



## Cruise-ship passenger injury litigation

### PURSUING CRUISE-SHIP PASSENGERS' PERSONAL-INJURY CLAIMS; PROCEDURE AND COMMON MISTAKES TO AVOID

Cruises to exotic, far-away destinations sound exciting, but they also present numerous risks and may cause serious injuries to passengers. These incidents occur on the ship and during shore excursions at ports of call.

The time and place of the injury or incident can greatly affect the viability of a passenger's claim. It is important to find out when the incident occurred, because there are strict contractual time limitations involved in pursuing a passenger's claim. Likewise, the location of the incident is crucial, as occurrences off the ship are significantly harder to litigate and could result in no recovery at all.

When pursuing a passenger's injury claim, attorneys must identify the cruise line involved and obtain the passage contract from the client or the cruise line's website. The passage contract contains various terms, conditions and disclaimers that govern the passenger's claims, and may pose litigation hurdles to the unwary.

#### The passage contract

When passengers book a cruise, they are issued a passage contract, sometimes referred to as ticket contract or cruise ticket contract, that governs every aspect of their cruise, as well as their legal rights and remedies. The passage contract is a maritime contract governed by the general maritime law. (*Wallis v. Princess Cruises, Inc.* (9th Cir. 2002) 306 F.3d 827, 834.)

Whether the contract terms are enforceable will depend on whether they were "reasonably communicated" to the passenger. The two-prong reasonable communication test first examines the physical characteristics of the contract such as type size, conspicuousness, and clarity of the notice on the ticket that its terms will affect the passenger's rights. Secondly, the test looks at the extrinsic factors indicating the passenger's ability to become meaningfully informed of the contractual terms at stake. (*Wallis*, 306 F.3d at 835-37.) These include the circumstances surrounding the passenger's purchase and retention of the contract, familiarity with the contract, the time and incentive under the circumstances to study the provisions of the contract, and any other notice that the passenger received outside of the contract.

In the old days, passengers actually received a booklet containing terms and conditions in fine print. Decades of cases on the enforceability of passage contract terms describe these booklets and the shortcomings in their physical appearance. Another commonly litigated issue was the timing of receipt of the contract and whether there was sufficient notice of these terms before the cruise. Nowadays, bookings are completed electronically, often far in advance of the cruise, and passengers must accept their passage contract online before finalizing the transaction. This process makes it simple for the cruise lines to prove that a passenger assented to the terms if issues arise in litigation.



While acceptance and receipt of the passage contract can be easily proven, an attorney should nevertheless evaluate whether the particular provision at issue was reasonably communicated. A term could be inconspicuous, vague, or ambiguous in its definition or application, or it may conflict with other contractual terms.

Ambiguities in the cruise-line contracts are construed against the carrier. (*Chan v. Soc'y Expeditions, Inc.* (9th Cir. 1997) 123 F.3d 1287, 1292.) Likewise, a term could be unenforceable because it is unlawful. For instance, for cruises that touch U.S. ports, disclaimers of liability for personal injuries or death caused by the cruise line or its agents' negligence are void. (46 U.S.C. § 30509.) Yet, such disclaimers of liability are found in some form or another in every passage contract and cruise lines often seek to enforce them via motions for summary judgment.

#### Determining the proper defendants

An attorney should carefully review the passage contract to identify the proper defendant. At times, the defendant is obvious. But there are many instances when it may not be clear, or even opaque, especially with related companies involved in the cruise-booking process or some material aspect of the cruise. While various entities may be named in the passage contract, the proper party to sue for injuries caused by the cruise line's direct negligence is the owner and/or operator of the vessel. These entities should be identified by name or defined as a "carrier." If the passage contract does not include the name of the carrier, the passenger's booking records should be reviewed to determine the vessel owner and/or operator.

In cases of injuries sustained during shore excursions, the proper defendant may not be initially known. Cruise lines market and sell foreign tours and shore excursions but often conceal the identity of the actual tour operators. Even during the tour, it may not be possible to identify the operators of excursions that are offered, as they are often required to display the cruise line's name on their signage. This conduct implicates legal relations like ostensible agency, with the cruise line acting as principal or employer for the excursion personnel.

At minimum, unidentified excursion or tour defendants should be named fictitiously. That being said, attorneys should keep in mind that many foreign-nation tour operators can successfully challenge personal jurisdiction in a United States courthouse, as they are often foreign companies with limited or no contacts to the forum state.

It may be possible to establish sufficient contacts based on the tour operator's direct dealings with the cruise line. In certain circumstances, passengers can utilize admiralty *in rem* proceedings. However, in most cases it is best to frame the allegations focusing on the cruise line's direct negligence, including vetting and hiring. Under general maritime law, joint and several liability remains in full effect (i.e., no Proposition 51 allocations) so that plaintiffs may collect the full amount of the judgment from one or all of the (joint) tortfeasors. (*Groff v. Chandris, Inc.* (S.D. Fla. 1993) 835 F.Supp. 1408, 1409 citing *Edmonds v. Compagnie Generale Transatlantique* (1979) 443 U.S. 256, 260 and n.7.) Defendants sort out proportionate liability by cross-actions against each other.

### Maritime law: Applicable time limitations

A passenger claim for personal injuries occurring on a cruise ship operating on navigable waters is a maritime tort. While the three-year statute of limitations under Title 46 United States Code section 30106 applies to maritime torts, that is not the case for cruise-ship incidents.

The passage contract of every cruise line operating in the United States requires a passenger to give notice of a claim of personal injuries within six months of the incident causing the injuries and to file a lawsuit within one year of the occurrence. Non-personal injury claims can have even shorter limitation periods for lawsuits or arbitration.

These limitations are permitted by 46 U.S.C. § 30508 and are consistently enforced by the courts. (See e.g., *Dempsey v. Norwegian Cruise Line* (9th Cir. 1992) 972 F.2d 998.) If a passenger first seeks legal advice after the six-month-notice period, a late notice may not be fatal, especially if the cruise line had contemporaneous notice of the injury because medical care was furnished on board the ship, or there was an investigation of the incident. Other variations will present themselves with passengers' claims.

When providing notice of a claim, the correspondence should be kept simple by stating the particulars of the claim, i.e., the name of the passenger, the name of the ship, the date of incident, a brief description of the incident and some language assigning blame for the negligent conduct. Once the lawsuit is filed, the passage contract may also dictate the time period within which it must be served. Such period may differ from the applicable rules of court and should be followed to avoid a possible dismissal of the case under the contract provision.

A one-year statute of limitations is enforceable. Attorneys should not make the mistake of assuming the limitations period in California for personal-injury cases, or any other state, will apply because state law statutes of limitations are preempted by general maritime law, and the federal statute (read, supremacy clause) authorizes shortened time limits.

### Proper forum for lawsuit

Attorneys should also consult the passage contract to ascertain the required forum for a passenger's lawsuit. Every

passage contract contains a *mandatory* and exclusive forum-selection clause, which is usually in the state where the cruise line is headquartered. While cruise passengers suing for personal injuries are entitled to file suit in a state court under the Savings to Suitors Clause, 28 U.S.C. § 1333(1), most cruise lines now choose a local federal district court, and that forum-selection clause will be enforced if reasonably communicated. (*Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585; *Korman v. Princess Cruise Lines, Ltd.* (2019) 32 Cal.App.5th 206.)

If the forum-selection clause requires a lawsuit in another state and the provision is enforced, any lawsuit filed in a state court in California will be dismissed. A state court cannot transfer the case to another state court or to a federal court. (See e.g., *Schlessinger v. Holland America, N.V.* (2004) 120 Cal.App.4th 552, *as modified* (July 9, 2004).) In that situation, filing in the wrong state court risks the claim will be time-barred in the proper forum. If the case is commenced in the wrong federal court, the court can and likely will transfer the case to the proper forum, pursuant to section 1404 of title 28 of the United States Code.

### Location and connection, and the standard of care

Maritime law applies when the admiralty jurisdiction for the "location and connection" test is satisfied. The "location" test looks at whether the tort occurred on navigable waters or whether an injury on land was caused by a vessel on navigable waters.

The "connection" test requires a court to evaluate whether the incident has a potentially disruptive impact on maritime commerce, and whether the general character of the activity giving rise to the incident has a substantial relationship to traditional maritime activity. (*Wallis, supra*, 306 F.3d at 840.)

Any passenger injury occurring on a cruise ship sailing navigable waters, or while embarking or disembarking the ship or during tender transport

to and from shore will be deemed a maritime tort. A more difficult question arises determining the law applicable to incidents occurring on land, especially in foreign countries, during shore excursions.

Foreign tour operators invariably argue that the foreign location laws apply, as they are generally less favorable to plaintiffs' interests. However, courts have also found that maritime law will extend to injuries occurring on land at regular ports of call, which are deemed part of the entire cruise experience. (See e.g., *Doe v. Celebrity Cruise* (11th Cir. 2004) 394 F.3d 891, and its progeny.)

Passengers are owed a duty of reasonable care under the circumstances. (*Kermarec v. Compagnie Generale Transatlantique* (1959) 358 U.S. 625, 631.) It is determined by the circumstances of each case. (*In re Catalina Cruises, Inc.* (9th Cir. 1998) 137 F.3d 1422, 1425.)

Thus, for activities that are offered that are unusual or different than what passengers generally experience, a greater degree of care may be reasonably necessary. (*Rainey v. Paquet Cruises, Inc.* (2d Cir. 1983) 709 F.2d 169, 172.) While a cruise operator is a "common carrier" by definition, the very high standard of care for common carriers that is recognized under state common and statutory law is preempted and does not apply. Courts routinely thwart efforts by passengers to apply California's common carrier law in such instances. (See e.g., *Cox v. Princess Cruise Lines, Ltd.* (C.D. Cal., June 25, 2013, No. CV 13-01765 RSWL) 2013 WL 3233461, at \*4.)

In a negligence cause of action under the general maritime law, a plaintiff must establish (1) duty; (2) breach; (3) causation; and (4) damages. (*Morris v. Princess Cruises, Inc.* (9th Cir. 2001) 236 F.3d 1061, 1070.) Additionally, in occurrences that are not uniquely maritime, such as excursions, a passenger must show the cruise line had actual or constructive notice of the danger, "at least where, ... the menace is one commonly encountered on land and not clearly linked to nautical adventure." (*Keefe v.*

*Bahama Cruise Line, Inc.* (11th Cir. 1989) 867 F.2d 1318, 1322.)

### Vicarious liability

Recently, the Eleventh Circuit reaffirmed the viability of vicarious-liability claims based on the doctrine of respondeat superior under the general maritime law. When the tortfeasor is an employee acting within the scope of their employment, the employer is liable without any fault. Claims against employees do not require any prior claims against them and no notice is required. (*Yusko v. NCL (Bahamas), Ltd.* (11th Cir. 2021) 4 F.4th 1164.) The Eleventh Circuit has also held that a plaintiff may pursue a medical-malpractice claim against a cruise line, asserting vicarious liability for the acts of its employee doctors and nurses, or establishing the same conclusion under the doctrine of ostensible agency. (*Franza v. Royal Caribbean Cruises, Ltd.* (11th Cir. 2014) 772 F.3d 1225.)

Attorneys seeking to allege negligent infliction of emotional distress should be mindful of any limitations on the recovery for claims made by virtue of the passage contract. Most passage contracts limit a right of action for negligence to instances where bodily injuries, including emotional distress, is a result of the passenger being physically injured or being placed in the zone of danger, and at risk of physical injury. This limitation is permitted by 46 U.S.C. § 30509, and the "zone of danger" test under general maritime law. (*Weissberger v. Princess Cruise Lines, Ltd.* (C.D. Cal., July 14, 2020, No. 2:20-CV-02328-RGK-SK) 2020 WL 3977938, at \*2-3 citing *Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 547-48.) It follows that bystander emotional-distress claims for witnessing an injury to a close relative, (e.g., *Dillon v. Legg* (1968) 68 Cal.2d 728), are not cognizable under maritime law.

Additionally, claims involving the unseaworthiness of a vessel are unavailable to passengers. They are reserved solely for seafarers and maritime workers. Likewise, claims for breach of

contract for failing to provide a safe cruise are not recognized unless the carrier specifically guaranteed safe passage in the contract, which is never the case. (*Stires v. Carnival Corp.* (M.D. Fla. 2002) 243 F.Supp.2d 1313, 1320.)

For incidents that occur on shore, during shore excursions, a cruise line will argue it is not liable for the acts of "independent contractors" based on disclaimers in the passage contract. However, an attorney should not simply accept this assertion, and instead, pursue discovery on two issues.

First, was there direct negligence by the cruise line selecting, hiring or retaining the operator? For instance, a cruise line could be directly liable for failing to properly vet a foreign tour operator, or to continue doing business with a company that has a history of causing passenger injuries.

Negligent cruise lines cannot escape liability by asserting a disclaimer in the passage contract. Any attempt is void under 46 U.S.C. § 30509. As noted above, passengers' attorneys should explore whether the relationship between the cruise line and the tour operator is actually *independent*. It should be no surprise that frequently, the cruise line will exercise significant control over the day-to-day operations of the excursion or tour, which supports the argument that the tour operator is the cruise line's agent and vicariously liable for any negligence during the excursion.

### Available remedies

In general-negligence personal-injury actions, a plaintiff may recover past and future economic and non-economic damages, including medical expenses, lost earnings, and general damages for the full panoply of pain and suffering damages. This includes mental anguish, discomfort, inconvenience, disfigurement, and loss of enjoyment of life and humiliation similar to state law claims. Passengers can also recover prejudgment interest. However, some claims or remedies are unavailable under the general maritime law. For instance, loss of consortium is unavailable unless

the injury occurred in state territorial waters. (*Chan, supra*, 39 F.3d at 1408.)

Lawyers should note that cruise lines, which generally advocate for the application of federal maritime law to passenger claims, will seek to apply state law when it is more beneficial to their interests. This is particularly true with claims for the recovery of past medical expenses. Cruise lines seek to apply the holding of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. In that case, the California Supreme Court limited a plaintiff's recovery of past medical expenses to the amounts actually paid to providers in full payment of their services (by insurers) pursuant to contractual agreements that incorporate "deductions" and "write-offs." However, a passenger's attorney can and should resist these arguments and assert general maritime law and the federal collateral-source rule govern these claims.

A plaintiff may recover the reasonable value of medical services provided, and no mention may be made of insurance payments or reductions made for benefits received from third parties. (See e.g., *Moreno v. Ross Island Sand & Gravel Co.* (E.D. Cal., Oct. 29, 2015, No. 213CV00691KJMKJN) 2015 WL 6690067.) The *Moreno* court found that the holding in *Howell* was inconsistent with the federal collateral-source rule. That said, the issue of how health insurance contractual write-offs should be treated in maritime cases has not yet been addressed by the Ninth Circuit. Most recently, the Eleventh Circuit decided that a jury should be permitted to consider all the evidence,

including amounts billed, amounts paid, and expert testimony about reasonableness, to arrive at a fair value for medical expenses. (*Higgs v. Costa Crociere S.P.A. Co.* (11th Cir. 2020) 969 F.3d 1295.)

If gross negligence is alleged and proved, punitive damages may also be available to passengers. This subject has been litigated for decades, with varying results. Recent cases have held that a passenger may recover punitive damages for intentional misconduct or gross negligence. (*Archer v. Carnival Corporation and PLC* (C.D. Cal., Nov. 25, 2020, No. 2:20-CV-04203-RGK-SK) 2020 WL 7314847, at \*9 citing *Churchill v. F/V Fjord* (9th Cir. 1988) 892 F.2d 763, 772 and *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.* (9th Cir. 1985) 767 F.2d 1379, 1385.)

### Jury or non-jury trial

If a passenger files a lawsuit in state court, either because it is permissible by the passage contract or the defendant did not seek to enforce a federal forum-selection clause, then a jury trial is available under the Savings to Suitors Clause. (28 U.S.C. § 1333(1).) If the lawsuit is filed in federal court and there is diversity jurisdiction, plaintiff is likewise entitled to a jury trial. However, if no diversity jurisdiction exists, then the only basis for the court's jurisdiction is admiralty, and a jury trial is generally unavailable. (FRCP, rule 38(e).) Parties may, however, consent to a jury trial, or plaintiff may seek an advisory jury under FRCP, rule 39. An attorney should always demand a jury trial, even in a federal

court where diversity jurisdiction does not exist, and argue that the plaintiff is entitled to a jury trial. Passengers should assert the Savings to Suitors Clause authorizes it, and the defendant cruise line unilaterally chose the federal forum by its unilateral selection clause.

### Conclusion

Lawyers who do not practice admiralty law may come into contact with clients who have returned from spoiled vacations with injuries and large unanticipated expenses, to say nothing of disabling conditions. These occurrences require careful consideration and familiarity with rules and conditions attendant to where and how harm happened, including the contracts and laws of the forums involved. Sometimes it is better to refer than to err, but learning the materials cited above will help lawyers become masters and commanders.

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