

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: EVERETT A. SISSON, Petitioner v.

BURTON B. RUBY, ET AL.

CASE NO: 88-2041

PLACE: Washington, D.C.

DATE: April 23, 1990

PAGES: 1 thru 50

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IN THE SUPREME COURT OF THE UNITED STATES

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EVERETT A. SISSON, :  
 :  
 : Petitioner :  
 :  
 : v. : No. 88-2041  
 :  
 BURTON B. RUBY, ET AL. :  
 :  
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Washington, D.C.

Monday, April 23, 1990

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:44 a.m.

APPEARANCES:

WARREN J. MARWEDEL, ESQ., Chicago, Illinois; on behalf of  
the Petitioner.

ROBERT J. KOPKA, ESQ., Chicago, Illinois; on behalf of the  
Respondent.

C O N T E N T S

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On behalf of the Petitioner	44



1 I can take out six people to fish on Lake Michigan, and I  
2 charge them a fee for taking them out. Not in the sense  
3 of a commercial boat that brings it in for restaurants and  
4 that sort of thing.

5 That night a fire broke out on the boat, which  
6 has been classified as one of the main perils of a boat,  
7 and it totally destroyed Mr. Sisson's yacht and did  
8 considerable damage to other yachts, as well as to marina  
9 property. A limitation of liability petition was filed in  
10 the U.S. District Court in Chicago --

11 QUESTION: Now, when you use the term yacht, Mr.  
12 Marwedel, do you mean something fairly specific?

13 MR. MARWEDEL: It is a 56-foot Hatteras inboard,  
14 twin screw motor yacht, which can be used for cruising  
15 throughout the Great Lakes.

16 QUESTION: And when you say other, it damaged  
17 other yachts, you mean boats of similar size, or much  
18 smaller size?

19 MR. MARWEDEL: Yes. In fact the petitioner's -  
20 - or the respondents' yacht was of similar size. There  
21 were some smaller yachts, sailboats, everything from  
22 another 56-foot yacht to a small sailboat.

23 QUESTION: What is the difference between a  
24 yacht and a sailboat?

25 MR. MARWEDEL: Well, they are all yachts. I am

1 only describing the size.

2 QUESTION: So, how do we, very briefly, define a  
3 yacht?

4 MR. MARWEDEL: Well, I think a yacht -- well, I  
5 am a sailor, and generally we refer to a yacht as  
6 something over 26 feet.

7 QUESTION: Over 26 feet.

8 MR. MARWEDEL: There is no rule, but it's just a  
9 term we use.

10 The district court dismissed the petition for  
11 limitation of liability on the grounds there was no  
12 subject matter admiralty jurisdiction.

13 The admiralty jurisdiction of the United States  
14 courts is derived from Article 3 of the Constitution and  
15 the judicial power. It confers on the courts the  
16 admiralty and maritime jurisdiction. Today those two  
17 terms are used synonymously, but in past times, in  
18 colonial times and in European times, the admiralty law  
19 generally dealt with just the sea, the navigable waters.  
20 The maritime law dealt with matters of contract, maritime  
21 liens, finance, that sort of thing. They have been  
22 combined in Article 3 into one judicial power.

23 In colonial times, as well as in the --  
24 basically the first 180, 190 years of this country, the  
25 tests for admiralty jurisdiction was generally the situs

1 test. If the -- if the accident took place, or the tort  
2 took place on a navigable waterway, it has since been  
3 extended to the Great Lakes, the western rivers, then you  
4 had admiralty jurisdiction.

5 This Court had a problem with that -- with that  
6 test the way it had been described in Executive Jet, where  
7 a small commercial aircraft, in taking off, struck some  
8 birds, essentially crashed and skidded into the water.  
9 The owners of the aircraft sued the airport under  
10 admiralty jurisdiction. We believe that the Court rightly  
11 ruled there was no admiralty jurisdiction. But the reason  
12 that we think should have been used is there was no vessel  
13 involved.

14 If you review the tort cases in the first 180  
15 years of admiralty jurisdiction, the facts disclose you  
16 have a vessel involved. It is not just the situs. It is  
17 not just the navigable water. It takes both. And  
18 obviously an airplane --

19 QUESTION: Is a sea plane a vessel?

20 MR. MARWEDEL: It can be, and under the rules of  
21 the road, if a sea plane is operating on the water as a  
22 vessel it must comply with the rules of a vessel. It has  
23 the same navigation lights, it must follow the same rules  
24 of the road.

25 QUESTION: Like if it is taxiing away to make a

1 take off?

2 MR. MARWEDEL: That still is under the rules of  
3 the road. If that sea plane just drops out of the sky and  
4 falls into the water, we may have a different result.  
5 That may be the Executive Jet. It's a fortuitous incident  
6 that it landed in the water.

7 I think if the focus is on the vessel, and the  
8 U.S. Code 1 U.S.C. Section 3 describes a vessel as a water  
9 craft or other contrivance used or capable of being used  
10 as a means of transportation on the water.

11 QUESTION: Does that go right down to a rowboat?

12 MR. MARWEDEL: It could. There are obviously  
13 situations that you will get to where you will question.  
14 A rowboat is -- may be -- questionable. But a lifeboat is  
15 a rowboat, and there are -- a rowboat has to follow the  
16 rules of the road. Rowboats or lifeboats have certain  
17 regulations on the Recreational Boating Act.

18 QUESTION: Well, suppose you have an outboard  
19 motor on the rowboat. Is that -- is that clearly a  
20 vessel?

21 MR. MARWEDEL: Yes. It is if it's a water craft  
22 or it's a contrivance that is designed for transportation  
23 on the water.

24 QUESTION: Well, supposing you are on an inland  
25 lake in northern Michigan or Wisconsin or Minnesota, and



1 the lake has no connection with the river or sea or  
2 anything, just say it's 10 square miles. Now is that  
3 admiralty jurisdiction? You're running an outboard  
4 motorboat on an inland lake?

5 MR. MARWEDEL: The way the courts have construed  
6 admiralty jurisdiction, no, it would not.

7 QUESTION: Why not?

8 MR. MARWEDEL: Because it is water that is  
9 solely with the boundaries of the state. It is not  
10 connected with interstate transportation. However, I  
11 think the judicial power could extend that far if the  
12 Court wanted to. We are not asking it to in this case,  
13 but I think the judicial power for admiralty is different  
14 from the commerce power, or the commerce clause. And if  
15 the Court saw fit to extent it, it could. The Federal  
16 Government, in enacting the Recreational Boating Act, has  
17 regulations for the operation of boats and for safety  
18 equipment of boats, and it just says water in the statute.  
19 It doesn't restrict it to navigable waters.

20 QUESTION: Well, it regulates mix masters too.  
21 I mean, you don't need the admiralty jurisdiction for the  
22 government to adopt safety rules.

23 MR. MARWEDEL: You don't -- you don't have to -  
24 -

25 QUESTION: Does it place these suits in

1 admiralty courts?

2 MR. MARWEDEL: You don't have to.

3 QUESTION: I was sort of with you up until the  
4 time where you expressed doubt about a rowboat. Why  
5 wouldn't a rowboat be a vessel? I don't understand why  
6 you hesitate.

7 MR. MARWEDEL: Well, you get to a point -- you  
8 get to a point in -- in -- in these types of craft where  
9 you can get to a personal flotation device. Now, a  
10 rowboat I don't have a problem with. Then you get to  
11 maybe a styrofoam raft that has a couple of oars on it. I  
12 would consider that to be a personal flotation device, the  
13 way a life jacket would be -- or water wings.

14 QUESTION: But you said a moment ago, I thought,  
15 that even an outboard on a rowboat on an inland lake is  
16 not admiralty jurisdiction.

17 MR. MARWEDEL: Well, because we don't have a  
18 navigable water. The test --

19 QUESTION: It doesn't depend on the -- it is a  
20 vessel, but it is not on navigable water?

21 MR. MARWEDEL: Correct. I -- I contend that you  
22 need both. You need a navigable water -- for the  
23 traditional maritime activity that has been exercised by  
24 this Court, you need a navigable waterway and you need a  
25 vessel. You need those two things.

1 QUESTION: And if it is navigable and you have a  
2 smaller craft, say an outboard motor or a small cruiser,  
3 maybe 12-14 feet long, and they are pulling a water skier  
4 and they run into another water skier, and there is  
5 serious personal injury, would the -- under your theory  
6 would the liability limitation act apply?

7 MR. MARWEDEL: The limitation of --

8 QUESTION: So that the injured skier's recovery  
9 is limited to the value of the vessel?

10 MR. MARWEDEL: The limitation act is slightly  
11 different from the general maritime, because it -- nowhere  
12 in that statute does it require a navigable water.

13 QUESTION: Well, under your -- under your  
14 theory, what would be the result of my case? Under the  
15 theory you are arguing here.

16 MR. MARWEDEL: The owner of the vessel is  
17 entitled to limit. The water skier would not be.

18 QUESTION: And so the only person driving was  
19 the owner of the vessel, and he injured somebody else that  
20 was water skiing, the Limitation of Liability Act would  
21 apply under your submission?

22 MR. MARWEDEL: It would apply. He would have  
23 his chance in court, although I would admit that if he is  
24 driving the boat and there was an error on his part, there  
25 would be very little chance of his prevailing on his

1 limitation action. But he would be entitled to use the  
2 limitation act.

3 QUESTION: (Inaudible) use it as a basis for  
4 jurisdiction of the admiralty court.

5 MR. MARWEDEL: Yes.

6 QUESTION: And this applies whether the accident  
7 occurs on an inland lake or not? Because --

8 MR. MARWEDEL: Well, thus far --

9 QUESTION: -- because the government says not.  
10 The government says that your theory produces different  
11 results, as I recall, depending upon whether the water  
12 skier is on the Mississippi River or on some land-locked -  
13 - land-locked lake in Wisconsin.

14 MR. MARWEDEL: We are not contending, for the  
15 purposes of our case, that the limitation act does apply  
16 in an inland lake. I am only pointing out that there is  
17 no language in the statute that restricts it to navigable  
18 waters.

19 QUESTION: But at least it applies to navigable  
20 waters, you would submit?

21 MR. MARWEDEL: Yes.

22 QUESTION: And if there is a vessel.

23 MR. MARWEDEL: And if there is a vessel.

24 QUESTION: And you said there is very little  
25 chance he would prevail. Let's have navigable water, a

1 vessel, injures a water skier, invokes Liability of  
2 Limitation Act. Is there some other way the water skier  
3 can recover for more than the value of the boat by  
4 alleging some other cause of action, like negligence or  
5 something? Was that the purport of your answer to me that  
6 he might not be successful?

7 MR. MARWEDEL: No, no. The limitation act would  
8 be a defense to all claims that would be brought. All I  
9 am saying --

10 QUESTION: So that if the vessel is worth  
11 \$12,500, the most the water skier can recover is \$12,500?

12 MR. MARWEDEL: Only if the vessel owner is able  
13 to prevail. I'm saying that it would be very difficult  
14 for the vessel owner to prevail --

15 QUESTION: Why?

16 MR. MARWEDEL: -- where he is driving the boat.  
17 For example, if the vessel owner makes a sharp turn,  
18 causing the water skier to have an accident, so that it's  
19 operational negligence on behalf of the owner, who is the  
20 operator as well, under the provisions of the limitation  
21 act he couldn't limit, because he has privity and  
22 knowledge of the proximate cause of the accident. But he  
23 has an opportunity to at least present his case in the  
24 limitation action in Federal court.

25 Now, if the accident were caused by some other -

1 - some other reason that was not within his privity and  
2 knowledge, for example he is going along in clear open  
3 waters and there is an underwater obstruction that caused  
4 his vessel to veer off, then he would be entitled to  
5 limit, because it was not within his privity and  
6 knowledge.

7 QUESTION: (Inaudible) this case?

8 MR. MARWEDEL: Well, in this particular case we  
9 have a --

10 QUESTION: Suppose you use -- suppose you are  
11 entitled to use the limitations act in this case. How  
12 about prevailing under it?

13 MR. MARWEDEL: We would hope to prevail. What  
14 we have to do is establish --

15 QUESTION: But you might not.

16 MR. MARWEDEL: But we might not.

17 QUESTION: Okay.

18 MR. MARWEDEL: It goes to what the proximate  
19 cause of the accident was and did we have privity and  
20 knowledge of that proximate cause. In our brief we use  
21 the analogy of the automobile. If I am driving the  
22 automobile, or I am driving the boat, and I cause the  
23 accident, I may be able to get into court under the  
24 limitation act, but I am probably going to lose. However,  
25 if I lend my boat to somebody else, or lend my car to

1 somebody else, and it is their negligence that causes the  
2 accident, I, as the owner, would be entitled to limit.  
3 The driver of the boat would not. So that the injured  
4 party would have a claim against the driver of the boat.

5 QUESTION: Mr. Marwedel, if we were looking just  
6 at Section 1333 and the question of the admiralty  
7 jurisdiction of the courts, without regard for the moment  
8 to whether the Limitation of Liability Act enlarges at all  
9 that jurisdiction, is a traditional maritime activity also  
10 required, do you suppose, for jurisdiction?

11 MR. MARWEDEL: This was first articulated in the  
12 Executive Jet decision and then again in the Foremost  
13 decision. And it's our contention that the operation of a  
14 vessel, as defined by the statute, is the most traditional  
15 maritime activity. The Eighth Circuit, subsequent to  
16 Executive Jet --

17 QUESTION: Well, your answer is yes?

18 MR. MARWEDEL: Yes.

19 QUESTION: Traditional maritime activity is part  
20 of the requirement. It isn't enough to have navigable  
21 water and situs. It has to be a traditional maritime  
22 activity.

23 MR. MARWEDEL: That's what the test has been  
24 subsequent to Executive Jet and Foremost.

25 QUESTION: Yes. And you accept that?

1 MR. MARWEDEL: I accept it, except as to how  
2 that is defined. And that is what has caused the lower  
3 courts so much confusion. The Seventh Circuit essentially  
4 restricted it to navigation, but that's not all vessels  
5 do. A vessel can be in navigation without actually moving  
6 through the water. As long as it is fit, manned and it is  
7 ready to go, it is in navigation until such time --

8 QUESTION: Well, I think the Seventh Circuit  
9 would hold that if this vessel were a commercial vessel  
10 and was tied up at a dock and had this fire, that there  
11 would be admiralty jurisdiction.

12 MR. MARWEDEL: Yes.

13 QUESTION: And yet, because this is not a  
14 commercial vessel, it -- it is not within -- admiralty  
15 jurisdiction.

16 MR. MARWEDEL: Basically that is correct. But  
17 this Court in *Foremost* indicated that the commercial  
18 activity of the vessel wasn't the test. And the  
19 jurisdiction of the admiralty courts in colonial times was  
20 to control the water, whatever moved on the water. These  
21 -- to look at just a commercial nexus, you would have to  
22 look at what is going on in this vessel. What if the next  
23 morning we were going to -- the system was going to take  
24 out six fishermen, and charge them all \$100 apiece to go  
25 fishing? We would wind up having to have a mini trial for



1 every case to determine what the traditional maritime  
2 activity was. And that's why we feel that the operation  
3 of a vessel, whatever a vessel does on the water, is a  
4 traditional maritime activity by definition.

5 QUESTION: It is -- it is your position in this  
6 case, if I understand it correctly, however, that it  
7 really doesn't matter, that we don't have to reach the  
8 question of whether this is traditional maritime activity  
9 or not.

10 MR. MARWEDEL: Correct. As long as there --  
11 it's a vessel.

12 QUESTION: Because the limitation act applies  
13 beyond admiralty.

14 MR. MARWEDEL: Additionally. Beyond admiralty,  
15 the limitation act would also give you jurisdiction.

16 QUESTION: But if we think --

17 QUESTION: You say -- you say without regard to  
18 the limitation act. it is enough for admiralty  
19 jurisdiction if there is a vessel and if there is  
20 navigable water?

21 MR. MARWEDEL: Yes. We get the same result with  
22 that test in Executive Jet, and we get the same result  
23 with that test in Foremost. It -- we would not disturb  
24 any of the prior decisions of this Court, going back and  
25 looking at all of them, involve a navigable water and a

1 vessel.

2 QUESTION: I suppose under the Seventh Circuit  
3 test if the yacht were just backing out of the -- backing  
4 away from the -- from the dock or the pier, and the fire  
5 broke out and there was a lot of damage, it -- it would be  
6 within admiralty jurisdiction because it would be moving.

7 MR. MARWEDEL: Because it was moving. And I  
8 think that is starting to split hairs.

9 QUESTION: Maybe if the engines were just  
10 started it would be in navigation.

11 MR. MARWEDEL: Yes. Well, I don't know with  
12 what their --I would assume that they are looking at  
13 movement through the water. But if that becomes a test,  
14 you have a problem with all sorts of vessels that are not  
15 pleasure craft, but not commercial vessels. You have  
16 government vessels, you have from the Federal Government,  
17 the state governments, the city governments.

18 QUESTION: Or the boat for hire tied up at the  
19 same marina.

20 MR. MARWEDEL: Exactly. And you could have a  
21 fire that would do damage to all sorts of different types  
22 of boats and have all sorts of different types of  
23 jurisdiction. And I think for uniformity on the navigable  
24 waters that the test of a vessel in navigable water is  
25 sufficient to keep out the -- if it's not a vessel it is

1 probably not a traditional maritime activity, but there  
2 may be some.

3 The sea plane, for example, is a bridge between  
4 the vessel and the airplane, so at some point it is a  
5 traditional maritime activity if it is operating as a  
6 vessel. If it is flying in the air it is not.

7 We also feel that our test is in agreement with  
8 what Congress has done in the Extension Act, where they  
9 extend the admiralty jurisdiction to vessels, without  
10 describing the type of vessel, on navigable waters. It's  
11 consistent with the wording in the limitation act which  
12 refers to vessels. And again, we don't feel that it would  
13 cause this Court to have to overrule any prior decisions,  
14 so that roughly 200 years of maritime jurisprudence would  
15 stay intact with our definition.

16 The limitation act provides a separate, as I  
17 have already indicated, a separate basis of jurisdiction.  
18 We feel that that was confirmed in the Richardson v.  
19 Harmon case, and it has been confirmed again in the  
20 supplemental rules that were propounded by this Court, the  
21 Supplemental Admiralty Rules, which conferred jurisdiction  
22 on the Federal court to hear limitation of liability  
23 cases.

24 I would like to reserve five minutes for  
25 rebuttal, if there are no further questions.

1 QUESTION: Very well, Mr. Marwedel.  
2 Mr. Kopka.

3 ORAL ARGUMENT OF ROBERT J. KOPKA  
4 ON BEHALF OF THE RESPONDENTS

5 MR. KOPKA: Thank you, Mr. Chief Justice, and  
6 may it please the Court:

7 I represent the respondent. With respect to the  
8 facts as stated by the petitioner, I would only add that  
9 after the occurrence the petitioner's yacht was worth \$800  
10 in salvage value. The fire caused \$275,000 worth of  
11 damage to the other boats and to the municipal marina, and  
12 what Petitioner is seeking to do is to limit his liability  
13 for \$275,000 worth of damage to \$800.

14 We believe that there are two issues addressed  
15 in this case.

16 QUESTION: (Inaudible) he might lose under the  
17 limitation act.

18 MR. KOPKA: He may lose under the limitation  
19 act. However, the description provided to the Court of  
20 what is privity and knowledge was somewhat inaccurate.  
21 Privity and knowledge is not the same as negligence. And  
22 a common law action under state law for negligence is  
23 something different than proving privity and knowledge.  
24 For example --

25 QUESTION: Yes, I agree.

1 MR. KOPKA: -- an owner of a vessel -- counsel  
2 gave an example of an owner of a vessel versus an owner of  
3 a car. An owner of a vessel may have no privity and  
4 knowledge, although his employee is negligent or is -- has  
5 privity and knowledge which gives rise to the occurrence,  
6 whereas under common law or state tort law, one might have  
7 vicarious liability for the actions of an employee. So  
8 you have a difference in applying the admiralty law when  
9 you have an employee who is either negligent or has  
10 privity and knowledge, as compared to on the land, where  
11 you would have vicarious liability by operation of state  
12 law.

13 I think that there are --

14 QUESTION: I don't know what -- does that mean a  
15 corporation can't have privity and knowledge?

16 MR. KOPKA: I think that is correct, Your Honor.  
17 A corporation would not have privity and knowledge in --  
18 in the admiralty context, and would then be, the  
19 limitation of liability would be available notwithstanding  
20 the privity and knowledge issue. Another issue which was  
21 raised by counsel which I think is a problem for counsel  
22 is this. Counsel claims that the Limitation of Liability  
23 Act doesn't say anything about navigable waterway. And  
24 that issue was raised in several courts below and it was  
25 rejected.

1           But what counsel would urge this Court to do is  
2 to allow application of the Limitation of Liability Act  
3 even on non-navigable waterways, such as inland lakes.  
4 And by doing so, under counsel's argument, there would be  
5 admiralty jurisdiction to every body of water,  
6 notwithstanding the fact that it is navigable or non-  
7 navigable, by virtue of the Limitation of Liability Act.  
8 This wasn't the intent of Congress in drafting the  
9 Limitation of Liability Act. In fact, this Court early on  
10 stated that the Limitation of Liability Act is a part of  
11 the general maritime laws.

12           And it is our position that the requirements of  
13 general admiralty jurisdiction should be applied to the  
14 Limitation of Liability Act, just as it's applied to every  
15 other general admiralty case coming before the Federal  
16 courts.

17           And the reason for that is because the admiral -  
18 - admiralty courts of the United States have a certain  
19 expertise and interest in matters which are strictly  
20 admiralty. And what has happened in the recent -- past,  
21 is that with a proliferation of pleasure craft upon the  
22 waterways, the Federal courts are being confronted with  
23 common law, garden variety tort cases which have nothing  
24 to do with the traditional maritime activity which this  
25 Court required for Federal jurisdiction in the Executive

1 Jet case.

2 QUESTION: Would there be any principled basis  
3 for our giving a more restrictive application to the  
4 Limitation of Liability Act than to the jurisdictional  
5 sections, 1333 and the Extension Act?

6 MR. KOPKA: No. I think that the jurisdictional  
7 aspects are the same. In other words, the Limitation of  
8 Liability Act, being a part of the general admiralty laws,  
9 should apply similarly. The only other restriction would  
10 be the language of the act itself.

11 And, accordingly, one of the issues that was  
12 asked of us to brief was the issue of the case of  
13 Richardson v. Harmon. Counsel mentioned, by the way, that  
14 there are no cases which would be disturbed by counsel's  
15 vessel test, and I point out that In re Phenix, the case  
16 preceding Richardson v. Harmon, indeed involved a vessel,  
17 and yet this Supreme Court found that there was no  
18 admiralty jurisdiction at that time.

19 We believe that the Richardson case does not  
20 hold broadly that there is a separate species of admiralty  
21 jurisdiction under the Limitation of Liability Act. We  
22 believe that if the Supreme Court in Richardson had  
23 intended a separate species or a separate vehicle to  
24 obtain jurisdiction through the Federal courts it would  
25 have said so. It did not.

1           Instead it construed Section -- what is now  
2 called Section 189 of the Limitation of Liability Act, to  
3 include damage which occurs to structures upon the land,  
4 whereas prior to the enactment of Section 189, such damage  
5 was not covered under Section 189 -- or under the  
6 Limitation of Liability Act.

7           QUESTION: (Inaudible) confine Richardson to its  
8 facts.

9           MR. KOPKA: I would confine --

10          QUESTION: You have to run into a bridge.

11          MR. KOPKA: That's correct. Which, of course,  
12 has been codified in the Extension of Admiralty Act.  
13 However, I would like to address the possibility that this  
14 Court would see Richardson more broadly than that. And if  
15 this Court does construe Richardson to supply a vehicle  
16 for Federal admiralty jurisdiction, even when the other  
17 requirements of Federal jurisdiction are absent, meaning  
18 today that there is no navigable water location, or that  
19 there is no significant contact to traditional maritime  
20 activity, then Richardson should be reconsidered in light  
21 of what has occurred in modern day. And that is what I  
22 have previously mentioned, which is the proliferation of  
23 pleasure craft, and accordingly, the proliferation of  
24 common variety torts being litigated in an admiralty court  
25 which has no interest in those torts.



1           QUESTION: Are you defending the court of  
2 appeals' decision? You are, I take it.  
3           MR. KOPKA: Indeed.  
4           QUESTION: And you agree with it?  
5           MR. KOPKA: I do.  
6           QUESTION: So you say that if the, if this yacht  
7 had been just backing away from its moorings, that would  
8 have been navigation and admiralty jurisdiction.  
9           MR. KOPKA: I think that there would --  
10          QUESTION: Or do you really intend to say that  
11 pleasure craft shouldn't be covered at all?  
12          MR. KOPKA: No, we are not taking the position  
13 that pleasure craft should not be covered at all, because,  
14 as this Court pointed out in the Foremost case, a  
15 collision between two pleasure craft may have a  
16 significant impact upon maritime commerce.  
17          QUESTION: How do you -- how do you -- what  
18 principal distinction do you, can you draw between a  
19 commercial craft that is just sitting at a dock and  
20 catches fire, like this one did, and a pleasure craft that  
21 catches fire, if the test is in navigation?  
22          MR. KOPKA: The test would be a two-fold test,  
23 Your Honor. The first inquiry -- pardon me.  
24          QUESTION: Well, neither one of them is  
25 technically in navigation in the sense that it isn't --

1 neither one of them is moving.

2 MR. KOPKA: No, but if you have a commercial  
3 maritime activity, and I would suggest that a commercial  
4 craft, even docked, is engaged in a commercial maritime  
5 activity. For example a tanker which is docked and is  
6 either being loaded with cargo or cargo is being loaded  
7 off of --

8 QUESTION: Well, no, but on that basis you  
9 should enquire about a pleasure craft if it is moving it  
10 isn't engaged in a commercial activity.

11 MR. KOPKA: Correct. The difference is --

12 QUESTION: Well, but, all of a sudden it is  
13 covered by admiralty jurisdiction.

14 MR. KOPKA: And the reason is because the  
15 Federal Government and the Federal judiciary have an  
16 interest in protecting commercial navigation. And because  
17 two pleasure -- even pleasure craft in navigation may have  
18 a significant impact upon the commercial activity, or the  
19 commercial navigation, that would be governed --

20 QUESTION: What circuit said -- the Seventh  
21 Circuit test is that if the commercial -- if the pleasure  
22 craft is moving, there is your admiralty jurisdiction.

23 MR. KOPKA: The Seventh Circuit --

24 QUESTION: And there's -- there's admiralty  
25 jurisdiction with a commercial craft even if it isn't

1 moving.

2 MR. KOPKA: That is correct. That is correct.  
3 And the reason for that is because commerce is the key  
4 element which provides the foundation for admiralty  
5 jurisdiction.

6 QUESTION: But a pleasure craft can affect  
7 commerce when it is docked just as well as when it is  
8 moving, as the fire here showed. Any -- any commercial  
9 vessels that happened to be on that dock would have --  
10 would have been effected by this fire, just as any  
11 commercial vessels out in the river or the lake would have  
12 been affected had the sailboat been moving, or had the  
13 pleasure boat been moving.

14 MR. KOPKA: First of all, there were no  
15 commercial vessels on this dock, but --

16 QUESTION: I understand that, but it could have  
17 been. Unless you consider the head fishing boats to be  
18 commercial boats. Are you sure they are not commercial?

19 MR. KOPKA: There is no evidence in the record  
20 that there were any commercial vessels on this particular  
21 dock.

22 QUESTION: No -- no fishing craft that took out  
23 people for daily fishing trips?

24 MR. KOPKA: No evidence in the record of that,  
25 Your Honor.

1 would be QUESTION: None in the record. state tort law  
2 liability. MR. KOPKA: However, let me respond to your  
3 point, which is that a pleasure yacht may have an impact  
4 upon commercial activity if it is -- even if it is docked.  
5 And my response to that is as follows. That the decisions  
6 of this Court in Executive Jet and in Foremost, and the  
7 Sisson decision of the Seventh Circuit, instructs the  
8 district courts to look at the wrong, what they call the  
9 wrong. And I would call that the offending vessel,  
10 meaning the vessel where the fire started, or the vessel  
11 which causes the collision, or the vessel which -- on  
12 which the tort occurs. Anything in motion would be covered,  
13 and if it And by focusing upon the wrong, we recognize,  
14 that the purpose of Federal case law is to affect the  
15 conduct of parties engaged in everyday activities, for  
16 example, navigation through navigable waterways. In an  
17 instance where a pleasure craft may have an impact upon  
18 commercial activity, although it is not in navigation,  
19 there would be no Federal interest in the conduct of that  
20 particular pleasure craft, even though it may have an  
21 effect upon commercial navigation, so that there would be  
22 no Federal jurisdiction. that would be navigation without  
23 a pilot. Which is not to suggest that there wouldn't be  
24 jurisdiction under the state courts. There clearly would.  
25 And for any tort committed by that pleasure craft, there

1 would be jurisdiction for any potential state tort law  
2 liability, and it may very well be that Federal standards  
3 are admissible in the Federal -- in the state law --

4 QUESTION: But commercial requirement is only, I  
5 take it is only relevant, really, to a commercial ship  
6 that is tied up.

7 MR. KOPKA: That is correct. That is how I  
8 understand the Seventh Circuit's decision, which is I  
9 think consistent with --

10 QUESTION: Yeah, because otherwise anything that  
11 is in motion on navigable waters is covered.

12 MR. KOPKA: Anything in motion would be covered,  
13 and if it was any effect at all on commercial activity,  
14 there would be no principled basis upon which to draw a  
15 line.

16 QUESTION: Anything in motion -- supposing a  
17 pleasure craft is not moored as securely as it should be,  
18 and the ropes break in a storm and it then bumps into  
19 another boat. Is that in navigation or not?

20 MR. KOPKA: I would say that it is. I would  
21 suggest that navigation is any movement through a body of  
22 water. And, accordingly, that would be navigation without  
23 a pilot, I suppose.

24 The Seventh Circuit's test, I think, is a  
25 principled approach, because it recognizes the foundation

1 upon which admiralty law is based. And that foundation is  
2 commerce. There is a balance which must be done by this  
3 Court, and that is the balance between the Federal  
4 interest in regulating maritime commerce, and the states'  
5 rights to adjudicate common law tort liability.

6 QUESTION: Well, it does seem to go beyond the  
7 test articulated in *Foremost and Executive Jet* of anything  
8 having a significant relationship to a traditional  
9 maritime activity. It extends beyond that and is more  
10 restrictive, is it not?

11 MR. KOPKA: I don't think so. I would suggest  
12 that it defines what *Foremost* --

13 QUESTION: Well, it certainly appears to be more  
14 restrictive, and it's hard for me to know why a pleasure  
15 craft which is moored or docked some place couldn't  
16 likewise be significantly related to a traditional  
17 maritime activity.

18 MR. KOPKA: If the pleasure craft which is  
19 moored or docked is in any way involved in a commercial  
20 maritime activity itself, then even under the Seventh  
21 Circuit's decision, it would provide the basis of Federal  
22 jurisdiction. So we are only dealing with the subsection  
23 of pleasure craft which are not themselves involved in  
24 commercial maritime activity.

25 And the question that the Seventh Circuit

1 answered is in what cases, in what types of situation, in  
2 what principled approach will we apply to answer the  
3 question of when pleasure craft, non-commercially related,  
4 should provide the basis of Federal jurisdiction, when  
5 would they have the significant maritime activity.

6 QUESTION: Neither the constitutional provision  
7 nor any of the statutes modifies the word maritime by  
8 commercial -- by the adjective commercial. Where do you  
9 get it from?

10 MR. KOPKA: Well, to start out, it comes from  
11 this Court's decisions in Executive Jet and Foremost. But  
12 the reasons for the addition of this, what we call the  
13 nexus test, were laid out in Executive Jet and Foremost.  
14 And the reason is that when those statutes and when the  
15 Constitution was drafted there was no concept of anything  
16 other than commercial activity upon the navigable  
17 waterways. We recite in our briefs some statistics --

18 QUESTION: What did Handel write his water music  
19 for? Was this a commercial thing going down the Thames,  
20 was it?

21 MR. KOPKA: At the time that we were talking  
22 about the navigable waterways, which at the time were  
23 waterways subject to the tides. So we would be dealing  
24 with essentially international commerce. Even when the  
25 waterways subject to admiralty jurisdiction were redefined

1 to include navigable waterways in the United States, we  
2 are talking about commercial activity upon those  
3 waterways. And --

4 QUESTION: I can't believe that people haven't  
5 been using the waterways for recreation for a long time.  
6 You tell me we just invented this, this is a modern  
7 creation.

8 MR. KOPKA: It is -- this is a modern creation  
9 which this Court invented in 1973, but I will, if I may be  
10 permitted an anecdote, I was at Mount Vernon yesterday and  
11 I was standing where George Washington's porch is, and I  
12 saw literally hundreds of pleasure craft. And I  
13 recognized that George Washington couldn't have seen  
14 anything like that in his day.

15 My suggestion is that, and the statistics which  
16 we supplied in our brief suggest, that at the turn of this  
17 century there weren't more than 1,000 pleasure craft in  
18 these United States, whereas in 1987 there were estimated  
19 to be 17 million pleasure craft upon the United States.  
20 So the question of when the Federal Government will have  
21 jurisdiction over a common law tort, which has nothing to  
22 do with commercial activity, wasn't foreseeable at the  
23 time the Constitution was drafted.

24 QUESTION: Well, let me ask you about your  
25 anecdote. You -- this -- the Michigan City harbor, I



1 guess, they send boats out and they do fishing. Maybe  
2 that's not in the record. And I suppose George Washington  
3 might have seen some Indians in canoes who were doing some  
4 fishing.

5 MR. KOPKA: That may be the case. That may be  
6 the case.

7 QUESTION: Or he may have fished from a canoe  
8 himself.

9 (Laughter.)

10 MR. KOPKA: That's true. I don't know, to  
11 answer your question, Justice Scalia, I don't know of any  
12 cases that really address the question of common law torts  
13 on pleasure craft, and whether they apply to the Federal  
14 admiralty jurisdiction, until the relatively recent past,  
15 other than those cases in which the Limitation of  
16 Liability Act was sought to be imposed. And in those  
17 cases the Limitation of Liability Act in Phenix did not  
18 provide, according to this Court, a separate basis of  
19 Federal jurisdiction.

20 Only in Richardson v. Harmon, which is one case  
21 somewhat different from all of the other cases decided  
22 under the Limitation of Liability Act, did this Court  
23 grant Federal admiralty jurisdiction. And I suggest that  
24 under the aegis of, and the test laid down by the  
25 Executive Jet and the Foremost cases, that Richardson v.

1 Harmon would not apply today, because the nexus  
2 requirement, the requirement that there be a significant  
3 connection to -- traditional maritime activity, would not  
4 be applied to a -- to a non traditional and a common law,  
5 garden variety tort.

6 QUESTION: How would your test apply to a large  
7 pleasure boat, then, used for illegal commercial activity?  
8 Smuggling drugs into the country, for example.  
9 (Laughter.)

10 MR. KOPKA: Interesting question. I wonder  
11 whether -- I question whether smuggling drugs is a  
12 commercial activity, and I suppose that it may -- it may  
13 be. Although this would point out, I suppose, the  
14 injustice of permitting a Limitation of Liability Act in  
15 such a situation.

16 (Laughter.)  
17 QUESTION: You could just make up another  
18 adjective. It has to be a lawful commercial activity. I  
19 mean, you made up the first one, make up a second one.

20 (Laughter.)  
21 MR. KOPKA: The requirement that there be a  
22 commercial activity is not one, I don't think, with  
23 respect, Justice Scalia, which was made up. I think that  
24 it was a recognition that commercial activity is the  
25 foundation upon which admiralty jurisdiction applies, and

1 with respect to states' rights to adjudicate garden  
2 variety torts, torts which do not have any basis, in which  
3 the Federal judiciary doesn't have any special interest.

4 What this Court recognized in *Foremost* --

5 QUESTION: Except that the torts are taking  
6 place on navigable water.

7 MR. KOPKA: Yes, but the question of whether  
8 admiralty jurisdiction applies to anything occurring on  
9 navigable waterway was addressed by *Executive Jet* and  
10 rejected. And I would submit that my esteemed opponent's  
11 recommendation that jurisdiction apply to anything on  
12 navigable waterway upon a vessel is really a return to the  
13 days prior to *Executive Jet* when any occurrence upon a  
14 navigable waterway would -- would permit Federal admiralty  
15 jurisdiction. I think --

16 QUESTION: Well, what if we just did here to the  
17 language of this Court's more recent opinions in *Foremost*  
18 and *Executive Jet*, to the effect that if the activity has  
19 a significant relationship to significant -- to  
20 traditional maritime activity, that is enough for  
21 admiralty jurisdiction?

22 MR. KOPKA: I fully support that position, and I  
23 suggest that --

24 QUESTION: All right. Well, that position is  
25 one which Mr. Marwedel says would result in jurisdiction

1 in the Federal courts in this case, that there needn't be  
2 movement of the vessel for it to have a significant  
3 relationship to traditional maritime activity. Is that  
4 the point of difference, then? Is that what it all boils  
5 down to?

6 MR. KOPKA: I believe it does. It boils down -

7 -

8 QUESTION: Movement or non-movement.

9 MR. KOPKA: I think it boils down to something a  
10 little bit broader than movement or non-movement, Justice  
11 O'Connor. I think it boils down to a definition of  
12 traditional maritime activity. And what Mr. Marwedel  
13 would suggest in this case is that a fire which started in  
14 a washer-dryer unit is traditional maritime activity, just  
15 because it happened to be upon a yacht which was docked.  
16 If that fire had started in a washer-dryer unit in a  
17 mobile home, there wouldn't be any question of traditional  
18 maritime activity.

19 QUESTION: Or just backing out -- backing away  
20 from the pier and the fire took place, there is  
21 jurisdiction?

22 MR. KOPKA: Because there was --

23 QUESTION: Even though it started in this  
24 washer-dryer.

25 MR. KOPKA: Because there would be a significant

1 impact, and only if there is a significant impact.

2 QUESTION: Well, so it's movement, as just --  
3 that's it, isn't it?

4 MR. KOPKA: That's right.

5 QUESTION: No, it isn't just movement. I would  
6 also be a traditional maritime activity if it occurred in  
7 the washer-dryer unit on a commercial barge. Right?

8 MR. KOPKA: That is correct. And again, the  
9 reason is because commerce is the key which is the  
10 foundation to Federal expertise. What is the reason --

11 QUESTION: Well, it isn't. As soon as it starts  
12 away from the dock, whether there is commerce or not,  
13 there is admiralty jurisdiction.

14 MR. KOPKA: Correct. But the reason that  
15 navigation is one basis of Federal admiralty jurisdiction  
16 --

17 QUESTION: I -- sometimes you see it and  
18 sometimes you don't.

19 (Laughter.)

20 MR. KOPKA: I think you see it in every case,  
21 Justice. I think that you see it any time you have  
22 navigation. And the reason is because any navigation upon  
23 navigable waterways may have a significant impact on the  
24 commercial activity on those waterways.

25 What the Seventh Circuit required was both

1 navigation and a potentially disruptive impact upon  
2 maritime commerce. So that any navigation by itself, in  
3 the absence of an impact or a potential impact on maritime  
4 commerce, would not serve to provide a basis for admiralty  
5 jurisdiction. The reason for that, again, is a  
6 recognition --

7 QUESTION: So then the Seventh Circuit would say  
8 even though this yacht had moved away from the dock, it  
9 was not subject to admiralty jurisdiction?

10 MR. KOPKA: That's correct. What the Seventh  
11 Circuit said was that in order -- if you have a non-  
12 commercial vessel you must find both that the tort  
13 involves navigation and a potentially disruptive impact  
14 upon maritime commerce.

15 QUESTION: Well, so it is not an admiralty  
16 jurisdiction as it backs away from the dock, unless  
17 there's a fire in the washer-dryer.

18 MR. KOPKA: Well, I would go further than that,  
19 and say unless there is a potentially disruptive impact  
20 upon maritime commerce. Because only with a potentially  
21 disruptive impact upon maritime commerce is the Federal  
22 interest in -- in protecting maritime commerce arise.

23 QUESTION: But, when you require a potentially  
24 disruptive impact on maritime commerce, you are in effect  
25 saying that until that happens the -- the ship isn't in

1 admiralty jurisdiction. Yet you really have to know  
2 before that, don't you?

3 MR. KOPKA: You have to know before -- the  
4 potential --

5 QUESTION: Well, what is the potentially  
6 disruptive impact here? Is it the damage from the fire?

7 MR. KOPKA: It -- it was the damage which may  
8 arise as a result of the fire. The Seventh Circuit  
9 provided an example in its decision. The example it  
10 provided was that if the fire spread across oil-covered  
11 water and blocked a channel which was used by commercial  
12 vessels, then that would be a potentially disruptive  
13 impact upon maritime commerce. But in another situation  
14 where it was simply backing out of a dock, there were  
15 nothing but pleasure boats in the area, there was no  
16 potential disruption --

17 QUESTION: I thought earlier in your submission  
18 all this yacht had to be was in motion and there would be  
19 admiralty jurisdiction.

20 MR. KOPKA: That is not -- that is not --

21 QUESTION: Well that's what you said.

22 MR. KOPKA: But that is not the position that  
23 the Seventh Circuit took. I would take the position that  
24 all it has to be is in motion. The Seventh Circuit took a  
25 more -- a more restrictive approach. The Seventh Circuit

1 took the approach that it has to be both in motion and  
2 have a potentially disruptive impact upon maritime  
3 commerce.

4 I would restrict it to navigation any time it's  
5 in motion, because in the Foremost decision, which this  
6 Court rendered in 1983, there really was no discussion of  
7 a potentially disruptive impact on maritime commerce in  
8 the facts of that case, although this Court did say in  
9 that case that navigation would provide a basis of Federal  
10 admiralty jurisdiction because of the potentially  
11 disruptive impact that a collision between two pleasure  
12 craft may have on maritime commerce.

13 QUESTION: So the test is whether this  
14 particular vessel, if something bad happened to it, would  
15 have a potentially disruptive impact?

16 MR. KOPKA: That is the Seventh Circuit's test.  
17 Correct.

18 QUESTION: Then, if on this yacht -- this yacht  
19 is out in the lake, out in the lake and there's an  
20 accident on the boat, and somebody -- a crew man is  
21 injured. Now, does that -- is that injury within  
22 admiralty jurisdiction?

23 MR. KOPKA: I don't believe it is, Your Honor.  
24 I would suggest to you that an accident on a boat is no  
25 different than an accident in a home or an accident in a



1 store.

2 QUESTION: Well, but even -- even under your  
3 submission that would not be covered.

4 MR. KOPKA: It would not be covered, and --

5 QUESTION: I know, and I am certain it wouldn't  
6 under the Seventh Circuit.

7 MR. KOPKA: But that's correct. And even under  
8 my submission it would not. And the reason that it would  
9 not is because the wrong had nothing to do with the fact  
10 that it was involved in navigation, unless the facts  
11 indicated that it was. We have a case currently pending  
12 in the Ninth Circuit in which the plaintiff slipped and  
13 fell upon a pleasure boat which happened to be docked.  
14 The Limitation of Liability Act was asserted by the --

15 QUESTION: So, at sea, where the pleasure boats  
16 just aren't within -- just because they are at sea aren't  
17 within admiralty jurisdiction.

18 MR. KOPKA: No. I would suggest that the  
19 concept of admiralty jurisdiction is not geographic. And  
20 I think that that was recognized by this Court in  
21 Executive Jet, that geographic jurisdiction under the  
22 Federal courts really doesn't exist. It is more  
23 constitutional jurisdiction. So that it is concurrent  
24 with the state's geography, and yet it arises only when a  
25 Federal interest is -- is impacted. And in this -- in

1 this case I was going to say the Federal interest is  
2 maritime commerce. It is now and it has been since the  
3 day of the Constitution.

4 QUESTION: Could you be more -- I understand it  
5 is not your test, but the Seventh Circuit, but this  
6 potentially disruptive effect on maritime commerce. I  
7 guess you would apply that test where -- where the  
8 pleasure craft is stationary, and -- and the Seventh  
9 Circuit would apply it where it is both stationary and  
10 moving? Is that right?

11 MR. KOPKA: No. I would not apply it when the  
12 pleasure craft is stationary, because when a pleasure  
13 craft is stationary it, it being the offending vessel,  
14 then it would have no impact -- no potentially disruptive  
15 impact upon maritime commerce, even involve navigation.

16 QUESTION: Even -- well even if this fire -- if  
17 the fire had occurred at a commercial dock. I mean, let's  
18 assume it's a dock where there is some pleasure craft but  
19 also commercial boats. That wouldn't be a potentially  
20 disruptive impact?

21 MR. KOPKA: That, I suppose, would be a  
22 potentially disruptive impact. However, the offending  
23 vessel being a pleasure craft, there again would be no  
24 Federal interest in regulating the conduct of that  
25 offending vessel. The purpose, it seems to me, of case

1 law is to regulate the conduct of individuals involved in  
2 activities. The individual in that scenario would be an  
3 owner of a pleasure craft.

4 QUESTION: Well, you could say the same when it  
5 is moving out in the -- out in the open water.

6 MR. KOPKA: But out in the open water you have  
7 the peril of a collision between two pleasure craft, or a  
8 collision between a pleasure craft and a commercial  
9 vessel, and the immediate impact upon commerce moving  
10 through the waterway.

11 QUESTION: But you -- but you have just told me  
12 that where you burn down the dock at which commercial  
13 vessels are docked it doesn't matter. I don't see how  
14 that is any -- any better.

15 MR. KOPKA: Well, let me suggest --

16 QUESTION: A little inconsistency there, isn't  
17 there?

18 MR. KOPKA: Let me suggest this. In the  
19 scenario that you gave, I would suggest that the first  
20 test of the Seventh Circuit would apply, that is, whether  
21 the activity involves commercial maritime activity. And  
22 in a dock, even if it is one pleasure boat among many  
23 commercial boats, then that in and itself, may involve  
24 commercial maritime activity. So that we are talking now  
25 about the first test as opposed to the second test.

1           You are correct that the second test, in my  
2 suggestion, would not apply. However, the first test,  
3 that a commercial maritime activity may be impacted, would  
4 permit Federal admiralty jurisdiction in that scenario.

5           The scenario where Federal admiralty  
6 jurisdiction would not be permitted is where the dock had  
7 only pleasure craft or pleasure craft which were not  
8 involved in maritime commercial activity and did not  
9 involve navigation.

10           With five minutes remaining, I would like to  
11 address the other issue, which is the question of whether  
12 Foremost -- pardon me, whether Richardson v. Harmon  
13 provides a separate species of Federal admiralty  
14 jurisdiction, as is suggested by the petitioner.  
15 Petitioner would have this Court read Foremost to apply  
16 Federal admiralty jurisdiction even when the tests that we  
17 have been discussing, the situs test and the nexus test,  
18 are absent.

19           And there is no basis, either in the law or in  
20 the Constitution, for applying Federal admiralty  
21 jurisdiction pursuant to the Limitation of Liability Act.  
22 There is nothing in the Limitation of Liability Act which  
23 provides a separate basis of Federal jurisdiction. There  
24 is nothing in the Section 189, the amendment to the  
25 Limitation of Liability Act, which provides a separate

1 basis of Federal jurisdiction.

2 And Richardson v. Harmon, to the extent that it  
3 is construed to provide such a basis, is out of step with  
4 the other cases of this Court, such as In re Phenix and  
5 the Foremost case. And since the advent of the nexus test  
6 in 1973 and again in 1983, that test should be applied to  
7 any cause of action under the Limitation of Liability Act,  
8 notwithstanding the decision in Richards v. Harmon.

9 If there are no other questions, I pray for an  
10 affirmance. Thank you.

11 QUESTION: Thank you, Mr. Kopka.

12 Mr. Marwedel, do you have rebuttal?

13 REBUTTAL ARGUMENT OF WARREN J. MARWEDEL

14 ON BEHALF OF THE PETITIONER

15 MR. MARWEDEL: Just a couple of points that I  
16 wanted to make clear. I believe that the law is very  
17 clear that a corporation can be found to have privity and  
18 knowledge of the proximate cause of an accident, and that  
19 a corporation could not limit, as happened in the Seventh  
20 Circuit, or the district court, rather, in In re Amoco  
21 Kadiz, where the Amoco corporation was found to have  
22 privity and knowledge and not able to use the limitation -  
23 - or have limitation for the oil spill.

24 QUESTION: In what court was that case?

25 MR. MARWEDEL: That was before Judge Magar in

1 Chicago, the district court.

2 Second, we are not urging that the limitation  
3 action statute be applied on inland lakes. I was only  
4 pointing out that the statute -- the words in the statute  
5 and in the supplemental admiralty rules don't require  
6 navigable waters. They don't use the phrase; they just  
7 use water.

8 QUESTION: I suppose that if there is  
9 inconsistency in treatment between pleasure boats on  
10 inland waters and pleasure boats on navigable waters,  
11 there's also inconsistency anyway between commercial boats  
12 in the two. Isn't that right? I mean, I assume you have  
13 commercial boats on inland -- some inland waters.

14 MR. MARWEDEL: You do, for example Lake Geneva  
15 in Wisconsin has a sightseeing boat that also carries the  
16 U.S. mail and picks people up from the train station and  
17 takes them around the lake and there are four drop off  
18 points. That is a lake that is wholly within the State of  
19 Wisconsin.

20 QUESTION: And they are not subject to admiralty  
21 jurisdiction?

22 MR. MARWEDEL: As far as I know that's never  
23 been determined by anyone. The issue hasn't come up. I  
24 had one, but it got settled.

25 Secondly, Phenix, we feel, was out of step with

1 Richardson and Butler and Hamilton. Phenix was a case  
2 where it's really form over substance. The Court found  
3 there was no jurisdiction under the limitation action  
4 because of the place that the lawsuit was filed. This has  
5 been subsequently corrected in the supplemental Rule F,  
6 paragraph 9, which allows the limitation action to be  
7 filed where the vessel is, where the owner has been sued,  
8 where the vessel has been arrested, or any other district  
9 court.

10 At the time of Phenix there were the admiralty  
11 rules that were more restrictive as to venue, so that in a  
12 sense the venue became jurisdictional, that the lawsuit  
13 then had to be filed someplace else but not in the court  
14 that was addressing the Phenix case.

15 Recreational boats are a matter of Federal  
16 concern, and Congress has passed many regulations  
17 concerning the operation, safety, fire fighting, life  
18 saving, et cetera, for the pleasure craft. In fact, 46  
19 U.S.C., under the Recreational Boating Act, preempts state  
20 law on the regulation and operation of boats. It will  
21 allow state law to have the same requirement that the  
22 Federal law requires, but no more.

23 The U.S. Coast Guard has a life-saving station  
24 at Michigan City which was right next to this marina. If  
25 there has to be an impact on commerce, we have a fire in

1 the middle of the night. As I understand the people that  
2 were awakened, sleeping on their boats, was immediately to  
3 get their boats out of the way, to get away from the  
4 flames. There was an oil line that went -- a gasoline  
5 line that went right under the dock in front of our boats.  
6 People were afraid that that was going to blow up. If the  
7 fire had spread it could have gone right to the Coast  
8 Guard station, which is situated literally at the end of  
9 this dock, and that provides the life saving for  
10 commercial as well as recreational craft. That Coast  
11 Guard station also supervises the navigational aids in  
12 that part of the lake.

13 As far as the number of -- of boats,  
14 recreational boats that we have now or in the time of  
15 Washington, the boats that were registered in Washington's  
16 time, I assume, because there was a statute, were  
17 registered with the U.S. government, as Mr. Sisson's boat  
18 was. It was enrolled under the laws of the United States  
19 with the U.S. Coast Guard.

20 Today we have statistics that go beyond the  
21 vessels that are enrolled, your -- usually your rowboat  
22 or your small sailboat are not enrolled with the Coast  
23 Guard, but large vessels such as this are. This is a boat  
24 that is designed, as any commercial ship is, for people to  
25 literally live on.



1 QUESTION: You say they are, are they required  
2 by statute to be enrolled, or is it a voluntary matter?

3 MR. MARWEDEL: In most instances it is a  
4 voluntary matter. You get to a certain size and use, I am  
5 not that familiar with the statute, but you get to the  
6 point where you have to. Also, when you --

7 QUESTION: This is to facilitate the transfer of  
8 title when you sell the boat, isn't it?

9 MR. MARWEDEL: Correct. And most lending  
10 institutions, boats of this size are -- usually you borrow  
11 money to buy a boat of this size, so the lending  
12 institutions require that you have this type of  
13 enrollment.

14 We also get -- if we are going to look at  
15 commerce, which is not set out in any of the statutes, and  
16 in the history of the admiralty side of the court,  
17 commerce was not the issue. Commerce is mentioned as the  
18 underpinning originally for the limitation act, which has  
19 been amended many times in the last century and in this  
20 century. Congress has never amended it to include  
21 Congress. It includes pleasure craft, in spite of lower  
22 courts suggesting that admiralty jurisdiction should not  
23 be extended to pleasure craft. Congress has never amended  
24 out the inclusion of all vessels on all waters.

25 But what is commerce? These boats now are --

1 are built all over the country. We see them go down our  
2 highways. There is not admiralty jurisdiction yet, but  
3 they are in the stream of commerce. They are bought and  
4 sold, they are insured, they buy fuel, they pay taxes.  
5 People hire crew members to work on pleasure craft. Mr.  
6 Trump's yacht's got a crew that is paid. That is a very  
7 large yacht, but it is still a pleasure craft. I would  
8 suggest that all of these boats are part of -- part of  
9 commerce.

10 We are a changing society. We are becoming a  
11 service society, we are becoming a society that has a lot  
12 of recreation. It is big business in this country. And  
13 it is using the natural resource, the resource that the  
14 admiralty courts used to supervise.

15 The commercial court, which you will find still  
16 in Europe -- there used to be a distinction where matters  
17 that happened on the water involving vessels were handled  
18 in the admiralty court. Matters involving loss of cargo,  
19 liens, contracts, bills of lading, were handled in a  
20 commercial court. In this country it is all combined  
21 together.

22 I submit that the admiralty jurisdiction under  
23 the Constitution extends to navigable waters for all  
24 purposes. It has been traditionally used and extended to  
25 vessels operating on navigable waters.

1           We submit that our vessel was in fact in  
2 navigation, although it was not navigating through the  
3 water. It was crewed, it was manned, it was ready to go.  
4 That it is a vessel, it is on a navigable water, it should  
5 be covered by the admiralty jurisdiction.

6           And we ask that the Court reverse the Seventh  
7 Circuit.

8           CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
9 Marwedel.

10           The case is submitted.

11           (Whereupon, at 11:43 a.m., the case in the  
12 above-entitled matter was submitted.)

## CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of: NO. 88-2041

EVERETT A. SISSON, PETITIONER v. BURTON B. RUBY et AL

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Lona M. May

(REPORTER)

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