

SEA-SPONDEAT SUPERIOR: ARE CRUISE SHIPS LIABLE FOR ON-BOARD MEDICAL MALPRACTICE?

Anthony Todaro[†]

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I. INTRODUCTION

When people book vacations on cruise ships they envision the fun they will have snorkeling, sightseeing and exploring the beaches. Recently, however, the media and public advocates have begun to scrutinize cruise ships for several reasons. A quick internet search will turn up a plethora of public outcry demanding cruise lines fix problems that passengers unknowingly face every time they go aboard a cruise ship.¹

[†] J.D. Candidate, Seton Hall University School of Law, 2016; B.A., Business and Economics, Ursinus College, 2012. I would like to thank the members of the *Seton Hall Circuit Review* for all of the edits and suggestions provided throughout this process. I owe a special thanks to Professor Kip Cornwell who guided and assisted me through the most

When buying tickets, outbreaks of norovirus or sustaining a serious injury are far from the mind of most passengers.² These issues are quite prevalent, however, and vacationers should be able to rely on the ship's infirmary to prevent the spread of serious illnesses and treat injuries.

Absent the minds of most passengers, cruise ship companies are bound almost exclusively by nineteenth century maritime law which differs significantly from the common and statutory law governing land-based torts.³ In what has become known as the "Barbetta rule," passengers are barred from bringing a medical malpractice lawsuit against a cruise ship company for injuries suffered at the hands of medical physicians in the ship's infirmary.⁴ Unlike hospitals which can be held vicariously liable for a doctor's medical negligence, the Barbetta rule reflects the long standing admiralty and maritime tradition that ship owners should not be held vicariously liable for medical negligence occurring within the infirmary because physicians are aboard the ship *merely for the convenience of passengers* and cannot control the patient's treatment.⁵ Under this logic, a cruise ship company bears no responsibility for onboard medical negligence despite the infirmary being the only medical facility passengers can access while at sea.

difficult stages in writing this Comment. Finally, I would like to thank my family and friends for the love and support that made all of my success possible.

¹ Seth Cline, *The 8 Worst Cruise Ship Disasters*, U.S. NEWS, (Feb. 14, 2013), <http://www.usnews.com/news/articles/2013/02/14/the-eight-worst-cruise-ship-disasters>; see also Meredith Galante, *10 Other Horrifying Cruise Ship Disasters*, BUSINESS INSIDER (Jan. 18, 2012), <http://www.businessinsider.com/costa-concordia-cruise-ship-disasters-2012-1>.

² Centers for Disease Control and Protection, *Vessel Sanitation Program: Facts About Noroviruses on Cruise Ships*, <http://www.cdc.gov/nceh/vsp/pub/norovirus/norovirus.htm> (last updated Aug. 5, 2013) (providing facts regarding contagious noroviruses which spread easy aboard cruise ships where many people are in close quarters).

³ Thomas A. Dickerson & Jeffrey A. Cohen, *Medical Malpractice on the High Seas*, N.Y. L. J. 1 (Mar. 3, 2015), https://www.nycourts.gov/courts/9jd/TacCert_pdfs/Dickerson_Docs/medicalmalpractice.pdf ("[P]assengers may travel on 21st-century cruise ships, but their rights and remedies for injuries sustained on or off the cruise ship are governed, in many cases, by 19th-century legal principles.").

⁴ See *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1371–72 (5th Cir. 1988).

⁵ Compare *Bercel v. HCA Health Servs. of Texas, Inc.*, 881 S.W.2d 21, 24–25 (Tex. 1994) (a patient may bring a negligence claim against a mental hospital despite the treating psychiatrist's status as an independent contractor because the hospital was required by statute to ensure patients received "adequate medical and psychiatric care and treatment"), and *Blanton v. Moses Cone Hosp.*, 354 S.E.2d 455, 457–59 (N.C. 1987) (a patient may allege that a hospital is vicariously liable for the malpractice committed by the treating doctor even though the doctor was not the hospital's agent because based on ordinary negligence at common law, a reasonably prudent hospital would have found it necessary to ascertain the doctor's qualifications prior to allowing him to perform surgery), with *Barbetta*, 848 F.2d at 1371–72 (5th Cir. 1988), and *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266–67 (Mass. 1891).

The Eleventh Circuit, however, has recently taken a stand against the *Barbetta* rule's applicability to cruise ships in one of its latest decisions, *Franza v. Royal Caribbean*.⁶ The Eleventh Circuit created a split between the circuit courts by holding in direct conflict with the Fifth Circuit's decision in *Barbetta v. S/S Bermuda Star*, which was the last case agreeing with the maritime tradition and gave it a name – the *Barbetta* Rule.⁷

The intention of this Article is not to analyze possible reasons for the validity of such a rule. Rather, this Article brings to light a newly-created circuit split and suggests a solution based on a thorough analysis of the issue. One of the questions this Article addresses is: how a hospital may be held vicariously liable for medical malpractice committed by doctors, but yet a cruise ship is usually exempt from the doctrine of respondeat superior for identical medical malpractice claims? And in doing so, this Article argues for the adoption of a uniform rule that dismisses the logic behind applying the *Barbetta* rule to today's cruise ships. By using the Eleventh Circuit's decision in *Franza* as the initial framework, this Article offers a modern rule allowing passengers injured by onboard medical malpractice to bring a claim against a cruise ship company. Only once such suggestions are implemented uniformly will medical patients aboard cruise ships receive the same protections afforded to patients treated at healthcare facilities on land.

To develop a solution, the roots of maritime law must be examined to interpret the complexities that make an easy solution to this problem almost impossible. Part II of this Article offers a detailed synopsis of the origins of maritime law that provides the basis for the *Barbetta* rule. An understanding reveals that, in some respects, maritime law has drifted away from other bodies of law. Part III addresses the circuit split at the core of this Article. The Fifth Circuit's decision in *Barbetta* relied on traditional maritime law to deny a vacationer the ability to bring a claim alleging medical malpractice against the carrier cruise line.⁸ The Eleventh Circuit's ruling finds that a passenger may bring a claim against a cruise ship owner for medical malpractice committed by the carrier's employed physician aboard the ship.⁹ Part IV analyzes the circuit split between the Fifth and Eleventh circuits and articulates possible solutions by analyzing traditional maritime law in the context of the modern cruise vacation industry. Lastly, this Article concludes by arguing that the other circuit courts should adopt the Eleventh Circuit's conclusion. Not only does the proposed solution provide fairness, but based on the circumstances of

⁶ *Franza v. Royal Caribbean*, 772 F.3d 1225, 1238 (11th Cir. 2014).

⁷ *Id.*; *Barbetta*, 848 F.2d at 1367, 1369–70.

⁸ *Barbetta*, 848 F.2d at 1367, 1369–70.

⁹ *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1248 (11th Cir. 2014).

present day maritime law, it is no longer appropriate to apply century old law to modern medical malpractice claims.

II. THE HISTORY BEHIND THE BARBETTA RULE

A. Maritime and Admiralty Jurisdiction

Maritime and admiralty law is its own body of law with original jurisdiction to hear such cases residing with the federal judiciary.¹⁰ The Constitution provides that “[t]he judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction.”¹¹ This means that the federal courts will typically have original jurisdiction to hear any issue regarding admiralty and maritime law. But what matters constitute admiralty or maritime? Moreover, what substantive laws are federal courts to apply to maritime and admiralty lawsuits?

Pre-twentieth century cases defining the scope of admiralty and maritime jurisdiction provided that such jurisdiction exists when the wrong occurs on “navigable waters.”¹² Over time, however, this simple distinction became murky as cases arose in which the wrong originated on land, but was later suffered on the water, or vice versa.¹³ To resolve this problem, the Supreme Court touched upon the test for determining admiralty and maritime jurisdiction by stating that not only must the wrong occur on navigable waters, but must also bear a “maritime nexus – some relationship between the tort and traditional maritime activities[.]”¹⁴ As it relates to the issue at hand, onboard medical malpractice is a tort that bears a maritime nexus to maritime activities and, therefore, is within the maritime and admiralty jurisdiction.

The federal judiciary has explained that “with admiralty jurisdiction comes the application of substantive admiralty law.”¹⁵ Without relevant legislation from Congress, the federal judiciary is to impose general maritime case law.¹⁶ The general maritime law is defined as “an amalgam of traditional common-law rules, modifications of those rules, modifications of those rules, and newly created rules” specifically tailored to the admiralty and maritime industry.¹⁷ This explains the difference

¹⁰ U.S. Const. art. III, §2, cl. 1.

¹¹ *Id.*

¹² *Plymouth*, 70 U.S. 20, 34–36 (1866).

¹³ *See e.g.*, *Smith v. Lampe*, 64 F.2d 201, 202 (6th Cir. 1933); *Hess v. United States*, 259 F.2d 285, 289–90 (9th Cir. 1958); *Chapman v. Grosse Pointe Farms*, 385 F.2d 962, 963–64 (1967).

¹⁴ *Exec. Jet Aviation v. City of Cleveland*, 409 U.S. 249, 256 (1972).

¹⁵ *E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986).

¹⁶ *Id.*

¹⁷ *Id.* at 864–65.

between medical malpractice claims brought against a hospital versus a cruise ship company. While a patient's ability to bring a medical malpractice suit against a hospital has been codified by statute and recognized by case law, no statute allows for a passenger to initiate a lawsuit against a ship owner for medical negligence.¹⁸ Moreover, the relevant case law holds to the contrary by barring claims against the ship owner for onboard medical negligence because a treating physician was brought aboard for the convenience of the passengers and the ship owner does not have any control over the treatment received by the claimant-passenger.¹⁹

B. Evolution of Medical Malpractice Litigation Against Hospitals and Medical Centers

The sharp distinction between hospitals and ship infirmaries did not always exist. In fact, hospitals and related medical centers once benefitted from a broad protection from the doctrine of respondeat superior in part due to the "charitable immunity doctrine"²⁰ which was applied in a similar fashion to the *Barbetta* rule.

American hospitals were traditionally exempt from vicarious liability arising from a doctor's medical negligence.²¹ Hospitals were predominately charitable institutions financed by religious organizations and the philanthropy of the wealthy.²² The premise of the charitable immunity doctrine was that hospitals should not be liable for negligent treatment rendered by a doctor because these facilities were established merely to help the sick and insane rather than profiting off attempts to cure and prevent disease.²³

Additionally, looking back to the 1800s, case law on this issue was sparse because only a small percentage of physicians treated patients in hospitals.²⁴ Typically, doctors would visit, and even perform surgery, on patients within their homes.²⁵ As a result, identical to the *Barbetta* rule,

¹⁸ Robert D. Peltz, *Has Time Passed Barbetta By?*, 25 U.S.F. MAR. L.J. 1, 7–9 (2011) (discussing guidelines that cruise ships adhere to, but noting the lack of regulations or applicable laws aimed at protecting vacationers who seek onboard treatment).

¹⁹ See *Laubheim v. De Koninglyke N.S. Co.*, 13 N.E. 781, 782 (N.Y. 1887); *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266–67 (Mass. 1891); *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918).

²⁰ See Roger N Braden & Jennifer L. Lawrence, *Medical Malpractice: Understanding the Evolution – Rebuking the Revolution*, 25 N. KY. L. REV. 675, 677 (1998).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 678, 681; see also *McDonald v. Mass. Gen. Hosp.*, 120 Mass. 432 (1876).

²⁴ Braden & Lawrence, *supra* note 20, at 677.

²⁵ Braden & Lawrence, *supra* note 20, at 677–78.

the charitable immunity doctrine took form and shielded hospitals from vicarious liability arising out of a doctor's negligence.²⁶

At the turn of the twentieth century, advancements in medical technology and the health care system spurred reformations of these traditions.²⁷ Hospitals were no longer considered secondary or lower-class institutions for health care because the convenience of modern equipment and a central staff attracted many doctors, drawing them away from making house calls.²⁸ Over time, health care institutions became an accepted place to perform operations and evaluate patients. Even wealthy patients who once preferred the comfort of their homes began to embrace the centralization that hospitals were now able to provide.²⁹

Gradually, health care institutions grew from merger facilities reliant on charity into complex medical centers focused primarily on profitability.³⁰ The control of hospitals began to transfer from the hands of religious organizations and good Samaritans to the medical physicians themselves or a board of directors.³¹ This conflict resulted in the erosion of the charitable immunity doctrine as it became unequitable to shield hospitals from vicarious liability while allowing such institutions to profit from treatment rendered by their physicians.³²

The medical malpractice system we are all accustomed to developed from this evolution, and is premised on three primary justifications: society finds it appropriate for an innocent victim to recover from the negligent individual who caused the victim's injury or loss; the innocent victim should not be "rendered destitute, and socially unproductive" because of a lack of financial means to remediate the injuries sustained and to serve as a deterrent effect for health care professionals and providers to ensure proper services will be rendered in the future.³³ To accomplish these justifications, those who have suffered injuries or loss due to a physician's medical negligence may hold the professional *as well as* the health care provider vicariously liable for the claimant's damages pursuant to the doctrine of respondeat superior.³⁴ Medical providers could

²⁶ Braden & Lawrence, *supra* note 20, at 678.

²⁷ Braden & Lawrence, *supra* note 20, at 677–78.

²⁸ Braden & Lawrence, *supra* note 20, at 678.

²⁹ Braden & Lawrence, *supra* note 20, at 678, (citing BARRY R. FURROW ET AL., HEALTH LAW CASES, MATERIALS AND PROBLEMS, 32 (3d ed. 1997)).

³⁰ Braden & Lawrence, *supra* note 20, at 681.

³¹ Braden & Lawrence, *supra* note 20, at 679.

³² Braden & Lawrence, *supra* note 20, at 679.

³³ John Jacobi & Nicole Huberfeld, *Quality Control, Enterprise Liability and Disintermediation in Managed Care*, 29 J. L. MED. & ETHICS 305, 307–309 (2001).

³⁴ Peter A. Bell, *Legislative Intrusion into the Common Law of Medical Malpractice, Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 946–47 (1984).

be held vicariously liable on the basis of apparent agency.³⁵ Accordingly, courts began to utilize judicial-made tests to chip away at the charitable immunity doctrine by establishing a hospital's liability for a physician's negligence.³⁶

C. Development of the Barbetta rule

New York federal court presided over one of the first cases contributing to the development of the Barbetta rule. In *Laubheim v. De Koninglyke Neder Landsche Stoomboot Maatschappij*, a passenger aboard a steamship from Rotterdam to New York fell and severely injured her knee.³⁷ The passenger was escorted to the vessel's surgeon, an employee of the steamboat company.³⁸ The injured passenger subsequently sued the steamboat company alleging that the surgeon's treatment was so poor that her leg had to be amputated once she arrived in New York.³⁹

The court stated that when a ship owner or carrier hires a surgeon, the owner or carrier has a duty to ensure the surgeon is "reasonably competent."⁴⁰ Thus, a ship owner or carrier can only be liable if it fails to hire a "reasonably competent" medical professional.⁴¹ Since the steamboat company exercised reasonable care and diligence in hiring its surgeon, the company was not liable for any negligent medical treatment the passenger claimed to have received onboard the steamboat.⁴²

This shield from vicarious liability was further discussed in *O'Brien v. Cunard*.⁴³ In *O'Brien*, all passengers were required by law to receive a vaccination prior to landing in Massachusetts.⁴⁴ Accordingly, the carrier employed a medical physician to administer the vaccination to all passengers before the vessel reached its final destination.⁴⁵ One passenger sued the carrier after arriving in Massachusetts, arguing that she was negligently vaccinated by the physician while aboard the vessel.⁴⁶

The court reiterated that once a carrier decides to bring aboard a physician, the carrier undertakes the duty to ensure the medical professional hired is competent to perform all tasks reasonably expected

³⁵ *Id.*

³⁶ Braden & Lawrence, *supra* note 20, at 680.

³⁷ *Laubheim v. De Koninglyke N.S. Co.*, 13 N.E. 781, 782 (N.Y. 1887).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *O'Brien v. Cunard*, 28 N.E. 266, 266 (Mass. 1891).

⁴⁴ *Id.*

⁴⁵ *Id.* at 266–67.

⁴⁶ *Id.* at 266.

of a physician aboard a ship for such a voyage.⁴⁷ Because the carrier satisfied its obligation to employ a competent doctor, the carrier was not vicariously liable for any negligence committed by the physician in performing the medical services he was employed by the carrier to provide.⁴⁸ Further, the court articulated that:

[t]he law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible for the proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier . . . owners of the ship cannot interfere in the treatment of the medical officer when he attends [to] a passenger.⁴⁹

From this holding, the federal judiciary formulated the law that will eventually be termed the Barbetta rule.⁵⁰ The ship owner or carrier's duty is merely to ensure it employs a reasonably competent and qualified medical physician and supplies the professional with the equipment necessary to properly treat those onboard.⁵¹ Once the ship owner or carrier has fulfilled these obligations, a passenger cannot hold the ship's owner or carrier vicariously liable for negligent treatment rendered by the physician because the owner cannot interfere or exercise control over the treatment.⁵² Additionally, an owner is not in the business of providing medical services to its passengers.⁵³ Rather, the physician is employed and brought aboard for the *mere convenience* of the passengers who *may elect to seek treatment* from the onboard medical professional(s).⁵⁴ This logic was

⁴⁷ *Id.* at 266–67.

⁴⁸ *Id.*

⁴⁹ *O'Brien*, 28 N.E. at 266.

⁵⁰ See *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1371–72 (5th Cir. 1988) (stating that a cruise ship company can only be vicariously liable for an employed medical physician's negligence if the company negligently hired the medical physician at fault for the claimant's injuries).

⁵¹ See e.g., *id.*, at 1369; *The Great N.*, 251 F. 826, 830 (9th Cir. 1918); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103 (E.D.Penn. 1982); *Branch v. Compagnie Gen. Transatlantique*, 11 F. Supp. 832, 832 (S.D.N.Y. 1935); *The Napolitan Prince*, 134 F. 159, 159–60 (E.D.N.Y. 1904); *O'Brien v. Cunard*, 28 N.E. 266, 267 (Mass. 1891); *Laubheim v. De Koninglyke N.S. Co.*, 13 N.E. 781, 782 (N.Y. 1887).

⁵² *O'Brien*, 28 N.E. at 267; see also *Churchill v. United Fruit Co.*, 294 F. 400 (D. Mass. 1923); accord *The Great N.*, 251 F. at 831.

⁵³ *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969); see also *O'Brien*, 28 N.E. at 267; *Di Bonaventure*, 536 F. Supp. at 103.

⁵⁴ *O'Brien*, 28 N.E. at 267.

carried into the twentieth century where it was strengthened by subsequent cases brought by passengers seeking ship owners be held vicariously liable for onboard medical malpractice committed by the medical professional(s) hired to administer treatment aboard the ship.⁵⁵

III. THE BARBETTA RULE AND THE CIRCUIT SPLIT

The Fifth Circuit's decision in *Barbetta v. S/S Bermuda Star* extended this maritime shield to the cruise line industry by holding that precedent establishes that passengers are barred from bringing a claim against a cruise ship company's negligent treatment rendered on cruise ships.⁵⁶ In *Barbetta*, a married couple vacationing in Mexico sued the cruise ship after the onboard doctor failed to discover that Mrs. Barbetta had diabetes while treating her.⁵⁷ In July of 1986, Mr. and Mrs. James and Florence Barbetta (collectively the "Barbettas") filed suit in the United States District Court for the Eastern District of Louisiana against the cruise ship - the S.S. Bermuda Star (the "Bermuda Star"), the owner of the Bermuda Star, and the company that chartered and operated the vacation.⁵⁸

The Barbettas were vacationers aboard the Bermuda Star for a cruise that departed from New Orleans and made stops in Florida and various ports in Mexico.⁵⁹ Shortly after the Bermuda Star departed from New Orleans, Mrs. Barbetta became ill and sought the assistance of the medical staff aboard the ship the following morning.⁶⁰ Mrs. Barbetta was treated aboard the Bermuda Star from January 26 until January 31.⁶¹ During that time, Mrs. Barbetta's condition continued to worsen.⁶² She was finally transported from the Bermuda Star on January 31 to a hospital after she developed severe pneumonia and fell into a coma.⁶³

The Barbettas sued the ship and its management for "[medical] malpractice, neglect, carelessness, and negligence" committed by the medical staff that treated Mrs. Barbetta aboard the Bermuda Star.⁶⁴ The Barbettas claimed that Mrs. Barbetta was originally suffering from a Type-A diabetes condition and the medical staff's failure to properly diagnose

⁵⁵ See *The Napolitan Prince*, 134 F. 159, 159-60 (E.D.N.Y. 1904); *Churchill*, 294 F. at 400.

⁵⁶ *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1367, 1369-70. (5th Cir. 1988).

⁵⁷ *Id.* at 1365.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1366.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Barbetta*, 848 F.2d at 1366.

⁶³ *Id.*

⁶⁴ *Id.*

the illness resulted in the significant deterioration of her health.⁶⁵ The Barbettas claimed to have incurred \$1,000,000 in damages which included medical treatment, pain and suffering, lost wages, loss of consortium and loss of service, society, and support as a result of the ordeal aboard the Bermuda Star.⁶⁶ The Barbetta's further alleged that the Bermuda Star, its owners and management were liable because they failed in their obligation to employ competent medical professionals and that the malpractice occurred during the course and scope of employment rendering the named defendants vicariously liable for the negligent medical treatment Mrs. Barbetta received.⁶⁷

In a matter of first impression, the District Court stated that a carrier company is not vicariously liable in instances where the ship's doctor negligently treats a passenger.⁶⁸ The court reasoned that under maritime law, the doctrine of respondeat superior cannot apply to a carrier vessel because there is no obligation to employ an onboard medical professional.⁶⁹ The court further reasoned that holding such parties liable would result in carrier vessels refusing to bring doctors aboard a ship entirely rather than to supply medical treatment as an added convenience to passengers.⁷⁰ Additionally, the ticket the Barbettas purchased contained a contract with a disclaimer provision that made it clear that the doctor aboard was not a "servant or agent" of the Bermuda Star, and that the company would not be liable for the doctor's malpractice.⁷¹ The District Court subsequently granted summary judgment in favor of all named defendants.⁷² The Fifth Circuit subsequently took the case on appeal to determine the issue of whether the doctrine of respondeat superior imposes liability on the cruise ship company if a doctor employed by the company renders negligent treatment to a passenger.⁷³

The Fifth Circuit relied upon the longstanding maritime principle that if a carrier employs a doctor, it is done for the convenience of the passengers and the carrier must only ensure that the doctor is competent and duly qualified.⁷⁴ But in either instance, a doctor's negligence in treating a passenger does not fall on the carrier.⁷⁵ The Barbettas' claim

⁶⁵ *Id.* (alleging that had the doctor properly diagnosed Mrs. Barbetta's condition she would never have suffered from the later incurred medical emergencies).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Barbetta*, 848 F.2d at 1367.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 1367-68.

⁷³ *Id.* at 1368, 1372.

⁷⁴ *Barbetta*, 848 F.2d at 1369 (internal citations omitted).

⁷⁵ *Id.* (internal citations omitted).

was determined to conflict with general maritime principles which explain that a medical physician carried aboard is present only for a passenger's mere convenience.⁷⁶ Carriers are not bound by respondeat superior because the ship owner or management of the carrier lack any meaningful control over the doctor that would otherwise demonstrate the medical staff aboard is the "servant or agent" of the carrier.⁷⁷ The mere presence of a doctor aboard a ship hired by the carrier for passengers' convenience does not equate to vicarious liability.⁷⁸

The Fifth Circuit in *Barbetta* acknowledged the lone case endorsing the only conflicting view and then immediately dismissed it.⁷⁹ In *Nietes v. American President Lines, Ltd.*,⁸⁰ a California District Court opined that a vessel's medical physician that collects a salary from the carrier, is regularly employed, and subject to the rules of the carrier and the owners' demands is presumed to be an ordinary employee.⁸¹ Accordingly, the carrier is vicariously liable for any malpractice or negligence committed by the onboard physician.⁸² The *Nietes* court reasoned that the carrier's ability to exercise control over the treatment methods rendered by an onboard medical professional is an unreasonable basis for refusing to hold the carrier liable for the physician's negligent treatment rendered to a passenger.⁸³

The Fifth Circuit stated that the *Nietes* Court misunderstood respondeat superior liability by misinterpreting the carrier's control over the doctor's general actions versus the requirement to control the doctor's treatment methods.⁸⁴ In the context of maritime law, the carrier or ship owner lacks "the expertise to meaningfully evaluate, and therefore, control a doctor's treatment of his patients and the power, even if it has knowledge, to intrude into the physician-patient relationship."⁸⁵

The Fifth Circuit made one concession in the *Barbetta* decision.⁸⁶ The court stated that while a carrier does not have an obligation to provide medical personnel for passengers, the carrier does have the responsibility of exercising "reasonable care to furnish such aid and assistance as

⁷⁶ *Id.* (citing *O'Brien v. Cunard*, 28 N.E. 266, 267 (Mass. 1891)).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1370–71.

⁷⁹ *See id.*

⁸⁰ *Nietes v. Am., President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959).

⁸¹ *Id.* at 220.

⁸² *Id.*

⁸³ *Id.* at 220–21.

⁸⁴ *Barbetta*, 848 F.2d at 1370–71.

⁸⁵ *Id.*

⁸⁶ *Id.* (citing 1 M. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* §39 (3d ed. 1975)).

ordinarily prudent persons would render under similar circumstances.”⁸⁷ But simply put, bringing aboard a doctor does not create a duty on the carrier pursuant to respondeat superior.⁸⁸

A. The Logic Behind the Fifth Circuit’s Decision: Summing up the Barbetta Rule

To clarify, the issue at hand is governed by maritime common law because these are tort actions claimed to have occurred while in navigable waters.⁸⁹ Maritime law and an overwhelming majority of jurisdictions and circuits have “establish[ed] that a cruise line cannot be held vicariously liable for the negligence of its ship’s doctor in the care and treatment of passengers.”⁹⁰ If and when a carrier opts to bring a doctor aboard for its passengers, the carrier has the obligation of ensuring the doctor is “competent and duly qualified.”⁹¹ The carrier’s duty is satisfied when the carrier is deemed to have diligently inquired into the competency of the doctor.⁹² If the carrier breaches this duty, it is responsible only for its own negligence; never the negligence of the doctor.⁹³ Under maritime principles, the carrier’s only responsibility is to guarantee that an employed medical professional is duly qualified and is a competent medical physician.⁹⁴

The basis for this principle in admiralty law contains two primary justifications: a cruise ship does not possess the expertise to control and supervise the doctor when treating a passenger and that the carrier does not have any control over the patient-physician relationship that exists between the passengers and the onboard medical staff.⁹⁵ Therefore, a passenger may bring a claim against a carrier for negligent hiring but cannot seek relief under the doctrine of respondeat superior for medical malpractice.⁹⁶ The premise underlying this rationale is that there is no maritime law that requires a carrier to bring aboard a doctor since they are

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990).

⁹⁰ *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1370 (S.D. Fla. 2005); see also *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988); *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918).

⁹¹ *Barbetta* 848 F. 2d at 1371.

⁹² *Id.* at 1367–69.

⁹³ *Id.*; see also *The Great N.*, 251 F. 826, 826 (9th Cir. 1918).

⁹⁴ *O’Brien v. Cunard Steamship Co.*, 28 N.E. 266, 267 (1891).

⁹⁵ *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1239–44 (11th Cir. 2014).

⁹⁶ *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1345–46 (S.D. Fla. 2005).

not in the business of providing medical services.⁹⁷ A ship is not a medical facility and a doctor aboard a carrier is an independent medical physician carried by the vessel for the convenience of its passengers.⁹⁸ The passengers are free to seek medical assistance by the medical staff aboard, but such action does not render the carrier vicariously liable for the medical staff's neglect or subsequent malpractice actions.⁹⁹

B. The Franza Decision Creating a Circuit Split

The Eleventh Circuit recently split with the Fifth Circuit when the court ruled in direct opposition to the long-established maritime law and allowed for a cruise ship passenger to bring claims against the carrier for malpractice and negligence.¹⁰⁰ In *Franza*, Pasquale Vaglio ("Vaglio"), a passenger aboard a Royal Caribbean cruise ship, fell and suffered a serious head injury while docked at the port in Bermuda.¹⁰¹ Vaglio was subsequently taken to the infirmary aboard the ship.¹⁰² A nurse evaluated Vaglio and found no further treatment was necessary.¹⁰³ As they returned to their cabin, the nurse informed Vaglio's wife and family to be alert because there was a chance Vaglio had sustained a concussion.¹⁰⁴

Two hours later, Vaglio's family called 911 while aboard the ship explaining that Vaglio's health had been deteriorating since leaving the infirmary.¹⁰⁵ The emergency team aboard was slow to respond, and the medical staff refused to proceed without first obtaining a credit card number when they finally wheeled Vaglio to the infirmary for the second time.¹⁰⁶ After another delay of more than an hour, the onboard doctor evaluated Vaglio and prepared him to be transferred to a nearby Bermuda

⁹⁷ See *Laubheim v. De Koninglyke N.S. Co.*, 13 N.E. 781, 782 (N.Y. 1887); *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (Mass. 1891); *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918).

⁹⁸ *Barbetta*, 848 F.2d at 1369.

⁹⁹ See *O'Brien*, 28 N.E. at 266 (holding that carrier vessels are not liable under respondeat superior because the treatment is under the control of the passenger rather than the carrier).

¹⁰⁰ See *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1228 (11th Cir. 2014).

¹⁰¹ *Id.* at 1227. While there is some dispute as to where exactly Vaglio fell, it is certain that Vaglio fell either on a loading ramp of the ship or on the dock itself. *Id.*

¹⁰² *Id.* at 1229.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Franza*, 772 F.3d at 1229. The expenses charged went to Royal Caribbean itself because the company owned the infirmary and employed those that operated it. *Id.* This is important to note because the origins of the *Barbetta* rule relied on the onboard doctor being an independent contractor rather than an employee. *Id.* at 1234–35. Additionally, it establishes control elements central to the continued validity of the *Barbetta* rule.

hospital.¹⁰⁷ Upon arrival, the medical staff at the hospital concluded too much time had lapsed and there was nothing the hospital could do for Vaglio's internal injuries.¹⁰⁸ Sadly, Vaglio was airlifted to a hospital in New York the following morning, where he remained in intensive care until his death a week later.¹⁰⁹

On January 10, 2013, Vaglio's daughter, serving as the representative of the Estate, brought a claim against Royal Caribbean.¹¹⁰ Franza argued that, under the doctrine of actual authority, Royal Caribbean was liable for the negligent acts of the onboard medical staff serving as Royal Caribbean's agents.¹¹¹ In the alternative, under apparent authority, Royal Caribbean was liable for having "manifested to [Vaglio] . . . that its medical staff . . . were acting as its employees and/or agents," and Vaglio "relied to his detriment on his belief that the physician and nurse were direct employees or actual agents [of Royal Caribbean Cruises]."¹¹² The District Court dismissed the case relying on the *Barbetta* rule reasoning that the claims were "predicated on duties of care which are not recognized under maritime law."¹¹³

On appeal, the Eleventh Circuit held that a ship-owner *can* be held vicariously liable for medical malpractice pursuant to the agency relationship Royal Caribbean possessed with the negligent medical staff.¹¹⁴ Accordingly, Franza's complaint alleging Royal Caribbean was vicariously liable for onboard medical malpractice should not have been dismissed.¹¹⁵ The Eleventh Circuit articulated that the existence of an agency relationship in maritime law was a question of fact.¹¹⁶ The primary consideration in finding a carrier liable under respondeat superior is the carrier's control over onboard workers as their principal.¹¹⁷ Thus, the elements Franza was required to establish were whether: "the [carrier as] principal acknowledge[d] the agent will work for it, the agent [manifested]

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* The complaint initially contained a count of "negligent hiring, retention[,] and training by Royal Caribbean" but was abandoned on appeal to the Eleventh Circuit. *Id.*

¹¹¹ *Id.* at 1230.

¹¹² *Franza*, 772 F.3d at 1230.

¹¹³ *Id.* (quoting *Franza v. Royal Caribbean Cruises, Ltd.*, 948 F. Supp. 2d 1327, 1331 (S.D. Fla. 2013) (noting that due to established maritime principles, Franza failed to state a claim upon which relief may be granted)).

¹¹⁴ *Id.* at 1238 (emphasis added).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1235–36 (citing *Naviera Netuno S.A. v. All Int'l Freight Forwarders, Inc.*, 709 F. 2d 663, 665 (11th Cir. 1983)).

¹¹⁷ *Franza*, 772 F.3d at 1236.

an acceptance of the undertaking, and control by the principal; over the actions of the agent [existed].”¹¹⁸

Franza’s complaint sufficiently demonstrated the medical personnel aboard the ship were employed and paid directly by Royal Caribbean, hired to work aboard the ship in the infirmary that was owned and equipped by Royal Caribbean, wore Royal Caribbean uniforms and were “*under the command* of the ship’s superior officers.”¹¹⁹ The Eleventh Circuit determined Royal Caribbean had exclusive and total control over the medical professionals aboard.¹²⁰ With such a relationship readily apparent, the *Franza* court concluded that adherence to the *Barbetta* rule was improper.¹²¹

The Eleventh Circuit dismissed the two prong control test relied upon in past decisions, including *Barbetta*.¹²² As a policy matter, medical professionals are expected to base treatment on their own independent judgment.¹²³ Thus, Royal Caribbean’s alleged inability to control the doctor’s treatment did not eliminate the possibility of an agency relationship.¹²⁴ Additionally, the carrier’s inability to intrude into a patient-physician relationship is not required for a carrier-doctor agency relationship to exist.¹²⁵ Thus, the Eleventh Circuit found no problem with treating the agency relationship between carrier and doctor the same as the relationship between a land-based medical services company and a doctor.¹²⁶

C. Pleading Requirements Post-Franza

The Eleventh Circuit recognized the circuit split with the Fifth Circuit and highlighted an additional method passengers injured by onboard malpractice may take: apparent authority.¹²⁷ Apparent authority is an equitable theory that does not require claimants to establish the control element maritime law emphasizes before a court may appropriately impose vicarious liability upon the carrier.¹²⁸ Therefore, apparent

¹¹⁸ *Id.* (quoting *Whetstone Candy Co. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1077 (11th Cir. 2003)).

¹¹⁹ *Id.* at 1237.

¹²⁰ *Id.*

¹²¹ *Id.* at 1238–39 (noting that courts should no longer “discern a sound basis in law for ignoring the facts alleged in individual medical malpractice complaints and wholly discarding the same rules of agency that we have applied to other maritime tort cases”).

¹²² *Id.*

¹²³ *Franza*, 772 F.3d 1225, 1239–40.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 1241.

¹²⁷ *Id.* at 1249 (“apparent authority is a distinct theor[y] of liability”).

¹²⁸ *Id.*

authority was recognized as the proper decision if the carrier's conduct equitably prevented it from denying the existence of an agency relationship rather than having carrier liability contingent on the notion of control elements.¹²⁹

The Eleventh Circuit concluded it was improper to dismiss Franza's complaint because the doctrine of apparent authority is dependent on the underlying facts.¹³⁰ The *Franza* court determined that Royal Caribbean represented the medical staff as its agents to Vaglio.¹³¹ These representations led Vaglio and his family believe he was under the care of competent and duly qualified Royal Caribbean doctors that were authorized to treat him on Royal Caribbean's behalf, and Vaglio relied on those representations and subsequent beliefs to his detriment.¹³² For these reasons, the Eleventh Circuit reversed the lower district court's opinion and allowed Franza to bring a suit against Royal Caribbean pursuant to respondeat superior.¹³³

IV. BRIDGING THE GAP IN MEDICAL MALPRACTICE CLAIMS

It can no longer be said that a medical physician comes aboard a cruise ship merely for the convenience of the passengers. To a degree, cruise ships are required to have an infirmary operated by several qualified physicians.¹³⁴ Almost without exception, cruise lines have agreed to adhere to the standards established by the American College of Emergency Physicians ("ACEP").¹³⁵ In their publication, the ACEP goes well beyond requiring cruise ships to provide a well supplied infirmary for passengers.¹³⁶ The ACEP's Health Care Guidelines for Cruise Ship Medical Facilities outlines minimum credentialing and training standards, and also includes medical policies and procedures that must be followed when treating passengers.¹³⁷

Cruise ships now use these infirmaries as an additional means of generating revenue. When a passenger visits a ship's medical center they

¹²⁹ *Franza*, 772 F.3d at 1249–50; *Huang v. Carnival Corp.*, 909 F. Supp. 2d 1356, 1361 (S.D. Fla. 2012).

¹³⁰ *Id.* at 1251–52.

¹³¹ *Id.* at 1252.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Am. College of Emergency Physicians, *Healthcare Guidelines for Cruise Ship Medical Facilities*, ACEP Policy Statements, <http://www.acep.org/content.aspx?id=29500> (last visited April 29, 2016).

¹³⁵ Robert D. Peltz & Gretchen M. Nelson, *New Destinations for Shipboard Malpractice*, 51 TRIAL 38, 40 (2015).

¹³⁶ *Id.*

¹³⁷ Am. College of Emergency Physicians, *supra* note 134.

are charged a “reasonable fee” for medical treatment.¹³⁸ Although cruise ship companies have refused to disclose their pricing schedules for treatment costs, research indicates that the costs equate to standard American medical bills charged by American hospitals.¹³⁹ Over the counter medications may be offered for free in some circumstances; however, other cruises have been reported to charge hefty sums for Aspirin.¹⁴⁰ While passengers can count on the cruise line ensuring the pharmacy is fully stocked, passengers should expect to pay 10 percent over retail at a minimum for prescription drugs.¹⁴¹ Passengers should not fear, however, because although medical expenses must be paid out of pocket immediately – akin to Vaglio being required to hand over a credit card before seeing a doctor – cruise lines even offer medical insurance serving as secondary coverage which will reimburse passengers for up to \$10,000 in onboard medical services.¹⁴²

The salaries paid to cruise ship physicians are significantly less than American doctors employed by a hospital. The average ordinary physician earns \$189,000.00 per year.¹⁴³ Conversely, doctors working aboard cruise ships make around \$80,000.00 less per year than doctors working in American hospitals.¹⁴⁴ Simple math demonstrates that when all factors are equal, including prices charged for treatment, after deducting physician salaries it is obvious that a cruise ship’s infirmary generates large revenues for the cruise line. For these reasons, it is evident cruise ships are profiting off of medical services and therefore it is not appropriate to allow cruise ships to invoke the *Barbetta* rule.

The first justification supporting the *Barbetta* rule was that cruise ships bring aboard a physician merely for the convenience of passengers

¹³⁸ See Royal Caribbean Int’l., *Feel Right at Home: Onboard Medical Services*, All About Cruising, <http://www.royalcaribbean.com/allaboutcruising/accessibleseas/feelRightAtHome.do> (last visited April 29, 2016).

¹³⁹ Teresa Machan, *Cruise Passengers Warned Over Medical Bills*, THE TELEGRAPH (Oct. 29, 2013), <http://www.telegraph.co.uk/travel/cruises/news/Cruise-passengers-warned-over-medical-bills/>.

¹⁴⁰ *Id.*; see also Jim Hollander, *Onboard Medical Facilities Have Cruise Passengers Covered: Health Professionals and High-Tech Machines Are Available on Ships to Treat Many Potential Ailments*, LA. TIMES (June 26, 2005), <http://articles.latimes.com/2005/jun/26/travel/tr-insider26>.

¹⁴¹ Hollander, *supra* note 140.

¹⁴² See *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1229 (11th Cir. 2014); see also Carnival, *Carnival’s Cruise Vacation Protection*, <http://www.carnival.com/about-carnival/vacation-protection.aspx> (last visited April 29, 2016).

¹⁴³ Jacquelyn Smith, *The Best- and Worst-Paying Jobs for Doctors*, FORBES (July 20, 2012), <http://www.forbes.com/sites/jacquelynsmith/2012/07/20/the-best-and-worst-paying-jobs-for-doctors-21>.

¹⁴⁴ Stephanie Chen, *Trouble at Sea: Free-Agent Doctors*, WALL ST. J. (Oct. 24, 2007), <http://www.wsj.com/articles/SB119318197257869091>.

and are not in the business of providing medical services.¹⁴⁵ In reality, modern cruise ships have pledged to be bound by the ACEP standards which require cruise ships to have an infirmary and several duly qualified physicians aboard to treat passengers.¹⁴⁶ Most importantly, cruise ships are in fact in the business of providing medical services. Treating passengers has become a lucrative source of additional revenues on cruise ships.¹⁴⁷ The change from providing medical treatment out of generosity to profit-making resulted in the erosion of the charitable immunity doctrine.¹⁴⁸ The justification being that since hospitals shifted their purpose from assisting the poor and sick to profit generating, they cannot seek to utilize equitable immunities employed in the past to incentivize goodwill.¹⁴⁹ Thus, it is time for the rejection of the *Barbetta* rule because while physicians in the past treated passengers for convenience, cruise ships today provide outlined medical services for a profit.

The second justification for the *Barbetta* rule – that cruise ship companies cannot be held vicariously liable because control over treatment lies solely with the physician and patient – is equally unconvincing.¹⁵⁰ The Eleventh Circuit has provided a workable method for imposing vicarious liability under the doctrine of respondeat superior that should be adopted by the other circuits.¹⁵¹

The two-prong concept of control is most important to the validity of the *Barbetta* rule: the carrier or ship owner is unable to dictate the types of treatment rendered and cannot interfere with a patient-physician relationship.¹⁵² These fundamental principles have been embedded in nineteenth century maritime law.¹⁵³ The justification was explained in *Barbetta*:

The work the physician or surgeon does . . . is under the control of the passengers themselves. It is their business,

¹⁴⁵ See *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988).

¹⁴⁶ Am. College of Emergency Physicians, *supra* note 134.

¹⁴⁷ Chris Gray, *Cruise Ship Medical Bills That Leave You Feeling Seasick, Which? Conversation: Health, Travel & Leisure*, WHICH.CO.UK (Oct. 24, 2013), <http://conversation.which.co.uk/travel-leisure/cruise-ship-medical-bills-that-leave-you-feeling-seasick/>.

¹⁴⁸ See *Jacobi & Huberfeld*, *supra* note 33, at 307–309.

¹⁴⁹ *Jacobi & Huberfeld*, *supra* note 33, at 307–309.

¹⁵⁰ *Barbetta*, 848 F.2d at 1369.

¹⁵¹ *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1241 (11th Cir. 2014).

¹⁵² *Barbetta*, 848 F.2d at 1368 (stating that control is a prerequisite for respondeat superior in maritime law).

¹⁵³ See *id.* (relying on *O'Brien*, *Churchill*, *The Great Northern*, and other relevant decisions that reference the element of control lacking to satisfy respondeat superior liability aboard ships).

not the business of the carrier . . . The master or owners of the ship cannot interfere in the treatment of the medical official when he attends [to] a passenger. He is not their servant engaged in their business, and subject to their control as to his mode of treatment.¹⁵⁴

Emphasizing this protection from the doctrine of respondeat superior, the Fifth Circuit stated that it was inappropriate to hold “shipping companies” vicariously liable because the vessel is not “in the business of providing medical services to passengers.”¹⁵⁵ The rationale: the lack of a “master-servant relationship” between the ship owner and the negligent physician.¹⁵⁶

The Eleventh Circuit, however, opted to take a favorable view of a line of maritime cases that focused on whether it would be “unjust and unreasonable” for a carrier to dodge responsibility for the negligence of its agents.¹⁵⁷ The Eleventh Circuit reasoned that along with the recognition of control, there is a long tradition in maritime mandating ship owners’ answer for the negligence of onboard agents.¹⁵⁸ In referencing its broad maritime jurisdiction, the Eleventh Circuit was never bound by the *Barbetta* rule and “our experience and new conditions [sometimes] give rise to new conceptions of maritime concerns.”¹⁵⁹ The Eleventh Circuit felt it was time to reject the *Barbetta* rule based on the circumstances and mounting concerns pertaining to this unwavering traditional standard safeguarding cruise line companies from onboard medical malpractice claims.¹⁶⁰

The Eleventh Circuit concluded that new conditions gave rise to “new conceptions and maritime concerns” that required a shift in the relevant legal standard.¹⁶¹ At the turn of the century, passenger vessels were being used to transport people from one land mass to another and doctors brought aboard to treat seafaring passengers were not as

¹⁵⁴ *Id.* (quoting *O’Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (1891)); *accord* *Churchill v. United Fruit Co.*, 294 F. 400, 401–02 (D. Mass. 1923); *The Great N.*, 251 F. 826, 831 (9th Cir. 1918).

¹⁵⁵ *Id.* at 1369–70 (citing *Amdur v. Zim Israel Nav. Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969)).

¹⁵⁶ *Id.* at 1370 (citing *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 104 (E.D.Penn. 1982)).

¹⁵⁷ *Frana v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1233 (11th Cir. 2014).

¹⁵⁸ *Id.* (citing *The Kensington*, 183 U.S. 263, 268 (1902); *The J.P. Donaldson*, 167 U.S. 599, 603 (1897)).

¹⁵⁹ *Id.* at 1239 (internal quotation marks omitted).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

prevalent.¹⁶² Today, however, cruise ship owners are benefiting from this same protection despite operating “state-of-the-art cruise ships that house thousands of people and operate as floating cities.”¹⁶³

The Eleventh Circuit took issue with applying the *Barbetta* rule when ships are being used as traveling vacation resorts “complete with well-stocked modern infirmaries and urgent care centers” rather than transporting individuals sprawled across the deck.¹⁶⁴ Additionally, where ships at the turn of the century would essentially disappear after leaving port, modern technology allows for ships to be in constant contact anywhere in the world.¹⁶⁵ For these reasons, the Eleventh Circuit stated the *Barbetta* rule is used more as tradition than for “the strength of its reasoning” and that “[t]he reasons that originally led other courts to adopt the rule have long since disappeared.”¹⁶⁶

While the Eleventh Circuit reiterated the requirement that a claimant must show that the ship owner represented the doctor as its agent and that the passenger relied on the representation to his or her detriment; the *Franza* decision made the burden of proof easy to satisfy.¹⁶⁷ Essentially, the Eleventh Circuit reasoned that vicarious liability may be imposed under apparent authority when a ship owner’s conduct, or subsequent inaction, can equitably prevent it from “denying the existence of an agency relationship.”¹⁶⁸ Therefore, a passenger bringing suit alleging medical malpractice must establish these elements as well as facts that prove the carrier had control over the treating physician or onboard medical staff.¹⁶⁹

In *Franza*, the factors considered as “probative” of control in the context of maritime respondeat superior (or apparent authority) were:

1. Direct evidence of the principal’s right to or actual exercise of control;
2. The method of payment for an agent’s services, whether by time or by the job;
3. Whether or not the equipment necessary to perform the work is furnished by the principal; and

¹⁶² See *O’Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266–67 (1891) (noting that a treating physician was brought aboard for the convenience of the passengers).

¹⁶³ *Franza*, 772 F.3d at 1239.

¹⁶⁴ *Id.* (transporting people from one area to another was argued by many as the basis for the *Barbetta* rule).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (citing *United States v. Reliable Transfer Co.*, 421 U.S. 397, 410 (1975)).

¹⁶⁷ *Peltz & Nelson*, *supra* note 135, at 40.

¹⁶⁸ *Franza*, 772 F.3d at 1249–50.

¹⁶⁹ *Id.* at 1236–37.

4. Whether the principal had the right to fire the agent.¹⁷⁰

Importantly, the entire medical staff were considered members of the ship's crew and were paid directly by Royal Caribbean.¹⁷¹ Additionally, Royal Caribbean paid for the supplies and all medical equipment aboard the vessel.¹⁷²

After analyzing the circuit split, it has become clear that the Eleventh Circuit's rationale in *Franza* should provide guidance for the other circuits in the future because far from solely transporting passengers from one location to another, modern cruise ships have become floating resorts attracting vacationers for onboard enjoyment.¹⁷³ Drifting from traditional maritime practices to the more modern tourist industry has caused some confusion with how to apply maritime precedent since increasing business also brings along additional liabilities. Cruise ships are not vessels engaged in maritime shipping, nor the sort of vessel incorporated by nineteenth century protections from respondeat superior and thus, not protected by the *Barbetta* rule.

The *Barbetta* rule was established to protect *shipping vessels* from liability when a third-party passenger was injured.¹⁷⁴ At the turn of the century, when a non-crew member was injured, a crew member or someone brought aboard to assist the crew would render treatment.¹⁷⁵ The court-made rule then became: ship owners cannot be held vicariously liable for negligent treatment because there was no duty to those third party passengers.¹⁷⁶ The rationale was that to impute vicarious liability would result in a refusal to treat injured individuals at a time when ships were isolated from the rest of world while out at sea.¹⁷⁷

None of these characteristics or concerns can be attributed to modern cruise ships. As a practical matter, cruise ships are not in the business of "shipping" nor qualify as shipping vessels. Rather cruise ship owners used their fleet of ships to take passengers around the ocean to enjoy a vacation

¹⁷⁰ *Id.* at 1237 (citing *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1120–21 (11th Cir. 2011)).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See Royal Caribbean International, *Onboard Experiences*, <http://www.royalcaribbean.com/findacruise/experiencetypes/home.do> (last visited April 29, 2016).

¹⁷⁴ See *The Neapolitan Prince*, 134 F. 159, 160–62 (E.D.N.Y. 1904) (emphasis supplied).

¹⁷⁵ See *The Great N.*, 251 F.826, 830–33 (9th Cir. 1918); *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266, 267 (1891); *Laubheim v. De Koninglyke N.S. Co.*, 13 N.E. 781, 781 (N.Y. 1887).

¹⁷⁶ *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369–70 (5th Cir. 1988); *The Korea Maru*, 254 F. 397, 401–402 (9th Cir. 1918); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1038–39 (S.D.N.Y. 1881).

¹⁷⁷ See *De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660, 667–669 (1943).

and then back to the home port.¹⁷⁸ Instead of transporting passengers to their new homes across the ocean,¹⁷⁹ cruise ships are essentially floating hotels that carry passengers on a week-long vacation before returning home.

Essentially all cruise lines have pledged to adhere to the ACEP's guidelines on medical staffing and all other requirements.¹⁸⁰ Since these companies have agreed to such mandates it has become apparent that cruise lines have agreed to employ a medical physician for more than just the "convenience of its passengers."¹⁸¹ Accordingly, cruise ships are not traditional shipping vessels bringing aboard a doctor for convenience and therefore cannot benefit from traditional protections afforded to shipping vessels not in the business of treating passengers.¹⁸²

While modern shipping vessels are outside of the purview of this Article, this protection against vicarious liability cannot be imputed to today's cruise ships. The fundamental control elements of the *Barbetta* rule are not satisfied by cruise ships.¹⁸³ The evidence has shown that these physicians aboard are part of the new age of infirmaries. These medical centers house doctors and support staff who utilize the same equipment one would find in an ordinary hospital.¹⁸⁴ These doctors are provided a salary directly from the carrier, bill for treatment under the carrier's name, are provided with all supplies and equipment, and report to higher ranking crew members.¹⁸⁵ This is more than sufficient to demonstrate that a master-servant relationship, which was lacking a century ago, now exists in the context of cruise lines.¹⁸⁶

¹⁷⁸ See Carnival, *Explore Carnival Cruises*, www.carnival.com/explore-carnival-cruises (last visited April 29, 2016); see also Royal Caribbean International, *supra* note 173.

¹⁷⁹ *Laubheim*, 13 N.E. at 782.

¹⁸⁰ Am. College of Emergency Physicians, *Cruise Ship Medicine Section – Cruise Line Directory: ACEP Policy Resources*, www.acep.org/cruise-line-directory/ (last visited April 29, 2016).

¹⁸¹ *Barbetta*, 848 F.2d at 1365.

¹⁸² An examination of *The Great Northern*, *O'Brien*, and other historical cases discussed above articulated that the true meaning of convenience was nothing more than merely having a medical professional aboard a passenger vessel. In *Franza*, this meaning was applied to show that "convenience" cannot equate to supplying a medical infirmary to passengers on modern day cruise ships as an additional source of revenue.

¹⁸³ See *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1236–38 (11th Cir. 2014).

¹⁸⁴ ROSS A. KLEIN, *CRUISE SHIP SQUEEZE: THE NEW PIRATES OF THE SEVEN SEAS*, 175 (ed. 2005).

¹⁸⁵ *Franza*, 772 F.3d at 1240–41.

¹⁸⁶ *The Great N.*, 251 F. 826, 831 (9th Cir. 1918); *O'Brien v. Cunard Steamship Co.*, 28 N.E. 266, 266–67 (1891).

Going forward, if cruise ship owners continue to engage in the practice of offering medical treatment and advertise their adherence to the ACEP guidelines, they should expect to find courts less inclined to apply the *Barbetta* rule. Direct oversight of the actual treatment being rendered will never again be the appropriate determination allowing carriers to dodge vicarious liability under such circumstances.¹⁸⁷ Even so, carriers have gone so far as to make public their medical guidelines for potential vacationers that dictate the medications that will be distributed (at a determined price) and what treatments, including surgeries, the medical staff will be on-call to perform.¹⁸⁸

While the exact issue remains to be solved, the recent Eleventh Circuit decision has provided the judiciary with the route to take when hearing future medical malpractice cases occurring onboard cruise ships. The Fifth Circuit applied the *Barbetta* rule out of tradition rather than practicality.¹⁸⁹ The elements essential to the nineteenth century maritime case law were not present in *Barbetta v. S/S Bermuda Star*. More importantly, apparent authority allows vacationers to recover for the negligent acts of an onboard physician.¹⁹⁰ As a doctrine based on the underlying facts, it is better aligned to tackle the confusion plagued by maritime law on this issue. The traditional underlying facts that led to the nineteenth century courts to establish protections from the doctrine of *respondeat superior* are not present in the cases regarding medical malpractice occurring aboard cruise lines. As such, the circuits must start to rely less on the traditional *Barbetta* rule and more on the facts of the underlying case to provide vacationers with the chance to bring a valid claim for medical malpractice occurring aboard a cruise ship.

V. CONCLUSION

When people book cruise ship vacations they are excited to get away and enjoy themselves. But most do not consider the hazards that accompany a cruise excursion. As cruise ship vacations continue to grow in popularity, outbreaks of noroviruses and passengers sustaining serious injuries will unfortunately become more frequent.¹⁹¹ Even if a future

¹⁸⁷ *Franza*, 772 F.3d at 1233; see also Peltz & Nelson, *supra* note 135, at 39.

¹⁸⁸ Carnival, *Is There a Doctor on Board?*, www.carnival.com/CMS/FAQS/Medical_Services.aspx (last visited April 29, 2016).

¹⁸⁹ See generally, *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988) (failing to discuss apparent agency and focused almost exclusively on the past decisions from the turn of the century).

¹⁹⁰ *Franza*, 772 F.3d at 1249.

¹⁹¹ See Cruise Market Watch, *Growth: Growth of the Cruise Line Industry*, www.cruisemarketwatch.com/growth/ (last visited April 29, 2016) (providing statistics

passenger is cautious, he or she reasonably expects the medical services offered aboard the ship will provide proper treatment services. But what cannot be anticipated by passengers is an onboard physician's mistake of negligence. At the heart of this Comment, a passenger may not have a cause of action against the cruise line for a physician's medical negligence.¹⁹²

The current circuit split between the Fifth and Eleventh Circuits presents both Congress and the Supreme Court with an opportunity to resolve a conflict 100 years in the making. Providing a remedy to this circuit split will finally bridge the gap between medical malpractice claims instituted against a hospital and those brought against a cruise ship company. Additionally, it will prevent future economic and physical harm to passengers who suffer injuries due to negligent treatment inside a cruise ship's medical center. Accordingly, clarifying this discrepancy between the Fifth and Eleventh Circuits in favor of the Eleventh Circuit is a unique opportunity to create bright-line pleading requirements while ensuring passengers aboard cruise ships are adequately protected from otherwise latent dangers.

indicating the significant rise in the amount of passengers carried worldwide and the additional cruise ships built in recent years to meet this demand).

¹⁹² See *Franza v. Royal Caribbean*, 772 F.3d 1225, 1238 (11th Cir. 2014).