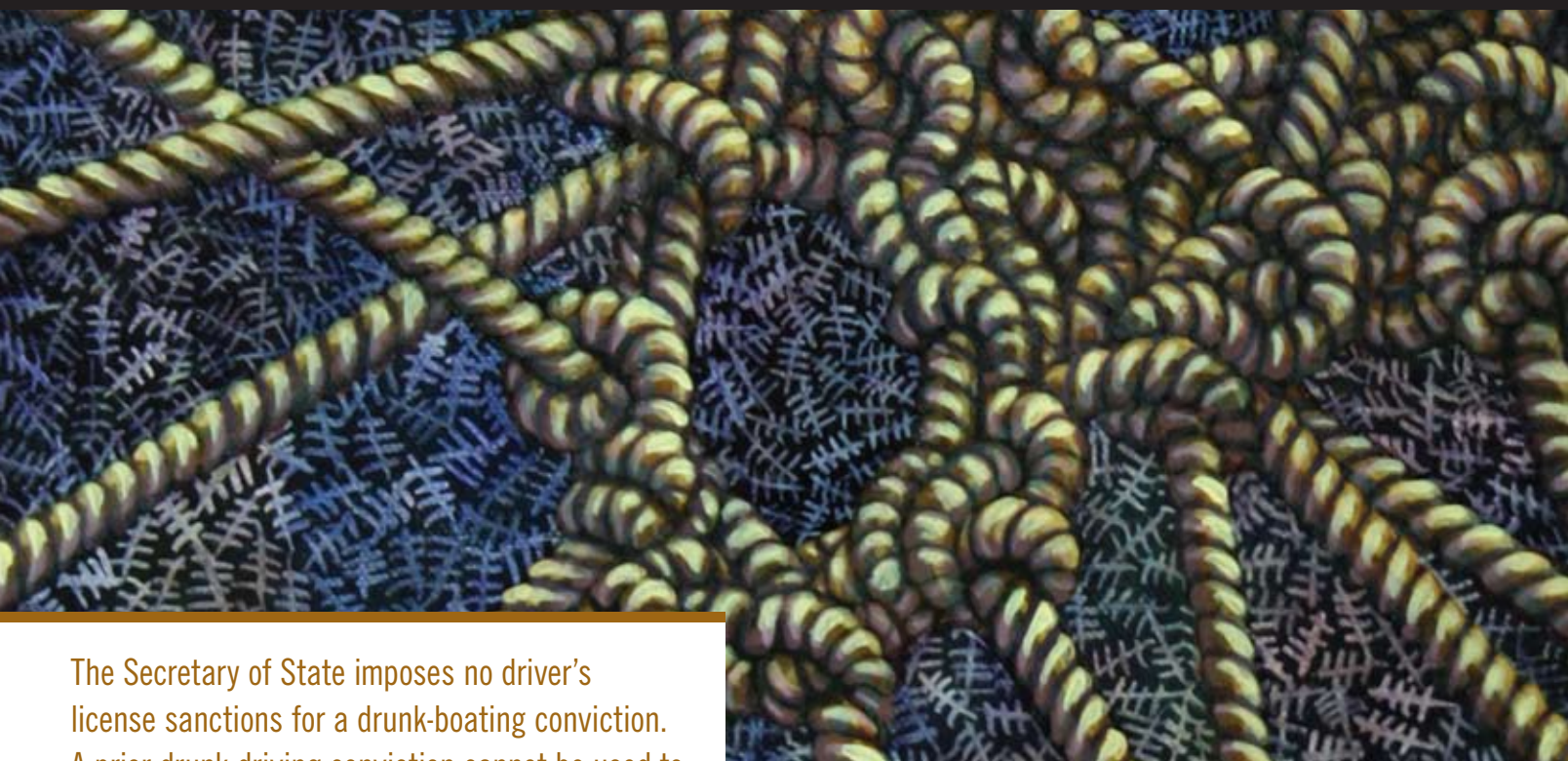


# Keeping Your Head Above Water in Drunk-Boating Cases

By Patrick T. Barone

## A Lawyer's Guide to Michigan's Drunk-Boating Laws



The Secretary of State imposes no driver's license sanctions for a drunk-boating conviction. A prior drunk-driving conviction cannot be used to enhance a subsequent drunk-boating offense, nor can a prior drunk-boating conviction be used to enhance a subsequent drunk-driving conviction.

The "look-back" period for felony drunk boating remains at 10 years.

It is unlawful to operate any type of watercraft while intoxicated or impaired, including sailboats, paddleboats, and even canoes. The "legal limit" for boating remains at 0.10 grams of alcohol per 100 milliliters of blood.

Michigan has one of the highest per capita rates of boat ownership in the nation. What may come as a surprise to some owners is that it is lawful to possess open containers of alcohol and to drink from them while operating a boat. It should come as no surprise, however, that it is unlawful to operate a boat while under the influence of alcohol or drugs (drunk boating), and this crime carries serious penalties that are similar to the crime of operating a car while intoxicated (drunk driving). Nevertheless, there are many significant differences in how drunk driving and drunk boating are viewed by prosecutors, the courts, and the Michigan Secretary of State. These differences are often lost on the non-specialist practitioner, and this lack of knowledge may result in inaccurate advice and counsel. Because of this, it is important to understand exactly when drinking while boating becomes a potentially unlawful act and when it does not.

This article is intended to serve as an overview of Michigan's drunk-boating laws and to highlight the important differences between Michigan's drunk-boating and drunk-driving laws.

## Boating Under the Influence

The laws covering drunk boating are contained within the marine safety portion of the Natural Resources and Environmental Protection Act (the act).<sup>1</sup> The act makes it unlawful for a person to operate a vessel (boat) while intoxicated or impaired by drugs or alcohol. "Vessel" is defined broadly enough to include any manner of watercraft capable of being used for transportation.<sup>2</sup> The term "operate" means to be in control of a boat while it is underway. For purposes of the act, one does not operate a boat while it is secured to a dock or at anchor.<sup>3</sup>

According to the act, a drinking boater may be charged with either the offense of "boating under the influence" or the offense of "boating with an unlawful bodily alcohol content."<sup>4</sup> However, because the drunk-boating laws were not "updated" in 2003 when the legislature substantially amended the drunk-driving laws, the "legal limit" for drunk boating remains at 0.10 grams of alcohol per 100 milliliters of blood. Additionally, and also unlike drunk driving, there is no zero tolerance for having the bodily presence of an illicit controlled substance (schedule 1 or cocaine) while boating.<sup>5</sup>

Another form of drunk boating is the "visibly impaired" offense. Like drunk driving, boating while visibly impaired requires the prosecutor to prove only that the boater's ability to operate the boat was "visibly impaired" by the consumption of alcohol.<sup>6</sup> It is also unlawful to knowingly allow an intoxicated person to operate a boat,<sup>7</sup> but there is no zero tolerance for boaters who are under 21 years of age. Thus, unlike drunk driving, underage drunk boaters are treated like their adult counterparts.

If a drunk boater causes a death, he or she can be charged with a homicide,<sup>8</sup> and Michigan has an additional felony criminal offense if a boater causes a serious injury through the use of a vessel. What constitutes a serious injury is considered on a case-by-case basis, but is defined statutorily as a "serious impairment of a body function," which includes, but is not limited to, serious visible disfigurement and measurable brain damage.<sup>9</sup> A current offense might also be enhanced to a felony on the basis of two prior drunk-boating convictions.<sup>10</sup>

Otherwise, with the exception of the presumptions described below, the evidence and proofs needed to prove a drunk-boating charge are much like those that apply in a drunk-driving case. The available defenses to the charges are also very similar.

## Penalties for Boating Under the Influence

A first conviction for drunk boating carries a sentence of up to 93 days in jail, 45 days of community service, or a fine of up to \$500 or any combination of these penalties.<sup>11</sup> A subsequent offense within seven years may lead to a sentence of up to one year

in jail, with a minimum 48 hours of consecutive jail time, a fine of \$200 to \$1,000, and up to 90 days of community service.<sup>12</sup> Unlike drunk driving, for which there is a lifetime "look-back" period for felonies,<sup>13</sup> drunk boating has a 10-year look-back period. Thus, if a boater has two prior drunk-boating offenses within the previous 10-year period, the new offense may be changed as a felony that is punishable by not less than one year and up to five years in jail or a fine of \$500 to \$5,000, or both.<sup>14</sup> When performing the 7- or 10-year look-back calculation, it is important to note that a prior drunk-driving violation cannot be used to enhance a subsequent drunk-boating charge. Perhaps more importantly, a prior drunk-boating offense cannot be used to enhance a subsequent drunk-driving offense.<sup>15</sup>

Additionally, there are enhanced penalties for causing the death or the serious impairment or disfigurement of another: sentences of up to 15 years or 5 years respectively.<sup>16</sup> Also, any convicted drunk boater will be required to undergo substance abuse screening, and may be ordered to participate in and successfully complete an appropriate rehabilitative program.<sup>17</sup>

## Boating "License" Sanctions

Once an alcohol-related conviction has been entered, there are also significant differences between the way Michigan law treats the privilege to operate a boat or a car. A convicted drunk driver will have his or her driver's license suspended or revoked by the Secretary of State, and the court has no discretion in the matter. Driver's license sanctions are also not individualized and depend only on the offender's master driving record.<sup>18</sup>

On the other hand, a drunk boater who is convicted of a first offense with no injury or death involved may or may not be ordered off the water. This is because, for first offenses, the court makes this determination, and the act provides that the order is permissive rather than mandatory. If the court does see fit to order a first-offense boater off the water, then the applicable time may be as little as six months to one year for a first conviction of boating while impaired,<sup>19</sup> or as much as one to two years for a first conviction of boating while intoxicated.<sup>20</sup>

The act provides no such discretion for repeat offenders. A second offense requires that the offender be ordered off the water for one to two years for a conviction of boating while impaired<sup>21</sup> and at least two years for a conviction of boating while intoxicated.<sup>22</sup> An order prohibiting operation of a vessel is also mandatory if the boater is convicted of drunk boating when there has been death or a serious injury, and this particular order does not expire.<sup>23</sup> The same is true for a conviction of a third offense of drunk boating.<sup>24</sup>



*5,000 Days and Still Counting* by Rodrick Strelau

It is not unlawful to be on board or to become intoxicated in a boat that is either docked or under anchor. This is significantly different from a drunk-driving prosecution, in which even a sleeping motorist in a nonrunning car can be successfully convicted.

If the court fails to order a repeat offender or a boater who has caused death or injury off the water, then the Secretary of State will step in and issue his or her own order. The difference, though, is that the Secretary of State's order will be for six months to two years.<sup>25</sup> The Secretary of State may issue an order without an expiration date if the offender has prior convictions of certain combinations of drunk-boating offenses.<sup>26</sup> Violating any order prohibiting operation is a 90-day misdemeanor for a first offense.<sup>27</sup>

### Presumptions Arising from Chemical Test Results

In 2003, the Michigan legislature removed the presumptions from the drunk-driving statutes.<sup>28</sup> However, similar changes were not made to the drunk-boating statutes. Thus, a presumption arises based on the boater's bodily alcohol content. If, at the time of boating, the bodily alcohol content was 0.07 grams per 100 milliliters of blood or less, then it is presumed that the boater was not impaired by alcohol. If the bodily alcohol content is more than 0.07 but less than 0.10 grams, the boater is presumed to have been impaired, and if the bodily alcohol content is 0.10 grams or more, the boater is presumed to have been intoxicated.<sup>29</sup> Also, unlike drunk driving, there is no permissible "inference" that the bodily alcohol level at the time of the test was the same as at the time of operation. Thus, if a jury finds that the boater's bodily alcohol content was 0.10 grams or above, it may find the boater guilty of drunk boating, but is not required to do so.<sup>30</sup>

### Implied Consent for Boaters

A Michigan boater gives his or her "implied consent" to submit to a chemical test upon the lawful request of a peace officer.<sup>31</sup> The test may be of the boater's breath, blood, or urine. The purpose of the chemical test is to determine the boater's bodily alcohol content or to determine if a controlled substance is present. A person arrested for a drunk-boating offense must be advised of the right to an independent test. The boater must also be advised that he or she has the right to refuse the test (although the officer can obtain a warrant for chemical testing) and that a refusal carries with it an automatic suspension of the boater's right to operate a vessel in Michigan for six months.<sup>32</sup> Readers may note that the implied-consent suspension for an automobile offense is one year.<sup>33</sup> It was changed from six months to one year as a part of the other changes made to the drunk-driving laws in 2003, but the drunk-boating statutes were not similarly changed.

If a peace officer believes that a boater has unreasonably refused a chemical test, then the officer must immediately notify the boater of the right to request an implied-consent hearing. The boater must request a hearing within 14 days of the alleged offense.<sup>34</sup> If the boater does not request a hearing in a timely way, his or her privilege will be automatically suspended.

### The Prosecution and Defense of Drunk Boaters

Because the evidence used to prosecute a drunk-boating case is likely to be very similar to that used to prosecute a drunk-driving case, it is also likely that the applicable defenses will be very similar. Again, however, there are some important differences. For example, if a boater has the presence of a controlled substance in his or her body, it is not a zero-tolerance crime, as it would be for an automobile case. Instead, the prosecutor must show that the drug substantially lessened the boater's ability to operate the boat.

Also, the term "operate" is defined much less broadly for boaters than it is for drivers, and it appears that a successful prosecution for drunk boating requires sufficient proof that the boat was actually moving and that at least one of the drunk passengers was in control. It is not unlawful to be on board or to become intoxicated in a boat that is either docked or under anchor. This is significantly different from a drunk-driving prosecution, in which even a sleeping motorist in a nonrunning car can be successfully convicted.<sup>35</sup>



It also appears that it is possible for more than one person to be “in control” of a boat while it is underway, as might be the case for a large sailboat. In theory, all drunk sailors on board a vessel could be charged. It also appears that a vessel that is on auto-pilot is being “controlled” by no person, and, therefore, no intoxicated person on board could be charged.

Moreover, because the term “vessel” is so broadly defined in the act, it appears to include a sailboat, a paddleboat, or even a canoe. Again, this is quite different from drunk driving, in which the term “vehicle” excludes those moved by “human power,”<sup>36</sup> and “motor vehicle” does not always include those propelled electrically.<sup>37</sup>

## Conclusions

Probably because highway funds were not tied to changes in the drunk-boating statutes, Michigan’s legislature did not see fit to make changes to the boating laws in 2003 similar to those it made in the statutes covering drunk driving. Consequently, the current drunk-boating laws are in many respects much like the pre-2003 drunk-driving laws. Nevertheless, like drunk driving, drunk boating is a serious offense in Michigan and carries with it serious penalties. ■



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## FOOTNOTES

1. MCL 324.80101 *et seq.*
2. MCL 324.80104(a).
3. MCL 324.80103(g).
4. MCL 324.80176(1)(a) and (b).
5. See MCL 257.8b, MCL 257.625(8), MCL 324.80101(f), and MCL 324.80176 (which does not contain a zero-tolerance provision similar to that of the drunk-driving statutes).
6. MCL 324.80176(3).
7. MCL 324.80176(2).
8. MCL 324.80176(4).
9. MCL 324.80176(5).
10. MCL 324.80177(1)(b).
11. MCL 324.80177(1)(a).
12. MCL 324.80177(1)(b).
13. MCL 257.625(9)(c).
14. MCL 324.80177(1)(c).
15. MCL 257.625(9)(b) and (c) and (25); MCL 324.80101(g); MCL 324.80177(5).
16. MCL 324.80176(4) and (5).
17. MCL 324.80185(2).
18. MCL 257.319.
19. MCL 324.80186(1)(c)(i).
20. MCL 324.80186(1)(b)(i).
21. MCL 324.80186(1)(c)(ii).
22. MCL 324.80186(1)(b)(ii).
23. MCL 324.80186(1)(a).
24. MCL 324.80186(b)(iii) and (c)(iii).
25. MCL 324.80191(1).
26. MCL 324.80192(1) and (2).
27. MCL 324.80196(1).
28. See 2003 PA 61, which removed the presumptions from MCL 257.625a(9).
29. MCL 324.80184(1).
30. See MCL 257.6251a(6)(a). There is no corresponding provision in the drunk-boating statutes.
31. MCL 324.80187.
32. MCL 324.80181(1)(b); MCL 324.80188(1); see MCL 324.80190 (also stating that a second refusal requires a one-year suspension).
33. MCL 257.625(1)(a).
34. MCL 324.80189.
35. *People v Stephen*, 262 Mich App 213; 685 NW2d 309 (2004).
36. MCL 257.79.
37. MCL 257.33.