

## CASENOTE

### CALMING TROUBLED WATERS FOR CRUISE SHIP OWNERS AND THEIR PASSENGERS: *CARLISLE* v. *CARNIVAL CORP.*

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## INTRODUCTION

On March 31, 1997, the Carlisle family boarded the Carnival cruise ship, *Ecstasy*, in the Port of Miami for a Caribbean cruise.<sup>1</sup> When fourteen year-old Elizabeth Carlisle began experiencing abdominal pain and lethargy, her parents took her to see Dr. Mauro Neri, the onboard physician.<sup>2</sup> Elizabeth visited Dr. Neri three times during the cruise because her symptoms did not improve.<sup>3</sup> Instead of examining her, Dr. Neri repeatedly advised the Carlises that Elizabeth had the flu and placed her on antibiotics.<sup>4</sup> On April 2, 1997, the Carlises discontinued their cruise in Cozumel, Mexico because Elizabeth continued to feel ill.<sup>5</sup> They flew home to Michigan where Elizabeth was taken to the emergency room and diagnosed with a ruptured appendix.<sup>6</sup> In addition to that injury, doctors determined that “[a]s a result of the rupture and subsequent infection, Elizabeth was rendered sterile.”<sup>7</sup>

The family filed suit in the Circuit Court for Miami-Dade County, Florida, seeking to hold Carnival vicariously liable for the negligence of Dr. Neri under a theory of apparent agency.<sup>8</sup> The trial court granted Carnival’s motion for summary judgment.<sup>9</sup> The family appealed.<sup>10</sup>

On August 27, 2003, the Third District Court of Appeal of Florida held that (1) “the ship’s doctor is an agent of the cruise line whose negligent medical treatment of a passenger should be imputed to the [shipowner],”<sup>11</sup> regardless of the independent contractor rank assigned to the doctor; and (2) title 46 U.S.C. §183(c) prohibits a cruise line from limiting its liability for the negligence of the ship’s doctor.<sup>12</sup> The appellate court accordingly reversed the summary judgment on the issue of vicarious liability, and remanded the case for further proceedings.<sup>13</sup>

Because the Port of Miami and Miami-Dade County are situ-

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1. Appellee’s Answer Brief at 6, *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. 3d DCA 2003) (No. 98-6109).

2. Brief of Appellant at 2, *Carlisle* (No. 98-6109).

3. *Id.* at 2.

4. *Id.* at 2.

5. Appellee’s Answer Brief at 6, *Carlisle* (No. 98-6109).

6. Brief of Appellant at 3, *Carlisle* (No. 98-6109).

7. *Id.* at 3.

8. Brief of Appellant at 4, *Carlisle* (No. 98-6109).

9. *Carlisle*, 864 So. 2d at 2.

10. *Id.*

11. *Id.* at 7.

12. *Id.* at 8.

13. *Id.* at 9.

ated within Florida's Third District, this decision – if the Florida Supreme Court affirms the appellate court's decision<sup>14</sup> — is binding on the world's largest cruise operators. The port of Miami is the homeport of eighteen ships.<sup>15</sup> Carnival Cruise Lines, Celebrity Cruises, Norwegian Cruise Line, Royal Caribbean International, Oceania Cruises, and Windjammer Barefoot Cruises have their homeports in Miami-Dade County.<sup>16</sup> The Port of Miami is “the undisputed ‘Cruise Capital of the World’ with one out of every three North American cruise passengers sail[ing] from Miami.”<sup>17</sup> More than 3.9 million passengers sailed from Miami in fiscal year 2003.<sup>18</sup>

Its geographic location makes the Port of Miami an ideal gateway port for frequent cruises directly bound for the Bahamas, Mexico, Caribbean, Central and South America, Europe, the Far East, and around the world.<sup>19</sup> Moreover, on October 6, 2003, the Port of Miami signed its 28th International Sister Seaports Agreement – this one with the Port of Buenaventura, in Colombia – with the goal of increasing the cargo and cruise trade opportunities between both ports.<sup>20</sup> Consequently, the Third District is essentially a court of last resort for much of the cruise industry.<sup>21</sup> Because of the significant number of cruise ships and passengers this decision directly affects, Judge Nesbitt's decision merits close scrutiny.

This significant decision changes the course of more than a century of rulings in which most courts persistently refused to

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14. *Carlisle*, 864 So. 2d, *reh'g denied*, 29 Fla. L. Weekly D328 (Fla. 3d DCA Feb. 4, 2004), *cert. granted*, *Carnival Corp. v. Carlisle* (No. SC04-393) (Fla. Feb. 4, 2004).

15. Port of Miami Public Relations Department, “Cruise Highlights” (09/02/03); Port of Miami Public Relations Department, “2003 Official Directory” (2003) at 14.

16. *Id.*

17. *Id.*

18. Port of Miami Press Release, “Port of Miami Reports Growth in Cargo and Cruise Activity” (October 28, 2003) at [http://www.miamidade.gov/portofmiami/press\\_releases/growth.asp](http://www.miamidade.gov/portofmiami/press_releases/growth.asp)

19. “Cruise Highlights,” *supra* note 15, at 1; “2003 Official Directory,” *supra* note 15, at 8.

20. Port of Miami Press Release, “Dante B. Fascell Port of Miami-Dade and Port of Buenaventura, Colombia to Sign International Sister Seaport Agreement” (October 03, 2003) at [http://www.miamidade.gov/portofmiami/press\\_releases/03-10-03-sister\\_seaport.asp](http://www.miamidade.gov/portofmiami/press_releases/03-10-03-sister_seaport.asp).

21. Interview with Charles R. Lipcon, Esquire, Attorney for the Plaintiff-Appellant, Law Office of Charles R. Lipcon, Miami, Fla. (Oct. 10, 2003). The author notes that a number of cruise lines, such as Crystal Cruises (Los Angeles, California) and Silversea Cruises (Fort Lauderdale, Florida) operate out of other cities. However, as stated in the text above, the world's largest cruise operators are homeported in Miami.

hold shipowners vicariously liable for the negligent medical treatment of passengers by shipboard doctors.<sup>22</sup> One lone court stepped up to the helm and changed course in 1959 in California when it decided that, in actuality, the shipboard physician was an employee of the vessel rather than an independent contractor.<sup>23</sup> Accordingly, the court decided not to absolve the shipowner of liability for the negligence of its onboard doctor when a child passenger became ill and died.<sup>24</sup> However, after *Nietes* — with the exception in 1993 of *Fairley v. Royal Cruise Line, Ltd.*<sup>25</sup> — the trend continued as before, and there is a virtual sea of cases to date in which the shipowner is absolved of liability for the doctor's negligent treatment of a passenger.<sup>26</sup>

On August 27, 2003, Judge Nesbitt refused to continue along this worn-out path. With his fusion of the law to the facts of this case and recognition of developments in the law of vicarious liability along with the realities of cruising in the 21st century, Judge Nesbitt has set a course for courts to hold cruise lines vicariously liable for the medical malpractice of their shipboard doctors.

Imposing vicarious liability upon shipowners will encourage them to raise the standards they utilize in hiring shipboard physi-

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22. *Cummiskey v. Chandris, S.A.*, 895 F.2d 107, 108 (2d Cir. 1990); *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988); *Churchill v. United Fruit Co.*, 294 F. 400, 402 (D. Mass. 1923); *The Great Northern*, 251 F. 826, 830-32 (9th Cir. 1918); *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y. 1904); *Mascolo v. Costa Crociere S.P.A.*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103-04 (E.D. Penn. 1982); *Cimini v. Italia Crociere Int'l. S.P.A.*, 1981 AMC 2674, 2677 (S.D.N.Y. 1981); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832, 832 (S.D.N.Y. 1935); *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266, 267 (1891); *Laubheim v. De Koninglyke Neder landsche Stoomboot Maatschappy*, 13 N.E. 781, 781 (1887).

23. *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 220 (N.D. Cal. 1959) (the father alleged that the shipboard physician's negligent treatment caused the death of his child aboard the vessel. The court held the shipowner vicariously liable).

24. *Id.* at 221.

25. *Fairley v. Royal Cruise Line, Ltd.*, 1993 AMC 1633, 1640 (S.D. Fla. 1993) (the plaintiff-passenger fell and alleged that the doctor's treatment was negligent. The majority rule precludes vicarious liability, but where a ship "[holds] the doctor out to be its agent, under circumstances suggesting that the doctor was treating the Plaintiff on behalf of the carrier, and the Plaintiff so relied to her detriment, then the Defendant [shipowner] could be liable for the ship doctor's malpractice" under an apparent agency theory).

26. *Cummiskey*, 895 F.2d at 108; *Barbetta*, 848 F.2d at 1369; *Churchill*, 294 F. at 402; *The Great Northern*, 251 F. at 830-32; *The Korea Maru*, 254 F. at 399; *The Napolitan Prince*, 134 F. at 160; *Mascolo*, 726 F. Supp. at 1286; *Di Bonaventure*, 536 F. Supp. at 103-04; *Cimini*, 1981 AMC at 2677; *Amdur*, 310 F. Supp. at 1042; *Branch*, 11 F. Supp. at 832; *O'Brien*, 28 N.E. at 267; *Laubheim*, 13 N.E. at 781.

cians, as well as the outfitting of, and procedures used in, the medical infirmary on board.<sup>27</sup> Shipowners will be more scrupulous in verifying the credentials and past employment history of their physicians. The record for the noted case reveals the high probability that no one at Carnival verified any of the information on Dr. Neri's resume.<sup>28</sup> When these higher standards of hiring compel vessel owners to consistently place well-qualified physicians aboard cruise ships, not only will the passengers (and crew)<sup>29</sup> be able to rely on receiving better medical care at sea, but also, and consequently, litigation will be avoided.

When the shipowner is immune from being held vicariously liable for the physical injury to, or death of, a passenger resulting from a shipboard doctor's negligence, the passenger's only recourse is to sue the physician directly.<sup>30</sup> Because shipboard doctors often reside in a foreign country and spend most of their time working at sea, this often results in fruitless attempts at serving process and establishing personal jurisdiction over the doctor.<sup>31</sup>

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27. Recognizing the absence of, and the need for, guidelines in the cruise industry, the International Council of Cruise Lines (ICCL), along with the American College of Emergency Physicians (ACEP), has established guidelines for its fifteen member passenger cruise lines (the membership is voluntary) that call on major ports in the United States and abroad, at <http://www.iccl.org/policies/medical2.cfm> (last visited Sept. 19, 2003).

28. Deposition of Arthur Diskin, M.D. at 31-32, 37, *Carlisle* (No. 98-6109).

29. The same shipboard physician who treats the passengers provides medical care to the crew, some of whom are very much involved in the safe passage of the vessel, i.e. the deck and engine crew, the bridge officers, and of course, the captain himself, so making better medical care available to the crew also can enhance safety at sea.

30. The crewmembers, however, have long been afforded cure and maintenance under the Jones Act of 1920 (46 U.S.C. § 688 (1975)) and are able to sue the shipowner directly under a theory of vicarious liability for the shipboard doctor's negligence. See *Central Gulf Steamship Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968) (the shipowner sent a crewmember with an eye injury to a shoreside doctor who was not a specialist in eye injuries, and could not even communicate with the seaman because they spoke two different languages, and the seaman eventually lost his eye. The shipowner was held liable for the negligence of the shoreside doctor to whom the shipowner sent his injured seaman, even though the shoreside doctor was not an employee or agent of the shipowner). See also *De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660 (1943) (another seaman lost his eye, but the Supreme Court affirmed a directed verdict against the seaman because the shipowner exercised reasonable care in securing a competent general practitioner, and just because the doctor apparently made a wrong diagnosis, it could not be proven that it was a negligent one).

31. The Carlises never found Dr. Neri in order to serve process on him. Their attorney, Mr. Lipcon, hired a process server to knock on Dr. Neri's door in England, to no avail. Interview with Charles R. Lipcon, *supra* note 21. Though there are cases in which the court established personal jurisdiction over the ship's physician, see *Rana v. Flynn*, 823 So. 2d 302 (Fla. 3d DCA 2002) (the alleged malpractice occurred while the vessel was in port in Florida); *Rossa v. Sills*, 493 So. 2d 1137 (Fla. 3d DCA 1986)

Imposition of vicarious liability will afford passengers a more viable legal remedy like that already afforded to crewmembers.

Part I of this paper presents the discordant situation resulting from one duty of care owed under the current law to crewmembers and another duty of care owed to passengers. Part II analyzes the century-long rationale behind the courts' interpretations and applications of the pertinent aspects of maritime law and agency law with regard to the evolution of the cruise industry, all leading up to the noted decision. Part III reviews the two significant attempts at changing course and imputing vicarious liability to the shipowner during the past century. Part IV examines the reasoning of the *Carlisle* court and how it properly applies the law to the realities of today's cruise industry. Part V explores the potential impact of this decision on the cruise lines. Finally, Part VI concludes that, by an extension of the court's reasoning, the duty of the cruise line to provide medical care to its passengers must be an affirmative, nondelegable duty.<sup>32</sup>

### *Part I*

#### One duty of care for crew - another duty of care for passengers

Passengers are owed a duty of reasonable care but are not entitled to a warranty of seaworthiness or recovery for cure, as are crewmembers under the Jones Act.<sup>33</sup> The Fifth Circuit in *Gib-*

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(finding personal jurisdiction over the ship's doctor), there are other cases in which the court dismissed the case for lack of personal jurisdiction over the doctor. See *Elmlund v. Mottershead*, 750 So. 2d 736 (Fla. 3d DCA 2000) (finding that the alleged medical malpractice occurred on the high seas and the doctor lacked more than incidental contact with Florida).

32. See *Roessler v. Novak*, 858 So. 2d 1158, 1162-63 (Fla. 2d DCA 2003). The court reversed final summary judgment in favor of appellee hospital because there were questions of material fact as to whether hospital was vicariously liable to patient under apparent agency theory. In his concurring opinion, Chief Judge Altenbernd cited to *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. 3d DCA 2003), and also to *Shands Teaching Hosp. & Clinic, Inc. v. Juliana*, 863 So. 2d 343 (Fla. 1st DCA 2003), though he admitted the two cases are distinguishable from *Roessler*, in a discussion of his preference for a theory of a nondelegable duty over apparent agency in medical negligence cases. He wrote that hospitals should be vicariously liable where patients are not able to shop around for another doctor, and that where the hospital has advertised its services provided, it should have a nondelegable duty to provide the proper services and equipment. Where the patient does not have the ability to shop around, the hospital has the ability and opportunity to ensure that a duly qualified physician is on site.

33. The Jones Act of 1920, 46 U.S.C. § 688 (1975) permits crewmembers to sue the shipowner under vicarious liability for negligent medical care.

*boney v. Wright*<sup>34</sup> discussed this curious irrationality created by maritime law and noted that a shipowner has a duty under the existing law to provide a seaworthy vessel for a bale of cotton but not for a passenger.<sup>35</sup> For over one hundred years, a twilight zone has existed where a vessel owner is vicariously liable for the doctor's negligent treatment of a crewmember under the maritime duty to provide maintenance and cure,<sup>36</sup> but the same shipowner is not held liable for the same doctor's identical negligent treatment of a passenger.<sup>37</sup>

This discordant situation is the result of maritime laws penned before the cruise industry existed and long before the industry developed into the hugely popular phenomenon that it is today. Ships were originally the primary means for transporting goods (and the necessary crew) from one port to another. At that time, passengers traveled aboard the ships, along with the mail and cargo,<sup>38</sup> primarily to reach a destination. The transport of passengers was incidental to the primary business of the vessel.<sup>39</sup> At the end of the 19th century, the primary purpose of some vessels became the transportation of passengers from one continent to another. Only in the past several decades, however, has the cruise ship transformed into the very destination itself. The cruise is now the vacation, the resort, the floating city sporting all of the attractions and amenities of both a town and a shoreside holiday village, including shops, dining, live entertainment, fully-equipped health clubs, swimming pools, rock climbing walls, ice

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34. *Giboney v. Wright*, 517 F.2d 1054, 1059 (5th Cir. 1975) (The owner of the thirty foot racing sloop "Love Machine" was permitted to limit his liability for injuries suffered by two children on board the vessel when a fire broke out because the two children were only passengers and not crewmembers. Therefore, his only duty to them was to exercise reasonable care rather than to furnish a seaworthy vessel).

35. *Id.* at 1059.

36. *See Central Gulf Steamship Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968); *De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660 (1943).

37. Beth-Ann Erlic Herschaft, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?*, 17 NOVA L. REV. 575, 584 (1992); Michael J. Compagno, *Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star*, 14 TUL. MAR. L.J. 381, 390 (1990).

38. *See e.g. The Korea Maru*, 254 F. 397 (9th Cir. 1918) (Two passengers traveling in steerage suffered injuries when they went up on deck for fresh air and a large wave broke over the deck, knocking them down). *See also* 46 U.S.C. § 155 (repealed in 1983) (A doctor is required when the vessel carries more than fifty immigrant passengers or passengers [in steerage] other than cabin passengers).

39. *See e.g. The Korea Maru*, 254 F. 397 (9th Cir. 1918).

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skating rinks,<sup>40</sup> libraries, planetariums,<sup>41</sup> wedding chapels,<sup>42</sup> “Caviar in the Surf,”<sup>43</sup> and even morgues, should the need arise.<sup>44</sup> However, at a land-based resort, there is generally either an option to visit a doctor on site or a doctor is available via telephone or a short drive away. This is not so at sea. Now that the vessel has itself become the holiday city out in the middle of the ocean with the nearest port perhaps having less than adequate medical care, the business of cruising today places the shipowner in the business of medicine, i.e., that of providing medical services to the passengers<sup>45</sup> under “the duty of exercising reasonable care under the circumstances” established in 1959 by the U.S. Supreme Court in *Kermarec v. Compagnie Generale Transatlantique*.<sup>46</sup>

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40. Royal Caribbean International’s 138,000-ton Voyager-class ships feature rock-climbing walls and ice skating rinks. Royal Caribbean International’s *Adventure of the Seas* has a “Royal Promenade,” which is two football fields in length, with shops, dining, and colorful street festivities—all of the attractions of a little city. Available at <http://www.royalcaribbean.com>

41. Cunard Line’s *Queen Mary 2*, at a cost of \$800 million, is the world’s longest, tallest, and most expensive passenger ship (as of January 2004), with a planetarium, 22 elevators, and the world’s largest floating library. The vessel made her inaugural voyage in January 2004, from Southampton, England to Fort Lauderdale, Florida. Available at <http://www.cunardline.com>

42. Princess Cruises’ 92,000-ton, 1,970-passenger *Island Princess* has a wedding chapel on board. *Island Princess Arrives in Vancouver*, (July 11, 2003), at <http://www.princess.com>

43. Seabourn’s signature indulgence enticingly named and pictured in their brochures as such. (Photograph displays three smiling waiters attired in freshly pressed white uniforms and standing hip-deep in a clear blue sea while presenting a large silver goblet containing an abundant amount of caviar packed in ice and floating on a beautifully-decorated ship’s life ring). See *THE YACHTING LIFE 2004 – 2005* at 6, Seabourn Cruise Line.

44. Holland America’s *Prinsendam* has a morgue on board, situated alongside the medical facility. It is equipped to handle several corpses. Email interview with Richey Grude, passenger on board the *Prinsendam* (November 12, 2003, 08:05:51 – 0800 (PST)).

45. The International Council of Cruise Lines (ICCL) along with the American College of Emergency Physicians (ACEP) has created guidelines for cruise ships because the carriers are, for all intents and purposes, in the business of providing medical care to their passengers (as well as to their crew). See generally International Council of Cruise Lines, *Cruise Industry Policies: Medical Facilities—Statement on Cruise Ship Medicine* at <http://www.iccl.org/policies/medical3.cfm> Arlington, Va (last visited Nov. 15, 2003).

46. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959) (holding that the shipowner “owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case”).



The *Barbetta* case involved a passenger who lapsed into a coma after the ship's physician failed to properly diagnose that she had diabetes.<sup>55</sup> She claimed in excess of one million dollars in damages as a result of the doctor's negligence, and she argued that the cruise line was liable under a theory of respondeat superior.<sup>56</sup> The Fifth Circuit upheld the trial court's decision which granted summary judgment for the shipowner.<sup>57</sup>

The *Barbetta* Court offered two reasons for the rule that the shipboard doctor's negligent medical treatment of a passenger cannot be imputed to the shipowner: first, the passengers control the work of the ship's doctor and the shipowner cannot interfere in this relationship. The owner, therefore, cannot control the doctor in his work.<sup>58</sup> Second, the shipowner does not have the expertise necessary to supervise the ship's doctor who is on board as a convenience for the passengers, because the "ship is not a floating hospital."<sup>59</sup> This decision exemplified a long line of cases that have come to be known as the *Barbetta* line.<sup>60</sup>

A. *The ship's doctor is under the control of the passengers*

The first justification for the *Barbetta* line of authority is the cruise line's lack of ability to control the doctor-patient relationship.<sup>61</sup> Shipowners have long argued that the passengers are in control because they have the choice whether to use the services of

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830-32; *The Korea Maru*, 254 F. at 399; *The Napolitan Prince*, 134 F. at 160; *Churchill*, 294 F. at 402; *Branch*, 11 F. Supp. 832; *Amdur*, 310 F. Supp. at 1042; *Cimini*, 1981 A.M.C. at 2677; *Di Bonaventure*, 536 F. Supp. at 103-04). The *Barbetta* Court also cites *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 666-67 (1943) ("tracing the development of the basic rule in the state courts, and recognizing the influence which those state 'judges of great learning, for courts of last resort of states having much to do with maritime pursuits,' had on the rule's development in the federal courts").

55. *Barbetta*, 848 F.2d at 1365.

56. *Id.*

57. *Id.* at 1374.

58. *Id.* at 1369-70 (citing *O'Brien*, 28 N.E. at 267; *Churchill*, 294 F. at 401-02; *The Great Northern*, 251 F. at 831).

59. *Id.* at 1369-70 (quoting *Amdur*, 310 F. Supp. at 1042; citing *O'Brien*, 28 N.E. at 267).

60. *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 3 (Fla. 3rd DCA 2003) (citing *Cummiskey*, 895 F.2d 107; *Churchill*, 294 F. at 402; *The Great Northern*, 251 F. 830-32; *The Korea Maru*, 254 F. at 399; *The Napolitan Prince*, 134 F. at 160; *Mascolo*, 726 F. Supp. 1285; *Di Bonaventure*, 536 F. Supp. at 103-04; *Cimini*, 1981 AMC at 2677; *Amdur*, 310 F. Supp. at 1042; *Branch*, 11 F. Supp. 832; *O'Brien*, 28 N.E. at 267; *Laubheim*, 13 N.E. 781).

61. *Barbetta*, 848 F.2d at 1369.

the onboard doctor.<sup>62</sup> In 1891, in *O'Brien v. Cunard Steamship Co.*, a steerage passenger sued the steamship company on the grounds that the ship's surgeon negligently vaccinated her.<sup>63</sup> In affirming a verdict in favor of the defendant steamship company, the Supreme Judicial Court of Massachusetts noted that the work of the surgeon is under the control of the passenger.<sup>64</sup> This makes it "[the passenger's] business, not the business of the carrier."<sup>65</sup>

The court continued its analysis and made the following absurd statement about ill passengers and the choices available to them: "[t]hey may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves, if they are sick, or may go without treatment if they prefer . . . ."<sup>66</sup>

This set of options has no basis in reality. Depending on where the vessel is — off the southern coast of South America rounding Cape Horn, or perhaps anchored in rough seas at Ile du Diable (Devil's Island), French Guiana (where there is not much more than a bartender serving drinks and snacks, and the ruins of an infamous penal colony) with the next available port many hours and nautical miles away — the ill passenger is a captive audience member, unable to freely choose to use, or not use, the doctor's services. The vessel becomes a one-horse town and there is no choice to be made by the passenger if the illness is such that he cannot wait to reach land. Upon deciding that treatment cannot wait for landfall, the ill passenger certainly has no plethora of doctors to sort through before choosing the ship's doctor.<sup>67</sup> There is, then, an element of control by the carrier over the doctor-patient relationship in that the choice of the patient-passenger is constrained by the choice of the shipowner.<sup>68</sup>

B. "*The ship is not a floating hospital*"<sup>69</sup>

The second justification for the *Barbetta* rule is that the

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62. *O'Brien*, 28 N.E. at 267; see also *Barbetta*, 848 F.2d at 1369-70; *Amdur*, 310 F. Supp. at 1042.

63. *O'Brien*, 28 N.E. at 266.

64. *Id.* at 266-67.

65. *Id.* at 267.

66. *Id.*

67. *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 6 (Fla. 3d DCA 2003).

68. *Id.*

69. *Barbetta*, 848 F.2d at 1369-70 (quoting *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969); citing *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266, 267 (1891)).

cruise line lacks the expertise with which to supervise the doctor in his practice of medicine because “the ship is not a floating hospital.”<sup>70</sup> This defense has worked for the past century because under general maritime law, cruise ships are not required to carry a doctor.<sup>71</sup> Even where a vessel is flying the flag of a nation that mandates the presence of a doctor on board,<sup>72</sup> the same defense for the owner has applied because the general rule has established that the cruise line can only be liable for neglecting to employ a competent doctor but not liable for that doctor’s negligent treatment.<sup>73</sup>

In 1959, the United States Supreme Court, in *Kermarec v. Compagnie Generale Transatlantique*, established a duty of care.<sup>74</sup> In this case, a seaman’s guest was injured as he descended a stairway on board the vessel while it was berthed in New York City.<sup>75</sup> The Court imposed upon the shipowner “the duty of exercising reasonable care under the circumstances” to all who are lawfully on board.<sup>76</sup> Hence, in the event of a situation which necessitates immediate medical treatment of a passenger and the vessel car-

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70. *Id.*

71. See MARTIN NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES*, § 3:10 (4th ed. 1990). 46 USCS § 155 required a vessel to carry a doctor on board if there were more than 50 passengers in steerage (statute repealed in 1983). See also *The Korea Maru*, 254 F. 397 (9th Cir. 1918).

72. Certain countries (but not the United States) require vessels flying their flags to carry a physician onboard. See *Amdur*, 310 F. Supp. 1033 (vessel flying Israeli flag mandates doctor on board); *The Napolitan Prince*, 134 F. 159 (E.D.N.Y. 1904) (British maritime law requires a doctor aboard British-flagged vessels); *O’Brien*, 28 N.E. 266 (same); *Malmed v. Cunard Line, Ltd.*, 1995 U.S. Dist. LEXIS 12256 (S.D.N.Y. 1995) (same); *Mascolo v. Costa Crociere S.P.A.*, 726 F. Supp. 1285 (S.D. Fla. 1989) (Italian law mandates that all Italian passenger ships sailing outside the Mediterranean Sea must have a physician on board with a degree in medicine from an accredited Italian medical school, fluency in two foreign languages, and a minimum of two years practicing medicine).

73. *Barbetta*, 848 F.2d at 1369 (citing the following cases, which are listed here in chronological order: *Laubheim v. De Koninglyke Neder landsche Stoomboot Maatschappy*, 13 N.E. 781; *O’Brien*, 28 N.E. at 267; *The Great Northern*, 251 F. 826, 830-32 (9th Cir. 1918); *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y. 1904); *Churchill v. United Fruit Co.*, 294 F. 400, 402 (D. Mass. 1923); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832 (S.D.N.Y. 1935); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103-04 (E.D. Penn. 1982)).

74. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

75. *Id.* at 626.

76. *Id.* at 629-630. (Maritime law does not distinguish between licensee and invitee. The Court stated: “[f]or the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality” (citing *The Lottawanna*, 21 Wall. 558, 575 (1874)).

ries no doctor, this duty of reasonable care requires either that the captain divert the vessel and put in to the nearest port, or that he evacuate a passenger by tender or helicopter.<sup>77</sup>

Depending on the vessel's location, this diversion into the nearest port can be costly and inconvenient.<sup>78</sup> Furthermore, if the vessel is many hours (or days) from the nearest port and a passenger needs immediate medical treatment, the weather conditions or the nature of the illness or injury can render too dangerous an evacuation of the ailing passenger by tender or helicopter and as such, the options become extremely limited.

It is an anomaly that the cruise line apparently has the expertise to hire the doctor but does not have the expertise to oversee his treatment of the passengers. The shipowner hires the doctor and places him on the ship, with the beneficial effect to the shipowner being that he will not have to divert the vessel if an ailing passenger requires medical treatment.<sup>79</sup> The shipowner then cloaks the doctor in a ship's officer's uniform, but classifies him as an independent contractor for whose negligence the cruise line cannot be held liable.<sup>80</sup> A number of cruise operators state, in the fine print of their glossy brochures, that they are not responsible for the services of their physicians because the shipboard doctors are "independent contractors."<sup>81</sup>

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77. *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 221 (N.D. Cal. 1959).

78. Both cruise ship owners and their passengers place a premium on timely arrivals and departures. As a member of the cruise staff aboard the ships of Royal Cruise Line (RCL) from 1988-1996, the author had occasion to file some of these complaints from passengers to the cruise line's headquarters. The rare delays were usually due to severe weather conditions en route to the port.

79. Interview with Charles R. Lipcon, *supra* note 21; Jeffrey B. Maltzman, *Shipboard Medical Care*, 10 *BENEDICT ON ADMIRALTY* § 9.03, (7th ed. rev. March 2000) (Maltzman also is defendant Carnival Corp.'s attorney in *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. 3d DCA 2003)).

80. Charles Lipcon, Attorney for the Plaintiff, the lower court hearing for *Carlisle v. Carnival Corp.*, (No. 98-6109). *See e.g.* *THE YACHTING LIFE 2004 - 2005*, *SEABOURN CRUISE LINE*; *WORLD VOYAGE 2004*, *HOLLAND AMERICA, LTD.*; *Carnival Cruise Lines Passenger Ticket Contract at* <http://www.carnival.com/ticketcontract.htm> (last visited Sept. 9, 2003). This independent contractor classification statement is notably absent from the brochures of Crystal Cruises and Radisson Seven Seas (though the author has not seen their passenger ticket contracts).

81. Brochures stating that the cruise line will not be liable for the acts of the independent contractor physicians: *THE YACHTING LIFE 2004 - 2005*, *Seabourn Cruise Line*; *EUROPE 2004*, *Cunard Line, Ltd.*; *QE2 WORLD CRUISE 2004*, *Cunard Line, Ltd.*; *QUEEN MARY 2 2004 INAUGURAL YEAR*, *Cunard Line, Ltd.*; *2003-2004 CRUISE VACATIONS*, *Carnival Cruise Line*. This statement of non-liability by the cruise line is notably absent from *Radisson Seven Seas Cruises* and *Crystal Cruises* brochures. (The author has not seen the passenger tickets). *Carnival* includes the statement of non-liability on its passenger ticket contract, paragraph 13, *available at*:





contractor for purposes of medical treatment.<sup>93</sup> He concluded that the older cases rested upon the idea that that neither the master nor the shipowner had the expertise to be able to “exercise control or supervision over a professionally skilled physician.”<sup>94</sup> In a refreshing shift, Judge Sweigert decided that this explanation could no longer be realistically applied where the shipboard doctor is “presumably [ ] under the general direction and supervision of the company’s chief surgeon through modern means of communication.”<sup>95</sup>

The decision was criticized by many courts, most notably by *Barbetta v. S/S Bermuda Star* in 1988 when the court stated: “We think the *Nietes* court has confused the employer’s right to control its employees’ general actions with its ability to control those specific actions which could subject the employer to liability.”<sup>96</sup> The *Nietes* decision stood alone until *Fairley v. Royal Cruise Line, Ltd.* in 1993.<sup>97</sup>

#### B. *Fairley* (1993): A potential exists for an apparent agency theory of recovery

In 1993, in *Fairley v. Royal Cruise Line, Ltd.*,<sup>98</sup> the court criticized *Barbetta* and supported parts of *Nietes* while discussing the potential, under certain circumstances, for an apparent agency theory of recovery.<sup>99</sup> Judge Marcus explored the distinction between servant and independent contractor<sup>100</sup> and concluded

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93. *Id.* at 220 (citing *Laubheim v. De Koninglyke Neder landsche Stoomboot Maatschappy*, 13 N.E. 781 (1887); *The Great Northern*, 251 F. 826 (9th Cir. 1918); *The Korea Maru*, 254 F. 397 (9th Cir. 1918)).

94. *Nietes*, 188 F. Supp. at 220.

95. *Id.*

96. *See Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1371 (5th Cir. 1988); *See also Malmed v. Cunard Line, Ltd.*, 1995 U.S. Dist. LEXIS 12256, 4 (S.D.N.Y. 1995) “[*Nietes*] appears to stand alone in this [decision] and has been roundly criticized for it” (quoting *DeRoche v. Commodore Cruise Line, Ltd.*, 31 Cal. App. 4th 802, 808 (Cal. Ct. App. 1994) and also citing *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033 (S.D.N.Y. 1969) for characterizing the *Nietes* court’s reasoning as “not sound as a general rule.”

97. *Fairley v. Royal Cruise Line, Ltd.*, 1993 AMC 1633, 1640 (S.D. Fla. 1993).

98. *Id.*

99. *Id.* at 1639-40 (discussing when proof of apparent agency would permit recovery).

100. *Id.* at 1635, discussing the RESTATEMENT (SECOND) OF AGENCY § 220(2) (“the distinction between servant and independent contractor is a legal conclusion drawn from the factual dynamic of the particular relationship, and turns on the interplay of a host of factors, among them, whether the work is ‘part of the regular business of the employer’; whether the contractor is engaged in a distinct calling; the degree of skill of the contractor; who supplies the locale, tools and instrumentalities; the period of



*Part IV: A NEW READING: Carlisle v. Carnival Corp.*<sup>107</sup>*A. Shipowner has control over the doctor-patient relationship*

The *Carlisle* court rejected the *Barbetta* line of cases, alternatively concluding that the cruise line's "duty to exercise reasonable care under the circumstances" extends beyond the hiring of the ship's doctor to the actions of the doctor placed on board by the cruise line.<sup>108</sup> Indeed, if the shipowner chooses to fulfill his "duty of exercising reasonable care"<sup>109</sup> to his passengers by hiring a doctor, it follows that he would be liable for the medical care given by the doctor his passengers must see if they need immediate treatment.<sup>110</sup> A cruise line has no legal duty to practice medicine but when a cruise line chooses to treat ailing passengers by providing a doctor on board, it then has "assume[d] the duty to treat carefully."<sup>111</sup>

Of course, an error by the physician does not prove that the doctor was negligent per se or that the cruise line was negligent in hiring him.<sup>112</sup> However, as the court in *Amdur v. Zim Israel Navigation Co.* noted, the shipowner is not liable for the doctor's negligence provided that the owner conducts a proper inquiry into the physician's background and qualifications.<sup>113</sup> This usually means checking into the doctor's background and verifying his creden-

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107. *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. 3d DCA 2003).

108. *Id.* at 8.

109. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

110. This reasoning correctly places the burden of hiring a truly competent doctor upon the cruise line. The record reflects that, even though Elizabeth Carlisle complained of abdominal pain, Dr. Neri did not palpate her abdomen until the third visit and then, only at the request of Mrs. (Darce) Carlisle. Deposition of Darce Carlisle at 76, *Carlisle* (No. 98-6109). Dr. Diskin, Carnival's surgeon in charge of hiring also stated, "[i]f the patient has abdominal pain, the abdomen should be palpated." Deposition of Arthur Diskin, M.D. at 69-70, *Carlisle* (No. 98-6109). The author spoke with Dr. Philip Floyd, M.D., F.A.A.P., Physicians to Children, Coral Gables, Florida on October 24, 2003, who stated that he knew of no situation in which he would prescribe antibiotics for the flu (as Dr. Neri did for Elizabeth Carlisle) because the flu is a virus and viruses do not respond to antibiotics. This is basic and well-settled knowledge in medicine.

111. *Carlisle*, 864 So. 2d at 4.

112. *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969) (citing to *The Korea Maru*, 254 F. 397 (9th Cir. 1918); *Churchill v. United Fruit Co.*, 294 F. 400 (D. Mass. 1923); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832 (S.D.N.Y. 1935); *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266 (1891); *The Great Northern*, 251 F. 826 (9th Cir. 1918); *Laubheim v. De Koninglyke Nederlandsche Stoomboot Maatschappy*, 13 N.E. 781 (1887)); *See also* Maltzman, *supra* note 79.

113. *Amdur*, 310 F. Supp. at 1042; *See also* Maltzman, *supra* note 79.

tials.<sup>114</sup> The deposition of Carnival's surgeon in charge of hiring leaves unanswered the question of who - if anyone - checked into Dr. Neri's background before his hiring.<sup>115</sup>

Judge Nesbitt noted that while an onboard doctor provides great benefit to the shipowner, it should not relieve the shipowner of liability for negligent treatment by the doctor.<sup>116</sup> As it was foreseeable that some passengers would become ill or injured and the only realistic alternative would be treatment by the ship's physician provided on board, the cruise line exercised control over the doctor-patient relationship.<sup>117</sup> The *Barbetta* line of cases based the control by the passenger on the misguided concept that the sick or injured passenger can choose to go untreated if he prefers and "demand that the captain fulfill his duty of care in some other fashion."<sup>118</sup> The *Carlisle* court noted that the ailing passenger lacked a panoply of options to sort through before arriving at the ultimate decision to visit the ship's doctor.<sup>119</sup>

The doctor is not on board solely for the passengers' convenience, as the shipowners contend. Where the shipowner can fulfill his duty of care by not having to divert the ship to a port, he is gaining a great economic benefit.<sup>120</sup> The shipowner in this way exerts control over the doctor-patient relationship because the choice of the passenger is limited to the choice already made by the shipowner. Accordingly, the court extended the cruise line's duty of reasonable care under the circumstances to include "the duty of the ship's doctor to adhere to the standard of a reasonable ship's doctor under the circumstances."<sup>121</sup>

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114. Maltzman, *supra* note 79.

115. Deposition of Arthur Diskin, M.D. at 31-32, 37, *Carlisle* (No. 98-6109).

116. *Carlisle*, 864 So. 2d at 5 (citing *NORRIS*, *supra* note 71. "[I]n light of the modern trends with respect to tort liability, it is probable that the earlier cases holding that in passenger matters the shipowner's duty is fulfilled by employing a duly qualified and competent surgeon and medical practitioner and is only liable for negligence in hiring him but not for treatment by him, will not be followed," citing Judge Sweigert's 'excellent opinion' in *Nietes*").

117. *Carlisle*, 864 So. 2d at 5.

118. *Id.* at 5 (court discussing the misguided reasoning by the *Barbetta* Court).

119. *Id.* at 6.

120. *Id.* at 4 (citing *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 221 (N.D. Cal. 1959); *Compagno*, *supra* note 37, at 389-90; *Herschafft*, *supra* note 37, at 593).

121. *Carlisle*, 864 So. 2d at 8; Deposition of Arthur Diskin, M.D., *Carlisle* (No. 98-6109). Dr. Diskin stated that if a patient comes in complaining of abdominal pain, the abdomen should be palpated, i.e. touched and pushed on. Additionally, Brief of Appellant, *Carlisle* (No. 98-6109), states that Dr. Neri did not give Elizabeth a physical examination the first two times he saw her. Not until the third time he saw Elizabeth, did he conduct a brief examination of her abdomen, and only then, at her mother's insistence. Deposition of Darce Carlisle at 76, *Carlisle* (No. 98-6109). Also,

*B. THE DOCTOR IS AN AGENT OF THE CRUISE LINE*

The *Carlisle* court concluded that, no matter the contractual ranking assigned to the doctor, he is in fact “an agent of the cruise line whose negligence should be imputed to the cruise line.”<sup>122</sup> The court also noted that maritime law and agency theory go hand in hand.<sup>123</sup> There is “no inherent conflict between a physician’s contractual independent contractor status and a finding of agency where the totality of the circumstances warrants.”<sup>124</sup> Carnival exercised control over the work of the doctor by providing the medical supplies, selecting the nurses, setting the hours of operation of the infirmary, and providing a policy and procedures manual for the infirmary operation.<sup>125</sup> The doctor was to provide medical services to passengers and crew in accordance with the cruise line’s guidelines.<sup>126</sup> Moreover, there was always a “hot line” available from ship to shoreside emergency physicians for communication and guidance.<sup>127</sup>

Judge Nesbitt noted that “[w]hen considering a claim based on agency, it is the right of control, not actual control, that may be determinative.”<sup>128</sup> Accordingly, courts have found liability in shoreside cases against hospitals for the physician’s malpractice on apparent agency even though the physician is an independent contractor.<sup>129</sup>

In *Carlisle*, the record indicates that at the time Dr. Neri treated Elizabeth Carlisle, he was wearing an officer’s uniform.<sup>130</sup>

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from the Deposition of Arthur Diskin, M.D. at 27-42, *Carlisle* (No. 98-6109), it is frighteningly evident that it is most likely that no one verified Dr. Neri’s credentials or references or past employment.

122. *Carlisle*, 864 So. 2d at 7.

123. *Id.* at 6 (discussing *Cactus Pipe & Supply Co., Inc. v. M/V Montmarte*, 756 F.2d 1103, 1111 (5th Cir. 1985)).

124. *Id.* at 6-7 (citing *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 854 (Fla. 2003)).

125. *Carlisle*, 864 So. 2d at 6; Reply Brief of Appellant at 3 - 4, *Carlisle* (No. 98-6109).

126. See Deposition of Arthur Diskin, M.D., *Carlisle* (No. 98-6109).

127. *Id.* See also *Carlisle*, 864 So. 2d at 7.

128. *Carlisle*, 864 So. 2d at 7 (citing *Villazon*, 843 So. 2d at 842).

129. See e.g. *Villazon*, 843 So. 2d at 842; *Shands Teaching Hosp. & Clinic, Inc. v. Juliana*, 863 So. 2d 343 (Fla. 1st DCA 2003); *Roessler v. Novak*, 858 So. 2d 1158 (Fla. 2d DCA 2003).

130. Appellant’s Brief at 11, *Carlisle* (No. 98-6109). A ship’s doctor is usually in uniform when in passenger areas of the vessel and also, when treating passengers. The doctor’s uniform, like the uniforms of other officers aboard, generally has epaulets. Aboard the ships of Royal Cruise Line, the doctor’s epaulets had four gold stripes—signifying the chief officer of that department—against a red background. The red signified the medical department. The doctor aboard the ships of Holland

To a passenger — even a well-traveled one — a doctor wearing an officer’s uniform aboard a ship represents to the passenger that the doctor is working for the cruise line. Furthermore, the uniform creates a sense of trust in an innocent passenger.<sup>131</sup> Indeed, the doctor, like the ship’s captain, on many cruise ships, wears an officer’s uniform with epaulets containing four gold stripes, signifying that he is the chief officer in his department.<sup>132</sup> Usually, the doctor is introduced, in uniform, along with the captain and other chief officers from each department to the passengers at the Captain’s Welcome Aboard Party at the beginning of each cruise.<sup>133</sup> Moreover, Carnival’s own physician in charge of hiring stated that Dr. Neri was “an officer on the ship.”<sup>134</sup>

The Carlisles paid Carnival for the doctor’s visits using their “Sail and Sign” card, which was provided to them by Carnival.<sup>135</sup> The procedure for paying the hospital for the doctor’s services is discussed by the court in *Shands*,<sup>136</sup> as pertinent to finding the hospital vicariously liable on apparent agency theory no matter

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America Line usually wears a uniform. See email interview with Richey Grude, passenger (November 12, 2003, 08:05:51 – 0800 (PST)) (on file with author). Sometimes, the doctor even wears a ship’s nametag as Dr. Neri did aboard the Carnival ship *Ecstasy*. See Appellant’s Brief at 11, *Carlisle* (No. 98-6109). Additionally, Darce Carlisle testified that Dr. Neri “dressed as . . . an officer of the ship. . . and “looked to [her] the way [she] would expect a captain of the ship to look.” Deposition of Darce Carlisle at 47-48, *Carlisle* (No. 98-6109). Moreover, on many vessels, the doctor is introduced to the passengers at the Captain’s Welcome Aboard Party, along with the other chief officers of the ship’s departments. This was always the case on the ships of Royal Cruise Line from 1988-1996. See also email interview, Kevin Farwell, Shore Excursions Manager on board Holland America’s *Volendam*, (October 18, 2003, 10:15:50 EDT) (on file with author) (“the doctor is introduced [at the] Captain’s Welcome Aboard on the first formal night”).

131. See generally Compagno, *supra* note 37.

132. The doctor’s uniform generally has epaulets. Aboard the ships of Royal Cruise Line, the doctor’s epaulets had four gold stripes—signifying the chief officer of that department—against a red background. The red signified the medical department. The doctor aboard the ships of Holland America Line usually wears a uniform. See email from Richey Grude, passenger, to author (November 12, 2003, 08:05:51-0800 PST) (on file with author).

133. Aboard the ships of Royal Cruise Line, the Captain’s Cocktail Party took place either the first night or the second (depending upon the itinerary). This is a procedure, typical in the industry, for introducing the passengers, at the beginning of each cruise, to the chief officers who are responsible for each department. This is also the technique employed by Holland America Lines. See email interview with Kevin Farwell, Shore Excursions Manager, on board Holland America’s *Volendam*, to author (Oct. 18, 2003, 10:15:50 EDT) (on file with author).

134. Deposition of Arthur Diskin, M.D. at 61, *Carlisle* (No. 98-6109).

135. Appellant’s Brief at 11, *Carlisle* (No. 98-6109). The “Sail and Sign” card is a credit card provided by Carnival for the sole purpose of making shipboard purchases.

136. *Shands Teaching Hosp. & Clinic, Inc. v. Juliana*, 863 So. 2d 343, 344-45 (Fla. 1st DCA 2003). The hospital was held vicariously liable for infant’s brain damage as a

whether the doctor is an independent contractor and even further, where the doctor has not even been hired by the hospital but by an outside subcontractor.<sup>137</sup>

In imposing vicarious liability to the cruise line, Judge Nesbitt noted that, on any cruise ship, the shipowner is

[A]lready held vicariously liable for the negligence of the same ship's doctor in the treatment of hundreds of people—the crew—under the maritime duty to provide maintenance and cure. Thus, in the case of a seaman, a shipowner is liable for the negligence of the ship's doctor regardless of the degree to which the doctor's medical activities, or the doctor-patient relationship, can be controlled by the shipowner.<sup>138</sup>

Another part of the *Barbetta* court's justification for the rule is that medicine is not the business of the cruise line. Medical treatment of passengers does, however, "bear[] a significant relationship to traditional maritime activity."<sup>139</sup> In 1995, the United States Supreme Court established the "nexus test" for considering whether a tort is "likely to disrupt maritime activity."<sup>140</sup> Judge Nesbitt noted that "[s]ick and injured crew and passengers, either left untreated or inadequately treated, are certainly likely to disrupt maritime activity, such as the successful navigation of a commercial vessel."<sup>141</sup>

The *Carlisle* court also held that 46 U.S.C. § 183(c) invalidated the cruise ticket's purported limitation of the shipowner's liability for the negligence of its agents and independent contractors.<sup>142</sup> Not only is such a disclaimer unlawful, but it also is

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result of the negligence of independent contractor perfusionist in the emergency room. (This case was decided two days after the *Carlisle* case).

137. *Id.* at 347-48.

138. *Carlisle*, 864 So. 2d at 7 (citing *De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660 (1943); *De Centro v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 140 (5th Cir. 1986); *Central Gulf Steamship Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968) (the shipowner sent a crewmember with an eye injury to a shoreside doctor who was not a specialist in eye injuries, nor could he even communicate with Sambula because they spoke two different languages, and the shipowner was found liable for the negligence of the shoreside doctor to whom he sent his injured seaman, even though the shoreside doctor was not an employee or agent of the shipowner)).

139. *Id.* at 3 (citing *Rand v. Hatch*, 762 So. 2d 1001 (Fla. 3d DCA 2000)).

140. *Id.* at 6 (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 543 (1995); *Sisson v. Ruby*, 497 U.S. 358, 365 (1990)).

141. *Id.* at 6.

142. *Id.* at 8. *See also* *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. App. 2002) (spouse sued carrier for damages for the death of her husband who fell off the ship and drowned off the coast of Greece. Appellate court reversed the lower court's granting of partial summary judgment for the carrier, holding that, under 46 U.S.C.

against public policy.<sup>143</sup> When a cruise passenger is forced to pursue a medical negligence claim against the doctor individually, the passenger must “engage in a game of personal jurisdiction and service of process roulette.”<sup>144</sup> Indeed, it is very difficult, and sometimes impossible, to serve process on a doctor who resides in another country and lives at sea.<sup>145</sup>

*Part V: SMOOTHER SEAS LIE AHEAD FOR CRUISE LINES AND THEIR PASSENGERS*

*A. Medicine is part of the business of cruise ships today*

Shipowners can no longer argue that medicine is not their business. While they are not exactly “floating hospitals,” they are, at the very least, floating cities.<sup>146</sup> Where there is a city of passengers and crew at sea, sometimes for days at a time, it is foreseeable that some of them will become ill and require medical attention. Particularly when the vessel is journeying to exotic ports-of-call where there are minimum medical facilities, the shipowner’s duty of reasonable care to passengers practically mandates medical care on board the vessel. In fact, Residensea’s *The World* carries on board, along with its doctors and nurses, a helipad for emergency evacuations, X-ray equipment, and operating facilities.<sup>147</sup> Many vessels also have morgues on board.<sup>148</sup>

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§ 183(c), the carrier cannot limit its liability); *Carlisle v. Ulysses Line Ltd.*, 475 So. 2d 248, (Fla. 3d DCA 1985) (unlawful exculpatory clause).

143. *Carlisle*, 864 So. 2d at 8 (citing *Carlisle v. Ulysses Line Ltd.*, 475 So. 2d 248 (1985) (exculpatory clause attempting to relieve the cruise line from liability for the negligence of its servants would be unlawful under 46 U.S.C. section 183c)).

144. *Id.* at 8.

145. *Id.* citing *Rana v. Flynn*, 823 So. 2d 302 (Fla. 3d DCA 2000); *Elmund v. Mottershead*, 750 So. 2d 736 (Fla. 3d DCA 2000); *Rossa v. Sills*, 493 So. 2d 1137 (Fla. 4th DCA 1986). See also interview with Charles R. Lipcon, *supra* note 21 (The Carlises were never able to serve process on Dr. Neri).

146. Residensea’s *The World* is a floating “resort community” on which passengers can purchase apartments where they reside as the vessel circumnavigates the globe. Available at [http://www.residensea.com/brochure/RES\\_5001\\_rental\\_brochure.pdf](http://www.residensea.com/brochure/RES_5001_rental_brochure.pdf) (last visited Feb. 13, 2004). In addition to doctors and nurses on board, this vessel carries X-ray equipment and operating facilities. Arline and Sam Bleecker, “Luxury Boat Provides Condos on the Sea,” *THE SAN DIEGO UNION-TRIBUNE*, Feb. 3, 2002.

147. See <http://www.residensea.com>. See also Arline and Sam Bleecker, “Luxury Boat Provides Condos on the Sea,” *THE SAN DIEGO UNION-TRIBUNE*, Feb. 3, 2002 at D-1.

148. Holland America Line’s *Prinsendam* has a morgue on board. Shipowners have recognized the likelihood of passengers becoming ill and even dying as evidenced by the presence of morgues and refrigerated containers on board. The ships of Royal



elderly, certain symptoms common with viral infections can lead especially quickly to severe dehydration, so these passengers do not have the option of waiting long for medical treatment.<sup>155</sup> The numbers and likelihood of illnesses requiring medical treatment on any given cruise makes a doctor's presence on board the only reasonable way in which the carrier can fulfill its duty of care to passengers under the circumstances.<sup>156</sup>

If a captain is forced to constantly divert his vessel, he will never be able to get through the scheduled itinerary for the week, let alone make it around the world in 104 days.<sup>157</sup> With constant diversions into ports or the time taken for evacuations, not only would the ship never get anywhere, but the passengers would not put up with it and would certainly choose another cruise line next time. As such, the presence of a doctor on board is a very great benefit to the cruise ship owner. Because of the foreseeability that some passengers will get injured or sick enough to require immediate medical treatment, medicine is now part of the business of the cruise line.

#### B. CHANGES TO HIRING GUIDELINES

Surely the *Carlisle* decision will encourage shipowners to exercise more care in the hiring of their physicians. Of course,

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"[e]very cruise ship that stops in a U.S. port must have health inspections twice a year by the CDC. Inspectors look for deficiencies that could result in an outbreak of illness and rate each ship on a 100-point scale (85 or lower is considered failing)." *See also* Gene Sloan, "Special Report: Newer Ships can be Ticket to Healthier Cruises," USA TODAY (January 10, 2003). The CDC also has guidelines for the cruise ship medical staff to follow, with particular regard to influenza and pneumonia, routine vaccinations for crew, and for itineraries longer than three days: passive surveillance for respiratory illnesses and provisioning with sufficient supplies to respond to an outbreak. Available at: <http://www.cdc.gov>. Additionally, the International Council of Cruise Lines (ICCL) is working with the American College of Emergency Physicians (ACEP) continually to create guidelines for the medical staff onboard ships to help prevent or to better contain an outbreak, *available at* <http://www.iccl.org>. Both the CDC and the U.S. Coast Guard play key roles in ensuring passenger health . . . ." Susan Jenks, "Cruise Lines Placing Higher Priority on Medical Care," THE SEATTLE TIMES (October 19, 2003).

155. Interview with Dr. Philip Floyd, M.D., F.A.A.P., Physicians to Children, Coral Gables, Fla. (Oct. 12, 2003).

156. *See generally* *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

157. A number of cruise lines offer voyages around the world. The Brochures of Cunard Lines, Silversea Cruises, Holland America Line and Crystal Cruises, all detail their world cruises. Most of them complete the journey anywhere from 104 up to about 120 days. Royal Cruise Line's world cruise in 1996 was scheduled to take 104 days. In actuality, it took several days longer because of an engine problem that was not repairable while the vessel remained at sea.

this is a learning experience for everyone involved in an industry that has grown so rapidly. Until fairly recently, there has been little in the way of guidance for cruise lines when it comes to hiring the shipboard physician. To this end, the International Council of Cruise Lines (ICCL) stepped aboard in 1995 and, along with the American College of Emergency Physicians (ACEP), developed guidelines for shipboard doctors' qualifications, medical equipment, and procedures for the medical staff.<sup>158</sup> These guidelines, however, are voluntary.

Many scholars and professionals also have called for international regulation of shipboard medical guidelines, an idea with excellent merit.<sup>159</sup> The guidelines, naturally, would have to remain flexible enough to be adaptable to each vessel's unique size, itineraries, and passenger demographics.<sup>160</sup> With the potential for these guidelines to result in the consistent placement of well-qualified physicians aboard every cruise ship, the decision of potential passengers whether to take a cruise could be positively influenced. Not too many people are attracted to the idea of having to seek medical help in a foreign country or a small, exotic port like Male, Maldives (a day's cruise from anywhere else) or on a five day transatlantic crossing if the ship's physician is not well-qualified, especially if elderly or traveling with young children. Elizabeth Carlisle's parents testified that the existence of a doctor on board affected their decision to cruise.<sup>161</sup>

Additionally, shipowners often get what they pay for. In a New York Times article, Princess Cruises stated: "[w]e try and pay the amount of money required to attract well-qualified individuals."<sup>162</sup> The cost to the cruise line could easily be built into the

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158. International Council of Cruise Lines, *Cruise Industry Policies: Medical Facilities—Statement on Cruise Ship Medicine* at <http://www.iccl.org/policies/medical3.cfm> (last visited September 19, 2003). The guidelines include some basic requirements such as: physicians should be fluent in English when the majority of the ship's passengers are English speaking, and there should be one doctor and two nurses for every 1,000 passengers. Guidelines are left to the fifteen member cruise lines to mold the framework to fit the size of the vessel, number of passengers on board, and nature of the itinerary.

159. See Thomas A. Gionis, *Paradox on the High Seas: Evasive Standards of Medical Care—Duty Without Standards of Care; A Call for the International Regulation of Maritime Healthcare Aboard Ships*, 34 J. MARSHALL L. REV. 751 (2001).

160. International Council of Cruise Lines, *Cruise Industry Policies: Medical Facilities—Statement on Cruise Ship Medicine* at <http://www.iccl.org/policies/medical3.cfm>. For example: One doctor and two nurses per 1,000 passengers, and two doctors and two nurses per 2,000 passengers.

161. Brief of Appellant at 6, *Carlisle* (No. 98-6109).

162. Douglas Frantz, *Getting Sick on the High Seas: A Question of Accountability*,

cost of passengers' tickets. No doubt, passengers would be willing to pay a little extra to receive better medical care on board their floating island should the need arise.<sup>163</sup>

### C. REDUCING LITIGATION

Naturally, when a physician makes an error in the medical treatment of a patient, it does not necessarily mean that the doctor was incompetent or that the shipowner negligently hired him.<sup>164</sup> The court examines whether the cruise line exercised due diligence with its hiring process.<sup>165</sup> The cruise line must conduct a proper inquiry into the physician's credentials and background.<sup>166</sup>

Now that passengers have the more viable legal remedy of seeking damages from the cruise line instead of having to serve process on the doctor himself,<sup>167</sup> some might argue that this will clog the courts with litigation. However, having better-qualified physicians on board cruise ships should decrease claims for personal injury or death resulting from onboard medical malpractice.

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N.Y. TIMES, October 31, 1999, at 4. Princess Cruises was paying its physicians \$120,000 per year in 1999 compared to Carnival's pay to Dr. Neri in 1997 of \$1,057.62 per week. The author notes, as did the court in *Central Gulf Steamship Corp. v. Sambula*, 405 F.2d 291, 301 (5th Cir. 1968), that of course, the doctor does not have to be an "American trained and American speaking doctor[]" because superbly skilled doctors hale from many countries. However, the doctor must be able to communicate well with the passengers and understand clearly what the passenger is describing about the pain they feel or the symptoms they are experiencing. Additionally, the doctor must be properly qualified to treat a wide variety of illnesses, injuries, and emergencies. To this end, the International Council of Cruise Lines (ICCL) and the American College of Emergency Physicians (ACEP) have stepped in with their guidelines. See also Robert D. Peltz and Vincent J. Warger, *Medicine on the Seas*, 27 MAR. LAW. 425 (2003).

163. Compagno, *supra* note 37, at 392.

164. Maltzman, *supra* note 79, at 9-8, citing *De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660 (1943); *The Korea Maru*, 254 F. 397 (9th Cir. 1918); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832 (S.D.N.Y 1935). See also email interview with Andrew Hastings, Former Passenger Service Representative with Royal Cruise Line (September 19, 2003, 09:45:19 - 0700) (regarding handling medical disembarkations and deaths: a passenger would come aboard with a terminal illness like congestive heart failure. They "knew they were [terminally] ill, [they] would book a cruise and then take a turn for the worse." Often, it was not the doctor's fault, and the doctor was not sued. "I [] remember feeling it was almost like they intended to die 'happily' on the ship.")

165. Maltzman, *supra* note 79, at 9-9.

166. *Id.*

167. Brief of Appellant at 8, *Carlisle* (No.98-6109) (discussing the cases in which it has been impossible to establish personal jurisdiction over the ship's doctor). See also Maltzman, *supra* note 79, at 9-19 (discussing personal jurisdiction over shipboard doctors); Interview with Charles R. Lipcon, *supra* note 21 (discussing the fact that the Carlises were never able to serve process on Dr. Neri).

*Part VI: CONCLUSION*Expanding the *Carlisle v. Carnival Corp.* Holding

Although the *Carlisle* court did not so hold, I conclude that its reasoning entails that cruise ship owners have a nondelegable duty to provide medical care for passengers, just as they do for their crewmembers.<sup>168</sup> The shipowners, the passengers, and the courts need a more predictable and reliable system than the constantly changing doctrine of vicarious liability.

Elsewhere the doctrine of vicarious liability has evolved from a narrow scope in which the master/employer was held liable only for those acts he expressly commanded, to a much broader scope in which an employer can now be liable for the negligent acts of an independent contractor engaged in work for the employer.<sup>169</sup>

The courts' struggle over the years with the amount of control necessary for imposing vicarious liability in shipboard medical malpractice cases is evident from the *Nietes* court's holding of vicarious liability, to the *Barbetta* court's refusal to impute vicarious liability, to the *Fairley* court's finding of a potential for recovery on apparent agency theory, and now to the *Carlisle* court imposing vicarious liability under apparent agency. With this, the cruise ship passenger cases have caught up to shoreside developments.

The next step for the courts to take in passenger medical mal-

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168. 46 U.S.C. § 688 (1975). See also *De Zon*, 318 U.S. at 660; *Central Gulf Steamship Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968); *The Iriquois*, 194 U.S. 240, 241-42 (1904).

169. *Fruit v. Schreiner*, 502 P.2d 133, 139 (Alaska 1972) (employer held vicariously liable for employee who drove into the plaintiff-pedestrian while the employee was acting in the scope of business). See also Brett A. Brosseit, *Buyers, Beware: The Florida Supreme Court's Abrogation of the Apparent Authority Doctrine Leaves Plaintiffs Holding the Tab for Torts of Franchisees—Mobile Oil Corp. v. Bransford*, 23 FLA. ST. U.L. REV. 837, 862 (1996); Matt Jackson, *Symposium: Copyright Law as Communications Policy: Convergence of Paradigms and Cultures: One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 CARDOZO ARTS & ENT L.J. 367, 393 (2002); Rhett B. Franklin, *Comment: Pouring New Wine into an old Bottle: A Recommendation for Determining Liability of an Employer Under Respondeat Superior*, 39 S.D. L. REV. 570, 602-03 (1994); *Roessler v. Novak*, 858 So. 2d 1158 (Fla. 2d DCA 2003) (patient with perforated viscus sued hospital's radiologist for negligence. The Appellate Court reversed and remanded the lower court's summary judgment granted in favor of hospital. Judge Alterbernd cited *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. 3d DCA 2003) and *Shands Teaching Hosp. & Clinic, Inc. v. Juliana*, 863 So. 2d 343 (Fla. 1st DCA 2003), though he noted that the two cases were distinguishable from *Roessler*, and stated in his concurrence that he would be in favor of a nondelegable duty were it "not for the existing precedent of apparent agency"); *Shands*, 863 So. 2d 343 (holding for plaintiff-child injured by negligence of hospital's perfusionist).

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practice cases is to make the shipowner's duty of care to passengers a nondelegable duty as it essentially is for crew. After all, passengers are as much an integral part of maritime activity today as are crew, and on a cruise ship, the passengers are the very purpose of the vessel's voyage. The Carlisle Court's reasoning, but not its holding, suggests we are already there.

"[T]he duty of exercising reasonable care under the circumstances"<sup>170</sup> makes the business of medicine an integral part of the business of owning a cruise line. This affirmative duty of the shipowner includes caring for passengers' health and therefore, a duty to provide medical care and treatment as necessary. On a ship of two or three thousand passengers and one thousand crew, it is foreseeable that someone during the cruise will become ill or injured and require medical care. The ill passenger cannot shop around for the doctor of his choice. The cruise line has already chosen the physician for him.

Moreover, the cruise line has the ability to ensure that it has placed on board a properly qualified and competent doctor by not only checking into his credentials and background, but also by ensuring that the ship's hospital has appropriate and up-to-date equipment and supplies, and that proper procedures and guidelines for treatment are provided to the medical staff and are followed by them.

The *Carlisle* court's reasoning suggests that there is a nondelegable duty based on the foreseeability of a passenger getting ill enough to require medical attention. Because a doctor was on board the *Ecstasy*, the *Carlisle* court does not come forth and hold that the duty to provide care is a nondelegable one just as it is for the crew. When the courts or the legislature can develop this duty, a more predictable and reliable system will be in place, calming the seas for the fast growing cruise industry and its passengers.

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170. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

\* Juris Doctor Candidate, May 2005, University of Miami School of Law. To my wonderful three-year-old son, Nicholas, who took his first cruise when he was one, and who is always reminding me to take the time to laugh and play. I would like to express my gratitude to Professor Robert Rosen for his thoughtful insights and guidance during the writing of this casenote. My thanks also go to Professor Susan Bennett for her invaluable contribution to my legal research and writing skills when I was in her first-year LRW class.

