UK P&I CLUB

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BODILY INJURY NEWS

The journal of the Thomas Miller Americas' bodily injury team

ISM Code doesn't expand shipowners' Scindia duties

Injuries in heavy weather

Longshore injury suit dismissed

Medical consolidation companies – do they really deliver?

Franza troubles cruise line operators

UK P&I CLUB IS MANAGED BY **THOMAS MILLER**

CONTENTS

Bodily Injury News

Bodily Injury News is the bi-annual newsletter of the Thomas Miller Americas' Bodily Injury Team.

The topics it addresses are highly relevant to all our Members worldwide given more than half of the Club's personal injury claims over $100,000 are brought in the American courts.

We welcome your feedback on the topics we cover as well as suggestions on subjects to address in future issues. Please send your comments and ideas to Louise Livingston at louise.livingston@thomasmiller.com

The information in this newsletter is not legal advice and should not be relied upon as such.

Staying ahead of the curve

The Club's latest financial figures confirm the on-going upward trend in the costs of personal injury, illness and death claims. The United States is consistently the most expensive and unpredictable jurisdiction for bodily injury claims. The average cost to the Club of both injury and illness claims has doubled over the last decade. The TMA Bodily Injury Team was established to bring their unrivalled and collective expertise to bear in working with UK Club members to develop strategies to manage these challenging claims. Working proactively with the Club's designated specialist Bodily Injury attorneys is a key element in the success of the team.

This year's Bodily Injury Seminar will be held on Thursday October 8, 2015 at the TMA New Jersey office in Jersey City. Our seminar is aimed at both US and non-US based operators and is always well attended by a cross section of Club members. We will continue the single-day format and will combine legal updates as well as practical exercises. A formal invitation with the topics to be covered will be sent shortly. If you are interested in attending, please e-mail susan.pietri@thomasmiller.com.

This edition of BI News contains articles on recent legal decisions concerning longshore workers (page 3 and page 8); heavy weather incidents (page 5); medical consolidation (page 9).

As always, we welcome your feedback on the topics we cover in our newsletter and invite you to suggest future topics. Contact details for our Bodily Injury Team can be found on the back page. ■

Mike Jarrett
President & CEO, Thomas Miller (Americas) Inc.

ISM Code doesn't expand shipowners' Scindia duties

Noreen Arralde offers welcome news for shipowners in a case involving the intersection of the International Safety Management ("ISM") Code and the U.S. Longshore and Harbor Workers Compensation Act (the "Longshore Act").

The 11th Circuit Court of Appeals recently held the ISM Code does not expand a shipowner's duties under the Longshore Act, as those duties were articulated by the U.S. Supreme Court in the case *Scindia Steam Navigation Co. v. De Los Santos.* This is welcome news for shipowners. The 11th Circuit is the first U.S. federal appellate court to address this issue and its holding should discourage other longshoremen from trying to use the ISM Code to impose additional duties on shipowners, such as the duty to supervise the cargo operations of U.S. stevedores.

The objectives of the ISM Code

The purpose of the ISM Code is to provide international standards for safe management and operation of ships and to prevent marine pollution. Given its global reach, the ISM Code recognizes that no two shipowners are the same and recognizes that ships operate in a wide range of conditions around the world. Accordingly, the ISM Code is based on general principles and is stated in broad terms so that it can have widespread application. The ISM Code is effective in this way – it sets standards which require commitment, competence and motivation from shipowners – rather than dictating a "one-size-fits-all" approach.

Implementation of the ISM Code in the U.S.

The ISM Code was implemented by the U.S. Congress as part of the International Convention for the Safety of Life at Sea. In its implementing legislation, Congress directed that compliance with the ISM Code was to be achieved through regulations that were "consistent with" the Code. If a shipowner fails to comply with these regulations, it may face a civil penalty or a revocation of its Coast Guard clearance.

Congress's implementation of the ISM Code demonstrated its intent to participate with nations around the world in achieving the safety goals of the Code. By its general statements, such as that regulations should be "consistent with" the objectives of the ISM Code, Congress clearly did not attempt to use the Code as a vehicle to change U.S. maritime law principles with regard to duty, breach and allocation of fault.

Horton v. Maersk Line, Ltd.

Plaintiff in *Horton v. Maersk Line, Ltd*. was working as a longshoreman, covered by the Longshore Act, when he was struck by a falling twistlock and suffered a broken neck. The twistlock had become dislodged as a cargo container was being offloaded by a crane operated by Horton's co-worker. There was some dispute as to precisely why the twistlock became dislodged, but the case is significant for the fact that plaintiff relied on the theory that the shipowner was at fault for his injury because it failed to properly supervise cargo operations and

that such failure was a violation of the ISM Code. Plaintiff's theory was as follows: the ISM Code mandates that a Safety Management System ("SMS") Manual be kept onboard the ship for the crew's use. This particular ship's SMS Manual stated that the ship's officers should supervise and ensure the safe loading and offloading of cargo. Plaintiff claimed the failure of the ship's officers to "supervise and ensure" the safe offloading of the container from which the twistlock fell constituted a violation of the ISM Code and, therefore, should be sufficient grounds for his negligence claim against the shipowner to be decided by a jury. The shipowner disagreed, arguing that its duties to longshoremen were quite limited once the ship had been turned over to a skilled and competent stevedore, such as plaintiff's employer. The shipowner urged the court to dismiss the case as a matter of law on grounds there had been no breach of its duties under the Longshore Act.

Plaintiff's case was dismissed by the U.S. District Court in Georgia and the 11th Circuit Court of Appeals (covering Alabama, Georgia, and Florida) upheld the decision to dismiss, holding that the ISM Code does not impose any duties on a shipowner beyond the legal obligations of the Longshore Act, as pronounced by the U.S. Supreme Court in *Scindia*.

Shipowners' *Scindia* duties are quite narrow

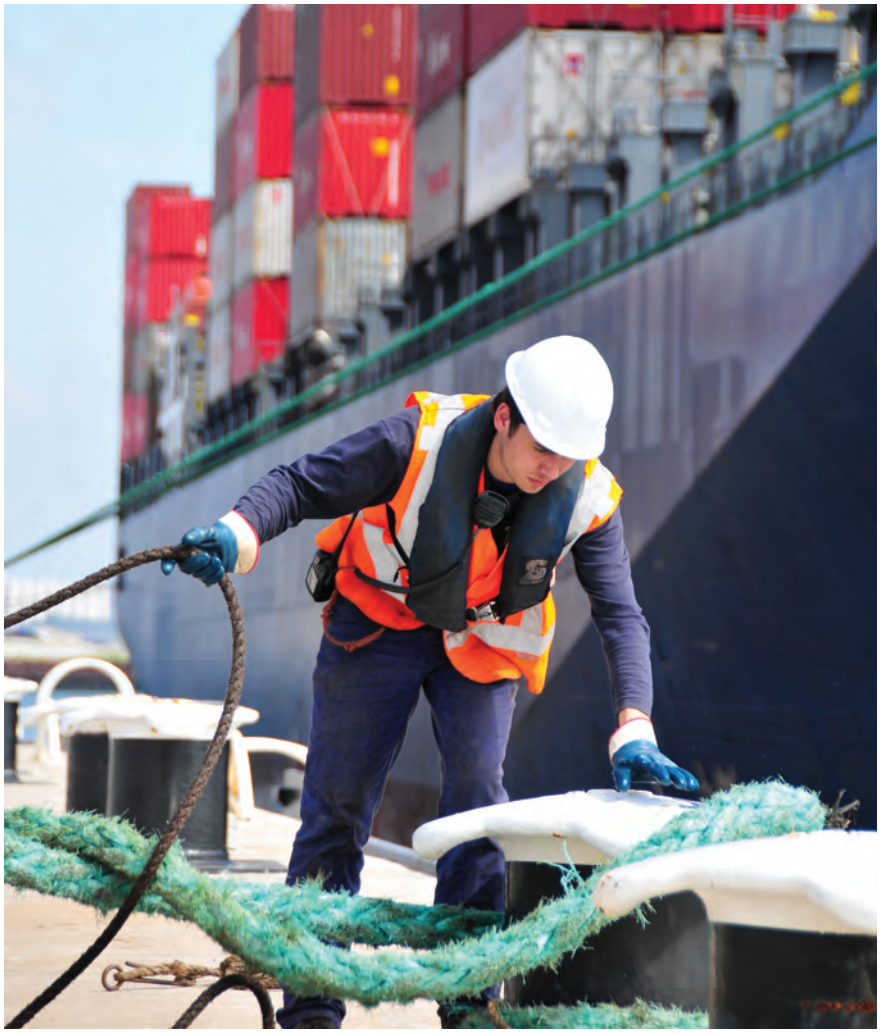
In *Scindia,* the U.S. Supreme Court explained that the Longshore Act imposes three limited duties on a shipowner:

1. to turn over the ship and its equipment in a condition that permits a stevedore to do its work with reasonable safety, and to warn the stevedore of any hidden dangers of which it knows or should know;

2. to act reasonably if it actively participates in cargo operations and to avoid exposing the longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the shipowner; and

3. to intervene when it becomes aware that the ship, its equipment or gear poses a danger to the longshoreman and is also aware that the stevedore is acting unreasonably to protect the longshoreman.

In *Horton,* the 11th Circuit reiterated that these duties are limited and defined, noting that the shipowner may rely on the stevedore to perform its work with reasonable care and that there is no duty to supervise the stevedore absent contract provision, positive law, or custom to the contrary. The court held that the creation of an additional duty on the part of the shipowner, as urged by plainitff, to oversee the stevedore's activity and insure the safety of longshoremen "would saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate" in enacting the Longshore Act.



Implications for shipowners

Had the court decided *Horton* in plaintiff's favor, shipowners would have seen significant erosion in the defenses provided to them under the Longshore Act. It is important to remember that the Longshore Act was amended to eliminate unseaworthiness as a basis for longshoremen to recover damages against a shipowner, in exchange for *drastically increased* workers' compensation benefits. In reality, shipowners already pay for these increased benefits through higher stevedore rates. The court was correct, therefore, to maintain the *status quo* and refuse to expand a shipowner's duties to include supervising longshoremen working on its ships. ■

Horton v. Maersk Line, Ltd., No. 14-14450, 2015 WL 845577 (11th Cir. Feb. 27, 2015).

Injuries in heavy weather

Working on deck in heavy weather conditions is dangerous, and should only be considered if essential to the safety of the ship and crew. **Linda Wright** reviews heavy weather incidents and suggestions for safer working in heavy weather.

Masters and owners have an obligation to provide a safe workplace. Heavy seas and raging winds try to defeat any attempt to be "safe." However, if a loose anchor is pounding the hull, or unsecured nylon lines on deck threaten to wash overboard and potentially tangle in the ship's propeller, the Master must make a decision whether the potential danger to the ship outweighs the high risk of sending crewmembers on deck.

If the decision is that work on deck is necessary, procedures must be completed for a full risk assessment. Reference to the Member's ISM guideline and the Code of Safe Working Practices for Merchant Seaman (Consolidated Edition 2014 is reproduced in this article), should be considered. Although this code originates in the UK, the practical advice should be reviewed by any Master or crewmember, so unexpected dangers can be planned for.

Additional precautions

- Master must approve the order for work
- Bridge officer on watch must be advised
- Job safety analysis prior to going on deck
- Person in charge of deck work should be in radio contact with bridge – for updates on work and assistance in case of an emergency
- Plan rescue efforts to assess risk to rescue team
- Whistle signal from bridge to alert if large waves are approaching.

Incident #1: Man overboard

While transiting the North Sea in heavy weather, the Chief Engineer notified the Master of leaking water of the engine room emergency escape hatch cover on the aft mooring deck into the steering flat. The hatch cover was secured on from the inside with chain blocks. But there was concern the coiled mooring lines on the aft deck may have become loose. The Master visibly (from a safe stairwell) confirmed loose nylon mooring ropes adjacent to the hatch cover. At this point he became concerned if the nylon lines were washed overboard, they may become entangled in the ship's propeller.

The bosun and an AB volunteered to go on deck to secure the lines. The

Master's plan had them both donning lifejackets and a safety harness, with fire fighter's lifelines attached to the harnesses and the other ends to handrails on two external stairwells. Slack in the lifelines would be manually taken up by the Master and another AB on one stairwell, and the Chief Officer and the Chief Engineer on the other.

As the bosun and the AB proceeded with the work, a large wave on the aft mooring deck washed both men overboard, causing all four crew manually holding the lines to lose their grips. As a result, the lifelines parted and the two crew were adrift in the heavy seas. Unfortunately, the sea condition made the option of turning vessel around too dangerous, and both men were lost.

Some of the conclusions

- No heavy weather checklist was available, and none required as part of the vessel's safety manual
- Master underestimated the potential wave height that could be expected in the prevailing weather conditions
- Strength of the firefighters' lifeline was insufficient to withstand the strong wave that washed the crewmembers overboard
- No appropriate strength lifelines were available upon the vessel
- Master overestimated the strength of the lifelines and the ability to manually control their loading under these conditions

Incident # 2: Unsecured empty cans on deck

Soon after departing San Juan, Puerto Rico, on route to Port Elizabeth, New Jersey, the subject ship prepared for heavy weather predicted to hit the next day. The winter storm was a large system affecting most of the US Eastern Seaboard. The Master issued a list to the deck department of items to be secured on deck, or moved to safer quarters. There was no mention of trash cans.

Early morning on the third day at sea, the Master secured the deck at 06:30hrs due to the heavy weather conditions restricting crewmembers' access. At 09:00hrs he instructed the Chief Officer to secure garbage cans inside a newly acquired 20 foot container placed on deck. There were also several empty cans on deck strapped to a cradle that were to be restowed in the container. (The ship had no trash incinerator or compactor, so garbage was placed in cans in the container, for discard at next port.)

The Chief Officer, the bosun, and two ABs started their task as the weather began to deteriorate. The door to the container was opened and latched with a small chain over a slightly bent 1¼ inch hook. The Chief Officer soon sent one of the ABs to get rope to better secure the open door. The bosun and the other AB were inside the container securing the cans. The Chief Officer was concerned the door would slam shut so he left the container to check the latch. As he did so, the door swung free knocking him into a bulwark stiffener beam. He suffered serious injuries to his ribs and back. He was later medevac'd during increasing winds and seas. There were two other minor injuries to crewmembers in the galley and a stateroom.

Some of the conclusions

- Was the deck work absolutely necessary for the safety of the ship and crew?
- A JSA meeting should have taken place prior to the task on deck
- No heavy weather checklist was available, and none required as part of the vessel's safety manual
- This work should have been done prior to the storm, when other securing on deck was performed
- Improper security of container door latching. Door should have had rope tie back for better safety.

Incident #3: Communication failure

This ship departed Portugal on a winter afternoon headed to Houston, full away at 02:00hrs. The anchors were secured at 02:15hrs.

Three days later in the evening, the Chief Officer ordered the Bosun and an AB to retighten the securing lines on the anchors, which were heard contacting the ship's hull when seas struck the bow. During the rest of the night, moderate seas deteriorated to heavy weather, alarming the Chief Engineer, who reduced the speed of the ship about 01:30hrs. The Master was awakened about 04:20hrs due to the ship's heavy pitching. He went to the bridge to check on the weather and agreed with the officer on watch, Chief Officer, to further reduce the speed. The Master remained on the bridge for several hours in which he discussed with the Chief Officer the possibility of checking conditions forward for the safety of the vessel and securing the anchors. Nothing was agreed upon at that time. The Master returned to the bridge as the Chief Officer handed over the watch to the Third Officer at 08:00hrs.

At 08:20hrs the Bosun and two ABs were seen waiting for the Chief Officer, who had advised them they were to check the securing lines on the port and starboard anchors. Two additional seaman arrived, and the six men went forward onto the forecastle. They split up to tighten the lines on the anchors.

At 08:40hrs two waves struck the ship so forcibly, the ship shook violently. As the vessel pitched into the first wave, one seaman was able to rush behind a deck tank and grab hold of ventilator trunk. He survived with minor injury. The other men were slammed by the two waves and strewn across the forecastle deck about 20 meters aft. The Chief Officer died, and an AB died later after rescue from the deck by his shipmates. The other ABs thrown by the waves suffered severe injuries.

Some of the conclusions

- The Master did not give orders for the on deck work, nor was he aware of the Chief Officer's intentions
- The Officer of the Watch – Third Officer – was not notified, so the bridge being unaware of the on deck presence of crew, did not take navigational precautions to lessen the force of the heavy seas
- Although an experienced deck officer, the Chief Officer underestimated the weather reports, despite the obvious sea conditions at the time, and warnings from other crewmembers
- There was no evidence that any crew-members were wearing safety harnesses
- No Job Safety Analysis meeting was held
- As the Master and the bridge personnel were completely unaware of the presence of crew on deck, there was no ability to assist the men immediately
- There was no indication that the anchor lines needed urgent attention at the time the Chief Officer elected to perform the task

The tragic results of this last incident highlight the need for preparation for the unexpected. Always consider the power of the sea, and the practical ways to follow safety measures in heavy weather. Members should consider having a permanent list of items specifically identified for safety when on deck in heavy weather (Again, see the Code of Safe Working Practices for Merchant Seaman). First and foremost, is the task absolutely essential for the safety of the ship and crew? If the answer is no, then wait for calmer sea conditions or the next port. ■

Code of safe working practices for merchant seaman
(Consolidated Edition 2014)

On deck work in heavy weather

- Necessity of work (i.e. can it wait until daylight, next port, do the risks outweigh the benefits?)
- Availability of rescue and emergency medical care if things go wrong
- Use of stabilizing fins (if fitted) to reduce rolling
- Adjust vessel course and speed
- Permit to work and company checklist completed
- Rigging lifelines
- Lifejacket with safety harness
- Adequate PPE (including full head protection that will reduce exposure to the elements)
- Using head mounted torches
- Using waterproof worksuits with reflective tape
- Deck illumination
- Visual contact from bridge
- Working in (at least) pairs
- Water resistant portable radios for communications with bridge
- Use of bridge searchlight to determine predominate wave direction at night. In restricted visibility or darkness, radar may be used to determine the predominant wave direction
- Be aware that even in a regular wave pattern, "rogue" waves can exist, which can vary in direction and size from the regular wave pattern being experienced
- ALWAYS plan for and expect, the unexpected

Slippery when wet

Markus McMillin looks at the Second Circuit's decision to uphold the dismissal of longshore suit involving sugar cargo on deck.

Plaintiff, an experienced longshoreman, was injured while his employer was discharging bulk sugar from a ship in light rain. He claimed he slipped on a mixture of rainwater and raw sugar, striking his tailbone on the deck. According to two co-workers, sugar on the deck of a ship is a common condition that longshoremen commonly encounter during discharge of bulk sugar. Plaintiff filed suit against the shipowner under 905(b) of the LHWCA.

The shipowner moved for summary judgment claiming it did not breach any of the three duties laid out in *Scindia* and its progeny:

1. the "turnover duty" which relates to the condition of the ship upon commencement of the stevedoring operations;

2. the "active control duty" which applies once the stevedoring operations have begun and provides that where the ship maintains "active control" a shipowner must exercise reasonable care to prevent injuries to longshoremen; and

3. the "duty to intervene" which clarifies a ship's duty should it obtain knowledge of both an obviously unsafe condition and the stevedore's failure to tend to such condition.

First duty: Breach of turnover duty?

On the first duty, plaintiff argued the turnover duty was breached because the slippery condition was foreseeable. The court rejected the argument stating there was no evidence the deck was slippery at the time the cargo operations commenced. Further, it ruled that a competent longshoreman would have expected to encounter, and could have avoided, a mixture of sugar and water on the deck.

Plaintiff also argued the ship did not have slip resistant grit in the paint on the deck. The trial court rejected this argument as well, stating lack of non-skid was not a hidden condition which would give rise to a shipowner's duty to warn. Further, to allow a longshoreman to bring a negligence action against a ship for lack of non-skid surfaces would be tantamount to allowing him to proceed on a theory of unseaworthiness, which is barred by the LHWCA.

Second duty: Active control

On the second duty, plaintiff argued that the ship breached its active control duty because it knew or should have known of the dangerous condition. The court rejected this argument, stating plaintiff missed the point – the ship did not have active control of the area or the unloading operation – plaintiff's employer did. There were no crew around the site of the incident. Thus, there was no breach of this duty.

Final duty: intervention

Regarding the final duty – to intervene – plaintiff argued that the ship had actual knowledge of the sugar/water mixture, knew it posed an unreasonable risk of harm and knew plaintiff's employer was not exercising reasonable care to protect its employees. The court disagreed, ruling that the condition was not so clearly unsafe that the shipowner should have intervened. To the contrary, the sugar/water condition was common during sugar discharge operations and a competent longshoreman would anticipate such a condition in performing his duties.

On appeal to the Second Circuit *(Giganti v. Polsteam Shipping Co.),* the court upheld the lower court's ruling, stating the precondition for ship's liability for an obviously dangerous condition arising during the process of loading or unloading is reasonable anticipation that the longshoremen will not be able to avoid it. Here, there was no question of fact that a longshoreman experienced in unloading sugar would be aware that sugar regularly falls on deck during discharge and that sugar mixed with water is slippery.

This is a well-reasoned case which illustrates that shipowners cannot be held liable for longshore injuries arising from a lack of common-sense awareness by longshoremen. They need to be aware of the conditions they routinely experience in discharging their duties. There was no hidden danger here that the longshoreman could not avoid. Thus, he had no viable third party action against the shipowner.

Although helpful, Members should not rely on decisions such as this one. 905(b) cases are notoriously fact intensive. ■

The hidden costs of medical consolidating companies

Dee O'Leary warns Members to beware of inflated rates by companies claiming quick medical care by using predetermined hospitals.

When an issue arises with a sick or injured crewmember in the Gulf region (Louisiana, Texas) or on the West Coast (California, Oregon and Washington) beware of "medical consolidating companies". These companies, who are generally appointed by local agents, will claim to obtain quick medical care by sending seaman to predetermined hospitals, clinics and doctors for evaluation and treatment. What the medical consolidating companies do not tell you, however, is that they have contracts in place with these hospitals, clinics and doctors who guarantee the consolidator a percentage and the rates charged are often over 200% above what is considered "usual and customary".

After charging a grossly inflated rate, the consolidator will then offer a nominal "discount" to the shipowner if the bill is paid quickly. The shipowner makes the payment to the consolidator, who then passes an undisclosed amount to the actual medical provider. The medical consolidater does not disclose to the shipowner the percentage that they receive for their "services." This process cuts out the ability to conduct a full and complete audit of the medical charges.

The arrangement between the medical provider and the medical consolidator clearly presents a conflict of interest, the more the hospital or doctor charge. the greater the percentage of fees to the medical consolidators. There is no transparency in the transaction between the medical provider and the medical consolidator, who will often refuse to provide a copy of the contract with the hospital or doctor. Thus, this vessel owner has no way of knowing if the medical charges are fair and if the fees paid to the medical consolidators are reasonable.

While it may be seemingly easier for a shipowner to allow their local agents to appoint whomever they prefer to assist with medical care, it is not always the most cost-effective way to handle the situation. The Club strongly recommends that any time there is an injury or illness requiring urgent medical treatment in the US, that the Club be contacted first. Over the years, the Club has worked with many medical case managers and auditors, and will work with the Member and the agent to find the most appropriate company to retain. The goal of the Club is to assist its Members in obtaining the best medical care at a fair price.

With the cost of bodily injury claims in the U.S. always on the rise, it is important to be alert to the pitfalls in using one of these medical consolidating companies. A prudent shipowner may be able to curtail the medical costs simply by appointing a reputable medical management company to oversee the medical care and audit the medical expenses. ■

Franza causes seasickness over vicarious liability

Troubling news for cruise line operators with the groundbreaking *Franza* ruling. **Jana Byron** explains what happened.

In 1988, the Fifth Circuit Court of Appeals decided the case of *Barbetta v S/S Bermuda Star* and in so doing set forth a general principle in US maritime law: a cruise line – as a matter of law – cannot be held vicariously liable for the medical malpractice of its shipboard medical staff. The so-called *Barbetta* rule has been followed consistently by courts in the Second, Fifth and Ninth Circuits (and had been applied by lower courts in the Eleventh Circuit), but neither the US Supreme Court nor the Eleventh Circuit had addressed the question. In *Franza v. Royal Caribbean,* decided on November 10th, 2014, the Eleventh Circuit refused to adopt the *Barbetta* rule. Observing that no controlling precedent existed, the Eleventh Circuit refused to recognize the immunity from suit for vicarious liability set forth in *Barbetta,* and in so doing, allowed a plaintiff to pursue a claim for shipboard medical malpractice against a cruise line.

Barbetta: Carry on cruising

In the *Barbetta* case, the claimants sought to convince the Fifth Circuit that a cruise line, as the employer of shipboard doctors and nurses, was vicariously liable for the actions of the shipboard medical personnel as employees of the cruise line. However, in order to establish such vicarious liability, a claimant is required to demonstrate that the employer had sufficient control over the employee, such that the employer could be rendered liable for the employee's negligence. The *Barbetta* court ruled

that in the context of cruise lines employing medical staff, this requisite control was lacking and thus the employer-carrier could not be held liable for the employee-doctor's negligence. The *Barbetta* court went on to hold that the only duty a cruise line owed its passengers was to properly employ competent and qualified medical staff. Thus, under *Barbetta*, a passenger could only proceed against a cruise line if it could be shown that the operator breached this narrow duty. Put differently, the *Barbetta* court rendered cruise lines immune from suit for the negligence of medical staff who had been properly vetted because the cruise lines were not able to control the doctor's decisions with respect to patient treatment and care.

The logic of *Barbetta* is simple and compelling: cruise lines are experts in cruising and not medicine. Thus, according to the *Barbetta* court, a cruise line does not have the requisite skills or expertise to direct the doctor/patient relationship and therefore cannot exercise the requisite control over the medical staff to render it vicariously liable for the acts or omissions of its medical providers. The *Barbetta* court deemed this lack of control so compelling that it concluded that, as a matter of law, a passenger could not state a cause of action against a cruise line for the medical negligence of shipboard medical staff.

Barbetta: Overboard

The Eleventh Circuit didn't just criticize the *Barbetta* rule: it tossed it overboard and allowed the plaintiff to proceed with her claim against Royal Caribbean for the medical malpractice of the shipboard medical staff. As is usually the case, bad facts make bad law – something the Eleventh Circuit alluded to when it commented that the issue of "vicarious liability raises fact-bound questions". According to the complaint filed in *Franza,* the decedent suffered a blow to the head while boarding a trolley near where the ship had docked in Bermuda. After he fell, he was taken to the ship's infirmary and evaluated by a nurse who recommended he return to his cabin cautioning "that [the decedent] might have a concussion." The decedent's condition deteriorated significantly over the next four hours but when his family called onboard 911 the complaint alleged that it took approximately 20 minutes for the ship's personnel to respond. The decedent was returned to the ship's infirmary, where according to the complaint he was forced to wait while the ship obtained his credit card information to pay for the medical services. Nearly four hours after his first visit to the infirmary he was evaluated by the ship's doctor who ordered that he be evacuated to a shoreside hospital in Bermuda. The next day he was airlifted to a hospital in New York where he passed away a week later.

…we must now acknowledge that medical professionals routinely work for corporate masters

The decedent's daughter sued Royal Caribbean directly - not the ship's medical staff - on behalf of his estate, seeking to hold the cruise line liable for medical negligence of the infirmary staff. The district court dismissed the claim citing *Barbetta*. The Eleventh Circuit reversed and remanded the case. The appellate court noted that the plaintiffs were making a "modest request" that they be permitted to proceed with the claim for vicarious liability. As the court put it, "we can see nothing inherent in onboard medical negligence, when committed by full-time employees acting within the course and scope of their employment, that justifies [immunity from suit]" and that rather questions of an employer's liability for its employee's actions are questions of fact.

Unmoved by the cruise line's argument to uphold *Barbetta,* the court noted, "[t]he roots of the *Barbetta* rule snake back into a wholly different world…we now confront state of the art cruise ships that house thousands of people and operate as floating cities, complete with well-stocked infirmaries and urgent care centers. In place of truly independent doctors and nurses, we must now acknowledge that medical professionals routinely work for corporate masters."

More specifically, the Court rejected the three "pillars" of *Barbetta:*

1. The shipowners cannot/should not interfere with the doctor/patient relationship. The *Franza* court noted that modern cases reject this and in fact have said that inquiry into whether or not the doctor is an agent is appropriate.

2. The shipowner cannot control or supervise medical personnel. In rejecting this, the court noted that cruise lines have some institutional knowledge of medicine and shore side personnel qualified to control/supervise medical personnel.

3. Shipowners do not have "immediate" control over doctors. In rejecting this, the *Franza* court noted that this is a fact specific inquiry and that with modern technology and ease of communication with the ships, this is no longer a valid reason for *Barbetta* immunity.

Trouble ahead?

The *Franza* ruling is groundbreaking, and for cruise line operators, highly troubling, for several reasons. First, it allows for a new venue for medical malpractice claims that was, until now, essentially precluded by *Barbetta.* It may also create problems for the cruise industry because, at present, *Franza* is only binding upon courts in the Eleventh Circuit – which is the forum of choice for most cruise lines that employ forum selection clauses in their passenger contracts. And finally, where there was no conflict among the circuits on the question of a carrier's vicarious liability for medical negligence of its employees, now there is one, which makes the issue ripe for consideration by the Supreme court. Where the case goes from here remains to be seen but it will undoubtedly result in more lawsuits against the cruise industry. Watch this space for more developments. ■

Expertise and experience

A specialist group from both the New Jersey and San Francisco offices empowered with a significant settlement authority to deal with the particularly demanding cases of bodily injury in America.

This dedicated team supports Members based both in the United States and abroad in dealing with a diverse and complex range of personal injury and illness cases. The one common factor is the influence of US jurisdiction or emergency response.

The team has handled cases ranging from suspicious death, passenger's leisure activity injuries, long-term occupational illness, engine room and cargo handling fatalities, through to shore-side accidents, loss of limbs in mooring activity and even sexual assault.

As well as supporting Member's claims and enquiries directly, the team share their collective experience through the pages of "Bodily Injury News".

Thomas Miller (Americas) Inc

New Jersey
Harborside Financial Center, Plaza Five, Suite 2710,
Jersey City, N.J. 07311, USA
T +1 201 557 7300
E newjersey.ukclub@thomasmiller.com

San Francisco
44 Montgomery Street, Suite 1480,
San Francisco, California 94104, USA
T +1 415 956 6537
E sanfrancisco.ukclub@thomasmiller.com

UK P&I CLUB

New Jersey

Louise S. Livingston
Direct: +1 201 557 7407

Louise is an attorney specializing in bodily injury claims. Before joining Thomas Miller (Americas) in March 2002, Louise was a partner in a San Francisco maritime law firm. She leads TM(A)'s Bodily Injury Team.

Jana Byron
Direct: +1 201 557 7433

Jana joined Thomas Miller (Americas) in November 2005 after seven years of practice as an attorney specializing in maritime matters.

Dee O'Leary
Direct: +1 201 557 7402

Dee joined Thomas Miller (Americas) in December 2007 after 17 years practicing law in New York City with a firm specializing in maritime matters.

Noreen D. Arralde
Direct: +1 201 557 7333

Noreen joined Thomas Miller (Americas) in 2012 after 13 years with a US litigation firm and six years as claims manager for a global container shipping company.

San Francisco

Linda Wright
Direct: +1 415 343 0122

Linda joined Thomas Miller (Americas) in May 2010. Previously, she was a P&I Club correspondent on the Pacific West Coast for 29 years.

Markus McMillin
Direct: +1 415 343 0113

Markus joined Thomas Miller (Americas) in 2006, having worked at two maritime law firms in San Francisco.