



SEA TRIALS

by James Mercante

"All Ashore" Is Not Always Fun and Games

With the recent disappearance of a passenger on open waters, the cruise lines are in the news.

In the sometimes unfortunate mayhem at sea and indeed ashore in ports-of-call, as demonstrated by one recent case, admiralty law takes center stage.

Maritime Torts

An accident on navigable waters aboard a cruise ship, or even a pleasure craft, carrying passengers or guests is governed by the General Maritime Law. Typically, the vessel owner can be held liable for any lack of reasonable care under circumstances which result in injury. The "reasonable care" test has been the standard since the U.S. Supreme Court's often-cited holding in *Kermarec v. Compagnie Generale Transatlantique* in 1959. Injuries caused by slip and fall accidents on board a vessel have consistently been found to constitute maritime torts. The extent to which the

circumstances and potential dangers surrounding maritime travel differ from those encountered shore side may determine how to evaluate whether the care exercised by the vessel owner was reasonable. For example, some accidents are unique to a ship while others are comparable to an injury ashore in a motor vehicle or hotel.

Crewmember Assaults

Jane Doe v. Celebrity Cruises, Inc. is a maritime case about a crewmember's sexual battery of a passenger. The decision is of interest because the assault did not occur on the ship, but ashore in Bermuda during the cruise. This created questions of whether there was admiralty jurisdiction and whether a common carrier has any responsibility for an employee's intentional act while the employee is off-duty.

The passenger, "Jane Doe", had purchased a ticket for a round-trip cruise from New York to Bermuda aboard Celebrity's M/V ZENITH. After a night out on the town in Bermuda with friends and crewmembers, a crewmember offered to assist the visibly intoxicated Doe back to the ship. The crewmember (one of the waiters assigned to Doe's table on the ship) allegedly raped the pas-

senger in a small public park not far from the ship. Doe sued the owner and operator of the ship and the company providing the catering personnel in federal court in Florida, alleging sexual assault, sexual battery, negligence, breach of contract of carriage, and intentional and negligent infliction of emotional distress. A jury returned a verdict for Doe on her sexual battery claim awarding her \$1 million in compensatory damages.

Admiralty Jurisdiction

On appeal, the Eleventh Circuit Court of Appeals (covering Florida and other states) first considered whether federal admiralty jurisdiction exists over an intentional tort claim involving an off-duty crewmember that takes place off the ship. Applying the standard two-pronged admiralty jurisdiction test of connection with maritime activity and location, the Court determined that since the cruise line industry is considered "maritime commerce", a crewmember's sexual assault on a passenger obviously has a potentially disruptive impact on maritime commerce. In this regard, the Court suggested that it was easy to imagine that if rape or other forms of sexual battery became a concern

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where no intentional conduct is involved.

In *Doe*, the Eleventh Circuit Court of Appeals made a clear distinction between an assault (or other intentional tort) committed by a crewmember on a passenger and a garden variety negligence case.

In the final analysis, the Eleventh Circuit concluded that cruise lines owe a non-delegable duty to protect their passengers from crewmember assaults and to provide safe transport. The Court was not convinced that the special carrier-passenger relationship was severed because the passenger and crewmember were off the ship, because the incident occurred within the seven-day period of the cruise. In addition, an integral part of the carrier-passenger relationship encouraged socializing with passengers while off duty in the ship's scheduled ports-of-call and, therefore, the relationship continued during their interaction ashore. Accordingly, the interaction between the passenger and crewmember was not outside the scope of this on-going relationship or the on-going cruise.

The jury's verdict for the plaintiff was affirmed and a petition for writ of certiorari was denied by the United States Supreme Court on October 31, 2005.

This case, involving an incident ashore, demonstrates that the admiralty jurisdiction of federal courts has a greater reach than many would expect.

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of passengers, cruise ship business would necessarily suffer. Moreover, the interaction between crewmembers and passengers during an on-going cruise bears a substantial relationship to traditional maritime activity sufficient to satisfy the connection with maritime activity prong.

The location test for jurisdiction was more difficult. The Court commented that the "temptation exists to draw a bright line between a crewmember's assault of a passenger that occurs on the ship versus in a port-of-call." The Eleventh Circuit noted that these facts may represent the "outer boundaries" of admiralty jurisdiction over torts, but nonetheless present sufficient "genuine salty flavor" to extend admiralty jurisdiction. Significantly, not long before this appeal, the U.S. Supreme Court had taken an expansive view of admiralty jurisdiction. In "a maritime case about a train wreck" the Supreme Court in *Norfolk Southern Railway Co. v. Kirby* stated that in modern maritime commerce "the shore is now an artificial place to draw a line."

Standard of Care

The issue of liability was attacked next. The cruise line wanted the well-settled *Kermarec* test

apply. Plaintiff disagreed and suggested that as common carrier, a cruise line owes a special duty to its passengers in circumstances involving intentional acts, and the standard should be strict or absolute liability. The cruise line's status as a "common carrier" under federal maritime law was undisputed. Hotly contested, however, was the applicable standard of care. The principal liability issue in the case, therefore, was which standard governed the cruise line's liability to its passenger for a crewmember assault: strict liability or reasonable care under the circumstances.

The strict liability of a common carrier (whether ship or train) for assaults by employees on passengers is historically rooted in the entrustment of passengers' personal safety to the common carrier. This strict standard rests upon the implied special duty of protection and safe transport that a common carrier owes to its passengers - not that the act is incident to a duty within the scope of the crewmember's employment. For example, in 1906, the Second Circuit Court of Appeals in *New York* renounced the "archaic" doctrine that when a servant of a carrier commits a wanton assault upon a passenger, he acts outside the scope of his authority and thus releases his employer from liability. The Second Circuit, however, continues to apply the reasonable care