



CRUISE LINES: REASONABLE CARE DUTY REQUIRES NOTICE

Eleventh Circuit Reaffirms Cruise Lines Are Not Insurers of a Passenger's Safety. Liability Will Only Arise Where: (1) Cruise Line Had Actual or Constructive Knowledge of the Alleged Risk-Creating Condition and (2) the Condition Was Not Open and Obvious.

Background

In 1959, the Supreme Court made clear that under maritime law, the owner of ship in navigable waters owes visitors "the duty of exercising reasonable care under the circumstances." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). Since then, courts across the

“When trying to avoid a Motion for Summary Judgment, a cruise ship passenger injured as a result of a hazard commonly encountered on land (for example, falling while walking, falling while traversing stairs, slipping/tripping, etc.), must create a fact issue as to whether: the cruise line had actual or constructive notice of the risk-creating condition, and whether the condition was open and obvious.”

U.S. have struggled with defining “reasonable care” aboard a cruise ship. In November, however, the Eleventh Circuit issued two opinions confirming that, in most cases, as a prerequisite to imposing liability, **a carrier must have actual or constructive notice of the risk creating condition.** *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). Further, there can be no liability where the risk-creating situation was open and obvious to the passenger.

Malley v. Royal Caribbean Cruises Ltd. – “A Cruise Ship Only Has a Duty to Protect Passengers From Dangers of Which it Has Notice.”

In *Malley v. Royal Caribbean Cruises Ltd.*, No. 17-11437, 2017 WL 5192361 (11th Cir. Nov. 9, 2017), a cruise ship passenger fell while attempting to step onto a high coaming (a raised divider) at a cocktail party on the vessel’s helicopter deck. After being served champagne by the crew, Ms. Malley proceeded to step over the coaming to get to the party. The coaming had handrails for passengers to use when traversing the coaming. Malley did not appreciate the height of the coaming and thus did not lift her leg high enough to clear the step. She caught her foot, fell forward and suffered serious injuries. She testified

she was unable to use the handrails as she had a glass of champagne in one hand, and her purse in the other. She sued for negligence, alleging that Royal Caribbean failed to warn of the coaming’s unreasonable height which created a dangerous situation in which passengers were likely to fall. The district court granted summary judgment to Royal Caribbean. The Eleventh Circuit affirmed, noting as a threshold matter that the cruise line is not “liable to a passenger as an insurer, only for its negligence.” The Court then put Ms. Malley to her proof. Finding that Malley presented no evidence that Royal Caribbean had actual or constructive notice of the danger presented by the high coaming, or that the danger of which she complained was not open and obvious, it affirmed the lower court’s dismissal of her claim. The Court reasoned:

- Malley presented no evidence that anyone had ever fallen on the coaming. She further presented no evidence that the cruise line was on notice that passengers had ever needed special assistance to cross the coaming.
- The cruise line’s provision of a hand rail beside the coaming and the use of yellow and black tape to distinguish the area did not prove

that the cruise line knew that the coaming was unreasonably high or that it created a risk to passengers. It merely warned that a step was necessary.

- The Eleventh Circuit also analyzed whether or not the height of the coaming was open and obvious to a reasonable person, thus negating liability on behalf of Royal Caribbean. It asked whether a reasonable person would have observed the condition and appreciated the nature of the condition. Malley testified that she could clearly see the coaming, but merely did not appreciate its true height. The court inferred that a person who could see a step should also be able to see how high the step was.

Gorczyca v. MSC Cruises, S.A. – To Establish Prior Knowledge Through Prior Incidents, Incidents Must be Substantially Similar. To Establish Constructive Knowledge, Plaintiff Must Show “Hazard Was Present for a Period of Time so Lengthy as to Invite Corrective Measures.”

In *Gorczyca v. MSC Cruises, S.A.*, No. 16-15491, 2017 WL 5125561 (11th Cir. Nov. 6, 2017), a cruise ship passenger fell while descending a stairway



inside the ship's theatre. She sued for negligence, alleging that the metal nosing on the step was loose, that the LED lights attached to the step emitted a blinding glare, and that there was no handrail. The district court granted summary to MSC. The Eleventh Circuit affirmed, finding that Gorczyca presented no evidence that MSC had actual or constructive notice of any of the three allegedly dangerous conditions.

- MSC's corporate representative testified that the cruise line knew about the loose nosing only after the passenger fell.
- Gorczyca failed to present evidence of prior accidents *substantially similar* to hers. Falls on other stairs and not involving loose metal nosing not sufficient.
- While other passengers allegedly fell in the same area, the falls did not occur or they were not reported, until after Gorczyca fell, thus no prior knowledge on part of ship.
- The Eleventh Circuit rejected the argument that placement of "watch your step" stickers near the step proved notice. Instead, such stickers serve to warn passengers generally, rather than warning about loose nosing. Shipowner will

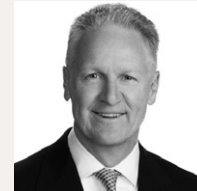
not be chastised for general safety warnings.

Conclusion

When trying to avoid a Motion for Summary Judgment, a cruise ship passenger injured as a result of a hazard commonly encountered on land (for example, falling while walking, falling while traversing stairs, slipping/tripping, etc.), must create a fact issue as to whether the cruise line had actual or constructive notice of the risk-creating condition, and whether the condition was open and obvious.

Vessel personnel should, of course, address all hazards of which they have notice. When prosecuting passenger injury claims, the plaintiff will seek records of prior similar incidents. If none exist, information to this effect from vessel personnel will be useful in seeking dismissal of plaintiff's claim. Counsel defending cruise liens should make themselves aware of prior incidents or the lack thereof, and strive to establish the condition as open and obvious when deposing the plaintiff and engaging in discovery. Considering the duties owed by a cruise line, establishing that the condition was open and obvious and not the subject of a prior incident will greatly assist counsel in seeking summary dismissal of these claims.

If you have any questions about this topic, please contact the following HFW attorneys:

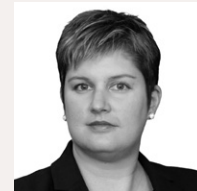


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