MARITIME LAW OR OREGON LAW?
SIGNIFICANT DIFFERENCES IN CASUALTY CASES

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Lawyers who do not regularly practice maritime law may sometimes overlook the possibility that federal maritime law, rather than state law, governs claims growing out of an accident occurring on navigable waters. If that happens, the parties in pursuing their claims or defenses, may fail to take advantage of significant differences in maritime law from state law.

When Does Maritime Law Apply to an Accident on Inland Waters?

Since the decision of the U. S. Supreme Court in *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), admiralty law applies to tort claims when two requirements are met:

1. The accident occurred in Anavigable waters@ of the United States or on the high seas (the Alocality@ test); and

2. The activity in which the accident occurred had a Asubstantial relationship to traditional maritime activity@ (the Amaritime nexus@ requirement).

The usual definition of Anavigable waters of the United States,@ for purposes of admiralty jurisdiction, is that a river or lake falls in that category if it by itself, or in conjunction with other waters into or from which it flows, is capable of being used in its ordinary condition for carriage of people or property in interstate or foreign commerce. *The Daniel Ball,* 77 U.S. (10 Wall) 557, 19 L.Ed. 999 (1870). Thus, the Columbia River is navigable waters up to Priest Rapids Dam (no lock permits boats to proceed through it) and the Willamette River is navigable waters to at least

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Eugene, since both are capable to those points of being used to transport people or goods between two or more states or in international commerce. Another less obvious example of inland navigable waters is the Snake River up to Hell=s Canyon Dam (no lock), which can be used to transport people and goods between at least the states of Oregon, Washington and Idaho, and even on upriver where the Snake forms the Idaho-Oregon boundary (goods and people can be transported across the River between Oregon and Idaho).

As to the maritime nexus requirement, it has been clear since *Foremost Ins. Co. v. Richardson,* 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), that claims arising out of pleasure boating accidents on navigable waters, as well as those involving commercial craft, meet the Arelationship to traditional maritime activity@ test and are governed by maritime law. Similarly, claims arising out of accidents occurring on the water at marinas located on rivers and lakes that are navigable waters of the United States are also governed by maritime law. *Sisson v. Ruby,* 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990).

Because the Admiralty Extension Act of 1948, 46 U.S.C. app. ' 740, extends admiralty law to apply to damage to persons or property on land Acaused by a vessel on navigable water,@ U. S. maritime law also governs claims arising out of any type of vessel striking a bridge, pier or other shoreside structure adjacent to navigable waters, and to claims for shoreside damage along such waters resulting from the wash of a vessel moving at excessive speed.

Although the criteria for determining whether particular conduct is or is not a tort governed by maritime law are fairly clear, there can still be questions in peripheral cases. For example, what about a personal injury or death in a commercially-run rafting accident on the Rogue River in areas where natural obstructions prevent travel by motorboat? What if the accident

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involved non-commercial rafting?

When Might the Result Be Different
If Maritime Law Is Applied, Instead of Oregon Law?

Maritime law differs from Oregon law in a number of substantive and procedural respects which could affect the outcome of a claim for personal injury, death or property damage resulting from an accident on navigable waters in Oregon. Among those differences are the following.

Substantive Law Differences.

$ The general standard of liability applicable under maritime tort law to everyone except employers of seamen subject to the Jones Act, 46 U.S.C. app. ' 688, and owners of vessels on which seamen are employed, is whether they exercised reasonable care under the circumstances. Maritime law, however, unlike Oregon common law, makes no distinction between the degrees of care owed to different classes of persons who are lawfully on the defendant=s premises, such as invitees and licensees. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959); *compare Nelsen v. Nelsen,* 174 OrApp 252, 256, 23 P3d 424 (2001). The standards of maritime products liability law are similar to those of Oregon law. *East River S.S. Corp. v. Transamerica Delaval, Inc.,* 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986). Unseaworthiness is now a ground for liability under maritime law only in claims of seamen against owners and operators of the vessels on which they are employed. There is nothing in maritime law like the Oregon guest passenger statute, ORS 30.115 (liability of owner-operator of watercraft to non-paying guests only for gross negligence or intoxication). Liability to passengers under maritime law is governed by *Kermarec* principles.

$ Maritime law is a pure comparative fault regime. Thus, a plaintiff=s contributory negligence bars recovery of damages only if the plaintiff=s fault was 100% of the cause

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of his damages. *Compare* ORS 18.470(1), barring recovery if plaintiff=s contributory negligence was greater than the combined fault of the other parties found to be responsible.

$ There is some question whether the plaintiffs in claims for wrongful death of a non-worker governed by admiralty law can recover non-economic damages. *Compare Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974), with *Tucker v. Fearn,* 333 F3d 1216 (11th Cir. 2003). If such damages are recoverable under maritime law, however, there is no cap. *Compare* ORS 18.560(1) limiting recovery of non-economic damages to $500,000.

$ A boat owner may be able to take advantage of the U. S. Limited Liability Act, 46 USC App. '' 181-188, to limit its liability for all claims arising out of a boating casualty to value of the boat immediately after the accident, if the casualty occurred Awithout the privy or knowledge@ of the owner. There is no such provision in Oregon law.

$ Whether punitive damages may be recovered in tort claims governed by admiralty law is open to some debate. *Compare Wahlstrom v. Kawasaki Heavy Industries, Ltd.,* 4 F3d 294 (2nd Circ. 1993), with *In re Exxon Valdez,* 270 F3d 1215 (9th Cir. 2001). If such damages are recoverable under maritime law, however, there is no provision like ORS 18.540 requiring the recovery of such damages to be shared with anyone other than the plaintiff.

$ The rules as to joint and several liability of multiple tortfeasors, and apportionment of the plaintiff=s recovery among them, are substantially different under admiralty law from those set forth in ORS 18.430 *et seq.* *McDermott, Inc. v. AmClyde,* 511 U.S. 202, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994).

Procedural Law Differences.

$ The statute of limitations of maritime law applicable to personal injury and

death claims is three years from accrual of the cause of action. 46 U.S.C. App. ' 763a. The Oregon statute of limitations on injury and death claims is two years. ORS 12.110. For all other maritime claims, the time bar imposed is that of the doctrine of laches, placing the burden on the plaintiff to show no prejudice to the defendant if the claim was brought after the expiration of the Aanalogous@ statute of limitations. It is unclear whether maritime law will look to federal statutes having a time limitation, or to statutes of the forum state, as the Aanalogous@ statute of limitations for purposes of laches.

$ The plaintiff in a case governed by admiralty law has a choice of forum. Such a case may be brought under the admiralty jurisdiction of the U. S. District Court under 28 U.S.C. ' 1333, where there will be no jury. Plaintiff may also choose to bring such a case in state court under the Asaving to suitors@ clause of 28 U.S.C. ' 1333, where a jury trial will normally be available. The few exceptions to concurrent jurisdiction of federal and state courts over admiralty claims include lawsuits brought *in rem* against a vessel or other maritime property and petitions to limit liability of a vessel owner under the Limited Liability Act. Those claims do not fall under the Asaving to suitors@ clause, and can be brought only in U. S. District Court in admiralty. A case governed by admiralty law, but brought in state court, can be removed to federal court only on grounds of diversity of citizenship between all plaintiffs and all defendants and the amount in controversy, pursuant to 28 U.S.C. ' 1332. Those cases cannot be removed as Afederal question@ cases under 28 U.S.C. ' 1331. Nor are they removable to the admiralty side of U. S. District Court under 28 U.S.C. ' 1332, because to allow such removal would deprive a plaintiff of its election to proceed in a forum in which a jury trial is available.

There are a number of reasons why a plaintiff might choose to bring a case governed

by admiralty law in the U. S. District Court under its admiralty jurisdiction, and thereby forego a jury trial. For example, an out-of-state owner of a large pleasure yacht seeking damages from a local recreational fisherman resulting from a collision between their boats on the Columbia River might well opt for a forum in which a jury trial is not available. Other reasons for filing an admiralty case under the admiralty jurisdiction of the U. S. District Court include taking advantage of procedures available only under U. S. District Court admiralty jurisdiction such as suing a vessel *in rem* under FRCP Supp. Rule C or obtaining jurisdiction through a maritime attachment under FRCP Supp. Rule B against an out-of-state defendant which has attachable property within Oregon. As noted below, the circumstances under which a pre-judgment attachment can take place in a maritime case under FRCP Supp. Rule B are somewhat broader than those in which such an attachment can occur under Oregon law. *Compare* FRCP Supp. Rule B to ORCP 84A(1) and (2).

$ The ability to exercise *in rem* procedures in a case brought under the U. S. District Court=s admiralty jurisdiction creates some advantages not available in a case governed by maritime law that is brought *in personam* in state court. *In rem* procedure is based on a maritime law fiction that a thing, typically a vessel, Acaused@ the plaintiff=s damage. Where *in rem* jurisdiction is exercised against a large and valuable vessel, it not only creates jurisdiction over the vessel, but also provides security for payment of any judgment obtained against the vessel. Maritime pre-judgment attachment under FRCP Supp. Rule B affords similar advantages to the plaintiff, giving it a means of getting personal jurisdiction over the defendant to the extent of the defendant=s property garnishable in Oregon and making the attached property available as security for any judgment obtained. Beyond that, however, there are probably instances in which attachment is possible under FRCP Supp. Rule B that would not be possible under ORCP 84A. The requirements

for a maritime attachment under Supp. Rule B are straightforward: plaintiff must be suing on a maritime claim, defendant must not be present in the district for service of process, and the defendant must have some property subject to attachment present or expected to be present shortly in the District. Under ORCP 84A(2), however, a pre-judgment attachment can be brought against a non-resident defendant only for recovery of damages for breach of contract or for injury to property in Oregon. It cannot be used in a personal injury claim occurring anywhere or for damage to property outside of Oregon. In addition, ORCP 84A(1) requires an order under ORCP 83A(1) allowing provisional process. One of the requirements for obtaining provisional process under ORCP 83 is a showing that Athere is probable cause for sustaining the validity of the underlying claim@ (ORCP 83C(2)), including Ano reasonable probability that the defendant can establish a successful defense to the underlying claim@ (ORCP 83A(13)).

Practice Tips.

1. Whenever bringing or defending a claim arising out of an accident on water, a lawyer should check out whether it is, either clearly or arguably, governed by admiralty law.

2. A lawyer should check out the pros and cons of admiralty law versus state law, if it is arguable whether admiralty law applies or, even if it does clearly apply, but the other side is not known to be contending that it applies. It is not uncommon that counsel for both sides B either intentionally or without awareness of the point B proceed with a case under state law, even when admiralty law would govern if anyone so contended.

3. If admiralty law applies and is going to be invoked:

    (a) Plaintiff=s counsel should consciously exercise the right to choose the forum. Is there any advantage to bringing the case in federal court under its admiralty

jurisdiction, without the right of jury trial, rather than in state court, or, if the requirements for diversity jurisdiction exists, on the Alaw@ side of the Federal Court, with right of jury trial?

(b) Defense counsel should consider whether the facts give rise to any defense under admiralty law that would not be available under state law (e.g., possible limitation of a boat owner=s liability under the Limitation of Liability Act).

(c) In maritime products liability cases, counsel should be aware that some of the claims may be governed by state law (e.g., in a case based on faulty vessel construction, breach of the ship construction contract specifications, since a contract to build a vessel is not deemed to be governed by federal maritime law B *see East River S.S. Corp. v. TransAmerica Delaval, Inc.*, *supra*).

(d) In cases involving alleged multiple tortfeasors, counsel for all parties should be aware of the maritime law rules of joint and several liability, contribution and indemnity. *See McDermott, Inc. v. AmClyde*, *supra*.

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