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CASENOTES

ADMIRALTY — COLLISION DAMAGES — FOURTH CIRCUIT HOLDS THAT A TIME CHARTERER MAY RECOVER HIRE PAID DURING DETENTION FROM THE VESSEL AT FAULT. *VENORE TRANSPORTATION CO. v. M/V STRUMA,* 583 F.2d 708 (4th Cir. 1978).

In *Venore Transportation Co. v. M/V Struma,*[1] the United States Court of Appeals for the Fourth Circuit held that a time charterer[2] of a vessel laid up for repairs as a result of a collision may recover hire[3] paid to the owner during such period by bringing an action against the vessel at fault in the collision. In reaching this conclusion, the Fourth Circuit distinguished the Supreme Court's holding in *Robins Dry Dock & Repair Co. v. Flint*[4] on the basis that *Venore,* unlike *Robins,* involved a claim for hire paid rather than one for profits lost as a result of the detention of the vessel. Because loss of such hire is generally the measure of the owner's damages when the charter party puts the vessel off-hire during the period the vessel is laid up,[5] the court concluded that its decision did not extend the scope of the tortfeasor's liability beyond the *Robins* decision's "foreclosure of remote damage claims."[6] The charter party[7] provision requiring the charterer to pay hire during detention was, in the court's estimation, an allocation of the risk of loss of the vessel's use

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1. 583 F.2d 708 (4th Cir. 1978), *noted in* 10 J. MAR. L. & COM. 456 (1979).
2. A time charter is an agreement under which

> [t]he owner provides the master and crew and undertakes the navigation of the vessel and to maintain her in an efficient condition. But the master although appointed by the owner, is placed "under the orders and direction of the charterers as regard employment or agency." The owners agree "to let" the vessel and the charterers "to hire" her "from the time of delivery" until the date set for "her redelivery." The charterers are to provide and pay for fuel supplies, port charges, pilotages, etc., and all other expenses except those pertaining to the captain, officers or crew.

Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co., 310 U.S. 268, 278 (1940). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 4-14 to 4-19 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

3. Hire is the compensation paid by the charterer to the owner for the use of the vessel. The time charter "is a contract for the use of a vessel for a specified length of time, and the shipowner receives *charter hire* based on the duration of the period the vessel remains at the charterer's disposal." N. HEALY & D. SHARPE, CASES AND MATERIALS ON ADMIRALTY 405 (1974) (emphasis added) [hereinafter cited as HEALY & SHARPE]. *See generally* O'Brien, *Freight and Charter Hire,* 49 TUL. L. REV. 956 (1975).
4. 275 U.S. 303 (1927).
5. The Yaye Maru, 274 F. 195, 200 (4th Cir.), *cert. denied,* 257 U.S. 638 (1921).
6. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710 (4th Cir. 1978).
7. "A charter party is a specific contract, by which the owners of a vessel let the entire vessel, or some principal part thereof, to another person, to be used by the latter in transportation for his own account, either under their charge or his." The New York, 93 F. 495, 497 (E.D.N.Y. 1899), *aff'd,* 113 F. 810 (2d Cir. 1902).

For a discussion of the historical origin of the term "charter party" see H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 12-1, at 395-96 (3d ed. 1979).

that should not operate to allow the vessel at fault to reduce her liability.[8]

I. THE FACTUAL BACKGROUND OF *VENORE*

The factual circumstances that brought the *Venore* case before the Fourth Circuit are not unusual in maritime commerce. In January of 1972, the Venore Transportation Company (Venore) entered into a charter party with the Oswego Shipping Corporation (Oswego) for the time charter of the S.S. Oswego Liberty for a period of thirteen and one-half years.[9] On November 27, 1974, the Oswego Liberty, while bound for Sparrows Point, Maryland, was struck amidships on her port side by the M/V Struma at the Annapolis Anchorage in the Chesapeake Bay.[10] As a consequence, the Oswego Liberty was laid up for repairs at Annapolis, Maryland until January 17, 1975.[11] During this period Venore paid hire to Oswego in the amount of approximately $225,000.00 as required by the terms of the charter party.[12] On October 17, 1975, Venore filed a complaint in the United States District Court for the District of Maryland against both the Struma and her owner, the Bulk Transportation Corporation (Bulk). In the interim Oswego had settled its claim against Bulk for the expenses required to repair the Oswego Liberty and put her back into service.[13]

The district court granted summary judgment in favor of the Struma, reasoning that *Robins* and its progeny bar a time charterer's recovery of any collision damages for loss of the chartered vessel's use occasioned by the fault of another vessel.[14] Venore appealed to the Fourth Circuit Court of Appeals, which reversed the district court in a two-to-one decision.[15]

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8. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710-11 (4th Cir. 1978). Because the charterer must pay hire in any event, and may not put the vessel off hire, this form of charter is known in the maritime trade as a "hell or high water" charter.
9. *Id.* at 709.
10. Venore's allegation in its amended complaint (admitted by the Struma for purposes of her motion for summary judgment) was that the Struma failed to avoid the collision by passing astern of the Oswego Liberty as required by Articles 19 and 22 of the Inland Rules, 33 U.S.C. §§ 204, 207 (1976), notwithstanding advice from the Oswego Liberty's pilot that such a maneuver could have been accomplished safely. Joint Appendix at 4-5, Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978).
11. 583 F.2d at 709.
12. *Id.*
13. *Id.*
14. Joint Appendix at 77, Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978). The district court's opinion was unreported. Venore Transp. Co. v. M/V Struma, Civil No. W-75-1499 (D. Md. April 25, 1977).
15. Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978). Judge Butzner joined in the majority opinion of Chief Judge Haynsworth. Judge Winter wrote a dissenting opinion.

II. THE *ROBINS* DOCTRINE

The concept that a time charterer has distinctly limited rights with respect to the recovery of damages for loss of use of the chartered vessel originated in *Robins Dry Dock & Repair Co. v. Flint.*[16] The United States Supreme Court held in *Robins* that a time charterer could not recover damages for loss of the vessel's use from a dry dock whose negligence delayed the chartered vessel's return to service.[17] The terms of that charter party required the owner to periodically lay up the vessel for repairs and maintenance. The charter party further provided that the payment of hire was suspended during such periods. In the course of one such period, the owner contracted with the defendant to dry-dock the vessel. While performing its duties, the dry dock negligently damaged the vessel's propeller, which resulted in a two-week delay in the vessel's return to service while awaiting the forging of a replacement. Although the vessel's owner settled its claims, the charterer brought an action for loss of use against the dry dock.[18]

Initially, the time charterer's action in *Robins* met little resistance. Although the United States Circuit Court of Appeals for the Second Circuit rejected a contention that the charterer could recover as a third-party beneficiary of the contract between the owner and the dry dock,[19] it nonetheless held that a claim in tort was permissible to recover the lost use occasioned by the defendant's negligence.[20] The Second Circuit's analysis indicated that it considered the result dictated by the conventional doctrine that tortfeasors are liable for the foreseeable consequences of their negligence.[21] The Supreme Court rejected this approach and reversed the decision.

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16. 275 U.S. 303 (1927).
17. *Id.* at 309.
18. *Id.* at 307. In addition, the time charterer brought an *in rem* action against the chartered vessel herself for the loss of her use. The United States Circuit Court of Appeals for the Second Circuit affirmed the district court's dismissal of that action. The Bjornefjord, 271 F. 682 (2d Cir. 1921).
19. Flint v. Robins Dry Dock & Repair Co., 13 F.2d 3, 4 (2d Cir. 1926), *rev'd*, 275 U.S. 303 (1927).
20. *Id.* at 5-6. The circuit court of appeals' opinion makes clear that the loss of use for which the plaintiff sought recovery in *Robins* was actually the benefit of his good bargain with the vessel owner. The lower court, unlike the Supreme Court, expressly noted that "[i]t appear[ed] from the evidence that the damages claimed . . . represented the difference between the market value of the steamer for the 14-day loss of use, and . . . the charter hire for that period." *Id.* at 4.
21. The circuit court of appeals expressed its rationale as follows:

    > [R]ecognition of [a time charterer's] right of action involves no extension of responsibility for results beyond those reasonably to be anticipated. The damages which respondent must meet are limited to reimbursement for the proximate results of its negligence. As this, however, has directly affected several parties, each is entitled to his just share of the total amount.

    Id. at 6.

Justice Holmes's opinion for the Court in *Robins* indicated that the crucial inquiry is the determination of the nature of the plaintiff's property interest in the negligently damaged ship. In rejecting the Second Circuit's holding that the charterer's damages were a foreseeable consequence of the dry dock's negligence, Justice Holmes made clear that the time charterer's position as a contractor for the use of the vessel was insufficient to establish a proprietary interest that would support a cause of action against a tortfeasor for loss of use.[22] In so holding, however, the Court did not differentiate between a loss of use measured by loss of anticipated profits from the vessel and one measured by loss of hire paid to the owner.

Almost twenty years later, the Second Circuit was called upon to reconsider *Robins* in the context of an action to recover hire paid during detention. In *Agwilines, Inc. v. Eagle Oil & Shipping Co.*,[23] a ship owner sought to recover the full hire that would have been due during detention, despite the fact that the time charterer was required by the terms of the charter party to pay half-hire during that period. In an opinion by Judge Learned Hand, the Second Circuit held that *Robins* foreclosed the owner's action for the hire to the extent that it had been paid, including recovery by the owner on behalf of the charterer.[24]

Subsequent decisions by other courts have given *Robins* broad significance. Because of Justice Holmes's holding that unintentional injury to a contractual relationship is not actionable,[25] courts have denied numerous damage claims in maritime tort cases on the basis that damages for the loss of a business expectancy were not recoverable absent a showing of the defendant's knowledge of the

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22. Robins Dry Dock & Repair Co. v. Flint, 275 U.S 303, 308-09 (1927). Justice Holmes observed that,

> [N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. . . . The law does not spread its protection so far.

Id. at 309.

Although the Court did not address the issue, presumably a demise charterer's interest in the vessel would be sufficient to support recovery on the *Robins* facts. *See, e.g., In re* M/V Vulcan, 553 F.2d 489 (5th Cir.) (per curiam), *cert. denied,* 434 U.S. 855 (1977). In the *Vulcan* a charterer of a drilling rig "under long-term *bareboat charter*" was allowed to recover damages for loss of use from the tortfeasor. *Id.* at 480 (emphasis added). Likewise, in Mar Enterprises, Inc. v. Lewis Refrigeration Co., 556 F.2d 951 (9th Cir. 1977), the court noted in dictum that the applicability of *Robins* to the rights of demise charterers "has not yet been ruled on." *Id.* at 957. With respect to the distinction between a time charterer's and a demise charterer's interest in the chartered vessel, see GILMORE & BLACK, *supra* note 2, at § 4-1, and note 33 *infra.*

23. 153 F.2d 869 (2d Cir.), *cert. denied,* 328 U.S. 835 (1946), *noted in* 59 HARV. L. REV. 619 (1946).
24. *Id.* at 871-72.
25. Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927).

contract.[26] In addition, several courts have expressed the view prior to *Venore* that a time charterer has no standing to recover on any claim against a tortfeasor arising from damage to the chartered vessel.[27]

III. THE FOURTH CIRCUIT'S *VENORE* OPINION

The Fourth Circuit reached its decision on the rationale that the Supreme Court's opinion in *Robins* was not controlling with respect to the *Venore* facts. The most significant factor in the court's analysis was the charter party provision in *Venore*, unlike *Robins*, that required the time charterer to pay hire during the period the Oswego Liberty was laid up for repairs.[28] Relying upon this distinction, the court developed a three-step justification for its result.

The first and most significant step in this rationale was the *Venore* court's view that *Robins* established what "is essentially a principle of disallowance of damages because of remoteness, and because of the concern that the number and the amount of potential claims in a given instance may be staggering."[29] The Fourth Circuit observed that the "payment for loss of use of the damaged vessel is a

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26. *E.g., In re* Great Lakes Towing Co., 395 F. Supp. 810, 811-12 (N.D. Ohio 1974) (dock workers' claim for lost wages against tortfeasor who damaged equipment provided by dock owner for their work held barred by *Robins*); *cf.* Henderson v. Arundel Corp., 262 F. Supp. 152, 159 (D. Md. 1966) (amendment alleging interference with contractual relationship could not avoid *Robins* bar against claim by damaged vessel's crew for lost wages), *aff'd per curiam,* 384 F.2d 998 (4th Cir. 1967).

27. *E.g.,* Rederi A/B Soya v. Evergreen Marine Corp., 1972 A.M.C. 1555, 1567 (E.D. Va. 1971) (a time charterer "does not have legal standing to recover . . . damages for loss of profits or loss of hire of the vessel"), *aff'd,* 1973 A.M.C. 538 (4th Cir. 1972); Dampskibsaktieselskabet Den Norske Afrika og Australieline v. Intalco Aluminum Corp., 306 F. Supp. 170, 176 (W.D. Wash. 1969) (time charterer "has no direct right to recover against the tort-feasor of owner"), *aff'd sub nom.* Dampskibsaktieselskabet v. Bellingham Stevedoring Co., 457 F.2d 889 (9th Cir.), *cert. denied,* 409 U.S. 1024 (1972).

In addition, one English authority observed that,

> A charterer not by demise cannot, since he is not in possession of the ship, recover as damages for negligence from a tortfeasor, who has damaged the ship, the loss of use of the ship during repairs for which time he may under the time charter remain liable to pay hire.

A. MOCATTA, M. MUSTILL & S. BOYD, SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING 49 (18th ed. 1974). *See also* Konstantinidis v. World Tankers Corp., [1965] 2 All E.R. 139, 155 ("There is no reported case, so far as I am aware, in the long history of chartering where a time charterer has recovered damages for pecuniary loss because of damage by a third party to the chartered vessel.").

28. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710-11 (4th Cir. 1978). The charter party between Venore and Oswego did not contain the conventional breakdown clause. Rather it provided, in pertinent part, that "the hire shall be payable in all events and without interruption for any cause during the entire period of this Charter." Joint Appendix at 38, Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978).

29. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710 (4th Cir. 1978).

conventional item of recovery."[30] Indeed, a tortfeasor's liability to a vessel owner for loss of use resulting from a collision is well established in cases in which the damaged vessel is less than a total loss.[31] Thus, the court reasoned that absent the charter party provision, the Struma would have been liable to Oswego for off-hire caused by the collision. Because Venore's claim for recovery of hire paid would not extend the Struma's liability beyond the amount she would have owed Oswego absent Venore's contractual obligation to pay hire while the Oswego Liberty was laid up, the court concluded that such a claim was not so remote as to be barred by *Robins*.[32]

The court's second step was to rebut the Struma's argument that Venore did not have a possessory interest in the Oswego Liberty sufficient to support a claim for the hire paid. As the Fourth Circuit noted, "[i]t is only in a highly technical sense that the time charterer may be said not to be in possession of the vessel."[33] Because the time charterer has the control of the commercial use of the vessel, the court concluded that such a charterer should have standing to recover hire paid to obtain such an interest.[34]

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30. *Id.*
31. Hewlett v. Barge Bertie, 418 F.2d 654, 657 (4th Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970). When the damaged vessel is under time charter, the amount of the charter hire is the prima facie measure of the owner's damages for loss of use. The Yaye Maru, 274 F. 195, 199-200 (4th Cir.), *cert. denied,* 257 U.S. 638 (1921); The Brand, 224 F. 391, 394-95 (3d Cir. 1915); *cf.* Agwilines, Inc. v. Eagle Oil & Shipping Co., 153 F.2d 869, 871 (2d Cir.) ("hire cannot be the measure of the loss of either owner or charterer" should charter rates fluctuate significantly after the charter party is made) (dictum), *cert. denied,* 328 U.S. 835 (1946).

    Should the vessel be a total loss as a consequence of the collision, however, the owner's damages are measured by "the vessel's market value immediately preceding the collision." Greer v. United States, 505 F.2d 90, 93 (5th Cir. 1974) (per curiam). For a discussion of the desirability of adopting the loss of use standard in total loss cases, see Comment, *Loss of Use as an Item of Damages in Admiralty Collision Cases,* 12 U.S.F.L. REV. 311 (1978).
32. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 711 (4th Cir. 1978).
33. *Id.* This "technical sense" is predicated upon the distinction between demise and time charters. One court has observed that a "time charter is an agreement for space on a vessel and, as distinguished from a demise or bareboat charter, gives the charterer no property interest in the vessel." Klishewich v. Mediterranean Agencies, Inc., 302 F. Supp. 712, 713 (E.D.N.Y. 1969). Thus, it is frequently stated that a demise charterer "is the owner *pro hac vice* of [the] vessel. All *in personam* liabilities arising out of the ship's operation are brought home to . . . the demise charterer." Offshore Tel. Co. v. M/V Waterbuck, 465 F. Supp. 1160, 1164 (E.D. La. 1979) (emphasis in original). Consequently, a demise charter is "tantamount to, though just short of, an outright transfer of ownership." Guzman v. Pichirilo, 369 U.S. 698, 700 (1962). A time charterer on the other hand merely has "the right to use the carrying facilities of the vessel and to direct her movements during the charter term." HEALY & SHARPE, *supra* note 3, at 405. *See generally* Cibro Sales Corp. v. M/V Asphalt Merchant, 1978 A.M.C. 2546, 2548-49 (D.N.J. 1978) ("there are significant legal differences between a demise and time charter"); GILMORE & BLACK, *supra* note 2, at § 4-20.
34. The time charterer contracts for "the right to use the carrying facilities of the vessel and to direct her movements during the charter term." HEALY & SHARPE, *supra* note 3, at 405. The court's discussion in *Venore* makes clear that it views these rights as significant enough to create a possessory interest in the vessel to the extent of hire paid. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 711 (4th Cir. 1978).

Finally, the Fourth Circuit harmonized its holding in *Venore* with the Supreme Court's opinion in *Robins.* The court emphasized that its decision permitted a time charterer to recover only hire paid to the owner, and not to charge its lost profit to the tortfeasor as well. The latter claim had been precluded by *Robins*, the court reasoned, but its decision in *Venore* merely permitted a recovery not addressed in *Robins*.[35] The court concluded, therefore, that its decision did not conflict with the doctrine formulated by the Supreme Court.

The dissenting opinion of Judge Winter, however, found the facts in *Venore* to be controlled by the *Robins* decision. The dissent would have affirmed the district court on the rationale that *Robins* had not denied recovery "on the ground that the damages were too remote, but on the ground that a time charterer has no standing or property interest to recover from an unintentional wrongdoer."[36]

IV. ANALYSIS

The Fourth Circuit's holding in *Venore* represents an attempt to harmonize two opposing legal theories of tort liability. The *Robins* doctrine holds negligent tortfeasors liable only for damages to known contractual relationships.[37] The *Robins* bar on claims resulting from negligent interference with contractual relations, however, has been frequently applied with reluctance by the courts,[38] and has received criticism from commentators.[39] Despite such

35. The Fourth Circuit distinguished its prior decision in Rederi A/B Soya v. Evergreen Marine Corp., 1972 A.M.C. 1555 (E.D. Va. 1971), *aff'd per curiam*, 1973 A.M.C. 538 (4th Cir. 1972), on the ground that it involved a time charterer's claim for lost profits barred by *Robins*, rather than a claim for hire paid. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710 (4th Cir. 1978).

In addition, the court implied that *Venore* was a case of first impression by distinguishing other *Robins* cases on the ground that claims for remote damages were involved, and by refusing to follow the English case of Chargeurs Reunis Compagnie Francaise de Navigation a Vapeur v. English & Am. Shipping Co., 9 Lloyds List L.R. 464 (Ct. App. 1921), despite similar factual circumstances. The Fourth Circuit observed that it had "found no American case reaching a similar conclusion, and we think that on principle we should not follow the early lead of the English Court of Appeal." Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710 (4th Cir. 1978).

36. 583 F.2d at 711 (Winter, J., dissenting).

37. In the words of Justice Holmes, "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was *under a contract* with that other, *unknown* to the doer of the wrong." Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927) (emphasis added).

38. *E.g.*, Dick Meyers Towing Serv., Inc. v. United States, 577 F.2d 1023, 1025 (5th Cir. 1978) ("the rule based upon [*Robins*] is too well-settled to be overturned by a panel of this court"), *cert denied*, 99 S. Ct. 1215 (1979); Federal Commerce & Navigation Co. v. M/V Marathonian, 392 F. Supp. 908, 913 (S.D.N.Y.) ("were this Court now free to write upon a *tabula rasa* and not constrained by the weight of a precedent, we would reject the negligent interference with contract doctrine"), *aff'd per curiam*, 528 F.2d 907 (2d Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).

39. *E.g.*, Harper, *Interference with Contractual Relations*, 47 NW. U.L. REV. 873, 884-89 (1953); James, *Limitation of Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 55-58 (1972).

criticism, *Robins* continues to be an influential precedent with respect to both maritime[40] and non-maritime tort liability.[41]

The alternative to the *Robins* approach is the foreseeability test enunciated in the Second Circuit's opinion in *In re Kinsman Transit Co.*[42] Under the *Kinsman* analysis the tortfeasor's liability turns on whether "the connection between the defendant's negligence and the claimants' damages is too tenuous and remote to permit recovery."[43] The *Kinsman* remoteness — foreseeability analysis is now frequently applied by courts determining the extent of a tortfeasor's liability.[44]

Although the influence of *Kinsman* may be strong with respect to maritime torts in general,[45] *Robins* remains the controlling precedent with respect to a time charterer's rights against a tortfeasor.[46] Even the Second Circuit has concurred in the view that "the *Robins* decision must be adhered to by the lower federal courts, at least in instances involving the factual contours of that case."[47]

The difficulty with the Fourth Circuit's analysis in *Venore* stems from its seeming merger of the holdings in *Robins* and *Kinsman.* Although the *Venore* court interpreted *Robins* as establishing "a principle of disallowance of damages because of remoteness,"[48] other courts, as did the dissent,[49] analyze the case in terms of the

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40. *See* notes 27 & 28 *supra.*

In a recent *Robins* case, the Fifth Circuit held that a railroad's claim for loss of use damages from a tug that struck a bridge was barred by *Robins* because the railroad's "right to use the bridge has none of the incidents of ownership attributable to the demise-charterer that would justify recovery for damage to physical property." Louisville & N.R.R. v. M/V Bayou Lacombe, 597 F.2d 469, 474 (5th Cir. 1979). Although the *Boyou Lacombe* court implied that the railroad's position was analogous to that of a time charterer, the opinion does not mention the Fourth Circuit's *Venore* opinion. *Id.* Thus, *Venore's* impact upon related fields of admiralty law is as yet undetermined.

41. *Compare* Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 168, 583 P.2d 721, 728, 148 Cal. Rptr. 867, 874 (1978) *and* North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 87-89, 240 S.E.2d 345, 354 (1978) (no liability for unintentional interference with contractual obligations) *with* Olson v. Iacometti, 91 Nev. 241, 245-46, 533 P.2d 1360, 1364 (1975) *and* Graham & Hill v. Davis Oil Co., 486 P.2d 240, 241 (Wyo. 1971) (plaintiff may only recover on negligence that breaches contract in which plaintiff is a third-party beneficiary).
42. 388 F.2d 821 (2d Cir. 1968).
43. *Id.* at 825.
44. *E.g., In re* Lyra Shipping Co., 360 F. Supp. 1188 (E.D. La. 1973). In *Lyra Shipping* the court held that a vessel negligently blocking a canal was not liable under *Kinsman* for the loss of a vessel at sea in heavy weather occasioned by the necessity to detour the canal. *Id.* at 1192-94.
45. *Id.*
46. *E.g.*, Federal Commerce & Navigation Co. v. M/V Marathonian, 392 F. Supp. 908, 915 (S.D.N.Y.), *aff'd per curiam*, 528 F.2d 907 (2d Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).
47. *Id.*
48. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 710 (4th Cir. 1978).
49. *See* text accompanying note 37 *supra.*

plaintiff's standing rather than the remoteness of his damages.[50] These two approaches would appear to be irreconcilable.[51]

The Fourth Circuit's ability to distinguish *Venore* from *Robins* on the facts is convincing, but its opinion fails to articulate effectively its true rationale because of the court's desire to harmonize its holding with *Robins*. The court's brief analysis of the requirement that Venore pay hire during detention nonetheless reveals the actual rationale for its holding. The court observed that such a provision in the "charter party has transferred the risk of loss of use from the owner to the time charterer."[52] Unfortunately, the court does not explain its reasoning, but the theory would seem to parallel other courts' reasoning that either an idemnity agreement[53] or a right of subrogation[54] allows a time charterer who has paid hire during detention to avoid the *Robins* bar. Both theories merely change the party to whom the tortfeasor is ultimately liable, rather than increase his liability.[55]

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50. *See, e.g.*, Federal Commerce & Navigation Co. v. M/V Marathonian, 392 F. Supp. 908, 910-11 (S.D.N.Y.), *aff'd per curiam*, 528 F.2d 907 (2d Cir. 1975), *cert. denied*, 425 U.S. 975 (1976).
51. See note 28 *supra*.
52. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 711 (4th Cir. 1978).
53. Express charter provisions couched in terms of indemnification have avoided the bar to a time charterer's recovery. In United States v. Panama Transp. Co., 174 F. Supp. 592 (S.D.N.Y.), *aff'd per curiam*, 268 F.2d 739 (2d Cir. 1959), the court held that a charter party provision stipulating that the charterer must indemnify the owner for hire lost subrogated the charterer to the owner's right to recover once the hire was paid as indemnity against the owner's loss. The court expressly stated that "the cases of *Robins* . . . and *Agwilines* . . . are not applicable here." *Id.* at 595. In addition, the Supreme Court of Canada held in Deep Sea Tankers Ltd. v. SS. "Tricape", 16 D.L.R.2d 600 (Can. 1958), that a similar clause required the owner to refund any indemnity to the extent that the hire was recovered from the negligent vessel. *Id.* at 602-03.

    Following the collision between the Struma and the Oswego Liberty, Venore and Oswego signed an indemnification agreement as an amendment to the charter party. Joint Appendix at 60-61, Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978).
54. The concept of subrogation was not discussed in *Venore*. A district court utilized the concept, however, in Dampskibsaktieselskabet Den Norske Afrika og Australieline v. Intalco Aluminum Corp., 306 F. Supp. 170, 176 (W.D. Wash. 1969), *aff'd sub nom.* Dampskibsaktieselskabet v. Bellingham Stevedoring Co., 457 F.2d 889 (9th Cir.), *cert. denied*, 409 U.S. 1024 (1972), to allow a time charterer to recover hire paid under the good faith belief that he had no right to put the vessel off-hire under the breakdown clause. The vessel in *Intalco* was delayed in unloading because the only shoreside crane collapsed onto the deck. There the court cited *Robins* for the proposition that the charterer could not recover directly against the tortfeasor. Nonetheless, the court held that the charterer's payment of hire during the detention subrogated him to the owner's right to recover from the tortfeasor. Such a theory would clearly apply only to the extent of the charterer's payments to the owner, and would thus like *Robins* and *Venore* not allow a charterer's claim for lost profits because the subrogation extends only to the limit of payment of hire by the charterer.
55. The tortfeasor's liability is not increased because absent the time charterer's agreement to pay hire during detention, a collision would put the vessel off-hire, and the lost hire would be the prima facie measure of the owner's damages for loss of use. See notes 31-33 & accompanying text *supra*.

For reasons not articulated in the Fourth Circuit's opinion, the result reached by the court is analytically defensible. Absent the charter party provision, Oswego would have an incontrovertable right to be made whole for the loss of the vessel's use, defined to include lost profits and measured by the charter hire the owner would have received but for the tortious act of the third party.[56] As befits a more remote plaintiff, however, Venore is accorded only a limited remedy. Its damages may not include profits lost as a result of the third party's tort,[57] but rather are measured by the charter hire paid during the detention of the vessel.[58] The seeming anomaly that, although in each instance the damages are differently defined, the plaintiffs receive identical sums, is more apparent than real. Charter hire is reflected on the books of the owner as revenue, a portion of which constitutes the owner's profit. For Venore, as a time charterer, hire is an expense of doing business. The time charterer realizes a profit only through use of the vessel in conducting its business.

Moreover, the court's decision is further justified if one contrasts the relative positions of the owner and time charterer in the event either were to be denied damages. For the owner, detention of the vessel means the interruption of the stream of revenue (charter hire) flowing from ownership of a productive asset. Contrast, however, the position of the time charterer. Not only is his stream of revenue cut off, but also he would be required to continue paying charter hire — resulting in a net loss of funds over and above his loss of the use of a productive asset. The time charterer may be less proximately situated, yet he can demonstrate that he will suffer more onerous harm than would the owner were he denied recovery of charter hire. Thus, as the *Venore* court indicated, the time charterer has assumed the "risk of loss of use"[59] of the vessel, thereby insuring the owner's continued and uninterrupted flow of income. Consequently, the limited right of recovery against the tortfeasor accorded the time charterer under such circumstances seems more than justified.

V. CONCLUSION

The Fourth Circuit's opinion in *Venore* exemplifies the difficulty that courts encounter when dealing with the stare decisis force of the *Robins* decision. The court's reluctance to permit an admitted tortfeasor to reduce his collision liability based upon the fortuity of

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56. See *id.*
57. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 711 (4th Cir. 1978) ("We do not intend to suggest, however, that the time charterer is entitled to lost profits.").
58. *Id.* at 709 ("recovery of charter hire should be allowed").
59. *Id.* at 711.

the form of the innocent vessel's charter,[60] led it to devote its attention to distinguishing *Venore* from *Robins*, rather than to explaining the legal theory utilized to reach its result. Notwithstanding this shortcoming, the decision will doubtless be welcomed by time charterers operating under similar circumstances. Likewise, owners may use the decision in the future as a bargaining point to persuade time charterers to bear the risk of the chartered vessel's use by agreeing to continue to pay hire during detention.[61]

Although the Fourth Circuit's *Venore* decision may be an erosion of the *Robins* doctrine, it nonetheless creates only a limited exception. The court expressly stated that it recognized no more than a time charterer's right to recover hire paid during detention, which right does not extend to profits lost while the vessel was laid up.[62] Whether the *Venore* decision will initiate a full-scale erosion of the *Robins* doctrine awaits future decisions by other courts of appeals or the Supreme Court.

David Eugene Rice

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60. This anomaly was an early source of judicial criticism of the *Robins* doctrine. It was observed that agreement to pay hire during detention leads to the "rather startling result that [the owner of the vessel at fault] receives the bonanza of a substantial reduction in damages through the mere chance that its victim has a favorable contract with another." Agwilines, Inc. v. Eagle Oil & Shipping Co., 153 F.2d 869, 872 (2d Cir.) (Clark, J., dissenting), *cert. denied*, 328 U.S. 835 (1946).

61. The willingness of Venore to agree to pay hire during detention in this case may be explained by the commercial relationship of the parties. The Oswego Liberty was built by the Marven Steamship Corporation, a wholly owned subsidiary of Bethlehem Steel Corporation, in 1965. In 1972, Oswego entered into a purchase agreement with Marven Steamship Corporation, and simultaneously time chartered the Oswego Liberty to Venore, another wholly owned subsidiary of Bethlehem Steel Corporation. Appellant's Brief at 3, Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978). Apparently, Venore's agreement was intended to ensure a constant source of income from which Oswego could meet its financial obligations to Marven Steamship Corporation under the purchase agreement.

In addition, Venore was apparently either operating or directing the commercial use of the Oswego Liberty for Marven Steamship Corporation prior to the sale to Oswego. In his deposition, Anthony J. Germano, the Shipping Vice President of Venore, testified as follows:

> Q. When the vessel was sold by Marven to Oswego Shipping Corporation, what then happened to the OSWEGO LIBERTY insofar as the shipping subsidiaries were concerned?
>
> A. Nothing. She continued right on *as we were handling her before*.

Joint Appendix at 26, Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978) (emphasis added).

62. Venore Transp. Co. v. M/V Struma, 583 F.2d 708, 711 (4th Cir. 1978).