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Charles D. Katz

Abstract

This Note explores the existing limitation laws followed in the United States and other countries and demonstrates that these laws have been applied unjustifiably to pleasure craft. It discusses the proposed limitation alternatives and their treatment of the pleasure craft limitation issue and offers a workable definition of pleasure craft, which can be used as a starting point for abolishing pleasure craft limitation of liability. This Note also discusses the inequities caused to claimants by international disparities in laws regarding pleasure craft limitation and the importance of uniform exclusion of pleasure craft from limitation schemes.

NOTES

RECOGNIZING THE NEED FOR INTERNATIONAL EXCLUSION OF PLEASURE CRAFT FROM LIMITATION OF LIABILITY STATUTES

INTRODUCTION

Whether pleasure craft should be covered by the United States Limitation of Vessel Owner's Liability Act¹ (Limitation Act or Act) has been debated for nearly a century.² Although courts consistently have held that the Act applies to pleasure craft,³ this application is unwarranted. Congress intended that the Act apply only to commercial vessels.⁴ Furthermore, public policy dictates that claimants should be compensated fully for injuries they suffer, absent a sound rationale for denying this compensation. There is no

1. 46 U.S.C. §§ 181-189 (1976). The Act entitles a shipowner to limit his liability for a maritime loss to his interest in the vessel and her freight then pending, as long as such loss occurred without the owner's privity or knowledge. *Id.* § 183(a). For a discussion of the privity or knowledge standard, see *infra* note 6.

2. See generally *In re Porter*, 272 F. Supp. 282, 286 (S.D. Tex. 1967) ("The sharp criticism of legal writers and some lower courts concerning applicability of the Act to pleasure craft indicates there is substantial ground for difference of opinion involving this controlling question of law."); *The Mamie*, 5 F. 813, 820 (E.D. Mich.) (Act not intended to apply to vessels built for purely pleasure purposes), *aff'd*, 8 F. 367 (C.C.E.D. Mich. 1881); Harolds, *Limitation of Liability and its Application to Pleasure Boats*, 37 TEMP. L.Q. 423 (1964) (pleasure craft limitation is not historically justified); Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 705-19 (1963) (Limitation Act should not be applied to pleasure craft); Tiffany, *Limitation of Liability and Pleasure Boats: 65 Years of Judicial Misinterpretation of the Intent of Congress*, 12 TRANSP. L.J. 249 (1981) (judicial application of Act to pleasure craft misconstrues the intent of Congress); Note, *Shipowners' Limitation of Liability—New Directions for an Old Doctrine*, 16 STAN. L. REV. 370, 382-83 (1964) (extension of limitation of liability to pleasure craft is without merit). *But see, e.g., In re Liebler*, 19 F. Supp. 829, 832 (W.D.N.Y. 1937) (1886 amendment extended coverage to all vessels, regardless of use).

3. See, e.g., *Gibboney v. Wright*, 517 F.2d 1054, 1057 (5th Cir. 1975) (legislative and judicial authority exists for allowing pleasure craft owners to limit their liability); *In re Brown*, 536 F. Supp. 750, 751 (N.D. Ohio 1982) ("[O]wner of a pleasure boat, engaged in non-commercial activities in navigable waters, is entitled to the protection of the Act."); *In re Nelson*, 25 F.2d 505, 506 (W.D. Wash. 1928) (1886 amendment extended coverage of limitation to pleasure craft owners); *The Aloha*, 228 F. 1006, 1007 (E.D. Va. 1915) (motorboat entitled to protection of Limitation Act).

4. See CONG. GLOBE, 31st Cong., 2d Sess. 331, 715-17 (1851) (main purpose of the Limitation Act was to equalize the American maritime commercial fleet with that of England).

sound reason for disallowing full recovery to those injured by pleasure craft. When pleasure craft inflict injuries⁵ and their owners are entitled to limit liability,⁶ claimants are often severely undercompensated.⁷ Given these inequitable results and the lack of justification for them, pleasure craft owners should not be allowed to limit their liability.

5. In two studies made by Donald Greenman for the Maritime Law Association covering the years 1953-1981, 16 of 129 cases concerning limitation of liability involved pleasure craft. D. GREENMAN, *MARITIME LAW ASS'N OF THE U.S., DOC. NO. 640, STATISTICAL ANALYSIS OF LIMITATION OF LIABILITY CASES 7437, 7439* (1982).

6. Pleasure craft owners are often denied the right to limit their liability because they usually operate their own vessels and, therefore, cannot prove absence of privity or knowledge. See Letter from Robert H. Knight to Hon. Warren G. Magnuson (Feb. 6, 1962), reprinted in S. REP. NO. 1602, 87th Cong., 2d Sess. 19-20 (1962). Claimants still suffer, however, in those instances where privity or knowledge is not found on the part of the owner. The conduct needed to satisfy the privity or knowledge standard has been the subject of much debate and academic discussion, see, e.g., Comment, *The Role of Privity and Knowledge in the Shipowners' Limitation of Liability Act*, 23 *LOY. L. REV.* 480 (1977) (lack of judicial consistency as to what constitutes privity or knowledge), and has been open to varied judicial construction. See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 877 (2d ed. 1975) ("'Privity or knowledge' and 'design or neglect' are phrases devoid of meaning. They are empty containers into which the courts are free to pour whatever content they will."). Initially, to achieve the goals set by Congress, see *infra* notes 30-33 and accompanying text, courts only found privity or knowledge where the owner directly contributed to the harm suffered. See, e.g., *Lord v. Goodall S.S. Co.*, 15 *F. CAS.* 884, 887 (No. 8506) (C.C.D. Cal. 1877) (Privity or knowledge requires "some personal concurrence, or some fault or negligence on the part of the owner himself, or in which he personally participates."), *aff'd*, 102 *U.S.* 541 (1880). Subsequent dissatisfaction with limitation and the Limitation Act, see *infra* note 8, made courts more willing to find privity or knowledge, and thereby deny an owner's right to limit his liability. See Watson, *The 1976 IMCO Convention: A Comparative View*, 15 *HOUS. L. REV.* 249, 271 (1978); G. GILMORE & C. BLACK, *supra*, at 877-84. In addition, Congress made it easier to find privity or knowledge when it enacted § 183(e) of the Act. Act of June 5, 1936, ch. 521, 49 Stat. 1479 (codified at 46 U.S.C. § 183(e) (1976)) (privity or knowledge of the master, superintendent or managing agent of a seagoing vessel is imputed to the owner). For a general discussion of privity or knowledge, see G. GILMORE & C. BLACK, *supra*, at 877-98.

7. See, e.g., *In re Rowley*, 425 *F. Supp.* 116 (D. Idaho 1977) (owner of a pleasure boat, operated for water skiing in his absence by his 20-year-old daughter, allowed to limit his liability to the value of his interest in the boat following collision with two floating air mattresses, causing the death of one child and serious personal injury to a second child); *In re Hocking*, 158 *F. Supp.* 620 (D.N.J. 1958) (owner's son negligently operated pleasure craft and owner was entitled to limit his liability to the post-accident value of the vessel (U.S.\$3,500), despite aggregate claims of U.S.\$305,000); *In re Kellogg*, 50 *F.2d* 957 (D.C.N.Y. 1931) (yacht explosion caused injuries to multiple claimants whose aggregate claims of roughly U.S.\$150,000 would be recoverable only to the extent of the vessel's value after the accident (U.S.\$7,500)).

Recent attempts to replace the outdated and increasingly unpopular Act⁸ and the equally unsatisfactory Brussels Convention⁹ produced the Convention on Limitation of Liability for Maritime Claims¹⁰ (IMCO Convention or Convention), propounded by the Inter-Governmental Maritime Consultative Organization (IMCO), and the Maritime Law Association (MLA) Proposed Draft Statute on Limitation¹¹ (MLA Statute). Both schemes provide claimants with greater compensation than they receive under existing limitation laws.¹² Both, however, also extend coverage to pleasure craft.¹³

A major reason for including these vessels in the MLA Statute was the difficulty anticipated by the drafters in finding a satisfactory definition of pleasure craft.¹⁴ Although difficult, this task must be undertaken. If either proposal is adopted as drafted, claimants injured by pleasure craft will continue to be undercompensated for their injuries. Once Congress has defined pleasure craft, it may

8. The dissatisfaction applies to both the Limitation Act and the limitation doctrine in general. See, e.g., *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437 (1954) (Black, J., dissenting) ("Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail."); *Pettus v. Jones & Laughlin Steel Corp.*, 322 F. Supp. 1078, 1082 (W.D. Pa. 1971) ("[L]imitation of liability is an anachronism in this present day and age."); Comment, *Limitation of Liability*, 24 NACCA L.J. 223, 225 (1959) ("An act which is vicious in its impact, unconscionable in its results, and outmoded in an age of institutionalized protective insurance, if it cannot be repealed outright, deserves only a narrow, grudging and constrictive construction.").

9. International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, Oct. 10, 1957, 1957 A.M.C. 1972 [hereinafter cited as Brussels Convention]. For a discussion of the Brussels Convention and its effect on international uniformity with respect to pleasure craft limitation, see *infra* notes 60-64 and accompanying text.

10. Convention on Limitation of Liability for Maritime Claims, Nov. 19, 1976, 16 I.L.M. 606 (1977) [hereinafter cited as IMCO Convention]. The Inter-Governmental Maritime Consultative Organization is a specialized agency of the United Nations, designed to facilitate intergovernmental cooperation on matters of shipping, navigation and maritime safety. *The Inter-Governmental Maritime Consultative Organization (IMCO)*, 30 U.N.Y.B. 1024 (1976). IMCO changed its name to the International Maritime Organization (IMO) on May 22, 1982. UNITED NATIONS, UNITED NATIONS HANDBOOK 1982, at 134 (1982).

11. Proposed Draft Act on Limitation of Liability, in MARITIME LAW ASS'N OF THE U.S., DOC. NO. 619, REPORT OF THE JOINT COMMITTEE OF THE COMITÉ MARITIME INTERNATIONAL AND LIMITATION OF LIABILITY 7075 (1979) [hereinafter cited as MLA Statute].

12. See *infra* note 70 and accompanying text.

13. See *infra* notes 75-80 and accompanying text for discussion of the IMCO Convention and *infra* notes 87-92 and accompanying text for discussion of the MLA Statute.

14. See MARITIME LAW ASS'N COMM. OF THE C.M.I. COMM. ON LIMITATION OF LIAB., COMMENTARY ON THE PROPOSED LIMITATION OF LIABILITY ACT 5 (Latest Working Draft Sept. 20, 1978) [hereinafter cited as 1978 DRAFT].

more easily exclude them from the coverage of any limitation scheme. An acceptable definition of pleasure craft, moreover, could produce greater international uniformity with respect to pleasure craft. All nations should exclude these vessels from the protection of limitation of liability statutes. Only then will the practice of international forum-shopping be discouraged¹⁵ and claimants injured by pleasure craft receive the compensation to which they are entitled.

Part I of this Note explores the existing limitation laws followed in the United States and other countries and demonstrates that these laws have been applied unjustifiably to pleasure craft. Part II discusses the proposed limitation alternatives¹⁶ and their treatment of the pleasure craft limitation issue. Part III offers a workable definition of pleasure craft, which can be used as a starting point for abolishing pleasure craft limitation of liability. Part IV discusses the inequities caused to claimants by international disparities in laws regarding pleasure craft limitation and the importance of uniform exclusion of pleasure craft from limitation schemes.

I. *THE CURRENT NATIONAL AND INTERNATIONAL APPLICATION OF LIMITATION OF LIABILITY TO PLEASURE CRAFT*

A. *United States: Judicial Failure to Address the Pleasure Craft Issue*

A study of cases involving pleasure craft limitation in the United States, published in 1964,¹⁷ revealed that courts often have been silent regarding the reasons for application of the Limitation Act to pleasure craft.¹⁸ In fact, United States Supreme Court cases addressing limitation of liability problems have failed to discuss this issue.¹⁹ In each case, the Court merely assumed that the Act applied to pleasure craft.²⁰

15. See *infra* notes 117, 126-27 and accompanying text.

16. See *supra* notes 10-11 and accompanying text.

17. Harolds, *supra* note 2, at 429-35.

18. *Id.*

19. *Coryell v. Phipps*, 317 U.S. 406 (1943); *Just v. Chambers*, 312 U.S. 383 (1941); *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502 (1932).

20. In *Coryell v. Phipps*, 317 U.S. 406 (1943), the Court granted limitation to the owner of a yacht which exploded due to leaking gas fumes in the engine room, *id.* at 408-09, after

Similarly, many lower courts have failed to address adequately the pleasure craft issue.²¹ Some courts have applied the Act to these vessels, without discussing the propriety of that application.²² Others have addressed the issue, claiming that the inclusion of pleasure craft is warranted by the Act's 1886 amendment.²³ Still other courts have applied the Act to pleasure craft simply because the incident in question occurred on navigable waters, thereby establishing admiralty jurisdiction.²⁴

finding that the owner had no privity or knowledge. *Id.* The Court ignored the issue of the applicability of the Act to pleasure craft. In *Just v. Chambers*, 312 U.S. 383 (1941), guests on board a yacht suffered carbon monoxide poisoning. The lower courts denied the owner's bid for limitation because he was found to have privity or knowledge of the condition which caused the injuries. *Id.* The Supreme Court confirmed the findings, *id.* at 385, but did not discuss whether it was proper to extend coverage of the Act to pleasure craft. Lastly, in *Spencer Kellogg & Sons v. Hicks*, 285 U.S. 502 (1932), a corporate owner filed a petition to limit its liability after its gasoline launch, being operated to ferry corporate employees across the Hudson River, struck an ice floe and sank, resulting in the loss of many lives. *Id.* at 506-07. The Court denied the petition because an employee of the corporation was found to have privity or knowledge of the conditions which led to the accident, and that privity or knowledge was then imputed to the corporation itself. *Id.* at 509-11. This case is often cited as authority for holding that the Act applies to pleasure craft, *see Harolds, supra* note 2, at 429, but such deference is erroneous for two reasons. First, the Supreme Court in *Spencer Kellogg* never addressed the issue of the Act's application to pleasure craft. Second, the vessel involved in this case was a motor launch, being used in connection with the corporate owner's business, and not a pleasure vessel. 285 U.S. at 506.

21. *Harolds, supra* note 2, at 430-35.

22. *See, e.g., In re Robertson*, 163 F. Supp. 242 (D. Mass. 1958) (collision between a cabin cruiser being operated negligently by the vessel's skipper while the owner was on board and a motor boat whose operator was also negligent). *See also Harolds, supra* note 2, at 430-32.

23. For example, in *In re Liebler*, 19 F. Supp. 829 (W.D.N.Y. 1937), a passenger on a motor boat fell into the water and was fatally injured by the boat's propeller. *Id.* at 830. The court ruled that the 1886 amendment extended the Act's coverage to all vessels, regardless of use. *Id.* at 832. *See also Harolds, supra* note 2, at 432-33.

24. *See, e.g., In re Madsen*, 187 F. Supp. 411 (N.D.N.Y. 1960) (water skier injured by pleasure speed boat on Lake Pleasant, New York; court denied limitation after ruling that Lake Pleasant was not a navigable water). *See also Harolds, supra* note 2, at 433-35. These cases make the availability of limitation dependent upon the existence of admiralty jurisdiction, and admiralty jurisdiction exists when the incident occurs on a navigable water. *See, e.g., Johnson v. Wurthman*, 227 F. Supp. 135, 136-38 (D. Or. 1964) (petition for limitation must be dismissed where the incident occurs on a non-navigable water, because the courts lack admiralty jurisdiction). Navigable waters

include the high seas, ports and harbors connected with the high seas, the Great Lakes, and all the rivers and lakes in the United States which are in fact navigable in interstate or foreign commerce, regardless of their status as salt or fresh waters, or their natural or artificial nature, or whether they come within state boundaries.

Comment, *Admiralty Jurisdiction Over Pleasure Craft Torts*, 36 MD. L. REV. 212, 212 n.2 (1976). *See also G. GILMORE & C. BLACK, supra* note 6, at 31-33.

Since the 1964 study, many courts have continued to apply the Act's provisions to pleasure craft, perpetuating the mistake of their predecessors.²⁵ Although no authoritative decision has yet to consider the question in depth,²⁶ the courts still cling to the belief that Congress intended the Act to apply to pleasure craft, despite indications to the contrary.²⁷

Cogent arguments have been made for an extension of the Act to include pleasure craft,²⁸ but the arguments against such an extension are more consistent with the Act's legislative history.²⁹ From its inception, limitation was "an idea conceived to serve the needs of commerce."³⁰ The Act, like the limitation doctrine itself, was imbued with a commercial purpose: to foster the national commercial maritime industry.³¹ It was enacted to equalize the strength of the American merchant fleet with that of England.³² No mention was

25. See, e.g., *In re Brown*, 536 F. Supp. 750 (N.D. Ohio 1982) (court denied motion to dismiss pleasure craft owner's petition for limitation of liability); *In re Parham*, 336 F. Supp. 748 (E.D. Ark. 1971) (explosion on houseboat caused death of claimant's decedent; petition for limitation denied due to court's finding of owner's privity), *aff'd sub nom.* *Parham v. Pelegrin*, 468 F.2d 719 (8th Cir. 1972); *Nuccio v. Royal Indem. Co.*, 280 F. Supp. 468 (E.D. La. 1968) (cabin cruiser negligently driven into stream's banks; court denied petition for limitation because owner had delegated control of the vessel to another and had privity or knowledge of the operator's negligence).

26. Harolds, *supra* note 2, at 435.

27. See *infra* notes 30-33 and accompanying text.

28. See, e.g., *In re Colonial Trust Co.*, 124 F. Supp. 73 (D. Conn. 1954) (pleasure craft industry creates jobs; pleasure craft provide experience in vessel operation and contribute during wartime or other emergency). See also 1978 DRAFT, *supra* note 14, at 5 (pleasure craft are considered "traditional maritime commercial activity" and annual retail sales in the pleasure craft industry totaled nearly five billion dollars in 1975).

29. See *supra* note 4 and accompanying text.

30. Donovan, *The Origins and Development of Limitation of Shipowners' Liability*, 53 *TUL. L. REV.* 999, 999 (1979). Limitation was developed to offset the many risks inherent in the shipping industry and to encourage shipowners to take those risks. See Purdy, *The Recent Amendment to the Maritime Limitation of Liability Statutes*, 5 *BROOKLYN L. REV.* 42, 43 (1935). By allowing limitation, maritime nations alleviated some of the heavy burden of financial responsibility which shipowners were forced to bear. *Id.*

31. See *CONG. GLOBE*, *supra* note 4, at 715.

32. Senator Hamlin, the limitation bill's author, recognized the need to strengthen the United States merchant fleet vis-à-vis the British. The Senator reasoned that the fact that the British government had changed British law pertaining to limitation of liability is a very strong and established reason why we should place our commercial marine upon an equal footing with hers. Why not give to those who navigate the ocean as many inducements to do so as England has done? . . . That is what this bill seeks to do, and it asks no more.

Id. To achieve this goal, Congress had to enact legislation which would adequately protect the United States shipowner against the "hazards of transoceanic voyages, and . . . give him

made of the Act's applicability to pleasure craft: its purposes were purely commercial.³³ The Act, in its 1851 form, therefore, offers no authority for extending limitation to pleasure craft.

Similarly, although section 183(f),³⁴ added by amendment to the Act,³⁵ offers prima facie support for the argument that pleasure craft owners are entitled to limit their liability,³⁶ closer scrutiny of the section reveals the weaknesses in this position. Proponents of pleasure craft limitation argue that pleasure craft, which are excluded from section 183(f),³⁷ are included elsewhere in the Act.³⁸ Otherwise, Congress would not have bothered to exclude them from section 183(f).³⁹ This argument may appear logical when based solely upon a literal reading of the Act, but it misconstrues the language of the section and disregards the commercial purposes of the Act.

Section 183(f)⁴⁰ excludes pleasure craft from the coverage of subsections 183(b)-(e).⁴¹ It does not affect the treatment of pleasure

every commercial advantage available." Donovan, *supra* note 30, at 1018-19 (footnote omitted).

33. See, e.g., *The Mamie*, 5 F. 813 (E.D. Mich.), *aff'd*, 8 F. 367 (C.C.E.D. Mich. 1881). The *Mamie* involved a steam-yacht engaged in travel and occasional fishing expeditions, often for a slight chartering fee. *Id.* The court held: "[I]t seems . . . [clear] that congress did not intend the act should apply to vessels engaged in purely local trade, and *a fortiori* to a vessel not built for the purpose of trade, but of pleasure . . ." *Id.* at 820. See also *supra* notes 31-32 and accompanying text.

34. 46 U.S.C. § 183(f) (1976). This section provides the following:

As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include *pleasure yachts*, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title, as amended.

Id. (emphasis added).

35. Act of June 5, 1936, ch. 521, 49 Stat. 1479 (codified at 46 U.S.C. § 183(f) (1976)).

36. See, e.g., Harolds, *supra* note 2, at 427-28.

37. 46 U.S.C. § 183(f) (1976).

38. See, e.g., *In re Porter*, 272 F. Supp. 282, 286 (S.D. Tex. 1967) ("Congress realized that . . . [pleasure] craft were within the scope of the general limitation provisions of § 183(a), but were not to be included . . . [in the subsections to which § 183(f) applied].").

39. See, e.g., *In re Brown*, 536 F. Supp. 750, 751 (N.D. Ohio 1982) (unnecessary to have excluded pleasure craft from § 183(f) if they had not already been included under § 188); *In re Liebler*, 19 F. Supp. 829, 832 (W.D.N.Y. 1937) ("The evident purpose of the [1886] amendment in taking out the exception was to make the statute applicable to all vessels, irrespective of the purposes to which they are put.").

40. 46 U.S.C. § 183(f) (1976).

41. *Id.* § 183(b)-(e). These subsections, added in 1935, Act of Aug. 29, 1935, ch. 804, 49 Stat. 960, and 1936, Act of June 5, 1936, ch. 521, 49 Stat. 1479, established a minimum

craft elsewhere in the Act because section 183(f) applies solely to subsections 183(b)-(e).⁴² If pleasure craft were previously included under section 188,⁴³ they would continue to be included.⁴⁴ The language of section 183(f) merely allows for the inclusion of pleasure craft⁴⁵ under section 188: it does not compel that result. Moreover, given the commercial emphasis of the Act itself,⁴⁶ it is likely that Congress did not intend to include pleasure craft within section 188⁴⁷ or any other provision of the Act.

Another reason why these sections⁴⁸ do not support the extension of limitation to pleasure craft is that even after their addition to the Act, the limitation fund under section 183(a)⁴⁹ continued to be based in part on the vessel's freight.⁵⁰ It would seem anomalous for Congress to have extended the Act's coverage to pleasure craft while continuing to base part of the vessel's value (for limitation fund purposes) on freight, which is defined as "the price or compensation paid for the transportation of goods by carrier."⁵¹ The definition of freight clearly denotes commercial activity.

Another argument against permitting pleasure craft owners to limit their liability is that, although limitation itself is still justifiable as a way of encouraging maritime ventures and maintaining a competitive maritime commercial fleet,⁵² pleasure craft limitation

limitation fund of U.S.\$60 per ton where seagoing vessels are involved and personal injury or death results. 46 U.S.C. § 183(b)-(e) (1976).

42. Section 183(f) also applies to § 183b, but that provision is irrelevant to this discussion; section 183b contains the procedural requirements for filing claims and commencing a suit. 46 U.S.C. § 183b (1976).

43. *Id.* § 188. Section 188 provides that "[e]xcept as otherwise specifically provided therein, the provisions . . . of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." *Id.*

44. *Id.* § 183(f). *See supra* note 34.

45. "[T]he term 'seagoing vessel' shall not include pleasure yachts . . . even though the same *may* be seagoing vessels . . . as used in section 188 of . . . [the Act]." 46 U.S.C. § 183(f) (1976) (emphasis added). *See supra* note 34.

46. *See supra* notes 31-33 and accompanying text.

47. 46 U.S.C. § 188 (1976).

48. *Id.* §§ 183(f), 188.

49. *Id.* § 183(a).

50. *Id.* "The liability of the owner . . . [shall not exceed] the amount or value of the interest of such owner in . . . [the] vessel, and her freight then pending." *Id.*

51. BLACK'S LAW DICTIONARY 599 (rev. 5th ed. 1979).

52. The United States must continue to be competitive in the world shipping market to

does not serve the same purposes.⁵³ There appears to be no rationale for allowing the owner of a pleasure craft who is not operating his vessel to limit his liability, even though the individual operating the vessel does so with the owner's consent and in a reckless or negligent fashion.⁵⁴ With little justification existing for allowing pleasure craft owners to limit their liability, the Act's coverage should not be extended to include them.

B. Other Nations: Limitation Under the 1957 Brussels Convention

Many developed countries have adopted limitation schemes based upon the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships⁵⁵ (Brussels Con-

counter the decline in status which the American merchant marine has suffered. See Note, *supra* note 2, at 390 n.135.

53. Martucci, *The Maritime Law Association's Proposed Statute on Shipowners' Limitation of Liability: A Practical Alternative to the IMCO Convention*, 10 LAW. AM. 839, 862 (1978).

54. For example, in *In re Hocking*, 158 F. Supp. 620 (D.N.J. 1958), a motorboat owner was entitled to limit his liability for damages caused by his 15-year-old son who was operating the vessel with his consent when the accident occurred. *Id.* at 621-22. Although the son was negligent in his operation of the boat and was found to be principally at fault, *id.* at 623, his father, the owner, was entitled to limit his liability to the post-accident value of the vessel (U.S.\$3,500), *id.* at 622-23, because he was not on board at the time of the accident and, therefore, lacked privity or knowledge. *Id.* at 623. The total claims against the owner had been U.S.\$305,000. *Id.* at 621.

This type of result could not have been intended by Congress when the Act was passed in 1851. See CONG. GLOBE, *supra* note 4, at 715. Professors Gilmore and Black accurately summarize the judicial lapse which has occurred and the harsh results caused:

The Limitation Act, originally passed to afford a measure of relief to a hard-pressed and highly competitive industry, has become a charter of irresponsibility for a few wealthy individuals No theory can justify the results . . . [where] the owner of a yacht or speedboat, who is provident enough to hire someone else to run the boat for him, is granted a general license to kill and destroy.

G. GILMORE & C. BLACK, *supra* note 6, at 882 (footnote omitted).

55. Brussels Convention, *supra* note 9. Among those nations which have ratified the Brussels Convention are France, Great Britain, Japan, Norway, and the Netherlands. *Ratification of Convention on Limitation of the Liability of Sea-Going Ships*, 1981-1982 ANNUAIRE COMITÉ MARITIME INTERNATIONAL 74 (1982) [hereinafter cited as *Ratification of Convention*]. See, e.g., Merchant Shipping (Liability of Shipowners and Others) Act, 1958, 6 & 7 Eliz. 2, ch. 62, amending Merchant Shipping Act, 1894, 57 & 58 Vict., ch. 60. "[T]he bulk . . . of the [Merchant Shipping] Act of 1958 was designed to give effect by domestic legislation to the . . . [Brussels Convention]." *Coldwell-Horsfall v. West Country Yacht Charters*, 1968 P. 341, 347 (1967).

vention). Although Congress discussed passage of an act based upon the Brussels Convention,⁵⁶ the proposed legislation was ultimately rejected.⁵⁷ The Brussels Convention was sponsored by the world shipping industry, which sought international uniformity with respect to limitation of liability.⁵⁸ Although uniformity was the goal,⁵⁹ it was not achieved with respect to pleasure craft.

The Brussels Convention extends coverage to seagoing vessels,⁶⁰ but allows each contracting state to determine which vessels to include in this category.⁶¹ Thus, unless all contracting states define seagoing vessels to exclude pleasure craft, these vessels will be covered by limitation in some nations but not in others, and uniformity will be lost. The results for both pleasure craft owners and claimants, in this event, could be erratic and harsh.⁶²

Limitation of liability in much of the maritime world, as in the United States, arose out of commercial necessity.⁶³ Furthermore, the need to achieve international uniformity with respect to plea-

56. Congress debated passage of a proposed bill entitled Shipowners' Limitation of Liability Act, 1962, S. 2314, 87th Cong., 2d Sess. (1962), which would have given effect to the Brussels Convention. See S. REP. NO. 1602, *supra* note 6, at 5-6. The purposes of the proposed act were to replace the 1851 Act and to unify United States law on the subject with that of other countries. *Id.*

57. See Rein, *International Variations on Concepts of Limitation of Liability*, 53 TUL. L. REV. 1259, 1267 (1979). Part of the reason that the United States rejected the Brussels Convention was that the Brussels Convention's limitation fund was computed according to a vessel's tonnage, rather than its value, as it is under the American Limitation Act. See Note, *supra* note 2, at 380.

58. Note, *Limitation of Shipowners' Liability—The Brussels Convention of 1957*, 68 YALE L.J. 1676, 1684 (1959). "It is of great importance that there be international uniformity in admiralty and maritime law. The rights and liabilities of shipowners and claimants should not vary depending upon the country in whose courts litigation is brought." Letter from Edward Gudeman to Hon. Warren G. Magnuson (Mar. 2, 1962), reprinted in S. REP. NO. 1602, *supra* note 6, at 17. For a brief discussion of the importance of international uniformity with respect to maritime transportation in general, see MARITIME LAW ASS'N OF THE U.S., DOC. NO. 450, REPORT OF THE COMMITTEE ON SHIPOWNERS' LIMITATION OF LIABILITY AND THE COLLISION AND ARREST OF SHIPS CONVENTIONS 4744-46 (1961) [hereinafter cited as CONVENTIONS REPORT].

59. See CONVENTIONS REPORT, *supra* note 58, at 4744.

60. Brussels Convention, *supra* note 9, art. 1, para. 1(1).

61. *Id.* art. 8. The proposed United States legislation, *supra* note 56, based upon the Brussels Convention, would have expressly applied to all vessels, including pleasure craft. See S. REP. NO. 1602, *supra* note 6, at 7.

62. For a discussion of the erratic results of different limitation laws existing in different countries, see *infra* notes 122-27 and accompanying text.

63. See Donovan, *supra* note 30, at 1000-05.

sure craft and to compensate claimants for injuries inflicted by these vessels outweighs any arguments which might be made to allow pleasure craft owners to limit their liability. Other nations, therefore, should not allow pleasure craft owners to limit their liability. The Brussels Convention, which improperly allows for the inclusion of pleasure craft by contracting states, is unacceptable; it sanctions "substantial variance"⁶⁴ among the countries which adopted it. On the international level, as within the United States, pleasure craft owners should be denied the opportunity to limit their liability.

II. CURRENT PROPOSALS FOR CHANGE IN LIMITATION LAWS: CONTINUED APPLICATION TO PLEASURE CRAFT

The maritime nations have recently been presented with an opportunity to replace their antiquated limitation schemes. The IMCO Convention⁶⁵ has been proposed to update and improve the limitation law existing under the Brussels Convention.⁶⁶ In addition, in the United States, the MLA Statute has been presented as an alternative to the inequitable Limitation Act.⁶⁷ Both schemes would alter substantially the prevailing limitation laws.⁶⁸ Unfortunately, although they would greatly increase the compensation available to claimants after a maritime accident,⁶⁹ both alternatives would also allow pleasure craft owners to limit their liability.

64. Note, *supra* note 2, at 391.

65. See *supra* note 10.

66. International Chamber of Shipping Observers' Report on the Diplomatic Conference on Limitation of Liability for Maritime Claims 1 (Nov. 1976) [hereinafter cited as International Chamber Report] (copy on file with the *Fordham International Law Journal*).

67. MLA Statute, *supra* note 11. See MARITIME LAW ASS'N OF THE U.S., DOC. NO. 619, COMMENTARY ON THE PROPOSED LIMITATION OF LIABILITY ACT 7062 (1979) [hereinafter cited as COMMENTARY].

68. For detailed discussions of these proposals and how they would affect existing limitation of liability in this country, see Martucci, *supra* note 53, and Watson, *supra* note 6. For discussions of particular problems inherent in the limitation controversy, see generally Biezup & Abeel, *The Limitation Fund and its Distribution*, 53 TUL. L. REV. 1185 (1979) (importance of the limitation fund in the limitation controversy); Buglass, *Limitation Of Liability From A Marine Insurance Viewpoint*, 53 TUL. L. REV. 1364 (1979) (limitation of liability is crucial to marine underwriters); Williams, *Limitation of Liability Versus Direct Action Statutes*, 8 VAND. J. TRANSNAT'L L. 815 (1975) (desirability of allowing insurance companies to limit their liability); Comment, *supra* note 6 (construction of the privity or knowledge standard in 46 U.S.C. § 183(a) (1976)).

69. See Martucci, *supra* note 53, at 856-60; Watson, *supra* note 6, at 272-75.

A. The IMCO Convention

In November of 1976, an IMCO Diplomatic Conference was convened in London to consider the viability of a new international convention on limitation of liability.⁷⁰ The primary purpose of the Conference was to replace the 1957 Brussels Convention⁷¹ which was disliked by both shipowners and claimants of many member states.⁷² Although it makes some improvements on the limitation provisions of the Brussels Convention,⁷³ the IMCO Convention does not alter the limitation of liability for pleasure craft owners.

The IMCO Convention applies explicitly to seagoing vessels,⁷⁴ and whether pleasure craft are to be included within this category is not made clear. It has been suggested that pleasure craft fall within the wording of article 15, which allows an individual state party to choose whether to apply the Convention to, or regulate on its own, those vessels "intended for navigation on inland waterways" and vessels of "less than 300 tons."⁷⁵ In the absence of specific contrary notification by a state party, the Convention would be deemed to apply to these vessels.⁷⁶ The ambiguity of the

70. International Chamber Report, *supra* note 66, at 1. The preliminary work on the new limitation scheme had been undertaken by the Comité Maritime International (C.M.I.) at the Hamburg Conference in 1974. *Id.* The C.M.I. is a non-governmental organization dedicated to facilitating and promoting "the unification of maritime and commercial law, maritime customs usages and practices." COMITÉ MARITIME INTERNATIONAL CONST. art. 1, reprinted in 1981-1982 ANNUAIRE COMITÉ MARITIME INTERNATIONAL 2 (1982).

71. International Chamber Report, *supra* note 66, at 1.

72. *Id.*

73. The IMCO Convention increased the standard of conduct required to defeat a petition for limitation. *Id.* at 2. The goal was to make limitation "as unbreakable as possible." *Id.* The "actual fault or privity" standard of the Brussels Convention, *supra* note 9, art. 1, para. 1(1), was replaced by the following: "A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result." IMCO Convention, *supra* note 10, art. 4. At the same time, the IMCO Convention increased the amounts available to claimants under the limitation fund. See International Chamber Report, *supra* note 66, at 3.

74. IMCO Convention, *supra* note 10, art. 1, paras. 1-2.

75. *Id.* art. 15, para. 2(a)-(b). See Watson, *supra* note 6, at 260.

76. Watson, *supra* note 6, at 260. The Convention provides that "[a] State Party which makes use of the option provided for in this paragraph shall inform the depositary of the limits of liability adopted in its national legislation or of the fact that there are none." IMCO Convention, *supra* note 10, art. 15, para. 2. Great Britain, for example, did make use of this option. For ships weighing less than 300 tons, Great Britain has chosen to provide limitation funds which are roughly half of those provided for in article six of the Convention. See IMCO, Status of Multilateral Conventions and Instruments in Respect of Which the Inter-Governmental Maritime Consultative Organization or its Secretary-General Performs Depos-

language used in article 15,⁷⁷ could lead to uncertainty and misconstruction regarding pleasure craft limitation, similar to that caused by both the Limitation Act and the Brussels Convention.

The information available on the Convention does little to clarify the ambiguity created by the wording of the text. One commentator studied an early draft of the Convention⁷⁸ and concluded that it granted contracting states the option of either excluding or including pleasure craft under a certain tonnage.⁷⁹

Because pleasure craft owners should not be allowed to limit their liability, pleasure craft should be excluded from the Convention's provisions. Furthermore, allowing each contracting state to establish different rules regarding pleasure craft does not promote necessary uniformity.⁸⁰ If the Convention enters into force,⁸¹ pleasure craft should be excluded from the provisions allowing limitation of liability.

B. *The MLA Statute*

When the MLA realized that the IMCO Convention was unlikely to be adopted by the United States,⁸² it drafted its own

itary or Other Functions 186 (1981) [hereinafter cited as Status of Conventions] (copy on file with the *Fordham International Law Journal*).

77. IMCO Convention, *supra* note 10, art. 15.

78. Carbone, *Limitation of Liability for Maritime Claims: An Analysis of the CMI Draft Convention as amended by IMCO* [1976] 3 COMITÉ MARITIME INTERNATIONAL, DOCUMENTATION 166 (1976).

79. *Id.* at 196. This draft appeared during one of the earlier drafting sessions. Popp, Comment, 56 CAN. B. REV. 150, 155 (1978). Under the draft's provisions, a party to the Convention is allowed to exclude, by way of national legislation, ships used for navigation in inland waterways, and pleasure craft and fishing vessels of less than 20 gross tons. *Id.* Deletion of the latter two vessels from the final draft, *see* IMCO Convention, *supra* note 10, art. 15, para. 2, has little practical effect on the pleasure craft limitation issue under the Convention because pleasure craft typically weigh less than 300 tons, Note, *supra* note 2, at 383, and are thus excludable. *See supra* text accompanying note 75.

80. *See supra* note 58.

81. The Convention has not yet become effective. Of the 12 countries needed to deposit the instruments of ratification, acceptance, approval or accession, IMCO Convention, *supra* note 10, art. 17, para. 2, only five have done so. *See* Status of Conventions, *supra* note 76, at 184. There are reliable indications, however, that entry into force may be effectuated by late 1983 or 1984. MARITIME LAW ASS'N OF THE U.S., DOC. NO. 642, at 7484 (1982).

82. The United States has not adopted the Convention, D. GREENMAN, *supra* note 5, at 7436, and does not seem likely to do so. MARITIME LAW ASS'N OF THE U.S., DOC. NO. 616, at 6968 (1978). A major reason for the unacceptability of the IMCO Convention is the inadequacy of the limitation fund it provides. D. GREENMAN, *supra* note 5, at 7436.

limitation proposal using the Convention as a model.⁸³ The MLA's primary goal was to update the existing limitation law in the United States with new acceptable domestic legislation.⁸⁴ Although the MLA Statute makes many favorable changes in the current limitation law, including raising substantially the compensation available to claimants,⁸⁵ it fails to exclude pleasure craft from its coverage.

The MLA Statute, like the Convention, does not expressly refer to pleasure craft. Application to those vessels, however, can be inferred from the extension of limitation to "any vessel."⁸⁶ Furthermore, comments accompanying the MLA Statute provide that "[t]he Joint Committee has not excluded 'pleasure craft.'"⁸⁷ In considering the proposed Draft Statute on Limitation, the MLA's Committee on Limitation of Liability (Limitation Committee) confronted the issue of pleasure craft limitation.⁸⁸ It weighed the arguments both for and against exclusion of pleasure craft from the MLA Statute⁸⁹ and even excluded them from earlier versions,⁹⁰ but deleted the exclusion from the final draft.⁹¹

A major stumbling block recognized in excluding pleasure craft was the "great difficulty"⁹² in finding a workable definition of these vessels. Although admittedly difficult, this task must be un-

83. MARITIME LAW ASS'N OF THE U.S., DOC. NO. 610, at 6797 (1977).

84. *Id.*

85. See Martucci, *supra* note 53, at 856-60, which compares the limitation funds available under the Limitation Act, IMCO Convention and MLA Statute.

86. MLA Statute, *supra* note 11, § 1(1)-(2).

87. See COMMENTARY, *supra* note 67, at 7065.

88. See 1978 DRAFT, *supra* note 14, at 3-5.

89. See *id.* at 4-5. Among the reasons cited for pleasure craft exclusion from the proposed MLA Statute were the commercial origins of the Limitation Act, *id.* at 4, the inequities to claimants caused by pleasure craft limitation, *id.*, the litigation problems which pleasure craft limitation would create, *id.*, and the absence of public policy reasons for allowing owners of pleasure craft to limit their liability. *Id.* The arguments against excluding pleasure craft were the consistent judicial construction of the Act as including pleasure craft, *id.* at 5, the increased recovery maritime claimants would receive under the new statute, *id.*, the positive effects which the pleasure craft industry has had on the nation's economy, *id.*, and the difficulty of defining which vessels would be considered pleasure craft, were they to be excluded. *Id.*

90. See, e.g., MARITIME LAW ASS'N COMM. OF THE C.M.I. COMM. ON LIMITATION OF LIAB., COMMENTARY ON THE PROPOSED LIMITATION OF LIABILITY ACT 2 (Latest Working Draft Mar. 2, 1979).

91. See MLA Statute, *supra* note 11, § 1(2).

92. See 1978 DRAFT, *supra* note 14, at 5.

dertaken in order to exclude pleasure craft owners from the coverage of all limitation schemes.⁹³

III. DEFINING PLEASURE CRAFT

The development of an acceptable definition of pleasure craft must precede uniform exclusion of these vessels from limitation coverage. Defining pleasure craft is not extremely difficult. Pleasure craft are those vessels which are utilized for pleasure activities, rather than commercial activities. The difficulty lies, however, in defining pleasure activity in such a way as to meaningfully distinguish it from commercial activity. Because of the subjective element in determining what constitutes pleasure, the best way to approach the problem is to determine first what is a commercial activity.⁹⁴ Thereafter, vessels not utilized for these purposes could be considered pleasure vessels.⁹⁵

Commercial activity is not easily definable.⁹⁶ Most definitions of commerce include some reference to trade or business.⁹⁷ In addi-

93. The Limitation Committee implied that courts could determine which vessels are pleasure craft for the purpose of exclusion from limitation protection. *See id.* at 4. Greater uniformity and certainty would be reached, however, if the courts were provided with some definition as a starting point.

94. Pleasure is amorphous. Commerce, on the other hand, has been defined repeatedly, *see infra* note 97, and provides a more tangible basis on which to ascertain a vessel's function.

95. Commercial and government vessels would seem to comprise those which fall within the non-pleasure category. Government vessels essentially are those which are used for public purposes. The distinction between commercial and government vessels is most important when the issue of sovereign immunity arises. *See, e.g., Flota Maritima Browning de Cuba v. SS. "Canadian Conqueror,"* 30 D.L.R.2d 172, 175 (Can. Ex. N.S. Adm. Dist.) ("[N]ot all ships of a foreign sovereign are entitled to immunity, but only those which are found to be dedicated to public uses."), *rev'd*, 1962 Can. Exch. 1 (1961), *aff'd*, 34 D.L.R.2d 628 (Can. 1962); Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1976) (foreign state not immune from United States court jurisdiction where action based upon commercial activity, as defined in § 1603(d)-(e)). The phrase public "includes such things as ships of war or vessels sent by the Government on exploring expeditions. It does not mean vessels 'used in ordinary commerce.' . . ." *Flota Maritima*, 30 D.L.R.2d at 177.

96. *Hopkins v. United States*, 171 U.S. 578, 597 (1898) (commerce, nevertheless, "is a term of very large significance").

97. Courts usually define commerce in the constitutional context of interstate commerce. *See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238, 298 (1936) ("As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade,' and includes transportation, purchase, sale, and exchange of commodities . . ." (citations omitted)); *May v. Sloan*, 101 U.S. 231, 237 (1879) (trade, in its broadest form, "includes not only the business of exchanging commodities by barter, but the business

tion, for purposes of admiralty, commerce is linked with the business of shipping.⁹⁸ Pleasure, on the other hand, is unrelated to shipping or commerce.⁹⁹ The difference between the two activities is significant enough to allow a distinction to be made for the purposes of limitation of liability.¹⁰⁰ The following definition is an example of how pleasure craft might be defined for the purposes of a limitation statute:

1. This [Limitation] Statute shall not apply to pleasure craft. Pleasure craft are herein defined as vessels used for primarily pleasure activities at the time of the incidents which give rise to claims against those who would have been entitled to limit their liability under this Statute,¹⁰¹ had the incidents occurred while the vessels were being used for primarily commercial activities.

of buying and selling for money, or commerce and traffic generally"); *Railroad Co. v. Fuller*, 84 U.S. (17 Wall.) 560, 568 (1873) ("Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on." (citation omitted)); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 76 (1824) ("The correct definition of commerce is the transportation and sale of commodities."). See also *Hoke v. United States*, 227 U.S. 308, 320 (1913) (commerce not limited to goods but also includes the transportation of persons). Many federal statutes, in addition, have referred to commerce in a business context. See, e.g., 15 U.S.C. § 12(a) (1976) (commerce defined as trade or commerce); *id.* § 61 (trade or commerce in goods, wares, or merchandise); 18 U.S.C. § 31 (1976) ("Used for commercial purposes" means the carriage of persons or property for any fare, fee, rate, charge or other consideration, or directly or indirectly in connection with any business, or other undertaking intended for profit.").

98. *Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975).

99. *Id.* "Neither noncommercial fishing nor pleasure boating nor water skiing constitutes commerce." *Id.* (citations omitted). See *Belden v. Chase*, 150 U.S. 674, 697 (1893) (pleasure yachts are "not allowed to transport merchandise or carry passengers for pay" and are "not authorized to transact business").

100. Other statutes have not let the difficulty of defining pleasure craft prevent the making of a distinction between commercial and pleasure vessels. See, e.g., 46 U.S.C. § 71(a)-(c) (1976 & Supp. IV 1980) (different measurement rules for vessels intended for use exclusively as pleasure vessels and vessels not so intended); *id.* § 86b(b)(2) (subchapter on loadline regulations for vessels making foreign sea voyages inapplicable to pleasure craft not used in trade or commerce); *id.* § 103 (1976) (repealed 1980) (vessels licensed as exclusively pleasure vessels not allowed to transport merchandise or carry passengers for pay).

101. Those who are entitled to limit their liability under the Limitation Act are owners, 46 U.S.C. § 183(a) (1976), and charterers who man, victual, and navigate vessels at their own expense. *Id.* § 186. The IMCO Convention extends this privilege to an owner, charterer, manager and operator of a seagoing ship, IMCO Convention, *supra* note 10, art. 1, paras. 1-2; a salvor, *id.* art. 1, paras. 1, 3; a person for whose act, neglect or default the shipowner or salvor is responsible, *id.* art. 1, para. 4, and an insurer. *Id.* art. 1, para. 6. The MLA Statute offers the same protection to owners, charterers, managers or operators, MLA Statute, *supra* note 11, § 1(1)-(2); salvors, *id.* § 1(1), (3), and insurers. *Id.* § 1(5).

2. This Statute shall not apply to vessels which are rented, leased, or chartered,¹⁰² where such vessels, subsequent to the renting, leasing, or chartering thereof, are used for primarily pleasure activities.

This definition resolves two of the problems envisioned by the Limitation Committee in finding an acceptable definition of pleasure craft.¹⁰³ The first problem is categorizing a pleasure vessel which, on a particular occasion, is used commercially.¹⁰⁴ Under this definition, the general classification of a vessel is irrelevant. The deciding factor in determining whether a vessel owner can limit his liability is the vessel's use at the time of the incident. Thus, a vessel being used for an activity which is primarily commercial in nature at the time of the accident would be covered by the limitation scheme. Conversely, a commercial vessel used primarily for pleasure activities when the accident occurs would not be entitled to the protection of limitation. Whether a vessel's activity is primarily commercial or pleasure would, of course, require judicial determination.¹⁰⁵ Furthermore, limitation should protect only those commercial activities which were originally meant to be protected.¹⁰⁶

The second problem foreseen by the Limitation Committee is the classification of a vessel that is commercially rented or leased but used by the lessee for pleasure purposes.¹⁰⁷ Like the first, this problem is resolved by the definition's focus on the vessel's use at the time of the accident. Once the rental transaction is completed, the commercial activity ends.¹⁰⁸ When the vessel is in the lessee's posses-

102. A charterer is one who hires, leases or engages a vessel for transportation or voyage. BLACK'S LAW DICTIONARY 214 (rev. 5th ed. 1979). A lease is a contract by which one owning tangible personal property grants to another the right to possess, use and enjoy it for a specified period of time in exchange for periodic payment of a stipulated price. *Id.* at 800.

103. 1978 DRAFT, *supra* note 14, at 5.

104. *Id.* The reverse problem, how to categorize a commercial vessel which on a particular occasion is used recreationally, would also be resolved by this definition.

105. A vessel's activity at the time of the accident would be the determining factor. Thus, a passenger ship such as an ocean liner, ferry, or sightseeing vessel would not be a pleasure vessel, because it charges passengers a fee to ride on the vessel. A fishing excursion, on the other hand, would be considered a pleasure activity, unless undertaken for profit.

106. Commercial activities of an illegal nature would be unprotected. Some examples of illegal activities might be piracy and privateering, 18 U.S.C. §§ 1651-1661 (1976), and involvement with the slave trade. *Id.* §§ 1581-1588. Others might be drug trafficking and exporting goods to or importing goods from an embargoed country.

107. 1978 DRAFT, *supra* note 14, at 5.

108. *See supra* note 102.

sion, therefore, its use is purely recreational and does not fall within the scope of the limitation statute.¹⁰⁹

The foregoing definition is offered only to show how a definition of pleasure craft might be formulated. It is not the only definition of pleasure craft which has been proposed in recent years.¹¹⁰ An earlier definition¹¹¹ focuses on the vessel's function when the accident occurs.¹¹² It excludes vessels not engaged in trade or commerce, under the ordinary meaning of those terms.¹¹³ Although this earlier definition makes no express reference to commercial rental of a vessel for subsequent pleasure activity, its author addressed this situation.¹¹⁴ A primary consideration in arguing that the rented vessel falls under pleasure activity would be the lessee's use of the vessel for purposes of pleasure.¹¹⁵ The similarity in the above two definitions supports the contention that a functional approach could lead to a workable definition of pleasure craft.

IV. INTERNATIONAL NECESSITY OF EXCLUDING PLEASURE CRAFT

A workable definition of pleasure craft can enable all maritime nations to exclude pleasure craft from coverage of limitation of liability statutes. Achievement of this goal will require the cooperation of all nations, to assure claimants equitable treatment when injured by pleasure craft. Any non-compliance among the leading maritime nations will decrease the likelihood of uniformity. Without uniformity, claimants will face varying treatment, depending upon which nation's limitation laws are applied.

109. A vessel's use, which is neither exclusively commercial nor exclusively pleasurable, but rather a combination of the two, would require a court to determine the vessel's primary purpose on the particular voyage in question. If primarily commercial, limitation would apply, but if primarily used for pleasure, it would not.

110. See, e.g., Note, *Pleasure Boat Owner Tort Liability in Admiralty: An Examination of the Limited Liability Act and a Proposal for Reform*, 50 S. CAL. L. REV. 549, 587 (1977) (Section 188 of the Act should be amended to exclude pleasure craft, which should be defined as "any vessel or water craft which at the time of any loss, damage or injury by collision was engaged in no trade or commerce within the ordinary meaning of those terms.").

111. *Id.*

112. *Id.*

113. *Id.* For example, the earlier definition would exclude a "speedboat towing a water skier or a yacht cruising on the bay," *id.*, because these activities are not within the ordinary meaning of trade or commerce. *Id.* at 588.

114. See *id.* at 588 n.180.

115. *Id.*

In the maritime field, international uniformity is "of vital importance."¹¹⁶ Uniformity in this area discourages forum-shopping,¹¹⁷ creates greater certainty for shippers, carriers and insurers when insuring maritime ventures,¹¹⁸ and creates administrative ease in maritime litigation.¹¹⁹ Uniformity with respect to limitation of liability is equally important. Liabilities of shipowners and recoveries of claimants should not change from forum to forum. Although most maritime nations provide limitation of liability in some form,¹²⁰ the amount of liability varies among the nations,¹²¹ and hence, so does the amount of recovery.

In a limitation proceeding, the law to be applied depends upon several factors. Among them are the flags of the vessels involved,¹²² the special interest a nation may have in the proceeding,¹²³ the place where the injury occurs,¹²⁴ and the forum in which the limitation proceeding is instituted.¹²⁵ For example, if the law of the place where the tort occurs (*lex loci delicti*) is applied, a claimant's recovery would depend upon "the wholly fortuitous circumstance of the place of injury."¹²⁶ Likewise, application of the law of the forum

116. Healy, *International Uniformity in Maritime Law: The Goal and the Obstacles*, 9 CAL. W. INT'L L.J. 494, 499 (1979).

117. *Id.* at 499-500.

118. *Id.* at 500.

119. *Id.* at 499. Without uniformity, courts and lawyers would encounter great difficulty when involved in a common situation in which, for example, a collision between a vessel of one state and a vessel of another, occurring in the territorial waters of a third state, is litigated in the forum of a fourth state. *Id.*

120. Note, *Demystifying the Application of Foreign Law in a Maritime Limitation Proceeding: In re Bethlehem Steel Corporation*, 12 U. TOL. L. REV. 719, 728 (1981). See Donovan, *supra* note 30, at 1000-05.

121. Note, *supra* note 120, at 728 & n.49. See Rein, *supra* note 57. Differences in the laws of various countries result partly from the fact that the United States has not adopted the Brussels Convention, while other maritime nations have. Healy, *supra* note 116, at 500. See *supra* notes 55-57 and accompanying text.

122. Staring, *Limitation Practice and Procedure*, 53 TUL. L. REV. 1134, 1172 (1979).

123. *Id.*

124. Note, *supra* note 120, at 728.

125. See *The Scotland*, 105 U.S. 24, 29 (1881). The general practice of the United States courts is to apply United States law to cases brought before them, unless another nation's laws warrant application. See Note, *supra* note 120, at 728. An example of a country which might have a better claim for application of its laws (over the laws of the forum where the suit is instigated) is one in whose territorial waters the tort occurred. *Id.*

126. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 384 (1959). The Court said:

To impose on ships the duty of shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an

(*lex fori*) would encourage a shipowner to seek a jurisdiction which would minimize his liability and a claimant to search for a forum where his recovery would be greatest.¹²⁷

Although uniform treatment with respect to pleasure craft limitation is desirable, neither the IMCO Convention nor the MLA Statute provides it. Similar to prior conventions concerning limitation of liability,¹²⁸ the IMCO Convention is intended to bring uniformity to the limitation laws of the maritime nations.¹²⁹ With respect to pleasure craft, however, the Convention only perpetuates the inconsistencies created by the Brussels Convention.¹³⁰ Article 15 of the IMCO Convention allows state parties to exclude or include from their implementing legislation, vessels weighing less than 300 tons or vessels used for navigation on inland waterways.¹³¹ Because most pleasure craft are less than 300 tons,¹³² their coverage under

onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country.

Id. The same rationale holds true with respect to claimants, whose compensation for maritime losses should not depend upon where the injury occurred.

127. See, e.g., *Black Diamond S.S. Co. v. Stewart & Sons*, 336 U.S. 386 (1949). In *Black Diamond*, a chartered American vessel collided with a British vessel in Belgium's territorial waters. *Id.* at 388. The American charterer petitioned for limitation of liability in a United States district court, *id.*, but claimed that Belgian law should be applied, *id.* at 390-91, because Belgium was the place where the accident occurred. The distinction between the two laws was significant. Under Belgian law, the maximum liability, based upon the tonnage of the vessel, was roughly U.S.\$325,000. *Id.* at 391. Under the United States Limitation Act, however, the post-accident value of the vessel was approximately U.S.\$1,000,000. *Id.* at 389. The Court recognized the fact that Belgian law could be enforced in American courts but stated that it had to be specifically pleaded and proved. *Id.* at 396-97.

128. See Boal, *Efforts to Achieve International Uniformity of Laws Relating to the Limitation of Shipowners' Liability*, 53 TUL. L. REV. 1277 (1979).

129. The preamble to the IMCO Convention declares this intention: "THE STATES PARTIES TO THIS CONVENTION, HAVING RECOGNIZED the desirability of determining by agreement certain uniform rules relating to the limitation of liability for maritime claims, HAVE DECIDED to conclude a Convention for this purpose . . ." IMCO Convention, *supra* note 10, preamble.

130. See *supra* note 79 and accompanying text. For a discussion of the Brussels Convention and the option it grants to contracting states, resulting in a loss of uniformity, see *supra* notes 60-64 and accompanying text. "[I]nterpretations of the [Brussels] convention will undoubtedly differ substantially from nation to nation, thereby eliminating any likelihood that meaningful uniformity will be achieved." Note, *supra* note 58, at 1714.

131. IMCO Convention, *supra* note 10, art. 15, para. 2. See *supra* notes 75-79 and accompanying text.

132. See Note, *supra* note 2, at 383.

the IMCO Convention would be left to the discretion of the state parties, thereby allowing for disharmonious results.¹³³

Uniformity is desirable, but “[a] bad convention should not . . . be adopted merely for the sake of uniformity.”¹³⁴ In addition, because of its other flaws,¹³⁵ the IMCO Convention should not be adopted. A better limitation scheme is needed.

Although the MLA Statute is generally preferable to the IMCO Convention,¹³⁶ if enacted, its application would be limited to the United States. Nonetheless, it can serve as a model for other maritime nations. Both the United States and the other maritime nations must update their limitation laws, and finally exclude pleasure craft from the new limitation schemes. Absent uniform international exclusion of pleasure craft, the inequities caused to claimants injured by these vessels will continue. Armed with a definition of pleasure craft, the United States and the other maritime nations can at last bring justice to pleasure craft injury victims.

CONCLUSION

Application of limitation of liability statutes to pleasure craft has been tolerated for too long. Claimants unfortunate enough to

133. If one state party chooses to exclude pleasure craft while a second chooses to apply the Convention, the chances for uniform treatment of these vessels is diminished. The results to claimants injured by pleasure craft can be erratic. For example, a claimant from state party A, which allows pleasure craft limitation under the Convention, is injured by a pleasure craft from state party B, which has chosen to exclude pleasure craft and apply its own laws to them. Claimant sues in his own state, which follows the Convention. The Convention provides a fund of 333,000 Units of Account, IMCO Convention, *supra* note 10, art. 6, para. 1(a)(i), which is roughly U.S.\$400,000. See Burr, *The IMCO Convention on Limitation of Shipowners' Liability: Should the United States Ratify?*, 10 *LAW. AM.* 799, 804 & n.28 (1978). The pleasure craft owner, however, files a petition for limitation of liability in state B, which applies its own limitation law, limiting a shipowner's liability to, say, U.S. \$50,000. If the law of state B is applied, claimant will be limited to a recovery of about one-eighth of what he would have received, were the law of state A (the Convention) to apply. The inequities of the results would magnify as the number of claimants dividing the limitation fund increased.

134. Healy, *supra* note 116, at 502.

135. See Martucci, *supra* note 53, at 863-64.

136. See *id.* at 864-67. Two of these reasons are the increased limitation fund under the MLA Statute, *id.* at 858-61, and the MLA Statute's requirement that the shipowner prove his entitlement to limitation, rather than making the claimant disprove that entitlement, as does the Convention. *Id.* at 846-49.

be injured in accidents involving pleasure craft have been under-compensated. The current United States Limitation Act is outmoded, inequitable and sorely in need of replacement. Similarly, the Brussels Convention, followed by many of the maritime nations,¹³⁷ has outlived its usefulness. Neither the IMCO Convention nor the MLA Statute, however, satisfactorily rectifies the impropriety of allowing pleasure craft owners to limit their liability.

Congress must recognize and act upon the need for change in this area of the law. Thereafter, other nations should be encouraged to follow suit. Absent proper justifications, each wrongdoer must answer for the harm he causes. Subsidizing pleasure craft owners was not one of the purposes for which limitation was designed,¹³⁸ and serves only to cause harm to victims of pleasure craft accidents.¹³⁹ Armed with a preliminary definition of what constitutes a pleasure vessel, the United States, and the rest of the maritime nations, may replace their existing limitation laws and adopt new schemes, finally excluding pleasure craft from their coverage. Justice requires that claimants injured by pleasure craft be compensated fully for those injuries.

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137. See *Ratification of Convention*, *supra* note 55, at 74.

138. See generally Donovan, *supra* note 30, at 1001-05 (commercial origin of limitation of liability); Note, *supra* note 58, at 1685 ("Indeed, the owners of pleasure yachts . . . are not engaged in economic competition at all.").

139. See, e.g., Note, *supra* note 2, at 383 ("The continued concern for the privileges of yacht and small-boat owners, which has neither competitive nor commercial justification, is perplexing and reprehensible.").