

Cruise ship's doctors – company employees or independent contractors?

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ABSTRACT

Traditionally, cruise companies have stated that they are in the transport business but not in the business of providing medical services to passengers. They have claimed not to be able to supervise or control the ship's medical personnel and cruise ship's doctors have therefore mostly been signed on as independent contractors, not employees. A United States court decision from 1988, Barbetta versus S/S Bermuda Star, supported this view and ruled that a ship's owner cannot be held vicariously liable for the negligence of the ship's doctor directed at the ship's passengers.

Some years ago a cruise passenger fell and hit his head while boarding a trolley ashore. Hours later he was seen aboard by the ship's doctor, who sent him to a local hospital. He died 1 week later, and his daughter filed a complaint alleging the cruise company was vicariously liable for the purported negligence of the ship's doctor and nurse, under actual or apparent agency theories. A United States district court initially dismissed the case, but in November 2014 the United States Court of Appeals for the Eleventh Circuit disagreed and reversed. From then on independently contracted ship's doctors may be considered de facto employees of the cruise line.

The author discusses the employment status of physicians working on cruise ships and reviews arguments for and against the Appellate Court's decision.

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Key words: ship's doctor, ship owner, head injury, medical malpractice, Florida jurisdiction, Barbetta, Franza, maritime medicine

INTRODUCTION

This article discusses the relevance of cruise ship's doctors being considered by American (US) courts as independent contractors (IC) or company employees in case of malpractice claims from passengers. The American Merchant Marine ("Jones") Act affords broad protections for seamen because they are regularly exposed to the "perils of the sea", and the ship owner can be held vicariously liable for any medical negligence directed at crew [1]. In 1988 a US court ruled that a ship owner cannot be held vicariously liable for the negligence of an IC ship's doctor directed at the ship's passengers [2]. But since then there has been amazing changes in cruise medicine and in ship-to-shore communication, and in 2014 a US Appellate Court overturned that rule, now regarding the ship's doctor as an employee rather than an IC [3].

Even though hardly any ocean-going cruise vessels are registered in the USA and few ship's doctors hold US medical licenses, this new rule is important because the majority of cruise passengers are American, most large cruise companies have their headquarters in USA [4], and their passenger cruise ticket contracts state that any claims against the companies shall be litigated in a specified US court. Therefore the 2014 Appellate Court decision may have profound consequences for the outcome of practicing cruise medicine in the future.

CRUISE MEDICINE

Since the cruise industry is booming [4] and all ships in international trade with more than 99 persons aboard must carry a doctor [5], there is a steadily increasing demand

for highly qualified ship's doctors. Cruise medicine covers most areas of medicine; whatever occurs on land can — and eventually will — happen at sea. Hence, the ship's doctor must be prepared to handle all medical conditions, often while facing additional challenges, such as minimal staff, limited diagnostic and therapeutic resources, language and cultural barriers, extreme weather conditions, and remote locations without access to assistance from ashore. These factors also increase the risk of undesirable outcomes in comparison with land-based practice.

THE BARBETTA CASE

Cruise companies have regularly stated that they are in the transport business but not in the business of providing medical services to passengers. Their ship's doctors have in most cases been signed on as ICs, not employees, and the companies do not have the expertise requisite to supervise or control the ship's medical personnel.

A US court decision from 1988, *Barbetta versus S/S Bermuda Star*, supported this view. It stated that a “ship is not a floating hospital” and ruled that a ship's owner cannot be held vicariously liable for the negligence of the ship's doctor directed at the ship's passengers [2]. The Florida Supreme Court upheld that same rule in 2007 [6].

Hence, the only way to state a claim against a cruise company is to claim negligent hiring and retention of an unqualified physician or go after the physician directly for his or her actions aboard the vessel [7]. It is not always clear *where* the ship's doctor can be sued [8], but few issues in health care spark as much ire and angst as medical-malpractice litigation [9]. So it is hardly surprising that many physicians have been scared away from working as ICs on cruise vessels out of “malpractice fear” [8]. As company employees they would have less reason to fear personal lawsuits.

WHAT CAN OVERTURN THE BARBETTA RULE?

Attempts to get the Barbetta rule rejected have focused on whether cruising companies can acquire — and provide — the necessary medical expertise to influence, guide and control the medical staff aboard and whether the IC doctors really are (“actual agency”) or appear to be employees (“apparent agency”). In this context actual authority means that the medical staff members are actual employees of the cruise line, that there is a *de facto*/real employment situation regardless of the contractual status. Apparent authority means that the medical staff members behaved and/or were presented by the company in ways that convincingly could lead the passengers to believe that they were employed company representatives [3].

THE SHIP'S DOCTOR: INDEPENDENT CONTRACTOR OR EMPLOYEE?

Many emergency physicians in USA work as ICs (also termed consultants, freelancers, the self-employed, and even entrepreneurs) primarily because ICs have substantial tax benefits and business write-off opportunities not offered to employees. The determination of whether a worker is an employee or an IC hinges on the degree of control that an employer has over the worker. Under common US law, tax authorities (Internal Revenue Service [IRS]) uses a *facts-and-circumstances* test to determine the degree of will and control an employer has over a worker, not only as to what shall be done but how it shall be done [10]. Employers typically provide benefits like personal time off, paid vacation, health insurance, and retirement plans; ICs receive none of these benefits and are responsible for submitting their own income taxes [11].

The general rule is that an employer is legally responsible for the negligence of his or her employees, but not for the negligence of an IC [1]. Vicarious liability (“*respondeat superior*”) is based upon a master-servant relationship [12]. As with most broad legal principles, there are many exceptions. A major source of confusion is that some of the relevant factors of the IRS IC “20-point test” may support employee status, while some may indicate IC [10].

THE STAKEHOLDERS' PREFERENCES

With no interest in medicine and no wish to get any closer to this complex and libellous subject than necessary, most ship owners have preferred to keep the physicians as ICs. The IC status not only eliminates the owner's legal liability for the doctor's actions, but also reduces the owner's bureaucratic and financial obligations toward the physician.

On some ships the nurses are employees while the physicians are ICs; an intriguing legal challenge if both professions are pursued in the same malpractice claim, but outside the scope of this article.

However, most ship's medical staff would prefer to be employees and some ICs even claim discrimination, finding it unjust that a position that must be covered for the ship to leave port [5] doesn't have the basic employee privileges and labour rights. When they point out unfair working conditions to onboard management, a common response has been, “You're not an employee”.

Tax benefits, the most attractive IC advantage for US doctors ashore, are irrelevant for the majority of ship's doctors [10]. They count as seafarers on vessels of foreign registry and are as such legally exempt from income tax in most countries, except Norway [13].

The IC doctors are usually hired for one contract at the time and lack many of the benefits that employees enjoy

(paid vacations and health cover between ship contracts, paid overtime, pension plans, full liability insurance coverage, employee discount on company shares, company-paid or -arranged medical training, accountable medical support from headquarters, etc.) [author's personal file]. And, not least, instead of the doctor running the risk of being personally sued, the ship owner would be "vicariously liable" for medical malpractice claims were he or she an employee.

THE FRANZA CASE

However, a ruling published by the Eleventh Circuit Court of Appeal on 10 November 2014 in Florida may from then on consider ship's doctors employees and thus contribute to reduce their malpractice fear: Overturning the *Barbetta* rule, the court stated that cruise lines might now be held liable for medical malpractice committed on board [3]. The case, according to the court opinion, was as follows:

"An elderly male cruise ship passenger fell and hit his head while boarding a trolley ashore when the ship was docked in the port of Bermuda. He was wheeled back onto the ship, where he sought treatment from the onboard medical staff in the ship's medical centre. There a nurse failed to assess the extent of his head injury and sent him to his cabin, according to the court opinion. When his condition deteriorated not long afterward, the onboard medical staff refused to examine him without first getting his credit card information. According to the plaintiff, the passenger finally saw the ship's physician 4 hours after the accident. At this time the doctor sent him to a hospital in Bermuda. He was airlifted the next day to a hospital in New York, where he died 1 week later" [3].

The passenger's daughter filed a complaint alleging the cruise company was vicariously liable for the purported negligence of the ship's doctor and nurse, under actual or apparent agency theories. In this case, named *Franza* after the passenger's daughter, she specifically asserted that both medical professionals were "employed by" the cruise line, were "its employees or agents," and were "at all times material acting within the scope and course of [their] employment" [3].

The district court applied the actual agency rule set forth in *Barbetta* versus *S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988) as a basis to dismiss the actual agency claim [2, 3]. The court also dismissed the apparent agency claim as inadequately pled [3].

THE FRANZA APPEAL

But on 10 November 2014 the US Court of Appeals for the Eleventh Circuit disagreed and reversed [3]. The logic behind *Barbetta* has been that a ship owner cannot be vicariously liable for the acts or omissions of a worker if the owner does not have the skill or expertise to interfere

in the patient/doctor relationship and does not have the requisite degree of control over the actions of the medical team. The Appeal Court held that the complaint did establish an agency relationship because (1) it was acknowledged that the medical staff acted on the cruise lines behalf and (2) that these medical personnel accepted the undertaking to do so. The court emphasized that allegations of vicarious liability raised fact bound questions and, if a claimant could show sufficient evidence of an agency relationship, then the claim must be allowed to proceed, and any motion to dismiss should be denied.

As control is the fulcrum of "*respondeat superior*", it recognised in *Franza* that the stated allegations at the pleading stage offered considerable "direct evidence" of the cruise line's "right to control" its medical staff. The onboard medical personnel were: (1) "employed by" the cruise line; (2) hired to work in a facility that the cruise line "owned and operated", described in its advertising as "its" medical centres; (3) paid directly by the cruise line; (4) considered to be members of the ship's "crew"; and (5) "required" to wear uniforms furnished by the cruise line and wearing its name and logo. Additionally, the cruise line "put the ship's physician and nurse under the command of the ship's superior officers." Furthermore, the plaintiff's alleged that the cruise line paid "salaries" to the ship's medical staff, the passengers were "billed directly" by the cruise line, and the cruise line allegedly paid "to stock the 'medical centres' with all supplies, various medicines and equipment;" all factors lending further support to a finding of control by the cruise line [3].

Hence, the Court of Appeals found that the complaint set out a basis for holding the cruise line liable under actual authority and rejected the line of authority relied on by the district court. In doing so, the court found the reasons for the *Barbetta* rule are no longer valid. Specifically, the court noted that passengers were regularly permitted to invoke vicarious liability in other maritime tort cases. Additionally, the court pointed to the widespread application of vicarious liability in medical negligence cases. The court also reversed as to apparent authority since the factual allegations supported a finding that the elements were adequately pled [3].

ARGUMENTS AGAINST REVERSAL OF BARBETTA

The cruise company urged the court to look beyond the complaint, to the passenger's cruise ticket contract, which makes clear that onboard medical personnel are ICs, not employees or agents [14]. The court declined to consider it because (1) *Franza* did not attach the ticket contract to the complaint; (2) the complaint made no mention of the contract; and (3) it would not "consider the nurse and doctor to be independent contractors simply because that is what

the cruise line calls them". Furthermore, it stated, "Nothing in the complaint suggests that these medical professionals somehow acted outside the scope and course of their employment or that the requisite control was missing" [3].

Playing the devil's (read: cruise line's) advocate, it could just as well be claimed that hardly anything in this case suggests that the ship's medical staff acted outside the scope and course of an IC status or that they were influenced or controlled by the cruise line.

It seems strange that the court would not consider the passenger cruise ticket contract since accepting the passenger cruise ticket contract is the condition for buying a cruise and going aboard. The fact that Franza was not including it in the complaint borders — from an outsider's view — on suppressing evidence because the contract addresses directly the claimed "promotion of medical staff through the cruise lines brochures/internet" as well as "direct billing by the cruise line to passenger for medical costs". A typical Cruise Ticket Contract, available in company brochures and on the internet, states clearly:

"To the extent Passengers retain the services of medical personnel or independent contractors on or off the Vessel, Passengers do so at their sole risk. Any medical personnel attending to a Passenger on or off the Vessel, if arranged by Carrier, are provided solely for the convenience of the Passenger, work directly for the Passenger, and shall not be deemed to be acting under the control or supervision of the Carrier, as Carrier is not a medical provider. (...) Even though the Carrier shall be entitled to charge a fee and earn a profit for arranging such services, all such persons or entities shall be deemed independent contractors and not acting as agents or representatives of Carrier" [14].

On many ships doctors wear a white coat in the office and are free to wear private clothes in public according to the passengers' dress code of the day. However, company-furnished uniforms are very useful on ships and clearly a safety issue: They make medical personnel (regardless of their employment status) easier to identify for officers and crew during emergencies, especially because the uniforms are always distinctly different from those of other ship workers, marked with caduceus symbols and/or red lines between gold stripes on their epaulettes and sleeves. Company-issued nametags are also for safety and convenience, in particular necessary to prevent crew from trying to chase medical staff out of areas that are off limits for regular passengers.

The Appellate Court recognised Franza's claim that the cruise line represented to immigration authorities that the doctor and nurse were members of the ship's crew. The question is: Why would the cruise line do that? There is hardly any reason for immigration officials to be interested in medical staff's employment status. According to internation-

al rules, all workers — or non-passengers — on board a ship are called "crew", whether they are ICs or employees [5].

If the ship's doctor is presented to the passengers, it is usually as a representative for one of the onboard services available for the passengers' convenience, run by ICs. The medical staff is primarily seen in the medical centre, usually placed in a far from central location aboard. Whenever a passenger requests medical service, he or she must routinely sign a consent form ("Medical Authorisation") on which the IC status of the medical staff is also emphasized [author's personal file]. The fact that insurance became an issue in Franza strongly suggests that conditions for treatment and IC status of the staff had in fact been discussed with the patient — with or without the daughter's knowledge.

When determining the doctors' employment status, reading the "Independent Contractor Physician Agreement" [author's personal file] is essential. Of special importance are passages like:

- **Independent contractor:** The parties agree that the physician is independently contracted to provide professional services aboard the ship, and at all times material hereto, the physician shall operate as, and be considered, an IC, and not an employee.
- **Ship's physician ultimate responsibility clause:** The ship's physician understands and agrees that any/all medical/or patient care decisions on board the ship will remain the ultimate responsibility of the ship's physician, regardless of any/all input, comment(s), consultation(s), recommendation(s) from any employee or agent of the company, and at no time shall any (of the above) be construed to replace the independent onsite clinical judgment and independent professional responsibility of the ship's physician. All medical practitioners enjoy full professional independence in exercising their medical judgment in undertaking medical examination procedures.
- **Personal expenses:** The physician is responsible for any expenses incurred for all medical examinations necessary under international regulations for the physician to work on board a vessel, advanced life support certifications or re-certifications, medical licenses, continuing education credits and passport fees.
- **Hours:** It is understood and agreed that the physician will be present in the medical facility for physician clinic hours as per the agreed ship schedule. In addition the physician will be available "on call" 24/7 for any medical emergencies outside those designated clinic hours.

Payment from the company is usually not a "salary", but compensation "by the job"; a fixed sum per completed contract agreed in advance. The passage "Hours" in the IC agreement shows what the payment is for, and there are no suggestions of a master-servant relation or of detailed company interference and control there.

In agreement with a remark by the Florida Supreme Court, the Court of Appeals stated that, “The thought of visiting a private and independent office of a totally independent physician may now be one more of history and cultural conditioning than current reality” [3]. Ship’s doctors might counter with: On land this may be right, but at sea that scenario is the rule, in particular on vessels with a solo IC doctor in remote areas where the company – or anyone else – cannot exercise any meaningful influence or control over the doctor (see above: IC contract: Ship’s physician ultimate responsibility clause). Many such ships operate worldwide and may be far away from company headquarters for years at the time. And while modern technology may enable distant ships to communicate instantaneously with the mainland, such company-doctor communications are rare and will then concern logistics and not medical treatment.

The Appellate Court acknowledges, “A cruise ship is different from a hospital. Undeniably, the practice of medicine is far more central to hospital operations than to the business of cruising” [3]. An IC ship’s doctor might point out that when marine officers exercise independent judgment, they follow instructions from a transport expert, not a hospital. IC doctors, like everybody else aboard – including all passengers – must follow company rules and the captain’s orders regarding administrative, safety and security matters, but company influence and control over the doctor’s actions in medical situations, especially in remote areas, are unrealistic, which in practice means useless or irrelevant.

The Appellate Court presumed that the cruise line must know “at least something about its purchases since it allegedly” owns and operates onboard medical centres” and “pays to stock the medical centres with all supplies, various medicines and equipment” [3].

However, this is only partly correct. Most cruise lines own and but usually don’t operate onboard medical centres. They pay for supplies, medicines and equipment to primarily fulfil their national and international obligations to their crew (“to ensure that seafarers are given health protection and medical care as comparable as possible to that which is generally available to workers ashore”) [1, 5].

That the companies own and equip the onboard medical centres doesn’t necessarily mean that they “have some institutional knowledge of medicine” [3]. An IC doctor who travel half around the world to join a ship, might be able to bring some minor equipment, but cannot be expected to set up a full medical centre upon arrival aboard. Frustrated by the lack of cruise line medical knowledge and of international rules, independent members of The American College of Emergency Physicians (ACEP) founded an ACEP Section on Cruise Medicine about the time of Barbetta. Its “Health Care Guidelines for Cruise Ship Medical Facilities” deals with most aspects of cruise medical practice, including staff

qualifications, facilities, medications, equipment and policies [15]. They also detail US congressional requirements regarding medical assistance for crew and passengers in criminal cases at sea (The Cruise Vessel Security and Safety Act of 2010) [16]. The cruise industry, through its interest organisation Cruise Lines International Association (CLIA), recommends its members to use the ACEP Guidelines as a minimum industry standard [4]. Hence, ship’s medical centres can be operated by IC ship’s doctors, based not on the cruise lines’ medical knowledge, but on the ACEP Guidelines, which are regularly updated by independent ACEP physicians [15]. Hence, when a cruise line representative announces that medical facilities aboard are in compliance with ACEP (or CLIA) standards [4, 15], it does not mean that the owner is influencing and controlling the ship’s doctors.

While at sea a passenger has little choice but to submit to onboard care, according to the Appellate Court [3]. But that’s also the time when a ship’s doctor will have little use of company interference and must trust his or her independent judgment. Companies argue that a passenger at sea is given the option to submit to onboard care and is free to seek medical attention ashore whenever the ship is in port. The claim in Franza that the passenger “was required to go to the ship’s medical centre to be seen for his injuries” seems strange and is actually at odds with regular practice on ships alongside. Port emergency services are essentially expected to handle passengers who fall ill or sustain injuries while vessels are in port. When accidents happen ashore, like in Franza, common practice is to refuse medical evaluation aboard to discourage later jurisdiction discussions [8].

Regarding apparent agency, the Appellate Court found enough reasons for “detrimental reliance”, for the passenger to believe that the medical staff members were direct employees or agents of a well-known and trusted cruise company [3]. As pointed out above, the IC status of the physician was widely announced in the passenger cruise ticket contract [14] and to help-seeking passengers. Besides, why would a passenger trust a company employee more than an IC doctor who had been thoroughly vetted by the same trusted company prior to signing the IC agreement?

FRANZA – THE CONCLUSION

In sum, the Appellate Court found that the allegations in Franza’s complaint plausibly support holding the cruise line vicariously liable for the medical negligence of its onboard nurse and doctor. Because Franza adequately pled all of the elements of both actual and apparent agency, it held that Franza may press her claims under either or both theories. Accordingly, it reversed and remanded for further proceedings consistent with this opinion [3]. With this ruling passengers will be able to sue cruise lines and make it past the pre-trial dismissal stage [7].

POST-FRANZA CONSEQUENCES

Following the Franza decision cruise operators, subject to the jurisdiction of the Eleventh Circuit, may be vicariously exposed to medical negligence claims unless any such medical personnel on board are ICs and are not held out to be, or cannot be perceived to be, employed as agents of the cruise line [17]. The ultimate issue of liability will now turn upon the facts of each case, consistent with the traditional maritime analysis of agency issues [18].

Deep pockets of successful cruise companies attract lawsuits. US trial lawyers called the reversal “a groundbreaking new precedent” and predicted that it “will undoubtedly open up cruise lines to an onslaught of personal injury litigation” [7]. To the relief of ship’s doctors, the claims will now be done against the companies instead of them.

An alternative might be for cruise lines to contract medical management companies to act as intermediaries in complaints and be responsible for any liabilities [19].

To what extent the number of claims, in particular frivolous ones, will rise after Franza is unlikely to be revealed to the public. Most cases will be settled by mediation or arbitration with a minimum of fuss and publicity [14] and usually include a non-disclosure clause.

After — and possibly partly because of — the Franza decision, more major cruise lines have hired medical staff as employees and others are planning to only employ full-time medical staff by the end of 2016.

The filing of a petition for *en banc* review of the Franza decision is likely [17]. However, cruise lines vicarious liability for ship’s doctors will not be resolved until there is a US Supreme Court or Congress decision [12].

DISCLAIMER

The author has worked as independent ship’s doctor and medical consultant for many cruise companies. Views opposing the court cases cited in this article are those of the author and do not reflect the views and opinions of other cruise doctors, cruise companies, the Norwegian Centre for Maritime Medicine or the editorial board of International Maritime Health.

CONFLICTS OF INTEREST

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