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ICCL LEGAL
&
INSURANCE SEMINAR
SHIP'S MEDICAL NEGLIGENCE:
RESPONDEAT SUPERIOR OR
STRICT LIABILITY?

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ANCIENT ROOTS

- ❑ **As early as 1887, maritime courts refused to impose liability on a ship owner for a ship doctor's negligence or substandard care.** *Laubheim v. De Koninglyke Neder landsche Stoomboot Maatschappy*, 13 N.E. 781 (N.Y. 1887)(A passenger sued a shipping line and alleged that the ship doctor negligently performed a surgery on her knee. The court held that the ship owner's duty to its passenger was to select a competent duly qualified doctor; the ship owner was only liable for its negligence in breaching this duty. It was not responsible for the negligence of the ship's doctor.)
- ❑ **Courts recognized that a master/owner cannot interfere in the treatment of the doctor when he/she attends a passenger – “the work which the physician or surgeon does is under the control of the passengers themselves.”** *O'Brian v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. 1981) (A passenger sued the shipping line and alleged that the ship doctor was negligent in administering a vaccine. The court held that “[t]he law does not put the business of healing sick passengers into the charge of common carriers.”)



“BASIC RULE”

“A doctor’s negligence in treating a passenger will not be imputed to the carrier.”



- *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y. 1904)
- *The Korea Maru*, 254 F. 397, 399 (9th Cir. 1918)
- *The Great Northern*, 251 F. 826, 830-32 (9th Cir. 1918)
- *Churchill v. United Fruit Co.*, 294 F. 400, 402 (D. Mass. 1923)
- *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832 (S.D.N.Y. 1935)

NIETES V. AM. PRESIDENT LINES, LTD.

188 F. Supp. 219 (N.D. Ca. 1959)



California's Departure from the "Basic Rule"

In 1959, the Northern District of California found that "when a carrier undertakes the treatment of illness through medical services ... aboard the ship, it assumes the duty to treat carefully."

The *Nietes* court departed from the basic rule based upon the land-based "growing tendency to hold the doctor a servant in special circumstances", for example, where he is a resident physician on a hospital staff.

The *Nietes* court considered the following factors in order to determine whether to impose liability on a carrier for a ship doctor's negligence:

- 1. If the carrier pays the doctor's salary;**
- 2. If the carrier can give the doctor orders; and**
- 3. If the carrier can subject the doctor to discipline.**

California's Court of Appeal for the First District refused to "depart from established law" and did not adopt the holding in *Nietes*. *DeRoche v. Commodore Cruise Line, Ltd.*, 1994 AMC 2347 (Calif. Ct. App. 1994).

The above factors established that the carrier had *some* control over the doctor aboard the ship.

BARBETTA V. S/S BERMUDA STAR

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

In 1988, the Fifth Circuit solidified the “basic rule” and refused to follow the *Nietes*’ reasoning.

The *Barbetta* court addressed the following question: **“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?”**

The *Barbetta* court discussed two “justifications” for the basic rule:

1. The relationship between the passenger and the physician is *not* a traditional activity over which a cruise ship has control; the carrier lacks control over the doctor-patient relationship.
2. A ship is not a floating hospital. It is not in the business of providing medical services to the passengers.

The *Barbetta* court noted that “the *Nietes* court wrongly assumed that without respondeat superior liability a carrier could escape legal responsibility simply by providing any doctor for its passengers.”

DUTY TO CHOOSE COMPETENT & QUALIFIED DOCTOR



The *Barbetta* court reiterated the uniform admiralty rule that a carrier has a duty to choose a doctor who is competent and duly qualified.

❖ *Barbetta* held that “[t]o the extent that a carrier negligently hires an incompetent doctor”, the carrier can be found liable for its *own* negligence in selecting the doctor.

- a. *Warren v. Ajax Navigation Corp. of Monrovia, et al.*, 1995 AMC 2609 (S.D. Fla. 1995)(holding that the general maritime law imposes upon a ship owner who elects to provide a physician for the convenience of his passengers the duty to use reasonable care in selecting a competent doctor)
- b. *Mascolo v. Costa Crociere, S.p.A.*, 726 F.Supp. 1285, 1286 n.1 (S.D. Fla. 1989)(noting that 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 duly qualified)
- c. *Cummiskey v. Chandris, S.A.*, 895 F.2d 107, 108 (2d Cir. 1990)(affirming the district court’s holding that the duty of a ship’s owner or operator to passengers is limited to the exercise of reasonable care in selecting a competent and duly qualified physician)
- d. *Hilliard v. Kloster Cruise, Ltd.*, 1991 AMC 314 (E.D. Va. 1990)(holding that a carrier does owe a duty to exercise reasonable care in selecting a competent and qualified doctor)
- e. *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F.Supp. 488 (D.P.R. 1992)(holding that 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 duly qualified).

REASONABLE CARE IN HIRING A DOCTOR

Reasonable care = conducting a reasonable inquiry into the doctor's background and credentials. *Metzger v. Italian Line*, 1976 AMC 453 (S.D.N.Y.), aff'd mem., 535 F.2d 1242 (2d Cir. 1975).

The doctor's "fitness" must be "diligently inquired into and proper evidence of his/her qualifications received." *Cummiskey v. Chandris, S.A.*, 719 F. Supp. 1183, 1989 AMC 2561 (S.D.N.Y. 1989), aff'd, 895 F.2d 107, 1990 AMC 1452 (2d Cir. 1990).

Courts have not made conclusive findings as to what qualifications the position of "shipboard doctor" requires. *Benedict on Admiralty*, Vol. 10, § 9.03, at 5 (2005).



GUIDANCE FROM ICCL WHEN HIRING MEDICAL PERSONNEL

ICCL has proposed a series of qualifications (for its member cruise lines) when hiring medical personnel:

- Knowledge of –
 - Life support techniques
 - Advanced life support
 - Intubation & cardiac care

- Current valid medical license (domestic or international)
- Training in intravenous line placement
- General medicine or general practice experience
- 2-3 years of clinical experience
- Ability to be conversant in English

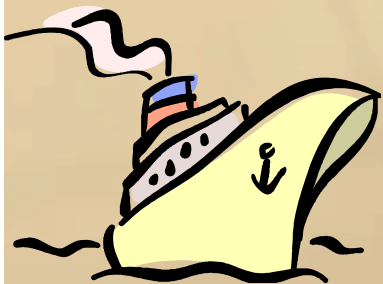


CARLISLE V. CARNIVAL CORP.

864 So.2d 1, 2003 AMC 2433 (Fla. 3d DCA 2003)

The cruise line's duty to exercise reasonable care under the circumstances extends to the actions of a doctor placed onboard a ship by the cruise line!

- The *Carlisle* court rejected *Barbetta's* finding that a passenger at sea has meaningful control over his or her relationship with the ship's doctor. Instead, the court found that "a cruise passenger at sea and in medical distress does not have any meaningful choice but to seek treatment from the ship's doctor."
- The *Carlisle* court found that a seriously injured or ill passenger is sufficiently foreseeable and likely to disrupt maritime pursuits, thus, these incidents are "substantially related to traditional maritime activity." Based upon this analysis, the court rejected *Barbetta's* argument that a cruise line is not in the business of providing its passengers with medical care.



The *Carlisle* court further pointed out that cruise lines are already held vicariously liable for the negligence of the "same ship's doctor in the treatment of hundreds of people - - the crew."

CARLISLE ANALYZED



HOLDING: The ship doctor is an agent of the cruise line for purposes of fulfilling the cruise line's duty to exercise reasonable care, regardless of his contractual status as an independent contractor. Thus, a ship doctor's negligence can be imputed upon a cruise line.

The *Carlisle* court found that the cruise line exercised a certain amount of control over the doctor's medical services:

1. The cruise line selected the nurses
2. The ship doctor was an officer of the ship
3. The cruise line provided the medical supplies
4. The ship doctor was subject to the ship's articles
5. The cruise line set the hours of operation of the infirmary
6. The cruise line provided a policy and procedure manual for the operation of the infirmary
7. The ship doctor was subject to dismissal by the cruise line for his failure to perform his duties (a) pursuant to the guidelines established by the cruise line and (b) to the satisfaction of the cruise line.



NOTE: The *Carlisle* court inappropriately modified uniform general maritime law. At least one court has stated that the question of "whether a vicarious liability claim against a ship owner for the negligent treatment of its on-board doctor will stand under maritime law" is not settled at this time. *Mack v. Royal Caribbean Cruise, Ltd.*, 838 N.E 2d 80 (III. App. Ct. 2005). The Supreme Court of Florida is currently reviewing the issue.

PENDING REVIEW BY THE SUPREME COURT OF FLORIDA

- The Supreme Court of Florida accepted jurisdiction of *Carlisle* and, after receiving briefs from Carnival, Carlisle, ICCL and FMLA, heard oral argument on September 27, 2005.
- ICCL stressed the impact of *Carlisle* “will inevitably be forum shopping”. Its brief highlighted the negative impact such a decision would have on the cruise line industry, i.e., the ruling subjects the cruise line industry to the application of inconsistent rules.
- The FMLA stressed that “it was legally inappropriate for the lower court to even enter into an analysis of the continued viability of the virtually unbroken line of cases dating back nearly 100 years, which have refused to impose vicarious liability upon a ship owner for the purported negligence of a ship’s physician in a lawsuit brought by a passenger.”

CURRENT ATTEMPTS TO AVOID *CARLISLE*

MEDICAL FACILITY - CONSULTATION REQUEST - GUEST

Charges: Physicians are independent contractors. All medical services are subject to charge based upon U.S. Government Medicare Physician Fee Schedule rates.

Name _____ Sex: M F
Last (Print) First

Cabin _____ Age _____ New Patient [] or Follow-up []

Reason for Consultation: (Please include all symptoms and when they began)

Is your medical consultation related to a shipboard accident? [] No [] Yes
If Yes, please provide details and location of incident:

Past Medical History: (if injury, have you injured this part of your body before?)

Past Surgical History:

Allergies (Medication, foods or other substances):

Current Medication(s): (Please circle those taken today)

Patient/Guardian signature _____ Date: _____

The following to be completed by the nurse:

Date: _____ Time: _____ Folio Number _____

Estimated time to be seen by the Doctor _____

Vital signs: T _____ P _____ R _____ BP _____

Nurse signature _____

MEDICAL FACILITY - CONSULTATION REQUEST GUEST

Charges: Physicians are independent contractors. All medical services are subject to charge based upon U.S. Government Medicare Physician Fee Schedule rates.

DISCLAIMER IN MEDICAL BILL

Medical Services Bill

Medical Authorization

I understand that **physicians are independent contractors ...**

Medical Services Bill

Name: _____ Nurse: _____
 Address: _____ Social Security: _____ Insurance: _____ Group Number: _____

80007 Hemoglobin Electrophoresis - Adult	\$24	81100 Blood (3 views)	\$40	8428 Cardiac Arrhythmia	\$100
80040 Albumin - ALB	\$24	7340 Fingers (2 views)	\$58	8429 Cardiac Arrhythmia	\$100
81400 Arteries - AMT	\$24	7350 Feet (complete)	\$28	8430 Cardiac Arrhythmia	\$100
84450 Aspartate Amin. Transference - AST	\$28	7355 Fingers (2 views)	\$58	8431 Cardiac Arrhythmia	\$100
82882 Blood glucose (Fasting - >8h)	\$25	7360 Feet (complete)	\$28	8432 Cardiac Arrhythmia	\$100
83310 Calcium	\$25	7365 Fingers (2 views)	\$58	8433 Cardiac Arrhythmia	\$100
80553 Cardiac status - Initial	\$75	7370 Feet (complete)	\$28	8434 Cardiac Arrhythmia	\$100
84874		7375 Fingers (2 views)	\$58	8435 Cardiac Arrhythmia	\$100
84875		7380 Feet (complete)	\$28	8436 Cardiac Arrhythmia	\$100
8833T Chlamydia	\$37	7385 Fingers (2 views)	\$58	8437 Cardiac Arrhythmia	\$100
82336 Chlamydia	\$27	7390 Hip - anterior (2 views)	\$42	8438 Cardiac Arrhythmia	\$100
84946 Cholesterol - CHOL	\$27	7395 Knees (complete)	\$40	8439 Cardiac Arrhythmia	\$100
85348 Coagulation Time	\$25	7400 Shoulder (2 views)	\$40	8440 Cardiac Arrhythmia	\$100
81026 Creatine Ck	\$16	7405 Single Abdomen AP	\$18	8441 Cardiac Arrhythmia	\$100
82950 Creatine Kinase - CK/CPK Total	\$15	7450 Fore and Toes (complete)	\$35	8442 Cardiac Arrhythmia	\$100
82923 Creatinine Kinase-Mb/CK-Mb	\$45	7580 Tons	\$28	8443 Cardiac Arrhythmia	\$100
82958 Creatinine - CrEA	\$28	7210 Waist (3 views)	\$13	8444 Cardiac Arrhythmia	\$100
82954 Cultures & Colony Estimation	\$44	8295 X-ray copies	\$15	8445 Cardiac Arrhythmia	\$100
88400 Culture - Strep. Agens	\$45			8446 Cardiac Arrhythmia	\$100
80100 Drug Abuse Test	\$41			8447 Cardiac Arrhythmia	\$100
86521 ESR	\$46			8448 Cardiac Arrhythmia	\$100
82874 Glucose - GLU	\$28			8449 Cardiac Arrhythmia	\$100
82877 GPT	\$27			8450 Cardiac Arrhythmia	\$100
82270 Quasid stool	\$25			8451 Cardiac Arrhythmia	\$100
83710 HCG	\$27			8452 Cardiac Arrhythmia	\$100
83113 Heteroantigen Pyrol	\$110			8453 Cardiac Arrhythmia	\$100
83915 Uric Acid Dihydroxycase - LDH	\$28			8454 Cardiac Arrhythmia	\$100
86141 Immuno E4 CDR	\$25			8455 Cardiac Arrhythmia	\$100
87448 Immuno A Urinary Antigen	\$16			8456 Cardiac Arrhythmia	\$100
84600 Lipid	\$17			8457 Cardiac Arrhythmia	\$100
82735 Magnesium	\$31			8458 Cardiac Arrhythmia	\$100
86208 Magnesium	\$28			8459 Cardiac Arrhythmia	\$100
84866 Phosphatase Acid	\$31			8460 Cardiac Arrhythmia	\$100
84078 Phosphatase Alkaline - ALP	\$28			8461 Cardiac Arrhythmia	\$100
84100 Phosphorus	\$27			8462 Cardiac Arrhythmia	\$100
84132 Potassium - K+	\$27			8463 Cardiac Arrhythmia	\$100
86589 PPD	\$25			8464 Cardiac Arrhythmia	\$100
81025 Prothrombin Test (Time)	\$27			8465 Cardiac Arrhythmia	\$100
84163 Protein Total - TP	\$26			8466 Cardiac Arrhythmia	\$100
85911 Prothrombin Time (PT)	\$26			8467 Cardiac Arrhythmia	\$100
82499 Punctate Influenza	\$31			8468 Cardiac Arrhythmia	\$100
82482 RBC (ec. h-t-ocul)	\$29			8469 Cardiac Arrhythmia	\$100
87184 Sensitivity Stainge Anticardic	\$31			8470 Cardiac Arrhythmia	\$100
83225 Sodium	\$26			8471 Cardiac Arrhythmia	\$100
87890 Strip Test	\$34			8472 Cardiac Arrhythmia	\$100
85971 Thrombin Time	\$28			8473 Cardiac Arrhythmia	\$100
85241 Total Bilirubin - TBL	\$28			8474 Cardiac Arrhythmia	\$100
84478 Thrombocytes - TRIG	\$28			8475 Cardiac Arrhythmia	\$100
84475 Urinary Ictohaline	\$25			8476 Cardiac Arrhythmia	\$100
84520 Urea Nitrogen - BUN	\$25			8477 Cardiac Arrhythmia	\$100
84550 Uric Acid	\$27			8478 Cardiac Arrhythmia	\$100
81006 Urinary Creatinik	\$26			8479 Cardiac Arrhythmia	\$100
88592 UVRG	\$27			8480 Cardiac Arrhythmia	\$100

MEDICAL AUTHORIZATION

I, _____, hereby authorize the medical staff and/or their agents, employees and representatives to conduct such tests, procedures, surgery, administration of anesthesia, medication and other therapies, with the exception of _____ (if none, enter the word, "none").

I understand that the medical care to be rendered will be limited to the type of care necessary, in the opinion of the medical staff, for my condition at the time of treatment. I accept the services of the medical staff and understand that whatever service is rendered is emergency treatment within the scope of the medical staff's authorized medical facility. I understand that the medical staff may be required to provide confidential medical information and/or records of my medical condition to the health insurance carrier and/or to other health care providers and/or to regulatory agencies and I hereby authorize such release of my confidential medical information/records for these purposes.

I acknowledge that medical doctors and nurses are made available on the ship for my convenience. I understand that physicians are independent contractors who do not accept insurance assignment from any insurer. As such, I understand and agree that full payment is due upon service rendered. I understand that although this bill may be submitted to my insurance carrier for consideration, I agree not to hold the insurance carrier responsible for any shipboard medical facility or physician charges including all or any portion of any charges not covered by my travel, health, or other insurance contracts.

I hereby authorize the release of my entire medical record, including patient histories, office notes, test results, radiology studies, films, referrals, consults and billing records, even if said records) include information relating to alcohol, drug abuse, mental health treatment, or confidential HIV related information, to me and/or my health insurer or any other entity from which I requested and paid payment for the services provided at this medical facility. I understand that signing this authorization is voluntary. My treatment has not been conditioned upon my authorization of this disclosure. I understand that I may only revoke this authorization in writing and that said revocation will not affect actions already taken based upon this authorization. This authorization is executed in compliance with the Health and Insurance Portability and Accountability Act of 1996 and 49 C.F.R. Parts 160 and 165.

Physician's Signature: _____ Date: _____

Physician's Stamp (For use only, please print name): _____

Page 2 of 2
 WHITE - Medical Center YELLOW - Guest PINK - Guest
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SOUTHERN DISTRICT OF FLORIDA

The Southern District of Florida continues to vacillate on whether it should follow the basic rule emphasized in *Barbetta* or follow *Nietes & Carlisle*.



1990: *Nanz v. Costa Cruises, Inc.*, 1991 AMC 48 (S.D. Fla. 1990) (held that the basic rule that a cruise operator is not vicariously liable to passengers for the negligence of a properly qualified ship's doctor also applies to the ship's medical staff working under the doctor's supervision; the court held that the doctor and the medical staff were the passengers' servants)

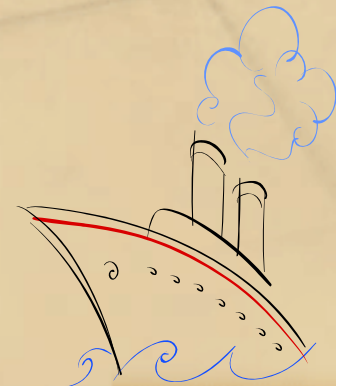
1993: *Fairley v. Royal Cruise Line Ltd.*, 1993 AMC 1633 (S.D. Fla. 1993) (the court denied the cruise line's motion to dismiss stating that the cruise line could be liable for the ship doctor's negligence under the alternate theories of liability (not respondeat superior); for example, the cruise line could be vicariously liable under theories of apparent agency and joint venture. **NOTE:** The court, however, did not rule on the merits of the passenger's claim since it was merely reviewing a motion to dismiss for failure to state a claim upon which relief could be granted.

1995: *Warren v. Ajax Navigation Corp. of Monrovia*, 1995 AMC 2609 (S.D. Fla. 1995) (the court granted the cruise company's motion for summary judgment and found that it was unreasonable for the passenger to believe that the cruise company has "authority" over the manner in which the ship doctor treated his patients; thus, the cruise company could not be held liable for the ship doctor's negligence under a theory of apparent agency) **NOTE:** In reaching its decision, the court did not discuss its earlier decision in *Fairley*. The Court focused on the reasoning in *Barbetta*.

CONTINUED CONFLICT IN THE S.D. FLA.

2004: *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 2004 AMC 728 (S.D. Fla. 2004)(the court denied the cruise line's motion to dismiss the plaintiff's vicarious liability claim against it for the alleged malpractice of a ship a doctor and followed *Fairley* by recognizing the possibility of a cruise line's vicarious liability based on a theory of apparent agency; the court ignored its ruling in *Warren* and primarily relied upon the recent Florida Third District court of Appeal (*Carlisle*) care which rejected *Barbetta* and followed the minority rule set in *Nietes*)

2005: *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367 (S.D. Fla. 2005)(the court declined to follow the decisions in *Huntley* and *Carlisle* finding no justification to deviate from the majority rule stated in *Barbetta*; the court dismissed the claim against the cruise line for vicarious liability for the ship doctor's alleged negligence (premised on actual agency))





CONSEQUENCES OF *CARLISLE* & *NIETES* (AVOIDANCE TECHNIQUES)

- There may be no consequences for operators with a forum selection clause outside of Florida (state court) or the Northern District of California, unless the court considers these decisions persuasive authority and a new general trend.
- If, however, your forum selection clause selects Florida (state court) or the Northern District of California (and until *Carlisle* is decided by the Supreme Court of Florida) options may need to be considered.

AMEND CRUISE TICKET CONTRACT

OPTION 1: REQUIRE SUIT TO BE BROUGHT IN FLORIDA FEDERAL COURT

“Any and all disputes shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami.”

OPTION 2: REMAIN IN STATE COURT EXCEPT WITH REGARD TO MEDICAL MALFEASANCE

“It is agreed by and between the Guest and [Carrier] that any and all personal injury and/or death suits arising from, or in connection to, *negligent shipboard medical care* shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami...”

CLAUSES WITHIN TICKET CONTRACT ARE GENERALLY ENFORCEABLE

- **Forum Selection Clause:** Carnival's ticket contract contained a forum selection clause that required all disputes to be litigated in a specific federal court. The state court granted Carnival's motion to dismiss and the appellate court affirmed. *Assiff v. Carnival Corp.*, 2006 Fla. App. LEXIS 8119 (Fla. 3d DCA 2006). NOTE: Not final until time expires to file rehearing motion and, if filed, disposed of.
- **Enabling Statute:** The law permits a cruise line to contractually shorten the three-year period to commence a suit to recover damages in negligence for personal injury (or death). A one-year period to file suit is lawful under §183(a). *Levick v. Steiner Transocean Ltd.*, 377 F. Supp. 2d 1251 (S.D. Fla. 2005).
- **Six Month Notice Clause:** The District Court of P.R. granted Costa's Motion for Summary Judgment where a passenger failed to provide written notice within 6 months of a personal injury claim, as required by the ticket/contract of passage. The Appellate Court agreed and affirmed. *Shankles v. Costa Armatori, S.P.A., et. al*, 722 F.2d 861 (1st Cir. 1983).

ANOTHER OPTION: CONCESSION AGREEMENT



- **Independent Contractor language within Concession Agreement**
- **Cruise Line Named as an Additional Insured within Concessionaire's Insurance Policy:**
 - obtain certificate (proof) of insurance
 - underwriter to be acceptable by cruise line, i.e., AA rated
- **Unconditional Defend, Hold Harmless and Indemnification Clause**
- **Concessionaire and Underwriter must agree to and/or waive personal jurisdiction and venue defenses to suit brought in cruise line's chosen forum, i.e., state court Florida**
- **Avoid geographical limitation to defense provided under concession agreement**
- **Notice provision required to cruise line re impending lapse of coverage or reduction of coverage**
- **No jurisdictional limitation within policy of insurance re obligation to defend or indemnify**
- **Choice of Law, i.e., Fla. Stat. § 627.428 or attorney's fees clause**

“EXCULPATORY” CLAUSES IN CRUISE PASSENGER TICKETS



Are exculpatory clauses against public policy and therefore unenforceable?

According to the Eleventh Circuit, a cruise line’s ticket disclaimer stating it was not liable for the negligence of its “servants or agents” is against public policy and cannot be valid in light of 46 U.S.C. app. § 183(c). *See, Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1985 AMC 826 (11th Cir. 1984), cert. denied, 470 U.S. 1004 (1985). NOTE: *Kornberg* involved a class action suit for the failure of a sanitation system, not a ship’s doctor substandard medical care. The Third DCA has also held that exculpatory clauses attempting to disclaim liability for the negligence of a ship owner’s employees are unlawful. *See, Carlisle v. Ulysess Line Ltd., S.A.*, 475 So.2d 248 (Fla. 3d DCA 1985).

Barbetta (1988), however, found a similar ticket provision valid. The court held that because “there was no liability to disclaim, the contractual provision [was] not a disclaimer; it is, instead, merely an accurate restatement of ... general maritime law...”

Fairley (1993) noted in a footnote that exculpatory clauses dealing with a carrier’s liability for providing medical care are contrary to 46 U.S.C. app. § 183(c).



NON-DELEGABLE DUTY TO PROVIDE MAINTENANCE & CURE

General Rule: A ship owner is liable for its negligent acts and the acts of its agents. This includes the negligent acts of shipboard AND tendered shore side medical providers.

- A ship owner has the obligation to tender a qualified doctor to crew.
- A ship owner/operator is vicariously liable for the negligence of its onboard doctor in the treatment of seamen. *De Zon v. Am. Pres. Lines*, 318 U.S. 660, 1943 AMC 483 (1943).
- A ship owner is liable for the negligence of a shore side provider selected by the ship owner to provide medical care to the seaman. *Gulf Central Steamship Corp. v. Sambula*, 405 F.2d 291, 1968 AMC 2521 (5th Cir. 1968).



ADDENDUM

- In consideration of the decision by the Florida Supreme Court in *Carnival Corp., v. Carlisle*, 953 So. 2d 461; 2007 AMC 305 the author notes:
- The Florida Supreme Court recognizing that “Federal maritime law [has] held that a shipowner is not vicariously liable for the medical negligence of [a] shipboard physician” to a ship’s passenger.
- In following the *Barbetta* line of cases the Florida Supreme Court rejected the reasoning of the *Nietes* Court from the Northern District of California and, in so doing, quashed the opinion of the Third District Court of Appeals.
- By following *Barbetta* the Florida Supreme Court adopted the following reasoning:
 - The relationship between the passenger and the physician is *not* a traditional activity over which a cruise ship has control; the carrier lacks control over the doctor-patient relationship.
 - A ship is not a floating hospital. It is not in the business of providing medical services to the passengers.

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