

# Use of the *Pennsylvania Rule* in Recreational Boat Accident Cases

## *An Enormous Aid to Litigants*

By Paul Andrew Kettunen

### Fast Facts:

Presently, to invoke maritime jurisdiction, a plaintiff must establish that the tort occurred on “navigable waters” (the locus requirement) and that it bore a “substantial relationship to traditional maritime activity” (the nexus requirement).

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### Introduction

Until the turn of the last century, Michigan consistently had the highest number of registered boats in the United States, which makes a good deal of sense considering that our state has the longest coast line—3,288 miles bordering the Great Lakes (greater than the length of the Atlantic coast from the top of Maine to Key West)—of any state other than Alaska.<sup>1</sup> Although Michigan was recently surpassed as the leading state in registered boaters,<sup>2</sup> the fact remains that pleasure boating on the Great Lakes and our inland lakes is not only a hugely popular activity for residents of Michigan and the surrounding states, but constitutes big business in all its facets: manufacturing, sales, chartering, marina use, marine insurance, and tourism.

One of the consequences of the widespread use of pleasure craft on our state waters, accelerated with the advent of the wildly popular “jet skis,” is the occurrence of boating accidents and resultant personal injury lawsuits. In those cases in which maritime jurisdiction may properly be invoked, it is fundamental to the success of the case that the Michigan practitioner understand and use the myriad unique substantive and procedural admiralty rules. While I strongly recommend that a practitioner pursuing or defending such a case dedicate significant time and energy to determining the applicable maritime rules, since to not do so constitutes a trap for the unwary, this article is limited to a discussion of only one maritime rule that may apply in such a case, known as the “*Pennsylvania Rule*.” I choose this rule to discuss because it is one of the most potent devices available to litigants in marine personal injury accidents, whether in the commercial- or pleasure-boating context.



## Does Maritime Law Apply?

Of course, the initial inquiry is to determine whether the marine accident constitutes a maritime tort to which admiralty jurisdiction applies.

The source of maritime tort jurisdiction in the United States is the Admiralty Clause found in article III, § 2 of the United States Constitution, codified at 28 USC 1333. However, except for two limited exceptions,<sup>3</sup> there are no statutory criteria for determining whether admiralty jurisdiction attaches in a given situation. Instead, the test for admiralty jurisdiction has been formulated and refined through caselaw.

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### Was the Waterway at Issue “Navigable”?

The thrust of what constitutes “navigable waters” is whether the waters at issue can in fact be navigated. In the seminal case of *The Daniel Ball*,<sup>5</sup> the United States Supreme Court articulated this concept in the context of analyzing whether the Grand River between Grand Haven and Grand Rapids in our fair state was “navigable” for purposes of invoking admiralty jurisdiction over a steamship that allegedly was not properly licensed in accordance with federal statute. The definition of “navigable waters” articulated by the Court remains surprisingly accurate today:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, ... [as] a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.<sup>6</sup>

This definition was succinctly restated in 1999 in *Reeves v Mobile Dredging & Pumping Co*, in which the United States Court of Appeals for the Third Circuit noted that a body of water is navigable “if it is one that, by itself or by uniting with other waterways, forms a continuous highway capable of sustaining interstate foreign commerce.”<sup>7</sup> Since the body of water in *Reeves* was “landlocked,” “entirely within the borders of the Commonwealth of

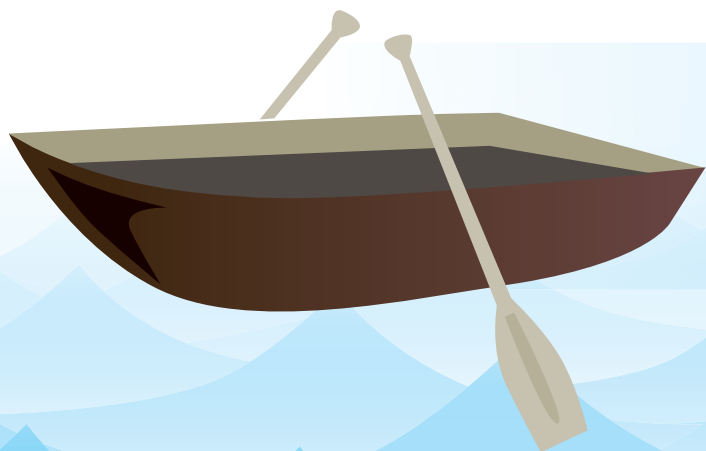
Pennsylvania,” and had “no waterways connecting it to any other state,” it was nonnavigable for purposes of admiralty jurisdiction.<sup>8</sup>

For the Michigan practitioner, the locus/navigation-in-fact portion of the admiralty-jurisdiction test will be met as long as the accident occurred on one of the Great Lakes, a navigable river connected to a Great Lake, or an inland lake connected to a Great Lake by a navigable river.<sup>9</sup>

### Did the Tort Bear a “Substantial Relationship to Traditional Maritime Activity”?

Historically, there was a good deal of question about whether damage arising from recreational marine activities could satisfy the nexus requirement: that the wrong bear a “substantial relationship to traditional maritime activity.” However, the Supreme Court laid that question to rest in 1982 in *Foremost Ins Co v Richardson*,<sup>10</sup> which involved the death of an occupant of a pleasure boat that had collided with another pleasure boat on a Louisiana river. Although agreeing that pleasure boats in themselves had little to do with maritime commerce, the Court found that the “potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.”<sup>11</sup> The Court stressed that the policy of protecting maritime commerce may only be served by subjecting operators of all types of vessels to uniform rules of conduct, concluding that the “failure to recognize the breadth of this federal interest ignores the potential effect of noncommercial maritime activity on maritime commerce.”<sup>12</sup>

The nexus test underwent substantial refining in 1990 by the Supreme Court in *Sisson v Ruby*,<sup>13</sup> and was most recently refined in *Jerome B Grubart, Inc v Great Lakes Dredge & Dock Co*,<sup>14</sup> in which the Supreme Court set forth a two-step inquiry for establishing the existence of a sufficient nexus between the tort and traditional maritime activity. First, a court must “‘assess the general features of the type of incident involved’ to determine whether the incident has a ‘potentially disruptive impact on maritime commerce’ ... [and not a mere] fanciful risk to commercial shipping.”<sup>15</sup> Second, “a court must ... determine whether ‘the general character’ of the ‘activity giving rise to the incident’ shows a ‘substantial relationship to traditional maritime activity.’”<sup>16</sup>



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In keeping with the *Foremost* Court's policy of promoting maritime uniformity through a liberal application of the nexus criteria, the nexus test has been held to be satisfied in a wide variety of recreational boating casualties, including damage arising from boat collisions, capsized craft, fire and other mishaps aboard ship, the drowning of swimmers because of negligent operation of locks, collisions between boats and swimmers, allisions<sup>17</sup> involving pleasure boats, scuba diving injuries, pleasure-boat product liability claims, and water skiing accidents.<sup>18</sup>

### The *Pennsylvania* Rule

If the body of water where the tort occurred was navigable and the tort arose out of a traditional maritime activity, the entire body of maritime law and procedure comes into play in a recreational-boating case. One of the more potent weapons in this arsenal is what has become known as the *Pennsylvania* Rule.

The *Pennsylvania* Rule derives, naturally enough, from the case of *The Pennsylvania*<sup>19</sup> and creates a presumption that if a party violated a statutory rule designed to prevent collisions from occurring, the party must show that its wrongdoing not only did not cause the accident, but *could not have contributed* to causing the accident.

The case involved the collision of two commercial ships off the coast of New Jersey, a sailing vessel and a steamer. The collision occurred in dense fog and resulted in the sinking of the sailing vessel and the death of 6 of her crew of 10. The owner of the sailing vessel libeled<sup>20</sup> the steamer and sued her owner for damages in the United States District Court of New York. The district court found the steamer wholly at fault, and the Second Circuit affirmed.

Although the Supreme Court concluded that the steamer was traveling at an excessive speed, it further concluded that the sailing vessel had violated a statutory navigational rule requiring a sailing vessel underway to blow her foghorn since the sailing vessel had used only her bell. In holding both vessels at fault, the Court articulated the rule as follows:

But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.<sup>21</sup>

Leading admiralty scholars have described this rule as "a drastic and unusual presumption" since it places the ultimate burden on the party violating the statute to disprove a presumed fact.<sup>22</sup>

### Applying the *Pennsylvania* Rule in Recreational Boating Cases

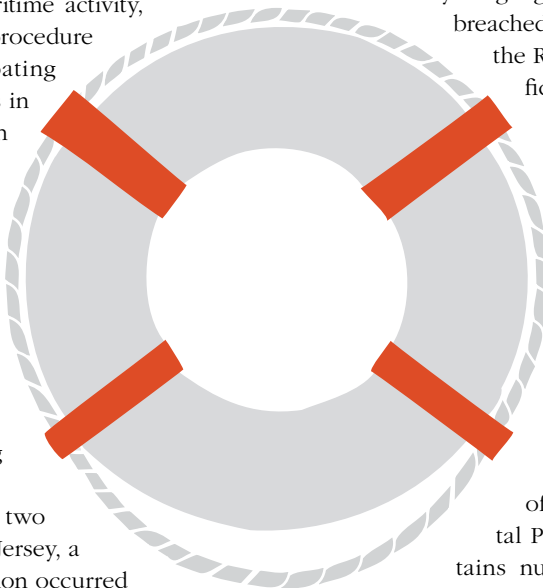
Courts have applied the *Pennsylvania* Rule in numerous collision cases that resulted in personal injuries to mariners and nonmariners alike, including pleasure-boat accident cases.<sup>23</sup> Moreover, although the rule was traditionally limited to damage arising from collisions, it has since been expanded to cover other damage claims such as those involving salvage,<sup>24</sup> groundings,<sup>25</sup> and allisions.<sup>26</sup>

Within these contexts, the *Pennsylvania* Rule potentially applies to any situation in which a statutory rule containing mandatory language designed to prevent collisions has been breached.<sup>27</sup> Typically, a violation of one or more of the Rules of the Road, which regulate vessel traffic maneuvers on the open seas (the International Rules)<sup>28</sup> and navigable inland waters (the Inland Rules),<sup>29</sup> has been used to invoke the *Pennsylvania* Rule in admiralty cases. However, in states where recreational boating is popular, there are a host of state and local statutes regulating boating safety, the breach of which may form the basis for applying the rule.<sup>30</sup>

In Michigan, boating safety is comprehensively regulated under the Michigan marine safety act,<sup>31</sup> which is part 801 of the Natural Resources and Environmental Protection Act.<sup>32</sup> The marine safety act contains numerous mandatory rules designed, or at least arguably designed, to prevent collisions, including local rules of the road and maneuvering restrictions;<sup>33</sup> age and boating-safety-education requirements;<sup>34</sup> no-wake and maximum-speed rules;<sup>35</sup> towing restrictions;<sup>36</sup> on-board movement restrictions for occupants;<sup>37</sup> diver-marking and vessel-distance requirements;<sup>38</sup> restrictions regarding raft/buoy placement, movement, and vessel attachments;<sup>39</sup> alcohol use restrictions;<sup>40</sup> and bathing-beach swimming-boundary requirements.<sup>41</sup> Significantly, it also provides that special rules and local ordinances may be established for vessels, water skis, water sleds, or other similar contrivances.<sup>42</sup>

Other provisions in the Natural Resources and Environmental Protection Act establish a separate regulatory regime for "personal watercraft," more commonly referred to as "jet skis,"<sup>43</sup> including the imposition of strict age and safety-training requirements on boat liveries in their rental of personal watercraft to the public.<sup>44</sup>

This discussion is only meant to provide a brief survey of the use of the *Pennsylvania* Rule in pleasure boat-cases subject to maritime jurisdiction. I strongly urge a practitioner faced with such a case to diligently and creatively research all possible statutory rules at the local, state, and federal levels designed to prevent boating accidents from occurring.



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## Conclusion

Along with the pleasures of recreational boating each season on the beautiful waters of our state comes the inevitable new batch of boating accidents involving property damage, personal injuries, or both. The job of the practitioner in such a case is to first carefully assess whether it is one to which admiralty jurisdiction may arguably attach and, if so, to become well apprised of the numerous procedural and substantive maritime devices available to advance his or her client's case. As should now be readily apparent from the example of the *Pennsylvania Rule* discussed in this article, these maritime rules are both unique and potent. Knowing of their existence and nature, and understanding under what circumstances they may be applied, will often mean the difference between winning and losing a recreational-boating-accident case. ■



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## FOOTNOTES

1. *World Book Encyclopedia*, v 13, p 500 (2000); Michigan Department of Environmental Quality, Shorelines of the Great Lakes <[http://www.michigan.gov/deq/0,1607,7-135-3313\\_3677-1595-,00.html](http://www.michigan.gov/deq/0,1607,7-135-3313_3677-1595-,00.html)>. This figure includes 1,056 miles of island shoreline. All websites cited in this article were accessed July 13, 2009.
2. Michigan now ranks fourth in registered boaters. United States Coast Guard, *Recreational Boating Statistics 2007*, COMDTPUB P16754.21 (June 27, 2008), p 63, available at <[http://www.uscgboating.org/statistics/Boating\\_Statistics\\_2007.pdf](http://www.uscgboating.org/statistics/Boating_Statistics_2007.pdf)>.
3. Admiralty Extension Act, 46 USC 30101; Great Lakes Act, 28 USC 1873.
4. See *Jerome B Grubart, Inc v Great Lakes Dredge & Dock Co*, 513 US 527; 115 S Ct 1043; 130 L Ed 2d 1024 (1995) (the latest Supreme Court case setting forth the parameters of the admiralty jurisdiction test for maritime torts).
5. *The Daniel Ball*, 77 US (10 Wall) 557; 19 L Ed 999 (1870).
6. *Id.* at 563.
7. *Reeves v Mobile Dredging & Pumping Co*, 26 F3d 1247, 1253 (CA 3, 1999).
8. *Id.*
9. See, e.g., *Brown v Outboard Marine Corp*, 1995 WL 795704 [ED Mich, 1995] ("tubing" accident on Detroit River between Windmill Point Light and Peche Island); *Polly v Estate of Carlson*, 859 F Supp 270 (ED Mich, 1994) (boating accident between Markley Marine on the Clinton River and Lake St. Clair).
10. *Foremost Ins Co v Richardson*, 457 US 668; 102 S Ct 2654; 73 L Ed 2d 300 (1982).
11. *Id.* at 675.
12. *Id.*; see also *Yamaha Motor Corp, USA v Calhoun*, 516 US 199; 116 S Ct 619; 133 L Ed 2d 578 (1996).
13. *Sisson v Ruby*, 497 US 358; 110 S Ct 2892; 111 L Ed 2d 292 (1990).
14. *Jerome B Grubart, Inc v Great Lakes Dredge & Dock Co*, n 16 *supra*.
15. *Jerome B Grubart*, 513 US at 534, 539, quoting *Sisson*, 497 US at 363–364.
16. *Jerome B Grubart*, 513 US at 534, quoting *Sisson*, 497 US at 364–365.
17. The word "allision" refers to contact between a moving vessel and a stationary object.
18. See Anno: *Admiralty jurisdiction: Maritime nature of tort—modern cases*, 80 ALR Fed 105.
19. *The Pennsylvania*, 86 US (19 Wall) 125; 22 L Ed 148 (1873).
20. An admiralty "libel" in traditional maritime terminology is the complaint filed against the vessel owner (*in personam*) or the vessel itself (*in rem*). The latter is unique to admiralty law and is filed when a maritime lien exists. It may entail an "arrest" of the vessel (i.e., a federal marshal takes the ship into formal custody and holds it, pending either a release on a stipulation for value or a judgment in favor of the plaintiff, or the "libellant"). A vessel itself may thus be sued, or "libeled," as was the case in *The Pennsylvania*. See Gilmore & Black, *The Law of Admiralty* (2d ed), pp 35, 787.
21. *The Pennsylvania*, 86 US at 136.
22. Gilmore & Black, p 494.
23. See, e.g., *Beene v Terrebonne Wireline Services, Inc*, 990 F2d 627 (CA 5, 1993); *Todd v Schneider*, 2003 WL 23514560 (D SC, 2003); *Tempest v United States*, 404 F2d 870 (CA 4, 1968); *Grelewicz v Kuchta*, 2006 WL 2632071 (ND Ill, 2006).
24. See, e.g., *Waterman S S Corp v Shipowners & Merchants Towboat Co*, 199 F2d 600 (CA 9, 1952), cert den 345 US 941. "Salvage" is a maritime term that refers to the saving of property that is in peril at sea. The person who successfully does so, referred to as the "salvor," is entitled under admiralty law to a monetary reward. See Gilmore & Black, pp 532–537. A typical example of this is the rescuing of a ship in peril at sea and towing her to safety, as was the case in *Waterman SS Corp*.
25. See, e.g., *The Denali*, 112 F2d 952 (CA 9, 1940), cert den 311 US 687; *In re Nautilus Motor Tanker Co*, 85 F3d 105 (CA 3, 1996); *Elizabeth Turner, Inc v Tug Lucky D*, 941 F Supp 439 (SD NY, 1996).
26. See, e.g., *Standard Transportation Co v Wood Towing Corp*, 64 F2d 282 (CA 4, 1933).
27. See, e.g., *Algoma Central Corp v Michigan Limestone Operations*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued January 22, 1996 (Docket No. 94-1917).
28. Formalized in the Convention on the International Regulations for Preventing Collisions at Sea, 1972 ("72 COLREGS"), 28 UST 3459, TIAS No. 8587, codified at 33 USC 1601 *et seq.* Published by the United States Coast Guard at <<http://www.navcen.uscg.gov/mvw/navrules/navrules.htm>>.
29. 33 USC 2001 *et seq.*
30. *Wilburn Boat Co v Fireman's Fund Ins Co*, 348 US 310, 320–321; 75 S Ct 368; 99 L Ed 337 (1955) (holding that state law may be applied in admiralty cases when there is no direct conflict with established federal maritime law). For an example of a recreational boating case in which the *Pennsylvania Rule* was successfully invoked using a violation of a state boating safety statute, see *Tassinari v Key West Water Tours, LC*, 2007 WL 1879172 (SD Fla, 2007).
31. MCL 324.80101 through 324.80199.
32. MCL 324.101 through 324.90106.
33. MCL 324.80144.
34. MCL 324.80141.
35. MCL 324.80146 and 324.80148.
36. MCL 324.80151.
37. MCL 324.80153.
38. MCL 324.80155.
39. MCL 324.80159 through 324.80162.
40. MCL 324.80176.
41. MCL 324.80149.
42. MCL 324.80110 through 324.80113.
43. MCL 324.80201 through 324.80219.
44. MCL 324.44522.