

## Orr v. City of New York Supreme Court of New York, Appellate Division, Second Department 304 A.D. 2d 541 (Decided April 7, 2003)

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transportation of the cargo. Moreover, evidence showed that the holds had previously contained a cargo of rock salt contributing to the damage affecting the present condition of the cargo. The court affirmed the lower court's holding that a carrier cannot delegate its duty to provide a seaworthy vessel to another party. Finally, the Court of Appeals felt that peril of the sea defense was not available to defendants based on the lower courts analysis.

The court affirmed that Bay Ocean was not a carrier within the meaning of COGSA and therefore, was not entitled to its package limitation. In *Sabah*, the court stated that the determination of whether a party is classified as a carrier under COSGA focuses on whether that party executed a contract of carriage with the shipper. Under COGSA a party is classified as a "carrier" and thereby covered by the \$500-per-package limitation on liability if that party executed a contract of carriage with the shipper. It is undisputed that Bay Ocean is not explicitly named in the voyage charter between Western Bulk and Steel Coils. Nevertheless, Bay Ocean maintained that since it was a party to the time charter between Lake Marion and Western Bulk, they should be considered a "carrier" within the meaning of COGSA. The Fifth Circuit found the voyage charter was the applicable contract of carriage. However, even if the time charter held any weight, it would still not save Bay Ocean because it merely acted as agent in the charter, as evidenced by the express language contained in the time charter contract. In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1956), the Supreme Court clarified that agents do not qualify for the \$500-per-package limitation, determining that Congress did not intend to limit liability of "negligent agents of a carrier." *Id.* at 301. For the foregoing reasons the decision of the district court was affirmed.

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#### **DEFINITIONS OF "SEAMAN" AND "VESSEL IN NAVIGATION" DEFINED UNDER THE JONES ACT**

**The New York Supreme Court erred in denying summary judgment to defendant City of New York where plaintiff was not a "seaman" nor working on a "vessel in navigation" as defined by the Jones Act (46 U.S.C. § 688).**

Orr v. City of New York  
Supreme Court of New York, Appellate Division, Second Department  
304 A.D. 2d 541  
(Decided April 7, 2003)

Plaintiff was employed by the defendant, City of New York ("City"), as a "marine oiler" or a "tankerman" at the St. George Terminal on Staten Island. Plaintiff was injured when he stepped off a gangplank onto a barge, where he slipped on oil. Plaintiff commenced action against the City pursuant to the Jones Act (46 U.S.C. § 688) which provided that "any seaman who shall suffer personal injury in the course of his

employment may, at his election, maintain an action for damages at law, with the right of trial by jury” (46 U.S.C. § 688). Thereafter, the City moved for summary judgment dismissing the complaint. The City contended that plaintiff was not a “seaman” within the meaning of the Jones Act because the barge at issue was not a “vessel in navigation.” The New York State Supreme Court denied the City’s motion and based their decision on a prior position that the City took in regards to plaintiff’s claim for worker’s compensation benefits for the aforementioned injuries. After trial a verdict was rendered in favor of the plaintiff and the City appealed.

On appeal the Appellate Division, Second Department found that the Jones Act had not clearly defined the term “seaman.” However, the court stated that the United States Supreme Court had set forth two essential requirements in order to identify a seaman: first that the employee’s duties must contribute to the function of a vessel or to the accomplishment of its mission and second that the employee has a connection to a vessel in navigation. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). The Supreme Court did not go on to define a “vessel in navigation.” The Appellate Division, Second Department acknowledged that there was no binding precedent for them to follow, but they found the definition set for by the Court of Appeals for the Second Circuit to be persuasive. The Second Circuit set forth three factors to be considered when defining a “vessel in navigation.” First, whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident; second, whether the structure was moored or otherwise secured at the time of the accident; and third, whether, despite being capable of movement, any transportation function performed by the structure was merely incidental to its primary purpose of serving as a work platform. *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F. 3d 30, 36 (2d Cir. 1996).

In reviewing evidence submitted by the City’s motion, the court found that the barge at issue was indeed not a “vessel in navigation.” At the time of the incident the barge had no means of self-propulsion and was being used primarily as a work platform to fuel and oil ferries. The barge was also moored at the time of the accident and the last time it was used to transport cargo was back in 1989 during a tugboat strike. The court held that this evidence was sufficient to support the City’s argument that the barge was not a “vessel in navigation” and therefore, the Plaintiff was not a “seaman.”

The Appellate Division, Second Department further addressed the lower court’s holding by looking to the City’s prior position concerning the plaintiff’s claim for worker’s compensation. The plaintiff had applied for and received worker’s compensation. At a proceeding for the claim, the City argued that benefits were only payable upon waiver of the plaintiff’s federal claim under the Jones Act. The Supreme Court held this to mean that the City believed plaintiff was entitled to collect under the Jones Act. The Appellate Division found that the City did not make such an argument and that although the plaintiff received worker’s compensation, it did not constitute a finding that the plaintiff was a “seaman.” The order of the Supreme Court was reversed and the complaint dismissed.

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