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Outside Counsel

## Medical Malpractice on the High Seas

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Each year more than 10 million consumers purchase a cruise ship vacation departing from and returning to a U.S. port located primarily in the State of Florida. Unlike consumers purchasing goods and services to be delivered on land, cruise passengers have limited rights and remedies should the cruise ship fail to deliver travel services promised and contracted for or which should reasonably be expected in this modern world. Stated, simply, passengers 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.<sup>1</sup>

Perhaps, the most disturbing, and certainly most disruptive, aspect of a cruise vacation is what happens when a passenger is sick or injured and needs the care of medical professionals. There are no uniform international standards for the qualification of medical care professionals, for the nature and quality of medical equipment aboard the cruise ship<sup>2</sup> or for the cost of medical care.<sup>3</sup> Cruise ships have, typically, not been held liable for the medical malpractice committed by their on-board medical staff.

### The Barbetta Rule

The rule commonly followed, the Barbetta rule, arose from the case of [Barbetta v. S/S Bermuda Star](#),<sup>4</sup> which involved a ship's doctor who treated a sick passenger for five days and failed to discover that she had diabetes. As a result the passenger's "condition deteriorated and she developed a severe case of pneumonia, lapsed into a coma and finally had to be removed from the ship....Both the pneumonia and coma, the Barbettas claimed, were caused by the doctor's failure to properly treat Mrs. Barbetta. during the five days of treatment."

The U.S. Court of Appeals for the Fifth Circuit addressed the issue: "Does general maritime law impose liability, under the doctrine of respondeat superior, upon a carrier or ship owner for the negligence of a ship's doctor who treats the ship's passengers?...An impressive number of courts from many jurisdictions have, for almost one hundred years, followed the same basic rule: When a carrier undertakes to employ a doctor aboard ship for its passengers' convenience, the carrier has a duty to employ a doctor who is competent and fully qualified. If the carrier breaches its duty, it is responsible for its own negligence. If the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier." The court in *Barbetta*, therefore, held that cruise ships are not vicariously liable for malpractice of ships' doctors.

Under the Barbetta rule, ships' doctors have, generally, been treated not as employees but as independent contractors<sup>5</sup> and often are beyond the jurisdiction of local courts and/or judgment

proof. This is particularly disconcerting, since injured or sick passengers have little choice but to rely upon the medical services and personnel provided by the cruise ship. The responsibility of cruise ships to transport sick passengers by way of appropriately equipped ambulances to appropriately staffed and equipped hospitals on shore may be problematic as well.<sup>6</sup>

## The Tide Begins to Turn

The Barbetta rule has been routinely followed by almost all U.S. courts with a few exceptions.<sup>7</sup> The rule was recently challenged by a Florida appellate court decision in [Carlisle v. Carnival Corporation](#),<sup>8</sup> wherein a 14-year-old female passenger became "ill with abdominal pain, lower back pain and diarrhea and was seen several times in the ship's hospital by the ship's physician" who misdiagnosed her condition as flu when, in fact, she was suffering from appendicitis. After several days of mistreatment she was removed from the cruise ship, underwent surgery after her appendix ruptured and was rendered sterile.

In rejecting a long line of cases in the U.S. Court of Appeals for the Fifth Circuit absolving cruise ships for the medical malpractice of a ship's doctor, the Carlisle court stated, "The rule of the older cases rested largely upon the view that a non-professional employer could not be expected to exercise control or supervision over a professionally skilled physician. We appreciate the difficulty inherent in such an employment situation, but we think that the distinction no longer provides a realistic basis for the determination of liability in our modern, highly organized industrial society. Surely, the board of directors of a modern steamship company has as little professional ability to supervise effectively the highly skilled operations involved in the navigation of a modern ocean carrier by its master as it has to supervise a physician's treatment of shipboard illness. Yet, the company is held liable for the negligent operation of the ship by the master. So, too, should it be liable for the negligent treatment of a passenger by a physician or nurse in the normal scope of their employment, as members of the ship's company, subject to the orders and commands of the master." The Florida Supreme Court [reversed](#) this decision 953 So. 2d 461 (Fla. Sup. 2007).

## The Sea Change

In *Franza v. Royal Caribbean Cruises*<sup>9</sup> the U.S. Court of Appeals for the Eleventh Circuit found the following relevant facts. While off the ship, passenger Pasquale Vaglio suffered a serious head injury "while boarding a trolley 'at or near the dock.'" Although Vaglio "'could have easily been referred ashore for...examination, evaluation and treatment' [i.e., King Edward Memorial Hospital in Bermuda was close by] he was instead 'taken in a wheelchair to the ship's infirmary'. In fact notwithstanding other treatment options, Vaglio allegedly 'was required to go to the ship's medical center to be seen for his injuries'."

Vaglio first entered the ship's infirmary at about 10 a.m. "No physician examined him at the time." Rather, a nurse allegedly employed full-time by Royal Caribbean, "performed the first relevant medical evaluation." The nurse "knew about the trolley accident, and indeed she observed a lump and an abrasion on Vaglio's head. Nevertheless, without administering or even recommending any diagnostic scans, [the nurse] advised Vaglio and his wife that Vaglio 'was fine to return to his cabin'. Cautioning only 'that [Vaglio] might have a concussion' the nurse instructed Vaglio's wife to keep an eye on her husband's condition."

The opinion continues that "Vaglio received no 'further care or treatment' during this first visit to the ship's infirmary. Instead 'relying on the advice of the ship's medical personnel' the Vaglios returned to their cabin at around 10:45 a.m." As his condition worsened and after some delay Vaglio was transported to the infirmary and then "encountered another delay; the onboard medical staff would not examine Vaglio until the ship's personnel obtained credit card

information." At about 1:45 p.m., "nearly four hours after his first visit to the ship's infirmary," Vaglio was finally evaluated by the ship's physician, who "was allegedly an employee" of Royal Caribbean. During the examination the doctor started a Mannitol drip and ordered that Vaglio be transferred to King Edward Memorial Hospital in Bermuda "for further care and treatment"...more than six hours after he was first examined" by the nurse. "By that time, Vaglio's life was beyond saving." The day after his fall, Vaglio was airlifted to Winthrop-University Hospital in Mineola, N.Y., where he died one week later.

The complaint by Vaglio's daughter, Patricia Franza, alleged that Royal Caribbean was liable for the malpractice of the nurse and doctor in two ways. First, Franza invoked the doctrine of actual agency, alleging that Royal Caribbean was negligent "by and through the acts of its employees or agents." In the alternative, she argued that Royal Caribbean was liable "under the theory of apparent agency" because the cruise line purportedly "manifested to [Vaglio]...that its medical staff...were acting as its employees and/or actual agents" and Vaglio, in turn, "relied to his detriment on his belief that the physician and nurse were direct employees or actual agents of [Royal Caribbean]."

In rejecting the *Barbetta* rule, the court held that "Plainly, under the ordinary rules of agency," the allegations in Franza's complaint support a finding that the nurse and doctor "were agents of Royal Caribbean....We decline to adopt the [*Barbetta* rule] because we can 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 so often in other maritime tort cases." The court noted that no decision of the U.S. Supreme Court or this court "binds us to the strictures of *Barbetta*," the roots of which snake back into "a wholly different world."

Instead of nineteenth-century steamships...we now confront state-of-the-art cruise ships that house thousands of people and operate as floating cities, complete with well-stocked modern infirmaries and urgent care centers. In place of truly independent doctors and nurses, we must now acknowledge that medical professionals routinely work for corporate masters. And whereas ships historically went 'off the grid' when they set sail, modern technology enables distant ships to communicate instantaneously with the mainland in meaningful ways. In short, despite its prominence, the *Barbetta* rule now seems to prevail more by the strength of inertia than by the strength of its reasoning.

## Endnotes:

1. See "The Costa Concordia Disaster: One Year Later, Many More Incidents Both On Board Megaships And During Risky Shore Excursions," 38 *Tulane Maritime Law Journal* 515-581 (Summer 2014); Dickerson, "The Cruise Passenger's Rights & Remedies 2014" at [www.nycourts.gov/courts/9jd/taxcertatd.shtml](http://www.nycourts.gov/courts/9jd/taxcertatd.shtml).
2. See e.g., *Morales v. Royal Caribbean Cruise*, 419 F.Supp.2d 97 (D.P.R. 2006); *Doonan v. Carnival Corp.*, 404 F.Supp.2d 1367 (S.D. Fla. 2005). For cruise ships that touch U.S. ports the Cruise Vessel Security and Safety Act of 2010 requires the provision of medical care for the victims of sexual assaults, including that medical doctors and nurses be licensed. See <https://www.congress.gov/111/bills/hr3360/BILLS-111hr3360enr.pdf>.
3. See e.g., *Morales v. Royal Caribbean Cruises*, 419 F.Supp.2d 97 (D.P.R. 2006). See also: "Cruise-Ship Health Care: Prescription of Trouble," *Consumer Reports Travel Letter*, p. 1, 6 (April 1999) ("Many passengers would be surprised to discover that there are no international standards of medical care on passenger cruise ships—not even one requiring that a physician be on board. Although most cruise ships generally do carry doctors, many of them are not U.S.-trained or licensed to practice in the States...No international agency regulates the infirmary facilities or equipment or requires a standard of training for cruise-ship-doctors." See

also: Gionis, "Paradox on the High Seas: Evasive Standards of Medical Care—Duty Without Standards of Care: a Call for the International Regulation of Maritime Healthcare Aboard Ships," 34 J. Marshall L.R. 751 (2001).

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

5. See *Meitus v. Carnival Cruise Lines*, 2000 Fla. App. LEXIS 10157 (Fla. App. 2000).

6. See e.g., *Wajnsat v. Oceania Cruises*, 2011 WL 465349 (S.D. Fla. 2011); *Gliniecki v. Carnival Corp.*, 632 F.Supp.2d 1205 (S.D. Fla. 2009).

7. See *Nietes v. American President Lines*, 188 F.Supp. 219 (N.D. Cal. 1959). See also Herschaft, "Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer By The Star Of Stare Decisis" ("It would be in the best interests 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.")

8. *Carlisle v. Carnival Corporation*, 2003 Fla. App. LEXIS 12794 (Fla. 2003), rev'd 953 So. 2d 461 (Fla. Sup. 2007).

9. *Franza v. Royal Caribbean Cruises*, 2014 WL 5802293 (11th Cir. 2014).

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