High Crimes on the High Seas

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HIGH CRIMES ON THE HIGH SEAS; RE-EVALUATING CRUISE LINE LEGAL LIABILITY

BY
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I. Introduction: The Perils of Sea Passage.

There are hundreds of cases that illustrate the perils of sea passage, from the past Century and those before it. But the loss of R.M.S. TITANIC remains-- almost 100 years later – so readily-used an analogy that the event remains a deep scar upon our country's collective conscience.¹

Perhaps it is the fact that she foundered and was lost on her maiden voyage. Perhaps it is that she so painfully illustrates the hubris of the so-called “Golden Age” which, transformed by the Industrial Revolution, propelled itself into what Mark Twain would call the “Gilded Age.”²

Perhaps it is that White Star Line seemed to have tweaked fate itself by naming the ship after the Titans. The Titans were a race of giants doomed by their arrogance to be struck down.³

There have been other notorious shipwrecks, with hundreds of passengers lost: LUSITANIA, SULTANA, and CENTRAL AMERICA, are some of the more notable.⁴ The GENERAL SLOCUM fire in 1904 perhaps provides the best analogy to TITANIC: it occurred “[o]n a pleasant morning in June, on quiet . . . waters;” 1000 of its estimated 1,100 passengers aboard were lost; the fire erupted among imprudently stowed flammable materials and the tragedy could have
readily been avoided by the simple exercise of “human skill and care.”

More to the point, the loss of life aboard GENERAL SLOCUM was caused in large part from ineffective life saving equipment and the Captain’s failure to conduct regular fire drills, resulting in an untrained and unprepared crew.

TITANIC’s voyage began with pomp and opulence, and aboard her were passengers with names like John Jacob Astor, and Benjamin Guggenheim. GENERAL SLOCUM’s passenger list bore no names so recognizable. But both voyages ended with hundreds of innocent lives lost and both voyages illustrate the risks inherent in the failure to exercise a high degree of care and vigilance in safeguarding passengers who board a ship and relinquish much of their liberty for the purpose of transportation.

TITANIC had been fitted with sixteen lifeboats, which collectively offered a total maximum capacity that exceeded the then-current maritime safety regulations established by the British Board of Trade. But the Board of Trade’s standard had been set in 1884, when the largest vessel afloat was one-quarter the size of the TITANIC; the year before TITANIC was launched, the Board of Trade had considered increasing its minimum lifeboat requirements, but had taken no action at the time TITANIC began her first and final voyage, on April 10, 1912.

TITANIC’s sinking brought about results unimaginable just the day before. Wyn
Wade characterizes the loss of TITANIC in his book End of a Dream\textsuperscript{10} as a “watershed between the nineteenth and twentieth centuries” because “[w]ith her sank the smug Victorian dream that mankind’s progressing technology was lifting the planet closer and closer to heaven.”\textsuperscript{11} Wade describes End of a Dream as a historical “report” documenting both the sinking of the ship and “society's response to the calamity;” which he compares to the assassinations of Presidents Lincoln and Kennedy.\textsuperscript{12} Whether one agrees with Wade as to these comparisons, the loss of TITANIC served a chilling blow to our country's collective confidence in what had become assumed norms of safety. TITANIC taught the hard lesson that no matter how grand, how opulent, how seemingly safe a ship may be – the simple lack of vigilance in her operation can cause a loss of profound proportion. This lack of vigilance manifested itself in the disregard of so many operational details: her disregard of ice warnings,\textsuperscript{13} her increased speed as she entered the ice field,\textsuperscript{14} her failure to monitor ocean temperatures (an indication of the presence of ice) for the simple lack of a rope long enough to reach the water,\textsuperscript{15} her failure to have conducted a scheduled lifeboat drill which left the crew completely unfamiliar with lifeboat capacity and operation\textsuperscript{16} and, of course, her failure to carry a sufficient number of lifeboats for all of the souls she carried aboard.\textsuperscript{17}
The legacy of TITANIC was a call for legislation to address many of these failures.  

18 The lesson of TITANIC was that, without legislation, corporate decision-making is likely based upon what is perceived to be in the best interests of the corporation.  

19 It was certainly so with White Star Line’s rush to have TITANIC launched without training the crew in the operation of her lifeboats and having cancelled a scheduled lifeboat drill.  

20 It seems equally so today, almost 100 years later, even as the numbers of Americans traveling by ocean carrier have exploded over the last two decades.  

The occurrences of rapes, assaults, murders and unexplained disappearances of passengers from cruise ships have increased as the numbers of people traveling by cruise ship has increased, and there has been little apparent effort from the cruise lines to stem the tide.  

22 As the cruise industry learns that larger ships mean larger profits and launches more super-sized ships, some carrying over 4,000 passengers, the question remains who, if anyone, will be responsible for policing the thousands of passengers, and the hundreds of crew members, who vacation, gamble, reside and work on these mega-ships?  

II. Crimes Aboard Cruise Ships May Not be Accurately Reported.  

According to the FBI, during the 4 year period beginning in 2002 through February
2007, 184 crimes were reported to have occurred on cruise ships and 84 of these cases involved crew members as the suspected perpetrators. Sexual assault and physical assaults on cruise ships were the leading crime reported to and investigated by the FBI on the high seas.\textsuperscript{24}

The actual numbers of these kinds of incidents aboard the many foreign flagged ships that board passengers in U.S. ports-- with recognizable names like Carnival, Princess, and Royal Caribbean – which comprise the fleet that serves the American cruise industry, may be much higher given the millions of passengers traveling aboard foreign flagged cruise ships and the financial incentive to under-report such incidents. In other contexts, some cruise lines have been prosecuted for failing to properly report and record oil discharges.\textsuperscript{25} The impact of negative press reports over oil discharges that might violate international conventions or federal regulations would seem to pale in comparison to negative press reports of passengers being assaulted, raped and killed.

The July 5, 2005 disappearance of newlywed George Smith once again propelled the issue of crimes aboard cruise ships before the public and, reminiscent of TITANIC, brought the issue before Congress in a series of congressional hearings, beginning in 2005 and continuing through 2007.\textsuperscript{26}

In testimony given to the Committee on House Transportation and Infrastructure
Subcommittee on Coast Guard and Maritime Transportation on March 28, 2007, by John Hickey, an attorney who defended cruise lines and insurers for 17 years and has spent the past 10 years suing them, he states:

The cruise lines have a long history, continuing to this day, of failing to properly disclose the incidents of sexual assaults, sexual batteries and similar incidents. 1999 was the year in which the light started to shine on the infection. In that year, in a sexual assault case brought by a passenger, a judge in Miami ordered that Carnival Cruise Line reveal statistics about sexual assaults. At first, Carnival disclosed approximately 62 incidents. In a later update, Carnival revealed 103. Also that year, Royal Caribbean commissioned a report from Kay Krohne of the Krohne Connection, a well known consultant to corporations on sexual harassment and assault issues. In a 16 page report, Krohne found, among other things, that “improper activity occurs frequently aboard ships but goes unreported and/or unpunished”. Specific recommendations were made to the cruise line. The cruise line admits even recently in sworn testimony that only some of those recommendations were implemented. In fact, in a deposition of Martine Pasquet, the director of Fleet Employee Relations and Performance for Royal Caribbean International, taken on July 13, 2006, Ms. Pasquet testified that even though she is the person in charge of all of the sexual harassment and assault training of the personnel on all of the Royal Caribbean ships, she did not know that in the past there were studies about these problems.27

In 1999, the same year that the Krohne report was completed, the cruise lines
began implementing a “Zero Tolerance For Crime Policy” which industry spokesman Terry Dale, President and CEO of the Cruise Line International Association (“CLIA”), describes in testimony he gave to the House Committee on House Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation on March 28, 2007. It was not until March 2007, however, according to Dale's testimony, that an agreement was reached between the CLIA, the U.S. Coast Guard and the FBI as to the reporting procedures to be followed.

Others testifying before the same committee state the FBI was not even aware of the “Zero Tolerance For Crime Policy,” whereby some cruise lines undertook voluntary reporting to the FBI, until FBI representatives met with representatives of the CLIA and of the International Cruise Victims Association (“ICVA”) in July 2007 at the direction of the Subcommittee Chairman, Elijah Cummings:

On July 25, 2007, a meeting was initiated by ICV with the FBI, and held at the headquarters of the FBI, and included Salvador Hernandez, Deputy Assistant Director, and John Gillis, Director of the Violent Crime Division of the FBI. The purpose was to review the concerns of the March 2006 agreement between the FBI, U.S. Coast Guard, and CLIA. Please refer to Section I Attachment that reflects the main points of our 2-hour discussion. The main conclusions from the meeting are as follows:

Both FBI representatives were unaware that in 1999 the Cruise Line Industry had
established a ``zero tolerance for crime`` policy, which required them to report all crimes to the FBI. The new agreement only addressed how crimes were to be reported. This agreement took about 14 months to resolve, beginning in January 2006. Both advised us that the FBI and the Justice Department did not have the resources to follow up on crimes on cruise ships unless it reached certain thresholds. This is the reason why, in 2005, only 50 cases were opened with only 4 convictions from cruises that carry 10 million passengers (information provided by the FBI).

Prof. Ross Klein testified before the Subcommittee on March 28, 2007 and questioned the accuracy of the voluntary reporting which began in 1999, calling for legislation mandating such reporting:

Placed in context, the issue of sex-related crimes onboard cruise ships was pushed into the national media in 1999 after Carnival Cruise Lines admitted in discovery hearings to receiving 108 complaints of sexual assault (including 22 rapes - 16 rapes of passengers by crew and 6 rapes in which one crewmember assaulted another) in a five year period; Royal Caribbean International indicated it had received 58 complaints in the same time period. Apparently to improve the industry's image, four companies (Carnival Corporation, Royal Caribbean Cruises Limited, Crystal Cruises, and Princess Cruises) signed a letter in July 1999, under the auspices of the International Council of Cruise Lines, pledging zero tolerance of crime and a commitment to report all crimes involving U.S. citizens to the FBI. . . . It is now eight years later and the problem of sex-related crimes on cruise ships continues to
be a problem. It also appears from the stories of victims that the commitment to
report all crimes on cruise ships has been forgotten or lost. The industry's inability
to control itself suggests that legislative action is sorely needed in order to protect
Americans against crime on cruise ships.31

Cruise lines have argued in the past that they are not required by U.S. law to report
crimes or casualties which occur outside U.S. territorial waters.32 Recent
testimony taken during these congressional committee hearings on the need for
further regulation shows a shift in the position espoused by industry spokesmen:
Terry Dale acknowledged in his March 28, 2007 testimony the applicability of 33
C.F.R. § 120.220, which requires that the FBI be notified where there is a “breach
of security, unlawful act, or threat of an unlawful act against any . . . passenger
vessels to which this part applies, or against any person aboard it, that occurs in a
place subject to the jurisdiction of the United States.” Similar testimony was given
by Lawrence Kaye, counsel for the CLIA and a member of its Board of Directors.33

Testimony from U.S. Coast Guard Assistant Commandant Wayne Justice, on the
other hand, demonstrates that this very agency which is entrusted with enforcement
of U.S. laws and regulations affecting cruise lines sees “the jurisdiction of the
United States” to be limited to U.S. territorial waters:

[T]he accepted international legal framework does not support the imposition of compulsory
reporting requirements by coastal States or the States of passengers for unlawful
acts committed beyond their territorial jurisdiction aboard foreign flagged vessels.

This same framework allocates investigative and enforcement jurisdiction to flag
or other coastal States, not U.S. law enforcement agencies, with respect to criminal
activity that occurs aboard foreign flagged cruise ships operating beyond the 12
mile U.S. territorial sea . . . .

So, while this U.S. reporting requirement applies to unlawful acts and related activity that occurs
in U.S. waters aboard foreign flagged cruise ships that call in the United States, it
does not require the reporting of unlawful acts and related activity aboard
foreign-flag vessels located outside U.S. territorial jurisdiction . . . 34

The Coast Guard Assistant Commandant goes on to compare boarding a cruise ship
in Miami, for a cruise to the Caribbean and back to Miami, to taking a vacation in a
foreign country:

- The nature of the legal environment aboard foreign flagged cruise ships should come as no
  surprise - as with any vacation taken in foreign territory, the responsibility for
crime prevention and response lies with the sovereign of that territory, not with the
sovereign of the vacationer`s home country. And most vacationers focus on
aspects of private security provided by the hotels and resorts they select, and may
even make such selections based in part on their perception of a crime-free
environment. 35

Testimony from FBI Deputy Assistant Director Salvador Hernandez shows the FBI
decides on a case by case basis when, and when not, it will open an investigation
where the crime occurs beyond U.S. territorial waters. Unfortunately, the testimony strongly suggests that the FBI more often chooses not to prosecute foreign crew members. For example, Janet Kelley's testimony from March 7, 2006 illustrates the FBI's apparent apathy to pursue these criminals:

I reported the crime to local authorities, which informed me that only the FBI had jurisdiction over crimes at sea. But it took the FBI months to investigate and interview the assailant who had raped me. They did not prosecute him, even though they had my clothing, the rape kit completed at my local hospital, the individual's identity and my testimony. The authorities had my full and complete cooperation to do whatever was necessary to apprehend and bring the criminal to justice. After the FBI interviewed this criminal, he remained on the same ship. I was terrified that I had been exposed to HIV. It was only after filing a civil suit against the cruise line and the individual who raped me that the cruise line conceded to have him tested for HIV. They fired him and sent him back to his homeland, Jamaica. For the record I would like to inform congress that my assailant went on later that same year and was reemployed with yet another cruise line. Through my own efforts this information came to light. I instructed my attorney to inform the cruise line which had hired him, that they had a rapist aboard the cruise ship. They determined that he falsified his application, and then they fired him. But where is he now?

The picture that emerges from testimony taken from the industry, the consumers, and the government agencies entrusted with regulating the industry shows the
consumers dangling without a lifeline between apathy on the part of our
government and self-interest on the part of the cruise industry.

The cruise lines know all too well that publicized crimes aboard cruise ships does
not sell cruise tickets. It is therefore naive to believe the cruise lines voluntarily
report all such incidents to the FBI or routinely release these figures to the consuming public.38

Testimony presented during the hearings held from 2005 through 2007 by
passengers who were victims of crimes committed aboard ship or family members
seeking the whereabouts of missing loved ones demonstrates substantial difficulties
were encountered by those seeking to obtain information from the cruise line.39

Even where law suits have been filed on behalf of victims, thereby invoking the use
of subpoenas and other civil discovery methods, this information is not readily
released and often can be obtained only after a court orders that it be produced.40

The cruise lines’ response to the increasing publicity of incidents involving
shipboard crimes has been smug and self-protective: the typical response seems to
be that crimes occur everywhere and cruise ships are safer than most American
cities.41 Prof. Klein's testimony to congress however suggests the statistics are
skewed and the comparison thus is inaccurate:

Based on the numbers given to Dr. Fox by the cruise industry, and the method he used to
extrapolate from industry-wide passenger load figures, his claim that cruise ships are safer
is a fair conclusion. However, as with any mathematical computation, if the numbers going into the equation are unreliable, then the result is also unreliable. In contrast to Dr. Fox's method, I have the advantage of focusing on a single cruise line, Royal Caribbean International. This provides much more reliable numbers for input. Rather than beginning with an industry-wide number of cruise passengers and then arriving at a daily population on cruise ships, I am able to draw directly from Royal Caribbean Cruise Limited's Annual Report the number of passenger days which, when divided by 365 and multiplied by 75% (Royal Caribbean International's share of company-wide passenger days), gives the average number of passengers on Royal Caribbean International ships per day (see Section C of Table 1). I also have figures for sexual assault and sex-related incidents that were provided by Royal Caribbean International as part of a civil suit and which were subsequently published by the Los Angeles Times in a January 20, 2007 article. The numbers cover a period of 32 months and include the following reported incidents: 81 sexual assaults, 52 cases of inappropriate touching, 28 cases of sexual battery, 99 cases of sexual harassment, and 13 cases that were specified as other. Using the numbers at my disposal, I conclude that one has a 50% greater chance of sexual assault on a Royal Caribbean International ship as compared to the US generally and that the pattern on Royal Caribbean International is consistent with that of other mass market cruise lines operating ships of similar size and style. In contrast to Dr. Fox's assertion that the rate of sexual assault on cruise ships is 17.6 per 100,000, I find a rate that is almost three times greater: 48.065 per 100,000.42

One might disagree with Dr. Ross' assertion that one cruise line can be used as a
barometer for all others, but it seems clear that, at least as to Royal Caribbean, it is not statistically safer than an American city. Dr. Ross also questions the data provided by the cruise lines. There may be merit here given the measures taken by the cruise lines to keep secret their information regarding crimes aboard ship. One commentator characterizes the cruise lines’ “investigations” into shipboard crimes as nothing more than use of attorney work product and attorney client privilege as a means not to preserve evidence for law enforcement or to improve shipboard security, but simply to prevent its disclosure through invoking these privileges. Similar testimony was given to Congress.

This topic is now overripe for a nation wide debate: What is the cruise lines’ legal duty to police its ships, personnel and passengers while at sea? Furthermore, what standard of care should be demanded of these common carriers when crimes are committed aboard their ships?

This article will document the evolution of the duty of care owed by ocean common carriers. It will present the history behind the high duty of care imposed by the general maritime law and will discuss the statutory presumption of fault enacted in 1838 at the beginning of the era of steam propulsion. This statutory presumption of fault was developed to ensure the exercise of utmost care by those common carriers harnessing the so-called “dangerous agency” of steam for the purpose of
transportation.\textsuperscript{47}

Today, there are much different and potentially much more dangerous “agencies” that should concern the modern ocean passenger. It may be the crew member with access to the passenger’s stateroom, it may be the passenger in the cabin next door, it may be the poorly trained and undermanned security department aboard the ship.

Historically, the development of new risks has resulted in the development of new standards of care. The law of products liability for example developed after the onset of the industrial revolution.\textsuperscript{48} It took some time for strict liability to develop: courts initially leaned very much towards the manufacturers, whose technological progress and inventions fueled the industrial revolution.\textsuperscript{49} Strict liability was ultimately developed through a combination of tort and contract theories: the tort doctrine of \textit{res ipsa loquitur} was expanded to produce an inference of negligence from the fact of a defective product and the contract doctrine of breach of warranty was expanded through the dismantling of the privity requirement so that not only purchasers, but other users and even bystanders were entitled to a remedy.\textsuperscript{50}

The article proposes a re-evaluation of cruise line legal liability, which is likewise governed by both tort and contract, and reconsideration of the standard of care required of the modern cruise operator. As millions of Americans travel on foreign flagged and foreign crewed cruise ships annually, the regulatory standards which
police the operation of these ships and the civil liability standards which provide redress to passengers who have been wronged both warrant reconsideration. The article also discusses the impact of the Supreme Court's current reticence to accept its constitutional role in developing the maritime law, and the resulting vacuum created by inaction from both the High Court and Congress. Finally, the article proposes that neither congressional action nor Supreme Court action is necessarily required to begin the process of setting things right, if the lower federal courts will simply reconsider faulty lower court case law which has resulted in a de facto rule of diminished care for the modern ocean common carrier.

III. Collision Course: Concerns for Safety vs. Corporate Profits.

Representative Christopher Shays, in opening remarks made to the House Committee on Government Reform's Subcommittee on National Security, Emerging Threats, and International Relations, on December 13, 2005 cited the disappearance of George Smith-- and another incident where “modern day brigands fired mortars at a cruise ship off the coast of Somalia”-- as “brazen acts of lawlessness on the high seas.” 51

The congressional hearings held by Rep. Shays' Committee in some sense parallel those conducted by Sen. William Alden Smith, following the loss of TITANIC.52 Before White Star Line could remove TITANIC's British crew and White Star Line’
s manager, Bruce Ismay, from the United States’ jurisdiction, Sen. Smith subpoenaed and detained the Ismay and surviving crew members, compelling their appearance and testimony. When reporters asked Smith how the U.S. Congress could exercise jurisdiction over British citizens, he replied “We may not have jurisdiction over the individual . . . but the American Congress is not without jurisdiction over the harbors of the United States. It is for these men who make use of the harbors to meet the public demand for information in regard to the disaster.”

Sen. Smith's congressional hearings ultimately resulted in domestic legislation, proposed by Sen. Smith himself, which required longitudinal bulkheads on passenger vessels and enough lifeboats for all aboard. Perhaps the recent congressional hearings will produce similar results.

The cruise industry's response to these recent hearings likewise evokes those from the industry in the last century: Even after TITANIC's loss of life industry spokesmen opposed Smith's proposed regulations and even remarked, “People need not be afraid of going into a ship because there are not lifeboats for all aboard. They have been doing it all their lives without knowing it . . .”

In recent testimony given to Rep. Shay’s Subcommittee during hearings on “Cruise Ship Security,” one witness quoted from briefs filed by Royal Caribbean Cruise
Lines in an ongoing lawsuit wherein Royal Caribbean argued that it had no duty whatsoever to report or investigate crimes nor need it provide family members with information when a passenger is missing:

The President of Royal Caribbean Cruise Lines stated on national television that the cruise line industry is a unique industry. He said it is the only industry not required to report a crime. I believe the legal position recently taken by this company, in defense of the lawsuit filed by Kendall Carver involving the disappearance of his daughter, Merriam Carver, illustrates loudly the big problem we are faced with regarding the cruise line industry. The position taken should raise many eyebrows. In a Memorandum of Law filed in court by the cruise line in response to Kendall Carver’s claim that the cruise line did not properly investigate the disappearance of his daughter, and intentionally withheld information from him, the cruise line said it has “no duty to investigate”, and no duty to provide information to any third party. The Memorandum of Law is attached. This demonstrates the industry currently is not accountable to anyone, at least that is the position they currently stated in legal proceedings involving Mr. Carver.  

Kendall Carver testified before Rep. Shays’ Subcommittee, detailing the difficulties he had experienced in obtaining accurate information from Royal Caribbean concerning the disappearance of his daughter Meriam – even after subpoenas were issued by two separate courts. Another witness who had reported the theft of valuables from his stateroom to the shipboard security officers (and was not involved in litigation over the loss) testified that he similarly encountered great difficulties obtaining documents, and that the cruise line had even denied that he had reported the theft. This witness also testified that cruise employees admitted there were no records maintained of thefts of less than $10,000.  

Admiral Dewey's observations on “the greed for corporate money-making” at the
expense of safety” seem to still hold true, as do those remarks made by TITANIC’s
designer, correlating the lack of concern for safety to a lack of regulation.\textsuperscript{60}
The cruise industry's recent response both to the publicity and the congressional
hearings mirrors this much earlier era in ocean transportation -- a time in which
industry could blithely assert that its consumers should close their eyes to safety
concerns because “[t]hey have been doing it all their lives without knowing it.”\textsuperscript{61}
Cruise lines are common carriers, no less than was White Star line.\textsuperscript{62} In responding
to these recent congressional inquiries and the adverse publicity generated by the
disappearance of Royal Caribbean passenger George Smith, the cruise industry
argues that a modern cruise ship is “statistically” safe.\textsuperscript{63} This argument of course
relies upon “statistics” compiled by an industry that is not required to record or
report the data, so the data is not independently audited.

The cruise lines also routinely equate themselves to land-based purveyors of
entertainment or hoteliers.\textsuperscript{64} But is that comparison really fair? A hotel guest can
choose to check out and a bar patron can choose to leave – but a passenger is
aboard for the ride, at least until the next port of call – and even then he or she can
only disembark at a substantial cost and inconvenience.

\textbf{IV. A Common Carrier's High Duty of Care}
\textbf{Is Derived From Its Dominion and Control Over the Ship and the Voyage And}
\textbf{the Duty to Provide Safe Transport Under the Contract of Carriage.}
The law of common carriage recognizes that a passenger is in some regard a “captive” whose custody is relinquished to the carrier. In the case of an ocean carrier, the passenger must rely upon the carrier and the ship's crew not only to operate the ship and prosecute the voyage, but also for those very basic needs such as food, comfort and safety. Historically, the general maritime law imposed a very high duty of care upon the common carrier of passengers.

The law of common carriage generally imposes a high duty of care as a corollary to a right of dominion and control. The general maritime law thus initially imposed upon the ocean common carrier a special duty of care -- “a very high degree of care” also referred to as “utmost care” -- owed by the ocean common carrier to those who enter into a contract of carriage, board a ship and pay for passage.

Though a modern cruise ship is equipped with more crew and more conveniences than the steamers of the late 19th Century, a passenger is still captive once aboard. All one need do is go through security at an embarkation point to recognize the level of dominion and control that a cruise line exercises over the ship. No similar dominion and control is exercised at a hotel check-in.

Furthermore, no one could reasonably argue that a cruise passenger is as free to leave a ship as a hotel guest is free to check out. A passenger is unquestionably more
reliant upon the ship and crew for personal safety than a guest at a hotel. A hotel
guest, after all, can dial “911” and expect a police response.\textsuperscript{70} A passenger may
only rely upon the cruise lines' shipboard security personnel, who in many instances
number less than a dozen for the entire ship.\textsuperscript{71}

There appears to be no real dispute that serious crimes regularly occur aboard cruise
ships, or that truly accurate records of the incidence of crimes are not disseminated
by the cruise lines, or that post-incident investigations are conducted by cruise lines,
if at all, primarily through shipboard security personnel, risk management personnel,
and, often, the cruise lines' attorneys – all of whom are concerned more with
protecting the corporation from civil liability than with preserving evidence of a
crime.\textsuperscript{72}

A cruise line's civil liability is adjudicated primarily upon legal liability principles
which place the burden of proof on the passenger, therefore a passenger's access to
evidence may mean the difference between a case going to trial and a summary
dismissal: the financial interests of the cruise line are thus fundamentally at odds
with the free flow of information.

Where an assault is committed against a passenger by a crew member, courts look
to the contract of passage and apply strict vicarious liability to find the cruise line
legally responsible for the assault committed by its crew member.\textsuperscript{73}
In *New Jersey Steamboat v. Brockett*\(^7\)

the Supreme Court relied in part upon cases involving railroad common carriers to conclude:

The principle is peculiarly applicable as between carriers and passengers; for, as held by the same court in *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 591, a common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.\(^7\)

*Brockett* acknowledged differing standards of care applicable to assaults committed by crew members, whose responsibilities include carrying out the shipowner's contractual obligations under the contract of passage, and assaults committed “by strangers and co-passengers.” to which the Supreme Court articulated a standard of protection “as far as practicable.”\(^7\) However, whether strict liability or reasonable care is the benchmark, cases ultimately turn upon the passenger's access to evidence sufficient to carry the burden of proof.

Information regarding passenger deaths, disappearances and injuries is thus not only bad press, it can also become the basis of legal liability. Where assaults are committed by fellow passengers, for which the cruise line is not strictly liable, such statistics might show a pattern in the locations and times which could be used to prove some constructive notice of a dangerous practice or a dangerous condition, or a failure in shipboard security. The current legal liability regime therefore
discourages dissemination of information and all but ensures that the cruise lines will continue to resist providing accurate reports or engaging in any real self-critical analysis that might later be used against them.

V. The Effect of the Diminution of Legal Liability Down To “Reasonable Care.”

One might ask: How can a modern multi-billion dollar a year industry act so indifferently when horrendous crimes are committed against its fare paying passengers who have entrusted their safety to these common carriers’ care?

Almost 50 years ago, the Supreme Court in *Kermarec v. Compagnie Generale Transatlantique*, ruled that a shipowner owes a duty of “reasonable care” to guests aboard its ship. Mr. Kermarec was not a fare paying passenger and was by no means a “captive” aboard a ship at sea: he was a shore-based visitor who boarded the ship while it was in port in order to visit with one of the ship’s crew members.

The Supreme Court developed a default rule of reasonable care applicable to Mr. Kermarec, who the Court described, variously, as a person “lawfully aboard the vessel who [was] not [a] member of the crew” and as a “visitor,” and as one who was “on board for purposes not inimical to [the shipowner’s] legitimate interests” -- but never as a passenger. Moreover, *Kermarec* never once mentions *Brockett* or *City of Panama* which were both prior Supreme Court cases recognizing the high duty of care owed by an ocean common carrier to its passengers.
Since *Kermarec*, however, the lower federal courts, as well as the state courts, have generally assumed that the rule of law set forth in *Kermarec* extends beyond its rather peculiar facts, such that the *Kermarec* standard of “reasonable care” applies to and circumscribes the duties owed by common carriers to fare paying passengers. These courts have interpreted *Kermarec* to have transformed the ocean common carrier’s historically “high duty of care” to a lesser duty of no more than “reasonable care.”

The rationale, when it has been discussed, has generally been that no higher duty of care need be demanded for risks not “peculiar” to maritime transportation. There seems to have been no genuine consideration of the high level of “dominion and control” over the ship and the voyage – which applies equally to both the “maritime” and “non-maritime” aspects of the ship’s operations.

Prior to *Kermarec* the courts viewed an ocean common carrier’s duty to fare paying passengers to be one of “a very high degree of care” or, stated another way, “the highest degree of care, prudence and foresight.” The origin of this high duty of care is in both the dominion and control that the common carrier exercises over the ship, the crew and the voyage, as well as those obligations undertaken by the common carrier in entering into a contract of carriage.

In a reported decision involving the *GENERAL SLOCUM*, the court in fact stated: “Owners and masters of vessels, who daily have the lives of thousands of helpless
human beings in their keeping, should be held to the strictest accountability and
required to exercise the highest degree of skill and care. In this way alone can human
life be safeguarded and such appalling disasters, as that which befell the General
Slocum, be effectually prevented.”86 In The Oregon the U.S. Ninth Circuit explained
that this high duty of care is owed to ship's passengers because the ocean common
carrier of passengers, unlike the common carrier of cargoes, do not owe the duty of
seaworthiness to the human “cargo.”87 Some courts have in fact remarked upon the
anomaly: “[O]ne might wonder how the admiralty with all of its tender concerns for
life and limb would extend the duty of furnishing a seaworthy vessel to a bale of
cotton but not a passenger.”88

This lack of a duty to furnish a seaworthy ship to passengers also starkly contrasts
the duty owed by a shipowner to the members of a ship's crew, who are owed a
seaworthy ship, which duty creates an exceedingly high duty of care that approaches
strict liability.89 The venerable history underpinning the duty of seaworthiness owed
to crew members is beyond the scope of this article, except to note that the shipowner
's dominion and control over the vessel played a significant role in the development
and the evolution of the warranty of seaworthiness.90

The fact that a shipowner does not owe a duty of seaworthiness to a passenger might
make minimal difference if the common carrier's duty of care remained one of “
utmost care.” But when the facts of a shipboard injury or an assault by a fellow passenger are weighed first through the prism of “reasonable care,” and then through the prism of “utmost care,” it becomes obvious that a serious diminution of legal liability has been effected by a case that utterly fails to consider or appreciate its ramifications.

For instance, in a case authored by noted admiralty jurist Hon. John R. Brown, entitled _Reyes v. Vantage Steamship Co._, the court concluded that the shipowner's practice of serving alcoholic beverages on board the ship to the crew created an unseaworthy condition which was a proximate cause of the crew members' death because he drunkenly jumped overboard and then drowned:

The practice of selling alcohol in such great quantities to the crew should not have been overlooked, or impliedly neglected by the District Court in its findings. Surely had this man not been drunk he would never have gone swimming in the ocean initially.

It is the opinion of this Court that the practice revealed by this record of operating a floating dram shop makes a ship unseaworthy, and if not that, at least clearly negligent. Judge Brown goes on to remark that “it is indeed ironic” for the shipowner to have supplied the liquor and then “complain that Reyes was negligent for being drunk.” The shipowners’ duty of care to an adult crew member in _Reyes_ stands in stark contrast to the case of 15-year old cruise passenger Lynsey O'Brien:
Lynsey was served more than 10 drinks and died on January 4th as a direct result of this liquor. The alcohol affected her so much - she was so intoxicated that it was reported she was vomiting over the balcony and fell overboard. I can’t imagine a worse crime than plying a 15 year old girl with so much liquor she literally died as a direct result. What makes this utterly unbearable is that the cruise ships believe they have no

As with the shipowner in *Reyes*, the cruise line sold and served the liquor to Lynsey O’Brien, but then denied any responsibility for her demise due to her intoxication. In young Ms. O’Brien’s case, the cruise line may have correctly stated the current state of the law – at least insofar as many lower federal courts have viewed it since *Kermarec*. But the question that these contrasting cases pose is this: Should a shipowner owe a higher duty of care in serving alcohol to its crew members than it owes to a minor passenger?

This article does not propose that a duty of seaworthiness should be owed to passengers, nor that a duty of seaworthiness need to be implied in contracts of passage. To the contrary, this article merely proposes that it is time to reconsider the recent watering-down of what was once a “high duty of care” owed to passengers. If
this high duty of care were owed to passengers like Lynsey O'Brien, the result would likely be the same as was reached in the *Reyes* case, although not through the quasi-strict liability doctrine of seaworthiness, but through a simple negligence doctrine.

*Rainey v. Paquet Cruises* provides what was, at the time the decision was penned, a contemporary analysis of the diminution of the ocean common carrier's duty of care, from the “highest degree of skill and care” as was discussed in *The Oregon*, down to one of mere “reasonable care under the circumstances,” in the wake of the Supreme Court's decision in *Kermarec*:

Appellant contends that the district court erred in making this determination in that it did not hold appellee to a higher standard than that of reasonable care . . . We disagree. . . . There is no sound reason to require that a carrier exercise a high degree of care for those trifling dangers which a passenger meets *"in the same way and to the same extent as he meets them daily in his home or in his office or on the street, and from which he easily and completely habitually protects himself . . . In *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959), the Court was called upon to decide whether a shipowner owed a lesser duty of care to a licensee than it did to an invitee. The Court held that "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case. *Id.* at 632, 79 S.Ct. at 410. . . . In the instant case, the district court cited *Kermarec* in support of its holding, and . . . we hold that the *Kermarec* rule of
reasonable care under the circumstances is applicable in passenger cases... In the absence of any proof that appellee had actual or constructive notice of the presence of the stool, a condition in no way peculiar to maritime travel, the district court did not err in dismissing the complaint.96

Rainey thus attempts to rationalize its holding that Kermerac effected a significant change in the duty of care owed to passengers by distinguishing risks it characterized as being “peculiar to maritime travel” from risks incident to activities aboard the ship which it likened to activities ashore, e.g. dining, dancing, and such other “trifling dangers which a passenger meets ‘in the same way and to the same extent as he meets them daily in his home or in his office or on the street, and from which he easily and completely habitually protects himself’”97 Rainey however failed to appreciate the passenger's lack of control over crew member access to their staterooms and failed to recognize that an individual's right to self defense at “his home or in his office” through the constitutional right to keep and bear arms, is non-existent aboard ship due to the dominion and control over shipboard activities exercised by the cruise line.

This attempt to differentiate between “maritime” risks and “trifling dangers” is made necessary because the Supreme Court in Kermerac never mentions the long line of cases holding an ocean carrier to a high duty of care. This is the same high duty of care that these lower federal courts have read Kermerac to have reversed.

Kermerac involved not a fare paying passenger but a visitor, but the lower federal
courts have nonetheless re-engineered its reasoning and have held that *Kermerac*
made a sea-change in the maritime law duty of care as it relates to passengers and
ocean common carriers.

VI. The Role of Regulation: Then and Now.

The advent of steam propulsion in the early 19th Century substantially increased the
numbers of people undertaking waterborne travel as well as some of the risks of
waterborne travel. Steam boilers were placed aboard wooden-hulled vessels,
resulting in the kinds of fires seen in the GENERAL SLOCUM. The Congress
addressed these increased risks with increased regulation:

The thirteenth section of the act of July 7, 1838, (5 Stat. at Large, 306,) provides: 'That in all suits and
actions against proprietors of steamboats for injury arising to persons or property from
the bursting of the boiler of any steamboat, or the collapse of a flue, or other
dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of
steam shall be taken as full *primâ facie* evidence sufficient to charge the defendant, or
those in his employment, with negligence, until he shall show that no negligence has
been committed by him or those in his employment.' This case falls within this section;
and it is therefore incumbent on the claimants to prove that no negligence has been
committed by those in their employment.99

Congress thus adopted a rule of law whereby common carriers were required to prove
their *absence of fault*, when a personal injury was caused by this so-called “dangerous
agency” within the common carriers’ control and with which the common carrier
sought to derive substantial profits.100 The evidence adduced in the *New World* in
fact was that the two steamboats were racing to the next port of call because the first
boat to arrive customarily boarded 25 to 50 additional passengers.101
This burden shifting rule enacted in 1838 was not unlike the law generally applicable in cases of bailment, in which the bailee must both explain the injury or loss and demonstrate a lack of its own negligence. The Supreme Court in *The NEW WORLD* 102 decried the difficulties of fixing degrees of diligence in “the personal safety of passengers” as being “imperfect and confessedly unsuccessful,” and characterized the carrier of passengers as a “bailee” such that the issue of liability must be left “to the jury to determine” under the rule of law which requires the carrier to demonstrate its freedom from negligence.103

*Kermarec* certainly changed all that, if the Supreme Court indeed intended to apply its “reasonable care” rule to ocean common carriers.

**VII. Reasonable Care is Not Enough.**

The threat of civil liability under a standard of reasonable care as it is currently interpreted by the lower federal courts and state courts is not enough. Admiral Dewey’s observations still ring true today: “I think that every passenger . . . takes his life in his hands . . . The greed for corporate money-making is so great that it is with the sincerest regret that I observe that human lives are never taken into consideration.”104

Rivkind’s congressional testimony suggests regulation is the answer:

Of course, there are civil liability laws that may hold a cruise line accountable depending on the circumstances. Although necessary, the threat of
civil liability is not enough. If this remains the sole means to police the security onboard the ships, the cruise lines will continue not to have an incentive to thoroughly investigate a crime onboard its vessel in fear of establishing civil liability on its part.\footnote{105}

Laws mandating that the FBI collect and make public all reports of all shipboard and investigate all crimes which occur aboard a ship that calls at a U.S. port or which involve U.S. citizens would serve the purpose of preserving evidence relating to crimes aboard ship, assuming the regulations were implemented effectively.

Currently, the FBI exercises wide discretion in determining which crimes to investigate and the cumulative testimony introduced during the recent congressional hearings suggests the FBI does not investigate very many cases and chooses to pursue very few. The cruise lines may undertake investigations but do so under the penumbra of evidentiary privileges which protect dissemination of the information they collect.

The current regime of reasonable care encourages cruise lines to hide evidence and leaves the victims of crime without much recourse unless the crime is proven to have been committed by a crew member such that strict liability attaches.\footnote{106}

If the cruise line’s responsibility to its passengers, alternatively, was evaluated under the historically higher pre-\textit{Kermarec} standard of care, the result might be quite different. If a standard requiring “utmost care” were imposed, arguably the cruise lines would be forced to produce evidence of their investigations, and evaluations and
analyses so as to demonstrate a pro-active effort in prevention of crime, rather than merely reporting it to the FBI who in turn appears to consider it a matter primarily to be dealt with by the ship's flag state – usually Panama or the Bahamas.107

The court in Rainey makes no distinction between a passenger, on the one hand, and an individual aboard for the purpose of visiting a crew member such as in Kermarec, except to say these “circumstances” should be taken into account. Proper “account” of these circumstances should perhaps consider that the thousands of passengers placed aboard ship together and assigned their respective cabins have not been screened for criminal records. A convicted child molester might easily be assigned a cabin alongside children. How might the cruise line's duty to passengers be measured in this “circumstance”? The answer differs considerably depending upon the duty of care imposed. Under the pre-Kermarec high duty of care, it might be argued that the cruise lines have an affirmative duty to discern such risks; under the post- Kermarec standard it would likely be sufficient for the cruise line to argue it had no prior notice nor any reason in a particular instance to inquire.108

The ship in the Kermarec case was moored at a dock at the time of the incident, so Mr. Kermarec was unquestionably free to leave the ship without suffering any inconvenience whatsoever, rather than making use of the shipboard stairwell which he later contended was defective and thus “unseaworthy.” The same cannot be said of a
passenger who has paid a non-refundable fare and flown 2000 miles to board a ship in
Miami, only to find out after the ship has sailed that the next door neighbor is too “
friendly,” or that the stateroom is not equipped with a safe to protect valuables, or that
multiple key cards have been issued for the stateroom, or that the cabin steward is
disrespectful of one's privacy.\footnote{109} As the numbers of individuals aboard cruise ships
increase, the courts must be called upon to consider whether cruise lines should
undertake proactive measures to assess the potential criminal risks posed by crew and
passengers alike.

*Kermarec* was decided well after the U.S. Supreme Court's 1890 decision in *The MAX
MORRIS v. Curry*\footnote{110} wherein the concept of comparative fault was introduced into the
substantive maritime law governing personal injuries. Why, then, is not the
straightforward device of comparative fault used to distinguish between so-called “
trifling” dangers against which the passenger is expected to “easily and completely
habitually protect himself” and those dangers “peculiar to maritime travel”?\footnote{111} These
are the concerns routinely expressed by those courts which apply the “reasonable care”
standard to fare-paying passengers. Would it not be more straightforward to simply
permit the finder of fact to determine whether the risk was one which the passenger
should have protected himself?

Where the passenger's own conduct can reduce carrier liability through comparative
fault, should the courts rely upon a convoluted theory of liability that is based upon a vague and imprecise differentiations between risks “peculiar” to maritime travel and risks which have shore-based counterparts? Moreover, is this a question of law, for the court to decide preemptively, rather than a question of fact for the finder of fact to decide?

When a crew member signs an employment contract in Guatemala, is flown by a manning agency to Miami to board the ship, is injured and is without means to return home even if he were to choose to do so – that crew member is owed a duty of care that is breached by a showing that “negligence, however slight” contributed in some way to his injury; it is a substantially relaxed standard of causation. 112

The passenger who has paid for passage, under the post- *Kermarec* caselaw, however is owed no more than a duty of “reasonable care” that typically requires the injured passenger to prove the cruise line's “notice” of a dangerous condition, and requires the passenger to rely upon the cruise line's preservation and production of evidence to do so. 113

If, on the other hand, a standard requiring “the highest degree of care, prudence and foresight” 114 of these common carriers were once again imposed upon common carriers– the burden of producing evidence would arguably be altered so as to require the cruise lines to produce an explanation of the injury-producing incident and would
therefore create an incentive for evidence to be preserved and produced.\textsuperscript{115}

*Kermarec* nominally rejected a distinction based upon status; its holding was that land-based distinctions between “licensees” and “invitees” had no place in the maritime law. But maritime law does routinely draw distinctions based upon status: the crew member who is in contractual privity with the shipowner is owed the duty of seaworthiness under the general maritime law, as well as a statutory duty of care that is breached by any act or omission which rises to the level of “negligence, however slight.”\textsuperscript{116} The duty of seaworthiness is owed to a seaman, but not a visitor.\textsuperscript{117} The concept of an increased duty of care, based upon status, is thus not inimical to maritime law and an increased duty of care based upon one's status as a fare paying passenger is not unreasonable; in fact, prior to *Kermarec* this was the law.

In *Felton v. Greyhound Lines, Inc.*\textsuperscript{118} the Fifth Circuit Court of Appeals, applying Louisiana law governing common carriage, recognized that a stricter standard of care is required of common carriers and when it produces a procedural shift in the burden of proof:

In contrast to the basic duty of reasonable care ordinarily required, however, the duty imposed on common carriers toward passengers in Louisiana is "stringent." Because of this heightened duty to provide safe passage, the Louisiana Supreme Court has created a significant procedural advantage for plaintiffs by shifting the burden of proof to the common carrier defendant once the passenger plaintiff shows an injury.\textsuperscript{119}
This “stringent” duty of care imposed upon common carriers under Louisiana law produces the same kind of burden-shifting device that applied to property claims in the context of bailment and common carriage of goods.\(^{120}\) If the federal maritime law governing ocean common carriers returned to the pre-\(Kermarec\) level of utmost care, arguably a similar burden shifting would result which in turn would require the cruise lines to preserve and produce evidence and demonstrate pro-active measures to prevent and deter the victimization of their passengers.

Most decisions after \(Kermarec\) however impose no more than “reasonable care under the circumstances”\(^{121}\) which translates into a relatively minimal duty of care required of the cruise line where injury from a dangerous condition is alleged, because prior knowledge of the dangerous condition must be proven and the cruise line controls preservation of and access to the evidence.\(^{122}\)

Where intentional torts are committed against passengers by members of the crew, during the contracted-for passage, some courts have held that the crew members actions towards the passenger constitutes not only a tort but also a breach of the contract of carriage – under which the cruise line owes the passenger “absolute” protection from the actions of the ship’s crew.\(^{123}\)

Other courts have rejected the breach of contract “absolute liability” theory articulated in \(Morton v. De Oliveira\) in favor of a vicarious liability theory based upon wilful
conduct of a crew member. 124

In York v. Commodore Cruise Line 125 the court made the anomalous decision that a cruise ship, unlike a hotel, need not provide its guests with a deadbolt locking device so as to preclude entry while the guest is inside the cabin because “security and safety risks on a ship are simply not the same as the security and safety risks in a hotel” 126 but then the court concluded that the cruise line should not be held to a higher degree of care than “reasonable care” since the risk of assault (which occurred within the cabin after entry was made by a pass key) was not “peculiar to maritime travel” because it was no different than shoreside risks encountered by that same hotel guest who is entitled to a deadbolt locking device! 127 York amply demonstrates that attempts to determine which risks are “peculiar to maritime travel” produce absurd results.

Given the cruise lines’ heightened degree of control over the surroundings and the abject lack of any immediate police response other than the limited shipboard security personnel, shipboard crimes committed by crew against passengers unquestionably should visit strict liability upon the carrier without proof of negligence. The passenger is not free to “check out” whenever he pleases and must rely upon the ship and its crew for his safety. Under these circumstances the passenger should be entitled to expect to be free from criminal insult from the ship’s crew and, if it does occur, should be entitled to expect reparations from the cruise line.
In those cases where a passenger commits a crime against another passenger the carrier can be expected to argue that it had no duty to oversee the activities of the passengers, no opportunity to prevent the crime and, finally, no duty to prevent crimes committed by its passengers. 128

The legal analysis where passenger-upon-passenger crime is involved is admittedly different than that which should apply to crew-upon-passenger crime, but nonetheless the passenger should be entitled to expect a cruise line to undertake measures to prevent such incidents. Recent outbreaks of illnesses aboard ships, where cruise lines have intervened to “quarantine” passengers from each other in order to quell the outbreak, amply demonstrate that the cruise carriers do have the literal “police power” to engage in preventative measures where safety is concerned. 129 This “police power” is derived from the inherent power of the Captain to maintain order aboard the ship he commands.

The cruise lines seem more than willing to exercise this power over the persons aboard its ships – both passengers and crew – when it furthers their economic interests – such as, for example, reducing their potential liability for shipboard outbreaks of illnesses. 130 The question therefore becomes, should this power to engage in preventative “police” measures to ensure safety carry with it a corresponding duty to do so?

In The Normannia the court readily recognized that there is a duty to screen passengers
prior to boarding the ship for potential risks of a disease that had broken out at the port of loading. Is it therefore unreasonable to expect carriers to screen passengers for potential risks of serious criminal behavior that pose a risk to fellow passengers? For example, should the cruise line have a duty to know a passenger is a registered sex offender before placing him in a cabin next door to, and with a balcony which adjoins that of, a family with young children?

Recent Congressional testimony given by Carnival Corp., which operates cruise ships under its readily recognizable brand names -- Princess, Holland America, Seabourn, Cunard, Windstar, Costa – in addition to the name Carnival, indicates that most ships are equipped with a brig which may be used to detain a passenger or crew member until the ship arrives at port.

Do these common carriers have the legal duty to maintain order aboard their ships and, if yes, what are the ramifications of this duty in the context of preventing crimes aboard their ships and investigating crimes once they occur?

If there is a legal duty to maintain order aboard ship, how might it be heightened where, for example, a particular passenger demonstrates a proclivity for violence after boarding the ship? The testimony given by some cruise lines to Congress acknowledges their preparedness to “isolate” individuals. What then should be expected from the cruise line that knowingly sells a block of rooms to a group of
passengers who are more likely to be victims of hate crimes? If there is a duty to maintain order, and police the ship, then arguably this duty is heightened if the cruise line solicits passengers more likely to be victims of crime.

Further, a substantial component of crime prevention is crime deterrence, which may be furthered by a variety of measures, including keeping and analyzing records of shipboard crimes:

To deter such misbehavior, a cruise line must do more than write up a "zero tolerance" policy and pay lip-service to it. Criminals aboard cruise ships, like those elsewhere, commit crimes because they perceive a minimal risk of detection and prosecution. Some cruise lines fail to install sufficient surveillance cameras in public areas to identify and deter potential perpetrators. Other carriers fail to hire enough supervisors and security guards to adequately keep tabs on the rest of the crew. Some carriers fail to make it clear to crew members that zero tolerance also applies to crew-passenger contact ashore. Carriers also generally do not warn passengers to be wary of crew member misconduct.

Should the cruise lines’ duty to undertake proactive measures to deter crime, whether committed by either crew or passengers, be measured under a standard of hindsight and “reasonable care,” or should the finder of fact be asked to measure the cruise line's undertaking under a standard of foresight and “the highest degree of care.” Certainly,
crime deterrence would encompass keeping records of where and when certain kinds of crimes occur. Are there particular passageways, for instance, where a passenger’s risk of assault or robbery is increased?

As the size of cruise ships increases, so too does the number of their crew and passengers; with the numbers of individuals aboard ship increasing by thousands, not hundreds, a good argument may be made that it is time to return the ocean common carrier to a regime of civil liability under the pre-*Kermarec* “highest degree of care, prudence and foresight.”

This high duty of care, as it might apply to criminal conduct aboard ship, would require “prudence and foresight” and thereby would require the carrier to demonstrate proactive measures to maintain order and prevent crime. This high duty of care would also not reward the carrier who fails to keep records of criminal incidents aboard its ships. After all, how could a carrier possibly demonstrate that it has exercised “prudence and foresight” if it fails to investigate crimes and analyze records of crimes in order to prevent crimes? Moreover, if a corresponding duty to produce these records (despite the use of cruise line counsel in preparing them) were imposed upon these common carriers—both the evidence as to exactly what occurred and the explanations as to what might have caused the occurrences would be more readily forthcoming.

VIII. Would Congress Reverse “Reasonable Care”? 
If what were needed to redress this problem were congressional action, it would be unlikely. Firstly, the standard of care owed to the modern cruise passenger is not found in a statute that might be amended, but in an interpretation of the general maritime law. Therefore, an entirely new statutory enactment would be needed.

Moreover, the lobbying ability of this multi-billion dollar industry is substantial. The International Council of Cruise Lines, or “ICCL,” is the industry trade association which merged in 2006 with the CLIA. The self-described “mission” of this organization is to “advocate[] industry positions, monitor[] international shipping policy, and help[] to formulate, review and update best industry practices for and among its membership . . .” Testimony given to congress in 2007 by the CLIA describes its mission as “the industry's advocate on a wide variety of issues, including those involving regulatory and legislative matters.” According to congressional testimony given in 2005 by the ICCL, the “leisure cruise” industry contributes over $32 billion a year to the U.S. economy and carries over 11 million passengers annually. Over 9 million of these passengers are from North America. By its own account, the “leisure cruise” industry has grown phenomenally over the past 20 years, averaging a growth rate of 8% per year. This industry, it might be expected, would wield significant opposition to any new statutory enactments which might increase their costs.
of operations.

Even post-9/11 security regulations are not immune from this powerful industry’s lobbying efforts. The ICCL recently asked Congress to reduce the number of inspections and interviews required of crew members from countries designated “high risk” by a post-9/11 registration procedure put in place in October 2002.¹⁴⁴

The ICCL requested that these registration and inspection requirements be waived for their industry’s foreign personnel, asserting that these regulations should be suspended for cruise line crew members because they “create[] a major inconvenience for crew members and the companies that employ them.”¹⁴⁵

The ICCL complained that these security measures affect “the vast majority of crew members” due to their countries of origin.¹⁴⁶ The cruise industry therefore admits to hiring individuals from some of the foreign countries whom our government has concluded pose a risk to national security, but nonetheless has asked the federal government to relax regulations specifically designed to reduce the risk of a breach of security simply because these regulations adversely impact corporate profits.¹⁴⁷

In short, the regulations are inconvenient and costly; the organization which speaks to Congress for the cruise industry therefore has brought its lobbying efforts to bear upon Congress. These efforts would likely be doubled were Congress to consider enacting legislation which affected the carriers’ civil liability to their passengers.¹⁴⁸
It is naive to believe that a new statutory regime of civil liability for the cruise industry could realistically be enacted within this decade. Congress has been “considering” amending the U.S. Carriage of Goods by Sea Act (“COGSA”) – the 1936 liability regime for common carriers of cargoes -- for almost 15 years despite widespread agreement on the need to modernize the statute. Still, no legislation has been forthcoming.

The cruise industry's ability to lobby congress, combined with the predictable opposition to any new statute perceived as regulating the “free market,” calls into serious doubt the likelihood of any new enactments affecting the cruise industry's civil liability any time soon. Meanwhile, millions of Americans continue to cruise aboard these foreign flagged ships.

**IX. The Resolution is Role Reversal.**

Historically, the source of the duty of care owed by an ocean common carrier to its passengers has always been the general maritime law – “a species of judge-made federal common law.” The substantive maritime law was developed in the United States by the federal courts following the Judiciary Act of 1789 and its grant of admiralty jurisdiction to the federal courts.

The early colonial common law courts, like their counterparts in England, attempted to restrain this constitutional grant of the federal courts’ jurisdiction but leading jurists,
including Judges Story, Marshall and Taney, succeeded in broadly interpreting the scope of admiralty jurisdiction and thereby broadening the sphere of maritime law.\textsuperscript{154}

Even before the Constitution, the Articles of Confederation had foreseen the need for federal admiralty courts and in fact granted the power to Congress to create such courts to hear “the trial of piracies and felonies committed on the high seas.”\textsuperscript{155} By the end of the 19\textsuperscript{th} Century, “there had developed a mature system of federal law applicable to maritime matters.”\textsuperscript{156}

Justice Story authored the historic decision in \textit{DeLovio v. Boit}\textsuperscript{157} which analyzed the “true nature and extent of the ancient jurisdiction of the admiralty.”\textsuperscript{158} Story may be considered one of the earliest proponents of uniformity in matters maritime, but he nonetheless recognized the likelihood that it would be “hopeless to expect that any greater uniformity will exist in the future than in the past.”\textsuperscript{159}

A lack of uniformity, despite the federal supremacy in maritime law, was rooted in the First Judiciary Act, because its grant of jurisdiction was not exclusive – the First Judiciary Act specifically provided “[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty and maritime jurisdiction, \textit{saving to suitors in all cases all other remedies to which they are otherwise entitled.”\textsuperscript{160}
Under this regime of non-exclusive jurisdiction, the state courts were empowered to hear admiralty matters. The Supreme Court's role, however, was preeminent because it was authorized to make maritime law, whereas the lower federal courts and the state courts are empowered only to interpret. In fact, in *Fitzgerald v. United States Lines, Co.*, the Supreme Court recognized its preeminent role under Article III of the Constitution in developing substantive maritime law.

Recently, during the latter part of the last century and the early beginnings of the current century, the Supreme Court has shown a deference to Congress and its statutory enactments (or lack thereof) which is at times so “deferential” that one who studies such precedents is lead to question whether the current Court views its role in the tripartite scheme of government as being truly equal to the other two branches. Commentators have decried the High Court's apparent abdication of its preeminent role in making the general maritime law:

Unfortunately, though, this deference to statute has become exaggerated in the present Supreme Court, and combined with this Court's view of the role of the states in a federal scheme, has provided the Court with a facade for its abdication of its constitutional responsibility to act as an independent source and administrator of a uniform body of maritime law.

The modern Court views its role as a much narrower one than Justice Story or Justice Taney could have envisioned, particularly in the context of maritime law, which has
historically been, and by its very nature is, judge-made law.

If this article were to propose an entirely new standard of care for cruise lines, the matter would best be addressed to Congress and unquestionably would require new legislation. This is particularly true now, given the current High Court's view of statutory deference and statutory construction. Here, however, there is no need for the High Court to make new law, but merely the need for the lower courts to recognize prior and un-reversed Supreme Court precedent. Those Supreme Court cases which imposed a high duty of care upon ocean common carriers have not been reversed by *Kermarec* – indeed the *Kermarec* case does not even mention common carriage, passage contracts, or the duties owed to passengers.

Thus, while many scholars find they must argue that new circumstances compel new laws, this article proposes a role reversal of sorts, because neither the Supreme Court nor Congress need act to redress an absence of cruise line legal liability for shipboard crimes. This article proposes that it is simply high time old law be reconsidered and reinstated. The corollary to the high level dominion and control that cruise lines exert over shipboard activities must be a correspondingly high duty of care. Where shipboard crimes occur, this high duty of care would operate to remove the current disincentive to keep and analyze records of criminal occurrences. In its place would loom a likelihood of civil redress for shipboard crimes, if proactive measures to prevent crime cannot be demonstrated by the cruise line.
Conclusion

There are strong public policy reasons which favor a return to the pre-
Kermarec standard of utmost care, without the preemptive parsing of “maritime” and “non-
maritime” risks that the lower federal courts have devised in order to implement
Kermarec beyond its intended scope.

A substantial number of serious crimes are committed aboard cruise ships and the
public is ignorantly unsuspecting. Some of these incidents are of the highest criminal
order and have resulted in loss of life.

An even higher crime is that the cruise industry has not redressed this problem. The
highest crime of all is that our courts are nothing more than co-conspirators if
Kermarec continues to be the benchmark pursuant to which we judge these common
carriers.

Given the increasing numbers of Americans traveling from U.S. ports aboard foreign
cruise ships, there is a real need for scrutiny of this industry. The industry cannot be
expected to police itself. Yet, the modern traveler looks much like those passengers
boarding the TITANIC – in awe of the ship's opulence and size, and unsuspecting of
the perils that await them.

There is a compelling argument that Kermarec has been misinterpreted for the past
half century. Perhaps the reason it has taken a half century to reconsider Kermarec is,
shortly after the case was decided, the numbers of Americans traveling by ocean
common carrier decreased dramatically. The age of the transatlantic ocean liner was replaced by the age of air travel.

Now, however, the resurgence of ocean travel and the growing size of the ships that accommodate ocean travel require that *Kermarec* be reconsidered and the dubious rule of “reasonable care” be reversed. The pre-*Kermarec* rule requiring “utmost care” to be exercised by ocean common carriers should be re-instated..

1 References to the catastrophe are still common in congressional debate, for example. See, e.g., 151 Cong. Rec. § 1979-01 (daily ed. March 3, 2005) (“One might say that as soon as he saw the tip of the iceberg, the captain of the Titanic sneaked out on deck, jumped in a lifeboat, went overboard . . . and left everybody else behind.”) (debating the Bankruptcy Abuse Prevention Consumer Protection Act of 2005); 150 Cong. Rec. §157-01 (“American workers are sinking on the TITANIC and this administration can only promise workers to send back the lifeboats once the first class passengers have been taken to safety”) (debating the Pension Funding Equity Act of 2003); 148 Cong. Rec. H2436-01 (“Yesterday in the Rose Garden the President signed a bill that, as I mentioned earlier, is called Enhanced Border Security, and it is adding a couple of more lifeboats to the TITANIC.”) (Debating “Immigration Reform.”) References are also made in reported cases. See, e.g., *Fairport International Exploration v. THE CAPT. LAWRENCE*, 245 F.3d 857, 864 n. 3 (6th Cir. 2001) (“Fairport is arguing that since the Captain Lawrence, a more substantial craft sank . . . a cheaper craft could not have been used . . . This argument is specious. Although the TITANIC was sunk by an iceberg, lifeboats were still able to navigate the icy waters of the North Atlantic to save its passengers.”) *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 926, 941 n. 28 (“Certainly, the White Star Line would have happily painted “Carnival Cruise Lines” all over the TITANIC had it known the ship’s rudder was too small, there were too few life boats, and the captain was going to speed in the dark of night through the Atlantic Shipping Lane which, at the time, was an impassable slalom course of icebergs.”)

of May 1, 1851, was a nineteenth century glimpse of Eden. The Golden Age of Victorianism had arrived.

The Second Industrial Revolution was born, and English-speaking nations achieved intellectual and social domination of the world. By the end of the century, the Golden Age, had become, in Mark Twain's famous epithet, the "Gilded Age." Wade's book was recently cited by the U.S. Supreme Court in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 904 n. 19, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000).

3 *Id.* at 33-38, 70-71 ("It was almost as if the catastrophe was prophecy fulfilled – an inevitable toppling of Titans by an outraged Divine Power.") Coincidentally, the TITANIC catastrophe had been prophesized, not once but three times: "It was revealed that Mayn Clew Garnett . . . had written a story remarkably foreshadowing the wreck of the Titanic. Garnett's story, "The White Ghost of Disaster" had been run off the presses at the time the Titanic was preparing for her maiden voyage . . . Garnett's tale concerned a giant 800-foot liner which struck an iceberg and foundered, losing half the people aboard because of an insufficient number of lifeboats. (Rumor intimated that the author had dreamed the story while returning home from Europe aboard the Olympic.) People then discovered another piece of fiction . . . even more uncanny than Garnett's premonition. Morgan Robertson's 1898 novel, *Futility*, also featured an 800-foot liner named, of all things, the *Titanic*. Finally, Celia Thaxfer's 1887 book of poetry was uncovered; her poem 'A Tryst' told the same story." *Id.*


5 *Van Shaick v. U.S.*, 159 F. 847, 851 (2nd Cir. 1908)("Human skill and care could have prevented or mitigated the disaster.").

6 *Id.* at 850-52 ("Counsel unites in describing the Slocum as 'a tinder box.' These facts are mentioned for the purpose of showing the high degree of care necessary to guard from danger the hundreds of helpless women and children who were constantly being carried by her. One who has charge of an ancient wooden building must be held to a higher degree of vigilance in guarding against fire than if the building were built of steel, concrete and stone.") GENERAL SLOCUM's Captain was criminally prosecuted for violations of 46 U.S.C.A. Sec. 464 and 475, for the failure to maintain the fire pumps and life preservers in serviceable condition, and was ultimately found guilty without any showing of criminal intent:

The offense of which the defendant has been convicted is statutory in character. Under the statute it was necessary for the United States to prove three propositions: First, that the defendant was captain of the Slocum. Second: that he was guilty of misconduct, negligence or inattention to his duties on the Slocum. Third: that by reason of such misconduct, negligence or inattention human life was destroyed. Intent is not an element of the offense . . . .

*Id.* at 850.
related that on Sunday the fourteenth, three additional boilers had been lit for the first time . . . 

brief lifetime. Nonetheless, [T]he first-class passenger list resembled the audience at a gala theatre premiere." Id. at 47

See generally Wade supra at note 2.

Id. at 12.

Id. at pp. 11-12.

Id. at p. 182.

Id. at 386 (TITANIC's surviving Fireman, Frederick Barnett, whose testimony was taken aboard OLYMPIC, “related that on Sunday the fourteenth, three additional boilers had been lit for the first time . . . Titanic had not realized her maximum speed as she entered the ice region, she had nevertheless steamed faster before than in her brief lifetime.

Id. at 187. See also 288 (“There had been another drill scheduled for the very day of the collision but it had never taken place.”) Further, TITANIC's shipbuilder Harland & Wolff had tested the lowering capacity of the lifeboats and certified them capable of safely holding 65 people upon lowering, but this information had not been imparted to the officers or crew, which resulted in the boats not having been filled to capacity – in some cases with less than half their capacity. Id.

See generally id. at pp 392-406. The ship complied with the British Board of Trade's lifeboat requirements, which were based upon her tonnage, but these regulations had not kept pace with the “rapidly increasing size of ocean liners” and her lifeboat capacity, had the boats been filled to capacity, would nevertheless have been short by more than 1,000 of the souls she carried aboard. Id. at 68. Initially, the ship's Chief Designer Alexander Carlisle had proposed equipping her with 50 lifeboats, instead of the 20 she was ultimately fitted with; after the tragedy, he remarked: “[u]ntil the Board of Trade and the governments of other countries require sufficient boats . . . shipowners cannot afford such extra top weight.” Id. at 68-69.

Two years after the sinking, the Safety of Life at Sea Convention (“SOLAS”) was adopted and subsequently ratified by the United States although the intervention of World War I delayed its implementation until 1929. See “The Titanic’s Legacy: The History and Legal Developments Following the World’s Most Famous Maritime Disaster,” 12 U.S.F. Mar. L.Jour. 45 (2000) at pp. 66-67. See also International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278, and Protocol of 1978 Relating to the International Convention for the Safety of Life at Sea, Feb. 17, 1978, 32 U.S.T. 5577, T.I.A.S. No. 10009. SOLAS prescribes a sufficient number of lifeboats for all aboard and requires that all vessels transporting more than 50 passengers be equipped with a wireless which is manned 24 hours a day and possesses a range of at least 100 miles. Id.

Admiral Dewey, quoted in the Washington Post, observed “I think that every passenger . . . takes his life in his hands . . . The greed for corporate money-making is so great that . . . human lives are never taken into consideration.” Id. at pp. 66-67. Another example of corporate self-interest at the expense of safety occurred in the operation of the “Marconi” telegraph aboard TITANIC, when the Marconi employee brushed off warnings from the German liner FRANKFURT, which was equipped with a telegraph supplied by Marconi's German competitor, Telefunken, with the remark: “You fool. Stand by and keep out.” Id. at 205 (“Marconi and Telefunken . . . had long been waging a commercial war that had eagerly been acted out by their young wireless operators.”)

Id. at 197, 286-87. See also id. at 394 (“Officers and crew were strangers to one another . . . neither was familiar with the vessel or its implements or tools . . . [resulting in] needless . . . sacrifice”) This unfamiliarity with the ship may also have caused the collision itself. According to testimony given to the Senate investigative committee First Officer Murdoch’s first order upon sighting the iceberg was “hard astarboard” and “full astern” – which was directly contrary to then-current tutorials on seamanship: “The first impulse of many officers in such a situation is to turn away from the danger, and at the same time to reverse the engines with full power . . . . It may be right for [the ship] to turn away . . . but if she does this . . . she should if possible, increase her speed . . . To turn away and slow is the surest possible way of bringing about collision.” Id. at 252-53 (quoting Knight’s Modern Seamanship) (italics in original)
Brett Rivkind, testifying before the Congressional Committee on House Relations' Subcommittee on National Security, Emerging Threats and International Relations in March 2006 put the figures in perspective: “With cruise ships now holding in excess of 2000 passengers, and crews of 800 to 1,000, and with new ships being built that will hold in excess of 5,000 passengers, the trend is there will be a significant increase in these numbers. My observation over the past twenty-three (23) years practicing maritime law has been that with this tremendous growth in the cruise ship industry, there has been increasing numbers of criminal activity aboard cruise ships, and an increasing need to address issues, such as security aboard cruise ships." Cruise Ship Security, House Committee on House Government Reform, Subcommittee on National Security, Emerging Threats, and International Relations (March 2006)(statement of Brett Rivkind). See also Mary Lu Abbott, "All Aboard, and They Mean All," L.A. Times L-2, December 3, 2006 ("The next three years will bring a bigger crop of new ships . . . [e]ight are due in 2007 and nine in 2008 and 2009 . . . [a]nd 2010 promises to bring 31 new ships . . .") The size of the ships are increasing with their numbers, with Norwegian Cruise Lines scheduled to launch three 4200 passenger ships beginning in 2009.

Congressional Quarterly, International Maritime Security, restating the proceedings of the House Committee on House Government Reform, Subcommittee on National Security, Emerging Threats, and International Relations (December 2005)(Opening Statement of Rep. Christopher Shays). See also, Kitty Bean Yancy, “Cruise Safety in Spotlight" USA Today, Dec. 15, 2005 available at www.usatoday.com/travel/news/2005-12-15-cruise-safety_x.htm ("Thirteen cruisers are presumed to have gone overboard in the past two years, according to the International Council of Cruise Lines. Nearly 11 million people took cruises in 2004 — 8.3 million of them Americans, the council says. According to the FBI, about 50 U.S. cruisers are crime victims or disappear each year. Half the reported incidents involve sexual assaults; 20% are assaults; and 10% involve a missing person. Shays said in an interview Thursday that cruise lines aren't forthcoming about reporting bad things that happen to passengers. “Statistics are only provided on a voluntary basis,” he said.

Mary Lu Abbott, “All Aboard, and They Mean All," L.A. Times L-2, December 3, 2006 ("The next three years will bring a bigger crop of new ships . . . Eight are due in 2007 and nine in 2008 and 2009, and 2010 promises to bring 31 new ships . . . The super-sizing trend continues: Norwegian Cruise Line is taking a quantum leap, building three 4,200 passenger, 150,000 ton ships with the first due in 2009.")

Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, March 27, 2007 (testimony of FBI Deputy Assistant Director Salvador Hernandez). 2007 WLNR 5853236.

U.S. v. Royal Caribbean Cruises Ltd., 24 F. Supp. 2d 155 (D.P.R. 1997)(Cruise line and crew charged with 11 crimes, including the failure to report an oil discharge in U.S. territorial waters, falsifying documents, making false statements to the U.S. Coast Guard and obstruction of justice); U.S. v. Royal Caribbean Cruises Ltd., 11 F. Supp. 2d 1358 (S.D. Fla. 1998) (Cruise line charged with falsifying records regarding an oil discharge on the high seas. Notably, Royal Caribbean argued the Coast Guard had no jurisdiction over the oil spill because it occurred on the high seas and, therefor, could not be charged with violating the False Statements Act by failing to record the discharge in the ship's Oil Record Book.)

John Christofferson, “Missing Honeymooner's Family Sues Royal Caribbean For Alleged Cover-Up that Hindered Investigation," ABC News, June 29, 2006 available at abcnews.go.com/US/LegalCenter/wireStory?id=2136880 ("The case of Smith's disappearance prompted congressional hearings and new legislation to tighten requirements for reporting when passengers disappear.") See also, “Family Of Missing Man Accuses Cruise Line Of Cover-Up" available at www.nbc6.net/news/5503358/detail.html ("The family said noise was reported coming from Smith's cabin and that security was called but did nothing. Blood was later found in two places. The family believes the cruise line intentionally slowed the investigation and even painted over bloodstains before investigators could take DNA . . . ‘They believe their son was murdered aboard the "Brilliance of the Seas" and that Royal Caribbean has deliberately attempted to cover up what happened to George, and to portray this to the media and the public as some sort of unfortunate accident,' maritime lawyer Brett Rivkind said. Immediately after the family's news conference, officials at Royal Caribbean headquarters in Miami denied the allegations and insisted that they were cooperating fully with the investigation. Now, members of the cruise line industry are about to come before a Congressional hearing early next week as a direct result of this case, one of many alleged violent crimes in an industry that sells
an image of fantasy and fun.

27 Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation March 28, 2007, WLNR 5853250, (Testimony of John Hickey).

28 Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation March 27, 2007, WLNR 5855992, (Testimony of Terry Dale).

29 Id.

30 Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, September 19, 2007 (Testimony of Kendall Carver) 2007 WLNR 18362106.

31 Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, March 28, 2007 (Testimony of Prof. Ross Klein) 2007 WLNR 5855875.

32 Committee on House Government Reform Subcommittee on National Security, Emerging Threats and International Relations, March 7, 2006 (Testimony of Brett Rivkind) 2006 WLNR 3904432 (“The President of Royal Caribbean Cruise Lines stated on national television that the cruise line industry is a unique industry. He said it is the only industry not required to report a crime. I believe the legal position recently taken by this company, in defense of the lawsuit filed by Kendall Carver involving the disappearance of his daughter, Merriam Carver, illustrates loudly the big problem we are faced with regarding the cruise line industry . . . . In a Memorandum of Law filed in court by the cruise line in response to Kendall Carver’s claim that the cruise line did not properly investigate the disappearance of his daughter, and intentionally withheld information from him, the cruise line said it has “no duty to investigate”, and no duty to provide information to any third party. The Memorandum of Law is attached. This demonstrates the industry currently is not accountable to anyone, at least that is the position they currently stated in legal proceedings involving Mr. Carver.”) See also Christopher Elliot, “Mystery at Sea: Who Polices the Ships?” N.Y. Times, February 26, 2006 also available at the New York Times website at travel2nytimes.com/2006/02/26/travel/26crime (“The major cruise lines don't release comprehensive crime statistics. But it is safe to say that there are many offenses — burglaries, thefts and assaults — that don't necessarily make for good talk-show fodder. It is these wrongdoings, which often go unreported to law enforcement officials, that raise two questions: How safe are you on a cruise ship? And what happens if you're the victim of an onboard crime? "Anything can happen on a ship," said Thomas A. Dickerson, the author of "Travel Law" (Law Journal Press, 2006).”

33 Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, March 27, 2007 (Testimony of Lawrence Kaye, Counsel to the CLIA and a member of its Board of Directors) (“I]In 1996 the Coast Guard adopted Title 33 of the Code of Federal Regulations, Part 120, entitled Security of Passenger Vessels (SPV Reporting Regulations), which established terrorism and crime reporting requirements covering every actual or suspected unlawful act against any passenger on cruise ships traveling to or from the U.S. These Regulations were amended and confirmed in 1998, 2003, and as recently as July 2006. Section 120.110 defines unlawful act to include any felony under U.S. federal law, under the laws of the States where the vessel is located, or under the laws of the country in which the vessel is registered.”)

34 Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation March 27, 2007, (Testimony of Wayne Justice, Assistant Commandant, U.S. Coast Guard)

35 Id.

36 Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation March 27, 2007 (testimony of FBI Deputy Assistant Director Salvador Hernandez). 2007 WLNR 5853236


38 Cruise Ship Security supra note 22 (“A business built on the premise of pleasure-filled conveyance has little incentive to inform third parties when the trip goes wrong.”) Testimony from John Hickey given on March 27, 2007 shows that Royal Caribbean has reported very different numbers for a similar period of time: “When reporting to the Congressional subcommittee organized by Congressman Shays, Royal Caribbean provided a list of sexual assaults or batteries onboard its ships for 2003 through 2005. A copy of the list is attached hereto as Exhibit 5. The
number was 66. However, in sworn answers to interrogatories recently filed in Miami, Florida, Royal Caribbean said for a 3 year period they had an incidence of sexual assault or battery for only 17. A copy of the sworn interrogatory answers is attached hereto as Exhibit 6.” Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation March 28, 2007, WLNR 5853250, (Testimony of John Hickey).

Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation March 28, 2007, WLNR 5853250, (Testimony of Ken Carver). (“As a victim, I have personally felt the pain, not only of losing our daughter, Merrian Carver, but also having to struggle with the cover-up by a major cruise line of the facts concerning her disappearance. She had been a passenger on a Celebrity Cruise Ship, which is owned by Royal Caribbean.”); Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation March 28, 2007 52007 WLNR 855728 (Testimony of Lorie Dishman) (“I retained a maritime lawyer who wrote many letters to the cruise line starting in the third week of March 2006. He requested my medical records, information regarding the crew member, and information about whether the crew member had any type of sexually transmitted diseases or HIV/AIDS. He also requested that the cruise line keep all tapes from all ship security cameras. The cruise line provided no information, even though multiple letters were sent to the President of the cruise line, Adam Goldstein, and to risk management. I later read a transcript of the hearing on cruise ship safety in mid March 2006 where Royal Caribbean promised under oath to Congressman Christopher Shays that they would cooperate with victims and provide information. Did they forget about my crime a few weeks earlier?” See also Cruise Ship Security supra note 22 (statement of Rep. Christopher Shays) (“For those waiting back on shore, any effort to determine what has happened to a friend or relative can also face daunting legal and corporate hurdles . . . Time, distance and legal uncertainties work to keep worried survivors at arms length. Some portray it as a stiff arm at that, extended in the interest of denying, delaying or discounting information about the inherent risks of sea travel.”)

In McAllister v. Royal Caribbean Cruises Ltd., 2004 WL 2188106 (E.D.Pa. 2004) and McAllister v. Royal Caribbean Cruises Ltd., 2005 WL 1490979 two motions to compel information regarding shipboard crimes, speeches or presentations made by company representatives regarding shipboard crimes, and even information regarding its investigation of the specific incident at issue, were filed before Royal Caribbean produced it.

See e.g., Elliot, “Mystery at Sea,” supra, quoting a cruise industry spokesman: “J. Michael Crye, the president of the International Council of Cruise Lines, a trade association for the cruise industry, says a cruise is as safe as your average community in the United States and, I would think, safer than staying at a motel.” Following the ICCL’s merger with CLIA, testimony was submitted by the industry association from Dr. James Allen Fox in March 2006 which appeared to support these assertions that cruise ships are “statistically safe.” Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, March 28, 2007 (Testimony of Prof. Ross Klein) 2007 WLNR 5855875.

Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, March 28, 2007 (Testimony of Prof. Ross Klein) 2007 WLNR 5855875.


Cruise Ship Security supra note 24 (statement of Brett Rivkind) (“Most of the time the attorneys for the cruise lines will board the vessel prior to the authorities, and start investigating and taking statements before the authorities do.”) Rivkind goes on to describe prelitigation tactics that include the use of work product and attorney client privilege to prevent disclosure of information relevant to the criminal investigation. See also McAllister ex rel McAllister v. Royal Caribbean Cruises Ltd., 2004 WL 2188106 (E.D. Pa. 2004) wherein Royal Caribbean Cruises refused to produce testimony and documentation concerning its awareness of shipboard crimes against passengers, refused to produce statistics on complaints of sexual assaults and refused to produce information concerning its self-proclaimed “sexual awareness task force.” The unreported decision relates to a discovery motion and much of this information was ordered to be produced.

The term “police” here signifies not only the effort to maintain order but also the effort to investigate crimes which do occur and to preserve evidence for eventual criminal prosecutions.

There is no question that these carriers are “common” carriers. The Shipping Act defines the term “common carrier” by water in interstate commerce” as “a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port . . . “ 46 U.S.C.A. Section 801.
The term “common carrier” is not otherwise defined in that particular section of the U.S. Code, but a definition can be found elsewhere: “The term "common carrier" means--(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . .” 46 U.S.C.A. Section 40102 (6).

47 The NEW WORLD, 57 U.S. 469, 476 (1853) citing 5 Stat. 306, which applied to “all suits and actions against proprietors of steamboats for injury . . . from the bursting of boilers . . . the collapse of a flue . . . or other dangerous escape of steam . . .”

48 Francis J. OBrien, The History of Product’s Liability, 62 Tul.L.Review 313, 314 (1988)(“The development of products liability law demonstrates the social and economic changes that have swept through this country in this century as a result of the industrial revolution.”)(presented at the Admiralty Law Symposium on Products Liability in Admiralty)

49 James A. Henderson and Aaron D. Twerski, Closing the American Products Liability Frontier: Rejection of Liability Without Defect, 66 N.Y. U. Law Review 1263, 1269 (1991)(discussing the "prodefendant biases during the industrial revolution" and the evolution towards strict products liability: “The law of products liability was markedly antiplaintiff during this early period, epitomized by the privity rule which effectively barred plaintiffs from recovering against negligent manufacturers. Indeed, so prodefendant were the rules relating to liability that a prominent legal historian observed that products liability hardly existed prior to 1900.”)(citations omitted).

50 Id. citing inter alia Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1100-02 (1960) (discussing the erosion of the privity requirement).


52 Wade supra note 2 at 147-160.

53 Wade supra note 2 at 154. This contrasts markedly with current federal government attitudes towards its authority over modern cruise lines. The Federal Maritime Commission, the agency responsible for enforcing shipping regulations, takes the position that it has “very limited jurisdiction” over these foreign flagged cruise lines. Under a page entitled “DISPUTES INVOLVING A CRUISE LINE” the FMC website states:

Note: The Federal Maritime Commission has very limited jurisdiction over cruise lines. Where a cruise line fails to provide a scheduled cruise for which it has collected passenger deposits, the FMC requires cruise lines to have a bond or other financial surety from which passenger deposits may be refunded. Those financial instruments are issued by companies specializing in such instruments. The FMC does not make refunds.

Although the Commission does not have jurisdiction over such matters as cruise satisfaction, billing issues, itinerary changes, and other disputes arising between cruise operators and their customers, CADRS will often refer such complaints to the cruise lines for their consideration. In some instances, we have been able to assist in reaching voluntary resolutions of problems . . .

See www.fmc.gov.

54 Wade supra note 2 at 413-15.

55 Id. at 416-17 quoting The London Morning Post. TITANIC’s designer however admitted that the industry could not be trusted to regulate itself where concerns for safety and the need for profits collide, remarking that “[u]ntil the Board of Trade and the governments of other countries require sufficient boats . . . shipowners cannot afford such extra top weight.”

Id. at 68-69.


57 Cruise Ship Security, House Committee on House Government Reform, Subcommittee on National Security, Emerging Threats, and International Relations (March 2006)(statement of Kendall Carver)(“Officials of the cruise line
both provided inaccurate and misleading information and kept our investigators from questioning members of the ship's crew.-- Cruise line officials also withheld information that would have been helpful, including some information we had requested by subpoenas issued on December 2, 2004 and January 24, 2005")


59Id.

60See Wade supra note 2 at 68-69.

61Wade supra note 2 at 416-17 quoting The London Morning Post.

62, e.g., 46 U.S.C. App. 1702(6)"common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that (A) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and (B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . .") See also 46 U.S.C.A. 40102(6). Indeed, it has been recognized that "o[]pulent cruise ships have been a part of the world's maritime tradition at least since the launching of Cleopatra's barge," Friedman v. Cunard Lines, 996 F. Supp. 303, 307 (S.D.N.Y. 1998).

63Id. (Statement of Bill Wright, Senior Vice President, RCCL ("While we deeply regret that our guests had the experiences they shared with the Subcommittee, these incidents represent an incredibly small fraction of our guests and absolutely do not represent, in any way, the experiences of 99.9 percent of our guests."))

64Love Boats supra note 30 ("Cruise lines argue that, for purposes of liability, they should be treated like a convenience store or a corner bar on land. However, these land-based establishments do not enter contracts of carriage for hire with passengers . . .")

65Briggs v. Washington Metropolitan Area Transit Authority, 481 F.3d 829, 844 (D.C. Cir. 2007)(noting that a passenger to whom a "special duty of care" is owed is "a person who has placed himself in some substantial sense in the custody or control of the carrier.")

66The City of Panama, 101 U.S. 453, 11 Otto 453, 25 L.Ed. 1061 (1879)("Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise . . .the owners of the vessel carrying passengers are not insurers of the lives of their passengers, nor even of their safety, in most other respects the obligations assumed are equally comprehensive and even more stringent . . .Passengers must take the risk incident to the mode of travel which they select, but those risks in the legal sense are only such as the utmost care, skill, and caution of the carrier, in the preparation and management of the means of conveyance, are unable to aver . . .When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence, the true requirement being that the personal safety of the passengers shall not be left to the sport of chance or the negligence of careless agents . . .")

67See, e.g., Jones v. Washington Metropolitan Area Transit Authority, 378 F.Supp.2d 718, 724 (E.D. Va. 2005)("Only where the risks involved and the carrier's control over the person are essentially the same as those that exist during carriage should the highest degree of practical care be imposed on a carrier. In other circumstances, a duty of ordinary care is appropriate."); Stagl v. Delta Airlines, 52 F.3d 463 (2nd 1995), contrasting an airline's duty of care for its passengers in its baggage terminal where it exercises "full dominion and control" to "common area[s]" within the airport, Stagl involved a tort committed by a fellow passenger, but the Second Circuit found the "common carrier/passenger relationship among [those] 'special circumstances in which there is sufficient authority and ability to control conduct of third persons that [courts] have identified a duty to do so . . .'. Id. at 468. The Stagl court further explained that "[t]his duty may obviously be implied from the contract of carriage and stems from the control of the carrier.") Id. (citations omitted).

68City of Panama, 101 U.S. 453, 11 Otto 453, 25 L.Ed. 1061. See also The Oregon, 133 F. 609, 618 (9th Cir. 1904); New Jersey Steam Boat Co. v. Brockett, 121 U.S. 637, 646, 7 S.Ct. 1039, 30 L.Ed. 1049 (1887)("a common carrier is bound, as far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.")

69See generally Committee on House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation March 28, 2007, WLNR 5856802, (Testimony of Gary Bald vice President for Global Security for Royal Caribbean)(describing various security procedures for embarkation/dismarkation and security measures taken on board
A passenger must rely upon the cruise lines' shipboard security. These security officers are likely to be most concerned with protecting their employer. Furthermore, Congressional testimony suggests shipboard security officers' numbers are far too little:

My experience is there is a security department onboard the vessel, which may be typically manned by a staff of eight (8) to maybe twelve (12) crewmembers, designated as security. There is usually a Chief of Security, and an Assistant Chief of Security among the eight (8) or twelve (12) crew deemed "security". Therefore, the actual number of active security patrols aboard the ship would be less. In addition, the security personnel maintain rotating shifts, which would leave even a lesser number of security actually patrolling the ship at a given time. It is important to know that the cruise ships are as high as thirteen (13) to fourteen (14) decks, with over 2000 passengers and 800-1000 crewmembers. The current system leaves only a few security personnel patrolling a thirteen deck cruise ship.

Cruise Ship Security, House Committee on House Government Reform, Subcommittee on National Security, Emerging Threats, and International Relations (March 2006)(statement of Brett Rivkind) Mr. Rivkind also questions their level of training.

See Id. (Statement of Ron Gorsline). Mr Gorsline is principal of a company who works with the cruise industry. He testified that the standard complement of security personnel in the industry is 5 to 7 security personnel for every 1000 passengers. Mr. Gorsline also testified that these security personnel are responsible for a number of shipboard operations other than policing the thousands of passengers and the hundreds of crewmembers aboard the ship.

Cruise Ship Security, House Committee on House Government Reform, Subcommittee on National Security, Emerging Threats, and International Relations (March 2006)(statement of Brett Rivkind) Rep. Shays, who has presided over the hearings, suggests a higher duty of care is needed:

Unlike shore-bound contracts for accommodation, the pact between cruise lines and their passengers should be read to include a duty to preserve evidence and provide information about the fate of those, however few, who have come to harm in isolated, unforgiving ocean environs." Id. (Opening statement of Rep. Christopher Shays)

See New Jersey Steamboat v. Brockett, 121 U.S. 637,645, 7 S.Ct. 1039, 1041 (1887)(noting that "the contract for safe transportation" entitled the passenger to "protection against the misconduct or negligence of the carrier's servants.") See also Doe v. Celebrity Cruises Inc.,394 F.3d 891, 2005 A.M.C. 214 (11th Cir. 2004)

The degree of care considered "reasonable" in any particular circumstance depends upon "The extent to which the circumstances surrounding maritime travel are different from those encountered in daily life." Id. Where an allegedly defective condition constituting the basis of a plaintiff's complaint is not unique to the maritime context, we have ruled that the ship's owner or operator could be held liable "only when it has actual or constructive notice of the risk-creating condition." See Rainey v. Paquet Cruises, Inc., 709 F.2d 169, 172 (2d Cir.1983); Gibboney v. Wright, 517 F.2d 1054, 1059 (5th Cir.1975); Urian v. Milstead, 473 F.2d 948, 951 (8th Cir.1973); Tullis v. Fidelity and Casualty Co., 397 F.2d 22, 23-24 (5th Cir.1968).
In the author's view, all operations of a ship are maritime, whether it be serving a meal, cleaning a hot tub, or navigating the vessel. A hotel guest can choose to walk down the street to a restaurant not associated with the hotel; a ship's passenger cannot. The "maritime"/"non-maritime" distinction is really a device to deal with pre- _Kermarec_ precedent which imposes a high duty of care upon the ship operator as a corollary to its dominion and control over shipboard operations. This article suggests it is time to consider discarding that device and returning to a level of care that is appropriate to the level of dominion and control that cruise lines exercise over all shipboard activities.

`Rainey`, 709 F.2d at 172 citing _Moore v. American Scantic Line, Inc._, 121 F.2d 767, 768 (2d Cir. 1941).

`The Oregon`, 133 F. 609, 618 (9th Cir. 1904) (“In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of the beginning of her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is or shall be in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or his negligence.”) . . . _The carrier of passengers, either by land or sea, does not assume this responsibility . . . But, instead of this warranty, he is held to a very high degree of care, prudence, and foresight_. When a carrier undertakes to convey persons by the powerful, but dangerous, agency of steam, public policy and safety require that he should be held to the greatest possible care and diligence.”)(emphasis added)(quoting _Edwin I. Morrison_, 153 U.S. 199, 210, 14 Sup.Ct. 823, 825, 38 L.Ed. 688 (1894))(citations omitted)

Van _Schaik_, 159 F. at 855. _Van Schaik_ was a case involving the criminal prosecution of the GENERAL SLOCUM’s Captain for violating specific statutes directed at maintaining firefighting equipment and preparedness. However, this statement characterizing the duty of care restates the civil duty of care then prevailing.

`The Oregon`, 133 F. at 618.

`Gibboney v. Wright`, 517 F.2d 1054, 1059 (5th Cir. 1975).

`Everett v. Carnival Cruise Lines`, 912 F.2d 1355, 1358 n. 3 (11th Cir 1990)(comparing the lesser duty of care owed to a passenger to the “higher duty” of care owed to a crew member through the doctrine of seaworthiness).

See, e.g., _In Re Marine Sulphur Queen_, 408 F.2d 89, 1972 A.M.C. 1122 (2d Cir. 1972), explaining that a shipbuilder cannot be held liable under a warranty of seaworthiness because the shipbuilder relinquishes control over the vessel to the ship owner.

558 F. 2d 238, 1979 AMC 1450 (5th Cir. 1977)

Id. at 244. Judge Brown concludes the seaman’s intoxication is no defense for the shipowner: “Certainly the sea holds enough perils for a sailor, even a sober one. But for his employer to supply the beer without adequate control and then complain that Reyes was negligent for being drunk on board ship is indeed ironic.” _Id._ at 245.

Id.


`Rainey v. Paquet Cruises, Inc._, 709 F.2d 169.

`Rainey_, 709 F.2d at 170-72.

Id.

Gary Kinder's Ship of Gold In The Deep Blue Seal recounts the story of the SS CENTRAL AMERICA which sank in a hurricane off the coast of North Carolina in 1857 with a substantial loss of life. Similarly, the SS REPUBLIC sank in a hurricane off the coast of Savannah Georgia, en route to New Orleans, with 59 passengers aboard. See "Civil War-Era Shipwreck May Hold $180 Million in Treasure" _The Los Angeles Times_, Sunday Aug. 17, 2003 p. A32. As steam propulsion made waterborne travel more expeditious, more people began to travel by sea, and more were exposed to the risks of sea passage.

The New World, 57 U.S. 469, 476 (1853).

Id. at 474 (“In the Philadelphia and Reading Railroad Company v. Derby, 14 How. R. 486, which was a case of gratuitous carriage of a passenger on a railroad, this court said: 'When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of
passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross.

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