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Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?

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Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?

Beth-Ann Erlic Herschaft

Abstract

Everyone from honeymooners to golden agers is lured by promises of a dream vacation aboard a luxury cruise ship.

KEYWORDS: passengers, cruise ships, malpractice

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I. INTRODUCTION

Everyone from honeymooners to golden agers is lured by promises of a dream vacation aboard a luxury cruise ship.¹ Prospective travelers pore

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1. In South Florida alone, more than nineteen million tourists have set sail from the Port of Miami, Port Everglades in Fort Lauderdale, and the Port Authority of West Palm Beach

over brochures which rhapsodize about gourmet food, comfortable quarters, discount shopping, sports activities, and the like. Other sections of these pamphlets describe more mundane aspects of the trip, including ticketing procedures, transfers, airline arrangements and medical services.² It is likely that passengers planning a cruise will be lulled into an expectation that all services aboard a ship are equally endorsed by the cruise line. However, common law dictates that if a passenger is dissatisfied with the care given by the shipboard physician, and subsequently attempts to hold the cruise line responsible for any negligence imputed to the physician, there is only limited recourse for recovery.

This article begins by examining the extent to which a cruise line is liable for the shipboard physician. Present custom limits the carrier's responsibility to negligent hiring³ because courts have refused to expand or extend that liability in cases of medical malpractice to the shipowner under

since 1988. Telephone Interview with Linda Papke, Secretary in the Department of Passenger Development for Port Everglades in Fort Lauderdale, Fla. (July 13, 1992); Telephone Interview with Marketing Department (name withheld by request) of the Port of Miami, FL. (July 13, 1992); Telephone Interview with Bob Hand, Port Accountant of the Port Authority of West Palm Beach, Fla. (July 13, 1992). The statistics are as follows: Port Everglades: 1988 calendar year - 1,680,000; 1989 fiscal year ending September 30, 1989 - 1,927,770; 1990 fiscal year - 2,117,503; 1991 fiscal year 2,271,086; Port of Miami: 1988 fiscal year - 2,502,411; 1989 fiscal year - 3,100,055; 1990 fiscal year - 2,734,816; 1991 fiscal year - 2,928,532; Port Authority of West Palm: 1988 fiscal year - 119,861 embarkations, and 119,936 debarkations; 1989 fiscal year - 139,778 embarkations and debarkations; 1990 fiscal year - 161,687 embarkations and 161,787 debarkations; 1919 fiscal year - 137,453 embarkations, and 138,806 debarkations.

2. The author of this article obtained a collection of brochures through Mari Montroy of Sunburst Travel, Inc. in Cooper City, Florida. The companies represented are: CARNIVAL, PUB. NO. 02202416, HOW ABOUT A CRUISE? (Feb. 1991); CHANDRIS, PUB. NO. CHA271, CELEBRITY CRUISES (June 1991); CLUB MED SALES, INC. CLUB MED I (U.S.A. n.d.); COSTA CRUISE LINES N.V., PUB. NO. 700M1125, EURO LUXE CRUISES (Oct. 1991); CUNARD, PUB. NO. CUL119, CHRISTMAS NEW YEAR'S AT SEA & ASHORE (June 1992); HOLLAND AMERICA LINE, PUB. NO. CB872, CARIBBEAN CRUISES (Jan. 15, 1992); MAJESTY CRUISE LINE, PUB. NO. 500M, THE SPLENDOR HAS BEGUN (Dec. 1991); NORWEGIAN CRUISE LINE, THE SUNWARD (U.S.A. n.d.); REGENCY CRUISES, PUB. NO. S-017 300M, TRANSCANAL & HAWAII (Jan. 1992); ROYAL CARIBBEAN CRUISES, PUB. NO. 91-022, THE GRAND RESORTS OF THE SEVEN SEAS (Dec. 1991); SEAWIND CRUISE LINE, PUB. NO. 600M, THE CLASSIC CRUISE FOR CONNOISSEURS (Mar. 1992); SPECIAL EXPEDITIONS, INC., PUB. NO. 500M, DOLPHIN CRUISE LINE (FEBRUARY 1992); AND WINDJAMMER BAREFOOT CRUISES, (n.p. 1992). [hereinafter BROCHURES].

3. Paul N. Daigle, *Other Non-Seamen Claims Against Shipowners and Charterers*, 55 TUL. L. REV. 1104, 1113-14 (1981).

the doctrine of *respondeat superior*.⁴ This will be followed by an explanation of the problems created by adhering to this practice. Next, the article will propose a legislative solution to these problems, which would be more compatible with trends in modern tort law. Failing congressional relief, the conclusion will suggest that courts reexamine case precedent in this area of admiralty, and take reasonable and practicable steps to change it.

II. CURRENT STATE OF THE LAW

All district and circuit courts,⁵ with the notable exception of the Northern District of California's decision in *Nietes v. American President Lines*,⁶ have classified a shipboard doctor's services differently from those of other crew members. In most cases, a shipboard owner is responsible for the actions of the entire crew, because they are subject to the master's control and discipline. In the case of a shipboard physician, however, there are four main reasons supporting departure from the general rule: First, the only duty owed by a carrier to its passengers for its doctor is to employ a practitioner who is suitably qualified and skilled.⁷ Second, a doctor is an

4. *Id.* But see *Nietes v. American President Lines*, 188 F. Supp. 219 (N.D. Cal. 1959). Under the doctrine of *respondeat superior*, also referred to as vicarious liability, an employer is imputed to have the ability to control or supervise an employee who is in the regular employment of the employer. W. PAGE PROSSER, LAW OF TORTS §§ 69-74 (4th ed. 1971).

5. For a sense of perspective, the cases espousing this doctrine are listed in chronological order: *Laubheim v. Netherland S.S.Co.*, 13 N.E. 781 (N.Y. 1887) (citations omitted); *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (N.Y. 1891); *Allan v. State S.S. Co.*, 30 N.E. 482, 484 (N.Y. 1892); *The Napolitan Prince*, 134 F. 159 (E.D.N.Y. 1904); *The Great Northern*, 251 F. 826, 830 (9th Cir. 1918); *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918); *Churchill v. United Fruit Co.*, 1923 AMC 1219, 1220 (D. Mass. 1923); *Branch v. Compagnie Generale Transatlantique*, 1935 AMC 848 (S.D.N.Y. 1935); *Ludena v. The Santa Luisa*, 122 F. Supp. 401, 408 (S.D.N.Y. 1953); *Mayer v. Zim Israel Navigation Co.*, 289 F.2d 562, 563 (2d Cir. 1960); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969); *Metzger v. Italian Line*, 1976 AMC 453, 455 (S.D.N.Y. 1975), *aff'd*, 35 F.2d 1242 (2d Cir. 1975); *Cimini v. Italia Crociere Int'l* 1981 AMC 2674, 2677 (S.D.N.Y. 1981); *Di Bonaventure v. Home Lines*, 536F.Supp 100, 103 (E.D. Pa. 1982); *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1367, 1371 (5th Cir. 1988); *Mascolo v. Costa Crociere*, 726 F. Supp. 1285, 1286 n.1 (S.D. Fla. 1989); *Cummiskey v. Chandris, S.A.*, 719 F. Supp. 1183, 1191 (S.D.N.Y. 1989), *aff'd*, 895 F.2d 107 (2d Cir. 1990); *Hilliard v. Kloster Cruise*, , 1991 AMC 314, 316-17 (E.D. Va. 1990); *Gillmor v. Caribbean Cruise Line*, 789 F. Supp. 488, 491-92 (D.P.R. 1992).

6. 188 F. Supp. 219, 221 (N.D. Cal. 1959). This court found the ship's doctor to be a salaried crew member, subject to the ship's discipline.

7. *Barbetta*, 848 F. Supp. at 1371.

independent contractor, not an employee or agent of the cruise line, thereby exempting the cruise line from any liability for the doctor's actions.⁸ Third, a ship's primary business is transportation, not medicine, and a passenger may elect to use its medical services *vel non*.⁹ Finally, there is no warranty of seaworthiness owed to passengers.¹⁰

Taking all of the above into consideration, it may startle even some seasoned voyagers to learn that most cruise lines have never been required "under the general maritime law or statute . . . to carry a [ship's] doctor."¹¹ There are certain cases, nevertheless, where the law of the flag under which the cruise ship is sailing prevails over general maritime law, and that foreign country's laws require a doctor.¹² Otherwise, when a shipowner elects to provide a carrier with a physician, the only requirement is that the hiring is done with care.

A. *Duty Limited to the Avoidance of Negligent Hiring*

The historical basis for this limited liability can be found in *Laubheim v. Netherland S.S. Co.*,¹³ which, affirming the court below, stated that "[i]f, by law or by choice, the [carrier] was bound to provide a surgeon for its ships, its duty to the passenger was to select a reasonably competent man for [the] office [of ship's surgeon], and it is liable *only* for a neglect of that duty."¹⁴ This becomes a heavy burden for a plaintiff to carry.

8. *Id.* at 1365; see also *Hilliard*, 1991 AMC at 316-17; *Mascolo*, 726 F. Supp. at 1286; *Di Bonaventure*, 536 F. Supp. at 103; *Amdur*, 310 F. Supp. at 1042; Robert M. Jarvis, *Admiralty*, 21 TEX. TECH. L. REV. 19, 56 (1990); Nathaniel G.W. Pieper & David W. McCreadie, *Cruise Ship Passenger Claims And Defenses*, 21 J. MAR. L. & COM. 151, 193 (Apr. 1990); Michael J. Compagno, Note, *Malpractice On The Love Boat: Barbetta v. S/S Bermuda Star*, 14 TUL. MAR. L.J. 381, 382 (1990).

9. *Amdur*, 310 F. Supp. at 1042. This idea was used persuasively in *Barbetta*, 848 F.2d at 1369; see also *Gillmor*, 789 F. Supp. at 491.

10. *The Iroquois*, 194 U.S. 240 (1904). The warranty, available to seamen, imposes a non-delegable duty upon the shipowner to see that the ship is "reasonably fit for its intended purpose." THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 4.5, at 134 (1987) (footnote omitted).

11. MARTIN J. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES*, § 3:10, at 72 (4th ed. 1990; see also *PIEPER & MCCREADIE*, *supra* note 8, at 193. In fact, there was only one statute, 46 U.S.C. § 155, which required a doctor to be aboard ships. It referred not to cruise ships, but to ships carrying a certain number of steerage passengers. Even that limited requirement was repealed in 1983.

12. See *Amdur*, 310 F. Supp. at 1036; see also *Mascolo*, 726 F. Supp. at 1285.

13. 13 N.E. 781 (N.Y. 1887).

14. *Id.* (emphasis added) (citation omitted).

Historically, physicians' credentials were not scrutinized closely by shipowners. However, ability to retrieve information about the practitioner's background through computer technology, as well as awareness that the carrier bears liability for negligent hiring, have resulted in the upgrading of standards to which a practitioner is held. Among these may be requirements that a physician's medical degree come from an accredited college, and, if foreign, there must be an American equivalent for acceptance. Carriers now lean towards hiring physicians with emergency room experience, due to their proficiency in evaluating and treating a wide panorama of symptoms and diseases.¹⁵

Because liability is presently imputed to a cruise line for negligent hiring, a reasonably prudent passenger may assume that the interviewing and hiring of officers and doctors for their ships would be a nondelegable duty. However, some cruise lines employ companies as a proxy to do both the interviewing and hiring of officers and doctors for their ships.¹⁶ Another method of hiring physicians is through the use of government certification.¹⁷

As a whole, courts have not been receptive to claims that a carrier has failed to live up to its duty. For example, in *De Zon v. American President Lines*,¹⁸ the United States Supreme Court, citing the court below, added that just because a doctor makes a mistaken diagnosis does not mean that he was negligent.¹⁹ Another rationalization appeared in *Amdur v. Zim*

15. Telephone Interview with Alan R. Kelley, Esquire, member of the law firm of Fowler, White, Burnett, Hurley, Banick and Strickroot, Miami, Fla. (July 24, 1992); Telephone interview with Michael T. Moore, Esquire, member of the law firm of Holland & Knight, Miami, Fla. (July 24, 1992); Telephone interview with Lawrence D. Winson, Esquire, member of the law firm of Shutts & Bowen, Miami, Fla. (July 24, 1992).

16. For example, in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1367 (5th Cir. 1988), Bahamian Cruise requested that a company called Pacific Asia Overseas Corporation (PASCOR) provide a doctor for the S/S Bermuda Star. In *Barbetta*, the court held that the cruise line's failure to make a separate investigation of the physician did not constitute negligent hiring practices.

17. *Mascolo v. Costa Crociere*, 726 F. Supp. 1285, 1285 (S.D. Fla. 1989). The cruise line in *Mascolo* was subject to the laws of Italy, which compelled "all Italian passenger vessels traveling outside the parameters of the Mediterranean Sea . . . [to] employ a physician who is duly licensed to serve on board passenger vessels." *Id.* The Italian Ministry of Health also imposed stringent regulations upon the doctor, including the successful completion of its own oral and written examinations, as well as other scholastic and practical requirements.

18. 318 U.S. 660 (1943).

19. *Id.* at 671.

*Israel Navigation Co.*²⁰ when that court stated that a physician's error in treatment does not prove his incompetence, or that the shipowner was negligent in hiring him.²¹ In both cases, no action was taken against the shipowner.²² Thus, allegations of negligent hiring are confronted with strong precedent generally holding to the contrary.

B. *The Physician as Independent Contractor*

The second contention, that a doctor does not qualify as either an employee or agent of the cruise line, is the dominant sentiment, because the shipowner is seen as "lack[ing] the ability to meaningfully control the relevant actions of . . . the ship's doctor" as a servant.²³ The prevailing judicial posture is that the shipping company also lacks the expertise by which to evaluate medical capability.²⁴ The court in *Amdur* spelled it out this way: "It is pure sophistry to assert that a ship's master is capable of 'supervising' the medical treatment rendered by a physician"²⁵

C. *The Contract Is Only Between the Doctor and the Passenger*

Along with the opinion that the doctor is an independent contractor is this related argument against acceptance of the vicarious liability policy: When a doctor treats a passenger, a contract arises only between the two of them, and the shipowner is not an unnamed third party to that agreement. This precept is found in a passage from *Amdur*, which forewarned future travelers that "[a] ship is not a floating hospital . . . a ship's physician is . . . carried on board a ship for the convenience of passengers, who are free to contract with him for any medical services they may require."²⁶ This was a predictable conclusion, considering that even in 1891, the court in

20. 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969).

21. *Id.*

22. In *Cimini v. Italia Crociere Int'l S.P.A.*, 1981 AMC 2674, 2677 (S.D.N.Y. 1981), the New York court appropriated the *Amdur* decision.

23. *Gillmor*, 789 F. Supp. at 491, (quoting *Barbetta*, 848 F.2d at 1369); *Cummiskey v. Chandris, S.A.*, 895 F.2d 107 (2d Cir. 1990); *Daigle*, *supra* note 3, at 1114 (citation omitted); *Jarvis*, *supra* note 8, at 56; *Pieper & McCreadie*, *supra* note 8, at 193; *Compagno*, *supra* note 8, at 382 (citations omitted).

24. *Barbetta*, 848 F. Supp. at 1369.

25. 310 F. Supp. at 1042. The *Amdur* court's reasoning was adopted in the following cases: *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103 (E.D. Pa. 1982); *Barbetta*, 848 F.2d at 1364; *Mascolo*, 726 F. Supp. at 1285; *Cummiskey*, 895 F.2d at 107; *Hilliard*, 1991 AMC at 314; and *Gillmor*, 789 F. Supp. at 488.

26. 310 F. Supp. at 1042 (emphasis added).

O'Brien v. Cunard Steamship Co., declared that "work which the physician or surgeon does . . . is under the control of the passengers themselves . . . [rather than] the business of the carrier."²⁷ This view has continued into modern times, where three out of five contemporary shipping companies advertising available medical care, three disclaim any liability for actions of the doctor, stating that the physician and passenger create their own contract without any participation from the cruise line.²⁸ In line with that theory, courts have traditionally supported carriers who give notice of their intention to avoid liability for onboard medical services.²⁹ For instance, in *Bowns v. Royal Viking Lines*,³⁰ the passenger had been issued a ticket which stated, as one condition of passage, that "[t]he Carrier shall not be liable for death, injury, illness * * * or fault or neglect of * * * ship's doctor * * *."³¹ The Southern District of New York upheld all conditions of the contract, claiming constructive notice was given, because the passenger admitted that she had never taken the time to read the ticket.³²

D. No Warranty of Seaworthiness Owed to Passengers

The refusal of courts to assign vicarious liability to carriers for negligent medical care to a passenger contrasts sharply with the accountability to which shipowners, including cruise lines, are held for the medical

27. 28 N.E. 266 (Mass. 1891).

28. Club Med I, Cunard Cruise Lines, Holland-America Lines, Majesty Cruise Lines, and Royal Caribbean Cruise Lines advertise medical services in their brochures. Cunard Cruise Lines, Holland-America Cruise Lines, and Regency Cruise Lines disclaim liability for shipboard doctors. See BROCHURES, *supra* note 2. Some other cruise lines who don't advertise medical services, such as Windjammer Cruises, only have a purser trained in first aid, so that they must put into the nearest port when there is any medical need. Telephone interview with Maryon B. Glasser, Administrative Assistant in Customer Relations, Windjammer Barefoot Cruises (July 13, 1992).

29. *Barbetta*, 848 F.2d at 1364; *Cimini v. Italia Crociere Int'l S.P.A.*, 1981 AMC 2674 (S.D.N.Y. 1981); *Bowns v. Royal Viking Lines, Inc.*, 1977 AMC 2159 (S.D.N.Y. 1977).

30. 1977 AMC 2159 (S.D.N.Y. 1977).

31. *Id.* at 2160.

32. *Id.* at 2162. Similarly, the court in *Cimini* upheld this provision which had appeared in the passenger's ticket: "The passenger agrees that [medical] services available for his convenience on board ship . . . are solely at the risk and expense of the passenger." 1981 AMC at 2676-77. In a like fashion, the contract at issue in *Barbetta* stated that the cruise line provided a doctor "solely for the convenience of the passenger . . . [and] [a]ny such person . . . treating or operating upon a Passenger is not the servant or agent of the Carrier, and the Carrier shall not be liable for any omission, negligence or damage done by such person." 848 F.2d at 1366,

malpractice of a physician hired by them for their crew members.³³ The Jones Act of 1920³⁴ allows seamen to sue both the Master and fellow crew members for negligence. The shipowner's duty to provide competent medical care grows out of both statute and case law.³⁵ Under the warranty of seaworthiness, "[t]he duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations."³⁶

The rationale behind this policy is further advanced by a Supreme Court ruling, which explained that a special relationship "exists between a seaman and his employer."³⁷ The Court also noted the symbiotic connection between a seaman and a ship under which a ship must provide "maintenance and cure [for an ailing] seaman for illness or injury during the period of the voyage"³⁸ This warranty is limited to seamen, and has never been extended to passengers aboard cruiseships.

In contrast to the exceptional duty owed by the carrier to the crew, courts have consistently held that the only duty owed by the shipowner to the passenger is one of "reasonable care under the circumstances,"³⁹ because "the contract of carriage [between the shipowner and the passenger] reveals no provision guaranteeing safe passage and the law of admiralty will not imply one"⁴⁰ However, carriers may be charged with a higher duty of care when they have received either actual or constructive notice of

33. *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966); *De Zon v. American President Lines*, 318 U.S. 660 (1943); *The Iroquois*, 194 U.S. 240 (1904); *Fitzgerald v. Burbank & Co.*, 451 F.2d 670 (2d Cir. 1971); *Central Gulf Steamship Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968); *McLaughlin v. Sun Transport, Inc.*, 1986 AMC 1518 (D. Del. 1984); *Maritime Overseas Corp. v. United States*, 433 F. Supp. 419 (N.D. Cal. 1977).

34. 46 U.S.C. § 688 (1975).

35. *Id.*; *Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332, 1335 (11th Cir. 1984) (citations omitted).

36. *The Iroquois*, 194 U.S. at 241-42.

37. *Barbetta*, 848 F.2d at 1369 n.1 (quoting *De Zon v. American President Lines*, , 318 U.S. 660, 664-69 (1943)).

38. *Id.*

39. *Gillmor*, 789 F. Supp. at 491 (quoting *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990)).

40. *Id.* In addition, on a ticket issued by Royal Caribbean Cruise Line, marked as a contract, it stated in relevant part: "No undertaking or warranty shall be given or shall be implied as to the seaworthiness, fitness or condition of the Vessel or any food, drink or medicine supplied on board." *Royal Caribbean Cruise Line, Passenger Ticket*, § 2(v) (1992) (copy available upon request).

a passenger's pre-existing disability.⁴¹ To sum up, a passenger cannot invoke breach of contract as a cause of action against a cruise line to show dereliction of its duty to the passenger when the shipboard doctor's negligence is at issue.

III. FLAWS IN THE CURRENT STATE OF THE LAW

There is no lack of argument for justifying the cruise line's refusal to accept vicarious liability for its doctor's medical malpractice.⁴² However, these reasons do not stand up under close analysis because they are no longer viable in modern society. This view was presented convincingly in the maverick case of *Nietes v. American President Lines*.⁴³ The *Nietes* court held the cruise line liable for the shipboard doctor's negligence under the doctrine of *respondeat superior*, stating that the shipowner can no longer claim an inability "to exercise control or supervision over a professionally skilled physician . . . in our modern, highly organized industrial society."⁴⁴

A. The Negligent Hiring Argument

Holding a shipowner liable only for the negligent hiring of a physician, but not the misdeeds of that physician towards a passenger, creates an obvious dichotomy. Courts have disclaimed a carrier's ability to supervise and evaluate the quality of services provided by a physician, but have granted it the intelligence to determine how to employ a competent physician.⁴⁵ As mentioned previously, the court in *Nietes* recognized the challenge a carrier faces in supervising a physician, but declared that modern

41. Pieper & McCreadle, *supra* note 8, at 177 (citations omitted). In addition, most cruise line brochures state that any passenger with a medical disability must report it to the company prior to sailing. The cruise ship also reserves the right to refuse passage to anyone whom it considers unfit for travel due to a disability. See BROCHURES *supra* note 2.

42. To cite an example, one of the major reasons the ancient shipowner disavowed liability was that the shipowner and the captain or master of the ship were generally the same person. Telephone Interview Ralph J. Mellusi, Attorney for Plaintiff-Appellant, *Cummiskey v. Chandris S.A.*, 719 F. Supp. 1183 (S.D.N.Y. 1989), (August 3, 1992). As owner and captain, he could state that his primary business was transporting passengers from one place to another, and, as a sailor, he had no training to evaluate any job other than those traditionally associated with shipping.

43. 188 F. Supp. 219 (N.D. Cal. 1959).

44. *Id.* at 220.

45. *E.g.*, *Amdur*, 310 F.Supp. at 1042.

technology would triumph over that hurdle.⁴⁶ If such a statement were true in 1959, then it certainly is true in 1992 considering the technological advances made in the past thirty-three years.

Because passengers must persuade a court that the carrier indulged in negligent hiring, passengers should meticulously investigate the criteria and procedures by which the doctor was selected. The same level of technology necessary to choose the physician should also be available to the cruise line to evaluate the doctor's daily duties, keeping in mind that the shipowner has chosen the same doctor to treat the crew as well as the passengers. Herein lies the true paradox: The cruise line is credited with enough knowledge and expertise to evaluate the physician so that it bears vicarious liability for the physician's negligence towards seamen; yet, the cruise line repudiates the same knowledge and expertise to make that evaluation when the same physician is negligent towards a passenger.

An additional problem arises when a passenger attempts to establish a vessel's liability, because the overwhelming majority of cruise ships fly foreign flags⁴⁷ and, as such, "are exempt from accident reporting requirements[,] and . . . are not obligated to reveal records of malpractice claims."⁴⁸ Thus, a passenger has no credible way of discovering whether any allegations of negligence have been levied against a practitioner or reports of negligent hiring have been documented.

B. *The Independent Contractor Controversy*

Referring to a shipboard doctor as an independent contractor rather than an employee or agent of the cruise line was challenged by the decision in *Nietes v. American President Lines*.⁴⁹ This opinion stated that when a ship's doctor is a "salaried member of the crew, subject to the ship's discipline and the master's orders, . . . he is, for the purposes of *respondeat superior* . . . , in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable."⁵⁰ Accordingly, vicarious liability attached to the cruise line for the death of a child who had been the victim of negligent medical care while aboard the carrier.⁵¹

46. 188 F. Supp. at 220.

47. Marilyn Adams, *Safety Standards Get An Overhaul*, MIAMI HERALD, Aug. 10, 1992, Business Monday at 21.

48. Brief for Plaintiff-Appellant at 30, *Cummiskey v. Chandris, S.A.*, 791 F. Supp. 1183 (S.D.N.Y. 1989).

49. 188 F. Supp. 219 (N.D. Cal. 1959).

50. *Id.* at 220.

51. *Id.*

Although no court has followed *Nietes*, a well-known commentator in the field of admiralty law recently made the following observation:

It is submitted that the ship's doctor is not an independent contractor but, in fact, a paid employee of the shipowner. He is a staff officer aboard ship; and signs the articles as a member of the ship's company. He is subject to ship's discipline under the general maritime law and is subject to the lawful commands of the master. When sick or injured he is entitled to the remedies of maintenance and cure, the Jones Act, and of a seaworthy ship. Like the steward or radio operator, the ship's doctor is a seaman for purposes of personal injury remedies and for wage relief. The professional standing of a physician is not a valid argument for affording him a special status when a member of the ship's company. He must, in truth, be regarded as on par with his fellow officers.⁵²

This astute comment successfully puts aside the present dichotomy of considering the shipboard doctor to be a crew member when he treats a member of the ship's staff, but calling the physician an independent contractor when a passenger alleges negligence.

There is another factor to weigh when deciding if a doctor is an employee of the cruise line or an independent contractor. After the passengers pay the doctor directly, does the cruise ship retain any portion of that money? If so, it would seem more likely that even a ticket contract clause stating that the doctor is an independent contractor would be invalid because the cruise line would be benefitting financially from the exchange.⁵³ It is for that reason that the decision in *Barbetta v. S/S Bermuda Star*⁵⁴ raises some questions as to the Fifth Circuit's rationale. Despite the fact that the physician in question had signed a contract directly with the cruise line, was not paid at all by the passengers, and received a monthly wage from the cruise line for his services, the court stubbornly refused to characterize the doctor's relationship to the cruise line as that of master/servant.⁵⁵

Moreover, consider the ramifications if a modern court were to regard the doctor as a servant or agent, rather than an independent contractor, as

52. NORRIS, *supra* note 11, at 75 (citations omitted).

53. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 71, at 509 (5th ed. 1984).

54. 848 F.2d 1364 (5th Cir. 1988).

55. *Id.*

was decided by the Northern District of California in *Nietes*.⁵⁶ The contract clauses in which a shipowner limits his liability for a physician would be under the purview of Title 46 of the United States Code app. section 183(c), which states: "It shall be unlawful for the . . . owner of any vessel transporting passengers . . . to insert in any . . . contract . . . any provision . . . purporting . . . to relieve such owner [or his servants] . . . from liability [from negligence] . . ." ⁵⁷ The statute also states unequivocally that "[a]ll such provisions or limitations contained in any . . . contract, or agreement are declared to be against public policy and shall be null and void . . ." ⁵⁸

Against the backdrop of section 183(c),⁵⁹ compare this revealing statement from the appellate court's decision in *Barbetta*,⁶⁰ in which it referred to the lower court's discussion: "In a normal, non-admiralty situation, the [district] court conceded, public policy would nullify the clause defendants included."⁶¹ Since the obvious intention of the lawmakers was to prevent carriers from leaving passengers without a cause of action when the carrier had been negligent, the statement of the district court establishes its recognition of the inherent injustice in allowing cruise lines to enforce a condition through maritime law that would never have been accepted under other circumstances.

An additional privilege reserved to cruise lines yet denied to passengers, is the ability to unilaterally waive any provision of the contract between the two entities.⁶² The passenger must pay for all charges prior to embarkation before receiving a confirmation by way of a contract/ticket in return. It is only then that passengers discover that they are bound to follow all provisions without exception, while the cruise line is not. Therefore, it appears that admiralty law is afforded a separate place in the legal spectrum, the ramifications of which can adversely affect the outcome

56. 188 F. Supp. at 221.

57. 48 U.S.C. app. § 183(c) (1958). The purpose of the statute is to "regulat[e] [the] relationship between common carrier of passengers and passengers with reference to duties, obligations and restrictions of carrier in connection with issuance of tickets and its liability to passengers for safe passage thereunder . . ." *Id.*

58. *Id.*

59. *Id.*

60. 848 F. Supp. at 1367.

61. *Id.* The clause in question "stated that the doctor was not a 'servant or agent' of the carrier," and intended to "limit defendants, liability regardless of whether the doctor was actually . . . classified as an independent contractor or an employee." *Id.*

62. Royal Caribbean Cruise Line, Passenger Ticket, § 11, 1992 (copy furnished upon request)

in both contract and tort law.

Another way to determine whether a doctor is an employee or an independent medical expert is to explore the conditions to which the physician and cruise line have stipulated. According to one local South Florida attorney,⁶³ doctor contracts vary with each cruise line. For instance, some cruise lines may choose certain doctors for specific cruises.⁶⁴ In other cases, the doctor may be employed for a fixed period of time such as six months.⁶⁵ If these procedures are standard in any way, it would be fatuous for a carrier to insist that it has no capacity to evaluate a doctor's services, because it apparently has already done so by its selective employment practices.

It has been said repeatedly that control and evaluation of services should be the benchmarks of vicarious liability, so as to differentiate an employee from an independent contractor.⁶⁶ However, the unusual case of *Muratore v. M/S Scotia Prince*⁶⁷ readily overcame that burden, when the doctrine of *respondeat superior* was applied to the charterer of a vessel when a passenger charged two shipboard photographers with the intentional infliction of emotional distress. In this most interesting case, the ship was a "bareboat charterer of the M/S Scotia Prince, a cruise ship owned by Transworld Steamship Company, Inc."⁶⁸ The charterer had made an agreement with an outside company to perform the cruise ship's hotel services.⁶⁹ In turn, the hotel corporation made an arrangement with a photography company, who then provided photographers for the ship.⁷⁰

The custom of this ship, as with others, was to have photographers take pictures of the passengers as they prepared to board.⁷¹ This passenger had clearly indicated to the photographers that they were not to take her picture; however, they ignored her request, and one photographer took the plaintiff's picture from the back after she turned her face away from them.⁷² When all the pictures were exhibited for the passengers to see and hopefully buy, the plaintiff discovered that her picture had been transfigured by the addition

63. Interview with Alan Kelley, *supra* note 15.

64. *Id.*

65. *Id.*

66. See Daigle, *supra* note 3.

67. 845 F.2d 347 (1st Cir. 1988).

68. *Id.* at 348.

69. *Id.*

70. *Id.*

71. *Id.* at 349.

72. *Muratore*, 845 F.2d at 349.

of a gorilla face covering the back of her head.⁷³ This, *inter alia*,⁷⁴ led the First Circuit Court of Appeals to find that the crew had failed to acknowledge the passenger's problem and take remedial steps to correct it.⁷⁵ The *Muratore* court thus held that, although there was no privity of contract between the ship and the photographers because the photographers had been hired by an intermediary, the photographers were not independent contractors, and the carrier had breached its duty to "exercis[e] reasonable care towards its passengers under the circumstances."⁷⁶

Applying that logic to the issue at hand, if a court can find vicarious liability through such an attenuated relationship as this carrier and this photographer, then surely the nexus between a vessel and its doctor, who do enjoy privity of contract, should be considered close enough to invoke the doctrine of *respondeat superior*. It is also food for thought to ponder the extent of expertise and control that was imputed to this vessel for its photographers in order to justify invoking vicarious liability.

C. Misconceptions About the Passenger/Doctor Contract

As noted earlier, except for the court in *Nietes v. American President Lines*⁷⁷ the prevailing opinion is that any treatment of a passenger by a shipboard doctor is the result of an exclusive and voluntary contract between them.⁷⁸ This view is supported by the assumption that a ship is not a medical facility, merely a form of transportation; therefore, the doctor is on board solely for the passengers' convenience.⁷⁹

These rationalizations do not hold water when examined in a practical light. To begin, the assertion that passengers may opt for the shipboard doctor's services, or choose another course of treatment is disingenuous, at the least, because once at sea, a passenger who has taken ill has very limited choices about obtaining competent medical care.⁸⁰ A land-based vacationer who becomes sick or injured while at a resort or hotel, may prefer to forego the medical care offered by the in-house physician in favor of outside help.

73. *Id.*

74. In another one of many confrontations between the photographers and the plaintiff, one photographer approached the plaintiff. As plaintiff turned away from him, the photographer jeered: "[T]ake the back of her—she likes things from the back." *Id.* at 350.

75. *Id.*

76. *Id.* at 353.

77. 188 F. Supp. 219 (N.D. Cal. 1959).

78. *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1969).

79. *Id.*

80. See *Commentary*, note 8, at 389-90.

On the other hand, the choice of having the ship head for the nearest port so that the passenger may get to a local doctor or hospital, or, in the alternative, having the captain call for paramedics, can be both costly and disturbing to a sick passenger onboard ship.⁸¹

Just because the shipboard passenger consents to use the only available medical services, as well as pay the physician for the privilege of doing so,⁸² does not mean that the passenger has freely bargained for the doctor's care.⁸³ Ailing passengers have nowhere else to turn at the onset of medical problems, and a lack of options may force them to accept the only accessible albeit potentially inadequate medical care.⁸⁴ This alleged contract between the doctor and the passenger/patient looks suspiciously like a contract of adhesion.⁸⁵

Secondly, the now familiar cliché that "a ship is not a floating hospital"⁸⁶ was effectively refuted by *Nietes v. American President Lines*, ten years before the phrase became popular.⁸⁷ In *Nietes*, Judge Sweigert acknowledged that neither statutory nor common law requirements existed for a ship to act as a medical facility or hospital.⁸⁸ He cautioned that "when a carrier undertakes the treatment of illness through medical services, provided by it aboard ship, it assumes the duty to treat carefully."⁸⁹

Putting that argument aside, the description of a cruise ship's primary function as that of transportation went the way of the dinosaur when the jet age was ushered in.⁹⁰ If a traveler wants to reach a destination quickly, a cruise ship is not the preferred conveyance. As a matter of fact, most cruise ships travel in a circle, actually giving a tour: they embark from one port, travel to other ports of call, and then return to the port from which they

81. *Id.*

82. On some ships, as this author discovered empirically, passengers pay the doctor directly when services are rendered. Whether or not the ship gets a portion of that payment varies from carrier to carrier. Interview with Alan Kelley, *supra* note 15.

83. See Brief for Plaintiff-Appellant at 14, *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988) (No. 87-3478).

84. See *Nietes v. American President Lines*, 188 F. Supp. 219 (N.D. Cal. 1959), in which the death of a child who became ill aboard ship was charged to the physician on board, and ultimately imputed to the cruise line. There was no argument there that the decedent's father had any choice except to use the doctor provided by the ship. *Id.*

85. Brief for Plaintiff-Appellant at 14, *Barbetta* (No. 87-3478).

86. *Id.*

87. 188 F. Supp. 219, 221 (N.D. Cal. 1959).

88. *Id.*

89. *Id.*

90. Brief for Plaintiff-Appellant at 24, *Cummiskey v. Chandris, S.A.*, 791 F. Supp. 1183 (S.D.N.Y. 1989) (No. 89-7912).

began their journey. The trip aboard a luxury liner is the vacation itself, and most ships have all the trappings of the finest hotels and resorts.⁹¹ The agenda of the cruise is presented daily, encouraging passengers to participate in and enjoy all of the activities and services offered by the ship. Thus, when passengers are exhorted to avail themselves of everything the ship has to offer, it is both reasonable and foreseeable that the shipboard doctor will be regarded as just another service rendered by the cruise ship to accommodate its passengers, as would be the equivalent in a shoreside setting.⁹²

The third area of dispute is that a ship's doctor is onboard predominantly to fulfill passengers' needs. Consider, for a moment, that a passenger is taking the trip of a lifetime aboard a commercially successful liner. There may be as many as twenty-five hundred others sharing the same experience.⁹³ It is reasonably foreseeable that at least one person on that ship is going to need more than just a band-aid or an aspirin. Because the ship must provide whatever constitutes "reasonable care towards its passengers under the circumstances,"⁹⁴ the ship may have to deviate from its path in order to fulfill its duty. Keeping that in mind, it would be neither reasonable nor acceptable to the rest of the passengers if the ship had to change course and put in at port every time one passenger needed serious medical attention.⁹⁵

One of the most persuasive and practical arguments that having a doctor on board profits both the shipowner and the passengers was presented in *Nietes v. American President Lines*.⁹⁶ The *Nietes* court recognized that the cost and inconvenience to the shipowner were he to comply with his duty to "provide such care and attention as is reasonable under the circumstances . . ." ⁹⁷ might be prohibitive without the benefit of a shipboard doctor.

91. *Id.*

92. *Id.*

93. This author traveled aboard "Majesty of the Seas," a ship belonging to Royal Caribbean Cruise Lines. The passengers were provided with a roster showing that the ship, the largest cruise ship in the world as of June, 1992, was carrying over 2500 vacationers irrespective of crew, staff and others aboard ship.

94. *Muratore v. M/S Scotia Prince*, 845 F.2d 347, 353 (1st Cir. 1988) (citation omitted). The *Muratore* court supported the district court's assertion that "a maritime carrier has an unconditional responsibility for the misconduct of its people toward passengers." *Id.* (citations omitted).

95. *Nietes*, 188 F. Supp. at 221.

96. *Id.* at 219.

97. *Id.* at 221.

As a result, the presence of a doctor aboard ship as an asset to the shipowner as well as the passenger convinced the *Nietes* court to follow the doctrine of *respondeat superior*.⁹⁸ Remember, too, that a carrier must provide proper medical care for its seamen, for whom it might also have to pull into port if there is no qualified doctor on board.⁹⁹ Accordingly, the cruise line is protecting itself from complaints caused by the inconvenience of disrupting the cruise in order to care for one sick traveler, as well as meeting its duty of care, when it elects to furnish a doctor on board.

D. Denial of the Warranty of Seaworthiness to Passengers

Although the warranty of seaworthiness has traditionally been out of reach for passengers, it is interesting to note that the warranty, which imposes a non-delegable duty upon the shipowner to see that the ship is "reasonably fit for its intended purpose,"¹⁰⁰ is available not only to seamen,¹⁰¹ but also to goods transported by the ship.¹⁰² A recent case decided by the District Court of Maryland reiterated that it is unlawful for a ship to add a disclaimer clause to a contract for goods, which would relieve it of liability from negligence.¹⁰³ Hence, the existence of a guarantee for goods but not for passengers was succinctly lamented by the Fifth Circuit, when it "pointed out the curious anomaly [sic] that a bag of coffee beans fares better than a non-crew member fare paying passenger to whom the warranty of seaworthiness does not run."¹⁰⁴ As applied to a ship's liability for medical malpractice, a passenger does not have the same remedy as a seaman for the same negligent act performed by the same physician.

Looking at the general principles of negligence: duty, breach, causation and damages, the court in *Gillmor v. Caribbean Cruise Line*,¹⁰⁵ made the following characterization: "A duty of care exists when injury is foreseeable

98. *Id.*

99. *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830 (2d Cir. 1977). In *Peninsular*, the shipowner changed course to procure aid for an ailing seaman, and was awarded reimbursement of the expenses incurred in doing so. *Id.* at 832.

100. THOMAS J. SCHOENBAUM, *ADMIRALTY & MARITIME LAW* § 4.5, at 134 (1987).

101. This warranty has also been extended to other maritime workers whom the Longshore and Harbor Workers' Compensation Act does not cover. *Id.*

102. *Id.*

103. *Nissho Iwai Am. Corp. v. M/V Sea Bridge*, 1991 AMC 2070 (D. Md. 1991).

104. *Aldacosta v. Tittle*, 544 F.2d 752, 755 (5th Cir. 1977) (citing *Giboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975)).

105. 789 F. Supp. 488, 490 (D.P.R. 1992).

or when contractual or other relations of the parties impose it. In determining the existence of duty, a court must examine and weigh the probability of an accident, the potential extent of the injury, and the cost of adequate precautions"¹⁰⁶ Since it is probable, rather than possible, that a medical emergency of some kind will occur aboard a large liner, that hazard should define the ship's duty as one of substantial care to its passengers.

IV. POSSIBLE WAYS TO PROTECT PASSENGERS

It would be in the best interest of the traveling public for admiralty courts to revoke this harsh policy of holding carriers harmless for the torts of physicians engaged by them. However, if admiralty courts continue to exonerate carriers in passenger medical malpractice cases, there are three possible ways to provide better care to travelers: First, the legislature can amend current statutory descriptions of a ship's staff so that a doctor is specified as an employee of the carrier; second, passengers can invoke the doctrine of agency by estoppel; and third, a shipping company may indemnify itself against potential medical malpractice claims.

A. Statutory Considerations

In order to clarify the position of a shipboard doctor, the current statute in place describes the staff department of a ship as being "composed of a medical division" which is supervised by the "senior registered medical doctor"¹⁰⁷ The present wording further asserts that "[t]he officer in charge of each division is responsible *only* to the master."¹⁰⁸

The case chosen to illustrate the meaning of the statute was *Nietes*, which stated "where a ship's physician is . . . subject to the ship's discipline and the master's orders . . . he is, for the purposes of *respondeat superior* . . . , in the nature of an employee or servant" ¹⁰⁹ Perhaps a further revision of this statute, adding the phrase "and the physician, as a staff member, is to be regarded as an employee of the ship," would be less ambiguous and be more analogous to public policy in other areas of tort. In the alternative, the legislature can overrule judicial decisions found to be against public policy.

106. *Id.*

107. 46 U.S.C.A. § 8302(c) (Supp. 1992).

108. *Id.* (emphasis added).

109. 188 F. Supp. at 220.

B. *The Theory of Agency by Estoppel*¹¹⁰

Even when law appears to be wrong, purists hold fast to the doctrine of *stare decisis*. A graceful way out of disturbing precedent in the field of vicarious liability, would be for the judiciary to accept the precepts of the Restatement (Second) of Agency section 267, which states:

One who represents that another is his servant or agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.¹¹¹

The same premise has been offered through the Restatement (Second) of Torts, section 429 which, in similar fashion, states that the employment of an independent contractor who is reasonably perceived to be performing the services of the employer or his servant, renders the employer liable for any negligence caused by that contractor, "to the same extent as though the employer were supplying [those services] himself"¹¹²

In the situation under discussion, it is logical to assume that when a doctor relieves a carrier of the onerous burden of disrupting a voyage in order to accommodate a passenger's medical needs, that physician is standing in the shoes of the carrier. Hence, the doctor can aptly be described as a servant.

C. *Indemnification*

One expert in the arena of torts explained the policy behind vicarious liability "as a required cost of doing business."¹¹³ He continued by stating that it is more appropriate for an employer to assimilate the responsibility for the torts of its employees "rather than [burden] the innocent plaintiff, . . . because [the employer] is better able to . . . distribute them, through prices, rates or liability insurance, to the public . . . and . . . the community at large."¹¹⁴

110. Brief for Plaintiff-Appellant at 25, *Cummiskey v. Chandris*, 719 F. Supp. 1183, (S.D.N.Y. 1989) (No. 89-7912).

111. RESTATEMENT (SECOND) OF AGENCY § 267 (1957).

112. RESTATEMENT (SECOND) OF TORTS § 429 (1965).

113. Appellant's Brief at 20, *Cummiskey* (No. 89-7912), (citation omitted).

114. *Id.*

Another way for shipowners to anticipate vicarious liability would be to set up a general fund.¹¹⁵ The Department of Transportation could administer this fund, and require that the Port Captain contribute an amount commensurate with the number of passengers leaving from that port per trip.¹¹⁶ Any passenger claiming medical malpractice on the part of the shipboard physician would be able to sue the fund, instead of the cruise line.¹¹⁷ The injured passenger would then expand the possibilities of getting compensated, if either the cruise line or the doctor were insolvent. Using this method of self-indemnification, carriers, of course, would add the cost to the price of a ticket. Therefore, the shipowner's investment in the health and safety of his passengers would benefit all parties.

V. CONCLUSION

Unfortunately, the well-reasoned decision of the *Nietes*¹¹⁸ court has been lying fallow for many years. Other maritime cases of the last three decades have chosen to follow precedent which favors the cruise lines, to the detriment of seafaring travelers.

As applied to all communities from which cruise lines embark, it would be reassuring to the passengers and worthwhile for the cruise lines to carry medical malpractice insurance for their doctors, because the cost would be minimal if spread among an increasing volume of travelers.¹¹⁹ Furthermore, the judiciary has sufficient reason to resurrect the *Nietes*¹²⁰ opinion favoring the imposition of the doctrine of *respondeat superior* upon shipowners for the alleged negligence of their shipboard practitioners, so that public policy will be satisfied in admiralty as well as other areas of law. If those entities choose to ignore this burgeoning problem, then perhaps the legislature will take the necessary steps to answer consumer needs, by reworking present statutes, overruling bad law, or promulgating new laws in favor of the consumer, who may ultimately bear the brunt of any negligent behavior.

Admiralty courts no longer need to steer by the star of *stare decisis* in the field of cruise ship medical malpractice cases, because in the long run,

115. Interview with Robert M. Jarvis, Professor of Law, Nova University Law Center, Fort Lauderdale, Fla. (Oct. 8, 1992).

116. *Id.*

117. *Id.*

118. 188 F. Supp. at 221.

119. Compagno, *supra* note 8, at 392.

120. 188 F. Supp. at 219.

both the cruise industry and its passengers will reap the benefits of prudent change.

Beth-Ann Erlic Herschaft