

COMMENTS ON AMENDING THE "BOATING WHILE INTOXICATED" LAW TO INCLUDE INNER-TUBERS

The task force report includes the following note under Suggested Options Submitted by SMRTF Members that would Require Legislative Action:

Expand the Boating While Intoxicated (BWI) statute to include tubes. This equates to another legislative option, designating tubes as a vessel on the river, which would hold tubers to the same standards motorboat operators are held. Concern was expressed that extending this law to non-motorized craft would greatly expand its reach and pose law enforcement challenges.

I believe this part of the report misstates the manner and effects of amending the so-called Boating While Intoxicated law to cover an intoxicated tuber.

SUMMARY: The Boating While Intoxicated (BWI) statute, now part of the Texas Penal Code, has gone through several changes since its enactment as part of the original Water Safety Act in 1959. My comments below trace the evolution of the prohibition and the watercraft covered. An operator of a non-motorized craft is currently covered by the BWI law, *unless the craft is propelled only by the current of water. [italics added]* Repealing this exception in the Penal Code would extend coverage to tubers, without affecting the Parks and Wildlife Code. As a matter of legislative history, my comments conclude with the remarks on the Senate floor of Senator Carl Parker, the author of the provision in the 1989 law that adopted the exception, who explained that the language was designed to exclude inner-tubes.

HISTORY OF THE TEXAS "BWI" LAW

1959

The original Water Safety Act, Chapter 179 of the Acts of the 56th Legislature, included these provisions:

Sec. 11 (d):

Any person who operates any vessel or manipulates any water skis, aquaplane or similar device, upon the waters of this State while such person is intoxicated, or under the influence of intoxicating liquor, or while under the influence of any narcotic drugs or barbituates [*sic*] or marijuana shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Fifty Dollars (\$50) nor more than Five Hundred Dollars (\$500) or by imprisonment of not to exceed six (6) months, or both.

Sec. 2 (2):

"Vessel" means every description of watercraft, other than a seaplane on water, used or capable of being used as transportation on water or which operates at night, and uses any means of locomotion other than paddle, oars, or poling.

The original Water Safety Act was codified as Article 1722a of Vernon's Annotated Penal Code.

1965

The Water Safety Act was amended (Chapter 676 of the Acts of the 59th Legislature), and the prohibition was reworded (see italics) to read:

Section 23(d):

Any person who operates any vessel or manipulates any water skis, aquaplane or similar device, upon the waters of this State *in a careless or imprudent manner* while such person is intoxicated, or under the influence of intoxicating liquor, or while under the influence of any narcotic drugs or barbiturates or marijuana shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than Fifty Dollars (\$50) nor more than Five Hundred Dollars (\$500) or by imprisonment of not to exceed six (6) months, or both.

1967

The definition of vessel was expanded by Chapter 628 of the Acts of the 60th Legislature by deleting the exception for a watercraft using a paddle, oars, or poling:

"Vessel" means every description of watercraft, other than a seaplane on water, used or capable of being used as transportation on water.

There was no definition of watercraft in the statute. If tubes were considered a watercraft (something I haven't researched), then they would have been covered by this BWI law.

1973

With the adoption of a new Penal Code, the Water Safety Act was transferred to Art. 9206 of the Civil Statutes. The prohibition became Art. 9206, Sec. 24(d). The definition of vessel became part of Art. 9206, Sec. 2a.

1975

In the adoption of the original Parks and Wildlife Code (Chapter 545 of the Acts of the 64th Legislature, effective Sept. 1, 1975), the "BWI" law was reworded slightly and became part of Chapter 31, Water Safety, of the Parks and Wildlife Code:

Sec. 31.097. Operation of Vessel While Intoxicated

(a) No person may operate a vessel or manipulate water skis, an aquaplane, or similar device in a careless or imprudent manner while he is intoxicated or under the influence

of intoxicating liquor or while he is under the influence of a narcotic drug, barbiturate, or marijuana.

(b) A person who violates this section is guilty of a misdemeanor and on conviction is punishable by a fine of not less than \$50 nor more than \$500 or by confinement in the county jail for not more than six months, or by both.

Sec. 31.003. Definitions.

In this chapter:

(2) "Vessel" means any watercraft, other than a seaplane on water, used or capable of being used for transportation on water.

1985

The punishment provision was moved from 31.097(b) to 31.127(b) of the Parks and Wildlife Code:

Sec. 31.127(b). A person who violates Section 31.096, 31.097, or 31.104 commits an offense that is a Class B Parks and Wildlife Code misdemeanor.

Under Sec. 12.405, punishment for a Class B misdemeanor was by fine of not less than \$500 nor more than \$2000, or jail term of up to 180 days, or both.

1989

In 1989, Sec. 31.097 was expanded by SB 276 (by Sen. Parker). After amendment, it read in part:

Sec. 31.097(b). No person may operate a moving vessel or manipulate water skis, an aquaplane, or other waterborne device while the person is intoxicated. *For the purpose of this section, a vessel does not include any device that is propelled solely by the current of the water.* A person who violates this subsection commits an offense. *[italics added]*

The second sentence, in italics above, was added to the bill as a floor amendment (to the committee substitute under consideration) during SB 276's second reading in the Senate on March 2, 1989. The remarks on the Senate floor by the bill's author and sponsor of the floor amendment, Senator Carl Parker, made it clear that "drunken inner-tubing" was excluded from the proposed law, under the exception for a "device that is propelled solely by the current of the water." Senator Parker's remarks are the basis of the current interpretation that the BWI law does not cover tubers, even though tubes can be propelled by the tuber's hands or feet. This legislative history is set out in more detail in the last part of this comment.

1993

In 1993, the BWI law was moved to the Penal Code (Chapter 900, Acts of the 73rd Legislature). Parks and Wildlife Code Sec. 31.097 was repealed. In Chapter 49 of the

Penal Code, effective Sept. 1, 1994, the BWI law was reformulated as a definition, a prohibition with the basic level of offense, and a range of enhanced penalties. The definition, prohibition, and basic level of offense have remained unchanged to the present:

Sec. 49.01. DEFINITIONS. In this chapter:

(4) "Watercraft" means a vessel, one or more water skis, an aquaplane, or another device used for transporting or carrying a person on water, other than a device propelled only by the current of water.

Sec. 49.06. BOATING WHILE INTOXICATED.

(a) A person commits an offense if the person is intoxicated while operating a watercraft.

(b) Except as provided by Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

Sec. 49.09. ENHANCED OFFENSES AND PENALTIES

[If the operator has prior intoxication offenses, the penalties are increased. Details omitted]

Note that the exception covering inner tubes was slightly reworded from the 1989 law to include any "device propelled only by the current of water."

COVERAGE OF NON-MOTORIZED CRAFT BY THE BWI LAW

Contrary to the statement in the task force report, several types of non-motorized craft are covered by the current BWI law. Subject to the exception, it specifically includes not just vessels (which, incidentally, are not defined in the Penal Code) but water skis and indeed any "device used for transporting or carrying a person on water." As examples of non-motorized craft, canoes and kayaks and paddle boards all are propelled by paddles. And sailboats are propelled by the wind (or paddles on a bad day). They are all covered by the current BWI law .

POSSIBLE AMENDMENT TO PENAL CODE TO REMOVE THE EXCEPTION FOR INTOXICATED INNER-TUBERS

Deleting the phrase "other than a device propelled only by the current of water" from the definition of "Watercraft" in Penal Code 49.01(4) would remove the exception for intoxicated inner-tubers. This definition of "Watercraft" applies only to Chapter 49 of the Penal Code. Removing this exception in the Penal Code would require no changes to the Parks and Wildlife Code or to its various definitions and provisions regarding watercraft and water safety.

LEGISLATIVE HISTORY OF SB 276 (1989) REGARDING EXCEPTION FOR DRUNKEN INNER-TUBING

I reviewed the audio file of the debate in the Texas Senate on March 2, 1989, when it took up SB 276 by Senator Carl Parker. According to a bill analysis, in 1988 there had been 298 boating accidents resulting in 67 deaths and 133 injuries statewide, and of these two-thirds were the direct result of alcohol use. The bill was designed to tighten up the BWI law. The Senate was considering a committee substitute version that covered operators or manipulators of all kinds of "waterborne devices." Among other provisions, it also would have criminalized the refusal to take a breathalyzer. Below are some excerpts from Senator Parker's remarks as he explains to the Senate his proposed floor amendments to the committee substitute. (To locate the audio file, search keyword 710027a on the website of the Texas State Library and Archives Commission, tsl.texas.gov, and forward about 15 minutes into the file).

[Discussion on motion to suspend rules to take up the legislation]

"Members, this is the watered-down version of the Water Safety bill."

"We have taken out drunken inner-tubing."

"I came to realize, in visiting with some members of the Senate, they've reached the point in life where the only excitement they have is getting drunk and floating in an inner tube. And I wouldn't want to deprive anybody of that."

"So unless it's propelled by something other than the current of the water, I have an amendment to take it out."

"I also have removed the criminalization of refusing to take the breathalyzer." ...

"So if you'll agree to unanimous consent to take it up and consider it, we will get the worst drunken boaters in the worst boats off the waterways." ...

[Discussion of floor amendment 1]

"Mr. President, the net effect of this is to take out inner-tubes, non-powered rafts, flotation devices so long as they're only powered by the current of the water."

"If they are pulled by a 200 horsepower cigarette boat on a rope, well they're covered. But otherwise they are not."

Senator Parker's floor amendments were adopted. SB 276 passed the Senate and the House with virtually no opposition.