

# MAN OVERBOARD: THE MISSING THEORY OF LIABILITY FOR CRUISE SHIP OWNERS

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## ABSTRACT

*The current admiralty law regime insulates ship owners from vicarious liability for an onboard physician's negligence toward passengers. Strict application of this rule in the cruise ship context produces inequitable outcomes and creates different theories of tort liability for different populations aboard the vessel; liability is imputed to the ship owner for negligence in treating crewmembers but not when treating passengers. Courts addressing this issue cite two justifications for maintaining the antiquated rule: the ship owner's lack of control over the physician-passenger relationship and the ship owner's lack of expertise to evaluate or supervise the physician's work. Consistent with agency law principles of vicarious liability, both justifications are grounded in the concept of control. However, in light of current maritime realities in the law and the industry, the rule requires reconsideration. There are a number of deliberate mechanisms in place to prevent passengers from bringing claims against cruise ship enterprises. The law should not be an additional barrier to insulate a massive international industry at the expense of individual consumers. The Supreme Court has previously modified maritime doctrines when they are no longer justifiable and should do so here. In 2010 Congress passed a statute addressing the cruise ship industry because it recognized the danger inherent in the excursion, the consumers' ignorance of the danger, and the degree to which passengers rely on the ship owner. Congress has shown that it can correct the perpetuation of inequities and should do so here. The issue of vicarious liability for cruise ship owners is ripe for evaluation. A number of courts have recognized the deficiencies in the current regime and attempted to reconcile the rule with contemporary realities. However, because admiralty jurisprudence places a premium on consistency and uniformity, most attempts at change are met with resistance. Thus, action by the*

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*Supreme Court or Congress is necessary to achieve a comprehensive change that reconfigures the current rule, which promotes inequitable outcomes and conflicts with other fields of law. Judicial pushback in the lower courts and relevant federal legislation suggest the issue is ripe for the Supreme Court's input.*

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## INTRODUCTION

In March 1997 the Carlisle family boarded a Carnival cruise ship for what was advertised as an unforgettable vacation experience.<sup>1</sup> The selected vessel provided all the amenities typically associated with cruise line mega-ships and that appeal to a vacationing family.<sup>2</sup> Shortly after departure, fourteen-year-old Elizabeth Carlisle fell ill and was treated several times by the ship's onboard physician.<sup>3</sup> The doctor advised the family that Elizabeth was suffering from the flu, provided her with antibiotics, and assured the family that Elizabeth's ailment was not serious.<sup>4</sup> However, Elizabeth remained in severe discomfort.<sup>5</sup> As a result, the family terminated their vacation and returned home.<sup>6</sup> Upon their return, a local physician diagnosed Elizabeth with a ruptured appendix.<sup>7</sup> As a consequence of the onboard physician's failure to identify her injury, Elizabeth suffered a severe infection.<sup>8</sup> The infection rendered Elizabeth sterile.<sup>9</sup>

Elizabeth's parents brought suit against the physician and the ship owner, Carnival, alleging negligence in Elizabeth's medical treatment.<sup>10</sup> They argued that Carnival should be held liable for the doctor's negligence under two theories: vicarious liability and, in the

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1. *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 463 (Fla. 2007); *Why Carnival?*, CARNIVAL, <http://www.carnival.com/cruising.aspx> (last visited Aug. 9, 2014).

2. *See What's it like?*, CARNIVAL, <http://www.carnival.com/what-to-expect-on-a-cruise.aspx> (last visited Jan. 3, 2015) (advertising luxurious accommodations in comfortable staterooms, for short or extended periods, fine dining of all varieties, and exciting and exotic activities onboard the ship).

3. *Carnival Corp.*, 953 So. 2d at 463.

4. *Id.*

5. *See id.*

6. *See id.*

7. *See id.*

8. *Id.*

9. *See id.*

10. *Id.*

alternative, apparent agency.<sup>11</sup> The Supreme Court of Florida<sup>12</sup> rejected the Carlisle's vicarious liability theory based on a mechanical application of general maritime law and echoing the established truism that a state court cannot depart from established federal maritime law.<sup>13</sup> The court did not address or engage the substantive question of a ship owner's vicarious liability for the negligence of an onboard physician in treating passengers.<sup>14</sup> However, the court conceded that it "[found] merit in the plaintiff's argument and the reasoning of the district court" before it quashed the lower court's decision.<sup>15</sup> While acknowledging that other courts had subsequently emulated the lower court's decision to impute the ship owner with vicarious liability, the Florida Supreme Court stated that, "[a]t the time the instant case was decided . . . with [one exception], the federal maritime law uniformly held that a ship owner is not vicariously liable for the medical negligence of the shipboard physician."<sup>16</sup>

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11. *Id.* Vicarious liability (respondeat superior) is based upon a master-servant relationship. See *Di Bonaventure v. Homes Lines, Inc.*, 536 F. Supp. 100, 104 (E.D. Pa. 1982) ("[R]espondeat superior theory is predicated upon the control inherent in a master-servant relationship."); RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment"); R.D. Hursh, Annotation, *Liability Under Respondeat Superior Doctrine for Acts of Operator Furnished with Leased Machine or Motor Vehicle*, 17 A.L.R.2d 1388 § 2 (1951) ("Liability of a master for his servant's acts, under the respondeat superior rule, requires that the acts have been done for, and in the service of, the master.").

12. Florida state law is a persuasive authority on maritime law because it is the home state for a number of the major cruise line enterprises. Thus, its jurisdiction is frequently invoked. See Maggie O. Tsavaris, *Calming Troubled Waters for Cruise Ship Owners and Their Passengers: Carlisle v. Carnival Corp.*, 35 U. MIAMI INTER-AM. L. REV. 153, 155 (2003) ("[T]he Florida Supreme Court . . . is binding on the world's largest cruise operators. The port of Miami is the homeport of eighteen ships. . . . The Port of Miami is the undisputed Cruise Capital of the World . . .") (internal quotation marks omitted).

13. See *Carnival Corp.*, 953 So. 2d at 470 ("[B]ecause this is a maritime case, this Court and the Florida District courts of appeal must adhere to the federal principles of harmony and uniformity when applying federal maritime law."). It is established law that "[a] passenger ticket is a maritime contract governed by maritime law." Kristopher E. Pearson, *Hope for Temporary Citizens Aboard Floating Cities: Carlisle v. Carnival Corp.*, 59 U. MIAMI L. REV. 295, 315 (2005). See also *The Moses Taylor*, 71 U.S. 411, 427 (1866). Moreover, "[t]orts committed within the boundaries of maritime jurisdiction are subject to maritime law." *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 86 (Ill. App. Ct. 2005); see also *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959).

14. See *Carnival Corp.*, 953 So. 2d at 470.

15. See *id.* But see *Carlisle v. Carnival Corp.*, 864 So. 2d 1, 7 (Fla. Dist. Ct. App. 2003) (holding 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.").

16. *Carnival Corp.*, 953 So. 2d at 470. But see, e.g., *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 91 (Ill. App. Ct. 2005) (noting that under federal admiralty law, a cruise ship owner can be vicariously liable for the medical negligence of onboard physicians).

Not all courts subscribe to the classic rule that ship owners are immune from liability for an onboard physician's negligence toward passengers.<sup>17</sup> However, because of federalism issues and the courts' reluctance to reconfigure established maritime doctrines, there have been no comprehensive, substantive changes that reconcile established doctrines with contemporary maritime realities.<sup>18</sup> Consequently, a discrete split has formed between the classic, antiquated doctrine and a few maverick courts. The split creates uncertainty for the cruise ship industry and the millions of passengers who take cruises each year. Importantly, the courts' devotion to uniformity prevents the issue from being thoroughly considered in light of current realities. Subsequent courts' enthusiasm to imitate the lower court's decision in *Carnival* is indicative of the sentiment toward the governing regime. The issue is ripe for consideration either by Congress or the Supreme Court.

This Note will explore the seminal cases that consider the maritime principal that ship owners are not vicariously liable for onboard physicians' negligence toward passengers and consider the arguments supporting the classic rule. This Note will analyze whether the ancient justifications are still as pertinent in contemporary maritime practice as when originally established. It will also consider the impact of congressional legislation in the cruise ship sphere that impacts the dynamics between ship owners, passengers, and crewmembers. Moreover, this Note will consider barriers that impede passengers from pursuing litigation against ship owners; both inherent in admiralty law, and as a deliberate consequence of the cruise industry's conduct. Finally, this Note proposes alternatives to resolve the current tension between the courts adjudicating this issue: Congress should promulgate legislation imposing vicarious liability on cruise ship owners for onboard physicians' negligence toward passengers, or the Supreme Court should grant certiorari to adjudicate this issue on the merits.

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17. See *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 221 (N.D. Cal. So. Div. 1959) (finding that a physician is the ship owner's employee and vicarious liability is imputed for the physician's negligence); see, e.g., *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 91 (Ill. App. Ct. 2005) (applying federal law and holding a ship owner vicariously liable for the medical negligence of its onboard physician); see also *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1375 (S.D. Fla. 2004) (finding plaintiff's complaint sufficiently alleged facts to support claims that cruise line was subject to vicarious liability for physician's alleged negligence).

18. See generally Robert D. Peltz, *Has Time Passed Barbetta By?*, 24 U.S.F. MAR. L.J. 1, 32 (2011) (considering whether the rationales for the classic rule are still viable).

## I. BACKGROUND: A MASSIVE INDUSTRY AND AN ANTIQUATED REGIME

In 2012 the cruise line industry generated more than \$42 billion in economic activity in the United States and serviced more than twenty million global passengers.<sup>19</sup> The cruise line industry provides consumers with unique vacation opportunities that expose passengers to a variety of experiences.<sup>20</sup> Current admiralty law requires ship owners to exercise only reasonable care toward passengers.<sup>21</sup> With rare exception, the only way a ship owner can breach that duty is on a negligent hiring theory where a ship owner hires an incompetent physician.<sup>22</sup> At the turn of the millennium, when cruise ship passengers numbered less than half of current numbers, conservative figures estimated 320,000 passengers per year sought medical attention during a voyage.<sup>23</sup>

Inherent in the ship owner and passenger relationship is a substantial degree of dominion and control over the passenger that suggests either (1) that ship owners owe a higher degree of care to passengers, or (2) that legitimate mechanisms should exist to protect passengers.<sup>24</sup> The relationship requires passengers to rely on the ship's personnel, facilities, and services because there is no alternative on the open ocean.<sup>25</sup> Moreover, cruise lines advertise their services and amenities to consumers in an attempt to induce travelers to choose their vessel over that of their competitors, certainly profiting from such services.<sup>26</sup> Because of this relationship, it is imperative that

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19. *Issues & Facts*, CRUISE LINES INT'L ASS'N, INC., <http://www.cruising.org/regulatory/issues-facts> (last visited Jan. 3, 2015).

20. See Pearson, *supra* note 13, at 295.

21. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959) ("It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew.").

22. See *Nietes*, 188 F. Supp. at 220 ("[T]he ancient rule [is] that a shipowner is liable for its negligence in hiring an incompetent physician, but is not liable for negligent treatment by him.").

23. See *Cruise-Ship Health Care: Prescription for Trouble*, 15 CONSUMER REP. TRAVEL LETTER 4, at 1, 6-10 (Apr. 1999).

24. See Marva Jo Wyatt, *High Crimes on the High Seas: Re-evaluating Cruise Line Legal Liability*, 20 U.S.F. MAR. L.J. 147, 170-71 (2008) (suggesting that cruise ship dominion over passengers is greater than that of other common carriers and hotels).

25. See *id.* at 171-72 (discussing passengers' reliance on the limited number of shipboard security personnel).

26. See Pearson, *supra* note 13, at 339 (proposing that cruise lines benefit from advertising that medical care is provided onboard the vessel). Moreover, whether a vessel offers medical care may be a deciding factor for some passengers. See *id.* at 295-96; see also Robert D. Peltz,

ship owners afford passengers legitimate protections and remedies to recover for injuries they may encounter during a voyage. However, cruise lines often use sophisticated contractual mechanisms to make it difficult for travelers to litigate claims against the cruise line or to preclude consumers from bringing causes of action altogether.<sup>27</sup> Because cruise line disputes are often governed by admiralty law and implicate longstanding principles of maritime jurisprudence, courts are reluctant to make changes to established doctrines.<sup>28</sup> Similarly, because maritime disputes can be subject to international, federal, and state jurisdictions, the courts place a premium on consistency and uniformity in applying general maritime law.<sup>29</sup>

Perhaps the most notable example of strict adherence to uniformity is the courts' rigid rejection of imputing liability to a ship owner for an onboard physician's negligence in treating passengers. Because of the emphasis on uniformity, admiralty law may be slow to adapt to current realities.<sup>30</sup> However, not all courts subscribe to the general approach that ship owners are immune from physicians' negligence toward passengers.<sup>31</sup>

Some courts recognize that passengers should have access to the same theories of recovery as are afforded similarly situated populations.<sup>32</sup> Adequate theories of recovery are necessary because

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*supra* note 18, at 32 ("There is little doubt that the ship's medical facility is not only an additional 'profit center' for today's modern cruise ship, but that its very existence is intended to serve the business interests of the carrier.").

27. See *Lobegeiger v. Celebrity Cruises, Inc.*, 869 F. Supp. 2d 1356, 1364 (S.D. Fla. 2012) (holding that cruise line was not vicariously liable for physician's alleged negligence because the ticket contract between the passenger and cruise line stated that physician was an independent contractor).

28. See *Rand v. Hatch*, 762 So. 2d 1001, 1002-03 (Fla. Dist. Ct. App. 2000) (holding that a two-part test applies to determine whether a tort falls under general maritime law: a "locality" test, which requires a court to determine whether the tort occurred in navigable waters and a "nexus" test, which requires determination of whether the tort had a significant relationship to traditional maritime activity). To determine whether a tort has satisfied the "nexus" test, the court must assess whether the "incident involved was of a sort with the potential to disrupt maritime commerce." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 538 (1995); see also *Antoine v. Zapata Haynie Corp.*, 777 F. Supp. 1360, 1364 (E.D. Tex. 1991) (holding subject matter jurisdiction over medical malpractice claim was legitimate because alleged negligence had potential to disrupt maritime commerce).

29. See, e.g., *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1372, (5th Cir. 1988); *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1039 (S.D.N.Y. 1969).

30. See generally *Peltz*, *supra* note 18, at 32-33.

31. See *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 221 (N.D. Cal. So. Div. 1959); *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374 (S.D. Fla. 2004).

32. See, e.g., *Nietes*, 188 F. Supp. at 221; *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 89 (Ill. App. Ct. 2005).

consumers substantially rely on the ship, its facilities, and staff and because ship owners' use of restrictive contractual clauses to inhibit consumers from sustaining causes of action requires equitable offsetting.<sup>33</sup> This Note proposes that Congress should promulgate legislation imputing an onboard physician's negligence toward passengers to the ship owner; relevant case law, academic scholarship, and recent collateral federal legislation support this proposition.<sup>34</sup> Congress should make theories of recovery available to passengers when a ship's physician commits negligence toward those passengers because of the nature of the relationship between the physician and the ship owner. In addition, the historic justifications for the doctrine are no longer salient in a contemporary society.<sup>35</sup> Notably, Congress has made identical theories of recovery available to crewmembers in comparable circumstances.<sup>36</sup> Congress has previously stimulated uniformity by codifying doctrines that required contemporary reconciliation.<sup>37</sup> Congress should do the same here.

Alternatively, the Supreme Court should grant certiorari to resolve the tension in the lower courts and definitively answer the question whether maritime law allows ship owners to be held vicariously liable for onboard physicians' negligence toward passengers.<sup>38</sup> Because any accord in the lower courts is fractured, there is doubt for consumers and for the cruise ship industry; therefore, the Supreme Court should grant certiorari and resolve any uncertainty. Moreover, the Supreme Court's missed opportunity to grant certiorari after *Carlisle* was prior to the enactment of the Cruise Vessel Security and

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33. See Beth-Ann Eric Herschaft, *Cruise Ship Medical Malpractice Cases: Must Admiralty Courts Steer by the Star of Stare Decisis?*, 17 NOVA L. REV. 575, 580-81 (1992).

34. See *Nietes*, 188 F. Supp. at 221; see also Cruise Vessel Security and Safety Act of 2010, 46 U.S.C. § 3507 (2012) (requiring cruise ships to carry "medical staff" to provide "medical treatment").

35. See generally Peltz, *supra* note 18 (analyzing whether the classic maritime rule is viable today "in light of subsequent changes in maritime law, technology, and the cruise industry itself.").

36. See *Personal Injury to or Death of a Seaman*, 46 U.S.C. § 30104 (2012); *Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir. 1971) (articulating that physician's negligence exposes the ship owner to liability); see also Michael J. Compagno, *Malpractice on the Love Boat: Barbetta v. S/S Bermuda Star*, 14 TUL. MAR. L.J. 381, 391 (1990) ("[A] shipowner is presently subject to malpractice liability for a ship's doctor who negligently treats a seaman.").

37. See 46 U.S.C. §§ 3507-3508.

38. See *Supreme Court Rejects Appeal over Liability for Ships' Doctors*, in 3 WEST'S MEDICAL MALPRACTICE LAW REPORT 13, at \*1 (Thompson/West 2007).



Safety Act.<sup>39</sup> Therefore, the need is more urgent now and Congress's intent is more defined as evidenced by collateral legislation in the cruise ship sphere that acutely impacts the ship owner and passenger relationship.

## II. CURRENT LEGAL LANDSCAPE: AN AMALGAMATION OF CONSTITUTIONAL, STATUTORY, AND COMMON LAW

Pursuant to the U.S. Constitution, federal courts have the authority to adjudicate "all Cases of admiralty and maritime Jurisdiction."<sup>40</sup> This broad grant of original jurisdiction is codified at 28 U.S.C. § 1333.<sup>41</sup> The body of law the Constitution references and that Congress subsequently codified, general maritime law, existed and operated well before the founding of the United States.<sup>42</sup> General maritime law was fashioned 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>43</sup>

This body of law has been applied by various nations for more than 3000 years.<sup>44</sup> Historic admiralty doctrines served as context for the framers when they drafted the Constitution.<sup>45</sup> To promote uniform application of the law, the framers only empowered Congress and the federal courts to create or modify general maritime law.<sup>46</sup> Subsequently, however, Congress passed the Judiciary Act of 1789.<sup>47</sup> The Judiciary Act contains the "saving to suitors" clause which, among other things, grants state courts in personam jurisdiction over maritime tort claims.<sup>48</sup> Thus, state and federal courts have concurrent jurisdiction to adjudicate general maritime law claims.<sup>49</sup> However, "[g]eneral maritime law is federal common law."<sup>50</sup> As the Florida

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39. See *id.*; 46 U.S.C. §§ 3507-3508.

40. See U.S. CONST. art. III, § 2, cl. 1; *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) (citing U.S. CONST. art. III, § 2, cl. 1); see also Pearson, *supra* note 13, at 296.

41. 28 U.S.C. § 1333(1) (2012).

42. See Pearson, *supra* note 13, at 296-97.

43. *R.M.S. Titanic, Inc.*, 171 F.3d at 960 (citing *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 191 (1970)); see also Pearson, *supra* note 13, at 296.

44. See Pearson, *supra* note 13, at 296.

45. See *id.* at 297.

46. See *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 381 (1918).

47. 28 U.S.C. § 1333(1) (2012).

48. See *id.*; see, e.g., *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 464 (Fla. 2007).

49. See *Carnival Corp.*, 953 So. 2d at 464.

50. Pearson, *supra* note 13, at 329.

Supreme Court articulated, “[f]ederal maritime law is an amalgamation of federal legislation, federal common law, and state maritime law.”<sup>51</sup> Thus, state courts do not have absolute latitude when resolving maritime disputes; where an issue can be resolved by federal maritime law, state courts must apply such law.<sup>52</sup> Where no federal law addresses the issue, “maritime law may be supplemented or modified by the states where the supplement or modification does not conflict with an essential feature of exclusive federal jurisdiction.”<sup>53</sup> Therefore, in exercise of its authority, a state court may “adopt such remedies as it sees fit so long as it does not make changes in the substantive law.”<sup>54</sup> However, the state violates its statutory grant when it fashions a remedy that “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>55</sup> Consistent with other categories of federal law, “Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.”<sup>56</sup>

### III. THE COMMON LAW DEVELOPMENT OF THE CURRENT RULE: SEMINAL CASES AND THE GOVERNING FRAMEWORK

Perhaps the most contested general maritime principle is the rule that ship owners are not vicariously liable for onboard physicians’ negligence toward passengers. When confronted with plaintiffs challenging this principle, courts are quick to deny claims and cite uniformity in admiralty jurisprudence as justification.<sup>57</sup> Courts applying the classic principle typically cite two rationales for insulating ship owners from vicarious liability: (1) the ship owner cannot control the relationship between the passenger and doctor because the passenger determines whether to use the doctor’s

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51. *Carnival Corp.*, 953 So. 2d at 464.

52. *Id.*

53. *Id.*

54. *Id.* at 465.

55. *Id.*

56. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917), *superseded by statute*, Longshore and Harbor Workers’ Compensation Act, Pub.L. 98-426, 44 Stat. 1424 *as stated in Dir.*, Office of Workers’ Comp. Program, U.S. Dep’t of Labor *v. Perini N. River Assoc.*, 459 U.S. 297 (1983); *see also* Pearson, *supra* note 13, at 329 (“Congress has the power to create maritime law, which prevails throughout the country.”).

57. *See, e.g.*, *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1372 (5th. Cir. 1988); *Carnival Corp.*, 953 So. 2d at 466.

services and to what extent, and (2) “[a] shipping company is not in the business of providing medical services to passengers.”<sup>58</sup>

However, a few contemporary courts have challenged the old doctrine.<sup>59</sup> These courts suggest that insulating ship owners from vicarious liability for physicians’ negligence is not appropriate based on current realities of the maritime industry.<sup>60</sup> These maverick courts argue that the relationship between the ship’s owner, the ship’s doctor, and the ship’s passengers requires a modification of the rule.<sup>61</sup>

#### A. *Nietes v. American President Lines, Ltd.*

The Northern District Court for the District of California was the first court to reconsider the general maritime rule that ship owners are not liable for onboard physicians’ negligence when treating passengers in *Nietes v. American President Lines, Ltd.*<sup>62</sup> In *Nietes*, the plaintiff brought an action against a ship owner alleging that his son became ill while on defendant’s vessel and later died because he received negligent medical treatment from the ship’s doctor.<sup>63</sup> The ship’s owner refuted the allegations and asserted the ancient admiralty rule: a ship owner is not liable for an onboard physician’s negligent treatment of passengers.<sup>64</sup> Additionally, the ship owner argued that the onboard physician was only an independent contractor pursuant to the passenger contract.<sup>65</sup> Therefore, liability could not be imputed to the ship owner based on a vicarious liability theory because the onboard doctor was not the ship owner’s employee.<sup>66</sup> However, the court adopted a different approach and suggested that the classic rule was no longer applicable in “our modern, highly organized industrial society.”<sup>67</sup> Moreover, the court stated that the relationship between the ship owner and the doctor

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58. *Carnival Corp.*, 953 So. 2d at 467 (quoting *Barbetta*, 848 F.2d at 1369).

59. *See, e.g.*, *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 221 (N.D. Cal. So. Div. 1959).

60. *See id.*

61. *See id.*

62. *Id.* at 220.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*; *see also* RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (“An employer is subject to liability for torts committed by employees while acting within the scope of their employment.”).

67. *See Nietes*, 188 F. Supp. at 220.

required liability to be imputed to the ship owner because the doctor was the ship owner's employee notwithstanding the formal independent contractor categorization:

It is our opinion that, where a ship's physician is in the regular employment of a ship, as a salaried member of the crew, subject to the ship's discipline and the master's orders, and presumably also under the general direction and supervision of the company's chief surgeon through modern means of communication, he is, for the purposes of respondeat superior at least, in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable.<sup>68</sup>

Additionally, the court considered the benefits a ship owner receives as a result of maintaining an onboard physician.<sup>69</sup> Because a ship owner owes a duty of reasonable care to his passengers,<sup>70</sup> maintaining a physician onboard is a "beneficial substitute for the [ship owner's] otherwise more costly duty to sick or injured passengers."<sup>71</sup> The court opined that if a ship owner did not provide an onboard physician, the duty of reasonable care owed to passengers could require the ship to change course or make for the nearest port depending on the severity of the passenger's ailment.<sup>72</sup> By maintaining an onboard physician, the ship owner avoids this costly and inconvenient duty and gives the particular vessel advantages over other vessels that may not offer medical services.<sup>73</sup> Additionally, because ship owners owe a higher standard of care to crewmembers than to passengers, the presence of an onboard physician likely satisfies the obligatory duty to crewmembers.<sup>74</sup> Therefore, the court concluded that because the physician was an employee of the ship owner—notwithstanding the independent contractor designation—and performed the ship owner's business by discharging his obligatory duties to the crew, the complaint against the ship owner

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68. *See id.*

69. *See id.* at 221.

70. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959).

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

72. *See id.*

73. *See id.*

74. Interestingly, the ship owner is vicariously liable to the crewmember for negligent treatment provided by the onboard physician. *See, e.g., De Zon v. Am. President Lines*, 318 U.S. 660, 665 (1943).

for the physician's negligence under a respondeat superior theory of liability was sustained notwithstanding the classic maritime rule.<sup>75</sup>

### B. *Barbetta v. S/S Bermuda Star*

The next fundamental case in admiralty jurisprudence that considered whether ship owners could be vicariously liable for onboard physicians' negligence toward passengers was *Barbetta v. S/S Bermuda Star*.<sup>76</sup> In *Barbetta*, plaintiffs, a married couple, brought suit against a ship owner based on the onboard physician's negligence in failing to discover that the wife had diabetes, despite treating her for an illness on several occasions.<sup>77</sup> As a result of the physician's negligence, the passenger's condition deteriorated severely such that she developed an acute case of pneumonia, lapsed into a coma, and had to be evacuated from the ship.<sup>78</sup> The plaintiffs argued that the physician's negligence occurred during the scope of his employment; thus, the ship owner should be vicariously liable for the physician's malpractice under a respondeat superior theory.<sup>79</sup> The court began its discussion by acknowledging the lower court's finding that "general maritime law offers no completely consistent answer" regarding whether ship owners are vicariously liable for onboard physicians' negligence toward passengers.<sup>80</sup> However, the court observed that the substantial weight of authority favored the general rule of barring respondeat superior liability for ship owners.<sup>81</sup> The court articulated two justifications for imposing the classic rule:

The work which the physician or surgeon does . . . is under the control of the passengers themselves. It is their business, not the business of the carrier . . . The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant engaged

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75. See *Nietes*, 188 F. Supp. at 221.

76. *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988); see also Peltz, *supra* note 18, at 1.

77. *Barbetta*, 848 F.2d at 1366.

78. *Id.*

79. *Id.*; see also RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

80. *Barbetta*, 848 F.2d at 1367.

81. See *id.* ("Although neither the Supreme Court, this court, nor any district court in this circuit has ruled on the question, we are not without guidance. An impressive number of courts from many jurisdictions have, for almost one hundred years, followed the same basic rule.").

in their business, and subject to their control as to his mode of treatment.<sup>82</sup>

In addition to arguing that the nature of the physician-passenger relationship inhibits the ship owner's ability to control the physician in the performance of his duties, the court stated the doctrine's second rationale: "[t]he law does not put the business of treating sick passengers into the charge of common carriers."<sup>83</sup> Essentially, ship owners are not in the medical care business. Both justifications for the classic rule are grounded in the concept of control consistent with the notion of control fundamental to the master-servant relationship in agency law.<sup>84</sup>

Next, the court evaluated the *Nietes* court's decision and found "[its] reasoning to be internally contradictory."<sup>85</sup> The court criticized two key rationales of the *Nietes* reasoning: (1) the presumption that an onboard doctor was connected through modern communication to a "chief surgeon" sufficient to control the onboard doctor is unrealistic; and (2) that by hiring an onboard doctor, the ship owner sufficiently discharges his duty to the passengers is not accurate because the ship owner may still be liable to the passengers for negligent hiring.<sup>86</sup> The court concluded that—in accordance with every other court to consider the question in the last one hundred

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82. *Id.* (quoting *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (Mass. 1891)).

83. *Id.* at 1370 (quoting *O'Brien*, 28 N.E. at 267).

84. *See id.*; *see also* *Di Bonaventure v. Homes Lines, Inc.*, 536 F. Supp. 100, 104 (E.D. Pa. 1982) ("[R]espondeat superior theory is predicated upon the control inherent in a master-servant relationship."). Additionally, the Restatement of Agency sets forth factors to consider when determining whether an actor is a servant or an independent contractor:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958).

85. *Barbetta*, 848 F.2d at 1370.

86. *See id.* at 1370-71.

years except for the *Nietes* court—general maritime law does not impose respondeat superior liability on a ship owner for a physician’s negligence toward passengers.<sup>87</sup>

Additionally, the court stated that a ship owner has no duty to provide a physician for its passengers’ use.<sup>88</sup> Because the law only requires the ship owner to exercise “reasonable care to furnish such aid and assistance as ordinarily prudent persons would render under similar circumstances,” the ship owner could provide no onboard physician and still satisfy his duty.<sup>89</sup> This distinction, the court suggested, bolstered a reading that a ship owner cannot be vicariously liable for its physician’s negligence under a respondeat superior theory because the physician is offered only for the convenience of the passengers.<sup>90</sup> Although there were subsequent challenges to *Barbetta* by courts and commentators alike, the *Barbetta* decision governed admiralty jurisprudence for two decades until the Florida Supreme Court considered the issue for the first time.<sup>91</sup>

### C. Carnival Corp. v. Carlisle

The Florida Supreme Court encountered the question of ship owner vicarious liability in *Carnival Corp. v. Carlisle* and categorized the inquiry as a question of “great public importance.”<sup>92</sup> The court acknowledged that, although the majority of federal courts followed the rule regarding ship owner’s liability toward passengers as articulated in *Barbetta*, the issue was a novel one for this court.<sup>93</sup> Moreover, the United States Supreme Court had not spoken on the issue so there was no binding authority.<sup>94</sup> The court recognized the

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87. See *id.* at 1372.

88. See *id.*

89. See *id.* (quoting ROBERT FORCE & MARTIN J. NORRIS, 1 THE LAW OF MARITIME PERSONAL INJURIES § 39 (5th ed. 2013)).

90. See *id.*

91. See, e.g., *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374 (S.D. Fla. 2004) (holding that a ship owner is liable for the onboard physician’s negligence under a vicarious liability theory); see generally *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 470 (Fla. 2007) (criticizing the *Barbetta* decision but nevertheless holding that uniformity in general federal maritime law requires the outcome that ship owners are not liable under a respondeat superior theory for the negligence of their onboard doctors); Compagno, *supra* note 36, at 381 (suggesting the *Barbetta* court missed an opportunity to reconcile ancient principles of maritime law with contemporary realities).

92. See *Carlisle*, 953 So. 2d, at 463.

93. See *id.* at 464.

94. See *id.*

tension between state and federal courts in adjudicating maritime claims: although state courts have latitude to fashion remedies they deem are appropriate and are not bound by the decisions of federal appellate courts, their scope is limited by principles of federalism because they do not have the authority to make changes in the substantive federal law.<sup>95</sup> A substantive change is made when the state remedy “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>96</sup> The court also suggested that federal legislation can be an indication that uniformity is necessary in the relevant body of law.<sup>97</sup>

Next, the court criticized the *Barbetta* decision because—while recognizing that control is required for respondeat superior liability—the *Barbetta* court failed to engage in any meaningful analysis of control on the facts presented.<sup>98</sup> Additionally, the *Barbetta* decision failed to recognize that the concept of control it emphasized was also the very crux of the *Nietes* rationale.<sup>99</sup> The court also acknowledged the appeal of the *Nietes* decision because “much has changed in the world in the one hundred years since the earlier courts held ship owners immune from [vicarious liability] claims.”<sup>100</sup> Moreover, the *Carlisle* court stated that “modern means of communication make it possible for the actions of the shipboard doctor to be controlled and supervised by a doctor thousands of miles away.”<sup>101</sup> The court also recognized that other courts have subsequently followed the lower court’s example in this case and subscribed to the *Nietes* approach.<sup>102</sup> The court conceded that it found merit in the lower court’s reasoning to impose vicarious liability on

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95. See *id.* at 465 (discussing that state courts are free to adjudicate admiralty claims but are nonetheless bound by federal decisions that accurately speak to the issue in question).

96. *Id.* (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994)).

97. See *id.*

98. See *id.* at 468 (“[R]ather than analyze the particular relationship between the parties to determine whether aspects of control could in fact exist, the *Barbetta* decision relied upon the factual conclusions of earlier maritime cases to support the general maritime rule.”).

99. See *id.* at 467.

100. *Id.* at 470.

101. *Id.*

102. See *id.*; see, e.g., *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374–75 (S.D. Fla. 2004) (holding plaintiff alleged facts sufficient to state a claim for ship owner’s vicarious liability for onboard physician’s alleged negligence toward passenger); *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 91 (Ill. App. Ct. 2005) (holding a cruise ship owner can be found vicariously liable for a physician’s negligence toward passengers).



the ship owner; nevertheless, it was constrained to “adhere to the federal principles of harmony and uniformity when applying federal maritime law.”<sup>103</sup> Therefore, because—at the time of the lower court’s decision—*Nietes* was the only authority holding ship owners vicariously liable for physicians’ negligence toward passengers, the court was compelled to conform to the dominant line of decisions.<sup>104</sup>

Post-*Carlisle*, the state of admiralty law regarding a ship owner’s liability for the negligence of its onboard medical personnel in treating passengers is convoluted. Although the vast majority of cases adhere to the general rule, the rationale for relying on the ancient rule is compromised for a number of reasons. First, the classic justifications are no longer as pertinent in current maritime realities as when originally established.<sup>105</sup> Second, the current doctrine relies on uniformity in the law as the basis for a rule when (1) there is no absolute uniformity, (2) courts admittedly do not subscribe to the classic justifications asserted for the law, and (3) courts citing uniformity as rationale for a decision are persuaded by alternative reasoning but hold otherwise for the sake of uniformity.<sup>106</sup> A legal regime that prefers rigid uniformity over progress is convoluted and obsolete.<sup>107</sup>

#### IV. CONGRESSIONAL IMPACT: COLLATERAL LEGISLATION IN THE ADMIRALTY SPHERE

State and federal courts are not the only entities tasked with creating maritime law.<sup>108</sup> Congress has authority to promulgate laws significant to admiralty law and binding on any court exercising

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103. *Carnival Corp.*, 953 So. 2d at 470.

104. *See id.*

105. *See generally* Peltz, *supra* note 18 (considering the classic rationales for the general maritime rule and suggesting that they may no longer be pertinent in a contemporary society).

106. *See Carnival Corp.*, 953 So. 2d at 470.

107. As former Supreme Court Justice Louis D. Brandeis articulated, “America has believed that in differentiation, not in uniformity, lies the path of progress. It acted on this belief; it has advanced human happiness, and it has prospered.” LOUIS D. BRANDEIS, BUSINESS—A PROFESSION ch. 22 (1914), available at <http://www.law.louisville.edu/library/collections/brandeis/node/224>.

108. *See S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917) (“Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.”), *superseded by statute*, Longshore and Harbor Worker’s Compensation Act of 1972, PUB. L. NO. 92-576, 86 Stat. 1251 (codified as amended at 33 U.S.C. § 903 (2012)), as stated in Dir. Office of Workers’ Comp. Program, U.S. Dep’t of Labor v. Perini N. River Assoc., 459 U.S. 297 (1983); *see also* Pearson, *supra* note 13, at 329 (“Congress has the power to create maritime law, which prevails throughout the country.”).

maritime jurisdiction.<sup>109</sup> Indeed, congressional legislation is an effective way to achieve the uniformity that is idealized in admiralty jurisprudence because all courts are compelled to follow the federal statute.<sup>110</sup> For the purposes of this Note, there are two pertinent federal statutes that have significant implications on the doctrine of ship owner liability. The first is the Jones Act.<sup>111</sup> The second is the Cruise Vessel Security and Safety Act of 2010.<sup>112</sup> Additional legislation in the maritime sphere highlights friction with other fields of law that are exacerbated when the antiquated maritime rule is endorsed.<sup>113</sup>

### A. *The Jones Act*

The Jones Act is a federal statute affording crewmembers the right to bring a cause of action against a ship owner for injuries sustained during the course of employment.<sup>114</sup> The Jones Act aims to provide a ship's employees with protections and remedies equivalent to those offered to railroad workers on land.<sup>115</sup> It grants the claimant the right to a jury trial, which is the exception for federal courts exercising original admiralty jurisdiction.<sup>116</sup> The statute affords broad protections because seamen are regularly exposed to the "perils of the sea."<sup>117</sup> However, the Jones Act is unlike its onshore counterparts

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109. See, e.g., *S. Pac. Co.*, 244 U.S. at 215.

110. See *Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519, 524 (Tex. App. 1993) ("When a seaman contends negligence against an employer because of an injury . . . the state and common law causes of action are preempted by the federal maritime law . . .").

111. 46 U.S.C. § 30104 (2012) ("A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.").

112. 46 U.S.C. § 3507 (2012).

113. See, e.g., 46 U.S.C. § 30509 (2012).

114. See 46 U.S.C. § 30104.

115. See *id.*; *Cox v. Roth*, 348 U.S. 207, 209 (1955) (finding that a seaman should have the same right of action as would a railroad employee); *Martin v. Harris*, 560 F.3d 210, 219 (4th Cir. 2009) ("The Jones Act incorporates by reference the rights and remedies afforded railroad employees under the FELA."); see also Federal Employer's Liability Act, 45 U.S.C. § 51 (2012); *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 507 (1957) ("The [Federal Employer's Liability Act] was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant.").

116. See 46 U.S.C. § 30104; see also FED. R. CIV. P. 9(h); 2 NICHOLS CYCLOPEDIA OF FED. P. FORMS § 53:5 (2014) ("The rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).").

117. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 347 (1995).

because the causation element is slight; the act requires only that the ship owner's negligence play "any part, even the slightest, in producing the injury or death for which damages are sought."<sup>118</sup> Notably, onboard physicians are considered crewmembers and offered the same remedies as true seamen under the Act.<sup>119</sup> Contrary to general maritime law, however, the Jones Act has been interpreted to impose vicarious liability on ship owners for a physician's negligence toward a crewmember.<sup>120</sup> In *De Zon v. American President Lines*, the Court's reasoning for imputing ship owners with vicarious liability for onboard physicians' negligence in treating crewmembers significantly erodes the rationale for barring the same theory of liability when treating passengers.<sup>121</sup> The Supreme Court rejected the reasoning that courts frequently cite when insulating cruise ships from liability for negligence committed in treating passengers: the physician's business with the patient is not the ship owner's business.<sup>122</sup> Instead, the Court found that the physician was performing the ship owner's business because he was discharging a duty the ship owner owed to the crewmembers.<sup>123</sup> The physician was acting in the ship owner's employ such that imposing vicarious liability was warranted.<sup>124</sup>

Thus, when an onboard physician discharges a ship owner's duty, the physician is performing the ship owner's business. More importantly, the ship owner has sufficient control over an onboard physician to establish vicarious liability under the Jones Act.

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118. *Rogers*, 352 U.S. at 506; *see, e.g., Comeaux v. T.L. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983) ("The 'producing cause' FELA standard, used for Jones Act negligence facilitates proof by the employee, incorporating any cause regardless of immediacy. Plaintiff's burden of proving such cause is 'featherweight.'"); *see also Peltz, supra* note 18 (stating that the standard of causation is greatly reduced compared to land-based theories of proximate cause).

119. *See, e.g., Irwin v. U.S.*, 111 F. Supp. 912, 918 (E.D.N.Y. 1953) *aff'd sub nom. Irwin v. U.S.*, F.2d 774 (2d Cir. 1956); *see also Compagno, supra* note 36 at 390 ("[A] ship's doctor . . . is entitled to the traditional seaman's remedies under the general maritime law and the Jones Act.").

120. *See De Zon v. Am. President Lines*, 318 U.S. 660, 672 (1943) (Black, J., dissenting) (stating that under the Jones Act, a ship owner is liable for the onboard physician's negligence toward crewmembers); *see, e.g., Fitzgerald v. A. L. Burbank & Co.*, 451 F.2d 670, 679 (2d Cir 1971); *Central Gulf S.S. Corp. v. Sambula*, 405 F.2d 291, 302 (5th Cir. 1968).

121. *See De Zon*, 318 U.S. at 665-66.

122. *See id.* at 666 ("Immunity 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.").

123. *See id.* at 668 ("The doctor in treating the seaman was engaged in the shipowner's business.").

124. *See id.*

### B. Cruise Vessel Security and Safety Act of 2010

The Cruise Vessel Security and Safety Act of 2010 (CVSSA) was enacted to “ensure the security and safety of passengers and crew on cruise vessels . . . .”<sup>125</sup> Notably, the statute explicitly states that it is intended to protect both passengers and crewmembers.<sup>126</sup>

One of the catalysts for the CVSSA was the disappearance of an American passenger – George Smith IV – during a cruise.<sup>127</sup> Congress observed that the current nature of cruise ship travel requires that legislation be promulgated to protect passengers onboard cruise ships because they have an inadequate appreciation of their vulnerability to harm while onboard, specifically in regard to violent and sexual assaults.<sup>128</sup> Congress determined that the statute applies to vessels that carry and board at least 250 passengers, are engaged in a voyage that embarks or disembarks passengers in the United States, and are not engaged on a coastwise voyage.<sup>129</sup> Moreover, because sexual violence is one of the most frequent offenses that occur on cruise ships, Congress promulgated specific and expansive

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125. Cruise Vessel Security and Safety Act of 2010, Pub. L. No. 111-207, 124 Stat. 2243 (codified at 46 U.S.C. § 3507 (2012)).

126. *Id.*

127. Siobhan Morrissey, *Cruising Toward Calamity: For Vacationers Encountering Trouble on Board, U.S. Laws May Provide Little Help*, A.B.A. J., Nov. 1, 2013, [http://www.abajournal.com/magazine/article/for\\_vacationers\\_encountering\\_trouble\\_on\\_cruise\\_ships\\_u.s.\\_laws/](http://www.abajournal.com/magazine/article/for_vacationers_encountering_trouble_on_cruise_ships_u.s._laws/) (stating the Cruise Vessel Security and Safety Act was passed in the wake of the George Smith’s disappearance); see also John Sullivan, *Metro Briefing Connecticut: Greenwich: Blood Found in Missing Man’s Ship Cabin*, N.Y. TIMES, July 13, 2005, <http://query.nytimes.com/gst/fullpage.html?res=940DEFDD103DF930A25754C0A9639C8B63> (noting that bloodstains were found in the cabin of missing man George Allen Smith IV, who disappeared during a cruise).

128. Congress made the following relevant findings:

(3) Passengers on cruise vessels have an inadequate appreciation of their potential vulnerability to crime while on ocean voyages, and those who may be victimized lack the information they need to understand their legal rights or to know whom to contact for help in the immediate aftermath of the crime.

(4) Sexual violence, the disappearance of passengers from vessels on the high seas, and other serious crimes have occurred during luxury cruises.

(5) Over the last 5 years, sexual assault and physical assaults on cruise vessels were the leading crimes investigated by the Federal Bureau of Investigation with regard to cruise vessel incidents. . . .

(8) . . . cruise line companies do not make comprehensive, crime-related data readily available to the public . . . .

(11) Most cruise vessels that operate into and out of United States ports are registered under the laws of another country.

Cruise Vessel Security and Safety Act § 2.

129. 46 U.S.C. §§ 3507(k)(1)(A)-(D) (2012).

regulations designed to maintain adequate medications, facilities, and personnel necessary to treat victims and preserve evidence.<sup>130</sup>

One of the most significant features of the statute is that it requires ship owners to provide “medical staff” capable of providing “assistance” to victims of sexual assault.<sup>131</sup> The CVSSA explicitly directs the “owner of a vessel” to “provide medical care.”<sup>132</sup> The statute also requires the relevant medical personnel to meet specific qualifications.<sup>133</sup> Additionally, the CVSSA mandates that the ship owner make information available to the passenger regarding onboard medical personnel and twenty-four hour contact information.<sup>134</sup> The “security guide” is required to be publicized on the ship owner’s website.<sup>135</sup> Moreover, the statute mandates that ship owners “make available on the vessel at all times medical staff.”<sup>136</sup> Thus, under the CVSSA, the ship owner owes affirmative and ongoing duties to passengers that cannot be discharged through an intermediary. Importantly, the ship owner no longer provides an

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130. *See id.* § 3507(d) (setting standards to which vessels must adhere regarding sexual assault cases).

131. Pursuant to the Cruise Vessel Security and Safety Act, a vessel must: “(3) make available on the vessel at all times medical staff . . .” *Id.* § 3507(d)(3).

132. *Id.* § 3507(d)(2).

133. Pursuant to the Cruise Vessel Security and Safety Act, medical personnel must:

(A) possess[] a current physician's or registered nurse's license and –

(i) ha[ve] at least 3 years of post-graduate or post-registration clinical practice in general and emergency medicine; or

(ii) hold[] board certification in emergency medicine, family practice medicine, or internal medicine;

(B) [be] able to provide assistance in the event of an alleged sexual assault, has received training in conducting forensic sexual assault examination, and is able to promptly perform such an examination upon request and provide proper medical treatment of a victim, including administration of anti-retroviral medications and other medications that may prevent the transmission of human immunodeficiency virus and other sexually transmitted diseases; and

(C) meet[] guidelines established by the American College of Emergency Physicians relating to the treatment and care of victims of sexual assault.

*Id.* § 3507(d)(3)(A)–(C).

134. The CVSSA requires:

(1) The owner of a vessel . . . shall:

(A) have available for each passenger a guide (referred to in this subsection as the “security guide”) . . . which –

(i) provides a description of medical and security personnel designated on board to prevent and respond to criminal and medical situations with 24 hour contact instructions.”

*Id.* §3507(c)(1)(A)(i).

135. *Id.* § 3507(c)(1)(C).

136. *Id.* § 3507(d)(3).

onboard physician for the passengers' convenience; the ship owner is statutorily mandated to provide medical personnel.

C. 46 U.S.C. § 30509

In addition to the substantive statutes that provide remedies for harmed passengers and impose requirements on ship owners, other statutes exist that limit a ship owner's ability to disclaim liability.<sup>137</sup> Most notable is the restriction on a ship owner's use of a contract provision disclaiming liability for "personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents."<sup>138</sup> If any such provision is included, it is void.<sup>139</sup> The statute's purpose is to prevent ship owners from being unduly insulated from liability for their agents' negligence.<sup>140</sup> The statute also highlights the importance of the employee-independent contractor distinction: a court will likely enforce a contract provision disclaiming liability for an independent contractor's negligence, but disclaiming liability for an employee's negligence is against public policy.<sup>141</sup>

V. THE SUPREME COURT'S IMPACT: MODIFYING MARITIME PRINCIPLES WHEN COMPELLED BY CONTEMPORARY REALITIES OR INEQUITABLE OUTCOMES

Admiralty law is a unique body of law; it is elaborate federal common law and subject to adjudication by different courts with varying levels of available remedies.<sup>142</sup> Therefore, any court that adjudicates an admiralty dispute is cognizant of the need for

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137. See, e.g., 46 U.S.C. § 30509(a) (2012).

138. *Id.* § 30509(a)(1)(A).

139. *Id.* § 30509(a)(2).

140. See *In re Royal Caribbean Cruises Ltd.*, 991 F. Supp. 2d 1171, 1178 (S.D. Fla. Feb. 4, 2013) ("Put another way, Royal's argument is premised on a purposed policy rational behind § 30509—namely that common carriers should not be able to secure immunity from liability for their own negligence in providing *transportation and other essential functions of common carriers.*") (citations omitted).

141. See, e.g., *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1316 (S.D. Fla. 2011); see also *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1367 (5th Cir. 1988) (summarizing the trial court's position before affirming as conceding that "[i]n a normal, non-admiralty situation . . . public policy would nullify the clause . . . . But the admiralty context, . . . is sufficiently different to change the result here.").

142. See *supra* Part II.

uniformity and consistency.<sup>143</sup> A state court exercising its admiralty jurisdiction may disseminate novel decisions where there is no controlling and applicable general maritime law, but the court is nonetheless constrained to adhere to established general maritime precedent because it lacks the authority to make substantive changes in the law.<sup>144</sup> A federal court may be reluctant to make a necessary change because it believes a holding that modifies established maritime law should come from the court with which the Framers granted original admiralty jurisdiction: the United States Supreme Court.<sup>145</sup> Slavish devotion to the revered principal of uniformity may perpetuate inequities in maritime jurisprudence and adverse consequences may be bolstered in a contemporary society.<sup>146</sup> However, as often as courts defer to uniformity in maritime disputes, deference is not absolute and circumstances exist that compel change to ancient and outdated doctrines.<sup>147</sup> The analysis the Supreme Court has used to modify admiralty doctrines in the past provides a useful framework for examining the validity of current maritime canons.

#### A. *Moragne v. States Marine Lines*

One of the most noteworthy cases in which the Supreme Court modified an ancient maritime doctrine is *Moragne v. States Marine*

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143. See *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 902 (11th Cir. 2004) (“[T]he purpose behind the exercise of this Court’s admiralty jurisdiction is to provide for the uniform application of general maritime law.”).

144. See, e.g., *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007).

145. See *Reliable Transfer Co. v. United States*, 497 F.2d 1036, 1038 (2d Cir. 1974), *overruled by* *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975) (“[W]e also are not insensitive to the considerations rooted in strong public policy that have impelled our Court as one of the inferior federal courts for many years to abstain from attempting to change the law in areas such as this, preferring to leave doctrinal development to the Supreme Court or to await appropriate action by Congress.”); see also U.S. CONST. art. III, § 2, cl. 2 (“The judicial Power shall extend to . . . all Cases of admiralty and maritime Jurisdiction.”). Although the Constitution allowed for Congress to create additional federal courts as may be necessary, the Constitution established only the Supreme Court. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”). Thus, the Framers’ grant of admiralty jurisdiction extended only to the Supreme Court.

146. See *Reliable Transfer Co.*, 421 U.S. at 410 (“The rule . . . has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit . . . The reasons that originally led to the Court’s adoption of the rule have long since disappeared.”).

147. See *id.* at 409; see also *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 375 (1970) *superseded by statute*, Longshore and Harbor Workers’ Compensation Act, Pub.L. 98-426, 44 Stat. 1424 *as stated in* *Garris v. Norfolk Shipbuilding & Drydock Corp.*, 210 F.3d 209 (4th Cir. 2000).

*Lines, Inc.*<sup>148</sup> In *Moragne*, the plaintiff brought a wrongful death claim for a death that occurred in state territorial waters based on an unseaworthiness theory.<sup>149</sup> The relevant state statute governed because the death occurred in state territorial waters. The statute offered a cause of action for wrongful death, but not based on an unseaworthiness theory.<sup>150</sup> The issue before the Court was whether general maritime law furnishes a cause of action for wrongful death.<sup>151</sup> The controlling rule—as articulated nearly eighty-five years prior—was that no action for wrongful death can be maintained under American maritime law without a statute creating such a right.<sup>152</sup> The Court observed that significant developments in American maritime law undermined the applicability of the previous doctrine.<sup>153</sup> Specifically pertinent were state legislatures promulgating wrongful death statutes and Congress enacting the Jones Act and the Death on the High Seas Act (DOHSA).<sup>154</sup> These legislative changes informed the relevant analysis:

[T]he work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases.<sup>155</sup>

Therefore, the appropriate inquiry was whether Congress's collateral legislation in the admiralty sphere that created a cause of action for wrongful death foreclosed recovery for wrongful death under general maritime law.<sup>156</sup> The Court analyzed the Jones Act,

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148. 398 U.S. 375 (1970).

149. *See id.* at 376.

150. *Id.* at 377 (recognizing the Florida Supreme Court answered the question whether the relevant statute contemplated recovery for wrongful death based on unseaworthiness in the negative).

151. *See id.* at 375–76. The applicable Florida wrongful death statute did not encompass wrongful death based upon the doctrine of unseaworthiness. *See Garris*, 210 F.3d at 213.

152. *See Moragne*, 398 U.S. at 377; *see also* *The Harrisburg*, 119 U.S. 199, 199 (1886), *overruled by Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

153. *See Moragne*, 398 U.S. at 388.

154. *See id.* at 390.

155. *See id.* at 393; *see also* Brief for the United States as Amicus Curiae at 15, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970) (No. 175) (“That no public policy presently exists for denying a remedy for wrongful death is illustrated by the universal disapproval by legislatures of the common-law rule preventing recovery for wrongful death.”).

156. *See Moragne*, 398 U.S. at 393.



DOHSA, and state statutes to determine whether their enactment should be interpreted as foreclosing a general maritime law wrongful death claim.<sup>157</sup>

The Court identified three anomalies that would be perpetuated if the current legal regime were maintained.<sup>158</sup> First, the same negligent conduct in identical circumstances that violates federal law produces liability only if the victim is injured, but not if killed.<sup>159</sup> Because DOHSA is not available within three miles of shore, a claimant's only available remedies are those furnished by relevant state statutes.<sup>160</sup> If the applicable state statute does not contemplate a wrongful death claim, no cause of action is available; if the claimant is only injured, a negligence cause of action is available.<sup>161</sup> Second, identical fatal breaches of the duty to furnish a seaworthy ship produce different results depending on where the death occurs.<sup>162</sup> If the death occurs outside state waters, DOHSA governs and a wrongful death cause of action may be predicated on an unseaworthiness theory.<sup>163</sup> If the death occurs within state waters, DOHSA is not applicable; thus, there is no remedy available to the victim if there is no state cause of action that contemplates an unseaworthiness theory.<sup>164</sup> Third, a seaman—a member of the ship's company—who is covered by the Jones Act has no available remedy for death due to unseaworthiness within territorial waters; however, a longshoreman,<sup>165</sup> "to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, [would] have such a remedy when allowed by a state statute."<sup>166</sup> Moreover, the Court recognized an evolution in claimants' preferred means of recovery: claimants

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157. *See id.* at 394.

158. *See id.* at 395.

159. *See id.*

160. *See* 46 U.S.C. § 30302 (2012) ("When the death of an individual is caused by wrongful act . . . on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible.").

161. *See Moragne*, 398 U.S. at 395.

162. *Id.*

163. *Id.*

164. *Id.*

165. A longshoreman is a person who loads and unloads ships at a seaport. *Longshoreman Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/longshoreman> (last visited Nov. 16, 2014).

166. *Moragne*, 398 U.S. at 395-96.

avored a negligence theory over an unseaworthiness theory.<sup>167</sup> The Court identified that the congressional intent was to ensure the availability of a remedy for seamen—which was historically provided by state statutes—for deaths occurring in territorial waters and not to foreclose recovery for wrongful deaths that occurred in state territorial waters.<sup>168</sup>

Thus, the Court recognized the governing rule created unjustifiable anomalies in the present maritime law such that “it should no longer be followed.”<sup>169</sup> Moreover, recognition of a cause of action for unseaworthiness in general maritime law promoted “uniformity in the exercise of admiralty jurisdiction”<sup>170</sup> and furthered Congress’s purpose to provide a remedy to seamen as evidenced by collateral legislation in the admiralty sphere.

### B. *United States v. Reliable Transfer Co., Inc.*

Another notable example of the Supreme Court making a substantial change to an established general maritime law is *United States v. Reliable Transfer Co.*<sup>171</sup> The issue before the Court was whether property damage must be divided equally in cases of collision between vessels when both vessels were found to have contributed some degree of fault, regardless of the relative degree of fault.<sup>172</sup> The Court began its analysis by noting that the current rule has been in existence for over 115 years.<sup>173</sup> At the time of its adoption, the rule seemed the “most just and equitable and . . . best (tended) to induce care and vigilance on both sides, in the navigation.”<sup>174</sup> The original rule was often justified because it was a method of apportioning

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167. *See id.* at 399 (“The unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act.”); *see also* GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 315 (1957) (“[When DOHSA was passed] the seaman’s right to recover damages for injuries caused by the unseaworthiness of the ship was an obscure and relatively little used remedy.”).

168. *See Moragne*, 398 U.S. at 397–98 (“[Congress’s] failure to extend the [DOHSA] to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the [DOHSA].”) (quoting *Lindgren v. United States*, 281 U.S. 38, 44 (1930)).

169. *Id.* at 378.

170. *Id.* at 401 (quoting *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 155 (1964)).

171. 421 U.S. 397 (1975).

172. *Id.* at 397.

173. *Id.* at 402.

174. *Id.* at 402–03 (quoting *The Schooner Catherine v. Dickinson*, 58 U.S. 170, 178 (1854), *abrogated by United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975)).

damages when it was difficult to determine which party was more at fault.<sup>175</sup> Although this argument has merit, the broad application of a crude and overinclusive rule results in inequitable and disproportionate outcomes because there are instances where a party that is less at fault pays as if it were fully at fault.<sup>176</sup>

Such outcomes cannot be tolerated when there are alternatives available. The Court stated that “[t]here can be no question that subsequent history and experience have conspicuously eroded the rule’s foundations.”<sup>177</sup> The Court noted as persuasive the fact that lower courts were following the current rule “only grudgingly.”<sup>178</sup> Even more significant to the Court’s reasoning was that some courts were ignoring the rule altogether.<sup>179</sup> The Court rejected the argument that this was an issue that should only be resolved by Congress instead of the judiciary.<sup>180</sup> Indeed, the Court stated that “[n]o statutory or judicial precept precludes a change in the rule,”<sup>181</sup> and such a change would only bring maritime recovery for property damage in line with maritime law regarding personal injury recovery. Additionally, the Court cited the reasoning of a leading admiralty law treatise in support of its proposition:

[T]here is no reason why the Supreme Court cannot at this late date ‘confess error’ and [change the rule] without Congressional action. The resolution to follow [the old rule], taken 120 years ago, rested not on overwhelming authority but on judgments of facts and of fairness which may have been tenable then but are hardly so today. . . . The regard for ‘settled expectation’ which is the heart-reason of . . . stare decisis . . . can have no relevance in respect to such a rule; the concept of ‘settled expectation’ would be reduced to an absurdity were it to be applied to a rule of damages for negligent collision. The abrogation of the rule would not, it

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175. *Reliable Transfer Co.*, 421 U.S. at 403.

176. *Id.* at 407.

177. *Id.* at 403.

178. *Id.* at 404; *see, e.g.*, *Oriental Trading & Transp. Co. v. Gulf Oil Corp.*, 173 F.2d 108, 111 (2d Cir. 1949) (“[W]e have no power to divest ourselves of this vestigial relic; we can only go so far as to close our eyes to doubtful delinquencies.”).

179. *Reliable Transfer Co.*, 421 U.S. at 405.

180. *Id.* at 409 (“[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and ‘Congress had largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.’” (quoting *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963))).

181. *Id.* at 410.

seems, produce any disharmony with other branches of the maritime law, general or statutory.<sup>182</sup>

In addition, the Court stated:

The rule of divided damages in admiralty has continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. The reasons that originally led to the Court's adoption of the rule have long since disappeared. The rule has been repeatedly criticized by experienced federal judges who have correctly pointed out that the result it works has too often been precisely the opposite of what the Court sought to achieve.<sup>183</sup>

The Court concluded that the need for uniformity in over 100 years of admiralty jurisprudence was outweighed by the inequitable outcomes resulting from the application of this rule.<sup>184</sup>

Thus, the Supreme Court demonstrated that persistent duration does not insulate a doctrine from revision. In some cases, a doctrine's persistence may be due to blind adherence to precedent and uniformity instead of merit. Although uniformity is useful and revered in maritime jurisprudence, it can also preserve doctrines that are no longer supported by legitimate legal foundations. Moreover, there is no justification for crude and overinclusive rules that produce inequitable results.

## VI. ANALYSIS: A CHANGE IN THE TIDE

The general maritime rule that ship owners are not vicariously liable for onboard physicians' negligence toward passengers needs revision. The discrepancy between the old rule and current realities is glaring in the cruise ship context.<sup>185</sup> The relationship between the ship owner and the physician has evolved significantly from the era when physicians were maintained solely for the passengers' benefit. The original justifications for the archaic rule are no longer applicable in a contemporary society and require reconciliation with modern realities: much like the principles the Supreme Court corrected in *Moragne* and *Reliable Transfer*.<sup>186</sup> Moreover, the uniformity that is so

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182. *Id.* (quoting GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 531 (2d ed. 1975)).

183. *Id.* at 410-11.

184. *Id.*

185. See Tsavaris, *supra* note 12, at 158-59.

186. See generally Peltz, *supra* note 18.

vigilantly pursued in maritime law does not exist in a meaningful respect under the current regime: the present system creates conflicts within the case law, inconsistencies in the treatment of identical harms, and incongruities with other legal fields. Finally, the current system—when considered in conjunction with the extensive mechanisms ship owners use to insulate themselves from liability—creates a scheme that perpetuates inequities and unfairness for consumers.

*A. How Close is Close Enough: The Ship Owner-Physician Relationship*

The physician is in many respects categorized as an employee, agent, or servant of the ship owner except in one critical classification, vicarious tort liability.<sup>187</sup> The physician is a staff officer onboard the vessel.<sup>188</sup> As such, he “signs the articles<sup>189</sup> as a member of the ship’s company.”<sup>190</sup> In doing so, the physician submits to the master of the vessel’s commands and any discipline imposed on him by general maritime law.<sup>191</sup> For purposes of personal injury and wage relief, the physician is considered a seaman.<sup>192</sup> The physician is entitled to rights and remedies that are furnished exclusively to crewmembers: such as the Jones Act, a seaworthy ship, and maintenance and cure.<sup>193</sup> In addition, a ship owner often pays the physician a salary, provides the physician with insurance, indemnifies the physician up to a certain sum, and—if litigation arises—provides the legal fees necessary to defend the physician.<sup>194</sup> Moreover, a ship owner receives a substantial

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187. See, e.g., *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 471 (Fla. 2007).

188. See 46 U.S.C. §§ 7101(f), 8302(c) (2012); see also ROBERT FORCE & MARTIN J. NORRIS, 1 THE LAW OF MARITIME PERSONAL INJURIES § 9:24 (5th ed. 2013).

189. “[A] type of contract by which sailors agree to the conditions, payment, etc., for the ship in which they are going to work.” *Ship’s Articles*, DICTIONARY.COM, <http://dictionary.reference.com/browse/ship's+articles> (last visited Nov. 16, 2014).

190. FORCE & NORRIS, *supra* note 188, at § 9:24.

191. See *id.*

192. See *id.*

193. See *id.* (identifying remedies that are available to the onboard physician that are offered only to crewmembers).

194. See, e.g., Pearson, *supra* note 13, at 314–15 (providing common contract provisions used by cruise ships); Peltz, *supra* note 18, at 28 (“Typically, the ship’s doctor receives a monthly salary, although he or she may also be paid a bonus depending upon the amount of passenger billings generated.”); Tsavaris, *supra* note 12, at 166–67.

benefit from the presence of an onboard physician.<sup>195</sup> The physician's presence likely discharges the ship owner's nondelegable duty of care to the crew.<sup>196</sup> The recent enactment of the CVSSA and the duty it imposes on ship owners makes the physician's presence exceptionally advantageous because a qualified physician likely discharges a ship owner's federal statutory duty owed to crewmembers.<sup>197</sup> Additionally, the ship owner owes a common law duty of reasonable care under the circumstances to passengers that the presence of an onboard physician likely discharges, provided that the doctor is non-negligently hired.<sup>198</sup> Finally, the ship owner receives substantial commercial value from the physician's presence because the ship owner can advertise the physician's services, which may be a decisive factor for discerning consumers.<sup>199</sup> In creating information disclosure requirements as part of the CVSSA, it suggests Congress recognizes that consumers use data from the mandatory disclosure requirements to make informed travel decisions.<sup>200</sup> Therefore, the CVSSA implicitly acknowledges that the presence—and effectiveness—of onboard medical personnel have an impact on consumers and, consequently, a ship owner's business.

Thus, the presence of an onboard physician discharges the ship owner's expensive and inconvenient duty to crewmembers and passengers and gives the vessel competitive advantages over similarly situated vessels. The onboard physician appears similar to the ship owner's employee, or agent. In most respects, the physician is treated identically to the ship owner's employee. The notable exception is when imputing tort liability to the ship owner. For

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195. See, e.g., *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 91 (Ill. App. Ct. 2005) (“[C]ruise lines benefit from carrying on-board physicians.”).

196. See *Tsavaris*, *supra* note 12, at 176 (“[Having a physician onboard] efficiently and economically fulfills the shipowner's nondelegable duty of care to the crew under the Jones Act.”).

197. See 46 U.S.C. § 3507(d)(3) (2012) (“The owner of a vessel . . . shall make available on the vessel at all times medical staff who have undergone a credentialing process . . .”).

198. See *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988) (“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.”).

199. See, e.g., *Di Bonaventure v. Home Lines, Inc.*, 536 F. Supp. 100, 102 (E.D. Pa. 1982) (medical services of the ship were advertised in travel brochures); *Suter v. Carnival Corp.*, No. 07-20298-CIV, 2007 WL 4662144, at \*1 (S.D. Fla. May 14, 2007) (“Carnival advertised to the public the availability of a competent doctor aboard the *Spirit* . . .”); see also *Pearson*, *supra* note 13, at 295–96 (“For some, the presence of medical care could be the deciding factor when choosing a cruise line for vacation.”).

200. See 46 U.S.C. § 3507(g)(4).

purposes of vicarious liability, a ship owner is not liable for a physician's negligence. Supreme Court or congressional intervention is necessary to remedy this inapposite regime.

*B. The Old Rule Won't Float: The Classic Justifications Are Not Significant in a Modern Society*

The two classic rationales for the old rule – the ship owner's lack of expertise and control to supervise the doctor in the performance of his duties, and the lack of power to intrude into the doctor's relationship with the patient – are no longer sufficient to justify a sweeping rule that insulates cruise ship owners from vicarious liability when an onboard physician acts negligently toward passengers.<sup>201</sup> Both rationales are premised on the concept of control, which is necessary for respondeat superior liability. Thus, there is some overlap in the analysis: some factors that cut against the first rationale may also cut against the second rationale.<sup>202</sup> In the sense that maritime law requires control to impose vicarious liability, it is consistent with agency law. However, the consistency with agency deteriorates on further examination.

The crux of the control rationale as articulated in the *Barbetta* line of cases is that it is the passenger, not the ship owner, who controls the relationship with the physician.<sup>203</sup> However, this assertion fails to grasp the reality of the relationship between the ship owner, the physician, and the passengers. If a passenger becomes injured or ill, it may be true that the passenger determines to what extent he will use the physician's services. However, if the passenger avails himself of the onboard medical service, there is no meaningful choice available regarding the physician selection.<sup>204</sup> The physician available is the physician the ship owner has provided. Thus, the ship owner exercises significant control over the medical choices available to the passenger while aboard the vessel.

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201. See generally Peltz, *supra* note 18.

202. See RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958) ("A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."); RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) ("Respondeat superior is inapplicable when a principal does not have the right to control the actions of the agent.")

203. See *Barbetta*, 848 F.2d at 1369 ("The work which the physician or surgeon does . . . is under the control of the passengers themselves.") (quoting *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 267 (Mass. 1891)).

204. See Pearson, *supra* note 13, at 317.

If the injured passenger foregoes treatment from the onboard physician, the alternative may require that the passenger be removed from the ship, that the ship make for port, or that the passenger receive no treatment at all. Any or all of the alternatives may be fatal to an injured or sick passenger. In some circumstances, removal may be impracticable because of the distance to the nearest port, the unavailability of air removal, or the severity of the ailment.<sup>205</sup> In such circumstances, the only option for the passenger is to avail him or herself of the physician the ship owner has provided.<sup>206</sup> The passenger is dependent on the physician the ship owner has chosen.<sup>207</sup> There is no meaningful choice available for the passenger because the ship owner has a “de facto monopoly on medical services available while at sea.”<sup>208</sup>

Even if the assertion that the ship owner cannot control the relationship between the doctor and the passenger is endorsed, the current rule remains problematic. Because there is no opportunity for the passenger to choose a physician other than the individual the ship owner has provided, the passenger may be compelled to accept the only care available, even if it is inadequate care.<sup>209</sup> In such cases, the alleged agreement between the physician and the passenger looks strikingly similar to an adhesion contract, where one party must accept the agreement offered by the other party or accept nothing.<sup>210</sup>

In *Barbetta*, the court criticized the *Nietes* decision as “confus[ing] the employer’s right to control its employees’ general actions with its ability to control those specific actions which could subject the employer to liability.”<sup>211</sup> However, the Restatement of Law on Agency and vicarious liability jurisprudence in other fields suggest the distinction is not as determinative as the *Barbetta* court proposes.<sup>212</sup> The Restatement defines a “master” as one who “employs an agent to perform service in his affairs and who controls

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205. *Id.* at 311.

206. *Id.*

207. *Id.*

208. Compagno, *supra* note 36, at 389.

209. *See* Herschaft, *supra* note 33, at 589.

210. *See id.*; *see also* Wheelock v. Sport Kites, Inc., 839 F. Supp. 730, 735 (D. Haw. 1993) (“[An adhesion contract] is offered on a ‘take this or nothing’ basis.” (quoting Leong v. Kaiser Found. Hosps., 788 P.2d 164, 168 (Haw. 1990))).

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

212. *See* RESTATEMENT (SECOND) OF AGENCY § 2(1) (1958); *see, e.g.*, *Drexel v. Union Prescription Ctrs., Inc.*, 582 F.2d 781, 785 (3d Cir. 1978) (“Actual control of the manner of work is not essential; rather, it is the right to control which is determinative.”).



or has the right to control the physical conduct of the other in the performance of the service.”<sup>213</sup> The Restatement defines a “servant” as one who “is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.”<sup>214</sup> Moreover, the Restatement distinguishes an “independent contractor” from a “servant” because the independent contractor “is not controlled by the [master] nor subject to the [master’s] right to control.”<sup>215</sup> In every relevant definition, the Restatement defines the relationship using actual control or the right to control.<sup>216</sup> In addition, vicarious liability case law in different fields supports the Restatement position that “it is the right to control, not the actual control that may be determinative.”<sup>217</sup> Thus, it appears the distinction the *Barbetta* court makes between control and the right to control is not dispositive and does not diminish the *Nietes* reasoning.

The *De Zon* decision stands in stark contrast to the asserted “lack of control” rationale that currently insulates ship owners from vicarious liability.<sup>218</sup> In *De Zon* – addressing the question whether a ship owner can be vicariously liable for the medical malpractice of a physician when treating crewmen – the Supreme Court explicitly stated that “[i]mmunity [from vicarious liability] 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>219</sup> There are differences between the identified populations’ (crewmembers and passengers) relationship to the ship owner; however, the relationship between the ship owner and the doctor is nearly indistinguishable in both circumstances. In both cases the ship owner retains the doctor and simultaneously discharges a duty (either to the passenger or the crewmember), even if the standard of the duty owed is different. In both cases the presence of the physician benefits the ship owner. In

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213. RESTATEMENT (SECOND) OF AGENCY § 2(1) (1958).

214. *Id.* § 2(2).

215. *Id.* § 2(3).

216. The most current edition of the Restatement also incorporates this definition. RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) (“Respondeat superior is inapplicable when a principal does not have the right to control the actions of the agent.”).

217. *Villazon v. Prudential Health Care Plan, Inc.*, 843 So. 2d 842, 846 (Fla. 2003) (holding HMO vicariously liable for negligence of independent contractor physicians because contractual status does not preclude a finding of agency).

218. *See De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660, 668 (1943).

219. *Id.* at 666.

both cases the ship owner lacks the control to dictate the degree to which the harmed individual pursues the physician's service. However, the ship owner is only liable to the victim in one scenario: when the physician commits negligence toward a crewmember.

The second rationale buttressing the *Barbetta* reasoning—ship owners do not have the expertise to evaluate and supervise physicians—was certainly valid at one point. However, as the *Nietes* court suggested in 1959, developments in technology may cast doubt on that broad declaration.<sup>220</sup> Moreover, it is suspect that a ship owner is charged with having the expertise to non-negligently hire a physician capable of treating passengers and crewmembers, but not to evaluate the physician's conduct in carrying out his duties. The CVSSA provides qualifications that an onboard physician must meet.<sup>221</sup> A ship owner is unlikely to be liable for negligent hiring if he hires a physician that meets the enumerated qualifications. Thus, ship owners have a predictable and sound method to avoid negligent hiring liability, foreclosing another avenue of recovery for passengers. Additionally, the CVSSA requires the ship owner to maintain supplies, medications, equipment, and materials necessary to perform certain functions.<sup>222</sup> According to the *Barbetta* rationale, a ship owner is charged with accurately hiring a physician who is capable of performing particular functions, required to provide the materials necessary for the physician to perform those functions, yet is incapable of evaluating the physician performing those functions.

### C. *The Implications of Collateral Legislation in the Admiralty Sphere*

#### 1. *The Jones Act*

The Jones Act's existence and application undermine the ancient admiralty rule's foundation. Notably, the employee-independent contractor label notwithstanding, the Jones Act treats physicians as crewmembers under the statute and provides the same remedies and

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220. See *Nietes v. Am. President Lines, Ltd.*, 188 F. Supp. 219, 220 (N.D. Cal. So. Div. 1959) (“We appreciate the difficulty inherent in such an employment situation, but we think that the distinction no longer provides a realistic basis for the determination of liability in our modern, highly organized industrial society.”).

221. 46 U.S.C. § 3507(d)(3) (2012).

222. See *id.* § 3507(d)(1)–(2).

theories of recovery as are furnished to the ship's crew.<sup>223</sup> Even if a physician is classified as an independent contractor, the physician is entitled to the exact same remedies as an employee.<sup>224</sup> The physician is entitled to employee remedies without imputing employee liability to the ship owner. This is one anomaly that the antiquated maritime rule perpetuates. An admiralty rule that promotes unjustifiable anomalies cannot be sustained.<sup>225</sup> In previous instances, the Supreme Court has rejected rules that perpetuate substantial anomalies. The need for Supreme Court intervention is glaring here because of collateral federal legislation in the cruise ship sphere. That legislation explicitly undermines the traditional rationale for the antiquated maritime rule. The magnitude of the cruise ship industry compels a Supreme Court response because the current regime imposes substantial risks on thousands of unwitting consumers every year.

Another demonstrable discrepancy apparent in the Jones Act's application to crewmembers and the general maritime rule's application to passengers is the assumption that a ship owner has sufficient control over a physician to impute the ship owner with liability for the physician's negligence when treating a crewmember, but a ship owner lacks the same control over the physician to impute the ship owner with liability for the physician's negligence when treating a passenger. The *De Zon* decision highlights this inconsistency. The Court explicitly rejected the rationale that the doctor and the patient's business is not the ship owner's business.<sup>226</sup> Instead, the Court stated that the physician was in fact performing the ship owner's business when treating the crewmember because the physician was discharging the ship owner's duty.<sup>227</sup> Moreover, "in this case, the physician was not in his own or the seaman's control; he was an employee and as such subject to the ship discipline and the master's orders."<sup>228</sup> The Court relied on the ship owner's control over the physician, and the relationship between the ship owner and

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223. See *Irwin v. U.S.*, 111 F. Supp. 912, 918 (E.D.N.Y. 1953); see also *Compagno*, *supra* note 36, at 390 ("[A] ship's doctor . . . is entitled to the traditional seaman's remedies under the general maritime law and the Jones Act.").

224. See *FORCE & NORRIS*, *supra* note 188, at § 9:24.

225. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 378 (1970).

226. See *De Zon v. Am. President Lines, Ltd.*, 318 U.S. 660, 666 (1943) (Black, J., dissenting) ("Immunity 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.").

227. See *id.* at 668.

228. *Id.*

physician, to sustain its holding that the ship owner was vicariously liable for the physician's negligent treatment of a crewmember.<sup>229</sup> Because the Supreme Court stated that a ship owner has sufficient control over the physician when treating crewmembers to establish vicarious liability under the Jones Act, the traditional justification that the ship owner has insufficient control over the physician when treating passengers to impute vicarious liability under the classic maritime rule is severely undermined.

The results perpetuated by the two inconsistent doctrines (the Jones Act and the classic maritime rule) are startling. Based on the current state of admiralty law, a circumstance could exist in which a crewmember and a passenger are exposed to identical negligence by the same onboard physician while aboard the same vessel, yet are not afforded identical rights.<sup>230</sup> The Supreme Court's framework in *Moragne* strongly advises against a doctrine that promotes such severe anomalies. The *Reliable Transfer* decision advises against maintaining a legal regime that perpetuates inequitable results. The current regime is a blend of both horrors: it promotes anomalies by offering different theories of recovery for different populations exposed to identical harms and endorses inequitable outcomes by condoning a system where legitimate theories of consumer recovery are barred to protect a colossal global industry. The Supreme Court has the authority to modify legal principles and promulgate the law of the land.<sup>231</sup> Moreover, the Supreme Court is specifically charged with adjudicating admiralty cases.<sup>232</sup> The Supreme Court has previously rejected rules that create substantial anomalies or inequitable outcomes and should do so here.

## 2. CVSSA

The CVSSA's enactment casts serious doubt on the legitimacy of the ancient admiralty doctrine that ship owners are not vicariously liable for onboard physicians' negligence in treating passengers. Notably, and in stark contrast to the inequitable results that occur from the application of the general rule and the Jones Act, the statute explicitly states that it is intended to protect both passengers and

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229. *Id.*

230. See Pearson, *supra* note 13, at 325-26.

231. See U.S. CONST. art. III.

232. See U.S. CONST. art. III, § 2, cl. 1.

crewmembers.<sup>233</sup> As the *Carlisle* court stated, legislation in the relevant sphere may be an indication that uniformity is necessary.<sup>234</sup> Thus, when a specific harm faces different populations, Congress has demonstrated that the same recovery theories should be available to both passengers and crewmembers, particularly when both populations are similarly situated and susceptible to identical harm.

The statute requires that ship owners “make available on the vessel at all times medical staff,” which suggests that it is the ship owner’s duty to provide medical staff; medical personnel are no longer provided only for the passengers’ convenience, they are required to comply with the federal statute.<sup>235</sup> Thus, the sections of the statute, read in conjunction, suggest the ship owner has a duty to provide medical services and information directly to the passengers. The duty to the passengers appears to be ongoing and cannot be discharged solely through hiring an intermediary, such as an onboard physician.

Moreover, Congress’s articulation of the qualifications required for the onboard medical personnel suggests that the duty of care owed to passengers is more than only a reasonable duty of care under the circumstances because there are enumerated criteria that must be satisfied.<sup>236</sup> The qualifications requirement may be read as relating to a ship owner’s duty of care in hiring physicians. If so, a ship owner would only have to comply with the enumerated criteria to be insulated from negligent hiring liability. If such a reading were endorsed, ship passengers would have almost no method of recovery against a ship owner for injuries caused by an onboard physician. When Congress acts to protect a vulnerable population, it is an inapposite reading that interprets the legislation as reducing methods of recovery. The CVSSA goes on to suggest that the ship owner has a relationship with the physician that resembles one predicated on control as is necessary for respondeat superior liability.<sup>237</sup> First, the ship owner is required to maintain certain supplies, materials, and equipment necessary for the medical personnel to perform their functions.<sup>238</sup> For the physician to non-negligently perform his duty to

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233. Cruise Vessel Security and Safety Act of 2010, Pub. L. No. 111-207, 124 Stat. 2243 (2010).

234. *See* *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465–66 (Fla. 2007).

235. 46 U.S.C. § 3507(d)(3) (2012).

236. *Id.*

237. *See supra* Part VI.A.

238. Pursuant to the CVSSA,  
the owner of a vessel to which this section applies shall –

the passengers, he is dependent on the ship owner performing his statutorily required duty to the physician. Thus, the ship owner maintains a degree of statutorily imposed control over the physician. Second, the ship owner is compelled to maintain a degree of confidentiality regarding certain medical information.<sup>239</sup> This suggests that, onboard the ship, the ship owner is privy to the confidential information that is typically exclusive to the physician-patient relationship.<sup>240</sup> The ship owner's involvement in such a private and confidential relationship implies that a contemporary ship owner is a part of a relationship that does not align with historical practices and, as such, has heightened obligations and duties. Finally, the ship owner is explicitly required to "make available on the vessel at all times medical staff," which suggests the ship owner is the party charged with control over the onboard medical personnel because it is now the ship owner's duty to provide, make available, supply, and inform passengers regarding onboard medical personnel.<sup>241</sup>

After the promulgation of the CVSSA, the ship owner's duty of care can only be discharged by providing medical personnel with specific medical qualifications.<sup>242</sup> The ship owner is the party specifically named with responsibility for fulfilling the enumerated obligations. This deliberate legislative choice demonstrates Congress's recognition that contemporary ship owners owe an ongoing

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(1) maintain on the vessel adequate, in-date supplies of anti-retroviral medications and other medications designed to prevent sexually transmitted disease after a sexual assault;

(2) maintain on the vessel equipment and materials for performing a medical examination in sexual assault cases to evaluate the patient for trauma, provide medical care, and preserve relevant medical evidence.

46 U.S.C. § 3507(d)(1)-(2) (2012) (although the statutory supply mandate is only identified as applying to sexual assaults, the proposition that the CVSSA requires ship owners to maintain medical supplies onboard when they were previously not required to do so is unaltered by this qualification).

239. *Id.* at § 3507(e).

240. *See id.*

241. *Id.* at § 3507(d)(3). In addition, the recently adopted industry initiative the Cruise Industry Passenger Bill of Rights mandates that members of the Cruise Lines International Association ensure a passenger's right "to have available on board ships operating beyond rivers or coastal waters full-time, professional emergency medical attention, as needed until shore side medical care becomes available." *Cruise Industry Passenger Bill of Rights*, CRUISE LINES INT'L ASS'N, <http://www.cruising.org/sites/default/files/images/Cruise-IndustryPassenger-Bill-of-Rights.pdf> (last visited Aug. 6, 2014).

242. 46 U.S.C. § 3507(d)(3).

obligation to their passengers that is not consistent with historical maritime norms.

Although it is unclear what degree of medical professional satisfies the CVSSA standard, it is evident that some type of medical personnel is required onboard.<sup>243</sup> Such a requirement has significant implications on the courts' analysis when considering whether a passenger is able to bring a claim against a ship owner for a physician's negligence because—after the CVSSA—the ship owner no longer provides a physician solely for the passengers' benefit. Instead, the ship owner provides an onboard physician to satisfy a congressionally imposed duty.

Here, the Supreme Court or Congress should recognize the disparate outcomes that occur as a result of collateral legislation in the admiralty sphere and act to modify the maritime rule such that similarly situated populations facing identical harms are offered comparable theories of recovery.

### 3. 46 U.S.C. § 30509

This provision is intended to ensure ship owners cannot discharge liability for the negligent acts of their agents. The current admiralty regime effectively makes this provision toothless in the onboard physician context. Conceivably, a ship owner could hire a physician as an employee and include in the passenger contract a disclaimer for the physician's negligence. Pursuant to § 30509, the disclaimer would be void.<sup>244</sup> However, even if void, the ship owner may escape liability for the physician's negligence because the maritime rule insulating ship owners from liability would apply.<sup>245</sup> Thus, Congressional intent to impose liability on ship owners for the negligent acts of its agents is thwarted when the maritime rule is applied. Essentially, the

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243. It is also important to note that the Cruise Line International Association (CLIA)—North America's largest global cruise industry organization—adheres to the medical standards promulgated by the American College of Emergency Physicians (ACEP). ACEP Guideline 2 relates to staff and requires that all physicians hold current licenses and certain Board certifications. *Health Care Guidelines for Cruise Ship Medical Facilities*, AM. COLL. EMERGENCY PHYSICIANS, <http://www.acep.org/Physician-Resources/Clinical/Health-Care-Guidelines-for-Cruise-Ship-Medical-Facilities/> (last updated Jul. 2014).

244. 46 U.S.C. § 30509 (2012).

245. Alternatively, the general maritime rule may be applied such that an onboard physician can never be categorized as an employee because the ship owner lacks the control necessary to impute vicarious liability. *See Carnival Corp. v. Carlisle*, 953 So. 2d 461, 467 (Fla. 2007). Thus, the physician may be categorized as an employee and not impute liability to the ship owner because of the general rule or may be precluded from the employee classification altogether.

antiquated maritime rule endorses the mischief the statute attempts to remedy; even if a physician is a ship owner's agent, the ship owner may still be insulated from liability for the agent's negligence notwithstanding a statutory ban on contractual provisions with the same effect.

#### *D. The Uniformity Façade in Maritime Law*

The default justification that a court sitting in admiralty jurisdiction applies when in doubt is uniformity.<sup>246</sup> However, when applying the current doctrine, the court does not implement the uniformity it cites. For example, when purporting to conform to the long line of maritime uniformity supporting the proposition that ship owners cannot be vicariously liable, the *Carlisle* court stated that *Nietes* was the only case to diverge from the established rule at the time of the district court's decision.<sup>247</sup> However, demonstrably absent from the court's analysis were the subsequent cases that followed the lower court's decision to depart from established precedent and attempt to reconcile the rule with current realities.<sup>248</sup> Even courts that considered and were persuaded by the maverick cases failed to depart from the established rule solely on the basis of uniformity and harmony instead of sound reasoning.<sup>249</sup> The *Reliable Transfer* court found persuasive the fact that courts followed the ancient doctrine grudgingly or not at all.<sup>250</sup> The willingness of courts to depart from the general rule is telling, and persuasive. The Supreme Court has previously rejected maritime doctrines that resort to uniformity instead of valid reasoning when the established rule is no longer justifiable and should do so here.<sup>251</sup> The Constitution explicitly authorizes the Supreme Court to adjudicate maritime controversies.<sup>252</sup> In addition, the Supreme Court

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246. See *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 902 (11th Cir. 2004) (“[T]he purpose behind the exercise of this Court’s admiralty jurisdiction is to provide for the uniform application of general maritime law[.]”); see also *Suter v. Carnival Corp.*, 2007 WL 4662144, at \*2 (S.D. Fla. May 14, 2007) (“When applying maritime law, courts must adhere to the principles of harmony and uniformity.”).

247. See *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 469–70 (Fla. 2007).

248. See *Mack v. Royal Caribbean Cruises, Ltd.*, 838 N.E.2d 80, 91 (Ill. App. Ct. 2005); *Huntley v. Carnival Corp.*, 307 F. Supp. 2d 1372, 1374–75 (S.D. Fla. 2004); *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633, 1641 (S.D. Fla. 1993) (surviving motion for summary judgment).

249. See *Carnival Corp.*, 953 So. 2d at 461; *Suter v. Carnival Corp.*, 2007 WL 4662144, at \*5 (S.D. Fla. May 14, 2007).

250. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 404 (1975).

251. See *id.*; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 381, 409 (1970).

252. U.S. CONST. art. III, § 2, cl. 1.



can achieve the comprehensive uniformity that is so fervently pursued in admiralty jurisprudence because its decisions are binding on all courts. Any delay in resolving the issue only perpetuates inequitable outcomes and exposes unwitting consumers to unjustifiable risk. The Supreme Court should grant certiorari and modify the doctrine such that it is consistent with contemporary realities.

*E. The Current Regime Creates Conflicting Rules in Overlapping Legal Fields*

Even if uniformity was a legitimate rationale for the ancient rule, the current regime provides inequitable outcomes and is incongruent with other legal fields. The current doctrine furnishes different remedies for individuals aboard identical vessels, injured in identical ways, and subject to identical negligence. Moreover, the regime conflicts with other fields of law, specifically agency and contract law. The current system endorses a rationale that deteriorates the distinction between independent contractors and employees. The doctrine endorses an outcome where, even if a physician is a de facto employee, a ship owner is not vicariously liable for his actions.<sup>253</sup> Thus, the employee-independent contractor distinction is essentially meaningless, and the statute prohibiting ship owners from disclaiming liability for employee negligence is impotent in the onboard physician context.

Also, the current doctrine creates tension with principles of contract law: cruise ship owners' use of liability disclaimers for independent contractors creates contracts that resemble contracts of adhesion and causes outcomes that may be invalid for public policy reasons.<sup>254</sup> If an identical disclaimer was used, and the physician was categorized as an employee, the disclaimer would be against public policy and invalid.<sup>255</sup> Thus, when two doctors commit identical negligence, but one is an employee and the other is an independent contractor covered by a disclaimer of liability, the ship owner conceivably would not be liable under the current regime for either

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253. Compare *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988) with RESTATEMENT (SECOND) OF AGENCY § 220, cmt. h (1958).

254. See *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1369 (5th Cir. 1988) (summarizing the trial court's position before affirming as conceding that "[i]n a normal, non-admiralty situation . . . public policy would nullify the clause . . . . But the admiralty context, . . . is sufficiently different to change the result here.>").

255. See 46 U.S.C. § 30508 (2012).

physician's negligence toward passengers. The independent contractor's negligence cannot be imputed to the ship owner because of the liability waiver, and the employee's negligence cannot be imputed to the ship owner under the classic maritime rule. However, in the exact same scenario, if the cruise ship included disclaimers for both physicians, one would be invalid for violating public policy. Even if the disclaimer were invalid, it is unclear whether the invalidation affects the liability of the ship owner because the current regime completely insulates the ship owner from vicarious liability for a physician's negligence toward passengers. Thus, it is possible that, even if a ship owner's liability disclaimer is invalidated on public policy grounds, liability will not be imputed because the general maritime rule still applies.

Congress has demonstrated that when different populations are faced with the identical harms, both populations should receive legal protections and remedies. Similarly, the Supreme Court has demonstrated that when legal principals have outlived their usefulness, the Court is authorized and expected to make changes because of obsolescence or inequitable outcomes. Both entities are justified in recognizing the disparate outcomes that occur under the current regime, and both are authorized to reconcile the general maritime rule with contemporary realities.

#### CONCLUSION

The general maritime law that ship owners are not liable for onboard physicians' negligence toward passengers is in need of revision. The classic justifications for the rule are not sustainable when considering the current realities of the cruise ship industry and maritime jurisprudence. The current regime endorses inequitable outcomes for identical scenarios and cites uniformity as a justification. However, there is no uniformity. Maverick courts have departed from the slavish devotion to uniformity and attempted to reconcile the admiralty rule with contemporary realities. The Supreme Court has been persuaded when lower courts refuse to follow an inequitable admiralty rule previously and has modified ancient doctrines when their original justifications are no longer as salient in spite of uniformity. Therefore, the Supreme Court should do the same here. The Supreme Court should grant certiorari and recognize this maritime rule requires modification. In the alternative, because Congress has the authority to promulgate statutes that have a

binding effect on every court exercising admiralty jurisdiction, Congress should promulgate a statute that mandates that ship owners are liable for onboard physicians' negligence toward passengers. Congress has recognized and addressed dangers in the cruise ship industry previously and should do the same here.