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Maritime Law: The Independent Contractor Defense Is Buried at Sea

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When I first started writing about Travel Law,[1] the rights and remedies available to victimized travelers were few indeed. The concept that an airline, cruise line, hotel, resort or travel intermediary such as an Internet travel seller or tour operator should be able to insulate itself from liability for the tortious and contractual misconduct of so called "independent contractors" was universally accepted by the courts on the land and on the sea. "Travel Law," Law Journal Press (2017), §5.04 and §3.02[3].

The 'Barbetta' Rule

In the context of maritime law, the near universal enforcement of the rule in *Barbetta v. S/S Bermuda Star*,848 F. 2d 1364 (5th Cir. 1988), insulating a cruise ship from liability for the medical malpractice of the ship's medical staff, is a perfect example of the independent contractor defense. Indeed, a variation of this rule—contractual disclaimers of liability for the misdeeds of ground service providers during shore excursions—was also universally enforced.

19th Century Passenger Rights

Until last year,[2] maritime law, as it related to passengers, was best described as "21st century cruise ships and 19th century passenger rights." However, to my surprise and the satisfaction of many, the U.S. Court of Appeals for the Eleventh Circuit not only agreed with this analysis but decided to dramatically transport passenger rights, at least in part, into the 21st century.

The 'Franza' Case

As noted in *Franza v. Royal Caribbean Cruises*,772 F. 3d 1225 (11th Cir. 2014):

> We decline to adopt the rule explicated in Barbetta, 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 ... As Justice Holmes famously put it, we should not follow a rule of law simply because 'it was laid down in the time of Henry 4th', particularly where 'the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past ... Here, the roots of the *Barbetta* rule 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 ... In place of truly independent doctors and nurses, we must now acknowledge that medical professionals routinely work for corporate masters.

One-Sided Relationship

Traditionally, the relationship between travelers and suppliers, including cruise ships and tour operators, was governed by contracts, often printed in nearly invisible print and loaded with self-serving and unconscionable clauses, both substantive and procedural in nature. These contracts, regardless of whether the traveler saw or agreed to the terms therein, were routinely enforced. Indeed, there were cases which held that promises made in advertising material would not be enforced because they were disclaimed or limited by contractual clauses. In essence, the cruise ship's or tour operator's contractual definition of their relationship to the consumer was nearly universally enforced by the courts.

The Facts Matter

However, in the court in *Franza* noted that it is not the contract that should define the relationship between cruise ship and passenger, but the facts of each case. "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." As noted by Michael Drennen in "Captaining The Ship Into Culpability," 40 Tul. Mar. L.J. 177 (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 *Franza* to insulate them from imputed liability.

Shore Excursion Accidents

Shore excursions are big business for the cruise lines[3] and are actively promoted both before and during the cruise. Typically, the components of a shore excursion will be provided by foreign ground service providers which may be uninsured, underinsured (see *Perry v. Hal Antillen NV*, 2013 WL 2099499 (W.D. Wash. 2013)), unlicensed and otherwise irresponsible. In addition to promoting and profiting from shore excursions, cruise lines invariably disclaim liability in the passenger ticket for the torts and contractual breaches of contract of the independent contractor foreign ground service providers.

Expanding Obligations

In an effort, perhaps, to circumvent the independent contractor defense, and faced with cases involving foreign ground providers not subject to U.S. long-arm jurisdiction, the courts a few years ago began applying common law principals 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 new duties to travelers and passengers.

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 the tourist relied on such representations. For example, terms such as "highly skilled boatmen" (*Chan v. Society Expeditions*, 123 F.3d 1287 (9th Cir. 1998)), "unsinkable boats" (*Wolf v. Fico Travel*, 2011 WL 5920918 (D.N.J. 2011)), "safe buses" (*Rovinsky v. Hispanidad Holidays*, 180 A.D. 2d 273, 580 N.Y.S. 2d 49 (1992)), "perfectly safe" canoeing conditions (*Glenview Park District v. Melhus*, 540 F. 2d 1321 (7th Cir. 1976)), "perfectly safe" catamaran ride (*Wolff v. Holland America Lines*, 2010 WL 234772 (W.D. Wash. 2010)) and describing cliff jumping as "an approved and safe activity" (*Gartland v. Douchette*, 2002 WL 1815982 (Conn. Super. 2002)), may require the travel purveyor to actually deliver on the warranty.

Ground Services Providers: In *Zapata v. Royal Caribbean Cruises*, 2013 WL 1296298 (S.D. Fla. 2013), the cruise passenger purchased excursion tickets onboard the cruise ship featuring "bell diving," during which decedent was asphyxiated. Decedent was brought to the surface for oxygen but unfortunately the oxygen tank was empty, whereupon decedent became unconscious and died. The court sustained, inter alia, a claim of negligent selection or retention of ground services providers if appropriate facts were repleaded. In *Perry v. Hal Antillen NV*, 2013 WL 2099499 (W.D. Wash. 2013), the cruise passenger returning from a cruise ship recommended shore excursion was run over a tour bus. The court sustained, inter alia, a claim for the negligent selection of a local ground operator and tour bus that transported cruise passengers to and from the shore excursion.

Dangerous Environments: In *Chaparro v. Carnival*, 693 F. 3d 1333 (11th Cir. 2012), the passengers took a cruise aboard the Carnival Victory, during which a Carnival employee urged plaintiffs to visit Coki Beach and Coral World, which plaintiffs did.

> On their way back to the ship from Coki Beach (plaintiffs) rode an open-air bus past a funeral service of a gang member who recently died in a gang-related shooting near Coki Beach ... While stuck in traffic, gang-related retaliatory violence erupted at the funeral, shots were fired and Liz Marie was killed by gunfire while she was a passenger on the bus.

The court sustained, inter alia, a claim of a failure to warn of danger in the local environment.

Carnival was familiar with Coki Beach because it sold excursion to passengers to Coki Beach; Carnival generally knew of gang violence and public shootings in St. Thomas; Carnival knew of Coki Beach's reputation for drug sales, theft and gang violence ... Carnival failed to warn (passengers) of any of these dangers; Carnival knew or should have known of these dangers because Carnival monitors crime in its ports of call; Carnival's negligence in

encouraging its passengers to visit Coki Beach and in failing to warn disembarking passengers of general or specific incidents of crime in St. Thomas and Coki Beach caused Liz Marie's death.

Third-Party Beneficiary Theory: In *Perry v. Hal Antillen NV*, 2013 WL 2099499 (W.D. Wash. 2013), the cruise passenger was run over by a tour van hired as a subcontractor by the tour operator Rain Forest Aerial Tram (RFAT). RFAT had entered into a contract with the cruise line (HAL) and executed a copy of a manual titled Tour Operator Procedures and Policies. The manual required "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." 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 USD 2,000,000 in auto and general liability coverage." Here, it was discovered after the accident that the tour van operator only had $85,000 in insurance coverage and the court held that the plaintiffs were third-party beneficiaries of the manual and had a claim against RFAT for failing to disclose to HAL that the tour van operator was a subcontractor and was only insured up to $85,000.

Apparent Agency

Traditionally, cruise ships have not been held vicariously liable for the medical malpractice of the ship's doctor or medical staff. *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1364 (5th Cir. 1988).

In *Franza*, an elderly cruise passenger, Pasquale Vaglio, fell and bashed his head while on shore. Allegedly due to the "negligent medical attention" that he received from the ship's doctor and nurse, his life could not be saved. "In particular the ship's nurse purportedly failed to assess his cranial trauma, neglected to conduct any diagnostic scans and released with no treatment to speak of. The onboard doctor, for his part, failed to meet with Vaglio for nearly four hours ... Vaglio died about a week later."

Indicia of Apparent Agency: As stated in *Franza*:

> For starters, Franza's complaint plausibly established: (1) that Royal Caribbean 'acknowledged' that Nurse Garcia and Dr. Gonzalez 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 name and logo. And, finally, Royal Caribbean allegedly represented to immigration authorities and passengers that Nurse Garcia and Dr. Gonzalez were 'members of the ship's crew' and even introduced the doctor 'as one of the ship's Officers. Taken as

true, these allegations are more than enough to satisfy the first two elements of actual agency liability.

Apparent Agency Applies: As stated in *Franza*:

> We are the first circuit to address whether a passenger may use apparent agency principals to hold a cruise line vicariously liable for the onboard medical negligence of its employees ... we conclude that a passenger may sue a shipowner for medical negligence if he can properly plead and prove detrimental, justifiable reliance on the apparent agency of a ship's medical staff member ... The federal circuits have made only passing references to apparent agency principals in maritime tort cases ... Nonetheless, 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 principals apply in this context. Indeed, the equitable foundations of apparent agency are just as important in tort as in contract ... Having long applied the principals of apparent agency in maritime cases, we discern no sound basis for allowing a special exception for onboard medical negligence, particularly since we have concluded that actual agency principals ought to be applied in this setting as well.

Endnotes:

1. My treatise, "Travel Law," Law Journal Press (2017)—2,000 pages and first published in 1981—has been revised and updated 65 times, now at the rate of every 6 months. I have written over 400 legal articles and my weekly column on Travel Law is available on http://etn.travel. See also Dickerson, Gould & Chalos, "Litigating International Torts in U.S. Courts," Thomson Reuters West (2017), Chapters 8-11.

2. Dickerson, "The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights," 28 Tul. Mar. L.J. 447 (2004).

3. See Perrin, "What I Learned Moonlighting as a Cruise Ship Trainee," http://www.cntraveler.com/perin-post/2013/04 ("Cardozo works year-round, planning, scheduling and executing shore excursion for demanding passengers ... These day trips are big business for the cruise lines: Royal Caribbean expects Navigator of the Seas to earn between $600,000 and $1,100,000 per week in onboard revenue, including tour sales.").

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