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# Limitation of Liability for Passengers or Persons

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In Canada, the *Marine Liability Act* sets out the relevant limitation of liability amounts for personal injury maritime claims. The relevant limitation amounts are based on two international Conventions: (i.) the *Convention on Limitation of Liability for Maritime Claims, 1976* (the "General Convention"); and (ii.) the *1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea* (the "Athens Convention"). The General Convention is adopted and forms part of Canadian Maritime Law through the language and operation of Part 3 of the *Act* (consisting of Sections 24 through 34). The Athens Convention is incorporated into Canadian Law through Part 4 (Sections 35 through 40).

On their own, the General Convention and Athens Convention have relatively straight forward, distinct applications. The Athens Convention applies to limit liability for injuries suffered by fare paying passengers aboard a vessel on a contract of carriage, while the General Convention applies to limit liability for all other personal injuries that occur either on board or in direct connection with the operation of a ship.

The *Act* incorporates these two Conventions into Canadian Maritime Law, but instead of applying both to the discrete categories of persons/passengers that the drafters intended the Conventions to apply to, our Government, through the *Act*, has created a new category of persons within the limitation regime; the "person" other than a paying passenger who is aboard a vessel that is "operated for a commercial or public purpose" (the "Commercial Purpose Persons").

The Commercial Purpose Person as a separate category of persons to consider in the limitation of liability regime is a uniquely Canadian creation that does not appear to exist in any other country that applies the General and Athens Conventions. Unfortunately, the inclusion of this new category within the limitation of liability analysis has resulted in the use of some confusing language in both Parts 3 and 4 of the *Act*, and has created a perceived overlap in the *Act's* treatment of both true passengers and Commercial Purpose Persons. On their own, it is relatively easy to determine what the limitation amounts are under both the General and Athens Conventions, but the language contained within Parts 3 and 4 have caused confusion for the Courts and others attempting to apply this uniquely Canadian limitation of liability regime. Our government's decision to rely on these same categories in the new compulsory insurance regime raises similar issues and difficulties to those that have been the source of frustration with respect to limitation of liability in Canada.

The difficulty with respect to the Commercial Purpose Person is that a determination of whether an individual falls within that category depends upon a somewhat vague classification of a particular voyage, as opposed to some more easily identifiable characteristics pertaining to the vessel itself or contract of carriage. The Athens Convention was intended to apply to paying passengers that purchase a ticket to board a vessel, while the limitation amounts detailed within the General Convention are based on the tonnage of the relevant ship. The Commercial Purpose Person, however, turns on a determination of the specific purpose for each voyage. As a result, a person aboard a vessel may fall under the General Convention limits if on one voyage, and that same person aboard that same vessel may fall within the Athens Convention limits on a subsequent voyage. Also, the commercial purpose analysis can take pleasure vessels out of the General Convention and bring them within the Athens Convention limits, which is a result that

goes against the common understanding of how pleasure craft limitation of liability laws are typically applied.

In underwriting a risk or assessing a claim it is important to understand the amounts that an Insured can limit liability to. This Article will discuss both the general application of Part 3 and the General Convention, and of Part 4 and the Athens Convention. Case summaries of two recent decisions that struggle with the perceived overlap between these two limitation regimes will follow, along with a summary of applicable limitation of liability amounts in all maritime personal injury claims.

Of note, recent amendments to the *Act* have resulted in the renumbering of some key sections, particularly those contained within Part 3 of the *Act*. Much of the wordings that were contained within section 28 are now contained within section 29, and vice versa. The amendments due not impact any of the issues addressed in this Article. For the purposes of this Article we will be relying upon the old section numbers to maintain consistency with the Court decisions that will be discussed below, and eliminate confusion when attempting to apply the reasons of the Courts to the legislation.

**GENERAL CONVENTION**

As noted above, the general limitation of liability regime is set out in Part 3 of the *Act*, which implements the General Convention with some additional Canadian amendments and limits.

Pursuant to Article 1 of the General Convention, this regime regulates the limitation of liability of shipowners, charterers, managers and operators of seagoing ships, as well as salvors. Article 1(4) extends the right to limit to employees and agents of such persons. Article 1(6) extends the benefits to liability insurers of persons entitled to limit.

The *Act* itself further extends the list of persons entitled to limit their liability beyond that allowed in the Convention. Section 25(1)(b) of the Act extends the right to limit to owners, charterers, managers and operators of all ships, not just "seagoing" ships, and further to any person with an interest in or possession of a ship. With these amendments, the right to limit applies to pleasure craft on lakes and rivers as well as to "seagoing" ships.

The claims that are subject to limitation of liability include claims for loss of life or personal injury, claims for loss of or damage to property, claims for consequential losses, claims for delay in the carriage of cargo or passengers, and various other claims.

Claims that will not fall within the protections of the General Convention include claims for salvage, claims for oil pollution damage governed by the 1969 Convention on Civil Liability for Oil Pollution, claims for nuclear damage, and claims by employees if the applicable law does not permit limitation.

In order to prevent a defendant from limiting his liability, the plaintiff must prove that the loss resulted from the personal act or omission of the defendant "committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result". This is a very

strict test and is often referred to as establishing an "unbreakable limitation", though the limit has recently been broken for the first time in Canada.[1]

The general limits of liability are established by Article 6 of the General Convention and by Section 28 of the *Act*. Section 28 of the *Act* sets out special Canadian limits for vessels of less than 300 gross tons ($1,000,000 for claims for loss of life or personal injury, and $500,000 for "other claims"). For vessels of more than 300 gross tons, the limitation amount is governed by Article 6 in the General Convention (i.e. limitation amounts increase as size of vessels increase).

The Section 28 limitation amounts and the higher amounts set out in Article 6 for larger vessels apply to the aggregate of all claims arising on any distinct occasion.

Article 6(2) specifies that where the limitation amount applicable to a personal injury claim is insufficient to satisfy all such claims, the amount applicable to property damage claims shall be made available to satisfy the personal injury claims. That said, a reading of Sections 26 and 28 suggest that Article 6(2) may not apply to vessels under 300 tons. There is also an argument that the "other claims" limitation fund is unavailable unless the incident actually gives rise to "other claims".

Finally, Article 7 of the General Convention and section 29 of the *Act* set out special limits of liability for:

- claims by passengers carried under a contract of carriage;
- passengers accompanying goods that are carried under a contract of carriage; and
- persons carried on board ships that are operated for a commercial or public purpose.

In such cases, the limitation amount is the greater of 2,000,000 SDR (approximately $3,400,000 depending upon currency values) and 175,000 SDR (approximately $300,000) multiplied either by the number of passengers on board the ship, or by the number of passengers the ship is certified to carry. However, these limits do not apply to vessels operated solely for pleasure purposes.

It is the language used in Section 29 of the *Act*, the reference contained therein to the Commercial Purpose Person, and the virtually identical language applying different limits in Section 37 under Part 4 (i.e. the Athens Convention Sections) that have caused much of the confusion and debate in Canada respecting these two limitation of liability regimes. This issue will be discussed in detail through the case summaries below.

**ATHENS CONVENTION**

The carriage of passengers is regulated by Part 4 of the *Act*, which implements the Athens Convention, and again introduces special Canadian amendments.

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[1] See *Societe Telus Communications* v. *Peracomo Inc.*, 2011 FC 494

The Athens Convention was drafted to apply to the international carriage of paying passengers, such as passengers aboard cruise ships or ferries traveling between countries.

The definition of "passenger" under the Athens Convention has no application to persons carried gratuitously (i.e. guests or stowaways), or to charterers. Edgar Gold states, in *Maritime Law* (Irwin Law: Toronto, 2003), that:

> "Passengers" are people carried on a ship, usually by agreement, for a fee…but crew members and other employees of the ship owner, as well as charterers and their families and guests are not passengers. Individuals who are rescued at sea or become stowaways are not passengers either. Passengers are distinguished as having contracted for carriage against payment of passage money.

Further, Mr. Gold states that the Athens Convention definition of "passenger" excludes:

> …non-fare paying persons, such as the carrier's employees, including the master, the crew and all others who are engaged to supply services to passengers on board. It also excludes others who have no contract of carriage, such as charterers and their guests, as well as individuals who are transported privately and not on commercial or public vessels.

Instead of adopting the same language respecting "passengers" to define the scope within which the Athens Convention passenger limits would apply in Canada, the drafters of the *Act* intentionally broadened the scope within which those provisions would apply.

Sections 36 and 37 of the *Act* expanded the scope of the Athens Convention in Canada to include the carriage of paying passengers on inland lakes and rivers, the domestic carriage of paying passengers as well as international carriage, and even to include the carriage of non-paying persons aboard commercial vessels as long as those persons were not acting as master or crew. This last category of "non-paying persons aboard commercial vessels" is discussed in greater detail in the Case Comment on *Gundersen* v. *Finn Marine* (below).

The Athens Convention applies to both contracting and performing carriers, allows both to limit liability, but prevents both from relying on waiver or release agreements to limit liability below the limits prescribed in the Convention. As a result, the *Act* provides a uniform method for establishing liability that balances the interests of shipowners and passengers. Of benefit to shipowners and their insurers is that they have a clearer indication of what they may be liable for, and to what degree (i.e. due to clearly defined limitation of liability provisions). The *Act* also provides passengers in Canadian waters with the ability to make claims, and to facilitate their prompt settlement, while protecting them from waiver and exemption clauses that attempt to restrict liability below the prescribed Athens limits.

Article 7 of the Athens Convention provides that the maximum liability of the carrier for the death of or injury to a passenger is 175,000 units of accounts or "standard drawing rights" (approximately $300,000 CDN depending upon relevant currency rates). These limits are individual limits applicable to claims by individual passengers.

In the case of claims by multiple passengers, the *Gundersen* case will show that the carrier may seek the right to limit liability to a global figure pursuant to Part 3 of the *Act* and the General Convention. Article 19 of the Athens Convention appears to preserve this right of the carrier.

Finally, Article 13 provides that the carrier will lose the right to limit liability where it is proved that the damage resulted from an act or omission done with intent to cause damage or recklessly and with the knowledge that such damage would probably result. It is very difficult for an injured passenger to prove that a carrier's conduct is such that the carrier should be disentitled to rely on the limitation of liability protections detailed within the Athens Convention.

**CASE COMMENT: *Gundersen* v. *Finn Marine*, 2008 BCSC 1665**

On December 3, 2008, Mr. Justice Davies released a decision in ***Gundersen* v. *Finn Marine***. This decision is of interest because it is one of the few Canadian decisions that applies and interprets the Athens Convention, and because the British Columbia Supreme Court confirmed that the Athens Convention has a broader application in Canada than even the Convention itself ever intended.

The *Gundersen* case is a personal injury case that arose when a person aboard a water taxi was injured at sea when the master of the vessel fell asleep at the helm, eventually causing the vessel to run aground on Salt Spring Island. While the vessel was a commercial water taxi on route to pick up paying passengers, the Plaintiff was not a paying passenger but was onboard as a non-paying guest/friend of the master. The Plaintiff had been riding along with the master of the water taxi since about 10:00am on the morning of August 15, 2003. The Collision occurred between 12:00 midnight and 2:00am in the early morning of August 16, 2003, while the Plaintiff was asleep in a bed in the aft port area of the vessel. The vessel struck Salt Spring Island at a crusing speed of about 20 knots per hour, resulting in serious personal injuries to both the Plaintiff and the master of the vessel.

*(i.) Issue*

The Court acknowledged that there are two relevant limitation of liability regimes detailed within the *Marine Liability Act* that had to be considered; the 175,000 units of account (approximately $300,000) limit under Part 4 of the Act (the "Athens Limit"), and the 2,000,000 units of account (approximately $3.4 million) limit under Part 3 of the Act (the "General Limit"). The key issue for the Court in *Gunderson* was as follows:

> Is the monetary extent of the defendants' liability to the Plaintiff limited by the Athens Limit, or by the substantially higher General Limit?

*(i.) General Limit or Athens Limit?*

The Athens Convention clearly indicates that it pertains to international "contracts of carriage", defined in Article 1(2) to mean a contract made by or on behalf of a carrier for the carriage by sea of a "passenger", or a "passenger" and his luggage. Article 1(4) of the *Athens Convention* defines "passengers" to include persons carried on a ship under a "contract of carriage". These "passenger" and "contract of carriage" requirements as detailed and defined in the *Athens*

*Convention* have no application to persons carried gratuitously (i.e. guests or stowaways) or to charterers[2].

The intention of the drafters was that the Athens Convention would apply primarily to vessels such as cruise ships and ferries travelling between countries.

As already discussed above, in Canada, the carriage of passengers is regulated by Part 4 of the *Act*, which implements the Athens Convention with special Canadian amendments that broaden the scope of the Athens Convention.

Specifically, Section 36 expands on the definition of ship to include ships of all types, whether seagoing or not. The effect of this change in definition is to make the Athens Convention applicable to the carriage of passengers on inland lakes and rivers.

Section 37(2)(a) expressly makes the Athens Convention applicable to contracts for the domestic carriage of passengers as well as international carriage.

Section 37(2)(b) further extends the application of the Athens Convention by dispensing with the requirement that there be a contract of carriage in the case of persons (excluding the master, crew or employees), carried on ships operated for a commercial or public purpose. This is achieved through the following strangely worded provision:

> 37(2) Articles 1 to 22 of the Convention also apply in respect of …
>
> (b) the carriage by water, otherwise than under a contract of carriage, of persons, or of persons and their luggage, excluding:
>
> (i) the master of a ship, a member of a ship's crew or any other person employed or engaged in any capacity on board a ship on the business of the ship, and
>
> (ii) a person carried on board a ship other than a ship operated for a commercial or public purpose.

Of note, this section refers to application to a "person" instead of a "passenger", where the term "passenger" had always been defined as a fare paying passenger that boards a vessel following payment of a fee.[3] After a review of relevant debates contained within Hansard (recording of legislative/parliamentary debates pertaining to drafting of legislation), the Court agreed that it was the intention of the drafters of the *Act* to broaden the scope and application of the Athens Convention through the use of the word "persons" in Section 37, resulting in the creation of the new limitation category described above as the Commercial Purpose Person.

The first clause of Section 37(2)(b) extends the application of the Athens Convention to the carriage of all persons regardless of whether there is a contract of carriage. The use of the term "persons" and the discarding of the requirement that there be a contract of carriage makes the Convention applicable to virtually every person on board a ship for whatever reason. It is likely

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[2] Tetley, W., *International Maritime and Admiralty Law* (ISP: Quebec, 2002), at 538

[3] See Edgar Gold, *"Maritime Law"* (Irwin Law: Toronto, 2003)

for this reason that the qualifiers in 37(2)(b)(i) and (ii) are introduced. Section 37(2)(b)(i) states that the Athens Convention does not apply to the master or crew of the ship or other persons employed on board the ship. Section 37(2)(b)(ii) is intended to ensure that the Convention does not apply to persons carried on board pleasurecraft (unless of course that pleasurecraft is being operated on a particular voyage for a commercial purpose).

In summary, the combination of Article 2 of the Athens Convention and Sections 36 and 37 of the *Marine Liability Act* seem to make the Convention applicable to both domestic and international carriage of passengers in ships of all sorts on inland lakes and rivers as well as the high seas. In addition, persons (not being master, crew or employees) on board ships used for commercial or public purposes (i.e. the Commercial Purpose Person) seem to be governed by the Convention regardless of the existence of a contract of carriage.

This interpretation of the applicability of the Athens Convention was confirmed by the Court in *Gundersen*, where it was found that section 37(2) of the Act applied to extend the Athens Limit, "to domestic gratuitous passengers on a vessel operated for a commercial purpose". This was the first key decision made in *Gundersen*; that the Athens Convention applied to more than just fare paying passengers, but also to the Commercial Purpose Person.

Next, the Court had to address confusion that arose respecting similar language referring to the Commercial Purpose Person in both Section 29 under Part 3 of the *Act*, and the above-noted language set out in Section 37 of Part 4. As noted above, the language used in Sections 29 and 37 are virtually identical, with both purporting to apply to this new, strictly Canadian limitation of liability category that we have defined as the Commercial Purpose Person. However, Section 29 suggests a $3.4 million limitation following injury to one Commercial Purpose Person, while Section 37 results in a $300,000 limit per injured Commercial Purpose Person aboard the vessel (i.e. simply $300,000 in the *Gundersen* case).

Plaintff's counsel in *Gundersen* argued that the *Act* must be read in a manner similar to that in which an insurance policy would be analyzed, advanced a submission that Sections 29 and 37 were in direct conflict or their proper application was at least ambiguous and difficult to determine, and that the conflict/ambiguity had to be resolved in favour of the injured Plaintiff with the result being an application of the higher $3.4 million limit contained within Section 29 and Part 3 of the *Act*.

Our Firm, acting for the Defendants, argued that this could not be the proper application of Section 29 as such a result would almost totally invalidate Part 4 and the Athens Convention, and bring all passenger[4] and Commercial Purpose Person cases under Part 3 and the General Convention. It could not be the intent of the drafters of the *Act* to have all these claims fall within the higher Part 3 General Limit when Part 4 and the Athens Convention were drafted with the narrow purpose of applying to these specific types of passenger and Commercial Purpose Person claims only, with no broader application. Our successful submission supported a more complicated interplay between Part 3 and the General Convention, and Part 4's Athens

[4] note: there are other subsections of Section 29 that deal with "passengers" in addition to Commercial Purpose Persons

Convention, which would necessitate the application of the lower Athens Limit in the *Gundersen* case.

In finding that the Athens Limit, as opposed to the higher, General Limit, should apply, the Court in *Gundersen* accepted that:[5]

1. Parliament deliberately extended the applicability of the Athens Limit to include individuals other than "passengers" by using the term "person" to include those aboard a vessel being operated for a commercial purpose "other than under a contract of carriage" (i.e. the Commercial Purpose Person);

2. If there is any possible overlap between the Athens Limit and the General Limit, it arises only in circumstances where the total amount that would be payable to all claimants under the Athens Limit would exceed the higher limit calculated in accordance with Article 7 of the General Limit, in which case a shipowner may limit such claims to the amount of the General Limit through a *pro rata* scaling of each claim; and

3. Other than as a cap on overall exposure as detailed above, the General Limit does not have priority over the Athens Limits on passenger liability. All passenger (and Commercial Purpose Person) claims will be treated as primarily subject to the Athens Limits.

There are essentially two limitation amounts available to a shipowner; the approximate $300,000 per injured passenger/Commercial Purpose Person under Part 4 and the Athens Convention, and the approximate $3.4 million global limit under Part 3 and the General Convention.[6] The shipowner has the option to proceed under the more specific Athens Limit, or the global General Limit. Accordingly, if there is only one injured passenger/Commercial Purpose Person, the shipowner will opt to proceed under the lower $300,000 Athens Limit. If a scenario arises where multiple injuries result in the Athens Limit exceeding the typically higher General Limit, then the ship owner can opt to apply the General Limit. That said, the General Limit cannot be viewed as a $3.4 million hard cap, as the General Limit may actually be higher in multiple injury situations.

*Gundersen* is an important case because it both identifies and discusses this new category in the limitation regime pertaining to persons aboard vessels operated for a commercial purpose, and clarifies the application of similar provisions appearing in both Parts 3 and 4 of the *Act* that have caused some confusion to individuals attempting to interpret the *Act*.

As a result, it now appears that the proper test to determine whether the Athens Convention applies includes an assessment of whether an individual is a person carried on board a ship that was "operated for a commercial or public purpose". The "commercial purpose" test is far

[5] See *Gundersen* case, p. 23 and 26-27

[6] Note: This analysis is focussed on a single injury scenario. In cases of multiple injuries, the Part 3 global limit under Section 29 may actually be higher than $3.4 million.

broader than the test set out in the Athens Convention itself (i.e. the test pertaining to "passengers" and "contracts of carriage"). Accordingly, there is now a real likelihood that a Court may apply lower Athens Limits in a wider variety of cases, as opposed to the higher General Limit.

It also appears that the General Limit can be relied upon by shipowners to further limit liability where the total amount that would be payable to multiple claimants under the Athens Limit would exceed the global fund calculated in accordance with Part 3, Article 7 and the General Convention. In such cases, the shipowner may limit such claims to the amount of the General Limit.

*(iii.) Amendments to the Act*

There are no amendments contained within Bill C-7 that, had they been in force prior to the hearing of *Gundersen*, would have impacted the decision in *Gundersen*. That said, it is interesting to note the following:

1. The amendment to section 36(1)(a) of the Act precludes the application of the Athens Limit where the vessel in question is propelled manually by paddles or oars;

2. The addition of section 37.1 of the Act precludes the application of the Athens Limit to participants in "adventure tourism activities", and to sail trainees as defined in that new section of the Act; and

3. The amendment to section 37(2)(b)(iii) of the Act precludes the application of the Athens Limit to "a person carried on board a ship in pursuance of the obligation on the master to carry shipwrecked, distressed or other persons or by reason of any circumstances that neither the master nor the owner could have prevented".

**CASE COMMENT: *Buhlman* v. *Buckley*, 2012 FCA 9**

The *Buhlman* case is a January 11, 2012 decision of the Federal Court of Appeal that demonstrates the continued difficulties that individuals (and lawyers) are having in applying the Part 3 and 4 limitations, and in particular in applying the Commercial Purpose Persons provisions.

In *Buhlman*, the injured persons were paying guests at a fishing lodge that offered their guests the use of boats owned by the lodge. During their stay, there was a collision between two vessels, both owned by the fishing lodge.

The first boat, a Crestliner vessel, was operated by an owner/employee of the fishing lodge. We will refer to this first boat as the "Owner Operated Boat".

The only two injured persons were the only occupants of the second boat, a Lund Outfitter. We will refer to this second boat as the "Injured Persons Boat". One of the injured persons was operating the Insured Persons Boat, and the other was aboard as a non-fare paying passenger.

At Trial (not the Court of Appeal), the entire focus of all counsel's arguments were on whether the vessels in question were being operated for a commercial or public purpose, and if they were, whether the $1,000,000 limit contained within Section 28 of Part 3 for all vessels under 300 tons applied, or the $3.4 million limit contained within Section 29 for Commercial Purpose Persons. Neither party appears to have attempted to address Part 4 and the Athens Convention as the Court notes, at paragraph 2, that the matter was brought pursuant to Part 3 and the General Convention.

With respect, all counsel at Trial missed the key issues entirely in the *Buhlman* case. This is not a case that would have ever required an assessment of "commercial or public purpose", or that should have ever attempted to apply the Athens Convention or the Section 29 $3.4 million limit. This was always a Section 28 $1,000,000 limit case for a maritime claim occurring in direct connection with the operation of a ship.

The Trial Judge confirms that the arguments submitted were off track, making the following comments at paragraph 45 respecting costs:

> Since the [party seeking to enforce the $1,000,000 section 28 limit] has succeeded upon an argument that they did not raise and the [injured parties] did not answer, in the exercise of my discretion pursuant to section 400 of the Rules, I make no order as to costs.

The Trial Judge and Court of Appeal got the decision right, and applied the $1,000,000 Section 28 general limit without a consideration of Commercial Purpose Persons or the Athens Convention. That said, due in part to the improper focus of initial submissions on commercial purpose and Section 29 issues, the Court does make a few comments in *obiter* that are either incorrect, or that may be misconstrued to cause further confusion with respect to the application of the two key limitation regimes.

The facts that make the *Buhlman* case confusing are that both vessels involved in the collision were owned by the same owner, and that there was in fact a commercial purpose aspect to the operation of both (i.e. the use of the vessels were a perk or amenity in the fishing lodge package). However, an error that appears to have been made that sent the parties improperly down a "commercial purpose" analysis was a failure to identify the specific role and function of the owner that was actually being claimed against in the Action.

Consider a scenario where a cruise ship collides with a ski boat. If claims are brought by injured "passengers" of the cruise ship against the cruise ship owner and master, then their claims will fall within Athens Limits. They are clearly "passengers" intended to fall within the Athens Convention. If, instead, claims are brought against the cruise ship by occupants of the ski boat, Article 6 and the General Convention will apply (i.e. not the passenger/Commercial Purpose Person provisions under Section 29, but the limit for injuries arising from operation of a ship under Section 28 and/or Article 6). Part 4 and the Athens Convention apply to claims brought against an owner/master by their paying passengers (or Commercial Purpose Persons), not by persons injured in other vessels in a collision. The inability to rely on waiver agreements and other key issues that result in lower Athens Limits would not be applicable to the claim brought by the ski boat occupants; Athens and Section 29 are simply not relevant.

While the same party owns both vessels in the *Buhlman* case, the analysis of limitation of liability is the same as that in the cruise ship/ski boat scenario. The claim in *Buhlman* is brought against the owners/operators of the Owner Operated Boat for negligent navigation resulting in the collision that caused injury; it is not brought against the owner of the Injured Persons Boat (despite the fact that the owner of both is the same). If the injured persons were advancing arguments against the owner of the boat that they were in (i.e. that it was not properly equipped, did not have a horn or warning lights that resulted in the collision), then it would be necessary to look at commercial purpose and the Athens Convention. However, these were not the allegations advanced in *Buhlman*. In *Buhlman* the allegations were against the owner/operator of the Owner Operated Boat only. Accordingly, like a ski boat suing a cruise ship, Athens and the Commercial Purpose Person have no application.

The Court and Court of Appeal correctly found that the Section 29 $3.4 million limit applying to Commercial Purpose Persons did not apply, and could only apply if the passenger/Commercial Purpose Person in question was aboard the vessel that was being sued.

However, the Trial Judge somewhat dangerously cites the *Cuppen* v. *Queen Charlotte Lodge* decision for support that Part 4 and the Athens Convention cannot apply, and perhaps makes a misleading reference to *Gundersen*. The Court also makes troubling comments with respect to the application of the Section 29 $3.4 million limitation applying to passengers/Commercial Purpose Persons.

The *Cuppen* case is very similar to *Buhlman* in that it involves an injured fishing lodge guest aboard a vessel that was being operated by the injured guest as part of a perk or amenity of the fishing lodge. In *Cuppen*, however, the claim was brought against the owner of the vessel occupied by the injured guest (based on improper/unsafe equipment and failures to warn respecting same).

The *Cuppen* case is difficult to apply because it pre-dates *Gundersen*, and the key issues arising from Section 37 pertaining to the Commercial Purpose Person were never identified or argued before the Court.[7] That said, it is clear that the Court in *Cuppen* correctly found that Part 4 and the Athens Convention had no application despite the fact that it can be argued that the plaintiff there was aboard a vessel operated for a commercial purpose because the Plaintiff fell within an exclusion contained within Section 37 pertaining to the master of the vessel (he was the only person aboard). The injured person in *Cuppen* could never be a Commercial Purpose Person because he was the master of the vessel.

If a similar improper/unsafe equipment argument had been advanced against the owner of the Injured Persons Boat in *Buhlman*, the injured operator of that vessel could not be a Commercial Purpose Person because he was also the master. However, there would be a reasonably strong argument that the other injured person aboard that vessel would fall within limits applicable to Commercial Purpose Persons.

[7] We have spoken with counsel in *Cuppen* who have confirmed same

The *Buhlman* Trial Judge's reference to *Gundersen* is also troubling in that it suggests that *Gundersen* supports an argument that "Part 3 applies to pleasure craft, while Part 4 does not". There is no support in *Gundersen* for such an argument. Part 4 will apply to a pleasure craft if that pleasure craft is operated for a commercial or public purpose.

Finally, the Trial Judge in *Buhlman* correctly finds that the $3.4 million Section 29 limit does not apply, notes that it will apply if the injured persons are bringing a claim against the vessel they occupied, but does not discuss the interplay between the Section 29 $3.4 million limit and the lower Athens Limits for the same classifications of passengers and Commercial Purpose Persons. A reader of the *Buhlman* decision may be left with the incorrect impression that a proper Commercial Purpose Person will immediately fall within the higher Section 29 limit, without first being subject to the lower Athens limit.

Fernandes Hearn was brought in at the Appeal level, and likely did not want to complicate matters too much because the Trial Judge came to the correct conclusion for their client in that the Section 28 $1,000,000 limit was applied. That said, it does appear that Fernandes Hearn was able to clarify the Part 3 / Part 4 relationship somewhat for the Court as the Court of Appeal, at paragraph 42, agrees with the Fernandes Hearn submission that Section 29 and Part 3 set a "global limit" for passenger and Commercial Purpose Person claims. This finding supports the decision of the Court in *Gundersen* (i.e. that passenger/Commercial Purpose Person claims proceed first under Athens, and that Section 29 and Part 3 then act as a global limit or cap), though the issue is not canvassed in detail by the Court (likely because it was not a relevant issue in *Buhlman*).

The *Buhlman* decision is an interesting and correct decision dealing with Part 3 General Convention limits on liability, though some of the comments made primarily at the trial court level and in *obiter* following misdirected submissions may cause some confusion moving forward. That said, a reading of both the Trial and Court of Appeal reasons appear to confirm support for all key findings set out in the *Gundersen* decision.

**CONCLUSIONS**

What does this all mean for pleasure craft operators of vessels under 300 tons?

1. If there are no fare paying passenger or Commercial Purpose Person claims, liability for personal injuries should not exceed the $1,000,000 Section 28 limit for personal injuries arising from the operation of a vessel;[8]

2. If there is a passenger or Commercial Purpose Person claim, liability will likely be limited to $300,000 per injured passenger/Commercial Purpose Person pursuant to the Athens Convention; and

3. In an attempt to estimate proper Policy limits, Section 29 and the General Convention is of assistance in attempting to apply a global cap for passenger and Commercial Purpose Person claims. Section 29 should be considered carefully, but appears to suggest that the global limit for these types of claims will not exceed the **greater of:**

   (*a*) 2,000,000 units of account ($3.4 million), and

   (*b*) 175 000 units of account ($300,000) multiplied by

   (i) the number of passengers that the ship is authorized to carry according to any Canadian maritime document required under the *Canada Shipping Act, 2001*, or

   (ii) the number of passengers on board the ship, if no Canadian maritime document is required under that Act.

This does not mean that a 6 person vessel must have $3.4 million in coverage for these types of claims. *Gundersen* suggests that the correct limitation amounts to consider for a 6 person vessel is the $300,000 x 6 limit available under Athens, and the $1,000,000 limit under Section 28 for claims that are not captured by Athens and Section 29.

Finally, it should also be noted that there are Articles under both the General and Athens Convention that set a test for injured Plaintiffs to break limits (i.e. where the act or omission of the defendant is "committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result"). However, the test to break limits is very difficult to meet.

[8] Though do note the discussion respecting Article 6(2) in the General Convention analysis above.

## Appendix A

**PART 3 & THE GENERAL CONVENTION**

*Liability of Ships under 300 tons*

28. (1) The maximum liability for maritime claims that arise on any distinct occasion involving a ship with a gross tonnage of less than 300 tons, other than claims mentioned in section 29, is

(a) $1,000,000 in respect of claims for loss of life or personal injury; and

(b) $500,000 in respect of any other claims.

*Passenger claims, no certificate*

29. (1) The maximum liability for maritime claims that arise on any distinct occasion for loss of life or personal injury to passengers of a ship for which no certificate is required under Part V of the *Canada Shipping Act* is the **greater of**

(a) 2,000,000 units of account; and

(b) the number of units of account calculated by multiplying 175,000 units of account by the number of passengers on board the ship.

*Passenger claims, no contract of carriage*

(2) Notwithstanding Article 6 of the Convention, the maximum liability for maritime claims that arise on any distinct occasion for loss of life or personal injury to persons carried on a ship otherwise than under a contract of passenger carriage is the **greater of**

(a) 2,000,000 units of account, and

(b) 175,000 units of account multiplied by

(i.) the number of passengers that the ship is authorized to carry according to its certificate under Part V of the *Canada Shipping Act*, or

(ii.) if no certificate is required under that Part, the number of persons on board the ship.

*Exception*

(3) Subsection (2) does not apply in respect of

(a) the master of a ship, a member of a ship's crew or any other person employed or engaged in any capacity on board a ship on the business of a ship; or

(b) a person carried on board a ship other than a ship operated for a commercial or public purpose.

**PART 4 & THE ATHENS CONVENTION**

*Extended application*

37. (2) Articles 1 to 22 of the Convention also apply in respect of

…

(*b*) the carriage by water, otherwise than under a contract of carriage, of persons or of persons and their luggage, excluding

(i) the master of a ship, a member of a ship's crew or any other person employed or engaged in any capacity on board a ship on the business of the ship, and

(ii) a person carried on board a ship other than a ship operated for a commercial or public purpose,

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