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# Hope for Temporary Citizens Aboard Floating Cities: *Carlisle v. Carnival Corporation*

KRISTOPHER E. PEARSON\*

Since most do not live in a tropical paradise, a cruise offers vacationers a way to escape to exotic lands during precious time off from work. Cruises provide all that the vacationer desires: accommodations, meals, entertainment, and transportation.<sup>1</sup> In recent years, there has been an increase in the number of people choosing to travel on cruise ships.<sup>2</sup> As the number of passengers increases,<sup>3</sup> the number of injuries or illnesses at sea has correspondingly increased.<sup>4</sup> Injury or illness on a cruise ship presents a unique situation: the ship is at sea and possibly far from the nearest port where one could seek land-based medical services. For many, an illness under these circumstances would only occur in a nightmare, but for an unfortunate few, this situation is all too real. It may be comforting to know that some cruise lines provide access to medical professionals aboard their ships.<sup>5</sup> For some, the presence of

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\* Juris Doctor Candidate 2005. The author wishes to thank all of those involved in the writing process, from topic selection to finalizing the piece, and to express gratitude to friends and loved ones for support along the way.

1. Carnival Cruise Lines' website advertises that its cruises provide the following types of amenities: dining, both formal and casual; bars and nightclubs that provide "Vegas-style" shows; spa treatment; and casinos, which include slot machines, blackjack poker and roulette. See Carnival Cruise Lines, Inc., Onboard Experience, at [http://www.carnival.com/CMS/Static\\_Templates/onboardexp\\_home.aspx](http://www.carnival.com/CMS/Static_Templates/onboardexp_home.aspx) (last visited Jan. 31, 2005).

2. In the 1991 fiscal year, approximately 2.9 million passengers sailed on cruise ships from the Port of Miami. Beth-Ann Erlic Herschaft, Comment, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?*, 17 NOVA L. REV. 575, 576 n.1 (1992). In the 2003 fiscal year, nearly four million passengers sailed on one of the eighteen cruise ships home ported at the Port of Miami. See Miami-Dade County, Port of Miami: Cruise Facts, at [http://www.miamidade.gov/portofmiami/cruise\\_facts.asp](http://www.miamidade.gov/portofmiami/cruise_facts.asp) (date last edited Apr. 2, 2004). "Cruise lines carried eleven percent more passengers from U.S. ports in the first quarter of 2003 than they did in the first quarter of 2002." Thomas A. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights*, 28 TUL. MAR. L.J. 447, 453-54 (2004).

3. Cruise ships can now carry nearly 4000 passengers. See Dickerson, *supra* note 2, at 454.

4. See Thomas A. Gionis, Comment, *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. REV. 751, 764-65 (2001) (discussing an increase in maritime injuries reported to the United States Coast Guard from the period of 1977 through 1986 to 1987 through 1997).

5. Carnival Cruise Line's website states: "Our infirmaries are staffed by qualified physicians and nurses who are committed to providing the highest quality of shipboard medical care. Each ship in the fleet carries one doctor and three nurses; the Destiny, Triumph and Victory each carry two doctors and four nurses." Carnival Cruise Lines, Inc., Customer Service, Frequently Asked Questions, "Is there a Doctor on Board?", at [http://www.carnival.com/CMS/FAQs/Medical\\_](http://www.carnival.com/CMS/FAQs/Medical_)

medical care could be the deciding factor when choosing a cruise line for vacation.<sup>6</sup> While the presence of medical care is a legitimate concern, what may be more important is the nature of the law governing shipboard medical care. It is the present status of this deeply-rooted maritime law, which does not hold cruise lines liable for negligent medical care provided aboard their ships, that courts are struggling to fairly reconcile with the reality facing today's cruise passenger.<sup>7</sup>

The United States Constitution specifically addresses maritime law. "Article III of the Constitution extends the judicial power of federal courts to 'all Cases of admiralty and maritime jurisdiction.'"<sup>8</sup> Congress codified this constitutional grant of original jurisdiction in 28 U.S.C. § 1333.<sup>9</sup> The United States Supreme Court in *Panama Railroad Co. v. Johnson*<sup>10</sup> determined that the drafters placed maritime law "under national control, because of its intimate relation to navigation and to interstate and foreign commerce."<sup>11</sup> These procedural aspects of maritime law date back to the origin of the United States; substantive general maritime law, however, reaches much further back in time.

General maritime law was spawned from "the well-known and the well-developed 'venerable law of the sea,' which arose from the customs among 'seafaring men,' . . . and which enjoyed 'international comity.'"<sup>12</sup> For more than 3000 years nations have applied this body of

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Services.aspx (last visited Jan. 31, 2005). Royal Caribbean International's website informs guests "every Royal Caribbean ship offers limited professional medical services – for a reasonable fee – through independently contracted, licensed (international or domestic) physicians and nurses." Royal Caribbean International, All About Cruising, Accessibility Onboard, Feel Right at Home, at <http://www.royalcaribbean.com/allaboutcruising/accessibleseas/feelRightAtHome.do> (last visited Jan. 31, 2005). Norwegian Cruise Line provides guests with a physician and nurse onboard each ship to provide medical care and services at customary charges. See Norwegian Cruise Line, Important Passenger Info, What You Need to Know, Is there a Doctor on Board?, at [http://www.ncl.com/more/fp\\_mi\\_w2n.htm](http://www.ncl.com/more/fp_mi_w2n.htm) (last visited Jan. 31, 2005).

6. The existence of a doctor affected the Carlisle's (the family in the noted case) decision to take the cruise. If Carnival Cruise Lines had not provided medical facilities onboard the vessel, they would not likely have taken the cruise. Respondent's Answer Brief at 35, *Carnival Corp. v. Carlisle*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003) (SC04-393).

7. If a passenger is injured on a cruise ship and decides to sue for her injuries, her case will be decided under general maritime law. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989); *Kornberg v. Carnival Cruise Lines, Inc.* 741 F.2d 1332, 1334 (11th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Rindfleisch v. Carnival Cruise Lines, Inc.*, 498 So. 2d 488, 490 (Fla. Dist. Ct. App. 1986), *rev. denied*, 508 So. 2d 15 (Fla. 1987).

8. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) (citing U.S. CONST. art. III, § 2, cl. 1).

9. See *id.* (citing 28 U.S.C. § 1333 (1948)).

10. *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924).

11. *Id.* at 386.

12. *Haver*, 171 F.3d at 960 (citing *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 191 (1970); *The Belgenland*, 114 U.S. 355, 363 (1885)).

law.<sup>13</sup> This rich, ancient corpus of law served as the backdrop for the framers when they drafted Article III of the Constitution.<sup>14</sup> This *jus gentium* was not to constrain or bind federal courts, but was a point of departure to be shaped and molded by federal courts exercising admiralty jurisdiction.<sup>15</sup> In the interest of the application of uniform laws as a vessel navigates the U.S. coastline through different states, the framers permitted only Congress and the federal courts to create or alter general maritime law.<sup>16</sup>

The general maritime law in the United States concerning shipboard medical care shares these ancient roots. In 1887, the Court of Appeals of New York in *Laubheim v. Netherland Steamship Co.*<sup>17</sup> denied the plaintiff's claim for imputation of the shipboard surgeon's negligence to the shipping line.<sup>18</sup> The court held that the shipping line "is responsible solely for its own negligence [in hiring the surgeon], and not for that of the surgeon employed."<sup>19</sup> This nineteenth-century case, and subsequent cases interpreting its holding, shaped the general maritime law that currently governs the legal relationship between a cruise line and its shipboard doctor.

This article addresses the distinct tension between the rapidly evolving cruise industry and the slowly responding body of general maritime law. This tension is exposed in the Florida Third District Court of Appeal's decision of *Carlisle v. Carnival Corp.*,<sup>20</sup> which analyzed the current law governing the relationship between a cruise line and its shipboard doctor. The noted case is significant because a state court departed from the general maritime law, which has governed a shipowner's<sup>21</sup> liability for the acts of the ship's doctor for over one hundred

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13. *Id.* (noting that "codifications of the maritime law have been preserved from ancient Rhodes (900 B.C.E.), Rome (Justinian's *Corpus Juris Civilis*) (533 C.E.), City of Trani (Italy) (1063), England (The Law of Oleron) (1189), the Hanse Towns or Hanseatic League (1597), and France (1681)").

14. *See id.*

15. *See id.*; *see also* Thompson v. The Catharina, 23 F. Cas. 1028, 1028-30 (D. Pa. 1795) (No. 13,949) (tracing the development of general maritime law back to the laws of the Rhodians, the Romans, the laws of Oleron, and the laws of the Hanse Towns).

16. *See* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 381 (1918). *See generally* All Underwriters v. Weisberg, 222 F.3d 1309 (11th Cir. 2000); J.B. Efferson Co. v. Three Bays Corp., 238 F.2d 611 (5th Cir. 1956); Northfield Ins. Co. v. Barlow, 983 F. Supp. 1376 (N.D. Fla. 1997); Garan, Inc. v. M/V Aivik, 907 F. Supp. 397 (S.D. Fla. 1995); Groff v. Chandris, Inc. 835 F. Supp. 1408 (S.D. Fla. 1993).

17. *Laubheim v. Netherland S.S. Co.*, 13 N.E. 781 (N.Y. 1887).

18. *Id.* at 781.

19. *Id.*

20. *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003).

21. For purposes of this article, the terms "shipowner" and "carrier" are used interchangeably to refer to the party that is liable for torts committed on the vessel it owns or controls through either direct ownership or a charter agreement.

years. This article sets forth the facts of the noted case, surveys the legal landscape regarding the particular legal issues, carefully analyzes the court's holding, focusing on the legal steps the court utilized, details the significance of the case, comments on the federal preemption issue not addressed by the court, and finally concludes with the importance of the decision and potential impact it may have in the future.

## I. THE SCENARIO

In March of 1997, the Carlisle family, Kristopher, Darce, and their fourteen-year-old daughter Elizabeth, embarked on a cruise with Carnival Cruise Lines (hereinafter "Carnival") aboard the M/S "Ecstasy."<sup>22</sup> During the cruise, Elizabeth suffered from abdominal pain, lower back pain, and diarrhea.<sup>23</sup> As a result of her condition, Elizabeth visited the ship's hospital several times, where she was seen by Dr. Mauro Neri.<sup>24</sup> Over the course of several days, Dr. Neri repeatedly advised the Carlises that their daughter was suffering from the flu.<sup>25</sup> Responding to their questions about appendicitis, he assured the Carlisle family that Elizabeth suffered only from the flu and prescribed antibiotics.<sup>26</sup> Out of concern for Elizabeth, the Carlises disembarked the ship and flew home to Michigan where she was diagnosed as having a ruptured appendix.<sup>27</sup> Ultimately, the doctors determined that the ruptured appendix and subsequent infection rendered her sterile.<sup>28</sup>

As a result of Elizabeth's injuries and the events aboard the M/S "Ecstasy," Darce Carlisle filed suit against Carnival and Dr. Neri in Miami-Dade County Circuit Court.<sup>29</sup> The complaint alleged that Carnival was liable for Dr. Neri's negligence under the theories of agency and apparent agency.<sup>30</sup> In addition, Carlisle alleged that Carnival acted negligently when it hired Dr. Neri.<sup>31</sup>

In the pre-trial stage of the litigation, Carnival moved for summary judgment, claiming it was not liable for Dr. Neri's actions under the theories of agency, apparent agency, or *respondeat superior* (vicarious

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22. *Carlisle*, 864 So. 2d at 2.

23. *Id.* at 2.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* There is a dispute as to the precise nature of Elizabeth's injuries. See Petitioner's Initial Brief at 4 n.3, *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003) (SC04-393).

29. *Carlisle*, 864 So. 2d at 2.

30. *Id.*

31. *Id.*

liability) based upon well-established principles of maritime law.<sup>32</sup> The trial court entered summary judgment for Carnival based upon those principles.<sup>33</sup>

Carlisle appealed the trial court's decision to the Florida Third District Court of Appeal. On appeal, the court reversed on the issue of vicarious liability and held:<sup>34</sup> (1) the ship's doctor is an agent of Carnival whose negligence should be imputed to the cruise line, regardless of the doctor's ascribed contractual status; and (2) that the portion of the cruise ticket in which the cruise line sought to disclaim liability for the negligence of the ship's doctor was invalid.<sup>35</sup> The appellate court remanded the matter for further proceedings consistent with its opinion.<sup>36</sup> The court also denied Carnival's subsequent motion for rehearing and certified that it had passed on a question of great public importance.<sup>37</sup> The case is currently active before the Florida Supreme Court. However, the court has not rendered a decision as to certiorari.<sup>38</sup>

## II. THE LEGAL LANDSCAPE

The issue of whether a cruise line can be held vicariously liable for the negligence of the ship's doctor based on agency or apparent agency has never been squarely addressed by the Florida Third District Court of Appeal, the Florida Supreme Court, the Court of Appeals for the Eleventh Circuit, or the United States Supreme Court.<sup>39</sup> Because of what the court determined was a lack of binding authority, the Florida Third District Court of Appeal surveyed the available precedents from other jurisdictions, the rationales behind those cases, and the views of commentators. The court then decided which rationale was most persuasive.<sup>40</sup>

### A. *Standards Engraved in the Nineteenth Century*

The Court of Appeals of New York was one of the first courts to

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32. *Id.*

33. *Id.*

34. The court found no error in the trial court's decision to grant summary judgment as to the claim for negligent hiring. *Id.* at 8 n.5 (citing *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1373-74 (5th Cir. 1988)).

35. *Carlisle*, 864 So. 2d at 7.

36. *Id.* at 8.

37. The court framed the issue as follows: "Whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger?" *Id.*

38. See Online Docket, Case No. SC04-393, available at <http://www.floridasupremecourt.org> (last visited Jan. 31, 2005).

39. *Carlisle*, 864 So. 2d at 5. See *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374 n.5 (S.D. Fla. 2004) (stating the Eleventh Circuit has not addressed this issue).

40. *Carlisle*, 864 So. 2d at 5.

address the negligence of a shipowner for its shipboard surgeon in the case of *Laubheim v. Netherland Steamship Co.*<sup>41</sup> In 1887, a passenger on the steamship "Stella" slipped on the ship's deck injuring her knee and, as a result, the shipboard surgeon operated on her injured knee.<sup>42</sup> The passenger sued the shipping line, alleging it was liable for the negligence of the shipboard surgeon.<sup>43</sup> At trial, both parties presented expert testimony regarding the treatment administered by the ship's surgeon, and each expert rendered a different conclusion.<sup>44</sup> The trial court dismissed the plaintiff's complaint because "no negligence upon the part of the company in selecting the surgeon was shown."<sup>45</sup> Consequently, the plaintiff appealed. What the parties did not know was that the decision by the Court of the Appeals of New York would affect passengers into the twenty-first century. The court of last resort deemed it unnecessary to determine "whether . . . the steam-ship company owed a duty to its passengers to provide a surgeon for their care and safety in the emergency of sickness or accident . . . ."<sup>46</sup> The shipowner's duty to its passengers was to select a reasonably competent man for that office, and the shipowner was only liable for neglect of that duty.<sup>47</sup> This became the only duty a shipowner owed to its passengers regarding medical care. Thereafter, the plaintiff's recourse against the shipowner arising out of the shipboard doctor's negligence was severely limited. Given a lack of evidence that showed carelessness or neglect on the part of the shipping line in its choice of surgeon, the court affirmed the trial court's decision.<sup>48</sup>

In *O'Brien v. Cunard Steamship Co.*,<sup>49</sup> the Supreme Judicial Court of Massachusetts added flesh to the bones of the skeleton created by the Court of Appeals of New York in *Laubheim*. In *O'Brien*, a passenger sued a shipping line alleging the ship's surgeon was negligent when he gave her a vaccination.<sup>50</sup> The plaintiff based her action on the theory that the surgeon was a "servant engaged in the . . . business [of the shipping line], and [was] subject to its control."<sup>51</sup> The court began its

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41. See *Laubheim v. Netherland S.S. Co.*, 13 N.E. 781 (N.Y. 1887).

42. *Id.* at 781.

43. See *id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. The court declared shipowners are "bound only to the exercise of reasonable care and diligence, and [are] not compelled to select and employ the highest skill and longest experience." *Id.*

48. *Id.* at 782.

49. *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. 1891).

50. *Id.*

51. *Id.* at 267.

analysis by stating, "we are of opinion that the [shipping line] is not liable for [the surgeon's] want of care in performing surgical operations."<sup>52</sup> The law at that time<sup>53</sup> required a steamship or other vessel, which carried more than fifty passengers, other than cabin passengers, to carry a duly qualified surgeon to care for such passengers during the voyage.<sup>54</sup> Violations of the law subjected the master of the vessel to a penalty not to exceed \$250.<sup>55</sup> Thus, shipping lines owed a legally imposed duty to provide medical care for passengers who rode in steerage. The court interpreted this duty to require the carrier to employ a duly qualified and competent medical practitioner.<sup>56</sup> However, once the shipowner provided a duly qualified medical practitioner, it was the passenger's choice whether to employ his services; therefore, the practitioner's work was under the control of the passenger, not the shipowner.<sup>57</sup> This finding ensured that the shipboard doctor was not a servant of the shipowner.<sup>58</sup> Justice Knowlton found, "[t]he law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible for the proper management of it."<sup>59</sup>

The court's decision was based on two factors: (1) the shipowner lacked the expertise to meaningfully evaluate and, therefore, control a doctor's treatment of his patients; and (2) even if it had the knowledge, the shipowner lacked the power to intrude into the physician-patient relationship.<sup>60</sup> The court then stated:

[The passengers] may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, *or may go without treatment if they prefer*; and, if they employ the surgeon, they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation or take the risk of going without it.<sup>61</sup>

The court established the principles that shipboard medical services were solely for the benefit of the passenger and the carrier remained detached from the doctor-patient relationship. Thus, the shipping line had fully discharged its duty to its passengers provided it had staffed a

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52. *Id.* at 266-67.

53. Act of Aug. 2, 1882, ch. 374, 22 Stat. 186, 188 (1882) (regulating the carriage of passengers by sea).

54. *O'Brien*, 28 N.E. at 267.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See id.*

59. *Id.*

60. *See id.*

61. *Id.* (emphasis added).



duly competent medical practitioner, supplied him with proper equipment, and ensured he was prepared for the passengers if they wished to employ his services.<sup>62</sup> Ultimately, the court declared its view was fully consistent with the Court of Appeals of New York in *Laubheim*.<sup>63</sup> Essentially, *O'Brien* provided the detailed legal reasoning lacking in *Laubheim*.

### B. A Quick Detour

For over half a century, the *Laubheim-O'Brien* rationale served as the marker for which courts chartered their courses when faced with suits brought by passengers against shipowners seeking to recover for the negligence of the shipboard doctor.<sup>64</sup> Then, in 1959, when faced with a question similar to that as presented in *Laubheim* and *O'Brien*, the District Court of the Northern District of California came to a different conclusion. In *Nietes v. American President Lines, Ltd.*,<sup>65</sup> the plaintiff, as administrator of his deceased son's estate, brought an action against the vessel owner, shipboard physician, and nurses, alleging that the negligent treatment of the ship's physician and nurses caused his son's death.<sup>66</sup> As a result of this alleged negligent treatment, the plaintiff claimed that the shipowner was liable under the doctrine of *respondeat superior*.<sup>67</sup> The shipowner moved to dismiss, relying upon "the ancient rule that a shipowner is liable for its negligence in hiring an incompetent physician, but is not liable for negligent treatment by him."<sup>68</sup>

Faced with the established general maritime law and a novel argument, Judge Sweigert held the ship's physician and nurses were servants for the purposes of *respondeat superior*; therefore, it was possible that the shipowner could be liable for their negligence.<sup>69</sup> The court used a four-part test to determine the physician's and nurses' status as servants:

- (1) whether the ship's physician and nurses were in the regular employment of the ship;
- (2) whether they were salaried members of the crew;

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62. *Id.*

63. *Id.*

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

65. *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219 (N.D. Cal. 1959).

66. *Id.* at 220.

67. *Id.*

68. *Id.* (citing *The Korea Maru*, 254 F. 397; *The Great Northern*, 251 F. 826; *Laubheim v. Netherland S.S. Co.*, 13 N.E. 781 (N.Y. 1887)).

69. *Id.*

- (3) whether they were subject to the ship's discipline and the master's orders; and
- (4) whether they were presumably under the general direction of the company's chief surgeon through modern means of communication.<sup>70</sup>

The court noted the existing shore side rule that a plaintiff could not hold a non-professional employer liable for failure to exercise control or supervision over a professionally skilled physician.<sup>71</sup> However, it rejected this rule as outdated and stated it "no longer provide[d] a realistic basis for the determination of liability in our modern, highly organized industrial society."<sup>72</sup> The court was persuaded to stray from the existing rule, following a growing tendency in many land-based cases to hold that a doctor was a servant in special circumstances, for example where he was a resident physician on a hospital staff.<sup>73</sup> In addition, shipowners were held liable for negligence in navigation, even though they had little or no skill in navigation.<sup>74</sup>

Constructing a policy argument to provide additional support for its position, the court found that if the carrier does not provide medical services to discharge its duty of reasonable care to its passengers, it traditionally must divert the ship's course to the nearest port, depending on the gravity of the illness.<sup>75</sup> If the master of the vessel fails to take such action when deemed necessary, the ill or injured passenger may sue the shipowner for the negligent acts of the master under the theory of *respondeat superior*.<sup>76</sup> Thus, providing medical services has been the traditional means in which a carrier has discharged its duty to its passengers. The carrier thereby avoided the costly alternative of diverting the entire vessel to provide medical attention to one passenger. A shipowner, when it provided medical care, benefited from having medical professionals onboard by obtaining a competitive advantage over carriers that did not.<sup>77</sup> Ultimately, the court articulated the principle that if the carrier intends to provide medical services to discharge its duty of reasonable care to its passengers, it must do so carefully.<sup>78</sup>

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70. *Nietes*, 188 F. Supp at 220.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 221.

75. *Id.* (citing *The Iroquois*, 194 U.S. 240 (1904)).

76. *Nietes*, 188 F. Supp. at 221.

77. *Id.*

78. *Id.*

### C. *Back on Course*

Despite the *Nietes* decision, the *Laubheim-O'Brien* rationale was embedded in maritime jurisprudence regarding a carrier's liability for the negligence of the medical professionals that it provided for its passengers. In the landmark case, *Barbetta v. S/S Bermuda Star*,<sup>79</sup> the United States Court of Appeals for the Fifth Circuit continued to apply the general maritime law established in *Laubheim-O'Brien*, thereby refusing to set sail on the course chartered by *Nietes*. In *Barbetta*, the appellate court confronted the question of whether a carrier that provided a doctor for its passengers was liable for the negligence of that doctor.

The Barbettas sued the S/S "Bermuda Star" (hereinafter "Star"), the vessel owner, and the company that chartered the vessel, Bahama Cruise.<sup>80</sup> The plaintiffs were passengers onboard the Star on a cruise organized by Bahama Cruise, which sailed from New Orleans, Louisiana to Key West, Florida, and then on to Cozumel and Playa del Carmen, Mexico.<sup>81</sup> During the five-day period on the vessel, Mrs. Barbetta developed a serious case of pneumonia and lapsed into a coma. Eventually, she was removed from the ship and taken to a hospital for treatment.<sup>82</sup>

The Barbettas alleged the shipboard doctor's failure to care for Mrs. Barbetta caused her severe case of pneumonia and eventual coma.<sup>83</sup> They claimed when she initially sought treatment from the ship's doctor she was suffering from diabetes, a condition of which she was unaware, and which the doctor failed to diagnose.<sup>84</sup> The Barbettas argued that since the doctor was in the course and scope of his employment, Bahama Cruise was vicariously liable for the doctor's negligence under the doctrine of *respondeat superior*.<sup>85</sup>

The cruise line's main defense was that under general maritime principles it was not liable for the negligence of the ship's doctor.<sup>86</sup> It also argued that the ticket served as a binding contract between the cruise line and the passenger.<sup>87</sup> The pertinent part of the ticket read:

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

80. *Id.* at 1365.

81. *Id.* at 1366.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* The Barbettas also alleged that the cruise line negligently hired the doctor. The court found no genuine issue of material fact regarding that claim of negligent hiring and granted summary judgment in favor of the defendant.

86. *Id.*

87. *See The Moses Taylor*, 7 U.S. 411, 427 (1866); *Wallis v. Princess Cruise, Inc.* 306 F.3d 827, 834 (9th Cir. 2002).

[Any physician provided by the Carrier is] solely for the convenience of the Passenger and services rendered by [the physician] to the Passenger are at the latter's expense. Any such person in dealing with, giving service to, treating or operating upon a Passenger is *not the servant or agent of the Carrier, and the Carrier shall not be liable for any omission, negligence or damage done by such person.*<sup>88</sup>

The cruise line argued that the doctor provided was for the convenience of the passenger, and that the doctor was not an agent; therefore, the cruise line was not liable for negligence imputed to the doctor.<sup>89</sup>

The cruise line moved for summary judgment based upon this argument. The United States District Court for the Eastern District of Louisiana granted the motion.<sup>90</sup> The district court began its decision from a unique point of departure by recognizing that the cruise line intended to limit its liability as evidenced by the disclaimer in the passenger ticket.<sup>91</sup> Further, the cruise line intended to limit liability regardless of whether the doctor was an independent contractor or an employee.<sup>92</sup> This led the court to narrow the issue to whether the defendant's limitation of liability was against public policy.<sup>93</sup> It reasoned that "because of the unusual nature of the voyage, because of the unusual nature of admiralty, and because it [is] in the best interest of the passengers . . . aboard vessels," a vessel ought to be able to contract away liability with its passengers.<sup>94</sup> The court concluded that vessel owners were more willing to provide medical care if the ship's doctors only contracted with, and were liable to, the passengers.<sup>95</sup> Thus, the cruise line was not held liable based upon the theory of *respondeat superior*.<sup>96</sup> The *Barbettas* subsequently appealed the decision.

The Fifth Circuit Court of Appeals began its analysis from a different point of departure. It asked the question, "[d]oes 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?"<sup>97</sup> Neither the U.S. Supreme Court nor the Fifth Circuit had previously ruled on the issue.<sup>98</sup> However, "an impressive number . . . [had], for almost one hundred years, followed the same basic

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88. *Barbetta*, 848 F.2d at 1366 (emphasis added).

89. *Id.*

90. *Id.* at 1367.

91. *Id.*

92. *See id.*

93. *See id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1369.

98. *Id.*

rule.”<sup>99</sup> The court referenced the principles established in *Laubheim-O’Brien*, framing the rule as:

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. If the carrier breaches its duty, it is responsible for its own negligence [in hiring the doctor]. If the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier.<sup>100</sup>

Next, it looked to the two factors enunciated in *Laubheim-O’Brien*. First, the carrier was not in the business of practicing medicine. Second, the carrier did not interfere with the doctor-patient relationship.<sup>101</sup> The court then cited *Amdur v. Zim Israel Navigation Co.*<sup>102</sup> for the oft-quoted proposition that “[a] ship is not a floating hospital; [thus,] a ship’s physician is an independent medical expert engaged on the basis of his professional qualifications.”<sup>103</sup> This provided the logical step the court needed to claim the carrier did not, and could not, have sufficient control over the medical treatment provided by the ship’s doctor.<sup>104</sup>

Because the carrier did not have sufficient control over the ship’s doctor, the shipowner was not a master; thus, control, an essential element of *respondeat superior*, was not satisfied.<sup>105</sup> The carrier lacked “the ability to meaningfully control the relevant actions of its ‘servant’ — that is, the ship’s doctor.”<sup>106</sup> Therefore, the cruise line was not vicariously liable for the doctor’s negligence.<sup>107</sup> Before the court ended its opinion, it reviewed and analyzed the plaintiff’s position, which argued for a departure from *Laubheim-O’Brien* and an adoption of *Nietes*.<sup>108</sup>

The Fifth Circuit criticized *Nietes* and stated the reasoning was “internally contradictory,” and the decision “unrealistically presumed away the problem.”<sup>109</sup> The court asserted that *Nietes* “claimed that the carrier’s ability to control the doctor should not be considered . . . ; instead, . . . a carrier must be liable for a ship doctor’s negligent treatment because the carrier chose to discharge its duty to provide its passengers with reasonable medical care by bringing the doctor aboard the

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99. *Id.*

100. *Id.*

101. *Id.* (quoting *O’Brien v. Cunard S.S. Co.*, 28 N.E. 266, 276 (Mass. 1891)).

102. *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033 (S.D.N.Y. 1981).

103. *Barbetta*, 848 F.2d at 1370 (quoting *Amdur*, 310 F. Supp. at 1042).

104. *Id.*

105. *Id.* at 1369.

106. *Id.* at 1370.

107. *Id.* at 1369.

108. *Id.* at 1370.

109. *Id.*

ship.”<sup>110</sup> The court averred that the *Nietes* rationale sounded in strict liability.<sup>111</sup> However, the *Nietes* court recognized the necessity of control by only imposing liability when the carrier has some control over the doctor, i.e., the carrier pays the doctor’s salary, can subject him to discipline, and can give him orders.<sup>112</sup> Consequently, the *Nietes* court determined “that the employment relationship between a carrier and a ship’s doctor provid[ed] the necessary control.”<sup>113</sup> The *Barbetta* court disagreed with the *Nietes* court’s interpretation of the requisites of control under the theory of *respondeat superior*.<sup>114</sup>

Again, the court returned to the two factors set out in *O’Brien*. It quoted *Amdur*, which also disagreed with the notion that there is sufficient control established through a link with the chief surgeon through the modern means of communication.<sup>115</sup> The *Barbetta* court drew a distinction between the employer’s right to control its employee’s general actions and the employer’s ability to control its employee’s specific actions, maintaining the carrier lacks the ability to control the doctor’s specific actions.

Furthermore, the court disagreed with the *Nietes* position that a carrier escaped its duty to render ordinary prudent care to its passengers by hiring a ship’s doctor, because the carrier also had a duty to hire a doctor that is duly competent and qualified. The *Barbetta* court reasoned that the cruise line could face liability for the negligent hiring of the doctor it provided, and this potential liability adequately discharged its duty.<sup>116</sup> In addition, it maintained that a passenger could have rejected the ship-board doctor’s care and the cruise line would then have to satisfy its duty in some other way.<sup>117</sup> Thus, the court concluded that *respondeat superior* liability was unnecessary to enforce the cruise line’s duty of care toward its passenger.<sup>118</sup>

#### D. A Potential Remedy While Maintaining Uniformity

The *Barbetta* opinion represented the general maritime rule regarding liability predicated upon the doctrine of *respondeat superior*. Although the *Nietes* court offered a different approach to *respondeat superior*, it was not followed by any other court until *Carlisle*. With

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110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1371.

114. *See id.* at 1372.

115. *Id.* at 1371 (quoting *Amdur*, 310 F. Supp. at 1042).

116. *Id.* at 1373.

117. *Id.* at 1372.

118. *Id.*

these cases as a backdrop, the Southern District of Florida, situated in a major hub of the cruise industry, discovered additional complexities surrounding the question of a cruise line's liability for its onboard doctor. In 1993, a federal trial court in Florida carefully parsed the *Barbetta* rationale and recognized that, while it foreclosed liability based on *respondeat superior*, a plaintiff could possibly recover under the theory of apparent agency without disturbing the *Barbetta* rule. Unfortunately, the procedural posture of the case prevented the court from delving into the merits. Two years later, another federal trial court in Florida addressed the merits of an apparent agency argument, but the facts of the case did not support liability. These two cases added to the legal landscape concerning the issue of a shipowner's liability for the negligent medical care provided by its doctor.<sup>119</sup>

The United States District Court of the Southern District of Florida addressed the issue of whether a cruise line was liable for the malpractice of the shipboard doctor in *Fairley v. Royal Cruise Line Ltd.*<sup>120</sup> In *Fairley*, the plaintiff sued Royal Cruise Line (hereinafter "Royal") for negligence and negligent hiring, among other theories, arising out of the plaintiff's injury and subsequent treatment by the shipboard doctor, which occurred while aboard one of Royal's cruise ships.<sup>121</sup> More specifically, Count III of the plaintiff's amended complaint alleged that "Royal Cruise Lines [was] liable for the alleged malpractice of its ship doctor alternatively on theories of apparent agency (also called agency-by-estoppel), joint venture, and *respondeat superior* (vicarious liability)."<sup>122</sup> Royal moved to dismiss the complaint and asserted that "[i]t is well[-]established under general maritime law that the only cause of action that may accrue against a shipowner for injuries resulting from the alleged malpractice of the ship's doctor is a claim for negligent hiring."<sup>123</sup>

Then U.S. District Judge Stanley Marcus<sup>124</sup> denied Royal's motion

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119. At the time *Carlisle* was decided, the Southern District had handed down other decisions that addressed the issue of a shipowner's liability for the shipboard doctor's medical malpractice. However, none of those opinions, besides *Warren v. Ajax Navigation Corp. of Monrovia* and *Fairley v. Royal Cruise Line*, explicitly discussed or ruled on liability under the theory of apparent agency. See *Jackson v. Carnival Cruise Lines*, 203 F. Supp. 2d 1367, 1373-74 (S.D. Fla. 2002); *Doe v. Celebrity Cruise Lines*, 145 F. Supp. 2d 1337, 1345 (S.D. Fla. 2001); *Warren v. Ajax Navigation Corp. of Monrovia*, 1995 A.M.C. 2609 (S.D. Fla. 1995); *Fairley v. Royal Cruise Line*, 1993 A.M.C. 1633 (S.D. Fla. 1993); *Nanz v. Costa Cruises, Inc.*, 1999 A.M.C. 48, 50 (S.D. Fla. 1991); *Mascolo v. Costa Crociere*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989).

120. *Fairley v. Royal Cruise Line*, 1993 A.M.C. 1633 (S.D. Fla. 1993).

121. *Id.*

122. *Id.* at 1634.

123. *Id.*

124. The Honorable Stanley Marcus was appointed to the U.S. Court of Appeals for the

to dismiss.<sup>125</sup> The court noted the position taken by the defendants,<sup>126</sup> but it did not stop its analysis at that point. The court proceeded to discuss vicarious liability<sup>127</sup> under the theory of *respondeat superior*.<sup>128</sup> Judge Marcus went further and analyzed the case law and alternative views expressed by Martin J. Norris,<sup>129</sup> a well-known commentator on maritime personal injury law.<sup>130</sup> First, the court outlined the position articulated in *Barbetta* as follows: (1) the shipowner lacks the ability to meaningfully control the shipboard doctor; and (2) it is the patient, not

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Eleventh Circuit on November 12, 1997. About the Court, Circuit Judges, at <http://www.ca11.uscourts.gov/about/judges.php> (last visited Jan. 31, 2005).

125. *Fairley*, 1993 A.M.C. at 1633.

126. The court stated, “[i]ndeed, the overwhelming tide of case law on the question holds that a shipowner may not be held vicariously liable for the torts of the ship’s doctor.” *Id.* at 1634 (citations omitted).

127. *Id.* at 1635. The theory of vicarious liability of a principal for the acts of its agent turns primarily on the ability of the principal to control the acts of the agent. RESTATEMENT (SECOND) OF AGENCY § 220(1), cmt. d (1958). Since vicarious liability is based on control, the principal is protected from liability for the acts of a *truly* independent contractor. RESTATEMENT (SECOND) TORTS § 409, cmt. b (1965) (emphasis added). The determination of whether a shipboard doctor is a servant or an independent contractor is a legal conclusion. RESTATEMENT (SECOND) OF AGENCY § 220(2). The court referenced the following factors for the analysis of servant or independent contractor status, none of which is alone dispositive:

whether the work is “part of the regular business of the employer”; whether the contractor is engaged in a distinct calling; the degree of skill of the contractor; who supplies the locale, tools and instrumentalities; the period of employment and the method of payment; and the extent of control exercised by the principal over the contractor or provided for by the agreement between them.

*Fairley*, 1993 A.M.C. at 1635 (citing RESTATEMENT (SECOND) OF AGENCY § 220(2)).

128. “*Respondeat superior* is conceptually different from liability for negligent hiring: under *respondeat superior*, the negligent acts of even the highly qualified agent may still engender the vicarious liability of the employer.” *Fairley*, 1993 A.M.C. at 1636 (citing *Sambula v. Cent. Gulf S.S. Co.*, 268 F. Supp. 1, 4 (S.D. Tex. 1967)).

129. Martin J. Norris (1908-1999) received his law degree from Brooklyn Law School in 1930. He worked in government in Washington and New York from 1936 to 1956. He then served as an United States Coast Guard Administrative Law Judge from 1956 to 1970. He authored several widely cited books on maritime law, including the two-volume work, *THE LAW OF MARITIME PERSONAL INJURIES* and the three-volume work, *THE LAW OF SEAMEN*. Eric Pace, *Martin J. Norris, 91, Judge and Authority on Maritime Law*, N.Y. TIMES, Feb. 10, 1999, at C23.

130. *Fairley*, 1993 A.M.C. at 1635 n.2. The court cited the following portion of Mr. Norris’s text:

It is submitted that the ship’s doctor is not an independent contractor, but, in fact, a paid employee of the shipowner. He is a staff officer aboard ship; and signs the articles as a member of the ship’s company. He is a subject to ship’s discipline under the general maritime law and is subject to the lawful commands of the master. When sick or injured he is entitled to remedies of maintenance and cure, the Jones Act, and of a seaworthy ship. Like the steward or radio operator, the ship’s doctor is a seaman for the purposes of the personal injury remedies and for wage relief. The professional standing of a physician is not a valid argument for affording him a special status when a member of the ship’s company. He must, in truth, be regarded as on par with his fellow officers.

*Id.* (quoting 1 MARTIN J. NORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 3:10, at 75 (4th ed. 1990)).



the shipowner, who actually controls the physician.<sup>131</sup> The court asserted, "[t]he consequence of the rule is that regardless of whether the ship's doctor is an independent contractor or in the regular employ of the ship, any claim against the carrier for the malpractice of its doctor must be dismissed."<sup>132</sup> Further:

the harshness of the rule can only be justified by the notion that meaningful control is a prerequisite to vicarious liability and that – under any conceivable set of facts, and even if [the ship's doctor] is a regular crew-member – the carrier has no meaningful ability to control the ship's doctor.<sup>133</sup>

Next, the court presented the *Nietes* rationale as follows: if (1) the shipboard doctor was "in the regular employment of the ship"; (2) "as a salaried member of the crew"; (3) "subject to the ship's discipline and the master's orders"; and (4) "presumably also under the general direction and supervision of the [shipowner's] chief surgeon through modern means of communication," the doctor was an agent under sufficient control for purposes of *respondeat superior*.<sup>134</sup>

Courts that have analyzed *Nietes* under a *Barbetta*-like rationale have criticized the opinion and claimed a shore side chief surgeon does not provide the control necessary for vicarious liability under the theory of *respondeat superior*.<sup>135</sup> The *Fairley* court also proposed that medicine is inherently a more skillful profession, which for purposes of vicarious liability may render a doctor's relationship with his employer "a breed apart from the less technical master-servant relationships."<sup>136</sup> In some situations, however, courts have held employers vicariously liable under the theory of *respondeat superior* even with distinct professions and contract provisions, suggesting the contrary.<sup>137</sup>

In addition, there might be a meaningful difference in the relationship between a cruise line and a ship's doctor, and a hospital and a staff physician with respect to the amount of supervision and control.<sup>138</sup>

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131. *Fairley*, 1993 A.M.C. at 1636.

132. *Id.* at 1636-37.

133. *Id.* at 1637.

134. *Id.* (quoting *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 220 (N.D. Cal. 1959)).

135. *Id.* (citing *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042-43 (S.D.N.Y. 1981); *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1371 (5th Cir. 1988); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103 (E.D. Pa. 1982)).

136. *See Fairley*, 1993 A.M.C. at 1638.

137. *Id.* at 1635-36 (citing *Pearl v. West End St. Ry. Co.*, 57 N.E. 339, 339 (1900) (Holmes, J.) (noting that "there is no more distinct calling than that of the doctor"); *Bing v. Thunig*, 163 N.Y.S.2d 3 (1957) (adopting the rule of *respondeat superior* and abandoning the doctrine of immunity of hospitals for the negligent acts of its employees based on the theory that the patient controlled the administration of care); 5 F.V. Harper, F. James, Jr., & O.S. Gray, *THE LAW OF TORTS* § 26.11 (2d ed. 1986)).

138. *Fairley*, 1993 A.M.C. at 1638.

Moving beyond the analysis of the shipowner's ability to control the actions of the shipboard doctor, the court found something that *Barbetta* had not. It found a different type of control illustrated in the following:

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 *Amdur* and *Barbetta*, [the passengers] are not "free to contract with [the ship's doctor] for any medical services they may require." If a passenger is ill, and port is distant, the ship's doctor is the passenger's only resort, since evacuation by air rescue is expensive, possible and appropriate only for emergencies. Further, the passengers may be reluctant to seek treatment from an unknown doctor in a foreign country.<sup>139</sup>

Statutory or common law maritime law does not require shipowners to provide shipboard doctors.<sup>140</sup> However, if shipowners do not, they must discharge their duty to provide reasonable medical attention in some other way, which could lead to a much greater expense.<sup>141</sup> The court concluded that where a cruise line has reaped the benefits of having a doctor, "there may be circumstances where it should be required to bear its consequences."<sup>142</sup>

The court then noted that the *Barbetta* line of cases rejects recovery based on the theory of *respondeat superior*. However, the plaintiff in the case before the court alleged several other theories of liability.<sup>143</sup> The court asserted, "we cannot say that there is no conceivable set of facts under which the Plaintiff could prevail on her claim in Count III on, for example, an [apparent agency theory]."<sup>144</sup> Even if the doctor

139. *Id.* at 1638-39 (citing *Barbetta*, 848 F.2d at 1370; *Amdur*, 310 F. Supp. at 1042; Michael J. Compagno, Note, *Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star*, 14 TUL. MAR. L. J. 381, 389 (1990) (emphasis added)).

140. *Id.* at 1639.

141. The court noted that evacuation by air rescue is very expensive, and diverting the vessel is a great inconvenience. *Id.*

142. *Id.* (citing Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L. J. 499 (1961)).

143. *Id.*

144. *Id.* at 1639. The Restatement (Second) of Agency describes the agency-by-estoppel theory as follows:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such an apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

*Id.* at 1640 n.6 (quoting RESTATEMENT (SECOND) OF AGENCY § 267 (1958)). In addition, the illustration is insightful:

P, a department store, contracts with T, as an independent contractor, to give medical attention to patrons of the store, T appearing as an employee . . . [B]y mistake T gives poison to a patron of the store, who takes it in the belief that it is medicine. P is liable for the harm.

was an independent contractor, if the shipowner held the doctor out to be an agent, suggesting the doctor was treating the plaintiff on behalf of the carrier and the plaintiff so relied to her detriment, then the carrier could be liable for the shipboard doctor's negligence under the theory of apparent agency.<sup>145</sup>

The court averred the carrier cannot circumvent liability under the theory of apparent agency by inserting in its passenger ticket a provision which claims that the ship's doctor is not an agent and it is not liable for his actions. It referred to 46 U.S.C. app. § 183c(a),<sup>146</sup> which prevents owners of passenger vessels from disclaiming liability in the event of death or personal injury due to the negligence or fault of said owners or his agents or servants.<sup>147</sup>

Since the court was reviewing a motion to dismiss for failure to state a claim upon which relief could be granted,<sup>148</sup> it did not definitively rule on the merits of the claim against the cruise line for the negligence of its doctor under one of the theories of liability. However, it did state that it would not be impossible for the plaintiff to prevail.<sup>149</sup> Therefore, the court denied the defendants motion to dismiss as to Count III of the plaintiff's complaint, the count containing apparent agency.<sup>150</sup>

Given the *Fairley* court did not dismiss the plaintiff's complaint, this decision falls somewhere between *Nietes* and *Barbetta*. It did not whole-heartedly accept the *Nietes* rationale; instead, it identified a theory of recovery that would not disrupt maritime law. It is important to note that the procedural posture of the case did not allow the court to hear the merits of the claim. Consequently, it is impossible to determine exactly how it would have decided the case on the merits. Given the

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*Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 267 illus. 3-4 (1958)).

145. *Fairley*, 1993 A.M.C. at 1640.

146. The relevant portion of 46 U.S.C. app. § 183c(a) is reproduced as follows:

It shall be unlawful for the manager, agent, master, or owner, of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury . . . All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

46 U.S.C. app. § 183c(a) (2000).

147. *Fairley*, 1993 A.M.C. at 1641 n.7.

148. FED. R. CIV. P. 12(b)(6).

149. *Fairley*, 1993 A.M.C. at 1641.

150. *Id.* Count III also sought recovery based on *respondeat superior*, but the court foreclosed recovery under that theory when it stated, "[a]lthough the majority rule preclude[d] suing the shipowner based on the theory of *respondeat superior*, [the] [p]laintiff has suggested several other theories." *Id.* at 1640.

attention the court devoted in its opinion to discussing possible claims upon which the plaintiff could have a basis for recovery, it is reasonable to say the *Fairley* court leaned more toward *Nietes*' policy rather than *Barbetta*'s. Ultimately, *Fairley* did not depart from well-established principles of general maritime law.

Two years later, in *Warren v. Ajax Navigation Corp. of Monrovia*,<sup>151</sup> the issue surfaced again in the Southern District of Florida. In *Warren*, the plaintiff, who suffered a heart attack while on a cruise, sued the cruise line for negligent medical care, alleging breach of contract and negligence under the theory of apparent agency.<sup>152</sup> The plaintiff argued that the statements made in the ship's brochure created a binding contract under which the shipowner was required to provide him with medical care.<sup>153</sup> First, the court granted summary judgment as to the breach of contract claim, finding "no provisions contained in the defendant's marketing brochure may be incorporated into the Contract of Passage."<sup>154</sup> Next, the court analyzed the claim for liability based on apparent agency.

The court began by analyzing whether the plaintiff reasonably believed that an agency relationship existed. It looked to case law on the issue for guidance. Interestingly, the court did not consider *Nietes* or *Fairley*.<sup>155</sup> Instead, the court adopted the position articulated in *Barbetta*, and relied upon the two factors set forth in *O'Brien*, that "the carrier or shipowner lack[ed] both (1) the expertise to meaningfully evaluate and, therefore, control a doctor's treatment of his patients and (2) the power, even if it had the knowledge, to intrude into the physician-patient relationship."<sup>156</sup> Under the well-established rule in *Barbetta*, the court dismissed the plaintiff's claim that he reasonably believed the ship's doctor was an agent of the carrier.<sup>157</sup> It commented that though the plaintiff's claim might have been honest, it was unreasonable given the clear rule of law.<sup>158</sup> In footnote three of the opinion, the court quoted the time-tested notion that "[i]gnorance of the law is no defense," and stated that this proposition "[a]pplies in the present case . . . ."<sup>159</sup> The court then considered whether the plaintiff relied upon his

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151. *Warren v. Ajax Navigation Corp. of Monrovia*, 1995 A.M.C. 2609 (S.D. Fla. 1995).

152. *Id.*

153. *Id.* at 2610.

154. *Id.* at 2611.

155. This is an observation from the opinion. The litigants may not have addressed *Nietes* or *Fairley* in their briefs.

156. *Warren*, 1995 A.M.C. at 2612 (citing *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1371 (5th Cir. 1988)).

157. *Id.* at 2613.

158. *Id.* at 2612-13.

159. *Id.* at 2613 n.3.

"unreasonable" belief that the ship's doctor was an agent of the shipowner when purchasing his cruise ticket.

The plaintiff stated in his deposition that he had cruised on that particular line on five previous occasions and his only criteria when selecting a cruise was cost and availability.<sup>160</sup> The status of the ship's doctor was not a consideration.<sup>161</sup> The court determined that the plaintiff failed to show that his decision to take the cruise was in reliance on the shipboard doctor's status as an agent of the shipowner.<sup>162</sup> Judge Ryskamp granted the defendant's motion for summary judgment on the claims based on the theory of apparent agency.

### III. THE DECISION

With the above referenced case law as its background, the Florida Third District Court of Appeal decided to reject application of the general maritime law in *Carlisle*, and travel into the waters explored by *Nietes*.<sup>163</sup> The court began its analysis by establishing the relationship between Carnival and Dr. Neri, quoting the pertinent parts of Dr. Neri's contract with Carnival. Paraphrased, the contract provided:

- (1) Dr. Neri shall treat both the passengers and crew;
- (2) the treatment Dr. Neri renders shall be in accordance with Carnival's Physician guidelines;
- (3) the treatment shall be performed on a seven-day per week basis during regular and on-call hours and for emergencies;
- (4) Dr. Neri's sole source of income is a weekly salary provided by Carnival during the term of his employment;
- (5) Carnival could dismiss Dr. Neri for "violations of the Ship's

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160. *Id.* at 2613.

161. *Id.*

162. *Id.*

163. The *Barbetta* rule is well-settled maritime law; before *Carlisle*, only *Nietes* had departed from this precedent. See *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1364, 1369 (5th Cir. 1988) (citing ten cases in support of its position); *Cummiskey v. Chandris, S.A.*, 895 F.2d 107, 108 (2d Cir. 1990) (refusing to overturn the well-established maritime precedent that a ship doctor's negligence in treating passengers not be imputed to the shipowner or operator); *Jackson v. Carnival Cruise Lines*, 203 F. Supp. 2d 1367, 1376 (S.D. Fla. 2002); *Doe v. Celebrity Cruise Lines*, 145 F. Supp. 2d 1337, 1345-46 (S.D. Fla. 2001); *Warren*, 1995 A.M.C. at 2612 (declaring that "[i]t is well settled under general maritime law" that a shipowner is not vicariously liable for the negligence of the shipboard doctor); *Fairley v. Royal Cruise Line*, 1993 A.M.C. 1633, 1634 (S.D. Fla. 1993) (stating that "the overwhelming tide of case law on the question holds that a shipowner may not be held vicariously liable for the torts of the ship's doctor"); *Nanz v. Costa Cruise, Inc.*, 1991 A.M.C. 48, 49-50 (S.D. Fla. 1990) (finding that each court with the exception of *Nietes* followed the same rule when addressing the issue of whether a shipowner was vicariously liable for the shipboard doctor's negligence); *Mascolo v. Costa Crociere*, 726 F. Supp. 1285, 1286 (S.D. Fla. 1989) (noting the long established rule in admiralty that a shipowner is not vicariously liable for the negligence of the shipboard doctor).

- Articles" or "failure to perform his duties to the satisfaction of Carnival";
- (6) Carnival issued Dr. Neri a ship's uniform;
  - (7) Dr. Neri agreed to have his photograph taken and his name and likeness could be used to promote and publicize Carnival's vessel in any and all media;
  - (8) Carnival considered Dr. Neri to be an officer of the ship;
  - (9) in a separate agreement, Carnival agreed to indemnify Dr. Neri for up to \$1 million dollars for claims brought against him while acting in the course of the ship's duties;
  - (10) Dr. Neri agreed to permit Carnival, or its insurer, to take absolute control over defense and handling of claims brought against him.<sup>164</sup>

Another relevant factor was that Carnival charged and collected the fee for medical care rendered on the ship.<sup>165</sup> These facts served as grounds for determining that Dr. Neri was subject to control and an agent of Carnival.

Next, the court laid out the relevant portion of the Carlisle's cruise ticket that explained the disclaimer of liability for acts or omissions of the ship's physician.<sup>166</sup> A passenger ticket is a maritime contract governed by maritime law.<sup>167</sup> Thus, the passenger ticket established a contractual relationship between Carnival and the Carlises. The disclaimer of liability found in the cruise ticket was similar to ones found in *Barbetta*, *Warren*, and *Fairley*.

The court then established admiralty jurisdiction.<sup>168</sup> It then declared that a cruise line ticket is a maritime contract governed by maritime law,<sup>169</sup> and lastly stated that a carrier owes a duty of reasonable

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164. *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 6 (Fla. Dist. Ct. App. 2003).

165. Passengers pay for medical services using their "Sail and Sign Card," which is a form of a credit card passengers are issued when they arrive onboard. Respondent's Answer Brief at 3, *Carnival Corp. v. Carlisle*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003) (SC04-393). Passengers then either pay cash or charge to a normal credit card the charges made on the "Sail and Sign Card."

166. The following portion of the passenger ticket was reproduced in the opinion:

If the vessel carries a physician, nurse, masseuse, barber, hair dresser or manicurist, it is done solely for the convenience of the guest and any such person in dealing with the guest is not and shall not be considered in any respect whatsoever, as the employee, servant or agent of the carrier and the carrier shall not be liable for any act or omission of such person or those under his order or assisting him with respect to treatment, advice or care of any kind given to any guest.

*Carlisle*, 864 So. 2d at 2-3.

167. See *The Moses Taylor*, 71 U.S. 411, 427 (1866).

168. *Carlisle*, 864 So. 2d at 3 (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Klostres Rederi v. Cowden*, 447 So. 2d 1017 (Fla. Dist. Ct. App. 1984); *Rand v. Hatch*, 762 So. 2d 1001 (Fla. Dist. Ct. App. 2000)).

169. *The Moses Taylor*, 71 U.S. at 427; *Wallis v. Princess Cruise Lines, Inc.*, 306 F.3d 827, 834 (9th Cir. 2002).

care to its passenger under maritime law.<sup>170</sup>

The court outlined the arguments made by both Carnival and Carlisle. Carnival argued that the cruise line's duty to its passengers does not impose vicarious liability upon the cruise line for the shipboard physician's alleged negligent treatment of one of its passengers. Carnival cited to *Barbetta*, the cases *Barbetta* cited, and the cases that subsequently cited the seminal decision.<sup>171</sup> Conversely, Carlisle argued that the *Barbetta* cases are "based upon flawed and outmoded assumptions regarding the cruise ship industry and the provision of medical services to passengers," and urged the court to adopt the position presented in *Nietes*.<sup>172</sup>

With the parties' positions framed, the court foreshadowed its holding by citing to *Nietes* and *Fairley*.<sup>173</sup> The court stated that the *Fairley* court "criticiz[ed] *Barbetta* and support[ed] the rationale of *Nietes*, while recognizing the viability of an apparent agency theory of recovery."<sup>174</sup>

The court began its analysis by stating that the issue had not been addressed by the Florida Supreme Court or the United States Supreme Court.<sup>175</sup> Given the lack of what the court perceived as binding precedent, it found "*Nietes* to be the most persuasive precedent."<sup>176</sup> The court also quoted the following passage from Norris's fourth edition of *The Law of Maritime Personal Injury*:

In light of the modern trends with respect to tort liability, it is probable that the earlier cases holding that in passenger matters the shipowner's duty is fulfilled by employing a duly qualified and competent surgeon and medical practitioner and is only liable for negligence in hiring him but not for treatment by him, will not be

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170. *Kermarec*, 358 U.S. at 62; *Rindfleisch v. Carnival Cruise Lines, Inc.*, 498 So. 2d 488 (Fla. Dist. Ct. App. 1986).

171. *Carlisle*, 864 So. 2d at 3 (citing *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988), *The Korea Maru*, 254 F. 399 (9th Cir. 1918); *The Great Northern*, 251 F. 826, 830-32 (9th Cir. 1918); *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 103-04 (E.D. Pa. 1982); *Cimini v. Italia Crociere Int'l S.P.A.*, 1981 A.M.C. 2674, 2677 (S.D.N.Y. 1981); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042 (S.D.N.Y. 1981); *Branch v. Compagnie Generale Transatlantique*, 11 F. Supp. 832 (S.D.N.Y. 1935); *Churchill v. United Fruit Co.*, 294 F. 400, 402 (D. Mass. 1932); *The Napolitan Prince*, 134 F. 159, 160 (E.D.N.Y. 1904); *O'Brien v. Cunard*, 28 N.E. 266 (Mass. 1891); *Laubheim v. Netherland S.S. Co.*, 13 N.E. 781 (N.Y. 1887). *See also* *Cummiskey v. Chandris, S.A.*, 895 F.2d 107 (2d Cir. 1990); *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337 (S.D. Fla. 2001); *Mascolo v. Costa Crociere*, 726 F. Supp. 1285 (S.D. Fla. 1989)).

172. *Carlisle*, 864 So. 2d at 1.

173. *Id.* at 4.

174. *Id.*

175. *Id.* at 5.

176. *Id.* (citing NORRIS, *supra* note 130, at 75; *Herschaft*, *supra* note 2; *Compagno*, *supra* note 139).

followed . . . .<sup>177</sup>

The court then commented on the *Barbetta* rationale. It criticized *Barbetta* and the subsequent line of cases, stating they rest on an “unrealistic suggestion” that an ill or injured cruise passenger, at sea, has some meaningful choice of whether to forego treatment by the ship’s doctor.<sup>178</sup> The court described the reality regarding the degree of passenger choice, with respect to medical care, when it asserted, “[a] cruise passenger at sea and in medical distress does not have *any* meaningful choice but to seek treatment from the ship’s doctor.”<sup>179</sup>

The court noted that the underlying theory in the *Barbetta* line of cases stems from the two factors set out in *O’Brien*: (1) the shipowner’s lack of control and (2) that the shipowner cannot interfere in the doctor-patient relationship. In addition, the court highlighted the passage in *O’Brien* where the court stated, “or may go without treatment if they prefer . . . .”<sup>180</sup> The court noted that absent from the list of options that *O’Brien* offered passengers was the “in some other way” option offered by *Barbetta*.<sup>181</sup> It emphasized this point, and explained that this “concept was no more realistic in 1891 than it is today”; *Barbetta* only inserted the “in some other way” language to “ameliorate the harshness of the rule it espoused.”<sup>182</sup>

The court systematically picked apart the underlying presumptions upon which the *Barbetta* cases rested their decisions. The court characterized as a “fallacy” the notion of a choice as put forth in *O’Brien* and *Barbetta* and called the theory that a ship’s doctor is on the ship for the passenger’s convenience a “fiction.”<sup>183</sup> The *Barbetta* line of cases assumes, the court reasoned, that an ill passenger, far away from a hospital, would go through a series of available choices and, after prudent consideration, ultimately choose to seek the services of the ship’s

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177. *Id.* (quoting NORRIS, *supra* note 130, at 74). Norris, the *Carlisle* court pointed out, referenced the “excellent opinion” in *Nietes* following the above-quoted passage. *Id.*

178. *Id.* at 6. The *Barbetta* line of cases presumes that a passenger can simply decide not to forgo treatment by the ship’s physician and demand that the ship’s captain fulfill his or her duty through some other means. However, even if the passenger demands to be airlifted to a location on land to receive medical attention, this request may not always be granted. See *Pota v. Holtz*, 852 So. 2d 379, 380 (Fla. Dist. Ct. App. 2003) (cruise line denied pregnant passenger’s request to be airlifted to the nearest hospital).

179. *Carlisle*, 864 So. 2d at 5 (emphasis added).

180. *Id.*

181. *Id.* at 5. The full passage the court quotes from *O’Brien* is as follows, “[t]hey may employ the ship’s surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, or may go without treatment if they prefer . . . .” *O’Brien v. Cunard S.S. Co.*, 28 N.E. 266, 276 (Mass. 1891).

182. *Id.* (footnote omitted).

183. *Id.* at 6.



doctor.<sup>184</sup>

The court believed that having a doctor onboard served the cruise line's interests.<sup>185</sup> It allowed the cruise line "to fulfill its duty to ill or injured passengers without necessarily being required to disrupt the voyage or incur the great expense to evacuate the patient."<sup>186</sup> The court recognized that the "practical realities of the competitive cruise line industry" dictated that a ship carry a doctor even though not required by law to do so.<sup>187</sup> It characterized a cruise ship as a small city at sea for days at a time.<sup>188</sup> The average cruise ship holds over 2000 passengers<sup>189</sup> plus the crew.<sup>190</sup> Sailing this small city at sea for several days leads to the reasonably anticipated risk that some passengers will become ill or be injured.<sup>191</sup> Not only does the cruise line reduce its costs by providing a doctor, it also benefits from the ability to market the presence of a doctor and medical facilities aboard the ship.<sup>192</sup>

The court addressed the principle, presented in *O'Brien* and reiterated in *Barbetta*, that a doctor's work is not the business of the cruise line. In *Rand v. Hatch*,<sup>193</sup> the Florida Third District Court of Appeal held that general maritime law applies to a claim for a shipboard doctor's malpractice. The *Rand* court based its assertion on the premise that a shipboard doctor's medical malpractice "bears a significant relationship to traditional maritime activity."<sup>194</sup> Accordingly, in *Rand*, the court determined that "[s]ick and injured crew and passengers, either left untreated or inadequately treated, are certainly likely to disrupt maritime

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184. *Id.*

185. *Id.*

186. *Id.* (citing *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 221 (N.D. Cal. 1959); *Fairley v. Royal Cruise Line*, 1993 A.M.C. 1633, 1639 (S.D. Fla. 1993); *Herschaft supra* note 2, at 593; *Compagno, supra* note 139, at 389-90). However, merely hiring a competent physician and placing him onboard does not preclude the duty to exercise reasonable care toward the passengers during the voyage. *Carlisle*, 864 So. 2d at 5 n.1.

187. *Carlisle*, 864 So. 2d at 5.

188. *Id.*

189. The average Carnival cruise ship holds approximately 2246 passengers. This figure is derived by averaging the passenger capacity of the twenty Carnival ships currently in service. See *Fun Ships, Fun Ship Fleet*, at <http://www.carnival.com/CMS/Ships/FunShips.aspx> (last visited Jan. 31, 2005).

190. There are approximately 258 recognized named populated areas (cities, towns, townships etc.) in Florida with a population of 2000 or less. 2000 U.S. Census Information, at <http://www.census.gov>. (last visited Jan. 31, 2005).

191. *Carlisle*, 864 So. 2d at 6.

192. *Id.* at 2. As part of Dr. Neri's contract, he had to agree that his photograph and likeness could be used in all media. It is reasonable to assume this included advertising media.

193. *Rand v. Hatch*, 762 So. 2d 1001 (Fla. Dist. Ct. App. 2000).

194. *Id.* at 1002 (citing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 543 (1995) (providing the test used to determine whether a tort falls within the purview of general maritime law); *Sisson v. Ruby*, 497 U.S. 358, 365 (1990) (expanding upon the analysis presented in *Grubart*)).

activity, such as the successful navigation of a commercial vessel.”<sup>195</sup>

The *Carlisle* court stated that maritime law embraced agency law,<sup>196</sup> which in turn led to its final determination. The following illustrates a crucial step in the court’s reasoning:

These principles [of agency] include that there is no inherent conflict between a physician’s contractual independent contractor status and a finding of agency where the totality of the circumstances warrant[s] [such a finding], . . . and that a conclusory statement of independent contractor status in a contract document is not necessarily controlling.<sup>197</sup>

The court initially looked to the amount of control Carnival maintained over Dr. Neri, noting that “the cruise line provides the medical supplies, selects the nurses, sets the hours of operation of the infirmary, and provides a policy and procedures manual for the operation of the infirmary.”<sup>198</sup> In *Villazon v. Prudential Health Care Plan, Inc.*,<sup>199</sup> the Florida Supreme Court stated, “[w]hen considering a claim based on agency, it is the right of control, not actual control that may be determinative.”<sup>200</sup> Dr. Neri was an officer of the ship and subject to the ship’s articles. He was “to provide ‘medical services and treatment to passengers and crew in accordance with [Carnival’s] Physician’s guidelines,’ and he was subject to dismissal for ‘failure to perform his duties to the satisfaction of Carnival.’”<sup>201</sup> Despite the ancient rule that shipowners are not in the business of treating passengers, the court concluded that the record supported “a certain amount of control over the doctor’s medical services.”<sup>202</sup> This bridged the first gap, argued in *O’Brien* and *Barbetta*, in the agency relationship for vicarious liability under *respondeat superior*.

The court also found that it was foreseeable that some passengers would become ill, be injured, or have medical problems while at sea.<sup>203</sup> Further, the only meaningful option was for the ailing passenger to seek aid from the ship’s doctor. The court found this lack of choice created

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195. *Rand*, 762 So. 2d at 1002-03.

196. *Carlisle*, 864 So. 2d at 6 (citing *Cactus Pipe & Supply Co. v. M/V Montmarte*, 756 F.2d 1103, 1111 (5th Cir. 1985); *West India Indus., Inc. v. Vance & Sons AMC-Jeep*, 671 F.2d 1384, 1387 (5th Cir. 1982)).

197. *Id.* at 6-7 (citing *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 853-54; RESTATEMENT (SECOND) OF AGENCY § 14N cmt. a; *Smith v. Commodore Cruise Lines, Ltd.*, 124 F. Supp. 2d 150, 157 (S.D.N.Y. 2000) (finding ship’s doctor was cruise line’s agent, whose knowledge of personal injury he treated is imputed to the cruise line)).

198. *Carlisle*, 864 So. 2d at 7.

199. *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003).

200. *Carlisle*, 864 So. 2d at 7 (citing *Villazon*, 843 So. 2d at 853).

201. *Id.*

202. *Id.* at 7.

203. *Id.*

control over the doctor-patient relationship, which was the second gap argued in *O'Brien* and *Barbetta* regarding the agency relationship for vicarious liability under *respondeat superior*. The facts, as stated above, led the court to declare:

We reject the holding of the *Barbetta* line of cases and hold that the cruise line's duty to exercise reasonable care under the circumstances extends to the actions of the ship's doctor placed on board by the cruise line. We accordingly hold that, regardless of the contractual status ascribed to the doctor, for purposes of fulfilling the cruise line's duty to exercise reasonable care, the ship's doctor is an *agent* of the cruise line whose negligence should be imputed to the cruise line.<sup>204</sup>

After making this departure from the course chartered by the *Barbetta* cases, the court pointed out that the cruise line is already vicariously liable for the shipboard doctor's negligence in treatment of the other bulk of people on the ship . . . the crew!<sup>205</sup>

Finally, the court analyzed the terms in the Carlisle's passenger ticket, which disclaimed liability for the ship's doctor under 46 U.S.C. app. § 183c(a). This statute makes it unlawful for the owner of a vessel that transports passengers between ports of the United States or between the United States and foreign ports to insert into any contract a disclaimer of liability for injury or death due to the negligence of the owner's servants.<sup>206</sup> Since the court concluded that the ship's doctor was an agent (more specifically, a servant) of the cruise line, it was unlawful to disclaim liability for the negligence of one of the ship's servants. The court's holding rendered the disclaimer null and void.<sup>207</sup>

In its final paragraph, the court described its view of the reality of the cruise industry as follows:

A cruise ship is a city afloat with hundreds of temporary citizens, some of whom are passengers and some of whom are employees and

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204. *Carlisle*, 864 So. 2d at 8 (emphasis added).

205. Under general maritime law a shipowner is liable for the negligent treatment of a seaman, regardless of the amount of control the cruise line can exert over the doctor's medical services or the doctor-patient relationship. *Carlisle*, 864 So. 2d at 8 (citing *De Zon v. Am. President Lines*, 318 U.S. 660 (1943); *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 140 (5th Cir. 1986); *Cent. Gulf S.S. Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968); *Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir. 1971)).

206. 46 U.S.C. app. § 183c(a) (1958) (emphasis added); *Carlisle v. Ulysses Lines, Ltd.*, 475 So. 2d 248 (Fla. Dist. Ct. App. 1985) (finding that an exculpatory clause attempting to relieve a cruise line from liability for negligence of its servants would be unlawful under 46 U.S.C. app. § 183c(a)); *Fairley v. Royal Cruise Lines*, 1993 A.M.C. 1633, 1641 n.7 (S.D. Fla. 1993) (citing 46 U.S.C. app. § 183c(a) for the proposition that the cruise line's disclaimer of liability for physician's negligence did not as a matter of law preclude apparent authority claim at the motion to dismiss stage).

207. *Carlisle*, 864 So. 2d at 8.

agents of the cruise line who comprise the ship's crew, each of whom, within their particular sphere, owe a duty of reasonable care to the passengers.<sup>208</sup>

The rule of law espoused by the court was essentially that a cruise line may be held vicariously liable under the theory of *respondeat superior* for the negligence of the shipboard doctor.<sup>209</sup>

On February 4, 2004, attorneys for Carnival sought rehearing of the case in front of the Florida Third District Court of Appeal.<sup>210</sup> The same three-judge panel, Senior Judge Nesbitt, Judge Cope, and Judge Ramirez, denied Carnival's motion for rehearing. The court declared that it had passed on a question of great public importance and framed the question as, "[w]hether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor, committed on a ship's passenger?"<sup>211</sup> The denial of the rehearing by the Florida Third District Court of Appeal raised the possibility for appeal to the Florida Supreme Court. The Florida Constitution, article V, § 3, sets out the jurisdiction for the Florida Supreme Court.<sup>212</sup> In this particular case, it appears the Florida Supreme Court would have jurisdictional grounds to hear the case.<sup>213</sup> However, the language in the particular provision, which would grant jurisdiction, uses the word "may," which is permissive.<sup>214</sup> Therefore, the court has discretion to hear the case. Carnival has appealed the case to the Florida Supreme Court, and both parties have filed the appropriate briefs.<sup>215</sup>

#### IV. THE SIGNIFICANCE

The *Carlisle* case is significant because it called into question the relationships between cruise lines and their passengers under maritime law. For only the second time, a court permitted recovery despite the long-standing general maritime principle that a shipowner is not vicariously liable under the theory of *respondeat superior* for the malpractice

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. FLA. CONST. art. V, § 3(b)(4).

213. The Florida Constitution states that the Supreme Court "may review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance . . . ." FLA. CONST. art. V, § 3(b)(4).

214. *Id.*

215. See generally Carnival's Initial Brief, *Carnival Corp. v. Carlisle*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003) (No. SCO4-393); Respondent's Answer Brief, *Carnival Corp. v. Carlisle*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003) (No. SCO4-393); Carnival's Reply Brief, *Carnival Corp. v. Carlisle*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003) (No. SCO4-393).

of the ship's doctor.<sup>216</sup> That principle has represented the general maritime law for over a century. Under the *Barbetta* line of cases, an injured passenger's only direct recourse against the cruise line was to sue for negligent hiring. If passengers wanted to recover for the doctor's malpractice, they could sue the doctor directly. However, *Carlisle* affords passengers direct remedies against the cruise lines for a doctor's malpractice. These other remedies raise interesting issues, which merit analysis.

This case is also significant because it addresses a conflict that arises out of the *Barbetta* rule. By allowing passengers to sue the cruise lines directly for medical malpractice, *Carlisle* dispelled the distinction between passengers and crewmembers with respect to vicarious liability for shipboard doctors.

Finally, Carnival, since the decision, has made significant changes in its relationship with its passengers. Carnival recently changed both its forum selection clause and its limitation of liability clause.<sup>217</sup> These changes affect a passenger's ability to pursue a claim against Carnival.

The *Carlisle* case highlights the inconsistencies with the current state of the law. The perpetuation of the long-standing precedent of maritime law challenges our notions of fairness and logic. This is why although not following the decisions, other courts have praised courts such as *Nietes* and *Carlisle* for their outcomes. The sections below discuss the current problems and inconsistencies with the ancient rule concerning a ship's liability for its shipboard doctor as it is applied to modern society.

### A. Passenger Remedies Under Maritime Law

By providing a ship's doctor, the shipowner satisfies its duty of reasonable care to its passengers if the shipowner chooses "a doctor who is competent and duly qualified."<sup>218</sup> Thus, if the shipowner provides a physician, a passenger cannot sue it directly for the actions of the doctor, but only for failure to hire a competent one. However, the passenger can sue the ship's doctor directly for malpractice. This section analyzes the passenger's remedies under maritime law.

#### 1. NEGLIGENCE HIRING

*Carlisle* is significant because, along with *Nietes*, it argued for another direct remedy against the cruise lines besides negligent hiring. This is important because proving that a cruise line is liable for negligent

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216. The first time a recovery was permitted was in the *Nietes* case. See *supra* Part III.B.

217. See *supra* Part V.C.

218. *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1371 (5th Cir. 1988).

hiring is very difficult.<sup>219</sup> Current law permits a cruise line to transfer its duty to its passengers by relying on a hiring agency to determine whether doctors are qualified to work on its ships.<sup>220</sup> Herschaft argued that it is logically inconsistent for courts to disclaim a carrier's ability to supervise the doctor's actions, but deem that the carrier has enough knowledge to discern what constitutes a competent doctor.<sup>221</sup> As Herschaft also noted, the "majority of cruise ships fly foreign flags and, as such, 'are exempt from accident reporting requirements, and . . . are not obligated to reveal records of malpractice claims.'"<sup>222</sup> Given these circumstances, a passenger can neither discover whether any allegations of negligence have been levied against a practitioner, nor whether reports of negligent hiring against the cruise line have been documented.<sup>223</sup> A cruise ship passenger cannot make a *prima facie* case for negligent hiring without evidence that the employer breached its duty by hiring an unqualified doctor. Due to a lack of reporting requirements, plaintiffs face a seemingly insurmountable burden when collecting the necessary facts to support their cases; thus, their cases may end by either a motion to dismiss or a motion for summary judgment.

Other commentators, Robert Peltz and Vincent Warger, argued that cruise ships are subject to "[a] number of governmental standards [that] . . . apply to cruise ships and their medical staffs."<sup>224</sup> They asserted that all ships sailing to U.S. ports are subject to regulation by both the United States Coast Guard and Public Health Services.<sup>225</sup> One of these regulations, the Vessel Sanitation Program, has "strict requirements for medi-

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219. See *Fairley v. Royal Cruise Line*, 1993 A.M.C. 1663 (S.D. Fla. 1993) (granting cruise line's motion to dismiss claim for negligent hiring); *Nanz v. Costa Cruises, Inc.*, 1991 A.M.C. 48, 50 (S.D. Fla. 1991) (granting cruise line's motion for summary judgment as to negligent hiring claim); *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374 (S.D. Fla. 2004) (granting cruise line's motion to dismiss claim for negligent hiring); *Jackson v. Carnival Cruise Lines*, 203 F. Supp. 2d 1367, 1372 (S.D. Fla. 2002) (granting cruise line's motion to dismiss claim for negligent hiring); *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 8 n.5 (Fla. Dist. Ct. App. 2003) (affirming the trial court's granting of cruise line's motion for summary judgment); *Barbetta*, 848 F.2d at 1374 (affirming summary judgment in favor of cruise line as to negligent hiring claim); *Doe v. Celebrity Cruise Lines*, 145 F. Supp. 2d 1337, 1345 (S.D. Fla. 2001) (granting cruise line's motion to dismiss as to plaintiff's negligent hiring claim). But see *Warren v. Ajax Navigation Corp. of Monrovia*, 1995 A.M.C. 2609, 2614 (S.D. Fla. 1995) (denying cruise line's motion for summary judgment on negligent hiring issue).

220. *Cent. Gulf S.S. Corp. v. Sambula*, 405 F.2d 291, 299 (5th Cir. 1968).

221. Herschaft, *supra* note 2, at 583.

222. *Id.* at 585 (citing Marilyn Adams, *Safety Standards Get an Overhaul*, MIAMI HERALD, Aug. 10, 1982, at BM21; Brief for Plaintiff-Appellant at 30, *Cummiskey v. Chandris, S.A.*, 791 F. Supp. 1183 (S.D.N.Y. 1989)).

223. *Id.*

224. Robert D. Peltz & Vincent J. Warger, *Medicine on the Sea*, 27 TUL. MAR. L.J. 425, 455 (2003).

225. *Id.* at 427-28.

cal records keeping, quarantine and death and illness reports.”<sup>226</sup>

Assuming that ships are subjected to reporting requirements, plaintiffs still face the burden of meticulously investigating the hiring criteria and procedures that the cruise line, or the companies to which they delegate this duty, use to select doctors.<sup>227</sup> This burden is difficult because even if a doctor makes a misdiagnosis after beginning work for the cruise line, that information does not create an issue of fact as to the cruise line’s negligence in hiring the doctor.<sup>228</sup> The court in *Laubheim* established a cruise line’s burden as follows: “In performing such duty, it is bound only to the exercise of reasonable care and diligence, and is not compelled to select and employ the highest skill and longest experience.”<sup>229</sup>

## 2. SUITS AGAINST THE SHIPBOARD DOCTOR

The *Carlisle* court’s outcome avoided the inherent problems that arise when plaintiffs seek redress directly from shipboard doctors. The citizenship of the shipboard doctors and the characteristics of their field create interesting obstacles for plaintiffs who wish to sue them personally. As many ships’ doctors are foreign nationals<sup>230</sup> and are always at sea, it is difficult to execute service of process against them, and even more difficult to find personal jurisdiction. Adding to the difficulty of obtaining service of process is the fact that cruise ships employ doctors for short durations and often rotate them among ships and itineraries.<sup>231</sup> In addition, doctors have far fewer resources than the cruise lines.<sup>232</sup>

In *Pota v. Holtz*, the cruise line’s defense counsel tried to circumvent this remedy. Counsel for Royal Caribbean attempted to accept service of process on the vessel and then claim that Liberian law (the law of the flag of the vessel) applied.<sup>233</sup> The court rejected this argument and found that a vessel moored at the port in the City of Miami is within the

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226. *Id.* at 455.

227. Herschaft, *supra* note 2, at 584.

228. Peltz & Warger, *supra* note 224, at 454.

229. *Laubheim v. Netherland S.S. Co.*, 13 N.E. 781, 782 (N.Y. 1887).

230. See *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1372 (5th Cir. 1988) (ship’s doctor was from the Philippines); *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 2 (Fla. Dist. Ct. App. 2003) (ship’s doctor was from Greece); see also Peltz & Warger, *supra* note 224, at 427 (stating “few American doctors want to spend months at sea each year”).

231. See Peltz & Warger, *supra* note 224, at 451 (stating most cruise lines hire doctors for a two-to-four month commitment).

232. According to the International Council of Cruise Lines, the average shipboard doctor’s salary is \$50,000 a year. This is less than half of what the average land-based general practitioner earns. See generally John Pain, *Some Question Medical Care on Cruise Ships*, MIAMI HERALD, Jan. 25, 2004, at B3.

233. *Pota v. Holtz*, 852 So. 2d 379, 381 (Fla. Dist. Ct. App. 2003)

State of Florida, not Liberia.<sup>234</sup>

The *Carlisle* case claimed the passenger is “effectively faced with having to engage in a game of personal jurisdiction and service of process roulette” when suing a ship’s doctor.<sup>235</sup> This game of roulette often leads to the difficult question of whether the doctor rendered the medical services in Florida waters or on the high sea.<sup>236</sup> The Carlisles sought this form of redress, and two years after having filed the case against Carnival they were still unable to serve process on Dr. Neri.<sup>237</sup>

### B. *Crewmembers’ Rights vs. Passengers’ Rights*

The result in *Carlisle* closed the gap between cruise passengers’ rights and crewmembers’ rights. The United States Supreme Court in *De Zon v. American President Lines*<sup>238</sup> established the gap when it determined that a shipowner is liable for any negligence of the ship’s doctor in rendering medical services to a crewmember.<sup>239</sup> The Court disagreed with the Ninth Circuit, which had determined that a shipowner’s duty to its crew ended when it exercised reasonable care in securing a shipboard doctor.<sup>240</sup> Ironically, the Court stated that “[i]mmunity cannot be rested upon the ground that the medical service was the seaman’s and the doctor’s business and the treatment not in pursuance of the doctor’s duty to the ship or the ship’s duty to the seaman.”<sup>241</sup> Furthermore, the Court affirmatively stated that the “doctor in treating the seaman was engaged in the shipowner’s business,” and “was performing the service because the ship employed him to do so, not because the [seaman] did.”<sup>242</sup> The Court’s statement contradicts the rationale articulated in *O’Brien*. In fact, these propositions are the principles that serve as the foundation of the *Barbetta* rule. Thus, current maritime law presents a dichotomy where crewmembers have greater rights than passengers.

The *De Zon* case is interesting given the breadth of case law with opposite holdings for passengers. The Court addressed this issue in footnote two of the case, declaring that courts have denied liability to

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234. *Id.* at 382.

235. *Carlisle*, 864 So. 2d at 8 n.4.

236. *See* *Rana v. Flynn*, 823 So. 2d 302 (Fla. Dist. Ct. App. 2002) (finding personal jurisdiction present where treatment was in Florida waters and there were multiple contacts with the state); *cf.* *Elmund v. Mottershead*, 750 So. 2d 736 (Fla. Dist. Ct. App. 2000) (finding no personal jurisdiction over non-resident ship’s doctor with insufficient Florida contacts).

237. *Carlisle*, 864 So. 2d at 8 n.4.

238. *De Zon v. Am. President Lines*, 318 U.S. 660, 665 (1943).

239. *Id.*

240. *Id.* at 664.

241. *Id.* at 666.

242. *Id.* at 668.



passengers on those grounds.<sup>243</sup> The Court cited the holdings of *Laubheim* and *O'Brien*, stating that those decisions had influence on the federal courts.<sup>244</sup> It also cited *The Great Northern*, *The Korea Maru, Branch v. Compagnie Generale Transatlantique*, and *The Napolitan Prince* for the proposition that a steamship is not liable for the negligence of its physician under statute or common law.<sup>245</sup> It made no comment as to the merits of that rationale as the passenger issue was not before the Court. Admittedly, the Jones Act<sup>246</sup> and the historic doctrine of maintenance and cure<sup>247</sup> provide crewmembers special protection. Although this may explain why crewmembers have different rights than passengers, those doctrines do not explain the logical contradiction presented in *De Zon*.

### C. Hedging Liability

The *Carlisle* case may have prompted Carnival to alter the language in its forum selection clause in an attempt to avoid liability arising from state trial courts that feel constrained to follow *Carlisle's* precedent, and to escape liability predicated on the doctrine of apparent agency.

Typically, cruise lines include forum selection clauses in their passenger tickets, which at one time required plaintiffs to sue in *any* of the courts in the State of Florida.<sup>248</sup> Three of the largest cruise lines are

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243. *Id.* at 666 n.2.

244. *Id.*

245. *Id.*

246. The Jones Act of 1920, 46 U.S.C. § 688 (1982) (providing crewmembers the right to maintain an action at law, with a trial by jury, for injuries while in the course of their employee). In *Central Gulf Steamship Corp. v. Sambula*, a crewmember sued the shipowner under the Jones Act for negligence in rendering maintenance and cure for the negligence of the doctor, which rendered the cure. *Cent. Gulf S.S. Corp. v. Sambula*, 405 F.2d 291, 302 (5th Cir. 1968). The court stated, "[a]lthough Dr. Lee was an independent practitioner, his engagement by Central Gulf in the discharge of its medical care duties to Sambula made him the agent of Central Gulf; and thus his deficient medical treatment, therapy, and prescription are attributable to Central Gulf on agency principles." *Id.*

247. In *The Osceola*, the Supreme Court articulated that a ship owed a crewmember a duty of maintenance and cure. *The Osceola*, 189 U.S. 158 (1902).

When the seaman becomes committed to the service of the ship the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter.

*De Zon*, 318 U.S. at 667. The duty to provide medical care does not require the shipowner to provide a doctor; however, a shipowner must divert its course, hail a passing ship or take any other appropriate measures to ensure the crewmember is provided with care. *Id.* at 667-68.

248. The following is an excerpt from a Carnival Cruise Line ticket:

It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising, under, in connection with or incident to this Contract

headquartered in Miami-Dade County.<sup>249</sup> Consequently, the circuit courts of Miami were often the venue for suits against cruise lines. However, at some point following the *Carlisle* decision, Carnival changed the wording of its forum selection clause. This clause now states:

It is agreed by and between the Guest and Carnival that all disputes and matters whatsoever arising under, in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state or country.<sup>250</sup>

Under the wording of the new clause, one can only sue in state court in Miami-Dade County when the federal district courts do not have jurisdiction to hear the case. A federal district court does not have original jurisdiction where there is a lack of diversity of citizenship.<sup>251</sup> For example, the federal district court does not have diversity jurisdiction over a case where the injured plaintiff resides in Florida, because the three major cruise lines are also citizens of Florida for jurisdictional purposes.<sup>252</sup> A federal district court also fails to have original jurisdiction when a plaintiff's cause of action did not arise "under the Constitution, laws, or treaties of the United States."<sup>253</sup> In a medical malpractice case

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shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

*Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991); *Cf. Pota v. Holtz*, 852 So. 2d 379, 380 n.1 (Fla. Dist. Ct. App. 2003) (explaining that Royal Caribbean Cruise Line's ticket contained a forum selection clause designating Miami-Dade County).

249. The following is a list of the three major cruise lines:

1. Carnival Cruise Line's corporate office is located at the following address:  
3655 NW 87th Avenue  
Miami, Florida 33178;
2. Royal Caribbean International's corporate office is located at the following address:  
1050 Caribbean Way  
Miami, Florida 33132;
3. Norwegian Cruise Line's corporate office is located at the following address:  
7665 Corporate Center Drive.  
Miami, Florida 33126

Cruise line profiles, *available at* <http://www.cruising.org> (last visited Jan. 31, 2005).

250. See Important Notices to Guests; Important Terms and Conditions of Contract, *available at* [http://www.carnival.com/CMS/Static\\_Templates/ticket\\_contract.aspx](http://www.carnival.com/CMS/Static_Templates/ticket_contract.aspx) (last visited Jan. 31, 2005) [hereinafter "Important Notices to Guests"].

251. 28 U.S.C. § 1332 (2000).

252. See Important Notices to Guests, *supra* note 250.

253. 28 U.S.C. § 1331 (2000).

against a cruise line, it is doubtful that a passenger would satisfy the requirements of federal question jurisdiction.<sup>254</sup> Alternatively, plaintiffs can bring their cases in federal court, without alleging diversity jurisdiction, under the district court's original jurisdiction for admiralty, maritime and prize cases.<sup>255</sup> However, they would most likely be reluctant to do so, because plaintiffs pursuing claims in admiralty under Rule 9(h) in federal court do not have a right to a trial by jury.<sup>256</sup> To avoid depriving plaintiffs of their right to a jury trial, which in most cases would violate the Seventh Amendment,<sup>257</sup> Carnival drafted its new forum selection clause to allow non-diverse plaintiffs, who do not satisfy federal question jurisdiction, to sue in a Florida state court, where they would receive a trial by jury.<sup>258</sup>

Carnival also made another change to its passenger contract. Sometime after the *Cariisles* went on their cruise, Carnival altered the portion of its "Cruise Ticket Contract Terms" that limits its liability for the negligence of independent contractors. The changes are apparent in the following disclaimer:

13. (a) Guest acknowledges . . . the ship's physician, nurse . . . are either operated by or are independent contractors. Carnival neither supervises nor controls their actions, nor makes any representation either express or implied as to their suitability. Carnival, in arranging for the services called for by the physician or nurse . . . does so only as a convenience for the Guest and Guests are free to use or not use these services. Guest agrees that Carnival assumes no responsibility, does not guarantee performance and in no event shall be liable for any negligent or intentional acts or omissions, loss, damage, [or] injury . . . to Guest . . . in connection with said services. Guests use the services of all independent contractors at the Guest's sole risk. Independent contractors are entitled to make a proper charge for any service performed with respect to a Guest.

(b) Guest further acknowledges that although independent contractors or their employees may use signage or clothing which contain the

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254. However, crewmembers suing for medical malpractice of the shipboard doctor could satisfy the requirements of federal question jurisdiction by suing under the Jones Act. *See Gonzalez v. M/V Destiny Panama*, 203 F.R.D. 673, 675 (S.D. Fla. 2001) (citing *Sanders v. Seal Fleet, Inc.*, 998 F. Supp. 729, 734 (E.D. Tex. 1998)); *see also* The Jones Act of 1902, 46 U.S.C. app. § 688 (2000).

255. *See* 28 U.S.C. § 1333 (2000); FED. R. CIV. P. 9(h).

256. *See Gonzalez*, 203 F.R.D. at 675 (finding that if a plaintiff sues in federal court and alleges admiralty jurisdiction under Rule 9(h) there will ordinarily not be a jury trial); *see also* *Neenan v. Carnival Corp.*, No. 99-2658-CIV-LENARD, 2001 WL 91542, at \*1 (S.D. Fla. 2001) (holding that because a plaintiff brought the claim in admiralty under Rule 9(h), Federal Rule of Civil Procedure 38(e) removed the right to trial by jury).

257. U.S. CONST. amend. VII.

258. *See generally* *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 440 (2001) (finding trial by jury is an obvious example of the remedies saved to suitors under 28 U.S.C. § 1333).

name "Carnival" or other related trade names or logos, the independent contractor status remains unchanged. Independent contractors, their employees and assistants are not agents, servants or employees of Carnival and have no authority to act on behalf of Carnival.<sup>259</sup>

The changes seem to address legal issues and plant defenses to prevent potential suits from plaintiffs under the doctrine of apparent agency.

## V. THE COMMENT

While the *Carlisle* case has many strengths, such as addressing new elements of control and noting significant policy arguments, the case suffers from a fatal flaw. The Florida Third District Court of Appeal is a state court. As such, once it determined that admiralty jurisdiction existed, it was bound to apply, and not alter, the well-settled general maritime law. The court was not free to survey available precedent and render a decision it saw fit; it was to abide by the rule enunciated in *Barbetta*.

This section comments on the courts holding. Part A addresses issues of federal pre-emption of state courts to alter maritime law. Part B discusses how the court's holding was pre-empted by federal maritime law. Part C discusses the holding in relation to state law. Part D proposes an alternate holding for the court, and analyzes that rationale. Lastly, Part E discusses two ways the rationale espoused in *Carlisle* could become part of the general maritime law.

### A. Maritime Law is Federal Common Law

Once a court has determined that admiralty jurisdiction exists, the court is bound to apply general maritime law.<sup>260</sup> General maritime law is federal common law.<sup>261</sup> Congress has the power to create maritime law, which prevails throughout the country.<sup>262</sup> When no congressional legislation addresses a maritime issue, "the general maritime law, as accepted by the *federal courts*, constitutes part of [the] national law, applicable to matters within the admiralty and maritime jurisdiction."<sup>263</sup> Therefore, Congress and the federal courts are the two bodies that are

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259. See Important Notices to Guests, *supra* note 250.

260. See *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 854 (1986); *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970); *Branch v. Schumann*, 445 F.2d 175 (5th Cir. 1971).

261. See *Chelentis v. Luckenbach*, 247 U.S. 372, 381 (1918); accord Robert D. Peltz, *The Myth of Uniformity in Maritime Law*, 21 TUL. MAR. L. J. 103, 103 (1996) ("The first lesson that every law student studying Admiralty I learns is that, although most maritime suits may be filed in state court, they are nevertheless governed by federal substantive maritime law to maintain the uniformity which is necessary for a national maritime law.").

262. See *Chelentis*, 274 U.S. at 381.

263. *Id.* (emphasis added).

permitted to create or alter maritime law. Where there is a lack of statutory or judicially created maritime principles regarding a specific legal issue, courts may apply state law insofar as such application does not frustrate the national interest in preserving uniformity in maritime law.<sup>264</sup>

The Supreme Court in *Southern Pacific Co. v. Jensen*<sup>265</sup> set forth the following standard to define which state laws conflict with maritime law: if the state law "works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."<sup>266</sup> When and only when there is lack of maritime law controlling an issue, a court may reach out to those principles of law it deems both persuasive and appropriate.<sup>267</sup> Even though a state court may adopt portions of state law while exercising admiralty jurisdiction, it may not make changes to substantive maritime law.<sup>268</sup> Whether parties litigate a case in federal or state court, if jurisdiction exists, the court must apply maritime law and any conflicting state law is pre-empted. *Carlisle* was heard in the Florida Third District Court of Appeal, and as a state court, it was bound to follow the general maritime law since the federal courts had previously established well-entrenched law on the issue. Therefore, because *Barbetta* and its progeny had previously precluded recovery under the theory of *repondeat superior*, the *Carlisle* court could not hold the cruise line liable under this theory. The Second Circuit Court of Appeals, in *Cummiskey v. Chandris, S.A.*, correctly refused to disturb the well-established maritime principle "that the negligence of a shipboard doctor in treating passengers is not to be imputed to the ship's owner or operator."<sup>269</sup> Unlike the court in *Cummiskey*, the *Carlisle* court usurped authority and refused to apply well-established maritime law.<sup>270</sup>

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264. See *Coastal Fuels Mktg, Inc. v. Fla. Express Shipping Co.*, 207 F.3d 1247, 1251 (11th Cir. 2000).

265. *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

266. *Id.* at 216.

267. See *Hilton Oil Transport v. Oil Transport Co.*, 659 So. 2d 1141, 1151 (Fla. Dist. Ct. App. 1995); accord *Peltz*, *supra* note 261, at 110.

268. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221-22 (1986) (citing *Madruga v. Superior Court*, 346 U.S. 556, 560-61 n.12 (1954)); see also *Norwegian Cruise Lines, Ltd. v. Zareno*, 712 So. 2d 791, 793 (Fla. Dist. Ct. App. 1998) ("Thus state courts may entertain maritime causes of action and may apply state law to supplement federal maritime law if the state law does not conflict with federal law or interfere with uniformity.").

269. *Cummiskey v. Chandris, S.A.*, 895 F.2d 107, 108 (2d Cir. 1990).

270. The *Carlisle* court did not address the issue of federal pre-emption of maritime law in its opinion. *Carnival* first brought this issue to the court's attention in its motion for rehearing. See Respondent's Answer Brief at 6, *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003) (SC04-393).

### B. *The Court Overstepped its Boundaries*

The *Carlisle* court declared that the shipboard doctor was an agent of the cruise line, and that the cruise line was vicariously liable for the torts of the ship's doctor. As a threshold matter, since the *Barbetta* line of cases precluded such recovery and the *Barbetta* rule was well-entrenched maritime precedent, the *Carlisle* court was pre-empted from holding the cruise line vicariously liable under the theory of *respondeat superior*.<sup>271</sup> While the court's decision imposing vicarious liability on the cruise line may be just and correct given the commercial realities of the cruise industry, a state appellate court cannot formulate such an alteration to the general maritime law.<sup>272</sup> Moreover, a state appellate court may not provide a remedy that "interfere[s] with the proper harmony and uniformity of [maritime law]."<sup>273</sup> In the absence of a statute, the judiciary develops maritime law, but it is the federal courts that shape the general maritime law.<sup>274</sup> The United States Supreme Court has stressed the need for uniformity within the general maritime law.<sup>275</sup> The argument for changing the *Barbetta* rule is persuasive, but either Congress or the federal judiciary must execute this reform. *Carlisle* disrupted uniformity and interfered with the proper harmony of maritime law.

Setting aside the pre-emption issue, the *Carlisle* court issued a well-reasoned opinion regarding vicarious liability under the theory of *respondeat superior*. Since the Florida Third District Court of Appeal's decision, *Carlisle* has received attention from a federal trial court in the Southern District of Florida. In *Huntley v. Carnival Corp.*,<sup>276</sup> the court cited *Carlisle* in a suit against a cruise line for medical malpractice based on actual or apparent agency.<sup>277</sup> Judge King cited *Carlisle*, stating, "[i]n a thorough and well-reasoned opinion, the *Carlisle* Court rejected *Barbetta's* finding that a passenger at sea has any meaningful control over his or her relationship with the ship's doctor . . . ." <sup>278</sup> The court in *Huntley* took the same approach as the court did in *Fairley*, holding, "based on the record before the Court and the persuasiveness of the above-cited case law, this Court is unable to conclude that [the] Plaintiff will be unable to establish any set of facts entitling her to

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271. See *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1372 (5th Cir. 1988).

272. See *Zareno*, 712 So. 2d at 793.

273. *Latman v. Costa Cruise Lines*, 758 So. 2d 699, 701 (Fla. Dist. Ct. App. 2000) (citing *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994)).

274. See *The Lottawanna*, 88 U.S. 558, 572-78 (1847).

275. *Id.* at 575.

276. *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1373 (S.D. Fla. 2004).

277. *Id.* at 1373-75.

278. *Id.* at 1374 (citing *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 5 (Fla. Dist. Ct. App. 2003)).

relief.”<sup>279</sup> Thus, the court praised *Carlisle* for its reasoning, but took the safe approach to avoid the federal pre-emption issue, as in *Fairley*.

### C. *The Court's Holding is Consistent with State Law*

Given that the *Carlisle* court correctly found that admiralty jurisdiction existed, it was bound to apply substantive maritime law, which is federal common law. However, if admiralty jurisdiction had not existed and the court was to decide the case under Florida substantive law, its decision would stand consistent with such law.

The holding in *Carlisle* is consistent with the Florida Supreme Court's jurisprudence regarding shore side medical malpractice. In *Villazon v. Prudential Health Care Plan, Inc.*,<sup>280</sup> the Florida Supreme Court was confronted with the issue of whether a patient's treating physicians were the HMO's agents, thereby subjecting the HMO to vicarious liability under the theory of *respondeat superior*.<sup>281</sup> In *Villazon*, the court stated “[t]he existence of an agency relationship is normally one for the trier of fact to decide.”<sup>282</sup> Furthermore, summary judgment is inappropriate “unless the facts are so crystallized that nothing remains but questions of law.”<sup>283</sup>

When determining whether an agency relationship existed, the court should look not only to actual control.<sup>284</sup> “It is the right to control, rather than actual control that may be determinative.”<sup>285</sup> In fact, depending upon the totality of circumstances, independent contractors can become agents subject to vicarious liability under the theory of *respondeat superior*.<sup>286</sup> According to the contracts in *Villazon*, the physicians were independent contractors of the HMOs.<sup>287</sup> Nevertheless, the court contended that contractual status did not preclude a finding of agency.<sup>288</sup> The court found that the record evidence provided a “significant indicia of [the defendants'] right to control the means by which medical services were rendered by [the physicians to the patients].”<sup>289</sup> In arriving at its holding, the court considered the reality of the HMO industry and how it changed the medical profession in a way the legal

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279. *Id.* at 1375.

280. *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842 (Fla. 2003).

281. *Id.* at 850-51.

282. *Id.* at 852.

283. *Id.* at 853 (citing *Shaffran v. Holness*, 93 So. 2d 94, 97-98 (Fla. 1957)).

284. *Id.* at 853.

285. *Id.*

286. *Id.*

287. *Id.* at 845-46.

288. *Id.* at 853.

289. *Id.* at 854.

system could not ignore.<sup>290</sup> Furthermore, the court found that “the prism through which we consider and evaluate issues of control must be honed,” taking into context the reality of the industry.<sup>291</sup>

It seems the *Carlisle* court incorrectly operated under the *Villazon* rationale. It considered the reality of the cruise industry and viewed control through that lens. It closely reviewed the record and determined, as did *Villazon*, that independent contractor status did not prevent a finding of agency. The *Carlisle* court reviewed the record to find that Carnival exerted control over the doctor-patient relationship. As stated in *Villazon*, “[t]he facts peculiar to each case must govern the ultimate disposition.”<sup>292</sup> While consistent with Florida law, the court failed to apply the proper well-settled general maritime law as articulated in *Barbetta*.

#### D. Alternative Rationale: Apparent Agency

The *Carlisle* court could have reached the same end result by applying the doctrine of apparent agency instead of *respondeat superior*. As the *Fairley* court noted, *Barbetta* does not preclude a plaintiff from bringing an action under the doctrine of apparent agency.<sup>293</sup> Further, a plaintiff could recover on that theory despite the majority rule. Proof of apparent agency would allow recovery even though the shipboard doctor was an independent contractor.<sup>294</sup> Even a state court can make such a finding because there is no clear maritime rule that precludes recovery on the theory of apparent agency. Although *Warren* decided the issue, that is only the decision of one district court in Florida.<sup>295</sup> Further, *Fairley* declared that such recovery might be possible under the right set of facts.<sup>296</sup> Given the lack of attention by Congress and the absence of judicially created maritime law governing this issue, the *Carlisle* court was not pre-empted from reversing summary judgment on the ground of apparent agency.

The *Carlisle* court could have decided the case on the grounds of

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290. *Id.*

291. *Id.*

292. *Id.*

293. See *Fairley v. Royal Cruise Line*, 1993 A.M.C. 1633, 1639 (S.D. Fla. 1993); see also Walter T. Johnson & Ann Gray Miller, *New Developments in Cruise Law*, 7 U.S.F. MAR. L.J. 111, 125 (1994) (noting that *Fairley* suggested the cruise line may be liable for the doctor's malpractice on an agency-by-estoppel theory). Even before *Fairley*, one commentator suggested that courts can respect the doctrine of *stare decisis* and find the cruise lines liable for the negligence of their doctors by adopting the theories articulated in the RESTATEMENT (SECOND) OF AGENCY § 267 and the RESTATEMENT (SECOND) OF TORTS § 429. Herschaft, *supra* note 2, at 594.

294. *Fairley*, 1993 A.M.C. at 1640.

295. See Peltz, *supra* note 261, at 114 (declaring that in absence of a decision by the U.S. Supreme Court or the controlling circuit court of appeals, the federal district courts are free to go their own way).

296. *Fairley*, 1993 A.M.C. at 1640.



the apparent agency. A finding of apparent authority is essential to liability under the theory of apparent agency. "Apparent authority is distinguished from actual authority because it is the manifestation of the principal to the third person rather than to an agent that is controlling."<sup>297</sup> The elements of apparent authority are: (1) conduct by the principal, which causes the third party to believe that the principal consents to the acts done on his behalf by the person purporting to act for him, and (2) reasonable interpretation by the third party.<sup>298</sup> Once apparent authority is established, the principal is subject to liability under the doctrine of apparent agency.<sup>299</sup>

*Warren* is the only case in Florida that fully analyzed a claim against a shipowner based on apparent agency; therefore, a comparison is edifying. Carnival's actions were sufficient to create the apparent authority of Dr. Neri to act on its behalf. On each occasion that Dr. Neri treated Elizabeth, he wore a Carnival Cruise Lines name tag and what appeared to be an officer's uniform.<sup>300</sup> The Carlisles did not pay Dr. Neri directly, but used their "Sail and Sign card," and Carnival employees processed and billed the payment.<sup>301</sup> The Carlisles also knew there was going to be a doctor onboard the ship, which affected their decision to go on the cruise.<sup>302</sup> Had Carnival not provided medical facilities they would not likely have taken the cruise with Carnival.<sup>303</sup>

In *Warren*, the plaintiff asserted that the cruise line held out the ship's doctor as an agent by publishing a sales brochure that stated a certified doctor would be aboard the ship.<sup>304</sup> Further, the plaintiff in *Warren* testified that his selection of that cruise was based solely on cost and availability, not the status of the ship's doctor.<sup>305</sup> With respect to the representations made by the cruise line and reliance by the plaintiff, *Warren* is distinguishable from *Carlisle* because of the additional facts regarding manifestations that were present in *Carlisle*.

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297. *Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1111 (5th Cir. 1985).

298. *See id.*; *Warren v. Ajax Navigation Corp.*, 1995 A.M.C. 2609, 2611 (S.D. Fla. 1995); RESTATEMENT (SECOND) OF AGENCY § 27 (1958).

299. *See also Warren*, 1995 A.M.C. at 2611; *Fairley*, 1993 A.M.C. at 1640 n.6:

One who represents that another is his agent or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agency is subject to liability to the third party for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

*Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 267 (1958)).

300. Respondent's Answer Brief at 36, *Carlisle v. Carnival Corp.*, 864 So. 2d 1 (Fla. Dist. Ct. App. 2003) (SC04-393).

301. *Id.*

302. *Id.*

303. *Id.*

304. *See Warren*, 1995 A.M.C. at 2612.

305. *Id.* at 2613.

As a result of the manifestations by Carnival, the Carlisles reasonably believed that Carnival consented to have Dr. Neri perform medical services on its behalf. The limitation of liability provision contained in the passenger ticket and cruise brochure did not automatically make the Carlisle's belief unreasonable.<sup>306</sup> Further, the Carlisles relied to their detriment because Elizabeth suffered injuries due to the negligence of the shipboard doctor. Since the cruise line made such representations and Dr. Neri appeared to be an agent, Carnival is potentially subject to liability to the Carlisles for the negligent conduct of the doctor.<sup>307</sup> In *Warren*, the plaintiff only pointed out that the cruise line issued a brochure and admitted that the ship's doctor did not factor into the plaintiff's decision to take the cruise. Therefore, the plaintiff in *Warren* failed to raise a genuine issue of material fact and his claim was disposed of at the summary stage.<sup>308</sup> Given the additional facts presented by the Carlisles, it is likely that their claim would have survived summary judgment.

Since maritime law did not control the issue of liability based on apparent agency, the *Carlisle* court could have looked to state law for guidance on the issue.<sup>309</sup> Florida courts have used the following test to determine apparent agency: (1) whether there was a representation by the principal; (2) whether a third party relied on that representation; and (3) whether the third party changed position in reliance upon the representation and suffered detriment.<sup>310</sup>

If the *Carlisle* court had decided the case based on apparent agency, in finding a genuine issue of material fact as to that claim, the court would not have materially altered general maritime law. This would have taken much of the controversy out of the decision. Opponents most likely could have argued only that Carnival's representations were insufficient to establish a question of fact to preclude summary judgment. Instead, the *Carlisle* decision, based on the theory of *respondeat superior*, is subject to the much stronger criticism that it materially changed general maritime law.

On the other hand, a finding of apparent agency would allow the

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306. The passenger contract in *Fairley* contained a similar limitation of liability provision and the court determined that it would not dispose of the plaintiff's case on a motion to dismiss. *Fairley*, 1993 A.M.C. at 1640.

307. See RESTATEMENT (SECOND) OF AGENCY § 267, cmt. a (1958) (stating "[t]he rule normally applies where the plaintiff has submitted himself to the care or protection of an apparent servant in response to an invitation from the defendant to enter into such relations with such servant").

308. *Warren*, 1995 A.M.C. at 2614.

309. See *Coastal Fuels Mktg, Inc. v. Fla. Express Shipping Co.*, 207 F.3d 1247, 1251 (11th Cir. 2000); accord *Doe v. Celebrity Cruises*, 145 F. Supp. 2d 1337, 1340-41 (S.D. Fla. 2001).

310. *Ramos v. Preferred Med. Plan, Inc.*, 842 So. 2d 1006, 1008 (Fla. Dist. Ct. App. 2003).

cruise lines to discontinue their outward representations, preventing future claims of apparent agency. The doctrine of apparent agency is based on the outward manifestations by the principal, reasonable reliance by the third party, and a loss caused by that reliance. The claim fails if any one of these elements is missing. A cruise line seeking to avoid liability under this theory could take actions to eliminate those elements. For example, if the facts of the case were more analogous to *Warren*, or Dr. Neri wore civilian clothes, did not wear a Carnival name tag, and received payment directly from the Carlises, the case would most likely be disposed of by a motion for summary judgment. However, it is unlikely that Carnival would allow a staff member to not wear a uniform. Additionally, Carnival could attack the reasonable reliance element, as it seems to have attempted to do in its newest disclaimer.<sup>311</sup>

In the newest version of its limitation of liability notice to guests, Carnival provides much more detail explaining how it is not liable for the actions of the shipboard doctor.<sup>312</sup> Carnival explains that it does not control the doctor's actions and that the doctor is placed on the ship for the convenience of the guests.<sup>313</sup> Despite the fact that the doctors wear Carnival uniforms, nametags, and use Carnival logos or signage, they are still independent contractors.<sup>314</sup> Thus, a cruise line could possibly circumvent a decision in the future based on apparent agency.

### E. Two Prospects of Re-establishing Uniformity

Admittedly, the *Carlisle* court's arms were tied, save for possible recovery under the doctrine of apparent agency. To solve this legal conundrum, either Congress or the Supreme Court must address the issue of whether a shipowner is liable for the medical malpractice of the shipboard doctor. Currently, neither body has addressed the issue. Given the persuasive arguments in favor of change and the need for uniformity in the field of maritime law, a decision from either body is long overdue.

#### 1. LEGISLATIVE ATTENTION

As stated in *Southern Pacific Co. v. Jensen*, "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."<sup>315</sup> The ability of Congress to preserve uni-

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311. See Important Notices to Guests, *supra* note 250.

312. *Id.*

313. *Id.*

314. *Id.*

315. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215-16 (1917).

formity in maritime law is exemplified in the Jones Act of 1920.<sup>316</sup> The Jones Act regulates crewmembers' remedies against their employers uniformly. "The Jones Act was intended to achieve 'uniformity in the exercise of admiralty jurisdiction' by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death."<sup>317</sup>

In her article, Herschaft argued that the legislature could address the issue by clarifying the shipboard doctor's position as an employee of the ship.<sup>318</sup> Given the *Carlisle* court's persuasive arguments for sufficient control to allow a claim for vicarious liability under the theory of *repondeat superior*, such a legislative change would seem consistent with the current realities of the cruise industry.

Another possible solution is for the legislature to amend and clarify 46 U.S.C. app. § 183c(a).<sup>319</sup> The legislature could define the term "servants" clearly to include shipboard doctors, nurses and any medical staff. Then, if the cruise lines attempted to limit liability for the negligence of the medical staff, such limitations would be contrary to 46 U.S.C. app. § 183c(a), and thus void.

## 2. A SUPREME COURT DECISION

The Supreme Court in *Southern Pacific Co. v. Jensen* also addressed the situation where Congress has not provided a controlling statute in an area of maritime law. "[I]n the absence of some controlling statute, the general maritime law, as accepted by our *Federal courts*, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."<sup>320</sup> A decision by the United States Supreme Court could enact change while maintaining uniformity in maritime law. In fact, the Court has enacted change in maritime law in the area of maritime remedies, as illustrated by *Moragne v. State Marine Lines, Inc.*<sup>321</sup>

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316. 46 U.S.C. § 688 (1982).

317. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 401 (1970).

318. See Herschaft, *supra* note 2, at 592 (arguing that the legislature could change the language of 46 U.S.C. § 8302(c) (1985) by adding "and the physician, as a staff member, is to be regarded as an employee of the ship").

319. A commentator, when discussing the *Fairley* decision, noted that the court raised the issue of 46 U.S.C. app. § 183c(a) when criticizing the *Barbetta* rule. She stated, "[o]nly time will tell whether this decision will result in another congressional 'technical clarification.'" Karen C. Hildebrandt, *Personal Injury and Wrongful Death Remedies for Maritime Passengers*, 68 TUL. L. REV. 403, 416 (1994). Her comment astutely pointed out that a clarification of 46 U.S.C. app. § 183c(a) could remedy the tension between the statute and the *Barbetta* rule.

320. *S. Pac. Co.*, 244 U.S. at 215 (1917) (emphasis added).

321. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). In (*United States v. Reliable Transfer Co.*), the Court also reversed another long standing maritime precedent. *United States v.*

In *Moragne*, the Court analyzed the ancient rule espoused by *The Harrisburg*<sup>322</sup> in 1886, which prevented a seaman's estate from recovering for wrongful death caused by a violation of a maritime duty. The Court in *Moragne* analyzed the basis for the rule enunciated in *The Harrisburg* and found that it rested on an antiquated principle of English law that no longer applied to American maritime law. This led the Court to state that "[w]e accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties."<sup>323</sup>

While the Court overruled a long-standing maritime precedent, it maintained uniformity. "Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts."<sup>324</sup> There, the Court noted that its decision was necessary to preserve uniformity in maritime law, and to avoid state courts applying state law to maritime issues. The Court found that such uniformity is consistent with "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with and operating uniformly in, the whole country.'"<sup>325</sup>

Since the court in *Carlisle* decided "an important question of federal law that has not been, but should be settled by [the United States Supreme Court]," the parties could appeal the decision to it.<sup>326</sup> However, certiorari is discretionary, so the Court would have to decide whether to restore uniformity to maritime law or leave it in a state of flux. Given the persuasive nature of the arguments asserted in *Carlisle*, the issue is ripe for consideration by the Court, as was the rule under *The Harrisburg* in *Moragne*.

## VI. THE CONCLUSION

A problem arises when passengers are injured or become ill while at sea. A cruise passenger's situation is distinct from that of a guest at a shore side hotel, in that a passenger at sea does not have the option of which doctor to visit. The passenger has no control over the doctor-patient relationship. The cruise line does have control over who practices medicine on the ship. Cruise lines do not employ a variety of doc-

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Reliable Transfer Co., 421 U.S. 397 (1975) (finding the doctrine of divided damages no longer applied in maritime law).

322. *The Harrisburg*, 119 U.S. 199 (1886).

323. *Moragne*, 398 U.S. at 409.

324. *Id.* at 401.

325. *Id.* at 402 (citing *The Lottawanna*, 88 U.S. 558 (1874)).

326. SUP. CT. R. 10.

tors from different backgrounds and different medical schools, from which the passenger can make a meaningful choice. Rather, they provide one or two doctors from the backgrounds and medical schools of the cruise line's choice. Ultimately, the cruise line chooses the doctor for the passenger, leaving the passenger with no control over the doctor-patient relationship. The *Carlisle* court raised these important policy arguments in its opinion.

Not only do cruise lines make the choice for the passengers, they benefit from this by advertising that medical care is provided onboard. Furthermore, if a cruise line does not provide a doctor in the case of an emergency, it may have to divert the ship or take other reasonable actions in order to satisfy its duty of reasonable care to the passenger.

If a passenger is in need of immediate medical attention, options such as an air-evacuation or diversion are not only very expensive, but could be ineffective because they take a considerable amount of time which is not always available in emergency situations. Moreover, leaving the ship and flying home to seek medical care is not always an option in emergencies. *Carlisle* argued that the current state of maritime law creates a situation where a cruise ship passenger either accepts the cruise line's choice of doctor, or goes without medical care. For a passenger who is ill or injured, that is no meaningful choice.

In *Nietes*, *Fairley*, *Carlisle*, and now *Huntley*, the courts recognized these realities of the cruise industry. This realization may have been one of the driving forces that caused those courts to depart from *Barbetta*, or look for ways for passengers to recover without actually departing from the rule. Given their holdings, it is reasonable to assume that those courts saw a need for change. Importantly, they recognized salient policy arguments in favor of change.

A number of commentators have also expressed a need for change. Compagno's article characterized the *Barbetta* opinion as "slavishly followed" and "outmoded."<sup>327</sup> He also stated that the "Fifth Circuit lost an opportunity to properly analyze the special circumstances inherent in the passenger shipowner-ship's doctor relationship . . . ."<sup>328</sup> Herschaft's article also criticized the validity of *Barbetta*. She stated in her closing remarks that "[a]dmiralty courts no longer need to steer by the star of *stare decisis* in the field of cruise ship medical malpractice cases, because in the long run, both the cruise industry and its passengers will reap the benefits of prudent change."<sup>329</sup> She also characterized the

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327. Compagno, *supra* note 139, at 391.

328. *Id.*

329. Herschaft, *supra* note 2, at 594-95.

*Nietes* opinion as "well-reasoned."<sup>330</sup> The *Nietes* opinion was also highly regarded by a well-known scholar in the field of admiralty and maritime law, Martin J. Norris,<sup>331</sup> who claimed Judge Sweigert's opinion was "excellent" and advocated change in light of modern trends of tort liability.<sup>332</sup> A San Francisco attorney, who specializes in travel law, characterized the *Carlisle* decision as "inevitable."<sup>333</sup>

The argument for change is persuasive. However, the need for uniformity in maritime law is also compelling. The status of the current law in Florida leaves maritime law in flux.<sup>334</sup> Trial courts in Miami-Dade and Monroe Counties in Florida may opt to follow *Carlisle*, while other courts in Florida or courts in other jurisdictions, such as Texas or New York, will most likely apply *Barbetta*. This patchwork body of law contradicts the spirit of general maritime law and the framers' intent. It is for this reason that no other court besides *Nietes*, until *Carlisle*, departed from the rule.

Maritime law is unique because it is federal common law. Maritime law cannot be analogized to the laws of the states, because by definition each state creates and maintains its own substantive law without the requirement of, or need for, national uniformity. In contrast, general maritime law must be nationally uniform and modified only by Congress or the federal courts. As with the rule of *The Harrisburg*, which reigned from 1886 to 1970 when it was overruled in *Moragne*, courts must continue to implement the well-established law enunciated in *Barbetta* until the correct entity effectuates uniform change.

Given the arguably controlling nature of the *Carlisle* decision, in a jurisdiction that houses three of the world's major cruise lines, the case hopefully will serve as the necessary vehicle to raise interest in Congress, or provide the stakes for the parties to pursue the outcome up to the United States Supreme Court. Ideally, the Supreme Court will address the issue and enact the seemingly inevitable change articulated in *Carlisle*, while maintaining a uniform body of general maritime law. Ultimately, regardless of the eventual outcome, *Carlisle* provided hope for temporary citizens aboard floating cities.

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330. *Id.* at 594.

331. See Pace, *supra* note 129.

332. NORRIS, *supra* note 130, at 72.

333. Catherine Wilson, *Cruise Line Faces Revived Lawsuit: An Appeals Court Reinstated a Medical Malpractice Case Against Carnival*, ORLANDO SENTINEL, Aug. 28, 2003, at B2.

334. This is not to argue that the need for change should bow to uniformity, because change can be implemented and uniformity maintained if the appropriate entity effectuates it.