

**In the  
Supreme Court of the United States**

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NANCY PORTER,

*Petitioner,*

v.

LUXURY CRUISES, INC.,

*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit**

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COMPETITION PACKET FOR THE  
FIFTEENTH ANNUAL JUDGE JOHN R. BROWN  
ADMIRALTY MOOT COURT COMPETITION, 2008

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**NANCY PORTER, Plaintiff-Appellee,**

**v.**

**LUXURY CRUISES, INC., Defendant-Appellant.**

No. 05-12345

United States Court of Appeals,  
Fifth Circuit

July 12, 2007

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHAUDHRY, Chief Judge, and JUSTINIAN, SOLOMON, HAMMURABI, BRACON, FORTESCUE, BLACKSTONE, WHALLEY, DIXWELL, GOFFE, JEFFREYS, STARELEIGH, TAYLOR, COFFEY, BLAKELY, WEAVER, STORY, and DANIEL, Circuit Judges.

SOLOMON, Circuit Judge:

We granted *en banc* rehearing in this case to reconsider our decision in *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1982 AMC 2644 (5th Cir. 1981). For the reasons set forth below, we conclude that *Sohyde* misinterpreted the Admiralty Extension Act, 46 U.S.C. § 30101, and that the decision must therefore be overruled.

Our reasons for overruling *Sohyde* entail the conclusion that the present case falls within admiralty jurisdiction. This conclusion in turn means that the case must be governed by substantive federal maritime law.<sup>1</sup> The controlling substantive maritime law is set forth in *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1988 AMC 2650 (5th Cir. 1988). *Barbetta* holds that shipowners cannot be subjected to vicarious liability for the torts of shipboard physicians. Inasmuch as the plaintiff in this case has alleged only vicarious liability against the shipowner defendant, we remand the case to the district court with instructions that the defendant's motion for summary judgment must be granted.

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<sup>1</sup> The fact that the case was filed in federal district court on the basis of diversity jurisdiction has no bearing on whether it is a case of admiralty jurisdiction for choice-of-law purposes. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410-11, 1954 AMC 1, 7-8 (1953).

I  
Facts and Proceedings

In September 2002, a Mississippi man named Willard Morton took a 7-day cruise aboard the *S.S. Radiant*, a cruise ship owned and operated by Luxury Cruises, Inc. During the cruise, Mr. Morton had an asthma attack. He consulted the ship's physician, Dr. Reginald Dyson, an employee of Luxury. Dr. Dyson provided Mr. Morton with a ten-day supply of 50 mg. tablets of pyribenzamine and advised him to take four tablets a day until the supply was exhausted. Mr. Morton was still taking the medication when the cruise ended. After disembarking at New Orleans, he got into his automobile and undertook to drive to his home in Mississippi. En route, he lost consciousness at the wheel of his car and crashed into Nancy Porter's car on Interstate Highway 10 near Slidell, Louisiana.

Ms. Porter was seriously injured. She brought the present diversity action against Luxury, asserting Luxury's vicarious liability under Louisiana law for the allegedly negligent conduct of Dr. Dyson in providing Mr. Morton with pyribenzamine without warning him not to drive a car while using the drug. Luxury moved for summary judgment dismissing the case, arguing that it is governed by a rule of federal maritime law shielding shipowners from vicarious liability for the negligence of shipboard physicians.

Luxury's argument subsumes two assertions: (a) that this case falls within admiralty and maritime jurisdiction; and (b) that the *Barbetta* decision—holding that shipowners cannot be held vicariously liable for the negligence of shipboard physicians—is a correct statement of maritime law. The trial court rejected the first assertion on the basis of *Sohyde*. It therefore denied Luxury's motion. Then—expressing doubts about the continuing validity of *Sohyde*—the trial court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b).

We accepted the appeal. A panel of this Court affirmed the trial court's decision but a member of the panel expressed agreement with the trial court's misgivings about the *Sohyde*

holding and suggested *en banc* reconsideration. Subsequently we granted Luxury's motion for rehearing *en banc*.

## II Analysis

Although the district court certified only the admiralty jurisdiction question for interlocutory appeal, once we accept an appeal under 28 U.S.C. § 1292(b) we have authority to review the entire case. *See Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-205, 1996 AMC 305, 308-309 (1996). We must therefore begin with the admiralty jurisdiction question and, if the answer to that question points to the application of federal maritime law (as it does), then move on to examine the content of the relevant general maritime law.

### A. Admiralty Jurisdiction

In the last quarter-century, the Supreme Court has decided three major cases involving admiralty tort jurisdiction. In each case, the Court explicitly left open the possibility that the Admiralty Extension Act, 46 U.S.C. § 30101,<sup>2</sup> provides an independent basis for jurisdiction. Most recently,<sup>3</sup> in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, the Court declared:

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<sup>2</sup> The Admiralty Extension Act has been codified in its current form at section 30101 of Title 46 for less than a year. *See* Pub. L. No. 109-304, 120 Stat. 1485 (2006). Immediately before the completion of the recodification of Title 46, the Admiralty Extension Act was codified (in the original language of the statute) at 46 U.S.C. app. § 740 (2000). The original language provided, in relevant part, as follows:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

<sup>3</sup> For earlier statements preserving the issue, *see* *Sisson v. Ruby*, 497 U.S. 358, 359 n.1, 1990 AMC 1801, 1802 n.1 (1990) ("Petitioner argues that the [AEA] . . . provides an independent

Because we conclude that the tort alleged . . . satisfies both the location and connection tests necessary for admiralty jurisdiction under 28 U.S.C. § 1333(1), we need not consider Great Lakes’s alternative argument that the [Admiralty Extension Act] . . . provides an independent basis of federal jurisdiction over the complaint.

513 U.S. 527, 543 n.5, 1995 AMC 913, 925 n.5 (1995).

The courts of appeals are divided on the question. In *Sohyde*, we held that the Admiralty Extension Act does not provide an independent basis for jurisdiction. See 644 F.2d at 1134-36 & n.4, 1982 AMC at 2646-49 & n.4. In a subsequent decision, the Eleventh Circuit agreed with us. See *Crotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 767, 1988 AMC 1514 (11th Cir. 1984). But the Fourth, Seventh, and Eighth Circuits have reached the contrary conclusion. See *Tagliere v. Harrah’s Illinois Corp.*, 445 F.3d 1012, 1013-15, 2006 AMC 1290, 1291-94 (7th Cir. 2006); *Whittington v. Sewer Constr. Co.*, 541 F.2d 427, 432, 1976 AMC 967, 972 (4th Cir. 1976); *St. Hilaire Moyer v. Henderson*, 496 F.2d 973, 979, 1974 AMC 2661, 2669-70 (8th Cir. 1974).

In *Sohyde*, we recognized that “the express terms of the Act” should limit the “jurisdictional inquiry” to deciding whether a “vessel” was on “navigable water” when “it caused the . . . damage in question.” 644 F.2d at 1135, 1982 AMC at 2647. Although “the express terms of the Act” have changed in minor ways since we decided *Sohyde*,<sup>4</sup> the current language is every bit as clear. It provides, in relevant part, as follows:

The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.

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basis for jurisdiction. We decline to consider that argument because it was not raised below.”); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 n.7, 1982 AMC 2253, 2260 n.7 (1982) (“We refer to [the] language [of the AEA] only to demonstrate that Congress did not require a commercial-activity nexus when it extended admiralty jurisdiction. We express no opinion on whether this Act could be construed to provide an independent basis for jurisdiction.”).

<sup>4</sup> See *supra* note 2 (quoting the original statutory language, which was still in force when *Sohyde* was decided).

46 U.S.C. § 30101(a).

If we simply apply this plain language, Ms. Porter’s claim against Luxury falls within the admiralty and maritime jurisdiction if the injury or damage to her person was “caused by a vessel on navigable waters.” It matters not that “the injury or damage [was] done or consummated” on an interstate highway many miles removed from those navigable waters. Once we recognize that the “injury or damage . . . caused by a vessel” includes injury or damage caused by vessel personnel, which is not a contentious proposition,<sup>5</sup> it follows that any injury caused by Dr. Dyson is sufficient to bring this case within the terms of the Admiralty Extension Act.<sup>6</sup> All we need decide, therefore, is whether there is any justification for overriding the plain language of the statute to reach a different result.

In *Sohyde*, we decided that the legislative history of the Admiralty Extension Act and the Supreme Court’s decision in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 1973 AMC 1 (1972), required us to override the statutory language. *See* 644 F.2d at 1135-36, 1982 AMC at 2647-49. On further reflection, we no longer believe this to be true. Since our *Sohyde* decision, the Supreme Court has three times indicated that the present question remains open. *See supra* note 3 and accompanying text. The Supreme Court obviously could not believe that *Executive Jet* resolves the issue.

Similarly, the Act’s legislative history does not support our prior resolution of the issue. The *Sohyde* court relied primarily on the argument that the Admiralty Extension Act was not in-

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<sup>5</sup> *See, e.g.*, *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 210, 1963 AMC 1649, 1652 (1963) (“There is no distinction in admiralty between torts committed by the ship itself and by the ship’s personnel while operating it, any more than there is between torts ‘committed’ by a corporation and by its employees.”). Indeed, Ms. Porter does not contend here (and did not contend below) that Dr. Dyson’s actions do not qualify as acts of the vessel.

<sup>6</sup> Ms. Porter concedes that the *S.S. Radiant* is a “vessel,” *cf. Stewart v. Dutra Construction Co.*, 543 U.S. 481, 2005 AMC 609 (2005), and that the vessel was “on navigable waters” at all rele-

tended to create new causes of action but rather to direct the courts to exercise admiralty and maritime jurisdiction. *See* 644 F.2d at 1135-36, 1982 AMC at 2648 (quoting S. Rep. No. 1593, 80th Cong., 2d Sess. (1948), *reprinted in* 1948 U.S. Code Cong. Serv. 1898, 1900). While the premise of this argument is correct, the *Sohyde* conclusion does not follow. Our holding that Ms. Porter's claim is within the admiralty and maritime jurisdiction does not create a new cause of action; in the absence of admiralty jurisdiction, her cause of action would exist under state law.<sup>7</sup>

Our own review of the legislative history reveals nothing to undermine the statutory language. It is not surprising that we find no support in the legislative history for the proposition "that jurisdiction under the Admiralty Extension Act . . . is necessarily constrained by the [nexus] principles . . . of *Executive Jet*," 644 F.2d at 1135, 1982 AMC at 2647, which were subsequently elaborated in *Foremost*, *Sisson*, and *Grubart*. None of those principles had been recognized when the Act was passed in 1948 (or during the period between 1930 and 1948, when the subject was extensively debated by the American Bar Association and the Maritime Law Association). Congress could not have intended to preserve them in the new Act. Nor is it surprising that the legislative history demonstrates only the intent "to eliminate the inequities, and anomalies, resulting from the strict application of the locality rule" and no intent to relieve claimants "from jurisdictional constraints unrelated to locality." 644 F.2d at 1136, 1982 AMC at 2648-49. In 1948, "the locality rule" was the *only* rule for establishing admiralty tort jurisdiction; there were no "jurisdictional constraints unrelated to locality." In short, the legislative history simply demonstrates Congress's desire to extend admiralty jurisdiction to all claims for injury or dam-

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vant times. Ms. Porter also concedes that Dr. Dyson is a member of the ship's crew and that he was employed exclusively on the *S.S. Radiant* at all relevant times.

<sup>7</sup> Indeed, the practical effect of our decision today is not to create a new cause of action but to preempt an existing one.

age caused by a vessel on navigable waters without regard to the entire body of jurisdictional rules that were then in force.

Because there is no basis to ignore the plain language of the Admiralty Extension Act, we hereby overrule *Sohyde* and hold that the Act provides an independent basis for jurisdiction without regard to the nexus principles of *Executive Jet* and its progeny.

### B. Vicarious Liability

“With admiralty jurisdiction comes the application of substantive admiralty law.”<sup>8</sup> The controlling substantive admiralty law in this case is the rule of *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1372, 1988 AMC 2650, 2662 (5th Cir. 1988): “[G]eneral maritime law does not impose liability under the doctrine of respondeat superior upon a carrier or ship owner for the negligence of a ship’s doctor who treats the ship’s passengers.” Ms. Porter has ably briefed and argued that *Barbetta* was wrongly decided and must be overruled. We do not agree. We endorse the holding and reasoning of the *Barbetta* court, which it expressed as follows:

An impressive number of courts from many jurisdictions have, for almost one hundred years, followed the same basic rule: When a carrier undertakes to employ a doctor aboard ship for its passengers’ convenience, the carrier has a duty to employ a doctor who is competent and duly qualified. If the carrier breaches its duty, it is responsible for its own negligence. *If the doctor is negligent in treating a passenger, however, that negligence will not be imputed to the carrier. . . .*

There are two justifications for the rule: The first justification emphasizes the nature of the relationship between the passenger and the physician, and the carrier’s lack of control over that relationship. . . . Along with recognizing that the relationship between a ship’s doctor and a passenger limits a carrier’s ability to control the doctor as he serves the passengers, the courts have also recognized a second restrictive force . . . :

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<sup>8</sup> *East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 864, 1986 AMC 2027, 2032 (1986).

[A] shipping company is not in the business of providing medical services to passengers; it does not possess the expertise requisite to supervise a physician or surgeon carried on board a ship as a convenience to passengers. A ship is not a floating hospital; a ship's physician is an independent medical expert engaged on the basis of his professional qualifications and carried on board a ship for the convenience of passengers, who are free to contract with him for any medical services they may require.

. . . The reason, of course, that both justifications for the general rule are tied to the concept of control is that respondeat superior liability is predicated upon the control inherent in a master-servant relationship. . . . Because it would be inconsistent with the basic theory of respondeat superior liability to impose responsibility vicariously where the "master"—that is, the ship owner or carrier—lacks the ability to meaningfully control the relevant actions of its "servant"—that is, the ship's doctor—these courts have refused to do so.

*Id.* at 1369-70, 1988 AMC at 2656-58 (emphasis added) (quoting *Amdur v. Zim Israel Navigation Co.*, 310 F. Supp. 1033, 1042, 1969 AMC 2418, 2431 (S.D.N.Y. 1969)).

When *Barbetta* was decided, there was apparently only one reported decision to the contrary.<sup>9</sup> Recently a few courts have disagreed with *Barbetta*, but the vast majority of the decisions have continued to reject shipowners' vicarious liability for medical malpractice. *See, e.g., Carnival Corp. v. Carlisle*, 953 So.2d 461, 2007 AMC 305 (Fla. 2007). We see no compelling reason to depart from settled maritime law on this issue.

### III Conclusion

For the foregoing reasons, we reverse the decision of the district court. The case is remanded to the district court with instructions to grant the defendant's motion for summary judgment.

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<sup>9</sup> *Nietes v. American President Lines, Ltd.*, 188 F. Supp. 219, 1960 AMC 1603 (N.D. Cal. 1959). *Barbetta* persuasively refuted *Nietes*. *See* 848 F.2d at 1370-72, 1988 AMC at 2659-62.

JUSTINIAN, Circuit Judge, with whom WHALLEY, GOFFE, and DANIEL, Circuit Judges, join, dissenting:

Because I believe that *Sohyde* was correctly decided and that admiralty jurisdiction would thus not lie in this case, I agree with the district court's judgment. I must therefore dissent.

The leading proponent for treating the Admiralty Extension Act as an independent basis for admiralty jurisdiction is Judge Posner, who wrote the Seventh Circuit's opinion in *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012, 2006 AMC 1290 (7th Cir. 2006). Although I disagree with that court's holding, I completely agree with Judge Posner's central premise—that “the most important requirement of a jurisdictional rule is not that it appeal to common sense but that it be clear.” 445 F.3d at 1013, 2006 AMC at 1291; *cf. id.* at 1015, 2006 AMC at 1294-95.

*Sohyde* has been the established law in this circuit for more than a quarter-century. It has not created any practical problems of which I am aware. It has, moreover, been the majority rule in the rest of the country for most of that period,<sup>1</sup> and it does not seem to have created any practical problems elsewhere. Although the Supreme Court has not had occasion to adopt the *Sohyde* rule itself, neither has it questioned the rule's validity. Under the circumstances, I do not believe that changing the rule contributes to clarity and certainty—the very factors that are so important to a jurisdictional rule—simply because we now take a different view of the issue than our predecessors did so many years ago.<sup>2</sup>

We are not even changing the rule to accomplish justice in a particular case (as the Seventh Circuit did in *Tagliere*). On the contrary, we are changing a well-established rule to deprive

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<sup>1</sup> In addition to the courts of appeals that have held that the Admiralty Extension Act is not an independent basis of admiralty jurisdiction, most of the district courts to address the issue have so held.

an innocent tort victim of her only viable remedy in order to protect the employer of a negligent actor<sup>3</sup>—a party that is not only better able to avoid the loss but is also in a better position to spread the risk of loss. It is often said that hard cases make bad law, but this should be an easy case.

Finally, I am not at all persuaded that the new rule we adopt today will be any easier to apply than the *Sohyde* rule we have been following for so many years. Although understanding the commands of *Sisson* and *Grubart* is not always clear, similar problems may arise here. Can we be so certain, for example, that Ms. Porter’s injuries were “caused” by Dr. Dyson’s negligence in the sense required under the Admiralty Extension Act?

Although my sympathies are with Ms. Porter, it would be inappropriate for me to discuss the legal merits of the vicarious liability question. In my view, I have no power to address that question in the present case. Luxury’s liability (if any) for the negligent actions of its employee should be determined under Louisiana law, as the district court correctly held.

I respectfully dissent. The district court’s decision should be affirmed.

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HAMMURABI, Circuit Judge, with whom TAYLOR, COFFEY, and WEAVER, Circuit Judges, join, dissenting:

I agree with the majority’s decision to overrule the *Sohyde* decision. But I must respectfully dissent from the majority’s decision to reaffirm the rule of *Barbetta*. In recent years a number of well-reasoned decisions have questioned the rule and reasoning of *Barbetta*. For

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<sup>2</sup> In view of the identity of the author of the *Sohyde* opinion, I think we should be particularly hesitant to overrule it. Judge John R. Brown was the leading admiralty judge of his generation and his conclusions on matters of maritime law should be entitled to great deference.

<sup>3</sup> I recognize that Dr. Dyson has not yet been found negligent. For purposes of Luxury’s summary judgment motion, however, we must accept the allegations of Ms. Porter’s complaint as true and must draw all reasonable inferences in her favor.

example, in *Mack v. Royal Caribbean Cruises, Ltd.*, 361 Ill. App. 3d 856, 838 N.E. 2d 80, 2006 AMC 121 (2005), the court provided a thorough treatment of the issue, noting:

[I]n recent years, federal and state courts have declined to follow the traditional rule that a carrier will not be held liable for negligent treatment rendered by its on-board doctor. [In the view of one of these courts, when] a ship's physician is in the regular employment of a ship, as a salaried member of the crew, subject to the ship's discipline and the master's orders . . . , he is, for the purposes of respondeat superior at least, in the nature of an employee or servant for whose negligent treatment of a passenger a shipowner may be held liable.

\* \* \*

[I]n addition to being criticized and rejected in the [modern] cases . . . , the rule barring vicarious liability claims against carriers for their on-board physicians' negligence has similarly been criticized by legal scholars. . . .

The . . . cases and scholarly works identify several compelling reasons to depart from the established rule barring vicarious liability claims. . . . The *Barbetta* court [first] justifies its holding that liability for an on-board doctor's negligence should not be imputed to a cruise line by reasoning that the passenger, rather than the shipowner, controls the relationship between the passenger and the on-board doctor. [In fact, however,] a passenger does not have control over his relationship with a ship's doctor because a cruise passenger at sea and in medical distress does not have any meaningful choice but to seek treatment from the ship's doctor. . . .

The second justification for the *Barbetta* rule is that shipowners are not in the business of providing medical care. However, it is entirely foreseeable that some cruise passengers at sea will develop medical problems. Accordingly, the treatment of cruise passengers by the ship's doctor is not alien to maritime pursuits. [While it may be true that there an inherent difficulty in having a nonprofessional employer exercise control over a skilled physician,] the distinction no longer provides a realistic basis for the determination of liability in our modern, highly organized industrial society. Surely the board of directors of a modern steamship company has as little professional ability to supervise effectively the highly skilled operations involved in the navigation of a modern ocean carrier by its master as it has to supervise a physician's treatment of shipboard illness. Yet, the company is held liable for the negligent operation of the ship by its master. So too, should it be liable for the negligent treatment of a passenger by a physician or nurse.

\* \* \*

Additionally, scholars and courts have reasoned that vicarious liability for an on-board physician's negligence should be imposed because cruise lines

reap the benefits of carrying a doctor aboard their vessels. While carriers do not have a duty to supply an on-board doctor, they do owe passengers in need a duty to provide reasonable medical attention under the circumstances. This duty can be discharged by putting into port or summoning air rescue, . . . depending on the seriousness of the malady. The cruise line benefits because it avoids many of these costs and inconveniences by the economic expedient of carrying the ship doctor. The cruise line further benefits by advertising the availability of the ship doctor, since the presence of a qualified physician on board, with a well-equipped and well-staffed infirmary, is an enticement to purchase the ticket.

\* \* \*

Finally, the [better-reasoned modern] cases and articles reason that to impose vicarious liability on a cruise line for the negligent treatment of passengers by its on-board physician is not unreasonable because the cruise line is already held vicariously liable for the negligence of the same ship's doctor in the treatment of hundreds of people—the crew—under the maritime duty to provide maintenance and cure.

361 Ill. App. 3d at \_\_\_, 838 N.E. 2d at 88-91, 2006 AMC at 129-133 (citations and internal quotation marks omitted).

I find the *Mack* court's treatment of the issue to be more persuasive than that of the *Barbetta* panel. In my view it makes no good policy or logical sense to shield a modern shipowner from the normal operation of the law of vicarious liability. I would accordingly remand this case to the district court with instructions to first determine whether Dr. Dyson was an employee acting in the course and scope of his employment by Luxury when he provided Mr. Morton with and advised him to take pyribenzamene. If that question is answered affirmatively, then whether Luxury is liable to Ms. Porter should turn on the assessment of Dr. Dyson's conduct under the general maritime law of negligence.

**NANCY PORTER, Plaintiff-Appellee,**

**v.**

**LUXURY CRUISES, INC., Defendant-Appellant.**

No. 05-12345

United States Court of Appeals,  
Fifth Circuit

May 30, 2006

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

A panel of this Court granted defendant-appellant Luxury Cruises, Inc. (Luxury) permission to appeal an interlocutory order under 28 U.S.C. § 1292(b). The district court entered that order in conformance with our binding decision in *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1982 AMC 2644 (5th Cir. 1981). As a three-judge panel, we are also bound by *Sohyde* until the full court sitting en banc overrules it or a subsequent decision of the Supreme Court undermines its continued validity. Having no power to overrule *Sohyde*, we must therefore affirm the decision of the district court.

SOLOMON, Circuit Judge, concurring:

I agree with the panel's decision to apply *Sohyde* here. In the present context, we can do nothing else, for we are as bound by that decision as the district court was. In my view, however, the time has come to reconsider *Sohyde*. I therefore urge my colleagues to grant en banc review in this case if Luxury petitions for rehearing.

**NANCY PORTER, Plaintiff-Appellee,**

**v.**

**LUXURY CRUISES, INC., Defendant-Appellant.**

No. 05-12345

United States Court of Appeals,  
Fifth Circuit

September 15, 2006

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHAUDHRY, Chief Judge, and JUSTINIAN, SOLOMON, HAMMURABI, BRACON, FORTESCUE, BLACKSTONE, WHALLEY, DIXWELL, GOFFE, JEFFREYS, STARELEIGH, TAYLOR, COFFEY, BLAKELY, WEAVER, STORY, and DANIEL, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the petition for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

United States District Court  
for the Eastern District of Louisiana

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**NANCY PORTER, Plaintiff,**

**v.**

**LUXURY CRUISES, INC., Defendant.**

No. 03-Civ-6838

March 2, 2005

PORTIA, J.:

This is a diversity action in which the defendant seeks summary judgment based on federal maritime law. For the reasons set forth below, defendant's motion must be denied.

Plaintiff Nancy Porter was seriously injured on September 17, 2002, when Willard Morton blacked out or fell asleep at the wheel of his vehicle and crashed into plaintiff's car on Interstate 10 two miles east of Slidell, Louisiana. Plaintiff alleges that Morton lost consciousness as a result of having ingested the prescription drug pyribenzamene, which Dr. Reginald Dyson had provided to Morton. Dr. Dyson is a physician employed by defendant Luxury Cruises, Inc., aboard the *S.S. Radiant*, a cruise ship owned and operated by Luxury. Plaintiff alleges that Morton was on a cruise aboard the *Radiant* when he had an asthma attack. On consulting Dr. Dyson, the ship's physician employed by Luxury, Morton received a ten-day supply of 50 mg. tablets of pyribenzamine, an antihistamine with known side effects such as sleepiness and occasionally momentary loss of consciousness. Morton was driving home to Mississippi after completing a cruise in New Orleans a few hours before the wreck. Plaintiff asserts that Morton crashed into her car because he was under the influence of pyribenzamine; that Dr. Dyson was negligent in supplying Morton with pyribenzamine and alternatively for failing to warn Morton not to drive a car while taking the drug; and that Luxury, Dr. Dyson's employer, is vicariously liable for his negligent conduct under Louisiana law. Plaintiff has not alleged that Luxury was itself guilty of any negligent conduct.

This court has subject-matter jurisdiction under 28 U.S.C. § 1332 because plaintiff is a citizen of Louisiana and Luxury is a Panamanian corporation with its principal place of business in Miami. Luxury has moved for summary judgment, arguing that this accident fell within admiralty and maritime jurisdiction and that the case is therefore governed by federal maritime law. Under controlling federal maritime law in this circuit, a shipowner is not subject to vicarious liability for the conduct of a physician employed by the shipowner. *Barbetta v. S/S Bermuda Star*, 848 F.2d 1364, 1988 AMC 2650 (5th Cir. 1988). Therefore, if Luxury is right about the presence of admiralty jurisdiction, it is entitled to summary judgment dismissing plaintiff's action against it.

Under controlling Fifth Circuit precedent, however, Luxury's attempt to bring this case under federal maritime law must fail. Federal maritime law cannot be applied unless admiralty jurisdiction exists. *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 23, 2004 AMC 2705, 2710 (2004). And Luxury's argument that this case falls within admiralty must be rejected. Luxury's principal contention is that the Admiralty Extension Act (AEA), 46 U.S.C. app. § 740, is an explicit grant of admiralty jurisdiction. That statute provides, in relevant part:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

While the present case seems to fall comfortably within the terms of the AEA,<sup>1</sup> *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1982 AMC 2644 (5th Cir. 1981), precludes this court from holding that the AEA itself confers admiralty jurisdiction. As Judge Brown explained in his opinion for the *Sohyde* Court, the AEA merely provides an exception to the normal requirement that a tort must occur on navigable water to fall within admiralty. The other requirements for admiralty jurisdiction in a torts case are unaffected by the AEA.

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<sup>1</sup> It is well settled that harms caused by vessel personnel are deemed caused by the vessel for Admiralty Extension Act purposes. See generally David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209, 274-75 (2003).

*Sohyde* means that Luxury's motion cannot succeed unless it can persuade the court that this case meets the "potential disruption of maritime commerce" and "substantial relationship to traditional maritime activity" requirements laid down in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 1995 AMC 913 (1995). This court cannot fathom how a car wreck on I-10 can have any potential for disrupting maritime commerce. Therefore, Luxury's motion for summary judgment must be denied.

This court is nevertheless "of the opinion that [the present] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from [this] order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Although *Sohyde* has settled the issue in this circuit (at least for the time being), strong arguments to the contrary have been advanced elsewhere since *Sohyde* was decided. Thus the Fifth Circuit may wish to reconsider its decision. Because the choice of law turns on whether admiralty jurisdiction exists here, and because the outcome is very likely to turn on whether Louisiana state law or the general maritime law applies, it would "materially advance the ultimate termination of the litigation" to know before trial whether admiralty jurisdiction exists here. This court therefore (1) certifies this interlocutory order for immediate appeal under 28 U.S.C. § 1292(b) and (2) stays all proceedings in the district court until the Court of Appeals has either denied permission to appeal or finally acted on the appeal.

It is so ordered.

**Selected Chronology of the Case\***

Sept. 17, 2002	Plaintiff injured
Sept. 2, 2003	Plaintiff files present action in the United States District Court for the Eastern District of Louisiana asserting diversity jurisdiction under 28 U.S.C. § 1332
Mar. 2, 2005	Defendant's pre-trial motion for summary judgment denied with a memorandum opinion; question certified for interlocutory appeal under 28 U.S.C. § 1292(b) (reported as <i>Porter v. Luxury Cruises, Inc.</i> , 2005 AMC 3286 (E.D. La. 2005))
Mar. 11, 2005	Defendant's petition for permission to appeal the interlocutory order filed
Apr. 21, 2005	Court of appeals grants permission to appeal
May 30, 2006	Court of appeals panel opinion (unreported) filed and judgment entered
June 12, 2006	Plaintiff-Appellant's motion for rehearing with suggestion for rehearing en banc filed
Sept. 15, 2006	Motion for rehearing granted
July 5, 2007	Court of appeals en banc opinion (reported at 492 F.3d 1387, 2007 AMC 3333) filed and judgment entered
Oct. 3, 2007	Petition for certiorari filed raising (1) the admiralty jurisdiction issue and (2) the vicarious liability issue (docket number 07-455)
Dec. 3, 2007	Petition for certiorari granted

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\* This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.