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THE CRUISE PASSENGER’S RIGHTS AND REMEDIES 2016

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ESSAY

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I. INTRODUCTION .................................................................................. 142
II. THE EVOLUTION OF TRAVELERS’ RIGHTS .................................. 142
III. A ONE-SIDED CONTRACTUALLY DEFINED RELATIONSHIP .......... 143
IV. DEVELOPMENT OF NEW DUTIES ................................................. 144
       A. Breach of Warranty of Safety ................................................. 146
       B. Negligent Selection of a Supplier or Ground Services Provider.. 146
       C. Duty To Warn of Dangerous Environment ............................. 148
       D. Third Party Beneficiary Theory ............................................. 149
V. ON-BOARD MEDICAL MALPRACTICE ........................................ 151
VI. ASSUMPTION OF DUTY/DUE DILIGENCE INVESTIGATIONS ........ 153
VII. UPDATE ON LITIGATION ROADBLOCKS .................................... 154
       A. The Limitation of Liability Act ............................................. 154
       B. Time and Jurisdictional Limitations ...................................... 156


I. INTRODUCTION

For the last forty years, I have been writing books and articles about travel consumers’ rights and remedies against airlines, cruise lines, rental car companies, taxis and ride sharing companies, hotels and resorts, tour operators, travel agents, informal travel promoters, and destination ground operators providing tours and excursions. During that same time period, I spent fifteen years as a consumer advocate, specializing in prosecuting individual and class action cases on behalf of injured and victimized travelers.

My travel consumer philosophy is simple. When consumers purchase travel services, such as transportation, accommodations, food and drink, tours of local sights, or destination excursions, they should receive the purchased travel services as promised and contracted for or which reasonably can be expected. If they do not receive those services, in whole or in part, then the injured or victimized traveler should be properly compensated in a court of law, preferably in the jurisdiction wherein the services were purchased and/or where the consumer resides and subject to law of that jurisdiction.

II. THE EVOLUTION OF TRAVELERS’ RIGHTS

When I first started writing about travel law in 1976, the rights and remedies available to travelers were few, indeed. The concept that an airline, cruise line, hotel, resort, or tour operator should be able to insulate itself from liability for the tortious and contractual misconduct of so-called “independent contractors” was universally applied by courts to claims arising on land and on the sea. In the context of maritime law, courts routinely enforced the rule from *Barbetta v. S/S Bermuda Star*, that insulated cruise ships from liability for the medical malpractice of the medical staff.

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2. See id. § 3.02(3)(c)(i).
3. 848 F.2d 1364, 1373, 1988 AMC 2650, 2664 (5th Cir. 1988).
4. See, e.g., Munford v. Carnival Corp., 7 F. Supp. 3d 1243, 1250 (S.D. Fla. 2014) (holding that a cruise ship passenger who suffered a stroke onboard the cruise ship could not hold the cruise line vicariously liable for actions of the ship’s doctor); Hung Kang Huang v. Carnival
As noted in my 2004 Tulane Maritime Law Journal article, maritime law, as it related to cruise passengers, was best described as twenty-first-century cruise ships combined with nineteenth-century passenger rights.\(^5\) However, to my surprise and satisfaction, the United States Court of Appeals for the Eleventh Circuit, in *Franza v. Royal Caribbean Cruises, Ltd.*,\(^6\) decided to dramatically transport passenger rights, at least in part, into the twenty-first-century.

In *Franza*, the estate of a deceased cruise passenger brought suit against a cruise line, alleging the decedent received negligent medical care aboard the ship after sustaining a severe head injury.\(^7\) The district court found that, under the *Barbetta* rule, the cruise line was immune from respondent superior liability for those providing medical care aboard the cruise ship.\(^8\) On appeal, the court rejected the district court's application of the *Barbetta* rule, noting that, unlike the nineteenth-century steamships upon which the "roots of the *Barbetta* rule" were based, modern cruise ships "house thousands of people and operate as floating cities . . . . In place of truly independent doctors and nurses, we must now acknowledge that medical professionals routinely work for corporate masters."\(^9\) Given the modern realities of cruise passenger travel and medical care aboard cruise ships, the court concluded that it could "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."\(^10\)

### III. A ONE-SIDED CONTRACTUALLY DEFINED RELATIONSHIP

Until recently, travelers' and suppliers' relationships with cruise ships and tour operators, were governed by contracts, often printed in nearly invisible print and loaded with self-serving and unconscionable clauses.\(^11\) These contracts were routinely enforced, regardless of whether

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\(^6\) 772 F.3d 1225, 2014 AMC 2716 (11th Cir. 2014).

\(^7\) *Id* at 1227-28, 2014 AMC at 2711.

\(^8\) *Id* at 1238, 2014 AMC at 2711-12.

\(^9\) *Id* at 1239, 2014 AMC at 2729.

\(^10\) *Id* at 1238, 2014 AMC at 2728.

the traveler saw or agreed to the terms therein. Indeed, some courts held that promises made in travel advertising material would not be enforced because the promises were disclaimed or limited by contractual clauses. In essence, the supplier or tour operator's contractual definition of its relationship to the consumer was nearly universally enforced by the courts.

However, in Franzia, the court noted that it is the facts of each case, not the contract, which define the relationship between cruise ship and passenger. Rejecting the cruise line's argument that a clause in the passenger ticket contract limited liability for onboard medical services, the court stated:

Royal Caribbean urges us to look beyond the complaint, to [the] passenger ticket contract ... which purports to limit the ship's liability for onboard medical services. Even if we were to look to the contract at this stage, we would not consider the nurse and doctor to be independent contractors simply because that is what the cruise line calls them.

The Franzia court's new approach to cruise line ticket clauses, coupled with its rejection of the Barbetta rule, will likely have significant implications for cruise lines, most of which have relied on these long-standing maritime travel rules to limit or completely avoid liability.

IV. DEVELOPMENT OF NEW DUTIES

Cruise lines often put substantial time and effort into planning shore excursions with the goal of generating significant revenue. Attracted by


14. See 772 F.3d at 1237-38, 2014 AMC at 2727.

15. Id.

16. See Matthew T. Dresner, Capturing the Ship into Culpability: Barbetta, Franzia, and the Efficacy of Imputing Liability to Corporate Shipowners in the Medical Malpractice Context, 40 Tul. Mar. L.J. 177, 189-90 (2015) ("This point strikes an ominous chord for cruise ship companies like Royal Caribbean, which—in conjunction with the Barbetta rule—have faithfully relied on contractual limitation of liability clauses like the one in Franzia to insulate them from imputed culpability").

the variety of activities offered in excursion packages, as well as the relative ease of booking, a significant portion of cruise ship passengers participate in excursions.18 Cruise lines actively promote shore excursions, emphasizing that the cruise lines’ tour operator partners are both safe and qualified.19 Despite these assurances, however, passengers have been injured while enjoying their excursions, forcing courts to grapple with determining the liabilities of the parties involved.20

In an effort, perhaps, to circumvent the independent contractor defense,21 and faced with cases involving foreign ground providers not subject to U.S. long arm jurisdiction, courts began applying common law principles to the liability of tour operators for tourist accidents abroad, and more recently in the maritime context, to cruise lines for shore excursion accidents. In so doing, these courts have recognized several duties cruise lines owe to travelers and passengers.

18. See Krista Carothers, Cruise Control, CONDE NAST TRAVELER, July 2006, at 56. ("Almost half of all cruise passengers—some five million a year—participate in shore excursions ranging from simple bus tours in port cities to more adventurous activities such as scuba diving trips and hot-air balloon rides. Excursions sold by a cruise line are generally the most convenient to book, and therefore are often more crowded—and more expensive—than those purchased independently"); see also Christopher Solomon, Voyage to the Great Outdoors, N.Y. TIMES, Oct. 2, 2005, at D1. ("250 passengers from a Carnival cruise ship had signed up and paid $93 for the experience of floating in inner tubes through a rain forest cave .... Cruise lines now offer a buffet of shore excursions for their guests at every port of call .... Passengers can attend a race-car academy in Spain, get their scuba diving certification in the Virgin Islands or even take a spin in a MIG fighter jet in Russia.").

19. See Carothers, supra note 18, at 56 ("Serious accidents on these trips are extremely rare, and although the lines disclaim any liability for mishaps that occur on these excursions, they say that they make every effort to ensure that the businesses they work with are licensed and reputable. ... ").


21. See discussion supra Part III.
A. Breach of Warranty of Safety

A warranty of safety may arise when a travel purveyor promises in a brochure that some or all of the travel services will be delivered in a safe or careful manner and it can be shown that a tourist relied upon such representations. For example, terms such as “highly skilled boatmen,” “unsinkable boats,” “safe buses,” “perfectly safe” canoeing conditions, and “perfectly safe” catamaran ride may require the travel purveyor to actually deliver on the warranty. However, general promises, such as claiming that a trip will be “safe and reliable,” typically do not constitute a warranty of safety.

B. Negligent Selection of a Supplier or Ground Services Provider

In an early case in 1992, Winter v. I.C. Holidays, Inc., the New York Superior Court found a tour operator liable for the negligent selection of a foreign bus company. The plaintiffs, passengers on a tour bus, were injured when the bus veered off a road and fell down an embankment. Noting that the foreign bus company was not only negligent, but also insolvent, uninsured, and otherwise unavailable to satisfy the claims of the injured travelers, the court held that a tour operator had a duty to select responsible independent contractors.

Recently, courts have recognized this duty in the context of cruise lines’ shore excursions. In Zapata v. Royal Caribbean Cruises, Ltd., a cruise passenger purchased tickets for an excursion featuring “bell diving.” During the excursion, the cruise passenger became asphyxiated, and employees brought the passenger to the surface for oxygen. Upon resurfacing, however, employees discovered the oxygen tank was empty,

29. Id.
30. Id.
32. Id.
and the passenger subsequently became unconscious and died.\textsuperscript{31} In determining that the plaintiff’s claims against the cruise line were governed by the Death on the High Seas Act (DOHSA), the court held that the plaintiff was unable to recover non-pecuniary damages.\textsuperscript{33} The court also found, however, that the plaintiff’s claims for negligent selection or retention of excursion operators under apparent agency or the agency by estoppel doctrine were legally sufficient, if the appropriate facts were re-pled.\textsuperscript{35} Finally, the court dismissed the plaintiff’s claims of joint venture and third party beneficiary theory, as the claims were expressly disclaimed in the Tour Operator Agreement.\textsuperscript{36}

Similarly, in \textit{Gibson v. NCL (Bahamas) Ltd.}, a cruise passenger sustained injuries while attempting to board a bus transporting her to a zipline tour in the Mexican jungle.\textsuperscript{37} The passenger alleged, among other claims, that the cruise line “failed to properly[, ] adequately inspect, screen, select, [and] retain services of the tour operator to ensure the operator was running a reasonably safe excursion.”\textsuperscript{38} The court granted the cruise line’s motion for summary judgment, because the passenger failed to prove that the cruise line had negligently selected the excursion operator and bus subcontractor, failed to warn of potential dangers, or engaged in negligent representations.\textsuperscript{39} The court did, however, find causes of action for apparent authority and joint venture.\textsuperscript{40}

The duty to responsibly select independent contractors may also apply in situations where an excursion operator fails to exercise necessary diligence when hiring independent contractors. In \textit{Perry v. Hal Antillen NV}, a cruise passenger returning from a cruise line recommended shore excursion was run over by the shore excursion tour bus.\textsuperscript{41} Evaluating the plaintiff’s claim that the tour operator acted negligently when selecting its drivers, the court noted that “[i]n general, an employer of an independent contractor can be held liable if the

\textsuperscript{33} Id.
\textsuperscript{34} Id. at *4-5, 2013 U.S. Dist. LEXIS 43389, at *12-13.
\textsuperscript{35} Id. at *4, 2013 U.S. Dist. LEXIS 43389, at *11.
\textsuperscript{36} Id. at *6, 2013 U.S. Dist. LEXIS 43389, at *17.
\textsuperscript{38} Id. at *2 n.3, 2012 U.S. Dist. LEXIS 74602, at *4 n.3.
\textsuperscript{39} Id. at *5-6, 2012 U.S. Dist. LEXIS 74602, at *17-21.
\textsuperscript{40} Id. at *7-8, 2012 U.S. Dist. LEXIS 74602, at *22-25.
employer negligently selects the independent contractor.” The court then found, however, that the plaintiff had failed to demonstrate both that the drivers “lacked competence in providing the necessary transportation” and that the excursion operator knew or should have known that its drivers were unable to competently perform their duties. Courts have rejected attempts by cruise lines to contractually disclaim liability for negligent selection of excursion operators. For example, in Reming v. Holland America Line Inc., a cruise passenger fell into a sink hole during a shore excursion in Mazatlan City. The cruise line’s contract included a clause disclaiming liability for negligent selection of a local tour bus company. The court held the clause unenforceable, thus expanding the scope of 46 U.S.C. § 30509 to include not only accidents on cruise ships, but also accidents occurring during shore excursion. Ultimately, while the cruise line had urged the court to dismiss the plaintiff’s claims, the court denied the cruise line’s summary dismissal, finding that the plaintiff’s claims should be heard at trial.

C. Duty To Warn of Dangerous Environment

A cruise passenger may bring a claim for negligence where a cruise line fails to adequately warn passengers of a dangerous environment at a port of call. For example, in Chaparro v. Carnival Corp., cruise passengers aboard Carnival’s M/V Victory visited Coki Beach and Coral World in St. Thomas, Virgin Islands based on the recommendation of a

42. Id. at *24, 2013 U.S. Dist. LEXIS 68679, at *81. In addition to considering the passenger’s negligent selection claim, the court engaged in an extensive discussion of liability issues regarding cruise lines and shore excursions, discussing a variety of liability theories, including agency by estoppel, third party beneficiaries, failure to disclose, joint venture, warranty of safety, negligent supervision and damages limitation under Washington’s Consumer Protection Statute. Id. at *10-30, 2013 U.S. Dist. LEXIS 68679, at *30-104.

43. Id. at *24, 2013 U.S. Dist. LEXIS 68679, at *81.


45. Id. at *4, 2013 U.S. Dist. LEXIS 21483, at *10.

46. Id.; see 46 U.S.C. 30509 (2012) (“The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting (A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner’s employees or agents; or (B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.”).

47. Reming, 2013 WL 594281, at *7, 2013 U.S. Dist. LEXIS 21483, at *18-19 (“The cruise line] has failed to provide any evidence or argument regarding HAL’s inquiry into Tropical Tour’s competence and fitness as an excursion provider. Therefore, Plaintiff’s claim regarding [the cruise line’s negligent] selection and retention of Tropical Tours remains for trial.”).
cruise line employee. While returning to the ship in an open-air bus, the passengers passed a funeral service of a gang member. Violence erupted and a passenger was killed in the ensuing gunfire. Plaintiffs alleged that the cruise line "generally knew of gang violence and public shootings" in the area, yet failed to warn the passengers of any potential dangers. Plaintiffs further alleged that the cruise line "knew or should have known of these dangers," and cited both the cruise line's encouragement to passengers to visit the beach and its failure to warn passengers of the local crime as evidence that the cruise line had failed to warn the passengers.

A cruise line's duty to warn may be impacted by its prior knowledge of a passenger's disability. For example, in Witover v. Celebrity Cruises, Inc., a disabled passenger using a scooter on a ramp to disembark an excursion tour bus fell to the ground, causing the scooter to fall on top of her. The passenger argued that, due to the cruise line's longstanding relationship with the tour company, the cruise line should have known of the danger during unloading and had failed to warn her of the potential harm. Importantly, the passenger claimed that cruise lines have additional "supplementary duties ... when they know of a passenger's disabilities or handicaps." The court agreed, noting that, as the passenger had specifically requested wheel-chair accessible shore excursions, the cruise line's "duty to warn of the dangerousness of her excursion should be viewed in light of its prior knowledge of her disabilities."

D. Third Party Beneficiary Theory

In Perry, a tour van acting as a subcontractor for a tour operator, Rain Forest Aerial Tram, Ltd. (RFAT), ran over a cruise passenger. RFAT had entered into a contract with the cruise line and executed a copy of a manual entitled "Tour Operator Procedures and Policies" (TOPPS).
TOPPS require[d] a tour operator in the Caribbean to obtain minimum limits of auto and general liability insurance of US$2.0 million/accident or occurrence. [S]hould the Operator subcontract for services (such as aircraft, rail, tour buses or watercraft), the Tour Operator must provide a list of its subcontractors and evidence of the subcontractor's insurance.59

The cruise line asserted that RFAT "was required to assure that any subcontractor it used to provide excursion related services had in place the equivalent of USD 2,000,000 in auto and general liability coverage."60 After the accident, it was revealed that the tour van operator only had about $80,000 in insurance coverage.61 The court held that the plaintiffs were third party beneficiaries of TOPPS,62 and, therefore, the plaintiffs had a claim against RFAT for failing to disclose to the cruise line that the tour van operator was a subcontractor and was only insured up to $80,000.63

Similarly, in Haese v. Celebrity Cruises, Inc., a cruise passenger and her mother were parasailing during a shore excursion when "the guide rope supporting them broke and both women fell into the water."64 As a result of the accident, the mother died, and the daughter was severely injured.65 Plaintiff alleged that the contract between the cruise line and excursion operator placed obligations on the excursion operator for the benefit of the plaintiff.66 By failing to comply with its safety obligations, plaintiff further alleged, the excursion operator had breached its contract.67 Similarly, plaintiff argued that the cruise line had breached the contract when it failed to adequately ensure that the excursion operator complied with the contract.68 In denying the cruise line's motion to dismiss, the court held that the plaintiff's allegations were sufficient for a claim based on third party beneficiary theory.69

59. Id. at *6, 2013 U.S. Dist. LEXIS 68679, at *3, *17-18 (internal quotation marks omitted).
60. Id. (internal quotation marks omitted).
61. Id. at *7, 2013 U.S. Dist. LEXIS 68679, at *18.
62. Id. at *14, 2013 U.S. Dist. LEXIS 68679, at *45.
63. Id. at *19-20, 2013 U.S. Dist. LEXIS 68679, at *63-64.
65. Id.
66. Id. at 1743.
67. Id.
68. Id.
69. Id.
V. On-Board Medical Malpractice

Traditionally, cruise lines had not been held vicariously liable for the medical malpractice of their ships’ doctors or medical staff. Courts and commentators alike criticized this policy as unfair, arguing that the strict application of this rule to passengers on a cruise ship voyage, where most passengers are typically unable to seek medical assistance outside of the cruise ship, was fundamentally unfair. In *Carlisle v. Carnival Corp.*, a cruise ship’s doctor misdiagnosed a passenger suffering from appendicitis. After several days, she was removed from the cruise ship and underwent surgery for her ruptured appendix; the rupture and subsequent infection rendered her sterile. The court noted that, while previous Fifth Circuit cases relied on the view that “a non-professional employer could not be expected to exercise control or supervision over a professionally skilled physician,” this approach was no longer applicable in modern society. The court pointed out that a cruise line’s board of directors had “as little professional ability to supervise effectively ... the navigation of a modern ocean carrier by its master as it has to supervise a physician’s treatment of shipboard illness,” yet a company could be held liable for a master’s negligent operation of a ship, but not the negligence of a ship’s medical staff. Thus, the court concluded that a cruise line should be held 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

70. See discussion *supra* Part III.

71. See, e.g., *Fairley v. Royal Cruise Line Ltd.*, 1993 AMC 1633, 1638 (S.D. Fla. 1993) (“Granted, the cruise ship is not a floating hospital. It is more like a floating hotel. But the passengers on a floating hotel are in a radically different situation from the guests in a hotel ashore: they are a captive audience. Contrary to the reasoning of *Armstrah and Barbutts*, they are not free to contract with him for any medical services they may require.” (citation omitted) (internal quotation marks omitted)); see also Beth-Ami Erlich Herschhaft, *Cruise Ship Medical Malpractice Cases: Most Admiralty Courts Steer by the Star of Stare Decisis?*, 17 *NOVA L. REV.* 575, 592 (1992) (“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.”).

72. 864 So. 2d 1, 2, 2003 AMC 2433, 2433 (Fla. Dist. Ct. App. 2003), rev’d, 953 So. 2d 461, 2007 AMC 305 (Fla. 2007).

73. *Id.*

74. *Id.*

75. *Id at 4, 2003 AMC at 2436.*

76. *Id.*
company, subject to the orders and commands of the master.\textsuperscript{77} While the Florida Supreme Court subsequently reversed the \textit{Carlisle} decision,\textsuperscript{78} several courts have allowed medical malpractice victims to assert a claim against cruise lines based on apparent agency, as well as negligent or fraudulent misrepresentations.\textsuperscript{79}

In \textit{Franza}, an elderly cruise passenger fell and injured his head while on shore.\textsuperscript{80} The passenger died a week later, allegedly due to the "negligent medical attention" he received from the ship's doctor and nurse.\textsuperscript{81} The court found that the following circumstances indicated an agency relationship on behalf of the cruise ship's doctors and nurses:

(1) that Royal Caribbean "acknowledged" that Nurse Garcia and Dr. Gonzales would act on its behalf, and (2) that each "accepted" the undertaking. Most importantly, Franza specifically asserted that both medical professionals were "employed by" Royal Caribbean, were "its employees or agents," and were "at all times material acting within the scope and course of [their] employment." Furthermore, the cruise line directly paid the ship's nurse and doctor for their work in the ship's medical center. Third, the medical facility was created, owned and operated by Royal Caribbean, whose own marketing materials described the infirmary in proprietary language. ... Fourth, the cruise line knowingly provided, and its medical personnel knowingly wore, uniforms bearing Royal Caribbean's name and logo. And, finally, Royal Caribbean allegedly represented to immigration authorities and passengers that Nurse Garcia and Dr. Gonzales were "members of the ship's crew," and even introduced the doctor "as one of the ship's Officers." Taken as true, these allegations

\textsuperscript{77} Id.
\textsuperscript{78} See 953 So. 2d 461, 471, 2007 AMC 305, 317 (Fla. 2007).
\textsuperscript{79} See, e.g., Lobegerieger v. Celebrity Cruises, Inc., 2012 AMC 202, 220-21 (S.D. Fla. 2011) ("Plaintiff alleges Celebrity 'held out' Dr. Laubscher as an officer of the ship's crew 'through his title, his uniform, his living quarters on board the ship and his offices on board the ship.'... Taking these allegations as true, Plaintiff has sufficiently alleged that Celebrity made manifestations which could cause Plaintiff to believe Dr. Laubscher was an agent of Celebrity."); Lobegerieger v. Celebrity Cruises, Inc., 869 F. Supp. 2d 1356, 1366, 2012 AMC 1254, 1267 (S.D. Fla. 2012) (finding summary judgment for cruise line on the basis that there was no apparent agency theory of liability for medical malpractice because the cruise line could not be vicariously liable for the doctor's actions); Hill v. Celebrity Cruises, Inc., 2012 AMC 234, 236-37, 240-41 (S.D. Fla. 2011) (finding no actual agency or apparent agency, but holding that a claim for negligent misrepresentation may be supported by misrepresentation that ship would have two doctors but only provided one).
\textsuperscript{80} 772 F.3d 1225, 1227, 2014 AMC 2710, 2711 (11th Cir. 2014).
\textsuperscript{81} Id. at 1227-28, 2014 AMC at 2711 ("In particular, the ship's nurse purportedly failed to assess his cranial trauma, neglected to conduct any diagnostic scans, and released him with no treatment to speak of. The onboard doctor, for his part, failed even to meet with Vaglio for nearly four hours. Tragically, Vaglio died about a week later.").
are more than enough to satisfy the first two elements of actual agency liability.\textsuperscript{82}

Rejecting the \textit{Barbetta} rule, the court noted that whether "a passenger may use apparent agency principles to hold a cruise line vicariously liable for the onboard medical negligence of its employees" was an issue of first impression.\textsuperscript{83} The court concluded that a passenger may bring suit against a cruise line for medical negligence, and can succeed so long as the passenger can prove "detrimental, justifiable reliance on the apparent agency of a ship's medical staff-member."\textsuperscript{84} The court explained that while federal circuits in the past had made references to apparent agency principles in maritime \textit{tort} cases, "given the broad salience of agency rules in maritime law ... and the important role the federal courts play in setting the bounds of maritime torts ... we think apparent agency principles apply in this context."\textsuperscript{85} The court noted that since "the equitable foundations of apparent agency are just as important in tort as in contract," it could find "no sound basis for allowing a special exception for onboard medical negligence, particularly since we have concluded that actual agency principles ought to be applied in this setting as well."\textsuperscript{86} Thus, the court found the cruise line vicariously liable for their negligent medical employees.\textsuperscript{87}

\textbf{VI. ASSUMPTION OF DUTY/DUE DILIGENCE INVESTIGATIONS}

Some cruise lines make a concerted effort to perform due diligence in the selection of shore excursion operators, and the extent of these efforts will often be a focal point of a court's negligent selection analysis. In \textit{Smolnikar v. Royal Caribbean Cruises Ltd.}, a cruise line passenger brought suit against the cruise line after being injured while participating in a "zip line" excursion tour operated by an independent contractor, Chukka Caribbean Adventures Ltd. (Chukka).\textsuperscript{88} The court addressed, among other theories of liability, whether the cruise line had acted negligently when selecting the zip line operators.\textsuperscript{89} In proving that a cruise line negligently selected a tour operator, the plaintiff must

\textsuperscript{82} Id. at 1236, 2014 AMC at 2725 (citations omitted).
\textsuperscript{83} Id. at 1249, 2014 AMC at 2745.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 1250-51, 2014 AMC at 2748 (citations omitted).
\textsuperscript{86} Id. at 1251, 2014 AMC at 2748-49.
\textsuperscript{87} Id. at 1254, 2014 AMC at 2754.
\textsuperscript{89} Id. at 1317, 2011 AMC at 2955.
demonstrate that the cruise line knew or should have known of the tour operator's incompetence. The relevant inquiry for the court was "whether Royal Caribbean diligently inquired into Chukka's fitness." The Soinilukar court looked to facts both before and after the cruise line offered the excursion to examine the cruise line's assessment of the excursion operator's fitness. Ultimately, the court found that it was reasonable for the cruise line to find that Chukka was a competent excursion operator for many reasons, including:

1. Royal Caribbean had an incident-free relationship with Chukka dating back 4-5 years before offering the Montego Bay tour;
2. It had never been made aware of any accidents occurring on any of Chukka's other tours;
3. The positive feedback received from Royal Caribbean passengers who participated in Chukka's other tours;
4. Chukka's reputation as a first-class tour operator;
5. At least two other major cruise lines had been offering the Montego Bay zip line tour for approximately a year;
6. It had not received any accident reports from Chukka pertaining to the Montego Bay tour.

VII. UPDATE ON LITIGATION ROADBLOCKS

In my 2014 Tulane Maritime Law Journal article on cruise passenger rights, I enumerated several substantive and procedural litigation roadblocks which make it difficult, if not impossible, to efficiently and fairly prosecute cruise passenger claims. The following is a brief explanation of recent developments in areas affecting passenger damage recovery since the publication of that article.

A. The Limitation of Liability Act

The Limitation of Liability Act (Limitation Act) allows the owner of a vessel to limit its liability to the value of the vessel and any pending freight. The Limitation Act is based on "the notion that a vessel owner should not be liable beyond the value of the vessel for incidents that

90. Id at 1318, 2011 AMC at 2956-57.
91. Id at 1318-19, 2011 AMC at 2957.
92. Id at 1319, 2011 AMC at 2957.
93. Id at 1319, 2011 AMC at 2957-58.
96. Id § 30565.
occur outside the owner’s control in the inherently risky business of the
sea.” Courts have expanded the application of the Limitation Act
beyond commercial shipping vessels, applying the Limitation Act to
yachts and other pleasure craft.98

The Limitation Act should be modified or repealed, especially as it
relates to cruise ships and jet skis.99 The U.S. House of Representatives
even called for the repeal of the Limitation Act in 2010 with a bill
entitled “Fairness in Admiralty and Maritime Law Act.”100 However, after
being considered by the Senate, the bill was “sunk by the Committee on
Commerce, Science, and Transportation later that year.”101

The Limitation Act was recently considered in the proceedings
regarding the sinking of the El Faro. All hands were en route to Puerto
Rico in October 2015 when the vessel sunk, leaving no survivors or
salvage of the vessel or cargo behind.102

On Oct. 30, 2015, attorneys for Tote Maritime, owners of the El Faro,
filed a petition for exoneration from or limitation of liability in a
Florida federal district court. . . . Although the El Faro is a total loss (with zero
value), the limitation fund filed by its owner is $15,309,003—a figure
comprised of $2,072,703 for “pending freight” (as the statute requires) and
. . . $420 per gross ton to increase the fund in respect to injury or death
claims.103

The vessel owner was able to limit its liability and prevent costly
litigation from family members of the decedents. However, in the
context of cruise lines, limiting suits to the value of the cruise ship would
be fundamentally unfair where potentially thousands of claimants could
exist.

97. James E. Mercante, Admiralty’s Arsenal: Limitation of Liability, Admiralty Law,
98. Id.
99. Commentators have debated efficacy of the Limitation Act in the modern maritime
(“the Limitation Act is now viewed by most as a relic of the clipper ship era in which it was
launched”); Mark A. White, The 1851 Shipowners’ Limitation of Liability Act: Should the
inequities lead one to wonder why, in modern America, with insurance and corporate ownership
so pervasive in marine transportation, shipowners should still be subsidized at the expense of
these innocent claimants.”).
100. See Mercante, supra note 97.
101. Id.
102. Id.
103. Id.
B. Time and Jurisdictional Limitations

The time limitations for making a claim and filing a lawsuit for physical injuries (six months to file claim, one year to commence a lawsuit) and non-physical injury claims (thirty days to file claim, ninety days to commence a lawsuit) are inconsistent with land based statutes of limitations for commencing similar lawsuits, which generally range from 2.5 years for physical injury to 6 years for breach of contract or fraud.104

In regards to jurisdictional limitations, there has been little change in asserting personal jurisdiction over out-of-state travel purveyors, such as cruise lines based in Florida, New York and Washington, which advertise through the marketing efforts of travel agents and Internet travel sellers. The “solicitation plus doctrine” still remains the rule in many jurisdictions.105

C. Forum Selection and Mandatory Arbitration Clauses

There has been little change in the enforceability of forum selection clauses, including federal forum selection clauses, in cruise passenger contracts.106 Forum selection, choice of law, and mandatory arbitration clauses have been enforced with some exceptions, even though they are often found lurking in hyperlinks and through misleading and deceptive Internet marketing.107

Although there still may be some dispute over what constitutes adequate notice of such clauses before purchase and before boarding the cruise ship, these clauses are still routinely enforced.108 As far as mandatory arbitration clauses coupled with class action and class arbitration waivers are concerned, they may or may not be enforceable based upon common defenses of fraud, duress, and unconscionability.109

104. Dickerson, supra note 94, at 557.
105. id. at 561.
106. id. at 563-67.
D. Athens Protocol

The 2002 Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea (2002 Protocol) went into effect on April 23, 2014. The 2002 Protocol generally does not apply to cruise ships that touch U.S. ports, unless a court interprets a clause within a passenger’s contract that mentions the Athens Convention and the limitation amount as to mean the Protocol applies. The impact of this new regime remains to be seen, but for the 20% of U.S. citizens that cruise on ships that do not touch U.S. ports, their potential recoverable damages for injury or death claims should increase. Under the 2002 Protocol, cruise lines may be liable for up to 250,000 Special Drawing Rights (SDRs); in certain situations, this ceiling increases to 400,000 SDRs.

The 2002 Protocol applies strict liability for personal injury and death caused by a “shipping incident,” which is defined as “shipwreck, capsizing, collision or stranding of the ship, explosion or fire of the ship or a defect in the ship.” A “defect in the ship” is defined as:

any malfunction, failure or non-compliance with applicable safety regulations to respect to any part of the ship or its equipment when used for the escape, evacuation, embarkation and disembarkation of passengers, or when used for the propulsion, steering, safe navigation, mooring, anchoring, arriving at or leaving berth or anchorage or damage control after flooding or when used for the launching of life-saving appliances.

Thus, in certain circumstances, cruise ship passengers injured during a cruise may be able to reap the benefits of the 2002 Protocol’s favorable liability scheme.


111. Wallis v. Princess Cruises, Inc., 306 F.3d 827, 834-37, 2002 AMC 2277-80 (9th Cir. 2002).

112. Dickerson, supra note 94, at 576-77.


114. Id. at 579 (quoting MAR. L. ASS’N, MLA REPORT, Doc. No. 810, at 17, 566 (Spring 2013); Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea art. 111, Dec. 13, 1974, 1463 U.N.T.S. 19).

VIII. Conclusion

Every year, thousands of travelers enjoy cruises and shore excursions. While there has been a noticeable and positive change in cruise passenger rights and remedies, especially as they relate to onboard medical malpractice and shore excursion accidents, much can be done to improve passengers' legal protections. Before booking a cruise, potential passengers should carefully consider their potential for injury and respective legal rights.