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Introduction

Over the past decade more and more people have been taking to the sea for a cruise ship vacation,¹ with most of them not thinking twice about the legal implications of a cruise vacation compared to one on land. The aim of this thesis is to provide a basic overview of passenger rights and particularly the cruise lines liability towards passengers in the event of an accident or other occurrence aboard a cruise ship or during other activities² connected with a cruise ship vacation. The thesis will also look into some of the problems that passengers can face when trying to make a claim for compensation, as well as certain areas where the cruise lines could do a lot more to protect passengers aboard their ships.



Chapters one and four are going to cover the various legal regimes that can come into play when a passenger is trying to make a claim for an incident that occurred during a cruise voyage. Chapter one will look at the international law aspects under the Athens Conventions, comparing the 1974 regime with the updated 2002 Protocol provisions, while chapter four will consider the domestic and regional laws of the UK, US, and the European Union.

Chapter two will expand upon the discussion from the first chapter further analysing the liability limitation regime in maritime law, particularly the aspects of it that have the greatest impact on cruise and ferry ship passengers, and discussing whether the prevailing mind-set of limiting liability is still desirable in the 21st century.

Chapter three will provide an overview of judicial interpretation which is necessary to fully grasp the complexities of the whole system and appreciate the different aspects that ultimately affect how laws are interpreted and thus have an impact on both the passenger and the cruise line.³ This chapter will also provide an overview of the common law legal system and its main characteristics to support the later analyses under chapters four and five.

The final chapter will go through the various accidents that can happen on cruise ships, looking at real life cases and highlighting possible dangers that anyone who plans to go on a cruise vacation should be aware of. The chapter will conclude with a brief discussion of some of the deficiencies that the cruise lines should address to better protect and serve the ever-growing number of people that are deciding to spend their holiday aboard one of their cruise ships.

¹ FCCA, 'Cruise Industry Overview – 2013' <<http://f-cca.com/downloads/2013-cruise-industry-overview.pdf>>

² Such as shore excursions.

³ Or other entity that might be held liable for an incident on board a ship.

Chapter 1

International Regime – The Athens Convention

The Athens Convention¹ sets out the international regime of carrier liability for damage suffered by passengers on board a seagoing ship.² The 1974 convention is in force in 35 countries.³ A 1976 protocol replaced the gold franc standard with the SDR⁴; this was followed by the unsuccessful protocol of 1990 which attempted to raise the liability limits and has now been superseded by the 2002 protocol which has introduced a number of important amendments and will enter into force twelve months after it is accepted by 10 States.⁵

The convention applies to any international carriage⁶ where the contract of carriage is made, or the place of departure or destination, or the ship's flag or registration is, in a State that is party to the convention.⁷

Establishing liability

Carrier liability under Article 3 is one area that has been substantially revised by the 2002 protocol. Under the 1974 Convention the carrier is liable if the damage suffered occurred as a result of the fault or neglect of the carrier in the course of carriage; in other words this creates a fault based test of liability. Under Article 3(2) the claimant has to prove the extent of the damage and that the incident which caused it occurred in the course of the carriage.⁸

Article 3(3) puts the burden of proof on the carrier, presuming fault or neglect, if the death, personal injury, or the loss of or damage to cabin baggage “arose from or in connexion with the shipwreck, collision, stranding, explosion or fire, or defect in the ship.” In regards to other

¹ The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (PAL) as amended by the Protocol of 1976

² The term ‘seagoing ship’ was considered in *Michael v Musgrave (Trading as YNYS Ribs) (The “Sea Eagle”)* [2011] EWHC 1438 (Admlty); [2012] 2 Lloyd's Rep. 37; for commentary see ‘Athens Convention - time limitation - definition of seagoing ship.’ J.I.M.L. 2012, 18(2), 111-112; and Lily Chan, ‘Athens Convention Time Bar - Is a RIB a “ship” and “sea-going”?’ 02/08/2012 <<http://www.lester-aldrige.co.uk/news/news/athens-convention-time-bar-is-a-rib-a-ship-and-sea-going-2305/>>

³ For a complete list of contracting States to the 1974 convention as well as each of its protocols see IMO website at <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>>

⁴ Special Drawing Rights as created by the International Monetary Fund (IMF) <<http://www.imf.org/external/np/exr/facts/sdr.htm>>

⁵ Article 20(1) Protocol of 2002 to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974; as of 31 March 2013 there are 9 contracting States to the 2002 Protocol <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>>

⁶ Defined in Article 1(9) PAL 1974/2002 as any carriage between two different States or a round-trip to the same State with an intermediary port of call in another State;

Note: PAL ‘1974/2002’ means that the Article has remained unchanged by the 2002 Protocol.

⁷ Article 2 PAL 1974/2002

⁸ This Article has been preserved in nearly the same form in Article 3(6) PAL 2002.

luggage the same is presumed irrespective of the nature of the incident. In all other cases the burden of proving fault or neglect is on the claimant.

The 2002 Protocol to a large extent rewrote Article 3 to make it more clear and established two levels of carrier liability. Preserving the fault based system from the old Article 3 and adding a second layer of strict liability for death and personal injury.

Under Article 3(1) the carrier is liable for death or personal injury to a passenger caused by a shipping incident⁹ up to an amount of 250,000 SDR unless it can prove that the incident resulted from war, insurrection, natural phenomenon, or was wholly caused by and with intent by a third party.¹⁰ If the loss exceeds this limit the carrier is further liable, unless it can prove that the incident was not caused by its fault or neglect.

Further for death or personal injury which is not caused by a shipping incident the burden of proving fault or neglect of the carrier lies on the claimant.¹¹ For cabin baggage the carrier is liable if the loss or damage was the result of its fault or neglect, which is presumed for loss caused by a shipping incident.¹² In regards to other luggage the carrier is liable if it can't prove that the loss or damage occurred without its fault or neglect.¹³

In regards to strict liability the salient point here is that it covers only incidents of shipping nature, meaning if a passenger gets hurt in the hotel part of the cruise ship then strict liability would not apply and ordinary principles of negligence would, as can be seen in the case of *Dawkins v Carnival*¹⁴ where the passenger slipped in the ships restaurant.¹⁵ The court treated the incident as it would a land based slip and fall accident considering the judgements of *Ward*¹⁶ and *Turner*¹⁷

New addition in Article 3 is the definitions paragraph (5) which makes the text of the article more concise and also defines in sub-paragraph (c) what a 'defect in the ship' covers, and

⁹ Shipping incident is defined in Article 3(5) as a "shipwreck, capsizing, collision or stranding of the ship, explosion or fire in the ship, or defect in the ship;" which is similar to the incidents mentioned in the PAL 1974 Article 3(3) which give rise to the presumption of fault in favor of the passenger.

¹⁰ For a full list of exclusions see Article 3(1)(a-b) PAL 2002

¹¹ Article 3(2) PAL 2002

¹² Article 3(3) PAL 2002

¹³ Article 3(4) PAL 2002

¹⁴ *Janet Dawkins v Carnival Plc (T/AS P & O Cruises)* [2011] EWCA Civ 1237; 2011 WL 4966529; for commentary on this case see Mark Harvey, 'Case Comment: Dawkins v Carnival Plc (t/a P&O Cruises): personal injury - cruise ships - international carriage by sea' J.P.I. Law 2012, 1, C23-25

¹⁵ Note that this case was under the 1974 Convention, which has a presumption of fault, not strict liability, but the same principle applies in regards to the distinction between ship based and hotel based incidents.

¹⁶ *Ward v Tesco Stores Ltd* [1976] 1 WLR 810 (CA)

¹⁷ *Turner v Arding & Hobbs Ltd* [1949] 2 All E.R. 911 (KBD)

helps to avoid any ambiguity that might have existed in regards to this term from PAL 1974.¹⁸

Under Article 5¹⁹ the carrier is not liable for loss or damage to any valuable items, such as art or jewellery, unless the items have been given to the carrier for safe-keeping. The limits from Article 8(3) still apply unless otherwise agreed pursuant to Article 10(1).²⁰

Finally it should be noted that if the carrier proves that the death, injury, or damage to luggage was caused or contributed to by the passengers own fault or neglect then the court may wholly or partly exonerate the carrier from any liability.²¹

Compulsory insurance

As a result of imposing strict carrier liability the 2002 Protocol had to ensure that carriers would be able to cover any passenger claims and as a result it has under Article 4bis introduced a system of compulsory insurance, which together with strict liability resembles the system created in the 1969 and continued in the 1992 Civil Liability Convention²² in regards to oil pollution liability. Just like Article VII(8) in CLC 1992, Article 4bis(10) gives the claimant a right to recover directly from the insurers or others providing the financial security. The carrier is responsible for maintaining insurance or other financial security to cover death or personal injury for a minimum amount of 250.000 SDR per passenger.²³

Making a claim

There is a two year time limit within which the passenger needs to make a claim for death, personal injury of luggage damage.²⁴ This time bar can be extended under certain circumstances up to a maximum of five years.²⁵ However pursuant to Article 16(4) the carrier may extend the claim period or the parties may agree together on an extension.

¹⁸ "What constitutes a defect in the ship has never been defined." – Lauren Haas, Blake Laphorn solicitors, 'the Athens Convention regime: upcoming developments' 04 Feb 2013

<http://www.bllaw.co.uk/sectors/marine/news_and_updates/athens_convention_regime.aspx>

¹⁹ PAL 1974/2002

²⁰ See section Liability Limits for more details below.

²¹ Article 6 PAL 1974/2002

²² International Convention on Civil Liability for Oil Pollution Damage (CLC) 1992, Article VII

²³ Article 4bis(1) PAL 2002

²⁴ Article 16(1); details as to how the limitation periods are calculated are set out in Article 16(2)

²⁵ Three years under Article 16(3) PAL 1974, and five years under Article 16(3)(a) PAL 2002; the 2002 Protocol extended the maximum limitation period after disembarkation from three to five years and added a three year period after the "claimant knew or ought reasonably to have known of the injury, loss or damage caused by the incident" [Article 16(3)(b) PAL 2002].

In regards to luggage loss or damage the passenger also needs to give notice to the carrier in accordance with the time limits set out in Article 15 of the Convention.²⁶

The claimant has an option to bring his claim to a Court located in a State Party to the Convention which is located in a State which is the (i) permanent residence or principal place of business of the defendant;²⁷ (ii) place of departure or destination as noted in the contract of carriage;²⁸ (iii) domicile or permanent residence of the claimant,²⁹ or the place where the contract of carriage was made,³⁰ if the defendant has a place of business and is subject to jurisdiction in that State.³¹ Alternatively the parties can agree, after the occurrence of the incident that gave rise to the claim, to a different jurisdiction or to arbitration.³²

However any contractual provisions that were entered into before the incident that gave rise to the claim, that attempt to restrict Article 17, limit or exempt the carrier from liability, or shift the burden of proof contrary to the Articles of the Convention, will be null and void.³³

The 2002 Protocol has also introduced a new Article 17bis which sets out rules for the recognition and enforcement of judgments in States that are party to the Convention.

Finally, Article 14³⁴ states that the only recourse against the carrier can be under the Athens Convention. This would appear to rule out any action brought by the claimant under domestic law principles of tort or contract law.

Liability limits

The liability limits are set forth in Articles 7 and 8. The Articles have largely remained unchanged, with the 2002 Protocol, except for the substantial increase in the limitation ceiling.

Under Article 7 the liability limits for death and personal injury to a passenger have been raised by the 2002 Protocol from 46,666 SDR to 400,000 SDR, the Protocol has also updated and clarified the language of the old Article. The State Parties also have a right to increase these limits under national law, if they so desire. Prior to the 2002 Protocol this has been done in the UK on two occasions first through The Carriage of Passengers and their Luggage

²⁶ PAL 1974/2002

²⁷ Article 17(1)(a) PAL 1974/2002

²⁸ Article 17(1)(b) PAL 1974/2002

²⁹ Article 17(1)(c) PAL 1974/2002

³⁰ Article 17(1)(d) PAL 1974/2002

³¹ The same requirement applies for actions brought under Article 4bis PAL 2002 [Article 17(2) PAL 2002].

³² Article 17(2) PAL 1974/Article 17(3) PAL 2002

³³ Article 18 PAL 1974/2002 (Note: the 2002 Protocol has slightly altered the language of this article, but its overall purpose has remained the same.)

³⁴ PAL 1974/2002

by Sea (United Kingdom Carriers) Order 1987³⁵ which raised the 46,666 SDR limit to 100,000 SDR and then again in 1998 through The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) Order 1998³⁶ raising the limit to 300,000 SDR.

Liability limits for luggage and vehicles under Article 8 have been raised from 833 SDR to 2,250 SDR for cabin luggage,³⁷ from 3,333 SDR to 12,700 SDR for vehicles and any luggage in or on them,³⁸ and finally from 1,200 SDR to 3,375 SDR for any other luggage not covered by the previous provisions.³⁹

The carrier can lose its right to limit “if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.”⁴⁰ This is the same test for breaking the limitation as used in the LLMC 1976⁴¹ Article 4 and CLC 1992 Article V(2) and it is nearly impossible to break the limitation,⁴² however it could be argued that 400,000 SDR is a reasonable amount for most personal injury losses, however it seems less reasonable when it comes to the death of a passenger.

In regards to luggage the limits are more in favour of the carrier as it is very common nowadays that passenger’s cabin luggage or their car far exceeds even the 2002 limits and the passenger is rarely in a position to negotiate with a carrier pursuant to Article 10(1) about setting a higher limit for valuables that might be brought on board.

The vehicle limitation amount is particularly troublesome, since 12,700 SDR is only about £12,500 or \$19,000⁴³ while the average price of a new car in 2013 is £28,973 in UK⁴⁴ and

³⁵ S.I. 1987/855 as amended by The Carriage of Passengers and their Luggage by Sea (United Kingdom Carriers) (Amendment) Order 1989 (S.I. 1989/1880) [Note: S.I. -> Statutory Instrument]

³⁶ S.I. 1998/2917

³⁷ Article 8(1) PAL 1974/2002

³⁸ Article 8(2) PAL 1974/2002

³⁹ Article 8(3) PAL 1974/2002

⁴⁰ Article 13(1) PAL 1974/2002

⁴¹ Convention on Limitation of Liability for Maritime Claims (LLMC) 1976

⁴² E.g. see Katie Smith Matison, ‘Comparison of Shipowners’ Limitation of Liability Schemes’ (Lloyd’s Maritime Training Programme) <http://www.lanepowell.com/wp-content/uploads/2009/04/matisonk_002.pdf> at page 7 – “This standard creates a very high threshold to successfully break limitation.”; Gotthard Gauci ‘The International Convention on the Removal of Wrecks 2007 - a flawed instrument?’ J.B.L. 2009, 2, 203-223 at 216 – “It is the view of this author that there does not continue to exist any justification for the virtually unbreakable right of the shipowner to limitation of liability”; for support of the limitation of liability system see David Steel QC, ‘Ships are different: the case for Limitation of Liability’ [1995] 1 LMCLQ 77

⁴³ Data from <http://coinmill.com/SDR_calculator.html#SDR=12700> done on 9 April 2013

⁴⁴ Motor Trader, ‘Average new car price rises to £28,973’ 8 August 2012 <<http://www.motortrader.com/latest-news/average-car-price-rises-28973/>>

\$30,748 in the US.⁴⁵ This could leave Ro-Ro ferry passengers who lose their car and its contents in less than perfect position since they are unlikely to break the limitation ceiling.

In addition to the above per passenger limitation, based on Article 19, the carrier can try to enforce its rights to the global limitation figure as set out in the 1957 and 1976 limitation conventions, in accidents where there are numerous passenger claims.⁴⁶

The 2006 IMO Reservation and Guidelines

The IMO has in 2006 created the Guidelines for the implementation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002⁴⁷ which provide a reservation template intended to be used as a standard reservation by Member States when implementing the 2002 Protocol. The reservation allows for a lower liability limit of 250,000 SDR per passenger or 340 million SRD per ship, when it comes to certain war and terrorism risks as mentioned in section 2.2 of the IMO Guidelines.

This was intended “to put States in a position to ratify the 2002 Protocol and thereby afford passengers better cover.”⁴⁸ However considering that the number of ratifications for the 2002 Protocol currently stands at only nine, it does not appear that the guidelines have had the desired effect to encourage widespread adoption of the 2002 Protocol.⁴⁹

Conclusion

The Athens Convention is not perfect with ratifications representing only about 45% of the world’s tonnage,⁵⁰ and with the biggest cruise passenger markets of US and Canada⁵¹ not

⁴⁵ Auto Blog, ‘Average price of new car sales transaction hits \$30,748, an all-time record’ 11 April 2012, <<http://www.autoblog.com/2012/04/11/average-price-of-new-cars-hits-all-time-record/>>

⁴⁶ This will be discussed in more detail in Chapter Two.

⁴⁷ IMO document Ref. A1/P/5.01, Circular letter No.2758, 20 November 2006; for more details see IMO website at <[http://www.imo.org/About/Conventions/listofconventions/pages/athens-convention-relating-to-the-carriage-of-passengers-and-their-luggage-by-sea-\(pal\).aspx](http://www.imo.org/About/Conventions/listofconventions/pages/athens-convention-relating-to-the-carriage-of-passengers-and-their-luggage-by-sea-(pal).aspx)>, <http://www.imo.org/blast/mainframe.asp?topic_id=280&doc_id=6676>; and SKULD website at <<http://www.skuld.com/topics/people/plr--athens-convention/insight/eu-passenger-liability-regulation-2009-plr/terrorism/>>

⁴⁸ IMO Legal Committee (LEG), 92nd session: 16-20 October 2006, Paris, <http://www.imo.org/blast/mainframe.asp?topic_id=280&doc_id=6676>

⁴⁹ For further commentary on the 2006 IMO Guidelines see Erik Røsæg, ‘Passenger Liabilities and Insurance: Terrorism and War Risks’ in Rhidian Thomas, *Liability Regimes in Contemporary Maritime Law* (2007, Informal Law) at Chapter 12; also see US Department of State, ‘U.S. statements on Athens Convention’ <<http://www.state.gov/s/l/2006/98262.htm>> – for US objections to the 2006 Guidelines and the way they try to amend the 2002 Protocol “without following the revision or amendment procedures prescribed in the Protocol and underlying convention.”

⁵⁰ IMO website at <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>>

⁵¹ Florida-Caribbean Cruise Association (FCCA), ‘Cruise Industry Overview – 2013’ <<http://www.fcca.com/downloads/2013-cruise-industry-overview.pdf>>

participating, as well as other major maritime countries such as Australia and India, being absent, along with many states in Latin America and Africa.

Further problem with the 1974 Convention was that while some countries regarded the limits for death and personal injury in the Convention as too low,⁵² something that has been to a degree rectified by the 2002 Protocol, others, “particularly in East Asia,” considered them too high.⁵³

With the 2002 Protocol one bright area for the amended Convention is in the EU where the Convention was adopted as domestic legislation through Regulation 392/2009,⁵⁴ nonetheless this presents its own problems since the EU is not officially a State and cannot accede to the Convention. This has in effect resulted in two very similar regimes coexisting side by side once the 2002 Athens Convention comes into force.

Ultimately creating a worldwide liability convention for passengers is no easy task as different countries put different values on human injury and life. Liability limitation conventions, in general, are rarely a good idea and when it involves a sensitive area like passenger injury or death it is even more complicated and nearly impossible to address in a way that satisfies countries worldwide.

Continuing the discussion of liability limitation, the next chapter will look at some of the arguments for and against the various limitation regimes that exist in the shipping industry today and which very often impact passengers and other private individuals the hardest, including the implications of Article 19⁵⁵ and the global limitation conventions and particularly how the 1976 changes made it a lot harder to break the global limitation figures.

⁵² Set at a meager 46,666 SDR or roughly 45,414 GBP, 70,197 USD [Data from <http://coinmill.com/SDR_calculator.html> done on 27 April 2013].

⁵³ Baris Soyer, ‘Boundaries of the Athens Convention: What You See is Not Always What You Get!’ in Rhidian Thomas, *Liability Regimes in Contemporary Maritime Law* (2007, Informal Law) at page 183, footnote 6

⁵⁴ Which will be considered in more detail in Chapter 4.

⁵⁵ PAL 1974/2002

Chapter 2

Limitation of Liability in International Conventions

Limitation of liability for ship-owners¹ has a long and rich history in the maritime world.² It is believed to originate between 454 AD and 1291 AD, with the first known evidence of it being from the Amalphan Table, an early 11th century Italian commercial code.³ The development of the concept continued over the centuries with many defining moments such as The Responsibility of Shipowners Act 1733⁴ in Britain and the US Congress Limitation of Liability Act 1851.⁵ These early efforts set the frameworks which eventually led to the development of the first international legislation in this area starting with the 1924⁶ and 1957⁷ Conventions and the more recent Convention on Limitation of Liability for Maritime Claims 1976 and its 1996 Protocol.⁸

Limitation of liability can be defined as the process by which the defendant can limit the amount of compensation he could potentially be liable for.⁹ In other words it allows the defendant to limit the amount of damages payable to the claimant.

¹ Note: both Limitation of the Liability Conventions of 1957 and 1976 extend the right to limitation to other entities such as charterers, managers, operators and others; for more details see Article 6 of 1957 Convention, and Article 1 of 1976 Convention (see bibliography for full name of the conventions).

² For a detailed historical account of the evolution of Limitation of Liability see James J. Donovan, 'The Origins and Development of Limitation of Shipowners' Liability' 53 Tul. L. Rev. 999 (1979)

³ James J. Donovan, 'The Origins and Development of Limitation of Shipowners' Liability' 53 Tul. L. Rev. 999 (1979) at 1001; also see Katie Smith Matison, 'Comparison of Shipowners' Limitation of Liability Schemes' (Lloyd's Maritime Training Programme) <http://www.lanepowell.com/wp-content/uploads/2009/04/matisonk_002.pdf>; and Christopher Hill, *Maritime Law* (6th Ed. 2004, LLP Professional Publishing) at page 394

⁴ The Responsibility of Shipowners Act 1733 (7 Geo. II, c.15)

⁵ Limitation of Liability Act 1851 (46 U.S.C. app. § 183); Katie Smith Matison, 'Comparison of Shipowners' Limitation of Liability Schemes' (Lloyd's Maritime Training Programme) <http://www.lanepowell.com/wp-content/uploads/2009/04/matisonk_002.pdf> at page 1, also note that the US is not party to the 1957 or the 1976 Conventions, see page 3 for more details; for more information on the US Act see John D. Kimball, 'US Limitation of Liability Act (46 USC section 183)' UK P&I Club <<http://www.ukpandi.com/knowledge-developments/article/us-limitation-of-liability-act-46-usc-section-183-760/>>

⁶ International Convention for the Unification of Certain Rules Relating To the Limitation of the Liability of Owners of Seagoing Vessels 1924

⁷ International Convention relating to the Limitation of the Liability of Owners of Sea-going Ships and Protocol of Signature 1957

⁸ John Hare, 'Limitation of Liability – A Nigerian Perspective' <<http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf>> at page 4 – "It is in the English version of limitation of liability that the international conventions relating thereto, culminating in the Limitation of Liability Convention of 1976, have their basis."; The 1976 Convention is incorporated into UK law through The Merchant Shipping Act 1995.

⁹ E.g. see Christopher Hill, *Maritime Law* (6th Ed. 2004, LLP Professional Publishing) – Chapter 10; also see Proshanto K. Mukherjee, 'Chapter Three – Essentials of the regimes of limitation of liability in maritime law' at page 40 <<http://www.jur.lu.se/Quickplace/jasn12/Main.nsf>> – where it is argued that "the term 'limitation of liability' is a misnomer", and the term "limitation of damages or compensation" is suggested.

Various types of liability limitations in maritime law

There are various regimes that govern different aspect of liability limitation in maritime law. The 1957 Limitation Convention and the 1976 LLMC¹⁰ establish liability limits in terms of tonnage.¹¹ These conventions provide the “global limitation figure,” i.e. a “tonnage-based figure [that] provides the maximum financial liability of the ship-owner in respect of all claims arising out of any one incident.”¹²

The Hague-Visby rules¹³ that are either mandatory through national legislation,¹⁴ or can be incorporated into maritime instruments by the parties,¹⁵ use a per package/kilogram limitation regime and have special provisions for container cargo.¹⁶

There are also special international conventions that set up liability limitations for particular types of cargo that is excluded from the LLMC 1976 under Article 3 and Article 18(1)(b). These include the Civil Liability Convention 1992¹⁷ and the Fund Convention 1992¹⁸ relating to oil pollution damage,¹⁹ the Convention on the Liability of Operators of Nuclear Ships 1962,²⁰ and the HNS Convention 1996,²¹ relating to hazardous and noxious substances.

¹⁰ Convention on Limitation of Liability for Maritime Claims 1976

¹¹ See Article 6 of 1976 Convention; Article 3 of 1957 Convention.

¹² Simon Baughen, *Shipping Law* (2nd Ed. 2001, Cavendish Publishing Limited) at page 405

¹³ Four different rules currently exist, with the first three already in force. The Hague Rules 1924; Hague-Visby Rules 1968; Hamburg Rules 1978; and Rotterdam Rules 2008 (not yet in force as of 18 May 2013); for a list of signatories see – A Survey of the Cargo by Sea Conventions <<http://www.admiraltylaw.com/papers/countrytable.pdf>>; and Rotterdam Rules 2008 status <http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html>; for a comparison of the different Rule regimes see Indira Carr, *International Trade Law* (4th Ed. 2010, Routledge-Cavendish) at page 317

¹⁴ In the UK this is through the Carriage of Goods by Sea Act 1971 – s1(2) – “The provisions of the Rules, as set out in the Schedule to this Act, shall have the force of law.”

¹⁵ Simon Baughen, *Shipping Law* (2nd Ed. 2001, Cavendish Publishing Limited) at page 106 – “The Rules are frequently incorporated into documents other than bills of lading, such as charterparties or waybills,”

¹⁶ Indira Carr, *International Trade Law* (4th Ed. 2010, Routledge-Cavendish) at page 254 and 259; Simon Baughen, *Shipping Law* (2nd Ed. 2001, Cavendish Publishing Limited) at page 128

¹⁷ International Convention on Civil Liability for Oil Pollution Damage 1992 <http://www.iopcfunds.org/uploads/tx_iopcpublishations/Text_of_Conventions_e.pdf>

¹⁸ International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 <http://www.iopcfunds.org/uploads/tx_iopcpublishations/Text_of_Conventions_e.pdf>

¹⁹ For more details on the liability limitation provisions see Simon Baughen, *Shipping Law* (2nd Ed. 2001, Cavendish Publishing Limited) at pages 332, 335, and 337; also see Incidents Involving the IOPC Funds 2012 <http://www.iopcfunds.org/uploads/tx_iopcpublishations/incidents2012_e.pdf>, all publications at <<http://www.iopcfunds.org/publications/>>

²⁰ For more details see Nathalie L.J.T. Horbach, Patrick Blanchard, ‘Nuclear civil liability for international transport: new queries and proposals’ *I.B.L.J.* 2006, 5, 633-662; Peider Konz, ‘The 1962 Brussels Convention on the Liability of Operators of Nuclear Ships’ *AJIL* 57(1) (1963), pp. 100-111, Michael Hardy, ‘The Liability of Operators of Nuclear Ships’ *ICLQ* 12(3) (1963), pp. 778-788

²¹ The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996; for more details see Simon Baughen, *Shipping Law* (2nd Ed. 2001, Cavendish Publishing Limited) at pages 339 and 341; also see The HNS Convention as Modified by the

The Athens Convention,²² as discussed earlier, provides a detailed regime of recovery for passenger injury, death and luggage claims, and through Article 19 creates a dual system together with Article 2 of LLMC in regards to liability limitation for such claims; however the difference is that the LLMC creates a global limitation while the Athens Convention works on an individual per passenger bases.²³

Additionally each state can set up other limitation regimes if they do not conflict with areas that are governed by the international conventions. For example the UK Merchant Shipping Act 1995 Section 191 governs liability limitations for “harbour authority, a conservancy authority and the owners of any dock or canal,”²⁴ and the Pilotage Act 1987 Section 22 sets out the limitation of liability in respect of ship pilots.²⁵

Due to the fact that the global limitation conventions²⁶ can play a role in major maritime incidents involving numerous passengers it is important to consider some of the developments that have taken place in the new 1976 Convention and how those developments can potentially affect the claimant.

Changes introduced by the 1976 Convention

It has been argued that with the 1976 Convention it has become close to impossible for the claimant to break the limitation ceiling;²⁷ and indeed looking at the established case law this seems to be the case.²⁸

2010 HNS Protocol, September 2010, article by the IOPCF,
<http://www.iopcfunds.org/uploads/tx_iopcppublications/HNS_2010_e.pdf>

²² Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL) 1974 and the Protocol of 2002 (not yet in force as of 1st Apr 2013), for liability limitation see Articles 7 and 8;

²³ B. Soyer, ‘1996 Protocol to the 1976 Limitation Convention: a more satisfactory global limitation regime for the next millennium?’ J.B.L. 2000, Mar, 153-172 at 162; also see J. Basedow et al., *The Hamburg Lectures on Maritime Affairs 2007 & 2008* (2010, Springer-Verlag) at page 55-75 - Erik Røsæg, ‘The Athens Convention on Passenger Liability and the EU’ at page 68

²⁴ Merchant Shipping Act 1995 s191(1); e.g. see *Mason v Uxbridge Boat Centre* [1980] 2 Lloyd’s Rep 592

²⁵ E.g. see *Oceangas (Gibraltar) v Port of London Authority (The Cavendish)* [1993] 2 Lloyd’s Rep. 292

²⁶ i.e. the 1957 Limitation Convention and the 1976 LLMC Convention

²⁷ Simon Baughen, *Shipping Law* (2nd Ed. 2001, Cavendish Publishing Limited) at page 405 – “it has now become almost impossible for a shipowner to lose the right to limit on the basis of its misconduct”; also see Charles Haddon-Cave QC, ‘Limitation Against Passenger Claims: Medieval, Unbreakable and Unconscionable’ CMI Yearbook 2001 (234p) <http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf> at pages 237-238, for an interesting take on why the limitation can be regarded as truly unbreakable.

²⁸ E.g. see *The Bowbelle* [1990] 1 W.L.R. 1330 at 1335 – the new test “imposes upon the claimant a very heavy burden”; the shift from 1957 to 1976 has been labeled as a “dramatic change” – at 1334; also see *The Capitan San Luis* [1994] Q.B. 465; and John Hare, ‘Limitation of Liability – A Nigerian Perspective’ <<http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf>> at page 10 – “The overall effect of the LLMC has been to completely transform the law in relation to the rights of shipowners (and others) to limit their liability.”

Two of the most significant changes introduced by the 1976 Convention are that it has transformed the test for breaking the limitation and it has shifted the burden of proof from the defendant ship-owner to the claimant.²⁹

The original “actual fault or privity”³⁰ test from the 1957 Convention was redesigned so that now for the limitation to be broken it is necessary for the claimant to establish that “the loss resulted from [the ship-owners] personal act or omission, committed with the intent to cause such loss, or recklessly³¹ and with knowledge that such loss would probably result.”³²

This is a much more stringent test to overcome³³ and it has further disadvantaged the claimant by placing the burden of proof on him, resulting in a virtually unbreakable liability limitation regime.³⁴ As an example, in the cases of *The Lady Gwendolen*³⁵ and *The Marion*³⁶ the claimants were successful in discharging the limitation under the 1957 test, however if the cases were tried under the 1976 Convention, based on the facts, “the right to limit would almost certainly not have been lost.”³⁷

The one aspect that seems to have remained the same since 1957 is the concept of the alter-ego with regard to corporate entities to determine whether the one who is personally liable³⁸ was acting for the company.³⁹ This test has developed through case decisions, most significant of which are *The Marion*⁴⁰ and *The Lady Gwendolen*.⁴¹

²⁹ *The Capitan San Luis* [1994] Q.B. 465 at 466 – “The burden of proof has shifted to the claimant.”; for more details see Christopher Hill, *Maritime Law* (6th Ed. 2004, LLP Professional Publishing) at pages 406-409

³⁰ Limitation of Liability Convention 1957 Article 1; for a discussion and definition of the test see *Arthur Guinness Son & Company (Dublin) Ltd. v The Freshfield (Owners) and Others (The Lady Gwendolen)* [1964] 3 W.L.R. 1062 at 1070; also see *Asiatic Petroleum Company, Limited v Lennard's Carrying Company, Limited* [1914] 1 K.B. 419 at 432; *Compania Maritima San Basilio S.A. v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1977] Q.B. 49 at 65 – “actual fault or privity. Those words apply, not only to deliberate wrongdoing, but also to negligence”;

³¹ For a definition of recklessness see e.g. *Goldman v Thai Airways International Ltd* [1983] 3 All ER 693 at 700

³² LLMC 1976 Article 4

³³ E.g. see Katie Smith Mation, ‘Comparison of Shipowners’ Limitation of Liability Schemes’ (Lloyd’s Maritime Training Programme) <http://www.lanepowell.com/wp-content/uploads/2009/04/mationk_002.pdf> at page 7 – “This standard creates a very high threshold to successfully break limitation.”

³⁴ Gotthard Gauci ‘The International Convention on the Removal of Wrecks 2007 - a flawed instrument?’ J.B.L. 2009, 2, 203-223 at 216 – “It is the view of this author that there does not continue to exist any justification for the virtually unbreakable right of the shipowner to limitation of liability.”

³⁵ *Arthur Guinness, Son & Company (Dublin) Ltd. v The Freshfield (Owners) and Others. (The Lady Gwendolen)* [1965] P. 294 (CA)

³⁶ *Grand Champion Tankers Ltd v Norpipe AS (The Marion)* [1984] A.C. 563

³⁷ Simon Baughen, *Shipping Law* (2nd Ed. 2001, Cavendish Publishing Limited) at page 409

³⁸ Article 4 of LLMC 1976 still requires to identify the “person liable”, as was the case with Article 1(1) of the 1957 Convention.

³⁹ Christopher Hill, *Maritime Law* (6th Ed. 2004, LLP Professional Publishing) at page 406 – “the so-called Lady Gwendolen test”

⁴⁰ *Grand Champion Tankers Ltd v Norpipe AS (The Marion)* [1984] A.C. 563

⁴¹ *Arthur Guinness, Son & Company (Dublin) Ltd. v The Freshfield (Owners) and Others. (The Lady Gwendolen)* [1965] P. 294 (CA) – at 296 – “Where, as in the present case, a company has entrusted the management of its

Another significant change has been that the right of salvors to limit their liability has been incorporated into Article 1(4) of the LLMC.⁴² This has reversed the decision of the House of Lords in the *Tojo Maru*⁴³ case where it was held that a salvor cannot limit his liability if he is not on board the salvage ship “when he did the act which caused the damage.”⁴⁴

John Hare has labelled the harsher test for breaking the liability limits as a compromise for the increased limits of compensation under the 1976 Convention.⁴⁵ This idea of a compromise or trade-off also seems to be a view shared by the judiciary as Rix J. has stated “As is well known, the 1976 convention has significantly raised the limit of liability over that of the 1957 convention, but has at the same time made it much harder for a claimant to break the limit.”⁴⁶

In other words, it could be argued that even though the limitation has become virtually unbreakable the limits have increased substantially⁴⁷ and therefore the less serious claims will not be affected even if the limitation is in place, the problem can arise however when there is substantial damage caused by the ship-owner,⁴⁸ such as a sinking of a whole cruise ship or ferry, in which case the claimant will be at a disadvantage.⁴⁹

ships to a traffic department, the effective head of that department (the traffic manager) may be regarded as the alter ego of the company for purposes of its shipping business, so that his acts and omissions can be attributed to the company as its acts and omissions”; also see comments of Willmer L.J. at 343

⁴² Article 1(4) LLMC 1976 – “If any claims set out in Article 2 are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this Convention.”; also see Article 6(4) LLMC 1976

⁴³ *The Owners of the Motor Vessel Tojo Maru Original Appellants Cross-Respondents v N. v. Bureau Wijsmuller Original Respondents Cross-Appellants (The Tojo Maru)* [1972] A.C. 242

⁴⁴ *The Tojo Maru* [1972] A.C. 242 at 288; for additional commentary see Christopher Hill, *Maritime Law* (6th Ed. 2004, LLP Professional Publishing) at page 401; for more details on salvage and the issues surrounding it see e.g. Olivia Lennox-King, ‘Laying the Mark to Port And Starboard: Salvage Under Duress and Economic Duress at Contract Law’ (2007) 21 A&NZ Mar LJ

⁴⁵ John Hare, ‘Limitation of Liability – A Nigerian Perspective’

<<http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf>> at page 10 – “It appears...that the LLMC created a compromise: a limitation fund which was as high as possible whilst remaining insurable at a reasonable cost, together with the creation of a virtually ‘unbreakable’ right to limit liability.”; also see Aleka Mandaraka-Sheppard, *Modern Admiralty Law* (2001, Cavendish Publishing) at page 880 – “This Convention was a compromise in order to strike a balance between successful claimants and shipowners.”

⁴⁶ *Caspian Basin Specialised Emergency Salvage Administration & Anor v Bouygues Offshore SA & Ors.* [1997] C.L.C. 1463 at 1466, this case is also a good example of the problems that can arise when two parties from different states get into a dispute as to which convention to use (1957 or 1976) as each parties interests are served by the different regime; also see comments by Shaw J. in *The Bowbelle* [1990] 1 W.L.R. 1330 at 1335 – under the 1976 Convention “shipowners agreed to a higher limit of liability in exchange for an almost indisputable right to limit their liability.”

⁴⁷ The 1996 LLMC Protocol has further increased the limits set by the 1976 Convention; for a detailed analyses of the 1996 Protocol see B. Soyer, ‘1996 Protocol to the 1976 Limitation Convention: a more satisfactory global limitation regime for the next millennium?’ J.B.L. 2000, Mar, 153-172

⁴⁸ Or other entity covered by Article 1 LLMC 1976.

⁴⁹ Note: insurance that might be taken out by the claimant, and the effect the insurance considerations had on the 1976 Convention, is beyond the scope of this chapter.

With the higher per passenger liability limit of 400,000 SDR introduced by the 2002 Athens Protocol, it is not hard to imagine that a major disaster with multiple casualties can very quickly reach the global limitation figure of 25 million SDR as set by Article 7(1) LLMC 1976. The 1996 Protocol⁵⁰ to LLMC 1976 has changed this in Article 7(1) to a maximum liability limit determined by multiplying 175,000 SDR by the number of passengers which the ship is authorized to carry according to the ship's certificate.

To see how this affects the limit in practice let's take a passenger ship with a carry capacity of 200 passengers; there is a disaster and 100 passengers die and are awarded the maximum limited compensation under the Athens Convention 2002 of 400,000 SDR each. This would be a total of 40 million SDR and under the 1976 LLMC the carrier could limit this amount to just 25 million SDR.

Under LLMC 1996 it would be 175,000 SDR multiplied by 200 passenger ship carry capacity equalling in a global limit of 35 million SDR, meaning 10 million SDR better off, but still 5 million SDR short of compensating the 50% of casualties from this accident.

So while it would appear that the new formula for calculating the global limit is more generous, it can still easily fall short of fully compensating every passenger in a major disaster.

The 1996 Protocol has further added Article 15(3)bis which enables a State Party to set higher or no liability limits to the global passenger liability through specific provisions of national law.

One interesting aspect that has been pointed out by Norman Gutiérrez is that there seems to be a missing link between the Athens Convention and the LLMC when it comes to entities such as holiday companies and tour operators, who fall under the definition of a carrier in the Athens Convention,⁵¹ but not under the qualifying definition of Article 1(2) of the LLMC. This could theoretically result in certain carriers being liable under the Athens Convention, but not qualifying for the global liability limitations of the LLMC.⁵²

It has been established that the 1976 Convention made it a lot more difficult to overcome and break the limitation, together with a lot of other changes, in effect completely reforming⁵³ the

⁵⁰ Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976

⁵¹ Article 1(1)(a) PAL 2002 – “‘carrier’ means a person by or on behalf of whom a contract of carriage has been concluded, whether the carriage is actually performed by that person or by a performing carrier;”

⁵² For more details see Norman A. Martínez Gutiérrez, *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes* (Routledge Publishing, 2011) at pages 205-206

⁵³ For more details see John Hare, ‘Limitation of Liability – A Nigerian Perspective’

<<http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf>> at page 10 – “The overall effect

law of global liability limitation. The next section will consider whether this is a good or bad development in this area of law, or whether the best outcome would be to abolish the limitation regime altogether.⁵⁴

Time for a change? The case for abolishing limitation of liability

Historically there were various reasons why limitation of liability for ship owners was established;⁵⁵ however it is questionable whether such reasons are still valid today.⁵⁶ Especially when it comes to liability for personal injury or death, it is beyond comprehension that “a cruise liner captain or aircraft pilot’s conduct could give rise to a charge of manslaughter but still be insufficient to break the limit under the Athens, LLMC or Warsaw Conventions;”⁵⁷ is the economic survival of the ship-owner or air-carrier really more important than fully compensating loss of life or a permanent disability?

If the liability regime is to be retained in some form, distinction needs to be made between limiting liability for purely property damage and limiting liability for personal injury and death.⁵⁸ However even if you abolish the limits in regards to personal injury or death, it is hard to argue with the basic principle of tort law: “that a person who damages or causes damage to the property of another should pay for it.”⁵⁹

of the LLMC has been to completely transform the law in relation to the rights of shipowners (and others) to limit their liability.”

⁵⁴ For a discussion of the limitation regime in the US see e.g. Katie Smith Matison, ‘Comparison of Shipowners’ Limitation of Liability Schemes’ (Lloyd’s Maritime Training Programme) <http://www.lanepowell.com/wp-content/uploads/2009/04/matisonk_002.pdf> at pages 13-22; also see B. Soyer, ‘1996 Protocol to the 1976 Limitation Convention: a more satisfactory global limitation regime for the next millennium?’ J.B.L. 2000, Mar, 153-172 at page 171

⁵⁵ From protecting national shipping interests to protecting vulnerable ship owners from going bankrupt because of one incident [Allan I. Mendelsohn, ‘The Public Interest and Private International Maritime Law’ 10 Wm. & Mary L. Rev. 783 (1969) <<http://scholarship.law.wm.edu/wmlr/vol10/iss4/3>> at page 789]; also see Preamble of The Responsibility of Shipowners Act 1733 – it is “of the greatest importance to this Kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein”; for the reasoning behind the US Limitation of Liability Act 1851 see *University of Texas Medical Branch at Galveston v. U.S.* 557 F.2d 438 (1977) at 454 – cross-reference to Remarks of Sen. Davis, February 26, 1851 – “The stated purpose of the Limitation Act was to place this country’s ‘mercantile marine upon the same footing as that of Great Britain.’”

⁵⁶ See Lord Mustill, ‘Ships are different — or are they?’ 1993 LMCLQ 490- 501; or Huybrechts M, ‘Limitation of liability and of actions’ [2002] 3 LMCLQ 370; for support of the limitation of liability system see David Steel QC, ‘Ships are different: the case for Limitation of Liability’ [1995] 1 LMCLQ 77

⁵⁷ Charles Haddon-Cave QC, ‘Limitation Against Passenger Claims: Medieval, Unbreakable and Unconscionable’ CMI Yearbook 2001 (234p) <http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf> at page 238

⁵⁸ Even David Steel a proponent of retaining the liability limitation admitted that passengers should be treated differently than freight [Charles Haddon-Cave QC, ‘Limitation Against Passenger Claims: Medieval, Unbreakable and Unconscionable’ CMI Yearbook 2001 (234p) at page 241]; for more details see David Steel QC, ‘Ships are different: the case for Limitation of Liability’ [1995] 1 LMCLQ 77

⁵⁹ Gotthard Gauci, ‘Limitation of liability in maritime law: an anachronism?’ (1995) Marine Policy 19(1) 65-74 at page 69

In the case of *The Garden City (no2)*,⁶⁰ Griffiths L.J. stated that limitation of liability “is a right given to promote the general health of trade and is in truth no more than a way of distributing the insurance risk.”⁶¹ If this is indeed true then it seems to hold weight only when it comes to commercial cargo, since the “health of the trade” should not, in the opinion of this writer, play a role in determining whether an injured passenger is entitled to a full compensation or not.

Lord Denning described the limitation regime in terms “that there is not much room for justice in this rule: but limitation of liability is not a matter of justice. It is a rule of public policy which has its origin in history and its justification in convenience.”⁶² A public policy created for the ship-owners at the expense of others; while that might have been acceptable years ago, opinions are changing⁶³ and as people become more aware of the law and their rights under it, and while the growth and profits of big business continue to skyrocket it is becoming more and more difficult to hold onto legal principles that are not just in the eyes of the majority,⁶⁴ even if there may be some valid arguments for their survival in certain circumstances.⁶⁵

In the US the judiciary is a lot more critical of the need for a limitation regime. Justice Black has said that the conditions that led to the 1851 Act⁶⁶ no longer prevail and if congress wants to subsidise the shipping industry they are free to do so, but it should be done “without making injured seamen bear the cost.”⁶⁷

Even more critically Judge Kozinski labelled the Limitation Act as “Misshapen from the start, the subject of later incrustations, arthritic with age, the Limitation Act has ‘provided the setting for judicial law-making seldom equalled,’” and added that it would be “well advised

⁶⁰ *Polish Steamship Co v Atlantic Maritime Co (The Garden City) (No.2)* [1985] Q.B. 41

⁶¹ *Polish Steamship Co v Atlantic Maritime Co (The Garden City) (No.2)* [1985] Q.B. 41 at 55

⁶² *Alexandra Towing Co Ltd v Owners of Dumb Barge Millet (The Bramley Moore)* [1964] P. 200 at 220; In the opinion of this writer this reasoning hardly makes a strong case for the retention of the limitation of liability regime.

⁶³ Charles Haddon-Cave QC, ‘Limitation Against Passenger Claims: Medieval, Unbreakable and Unconscionable’ CMI Yearbook 2001 (234p) at page 234, also at page 241 – “more and more questions are being asked about the justification for limitation of any sort”

⁶⁴ Lord Mustill “Ships are different-or are they?” [1993] LMCLQ 490-501 – “It may still take a number of years, but the time will come when the ethics of limitation will be firmly put in issue. Surely, if the international insurance market is to resist these it must first eliminate the elements which would rightly be identified at first sight by any objective observer as wholly indefensible.”

⁶⁵ For arguments for limitation of liability see John Hare, ‘Limitation of Liability – A Nigerian Perspective’ <<http://web.uct.ac.za/depts/shiplaw/fulltext/harepapers/limliab-nigeria.pdf>> at page 19 – “The Case for Limitation of Liability in Modern Maritime Law”; also see David Steel QC, ‘Ships are different: the case for Limitation of Liability’ [1995] 1 LMCLQ 77

⁶⁶ Limitation of Liability Act 1851 (46 U.S.C. app. § 183)

⁶⁷ *Maryland Cas. Co. v Cushing* (1954) 347 U.S. 409, 74 S.Ct. 608 at 623

to examine other approaches or to consider whether the rationale underlying the Liability Act continues to have vitality”⁶⁸ in modern times.

M.M. Billah argues that “liability serves two purposes: compensation and deterrence,”⁶⁹ what limitation of liability does is to negate the deterrence factor, which then “encourages negligent navigation.”⁷⁰ In other words if the level of potential liability is lower than the amount needed to prevent an accident and a potential claim, then there is no economic incentive for the ship-owner to try to prevent it.⁷¹

Shipping has come a long way from the 18th century and now is dominated by huge corporate interests that are extremely unlikely to go bankrupt even if a major incident does take place.⁷² In the opinion of this writer there is no legal reason or justice in the liability limitation regime.

The growing notion “that if somebody is hurt, then it must be somebody’s fault – and they should pay full compensation”⁷³ is gaining strength, and with the legislative strides made by the Oil Pollution Act of 1990 in the US, which in effect allows states to abolish limitation in regards to oil pollution damage,⁷⁴ it is only a matter of time (or a matter of few other major disasters taking place) before the public opinion shifts completely and the pressure outweighs that of the industry lobby groups and politicians will have to act. The sad part is that it usually takes a major disaster for the winds to shift, as has been the case throughout history.⁷⁵

⁶⁸ *Esta Later Charters, Inc. v Ignacio* 1989 A.M.C. 1480 at 1488

⁶⁹ Muhammad Masum Billah, ‘Economic Analysis of Limitation of Shipowners’ Liability’ 19 USFMLJ 297 at 300

⁷⁰ M.M. Billah, 19 USFMLJ 297 at 298

⁷¹ M.M. Billah, 19 USFMLJ 297 at 306-307

⁷² E.g. the Exxon Valdes Disaster where damages were in excess of \$7 billion [Charles Haddon-Cave QC, ‘Limitation Against Passenger Claims: Medieval, Unbreakable and Unconscionable’ CMI Yearbook 2001 (234p) at page 240] or more recently the BP Deepwater Horizon incident, while not entirely related to shipping, it shows that even the largest of environmental disasters (with costs estimated at \$42 billion) is not enough to bankrupt a huge multinational corporation, see Dominic Rushe, ‘BP sues Halliburton for Deepwater Horizon oil spill clean-up costs’ The Guardian 03/01/2012 <<http://www.guardian.co.uk/business/2012/jan/03/bp-sues-halliburton-over-deepwater>>

⁷³ Charles Haddon-Cave QC, ‘Limitation Against Passenger Claims: Medieval, Unbreakable and Unconscionable’ CMI Yearbook 2001 (234p) at page 234

⁷⁴ For more details see Gotthard Gauci, ‘Limitation of liability in maritime law: an anachronism?’ (1995) Marine Policy 19(1) 65-74 at page at 73-74

⁷⁵ Charles Haddon-Cave QC, ‘Limitation Against Passenger Claims: Medieval, Unbreakable and Unconscionable’ CMI Yearbook 2001 (234p) at page at 239 – Major Japanese air crash “This started a process which has led to the unraveling of limitation against passenger claims in the aviation world – and is having a knock-on effect in the shipping world. Many applauded the Japanese for politely (and unilaterally) bowing out of the Warsaw shambles in October 1992 and waiving all limits on national and international flights by Japanese carriers.”; also see e.g. the creation of SOLAS after The Titanic disaster <<http://www.imo.org/OurWork/Safety/Regulations/Documents/TITANIC.pdf>>; The Erika regulations in EU after Oil Tanker disaster [Maritime safety: Erika I package “Pressure of public opinion prompted the Commission to propose action at Community level.” <http://europa.eu/legislation_summaries/transport/waterborne_transport/l24230_en.htm>], etc.;

Conclusion

As highlighted in the above discussion, different liability regimes exist within the shipping industry. The Athens Convention together with the LLMC forms an interesting double limitation system that employs per passenger limitation combined with an overall global liability limitation regime that takes precedence.

Both of these conventions employ a hard to break limitation ceiling while at the same time they have been gradually, and often substantially, raising their liability limits. One view is that this has been done to preserve certainty in the insurance markets,⁷⁶ but whatever the ultimate reasons are behind the current nature of liability limitation, the end result should always be to fully compensate an innocent third party and where necessary award punitive damages to discourage certain industry practices.



So far chapters one and two looked at the international side of carrier liability towards passengers and some of the problems that may arise; the next chapter will consider judicial interpretation of international treaties and some basic principles of the common law legal system.

These are just three examples in the unacceptable pattern of disaster->regulation, disaster->regulation. It is the 21st century and a change to this disastrous pattern is long overdue. The lawmakers should be in the business of trying to prevent disasters and not waiting for them to happen in order to wake up and act.

⁷⁶ Norman A. Martínez Gutiérrez, *Limitation of Liability in International Maritime Conventions: The Relationship between Global Limitation Conventions and Particular Liability Regimes* (Routledge Publishing, 2011) at page 201

Chapter 3

Judicial Interpretation of International Treaties and the Common Law Legal System

This chapter will look at how domestic courts use and interpret international law with a focus on the English and American legal systems. It will first look at general aspects of international law, its definition and sources, followed by a discussion of the basic principles and characteristics of the common law legal system, this part will provide a useful background when later looking at the domestic and regional laws that affect cruise ship passengers. Continuing with an analysis of how English courts interpret international treaties considering various court decisions, academic opinions and other sources, and finishing up with a brief discussion of some key points in regards to international treaties in the United States.



International law has a long and varied tradition, from the dawn of human civilization there have been agreements between different civilisations¹ that could be regarded as the early predecessors of what is now considered international law. The main body of today's international law has developed post Second World War with the establishment of the United Nations in 1945² and other international organizations as well as the creation of close state partnerships such as the EU, which is by some regarded more of a federal state itself than an international body.³

International law is becoming more and more important as the number of international businesses grows and movement of people, goods, and services between different states increases; which in turn results in the increase of international disputes and the pressure on domestic courts to adjudicate those disputes.⁴ In the words of Lord Bingham, “to an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and

¹ As long ago as 1400BC with “the great empires of Egypt, Babylon, Assyria and the Hittites” at page 2 (of Bederman’s book); for more details on the early beginning of international law see David J. Bederman, *International Law in Antiquity* (Cambridge University Press, 2001)

² UN at a Glance <<http://www.un.org/en/aboutun/index.shtml>>; for more details on the UN also see The Charter of the UN <<http://www.un.org/en/documents/charter/index.shtml>>;

³ Robert R. Schutze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP Oxford, 2009); also see Viviane Reding, ‘Why we need a United States of Europe now’ SPEECH/12/796, 8 Nov 2012, <http://europa.eu/rapid/press-release_SPEECH-12-796_en.htm>

⁴ *Regina (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Another (United Nations High Commissioner for Refugees intervening)* [2005] 2 A.C. 1 at 11 – “The use of international law in the domestic courts has a long and valuable history.”

application of international law, not on an occasional basis, now and then, but routinely and often in cases of great importance.”⁵

Definition and sources of international law

Definition

According to Malcolm Shaw’s definition “Law consists of a series of rules regulating behaviour” and reflects the ideas of the society within which it functions.⁶

To put this into international perspective; International law is a body of law⁷ that governs relations that involve more than one state, be it relations between the states themselves (public international law) or private entities operating in more than one state (private international law⁸). Most of written international law is enshrined in various treaties and conventions.⁹ The Vienna Convention 1969¹⁰ in Article 2(1)(a) defines a treaty as “an international agreement concluded between States in written form and governed by international law.”

Sources

The Statute of the International Court of Justice¹¹ in Article 38 lists four main categories of sources of international law.¹² Many academics have come up with similar lists of sources, such as J. Starke’s list that consist of “Custom, Treaties, Decisions of judicial or arbitral tribunals, Juristic works, and Decisions or determinations of the organs of international institutions.”¹³

Domestic courts can consider any of these sources. The priority of sources mostly depends on the practices of a particular legal system be it common law system which places more

⁵ Lord Bingham, ‘Foreword’ in Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing, Oxford, 2005)

⁶ Malcolm N. Shaw, *International Law* (Cambridge University Press, Sixth Edition 2008) at page 1

⁷ This includes: treaties, conventions, customary law, judicial decision, and many other sources.

⁸ Also termed as ‘conflict of laws’ see Malcolm N. Shaw, *International Law* (Cambridge University Press, Sixth Edition 2008)

⁹ Such as the United Nations Convention on the Law of the Sea (UNCLOS) 1982; or the 1999 Montreal Convention for Unification of Certain Rules for International Carriage by Air; and many others.

¹⁰ Vienna Convention on the Law of Treaties 1969

¹¹ The Statute of the International Court of Justice is annexed to the Charter of the United Nations, of which it forms an integral part. < <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>>

¹² These are: “a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

¹³ Joseph Gabriel Starke, *Introduction to international law* (Butterworths, 1984) at page 149

emphases on case law or the civil law system that is more code based and places some emphases on influential academic opinions and articles.



Before going on to the analyses of how common law courts interpret international treaties, the next section will provide a look at some basic features that characterise the system. This part will be especially useful for those that are not familiar with the common law legal system and will provide some insights into how it functions.

Some basic principles of a common law jurisdiction

In common law jurisdictions case law plays a very important role together with the principle of precedent¹⁴. In England the two main sources of law are the Acts of Parliament and Case Law. In areas that are not controlled by any Act of Parliament the English courts are free to adjudicate on the matter. They can use various sources when adjudicating a case, including Acts of Parliament, prior Case Law, White and Green papers¹⁵, EU Law,¹⁶ even precedents of foreign or international courts, if appropriate, and many other sources.

Certain areas are solely governed by laws created through case decisions. For example the case of *Donoghue v Stevenson*¹⁷ is the founding case behind the concept of negligence, establishing the principle of duty of care.¹⁸ This case also illustrates how the court can use foreign case law, in this case from the United States, as persuasive authority to help with a decision in a developing area of law.¹⁹ The basic principle of duty of care established in

¹⁴ Precedent is defined by the *Oxford English dictionary of Law* as: “A judgment or decision of a court, normally recorded in a law report, used as an authority for reaching the same decision in subsequent cases. In English law, judgments and decisions can represent authoritative precedent (which is generally binding and must be followed) or persuasive precedent (which need not be followed). It is that part of the judgment that represents the legal reasoning (or ratio decidendi) of a case that is binding, but only if the legal reasoning is from a superior court and, in general, from the same court in an earlier case. Accordingly, ratio decidendi of the House of Lords are binding upon the Court of Appeal and all lower courts and are normally followed by the House of Lords itself. The ratio decidendi of the Court of Appeal are binding on all lower courts and, subject to some exceptions, on the Court of Appeal itself. Ratio decidendi of the High Court are binding on inferior courts, but not on itself. The ratio decidendi of inferior courts do not create any binding precedent.”; note: The House of Lords has been replaced by the Supreme Court through the Constitutional Reform Act 2005, and started its operation on 1st October 2009, for more details see <<http://www.supremecourt.gov.uk/>>

¹⁵ Parliament papers generated prior to passing a Bill, that can give an insight into the intention of the parliament for passing a particular Bill; Oxford Dictionary definition: White Papers - contain statements of policy or explanations of proposed legislation; Green Papers - are essentially discussion documents;

¹⁶ When the issue in question concerns an aspect of EU Law.

¹⁷ *Donoghue v Stevenson* [1932] A.C. 562

¹⁸ *Donoghue v Stevenson* [1932] A.C. 562 at 577 – “manufacturer, or indeed the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed”

¹⁹ *Donoghue v Stevenson* [1932] A.C. 562 at 576-577

Donoghue v Stevenson was further refined and expanded in the case of *Caparo v Dickman*²⁰ which established the three part test for duty of care.²¹

Further example of how new legal principles can be created without a specific Act of Parliament through case law is shown by the case of *Rylands v Fletcher*²² which created a new area of law that today comes under the tort of nuisance.²³

In the US an example of the development of law through cases²⁴ can be seen from the line of cases of *Thomas v Winchester* (1852),²⁵ *MacPherson v Buick Motor Co.* (1916),²⁶ *Goldberg v Kollsman Instrument Corp.* (1963),²⁷ and *Codling v Paglia* (1973);²⁸ that first slowly eroded the need for privity in negligence²⁹ and eventually led to the establishment of the doctrine of strict products liability.³⁰

Another significant development in US case law came in the case of *Palsgraf v. Long Island Railroad*³¹ which has redefined the principle of proximate causation and foreseeability in negligence actions.³²

Common law is an ever evolving system that is not easily controlled or predictable, the courts determine the direction of the law,³³ and as can be seen from the above discussion it is not

²⁰ *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605

²¹ *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 at 609 – “Three elements are needed for a duty of care to exist: there must be reasonable foreseeability, a close and direct relationship of ‘proximity’ between the parties and it must be fair, just and reasonable to impose liability.”

²² *Rylands v Fletcher* (1868) L.R. 3 H.L. 330

²³ *Rylands v Fletcher* (1868) L.R. 3 H.L. 330 at 339-340 – “the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

²⁴ E.g. see the landmark decision of *Marbury v Madison* 5 U.S. 137 (1803) where the United States Supreme Court established its power of judicial review and the ability to declare a law to be unconstitutional.

²⁵ *Thomas v Winchester* (1852) 6 N.Y. 397

²⁶ *MacPherson v Buick Motor Co.* (1916) 217 N.Y. 382

²⁷ *Goldberg v Kollsman Instrument Corp.* (1963) 12 N.Y.2d 432

²⁸ *Codling v Paglia* (1973) 32 N.Y.2d 330

²⁹ *MacPherson v Buick Motor Co.* (1916) 217 N.Y. 382 at 389 – “the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature... If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger...If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.”

³⁰ *Codling v Paglia* (1973) 32 N.Y.2d 330 at 335 – “We hold that today the manufacturer of a defective product may be held liable to an innocent bystander, without proof of negligence, for damages sustained in consequence of the defect.” At 340 – “Our decision is one of policy but is mandated by both justice and common sense.”

³¹ *Palsgraf v. Long Island Railroad Co.* (1928) 248 N.Y. 339

³² *Palsgraf v. Long Island Railroad Co.* (1928) 248 N.Y. 339 at 341; – “The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed.” And at 343 – “the orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.”

unusual for common law courts to venture into new areas of law where they deem that it is in the public interest,³⁴ common sense,³⁵ or an intention of the Parliament to do so.³⁶

It's a flexible system that can adapt to new technological developments³⁷ as well as social developments³⁸ without the need for Parliament to step in and create new or amend existing laws.

This illustrates the relative freedom of interpretation that English courts³⁹ enjoy when it comes to international law. If the courts deem it appropriate they can apply international law provisions even if they are not officially recognised by the British Parliament,⁴⁰ for example in the case of *Republic of Ecuador v Occidental Exploration*⁴¹ the court looked at an international instrument that has not been incorporated into national law in order to “determine a person's rights and duties under domestic law.”⁴² The relative freedom of interpretation can also play a significant role when it comes to interpreting and using international customary law.⁴³



The following section will analyse the approaches used by the English courts when interpreting international treaties such as the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. Different views of the judiciary and commentators will be considered to try to determine the best approach and also take into account the

³³ Although Parliament can always amend court decisions through legislation;

³⁴ E.g. when determining whether the common law offence of corruption of public morals has occurred; also see *R v Brown* [1994] 1 AC 212 for a discussion of what is or isn't in the public interest

³⁵ *Codling v Paglia* (1973) 32 N.Y.2d 330 at 340 – “Our decision is one of policy but is mandated by both justice and common sense.”

³⁶ E.g. based on White or Green papers or other relevant sources;

³⁷ E.g. see the areas of copyright law; commercial law – electronic contracts, forms; problems however still exist in some areas e.g. see *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* [2010] FCA 24 at para 19 – held widespread copyright “infringements are occurring worldwide”; also see Lyria Bennett Moses, ‘Adapting the Law to Technological Change: A Comparison of Common Law and Legislation’ [2003] UNSWLWJL 33

³⁸ *Stack v Dowden* [2007] 2 A.C. 432 at 451 – Baroness Hale stated that “the evolution of the law of property to take account of changing social and economic circumstances will have to come from the courts rather than Parliament.”

³⁹ And other common law courts;

⁴⁰ i.e. signed/ratified by them;

⁴¹ *Republic of Ecuador v Occidental Exploration and Production Co* [2006] Q.B. 432

⁴² *Republic of Ecuador v Occidental Exploration and Production Co* [2006] Q.B. 432 at 432 – “Held, dismissing the appeal, that the court had jurisdiction to interpret an international instrument which had not been incorporated into English law where it was necessary to do so in order to determine a person's rights and duties under domestic law.”

⁴³ For detailed discussion of the issues surrounding international customary law and their part in the English legal system see Roger O'Keefe, ‘The Doctrine of Incorporation Revisited’ (2008) 78(1) BYIL 7-85 – is international customary law part of English Law or only a source of law?; also see Patrick Capps, ‘The Court as Gatekeeper: Customary International Law in English Courts’ (2007) 70(3) MLR 458-471; for a recent case on these issues see *R v Jones (Margaret)* [2007] 1 AC 136

implications it can have when the court is interpreting a convention to resolve a dispute between a passenger and a carrier.

Approach of English Courts to cases involving international treaties

In England the Parliament has to pass an act to incorporate a treaty into national law.⁴⁴ This principle was strongly emphasized by Lord Hoffman's judgment in the *Lyons case*⁴⁵ where he stated that:

“it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them”⁴⁶ ... Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statute which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so.”⁴⁷

However Lord Hoffman goes on to say that “there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation.”⁴⁸ Lord Goff in *AG v Observer*⁴⁹ expressed a similar view when he stated that “I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty.”⁵⁰

⁴⁴ E.g. the Human Rights Act 1998 incorporated provisions of the European Convention on Human Rights (ECHR) into English law; European Communities Act 1972 incorporated the EU treaties when UK joined the EU (for the newest developments in regards to EU see the European Union Act 2011); United Nations Act 1946 that incorporated certain provision of the UN Charter into English law; etc.

⁴⁵ *R. v Lyons (Isidore Jack) (No.3)* [2003] 1 A.C. 976

⁴⁶ Also see *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry (International Tin Council Case)* [1990] 2 AC 418 at 420 – “the Crown's power to conclude treaties with other sovereign states was an exercise of the Royal Prerogative, the validity of which could not be challenged in municipal courts; but that the Royal Prerogative did not extend to altering domestic law or rights of individuals without the intervention of Parliament and a treaty was not part of English law unless and until it had been incorporated into it by legislation”

⁴⁷ *R. v Lyons (Isidore Jack) (No.3)* [2003] 1 A.C. 976 at 992

⁴⁸ *R. v Lyons (Isidore Jack) (No.3)* [2003] 1 A.C. 976 at 992

⁴⁹ *Attorney General v Observer Ltd* [1990] 1 AC 109

⁵⁰ *Attorney General v Observer Ltd* [1990] 1 AC 109 at 283; for further discussion of these issue also see Colin Warbrick, ‘International law in English courts - recent cases’ I.C.L.Q. 2003, 52(3), 815-824

From these statements it would appear that even if English courts are not bound by International treaties, if they are not incorporated into English law by an Act of Parliament, they are still going to try to give them effect, as far as possible.

Interpretation of international conventions can be a delicate matter for many domestic courts as they need to balance their internal (home state) procedures with those set up by a particular convention. Based on an analysis by Indira Carr⁵¹ it would seem that courts in many countries are very reluctant to acknowledge prior international case law when interpreting the same convention provisions,⁵² even if that can sometimes go against what the drafters of the convention intended.⁵³

On the other hand English common law courts are a lot more open to considering and even following foreign case precedents on matters of international law that is before them.⁵⁴

In the case of *Stag Line v Foscolo*⁵⁵ the House of Lords acknowledged that rules set up by an international convention should not be hindered by rigid domestic precedents, “but rather that the language of the rules should be construed on broad principles” of general acceptance.⁵⁶

The approach of international acceptance and cooperation was confirmed by Lord Denning in *Corocraft v Pan Am*⁵⁷ where when referring to the decision of the New York State Court of Appeals he said that “I find myself in entire agreement with them. Even if I disagreed, I would follow them in a matter which is of international concern. The courts of all the countries should interpret this Convention in the same way.”⁵⁸ He goes on to say that “it

⁵¹ Indira Carr, *International Trade Law* (Routledge, Fourth Edition 2010)

⁵² Indira Carr, *International Trade Law* (Routledge, Fourth Edition 2010) at page 71 – “there is reluctance on the part of courts to refer to opinions from other jurisdictions as an aid to interpretation”; for a detailed discussion of the challenges of uniform interpretation of the CISG Convention see John E. Murray, ‘The Neglect of CISG A Workable Solution’ 17 JLCOM 365

⁵³ E.g. in United Nations Convention on Contracts for the International Sale of Goods (CISG), Vienna, 1980 - Article 7 sets out the rules for interpretation of the treaty;

⁵⁴ Indira Carr, *International Trade Law* (Routledge, Fourth Edition 2010) at page 71 - “recognition of the international nature of conventions and the need to refer to foreign judgments on the part of British judges”

⁵⁵ *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] A.C. 328

⁵⁶ Lord Macmillan in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] A.C. 328 at 350 – “As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance.”

⁵⁷ *Corocraft Ltd v Pan American Airways Inc* [1969] 1 Q.B. 616

⁵⁸ *Corocraft Ltd v Pan American Airways Inc* [1969] 1 Q.B. 616 at 655; also see *In Re International Tin Council* [1987] Ch. 419 at 424 – “The court should seek to interpret domestic statutes in such a way as to be consistent with the United Kingdom's international obligations.”

would be absurd” if the amount recoverable under the convention⁵⁹ would be different depending on where the case is brought.⁶⁰

The prevailing view of the English courts seems to be that the intentions of the states that were at the international conference that adopted the treaty should be taken into account when interpreting the provisions of the treaty.⁶¹ In other words the convention should be given a purposive interpretation.⁶² However as Lord Hope states “The general rule is that international treaties should, so far as possible, be construed uniformly by the national courts of all states.”⁶³

From the above discussion it can be concluded that the approach of the English courts to interpretation of international conventions is one of uniform applicability that takes into account the international aspect of the conventions and prior case law in order to ensure uniform application of the convention provisions regardless of what country the case is tried in. In other words the convention should be interpreted based on principles of international law looking at the signatories to the convention and their intentions when creating the convention rather than based on domestic factors or purely domestic case precedents. The problem is that most countries do not follow this model when giving effect to convention provisions in their national courts and many countries especially ones based on civil law systems do not give proper weight to international case law from other countries. This in turn can lead to inconsistencies in application of international conventions in a uniform manner in all countries that are party to them.⁶⁴ As Professor Munday has stated back in 1978 the best

⁵⁹ Referring to the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) 1929

⁶⁰ *Corocraft Ltd v Pan American Airways Inc* [1969] 1 Q.B. 616 at 656

⁶¹ *Morris v KLM Royal Dutch Airlines* [2002] Q.B. 100 at 107 – “The language of that Convention that has been adopted at the international conference to express the common intention of the majority of the states represented there is meant to be understood in the same sense by the courts of all those states which ratify or accede to the Convention.”; *Deep Vein Thrombosis and Air Travel Group Litigation, Re* 2002 WL 31784484 at para 26 – “What one is looking for is a meaning which can be taken to be consistent with the common intention of the states which were represented at the international conference.”; also see *In Re Deep Vein Thrombosis and Air Travel Group Litigation* [2004] Q.B. 234;

⁶² *Fothergill Respondent v Monarch Airlines Ltd. Appellants* [1981] A.C. 251 at 279; *Deep Vein Thrombosis and Air Travel Group Litigation, Re* 2002 WL 31784484 at para 24

⁶³ *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No.3)* [2000] 1 A.C. 147 at 244

⁶⁴ For further discussion on the interpretation of international conventions in national courts see: Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing, Oxford, 2005); an interesting perspective to these issues is also provided by John Howell QC and Shaheed Fatima in ‘Using International Law in Domestic Courts’ where they “examine the relationship between international and domestic law,” as well as look at the way in which “unincorporated treaties are used in domestic law.”

<http://www.blackstonechambers.com/news/publications/using_intl_law.html>;

way to achieve uniformity is “for all States concerned to pay serious heed to one another's case law.”⁶⁵

However some commentators and judges offer a different view to this uniformity debate. Anthea Roberts argues that “Despite the obvious advantages of uniform interpretation of treaties, we should be cautious about treating this as the sole or even primary aim of treaty interpretation. The Vienna Convention on the Law of Treaties does not require consistent interpretation, instead calling for treaties to be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’^{66,67}

The House of Lords discusses the Vienna Convention at some length in *Fothergill v Monarch Airlines*⁶⁸ where Lord Scarman states that “Faced with an international treaty which has been incorporated into our law, British courts should now follow broadly the guidelines declared by the Vienna Convention on the Law of Treaties.”⁶⁹ However the ultimate consideration still seems to be based on uniformity⁷⁰ rather than on the “object and purpose.”⁷¹ Based on the opinion of ICJ Judge Bruno Simma “maintaining the law’s coherence and integrity”⁷² should be the main consideration for domestic courts as their jurisprudence “on questions of international law is gaining more and more relevance for the development of the law.”⁷³

In conclusion there are various opinions on the correct way to interpret treaties in national law, but ultimately it is up to the courts to decide what method is the most appropriate for each treaty,⁷⁴ and until there is some sort of international effort to harmonise national courts interpretations of international treaty provisions, as the amount of international law increases this question is just going to get more complicated. The ultimate balance has to be between

⁶⁵ R. Munday, ‘The Uniform Interpretation of International Conventions’ (1978) 27(2) ICLQ 450 at 458-459 – “if there is genuine concern to achieve a degree of uniformity with other signatories to conventions, in the absence of any supreme international jurisdiction capable of resolving differences between national courts, the most effective approach for all States concerned is to pay serious heed to one another's case law.”;

⁶⁶ Vienna Convention on the Law of Treaties 1969 – Section 3. Interpretation Of Treaties – Article 31

⁶⁷ Anthea Roberts ‘Comparative international law? The role of national courts in international law’ I.C.L.Q. 2011, 60(1), 57-92 at 84

⁶⁸ *Fothergill Respondent v Monarch Airlines Ltd. Appellants* [1981] A.C. 251

⁶⁹ *Fothergill Respondent v Monarch Airlines Ltd. Appellants* [1981] A.C. 251 at 290

⁷⁰ *Fothergill Respondent v Monarch Airlines Ltd. Appellants* [1981] A.C. 251 at 294 – “uniformity is the purpose to be served by most international conventions”

⁷¹ Vienna Convention on the Law of Treaties 1969 – Section 3. Interpretation Of Treaties – Article 31

⁷² Bruno Simma ‘Universality of International Law from the Perspective of a Practitioner’ 20 EURJIL 265 at 290

⁷³ Bruno Simma ‘Universality of International Law from the Perspective of a Practitioner’ 20 EURJIL 265 at 290

⁷⁴ For further details see Anthea Roberts ‘Comparative international law? The role of national courts in international law’ I.C.L.Q. 2011, 60(1), 57-92 at 85; – “Lord Steyn of the UK House of Lords contends that national courts must search for ‘the true autonomous and international meaning of the treaty. And there can only be one true meaning.’”

uniform application on one hand and between preserving the object, purpose and integrity of the law on the other.⁷⁵



The Athens Convention is not yet implemented in the US; therefore the next section will only very briefly look over some of the challenges when it comes to international treaties in the US legal system. It will provide some useful background when later looking at the Athens Convention in US carriage contracts.

Brief overview of the position of treaties in US law

There are two ways an international treaty can become part of US law. “The word treaty does not have the same meaning in the United States and in international law. Under international law, a ‘treaty’ is any legally binding agreement between nations. In the United States, the word treaty is reserved for an agreement that is made “by and with the Advice and Consent of the Senate.”⁷⁶ International agreements not submitted to the Senate are known as ‘executive agreements’ in the United States, but they are considered treaties and therefore binding under international law.”⁷⁷

There is also a distinction between self-executing treaties and non-self-executing treaties.⁷⁸ If a “Convention is a self-executing treaty, no domestic legislation is required to give it the force of law in the United States.”⁷⁹ While non-self-executing treaties cannot be used directly without an implementing act of Congress they can be relied on “as evidence of customary international law.”⁸⁰

A treaty that complies with the Constitution is regarded as “the supreme law of the land”⁸¹ on the other hand executive agreements are a lot lower on the hierarchy of sources of law; as

⁷⁵ A clear example of what can happen when domestic courts follow their own procedures and disregard international uniformity and precedent can be seen from the opposing decisions of the USSC and the German Bundesverfas on the issue of consular rights under the Vienna Convention on Consular Relations; for a detailed discussion of the issues see Carsten Hoppe, ‘Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights’ 18 EURJIL 317

⁷⁶ Article II, Section 2, Clause 2 of the United States Constitution; see e.g. *The Koenigin Luise* (1910) 184 F. 170 at 173 – “By the Constitution of the United States the President has the power, by and with the advice and consent of the Senate, to make treaties. ... And such treaties and laws of the United States, when made in pursuance of such constitutional authority, as well as the Constitution, are declared to be the supreme law of the land.”; also see *The Albergen* (1915) 223 F. 443

⁷⁷ *Treaties and Other International Agreements: The Role of the United States Senate: A Study*, prepared for the Committee on Foreign Relations, United States Senate (US Government Printing Office, 2001; Washington, DC) <<http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>>

⁷⁸ E.g. see *U.S. v Ionia Management S.A.* 2009 A.M.C. 153 at 156 where it was held that “MARPOL is not a self-executing treaty”

⁷⁹ *Trans World Airlines, Inc. v Franklin Mint Corp.* (1984) 466 U.S. 243 at 244 and 252

⁸⁰ *Bowoto v Chevron Corp.* (2008) 557 F.Supp.2d 1080 at 1090

⁸¹ *The Koenigin Luise* (1910) 184 F. 170 at 173

noted in *US v Guy Capps*⁸² where it was held that “whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.”⁸³

Overall the process in the US seems to be a bit more complex than that in England due to the federal and state system, self and non-self-executing distinction as well as the possibility of confusion with the difference in meaning of the word ‘treaty’ in US and international law, together with the option of the executive agreement alongside treaties.⁸⁴

Conclusion

In conclusion the interpretation of international treaties is a complex process that depends on many various factors as can be seen from the above discussion. As the amount of international law constantly increases there is an ever-increasing pressure on national courts to adjudicate matters of international law. One of the many reasons why international lawyers prefer to bring cases before national courts rather than the international courts is because international courts often lack the power to enforce the judgement.⁸⁵

Due to the inherently different legal systems of various countries that are parties to the same treaties it is very difficult to maintain uniformity in interpretation while at the same time trying to preserve the integrity of the treaty. The biggest problem can arise when in the same case damages awarded in one country would be significantly higher than damages awarded in the same case in another country. This can then lead to lawyers finding ways to get cases heard in countries that have the most favourable interpretation for their case.⁸⁶

⁸² *U.S. v Guy W. Capps, Inc.* (1953) 204 F.2d 655

⁸³ *U.S. v Guy W. Capps, Inc.* (1953) 204 F.2d 655 at 659-660; also see *Canadian Lumber Trade Alliance v U.S.* (2006) 425 F.Supp.2d 1321 at 1357

⁸⁴ For more details on the US treaty system in addition to the above sources see: Frederic L. Kirgis, ‘International Agreements and U.S. Law’ (1997) <<http://www.asil.org/insigh10.cfm>>; Marci Hoffman, ‘Features - Researching U.S. Treaties and Agreements’ (2001) <<http://www.llrx.com/features/ustreaty.htm>>; for issues relating to US courts following ICJ precedent see Philip V. Tisne, ‘The ICJ and Municipal Law: The Precedential Effect of the Avena and Lagrand Decisions in U.S. Courts’ (2005) 29(4) *FILJ* 865-914; and Frederic L. Kirgis, ‘International Law in the American Courts – The United States Supreme Court Declines to Enforce the I.C.J.’s Avena Judgment Relating to a U.S. Obligation under the Convention on Consular Relations’ (2005) 9(5) *GLJ* 619-637

⁸⁵ Anthea Roberts, ‘Comparative international law? The role of national courts in international law’ *I.C.L.Q.* 2011, 60(1), 57-92 at 58 – “Scholars have long recognized the pivotal role that national courts could play in international law’s enforcement--the Achilles’ heel of international law--given their advantages of accessible jurisdiction and enforceable judgments.”

⁸⁶ E.g. see: Steven Wilson Brice, ‘Forum Shopping in International Air Accident Litigation: Disturbing the Plaintiff’s Choice of an American Forum’ 7 *B.C. Int’l & Comp. L. Rev.* 31 (1984); also see Barlow Lyde & Gilbert Aerospace team, ‘Forum shopping and FNC in international aviation disputes’ <[http://www.willis.com/Documents/Publications/Industries/Aerospace/9313_FACTSHEET_Barlows\[180x290\]](http://www.willis.com/Documents/Publications/Industries/Aerospace/9313_FACTSHEET_Barlows[180x290])>.

At present the system of domestic courts interpreting international law seems to be working, especially in jurisdictions that place more emphases on international case decisions during their interpretation, however as the pressure of increasing amount of international law on domestic courts increases only time will tell whether the current status quo can continue.



So far the above chapters have mostly looked at the international side of carrier liability towards passengers and some of the problems that may arise, covering the Athens Convention, limitation of liability, judicial interpretation of international treaties, and some basic principles of the common law legal system; the next chapter will look at some regional and domestic laws that can affect cruise ship passengers.

pdf>; in the maritime sphere the most recent example is in regards to the Costa Concordia cases and the continued attempt by claimant lawyers to try to bring the case in the US, e.g. see Jim Walker, 'Costa Concordia Litigation: Tactical Blunder By Carnival Opens Door For Lawsuits in Miami' Cruise Law News, 28 Feb 2013, <<http://www.cruiselawnews.com/2013/02/articles/passenger-rights/costa-concordia-litigation-tactical-blunder-by-carnival-opens-door-for-lawsuits-in-miami/>>;

Chapter 4

Domestic and Regional Laws – UK, EU, and the US

The Athens convention applies to any international carriage as specified by Article 2(1) PAL 2002, however for domestic carriage or for carriage within a specific geographic area different rules of domestic and regional law can apply.

Domestic and Regional laws can differ greatly between different countries and regions and their liability regimes and available remedies naturally vary as well. This section will look at the regional laws of the EU and domestic laws of UK and the US when it comes to liability towards ship passengers.

European Union

“The European Commission is the institution responsible for ensuring EU law is applied throughout all Member States.”¹ “There are three basic types of EU legislation: regulations, directives and decisions. A regulation is similar to a national law with the difference that it is applicable in all EU countries. Directives set out general rules to be transferred into national law by each country as they deem appropriate. A decision [on the other hand] only deals with a particular issue and specifically mentioned persons or organisations.”²

Regulation 392/2009

In April 2009 the EU has implemented Regulation 392/2009,³ also known as the EU Passenger Liability Regulation (PLR),⁴ relating to the “liability of carriers of passengers by sea in the event of accidents” which has come into effect on 1st January 2013.⁵ The regulation gives effect to the Athens Convention as amended by the 2002 Protocol and to the 2006 IMO Guidelines in the EU and the EEA.⁶

¹ European Commission, ‘Application of EU law’ <http://ec.europa.eu/eu_law/index_en.htm>

² European Commission, ‘Legislation’ <<http://ec.europa.eu/legislation/>>; for more details and examples see European Union, ‘Regulations, Directives and other acts’ <<http://europa.eu/about-eu/basic-information/decision-making/legal-acts/>>

³ Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents;

⁴ See SKULD website at <<http://www.skuld.com/topics/people/plr--athens-convention/insight/eu-passenger-liability-regulation-2009-plr/introduction/>>

⁵ Paragraph (2) EU Reg. 392/2009

⁶ EEA – European Economic Area; further references to EU in regards to the Reg. 392/2009 should be taken to include the EEA.

Since most EU states are not party to the 2002 Athens Convention, the Regulation has introduced “significant new compensation and insurance obligations on the operators of passenger vessels which trade in Europe or fly the flag of an EU Member State.”⁷

In addition to incorporating the 2002 Athens Convention and the 2006 IMO Guidelines, the PLR has introduced several additional requirements on EU Member States. First, through Article 1(2) it has extended the scope of application of Annex I & II⁸ to cover carriers operating within a single Member State (i.e. domestic carriage) with class A and B ships as defined in Article 4 of Directive 98/18/EC. However Article 11 allows states to defer the application of the regulation for class A vessels until 31 December 2016, and for class B vessels until 31 December 2018.

Secondly, Article 4 has introduced compensation in respect of damaged mobility equipment or other specific equipment used by disabled passengers. The carrier’s liability is governed by Article 3(3) of the Athens Convention, and the passenger is entitled to recover the cost of repair or replacement of the damaged equipment.

Thirdly, Article 6 sets up a system for advanced payment of compensation to a passenger to cover immediate expenses in the event of death or personal injury caused by a shipping incident. The payment should be proportional to the damage suffered and paid within 15 days of identifying the person entitled to damages. In the event of death this payment should be a minimum of 21,000 EUR. Additionally the payment is not an admission of liability and can be offset against any future sums awarded under the regulation.

Finally under Article 7 the carrier needs to ensure that the passengers are informed of their rights under this Regulation at the time of sale of at the latest at the time of departure.

This Regulation creates a separate regime similar but not identical to the 2002 Athens Convention, it will be interesting to see how the two regimes interact once the Athens Convention comes into force and what unforeseen issues might arise when it comes to judicial interpretations of the various provisions.⁹

⁷ SKULD website <<http://www.skuld.com/topics/people/plr--athens-convention/insight/eu-passenger-liability-regulation-2009-plr/background/>>

⁸ I.e. the 2002 Athens Convention and the 2006 IMO Guidelines as incorporated in Reg. 392/2009

⁹ For a commentary on the Athens Convention and its proposed EU implementation see Baris Soyer, ‘Boundaries of the Athens Convention: What You See is Not Always What You Get!’ in Rhidian Thomas, *Liability Regimes in Contemporary Maritime Law* (2007, Informal Law) at Chapter 11

Regulation 1177/2010

From a passenger rights perspective Regulation 1177/2010¹⁰ is also of particular interest. It “aims to establish a set of rules for the rights of passengers when travelling”¹¹ by sea and inland waterways.

The regulation sets out rules in regards to non-discrimination between passengers,¹² non-discrimination and assistance for disabled persons,¹³ compensation for delays and cancellations,¹⁴ information provision, and handling of complaints^{15, 16}.

The regulation applies to passenger services¹⁷ and cruises where the port of embarkation is situated in a Member State, or to passenger services where the port of disembarkation is in a Member State and the service is operated by a Union carrier.¹⁸ However the regulation does not apply to: (i) ships certified to carry up to 12 passengers, (ii) ships with a crew of three or less persons, (iii) service that is less than 500 meters, (iv) excursion and sightseeing tours other than cruises, and (v) non-mechanically propelled ships, and historical ship replicas with fewer than 36 passengers.¹⁹

Two areas that are likely to affect most passengers relate to Chapter II on the rights of disabled persons and persons with reduced mobility, and Chapter III regarding cancellations and delays.

Disabled persons and persons with reduced mobility

Article 7 states that disabled persons²⁰ and persons with reduced mobility must have the same access to tickets, reservations, and ability to embark as all others and at no additional cost. There are however some situations where derogation from Article 7(1) is needed to meet legally set safety requirements or where the design of the ship or port infrastructure makes

¹⁰ Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004; The Regulation started to apply on 18 December 2012 and is directly applicable in all Member States.

¹¹ Steamship Mutual P&I Club, ‘EU - Rights of Passengers Travelling by Sea and Inland Waterways’ <<http://www.simsl.com/Publications/Articles/EUSeaPassengers0911.htm>>

¹² Article 4

¹³ Chapter II

¹⁴ Chapter III

¹⁵ Chapter IV

¹⁶ EU Reg. 1177/2010 Article 1(a-e)

¹⁷ EU Reg. 1177/2010 Article 3(f) – “‘passenger service’ means a commercial passenger transport service by sea or inland waterways operated according to a published timetable;”

¹⁸ EU Reg. 1177/2010 Article 3(e) – “‘Union carrier’ means a carrier established within the territory of a Member State or offering transport by passenger services operated to or from the territory of a Member State;”

¹⁹ EU Reg. 1177/2010 Article 2(1-2); also note few other exclusions in Article 2(3-5)

²⁰ Note that further references to disabled persons/passengers should be taken to include persons of reduced mobility

carriage of disabled passengers unsafe or otherwise impossible.²¹ In addition the carrier, travel agent or tour operator may request that the disabled person be accompanied by another person that can provide the necessary assistance to meet the safety requirements under Article 8(1).²²

In situations where the carrier, tour operator or travel agent pursuant to Article 8(1) refuses to issue a ticket or denies a reservation, he shall make all reasonable efforts to propose an alternate passenger service or cruise for the disabled passenger.²³

Further under Articles 9 and 10 a disabled person has a right to information about accessibility and a right to assistance in ports and on board ships, free of charge, and if possible tailored to his particular needs.

There are however certain obligations on the disabled persons as well. The disabled persons must inform the carrier or the terminal operator 48 hours in advance of any assistance that might be needed, they must arrive at the terminal at the specified time, and they shall notify the carrier, at the time of reservation or advance purchase of the ticket, of their specific needs with regard to accommodation, seating or services required or their need to bring medical equipment.²⁴ If no notification is made the carrier should still try to provide assistance so that the disabled person is able to embark, disembark and travel on the ship.²⁵

Finally under Article 15(1) carriers and terminal operators are liable for loss or damage to any mobility equipment or other specific equipment if the incident causing the loss or damage was due to their fault or neglect. The passenger is entitled to recover the cost of repair or replacement of the damaged equipment.²⁶ However note that paragraphs 1 and 2 shall not apply where Article 4 of Regulation (EC) No 392/2009 applies.

Cancelations and delays

In the event of a cancellation or a delay in departure of a passenger service or a cruise, passengers need to be informed of the situation as soon as possible and no later than 30 minutes after the scheduled departure, and they need to be informed of the new departure and arrival times as soon as such information is available.²⁷ Further if connecting service is

²¹ Article 8(1)

²² Article 8(4)

²³ Article 8(2)

²⁴ Article 11(1-2)

²⁵ Article 11(4)

²⁶ Article 15(2)

²⁷ Article 16(1)

missed as a result of the cancellation or delay passengers should be informed about alternative connections.²⁸

If the cancellation or delay is expected to last over 90 minutes, snacks, meals or refreshments should be provided free of charge, when possible, in proportion to the waiting times.²⁹ If the delay or cancellation extends further overnight accommodation should be provided, on board or ashore free of charge, but is limited to 3 nights at 80 EUR per night for ashore accommodation.³⁰

Additionally in the event of a 90 minute delay or cancellation the passenger has a choice to be either re-routed to his final destination free of charge or be refunded the ticket price and returned to his original place of departure.³¹

In regards to late arrival, under Article 19, the passenger is entitled to claim 25% of the ticket price if the delay is: (i) one hour in a four hour journey, (ii) two hours in a 4-8 hour journey, (iii) three hours in a 8-24 hour journey, or (iv) six hours in a journey exceeding 24 hours. If the delay is double the above times the passenger is entitled to a 50% refund of ticket price.

There are certain exemptions that may apply in delays and cancellations as mentioned in Article 20, such as when the delay or cancellation is caused by weather or other extraordinary conditions or where the passenger holds an open ticket, has been informed of delay prior to purchase, or has caused the delay himself.

Finally it should be noted that Articles 16(2), 18, 19 and 20(1) and (4) do not apply to cruise passengers. Certain protections for cruise passengers are governed through EU Directive 90/314/EEC on package holidays,³² which is given effect through national legislation. In the UK this is done by The Package Travel, Package Holidays and Package Tours Regulations 1992.³³

These are welcome developments in regards to passenger rights in EU States and it is refreshing to see a push from EU legislators to try to curb the contractual imbalance between big ship operators and consumers.

²⁸ Article 16(2)

²⁹ Article 17(1)

³⁰ Article 17(2)

³¹ Article 18

³² Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours;

³³ S.I. 1992/3288; for more details see Steamship Mutual P&I Club, 'EU - Rights of Passengers Travelling by Sea and Inland Waterways' <<http://www.simsl.com/Publications/Articles/EUSeaPassengers0911.htm>>; for further discussion of the 1177/2010 regulation see Massimiliano Piras, 'International Recent Developments: European Union—Maritime Passenger Transport' 36 Tul. Mar. L.J. 627 (2012)

Laws of the United Kingdom and the United States³⁴

The UK³⁵ is party to the 1974 Athens Convention through ss183-184 of the Merchant Shipping Act (MSA) 1995. This is however overridden by the new EU Regulation 392/2009, discussed above, which incorporates the 2002 Athens Convention. It has reconciled these two regimes through Section 183(2A)³⁶ of the MSA 1995 which states that in conflicts the EU Regulation prevails over Schedule 6 of the MSA incorporating the 1974 Convention. Additionally the UK has deferred application of the 392/2009 Regulation in regards to domestic carriage by class A vessels until 2017 and by class B vessels until 2019.³⁷

On the other hand the US is not party to the Athens Convention and any ferry or cruise passenger carriage is governed through common law principles of contract and tort and a maze of State and Federal legislation, including the Shipping Act of 1984,³⁸ Death on the High Seas Act 1920;³⁹ Florida Statute § 910.006,⁴⁰ Americans with Disabilities Act of 1990,⁴¹ and the Cruise Vessel Security and Safety Act of 2010.⁴²

³⁴ For a Canadian law perspective see Edgar Gold, Aldo Chircop, Hugh M. Kindred, *Maritime Law (Essentials of Canadian Law)*, (Irwin Law 2003) at pages 479-494

³⁵ Note: the term 'UK' in this chapter refers to the laws as they apply in England and Wales, although certain Acts of Parliament apply to the whole UK.

³⁶ Implemented by The Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012 (S.I. 2012/3152)

³⁷ Article 11 of Reg. 392/2009; Maritime and Coastguard Agency, MIN 448 (M), 'Passenger Ships: Implementation of Regulation (EC) 392/2009 on the liability of carriers of passengers by sea in the event of accidents' (2012); for more details on the Regulation also see Shipowners P&I Club, Circular 22/2012 <[http://www.shipownersclub.com/media/446992/circular_22_2012%20reg_\(ec\)_392_2009_\(plr\).pdf](http://www.shipownersclub.com/media/446992/circular_22_2012%20reg_(ec)_392_2009_(plr).pdf)> and <<http://www.shipownersclub.com/media/428603/regulationec3922009plr.pdf>>

³⁸ 46 U.S.C. § 40102(6) (former 46 U.S.C. § 1702 (6)) – defines a common carrier, standard of duty; also see Restatement (Second) of Torts § 314A (1965); *American Association of Cruise Passengers, Inc. v Carnival Cruise Lines, Inc.* 911 F.2d 786, 286 U.S.App.D.C. 44 (1990) at *789 **47 – held that a “cruise ship is a common carrier regardless of whether it is engaged in one-way or round-trip transportation”; Philip H. Budwick, 'Strict Liability or Negligence: What Standard of Care Applies When Crewmembers Assault Passengers on Cruise Ships?' 19 Tul. Mar. L.J. 353 (1995);

³⁹ 46 U.S.C. §§ 30301-30308 (former 46 U.S.C. app. §§ 761–768); Walter T. Johnson, Ann Gray Miller, 'New Developments in Cruise Law' 7 U.S.F. Mar. L.J. 111 (1994) at 112 – “Most wrongful death actions involving cruise passengers are covered by the Death on the High Seas Act (DOHSA), which limits recovery to pecuniary damages”; also see 'Congressional Hearings Wade Into Cruise Line Safety' 48-MAY Trial 48 (2012) – for a brief summary recent criticisms of the act and the inequalities it can create; and Jim Walker, 'The Death on the High Seas Act - Screwing American Passengers for 89 Years' Cruise Law News, 2009 <<http://www.cruiselawnews.com/2009/09/articles/maritime-death/the-death-on-the-high-seas-act-screwing-american-passengers-for-89-years/>>

⁴⁰ State special maritime criminal jurisdiction <<http://www.flsenate.gov/Laws/Statutes/2012/910.006>>; West's F.S.A. § 910.006; the statute provides jurisdiction to the authorities in Florida for criminal acts aboard a cruise ship that occur outside the state of Florida; for brief commentary see Brett Rivkind, 'Special Maritime Criminal Jurisdiction' Maritime Injury Attorney Blog, 2011 <<http://www.maritimeinjuryattorneyblog.com/2011/05/special-maritime-criminal-juri.html>>; also see *State of Florida v. Matthew Stepansky* 761 So.2d 1027 (Fl SC) (2000);

⁴¹ For text of the act and its amendments see US Department of Justice <<http://www.ada.gov/pubs/ada.htm>>; *Spector v. Norwegian Cruise Line Ltd.* 545 U.S. 119, 125 S.Ct. 2169 at 2177 – “the Supreme Court held that certain U.S. statutes, including the Americans with Disabilities Act, are applicable to foreign cruise ships except

However “[t]he Athens Convention is [still] important since it may apply to as many as 20% of U.S. cruise passengers who annually “sail from, and back to, foreign ports, like a Mediterranean or Caribbean cruise,”⁴³ and secondly parties are also free to incorporate principles of the Athens Convention into their contracts,⁴⁴ but it was held in *Wallis v Princess Cruises*⁴⁵ that the “Athens Convention limitation must be reasonably communicated before it can bind a passenger under federal maritime law,”⁴⁶ a simple reference to the convention is not sufficient.⁴⁷

The main areas of domestic law that come into play in passenger claims include contract law and tort law in reference to negligence and products liability actions.

In the UK this will apply mostly to domestic carriage that does not come under the MSA 1995 implementing the 1974 Athens Convention and the 392/2009 EU Regulation, and to international carriage claims where the defendant is not the carrier or performing carrier as

in cases where applying the statute would interfere with a ship's internal affairs. In such a case, a clear statement of congressional intent would be required to apply the statute.” (Quoted from *Global Industries Offshore LLC v. Pipeliners Local Union 798*, 2006 WL 724815 at 5)

⁴² PL 111-207, July 27, 2010, 124 Stat 2243 (46 U.S.C. § 3507); for more details see Constantine G. Papavizas, Lawrence I. Kiern, ‘2009-2010 U.S. Maritime Legislative Developments’ 42 J. Mar. L. & Com. 291 (2011) at 306 – The act requires, among other things, policies to restrict crewmember access to passenger cabins, security portholes to be fitted on passenger cabin doors, security cameras, equipping new cruise vessels with time sensitive locks and latches, higher guard rails, distributing safety guide to all passengers (e.g. see Disney Cruise Line Notice at <<http://disneycruise.disney.go.com/security-guide/>>) as well as crime reporting to the FBI.; also see Christopher Elliott, ‘A long way to go to ensure passengers’ safety on cruise ships’ The Washington Post, 18 July 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071303057_pf.html>; Lawrence I. Kiern, ‘President Obama Signs Cruise Vessel Security and Safety Act of 2010 Into Law’ The Maritime Executive, 29 July 2010, <<http://www.maritime-executive.com/article/president-obama-signs-cruise-vessel-security-and-safety-act-2010-law/>>

⁴³ Thomas A. Dickerson, ‘The Modern Cruise Passenger's Rights & Remedies - Part II’ 79-JUN N.Y. St. B.J. 18 (2007) – citing Edelman, ‘The Athens Convention and American Lawyers’ The New York Law Journal, May 29, 2003, p. 3.

⁴⁴ Paul S. Edelman, James E. Mercante, ‘Admiralty Law’ (2008) <<http://www.kreindler.com/Publications/Admiralty-Law-Paul-S-Edelman-and-James-E-Mercante.shtml>> – “The Athens Convention has been enforced contractually in U.S. courts, particularly those of New York and California, where the passenger ticket explains what it is and expresses the limits of liability.”; e.g. see *Mills v. Renaissance Cruises* 1993 A.M.C. 131 (N.D. Ca.1993), *Becantinos v. Cunard Line Ltd.* 1991 WL 64187 (S.D.N.Y.); Also see Thomas A. Dickerson, ‘The Cruise Passengers' Rights & Remedies 2012’ <<http://www.nycourts.gov/courts/9jd/taxcertatd.shtml>> at page 141 – “a contractual limitation has been held to be enforceable when the passenger’s injuries occur on cruises that do not touch U.S. ports...as long as there has been sufficient notice” e.g. see *Berman v. Royal Cruise Line* 1995 A.M.C. 1926 (Ca. Sup. Ct. 1995); *Kirman v. Compagnie Francaise De Croisieres* 39 Cal.Rptr.2d 401, 1994 A.M.C. 2848

⁴⁵ *Wallis v. Princess Cruises, Inc.* 306 F.3d 827 (9th Circuit) (2002); also see *Wajnstat v. Oceania Cruises, Inc.* 684 F.3d 1153 (11th Circuit) (2012)

⁴⁶ 306 F.3d 827 at 839; also see at 835 – where the “two-pronged “reasonable communicativeness” test” was used;

⁴⁷ 306 F.3d 827 at 840 “a passage contract clause that merely references the “ ‘Convention Relating to the Carriage of Passengers and Their Luggage by Sea’ of 1976 (‘Athens Convention’)” without providing an approximate monetary limitation does not meaningfully inform a passenger of a liability limitation, and is therefore unenforceable.” In other words it “does not reasonably communicate a liability limitation.” at 830

defined by the Athens Convention, due to the restriction on claims set by Article 14 of the Convention.

Contract

Contract law consists of statutory and common law principles of offer, acceptance, misrepresentation, terms interpretation, and termination, among others. In the UK carriage contracts that do not come under ss183-184 MSA 1995 are treated just like any other contract.

Freedom of contract is a key principle in both the UK and US; however in the UK it has been curtailed in certain consumer agreements through the Unfair Contracts Terms Act 1977 which also applies to domestic contracts of carriage. The Act was designed to protect consumers from unfavourable terms in contracts where there is imbalance in the parties bargaining powers. One of the protections is that the Act precludes terms in contracts that “exclude or restrict ... liability for death or personal injury resulting from negligence,”⁴⁸ however the Act is restricted by Section 28 when it comes to carriage of sea passengers, to allow a party to limit his liability to the extent that would be permitted if the Athens Convention applied.⁴⁹

In the US there are also certain restriction on contract terms, such as those, imposed by Title 46, United States Code, Chapter 305 on Exoneration and Limitation of Liability. Title 46 U.S.C. § 30509, for example, precludes contract terms that try to limit “the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents.”⁵⁰

Negligence

In the UK and the US an action for negligence can be brought under domestic law against the carrier or any other entity connected with the accident on board the ship. Under UK law in order to demonstrate negligence the claimant needs to prove that the defendant owed him a duty of care, that the defendant was in breach of that duty and that the claimant suffered damage caused by the breach of duty, which was not too remote. The case of *Donoghue v*

⁴⁸ Section 2(1)

⁴⁹ For an overview of the early law in this area see Christopher Hill, *Maritime Law* (6th Ed. 2004, LLP Professional Publishing) at pages 446-448

⁵⁰ For more details see 46 U.S.C.A. § 30509; and *Johnson v. Royal Caribbean Cruises, Ltd.* (2011) 449 Fed.Appx. 846, 2011 WL 6354064 (C.A.11 (Fla.)); also see 46 U.S.C. § 30508 for restriction on limiting the time for bringing a claim or giving notice of personal injury or death; for further discussion of the implication of some contractual terms see chapter five;

*Stevenson*⁵¹ established the bases of duty of care through the neighbour test; this was later refined and clarified in *Caparo v Dickman*⁵² with the three stage test for duty of care. In order to establish duty of care the claimant needs to prove the foreseeability of damage,⁵³ proximity,⁵⁴ and whether it is fair, just and reasonable to impose a duty. Possible defences can arise when the claimant consented to run the risk of injury or when there was contributory negligence. The US system is similar; the claimant needs to prove duty, breach, causation and damages.

In relation to negligence the *res ipsa loquitur* (the thing speak for itself) doctrine⁵⁵ is important;⁵⁶ it enables the claimant to shift the burden of proof to the defendant if the following three criteria are satisfied: “(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.”⁵⁷ “If all three requirements are met, the jury may infer that the defendant was negligent even though there is no direct evidence to that effect.”⁵⁸

In contrast to the above US view, in the UK it has been argued that it is “difficult to believe that *res ipsa loquitur* has any future role to play in the proof of negligence.”⁵⁹ However in a recent case the Privy Council of the House of Lords applied the principle in *George v Eagle Air Services*,⁶⁰ so perhaps there is still “continued desirability, [for the doctrine] at least so far as concerns personal injury accident victims and their dependants.”⁶¹

⁵¹ *Donoghue v Stevenson* [1932] A.C. 562; similar case in the US – *Boyd v Coca Cola Bottling Works* (Tenn. 1915) 132 Tenn. 23, 177 S.W. 80

⁵² *Caparo Industries Plc. v Dickman and Others* [1990] 2 A.C. 605

⁵³ Objective test (reasonable man test)

⁵⁴ Consider: the relationship with victim, and the effective or legal cause of the damage;

⁵⁵ Or in other words “negligence presumed from circumstance” – Pablo Salvador-Coderch, Nuno Garoupa, Carlos Gomez-Liguerre, ‘Scope of liability: the vanishing distinction between negligence and strict liability’ (2009) E.J.L. & E. 257 at 278

⁵⁶ Particularly in the US; For an entertaining article about the principle see Colin E. Flora, ‘The Legal Doctrine of *Res Ipsa Loquitur*’ Pavlac Law LLC Blog, 2012, <<http://www.pavlacklawfirm.com/blog/2012/08/24/the-legal-doctrine-of-res-112278>>

⁵⁷ *Ybarra v Spangard* (Calif. 1945) 25 Cal.2d 486 at 489, 154 P.2d 687 at 689

⁵⁸ *Colmenares Vivas v Sun Alliance Ins. Co.* (1st Cir. 1986) 807 F.2d 1102 at 1104

⁵⁹ Christian Witting, ‘*Res ipsa loquitur*: some last words?’ L.Q.R. 2001, 117(Jul), 392-397 at 397

⁶⁰ *George v Eagle Air Services Ltd* [2009] UKPC 21; [2009] 1 W.L.R. 2133 (PC (StL))

⁶¹ Kevin Williams, ‘*Res ipsa loquitur* still speaks’ L.Q.R. 2009, 125(Oct), 567-570 at 569; also see Mitchell McInnes, ‘The death of *res ipsa loquitur* in Canada’ L.Q.R. 1998, 114(Oct), 547-550 – for a commentary on the demise of *res ipsa loquitur* in Canada;

Secondly it is important to consider contributory negligence as it can considerably limit the amount of damages a passenger can recover.⁶² The procedural aspect of determining the percentage of each party's negligence can differ a lot between various jurisdictions; in the UK the principles are mostly enshrined in the Law Reform (Contributory Negligence) Act 1945. Most often both parties are at fault and it is left to the court to determine the degree of fault of each party based on the facts of a particular case.⁶³

Products liability

The third area under domestic law which is important in regards to cruise ship incidents is products liability, where the typical defendant is the ship builder or manufacturer of one of the thousands of items on board a ship from gym equipment to lounge chairs to high-tech toys such as a FlowRider or something as simple as a can of contaminated soda.

In the US products liability developed over time mainly through case law, from the 19th century very limited recovery under contract law⁶⁴ to the present position of negligence and strict liability concepts⁶⁵ in the area of products liability. The imposition of strict products liability was justified on the bases that the manufacturer can protect himself by insurance and spread the cost over the consumers of his products.⁶⁶

In *East River* the US Supreme Court confirmed earlier decisions holding that products liability, including strict liability are part of the general maritime law of the United States.⁶⁷ It has further confirmed the two part test from *Executive Jet*,⁶⁸ that for a product liability claim

⁶² Note the distinction between Contributory negligence and Comparative negligence in the US; also note that while it is called Contributory negligence in the UK, it is actually what in the US is called Comparative negligence [Jennifer J. Karangelen, 'The Road to Judicial Abolishment of Contributory Negligence has Been Paved by *Bozman v. Bozman*' (2004) 34 U. Balt. L. Rev. 265 at 286 – "England replaced contributory negligence with comparative negligence in the Law Reform (Contributory Negligence) Act 1945"; also see *Placek v. City of Sterling Heights* 405 Mich. 638, 275 N.W.2d 511 at 515 – "almost every common-law jurisdiction outside the United States has discarded contributory negligence and has adopted in its place a more equitable system of comparative negligence"]; for a detailed discussion of the two concepts see: Christopher J. Robinette, Paul G. Sherland, 'Contributory or Comparative: Which is the Optimal Negligence Rule?' (2003) 24 N. Ill. U. L. Rev. 41; also see Peter Nash Swisher, 'Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in its Place' (2011) 46 U. Rich. L. Rev. 359

⁶³ Christopher Hill, *Maritime Law* (6th Ed. 2004, LLP Professional Publishing) at page 449; also see Andrew Noble, 'Scope of the Law Reform (Contributory Negligence) Act 1945' *Arbitration* 1994, 60(4), 290-291

⁶⁴ Which existed only in cases where there was a breach of express warranty or where fraud was detected;

⁶⁵ *MacPherson v Buick Motor Co.* (N.Y. 1916) 217 N.Y. 382, 111 N.E. 1050; *Escola v Coca Cola Bottling Co. of Fresno* (Calif. 1944) 24 Cal.2d 453, 150 P.2d 436; *Greenman v Yuba Power Products, Inc.* (Calif. 1963) 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697

⁶⁶ E.g. see *Escola v Coca Cola Bottling Co. of Fresno* (Calif. 1944) 24 Cal.2d 453, 150 P.2d 436

⁶⁷ *East River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858, 106 S. Ct. 2295 at 2296 – "Admiralty law, which already recognizes a general theory of liability for negligence, also incorporates principles of products liability, including strict liability."; also at 2299 – "We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law."

⁶⁸ *East River S.S. Corp. v. Transamerica Delaval, Inc.* (1986) 476 U.S. 858, 106 S. Ct. 2295 at 2298

to be recognized in Admiralty it not only has to take place in navigable waters but “there must also be a maritime nexus-some relationship between the tort and traditional maritime activities.”⁶⁹ This was to prevent situations “where the maritime locality of the tort is clear, but where the invocation of admiralty jurisdiction seems almost absurd.”⁷⁰

Products liability is divided into three areas, where the product is defective at the time of sale, where insufficient warning about the potential risk of the product is given, and where the product has a design defect. The most common causes of action in products liability for ship passengers are under the design defect criteria.

Strict liability in defective designs has been abandoned⁷¹ in preference to the consumer expectations test⁷² and the risk/utility test. The formula most commonly referred to under the risk/utility test is “Judge Learned Hand's simple but elegant formula for negligence, ‘if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$ ’.”⁷³

Several cases that illustrate the effects of products liability in passenger claims include *Fedorczyk v Caribbean Cruise Lines*,⁷⁴ *Briscoe v Celebrity Cruises*,⁷⁵ and *Silivanch v Celebrity Cruises*⁷⁶ where a manufacturer of a sand filter used in a whirlpool was sued when a passenger contracted the legionnaire’s disease.

In the UK products liability is governed by the Consumer Protection Act (CPA) 1987 which was designed to implement EU Directive 85/374. “The Directive was intended fully to harmonise the rules on liability for defective products across the European Union,” however there are doubts as to how effective it has been in achieving this goal since “[t]he absence of

⁶⁹ *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio* (1972) 409 U.S. 249, 93 S.Ct. 493 at *256 **498; But note that in *Executive Jet* case “the Court limited its holding to aviation torts;” however see *Foremost Ins. Co. v. Richardson* (1982) 457 U.S. 668, 102 S.Ct. 2654 which extended the nexus test beyond aviation torts. – Monica A. Beckford, Michael L. Sanner, ‘Delta Country Ventures: Limiting Admiralty Jurisdiction’ (1993) 6 U.S.F. Mar. L.J. 245 at 247

⁷⁰ *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio* (1972) 409 U.S. 249, 93 S.Ct. 493 at *255 **498; For further discussion of maritime products liability see Robert Force, ‘Maritime Products Liability in the United States’ (1986) 11 Mar. Law. 1

⁷¹ *Volkswagen of America, Inc. v Young* (Md. 1984) 272 Md. 201, 321 A.2d 737

⁷² *Bruce v Martin-Marietta Corp.* (10th Cir. 1976) 544 F.2d 442

⁷³ *Krummel v Bombardier Corporation* (5th Cir. 2000) 206 F.3d 548 at 554 – negligence = $B < PL$

⁷⁴ *Fedorczyk v. Caribbean Cruise Lines, Ltd.* (3rd Cir. 1996) 82 F.3d 69 – passenger tried to sue the cruise line for inadequate anti-slip strips in a bath tub after a slip and fall injury;

⁷⁵ *Briscoe v. Celebrity Cruises, Inc.* (Fl. 2005) 894 So.2d 294 – claimant alleged a design defect in the stairs when injured;

⁷⁶ *Silivanch v. Celebrity Cruises, Inc.* (SDNY 2001) 171 F.Supp.2d 241

clear statutory rules and a lack of decided case law have unfortunately led the Directive to be almost wholly ineffectual in key product areas.”⁷⁷

The key case in products liability analysing the concepts of the Act and the Directive is *A v National Blood Authority*.⁷⁸ The case “established guidelines for “defect” in a non-standard product case” however definition of a defect in a standard product case⁷⁹ “has not yet been tested in England and Wales.”⁸⁰

Jurisdiction and applicable law

When it comes to determining proper venue for a case, domestic law once again varies from country to country, and jurisdiction depends on the laws of the particular state. There are several things to bear in mind, first what are the conditions for bringing the claim, do foreign national have standing to bring a case, in addition if the incident happened in a foreign country or on board of a foreign flagged ship in international waters the court might decline jurisdiction and refer the case to the appropriate foreign court.

The courts in the US can decline jurisdiction on the grounds of forum non conveniens.⁸¹ Several suits pertaining to the Costa Concordia disaster were filed in US courts, two of the cases so far were dismissed on the grounds of forum non conveniens,⁸² but another case was remanded back to the state court and the federal judge concluded, in dicta, that there is no reason why the case should be taken to Italy instead of Florida;⁸³ however the defendants are still able to assert forum non conveniens argument before the state court.⁸⁴

⁷⁷ Christopher Johnston, ‘A personal (and selective) introduction to product liability law’ J.P.I. Law 2012, 1, 1-17 at 2; also see David Body, ‘Product liability claims under the Consumer Protection Act 1987: some practical problems’ J.P.I. Law 2012, 2, 79-89

⁷⁸ *A v National Blood Authority (No.1)* [2001] 3 All E.R. 289 (QBD)

⁷⁹ I.e. non-standard product discussed was blood for transfusion, whereas a standard product would be something a consumer would buy in a supermarket.

⁸⁰ David Body, ‘Product liability claims under the Consumer Protection Act 1987: some practical problems’ J.P.I. Law 2012, 2, 79-89 at 79, also see for further discussion and the practical problems of the current products liability system in the UK;

⁸¹ E.g. see *Velasquez v.C.S.C.S. International, N.V.* 149 Fed.Appx. 881, 2005 WL 2130510 (C.A.11 (Fla.)); *Van Schijndel v Boeing Company* (Calif. 2006) 434 F.Supp.2d 766 at 769; *In re Air Crash Near Athens, Greece on August 14, 2005* (Illinois 2007) 479 F.Supp.2d 792

⁸² *Giglio Sub s.n.c. v. Carnival Corp.* 2012 WL 4477504 (S.D.Fla.), 2012 A.M.C. 2705; also see Jim Walker, ‘Another Judge Dismisses Costa Concordia Lawsuit Filed in Florida’ Cruise Law News, 8 Feb 2013, <<http://www.cruiselawnews.com/2013/02/articles/sinking/another-judge-dismisses-costa-concordia-lawsuit-filed-in-florida/>>

⁸³ *Abeid-Saba et al v. Carnival Corporation et al* Case 1:12-cv-23513-WPD, Document 62, Entered on FLSD Docket 02/15/2013, at page 6 – “There is no indication that the Italian government owned or ran the vessel. There is no evidence of the importance of the Costa Concordia or cruising to the Italian economy. Italy has not taken a position in this lawsuit. Put simply, there is a dearth of evidence to show that Italy has a strong foreign interest in this case. This case is about international and U.S. passengers injured on a pleasure cruise run by a private corporation and whether that corporation properly adhered to safety standards or was otherwise negligent. U.S.-Italian relationships will not be rocked if a Florida state court judge awards money damages

The second issue to be aware of is the domestic system itself, for example in the US the difference between state and federal law needs to be considered, and where which applies.⁸⁵

The claimant should familiarise himself with all the relevant jurisdictional requirements in domestic law depending on the country where he intends to file the case, and also with the requirements of the Athens Convention where applicable.

A further complication for a passenger claim can arise in relation to the law to be applied. This will typically be set by the terms of the contract of carriage; however it is not always that simple. When it comes to cruise ship passengers the applicable laws can differ based on the flag state of the ship, place of business of the carrier, domestic laws, in the US this is complicated by both state and federal laws, international conventions, nationality of the passenger, and other factors.

Conclusion

This chapter has provided an overview of the passenger compensation regime recently implemented in the EU, through Regulation 392/2009, as well as important passenger rights protections under Regulation 1177/2010.⁸⁶ These are important development in creating a uniform system of passenger compensation within the EU as well as bringing the rights of sea and waterway passengers in line with others in the rail,⁸⁷ air,⁸⁸ and road⁸⁹ sectors across the EU.

The second aspect of passenger compensation that has been considered in this chapter, is in regards to the rights and obligations of passengers under the English common law system, as well as mentioning aspect of the US system, which plays an important role in the cruising

because and Italian corporation was negligent.”; also see companion case *Scimone v. Carnival Corp.* USDC-FLSD, Docket No.: 12-CV-23505

⁸⁴ For further commentary see Jim Walker, ‘Costa Concordia Litigation: Tactical Blunder By Carnival Opens Door For Lawsuits in Miami’ *Cruise Law News*, 28 Feb 2013, <<http://www.cruiselawnews.com/2013/02/articles/passenger-rights/costa-concordia-litigation-tactical-blunder-by-carnival-opens-door-for-lawsuits-in-miami/>>; also see Brett Rivkind, ‘Federal Judge Grants Motion to Remand to Costa Concordia Plaintiffs’ *Maritime Injury Attorney Blog*, 11 March 2013, <<http://www.maritimeinjuryattorneyblog.com/2013/03/federal-judge-grants-motion-to.html>> Susan Young, ‘Can Victims of Costa Concordia Sue in the U.S.?’ *Travel Agent Central*, 1 March 2013, <<http://www.travelagentcentral.com/ocean-cruises/can-victims-costa-concordia-sue-us-39295>>

⁸⁵ See Onno Rijdsdijk, ‘A Particular Aircraft Accident Litigation Scenario’ (2009) 34 *Air and Space Law*, Issue 2, pp. 57–85 at page 77;

⁸⁶ For more details see EU website at <<http://ec.europa.eu/transport/passenger-rights/en/29-other-modes-2.html>> and <<http://ec.europa.eu/transport/themes/passengers/maritime/>>

⁸⁷ Regulation 1371/2007; for more details see EU website at <<http://ec.europa.eu/transport/passenger-rights/en/13-rail.html>> and <<http://ec.europa.eu/transport/themes/passengers/rail/>>

⁸⁸ More details at EU website <<http://ec.europa.eu/transport/passenger-rights/en/03-air.html>> and <http://ec.europa.eu/transport/themes/passengers/air/index_en.htm>

⁸⁹ Regulation 181/2011; for more details see EU website at <<http://ec.europa.eu/transport/passenger-rights/en/29-other-modes-3.html>> and <<http://ec.europa.eu/transport/themes/passengers/road/>>

industry due to the fact that in 2012 out of around 20 million cruise passengers worldwide, 17 million sailed from the US with 11.5 million being residents of US and Canada.⁹⁰

The cruise industry has enjoyed a significant growth in recent years⁹¹ and therefore it's becoming more and more important for proper passenger protection to be in place and for passengers to be more aware of their rights and the risks connected with going on a cruise vacation.

⁹⁰ Florida-Caribbean Cruise Association (FCCA), 'Cruise Industry Overview – 2013' <<http://www.fcca.com/downloads/2013-cruise-industry-overview.pdf>>

⁹¹ Cruise Market Watch, 'Growth of the Cruise Line Industry' <<http://www.cruisemarketwatch.com/growth/>>; also see Patricia Reaney, 'Cruise industry tops 20 million clients, focuses on Asia' Reuters, 30 Jan 2013, <<http://www.reuters.com/article/2013/01/30/us-travel-cruising-idUSBRE90T1CO20130130>>; for growth in Australia see International Cruise Council Australia, 'Cruise Industry Report – Australia 2011' <<http://www.cruising.org.au/downloads/2011-Australian-Cruise-Industry-Report.pdf>>; for more details see CLIA website for Market Research <<http://www.cruising.org/pressroom-research/market-research>> and Statistical Reports <<http://cruising.org/regulatory/clia-statistical-reports>>; and US Department of Transport, 'North American Cruise Statistical Snapshot, 2011' <http://www.marad.dot.gov/documents/North_American_Cruise_Statistics_Quarterly_Snapshot.pdf>

Chapter 5

Cruise Ship Dangers and Passenger Implications

This chapter will look into the various dangers that exist on and off¹ cruise ships, covering different accidents, perils of on-shore excursions, and also mentioning several legal restraints imposed on passengers through carriage contracts as well as consider some practical difficulties that might arise when making a claim for compensation.²

The chapter will conclude with a general discussion of passenger safety, the cruise industry position, and several examples of recent incidents that might make some people think twice before considering a cruise vacation with certain operators, as well as looking at some possible reforms and other solutions to the problems that developed as a result of the rapid growth in the cruise industry over the past decade.

Passenger accidents and rights

This section will look at some common incidents that can occur on board a cruise ship and also consider what the passenger's rights are in the various situations, and some of the complications a passenger might encounter when trying to make a claim.

Just like on land, in a city or a hotel, many of the same type of accidents and crimes can take place on board modern cruise ships which have come a long way in the past hundred years from the days of the Titanic which could carry 3,547³ passengers and crew⁴ and had a gross tonnage of 46,328 to huge super ships like the Queen Mary 2 at 148,528 tons or the Allure/Oasis of the Seas at 225,282 tons and carrying 8,702 passengers and crew.⁵

Many cruise ships, today, are like small cities, the big difference being that you are on a ship and if something goes wrong there is only so much that can be done with the limited resources on board and often being hundreds of miles from the nearest shore.

¹ Shore excursions or legal restraints in contracts of carriage;

² This chapter will mostly cover US case law with reference to the Athens Convention and EU Regulations where appropriate.; Athens Convention refers to The Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 and 2002;

³ Sources: Andrew Clarkson, 'Comparing Titanic To Modern Ships And Cruise Liners' <http://www.titanic-titanic.com/compare_modern_ships_to_titanic.shtml> Titanic Info, <<http://www.titanicstory.com/shipspec.htm>>; Malcolm Oliver's Cruiseblog, 'Titanic Vs Oasis of the Seas' <<http://malcolmoliver.wordpress.com/titanic-vs-oasis-of-the-seas/>>;

⁴ The actual number of passengers and crew on its maiden voyage was 2228. Source: The Canadian Press, 'Titanic vs. Oasis Of The Seas: Compare World's Biggest Cruise Ships, Then And Now (GRAPHIC)' The Huffington Post Canada, 11 Apr 2012, <http://www.huffingtonpost.ca/2012/04/11/titanic-vs-oasis-compare-cruise-ships_n_1419368.html>; also see Titanic Inquiry Project, <<http://www.titanicinquiry.org>>

⁵ Sources of info: Royal Caribbean, 'Ship Fact Sheet – Allure of the Seas' <<http://www.royalcaribbeanpresscenter.com/fact-sheet/20/allure-of-the-seas/>>; Cruise Critic, 'The Biggest Cruise Ships in the World' <<http://www.cruisecritic.com/articles.cfm?ID=1431>>

Legal restraints imposed through carriage contracts

When an accident happens on board a cruise ship there are many factors that can affect a passenger's claim. The main complicating factor that exists for passengers in many jurisdictions is the carriage contract itself⁶ which can incorporate many onerous terms in the carriers favour, in the absence of national legislation; including jurisdiction, arbitration, and choice of law clauses, as well as clauses limiting the time within which a claim for injury or damage has to be filed.⁷ Many of these carriage contracts further try to limit recoverable damages through application of the 1974 Athens Convention or through other means.⁸

However as mentioned in chapter four above under contract law, there are statutory limits to how far contractual provision can go in limiting liability for death and personal injury. For example in the case of *Johnson v Royal Caribbean Cruises*⁹ it was held that a waiver relieving carrier of liability for death and personal injury arising out of on board activities such as the FlowRider surfing simulator is void pursuant to Title 46 U.S.C. § 30509.¹⁰

Choice of law clauses "can have a dramatic impact on the likelihood of recovering proper damages."¹¹ Laws of certain countries can limit damages for death¹² and injuries¹³ or prevent recovery, in certain situations, altogether.¹⁴ The court in *Klinghoffer* "discussed several factors influencing the choice of law to govern a maritime tort claim"¹⁵ including: the place of the wrongful act, law of the flag, allegiance or domicile of the injured, allegiance of the defendant ship owner, place of contract, inaccessibility of foreign forum, and the law of

⁶ For an example of a carriage contract see e.g.: Royal Caribbean's Cruise Ticket Contract <http://www.royalcaribbean.com/content/en_US/pdf/CTC_Not_For_BR.pdf>; Cunard Passage Contract <<http://www.cunard.com/legal-information/?view=3078#tabbedModule1986>>; Disney Cruise Line Cruise Contract <<http://disneycruise.disney.go.com/cruise-contract/>>; Thomson Cruise Condition of Carriage <<http://www.thomson.co.uk/editorial/legal/cruise-conditions-of-carriage.html>>; Costa Cruise Ticket Contract <<http://www.costacruise.com/B2C/USA/Support/contract/contract.htm>>; Carnival Ticket Contract <http://www.carnival.com/cms/static_templates/ticket_contract.aspx>;

⁷ For more details see Thomas A. Dickerson, 'The Cruise Passengers' Rights & Remedies 2012' <<http://www.nycourts.gov/courts/9jd/taxcertatd.shtml>> at pages 11-12

⁸ E.g. see Royal Caribbean's Cruise Ticket Contract cl 11;

⁹ *Johnson v. Royal Caribbean Cruises, Ltd.* (2011) 449 Fed.Appx. 846, 2011 WL 6354064 (C.A.11 (Fla.))

¹⁰ Also see *Kermarec v. Compagnie Generale Transatlantique* (1958) 358 U.S. 625, 79 S.Ct. 406 where it was held that carriers need to exercise reasonable care towards passengers (i.e. invitees and licensees); and in *Royal Ins. Co. of America v. Southwest Marine* (1999) 194 F.3d 1009 it was held that a party to a maritime contract cannot "shield itself contractually from liability for gross negligence." at 1016

¹¹ Thomas A. Dickerson, 'The Cruise Passengers' Rights & Remedies 2012' <<http://www.nycourts.gov/courts/9jd/taxcertatd.shtml>> at page 126

¹² E.g. see *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China* 923 F.2d 957, 59 USLW 2457 (2nd Cir. 1991)

¹³ E.g. see *Wendelken v. Superior Court In and For Pima County* 137 Ariz. 455, 671 P.2d 896 (1983); *Feldman v Acapulco Princess Hotel* 137 Misc.2d 878, 520 N.Y.S.2d 477 (1987)

¹⁴ *Tucker v. Whitaker Travel, Ltd.* 620 F.Supp. 578 (1985)

¹⁵ *Klinghoffer v. S.N.C. Achille Lauro* 795 F.Supp. 112 (1992 SDNY) at 115

forum. Choice of law and forum selection clauses are often linked, both in contract drafting and also by courts later interpreting those clauses.¹⁶

Two main factors courts consider in deciding whether a forum selection clause is enforceable are whether it is unfair or unreasonable and whether it was reasonably communicated.¹⁷ In *Morag v Quark Expeditions*¹⁸ on a cruise from Antarctica to Argentina a clause selecting English law and the courts of London was held to be valid since the “Plaintiffs have shown nothing fundamentally unfair, despite its inconvenience, about the mandatory forum selection clause, and the ... clause was reasonably communicated.”¹⁹

Similarly in *Burns v Radisson Seven Seas Cruise*²⁰s clause selecting Paris, France as the forum was held valid for a Tahiti cruise that did not touch US waters, since “it was reasonable for cruise operator to select the foreign forum as a neutral location in order to dispel confusion as to where passengers from a variety of countries could bring lawsuits.”²¹

The situation in the EU has been simplified with the recent implementation of Regulation 392/2009²² which has created a uniform regime applying the principles of the 2002 Athens Convention across the EU on ships sailing to and from the region as well as on EU flagged ships.²³ While the regime is not perfect due to its liability limits, as discussed in chapters one and two, it is still a big improvement over the ridiculously low limits of the 1974 Convention, which is still the only international instrument in force when it comes to passenger compensation.

Accidents on board and on shore

In contrast to other transport modes such as road or aviation where accidents are mostly confined to a plane or bus crash, on cruise ships accidents and injuries can happen from any

¹⁶ However see Michael J. Maloney, ‘Practical Guide to Analyzing Forum Selection Clauses in Personal Injury and Wrongful Death Claims under Maritime Contracts’ 24 Tul. Mar. L.J. 705 (2000) which discusses the importance in distinguishing forum selection clauses from choice of law clauses.

¹⁷ E.g. see *Heinz v. Grand Circle Travel* 329 F.Supp.2d 896 (2004)

¹⁸ *Morag v. Quark Expeditions, Inc.* 2009 A.M.C. 2309, 2008 WL 3166066 (D.Conn.)

¹⁹ *Morag v. Quark Expeditions, Inc.* 2009 A.M.C. 2309, 2008 WL 3166066 (D.Conn.) at 5; Also see *Falcone v. Mediterranean Shipping Co.* 2002 WL 32348270 (E.D.Pa.) where Italy was held to be the proper venue for a Mediterranean cruise pursuant to the forum selection clause in the contract of carriage.

²⁰ *Burns v. Radisson Seven Seas Cruises, Inc.* 867 So.2d 1191 (2004)

²¹ *Burns v. Radisson Seven Seas Cruises, Inc.* 867 So.2d 1191 (2004) at 1191; also see *Seung v. Regent Seven Seas Cruises, Inc.* 393 Fed.Appx. 647, 2010 WL 3273535 (C.A.11 (Fla.)); for more details see the two cases that have established the main principles in this area: *M/S Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 92 S.Ct. 1907 (1972); and *Carnival Cruise Lines, Inc. v. Shute* 499 U.S. 585, 111 S.Ct. 1522 (1991)

²² Regulation (EC) No 392/2009 of the European Parliament and of the Council of 23 April 2009 on the liability of carriers of passengers by sea in the event of accidents;

²³ For details on the Athens regime see chapter one above, as well as the discussion of Regulation 392/2009 in chapter four;

number of activities more comparable to a holiday resort with the added danger of being on water often hundreds of miles from the nearest hospital or advanced medical care.

Death

One of the most serious consequences of an accident is a passenger's death. The most obvious cause of death, although not very common, is when a passenger ship sinks and takes passengers that were unable to escape with it. The most recent example is the death of 32 passengers aboard the Costa Concordia²⁴ which struck a reef and sunk as a result of its incompetent crew. What compounded the situation was the fact that the captain abandoned his ship and refused to return to help with the evacuation,²⁵ the age old concept and tradition of 'the captain going down with the ship'²⁶ had, apparently, no meaning for Schettino.²⁷ On the centennial anniversary of the Titanic sinking, the Costa Concordia disaster has once again reminded the public that ships do sink and safety procedures should be reviewed frequently and not just after a major disaster.

Other major sinking disasters in recent history include the 1987 sinking of the Herald of Free Enterprise which claimed 193 lives when the ferry left the port with the bow door on the car deck still open;²⁸ and the sinking of the MS Estonia in 1994 claiming 852 lives when it sank on route from Tallinn to Stockholm.²⁹

²⁴ BBC News, 'Costa Concordia disaster' 17 Oct 2012, <<http://www.bbc.co.uk/news/world-europe-16563562>>

²⁵ BBC News, 'Concordia disaster: Coastguard calls captain' 17 Jan 2012, <<http://www.bbc.co.uk/news/world-europe-16599655>>; also see Amy Simmons, 'Should the captain go down with his ship?' ABC News, 19 Jan 2012, <<http://www.abc.net.au/news/2012-01-18/should-the-captain-go-down-with-his-ship3f/3780068>>

²⁶ BBC News, 'Must a captain be the last one off a sinking ship?' 18 Jan 2012, <<http://www.bbc.co.uk/news/magazine-16611371>>

²⁷ Francesco Schettino, Captain of the Costa Concordia;

²⁸ It was "the worst peacetime British maritime accident since the sinking of the Titanic in 1912." at 22min – National Geographic Channel, 'Seconds from Disaster: Zeebrugge Ferry Disaster' Season 2 Episode 5, 16 Aug 2005, <<http://www.imdb.com/title/tt0967834/>>, <<http://natgeotv.com/uk/seconds-from-disaster/videos/zeebrugge-ferry-disaster>>, <<http://www.youtube.com/watch?v=y8XH68OKRL4>>; also see Marine Accident Investigation Branch (MAIB), 'Herald of Free Enterprise report' <http://www.maib.gov.uk/publications/investigation_reports/herald_of_free_enterprise/herald_of_free_enterprise_report.cfm>; BBC, '1987: Hundreds trapped as car ferry capsizes' <http://news.bbc.co.uk/onthisday/hi/dates/stories/march/6/newsid_2515000/2515923.stm>; and Trevor J.

Douglas, 'Master or servant: a corporation's liability for the activities of a ship's master' J. Crim. L. 2008, 72(6), 497-518 – which considers the criminal liability of the corporate entity that owns or operates the vessel;

²⁹ Cineflix Productions 'Zero Hour: The Sinking of the Estonia' <<http://www.cineflixproductions.com/shows/38-Zero-Hour>>, <<http://www.imdb.com/title/tt1113712/>>, <http://www.youtube.com/watch?v=eFDGL_ehpkl>; also see Finland Safety Investigation Authority, 'MV Estonia Final Report' <<http://www.turvallisuustutkinta.fi/en/Etusivu/Tutkintaselostukset/Vesiliikenne/MVEstonia>>; History, 'Sep 28, 1994: Estonia sinks' <<http://www.history.com/this-day-in-history/estonia-sinks>>; and Marine Insight, 'The MS Estonia Ship Disaster' 10 Nov 2012, <<http://www.marineinsight.com/marine/marine-news/headline/the-ms-estonia-ship-disaster/>>

Apart from ship sinking there are also other ways a passenger can potentially lose his life on board a ship, from something as simple as a slip and fall,³⁰ to allergic reactions,³¹ and deadly diseases,³² to falling overboard incidents;³³ with the most recent case happening on the 9th of May 2013 when Australian officials reported that two people fell overboard from the Carnival Spirit cruise ship about 150 kilometres from shore and their disappearance was only noticed once the ship docked in port,³⁴ even though there were security cameras present, although their quality is in question since “investigators were having the video enhanced in a bid to determine whether the couple had jumped or had fallen by accident.”³⁵ It is surprising that in the 21st century the cruise lines still can’t be bothered to install man overboard sensors³⁶ and high definition security cameras which are monitored 24/7³⁷ so that if someone does fall overboard or other suspicious activity takes place on deck,³⁸ the crew can act

³⁰ *Lasky v. Royal Caribbean Cruises, Ltd.* (2012) 850 F.Supp.2d 1309

³¹ Passenger died shortly after departure from what was believed to be a peanut allergy. – Jim Walker, ‘Passenger Death On Norwegian Cruises Lines’ Epic Forces Cruise Ship’s Return To Miami’ *Cruise Law News*, 15 Aug 2010, <<http://www.cruiselawnews.com/2010/08/articles/maritime-death/passenger-death-on-norwegian-cruises-lines-epic-forces-cruise-ships-return-to-miami/>>; Eric Bungay, ‘Epic passenger’s allergy believed to be peanut’ *WTSP News*, 18 Aug 2010, <<http://www.wtsp.com/news/national/story.aspx?storyid=141750>>; Laura Isensee, ‘Man’s death sends cruise ship back to port’ *The Miami Herald*, 15 Aug 2010, <http://articles.sun-sentinel.com/2010-08-15/news/fl-cruise-ship-death-20100815_1_cruise-ship-caribbean-cruise-norwegian-cruise-line-s-epic>

³² Laura Devlin, ‘Ex-Royal Caribbean captain died of Legionella’ *BBC News*, 25 Apr 2013, <<http://www.bbc.co.uk/news/uk-england-norfolk-22286025>>; also see Jim Walker, ‘Salt into the Wound: Royal Caribbean Denies Legionnaires Disease Came from Liberty of the Seas’ *Cruise Law News*, 29 Apr 2013, <<http://www.cruiselawnews.com/2013/04/articles/legionnaires-disease/salt-into-the-wound-royal-caribbean-denies-legionnaires-disease-came-from-liberty-of-the-seas/>>

³³ Diana Gonzalez, ‘Family Seeks More Answers in Disappearance of Man From Cruise Ship’ *NBC Team 6 Investigators*, 2 May 2013, <<http://www.nbcmiami.com/news/local/Family-Seeks-More-Answers-in-Disappearance-of-Man-From-Cruise-Ship--205671551.html>>; and Nick Lazaredes, ‘Lost at Sea’ *Dateline SBS*, 28 Feb 2012, <<http://www.sbs.com.au/dateline/story/about/id/601401/n/Lost-at-Sea>>, <<http://www.youtube.com/watch?v=bLgc1dqhCsQ>>

³⁴ 7 News, ‘Missing couple fell from cruise ship’ 9 May 2013, <<https://www.youtube.com/watch?v=6G1XM4wPIJ8>>

³⁵ Ian Johnston, ‘Two passengers vanish from Carnival cruise ship’ *NBC World News*, 9 May 2013, <http://worldnews.nbcnews.com/_news/2013/05/09/18143580-two-passengers-vanish-from-carnival-cruise-ship>

³⁶ E.g. see RZDMPA, ‘Man-overboard Early Detection System (MEDS)’ <<http://www.rzdmpa.com/index.php/man-overboard>>

³⁷ “Cruise ships are required by law to have technologies in place to detect when passengers go overboard. CCTV and motion detection technologies exist today but the majority of cruise lines refuse to implement the systems.” – Jim Walker, ‘Two Passengers Overboard From Carnival Spirit Cruise Ship’ *Cruise Law News*, 9 May 2013, <<http://www.cruiselawnews.com/2013/05/articles/disappearances-1/two-passengers-overboard-from-carnival-spirit-cruise-ship/>>

³⁸ Woman assaulted at night on the deck of a Royal Caribbean cruise ship by a naked man. – Jim Walker, ‘Is It Safe to Walk the Decks of Royal Caribbean Cruise Ships at Night?’ *Cruise Law News*, 7 May 2013, <<http://www.cruiselawnews.com/2013/05/articles/social-media-1/is-it-safe-to-walk-the-decks-of-royal-caribbean-cruise-ships-at-night/>>

immediately to protect the passengers that have decided to spend their time and money sailing on their ship.³⁹

In most death cases the obvious party to sue would be the cruise line; in terms of damages from January 2013 in EU passengers can recover at least 250,000 to 400,000 SDR if the cruise line is at fault.⁴⁰

In the US the main obstacle to recovery for death that took place on the high seas is the Death on the High Seas Act of 1920⁴¹ which limits the type of damages that can be recovered “to pecuniary damages and precludes any claim for wrongful death under general maritime law or state wrongful death statutes.”⁴² “In addition, plaintiffs are not entitled to a jury trial.”⁴³ In effect what this means is that if you die at sea or in situations where the act may apply,⁴⁴ and you are an “unemployed, retired, elderly or minor passenger ... [the] cruise ship companies have to pay virtually nothing.”⁴⁵ The act has been described by passenger lawyers as “unjust and archaic,”⁴⁶ “screwing American passengers for 89 years.”⁴⁷

³⁹ For more info see Jim Walker, ‘Disappearances at Sea: Cruise Industry Refuses to Comply with Cruise Safety Law’ Cruise Law News, 11 May 2013, <<http://www.cruiselawnews.com/2013/05/articles/disappearances-1/disappearances-at-sea-cruise-industry-refuses-to-comply-with-cruise-safety-law/>>

⁴⁰ For more details see chapters one and four.

⁴¹ 46 U.S.C. §§ 30301-30308

⁴² Karen C. Hildebrandt, ‘Personal Injury and Wrongful Death Remedies for Maritime Passengers’ 68 Tul. L. Rev. 403 (1994)

⁴³ Spencer Aronfeld, ‘Why Cruise Lines Aren't Accountable to Their Passengers’ Huff post Travel, 13 March 2013, <http://www.huffingtonpost.com/spencer-aronfeld/why-cruise-lines-arent-accountable_b_2839814.html>; also see *Lasky v. Royal Caribbean Cruises, Ltd.* (2012) 850 F.Supp.2d 1309 at 1313 – “The law in this area is murky and reflects conflicting views on this issue. However, the weight of authority ... supports ... [the] position that Plaintiff is not entitled to a jury trial on her DOHSA claim.” “federal courts have permitted jury trials in cases involving DOHSA claims in only two situations.” When a DOHSA claim is joined by another claim that requires trial by jury and arises from the same occurrence, and when it is joined by a claim invoking diversity jurisdiction.

⁴⁴ In the case of *Moyer v. Klosters Rederi* (1986) 645 F.Supp. 620– where a passenger died on a snorkeling expedition while on a cruise, the court held that “maritime incidents occurring within the territorial waters of foreign states fall within the ambit of DOHSA.” at 623; *Lasky v. Royal Caribbean Cruises, Ltd.* (2012) 850 F.Supp.2d 1309 at 1312 – held DOHSA applied even though the passenger died a month after the cruise on land, from injuries that occurred during the cruise; also see Jim Walker, ‘Tragedy on HAL's Half Moon Cay: A Mother's Perspective’ Cruise Law News, 4 Nov 2011, <<http://www.cruiselawnews.com/2011/11/articles/maritime-death/tragedy-on-hals-half-moon-cay-a-mothers-perspective/>> – which talks about a child drowning case on a private Bahamas island owned by the cruise line;

⁴⁵ Spencer Aronfeld, ‘Why Cruise Lines Aren't Accountable to Their Passengers’ Huff post Travel, 13 March 2013, <http://www.huffingtonpost.com/spencer-aronfeld/why-cruise-lines-arent-accountable_b_2839814.html>

⁴⁶ Spencer Aronfeld, ‘Why Cruise Lines Aren't Accountable to Their Passengers’ Huff post Travel, 13 March 2013

⁴⁷ Jim Walker, ‘The Death on the High Seas Act - Screwing American Passengers for 89 Years’ Cruise Law News, 2009 <<http://www.cruiselawnews.com/2009/09/articles/maritime-death/the-death-on-the-high-seas-act-screwing-american-passengers-for-89-years/>>; for more general information on death on the high sea, also see Annie Correal, ‘Death on board: What happens if you die on a cruise?’ Columbia University News Service, Student Work, 13 Feb 2007, <<http://jscms.jrn.columbia.edu/cns/2007-02-13/correal-deathonboard.html>>

Slips and falls

Slips and falls are probably among the most common accidents that can happen on a cruise ship. Liability largely depends on what caused the slip and fall and whether the carrier was in any way negligent in causing it, by for example leaving a wet floor unsupervised,⁴⁸ or carpet improperly secured.⁴⁹

The “ship-owner owes passengers the duty of exercising reasonable care under the circumstances.”⁵⁰ This includes a duty to warn passengers of non-obvious dangers, however if a danger is obvious, such as a risk of slipping when getting out of a pool or shower,⁵¹ there is no duty to warn.⁵²

There are numerous ways a passenger can slip, trip, or be injured by a falling object on a cruise ship, including improper stair or floor design, wet towels left on a cabin floor, drink falling from an upper deck, slipping on a salad dressing or tripping on a bench cushion, and many others.⁵³ It is however also important for passengers to exercise a bit of caution and common sense when walking around a cruise ship, and keep in mind that a ship is a moving vehicle on the sea.

Disease

Food poisoning and disease are particularly problematic on cruise ships since in a confined space with thousands of people around, viruses and germs can spread quickly throughout the ship if proper hygiene is not adhered to. According to the CDC reports norovirus is the leading cause of ship borne illnesses.⁵⁴

Recent court cases in this area include *Bird v Celebrity Cruise Line* where a passenger claimed she contracted bacterial enteritis as a result of food poisoning aboard the cruise ship.⁵⁵ A perfect example of how products liability can play a role in a passenger claim is the

⁴⁸ *Janet Dawkins v Carnival Plc (T/AS P & O Cruises)* [2011] EWCA Civ 1237, 2011 WL 4966529

⁴⁹ *Kermarec v. Compagnie Generale Transatlantique* (1958) 358 U.S. 625, 79 S.Ct. 406

⁵⁰ *Mendel v. Royal Caribbean Cruises, Ltd.* 2012 WL 2367853 (S.D.Fla.) at 4, citing *Kermarec v. Compagnie Generale Transatlantique* (1958) 358 U.S. 625, 79 S.Ct. 406

⁵¹ *Luby v. Carnival Cruise Lines, Inc.* (S.D.Fla.1986) 633 F.Supp. 40 – A passenger tried to sue a cruise line for tripping over a shower ledge in her cabin. While there are many valid reasons to sue a cruise line, there are certain instances where a passenger should just take a bit of responsibility for their own actions, and exercise a bit of caution and common sense.

⁵² *Mendel v. Royal Caribbean Cruises, Ltd.* 2012 WL 2367853 (S.D.Fla.) at 4, citing *Luby v. Carnival Cruise Line* (S.D.Fla.1986) 633 F.Supp. 40 at 41, and *Young v. Carnival Cruise Lines* 2011 WL 465366 at 3

⁵³ For more case examples of slips, trips, and falling objects injuring passengers see Thomas A. Dickerson, ‘The Cruise Passengers’ Rights & Remedies 2012’ <<http://www.nycourts.gov/courts/9jd/taxcertatd.shtml>> at pages 22-25

⁵⁴ Centers for Disease Control (CDC), ‘Outbreak Updates for International Cruise Ships’ <<http://www.cdc.gov/nceh/vsp/surv/gilist.htm>>; also see Cruise Law News articles on norovirus at <<http://www.cruiselawnews.com/articles/norovirus/>>

⁵⁵ *Bird v. Celebrity Cruise Line, Inc.* (2005) 428 F.Supp.2d 1275 at 1277

case of *Silivanch v Celebrity Cruises*⁵⁶ where a passenger contracted Legionnaires' disease as a result of a defective sand filter used in the whirlpool spa, and sued the filter manufacturer in products liability and was awarded over two million dollars in damages. In a recent UK case a ship surveyor has detained the cruise ship, Van Gogh, for being dangerously unsafe pursuant to ss94-95 of the MSA 1995⁵⁷ as a result of norovirus contamination on previous two cruises and the danger of further outbreaks.⁵⁸

Infection and spread of disease seems to be a recurring problem on certain cruise ships, and while the cruise lines try to blame poor passenger hygiene as the culprit,⁵⁹ they are continuing to fail CDC health inspection, with six ships failing so far in 2013.⁶⁰ The CDC reports put into perspective how disgusting poorly maintained and managed ships can really be.⁶¹

Shore excursions

Shore excursions are a big business for the cruise lines, with almost half of all cruise passengers participating in them.⁶² Their operation is often delegated⁶³ by the cruise lines to independent contractors that organise and run the various excursions. The problem with delegating these activities to the independent contractors is that the cruise lines are often found not responsible for their misconduct or negligence,⁶⁴ which in some cases can be

⁵⁶ *Silivanch v. Celebrity Cruises, Inc.* (2001) 171 F.Supp.2d 241

⁵⁷ Merchant Shipping Act 1995

⁵⁸ *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport; The Van Gogh* [2008] EWHC 2794 (Comm), [2009] 1 All ER (Comm) 955; For details and commentary see Ulrich Jurgens, 'Invalid detention: how the wrong law makes a ship safe: The Van Gogh' L.M.C.L.Q. 2009, 2(May), 180-188

⁵⁹ Jim Walker, 'Viral Outbreak Delays Departure of Cruise Ship From Liverpool' *Cruise Law News*, 7 May 2013, <<http://www.cruiselawnews.com/2013/05/articles/norovirus/viral-outbreak-delays-departure-of-cruise-ship-from-liverpool/>> – "Paul Foster, speaking on behalf of Cruise and Maritime Voyages, said: "It's one of those things that are brought on board by passengers. I always say a ship cannot get a sore throat."

⁶⁰ Jim Walker, 'Carnival Fascination Cruise Ship Flunks Health and Sanitation Inspection' *Cruise Law News*, 11 Apr 2013, <<http://www.cruiselawnews.com/2013/04/articles/norovirus/carnival-fascination-cruise-ship-flunks-health-and-sanitation-inspection/>>; also see Sky News, 'Norovirus Outbreak Strikes US Cruise Ship' 8 March 2013, <<http://news.sky.com/story/1062270/norovirus-outbreak-strikes-us-cruise-ship>>

⁶¹ Jim Walker, 'Disease Breeding Grounds: Three Cruise Ships Fail Health & Sanitary Inspections' *Cruise Law News*, 27 March 2013, <<http://www.cruiselawnews.com/2013/03/articles/norovirus/disease-breeding-grounds-three-cruise-ships-fail-health-sanitary-inspections/>>

⁶² Thomas A. Dickerson, 'The Cruise Passengers' Rights & Remedies 2012' <<http://www.nycourts.gov/courts/9jd/taxcertatd.shtml>> at page 55; also see Wendy Perrin, 'Cruise Ship Shore Excursions – What I Learned Moonlighting as a Cruise Ship Trainee' *Conde Nast Traveller*, 13 Apr 2013, <<http://www.cntraveler.com/perrin-post/2013/04/cruise-ship-shore-excursions-what-i-learned-moonlighting-as-a-cruise-ship-trainee-042313>> – "These day trips are big business for the cruise lines: Royal Caribbean expects Navigator of the Seas to earn between \$600,000 and \$1,100,000 per week in onboard revenue, including tour sales."

⁶³ Although "Some shore excursions are run by the cruise companies themselves or by companies established by the cruise companies to operate these excursions." – Karen C. Hildebrandt, 'Personal Injury and Wrongful Death Remedies for Maritime Passengers' 68 Tul. L. Rev. 403 (1994)

⁶⁴ E.g. see *Smolnikar v. Royal Caribbean Cruises Ltd.* (2011) 787 F.Supp.2d 1308

severe, involving “insolvent, unsafe and uninsured” companies.⁶⁵ However cruise ship owners cannot limit their own negligence in selecting and retaining the excursion operator, meaning that while “cruise ship owners, such as Royal Caribbean, cannot be held vicariously liable for the negligence of an independent contractor ... they may be liable for negligently hiring or retaining a contractor.”⁶⁶

Apart from negligent selection and retention of an independent contractor a passenger’s claim can be combined with other counts, such as failure to warn,⁶⁷ negligent misrepresentation,⁶⁸ or assertion of vicarious liability through the doctrine of apparent agency.⁶⁹ If a passenger cannot make a claim against the carrier then another option would be to try to sue the independent contractor directly, which can present its own challenges when dealing with the legal system of foreign countries where the contractors are based.

A better solution to protect passenger interests would be to hold liable any entity that profits from the shore excursion,⁷⁰ so if the cruise line is getting part of the passenger’s fee for the excursion it should be jointly and severally liable for any injury sustained by the customer that the excursion operator would otherwise be liable for. The cruise lines are clearly in a better position to then recover their costs from the operator if he was solely responsible for the accident.⁷¹

Intoxication

The best way for passengers to stay safe is to be careful, pay attention to safety warning, and do not try activities that are beyond their skill or comfort zone. However one of the most dangerous things a passenger can do on a cruise ship is to get so intoxicated that they don’t even know where they are or what they are doing and they have no trusted sober friends around who can make sure they stay safe.

⁶⁵ “*Winter v. I.C. Holidays, Inc.*, New York Law Journal, Jan 9, 1992 p.23, Col. 4 (N.Y. Sup. Ct. 1992) involved the negligent selection of a foreign bus company which was insolvent, unsafe and uninsured.” – Paul S. Edelman, James E. Mercante, ‘Admiralty Law’ (2008) <<http://www.kreindler.com/Publications/Admiralty-Law-Paul-S-Edelman-and-James-E-Mercante.shtml>>

⁶⁶ *Smolnikar v. Royal Caribbean Cruises Ltd.* (2011) 787 F.Supp.2d 1308 at 1318

⁶⁷ *Smolnikar v. Royal Caribbean Cruises Ltd.* (2011) 787 F.Supp.2d 1308 at 1322; *Heyden v. Celebrity Cruises, Inc.* 2013 WL 773477 (S.D.Fla.) at 4 – this case involved a Segway accident claim against the cruise line;

⁶⁸ *Heyden v. Celebrity Cruises, Inc.* 2013 WL 773477 (S.D.Fla.) at 5

⁶⁹ *Smolnikar v. Royal Caribbean Cruises Ltd.* (2011) 787 F.Supp.2d 1308 at 1324; also see Karen C. Hildebrandt, ‘Personal Injury and Wrongful Death Remedies for Maritime Passengers’ 68 Tul. L. Rev. 403 (1994) at 417

⁷⁰ “The cruise line may demand and receive more than 50 percent of a tour’s proceeds.” – Michael Eriksen, ‘Love Boats on Troubled Waters’ (2006) 42-MAR JTLATRIAL 48 at page 3

⁷¹ For further discussion of independent contractors and of the various perils of shore excursions see Thomas A. Dickerson, ‘The Cruise Passengers’ Rights & Remedies 2012’ <<http://www.nycourts.gov/courts/9jd/taxcertatd.shtml>> at page 52 onwards; also see Karen C. Hildebrandt, ‘Personal Injury and Wrongful Death Remedies for Maritime Passengers’ 68 Tul. L. Rev. 403 (1994) at 414

Getting intoxicated can be the last thing a passenger ever does on a cruise ship, as falling overboard,⁷² getting alcohol poisoning,⁷³ or just doing stupid stuff, like sliding down banisters,⁷⁴ is a lot more likely, while intoxicated. Alcohol not only impairs a passenger's ability to evacuate and save themselves in an emergency, but it can also make them a much easier target of theft, rape or other criminal act.⁷⁵

An example of how a fun night can quickly turn deadly is the case of George Smith, who disappeared on his honeymoon cruise in 2005. Based on the available evidence he got drunk and ended up overboard, whether it was the result of an accident or criminal act is still eight year later under investigation;⁷⁶ the FBI in New York has recently agreed to review the case once again.⁷⁷

In another case an intoxicated woman fell overboard and was rescued hours later, but has alleged that it took the cruise line too long to rescue her and then they refused to airlift her to hospital.⁷⁸

⁷² Independent Newspaper Ireland, 'My life exploded when Lynsey died' 21 Oct 2012, <<http://www.independent.ie/irish-news/my-life-exploded-when-lynsey-died-28821553.html>> – 15 year old girl is served several drinks and falls overboard from a balcony in her cabin while trying to vomit; see other case in Dori Saltzman, 'Cruise Passenger Who Jumped Overboard Sues Carnival for Delayed Rescue' Cruise Critic, 14 March 2013, <<http://www.cruisecritic.com/news/news.cfm?ID=5259>>; also see interesting views from the general public compiled in Melissa Baldwin, 'Man Overboard ... Who Should Pay?' Cruise Critic, 2007, <<http://www.cruisecritic.com/articles.cfm?ID=503>>

⁷³ Katie McFadden, 'Teen Dies on a Carnival Cruise Ship, Alcohol Poisoning Suspected' Travelers Today, 27 Feb 2013, <<http://www.travelerstoday.com/articles/5065/20130227/teen-dies-carnival-cruise-ship-alcohol-poisoning-suspected.htm>>; also see Jim Walker, 'New York Teenager Dies on Carnival Miracle Cruise Ship' Cruise Line Law, 26 Feb 2013, <<http://www.cruiselawnews.com/2013/02/articles/maritime-death/new-york-teenager-dies-on-carnival-miracle-cruise-ship/>>

⁷⁴ Meyer v. Carnival Cruise Lines, Inc. 1994 WL 832006 (N.D.Cal.,1994); also see Daily Mail News, 'I was drunk': Passenger drops anchor of moving cruise ship in the middle of the Caribbean' Mail Online, 1 Dec 2010, <<http://www.dailymail.co.uk/news/article-1334384/Cruise-passenger-Ryan-Ehlert-drops-anchor-middle-Gulf-Mexico.html>> where a drunk passenger released an anchor while the ship was underway, which could have seriously damaged the ship;

⁷⁵ "Most of the sexual assaults on cruise ships took place in private cabins and over half were alcohol-related incidents." – Salvador Hernandez, 'Testimony: Crimes Against Americans on Cruise Ships' Federal Bureau of Investigation (FBI), 27 March 2007, <<http://www.fbi.gov/news/testimony/crimes-against-americans-on-cruise-ships>>; Also see Jim Walker, 'Bad Times Aboard the Fun Ships: Passenger Alleges Rape Aboard Carnival Victory Cruise Ship' Cruise Law News, 23 Jan 2013, <<http://www.cruiselawnews.com/2013/01/articles/rape-1/bad-times-aboard-the-fun-ships-passenger-alleges-rape-aboard-carnival-victory-cruise-ship/>>

⁷⁶ 48 Hours, 'Murder at Sea?' CBS, 11 May 2013, <<http://www.cbsnews.com/video/watch/?id=50146641n>> or <http://www.youtube.com/watch?v=A1vn_sn9A7c>

⁷⁷ Kristina Sgueglia, 'FBI to review honeymooner's 2005 cruise ship death' CNN, 15 May 2013, <<http://edition.cnn.com/2013/05/14/us/new-york-fbi-cruise-death/>>; Brandie Piper, 'FBI reviewing George Smith's 2005 cruise ship death' KSDK, 14 May 2013, <<http://www.ksdk.com/news/article/380494/28/FBI-reviewing-2005-cruise-ship-death>>

⁷⁸ Inside Edition, 'Woman Falls Overboard On Cruise Ship, Treads Water Until Rescue' 6 May 2013, <<http://www.insideedition.com/investigative/6287-woman-falls-overboard-on-cruise-ship-treads-water-until-rescue>>, video at <<https://www.youtube.com/watch?v=z4hQVKjss28>>; also see Jim Walker, 'Carnival Booze Cruise Disaster Ends Up In Court' Cruise Law News, 14 March 2013,

Unfortunately getting intoxicated on a cruise ship is not confined to adult passengers, on a 2006 cruise a fifteen year old girl “was served 10 drinks in a bar on the cruise ship”⁷⁹ only to later fall from the balcony of her room when she was sick.⁸⁰

These are just three examples of passengers getting intoxicated and subsequently falling overboard to their death, unfortunately it appears to be more common than it should, and that is only the tip of the iceberg of all the bad things that can happen to an intoxicated passenger on a cruise ship;⁸¹ while the cruise lines are still trying to maintain that they take care of drunk passengers and that “It is unacceptable and forbidden for any crew member to knowingly serve any intoxicated guest.”⁸²

In 2004 a Florida Appeals Court held that a passenger can sue a cruise line for negligence when it fails to “exercise reasonable care for the safety of its passengers, as is established by the general maritime law...in both (a) overserving the plaintiff... and (b) failing to protect him from his (albeit self-imposed) disability.”⁸³

The main problem stems from the fact that cruise lines make a lot of money on alcohol sales⁸⁴ and their main goal is to sell as many drinks as possible because it means more profits

<<http://www.cruiselawnews.com/2013/03/articles/passenger-rights/carnival-booze-cruise-disaster-ends-up-in-court/>>

⁷⁹ Independent Newspaper Ireland, ‘My life exploded when Lynsey died’ 21 Oct 2012,

<<http://www.independent.ie/irish-news/my-life-exploded-when-lynsey-died-28821553.html>>;

⁸⁰ Independent Newspaper Ireland, ‘Tragic teen fell off liner while vomiting after drinking session’ 6 March 2006, <<http://www.independent.ie/irish-news/tragic-teen-fell-off-liner-while-vomiting-after-drinking-session-26392763.html>>; however also see Independent Newspaper Ireland, ‘Cruise ship company: Don't blame us for tragic teen's death’ 21 Apr 2006, <<http://www.independent.ie/irish-news/cruise-ship-company-dont-blame-us-for-tragic-teens-death-26390550.html>> for the cruise lines account of the events that led to the death of Lynsay O'Brien;

⁸¹ For a history of cases involving intoxication on cruise ships see the second half of Jim Walker, ‘Booze Cruise: The Royal Caribbean Way’ Cruise Law News, 14 May 2012,

<<http://www.cruiselawnews.com/2012/05/articles/cruise-booze/booze-cruise-the-royal-caribbean-way/>>

which talks about a track record of accidents going all the way to the 1990s involving alcohol on ships;

Brawls on cruise and ferry ships are also not uncommon, see:

Jim Walker, ‘More Cruise Ship Violence - A Drunken Brawl On Carnival's Dream’ Cruise Law News, 31 Aug 2010,

<<http://www.cruiselawnews.com/2010/08/articles/passenger-rights/more-cruise-ship-violence-a-drunken-brawl-on-carnivals-dream/>> – a brawl in the Caliente Club on Carnival Dream cruise ship;

David Gerges and David Baker, ‘Drunken students run amok naked on cross-Channel ferry en route to ski resort and are banned from return trip’ Mail Online, 9 Apr 2012, <<http://www.dailymail.co.uk/news/article-2127155/Nude-students-run-amok-cross-Channel-ferry-drunken-ski-trip.html?ito=feeds-newsxml>>;

Also see sections 101-108 of the UK MSA 1995 that cover, among other things, several actions that can be taken against unwelcome and disorderly passengers on board ships, including the captains power of arrest.

⁸² Adam Goldstein, ‘Royal Caribbean President & CEO Discusses Onboard Alcohol Policies’ Royal Caribbean Connect Blog, May 2012, <<http://www.royalcaribbean.com/connect/blog/royal-caribbean-president-ceo-discusses-onboard-alcohol-policies/>>

⁸³ *Hall v. Royal Caribbean Cruises, Ltd.* (2004) 888 So.2d 654 at 654; also see *Doe v. NCL (Bahamas) Ltd.* 2012 WL 5512347 (S.D.Fla.)

⁸⁴ Many cruise lines are also introducing drink packages [“The cruise lines stand to make big bucks from the drink packages.”] further encouraging passengers to overindulge. – Genevieve Shaw Brown, ‘Norwegian Cruise

for them and more commissions for the waiters and bar staff,⁸⁵ the problem however is that they often fail to take responsibility and proper care of their intoxicated guests.

The recent statement from Royal Caribbean CEO,⁸⁶ compared with the numerous news, accident reports and lawsuits⁸⁷ clearly paint a very different picture, but regardless of what a cruise lines policy may be, perhaps passengers should also take a bit of responsibility for their own actions and heed the warning that being intoxicated on a ship in the middle of the ocean is never a good idea.

Other dangers

There are many other accidents that can happen on a cruise ship, or through other activities such as shore excursions, if passengers are not careful or if the cruise staff is complacent.⁸⁸

Large cruise ships, like holiday resorts, have many different activities on-board that guests can try out and any activity from swimming,⁸⁹ surfing,⁹⁰ rock climbing⁹¹ to ice skating, carries a certain risk and passengers themselves are the best judges of what they should and

Line Tries 'All You Can Drink Plan' on Ships' ABC News, 15 Nov 2012, <<http://abcnews.go.com/Travel/norwegian-cruise-line-adds-drink-option-carnival-celebrity/story?id=17726352>>; for concerns raised about the introduction of drink packages see Arlene Satchell, 'More cruise lines add liquor to one-price drink packages' Sun Sentinel, 30 Sep 2011, <http://articles.sun-sentinel.com/2011-09-30/business/fl-cruise-alcohol-packages-20110909_1_cruise-lines-brett-rivkind-royal-caribbean-cruises>

⁸⁵ As can be seen from a report by Paul Boyd, 'Inside Edition: Investigate Cruise Ship Drinking' Inside Edition, 4 May 2012, <<http://www.insideedition.com/investigative/4295-inside-edition-investigate-cruise-ship-drinking>>, video at <www.youtube.com/watch?v=RIMrgNs9X68>; Inside Edition has also reported on yet another case from 2011 of a drunk passenger, Jose Miguel Tello, falling overboard.

⁸⁶ Adam Goldstein, 'Royal Caribbean President & CEO Discusses Onboard Alcohol Policies' Royal Caribbean Connect Blog, May 2012, <<http://www.royalcaribbean.com/connect/blog/royal-caribbean-president-ceo-discusses-onboard-alcohol-policies/>>

⁸⁷ Jim Walker, 'Carnival Murder Case Reveals Out of Control Cruise Booze' Cruise Law News, 9 Dec 2011, <<http://www.cruiselawnews.com/2011/12/articles/maritime-death/carnival-murder-case-reveals-out-of-control-cruise-booze/>>; *Jane Doe No. 8 v. Royal Caribbean Cruises, Ltd.* 860 F.Supp.2d 1337, for details see Michael Miller, 'Royal Caribbean Sued After 17-Year-Old Girl Allegedly Raped by Cruise Singer' Miami New Times, 12 May 2011, <http://blogs.miaminewtimes.com/riptide/2011/05/royal_caribbean_sued_after_17-.php>; also see Jim Walker, 'Latest Royal Caribbean Rape Allegation Reveals Problem of Underage Drinking on Cruises' Cruise Law News, 12 May 2011, <<http://www.cruiselawnews.com/2011/05/articles/sexual-assault-of-minors/latest-royal-caribbean-rape-allegation-reveals-problem-of-underage-drinking-on-cruises/>>

⁸⁸ For a comprehensive list of cruise ship accidents and cases see Thomas A. Dickerson, 'The Cruise Passengers' Rights & Remedies 2012' <<http://www.nycourts.gov/courts/9jd/taxcertatd.shtml>>; also see Thomas A. Dickerson, 'The Cruise Passenger's Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights' (2004) 28 Tul. Mar. L.J. 447;

⁸⁹ *Prokopenko v. Royal Caribbean Cruises Ltd.* 2010 WL 1524546 (S.D.Fla.); *Mendel v. Royal Caribbean Cruises, Ltd.* 2012 WL 2367853 (S.D.Fla.)

⁹⁰ *Johnson v. Royal Caribbean Cruises, Ltd.* (2011) 449 Fed.Appx. 846, 2011 WL 6354064 (C.A.11 (Fla.)); also see Jim Walker, 'Wipeout! Liability of Royal Caribbean Cruise Line for FlowRider Accidents' Cruise Law News, 26 June 2010, <<http://www.cruiselawnews.com/2010/06/articles/passenger-rights/wipeout-liability-of-royal-caribbean-cruise-line-for-flowrider-accidents/>>

⁹¹ Rivkind & Margulies, P.A., 'Case Results' <<http://www.rivkindlaw.com/lawyer-attorney-1646187.html>> – "Passenger injured while participating in rock climbing aboard cruise ship, seriously injured due to negligence of the cruise ship employee handling of the ropes. Confidential settlement."

should not try out. If however something does go wrong and a passenger is injured then the two best possibilities for recovery would be to sue in negligence if the cruise line or its staff were at fault by for example violating safety guidelines,⁹² not warning passengers of certain dangers,⁹³ or just failing to exercise reasonable care under the circumstances;⁹⁴ or through products liability if the passenger got injured as a result of a defective product on board, such as the defective whirlpool spa sand filter,⁹⁵ bad stair⁹⁶ or floor⁹⁷ design, a treadmill in the ships gym,⁹⁸ or any other product or equipment on board the cruise ship.⁹⁹ An alternative claim process can be through the Athens Convention if the incident took place under its jurisdiction.¹⁰⁰

Cruise ships can be a dangerous place if passengers are not careful and if the cruise lines put too much emphasis on profits at the expense of safety and disregard known dangers that exist on cruise ships. The next section will look at some of these problems that exist within the cruise industry and some of the implications of the profit versus passenger safety mentality.

⁹² *Johnson v. Royal Caribbean Cruises, Ltd.* (2011) 449 Fed.Appx. 846, 2011 WL 6354064 (C.A.11 (Fla.)); also see *Doe v. Royal Caribbean Cruises, Ltd.* 2011 WL 6727959 (S.D.Fla.) – where a passenger that got raped alleged that the cruise line was negligent in not monitoring its security cameras and not warning her of previous sexual assaults on the cruise ship;

⁹³ E.g. see *Luby v. Carnival Cruise Line* (S.D.Fla.1986) 633 F.Supp. 40

⁹⁴ *Kermarec v. Compagnie Generale Transatlantique* (1958) 358 U.S. 625, 79 S.Ct. 406

⁹⁵ *Silivanch v. Celebrity Cruises, Inc.* (2001) 171 F.Supp.2d 241

⁹⁶ *Mendel v. Royal Caribbean Cruises, Ltd.* 2012 WL 2367853 (S.D.Fla.) at 3 – alleged pool step design defect; held “undisputed evidence showing that Defendant was not actually involved in the design of the swimming pool step and handrails precludes Plaintiff’s claim to the extent her claim is premised on a theory of negligent design”

⁹⁷ *Groves v. Royal Caribbean Cruises, Ltd.* 463 Fed.Appx. 837, 2012 WL 933236 (C.A.11 (Fla.)) at 1 – passenger injured when stepping from carpeted area onto granite floor; passenger failed to prove that the cruise line “actually created, participated in, or approved the alleged negligent design of these areas near the dining room where [the passenger] was injured.”

⁹⁸ “*Berman v. Royal Cruise Line, Ltd.*, 1995 AMC 1926, 1927 (Cal. Super. Ct. 1995) (passenger injured exercising on treadmill)” – Thomas A. Dickerson, ‘The Cruise Passenger’s Dilemma: Twenty-First-Century Ships, Nineteenth-Century Rights’ (2004) 28 Tul. Mar. L.J. 447 at 516

⁹⁹ There are of course other legal avenues as well apart from negligence and products liability, as has been discussed throughout this thesis. Also see e.g. The Brady Law Group, ‘Cruise Ship Accidents’ <<http://www.bradylawgroup.com/practice-areas-cruise-ship-accidents.php>> – A claim against a cruise line can also be strengthened if the cruise line is found to be in breach of its SOLAS obligations.; and the case of *Milner v Carnival Plc (t/a Cunard)* [2010] EWCA Civ 389, [2010] 3 All E.R. 701 which involved a claim for a ruined cruise holiday; for commentary see Nigel Tomkins, ‘Damages: holiday claims - ruined holiday - measure of damages’ J.P.I. Law 2010, 4, C200-203

¹⁰⁰ In a country that is party to the Convention under Article 2 PAL 1974/2002; or in EU under Reg. 392/2009 Article 2;

Passengers and the safety record of the cruise industry

This section will look into the safety record of the cruise industry from the perspective of crime on board and from the passenger safety versus profit analyses standpoint.

Crime

Apart from accidents it is also important for passengers to be aware of the dangers of crime on board cruise ships. There are two sides to the debate of how safe ships are and what crimes happen on board cruise ships. On the one side is the cruise industry which maintains that “cruises are one of the safest ways to travel”¹⁰¹ and that “Serious crime aboard cruise ships is very rare;”¹⁰² on the other side are the numerous victims of serious crime,¹⁰³ passenger lawyers,¹⁰⁴ and other passenger safety advocates¹⁰⁵ who maintain that crime is a serious problem which the cruise lines are trying to ignore and cover up.¹⁰⁶

What is important to keep in mind is that the cruise lines have a vested interest in preserving the image of a crime free cruise industry, and based on several reports they have gone to some length to try to maintain that image, from cleaning crime scenes before the FBI arrives,¹⁰⁷ to bullying crime victims,¹⁰⁸ or losing security footage.¹⁰⁹ The cruise lines and their

¹⁰¹ Robert Anglen, ‘Law shields industry on cruise-ship crime information’ USA Today, 10 Jun 2012, <<http://usatoday30.usatoday.com/news/nation/story/2012-06-10/cruise-ship-crime-information-shielded/55485228/1>> – “The cruise industry ... for years has maintained that cruises are one of the safest ways to travel, and that a person is far more likely to be a victim of crime at home than aboard a ship.”

¹⁰² Cruise Lines International Association (CLIA), ‘Cruise Industry’s Commitment to Safety & Security Practice’ <<http://www.cruising.org/regulatory/cruise-industry-policies/cruise-industrys-commitment-safety-security>>

¹⁰³ E.g. see International Cruise Victims Association (ICV), <<http://www.internationalcruisevictims.org/>>; Rep. John Shadegg [(R) – Arizona], ‘Arizona Victim Leads to Cruise Line Safety Legislation Passage’ 17 Nov 2009, <<http://www.youtube.com/watch?v=0AsXeOhZU8A>> – taking about the disappearance of Merrian Carver in August 2004 and the unacceptable conduct of the cruise line following the incident;

¹⁰⁴ E.g. see website of Jim Walker, <<http://www.cruiselawnews.com/articles/crime/>> that has numerous articles on cruise ship crime including many rape and sexual assault incidents <<http://www.cruiselawnews.com/articles/rape-1/>>

¹⁰⁵ E.g. Ross Klein, <<http://www.cruisejunkie.com/whois.html>>

¹⁰⁶ E.g. see Julie Rawe, ‘Crime Rocks The Boats’ Time Magazine, 7 March 2006, <<http://www.time.com/time/magazine/article/0,9171,1169912,00.html>>; ‘Murky reporting obscures some cruise ship crimes’ WKMG Channel 6 Orlando (Click Orlando), 13 May 2013, <<http://www.clickorlando.com/news/murky-reporting-obscures-some-cruise-ship-crimes/-/1637132/20124350/-/syab3/-/index.html>>; or Jim Walker, ‘Reason No. 2 Not To Cruise: Cruise Ships Are A Perfect Place to Commit A Crime, And Get Away With It!’ Cruise Law News, 11 Apr 2010, <<http://www.cruiselawnews.com/2010/04/articles/crime/reason-no-2-not-to-cruise-cruise-ships-are-a-perfect-place-to-commit-a-crime-and-get-away-with-it/>>; also see Blane Bachelor, ‘How safe is your cruise ship?’ Fox News, 27 June 2012, <<http://www.foxnews.com/travel/2012/06/27/how-safe-is-your-cruise-ship/>> – “Charles Lipcon, a Miami-based maritime attorney ... “...the thing I find disappointing is that when something does go wrong, [cruise lines] don’t go out of their way to help the victim. Instead, they go out of their way to protect themselves.””

¹⁰⁷ Julie Rawe, ‘Crime Rocks The Boats’ Time Magazine, 7 March 2006, – “ship security, by allowing housekeeping to repeatedly steam-clean the carpet, failed to preserve the alleged crime scene” of a reported gang rape; Jim Walker, ‘Reason No. 2 Not To Cruise: Cruise Ships Are A Perfect Place to Commit A Crime, And

representatives are also fast to condemn any news reports¹¹⁰ that try to expose the problems of crime on board their cruise ships.¹¹¹

A recent controversy that came to light involves the relatively new Cruise Vessel Security and Safety Act of 2010; one of its purposes was to create a system for crime reporting,¹¹² so that all crimes on cruise ships are documented and reported in a public database.¹¹³

What was later revealed was that the wording of the act was changes at the last minute¹¹⁴ in a way that has enabled the FBI to interpret it so that only a fraction of actual crimes need to be reported in the public database, artificially creating a picture of relatively crime free ships. This is achieved by not having to report crimes that are not investigated by the FBI or that are still considered as an active investigation,¹¹⁵ so for example a sexual assault reported to ship security but never investigated by the FBI will not be shown in the database.¹¹⁶ It also means that “crimes committed today might not end up reported any time soon.”¹¹⁷

Get Away With It!’ Cruise Law News, 11 Apr 2010, – “the cruise lines notified the FBI only after they destroyed evidence and sanitized the crime scene”

¹⁰⁸ Julie Rawe, ‘Crime Rocks The Boats’ Time Magazine, 7 March 2006, – “passenger accused of sexual assault testified that a ship security officer coached him to state that “no sex was performed by anyone.””

¹⁰⁹ Jim Walker, ‘Reason No. 2 Not To Cruise: Cruise Ships Are A Perfect Place to Commit A Crime, And Get Away With It!’ Cruise Law News, 11 Apr 2010, – “the CCTV images are invariably taped over, “lost” or the cruise line will claim that the CCTV system was not working”

¹¹⁰ For example see the informative CNN video report: Drew Griffin, ‘Security experts: Sexual predators at sea’ CNN, Anderson Cooper 360, 9 July 2012, <<http://ac360.blogs.cnn.com/2012/07/10/cruise-security-experts-predators-at-sea/>>

¹¹¹ Theresa Norton Masek, ‘CLIA Takes Steps to Battle Sensationalist Reports on Cruise Ship Crime’ Travel Pulse, 5 Aug 2012, <<http://www.travelpulse.com/clia-takes-steps-to-battle-sensationalist-reports-on-cruise-ship-crime.html>>

¹¹² 46 U.S.C. § 3507(3)

¹¹³ 46 U.S.C. § 3507(4); Coast Guard Investigative Service, ‘Cruise Line Incident Reporting Statistics’ <<http://www.uscg.mil/hq/cg2/cgis/CruiseLine.asp>>

¹¹⁴ Adding in words: “that are no longer under investigation by the Federal Bureau of Investigation.”; “the ICV learned from Sen. John Kerry’s office that the FBI had requested additional language be added to the criminal reporting requirement when the bill was updated by the Commerce Committee.” – Matthew Harwood, ‘Erasing cruise ship crime’ Salon.com, 25 June 2012, <http://www.salon.com/2012/06/25/erasing_cruise_ship_crime/>

¹¹⁵ I.e. “crimes would only be reported publicly after the FBI opened and closed the case” – Matthew Harwood, ‘Erasing cruise ship crime’ Salon.com, 25 June 2012

¹¹⁶ For another perfect example of how the crime statistics can be undermined by not listing a cruise rape case where there is no doubt that a crime took place since the rapist has been convicted and is serving jail time, see Jim Walker, ‘Cruise Ship Rapist Pleads Guilty and Sentenced to Jail, But the FBI Refuses to Post Crime Data for Public Viewing’ Cruise Law News, 19 June 2012, <<http://www.cruiselawnews.com/2012/06/articles/fraud/cruise-ship-rapist-pleads-guilty-and-sentenced-to-jail-but-the-fbi-refuses-to-post-crime-data-for-public-viewing/>>

¹¹⁷ Kurt Schmidt of the FBI’s Violent Crimes Unit – Matthew Harwood, ‘Erasing cruise ship crime’ Salon.com, 25 June 2012, <http://www.salon.com/2012/06/25/erasing_cruise_ship_crime/>

To put this into perspective “between December 2007 and October 2008, cruise lines voluntarily reported 363 crimes to the FBI ... But only 54 crimes were reported publicly between 2010 and the first quarter of 2012 under the FBI’s new mandatory reporting.”¹¹⁸

The FBI themselves admitted that “Reporting only on crimes that were closed and/or prosecuted would be a misrepresentation of the true crime picture.”¹¹⁹ So the question remains why doing the exact thing they have opposed with crimes on land, takes place for crimes on cruise ships? Regardless of what the motives are¹²⁰ the bottom line is that one of the main objectives of the act has been undermined, which has resulted in a worse crime reporting situation than existed before the enactment of the act.¹²¹ Moreover it has contributed to the public being deceived into a false sense of security when going on a cruise holiday; thinking that they or their children will be perfectly safe when in fact that might not always be the case.¹²²

Jurisdiction for criminal investigation on board cruise ships usually lies with the flag state of the ship, however in cases involving US citizens the FBI usually gets involved and the cruise lines have a duty to report certain crimes involving US citizens to the FBI, as discussed above.¹²³

¹¹⁸ Matthew Harwood, ‘Erasing cruise ship crime’ Salon.com, 25 June 2012

¹¹⁹ Matthew Harwood, ‘Erasing cruise ship crime’ Salon.com, 25 June 2012

¹²⁰ For further discussion see e.g. Jim Walker, ‘FBI Cruise Crime Cover Up Story Goes Viral’ Cruise Law News, 26 June 2012, <<http://www.cruiselawnews.com/2012/06/articles/crime/fbi-cruise-crime-cover-up-story-goes-viral/>>; also see Christopher Elliott, ‘A long way to go to ensure passengers’ safety on cruise ships’ The Washington Post, 18 July 2010, <<http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071303057.html>> – which mentions the surprising turnaround from CLIA (Cruise Lines International Association) who first opposed the law and at the last minute changed to supporting it – “When I hear a trade organization that resisted this law nearly every step of the way talking like that, I can’t help being a little skeptical. (The cruise industry insists it cooperated.)” “It’s hard for me to tell whether CLIA is being a dignified loser or whether it got some important concessions when the bill was being marked up.”

¹²¹ “Where the FBI once publicly reported more than 400 crimes a year, only six crimes on ships in the past nine months have been listed on the public database.” – Robert Anglen, ‘Law shields industry on cruise-ship crime information’ USA Today, 10 Jun 2012, <<http://usatoday30.usatoday.com/news/nation/story/2012-06-10/cruise-ship-crime-information-shielded/55485228/1>>; also see Jim Walker, ‘Are the FBI and Coast Guard Underreporting Cruise Ship Crimes?’ Cruise Law News, 24 Oct 2011, <<http://www.cruiselawnews.com/2011/10/articles/crime/are-the-fbi-and-coast-guard-underreporting-cruise-ship-crimes/>>

¹²² E.g. see Jim Walker, ‘Should I Send My Daughter on a Cruise?’ Cruise Law News, 18 Nov 2012, <<http://www.cruiselawnews.com/2012/11/articles/sexual-assault-of-minors/should-i-send-my-daughter-on-a-cruise/>>

¹²³ FBI, ‘Crime on the High Seas - Cruises Not a Vacation from Vigilance’ 22 May 2006, <http://www.fbi.gov/news/stories/2006/may/cruise_crime052206>

In addition to crimes on board the ship passengers should also be aware of the potential dangers that exist in certain ports of call,¹²⁴ and they should also keep in mind that camera surveillance systems do not always mean an increased level of security.¹²⁵

Just like on land, crime on cruise ships is going to continue and there are some legitimate concerns when the people investigating the crime can potentially be influenced by what is best for the cruise line and not necessarily for the victim. One possible solution that might help to eliminate some of these concerns would be to create an independent public body that provides security on cruise ships and whose agents cannot come under the influence of the cruise ship operator or their lawyers and their primary concern is for the victim not the perpetrator nor to protecting the cruise lines interests.

Another aspect that needs to change is the transparency of the cruise industry and the public's right to information. Apart from crime, disease and other vital statistics of each ship, the public should have the right to know the ship history, including its maintenance and service record, any court orders placed on the ship, detailed information on the officers in charge on the bridge and their respective competencies, and any other information that might potentially have an impact on the passenger of that ship.¹²⁶

The disaster -> regulation cycle

Going back to passenger overboard incidents, there have been at least 200 disappearances from cruise ships since 2000 and those are just the widely reported known cases,¹²⁷ it is

¹²⁴ E.g. see Jim Walker, 'Warning: U.S. Citizen Murdered in Nassau - Cruise Passengers Urged to Avoid Travel to the Bahamas!' Cruise Law News, 14 May 2013, <<http://www.cruiselawnews.com/2013/05/articles/caribbean-islands/warning-us-citizen-murdered-in-nassau-cruise-passengers-urged-to-avoid-travel-to-the-bahamas/>>; also see Thomas A. Dickerson, 'The Cruise Passengers' Rights & Remedies 2012' <<http://www.nycourts.gov/courts/9jd/taxcertatd.shtml>> at pages 19-21 for look at several court cases involving criminal acts on board cruise ships;

¹²⁵ The courts have contributed to this problem in the case of *Doe v. Royal Caribbean Cruises* 2011 WL 6727959 (S.D.Fla.) where it was held that a "mere installation of video cameras does not create a duty to monitor them." When the cameras are visibly present it heightens a sense of security in passengers, by not monitoring them it should have been held that the cruise line has contributed to creating a more dangerous environment or they should have at least made passengers aware that they should not rely on the cameras for their security.

¹²⁶ Such as whether any crew members that might supervise your kids, or have access to your cabin have any criminal convictions, or a track record of poor passenger service and complaints lodged against them. This is something that should also be available not just in the maritime sphere but also in aviation with passengers having the right to request plane maintenance logs and crew background details, before getting on the flight.

¹²⁷ Cruise Junkie, 'Cruise and Ferry Passengers and Crew Overboard 1995 – 2013' <<http://www.cruisejunkie.com/Overboard.html>>; also see Natalie Clarke, 'The vanishing passengers: It's a mystery as bizarre as it is disturbing - why have 165 people gone missing from cruise ships in recent years?' Mail Online, 23 Sep 2011, <<http://www.dailymail.co.uk/femail/article-2040248/Why-165-people-gone-missing-cruise-ships-recent-years.html>>; and Cruise Ship Law Blog, 'Articles Posted in Cruise Disappearances' <<http://blog.lipcon.com/category/cruise-line-crimes/cruise-disappearances>>

impossible to tell how many foreign nationals that work on these ships often from poor developing countries have gone missing over the years.

It could be argued that 200 passengers over a 13 year period is not a huge number considering that around 140 million passengers cruised in that period,¹²⁸ however even one unexplained disappearance that is not properly investigated is one too many. It is absolutely unacceptable that when a person goes missing from a cruise ship at sea there are no international procedures and often no investigation into what really happened; after all the only concern of the cruise lines seems to be their bottom line and as long as it does not happen too often and it does not delay their next cruise, then it's not really an issue worth investing in.¹²⁹ The same however cannot be said for the families who have lost a loved one and have no idea what had happened to them.¹³⁰

It is an absolute disgrace that the cruise lines are continuing to refuse investing in better security and man overboard sensors and trying to find ways to get out of their legal obligations under the Cruise Vessel Security and Safety Act,¹³¹ while at the same time spending millions on "all types of new water-slides, rock climbing walls and other amusements."¹³² The result of this behaviour is evidenced by the continued disappearances at

¹²⁸ Florida-Caribbean Cruise Association (FCCA), 'Cruise Industry Overview – 2013' <<http://www.fcca.com/downloads/2013-cruise-industry-overview.pdf>>

¹²⁹ E.g. see IHS Safety at Sea, "Man overboard' tech deadline nears' 6 Oct 2011, <http://www.safetyatsea.net/login.aspx?reason=denied_empty&script_name=/secure/displaymag.aspx&path_info=/secure/displaymag.aspx&articlename=sane20111006008ne> – Cruise lines "desire to put profits above responsibility"; also see Jim Walker, 'Stonewalling at Sea - Cruise Lines Continue to Cover Up Disappearances on the High Seas' Cruise Law News, 6 Jan 2013, <<http://www.cruiselawnews.com/2013/01/articles/disappearances-1/stonewalling-at-sea-cruise-lines-continue-to-cover-up-disappearances-on-the-high-seas/>> – "If the evidence tends to suggest that a crime occurred, or the circumstances involve facts that may place the cruise lines in an embarrassing light, the cruise lines suppress the information."

¹³⁰ For just two of many such cases see: Nick Lazaredes, 'Lost at Sea' Dateline SBS, 28 Feb 2012, <<http://www.sbs.com.au/dateline/story/about/id/601401/n/Lost-at-Sea>>, <<http://www.youtube.com/watch?v=bLgc1dqhCsQ>> – disappearance of Rebecca Coriam; 48 Hours, 'Murder at Sea?' CBS, 11 May 2013, <<http://www.cbsnews.com/video/watch/?id=50146641n>>, <http://www.youtube.com/watch?v=A1vn_sn9A7c> – disappearance of George Smith IV under suspicious circumstances;

¹³¹ Despite the fact that the Cruise Vessel Security and Safety Act of 2010, requires man overboard systems to be put on cruise ships [46 U.S.C. § 3507(a)(1)(D)], the industry is continually trying to find loopholes that enable them to spend as little as possible on its implementation, rather than focusing on completely eliminating incidents where it takes hours to discover that a person went overboard.

¹³² Jim Walker, 'Disappearances at Sea: Cruise Industry Refuses to Comply with Cruise Safety Law' Cruise Law News, 11 May 2013, <<http://www.cruiselawnews.com/2013/05/articles/disappearances-1/disappearances-at-sea-cruise-industry-refuses-to-comply-with-cruise-safety-law/>>

sea, like the recent case of two people that went missing from the Carnival Spirit of the coast of Australia.¹³³

In this regard the cruise lines are nearly identical to the airlines, in that there seems to be a clear desire to balance economic interests with people's lives. In aviation they call it tombstone regulation, waiting for enough people to die before anything changes.¹³⁴ This has been the trend throughout aviation history, with accidents such as United Airlines Flight 811¹³⁵ and the McDonnell Douglas DC-10 cargo door incidents¹³⁶ that led to the needless loss of hundreds of lives; and unfortunately also throughout maritime history,¹³⁷ most notable of which was the Titanic disaster, which led to an overhaul of passenger safety with the adoption of the International Convention for the Safety of Life at Sea (SOLAS).¹³⁸ Unfortunately the mentality seems to be continuing, in aviation with holding back on improvements such as PCA systems,¹³⁹ and in the cruise industry with something as simple as better man overboard systems, among other things.

¹³³ 7 News, 'Missing couple fell from cruise ship' 9 May 2013, <<https://www.youtube.com/watch?v=6G1XM4wPIJ8>>; 7 News, 'Search for missing couple suspended' 10 May 2013, <<https://www.youtube.com/watch?v=eIB-q0TWy7g>>

¹³⁴ Jerome Greer Chandler, Aviation journalist in 'Air Crash Investigation - Fire in the Hold, ValueJet 592' <<http://cineflixproductions.com/shows/28-Mayday>>, <www.youtube.com/watch?v=YpkKuyDrcJI> at minute 43 – "Its classic tombstone regulation, you build a body count, and that body count is the only thing that sways people to go out and do anything."; also see eTN, 'AA pilot: airline mentality often cost over safety' 12 Apr 2008, <<http://www.eturbonews.com/2109/aa-pilot-airline-mentality-often-cost-over-sa>>

¹³⁵ Where a known cargo door design defect was left unchecked for years until it resulted in 9 deaths on flight 811; for more details see National Geographic, 'Mayday – Unlocking Disaster' <<http://www.imdb.com/title/tt0644768/>>, <<http://www.youtube.com/watch?v=sn4huBMYk0o>> – see at minute 44 for other examples of balancing profit against prevention; and Aviation Safety Network, 'United Airlines Flight 811' <<http://aviation-safety.net/database/record.php?id=19890224-0>>

¹³⁶ Where a series of accidents happened as a result of the improperly designed cargo door on the McDonnell Douglas DC-10 aircraft; Aviation Safety Network, 'American Airlines Flight 96' <<http://aviation-safety.net/database/record.php?id=19720612-0>>; Aviation Safety Network, 'Turkish Airlines DC-10 Flight 981' <<http://aviation-safety.net/database/record.php?id=19740303-1>>; It was found that neither of the NTSB (National Transportation Safety Board) recommendations, issued after the first incident, was implemented.

¹³⁷ For examples of the 'disaster -> regulation' trend see The Telegraph, 'Cruise ship safety: timeline of disasters and safety regulations' 16 Jan 2012, <<http://www.telegraph.co.uk/travel/cruises/9017985/Cruise-ship-safety-timeline-of-disasters-and-safety-regulations.html>>;

¹³⁸ IMO, 'Surviving disaster – The Titanic and SOLAS' <<http://www.imo.org/ourwork/safety/regulations/documents/titanic.pdf>>; also see IMO, 'International Convention for the Safety of Life at Sea (SOLAS), 1974' <[http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-\(solas\),-1974.aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-(solas),-1974.aspx)>

¹³⁹ Following the 1985 Japan Air Lines Flight 123, and 1989 United Airlines Flight 232, NTSB urged in its report to research technology that would enable a plane to land without hydraulics [NTSB/AAR90/06 Accident Report at page 102 <<http://www.airdisaster.com/reports/ntsb/AAR90-06.pdf>>]. PCA (Propulsion Controlled Aircraft) was successfully tested by NASA on a civil MD-11 aircraft, all the way back in 1995 [NASA, 'Dryden History' <<http://www.nasa.gov/centers/dryden/history/pastprojects/PCA/index.html>>]. However 8 years later no such technology was yet implemented, when in 2003 a DHL Flight lost its hydraulics when it was struck by a missile over Iraq [National Geographic, 'Mayday – Attack Over Baghdad' <<http://www.imdb.com/title/tt0764080/>>],

The cruise lines thinking here appears to be clear, 200 or more missing or dead people over a ten year period is clearly not worth their investment, perhaps they would not be so eager to dismiss it if they knew some of the people that have lost someone from one of their ships. This absolute disregard for human life is disgusting. The technology to immediately see and respond to persons falling overboard exists,¹⁴⁰ the only question remains how many more lives it is going to take before the cruise lines whose profits are higher than ever before¹⁴¹ finally bother to do something about it, so that no more families are left grieving the loss of a loved one who went missing from a cruise ship and never came back.

Another area where the cruise lines have been avoiding safety improvements is in putting redundancy systems on board their ships in the event of complete power failure. In recent years this has caused major discomfort for thousands of passengers on the Costa Allegra which was stranded in pirate infested Indian Ocean,¹⁴² and on the Carnival Triumph which, earlier this year, had to be towed back to port from the Gulf of Mexico when an engine room fire disabled the ship.¹⁴³

With both these incidents the cruise lines have been very lucky that the failures happened on calm waters in good weather otherwise it could have been a lot worse, since “nearly all ships

video at <http://www.dailymotion.com/video/xlvjw5_air-crash-investigation-s03e03-attack-over-baghdad_shortfilms>]

¹⁴⁰ E.g. see RZDMPA, ‘Man-overboard Early Detection System (MEDS)’ <<http://www.rzdmpa.com/index.php/man-overboard>>

¹⁴¹ E.g. see Shaun Bevan, ‘Royal Caribbean shares rise, profits up 62% in Q1’ South Florida Business Journal, 25 Apr 2013, <<http://www.bizjournals.com/southflorida/news/2013/04/25/royal-caribbean-profits-up-62-in.html>>

¹⁴² BBC News, ‘Cruise ship Costa Allegra adrift off Seychelles’ 27 Feb 2012, <<http://www.bbc.co.uk/news/world-asia-17183134>>; Bazi Kanani, ‘Cruise Ship Adrift in Pirate Infested Indian Ocean’ ABC World News, 27 Feb 2012, <<http://abcnews.go.com/International/cruise-ship-adrift-emergency-costa-cruises/story?id=15801633>>

¹⁴³ Gene Sloan, ‘Carnival cruise ship on emergency power after fire’ USA Today, 10 Feb 2013, <<http://www.usatoday.com/story/cruiselog/2013/02/10/carnival-triumph-cruise-fire/1907187/>>; BBC News, ‘Carnival Triumph: Conditions ‘worsen’ on stranded ship’ 12 Feb 2013, <<http://www.bbc.co.uk/news/world-us-canada-21431422>>; Ellen Wulforst, ‘Fuel leak started fire on Carnival cruise ship: Coast Guard’ Reuters, 18 Feb 2013, <<http://www.reuters.com/article/2013/02/18/us-mexico-carnival-idUSBRE91H0OZ20130218>> also see Matt Gutman, ‘20/20 Troubled Waters: The Carnival Triumph’ ABC News, 15 Feb 2013, <<http://www.youtube.com/watch?v=VJ6vDATdCO4>>

For reports of earlier problems with the ship and that this was “an accident waiting to happen,” see – Art Rascon, ‘Carnival passengers on both this cruise and prior ones talk about problems on the ship’ ABC 13 News, 15 Feb 2013, <<http://abclocal.go.com/ktrk/story?section=news/local&id=8995122>>;

For other recent incidents with the Carnival fleet see: Colleen Jenkins, Phil Wahba, ‘UPDATE 4-New cruise debacle for Carnival as ship stuck in port’ Reuters, 14 March 2013, <<http://www.reuters.com/article/2013/03/14/carnival-breakdown-idUSL1N0C62LZ20130314>>; and Phil Wahba, ‘UPDATE 1-Carnival says technical issue slows its Legend cruiseship’ Reuters, 15 March 2013, <<http://www.reuters.com/article/2013/03/15/carnival-breakdown-idUSL1N0C762W20130315>>

lack backup systems to help them return to port should power fail because to install them would have cost operators more money.”¹⁴⁴

The IMO has finally acted in this area with all new ships built after 2010 requiring such redundancy systems;¹⁴⁵ however that is of little comfort for passengers on all other cruise ships, except ten that already have such systems,¹⁴⁶ in operation today.

Another example of the ‘accident->change’ pattern is exemplified by the Costa Concordia disaster.¹⁴⁷ It took 32 lives for the cruise lines to come to their senses and inform passengers about safety and evacuation procedures before going to sea and not ‘in the first 24 hours after setting sail;’ this change is however still only a guideline, voluntarily adopted by the CLIA members,¹⁴⁸ until IMO approves the amendments proposed at its 91st session of the Maritime Safety Committee.¹⁴⁹

It is a sad state of affairs and a black mark on the industry when it still operates based on this reactionary approach rather than putting forward an effort to prevent accidents from happening in the first place; was it really that hard to foresee that a ship might encounter a problem in the first 24 hours after departure? It is hard to determine whether it would have

¹⁴⁴ Barry Meier, John Schwartz, ‘Lack of Backup Power Puts Cruise Passengers at the Ocean’s Mercy’ New York Times, 24 Feb 2013, <<http://www.nytimes.com/2013/02/25/business/many-cruise-ship-lack-backup-power-systems-vexing-regulators.html>> – “choice for cruise operators was simple: A ship is just so big and a company can either put more equipment or more people on it. “The more passenger cabins you can fit into that envelope the more revenue you can get,””

¹⁴⁵ International Maritime Organization (IMO), ‘Passenger ships’ <<http://www.imo.org/ourwork/safety/regulations/pages/passengerships.aspx>> – “The amendments include: ... - safe areas and the essential systems to be maintained while a ship proceeds to port after a casualty, which will require redundancy of propulsion and other essential systems;”

¹⁴⁶ Barry Meier, John Schwartz, ‘Lack of Backup Power Puts Cruise Passengers at the Ocean’s Mercy’ New York Times, 24 Feb 2013; although based on reports Carnival has pledged to spend \$300 million on improving safety systems on 32 of its ships – Reuters, ‘UPDATE 1-Carnival Cruise to spend \$300 mln on ship safety’ 17 Apr 2013, <<http://www.reuters.com/article/2013/04/17/carnival-safety-idUSL3NOD4IHH20130417>>

¹⁴⁷ BBC News, ‘Costa Concordia disaster’ 17 Oct 2012, <<http://www.bbc.co.uk/news/world-europe-16563562>>; also see Tanya Mohn, ‘High-seas safety in spotlight a year after deadly Costa Concordia crash’ NBC News, 12 Jan 2013, <<http://www.nbcnews.com/travel/high-seas-safety-spotlight-year-after-deadly-costa-concordia-crash-1B7937378>>

¹⁴⁸ Cruise Lines International Association (CLIA), ‘Cruise Industry Operational Safety Review’ <<http://www.cruising.org/regulatory/cruise-industry-policies/cruise-industry-operational-safety-review>>; also see Marnie Hunter, ‘Cruise industry adopts new safety policy’ CNN, 10 Feb 2012, <<http://edition.cnn.com/2012/02/10/travel/cruise-industry-safety-drills/index.html>>; Jim Walker, ‘CLIA Safety Proposal Ignored: Lifeboat Plunges 60 Feet, 5 Dead’ Cruise Law News, 10 Feb 2013, <<http://www.cruiselawnews.com/2013/02/articles/maritime-death/clia-safety-proposal-ignored-lifeboat-plunges-60-feet-5-dead/>>

¹⁴⁹ IMO, ‘Maritime Safety Committee agrees new measures for passenger ship safety and protection of personnel from noise on-board ships’ Maritime Safety Committee (MSC), 91st session, 26 to 30 November 2012, <<http://www.imo.org/mediacentre/pressbriefings/pages/55-msc-91-ends.aspx>>

made a difference in the Costa Concordia disaster, but it is probably safe to assume that it did not help when 600 passengers¹⁵⁰ had no idea what to do in an emergency.

The IMO has adopted guidelines to try to act proactively,¹⁵¹ however so far it does not seem to be working so well in practice. It took a decade for the IMO's 2000 'proactive' review of passenger ship safety to come up with meaningful regulations, including the redundancy systems on ships built after 2010, mentioned above, while in that time there have been several cruise ship stranding's, and many ship fires.¹⁵² Another example of this trend of waiting for accidents to create safety regulations are the two sinking's of the "Herald of Free Enterprise in March 1987 and the even more tragic loss of the Estonia in September 1994,"¹⁵³ which finally compelled the IMO to update the SOLAS Convention at the 1995 Conference.¹⁵⁴

Unfortunately just like in aviation, it seems that in passenger shipping it also has to take a number of human lives and a major disaster for things to change, because after all who would want an industry that operates on a precautionary bases and loses a few dollars when you can just wait a few decades to introduce safer practices once a major perfectly preventable accident does take place.

The same is true in regards to small one person incidents, be it death, rape, or person overboard, these are harder to track to get a full picture of just how prevalent they are, but once again the trend is that it has to get to a point where enough people are outraged before any changes are even considered.¹⁵⁵



Cruise ships can be a great way to spend a holiday; however passengers should not let their guard down just because they are on a cruise ship. "You don't know the people on a cruise ship. You don't know who's in the cabin next to you. Crime doesn't stop just because you are

¹⁵⁰ Beverly Beyette, 'Costa Concordia capsizing spotlights cruise ship safety' Los Angeles Times, 19 Jan 2012, <<http://www.latimes.com/travel/la-tr-insider-20120122,0,4033122.story>> – "there had been no drill for the 600 passengers who boarded Jan. 13 at Civitavecchia, the port of Rome;"

¹⁵¹ IMO, 'Safety of ro-ro ferries' <<http://www.imo.org/ourwork/safety/regulations/pages/ro-roferries.aspx>> – "More importantly, action should be taken before an incident occurs, applying the proactive policy IMO adopted in the 1990s."

¹⁵² Monica Kim, 'The Four Most Common Cruise Ship Mishaps (Hint: Not Icebergs)' Conde Nast Traveller, 17 May 2012, <<http://www.cntraveler.com/daily-traveler/2012/05/cruise-ship-accidents-fires-collisions-sinking-costa-concordia>> – "There were 72 fires aboard cruise ships over the last 20 years."

¹⁵³ IMO, 'Safety of ro-ro ferries' <<http://www.imo.org/ourwork/safety/regulations/pages/ro-roferries.aspx>>

¹⁵⁴ IMO, 'Safety of ro-ro ferries' <<http://www.imo.org/ourwork/safety/regulations/pages/ro-roferries.aspx>>

¹⁵⁵ For details of the effort that went into passing the Cruise Vessel Security and Safety Act of 2010 see Jim Walker, 'Congresswoman Matsui and Laurie Dishman Take on the Cruise Industry' Cruise Law News, 20 Sep 2010, <<http://www.cruiselawnews.com/2010/09/articles/crime/congresswoman-matsui-and-laurie-dishman-take-on-the-cruise-industry/>>

on a boat.”¹⁵⁶ In addition to being vigilant on board, passengers should also inform themselves of other dangers associated with a cruise holiday and most of all their rights on board the ship in the event of accident or crime.

On the one side are the cruise lines and their travel agents who only have positive things to say to potential passengers as it is their job to entice them into taking a cruise holiday. On the other side are the lawyers who represent injured passengers against the cruise lines and they often have a more grim outlook and many inside stories of the cruise industry,¹⁵⁷ that are often hidden under the gleam of shiny travel brochures. For any passenger the key is to always know the view from both sides, regardless of their personal opinions and biases, because after all it is better to know the good and the bad at front, then just to know the good and find out about the bad personally later.

Knowledge is power, the power to stay safe and know the potential dangers, however unlikely a passenger thinks they might be.

¹⁵⁶ FBI, ‘Crime on the High Seas - Cruises Not a Vacation from Vigilance’ 22 May 2006, <http://www.fbi.gov/news/stories/2006/may/cruise_crime052206>

¹⁵⁷ Jim Walker, ‘Top 10 Reasons Not To Cruise’ Cruise Law News, 8 Apr 2010, <<http://www.cruiselawnews.com/2010/04/articles/worst-cruise-line-in-the-world/top-10-reasons-not-to-cruise/>>

Conclusion

The Titanic sunk over a century ago but passengers need to realise that things can still go wrong when they are hundreds of miles from the nearest shore with help far away; the recent Costa Concordia disaster was a wakeup call for many to start paying closer attention to safety on board.¹

The aim of this thesis was to provide some basic legal insights into the laws that are likely to affect cruise ship passengers and to also provide few insights into some of the deficiencies that still exist when it comes to passenger safety and crime on board cruise ships.

The first few chapters have looked at both international law and aspects of domestic and regional laws affecting passenger claims for death, personal injury, and loss of luggage. In addition the EU regulation on rights of passengers when travelling by sea and inland waterways² has been analysed to provide a look at the rights of passengers in general and not just their rights at the end when something goes wrong.

There have been proposals in the US recently, as well, when it comes to cruise passenger rights, with Senator Charles Schumer introducing the Cruise Ship Passenger Bill of Rights³ however that has not received a lot of support so far, which is probably due to the strong influence of the industry lobby groups,⁴ but at least some progress has been made through the Cruise Vessel Security and Safety Act of 2010, which has been mentioned above.

Other important areas that have been addressed include the liability limitation regime and its continued issues of hypocrisy and unfairness⁵ when it comes to limiting compensation of innocent parties who are hurt or suffer damage through no fault of their own, yet still the international community persists with creating limitation conventions for the benefit of

¹ Katia Hetter, 'Cruise safety one year after Concordia' CNN, 11 Jan 2013, <<http://edition.cnn.com/2013/01/11/travel/concordia-anniversary>> – "This accident was sobering for cruise travelers, many of whom in the past might have tried to skip the muster drill or chat away during the safety instructions."

² Regulation (EU) No. 1177/2010

³ Senator Charles E. Schumer, 'Press Release' 18 March 2013, <<http://www.schumer.senate.gov/Newsroom/record.cfm?id=341068>>

⁴ Dennis Schaal, 'Cruise passenger bill of rights: Is it dead in the water' Skift, 30 March 2013, <<http://skift.com/2013/03/30/cruise-passenger-bill-of-rights-dead-in-the-water/>>; also see Dori Saltzman, 'Cruise Bill of Rights has Flaws' Cruise Critic, 25 March 2013, <<http://www.cruisecritic.com/blog/index.php/2013/03/25/cruise-bill-of-rights-has-flaws/>>; and Monica Miller, 'Schumer Calls For Cruise Ship Passenger's Bill Of Rights' CBS New York News, 17 March 2013, <<http://newyork.cbslocal.com/2013/03/17/schumer-calls-for-cruise-ship-passengers-bill-of-rights/>>

⁵ Charles Haddon-Cave QC, 'Limitation Against Passenger Claims: Medieval, Unbreakable and Unconscionable' CMI Yearbook 2001 (234p) – "a cruise liner captain or aircraft pilot's conduct could give rise to a charge of manslaughter but still be insufficient to break the limit under the Athens, LLMC or Warsaw Conventions"

industries that are more than capable of taking care of themselves in the age of inflated profits and huge multinational corporations.⁶

The legal system itself and judicial interpretation within it, has also been discussed, which is often an area that is overlooked when considering the rights of passengers. However as can be seen from the recent Costa Concordia cases⁷ internal workings of the legal system and the procedural rules within it can have a huge impact on the claimants ability to be fully compensated, be it by way of limiting damages that can be recovered,⁸ or simply through the procedural rules that enable a claimant to hire a lawyer on a contingency bases, which unfortunately is not permitted in every jurisdiction such as Italy.⁹ These are just some of the reasons why passengers that have been affected by the Costa Concordia disaster are trying to seek redress in Florida courts instead of the Italian ones, even though it can often be an uphill struggle trying to sue in another jurisdiction especially when it goes against the terms in the carriage contract and is further not helped by the fact that “[t]he case involves an Italian

⁶ For an extreme example see the BP Deepwater Horizon incident, while not related to passenger shipping, it shows that even the largest of environmental disasters (with costs estimated at \$42 billion) is not enough to bankrupt a huge multinational corporation, see Dominic Rushe, ‘BP sues Halliburton for Deepwater Horizon oil spill clean-up costs’ The Guardian 03/01/2012 <<http://www.guardian.co.uk/business/2012/jan/03/bp-sues-halliburton-over-deepwater>>

The cruise industry might not be as massive as the oil one, but they are still more than capable of surviving a disaster without liability limitation protections, especially when the courts continue to be as lenient as in the Costa Concordia case charging Costa only €1 million fine to settle criminal charges for killing 32 people, while their parent company profits were \$1.5 billion in 2012; what incentive does a fine like this provide when it does not even make a dent in the company’s bottom line? [Johanna Jainchill, ‘Carnival CEO: 2012 ‘most challenging’ year in history’ USA Today, 20 Dec 2012, <<http://www.usatoday.com/story/cruiselog/2012/12/20/carnival-earnings-costa-concordia/1782359/>> – while Carnival (parent company of Costa) profits were down in 2012 after the Costa Concordia disaster they still made \$1.5 billion; Emily Davies, ‘One million euro fine for 32 lives: Costa Concordia owners escape criminal trial by accepting fine that values each victim at just £26,000’ Mail Online, 10 Apr 2013, <<http://www.dailymail.co.uk/news/article-2306963/Costa-Concordia-owners-escape-criminal-trial-accepting-fine-values-victim-just-26-000.html>]

⁷ *Abeid-Saba et al. v Carnival Corporation et al.* Case 1:12-cv-23513-WPD, Document 62, Entered on FLSD Docket 02/15/2013; *Scimone v Carnival Corp.* USDC-FLSD, Docket No.: 12-CV-23505; *Wilhelmina Warrick et al. v Carnival Corporation et al.* Case 0:12-cv-61389-WPD; also see *Giglio Sub s.n.c. v. Carnival Corp.* 2012 WL 4477504 (S.D.Fla.), 2012 A.M.C. 2705 – not involving passengers but others affected by the disaster;

⁸ E.g. psychological injuries are not recoverable in every jurisdiction the same way; Jim Walker, ‘Will Costa Concordia Passengers Be Able to Sue Costa and Carnival in the U.S.?’ Cruise Law News, 12 Sep 2012, <<http://www.cruiselawnews.com/2012/09/articles/sinking/will-costa-concordia-passengers-be-able-to-sue-costa-and-carnival-in-the-us/>> – “compensation for pain and suffering and emotional distress are harder if not impossible to collect in Italy”

⁹ Jim Walker, ‘Will Costa Concordia Passengers Be Able to Sue Costa and Carnival in the U.S.?’ Cruise Law News, 12 Sep 2012, <<http://www.cruiselawnews.com/2012/09/articles/sinking/will-costa-concordia-passengers-be-able-to-sue-costa-and-carnival-in-the-us/>> – “Italy does not allow attorneys to work on a contingency fee basis in which the lawyer’s fee comes out of any settlement or verdict”; also see ‘Costa Concordia plaintiffs claim “a huge victory”’ Marine Log, 26 Feb 2013, <http://marinelog.com/index.php?option=com_content&view=article&id=3673:costa-concordia-suit-plaintiffs-claim-qa-huge-victoryq&catid=1:latest-news&Itemid=195> – “passengers litigating their claims in Italy would be subject to paying for litigation costs and under the American system, plaintiffs’ law firms only seek compensation if their clients are successful”;

cruise ship, operated by a company based in Italy, flying an Italian flag, captained by an Italian officer, which crashed in Italian waters and is being investigated by the Italian authorities.”¹⁰

The final chapter of the thesis builds on all of the above elements and has gone into more detail on issues such as the contractual restraints imposed on passengers through carriage contracts, and has critically discussed many of the various accidents that can happen on and off the ship and their consequences; with a final discussion covering certain aspects of the cruise industry’s safety record and its position of balancing self-interests with passenger safety.

There are many issues that still exist in cruising today. It is frightening to discover that incidents such as rape and child molestation by members of crew are taking place on board some ships,¹¹ and that just in the past decade around 200 people worldwide disappeared from cruise ships never to be heard of again. This combined with bad operational practices and a lack of up to date equipment when it comes to man overboard incidents¹² as well as monitoring and properly investigating crime on board just adds to the frustration of any passenger who might find themselves in such a situation.

As with many other industries such as oil and aviation, the trend of disaster first, corrective legislation later, continues within the cruising industry, it is a sad state of affairs when it takes an accident for things to change. Hopefully this trend can be broken and it is not going to take another deadly accident to improve the safety of ship passengers.

With ships that can carry over 8000 passengers and crew¹³ the result of any disaster would affect more people than ever before in history, therefore legislators around the world should pay close attention to the cruise industry whose popularity and capacity, with ever increasing vessel sizes, is growing each year.¹⁴ With it passenger protection and safety should grow as

¹⁰ Jim Walker, ‘Another Judge Dismisses Costa Concordia Lawsuit Filed in Florida’ Cruise Law News, 8 Feb 2013, <<http://www.cruiselawnews.com/2013/02/articles/sinking/another-judge-dismisses-costa-concordia-lawsuit-filed-in-florida/>>

¹¹ E.g. see Tony Pipitone, ‘Disney Cruise Line fails to promptly report molestation of 11-year-old girl in port’ WKMG Channel 6 Orlando (Click Orlando), 20 May 2013, <<http://www.clickorlando.com/news/disney-cruise-line-fails-to-promptly-report-molestation-of-11-year-old-girl-in-port/-/1637132/20227248/-/item/0/-/12w3atcz/-/index.html>>

¹² In many man overboard cases hours are often lost searching the ship even when the crew is being told the passenger went overboard, this is in large part due to the lack of proper detection equipment that would enable the crew to immediately know when someone falls overboard.

¹³ E.g. Royal Caribbean, ‘Ship Fact Sheet – Allure of the Seas’ <<http://www.royalcaribbeanpresscenter.com/fact-sheet/20/allure-of-the-seas/>>

¹⁴ Legislators should also remember “The lesson of TITANIC ... that, without legislation, corporate decision-making is likely based upon what is perceived to be in the best interests of the corporation.” “The occurrences of rapes, assaults, murders and unexplained disappearances of passengers from cruise ships have increased as

well, and keep pace with modern technological advancements that can often mean the difference between life and death.

the number of people traveling by cruise ship has increased, yet there has been little apparent effort from the cruise lines to stem the tide.” – Marva Jo Wyatt, ‘High Crimes on the High Seas: Re-Evaluating Cruise Line Legal Liability’ 20 U.S.F. Mar. L.J. 147

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