

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

ORIGINAL

CAPTION: McDERMOTT INTERNATIONAL, INC. Petitioner V.

JON C. WILANDER

CASE NO: 89-1474

PLACE: Washington, D.C.

DATE: December 3, 1990

PAGES: 1 - 57

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - X

3 McDERMOTT INTERNATIONAL, INC., :

4 Petitioner :

5 v. : No. 89-1474

6 JON C. WILANDER :

7 - - - - - X

8 Washington, D.C.

9 Monday, Wednesday 3, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:14 a.m.

13 APPEARANCES:

14 JAMES B. DOYLE, ESQ., Lafayette, Louisiana; on behalf of
15 the
16 Petitioner.

17 JENNIFER J. BERCIER, ESQ., Cameron, Louisiana; on behalf
18 of the Respondent.

19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
JAMES B. DOYLE, ESQ.	
On behalf of the Petitioner	3
JENNIFER J. BERCIER, ESQ.	
On behalf of the Respondent	24
<u>REBUTTAL ARGUMENT OF</u>	
JAMES B. DOYLE, ESQ.	
On behalf of the Petitioner	48

P R O C E E D I N G S

(11:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear next in No. 89-1474, McDermott International v. Jon C. Wilander.

Mr. Doyle, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES B. DOYLE

ON BEHALF OF THE PETITIONER

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

The case before you today involves a question of statutory interpretation; specifically who is entitled to sue for damages under the Jones Act. That section, which is also known as the Merchant Marine Act of 1920 provides a right of action to a seaman who is injured in the course of his employment. The term seaman is not defined further in the body of the statute and it has been the subject of much debate.

This case also provides an opportunity for the Court to reestablish and reaffirm a uniform national rule. The last definitive opinion reached by this Court was 33 years ago. And since that time there have been two divergent tracks which have been taken from that opinion even though it was clear.

One group of circuit courts decides seaman

1 status questions based on an analysis, at least in part,
2 of the subject seaman's relationship to the transportation
3 function or the navigation function of the vessel. The
4 Fifth Circuit in particular among the others does not take
5 this into consideration, at least not in the same way.
6 This has led to an inconsistency of results throughout the
7 country and needs to be addressed.

8 This case particularly draws that line for the
9 Court, because in this case there is little question, and
10 the Fifth Circuit so found, that Mr. Wilander, the seaman,
11 the person claiming status under the act had no
12 responsibilities relative to the vessel to which he
13 claimed status which were related to its transportation or
14 navigational function. It also presents a contrast for
15 the Court because as a matter of first principle in this
16 case, the district judge was forced to decide what was
17 American law because the plaintiff's invocation of the
18 Jones Act required it since he was injured in a foreign
19 environment. He was injured on a platform in the Persian
20 Gulf.

21 QUESTION: May I ask a preliminary question for
22 my information?

23 MR. DOYLE: Yes, Justice O'Connor.

24 QUESTION: Is there a general maritime
25 negligence action which the respondent could have brought?

1 MR. DOYLE: No, not in this case, Your Honor,
2 because the person he was bringing suit against would have
3 been his employer and except for the Jones Act's variation
4 from the general common law there would be no action
5 against his employer for the general maritime negligence.

6 QUESTION: Now, may I also ask you what
7 difference you think it makes whether Mr. Wilander aided
8 in the navigation of the vessel? If a person who lives
9 and works aboard ship -- why isn't that person just as
10 much a member of the crew, as it were, as someone who aids
11 in navigation?

12 MR. DOYLE: I think that the concept of aid to
13 navigation has always been considered as a degree of the
14 permanency of the attachment between the worker and the
15 employer's vessel.

16 QUESTION: But not a necessary concept.

17 MR. DOYLE: Well, the Fifth Circuit says it's
18 not necessary, but the other circuit courts seem to say
19 that it is, in its particular --

20 QUESTION: And we haven't spoken to the issue?

21 MR. DOYLE: You have spoken to the issue many
22 times. The last time definitively in Senko v. La Crosse
23 Dredging which reemphasized the aid to navigation
24 requirement.

25 And I believe, Justice O'Connor, following up

1 with your question, it must be at all times considered
2 when reviewing the Jones Act that it is an
3 employment-based statute. It's a statute which depends on
4 the reasonable expectations of the employer and the
5 employee. In this case, McDermott International would
6 have been perfectly justified in believing that an
7 employee such as Mr. Wilander, who is a painter foreman
8 operating on platforms in the Persian Gulf, would be more
9 exposed to those types of hazards and risks associated
10 with platform work than he would have been with the perils
11 of the sea.

12 And I should make one further point in response
13 to Justice O'Connor's question. Mr. Wilander did not live
14 aboard the vessel to which he claims attachment for
15 purpose of his Jones Act claim.

16 QUESTION: Would you comment on the facts a
17 little bit to that extent?

18 MR. DOYLE: Yes, Justice O'Connor.

19 QUESTION: I guess he slept, ate, and planned
20 his activities aboard the barge DB-9?

21 MR. DOYLE: That is correct, Your Honor. He
22 did. And he participated with respect to the Gates Tide,
23 the American vessel, by using it as a means of transport
24 to and from the areas in which he did his work.

25 QUESTION: Do you concede that he was a member

1 of the crew of DB-9?

2 MR. DOYLE: No, I don't, because he's not a
3 member of the crew of that vessel any more than he is of
4 the Gates Tide, since he did not contribute to the
5 transportation or navigational function of the DB-9.

6 QUESTION: Assuming we think that's an essential
7 test --

8 MR. DOYLE: Exactly so.

9 QUESTION: -- which the Fifth Circuit does not.

10 MR. DOYLE: Exactly so. But this Court's
11 opinion in Senko v. La Crosse Dredging is relevant,
12 because the DB-9 when it performs its work, you'll find
13 from the record, is frequently tied up to a platform.
14 It's not mobile. It stays in place and in position and
15 serves as a floating hotel. And in this Court's opinion
16 in Senko this quotation is found: "The duties of a man
17 during a vessel's travel are relevant in determining
18 whether he is a member of the crew while the vessel is
19 anchored."

20 QUESTION: Well, take a vessel different than
21 the one we're talking about here, Mr. Doyle. How about
22 the mess crew on the vessel or people who are just there
23 to repair in case things go wrong? Are they not seamen
24 under your definition?

25 MR. DOYLE: I think the mess crew certainly is

1 composed of seamen, Your Honor, because they serve the
2 vessel, Mr. Chief Justice, in its use as a vessel as
3 opposed to something which has another mission.

4 QUESTION: So they don't have to participate in
5 the actual steering of the ship, then?

6 MR. DOYLE: Exactly.

7 QUESTION: That would be true of repair people,
8 too?

9 MR. DOYLE: Well, repair people present a
10 special problem because, of course, ship repairs are
11 specifically identified under the L&H Act and it could be
12 that under some circumstances they would be covered there
13 and not under the Jones Act, but if they're brought along
14 on a sea voyage, specifically for the purpose of
15 conducting those repairs to the engines or the
16 appurtenances of the vessel which are required during its
17 voyage, they are aiding that vessel in its navigation
18 every bit as much as the master.

19 QUESTION: How about the dance instructor and
20 the bartender on the Love Boat?

21 (Laughter.)

22 MR. DOYLE: They, also, Justice O'Connor, aid,
23 aid in the function of the vessel, for a different reason
24 though perhaps.

25 QUESTION: Are they covered?

1 MR. DOYLE: I think they are covered but perhaps
2 for a different reason. The analysis that I've made of
3 those types of activities in the brief is one which points
4 out that the -- that the cruise ship engages in maritime
5 commerce and part of its business is to transport
6 passengers from one place to another and to keep them
7 entertained during the vessel's journey. Since they do,
8 they perform a necessary function of the vessel in
9 maritime commerce which is no different from that
10 performed by the fishermen who are on the fishery ship or
11 the cook who's represented on the tug boat which plies the
12 waters around Manhattan Island.

13 QUESTION: Do you think your -- the Seventh
14 Circuit agrees with your view?

15 MR. DOYLE: I think they do, Justice White,
16 although they --

17 QUESTION: All you need to do is to contribute
18 to the function of the vessel and navigation?

19 MR. DOYLE: I approach --

20 QUESTION: That doesn't sound like the court of
21 appeals for the Seventh Circuit.

22 MR. DOYLE: No, sir, it doesn't sound like their
23 opinion, but I approach it this way, Justice White. I
24 think that the opinion that was reached by the Seventh
25 Circuit in Johnson was based upon a particularized

1 circumstance. A person who was working aboard a structure
2 which under title I, section 3 would have been a vessel
3 but reached a point in its life when it was not and that's
4 when this particular individual in Johnson did his work,
5 was when the vessel was no longer a Jones Act vessel.

6 QUESTION: Well, let me -- how do you differ
7 then with the Fifth Circuit?

8 MR. DOYLE: I differ in this way. The Fifth
9 Circuit says that your connection with a vessel as a
10 putative seaman is relevant if you are connected only to
11 those activities which are conducted aboard the vessel
12 when it's stopped. There's not a case that I've seen in
13 the Fifth Circuit, which is primarily the oil field area,
14 which holds that a function which is being performed by a
15 person who is a seaman on a nontraditional vessel is
16 performed while the vessel is in motion or truly within
17 navigation.

18 Mr. Wilander's is a case in point. The Gates
19 Tide is a vessel. It's a 185-foot crew boat. But Mr.
20 Wilander didn't have anything to do aboard that vessel
21 until it was moored to the platform. Likewise the crew --

22 QUESTION: Do you take the position he was
23 simply in the position of a passenger aboard the Gates
24 Tide?

25 MR. DOYLE: I do, Justice O'Connor.

1 QUESTION: Do you go that far?
2 MR. DOYLE: I do.
3 QUESTION: You think he's just a passenger?
4 MR. DOYLE: Well, he is just a passenger who is
5 there in an employment-related function. In that sense I
6 would --
7 QUESTION: He's also an employee?
8 MR. DOYLE: He's an employee, not a master of
9 the Gates Tide, but an employee of McDermott International
10 which had chartered it. But further to your question,
11 Justice O'Connor, I would submit that Mr. Wilander's
12 employment-related connection with respect to the Gates
13 Tide is no different in any material degree from a legal
14 secretary who works in a Manhattan law firm and lives on
15 Staten Island and rides the ferry to work every day.
16 QUESTION: Did the employer own all these
17 vessels, the Gates Tide, and -- or lease the Gates Tide
18 and the DB-9?
19 MR. DOYLE: The employer owned the DB-9 --
20 QUESTION: Is it a group of vessels, in effect?
21 MR. DOYLE: There were a group of vessels there,
22 yes, ma'am.
23 QUESTION: Well, maybe we should look at whether
24 he's attached to "a group of vessels." Is that a
25 possibility?

1 MR. DOYLE: That is a possibility; however, in
2 this case it presents special problems, because not all of
3 the vessels to which he could have been detached were
4 American. The DB-9, as I told you, was Panamanian and
5 actually the Gates Tide which was only there for 5 days
6 during the 15 months that Mr. Wilander was employed was
7 the only American vessel that was on the job.

8 QUESTION: Well, what about a -- what about a
9 fishing boat? They're going to go whale hunting and they
10 take along a guy that knows how to spear whales. He
11 doesn't do anything to the vessel. He just rides and all
12 of a sudden they see a whale. And he harpoons it. Now he
13 certainly is the -- he is performing the entire mission of
14 the vessel. They want to get a whale and this fellow
15 involved in this case, the whole reason for this -- for
16 this ship he's on is to go around and tie up and let the
17 fellow paint, just like -- instead of harpooning a whale
18 he's doing some painting, which is the only reason that
19 vessel runs around.

20 QUESTION: Justice White, I'd appreciate the
21 opportunity to finish my answer to your earlier question.
22 The distinction here is that the fisherman who is looking
23 for the whales is performing a mission of the vessel which
24 is engaged in maritime commerce. Not so Mr. Wilander,
25 because the mission that he's performing is solely and

1 strictly related to the platform.

2 QUESTION: So, so if this fellow had
3 been -- while the boat that he was -- the boat where he
4 was living and operating -- if he had been hurt on the way
5 would he have been a seaman?

6 MR. DOYLE: No, sir, I think not, but perhaps

7 -- QUESTION: Well, it would have been in
8 navigation.

9 MR. DOYLE: The vessel would have been in
10 navigation.

11 QUESTION: He would have been -- and his being
12 carried to do his mission is certainly part of the boat's
13 mission.

14 MR. DOYLE: I think this, Justice White. I
15 think that he has to form an attachment to the vessel
16 which is employment-related in scope and in content.

17 QUESTION: No, go ahead.

18 MR. DOYLE: And to restrict -- and to restrict
19 that as the Fifth Circuit does -- not to restrict it,
20 rather to broaden it as the Fifth Circuit does -- and to
21 say that we are going to consider your attachment to the
22 special mission as satisfying all requirements of status
23 under the aid to navigation test is inconsistent with what
24 this Court has ever said.

25 QUESTION: I don't understand your answer to

1 Justice White's question about the harpooner on a whale
2 boat. Why is the respondent Wilander different?

3 MR. DOYLE: Well --

4 QUESTION: You added that one wasn't in maritime
5 commerce, but that's simply adding on something to the
6 mission of the ship that I hadn't understood from your
7 previous definition.

8 MR. DOYLE: Well, in my brief, Mr. Chief
9 Justice, I had taken pains to point out that the Jones
10 Act's outer limits is going to be defined in some way as
11 what maritime commerce has covered and engaged in by the
12 vessel and I suggest in my brief that part of the reason
13 why the Robison opinion to the Fifth Circuit has lost its
14 support --

15 QUESTION: Well can't you answer the question
16 any more shortly than that?

17 MR. DOYLE: I'm sorry. I believe that the
18 whaling vessel is different from a vessel which is going
19 from platform to platform and after the rides is not
20 engaged in maritime commerce, while the whaling vessel is
21 at all times engaged in this type of commerce.

22 QUESTION: Well, that still doesn't get to
23 why -- you mean just that because the vessel has stopped
24 and tied up, he suddenly changes from a seaman to a
25 nonseaman?

1 MR. DOYLE: No, sir, he never attained the
2 status as seaman in the first place. The whaling vessel
3 did.

4 QUESTION: What's the difference? Well, what
5 the difference? Why does one obtain it and the other
6 doesn't?

7 MR. DOYLE: For one thing, Mr. Chief Justice, in
8 the real world, the person who is the whale spotter on the
9 vessel is going to have other duties and he is going to
10 form that type of permanent attachment to the vessel which
11 is related to navigation.

12 QUESTION: That wasn't in my hypothetical.

13 MR. DOYLE: No, sir.

14 QUESTION: All he did -- his only job on that
15 ship is to -- is when they get into whale territory to get
16 up there and look and be ready.

17 QUESTION: Mr. Doyle --

18 MR. DOYLE: Yes.

19 QUESTION: -- what if it was seals instead of
20 whales?

21 MR. DOYLE: Seals --

22 QUESTION: Would that have been different? I
23 mean if they had gone out hunting seals, they had to get
24 off a ship in order to harpoon the darn thing, then he
25 wouldn't be a seaman?

1 MR. DOYLE: That's right.

2 QUESTION: But he would if he goes for whales,
3 is that the difference?

4 MR. DOYLE: Well, in the case involving the seal
5 clubbers which is in the respondent's brief --

6 QUESTION: Right.

7 MR. DOYLE: -- I believe that the distinction
8 there between their case and mine is that those people
9 performed the mission -- the only mission that the vessel
10 had to do which was in maritime commerce. The only way
11 they could perform it was to engage in that type of
12 activity. Therefore --

13 QUESTION: Well, what's it saying here if
14 somebody's on a boat that does nothing but carry people to
15 paint? I mean that's the boat's mission. This other boat
16 carries people to harvest seals.

17 MR. DOYLE: Well, as I've said, Justice Scalia,
18 I think that the aid to navigation requirement at its base
19 is an indicator, one of perhaps more than one, of the
20 connexity between the seaman and the vessel itself.

21 The people who are engaged in a voyage which has
22 several points of terminus, such as the seal clubbers,
23 could be more attached to the vessel for another reason,
24 not having anything to do with aid to navigation. Mr.
25 Wilander's different because he only used this boat to go

1 back and forth from his --

2 QUESTION: You see you're giving two separate
3 answers it seems. Maybe I misunderstand you. But I
4 thought at first was that the boat that Mr. Wilander was
5 on -- he did nothing 'til he got -- 'til it stopped and he
6 was there to paint and then he painted. But there's
7 something more to your answer than that?

8 MR. DOYLE: Well, it is, Mr. Chief Justice, in
9 response to Justice Scalia's question because I believe
10 that the vessel that was involved in the case that was
11 hunting for seals was more -- had a more all-encompassing
12 voyage. The people actually formed a --

13 QUESTION: Well, but now is that a requirement
14 under this act? We're -- if we -- to have a more
15 all-encompassing voyage?

16 MR. DOYLE: Well, it is a requirement that the
17 seaman, the person seeking status under the act, have a
18 permanent attachment to the vessel. And I suggest that
19 the attachment in the seal clubber case is more permanent
20 than Mr. Wilander's, because he only used this vessel for
21 limited purposes; to go back and forth to the platforms on
22 which he did his work.

23 QUESTION: Well, he lived on it, didn't he?

24 MR. DOYLE: No, sir, not on the vessel to which
25 he claims attachment. He lived on the DB-9.

1 QUESTION: Oh.

2 MR. DOYLE: And that's another problem, Justice
3 White, because the jury actually found him connected
4 permanently to two vessels.

5 QUESTION: Mr. Doyle, are we here reviewing a
6 sufficiency of the evidence claim? Is the issue we have
7 to weigh whether there was enough evidence that he was a
8 member of the crew to let this question go to the jury?

9 MR. DOYLE: Well, I think not, Justice O'Connor,
10 because in this case, it is going to be controlled
11 exclusively by what the court would have decided was
12 relevant evidence. The court decided in this case that it
13 was relevant for the jury to consider on the permanent
14 attachment question, Robison-type evidence, and if it had
15 been in the Seventh Circuit, that evidence would not have
16 been relevant so the jury wouldn't have had it. So it's
17 not a sufficiency of the evidence question.

18 QUESTION: It's whether the evidence was
19 relevant at all.

20 MR. DOYLE: Exactly.

21 QUESTION: What evidence?

22 MR. DOYLE: The evidence of his attachment to
23 the special mission which he alleged was performed by this
24 vessel, by the paint boat, as opposed to transportation as
25 a navigation function.

1 QUESTION: Mr. Doyle, let me recap something
2 which will at least explain why I'm not following what
3 you're saying. You started off with a criterion that the
4 seaman must be somehow engaged as an aid to the
5 navigational function of the ship.

6 Then Justice O'Connor raised the question, what
7 about the bartender and the dance instructor? And you
8 said, well, they qualify because they're not steering or
9 doing anything like that, but it's the object of the
10 ship's passage through the water to engage in recreational
11 activities which they are aiding.

12 Then we got to the question of the harpooner or
13 the seal harpooner and the problem that you had with
14 including the seal harpooner was that the ship was not
15 moving at the time he harpooned and that the harpooning
16 was not, as I understand it, an act in furtherance of
17 the -- of maritime commerce and I think the trouble, at
18 least that I'm having, is understanding what you mean by
19 maritime commerce.

20 In the case of the bartender
21 and the dance instructor, the ship is at least part of the
22 time moving around because that's the way it makes its
23 money, by carrying people, and the reason they want to be
24 carried in the ship includes the fact that they would like
25 to avail themselves of dancing and the drinking that goes
 on the ship.

1 In the case of -- that we have before us, the
2 boat in question has got to move through the water or the
3 petitioner here, the respondent here doesn't get to the
4 platform, and it's certainly doing it for a commercial
5 purpose because that's why they're paying people to move
6 the ship is to get him there so he can do the painting.
7 Why is there not a connection to maritime commerce in the
8 latter case, but there is a connection to maritime
9 commerce for the bartender? I think we're asking for that
10 definition. What is maritime commerce and how do you
11 defend the distinction that you're making?

12 MR. DOYLE: Justice Souter, specially I will
13 refer to Justice Harlan's dissent in the Senko case,
14 because I think it clarifies it. He said you look to the
15 service of the vessel in its use as a vessel. The
16 bartender and the cruise ship dance instructor serve that
17 vessel in its use as a vessel. They complement its only
18 reason for being. Not so Mr. Wilander in his case,
19 because he does nothing with respect to the navigation of
20 the vessel. He only has responsibilities which occur off
21 the vessel, which happen when the vessel is tied up.

22 QUESTION: Yes, but it's the reason the
23 ship -- that boat even moves.

24 MR. DOYLE: Well, the object of his work is the
25 only reason that the vessel moves --

1 QUESTION: Well, that's him.

2 QUESTION: And he does much of his work from the
3 vessel, does he not?

4 MR. DOYLE: Actually the facts I believe will
5 show, Mr. Chief Justice, that he supervised and he
6 stationed himself on the vessel most of the time except
7 when he was inspecting the work on the platform.

8 QUESTION: Well, why did you say then that he
9 does most of his work off the vessel?

10 MR. DOYLE: Because the object of his work is
11 off the vessel. He has to inspect the work that his
12 painting crew has done and that takes place on the
13 platform.

14 QUESTION: If he were -- if he lived on this
15 boat and it went out to paint other boats regularly, would
16 you agree that he was a seaman?

17 MR. DOYLE: I would agree that the degree of
18 permanency that made up his attachment to that vessel
19 would be different in character than it is here.

20 QUESTION: But then does that you bring up to
21 answer my question, yes or no?

22 MR. DOYLE: I would not agree that he's a
23 seaman, no, sir. I think that --

24 QUESTION: Even though that he lived on this
25 boat -- this boat that did nothing but paint other boats

1 and they -- it painted other boats regularly, he still is
2 not a seaman?

3 MR. DOYLE: I don't believe he is and I don't
4 believe this Court has so held in Senko and the other
5 cases that --

6 QUESTION: And why is he not a seaman?

7 MR. DOYLE: Because he doesn't contribute, as
8 this Court has said, to the navigational function of that
9 vessel. He contributes only to his --

10 QUESTION: Although whale harpooners do?

11 MR. DOYLE: Yes, sir.

12 QUESTION: But seal harpooners don't?

13 MR. DOYLE: Well, I didn't actually say that,
14 Justice Scalia, and I think that they could well in the
15 context of the voyage for the reasons that I've stated.

16 If there are no further questions of the
17 Court --

QUESTION: I have just one.

18 MR. DOYLE: Yes, sir.

19 QUESTION: You referred to Justice Harlan's
20 dissent in the Senko case?

21 MR. DOYLE: Yes, sir.

22 QUESTION: Do you think we have to overrule the
23 Senko case in order to sustain your position?

24 MR. DOYLE: To sustain our position? No, sir.
25 I think Senko is very consistent with what the Court had

1 done before because Senko did consider the navigational
2 activities of the subject worker to determine whether he
3 was -- whether he had status or not. And very pertinent
4 to our discussion here, Justice Stevens, they said he
5 would have had a significant relationship to the
6 navigation of the vessel when it went into navigation.
7 That's the same thing that this Court had; a procurium
8 opinion, Gianfala v. Texas Company; reversed a Fifth
9 Circuit opinion. It was assumed by the Robison family that
10 they had some impact on oil drilling activity being
11 maritime commerce, but also that particular worker in the
12 Gianfala case did the same thing. It was a
13 semisubmersible rig and his job included a responsibility
14 that he move it.

15 So this Court has never moved off the
16 requirement that a person aid in the navigation of a
17 vessel before he is considered to be a member of its crew.
18 And it's never adopted the broader test that Robison uses
19 to determine the attachment.

20 QUESTION: Have we ever passed on the bartender,
21 dance instructor example?

22 MR. DOYLE: No, sir, you haven't, but the
23 argument in Senko, I think, was advanced against their
24 obtaining status and it was met by Justice Harlan in the
25 fashion that I've described.

1 QUESTION: Thank you.

2 MR. DOYLE: Thank you, Mr. Chief Justice.

3 QUESTION: Thank you, Mr. Doyle.

4 Mrs. Bercier?

5 ORAL ARGUMENT OF JENNIFER J. BERCIER

6 ON BEHALF OF THE RESPONDENT

7 MRS. BERCIER: Mr. Chief Justice, and may it
8 please the Court:

9 As this Court stated only a few weeks ago in the
10 admiralty case of Miles v. Apex Marine, we do not sail
11 today in unchartered waters. Since the passage of the
12 Merchant Marine Act in 1915, Congress has provided us with
13 six indicia of their approval of the mission seaman's test
14 for status used in the Fifth Circuit in the overwhelming
15 majority of admiralty courts in this nation.

16 As the Court noted in Miles -- sir?

17 QUESTION: There aren't too many of them, are
18 there?

19 MRS. BERCIER: There are 11 circuits I count
20 that --

21 QUESTION: How many? 5? 6?

22 MRS. BERCIER: There are 11 circuits that I
23 count, everybody except the Seventh and the Fourth --

24 QUESTION: I see.

25 MRS. BERCIER: -- along with the Fifth Circuit.

1 I did find admiralty decisions in all of them. Some of
2 them don't have very many, Your Honor.

3 MRS. BERCIER: As the Court noted in Miles, such
4 policy decisions by Congress are to be given their
5 appropriate weight in decisional law, since it is by this
6 means that Congress indicates the sphere within which its
7 policy is to have effect.

8 As petitioner noted, the term seaman was not
9 defined in the Merchant Marine Act, so our first indicia
10 of the correct instruction to be given to this term must
11 come from an examination of the meaning given to it by
12 courts of that era. We would refer the Court to some of
13 the most important decisions of the era discussed more
14 fully in our brief in that of amicus American Trial
15 Lawyers, including the Ocean Spray, Saylor v. Taylor,
16 which is the seal clubber case, the J.S. Warden, involving
17 a bartender, written by Judge Leonard Hand, the Minna and
18 the Murphy Tugs written by Judge Brown, who later as
19 Justice Brown would sit on this Court and author the
20 Osceola and the Buena Ventura, cited by this Court in the
21 first three cases to discuss seaman status, Warner v.
22 Goltra, Norton v. Warner, and South Chicago Coal Company
23 v. Bassett.

24 QUESTION: Mrs. Bercier --

25 MRS. BERCIER: Yes, ma'am.

1 QUESTION: -- in the Norton case, the Court
2 spoke about a seaman having, needing to have a permanent
3 connection with a vessel.

4 MRS. BERCIER: Yes, ma'am.

5 QUESTION: Now how do we find that with the
6 Gates Tide here? This respondent lived aboard the DB-9,
7 did he not?

8 MRS. BERCIER: Yes, ma'am, he did live aboard
9 the DB-9 and this goes back to your question earlier about
10 a fleet of vessels. He lived and planned his activities
11 aboard the DB-9. He would then be --

12 QUESTION: So under Norton and your argument,
13 you would say at least he's a member of the crew of the
14 DB-9?

15 MRS. BERCIER: Yes, ma'am.

16 QUESTION: But that's not the basis of his
17 claim.

18 MRS. BERCIER: I disagree --

19 QUESTION: He has to -- because it's registered,
20 only the Gates Tide as a U.S. vessel, he has to win or
21 lose on the basis of his attachment to the Gates Tide?

22 MRS. BERCIER: That is how petitioner has
23 characterized that. I don't agree with that conflict of
24 laws interpretation. The DB-9 was owned by a company with
25 its principal place of business in New Orleans, Louisiana.

1 QUESTION: Well, how do we have to take this
2 case? I thought the jury found separately that he was a
3 member of the crew of three different vessels.

4 MRS. BERCIER: They found him a member of the
5 crew of the DB-9 and the Gates Tide.

6 QUESTION: All right, two.

7 MRS. BERCIER: Yes, ma'am.

8 QUESTION: And if we think he was not a member
9 of the crew of the Gates Tide, what do we do here, because
10 this other question isn't here, is it?

11 MRS. BERCIER: No, Your Honor, certiorari was
12 not granted. In fact, that was -- certiorari was applied
13 for on that issue and not granted.

14 QUESTION: Right.

15 MRS. BERCIER: I feel that --

16 QUESTION: So that would be the end of the case
17 if we think there wasn't enough here to make him a seaman
18 of the Gates Tide, that's it.

19 MRS. BERCIER: Well, of course, I think you can
20 still affirm that this circuit in this case -- I think
21 what this case is about is are we going to choose between
22 the Fifth Circuit rule and the Seventh Circuit rule. I
23 think that's really the issue before the Court.

24 And the Court referred -- Justice O'Connor
25 referred to the Norton case -- Norton says specifically

1 that navigation, as that term is used in the aid to
2 navigation test, is not limited to putting over the helm
3 but includes duties essential for other purposes of the
4 vessel. The plaintiff in Norton was on the vessel that
5 never went out to sea. So was the plaintiff in Senko.

6 QUESTION: Well, even if we think that's true,
7 isn't there this element of whether he has to be
8 permanently attached to the vessel?

9 MRS. BERCIER: Okay. Permanent attachment is
10 the --

11 QUESTION: Here he was just hauled around for a
12 few days on the Gates Tide, is that right?

13 MRS. BERCIER: He was assigned to the Gates Tide
14 for this particular hitch, and this has been a rule which
15 has developed in the Fifth Circuit due to the fleet of
16 vessels concept where employees are required to work on
17 different vessels. And we have found that he has that
18 degree of permanent attachment if he is performing for
19 that period of this work, a substantial portion of his
20 work aboard the Gates Tide. That --

21 QUESTION: Did the Fifth Circuit rely on this
22 theory that you're expounding on, to answer Justice
23 O'Connor's question?

24 MRS. BERCIER: That wasn't part of the issues
25 before the Court when we decided the --

1 QUESTION: Can you answer my question yes or no?

2 MRS. BERCIER: I'm trying to remember, Your
3 Honor. No, Your Honor.

4 QUESTION: It didn't. So you're not really
5 defending the reasoning of the Fifth Circuit in this case?

6 MRS. BERCIER: As to the permanent attachment
7 question?

8 QUESTION: Yeah, as to whether he was attached
9 to a group of vessels.

10 MRS. BERCIER: No, Your Honor, I don't think the
11 Fifth Circuit relied on the fleet of vessels concept at
12 all. I think the Fifth Circuit concluded that the
13 evidence was sufficient that he was a member of the crew
14 of the Gates Tide.

15 QUESTION: But you're not defending that, is
16 that it?

17 MRS. BERCIER: Oh, sir?

18 QUESTION: Are you defending that or not?

19 MRS. BERCIER: Yes, I am. I'm asking the Court
20 to affirm the Fifth Circuit finding that he was a crew
21 member of the Gates Tide.

22 QUESTION: I thought you were asking that
23 perhaps we could affirm for another reason -- that he was
24 a member of -- he was a seaman in terms of a whole group
25 of vessels?

1 MRS. BERCIER: No, Your Honor, that question was
2 brought up as to the degree of his permanency of
3 attachment. But I feel that we need to affirm in this case
4 based on the fact that he was a seaman as to the Gates
5 Tide.

6 QUESTION: Mrs. Bercier, could you tell me how
7 your theory excludes or does it exclude the instance
8 posited by Mr. Doyle of a secretary who takes the Staten
9 Island Ferry to work?

10 MRS. BERCIER: Sure. The lady who takes the
11 Staten Island Ferry to work does not contribute to the
12 mission of the vessel. It's very simple. If there's an
13 analogy to be drawn in -- or to the Staten Island Ferry,
14 it's to the man aboard the Staten Island Ferry who directs
15 the cars where to park.

16 QUESTION: But if -- so it would be different if
17 her employer provided a boat whose only mission was to
18 bring those employees from Staten Island to Manhattan?

19 MRS. BERCIER: No, I don't think so.

20 QUESTION: Why not? That would be the sole
21 mission of the vessel, just as here the sole mission is to
22 bring painters to the platform.

23 MRS. BERCIER: But she would not be contributing
24 to that mission and the mission of the vessel --

25 QUESTION: Yes, she would. She does the work.

1 Just as he does the painting, she does the secretarial
2 work. That's the whole purpose of the boat, to get the
3 employees to do the work.

4 MRS. BERCIER: Well, Your Honor, I think that's
5 a broad interpretation of seaman's status and I won't
6 argue with you if you want to hold that but that would
7 make her --

8 QUESTION: She's a seaman, too.

9 MRS. BERCIER: I'll make her a seaman, too, if
10 you want to.

11 QUESTION: All right.

12 (Laughter.)

13 QUESTION: I'm sorry. I can't hear you.

14 MRS. BERCIER: I'm sorry.

15 QUESTION: Would you speak so that we can all
16 share in your response to the questions?

17 MRS. BERCIER: Yes, ma'am. Yes, ma'am.

18 QUESTION: Thank you.

19 QUESTION: You will acquit her that status even
20 though the vessel is not paying her a salary and no one is
21 paying her salary to be on the vessel?

22 MRS. BERCIER: Well, Justice Scalia would afford
23 her that status.

24 QUESTION: Well, I want to know what you would
25 do.

1 MRS. BERCIER: I would require her to contribute
2 to the mission of the vessel. I'm not quite sure about
3 the hypothet if she is performing -- if the vessel has any
4 connection other than transportation to and from her
5 employment. If she is actually --

6 QUESTION: I thought it was just getting her
7 from Staten Island over to Manhattan.

8 MRS. BERCIER: Uh-huh.

9 QUESTION: You'd make her a seaman there?

10 MRS. BERCIER: No, Your Honor, I don't think she
11 would be a seaman. The Fifth Circuit has held that
12 employees that are transferred to and from work sites
13 where the boat does not have anything to do with their
14 duties are not seamen. The important distinction in this
15 case is that all the air compressors and hoses were kept
16 aboard the Gates Tide at all times and they remained upon
17 the Gates Tide and the crew pulled the hoses up on the
18 platform to perform the work, so the vessel itself was
19 essential to performing the painting functions.

20 QUESTION: The seaman was actually being paid to
21 be on the boat --

22 MRS. BERCIER: Yes, sir.

23 QUESTION: -- to do his work.

24 MRS. BERCIER: Yes, sir, he was. That's
25 absolutely correct.

1 QUESTION: Did the members of the crew of the
2 Gates Tide do their painting while they were on the Gates
3 Tide?

4 MRS. BERCIER: Mr. Wilander, as I understand the
5 facts, Mr. Wilander and at least one other employee would
6 stay on the vessel to operate the machinery, the air
7 compressor and the hoses. There would be other members of
8 the crew up on the platform doing the painting and he
9 would also conduct his supervision from the vessel itself.

10 QUESTION: So the Gates Tide would not have
11 accomplished its mission if it had simply dropped these
12 people off on the boat and then gone back.

13 MRS. BERCIER: Absolutely, Your Honor. And
14 that's why it's designated as the paint boat for that
15 purpose.

16 I would like to address the question
17 of -- raised by the Court as to what is maritime commerce.
18 Maritime commerce is business performed from a vessel. I
19 don't think that Herb's Welding can be made to stand for
20 the proposition as petitioner argues that oil field and
21 related activities are not maritime commerce. They are
22 maritime commerce when they're performed from a vessel in
23 this case.

24 I would like to also point out that adoption of
25 the Seventh Circuit test for status would create a huge

1 gap in coverage for thousands of offshore workers who are
2 required to face the perils of the sea as incident to
3 their employment. The Outer Continental Shelf Lands Act
4 by its own terms does not apply to those aboard vessels
5 and as explained earlier, the statutory definition of the
6 term vessel at 1 U.S.C. 3 includes all water craft used in
7 transportation or capable of being used in transportation;
8 therefore it would include all of the floatable
9 special-purpose craft engaged in offshore mineral
10 production.

11 If a worker on the outer continental shelf
12 aboard one of these structures is not a seaman, he will be
13 left with no remedy, because the Lands Act will not
14 provide him with compensation nor can State workmen's
15 compensation laws be applied extraterritorially.

16 QUESTION: How about workers on the platform
17 itself out there in the Gulf? How are they covered if
18 they're not seamen?

19 MRS. BERCIER: If they are -- if they're on the
20 outer continental shelf, they are covered --

21 QUESTION: No, I said in the Persian Gulf.

22 MRS. BERCIER: Oh, in the Persian Gulf.

23 QUESTION: That's right, on a platform in the
24 Persian Gulf. What covers that worker?

25 MRS. BERCIER: The Outer Continental Shelf Lands

1 Act does not cover him. Louisiana State Workman's
2 Compensation Law does not cover him. I don't know what
3 the law of Qatar would do.

4 QUESTION: So perhaps nothing unless local law
5 provided it?

6 MRS. BERCIER: Yes, I would feel sure nothing.

7 QUESTION: Would you tell me why you think we
8 need to be concerned about the so-called aid in navigation
9 test as opposed to looking at whether someone is a member
10 of a crew of a vessel and sufficiently attached and doing
11 the mission? What does aid in navigation add to that?

12 MRS. BERCIER: Nothing, Your Honor. That is the
13 argument of petitioner. As Judge Robison noted in -- as
14 Judge Wisdom noted in the Robison opinion, the aid to
15 navigation requirement has been watered down so much that
16 it's really lost its meaning.

17 I think that the mission concept is much more
18 useful and encompasses the changing needs of the maritime
19 industry.

20 We would also refer the Court to the
21 Oceanographic Research Vessels Act. Vessels engaged in
22 oceanography, like the paint boat Gates Tide, carry two
23 crews; one a navigational crew and another crew of
24 scientific personnel. By means of the statute, Congress
25 excluded these scientists from seaman status under the

1 Jones Act if the ship owner obtained certification from
2 the Coast Guard if the vessel is engaged in oceanography.
3 Now, obviously this statute would never have been
4 necessary except that Congress recognized these scientists
5 would normally be classified as seamen.

6 I feel that the fourth and clearest indicia of
7 congressional intent came in 1970 and 1971 when Senator
8 John Tower of Texas introduced legislation to extend the
9 benefits of the Longshoreman Act to workers employed
10 offshore in marine extractive operations, which the bill
11 defined as basically anything to do with mineral
12 production over navigable waters.

13 The bill would have made such compensation the
14 sole and exclusive remedy; no more Jones Act, no more
15 General Maritime Law, no more Death on the High Seas Act
16 and it would have amended the Longshoremans Act to remove
17 the exclusion from member of a crew of a vessel unless
18 that person was engaged solely under the Manning
19 Requirements set forth by the United States Coast Guard.

20 So this bill would have in effect have codified
21 the application of the Seventh Circuit rule in areas where
22 mineral production takes place over navigable waters.
23 Presented with the opportunity to make this change in the
24 law, Congress rejected this bill twice.

25 In 1982, Congress amended the Jones Act to

1 preclude --

2 QUESTION: Did it pass a law rejecting the bill?

3 MRS. BERCIER: No, they just voted down the
4 bill, Your Honor. The bill was not passed.

5 Congress amended the Jones Act in 1982, though,
6 to preclude coverage for alien workers engaged in oil and
7 gas operations off the coast of foreign countries. Vaz
8 Borralho v. Keydril, cited in the brief of amicus American
9 Trial Lawyers, discusses the legislative history of this
10 amendment and concludes that its purpose was to clarify
11 and codify existing conflict of laws rules.

12 The opinion quotes the statement of Senator Long
13 of Louisiana: "Such a clarification would not affect U.S.
14 workers no matter where in the world they were or seamen
15 on bluewater vessels or anyone on the U.S. continental
16 shelf."

17 Our brief also cites the statement of Senator
18 John Breaux. The Amendment "does maintain the full range
19 of U.S. Jones Act protection American courts currently
20 give to American citizens employed on both traditional
21 Merchant Marine vessels and special-purpose vessels
22 engaged in exploration and development of mineral
23 resources no matter where they are located."

24 As the foregoing clearly indicates, Your Honors,
25 Congress knows how to amend the Jones Act. Congress knows

1 that special-purpose vessels engaged in offshore oil
2 production fit the statutory definition of a vessel.
3 Congress knows workers aboard these structures are covered
4 under the Jones Act. Congress has rejected the
5 opportunity to change this status. Congress has made its
6 own policy decision, and this being the case, this Court
7 must give effect to the will of Congress.

8 QUESTION: Mrs. Bercier --

9 MRS. BERCIER: Yes, ma'am.

10 QUESTION: -- would you help me where exactly
11 what question we have to answer here. Is it a sufficiency
12 of the evidence claim? Apparently our courts have left
13 the answer to what is a seaman to be determined as a -- by
14 the tryer effect, in this case a jury.

15 MRS. BERCIER: Yes, ma'am.

16 QUESTION: I would have thought perhaps it was a
17 mixed question of law in fact, but our cases don't talk in
18 those terms, do they?

19 MRS. BERCIER: No, ma'am, they certainly don't,
20 and that has been the holding starting with Bassett --

21 QUESTION: That's very difficult for me to
22 understand how it could be other than a mixed question,
23 but assuming it's not, what do we answer here? Whether
24 certain evidence is relevant or whether the evidence was
25 sufficient, or both, to go to the jury?

1 MRS. BERCIER: I think that what the Court is
2 required to answer in this case -- what I understood we
3 were here for today -- is to determine whether or not a
4 worker must contribute to the transportation function of a
5 vessel in order to be a seaman, as he is required to do
6 now in the Seventh Circuit. The Seventh Circuit would not
7 make a bartender or a --

8 QUESTION: Well, are we reviewing instructions
9 to the jury then? What are we looking at here?

10 MRS. BERCIER: I think we're reviewing the test
11 used by the Fifth Circuit --

12 QUESTION: Well, what difference does that make
13 if the jury didn't have the test? I don't understand what
14 it is we're looking at here.

15 MRS. BERCIER: The Fifth Circuit -- the jury did
16 have the test used by the Fifth Circuit. That was also
17 the basis of the jury charge. They were charged that if
18 you find that he contributed to the mission of the vessel,
19 he is a seaman. So I think we're trying to find out today
20 if in fact that is the law.

21 QUESTION: Well, Mrs. Bercier, are you
22 suggesting that our previous cases say that no matter how
23 little evidence would support a finding of the person
24 being a seaman that's nonetheless good enough if the jury
25 finds it?

1 MRS. BERCIER: No, sir, and in fact that's what
2 this Court addressed in Norton v. The Warner Company,
3 wherein the Court stated that although we held in South
4 Chicago v. Bassett that seaman status is almost always for
5 the tryer fact. In this case we must hold this
6 seaman -- this is a seaman as a matter of law.

7 QUESTION: And presumably in some cases
8 conversely that a person was not a seaman as a matter of
9 law.

10 MRS. BERCIER: Absolutely, Your Honor.

11 QUESTION: But in any event the jury is supposed
12 to be accurately instructed about what the law is.

13 MRS. BERCIER: Yes, sir. Yes, sir. So I think
14 our question is what -- were they in this case. And I
15 contend that they were.

16 I think that petitioner misreads the holding of
17 this Court in Herb's Welding v. Gray. This Court has
18 never suggested that workers engaged in offshore drilling
19 on a floating or floatable structure were not seamen
20 and/or were not engaged in maritime commerce. In fact,
21 this Court specifically distinguished between workers
22 aboard fixed platforms and those aboard floatable
23 structures and recognized the vessel status of the latter.

24 Herb's Welding stands for the proposition that
25 oil drilling is not traditional maritime activity when it

1 is done on land, since by prior decision of this Court,
2 the Court was required to treat the fixed platform as
3 equivalent to an artificial island. But in this case, the
4 oil drilling and the services related -- they, too, were
5 done from a vessel. The restrictive interpretation of
6 maritime activity espoused by the petitioner was
7 repudiated by this Court very recently in the case of
8 *Sisson v. Ruby*, which declined to hold that only
9 navigation can be characterized as substantially related
10 to traditional maritime activity.

11 QUESTION: I want to clarify one point.

12 MRS. BERCIER: Yes, sir.

13 QUESTION: You're not contending that this
14 fixed -- that this platform, the drilling platform here,
15 was anything other than a fixed platform, are you?

16 MRS. BERCIER: That's correct, Your Honor. We
17 are not contending that.

18 QUESTION: And have we ruled that that cannot be
19 a vessel?

20 MRS. BERCIER: Yes, Your Honor, *Rodrey v. Etna*.
21 The Court held that that was a -- considered the
22 equivalent of an artificial island.

23 Petitioner also urges this Court to define the
24 term seaman by reference to the Federal Employees
25 Liability Act. This approach is not new and was

1 specifically rejected by this Court in 1952 in the case of
2 Desper v. Starved Rock Ferry Company, wherein the Court
3 stated, "Seamen were given the rights of railway employees
4 under the Jones Act, but the definition of seaman was
5 never made dependent on the meaning of employee as used in
6 legislation applicable to railroads." Our brief and that
7 of the amicus discusses at great length prior decisions of
8 this Court pertaining to seaman status including Warner,
9 Bassett, Norton, Swansen, Senko, Gianfala, Grimes, Butler,
10 and Tipton. Rather than belabor the facts and holdings of
11 each of these cases, we would simply point out that in
12 Gianfala, Grimes, Senko, Tipton, and Butler, all of these
13 workers would clearly have failed the Seventh Circuit test
14 for seaman status as a matter of law. None would have
15 made it to the jury. And this Court held in each of those
16 cases that the facts presented a question for the trier
17 of fact to decide as to seaman status.

18 I feel that to -- in reversing the Fifth Circuit
19 this Court would be required to overrule Gianfala, Grimes,
20 Senko, Tipton, and Butler. The decision --

21 QUESTION: If the only alternative is the
22 Seventh Circuit's approach, but as I understand your
23 opponent, Mrs. Doyle or Mrs. Bercier, he is not arguing
24 for that, because I think he concedes that bartenders and
25 dance instructors are covered. So therefore, he's not

1 really arguing for the Seventh Circuit's approach.

2 MRS. BERCIER: The Seventh Circuit is the only
3 alternative if you -- if you want to make a bartender and
4 a dance instructor seamen, then you have to make a painter
5 a seaman, too, Your Honor, because the only rationale for
6 making the bartender and the dance instructor seamen is
7 that they contribute to the mission of the vessel. So
8 that would equally apply to Mr. Wilander in this case.

9 QUESTION: Do you think the Seventh Circuit
10 would consider a bartender a seaman?

11 MRS. BERCIER: No, sir.

12 QUESTION: No.

13 MRS. BERCIER: I surely don't. It states
14 specifically in their test that they must contribute to
15 the transportation function of the vessel. I feel that
16 the Seventh Circuit rule is impossible to reconcile with
17 the Norton case wherein Justice Douglas noted navigation
18 is not limited to putting over the helm.

19 The fact that Norton's duties were different
20 from that of the -- a more traditional mariner or seaman
21 did not prevent this Court from holding he was a seaman as
22 a matter of law and the Court explained as per Justice
23 Douglas that the fact that his duties were different was
24 because he was aboard a vessel with a different type of
25 mission or different type of duties.

1 QUESTION: Yes, but isn't it true that Justice
2 Douglas did seem to think it necessary to say he
3 contributed to the navigation function of the vessel?

4 MRS. BERCIER: Yes, Your Honor, but he gave the
5 term navigation such a broad meaning, because it said it's
6 not limited to steering --

7 QUESTION: But maybe --

8 MRS. BERCIER: -- it's limited to all the other
9 purposes of the vessel.

10 QUESTION: Well, maybe so, but he did seem to
11 think navigation was an ingredient of the test and you're
12 really arguing that it's not.

13 QUESTION: Well, resume there at 1:00, Mrs.
14 Bercier.

15 MRS. BERCIER: Thank you, Your Honor.

16 (Whereupon at 12:00 p.m., oral argument in the
17 above-entitled matter was recessed, to reconvene at 1:00
18 p.m. this same day.)
19
20
21
22
23
24
25

A F T E R N O O N S E S S I O N

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: Mrs. Bercier, you may resume.

MRS. BERCIER: Thank you, Your Honor, and may it please the Court:

As I left off I believe I was answering a question of yours, Mr. Justice Stevens, and I believe that question was how do I define aid in navigation? I define aid in navigation as being the equal to aiding in the mission of the vessel, because this Court held in Norton v. Warner that navigation includes all of the purposes for which the vessel sails.

Petitioner's reliance on the dissent in Senko is of no help to him. In Senko the plaintiff was never aboard the vessel while it is in motion. In Gianfala v. Texas Company, there was a specific finding of fact in the lower court that the worker had no transportation-related duties, yet this Court held that his question -- his status was a question of fact for the jury.

QUESTION: Would it be more helpful to everybody on that theory if we dropped the reference to navigation entirely?

MRS. BERCIER: Absolutely, Your Honor, and that's what the Fifth Circuit has done. The inquiry in

1 the Fifth Circuit is not does he aid in navigation, but
2 does he contribute to the mission of the vessel, its
3 operation, its welfare, and its maintenance. And it's
4 been a workable rule.

5 I would refer the Court before I sit down to the
6 statement of Justice Cardoso in this Court's case of
7 Warner v. Goltra. Justice Cardoso, holding that the
8 master of a vessel was also included within the coverage
9 of the Jones Act, noted that the term seaman must be
10 defined in light of the mischief to be corrected and the
11 end to be attained. The new measure of recovery under the
12 Jones Act, according to Cardoso, should be the same for
13 everyone aboard the vessel.

14 QUESTION: Out of curiosity, what kind of
15 condition is Mr. Wilander in now?

16 MRS. BERCIER: He has some permanent memory
17 loss, Your Honor. He sustained a head injury, has a steel
18 plate in his head.

19 QUESTION: Is he working at all?

20 MRS. BERCIER: Sir?

21 QUESTION: Is he working at all?

22 MRS. BERCIER: He's working in sales, no longer
23 going to work offshore where the money was.

24 This Court stated in 1958 in Kernan v. American
25 Dredging Company that by passing the Jones Act, Congress

1 did not intend to create a static remedy, but one which
2 would respond to meet the changing conditions and the
3 commensurate responsibility of the maritime industry
4 toward its vessel-based workers.

5 Judge Wisdom noted in Robison that the absence
6 of any legislative restrictions in the act enabled the law
7 to develop naturally along with the development of
8 special-purpose vessels. The very real need for
9 uniformity in the maritime law, with which we absolutely
10 agree, mandates a rule which will be workable and which
11 will implement the intent of Congress in every
12 jurisdiction of this Nation, not just ones that have only
13 river traffic.

14 The Seventh Circuit rule allows workers to step
15 in and out of coverage depending on whether they are
16 performing transportation-related duties. It would
17 inordinately complicate the typical ship owner's necessary
18 insurance arrangements and completely ignore the fact that
19 all aboard the vessel are exposed to the same maritime
20 perils. There is now a maritime negligence cause of
21 action. There is now coverage under the Jones Act for
22 workers aboard these vessels.

23 The only acceptable conclusion is that seaman
24 status should be accorded to every employee, who like John
25 Wilander contributes to the economic mission of the

1 vessel. Without John Wilander and his paint crew, the
2 Gates Tide never turned a prop, because it had no mission
3 at all. Working a shift of 90 straight days on, all of it
4 over water, 80 percent of the time spent aboard a vessel,
5 John Wilander was the quintessential seaman of the modern
6 age. I'd be happy to address any
7 questions the Court might have in my time remaining.

8 QUESTION: Thank you, Mrs. Bercier.

9 MRS. BERCIER: Thank you, Your Honor.

10 QUESTION: Mr. Doyle, do you have rebuttal?

11 REBUTTAL ARGUMENT OF JAMES B. DOYLE

12 ON BEHALF OF THE PETITIONER

13 MR. DOYLE: I do. May it please the Court:

14 I think it is very important for the Court to
15 understand that Mr. Wilander was not in this case left
16 without a remedy and I would specifically refer the Court
17 to page 33 of the joint appendix at which the clause in
18 the contract dealing with his remedy is reproduced. He
19 had at a minimum the Louisiana worker's compensation law
20 to apply to any injury that would befall him in the
21 service of his employer.

22 I would also address Justice O'Connor's question
23 earlier as to whether the status determination is a mixed
24 question of law and fact, it is. This has been
25 recognized, not by this Court, but by the Fifth Circuit

1 and followed in many others. The citation on the case is
2 Crador, C-r-a-d-o-r, v. The Louisiana Department of
3 Highways, 625 Fed. 2nd 12.27.

4 And Justice Souter, turning to your comment
5 respecting navigation and dropping that requirement
6 entirely, it points out the problem which I think results
7 in the Robison test and in the Fifth Circuit and in
8 respondent's argument. And that problem is if you drop a
9 bright line requirement, you're left with no logical
10 stopping point.

11 QUESTION: But haven't you dropped the bright
12 line requirement once you start including bartenders and
13 dance instructors? I think it seems to me that my
14 question is one about candor rather than a change in the
15 rule.

16 MR. DOYLE: It is. It very much is, Justice
17 Souter. But the distinction between the bartender and the
18 dance instructor and Mr. Wilander is that they
19 indisputably support the vessel in its use as a vessel.
20 They sign on the articles as seamen. They sail as members
21 of the crew. Mr. Wilander didn't support this vessel. He
22 was supported by it. He used this vessel as a tool to
23 perform his work and that is the distinction which this
24 Court needs to address. Otherwise, as one commentator
25 said, three men in a tub would fit the test for status and

1 a convincing argument could be made to include Jonah and
2 the whale. There's just no logical end to it.

3 In the Fifth Circuit in 1982, four judges on a
4 panel of 13 felt that an en banc rehearing should be
5 granted so that the court could have an opportunity to
6 determine whether a helicopter was a vessel and whether
7 its pilot was a member of its crew. And quoted from the
8 decision of the court in the Fifth Circuit and other cases
9 and holding that courts of appeals and district courts
10 have extended Robison to strange sorts of things to find
11 them to be vessels and the injured person to be a seaman.
12 And they specifically cited floating oil-drilling
13 platforms, which when they do their work are invariably
14 hard aground and not capable of movement at all.

15 QUESTION: But those instances go to what's a
16 vessel, not what's a seaman. You don't doubt that we have
17 a vessel here?

18 MR. DOYLE: Well, I think the inquiry is
19 inextricably tied together. In this case, we're dealing
20 with a 185-foot crew boat, true. But in other cases that
21 have dealt with the same theoretical premise, Justice
22 Scalia, a crane barge, which is a vessel under title I,
23 section 3, a quarterboat barge, which is a vessel under
24 title I, section 3, have been held not to meet the test
25 for status, one case from the Fourth Circuit, one from the

1 Fifth. So there are circumstances in which a traditional
2 vessel is used for reasons other than the fact that it is
3 a vessel.

4 QUESTION: But aren't you still arguing that if
5 in effect we get soft in defining who is a seaman, we're
6 going to be asked to be soft in defining what is a vessel,
7 and they're really 2 separate inquiries.

8 MR. DOYLE: Well, I think that's the result
9 which has now been reached. I think that if there's an
10 argument that can be made by principled jurists that a
11 helicopter is a vessel, the rule is too lax in the Fifth
12 Circuit and it needs to be shored up. And the navigation
13 requirement applies equally to the vessel as well as the
14 men that are serving upon it.

15 QUESTION: Of course, if the helicopter were a
16 vessel the pilot would clearly be a seaman.

17 MR. DOYLE: Well, that's right, because he would
18 be serving the mission of the helicopter. But the court
19 ruled that he --

20 QUESTION: And vice versa I assume?

21 MR. DOYLE: And vice versa. But not in the same
22 character, of course, as Mr. Wilander because the
23 helicopter would then also have a transportation function.

24 QUESTION: If I understand your point correctly,
25 Mr. Doyle, it is that you don't go as far as the Seventh

1 Circuit. But you say that to be a seaman you have to be
2 furthering the purpose of the vessel as a vessel.

3 MR. DOYLE: Yes, sir.

4 QUESTION: And your assertion here is that this
5 boat was not being used as a vessel when it just tied
6 alongside to do painting.

7 MR. DOYLE: No, sir, not -- it might be a fine
8 distinction, Justice Scalia, but it is not that the boat
9 was not being used as a vessel. It's that the function
10 that Mr. Wilander served in reference to the vessel had
11 nothing to do with its use as a vessel.

12 QUESTION: Weren't there -- wasn't there
13 machinery on the vessel that aided in the painting?

14 MR. DOYLE: It was carried from platform to
15 platform. Yes, sir, there was.

16 QUESTION: Didn't it remain on the vessel?

17 MR. DOYLE: It remained on the vessel during the
18 time that the painting activity was conducted, yes, sir.

19 QUESTION: So it was a painting -- so it was a
20 vessel that was used in the painting of these platforms.

21 MR. DOYLE: It was --

22 QUESTION: That was its mission.

23 MR. DOYLE: But in that sense, Justice White,
24 the vessel performed no additional function other than the
25 transport of the men and the equipment from one point to

1 the other. It served --

2 QUESTION: Although you know that the vessel had
3 the equipment on it and it stayed on it.

4 MR. DOYLE: Yes, sir, and once it arrived it's
5 no different from the crane barge which is a vessel for
6 some purposes but has been specifically held not only in
7 the Fourth Circuit but the Fifth, not to be a vessel for
8 Jones Act purposes.

9 QUESTION: But what you're really saying I think
10 then is that vessel has to mean or has to be defined in
11 terms of ways common to all possible vessels. Isn't that
12 what you're saying?

13 MR. DOYLE: Well, I'm saying that the
14 distinction that's drawn is between the statutory
15 definition of a vessel which covers a multitude of
16 appliances and the use to which that appliance is put once
17 it goes to work.

18 QUESTION: All right, so there's a distinction
19 between vessel as such and vessel with a specific purpose
20 in a given case.

21 MR. DOYLE: Jones Act, yes, sir.

22 QUESTION: All right, so if your criterion is
23 going to be what is common to all vessels as such, how can
24 you consistently concede that the bartenders and the dance
25 instructors are seamen?

1 MR. DOYLE: Again, because of their connection
2 to the vessel. I said earlier and I'll reemphasize, the
3 connection is not only to be determined in light of the
4 navigational function. It can be found for other reasons.

5 QUESTION: No, but aren't you now saying that
6 once you've got a vessel, anyone who is permanently
7 connected with it, is a seaman?

8 MR. DOYLE: I think in many cases that is the
9 decision made --

10 QUESTION: Why not in this case?

11 MR. DOYLE: Because he's not permanently
12 attached to the vessel and one indicia of the fact --

13 QUESTION: He was during the period that he was
14 assigned to use it for the painting duties.

15 MR. DOYLE: Well, but during that time --

16 QUESTION: I mean the bartender is not attached
17 to it for life. He's attached to it for the voyage and
18 this man was attached to it for the length of this boat's
19 voyage which was to the platform while the work went on.

20 MR. DOYLE: I think, Justice Souter, that with
21 respect that's not consistent with the way that the law
22 has been applied. What I've tried to do in making a
23 distinction and saying that bartenders and cooks are
24 covered and people such as Mr. Wilander are not is to rely
25 on this Court's jurisprudence, which I think clearly makes

1 that distinction and I think Norton v. Warner Company and
2 Senko are two of the ones that illustrate it most broadly,
3 because they were only seamen because they would have a
4 navigational function with respect to that vessel when it
5 was put in transit, Mr Wilander never had it. So he never
6 achieved status in the first place under that argument.

7 And I might point out that there's nothing that
8 is inherently different about that type of proposition
9 than you find in the maritime employment field generally.
10 You can have an offloading operation performed of a vessel
11 on a dock and have three different types of coverage that
12 apply to the workers. The checkers are going to be
13 covered under State compensation. The longshoremen under
14 the LHWCA and the seamen under the Jones Act. All exposed
15 to the same risks. All doing the same job. But their
16 duties are defined in terms of their employment
17 responsibilities. Mr. Wilander's employment
18 responsibility was to paint the platforms. The jury
19 obviously agreed with that, because they said he was
20 permanently attached to the platform as well as to the
21 vessel.

22 On the point about the review, I think that it
23 should be pointed out, Justice O'Connor, that the Fifth
24 Circuit specifically ruled that under the Seventh Circuit
25 test, Mr. Wilander would not have submitted sufficient

1 evidence to go to the jury on status and under Robison he
2 did. I think that ends the inquiry.

3 And further with respect to the question --
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CHIEF JUSTICE REHNQUIST: Your time has expired,
2 Mr. Doyle.

3 The case is submitted.

4 MR. DOYLE: Thank you, Mr. Chief Justice.

5 (Whereupon, at 1:11 p.m., the case in the
6 above-entitled matter was submitted.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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:

#89-1474 - McDERMOTT INTERNATIONAL, INC. Petitioner v. JON C. WILANDER

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

BY

Longenecker Hulse

(REPORTER)

RECEIVED
SUPREME COURT U.S.
MARSHALS OFFICE

'90 DEC 11 AMO:12