Pleasure Boating and Admiralty: Increasing Conformity and Decreasing Significance

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I
INTRODUCTION

Thirty-five years ago, Professor Preble Stolz identified the application of admiralty law to pleasure boating as an important issue of federalism.¹ No doubt he would have been amused by the irony that the Supreme Court, having initially rejected his position in Foremost Insurance Co. v. Richardson,² and Sisson v. Ruby,³ then reversed course and accepted it in Yamaha Motor Corp., U.S.A. v. Calhoun.⁴ In this most recent decision, the Court applied state law to allow the award of nonpecuniary damages for the wrongful death of a “nonseafarer” in state territorial waters. Professor Stolz would have been disappointed by this decision only in the failure of any justice to invoke that much neglected maxim of jurisprudence, “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.” But what is the wisdom that has now come to the Supreme Court?

Several contributors to this symposium have argued that whatever this wisdom is—and some doubt that there is any—it has resulted in an extraordinarily complex body of law.⁶ Professor Stolz did not anticipate this criticism of decisions handed down long after he wrote his seminal article. And even if he would have joined in it, it was not among the arguments that he advanced in his seminal article. His arguments were not based on

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simplicity, but went in the opposite direction, away from simplicity toward recognizing the complexity inherent in our federal system of government. Indeed, his arguments are more likely to increase than to decrease the complexity of the standards for determining admiralty jurisdiction.\footnote{See Carmilla & Drzal, Foremost Insurance Co. v. Richardson: If This Is Water, It Must Be Admiralty, 59 Wash. L. Rev. 1, 9 (1983). The distinction that they propose, based on the registration of the vessels involved, is one that is more appropriately drawn by a legislature than by a court. Id. at 14–16.}

Professor Stolz's position really was twofold: first, for restricting admiralty jurisdiction, and second, for applying state law to most issues raised by pleasure boating. The weight of his arguments fell behind the second of these positions. The first was important only because admiralty jurisdiction led to the application of admiralty law. The problem with applying admiralty law, according to Professor Stolz, was the absence of any reason to regulate pleasure boating as a matter of uniform national policy. The state courts were familiar with most of the issues in pleasure boating cases from the ordinary law of torts and contracts. Just like the federal general common law rejected in \textit{Erie Railroad v. Tompkins}, federal judge-made admiralty law could not justifiably displace state law in pleasure boating cases.

With all the wisdom that we have since acquired in hindsight, we can say that if the arguments for applying admiralty law were not so strong then, the results have not been so bad now. Or, at least, not for the reasons offered by Professor Stolz. The first part of this article surveys the areas in which admiralty law and state law have converged. The second part examines areas of continued divergence. A brief conclusion suggests that the problem, to the extent it persists, has less to do with aggressive federal lawmaking in admiralty than with the failure of admiralty law to follow trends that have already taken root in state law.

\section*{II}
\textbf{CONVERGENCE BETWEEN ADMIRALTY LAW AND STATE LAW}

The extension of admiralty jurisdiction to pleasure boating cases creates two different, but related, problems: first, that plaintiffs will engage in forum shopping to obtain the application of favorable law; and second, that admiralty law will differ in drastic and unjustifiable ways from state law. Both of these problems have been alleviated by general developments in admiralty law since Professor Stolz wrote his article.

The first problem presupposes a connection between invoking admiralty jurisdiction and applying admiralty law. This connection has been eroded by the modern view of the "saving to suitors" clause. On this view, the same substantive law applies to a case regardless of the forum chosen by the
plaintiff. In particular, in savings clause actions brought in state court (or in federal court based on diversity of citizenship), substantive admiralty law applies just as it would in admiralty cases. The same result also follows, through the normal pre-emption of state law, in those areas in which Congress has enacted legislation. A prominent example is the Federal Boat Safety Act, which pre-empts state tort claims for covered product defects.

_Yamaha_ weakens the connection between choice of forum and choice of law in the opposite direction: by requiring the application of state substantive law in admiralty cases. This revitalized use of the category of “maritime but local” cases, just like the modern understanding of the savings clause, diminishes the advantages of forum shopping for favorable admiralty law.

Nevertheless, Professor Stolz would not find these developments to be entirely satisfactory since his fundamental objection was to the expansion of federal admiralty law at the expense of state law. Applying the same law to all pleasure boating cases meets this objection only if the law, as in _Yamaha_, is state law. Otherwise, there must be some good reason to apply federal law, as Professor Stolz recognized with respect to uniform rules of navigation. In other cases, he found that the uniformity achieved by applying federal law came at too high a price: by displacing state substantive law. Professor Stolz concentrated on remedies:

Apart from collision cases, admiralty law does not permit contribution between tortfeasors; many states have statutes allowing contribution. Admiralty law holds a shipowner to a standard of reasonable care for all classes of visitors; the law of many states imposes differing standards depending on whether the visitor is a social or a business invitee. There is no statute of limitations in admiralty; there is in state law.

This list raises the second problem of drastic and unjustifiable differences between admiralty law and state law. Yet just to examine the list is to see what has become of Professor Stolz’s argument. On each issue on the list, either admiralty law or state law has changed, bringing both bodies of law closer together. Contribution and comparative negligence are now broadly allowed in admiralty, with only narrow exceptions. And both doctrines

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13Stolz, supra note 1, at 663.
have now been accepted by a large majority of states.\textsuperscript{15} The states have largely discarded different duties of care owed to social or business invitees, again bringing state law closer to admiralty law.\textsuperscript{16} From the other direction, Congress has brought admiralty law closer to state law by enacting a general statute of limitations for personal injury claims in admiralty.\textsuperscript{17} In another passage, Professor Stolz also implied that requirements for preferred ship mortgages differed from those for financing under state law,\textsuperscript{18} but here, too, conformity has been achieved by statute.\textsuperscript{19}

All of these examples are part of a broader trend towards conformity between admiralty law and state law. The decisions on such varied issues as products liability\textsuperscript{20} and contribution among joint tortfeasors\textsuperscript{21} have followed the dominant trends in state law. For instance, in the recent decision in \textit{Saratoga Fishing Co. v. J. M. Martinac \& Co.},\textsuperscript{22} the Supreme Court followed the weight of state and federal decisions and held that a products liability claim against the manufacturer of a vessel did not allow recovery for damage to equipment added to the vessel.\textsuperscript{23} Whatever the particular merits of this decision, they are less important than its focus on the reasoning in products liability cases generally.

So long as admiralty law follows developing trends in state law, as in \textit{Saratoga Fishing}, the choice between federal and state law raises only isolated problems in a few states. Thus litigation has continued over the application of the admiralty rule of comparative negligence, but only in those states that have retained the old rule of contributory negligence.\textsuperscript{24} Conversely, however, where admiralty law has departed from general trends in state law, as it has done on the issue of recovery of nonpecuniary damages for wrongful death,\textsuperscript{25} then the choice between admiralty law and state law

\textsuperscript{15}W. Keeton et al., Prosser and Keeton on the Law of Torts 338, 471 (1984 & 1988 Supp.) (noting that contribution has been adopted in "most" states and that comparative fault now exists in 46).
\textsuperscript{16}Id. at 422–23.
\textsuperscript{17}See 46 U.S.C. app. § 763(a).
\textsuperscript{18}Stolz, supra note 1, at 661.
\textsuperscript{19}See 46 U.S.C. § 31322(d) (recognizing security interests in vessels under a state titling system approved by the Secretary of Transportation).
\textsuperscript{22}117 S. Ct. 1783 (1997).
\textsuperscript{23}Id. at 1787.
\textsuperscript{24}See, e.g., Alford v. Appalachian Power Co., 951 F.2d 30 (4th Cir. 1991) (finding no navigable water on inland lake in order to avoid application of maritime law of comparative negligence), and Foster v. Peddicord, 826 F.2d 1370 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988) (finding no admiralty jurisdiction in a diving accident for the same reason).
\textsuperscript{25}See infra III.C.
becomes a significant problem. The next section of this article examines the areas of continued divergence.

III
DIVERSION BETWEEN ADMIRALTY LAW AND STATE LAW

Increasing conformity between admiralty and state law has made the application of admiralty law to pleasure boating a matter of diminishing significance. This is not to say, of course, that all differences between admiralty and state law have been removed. Far from it. As Professor Charles Alan Wright said of diversity jurisdiction, a choice of forum always gives an attorney the opportunity to select the forum most advantageous to his client.26 Hence the continued litigation over admiralty jurisdiction.

It is idle, anyway, to expect that all the differences between admiralty and state law will be smoothed over. The boundary between maritime law and shoreside law, just like the coastline that it often follows, is seldom smooth. In three areas, this boundary is likely to be especially ragged: in distinctive procedures in admiralty, in petitions to limit liability, and in damages for wrongful death. These areas are taken up in turn in the following subsections.

A. Distinctive Procedures in Admiralty

After Foremost and Sisson, the distinctive procedures in admiralty make an unavoidable difference in pleasure boating cases. If there is admiralty jurisdiction and the plaintiff chooses to invoke it, then admiralty procedures follow as a matter of course, the most important being arrest and maritime attachment27 and trial to the court without a jury.28 Although of general significance in admiralty litigation, these procedures rarely turn out to be decisive in pleasure boating cases.

The pretrial remedies of arrest and maritime attachment matter less in pleasure boating than in commercial cases because the value of recreational vessels, unlike commercial vessels, does not usually exceed the amount of the plaintiff’s claim. If the plaintiff must seek recovery from other assets of the defendant, the expense of posting security for seizure by the federal marshal and of maintaining the vessel while the action is pending will

outweigh the tactical advantage of seizing this asset from the defendant. As we shall see, the relatively low value of pleasure boats more often works to the defendant's advantage as an asserted cap on liability under the Limitation of Liability Act.

Seizing some other asset of the defendant through maritime attachment remains theoretically available to the plaintiff, but only if "the defendant cannot be found within the district" where the action is brought and the asset is seized. An individual defendant in a pleasure boating case, unlike a commercial defendant, seldom will have assets far from home. In any event, some courts have interpreted presence even more strongly to preclude even minimum contacts with the forum. Almost all defendants in pleasure boating cases will have at least minimum contacts with the place where the accident occurred, resulting in a finding of presence and defeating any attempt to use maritime attachment.

For the same reason, arrest and maritime attachment need not be used to acquire personal jurisdiction over the defendant. Although these procedures remain among the few surviving examples of quasi-in-rem jurisdiction, allowing personal jurisdiction to be exercised over a defendant based solely on the presence of assets within the forum, they do not make much difference in pleasure boating cases. The parties to these disputes almost invariably have minimum contacts with the forum, based either on residence, substantial activity in the forum, or, as noted, minimum contacts through the accident or contract giving rise to the plaintiff's claim. In contrast to commercial cases, the parties are seldom foreign residents or corporations without any systematic contacts with the forum.

Jury trial remains a far more significant issue for most plaintiffs than the mainly theoretical advantages of arrest and maritime attachment. Jury trial also inclines plaintiffs in the opposite direction, away from admiralty towards state courts or towards federal courts exercising jurisdiction on some other basis, such as diversity of citizenship. Under existing law, the plaintiff's decision to have a jury trial will always prevail over the defendant's attempt to force the case into federal court based on admiralty jurisdiction. Under the removal statute, plaintiffs can also sue in state court and prevent removal in most circumstances, at least in the absence of some

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other basis for federal jurisdiction. So, too, if the case is brought in federal court on some basis other than admiralty jurisdiction, the plaintiff can simply request a jury trial and refuse to designate the case as one in admiralty.\textsuperscript{34} Either way, the plaintiff can obtain a jury trial by making a timely demand for one.

As always, the situation becomes more complicated if the defendant seeks to limit its liability. Again, however, the legal rules have evolved to protect the plaintiff’s right to jury trial. The issue of limitation itself remains exclusively within the admiralty jurisdiction, and the defendant, through a petition for limitation, can force all the claims against it into a federal court sitting in admiralty.\textsuperscript{35} But when there is only a single prospective plaintiff, as often occurs in pleasure boating cases, her claim can be resolved by a jury.\textsuperscript{36} In cases with multiple plaintiffs, and, in particular, plaintiffs with claims exceeding the value of the vessel, they will lose their right to jury trial. The problem in these cases arises, however, not from general admiralty procedures but from the Limitation of Liability Act, which is discussed in the next subsection.

\textit{B. The Limitation of Liability Act}

The only area in which wide divergence persists between admiralty law and state law is that traditional whipping boy of admiralty scholarship, the Limitation of Liability Act.\textsuperscript{37} This statute has no analogue in state law, and federal bankruptcy law is far less generous to prospective defendants. The Limitation of Liability Act confers a windfall on vessel owners by limiting all claims arising out of a single accident to the value of the vessel after the accident.\textsuperscript{38} Especially in pleasure boating cases, the value of the vessel is often minimal. Such drastic consequences have led judges to try to avoid applying the Limitation of Liability Act. In pleasure boating cases, they have used a variety of means to do so: they have found no admiralty jurisdiction over the plaintiff’s claim, or that the owner’s pleasure boat was not a vessel, or more successfully, that the owner acted with “privity or knowledge.”

The first of these loopholes was almost entirely closed by \textit{Sisson v. Ruby}, which extended admiralty jurisdiction to any claim from navigation of a vessel or “any other activities traditionally undertaken by vessels, commer-

\textsuperscript{34}Fed. R. Civ. P. 9(h).
\textsuperscript{35}See 46 U.S.C. app. § 185.
\textsuperscript{37}Stoltz, supra note 1, at 707–13.
cial or noncommercial," on navigable waters. Nevertheless, later decisions have continued to find no admiralty jurisdiction based on the absence of any threat to maritime commerce, from defects such as a carbon monoxide leak inside a vessel, or from incidents such as swimming accidents.

The second loophole also has been closed off by the uniform holdings of the circuit courts that pleasure boats are vessels within the meaning of the Limitation of Liability Act. These decisions have reasoned, with some force, that the use of the unqualified term "vessel" in the main provision of the Act, accompanied by the exclusion of "pleasure yachts" from the term "seagoing vessel" used in narrower provisions, requires the conclusion that pleasure boats are generally covered by the Act.

Because these two loopholes are now largely closed, the third has become all the more important. A court can deny limitation if the plaintiff's loss occurred with the "privity or knowledge" of the vessel owner. The burden of proof on this issue is on the vessel owner once the plaintiff has established the cause of the loss. It is also a heavier burden for the owner of a pleasure boat to carry than for the owner of a commercial vessel, for two reasons: the owner of a pleasure boat is usually an individual, not a corporation; and the owner often has been directly involved in the incident giving rise to the loss, most clearly when he was operating the vessel when the accident occurred. Even when the owner was not operating the vessel, however, privity or knowledge can be established by the owner's decision to delegate control of the vessel to the person who was operating it or by the owner's knowledge of dangerous conditions aboard the vessel.

Heavy as this burden is, the owner of a pleasure boat can sometimes carry it. This possibility has led courts to be reluctant to dismiss petitions for limitation of liability before the cause of the plaintiff's loss has been established. Statistics compiled by the Maritime Law Association reveal

39Sisson, 497 U.S. at 362.
40H2O Houseboat Vacations Inc. v. Hernandez, 103 F.3d 914 (9th Cir. 1996).
41Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260 (9th Cir. 1993).
42McCauley, supra note 36, at 295.
45McCauley, supra note 36, at 304–05.
46See Matter of Guglielmo, 897 F.2d 58, 61–63 (2d Cir. 1990) (no limitation of claim for negligent entrustment); Joyce v. Joyce, 975 F.2d 379, 385 (7th Cir. 1992) (limitation petition dismissed for lack of subject-matter jurisdiction because vessel owner who knew enough to be liable for negligent entrustment also knew enough to establish privity or knowledge); McCauley, supra note 36, at 310–12.
that, in reported cases from 1953 to 1996, owners of pleasure boats have succeeded in limiting liability 40% of the time. This figure is slightly higher than the success rate for all other vessels, which is 37%. Nevertheless, both figures are likely to overstate the success of vessel owners in all cases. Only close cases on the issue of privity or knowledge are likely to be litigated to judgment and to result in a published opinion. Clear cases are likely to be settled (or decided without opinion) in favor of the plaintiff because the evidence on the issue of liability also supports a finding of privity or knowledge. Clear cases in which the vessel owner proves the absence of privity or knowledge are likely to be rare. It follows that settled and unreported cases are likely to be disproportionately cases in which the vessel owner fails to limit liability.

Even so, a 40% success rate for the owners of pleasure boats in reported cases is significant. Does it establish that pleasure boating should be excluded from admiralty? Not really, because the problem is not with the breadth of admiralty jurisdiction but with the breadth—or, as many critics contend, with the very existence—of the Limitation of Liability Act. Whatever the justification for the Act in commercial cases, it is far weaker in pleasure boating cases. There is no need, as a matter of national policy, to foster the construction of pleasure boats and there is no reason to believe that plaintiffs in pleasure boating cases are less deserving of full compensation than plaintiffs in other tort cases. For precisely these reasons, courts have sought to deny the benefit of the Act to owners of pleasure boats.

Courts cannot entirely avoid applying the Act, however, and in particular, they cannot avoid doing so based on the arguments of federalism emphasized by Professor Stolz. The Limitation of Liability Act extends federal power at the expense of the states, but at the instance of Congress, not the federal courts. Unlike the federal courts, Congress has plenary power to regulate interstate commerce, and therefore, to determine the balance of power between the Federal Government and the states. The congressional judgment in the Limitation of Liability Act was to exclude “pleasure yachts” from some of its provisions, and necessarily to include pleasure boats in others. This judgment cannot be revised by narrowing the scope of admiralty jurisdiction, and certainly not out of concerns, like Professor Stolz’s, about

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50The MLA Report, MLA Doc. No. 729 (May 2, 1997), at 10532. The rate is somewhat lower, 33%, if the period is limited from 1968 to 1996. Id. at 10530, 10532.

51This follows from the general proposition that success rates in litigation should approach 50%. Priest & Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984).

the expansion of judge-made federal admiralty law at the expense of state law. The problems of federalism created by the Act were created by Congress and must be left, for the most part, to be remedied by Congress. Apart from a broad interpretation of the requirement of "privity or knowledge"—which has nothing to do with issues of federalism—the federal courts can do little to alleviate the lamentable consequences of the Limitation of Liability Act.

C. Damages for Wrongful Death

Damages in wrongful death claims, and in related survival claims, have been the subject of repeated litigation in admiralty. Plaintiffs and their attorneys have been particularly anxious to avoid the prohibition on recovery of nonpecuniary damages under the Death on the High Seas Act and the Jones Act.\(^53\) It is only natural that they have turned to state law when it allows the recovery of such damages, for instance, for loss of society or in the form of punitive damages. It is more surprising that their efforts proved to be successful in *Yamaha*. The main question about *Yamaha* does not concern the deference that it accords to state law—it requires the federal courts to apply state law—but whether *Yamaha* draws the distinction between state and federal law at the right place.

*Yamaha* draws this distinction based on both location and status: the death must occur in state territorial waters and it must be of a nonseafarer. Whatever the merits of this distinction—and others have pointed out that simplicity is not one of them—it is not a distinction between pleasure boating and maritime commerce. Pleasure boats can be involved in accidents outside of territorial waters and nonseafarers can be passengers aboard commercial vessels.\(^54\) The restrictions on the scope of state law under *Yamaha* are dictated by federal statutes, or at least the Supreme Court’s interpretation of these statutes, and less by simple assertions of lawmaker authority by the federal courts. On the contrary, it is the failure of the federal courts to develop federal remedies for wrongful death that gave rise to the problem addressed in *Yamaha*.

The restriction of state law to state territorial waters results from the Death on the High Seas Act, which covers deaths beyond three nautical miles from shore and allows recovery of "a fair and just compensation for the pecuniary


loss sustained by the persons for whose benefit the suit is brought." The quoted phrase has been interpreted to preclude any recovery for nonpecuniary damages. The restriction of state law to deaths of "nonseafarers" also derives from federal legislation: from the special remedies for seamen under the Jones Act. Although the Jones Act does not, by its literal terms, preclude the recovery of nonpecuniary damages, the Supreme Court has reached this result by interpretation. It follows that state law, even if it applied to pleasure boating as an initial matter, could not overcome the limited recovery allowed in cases covered by these statutes.

The problem in Yamaha derived from a source entirely different from pleasure boating: the failure of admiralty law to provide a full recovery for wrongful death. This failure was only partially remedied by Moragne v. States Marine Lines, Inc., which went no further than recognizing claims for wrongful death under the general maritime law. Subsequent decisions have vacillated on the recovery of nonpecuniary damages, first allowing recovery of nonpecuniary damages for the death of a longshore worker within the three-mile limit and then refusing to do so for claims covered by the Death on the High Seas Act or the Jones Act. As Professors Force and Robertson have demonstrated, the decisions denying recovery resulted more from a general failure of admiralty law to develop along with state law than from an aggressive assertion of lawmaking power by the federal courts.

Professor Stolz would be vindicated by Yamaha only if the exclusion of pleasure boating cases from admiralty would have more easily generated a simpler body of law. In his article, however, he does not offer simplicity as an argument for his position. He recognizes, for instance, that questions of navigation must be governed by admiralty law, even if questions of remedy are determined by state law. Nor could he argue for exceptions to the Death on the High Seas Act and the Jones Act for cases involving recreational boats. These statutes do not define their coverage in those terms. He is forced, in short, to make either the same distinctions or similar distinctions to those under existing law. Having gone that far down the path

61Stolz, supra note 1, at 712–17.
towards existing law, he would be hard pressed to defend his own proposal as superior.

IV
CONCLUSION

The complications in Professor Stolz's position fairly raise the question whether existing law is any more complicated than the regime that he proposed. Indeed, any regime that relies on joint regulation by federal and state law is bound to be complex. Whatever the virtues of federalism, simplicity is not one of them. Accordingly, Professor Stolz relies far more heavily on the superior ability of the states to regulate most aspects of pleasure boating, both because they have a greater body of private law, particularly tort law, on which to rely and because they can more readily fill any gaps in this body of law as it applies to pleasure boating. The course of decisions recounted above, however, severely undermines this argument. Both the Supreme Court and Congress have been active in changing admiralty law. The risk in pleasure boating cases is not that the federal admiralty law will go too far in displacing state law, as Professor Stolz feared, but that it will not go far enough in bringing itself up to date. That is the lesson to be drawn from the pleasure boating cases affected by the Limitation of Liability Act and the restrictions on remedies for wrongful death in admiralty. It is a lesson that extends beyond pleasure boating to all of admiralty law.