

In the  
**Supreme Court of the United States**

**ORIGINAL**

FOREMOST INSURANCE COMPANY, ET AL., :

Petitioners :

v. :

PANSY F. RICHARDSON, ET AL. :

No. 80-2134

Washington, D. C.

Tuesday, January 12, 1982

Pages 1 thru 40

**ALDERSON  REPORTING**

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Tuesday, January 12, 1982

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 12:15 a.m.

APPEARANCES:  
ARTHUR H. ANDREWS, ESQ., Franklin, Moore & Walsh  
P.O. Box 3958, Baton Rouge, Louisiana 70821; On behalf  
of Petitioners  
DORSEY C. MARTIN, III, ESQ., Maughan, Atkinson & Martin, Ltd.  
1755 Wooddale Blvd., Baton Rouge, Louisiana 70806; on  
behalf of Respondents.

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DORSEY C. MARTIN, III, ESQ. On behalf of the Respondents	21

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE BURGER: We will hear arguments next in Foremost Insurance Company against Pansy F. Richardson. Mr. Andrews, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ARTHUR H. ANDREWS, ESQ.

ON BEHALF OF THE PETITIONERS

MR. ANDREWS: Mr. Chief Justice, and may it please the Court:

The complaint that we have with the lower court opinion in the Fifth Circuit is that it, that court, abandoned any requirement of the commercial connection to either the location of this maritime, or so-called maritime, collision and the activity complained of. Since this Court's opinion in Executive Jet v. The City of Cleveland, there has been a lot of debate as to just what the Court meant in much of the dicta in that decision in light of the fact that the decision was limited to aircraft crashes on navigable waters.

I think that there is uniform agreement with the scholars and courts that something beyond the locality alone rule was required or ought to be required, because that locality alone rule does not work so well anymore.

There is two fields of debate as I recognize the issues, as to whether the locality should be abandoned completely and that a maritime nexus alone should apply. I



1 think that the majority view, certainly the view that I take  
2 and I believe the view taken by most scholars, is that  
3 locality is still important. But in addition to locality,  
4 there ought to be something else. That has been formulated I  
5 think as the so-called locality plus rule. The plus that I  
6 would add to the occurrence is the plus of some commercial  
7 flavor to either the location of the wrong or the activities  
8 complained of.

9           The Fifth Circuit, in its early decisions following  
10 Executive Jet; notably, Peytavin which involved a collision of  
11 automobiles on a floating pontoon portion entrance way to the  
12 ferry, found that there was no maritime jurisdiction in that  
13 type of action, but I would suggest to you, kept a commercial  
14 flavor to it.

15           QUESTION: Mr. Andrews, what do you mean by a  
16 commercial flavor? Supposing this were a rented boat.

17           MR. ANDREWS: Rented boats I don't think should  
18 really -- what are we talking about in the nature of? Rented  
19 boats would certainly -- this case, what makes this case I  
20 think interesting and what makes it here is that we are  
21 talking about commercial pleasure boating in the purest sense,  
22 as the district court found.

23           QUESTION: I'm just wondering about commercial  
24 pleasure boating. If you rent the boats -- would that be  
25 enough commercial flavor?

1           MR. ANDREWS: I cannot honestly tell the Court that  
2 I can draw the line so fine to say that if I was paddling a  
3 boat around, rented, on the Potomac River and it sunk because  
4 of some defect in it, that that ought to be maritime law. My  
5 reaction is that it should not be.

6           QUESTION: How would you help us to define -- you  
7 asked us to adopt the commercial flavor test, and I'm just  
8 trying to get from you what is it that would give us enough  
9 commercial flavor?

10          MR. ANDREWS: The way I would approach the problem,  
11 as pointed out in brief and which I believe is supported by at  
12 least Benedict, I would use a twofold sort of test. When we  
13 are in the traditional blue water sea, more than a marine  
14 league, away from the shore, I would use essentially a  
15 locality alone test, so that the activity complained of would  
16 not have to have a very strong relationship to commerce in  
17 order to support maritime jurisprudence or the admiralty  
18 jurisdiction of a federal court.

19          As I moved shoreward and got closer to the beach,  
20 and as I moved inward, then I would require that the  
21 complained of activity have some closer connection to  
22 traditional notions of maritime activity or, i.e., commerce.  
23 Now, the Kelly v. Smith case is one that definitely gave us  
24 problems in the Fifth Circuit. Judge Thornberry in our  
25 argument there indicated that the panel decided our decision

1 would probably not decide Kelly v. Smith the way it was. But  
2 you will recall that is the case of the deer poachers who were  
3 fleeing an island in the Mississippi River. Certainly, the  
4 court had a good deal of fun in writing that case.

5           One of the things that is important, too, and ought  
6 not to be overlooked in Kelly is that there was simply no  
7 other cause of action. All of the state proceedings had  
8 prescribed, or the statute had run, in common-law lingo. But  
9 in Kelly, the remedy, if there was to be a remedy, was to be  
10 admiralty.

11           I view that Kelly v. Smith is more of an extreme  
12 example of the lack of a maritime flavor to the activity. But  
13 look at the location. We're talking about the Mississippi  
14 River, and a very definite hazard can be posed to commercial  
15 navigation because of the activity complained of. We've got  
16 the Kelly court recognizing that the pilot of the small boat  
17 is the pilot that is wounded by the shot from shore, and we  
18 have got activity in the Mississippi River.

19           That is why I think that Kelly ought to be the far  
20 parameter --

21           QUESTION: Really what you are saying, I guess, is  
22 that instead of using navigability as the test, you'd use  
23 commercial navigability.

24           MR. ANDREWS: I would. That is --

25           QUESTION: Wherever you have got commerce, then --

1 whatever, it's a pleasure boat or what --

2 QUESTION: Then location would be the sole test if  
3 it was on water that was used for commerce.

4 MR. ANDREWS: No, sir. I think that that would be  
5 equally wrong. I think --

6 QUESTION: Well, most boats have to come to shore,  
7 and they come into a port through some channels.

8 MR. ANDREWS: That is right.

9 QUESTION: Which are used by pleasure boats and all  
10 other kinds of boats. You would say even there, that location  
11 would not be the sole test.

12 MR. ANDREWS: No. I would say that the location  
13 ought to be examined in light of its importance to commerce,  
14 and that the activity complained of ought to also be examined  
15 in light of its relationship --

16 QUESTION: You wouldn't require some connect -- so  
17 no pleasure boat would ever be covered by admiralty.

18 MR. ANDREWS: I wouldn't go so far as to say that.  
19 If a pleasure boat collided --

20 QUESTION: Well, give me an example.

21 MR. ANDREWS: A pleasure boat colliding with a barge  
22 on this particular waterway further south, or whatever. A  
23 commercial --

24 QUESTION: If coming into a harbor you collide with  
25 a commercial ship that is maritime, and if you collide with



1 another pleasure boat it is not.

2           MR. ANDREWS: I cannot say that either, because that  
3 is the importance of the harbor. Certainly, if this accident  
4 would have occurred in the Port of New York, or in the City  
5 and Port of New Orleans or Baton Rouge, I could not come to  
6 this Court or any other court and say that the federal  
7 interest, and the admiralty interest is not significantly  
8 great enough, and that this activity is so remote from  
9 commerce and legitimate admiralty ends that there should be no  
10 jurisdiction.

11           I beleive I can say that where we are now, because  
12 we are talking about a very insignificant inland waterway that  
13 has no commercial purpose and if it is even found --  
14 recognized by the Fifth Circuit -- if it has any significance  
15 to commercial activities, it is very minor.

16           QUESTION: Mr. Andrews, supposing you took the  
17 portion of the intercoastal waterway around the perimeter of  
18 Florida, which is primarily used by large numbers of pleasure  
19 boats, yachts and things like that. Admiralty jurisdiction or  
20 not when two pleasure boats bump into each other?

21           MR. ANDREWS: Within the intercoastal waterway? I  
22 would say that there would probably be jurisdiction.

23           QUESTION: So you don't have to have any commerce  
24 associated with the vessels. So I think you are back to  
25 location. What is your test?

1 MR. ANDREWS: I think that the test is this, and it  
2 is not just Mr. Andrews saying it. I believe that Mr.  
3 Benedict helps me, and I am glad to say that. But, I think  
4 that you have to look at the location, and its relationship to  
5 commerce.

6 QUESTION: I'm looking at the location, say, between  
7 Palm Beach and Miami down there.

8 MR. ANDREWS: Now let's look at the activity, too.

9 QUESTION: And the location is 90% pleasure boats  
10 and two pleasure boats bump into each other.

11 MR. ANDREWS: But the location is also within --  
12 well, I was under the impression that we were talking about  
13 the intercoastal waterway that I am familiar with that has a  
14 great deal of inland barge traffic and a great deal of inland  
15 ship traffic.

16 QUESTION: I think along the Florida one -- assume  
17 for my example anyway that there is a large amount of pleasure  
18 boating in a waterway and maybe an occasional commercial  
19 fisherman or something, and two pleasure boats collide.

20 MR. ANDREWS: In that situation, and because we are  
21 talking about close to shore, I would say probably no  
22 jurisdiction. There is no need for that jurisdiction. There  
23 is no need for the federal court to entertain it. There is a  
24 state action and a state remedy is available, but that is not  
25 what I would turn it on. It is just simply that the need to

1 regulate, as historically the admiralty has -- commerce and  
2 shipping -- is simply not there. And it ought not to be a  
3 case of -- you are opening up not only a type of or class of  
4 case to the jurisdiction of a court, but an entire field of  
5 law that ought not to be applicable to them.

6           In Louisiana we have a great deal of small  
7 commercial fishermen, small trappers, and under this decision  
8 of the Fifth Circuit and where it is going to bother, I would  
9 suggest, people in Louisiana, but elsewhere is that if two  
10 Pirois collide on an inland waterway, that not only gives this  
11 certainly trivial incident access to a federal court, which  
12 may not be bad, but it gives it access to an entire field of  
13 law. I would suggest to you by the time the court started  
14 carving out exceptions to make this thing work, that that's  
15 where the confusion would turn into. I don't know what  
16 plaintiff would have done if I would have tried to limit my  
17 liability.

18           QUESTION: In your example, the water that you are  
19 talking about would be navigable. It is navigable, those  
20 inland waterways, and error to commercial fishing boats.

21           MR. ANDREWS: That is right.

22           QUESTION: But that is not a good enough connection  
23 with commerce?

24           QUESTION: You're talking about, Your Honor, the  
25 type of boats we are dealing with, so yes, I would say no, it

1 isn't good enough. And because we are also talking about the  
2 water bodies.

3 As the Court is aware, --

4 QUESTION: What about Justice Stevens' example of  
5 90% pleasure boat water and 10% commercial? Two pleasure  
6 boats collide. You say no jurisdiction.

7 MR. ANDREWS: Yes.

8 QUESTION: The pleasure boat collides with a  
9 commercial boat. Jurisdiction?

10 MR. ANDREWS: I would say so.

11 QUESTION: And if two commercial ships collide,  
12 obviously, --

13 MR. ANDREWS: Jurisdiction.

14 QUESTION: On the same water.

15 MR. ANDREWS: That is right, in the same location.

16 QUESTION: What would happen in the little area  
17 between Baton Rouge and Louisiana if two boats with two kids  
18 in them, netting for crawfish? I guess they would be covered,  
19 too.

20 MR. ANDREWS: Under the Fifth Circuit's Kelly v.  
21 Smith, that is admiralty. And that is what I think is wrong  
22 with it, Your Honors, and that is why I believe that if you do  
23 look at the location, and as it moves inshore, there is just  
24 not that need to have admiralty jurisdiction apply, and that  
25 is why there ought to be more of a commercial flavor.



1 QUESTION: I wonder, do I get you that if the  
2 particular body of water -- for our basic premise, of course,  
3 it is navigable -- is a commercial highway of some kind, then  
4 the fact that there's a collision of two pleasure boats on the  
5 commercial highway, that is admiralty?

6 MR. ANDREWS: I would say that is.

7 QUESTION: Whereas, as you suggest in this case, the  
8 body of water may be navigable but it is not a commercial  
9 highway, and therefore, these two pleasure boats, it is not  
10 admiralty. But if two commercial fishermen collided at the  
11 very spot that these two collided, it would be admiralty. Is  
12 that right?

13 MR. ANDREWS: I think that is correct. I would  
14 agree with the trial judge --

15 QUESTION: Wouldn't that get the courts --

16 MR. ANDREWS: It is confusing. The Fifth Circuit  
17 suggested that one of the reasons they would not apply the  
18 rule is that it would be a difficult test to administer. Look  
19 at the locality alone rule that we've got here. Certainly, if  
20 there is a test difficult to administer, it is that.

21 QUESTION: Well, if the test were only did it happen  
22 on navigable water, federally regulable, if it did, then it's  
23 admiralty. That would be a much simpler test, wouldn't it?

24 MR. ANDREWS: There's no question that it --

25 QUESTION: Well, didn't the Fifth Circuit say that

1 the test was navigable or capable of being made navigable, so  
2 that it isn't something that is an automatic proof by simply  
3 looking at the location.

4 MR. ANDREWS: No, sir. That is true. The Fifth  
5 Circuit did not go on location; it said that a collision  
6 between two vessels, regardless of whether they are pleasure,  
7 the fact that there is a collision is a traditional maritime  
8 activity.

9 QUESTION: And one couldn't apply their test without  
10 -- not knowing either whether the water was navigable or  
11 whether it was capable of being made navigable.

12 MR. ANDREWS: I think that that is correct because I  
13 believe that the Fifth Circuit was talking about navigability  
14 in the same sense that it has historically -- streams have  
15 historically been considered navigable for commerce clause  
16 purposes.

17 QUESTION: They say it takes 6A, if the waterway is  
18 capable of being used in commerce. That is the sufficient  
19 threshold to invoke admiralty jurisdiction.

20 MR. ANDREWS: That is right.

21 QUESTION: That means it has to be navigable, in  
22 fact.

23 MR. ANDREWS: No, not at the time. Not according to  
24 the Fifth Circuit. It says that if it is navigable or  
25 susceptible of being navigable, in a commercial sense. If it

1 is either commercially navigable or susceptible to commercial  
2 --

3 QUESTION: Well, if the waterway is capable of being  
4 used in commerce.

5 MR. ANDREWS: That is right.

6 QUESTION: Well, is it or isn't it capable right  
7 now? That is the question.

8 MR. ANDREWS: This particular stream?

9 QUESTION: Yes.

10 MR. ANDREWS: We don't have --

11 QUESTION: They remanded it, didn't they? Didn't  
12 they remand --

13 MR. ANDREWS: No. The Fifth Circuit reversed the  
14 district court and we had one concurring opinion in part and a  
15 dissent in part by Judge Thornberry who would have remanded to  
16 determine the navigability, in fact, of this particular  
17 stream. In the record, there is some evidence from the Coast  
18 Guard, I believe the Corps of Engineers, as to the nature of  
19 the stream at this particular point. That issue of  
20 navigability, in fact, was never tried, nor recognized by the  
21 court.

22 QUESTION: Do you think the court of appeals held  
23 that it was navigable?

24 MR. ANDREWS: It did not hold that. I think if you  
25 will look at that portion of the opinion in the Joint

1 Appendix, I believe the words that the Fifth Circuit was that  
2 "we recognize" from the record that this area is not used for  
3 commerce or seldom, if ever, used I believe is the word that  
4 they used. So that the issue of navigability in fact has  
5 really never been adjudicated. Judge Thornberry would send it  
6 back.

7           We haven't asked for that remedy here because we  
8 want you to look at the commercial aspects of it, as we did in  
9 the district court and as we did in the Fifth Circuit. I  
10 think that that is an important thing to look at.

11           QUESTION: Mr. Andrews, are you approaching your  
12 argument as a matter of constitutional law or statutory law?

13           MR. ANDREWS: I think that we're probably talking  
14 about Article III jurisdiction of the U.S. Constitution, yes.

15           QUESTION: Certainly, the statute, Section 1333,  
16 might be narrower than Article III's language.

17           MR. ANDREWS: I think that that is correct.

18           QUESTION: Is that your view?

19           MR. ANDREWS: As far as the -- I don't really know,  
20 Your Honor. I don't know if I can answer that intelligently  
21 for you right now.

22           QUESTION: Let me ask you another question. There  
23 is a statute, it's 46 U.S. Code Section 740, which extends  
24 admiralty and maritime jurisdiction to all cases of damage or  
25 injury caused by a vessel on navigable water.



1 MR. ANDREWS: Yes.

2 QUESTION: Doesn't that appear to include pleasure  
3 boats?

4 MR. ANDREWS: I think that it does include pleasure  
5 boats. That Extension of Admiralty Act is a legislative  
6 enactment, and I think, too, that the --

7 QUESTION: Then, is this case governed by that  
8 statute?

9 MR. ANDREWS: No, it is not governed by that statute.

10 QUESTION: Why not?

11 MR. ANDREWS: As I pointed out in my brief, the  
12 Fifth Circuit -- and I pointed it out for another purpose, but  
13 I think that the case is applicable here -- there is a case  
14 cited in my brief that is the Sohyde Drilling Company case.  
15 In Louisiana and Texas, we are very familiar with offshore  
16 drilling, and we have some very specialized vessels that  
17 sometimes are vessels and sometimes are islands. This  
18 particular vessel was an island at the time of this injury in  
19 that it was a submersible drilling platform that was drilling  
20 on the bottom of the lake.

21 The action was attempted to be brought under the  
22 Admiralty Extension Act. The Fifth Circuit in that opinion  
23 said that there ought to be some commercial traditional nexus  
24 of the activity and the complained-of injury in order to  
25 support admiralty jurisdiction. So --

1           QUESTION: Well, that may not be a correct  
2 interpretation of that language in the statute, which  
3 certainly on its face would literally include pleasure boats  
4 unless pleasure boats are not vessels.

5           MR. ANDREWS: I think that that boat -- I think that  
6 pleasure boats would be vessels under the Act. And if there  
7 was some damage to a shore-based plaintiff or to an extension  
8 of land that was caused by a vessel, including a pleasure  
9 craft, in navigation, then I believe there would be supportive  
10 jurisdiction in a federal admiralty court under the Extension  
11 of Admiralty Act.

12           There are other legislative expansions, I would  
13 suggest, of the jurisdiction; notably, Death on the High Seas  
14 Act, the limitation of liability acts, which are legislative  
15 encroachments upon traditionally-defined jurisprudential  
16 jurisdictional guidelines.

17           QUESTION: Well, we've never held they've gone too  
18 far, have we?

19           MR. ANDREWS: I don't think that I can complain that  
20 you've gone too far in any event, so far.

21           QUESTION: And we've sustained those statutes,  
22 haven't we?

23           MR. ANDREWS: That is correct.

24           QUESTION: And said that Congress could define those  
25 things for us?

1 MR. ANDREWS: That is right.

2 QUESTION: And isn't the statute that Justice  
3 O'Connor called to your attention -- it goes rather far,  
4 doesn't it?

5 MR. ANDREWS: It does go rather far, but it is --  
6 and one of the reasons that I would suggest to the Court that  
7 we needed it was because at that time, the Court was primarily  
8 looking at locality alone. And certainly, we had some awkward  
9 results when we were applying that law, and the Extension of  
10 Admiralty Act eliminated a lot of the injustices that were  
11 just inherent in the application of that Act.

12 I think that it's time that we do look at a little  
13 something else. We need something. One of the groups of  
14 scholars would indicate that they would have maritime nexus  
15 without any need for the location to be important. I don't  
16 think that this Court ought to go that far. If we look at the  
17 contract cases in the maritime field, we haven't had a heck of  
18 a lot of problems with it because despite the fact that we're  
19 talking about contract, we have been talking about requiring a  
20 maritime nexus there which is almost inevitably commercial.  
21 And we simply haven't had those problems in the contract,  
22 maritime contract field that we have in the maritime personal  
23 injury when we have applied the locality alone test, but with  
24 the advent of all this pleasure boating and pleasure and sport  
25 fishing.

1           So something ought to be done. I would suggest to  
2 you that what I have proposed, and as Professor Benedict  
3 points out, I think that's a workable solution. I think, too,  
4 that that rule would also help in the real puzzling question  
5 of aircraft litigation and aircraft collisions at sea.  
6 Because there, too, we are talking about -- once we are  
7 talking about international flights, for example, from New  
8 York to London and a crash in the middle of the Atlantic, we  
9 are talking -- and we start talking about the traditional role  
10 of the maritime services in transporting passengers from one  
11 country to another. Then there, we don't need that much of a  
12 connection to traditional notions of maritime activity, so  
13 that you are not doing any injustice or abusing language to  
14 try to make something fit in both categories.

15           QUESTION: I may not understand your argument. What  
16 is your view? Is there or is there not jurisdiction when two  
17 airplanes collide in the middle of the Atlantic?

18           MR. ANDREWS: That debate is much greater than the  
19 debate here. I think, in my view, if we have two airplanes  
20 colliding in midair in the middle of the Atlantic, we have got  
21 to have jurisdiction someplace. There may not be remedies  
22 available to those passengers. That type of activity is a --  
23 that is transportation is the type of activity which has  
24 traditionally been done by oceanliner. I would say that --

25           QUESTION: Traditionally, they didn't fly.



1 MR. ANDREWS: That's true. But I would say, too,  
2 that you have a closer maritime connection.

3 QUESTION: I just didn't know what you were  
4 arguing. I'm still not sure. Are you saying there is or is  
5 not jurisdiction?

6 MR. ANDREWS: I'm saying that we've got -- well, let  
7 me --

8 QUESTION: You're saying it's a tough question.

9 MR. ANDREWS: Can I cite my example to -- because I  
10 didn't want to get both of them off of the ground. I wanted  
11 them to crash in the ocean. My example and the rule --

12 QUESTION: I assume that if they crash in the middle  
13 of the Atlantic they are eventually going to get down into the  
14 water.

15 MR. ANDREWS: That is right. But I think that we  
16 have -- the rule that Benedict would put forth to look at the  
17 commercial location and commercial activity and weigh that to  
18 determine admiralty jurisdiction would also work in the other  
19 field of -- closely-related field of cases, or line of cases;  
20 notably, Executive Jet --

21 QUESTION: I'm just trying to figure out your  
22 answer. Your answer is yes, because it is commerce and it's  
23 the location rule.

24 MR. ANDREWS: My answer is yes.

25 QUESTION: Do you get that out of Executive Jet

1 Aviation?

2 MR. ANDREWS: No. I think that you would get that  
3 out of --

4 QUESTION: Your new test.

5 MR. ANDREWS: Yes. My test. And whether or not  
6 that's -- well, the courts are so inclined to get it out,  
7 too. I don't know. I don't think I need to reserve any other  
8 time for rebuttal, but if there are no other questions I will  
9 sit down.

10 CHIEF JUSTICE BURGER: Mr. Martin?

11 ORAL ARGUMENT OF DORSEY C. MARTIN, III, ESQ.

12 ON BEHALF OF THE RESPONDENTS

13 MR. MARTIN: Mr. Chief Justice, and may it please  
14 the Court:

15 It is the respondents' position herein, Your Honors,  
16 that the Fifth Circuit Court of Appeals case is correct in  
17 encompassing and saying that the factual situation herein is  
18 encompassed within the admiralty jurisdiction of this Court.  
19 Admiralty law has traditionally, I would suggest, been  
20 concerned with navigation, navigation rules and collisions  
21 which occur on navigable waterways.

22 The case of Executive Jet, this Court's case,  
23 Aviation v. City of Ohio, tells us that, and Justice Stewart,  
24 writing the majority says that the law of admiralty deals with  
25 navigation rules. The rules that govern the manner and

1 direction vessels move upon navigable water, and he further  
2 states that when a collision occurs, the litigants will look  
3 to the law of admiralty with its peculiar expertise in this  
4 field to determine the nature of damages and fault and  
5 liability.

6 QUESTION: What case were you referring to?

7 MR. MARTIN: This is the Supreme Court case,  
8 Executive Jet Aviation v. City of Ohio, Your Honor. The same  
9 premise, of course, is recognized in lower court opinions.  
10 The St. Hilaire Moyer case which is cited in the brief, v.  
11 Henderson, Eight Circuit case, together with Kelly v. Smith of  
12 the Fifth Circuit, both recognize that admiralty law has  
13 traditionally furnished remedies for those injured while  
14 traveling navigable waters.

15 Then we have the problem with the three prior  
16 Executive Jet Supreme Court cases of Levinson v. Deupree,  
17 Coryell v. Phipps and Just v. Chambers, which seem to me to  
18 indicate that the traditional remedies that this Court has  
19 furnished for those who are injured while traversing navigable  
20 waters is not merely lost because pleasure boats were involved.

21 QUESTION: What is your definition of a navigable  
22 water?

23 MR. MARTIN: Your Honor, I would use the definition,  
24 of course, that comes from the Daniel Ball case, that first it  
25 has to be navigable, in fact, and that it is navigable in fact

1 when it is susceptible of commerce in its ordinary state, and  
2 it is susceptible of commerce when it by itself or along with  
3 other streams, forms a continuous highway over which commerce  
4 can be adapted. And the Amite River here, I would submit,  
5 meets that definition, because the Amite River, of course,  
6 from the evidence and so forth, is navigable in fact. The  
7 Corps of Engineer report, the Department of the Army report as  
8 to depth --

9 QUESTION: It is not navigable from shore to shore.  
10 It is not navigable up close to the shore.

11 MR. MARTIN: Well, it permits commerce at the point  
12 of this collision, certainly, and --

13 QUESTION: You can't run the boat through weeds up  
14 against the shore.

15 MR. MARTIN: No, Your Honor, no, sir, but in the  
16 middle of --

17 QUESTION: So it is not navigable, is it?

18 MR. MARTIN: Not close to the shore. I am sure that  
19 the depth would taper off toward the shore, but --

20 QUESTION: It is not navigable, is it?

21 MR. MARTIN: Oh, yes, sir, I would submit that it is  
22 navigable, in fact, because it has a depth that --

23 QUESTION: What about those streams I was asking  
24 your opponent about between Baton Rouge and New Orleans?  
25 Those are --



1 MR. MARTIN: Your example about the crawfish  
2 fishermen?

3 QUESTION: Yes. Those are navigable rivers.

4 MR. MARTIN: Some of them, yes, sir, would meet the  
5 Daniel Ball navigation --

6 QUESTION: And the little rowboats, they're not in  
7 commerce, are they?

8 MR. MARTIN: Well, if the crawfish in your example  
9 are sold to an outlet, a seafood outlet, which most of these  
10 people make a living that way, then commerce is involved and  
11 under my definition --

12 QUESTION: But I wouldn't call making 50¢ a day  
13 making a living.

14 MR. MARTIN: No, sir, if that's all they were  
15 making, but some of those people crawfishing making quite a  
16 good living, you know, forty or fifty thousand dollars a year.

17 QUESTION: The one that goes for crawfish to eat  
18 himself, he is on navigable waters, he is controlled by  
19 maritime law.

20 MR. MARTIN: That is correct.

21 QUESTION: There's something wrong there.

22 MR. MARTIN: Well, I would submit that it would be  
23 correct because in your example, that particular fisherman's  
24 vessel has been so defined --

25 QUESTION: He is not a fisherman; he is out fishing,

1 but that is not his business.

2 MR. MARTIN: He is a pleasure fisherman, or a person  
3 engaged in pleasure fishing for his own good --

4 QUESTION: Like these people were.

5 MR. MARTIN: I would submit that he is still in a  
6 waterbound vessel, and he still has to face the same hazards  
7 in that little Piro, in that little pleasure boat --

8 QUESTION: Well, if his boat sinks, he can walk to  
9 shore. Is that your idea of navigable water?

10 MR. MARTIN: It would depend, of course, upon the  
11 depth of the river at the time.

12 QUESTION: That's what I thought. But under the  
13 definition you want and the Fifth Circuit, if it's a navigable  
14 stream in the middle, it's navigable for all purposes.

15 MR. MARTIN: Well, I would submit that if it is  
16 susceptible to supporting commerce, whether it be in the  
17 middle of the stream or on the end of the stream and so forth,  
18 yes, under the Supreme Court case, Daniel Ball, it is  
19 navigable because -- this Amite River, you must understand, it  
20 flows, it bottoms out into Lake Maurepas, which also connects  
21 to the Pontchartrain, and from the Pontchartrain, this river  
22 can give access to commerce, not only within the state of  
23 Louisiana, but with other states and also, international trade.

24 QUESTION: Do we know anything about the depth of  
25 the Amite at the point these boats --

1           MR. MARTIN: Yes, Your Honor. The record -- I think  
2 it's the Corps of Engineers report. No, it's the Department  
3 of Army report which is in the record at pages 103 to 119,  
4 shows the depth of the Amite River near the point of collision  
5 to be eight feet, within a range permissible for commercial  
6 vessel use. Now, I don't know if they measured -- I'm sure  
7 that that would be the deepest point.

8           QUESTION: Could the jurisdictional issue possibly  
9 be resolved on the depth of the water right under the boats at  
10 the time they collided? The Atlantic Ocean is very shallow  
11 right by the shore and so is the Mississippi River with a  
12 nine-foot channel in the center. But the entire river of  
13 Mississippi is a navigable stream, isn't it?

14           MR. MARTIN: Yes, Your Honor. And I would submit  
15 that within the definition that we have of navigability, the  
16 Amite River meets that definition here, at the point of the  
17 collision and further on down. I think it is susceptible of  
18 commerce, and indeed, we have documentation in the record that  
19 shows that it might, in fact, be engaged in commerce because  
20 there are certain bridge openings along the river, and it's  
21 part of the record, too, it's the Department of Transportation  
22 report and record 136 through 139 reveals that at the time of  
23 the accident, there were numerous openings of bridges for  
24 vessels along the Amite River.

25           Now, it could be a large pleasure boat or it could

1 have been a commercial boat of some sort, but that bridge was  
2 open to permit traffic. And it's not the type of situation  
3 that we have in Adams v. Montana where you have a stream which  
4 is dammed on both ends --

5 QUESTION: Sometimes, you open the bridge for a  
6 small boat with a very high mast.

7 MR. MARTIN: That's correct, Your Honor, and  
8 sometimes you would open it, and I believe the record will  
9 reflect, sometimes the bridges will open merely for  
10 maintenance purposes. But they are differentiated in that  
11 record, and sometimes they were open for vessels or whatever  
12 nature.

13 But the Fifth Circuit I believe had to conclude that  
14 this river certainly was navigable under the definition of  
15 these courts in order to find admiralty jurisdiction. And I --

16 QUESTION: Judge Thornberry would have remanded for  
17 the sort of finding that you suggest could be made but wasn't  
18 made -- whether it was commercially used. Is that correct?

19 MR. MARTIN: Yes, sir, that is how I understand his  
20 dissent in that case.

21 Your Honor, it would be submitted that the proper  
22 focus should not be on profit or commerce, but the proper  
23 focus should be to equate traditional maritime activities with  
24 waterbound vessels. And if you adopted a test in that order,  
25 we would see that we would be working with a simple test. It



1 would be almost as simple as locality. If there is a  
2 waterbound vessel involved, then there is admiralty  
3 jurisdiction. Because these pleasure boats can cause as much  
4 problems to commerce and to the freedom of navigation on these  
5 navigable streams if they collide as two commercial vessels.  
6 We recognize that commercial vessels and fishing vessels come  
7 in all sizes, -- I mean pleasure vessels come in all sizes,  
8 and a pleasure boat is not relegated like your large pleasure  
9 lots and so forth, to interstate waters, but can traverse  
10 international waters. The test is irrational, in my opinion,  
11 if you place it on profit or commerce.

12           Now, if we adopted, or if you adopted the test which  
13 would equate the traditional maritime nexus with waterbound  
14 vessels, I think you would be excluding those cases that this  
15 Court has expressed it did not want to decide under admiralty  
16 law; those cases involving aviation, those cases involving the  
17 individual who is injured on the surfboard. That is not a  
18 waterbound vessel. Swimmers colliding with a submerged  
19 object, which has been held admiralty law, and the Peytavin  
20 case which was a Fifth Circuit case, where the automobile was  
21 readended on one of these floating pontoons as it was getting  
22 ready to board a ferry. That would not -- if you do that, if  
23 you adopt this case, you would be excluding those unwanted  
24 cases, but yet, you would be avoiding the observed  
25 distinctions between injured passengers and non-passengers,

1 between profit and non-profit, and this test would protect the  
2 uniformity, the federal interest, I would suggest, in  
3 uniformity because all these federal rules of the road are  
4 made applicable to all boats. Vessel is defined to include --

5 QUESTION: Do you think the federal statutes  
6 defining the rules of the road and setting other safety  
7 measures, these statutes you refer to, are they applicable to  
8 this river?

9 MR. MARTIN: Yes, Your Honor, they certainly were.  
10 In fact, --

11 QUESTION: So you think that if in a local suit, if  
12 there was no admiralty jurisdiction under state law they could  
13 still say there was negligence because of failure to abide by  
14 some federal rule of the road?

15 MR. MARTIN: I think the federal rules of the road  
16 would determine the standard of care in that particular  
17 incident. And I'm worried about the situation --

18 QUESTION: So there would be federal law controlling  
19 the case in any event.

20 MR. MARTIN: Yes, sir. Well, part of the federal  
21 law. The federal rules of the road would apply, but  
22 necessarily the remedies and the liability determinations that  
23 comes from admiralty law, so to speak.

24 QUESTION: You can't talk about rules of the road  
25 with admiralty. Because every time I have had an admiralty

1 case and I say try it like two automobiles, the admiralty  
2 lawyers look at me like I'm nuts. It's a little selected part  
3 of the law.

4 MR. MARTIN: Yes, Your Honor.

5 QUESTION: And you want to put the pleasure boats  
6 over in there.

7 MR. MARTIN: I'm worried about what would happen,  
8 Your Honor, if we allow the states to regulate in these areas,  
9 because we tie the test of profit or commerce --

10 QUESTION: It would be the same way the state  
11 regulates one foot from the water. If he's out in the water  
12 one foot, the state can regulate that just as easily as it  
13 could another foot, couldn't it?

14 MR. MARTIN: I think so. If he's not in a  
15 waterbound vessel, I think the state should regulate it.

16 QUESTION: Well, he's in a navigable river, he's one  
17 foot in it.

18 MR. MARTIN: Yes, sir, it's not like the factual  
19 situation here --

20 QUESTION: So he's in navigation.

21 MR. MARTIN: If it's not like the factual situation  
22 here --

23 QUESTION: I still think you have to draw a line  
24 someplace.

25 MR. MARTIN: Yes, Your Honor, I agree with you.

1 QUESTION: Well, draw it.

2 MR. MARTIN: I think you should, and I think you  
3 should draw the line either on the test submitted by the court  
4 in Kelly v. Smith and adopt it in this case where you look at  
5 the totality of the circumstances involved. You look at the  
6 instrumentalities involved; you look at the role of the  
7 parties, you look at the causation and you look at traditional  
8 concepts of maritime law. And if you look at those in  
9 connection with this case, you find out that both individuals  
10 were pilots of vessels on navigable water. They are subjected  
11 to the same rules as the big boats and so forth. They are  
12 subjected to the same hazards of navigation.

13 QUESTION: Suppose they had been in five feet of  
14 water? And I warn you I'm going to two.

15 MR. MARTIN: I don't know what would be susceptible  
16 of commerce, but if there is a determination that it is not  
17 susceptible of commerce in its present state, then admiralty  
18 law should not get into that situation, because the federal  
19 interest is not there, in protecting the uniformity for  
20 commercial vessels and so forth.

21 QUESTION: What is the source of the rule? There  
22 must be some connection with commerce or some capability of  
23 commerce rather than navigability. Is that the same?

24 MR. MARTIN: I would hate to pin the test on  
25 commerce, Your Honor, because --



1 QUESTION: I know, but you are suggesting that. You  
2 just suggested that a minute ago. Didn't the Fifth Circuit  
3 say that if it's -- did it say if it's capable of being  
4 navigable, or if it's capable of supporting commerce?

5 MR. MARTIN: I believe the Fifth Circuit said if  
6 it's navigable, if it's susceptible of commerce, which they  
7 concluded this river was susceptible of commerce.

8 QUESTION: Just relying on the Daniel Ball, weren't  
9 they?

10 MR. MARTIN: That's correct, Your Honor, interpreted  
11 it under the commerce clause.

12 QUESTION: Suppose you've got a 200-foot yacht,  
13 which is pure pleasure, a crew of 40 men. I suppose under  
14 your theory, that's got to be treated along with an 18-foot  
15 boat with an outboard motor.

16 QUESTION: Used for pleasure.

17 MR. MARTIN: I would say the test should be drawn  
18 either like St. Hilaire Moya on waterbound vessels alone. If  
19 they're involved, there's admiralty law, if they're on a  
20 navigable stream. Or I suggest that you apply the Kelly v.  
21 Smith test, which looks at the totality of the circumstances,  
22 and even looking at Kelly v. Smith, --

23 QUESTION: How would you say if you look at  
24 waterbound vessels alone -- you mentioned earlier the swimmer  
25 who hit something in navigable waters and that was held to be

1 --

2 MR. MARTIN: Admiralty law.

3 QUESTION: But you would say it was not because he  
4 was not aboard a waterbound vessel.

5 MR. MARTIN: Not a waterbound vessel, that's correct.

6 QUESTION: And a waterskier similarly? Is he on a  
7 vessel or --

8 MR. MARTIN: That gets a little bit -- if the  
9 waterskier is being pulled by a waterbound vessel, then I  
10 think that there is a possibility of navigability. Certainly,  
11 if the boat that the waterskier has been pulled by collides  
12 with another vessel, pleasure or otherwise, yes, there would  
13 be admiralty law.

14 QUESTION: What if the boat the waterskier is being  
15 pulled by simply runs aground in the shallow?

16 MR. MARTIN: Yes, the waterbound vessel is involved  
17 and I would say that under this test, you would have admiralty  
18 law. It's a hazard of navigability. The commercial vessels  
19 runs that same risk, too.

20 QUESTION: How about the pleasure boat that is  
21 involved in a single boat accident resulting from a  
22 manufacturer's defect in the vessel? Still apply admiralty  
23 law to that kind of case?

24 MR. MARTIN: If the boat was engaged in navigation,  
25 I would say yes, it certainly could be heard in admiralty law.

1 QUESTION: What justification is there really for  
2 denying the states their traditional jurisdiction over tort  
3 suits of that type?

4 MR. MARTIN: There's very little justification in  
5 your particular case. There's more justification in the case  
6 that we are litigating today, because it involves the federal  
7 interest in protecting the freedom of navigation for all  
8 vessels, and the federal interest has been reiterated and  
9 shown to us by the statutes.

10 QUESTION: Well, but of course, the federal  
11 government has enacted laws such as the 55 miles an hour law  
12 governing automobiles and other automobile regulations, but  
13 that doesn't result in our depriving the states of their  
14 traditional jurisdiction over tort suits involving automobiles.

15 MR. MARTIN: I think the automobile situation might  
16 be distinguished in that admiralty law has developed its own  
17 particular type of law and its own particular type of defenses  
18 and so forth. And in Louisiana if a commercial automobile or  
19 commercial truck is involved in an accident, the same type of  
20 law would apply. In Louisiana, the law of negligence would  
21 apply to that. But if a commercial vessel was involved in  
22 admiralty, then admiralty's particular type law would apply,  
23 which is different than Louisiana. I don't think you can make  
24 that same analogy between highway --

25 QUESTION: But now we're talking about the purely

1 private vessel and whether the state should be deprived of  
2 jurisdiction there.

3 MR. MARTIN: I would argue that if they are to be  
4 deprived of jurisdiction, it is because of the federal  
5 interest in this area in protecting navigation. A collision  
6 between those two private vessels presents a hazard to another  
7 commercial vessel or commerce on that river, and that's where  
8 the federal interest comes in because admiralty law recognizes  
9 that. That's why I would say the difference is there.

10 QUESTION: Mr. Martin, would you say that -- just  
11 directing your attention to the manufacturer's defect  
12 suggestion. Is the issue -- is unseaworthiness of a vessel a  
13 traditional area of state or federal jurisdiction, would you  
14 say?

15 MR. MARTIN: It's federal jurisdiction, I would say.

16 But I am saying that if we're going to define  
17 traditional maritime nexus -- and I agree that there should be  
18 some definition of that and there should be more than locality  
19 -- to limit the type of cases that come before this Court and  
20 so forth, I'm saying that the proper test should not be on  
21 commerce or profit, because it produces irrational results.  
22 We might not be able to determine if there's a fishing boat  
23 right down here and this man over here is engaged in selling  
24 his fish in a very small vessel, but he's engaged in selling  
25 his fish for a living to a seafood outlet, well, to this



1 fellow down here, he appears to be pleasure. He doesn't have  
2 the words "commerce" written across his vessel. So then the  
3 state law might control.

4 But later on, we find out he was selling those fish  
5 --

6 QUESTION: Does the man in the little fishing boat  
7 get maintenance inshore if he got injured?

8 MR. MARTIN: Could he get maintenance and care? No,  
9 sir, he'd have to be a seaman for that, and I don't think he  
10 would be a seaman.

11 QUESTION: Why wouldn't he be a seaman?

12 MR. MARTIN: Because he's not --

13 QUESTION: He was at sea, according to you.

14 MR. MARTIN: I don't think it would --

15 QUESTION: Maritime law only applies to sea, doesn't  
16 it?

17 MR. MARTIN: No. I think maritime law is broader  
18 than the Jones Act seamen type cases and so forth.

19 QUESTION: That's what I'm trying to say.

20 MR. MARTIN: Yes, sir, I think maritime law is  
21 broader than that. I think maritime law should include  
22 collisions between purely pleasure boats on the --

23 QUESTION: But for this case, you're not interested  
24 in anything but the collision part of admiralty.

25 MR. MARTIN: For this particular case, yes, Your

1 Honor, but my personal feelings are that admiralty law should  
2 encompass any waterbound vessel on navigable water.

3 QUESTION: But you don't need it for this case.

4 MR. MARTIN: No, sir, that's correct.

5 QUESTION: Well, why carry it?

6 MR. MARTIN: Maybe I shouldn't.

7 CHIEF JUSTICE BURGER: We will resume there at 1:00  
8 o'clock.

9 (Whereupon, at 12:00 p.m. the oral argument in the  
10 above-entitled matter recessed for lunch, to reconvene at 1:00  
11 p.m. the same day.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE BURGER: You may continue, counsel.

4 ORAL ARGUMENT OF DORSEY C. MARTIN, III, ESQ.

5 ON BEHALF OF THE RESPONDENTS (Continued)

6 MR. MARTIN: Your Honors, it is submitted under  
7 either of the tests that have developed in the circuit courts,  
8 attempting to define what this Court meant by traditional  
9 wrong bearing a significant relationship to traditional  
10 maritime activities. Either the test of *St. Hilaire Moya v.*  
11 *Henderson* of the Eighth Circuit saying that the traditional  
12 maritime nexus is met when a waterbound vessel is involved, or  
13 the test of *Kelly v. Smith* of the Fifth Circuit saying that  
14 traditional maritime nexus is met when the totality of the  
15 circumstances, considering the role and instrumentality, the  
16 causation and the parties involved.

17 Under either one of these tests, the facts of this  
18 case support admiralty jurisdiction. All vessels applying on  
19 navigable waters, regardless of their size or commercial  
20 status, face these unique hazards of the waters which maritime  
21 law, due to its continued experience, is peculiarly suited to  
22 handle.

23 It is submitted, Your Honor, that because the Fifth  
24 Circuit case in this matter recognizes the traditional concept  
25 of admiralty law in regard to the factual situation of this

1 case, that Fifth Circuit case promotes the federal interest in  
2 keeping our navigable waters free from maritime uses, and also  
3 promotes uniformity of commerce and makes jurisdiction readily  
4 ascertainable before a collision, not after a collision, and a  
5 determination by the courts as to whether or not there is a  
6 substantial commercial interest involved; i.e., federal rules  
7 of admiralty, or whether it is purely pleasurable, invoking  
8 state rules.

9           And because the Fifth Circuit case provides a  
10 rational, simple test that is not all-inclusive that would  
11 accomplish what this Court would like like to do in  
12 eliminating certain cases which do not have a nexus to  
13 admiralty law from being heard in admiralty, that it should be  
14 upheld.

15           CHIEF JUSTICE BURGER: Very well. Do you have  
16 anything further?

17           MR. ANDREWS: Your Honor, I don't want to take any  
18 rebuttal; I would like to point out to the Court because it is  
19 not in my brief, but the record will support my statement that  
20 after this collision, one of the passengers on my vessel waded  
21 over to plaintiff and pulled him ashore, so we're talking  
22 about water that is less than waist deep in this location.

23           CHIEF JUSTICE BURGER: Very well, thank you,  
24 gentlemen, the case is submitted.

25           (Whereupon, at 1:05 p.m. the oral argument in the



1 above-entitled matter ceased.)

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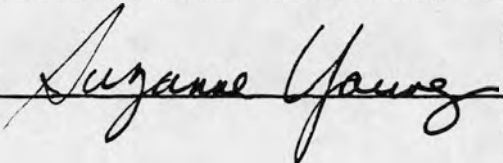
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