

**TRAVEL LAW: SLIP AND FALL ON A CRUISESHIP POOL DECK:
HOW SLIPPERY IS TOO SLIPPERY?**

REVISION #3

August 27, 2015

A substantial number of accidents aboard cruise ships involve slips, trips and falls on liquids including spilled beverages and rainwater on pool decks and elsewhere [see Dickerson, *Travel Law*, Section 3.03 (2015)]. Should a lawsuit be filed by a injured passenger alleging that the cruiseline was negligent, what must be proven? As noted by the United States Court of Appeals for the 11th Circuit in *Sorrels v. NCL (Bahamas) Ltd*, 2015 WL 4619887 (11th Cir. 2015), a slip and fall case, the presentation of expert testimony regarding the "coefficient of friction" of the surface slipped on may be helpful.

Travel Law Update

Legion Of Honor For Averting Disaster

In Nossiter, *A Shot, a Glimpse of an AK-47, and U.S. Servicemen Pounced in Gunman on Train in France*, www.nytimes.com (8/22/2015) it was noted that "It was 5:45 p.m., a normal Friday afternoon on the sleek high-speed train that takes high-level European diplomats, businesspeople, tourists and ordinary citizens between Amsterdam, Brussels and Paris...The man with the gun kept going down to carriage, holding his AK-47 and a Luger pistol. In a pocket was a sharp blade capable of inflicting grievous harm. He had at least none cartridges of ammunition, enough for serious carnage. Alek Skarlatos, a specialist in the National Guard from Oregon vacationing in Europe with a friend in the Air Force, Airman First Class Spencer Stone and another American, Anthony Sadler, looked up and saw the gunman. Mr. Skarlatos, who was returning from a deployment in Afghanistan, looked over at the powerfully built Mr. Stone, a martial arts enthusiast. 'Let's go, go'! He shouted...Their actions saved many lives on the train, which was packed with over 500 passengers...The attack took place in Oignies, near the historic town of Arras".

And in Breeden, *Americans and Briton Receive Top French Honor for Stopping Train Gunman*, www.nytimes.com (8/24/2015) it was noted that "President Francois Hollande of France on Monday awarded the Legion of Honor, France's highest award, to three Americans and a Briton for their role in stopping a gunman on a

high-speed train to Paris from Amsterdam on Friday”.

Illegal Tip Pooling

In Gurrieri, *NY Restaurant To Fork Over \$1.1M To End Tip Pool Suit*, [www.law360](http://www.law360.com) (8/24/2015) it was noted that “Le Cirque, the iconic high-end French restaurant on Manhattan’s Upper East Side, agreed Monday to pay \$1.1 million to a proposed class of workers who claim they were subjected to an illegal tip pooling policy that violated the Fair Labor Standards Act and New York state labor law...(the lawsuit alleged that defendant) illegally misappropriated tips by requiring...food service employees to share their tips with captains, who the plaintiffs claim had supervisory authority which rendered them ineligible for such tips”.

Meditation On Flying

In Satlzstein, *What It’s Really Like to Be an Airline Pilot*, www.nytimes.com (8/4/2015) it was noted that “Mark Vanhoenacker’s new book, ‘*Skyfaring: A Journey With a Pilot*’ (Knopf), isn’t exactly a memoir. It’s a meditation on flying, on the physical act of soaring through the air in a giant metal tube, and on the foreign-to-most experiences of the pilot behind the yoke. ‘I am

occasionally asked if I don't find it boring, to be in the cockpit so many hours', he writes. 'But I've never had the sense that there was any more enjoyable way to spend my working life, that below me existed some other kind of time for which I would trade my hours in the sky'...So I was always really drawn to that sense that planes give us, that the whole world is going on at once. That planes can transport us in a way that really nothing else can".

Airbnb Horror Story

In Lieber, *Airbnb Horror Story Points to Need for Precautions*, www.nytimes.com (8/14/2015) it was noted that "Her 19-year-old son told her that his Airbnb host in Madrid had locked him in the fourth-floor apartment where he was supposed to be staying and removed the key. The host was still there, he said, rattling knives around in the kitchen drawer and pressing him to submit to a sexual act. He begged his mother for help. When she called Airbnb, its employees would not give her the address and would not call the police...According to her son... he was sexually assaulted that night. Eventually, he persuaded his host to free him. He returned home to Massachusetts and is in trauma therapy...Airbnb, Uber and their ilk have managed to get people to refer to them as pioneers of something called the

sharing economy, a neat trick given that they are in the business of renting out rooms and charging for rides. What they do share, however, is risk...Still, logic and decency would suggest that when you're in danger...Airbnb would come to your rescue. And in the wake of this episode, Airbnb said on Friday that it was clarifying its policies to make sure that its employees know to always call the police when someone reports an emergency in progress".

Watch Your Weight, Please

In *Uzbekistan Airlines starts weighing passengers 'to ensure flight safety'*, www.eturbonew.com (8/14/2015) it was noted that "Plump passengers beware. The national airline of Uzbekistan says it has begun weighing those traveling along with their carry-on baggage. The isolated Central Asian state's carrier said that it had introduced the new regulations out of concern for 'flight safety'...The airline took the statement down from its website following a storm of media interest".

Delta's "Magic" Frequent-Flier Miles

In Lieber, *Guesswork in Cashing in Delta's Frequent-Flier Miles*, www.nytimes.com (7/31/2015) it was noted that "For about a

quarter-century, frequent-flier miles have represented a kind of magic for many consumers...But that magic was a trick. All along, those free seats were probably ones that the airlines weren't going to be able to fill with paying customers, so they were nearly free for the carriers to give away. Over the last 18 months, Delta Air Lines has been engaged in some sleight of hand of its own. The airline no longer posts any award chart explaining how many miles your free tickets will require, the way that United and American Airlines still do. But Delta also hasn't moved to a transparent miles redemption system that is based entirely on the cash price that the 'free' ticket would otherwise cost, as Southwest Airlines and JetBlue Airways do. Instead, Delta issues proclamations like this one that came along a few weeks ago: 'For travel on or after June 1, 2016, the number of miles needed will change based on destination, demand and other considerations. But most Award prices will remain unchanged'. Which destinations? How much demand? What other considerations? Which prices? The airline won't say. You're just supposed to cross your fingers and hope that you have enough miles come vacation time or if you have to get to a funeral quickly. Or hope for some magic...As for all of the people who no longer get anywhere near the value they once did from their miles, at least there's this bit of magic left: It is still amazing that you can close your eyes in a metal tube in Los Angeles and wake up close

to Sydney, even if it takes many hundreds of thousands of frequent-flier miles to get there for free”.

Blame Those Mischievous Airline Robots

In David Z. Morris, *Are airline passengers getting ripped off by robots?*, <http://fortune.com> (8/4/2015) it was noted that “On July 24, the (U.S. DOT) announced that it was launching an investigation into fares set by major airlines after the May crash of Amtrak Train 188. The fatal derailment stopped Amtrak service along the packed northeast corridor for nearly a week, sending travelers looking for alternatives. As demand surged, flyers paid as much as four times usual fares. That certainly looked like, in Transportation Secretary Anthony Foxx’s words, ‘price gouging’. But what a flyer pays for a seat is determined in large part by computer algorithms that respond automatically to shifting demand, with little moment-to-moment human involvement. These so-called dynamic pricing systems are increasingly common across a variety of industries, and the DOT’s investigation will have to wrangle with some fundamental questions they raise...At any given moment, airlines’ dynamic pricing systems work within a limited range of fares, filed with the Airline Tariff Publishing Company (ATPCO) about once a day. That includes the maximum fare for coach seats-what’s known as

the Y fare. It's a price usually only seen by the most desperate last-minute travelers, and can be many times higher than a typical fare. But each airline's daily Y fare would have been set before Amtrak 188's crash. As demand spiked, automated systems would have reserved more and more seats for sale at the maximum rate, without any humans necessarily involved. The most concrete question for the DOT will be whether airlines inflated their highest fares in the days following the derailment". Stay tuned.

Sick Railroads

In Fitzsimmons & Chen, *Aging Infrastructure Plagues Nation's Busiest Rail Corridor*, www.nytimes.com (7/26/2015) it was noted that "In Maryland, a century-old rail tunnel needed emergency repairs this winter because of soil erosion from leaks, causing widespread train delays. In Connecticut, an aging swing bridge failed to close twice last summer, stopping train service and stranding passengers. And last week, New Jersey Transit riders had a truly tortuous experience. There were major delays on four days because of problems with overhead electrical wires and a power substation, leaving thousands of commuters stalled for hours...These troubles have become all too common on the Northeast Corridor, the nation's busiest rail sector, which stretches from Washington to Boston and carries about 750,000

riders each day on Amtrak and several commuter rail lines. The corridor's ridership has doubled in the last 30 years even as its old and overloaded infrastructure of tracks, power lines, bridges and tunnels has begun to wear out...The delays are not just miserable for the passengers stuck on the trains; they have a ripple effect, sending more traffic onto roads and wasting hours for commuters who could be working. The shutdown of the corridor for one day could cost the country \$100 million in added congestion, productivity losses and other effects, according to a report from the Northeast Corridor Infrastructure and Operations Advisory Commission, a group established by Congress to improve the network".

Travel Law Article: Proving A Slip And Fall Case

In the *Sorrels* case, the Court noted that "In the early morning hours of April 14, 2012, Mrs. Sorrels exited the lounge of the Norwegian Sky, and made her way onto one of the adjacent exterior pool decks. The deck was wet from rain. After walking approximately 100 feet on the deck, Mrs. Sorrels slipped and fractured her wrist. Mr. And Mrs. Sorrels (the Plaintiffs) sued NCL for negligence under maritime law, which governs the liability of a cruise ship for a passenger's slip and fall".

Standard Of Care

"Under maritime law, the owner of a ship in navigable waters owes passengers a 'duty of reasonable care' under the circumstances...To prevail on their negligence claim, therefore, (the Plaintiffs) had to prove 'that (1) [NCL] had a duty to protect [Mrs. Sorrels] from a particular injury [i.e., her slip and fall]; (2) [NCL] breached that duty; (3) the breach actually and proximately caused [Mrs. Sorrel's] injury and (4) [Mrs. Sorrels] suffered actual harm'".

The Coefficient Of Friction

"In slip and fall cases involving an allegedly dangerous or defective surface, the question of liability sometimes turns on (or is at least informed by) the surface's coefficient of friction (COF), which is, in layman's terms, 'the degree of slip resistance' (citing *Mihailovich v. Laatsch*, 359 F. 3d 892, 921 n. 2 (7th Cir. 2004)...See also *Shorter Oxford English Dictionary* 1035 (5th ed. 2002) (defining COF as 'the ratio between the force necessary to move one surface horizontally over another and the normal force each surface exerts on the other'). 'The higher the [COF] the slipperier the [surface] w[ill] be.' *Mihailovich*").

Proving The COF

"Evidence concerning a surface's COF is generally presented through the testimony of an expert witness, who opines on the appropriate COF industry standard and on whether the surface in question meets that standard (citing *Rosenfeld v. Oceania Cruises, Inc.*, 654 F. 3d 1190, 1193-94 (11th Cir. 2011)...To help establish (NCL's duty of reasonable care) and (the breach thereof, the Plaintiffs) had Dr. Ronald Zollo, a civil engineer, conduct COF testing on the deck. The testing by Dr. Zollo (and by NCL's own expert) took place approximately 520 days after Ms. Sorrel's accident. Dr. Zollo-who performed his tests following a rain-fall reported that wet testing produced a COF range from 0.70 on the high end to 0.14 on the low end. The average value for all wet testing was 0.45. Dr. Zollo also reviewed video of Ms. Sorrels deposition testimony and other documents relevant to the litigation".

The Industry COF Standards

"Dr. Zollo opined that a COF of 0.45 is 'below minimum standard values that have long been accepted as required in order to classify a walkway surface as slip-resistant...According to Dr. Zollo, the American Society for Testing and Materials (ASTM),

the Occupational Safety and Health Administration (OSHA), the Federal Register, and the Hospital Research Bureau set the minimum COF value for passenger walkways at 0.50. Dr. Zollo further reported that, pursuant to Section 11.12.1.2 of ASTM F1166-07 (entitled 'Standard Practice for Human Engineering Design for Marine Systems, Equipment and Facilities') walkways on ships 'shall have a non-skid surface sufficient to provide a [COF] of 0.6 or higher measured when the surface is wet'".

Dr. Zollo's Opinions

"Based on his investigation of the COF testing, Dr. Zollo rendered a number of opinions. First, at the time the deck was tested, it did not meet the minimum COF standard for passenger walkways under Section 11.12.1.2 of ASTM F1166-07. Second, based on other reported slip and fall incidents that occurred aboard the Norwegian Sky, NCL knew or should have known that the condition of the deck in question posed an unreasonable risk of passengers when it was wet. Third, due to the 'wide range of friction resistance along the walkway[,], the deck 'trap[ped] individuals via a false sense of security[.]' Fourth, even if NCL had posted warning signs about the deck, they would have been inadequate to warn passengers of the potential 'hidden' danger".

The Court's Decision

In reversing the Trial Court's exclusion of Dr. Zollo's testimony and the publications he relied upon to establish an appropriate COF and granting NCL's motion for summary judgment, the Court of appeals, inter alia, made the following determinations.

COF Applies To Workers And Passengers

First, the ASTM COF standard applied not only to workers aboard ships but to passengers as well. "[T]here are numerous areas traversed by both crew members and passengers, including the pool decks (where crew members may bring drinks to passengers and clean the pool and repair chairs). A deck constructed of a single material (here, teakwood) cannot be designed to meet two different COF standards—one for passengers and one for crew members—at the same time".

Delay In Testing

Second, although the COF testing by Dr. Zollo and NCL's expert took place 520 days after the accident both experts agreed that conditions for the test were the same as when the accident

occurred. "We have long held...that a delay in viewing or inspecting where an accident took place normally goes to weight and not to admissibility".

Evidence Of Other Accidents

Third, the Plaintiffs introduced "evidence of 22 other slip and fall incidents on teakwood flooring in public areas of the Norwegian Sky over a four-year period. However, the Court rejected this type of evidence because (1) "none of them occurred where Mrs. Sorrels fell"; (2) "the liquids that the other passengers slipped on differed-most involved unknown wet substances-and many of the incident reports noted that there was no indication of rainwater, the liquid that supposedly helped cause Mrs. Sorrel's fall"; (3) "in some of the other incidents there were other factors involved. For example, three passengers slipped while playing table tennis and another (a 12-year old) fell while chasing someone around the pool".

Posting Of Warning Signs

Fourth, the testimony of NCL witnesses to the effect that "the ship's deck department would sometimes post warning signs on the pool deck after it had rained. (However, none of NCL's

witnesses) could recall whether signs were posted on the night of (the accident)...But the issue is not whether NCL violated any of its own internal policies and procedures by not posting warning signs. Rather, the issue is whether NCL had actual or constructive knowledge that the pool deck where Mrs. Sorrels fell could be slippery (and therefore dangerous) when wet, and whether it negligently failed to post a warning sign after the rain that preceded Mrs. Sorrels' accident".

Justice Dickerson been writing about *Travel Law* for 39 years including his annually updated law books, *Travel Law*, Law Journal Press (2015) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2015), and over 350 legal articles many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml. For additional travel law news and developments, especially, in the member states of the EU see www.IFTTA.org

