

**Deutsche Shell Tanker Gesellschaft mbH v. Placid Refining Co.  
United States Court of Appeals, Fifth Circuit 8 June 1993 993 F.2d  
466 (5th Cir. 1993)**

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at 606). The court noted that the vessel operator in *Gaspard* "never surrendered possession, command or navigation of the boat; maintained the vessel; operated and navigated it; supplied the crews; insured it; and paid for all repairs." *Id.*

The court rejected Trahan's reliance on *Federal Barge Lines, Inc. v. SCNO Barge Lines, Inc.*, 711 F.2d 110 (8th Cir. 1983), which held that a bareboat charter existed even though the owner supplied the crew. *Walker*, 995 F.2d at 81. The court distinguished *SCNO* on the basis of a comprehensive written charter agreement in *SCNO* which stated that both parties intended to create a full demise charter. *Id.* (citing *SCNO*, 711 F.2d at 111-12).

The court also rejected Trahan's argument that Terra would be liable under the borrowed servant doctrine notwithstanding a finding that the charter was a time charter. *Id.* The court stated that the trial court did not hold that Braus was a borrowed servant for Terra. *Id.* Furthermore, the court held that the borrowed servant doctrine did not apply to

these facts. *Id.* (citing *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969)).

Finally, the court suggested that Trahan could not recover loss of consortium damages. *Walker*, 995 F.2d at 82. The court relied on *Miles v. Apex Marine Corp.*, 489 U.S. 19 (1990), which held that loss of society damages are not permitted in general maritime actions involving the death of a Jones Act seaman. *Walker*, 995 F.2d at 82. The court noted that it had already extended *Miles* to prevent recovery for loss of society damages in general maritime actions resulting from personal injury to seamen. *Id.* (citing *Michel v. Total Transportation, Inc.*, 957 F.2d 186, 191 (5th Cir. 1992); *Murray v. Anthony J. Bertucci Construction Co.*, 958 F.2d 127 (5th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 113 S. Ct. 190 (1992)). Because the Supreme Court has indicated an intention to maintain uniformity in admiralty actions, the court suggested, without deciding, that damages for loss of society should not be permitted in a general wrongful death action which involves the operator of a fishing boat. *Id.*

James Marks '94 & Andrew Menger '95

DEUTSCHE SHELL TANKER GESELLSCHAFT MBH V. PLACID REFINING CO.  
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT  
8 JUNE 1993  
993 F.2d 466 (5th Cir. 1993)

Under a standard "New Jason clause," a general average claim may be invoked even if the carrier is negligent, provided the carrier is not liable for the damage under the Carriage of Goods by Sea Act (COGSA), 46 App. U.S.C.A. § 1301 et seq (West 1993). The carrier is liable for cargo damage under COGSA, 46 App. U.S.C.A. § 1304(1) (West 1993), when the vessel is unseaworthy as a result of the carrier's lack of due diligence. A general average act may be invoked when the failure to maintain a ship's radar results in radar failure and the subsequent grounding of a vessel during river flood stage.

**FACTS:** In 1983, Deutsche Shell contracted with Placid Refining Co. to transport a shipment of crude from Sullom Voe, Scotland to Placid's refinery in Port Allen, Louisiana aboard the tanker DIALA.

*Deutsche Shell Tanker Gesellschaft mbH v. Placid Refining Co.*, 993 F.2d 466, 467 (5th Cir. 1993). A compulsory Mississippi River pilot boarded the DIALA at the Mississippi to guide the tanker upstream. *Id.* While



passing through shallow waters on the Mississippi, the tanker experienced a vibration which caused the vessel's 10-centimeter radar picture to fail. *Id.* The vessel's captain radioed for service of the 10-cm radar and the 3-cm radar, which suffered from a weak picture. *Id.* The vessel encountered a squall further upriver which left all of the radar inoperative. *Id.* The captain maneuvered the two radar systems to display a picture on the 3-cm screen. *Deutsche Shell*, 993 F.2d at 467. The compulsory Mississippi River pilot, who was on board at the time, refused to proceed without two operational radar systems and directed the ship to drop anchor. *Id.* at 467-68. The Mississippi was at flood stage and in the process of dropping the second anchor, a swift current caught the ship, sweeping her two miles downstream where she ran aground. *Id.* at 468. The vessel was eventually refloated after a week of salvage efforts and the crude was delivered to the refinery. *Id.*

*Deutsche Shell* filed a claim against Placid Refining Co. to recover a portion of the loss under the general average clause of the shipping contract. *Id.* Placid denied ownership of the cargo at the time of the grounding and alleged that *Deutsche Shell's* failure to maintain the vessel's radar was the proximate cause of the accident. *Deutsche Shell*, 993 F.2d at 468. The United States District Court for the Eastern District of Louisiana held that Placid did own the cargo at the time of the accident, *Deutsche Shell* failed to establish that a general average act had occurred, and the proximate cause of the grounding was "*Deutsche Shell's* failure to exercise due diligence in maintaining the 3-cm[.] radar." *Id.* *Deutsche Shell* appealed to the United States Court of Appeals for the Fifth Circuit and Placid cross-appealed on the district court's finding of cargo ownership. *Id.*

**ISSUE:** May a general average act be invoked when the failure to maintain a

ship's radar results in radar failure and the subsequent grounding of a vessel during river flood stage?

**ANALYSIS:** The Fifth Circuit began by examining the standard "New Jason clause" analysis pertaining to general average claims. *Id.* (citing *The Jason*, 225 U.S. 32 (1912)). The court noted that general average is a maritime doctrine in which all parties of a maritime venture are ratably liable for losses expended for the common good of the venture. *Id.* at 468 n.3 (quoting *Atlantic Richfield Co. v. United States*, 640 F.2d 759, 761 (5th Cir. Unit A 1981)). Under a standard "New Jason clause," a general average claim may be invoked even if the carrier is negligent, provided the carrier is not liable for the damage under the Carriage of Goods by Sea Act (COGSA), 46 App. U.S.C.A. § 1304(1) (West 1993). *Deutsche Shell*, 993 F.2d at 468 (citing *Atlantic Richfield*, 640 F.2d at 761). The carrier is liable for cargo damage under COGSA when the vessel is unseaworthy as a result of the carrier's lack of due diligence. *Id.* (citing 46 App. U.S.C.A. § 1304(1) (West 1993)). A general average act occurs only when extreme sacrifices are made in order to preserve the common maritime adventure from peril. *Id.* at 469 n.12 (quoting York/Antwerp Rule A (1974), reprinted in 2 BENEDICT ON ADMIRALTY § 181, AT 13-1).

The Fifth Circuit noted a three step analysis required to determine whether a general average claim is appropriate. *Id.* (citing *Atlantic Richfield*, 640 F.2d at 761-62). First, the vessel owner has the burden of establishing that a general average act occurred at a time there was a separate cargo owner. Once the vessel owner satisfies this burden, the cargo owner may avoid liability by establishing that the vessel's unseaworthiness at the start of the voyage was the proximate cause of the general average act. Finally, the vessel owner may still be granted compensation by proving that due diligence was taken to



make the vessel seaworthy by the start of the voyage. *Id.* (citing *Atlantic Richfield*, 640 F.2d at 761-62).

Because the Fifth Circuit found that Deutsche Shell did not exercise due diligence in maintaining its radar, it declined to decide whether a general average act occurred and whether the issue was properly raised in the proceeding. *Deutsche Shell*, 993 F.2d at 469. The court upheld the district court's conclusion that Deutsche Shell failed to exercise due diligence to maintain the vessel's radar in seaworthy conditions. *Id.* at 470. The court held that the radar failed because of water incursion resulting from Deutsche Shell's lack of maintenance. *Id.* at 472. The court cited the district court's findings that no repair log was kept and the antenna array was never removed and overhauled despite the manufacturer's recommendation that an overhaul be performed every two years. *Id.* at 471. The antenna cover which is exposed to harsh weather conditions becomes porous after time, allowing water seepage. *Id.* After the accident, a technician boarded the vessel to repair the radar system. *Deutsche Shell*, 993 F.2d at 471. His report indicated signs of water damage. *Id.* After extensive study, all evidence pointed to water incursion as a

cause of the radar failure. *Id.* at 472. The court noted that Deutsche Shell would have discovered all of the radar system's problems had it performed a routine overhaul. *Id.* at 473.

The circuit court, contrary to the district court, did find evidence that the T/R Cell had been replaced within its useful life expectancy. *Id.* Nonetheless, the court held that the water incursion, resulting from Deutsche Shell's lack of maintenance, caused the radar to fail and was sufficient to support Placid's judgment. *Deutsche Shell*, 993 F.2d at 473.

Deutsche Shell contended that even if there was a lack of due diligence in maintaining the radar, such inaction did not proximately cause the grounding of the vessel as the district court concluded. *Id.* at 473-74. The court rejected this argument, finding that the river flood state and the pilot's decision to anchor because of the two failed radar units were sufficiently foreseeable events. *Id.* at 474. The court noted that grounding is the risk a vessel faces when operating without an adequate radar system. *Id.*

Robin Smolen '95

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GREAT LAKES DREDGE & DOCK CO. v. CITY OF CHICAGO  
UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT  
24 AUGUST 1993  
3 F.3d 225 (7th Cir. 1993)

Seventh Circuit holds that admiralty jurisdiction extends to tortious acts only if the alleged act (1) occurred "on the navigable waters of the United States," (2) created "a potential hazard to maritime commerce," and (3) was "substantially related to traditional maritime activity." Federal admiralty jurisdiction extends to a claim alleging that the negligent installation of pile clusters on a navigable waterway of the United States caused substantial damage on land far from the waterway and resulted in the closing of the waterway. Seventh Circuit holds that a corporate shipowner's liability is limited to the owner's interest in the vessel under the Limitation Act for damages resulting from the acts of purely ministerial employees, but is not limited when a managerial employee personally participates in the negligent act.