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Name: Marlene Gillian January

Student Number: JNRMAR002

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Supervisor: Graham Bradfield

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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by candidate

Signature: MG January

22 October 2007

Date:

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1. INTRODUCTION

The Shipping Industry has recently undergone a change in legislation, which is not unusual for such a constantly evolving industry. The National Ports Act 12 of 2005 ("the Act") was approved by the National Assembly on 1 March 2006 and it came into operation on 26 November 2006. Most of the provisions in Chapter 9 of the Act have been kept the same as the previous legislation[1] however section 76 of the Act effects a significant change from the previous manner in which liability for pilot error has been treated.

Under the previous dispensation both the pilot and the port authority were exempt from liability for loss or damage caused by the pilot's negligence. The onus rested with the Port Authority who had to prove that the negligence were only due to error in order to rely on the exemption of liability clause. The National Port Authority has now repealed those provisions of the previous legislation and replaced it with section 76 of the Act. Under the provisions of s 76 the exemption is for the consequences of the pilot's acts or omissions in good faith'. Under the previous dispensation, courts have interpreted the meaning of the word 'negligent' and in the last leading case[2] relating to such interpretation, it left the question hanging without any final conclusion, except for the fact that the word 'negligent' should be interpreted in the narrow sense. Under the provisions of section 76 the word 'negligence' has been removed and replaced with the words 'good faith'.

2. PURPOSE OF DISSERTATION

This dissertation seeks to explore why this inconsistency in legislation when dealing with the issue of liability of the Port Authority has arisen. The courts' interpretation of the word 'negligent' which previously was the determining factor for the exemption of liability which the Port Authority enjoyed, shall be demonstrated through case law and it will be suggested that the courts' strict interpretation of the section may have been a possible reason for the amendment of the statutory provisions dealing with

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[1] South African Transport Services Act No 65 of 1981 which was repealed by the Legal Succession to the South African Transport Services Act 9 of 1989

[2] *Owners mv "Stella Tingas" v mv "Atlantica", Transnet Limited t/a Portnet and Transnet Limited t/a Portnet and Peter Buffart* 2002 (1) SA 647 (D) in the court a quo and *Transnet Limited t/a Portnet v The Owners of the mv "Stella Tingas" and the mv "Atlantica"* 2003 (2) SA 473 (SCA) on appeal.

liability for pilot error. The deeming of the pilot to be the employee of the shipowner in the Act, reiterates the fact that the liability shifts from the Port Authority to the shipowner. The dissertation investigates whether other countries treat the issue of liability for pilot error in a similar manner, as well as whether or not the Port Authority elsewhere also enjoys a similar exclusion of liability as in South Africa. Having deemed the pilot the employee of the shipowner, the dangers of divided control between the master and the pilot play a significant role, because the master ultimately remains in command of the vessel and the pilot is in control of navigation of the vessel. The master is only allowed to intervene with the pilot in an emergency.[3] With the Act deeming the pilot the employee of the shipowner, does the pilot not fall under the command of the master and not that of the Port Authority.

Should section 76 read as a whole, effectively exclude the liability of the Port Authority, and then there is concern as to whether there is any incentive for the Port Authority to provide certified pilots to provide a high quality service. The risk is created that the Port Authority without any kind of liability could provide poorly trained pilots who have no accountability for the consequences of their actions to shipowners who have no other option but to take them on board to navigate their vessels. With large claims for loss or damage in the shipping industry, this is a great risk which needs to be avoided.

If the reason for shifting any vicariously liability onto the shipowner was to place such liability on a party who enjoys the right to limit liability, this dissertation will suggest that the limitation of liability should be extended to the Port Authority as an alternative to the current exclusion of liability.

3. WHAT IS PILOTAGE

3.1 A pilot has been described as a person not belonging to a ship who has the conduct thereof.[4] The modern day pilot is employed by the Port Authority and provides the service of pilotage to vessels that enter or leave a port. All South African ports are compulsory pilotage areas, meaning that vessels are not allowed to enter or leave South African harbours without a pilot to navigate the vessel. The

[3] Section 75(6) of the Act

[4] Douglas and Geen, *The Law of Harbour and Pilotage* 4th edition Lloyd's of London Press 1993 at 169

Act in section 75[5] regulates compulsory pilotage within the South African Ports and in the context of this dissertation only compulsory pilotage will be dealt with. A distinction is made between voluntary[6] and compulsory pilotage.[7] In South Africa application can be made for a pilot exemption certificate in order to be exempt from compulsory pilotage. Voluntary pilotage is recognised in South Africa, but it tends to be the exception rather than the rule.[8] In practice it is normally employed where a vessel in South African waters has run into problems and need to tranship its cargo. In those circumstances it will be possible to employ a voluntary pilot on board the vessel to execute the specific manoeuvring to enable the transhipment and the shipowner takes on the responsibility for the pilot error. However outside of these circumstances pilotage is compulsory.

4. APPLICABLE LAW

4.1 The Admiralty Jurisdiction Regulation Act 105 of 1983 ("AJR Act") in section 1[9] defines a 'maritime claim' to include a claim for, arising out of or relating to...towage or pilotage.' Claims which relate to pilot error more often than not relate to collisions resulting in damage or loss of property. Section 2(1) of the AJR Act provides that 'subject to the provisions of this Act each provincial and local division, including a circuit local division, of the Supreme court of South Africa shall have jurisdiction (hereinafter referred to as admiralty jurisdiction) to hear and determine any maritime claim (including, in the case of salvage, claims in respect of ships, cargo or goods found on land), irrespective of the place where it arose, of the place of registration of the ship concerned or of the residence, domicile or nationality of its owner.' The point is that maritime claims include pilotage which falls to be adjudicated by the courts in their admiralty jurisdiction. Under the AJR Act, the law applicable to such disputes are determined by the

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[5] Section 75 (1) Subject to subsection (2) a pilot must navigate every vessel entering, leaving or moving in a port.
(2) Pilotage is not compulsory in respect of any vessel or class of vessels that have been exempted from pilotage by the Authority in writing....

[6] Hare at page 355 defines a voluntary pilot as: 'A voluntary pilot is a pilot engaged by the shipowner, a master or even the ship's agent without the compulsion of statute and without legitimate directive of competent authority.'

[7] Hare at page 355 defines a voluntary pilot as: 'This occurs when a port authority or legislative decree makes the employment of a designated pilot, unrelated to the crew of the vessel concerned, a pre-requisite for the movement of that ship in a port.'

[8] Hare, *Shipping Law and Admiralty Jurisdiction in South Africa* Juta & Co, 1999 p356

[9] 'In this Act, unless the context indicates otherwise ..."maritime claim" means any claims for, arising out of relating to ... damage caused by or to a ship, whether by collision or otherwise... pilotage'

provisions of Section 6. Section 6 would apply to the extent that the matter is no longer regulated by section 6. In that instance section 6 (1) provides that it be determined whether the claim is one which the courts has admiralty jurisdiction over before the enactment of the Admiralty Jurisdiction Act on 1 November 1983. Subsection 6 (1) is however subject to subsection 6 (2)[10] and should the aforementioned not be the case, then South African Law would apply.

4.2 Pilotage is governed by the National Ports Act No 12 of 2005 and due to the fact that currently there is existing legislation governing the issue of pilotage in South Africa, means that section 6 of the AJR act would apply to a pilotage claim that arise out of a collision.

4.3 This was illustrated in the *Stella Tingas* case where an appeal against the owners of the "Atlantica" was done on the basis that the owners were liable in terms of Section 35 of the United Kingdom Pilotage Act of 1983 by way of section 6 (1). Section 35 reads as follows:

> Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.[11]

4.4 The court in this matter pointed out that there are inconsistencies between the South African Legislation and the English Law. In England, the pilot was deemed to be the servant of the shipowner and in light of that the shipowner carried the vicarious liability for the actions of the pilot. This was also the case in terms of the Common Law when the shipowner was held liable for the actions of a voluntary pilot. The court held that this appear to be completely inconsistent with the South African legislation, the then LSSATS Act Section 10 Schedule 1 which states that the pilot is in fact the employee of Transnet t/a Portnet. Secondly the court applied section 6 (2) and held that the provisions of the LSSTS Act Schedule 1 Section 10

[10] The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.
[11] United Kingdom Pilotage Act of 1983

in the meaning of section 6 (2) must prevail over English Law, because that is the relevant statute that applies.

5 WHAT PROMPTED THIS CHANGE?

5.1 The Port Authority has in the Act legislated to exclude themselves from liability from all loss or damage caused by the act or omissions of the pilot.

5.2 When pilot error occurs, normally damage is caused usually in the form of a collision and someone has to be held liable for such damage. In South Africa, the Legal Succession to the South African Transport Services Act 9 of 1989 ("LSSATS Act") dealt with the liability of the pilot and its employer[12] in section 10 of Schedule 1 prior to the Act coming into operation.

5.3 Section10(7) of Schedule 1 to the LSSATS Act reads as follows:

> 'The company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot.'[13]

5.4 The onus of proof rested with the Port Authority who has to prove that the loss or damage was caused solely by the negligence of the pilot in order to rely on the exemption clause.

5.5 The effect of the section above was, broadly speaking that should the Port Authority prove that the negligent act occurred as a result of the pilot actions or omissions, then both the pilot and it were exempt from liability for the loss or damage suffered.

5.6 In a series of cases[14] the court has been called upon to deal with cases in turn and interpret provisions and in using strict interpretation found negligence to mean

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[12] According to the IMO website, Qualified pilots are usually employed by the local port or maritime administration and provide their services for a fee, calculated in relation to the ship's tonnage, draught or other criteria.

[13] Legal Succession to the South African Transport Services Act 9 of 1989, Section 10 (7)

[14] The Aluco: Shell Tankers Ltd v SA Railway and Harbours 1967 (2) SA 606 (E), *Yung Chun Fishery Company Limited v Transnet Limited t/a Portnet* (C) Case number AC 30/97 1 September 2000 unreported and *Owners mv "Stella Tingas" v mv "Atlantica" , Transnet Limited t/a Portnet and Transnet Limited t/a Portnet and Peter Buffart* 2002 (1) SA 647 (D) in the court a quo and *Transnet Limited t/a Portnet v The Owners of the mv "Stella Tingas" and the mv "Atlantica"* 2003 (2) SA 473 (SCA) on appeal.

'ordinary' negligence and not 'gross negligence' or 'recklessness'. The court of first instance in the Stella Tingas assumed for the purpose of the judgement that negligence meant 'ordinary negligence' and then based on the facts that the pilot was grossly negligent overturned the decision of the court of first instance.

5.7 In terms of the previous dispensation, the Port Authority and the pilot limited its liability for loss or damage caused by pilot negligence. As already pointed out the Stella Tingas judgement overturned the court of first instance decision based on the facts. The fact that the court of first instance held the Port Authority liable for loss or damage in the judgement and not allowed [Port Authority] to rely on the exemption clause, is what prompted the change to the new legislation.

5.8 The courts have been asked to interpret the meaning of the limitation section during the 1967 case of *The Aluco: (Shell Tanker case)*.[15] In this case the exemption provision reads as follows:

> The East The East London Harbour ... and the Durban harbour are hereby declared to be compulsory pilotage harbours save and except in respect of such ships as may be exempted by statute or regulation; provided that the administration of the pilot who is a servant thereof shall be exempt from liability for any loss or damage that may arise or be caused through the act, omission or default of such pilot.

5.9 The court held that the interpretation of the section must be construed strictly and in view of such an interpretation, which does not explicitly exclude the liability of the Port Authority for the acts of other servants of [Port Authority], then that would fall outside of the intention of the section.

5.10 Cloete J goes on to say that if this restrictive interpretation is applied, then the section would not extend to include any other servant other than the pilot in the case where damage or loss has been suffered. Held further that should the Port

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[15] *The Aluco: Shell Tankers Ltd v SA Railway and Harbours* 1967 (2) SA 606 (E) The Shell Tanker was over turned in a river of the South African Port of East London. During the turning the tanker took bottom on shallow ground within the turning circle demarcated by port authority. It transpired that the information and data given to the pilot by the authority had been outdated and this meant that the damage was not solely caused by pilot error. The Port Authority (Portnet) was held liable for the loss and the court laid down certain important guidelines.

Authority wish to rely on the exclusion section to avoid liability it must be proved that the pilots conduct was the sole and proximate cause of the damage.[16]

5.11 Therefore should the loss or damage occur as a result of pilot error alone, then it would result in complete exemption from liability for the Port Authority.

5.12 This question of strict interpretation of the word 'negligence' in section 10 (7) of Schedule 1 of the LSSAT Act came under the spot light again in an unreported judgement in the *Yung Chun Fishery* case.[17] The matter was brought by the applicants [*Yung Chun Fishery Company Limited*][18] on the basis that the collision arose out of the recklessness and alternatively the gross negligence of the pilot as well as the negligence of one or more of the defendants [Transnet Limited t/a Portnet] employees acting within the course and scope of their employment. It was further alleged that [Portnet] owed a duty of care to ensure that the vessel under pilotage by [Portnet] employees are not damaged.

5.13 As seen previously courts have strictly construed and narrowly interpreted the wording of the section. The exclusion of liability is confined only to the meaning of the words of the limitation section[19] so as to not include any other employee of the Port Authority.[20]

5.14 The interpretation of negligence has been done in other areas of law such as the law of contract and the law of delict. The court referred to the academic book[21] in the law of contract in which Christie states that:-

> [T]he method is particularly applicable to clauses which do not specifically set out the legal grounds for liability from which exemption is granted. In interpreting such clauses the court must first examine the nature of the contract in order to

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[16] *Supra* note 14 at 672-673

[17] *Yung Chun Fishery Company Limited v Transnet Limited t/a Portnet* (C) Case number AC 30/97 1 September 2000 unreported

[18] The facts are that on 27 September 1995 Cape Town Harbour was very foggy when the vessel (mfv "Yung Chun No 17") was being navigated by a Portnet pilot into the harbour. The vessel collided with an A-berth spur in the harbour. As a result of the collision the defendants claimed R1 693 730, 80 from Portnet.

[19] Section 10 (7) of Schedule 1 of the LSSATS Act No 9 of 1989

[20] *The Aluco: Shell Tankers Ltd v SA Railways and Harbours* 1967 (2) SA 666 (E) at 673 H

[21] Christie, *The Law of Contract in South Africa* (3rd edition) at 209

decide what legal grounds of liability would exist in the absence of he clause (for instance strict liability, negligence, or gross negligence), and the clause will then be given the minimum of effectiveness by being interpreted to exempt the party concerned only from the ground of liability for which he would otherwise be liable which involves the least degree of blameworthiness.

5.15 The court has to answer the burning question whether the words 'negligent act or omissions' in section 10 (7) of Schedule 1 of the LSSATS Act if narrowly construed would include reckless or grossly negligent conduct. The distinction between ordinary negligence and gross negligence has been a topic that courts interpreted in various cases.[22] Gross negligence has been interpreted by courts to mean that a person has no consideration for the consequences of his actions whatsoever and actually express an attitude of reckless disregard for such consequences.[23] Ordinary negligence would be when a person fails to take the same care that on ordinary person in similar situation would have done.[24] The concept of recklessness has also been interpreted in company law and there courts have held that recklessness is gross carelessness and contains an element of risk.

5.16 Based on the evidence that have been led in the *Yung Chun* case, the court found that the pilot had in fact checked the radar and had put the vessel into hard astern to avoid the collision, but to no avail. The interpretation of the exemption clause by the court was found to be interpreted strictly and found that the exemption of liability would only apply in respect of the wording of the section 10 (7) of Schedule 1 of the LSSATS Act. Held further that the expressed wording of the act only refers to the negligent act or omission and that wording excludes reckless or gross negligent acts or omissions on the part of the pilot. Transnet t/a Portnet were allowed to rely on the exclusion of liability clause.

5.17 The two exclusion sections discussed both hold the same benefit for the Port Authority and also includes liability for damage by the Port Authority in certain circumstances. It provided for a negligent act or omission on the part of the pilot to ensure that the exclusion of liability operates. The court was once again

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[22] *S.A.R.H.v Lyle Shipping Company Ltd* 1958 (3) SA 416 at 419, *Cape Town Municipality v Payne* 1923 AD 207, *Government RSA (Department of Industry) v Fibre Spinners and Weavers (Pty) Ltd 1977* (2) SA 324 (D) at 335 E, *S v Dhlamini* 1988 (2) SA 302 (A)

[23] *S v Dhlamini* 1988 (2) SA 302 (A)

[24] *Central South African Railways v Adlington & Co* 1906 TS 964 at 973

approached in the *Stella Tingas* [25]matter to consider the interpretation of clause 10 (7) of Schedule 1 the LSSATS Act to establish whether the wording include or exclude gross negligence in order to hold the Port Authority liable should it be proven that there gross negligence exist on the part of the pilot.

5.18 After hearing the facts[26], some of the claims, amongst others[27] before the court brought by the owners of the mv "Stella Tingas" against the owners of the mv "Atlantica", were on two grounds. The first was that the collision was caused by the negligence of the master and crew and secondly that the collision occurred as a result of negligence of the pilot, for which the owner of the mv "Atlantica" is vicariously liable by way of Section 35 of the United Kingdom Pilotage Act of 1983 ("Pilotage Act"). It was advanced that the Pilotage Act would apply in South Africa by way of Section 6 (1) of the AJR Act. With regards to Transnet t/a Portnet, the owners of the mv "Stella Tingas" brought the action against [Portnet] on the basis that the collision was caused by the gross negligence of the pilot and that by way of section 10 (7) of Schedule 1 of the LSSATS Act, [Portnet] would not be able to rely on the protection by way of the exemption of liability afforded by the section. The court a quo was asked only to decide on the question of liability.

5.19 After careful consideration of the evidence the court assumed 'negligent' to mean ordinary negligence and on the actions of the pilot found him to be grossly negligent and based on that Transnet t/a Portnet was liable to pay damages caused

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[25] *Owners mv "Stella Tingas" v mv "Atlantica", Transnet Limited t/a Portnet and Transnet Limited t/a Portnet and Peter Buffart* 2002 (1) SA 647 (D) in the court a quo and *Transnet Limited t/a Portnet v The Owners of the mv "Stella Tingas" and the mv "Atlantica"* 2003 (2) SA 473 (SCA) on appeal.

[26] Shortly after midnight on 17 June 1997 the mv "Atlantica", a bulk carrier collided with the mv "Stella Tingas" in the Durban harbour. At the time the mv "Stella Tingas" was berthed alongside in Durban Harbour, loading cargo and the mv "Atlantica" was entering into the Durban Harbour under pilotage with two tugs attending to the pilotage of the vessel. The pilot navigating the Atlantica was at the time in the employee of Portnet.

[27] Whether, in terms of Section 6 of the Admiralty Jurisdiction Regulation Act, No 105 of 1983, this Court is obliged to apply the law which the High Court of Justice of the United Kingdom in the exercise of its jurisdiction would have applied as at 1st November 1983. Allied to this issue is the question whether the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied the United Kingdom Pilotage Act of 1983. Whether, by virtue of Section 35 of the United Kingdom Pilotage Act of 1983, the owners of the "Atlantica" are liable for the negligence of the pilot, who acted as their agent and within the course and scope of his authority. The question of apportionment as between the Defendants (Atlantica) and the Third Parties (Portnet and the pilot) and also whether or not the Third Parties are liable to compensate the First Defendant for the damage sustained by the "Atlantica" in the collision.'

by the collision to the mv "Stella Tingas". With regard to the liability of the mv "Atlantica", the court found that the master of the mv "Atlantica" was not negligent and that the owners of the mv "Atlantica" was not vicariously liable for the actions of the master. The court held further that section 35 of the United Kingdom Pilotage Act of 1983 on which the appellants [owners of mv "Stella Tingas"] relied to hold the owners of the mv "Atlantica" vicariously liable, did not apply in South Africa by way of Section 6 of the AJR Act after referring to various cases[28] and texts[29]. The court made no finding as to the claim against the pilot Peter Buffart.

5.20 The matter went on appeal by way of Transnet appealing against the judgement on the grounds amongst others that the pilots conduct although it was negligent was not grossly negligent and the owners of the mv "Stella Tingas" appealed against the judgement on the grounds that the Pilotage Act applied by way of section 6 (1) of the AJR Act and due to that the owners of the mv "Atlantica" should be held vicariously liable for the actions of the master with respect to loss and damage suffered as a result of the collision. For the purpose of this dissertation, the latter would not be dealt with at this point.

5.21 The judges on appeal firstly assumed that the exemption of Section 10 (7) of Schedule 1 of the LSSATS Act shall not apply if it is found that the pilot is found to be grossly negligent and that the protection afforded to the pilot does only extend to negligence in terms of Section 10 (7) Schedule 1 of the LSSATS Act and did not extend to gross negligence. In view of this the court had to decide whether the conduct of the pilot fell within the definition of gross negligence.

5.22 The court said that the concept of gross negligence was not capable of precise definition. The court held that if one were to consciously take a risk, then there would not be any negligence at all and because of that it is not the consciousness

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[28] *Shipping Corporation of India Ltd v Evdomon Corporation and Other* 1994 (1) SA 550 AD; *Trivett and Co (Pty) Ltd & Ors v WM Brandt's Sons & Co Ltd & Ors (Waikiwi Pioneer)* 1975 (3) SA 423 AD; *Braby-Hamilton Stevedore Company & Ors v m.v. Kalantiao* 1987 (4) SA 250 (D); *The Andrico Unity* 1989 (4) SA 325 AD; *Esso Petroleum Company v Hall Russell and Company* 1989 (1) AllER, 37; *Gavin Weir v Union Steamship Co* (1874) NLR 61; *The Waziristan* [1953] 2 AllER, 1213

[29] Abbott Merchant Ships and Seamen 14th Edition (1901) and Halsbury Laws of England Vol 31 (1) 758

of risk-taking that distinguishes gross negligence from ordinary negligence. [30] Scott JA also explains that if a person foresees the danger and still persists in what was initially set out to be done or does not act, but consciously believes that danger will be avoided, then such conduct may result in ordinary negligence or gross negligence. It all depends on what the circumstances were at the time that these decisions were made. However if risk is foreseen and the person acts recklessly then that conduct will amount to what is known as *dolus eventualis*[31], meaning recklessness in the narrow sense.

5.23 The court came to the conclusion that although falling short of *dolus eventualis*, gross negligence must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme and it must demonstrate where there is conscious risk taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care.[32] Held further that whether there is conscious risk taking or not each case has to be decided on its own circumstances and where the *deviation* from what is reasonable is so much that it constitutes gross negligence.

5.24 The court considered the evidence that was presented to the court a quo specifically relating to the pilot's conduct in which Booysen J depicted the pilot as acting in a 'true dare devil spirit'[33] and found that the conduct of the pilot amounted to negligence and not that of gross negligence. The interpretation of Section 10 (7) of Schedule 1 of the LSSATS Act was interpreted in a strict sense only to include negligence of the pilot and to exclude reckless or gross negligence.

5.25 Once again the strict approach for the interpretation of legislation has been applied by the court. The meaning of the section is only given effect to when dealing with exclusion of liability clauses. This has been the consistent approach by the courts for many years, until the court a quo in the case of mv "Stella Tingas" have used a wider interpretation to the LSSATS Act. As mentioned

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[30] *S v Van Zyl* 1969 (1) SA 553 (A)
[31] Dolus eventualis means a person's state of mind when he or she contemplates committing an act and appreciates that it may result in certain consequences but proceeds in any event.
[32] *Supra* note 16 at 481 B
[33] *Supra* note 16 at 485 C-D

earlier the appeal court also held on the matter of liability of the owners of the mv "Atlantica" that the Pilotage Act did not apply in South Africa by way of section 6 (1) of the AJR Act, and that in the Pilotage Act the shipowners vicarious liability stems from the fact that the voluntary pilot and now a compulsory pilot are the servant of the shipowner. During the time that the judgement in the *Stella Tingas* appeal was handed down, the pilot was not the servant of the shipowner and section 10 (7) of Schedule 1 of the LSSATS Act only governed the relationship between the pilot and his employer as well as the exclusion of liability for both the pilot and its employer.

5.26 Since the *Stella Tingas* judgement in 2003 the Act was tabled and came into operation on 26 November 2006 and brought with it changes which prove to be inconsistent with the way in which the legislator has dealt with the issue of exclusion of liability in the predecessors[34] of the Act. It is submitted that the *Stella Tingas* judgement and the interpretation by the court a quo of section 10 (7) of Schedule 1 of the LSSATS Act as well as the reasons afforded by Scott JA on appeal could be what prompted the change with the introduction of section 76 of the Act. In addition there was uncertainty as to the interpretation of 'negligence' by the court because the *Stella Tingas* judgement left the position wide open. There were also at time concerns as to the findings of the court of first instance in its judgement which exposed the Port Authority to claims in the maritime industry. Such claims in the industry are normally very sizable claims and I submit that this risk to the Port Authority may have been part of what prompted the change to the new legislation which now in Section 76 (1) provides that:-

> 'Neither the Authority nor the pilot is liable for loss or damage caused by anything done or omitted by the pilot in good faith whilst performing his or her functions in terms of this act.'

5.27 This section continues in Section 76 (2) in which it is held that:-

> 'Notwithstanding any other provision of this Act, the pilot is deemed to be the servant of the owner or master of the vessel under pilotage and such owner or master is liable for the acts or omissions of the pilot.'

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[34] South African Transport Services Act No 65 of 1981 which was repealed by the Legal Succession to the South African Transport Services Act 9 of 1989

5.28 Chapter 9 of the Act specifically dealing with pilot services, their functions has remained the same, however section 76 of the Act replaced the previous provisions of the LSSATS Act section 10 (7) of Schedule 1. The words 'negligent act or omission' of the pilot has been replaced with 'anything done or omitted by the pilot in good faith' in section 76(1). The inclusion of section 76 is drastic compared to how the legislator treated the matter previously. Section 76 in the Act consist of two subsections, which will be dealt with separately, meaning section 76 (1) dealing with 'good faith' and section 76(2) dealing with the 'deemed employee'. Thereafter the combined effect of section 76 would be addressed.

6 GOOD FAITH

6.1 What does good faith mean?

6.1.1 Section 76 (1) refers to 'good faith' as opposed to the previous wording, 'negligence' which relates to the acts or omissions of the pilot referred to in the exclusion clause.

6.1.2 The concept of 'good faith' raises questions as to what is meant by it in this context. This is important to establish because the pilot and the Port Authority's liability may now become restricted to the opposite of 'good faith' which is 'bad faith'. 'Negligence' has been interpreted before in the absence of any definition provided in the LSSATS Act by courts. Similarly no definition has been provided for 'good faith' in the Act. In the absence of the definition in the Act of 'good faith', it has to be determined what is meant by the phrase in the context of the Act. Usually in the absence of a definition in the Act, case law would provide some assistance, however no cases has yet been adjudicated to provide statutory interpretation of 'good faith' in the context of section 76(1).

6.1.3 The Insolvency Act No 24 of 1936 ("Insolvency Act") is but one act that defines 'good faith' in relation to the disposition of property, to mean '...the absence of any intention...' However this is not an appropriate comparison in the context of interpreting 'good faith' in section 76(1), but it does make an interesting point which is relevant and that is that 'good faith' means the absence of intention. In the absence of case law in which the courts would

have interpreted 'good faith' in the context of section 76(1) due to the recent nature of the Act, the interpretation thereof has made an appearance in Employment law in the case of *Ganes and Another v Telecom Namibia Ltd*[35]. The relevance of including this is merely to demonstrate how the courts have interpreted the relationship between employer and employee in South Africa. This is relevant because the pilot is now in terms of section 76 (2), which will be discussed below deemed to be the employee of the shipowner and/ or master and in that relationship, as the court has demonstrated here 'good faith' exists. The court in this matter held that the employee owes a duty of good faith to his employer and that duty entails that the employer will not work against the interests of the employer and also not to place [employee] in a position that is in conflict of the employer. This case is directly relevant to the interpretation of 'good faith' in the broader context of section 76 specifically pertaining to the relationship between the pilot and the shipowner and/or master. In terms of section 76(1) it illustrates that in South African law, the pilot would owe a duty to act in good faith toward his employer which in this instance is the shipowner. This gives a frame of reference form which to work when one has to establish the pilot's state of mind when boarding the vessel to determine whether [pilot] acted in good faith or not.

6.1.4 The Act is clear when it states that the Port Authority will be excluded from liability when the when the pilot performs his duties in good faith. The question is how one would determine whether or not an act was committed in good faith. Maxwell[36] states that when there is confusion as to meaning of the words in the statute that it be interpreted and understood in the 'sense in which best harmonise the enactment.' He also goes on to state that when interpreting words, the ordinary meaning of the word should be considered, but in addition one should also understand the word in its ordinary meaning as it is applied in the subject matter.[37]

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[35] 2004 (3) SA 615 (SCA) at 626
[36] Maxwell, *Interpretation of Statutes* (12th edition) Sweet and Maxwell Limited, 1969 at page 76
[37] See Maxwell, *Interpretation of Statutes* (12th edition) Sweet and Maxwell Limited, 1969, at page 76, footnote 4

6.1.5 Good faith, when giving the ordinary meaning of the word means that the mental and moral state of honesty, conviction as to the truth and as seen above the absence of the intention to prejudice. In essence good faith is really honesty and a sincere intention to deal with others fairly. The word good faith is an abstract and comprehensive term which encompasses a sincere belief or motive without desire to defraud others. Lastly, the dictionary allows some assistance as to the ordinary meaning of the word, however the dictionary according to Maxwell[38] merely provide 'consultation "in the absence of any judicial guidance or authority"'.

6.1.6 Now that the meaning of good faith has been established the test is whether this meaning is appropriate in the context of the act, specifically relating to the pilots functions, since the pilot now deemed the employee of the shipowner has to navigate the vessel.

6.1.7 Negligence as was included in the LSSATS Act required an objective test which has to be discharged by the Port Authority in order for [Port Authority] to rely on the exclusion of liability which section 10 (7) of Schedule I of the LSSATS Act provided. Traditionally the forseeability test is applied to determine whether or not conduct was negligent.[39] Van der Walt[40] sets out the three elements of which the test consists. Theses are the reasonable foreseeability of harm, reasonable precautions to prevent the occurrence of such foreseeable harm and failure to take the reasonable precautions. Based on this test it can be determined that conduct is negligent if a reasonable person in the same position would have seen the possibility of harm and have taken the reasonable steps to prevent and avoid such harm. This test was also applied in the *Stella Tingas* case in the court of first instance, and based thereon the pilots conduct was found to be gross negligent and the Port Authority was accordingly held liable.

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[38] Maxwell, *Interpretation of Statutes* (12th edition) Sweet and Maxwell Limited, 1969 at page 55 also footnote 52

[39] Van der Walt JC, Midgley JR, *Principles of Delict* (3rd edition) Lexis Nexis Butterworths, 2005 at page 168

[40] *Supra* note 39 at page 168

6.1.8 Negligence could be determined by the actions of the pilot based on the evidence which was provided to the court. Even when the court was tasked with the interpretation of section 10 (7)[41] strict interpretation was applied by courts to exclude gross negligence from the section 10 (7). In a manner of speaking, in law an objective test is an easier test to apply than that of a subjective test. Subjective tests are more difficult tests to prove than the objective tests. The subjective tests relate to the state of mind of the individual which in this instance is the pilot specifically when he was performs his functions. The difficulty is that only the pilot can explain that state of mind. The objective test relating to the same individual would be determined by third parties such as the community. The values of the community would be used to determine whether or not the actions or omissions would be contrary to public policy.

6.1.9 Good faith has strong roots in South African law and has played a significant role in the development of Roman Dutch law and has mainly manifested itself in the law of contract and also in the law of delict today. It is also common in South African law for the two areas of law to overlap. During Roman Times the law made a distinction between two legal proceedings the *stricti iuris* and the *bonae fidae*. With regard to *strict iuris*, the judge had to decide based on strict rules of civil law and in *bonae fidae*, the judge had to use the standard of good faith in making a finding. For both these proceedings, there were defences of bad faith. These were called the *exceptio doli specialis* and *exceptio doli generalis*.[42] This defence was brought to demonstrate in the first instance that the contract was concluded induced by fraud or in the second instance that the mere fact that the other party brought the action was an act of bad faith.

6.1.10 In later years, the concept of good faith played much more of a direct role and the court started connecting the concept of good faith more to what the

[41] Schedule 1 of LSSTS Act
[42] Roger Brownsword et al *Good faith in Contracts Concept and Context* (1999) Ashgate Publishing Limited 216

community considered an act of good faith to be.[43] The defence of *exceptio dolis* only lasted in South African law until the 1980's.[44]

6.1.11 It appears appropriate to apply an objective test to determine whether or not an act or wrongdoing constitutes *contra bonis mores* or is against the legal convictions of the community. In South Africa the objective test is applied to determine wrongfulness by using the *bonis mores* criterion. The test of reasonableness applied here and as was seen in the *Coronation Brick*[45] case where the question was asked whether the contractual conduct of the defendant was reasonable according to the moral convictions or feelings of the community in respect of a claim for consequential loss of production suffered. As demonstrated in the *Coronation Brick* case the application of the *boni mores* criterion weighs up the interests which are promoted by the act against the interest that are infringed. This reasonable test is an objective one which takes into account the legal convictions of the community.

6.1.12 In many South African cases[46] it has been stated that there is a definite link between *bonis mores* and *bona fides* (good faith). The perception of boni mores or legal convictions of the community[47] is closely linked to good faith and through our case law it has become clear that the concept of bonis mores cannot be separated from concepts which include good faith, equity, justice and reasonableness.

6.1.13 The basis for suggesting that 'good faith' in the context of section 76 is linked to *bonis mores* suggests that there is an element of objectivity which could be used when interpreting 'good faith'. The fact that *bonis mores* provide for an objective approach may make the exemption clause easier to break specifically when proving whether the pilot acted in good faith. A subjective test as to the state of mind of the pilot would make the exemption clause very difficult to

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[43] Roger Brownsword et al *Good faith in Contracts Concept and Context*, Ashgate Publishing Limited, 1999 at 217

[44] *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A)

[45] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 380

[46] *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* supra note 42 at 380; Sasfin v Beukes 1989 (1) SA 1 (A)

[47] *Minister van Polisie v Ewels* 1975 3 SA 590 (A)

break, because the pilot would be the only one to disclose his or her state of mind. 'Good faith' in the context of section 76 (1) is the key to success of the exemption of liability for the pilot and the Port Authority and depending on how one would interpret and disprove 'good faith' on the part of the pilot the exemption clause may be broken.

6.1.14 The close link between *boni mores* and 'good faith' was seen in the *Sasfin*[48] case where an anaesthetist had entered into a deed of cession allowing the finance company control over all of his earnings for the rest of his life. The cession allowed for the financial institution to recover all debts owed to Beukes irrespective of whether he had already settled his debt with the financial institution or not. The court referred to public interest and held that such a deed was incompatible and therefore contrary to public policy and in addition held that the actual deed of cession was 'grossly exploitive' and unfair. The contact was not upheld.

6.1.15 The *Sasfin* judgement moved away from not only the two contracting parties, but also includes the moral conscious of the community which in itself includes elements of fairness and good faith. As mentioned the concept of good faith and bonis mores find application in the law of contract and law of delict in South Africa. Good faith specifically is the underlying principle in contracts between parties and finds application through the medium of public policy.[49]

6.1.16 Even though the concept of good faith has found application in the law of contract as well as the law of delict in South Africa, it is the law of delict that could more often than not find application here. It is the understanding that due to the legislator legislating this exclusion of liability, no contract exists between parties, but merely the legislation which imposes these provisions upon them. In this instance the law of contract and law of delict are relevant as to the interpretation of 'good faith' so as to understand 'good faith' in the context of section 76.

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[48] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)
[49] See Roger Brownsworth et al, footnote 11 at 215, *Sasfin (Pty) Ltd v Beukes* 1989 (1) (A)

6.1.17 The concept of good faith is hard at most to break in the context of section 76, but should an objective approach be applied, it may be easier to break the exemption of liability. One has to bear in mind that the parties involved are not only the Port Authority, pilot and the shipowner, but recourse should also be available to the other shipowners who's vessels are not under pilotage which may suffer damage or loss as a result of an act or omission of a pilot navigating a vessel.

6.2 **Is there any justification for the concept of good faith?**

6.2.1 The Port Authority in other acts[50] which have been passed, have excluded themselves from liability in a similar way as provided in section 76 of the Act. The Ship Registration Act ("Ship Registration Act") in section 13 reads as follows:-

> The State, the Minister, the Authority, any person in the service or acting on the authority of an organ of state or the Authority, or any person appointed to exercise any power or to perform any duty in terms of this Act, is not liable in respect of any loss or damage resulting from anything done or not done in good faith in terms of this Act.[51]

6.2.2 The South African Maritime Authority Act ("SAMSA Act") also contains a similar provision which includes the concept of good faith as part of the exclusion of liability clause and it provides that:-

> The Authority, its officers and any person or body acting on its authority are not liable for any loss or damage suffered by any person by reason of anything done or not done in good faith in the carrying out of the Authority's duties...[52]

6.2.3 The concept of good faith has consistently been used in the maritime legislation in the exclusion of liability clause; however is their any justification for using it in the current act. The Ship Registration and the SAMSA Act both deal with emergency situations such as forfeiture, detention of ships, salvaging of ships and also with non emergency situations such as

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[50] Ship Registration Act 58 of 1998 and South African Maritime Authority Act No 5 of 1998
[51] Ship Registration Act 58 of 1998, Chapter 3 Section 13
[52] South African Maritime Authority Act No 5 of 1998 , Chapter 5 Section 46(1)

ship registration, licensing, training. The law of delict provide for necessity and emergency amoungst others, as a defence for a claim arising in the law of delict. 'A state of necessity exists when the defendant is placed in such a position by superior force (*vis* maior) that he is unable to protect his interests (or those of someone else) only by reasonably violating the interests of an innocent third party.'[53] Certain factors are taken into account when determining whether or not to necessity were present in the circumstances.

6.2.4 These factors are whether a state of necessity really existed, that the state of necessity should be determined objectively, the state of necessity must be imminent, the interests of others should also be protected including life and property, the person must not rely on necessity where he is compelled by law to endure the danger, and the act of necessity must be the only reasonable possible means of escaping the danger.

6.2.5 Taking this into account the previous acts which contain similar provisions deal with dangerous situations which require special treatment and sometimes necessary action which is dangerous in order to save life and property. In the law of delict such necessities finds justification as to not be held delictually liable in those circumstances.

6.2.6 In the case of the SAMSA and the Ship Registration Act it could be sufficiently justified to exclude liability of the Port Authority in those circumstances, but it does not justify the blanket exclusion of all liability in respect of pilotage and especially not if section 76(1) is read together with 76(2) which deems the pilot to be the employee of the shipowner.

6.2.7 Perhaps the exclusions in the Act would not be necessary if the Port Authority had the same benefit as the shipowner. Due to the fact that the *Stella Tingas* case in the court a quo found the Port Authority liable for the gross negligence of the pilot, even though the appeal against the judgement was upheld, the Port Authority it appears are closing up any possible recourse for liability that may

[53] Neethling et al, *Law of Delict*, (5th Edition) Lexis Nexis Butterworths, 2006 at page 80

be exercised against them. If this assumption is correct, then the inclusion of good faith in the exclusion of liability clause achieved [Port Authority] objective, but this would only be justified if the Port Authority equally shared the risk with the shipowners.

7 DEEMING THE PILOT THE EMPLOYEE OF THE SHIPOWNER

7.1 During the *Stella Tingas* appeal the owner of the mv "Stella Tingas" appealed against the court quo judgement that the owners of the mv "Atlantica" were not liable for their damage by reason that the Pilotage Act did not apply in South Africa via Section 6 (1) of the AJR Act. The court held that there was a difference between the Pilotage Act section 35 and section 10 Schedule 1 of the LSSATS Act. Section 10 Schedule 1 provided that the pilot was the employee of Transnet t/a Portnet and that the master was prohibiting from interfering with the pilot's navigation[54] of the vessel and the carrying out of its duties. The court found that this was completely inconsistent with the position in England which provides that pilot irrespective of whether compulsory or voluntary is the servant of the shipowner. The deeming of the pilot the employee of the shipowner has already been held in other countries, but for South Africa, I submit that the judgement of the Stella Tingas case may have been one of the deciding factors to include the deeming of the pilot the employee of the shipowner into section 76 (2) of the Act. The section provides that:-

> '...the pilot is deemed to be the servant of the owner or master of the vessel under pilotage and such owner or master is liable for the acts or omissions of the pilot.'

7.2 As such an employee, the responsibility and liability shifts from the Port Authority to the shipowner in the event of any loss or damage caused by such 'employee' of the shipowner. The employee of the Port Authority is now also

[54] A master shall at all times remain in command of his ship and neither he nor any person under his command may, while the ship is under pilotage, in any way interfere with the navigation or movement of the ship or prevent the pilot from carrying out his duties except in the case of an emergency, where the master may intervene to preserve the safety of his ship, cargo or crew and take whatever action he deems necessary to avert the danger.

deemed to be the employee of the shipowner. The dictionary[55] provides synonyms for the word deemed as 'regard' or 'consider.' This means that the Port Authority acts as if the employee is that of the shipowner when exercising his or her duties as pilot even though the pilot is not. In doing so the legislator in the Act shifts the accountability for its employee to the shipowner.

7.3 The common law remedy of vicarious liability still features, however the act ensures that there is an interim swap of employer with regard to the pilot when the vessel is under pilotage. The principle of vicarious liability in South African law imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. In terms of the Act, the shipowner is the liable party as employer and not the Port Authority.

7.4 It is noteworthy that the legislator chose to separate section 76 into two subsections. Section 76(1) refers to the Port Authority not being liable for anything done or omitted by the pilot in good faith while performing his functions in terms of the act. The functions referred to by the act in section 75 refer to the navigation of vessels in the port as well as directing its movement. There may some liability to be found in this subsection in terms of the law of delict, if it could be proven that the pilot did not act in good faith while performing his duties. The Port Authority as employer in terms of the subsection could then be held liable should the pilot not act in good faith in his scope of employment while fulfilling his functions.

7.5 As far as subsection 76(2), deeming the pilot the employee of the shipowner and simultaneously not referring to the functions of the pilot in terms of the act, in other words not fulfilling his duties in the scope of his employment with the Port Authority as the employer, the legislator allowed for that transition to move the pilot from being the employee of the Port Authority to the employ of the shipowner. In doing so, the vicarious liability now rests with the shipowner, because the pilot is now not performing his functions in terms of the act any more, but merely exercising acts or omissions.

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[55] Sara Tulloch *The Reader's Digest Oxford Complete Wordfinder* Reprinted with amendments 1993, p374.

7.6 The pilot is in terms of the Act is deemed to be the employee of the Shipowner, but one has to wonder if this section is an attempt to avoid liability. The Port Authority is not afforded the privilege of limiting its liability such as the shipowner and this situation has now created a scenario where the Port Authority can now claim for damage to its property caused by the acts of the deemed pilot against the shipowner who is vicariously liable for the acts of the deemed employee. The court held in the *"Inyati"* case that the Port Authority could not claim for loss or damage to its own property due to the acts or omissions of the pilot who is an employee of the Port Authority. This section in the Act has opened up recourse for the Port Authority against the shipowner which the in terms of South African case law were not permitted.

7.7 'Based on the facts[56] the owners of the "Inyati" sued the Union Government, and the Union Government claimed damages in reconvention for injuries done to the "Richard King" through improper and negligent navigation on the part of the "Inyati".'[57] For the purpose of this section I shall only deal with the claim in reconvention and in the following section deal with the initial claim. The court considered whether the Union Government had a claim to recover damages. In conclusion the court held that it was satisfied that: 'the Union Government which compels a ship to take the Government's servant as pilot cannot recover damages

[56] 'The S.S. "Inyati" left the wharf of Durban in charge of a pilot in the employ of the Union Government. The port of Natal was a compulsory pilotage harbour. The "Inyati" was preceded by the "Richard King" a government steam tug who was being navigated by a Union Government employee, the master. It was later argued that the "Richard King" should not have preceded the "Inyati", but should rather have followed it since it was only present to collect the pilot once his duties onboard the "Inyati" was complete. When the two vessels were out at sea, the "Richard King" waited for the "Inyati" keeping only a speed that is sufficient to keep way on. The Inyati" approached the "Richard King" at 9 knots per hour within 400 feet. It was recorded that the pilot of the "Inyati" then gave the order full speed astern hard a starboard, endangering the "Richard King" which was preceding it. The master of the "Richard King" who could see the danger proceeded full speed ahead, but a collision followed anyway. It was argued that the compulsory pilotage area ended at the Bar and that the compulsory pilot was only suppose to be in control of the vessel up to that point and not further. In view of this argument it was submitted that the master of the "Inyati" is in fact solely responsible for the navigation of the vessel. The court did not however agree with this notion. It was held: '...that the pilot is responsible for the navigation until he leaves the bridge, and hands over to the master.' In stating same, the court did not take into account any extraordinary circumstances. The court referred to English law, the Merchant Shipping Act specifically the then Section 388 which states, 'where a ship is in charge of a compulsory pilot, the owner or master is not liable, where damage is caused by the fault or incapacity of the pilot, acting in charge of the ship.' Held further that this part of the act is meant to apply in the United Kingdom and the court also satisfied itself that there was no legislation in Natal, South Africa that made the provision apply there. Be that as it may the court made a finding using that as background.

[57] *The Inyati: JT Rennies and Sons v Minister of Railways and Harbours*, 1913 NPD 396 at 397

where, through the negligence of that servant, damage is caused to Government property.'

7.8 This judgement recognises that the courts have closed up the possible avenue where the Port Authority could claim damages relying on the negligence of their own employee to do so. The interesting fact is that the Port Authority has now included in legislation the deeming provision in section 76 (2) which have the exact opposite effect as the judgement of the *"Inyati"* decision. The section has altered the situation as we know it and has opened up an avenue for the Port Authority to do exactly what the decision in the *"Inyati"* tried to prohibit.

7.9 The Port Authority now has a claim against the shipowner or master for loss or damages suffered due to the act or omission of the pilot (a Port Authority employee) who is now deemed to be the servant of the owner or master, but which technically is an employee of the same Port Authority who institutes a claim and should be allowed to contract out of liability and also in the process enrich itself. The shipowner has to pay the Port Authority for the services of the pilot which he takes on board for the services rendered and should damage be caused by the pilot the liability rests with the shipowner. An advantage which the shipowner has in this respect is the fact that they can limit their liability with respect to damage and loss suffered. The right is afforded by the Merchant Shipping Act No 57 of 1951.[58] The disadvantage is that the shipowner may have to use the limitation of liability more than usual.

7.10 In the *Drifters Adventures Tours CC*[59] case[60] the court found that contracting out of this liability altogether would be perverse and the company was not allowed to contract out of liability. Once again the subject of liability is linked to a contract as was seen earlier when the concept of good faith and bona fides were also linked to the law of contracts. The Act is legislation and does not constitute a contract between parties but is the enforceable law at present.

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[58] The limitation of liability will be discussed later in the text.
[59] *Drifters Adventures Tours CC v Hircock* 2007 (2) SA 83 (SCA)
[60] H was a passenger in and adventure tour bus in Namibia. W was acting in the course and scope of his employment when an accident occurred and H was injured. H instituted action against the company for the damages suffered and D relied on an indemnity form which was signed by H prior to the tour.

7.11 At present the Port Authority is the only service provider in the country, and also the most profitable of all the state institutions. It is odd that they do not purchase insurance against loss or damage to life and property against the actions of their employees while performing their duties in course and scope of employment. Even if the Port Authority does not want to adhere to the principle of vicarious liability, surely the Port Authority could contribute to the liability of the shipowner.

7.12 The question of liability is one which has been litigated on in other jurisdictions around the world. One such county is Australia which has a similar system and legislation which is in line with the Act. Sydney Harbour is a compulsory pilotage port and any vessel which enters the port must have a compulsory pilot provided by the Sydney Sea Pilots Pty Ltd which is under contract with the Sydney Port Corporation.[61] In Australia the Marine Safety Act 1998 (NSW) section 80 (1) provides that:

> [N]either the State, nor the Minister, nor a pilotage service provider is liable for any loss or damage that is attributable to the negligence of any person made available as a marine pilot by the pilotage service provider while the person is acting as a marine pilot.

7.13 In section 79[62] it states that:

> [A] person who is made available as a marine pilot by the pilotage service provider and who has the conduct of a vessel is subject to the authority of the master of the vessel. The master is not relieved from responsibility for the conduct and navigation of the vessel merely because the vessel is under pilotage,

and in section 79 (2) it states that:

> [T]he master and the owner of a vessel being navigated under circumstances in which pilotage is compulsory are jointly and severally liable for any loss or damage caused by the vessel or by any fault of navigation of the vessel in the same manner as if pilotage were not compulsory.

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[61] Chris S Yuen '*Marine Pilotage in Australia: Sydney Ports Case Study*' (2003) 17 MLAANZ Journal available at [Accessed 12 January 2007]

[62] Marine Safety Act 1998 (NSW) section 79

7.14 These provisions relating to shipowner liability under pilotage in NSW[63] legislation is similar to what is contained in the Navigation Act 1912 (Cth).[64] Australia has similar provisions as those contained in the Act here in South Africa and it would appear as if it is not a new concept[65] for the Port Authority to hold the owner or the master of the vessel under compulsory pilotage liable for loss or damage suffered by way of deeming the pilot to be the servant of the master and/or shipowner.

7.15 Australia, unlike South Africa to which this is a fairly new concept of blanket exclusion of liability by the Port Authority, has had litigation in their courts to establish this burning question of liability and to determine who should be liable?

7.16 The amendments in the Act deeming the pilot the employee of the shipowner is in line with other jurisdictions such as Australia and could therefore be justified on ground of international uniformity. It is also interesting to see how other courts have dealt with such provisions since South African courts have not yet had an opportunity to interpret and adjudicate section 76 of the Act. In analysing the *Oceanic* case it may be possible to use it as a basis for interpreting and understanding the provisions of the Act which has been legislated on a similar basis as that in Australia. Hopefully the various judge's decisions would provide for alternate ways to view section 76 in our context.

7.17 The leading case in Australian Courts on this topic is *Oceanic Crest Shipping Company v Pilbara Harbour Services Proprietary Limited*[66]. On 8 August 1978 a vessel owned by Oceanic Crest Shipping Company ("Oceanic") damaged part of a wharf in the Port of Dampier. The wharf was owned by Hamersley Iron Pty. Ltd. ("Hamersley") while under the control of a pilot. The pilot was supplied to the

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[63] New South Wales

[64] Section 410B of the Navigation Act 1912 (Cth) provides: - '(1) A pilot who has the conduct of a ship is subject to the authority of the master of he ship and the master is not relieved from responsibility for the conduct and navigation of the ship b reason only of the ship being under pilotage' and '(2) Notwithstanding anything contained in a law of the Commonwealth or of a State or Territory, the owner or master of a ship navigating under circumstances in which pilotage is compulsory under a law of a State or Territory is answerable for any loss or damage caused by the ship, or by fault of the navigation of he ship, in the same manner as he would if pilotage were not compulsory.'

[65] Section 35 of the Piltage Act of 1983 contained provision which deemed the pilot the servant of the shipowner and the shipowner vicariously liable for damage or loss due to the negligence of the pilot.

[66] (1986) 160 CLR 626

Oceanic by Pilbara Harbour Services Pty. Ltd. ("Pilbara"). Pilbara was in charge of controlling the port and Pilotage was compulsory in the Port of Dampier.[67]

7.18 The pilot was also employed by Pilbara and was appointed as a pilot in the harbour in line with Section 4 of the Shipping and Pilotage Act 1967. Hamersley sued Pilbara for the damages suffered and in the Supreme Court of Australia. 'Wallace J. found that the damage had been caused by the negligence of both the master and pilot whom he held were both Oceanic's servants'[68]. Held further that Oceanic was liable for $625,362.36 and that the Oceanic was the "particular employer" of the pilot and due to that Oceanic was found to be vicariously liable for the damages caused by the negligence of the pilot. This meant that Pilbara did not have to contribute to the damages which Oceanic had to pay to Hamersley.

7.19 The matter was then taken onto appeal where most of the existing findings were confirmed except for the finding that the master was negligent, which had been set aside here on appeal. All other findings from the Supreme Court of Australia were upheld.

7.20 Oceanic was not satisfied with the outcome of the matter and appealed to the High Court seeking judgement against Pilbara. Oceanic wanted Pilbara to be jointly responsible for the damages and to contribute to the damages which they now had to pay Hamersley. The basis for the appeal was founded on two grounds. The first argument made by Oceanic was that Pilbara owed Oceanic a duty to provide them with a pilotage service which would be carried out with reasonable care and skill by a competent pilot and that Oceanic was entitled to claim damages for economic loss caused by breach of that duty.[69] In the alternative they (Oceanic) argued that Pilbara is liable to Hamersley for the damages caused and that Oceanic could claim a contribution from Hamersley.

7.21 This argument was based on section 7(1)(c) of the Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (W.A) which provided:-

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[67] Shipping and Pilotage Act 1967, section 9(2)(a)
[68] *Oceanic Crest Shipping Company v Pilbara Harbour Services Proprietary Limited* (1986)160 CLR 626 at 627
[69] *Supra* note 66 at 634

> [W]here damage is suffered by any person as the result of a tort –
>
> ...(c) any tortfeasor liable in respect of that damage may recover a contribution from any other tortfeasor who is or would if sued have been liable in respect of the dame damage...[70]

7.22 Gibbs J in his judgement to the arguments provided by Oceanic states that 'Oceanic cannot succeed in either argument unless Pilbara is vicariously liable for the negligence of the pilot whom it supplied.'[71] In view of this statement, the court had to decide if the government or state body would be vicariously liable for the acts or omissions of its servants, in this case Pilbara for the negligence of the pilot. The matter was decided by five judges[72] and two[73] of the five judges dissented.

7.23 The majority decision by Gibbs J, Wilson J and Dawson J held that Pilbara as the general employee of the pilot could not be held vicariously liable for the damage caused. Gibbs J in his judgement states that where a person is employed in terms of a contract of service, that employer of the person would not be liable if the law bestows upon him a separate duty which he or she has to exercise. In support of this Gibbs J quotes Dixon J in the *Field v Nott* case in which the honourable judge states that:-

> [W]hen a public officer, although a servant of the Crown, is executing an independent duty which the law casts upon him, the Crown is liable for the wrongful acts he may commit in course of his execution. As the law charges him with a discretion and responsibility which rests upon him in virtue of his office or of some designation under the law, he alone is liable for any breach of duty.[74]

7.24 With regard to Section 410B of the Navigation Act 1912 (Cth), Gibbs agrees with the terms of subsection 410B(2)[75] in that the shipowner is liable for the damage caused by the pilot. He also leaves the judgement of the *Fowles* case undisturbed. In conclusion he finds that Pilbara is not liable to Oceanic and dismisses the appeal.

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[70] *Supra* note 66 at 634
[71] Ibid
[72] Gibbs J, Wilson J, Brennan J, Deane J and Dawson J.
[73] Brennan J and Deane J
[74] *Field v Nott* (1939) 62 C.L.R. at page 675 paragraph 3
[75] Navigation Act 1912 (Cth)

7.25 Wilson J in his judgement also considers the facts carefully as well as the various arguments that have been presented. In his judgement, he concedes that Pilbara had no authority to be piloting ships, but rather to provide qualified pilots for the masters of the vessels to use. He explains the history of pilotage to the point it is at today in his judgement.[76] He goes on to state on the basis of other judgements such as *Holman v Irvine Harbour Trustees*[77] that as long as the harbour authority provide only pilots to the vessels, that they will not be vicariously liable for the actions of such pilots. In addition he concludes that it is a question of status and statutory authority which has to be answered to conclude this matter. He finds that the authority that was given to the pilot to pilot the vessel was not given by Pilbara Harbour Authority, but rather by the Shipping and Pilotage Act of 1967. Based in this it is the pilot that acts in terms of this authority bestowed upon him by statute and in terms of that the authority is his alone and that ensures that the employer of the pilot cannot be held vicariously liable. This means that since the pilot acts in terms of this independent duty even in harbours where pilotage is compulsory the vicarious liability rests with the shipowner. Wilson J dismissed the appeal.

7.26 Dawson J in his judgement also touches on some of the same issues as Wilson J. The issue of absence of control was discussed as well as the view on it in the *Fowles*[78] case, which was that the absence of control was the main factor which gave rise to the independent status of the pilot. He says that there is a difference between the absence of control where a pilot's independent status does not warrant such a control and that of an employee where the employer does not have sufficient experience to exercise such control. Based on this it is his view that with

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[76] *Supra* note 66 at 646 and 647 ...Pilot originally use to be self employed individuals who rendered their services to shipowners and masters who needed pilot services. These pilot services were non compulsory and in these circumstances, there had to be some kind of vicarious liability to the shipowner in the event of damage caused. When pilotage become compulsory in certain harbours, the shipowner could rely on compulsory pilotage as a defence to ensure that they were not held vicariously liable for damage suffered due to the pilot actions. This defence however was soon abolished by the Article 6 of the International Convention for the Unification of Certain Rules of Law in Regard to Collisions adopted at Brussels, September 23, 1910 and in force as of March 1, 1913. Such changes were also effected in the United Kingdom in both the Pilotage Act 1913 as well as the Merchant Shipping Act1984 (UK).

[77] (1877) R 406

[78] [1916] 2 AC 551

respect to the Crown or the Harbour Authority it is the very nature of the pilot relationship with the aforementioned parties respectively that is inconsistent with the exercise of control by the Crown or Harbour Authority and the employee which is the pilot.[79] The same as Wilson J, Dawson J also explores the evolution of pilotage starting with the fact that pilots were independent parties who contracted their services to masters and shipowners who needed same. In those circumstances of voluntary pilotage, the liability of taking on a pilot was created due to the contractual nature of the shipowner taking on the pilot in order to navigate the vessel. In harbours and other areas where pilotage became compulsory the vicarious liability of common law could no longer be exercised because the shipowners relied upon the defence of compulsory pilotage. This was however done away with by Section 15 of the Pilotage Act 1913 (U.K.) in order to unify and bring in line the legislation with that of other countries. This section eventually gave rise to the section which has been presented in this case which is Section 410B of the Navigation Act 1912 (Cth). Dawson J quotes the honourable Judge in *The Towerfield* case in which it was held that:-

> ...the effect of section 15 was to render the shipowner responsible so that he was both liable for the loss and damage caused to others and precluded from recovering any loss which he had suffered by reason of damage to his ship.

7.27 In conclusion, Dawson J found that there is little difference between section 15 of the Pilotage Act[80] and section 410B of the Navigation Act[81]. He states that the vicarious liability that is imposed on a shipowner is as if the pilot was voluntary employed as oppose to compulsory employed. In view of the above, Dawson J finds that for two reasons, being the Fowles case and Section 410B(2) of the Navigation Act 1912 (Cth), that Pilbara will not be held liable for the damage suffered by Hamersley and that there will be no claim contribution to Oceanic.

7.28 Brennan J, in his judgement says that :'It is only when the functions of an employer are so limited by statute as to exclude the function performed by an employee in discharging his statutory responsibility that the employer is immune from liability for the employee's negligence in discharging that responsibility. But

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[79] *Supra* note 66 at 683 paragraph 1
[80] 1913 (U.K.)
[81] 1912 (Cth)

a trading corporation whose objects are advanced by the employment of servants to discharge independent statutory responsibilities and whose powers extend to the employment of servants to advance the objects may be held liable on the same footing as railway companies employing constables, that is "liable to the railway companies employing constables, that is:" liable to the extent to which their servant and agent is liable – not further than that, but to that extent."'[82]

7.29 Brennan J also holds the view that Section 410 B[83] does not affect vicarious liability, but that it creates a parallel liability between the employer and the shipowner. Brennan goes further to say that the shipowner and the general employee, the Port Authority should both be liable for the damage caused by the pilot while navigating the ship.[84] In his judgement Brennan J does not apply the discretionary rule[85] which was applied in the *Fowles*[86] case. The court also makes a distinction between the general employer of the pilot, being the Port Authority and the particular employer, being the shipowner. In his judgement Brennan J comes to the conclusion that Hamersley has to contribute to the damages paid by Oceanic.

7.30 In agreement with the judgement of Brennan J was Deane J states that the 'proposition that a general employer, be it a public instrumentality or private company, is not vicarious liable for the negligence of the licensed pilots in its employ in carrying out the piloting duties which it employs and pays them to perform and for which the employer charges fees to the shipping owner is one which lies ill indeed with the ordinary principles governing vicarious liability in

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[82] *Supra* note 66 at 664
[83] Navigation Act 1912 (Cth), section 410B
[84] *Supra* note 66 at 670
[85] The notion, more commonly know as the discretionary rule is contained in Fowles v Eastern and Australian Steamship Co. Ltd [1916] 2 A.C. 551 at 562 where Isaacs J expresses the opinion that: '...these Acts of Parliament did not alter the original status of a pilot, which is, in effect, that he must be regarded as an independent professional man in discharging his skilled duties. If it had been intended to alter this old and familiar status, it is to be supposed that the Legislature would have done it more explicitly. What it has done is more consistent with a different and limited purpose, namely, to secure a proper selection, a proper supply, a proper supervision, and a proper remuneration of men to whose skill life and property is committed, whether the shipowner likes it or not. For this purpose they become servants of the Government. For the purpose of navigating ships they remain what they are, and the duty which the State and Government owes to a shipowner, exercised, it is true, be various authorities is to provide a qualified man in the terms of the statutes, but not to take the conduct or management of the ship.'
[86] *Fowles v Eastern and Australian Steamship Co. Ltd* [1916] 2 AC 551 at 562

tort...'. [87] He goes on to say that the specialist employee, which the pilot is, is now seen more as the exception rather than the rule.[88] The learned judge also accepted the law is clear on the principle of vicarious liability of the general employer in that such general employer will be held vicariously liable for the damage caused by the negligence of such employee in the course of the ordinary discharge of its duties. [89]In conclusion, Deane J found that Pilbara was vicariously liable for the damage that was caused by the pilot and that Oceanic Shipping could claim the contribution which they seek for the damages.

7.31 The majority judgement in this matter found that the Port Authority is not liable for two reasons. The first reason was that of section 410B (2) of the Navigation Act 1912 (Cth) excluded such liability of the Port Authority by its very nature and secondly in line with the judgement of the *Fowles* case, the pilot was in public office which had an independent legal duty to discharge an due to that such an officer was alone responsible for such acts and the Authority who was the employer of such an officer would not be held vicariously liable for such acts.

7.32 The Port Authority in South Africa, with the new legislation has now deemed the pilot the employee of the shipowner. After exploring the Australian legislation and more specifically the case law, it can be used as a basis to analyse the possible arguments that could be afforded in South Africa under the current legislation. South Africa is trying to become unified with the rest of the world. The provision which deems the pilot the employee the shipowner is in fact justified in terms of international uniformity. The shipowner that uses many ports around the world would find comfort in the fact that he knows what to expect when entering a foreign port. This unification allows for such a unified system to operate in ports around the world.

7.33 Having said that, Brennan J afforded a good argument. In his judgement he stated that should the responsibilities of the employer, in this case the Port Authority be limited by statute as to exclude the function performed by an

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[87] *Supra* note 66 at 676
[88] Ibid
[89] Ibid

employee in discharging his statutory responsibility then the employer would not be liable for the negligence of such employee.[90] In the case of the Act the two functions of the Port Authority and the pilot have been separated, yet the functions overlap.

7.34 It terms of section 74 (1) (b) of the Act the Port Authority does have control over piloting of the vessels in the harbour, because the provision reads:-

'...control the entry, stay, movement and operations of vessels in ports, and the departures of vessels from ports.'

7.35 In section 74 (1)(d) it is provided that:- '...the Authority must, for the purpose of ensuring safety of navigation and shipping in ports provide or procure pilotage services, licence pilots and regulate the safe provision of pilotage services by licensed pilots.'

7.36 Based on only these two section set out above the Port Authority already has the function to ensure safe navigation in ports as well as licensing of pilots and the safe provision of pilotage services. The pilot in terms of the act has to '...navigate the vessel in the port... '[91] as a pilot's function. Both the functions of the Port Authority and the pilot involve pilotage by way of the Port Authority licensing the pilot to navigate the vessel under pilotage and the pilot navigating the vessel as well as ensuring safe navigation. This is a common purpose and the Port Authority fulfils one part of the pilotage function and the pilot the other. The remaining functions of the Port Authority are set out in Chapter three.

7.37 Chapter three, section 11 of the Act sets the functions out as being 'own, manage, control and administer ports to ensure their efficient and economic functioning, and in doing so the Authority must...' Amoungst others, the most important include:-

'regulate and control –

(i) navigation within port limits and the approaches to ports;

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[90] *Supra* note 66 at 664

[91] National Ports Act No 12 of 2005, section 75 (3)

(ii) the entry of vessels into ports, and their stay, movements or operations in and departures from ports;

(iii) the loading, unloading and storage of cargo and the embarkation and disembarkation of passengers...

(iv) ensure that adequate, affordable and efficient port services and facilities are provided;

(v) exercise licensing and controlling functions in respect of port services and port facilities;

(vi) ensure that any person who is required to render any port services and port facilities is able to provide those services and facilities efficiently

(vii) provide or arrange for tugs, pilot boats and other facilities and services for the navigation and berthing of vessels in the ports'[92]

7.38 The Port Authority also specifically has a function to ensure that any person who is required to render any port service and port facilities is able to provide those services and facilities efficiently. This in itself means that the pilot function and that of the Port Authority are linked merely because it is the [Port Authority] that has to ensure that the people provided for such port services including pilotage can fulfil such function efficiently. If one applies Brennan J argument then the Port Authority duties in terms of the legislation and that of the pilot's functions are closely linked and due to that the Port Authority should be held vicariously liable for the acts or omissions of the pilot provided pilot did not act in good faith.

7.39 The Act[93] furthermore in section 73(1)(ii) provides that 'the Authority may charge fees, in accordance with a tariff determined in terms of section 7, for (amongst others) pilotage dues for the provision of pilotage. This confirms that the Port Authority in terms of its legislative duty, employ these pilots and then provides these pilots for the use of the shipowners who wishes to enter the South African compulsory harbour. Whether or not the above argument would be successful remains to be tested in a South African court.

[92] National Ports Act No 12 of 2005
[93] *Supra* note 87 section 73 (1)(ii)

7.40 In Australia the case law substantiates the legislation in that the duties of the pilots are received from the statute. The interpretation by Australian courts of receiving such duties from statute is that pilots have an independent duty which they fulfil and for this reason there exists a contract between the shipowner and the pilot for pilotage services. The same situation could be argued in South Africa and if it is successful it would mean that a contractual relationship would exist between the shipowner and the pilot which currently is not the case. In turn the principle of good faith which mostly operates in law of contract in South Africa could find direct application in the interpretation of 'good faith' in the context of the Act.

7.41 With regard to the Inyati decision, it could be argued that since the Port Authority provide the port services in line with its authority in terms of the Act and in the case of pilotage, the pilot operates within the independent duty which is bestowed upon him by the Act, the Port Authority should then not be in contravention of the decision in the Inyati, in that it claims damages based on the negligence of its own employee which it now deems to be the employee of the shipowner, because effectively the Port Authority would only be the '*general employer*' of the pilot, but the real relationship of master and servant would lie between the shipowner or master and the pilot. However this new act allows there to be an action available to the Port Authority where clearly the Inyati case made sure that there was not. This new legislation has now opened up an avenue to the Port Authority which was closed by the judgement in the Inyati case, allowing the Port Authority to institute action for damage and loss to their own property based on the negligence of their own employee which is the pilot from the innocent shipowner.

7.42 From the current legal position in Australia, it would appear that the Port Authority is within its right to deem the shipowner vicariously liable for the damage or loss caused by the pilot. This section which deems the pilot the employee of the Port Authority seems to be in line with what other countries have currently operating in their ports. This means there is more of a standardisation taking place. The question is now, whether South Africa is on the same level as a

country such as Australia, to implement such legislation? I do agree that South Africa, as a developing country, should emerge and manage the same standards as the leading nations in the world, but my concern is whether the country is ready for such a standardisation. In my opinion such a development should be gradually phased in.

8 DANGERS OF DIVIDED CONTROL: THE MASTER VS THE PILOT

8.1 General Introduction to Divided Control

8.1.1 The atmosphere on the bridge of a vessel is one that can be very tense, but yet be very professional. Master and pilot have what the industry and academics call a divided control. This merely stems from the different functions that each party has to fulfil during the time that both are on board the vessel. Usually the master will be in control and command of his vessel until the point that he has to hand over navigation of the vessel to the pilot who is then responsible for navigation. At this point the theory of 'proceeding to master's instructions and pilot's advice' are employed. This expression is not entirely true, because the pilot is responsible for the navigation of the vessel in terms of Act and not only that of advisor to the master and in addition, the master remains responsible for the acts and omissions of the pilot.

8.1.2 The expression as set out above about a master and pilot has not been true in practice, due to legislation interference. Legislation[94] has always made reference to the duties of the pilot and the master in doing so have allowed for the master to interfere with the navigation of the vessel by the pilot in emergency circumstances. Today this is still the case.

8.2 The Master

8.2.1 The master is usually employed by the shipowner and is in command and effectively the person in control of everything on board the vessel. Masters are duly certificated individuals and are responsible for the managing of the vessel and crew, navigate the vessel during a voyage, employ pilots when necessary

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[94] United Kingdom Pilotage Act of 1913 and 1983

and keep proper log of all activities of the vessel and crew.[95] In relation to pilotage, the master of the vessel remains in command at all times while the vessel is under pilotage by a licensed pilot provided by the Port Authority in terms of the Act:-

'The master of the vessel must at all times remain in command of the vessel ...'

8.2.2 In addition the Act also states that the master or any of his persons under his command will not interfere with the navigation or the movement of the vessel while under pilotage or interfere with the duties of the pilot except in an emergency situation. This limits the duties that the master has on board the vessel while under pilotage, but illustrates the inconsistency with the 'master's instructions and pilot's advice'. The master is not to interfere with the duties of the pilot; however it becomes the master's duty to intervene in emergency situations. Either way, the master remains liable for the acts or omissions of the pilot. It is the master's duty on board the vessel to ensure that all the pilots' orders are obeyed in support of him fulfilling his duties.

8.2.3 The Act in section 76 (1)[96] holds the master liable for the loss or damage suffered as a result of the acts or omissions of the pilot. Irrespective of whether the master had interfered as provided for by the act in emergency situations.

8.3 **The Pilot**

8.3.1 'Pilots are persons who have a special knowledge of particular waters, and, and the safe conduct of the vessel denotes upon the pilot during the time that he has the vessel in charge.'[97] [Pilots] are usually taken on board vessels to ensure the safe navigation of the vessel either because the area is a compulsory pilotage area or even if it is not.

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[95] See Duckworth & Freeman, *Principles of Marine Law* (4th Edition), London, 1930 at page 32

[96] Section 76 (1) of the Act provides that 'Notwithstanding any other provision of this Act, the pilot is deemed to be the servant of the owner or master of the vessel under pilotage and such owner or master is liable for the acts or omissions of the pilot.'

[97] *Supra* note 97 at 165

8.3.2 The pilot is employed by the Port Authority to render pilotage services in the South African harbours which as already mentioned earlier are compulsory pilotage areas. The Port Authority licences these pilots in order for them to render their services in terms of the Act.

8.3.3 Section 75[98] of the Act has been kept mostly the same as the previous legislation. The master is in command of the vessel and the pilot is in control of the navigation thereof. The master has his duties which include not intervening with the pilot in any way while [pilot] fulfils his duties, except in the event of an emergency. This creates a difficult situation because even though the master is in command of his vessel, he cannot act and the pilot is not under the command of the master. The pilot gives orders to the master and crew who they have to obey, but the pilot is not the employee of the shipowner or master or part of the crew. Being an independent party on the vessel and yet being protected by legislation with respect to liability, it left a very uncomfortable relationship between the master and the pilot.

8.4 The Effect of Section 76 (2) of the Act on Divided Control

8.4.1 In terms of the LSSATS Act the section 10 of Schedule 1 has been kept the same in the Act, however section 76 (2) of the Act has changed the status of the pilot on board the vessel. The Act now deems the pilot to be the servant of

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[98] 75(1) Subject to subsection (2), a pilot must navigate every vessel entering, leaving or moving in a port. (2)Pilotage is not compulsory in respect of any vessel or class of vessels that have been exempted from pilotage by the Authority in writing.
(3) The pilot's function is to navigate a vessel in the port, to direct its movements and to determine and control the movements of the tugs assisting the vessel under pilotage.
(4)The pilot must determine the number of tugs required for pilotage with the concurrence of the master of the vessel.
(5) In the event of a disagreement between the pilot and the master of the vessel regarding the number of tugs to be used as contemplated in subsection (4), the Harbour Master takes the final decision.
(6)The master of the vessel must at all times remain in command of the vessel and neither the master nor any person under the master's command may, while the vessel is under pilotage, in any way interfere with the navigation or movement of the vessel or prevent the pilot from carrying out his or her duties, except in an emergency, where the master may intervene to preserve the safety of the vessel, cargo or crew and take whatever action he or she considers reasonably necessary to avert the danger.
(7) Where the master of the vessel intervenes as contemplated in subsection (6), he or she must immediately inform the pilot of the vessel and, after having restored the situation, must permit the pilot to proceed with the execution of his or her duties.
(8) The master of the vessel must ensure that the officers and crew are at their posts, that a proper lookout is kept and that the pilot is given all assistance in the execution of his or her duties.

the shipowner and or the master which was not the case before. Even though the Port Authority excludes itself from liability by deeming the pilot the employee or servant of the shipowner, this may have an effect on this divided control that exists between the parties.

8.4.2 The courts have always assumed the attitude as to not encourage the interference by the master with the pilot and the amount of cases where the interference of the master has been justified are nominal. Douglas and Geen[99] indicates that the interference by the master should be taken in a positive nature either for an order given in the absence of the pilot having given an order or in the situation where an order is revoked by the master, and such pilot having continued and being the cause of a collision. In the *Tactician* case[100] it was held that if a master does not interfere when he should it will amount to a *novus actus intervenience* and therefore the master shall be held liable only in those circumstances for not interfering and countermanding the pilot orders.

8.4.3 Furthermore, the court held in the case of *The Peerless*[101] that:

> 'there may be occasions on which the master of a ship is justified in interfering with the pilot in charge , but they are very rare. If we encourage such interfering, we should have a double authority on board, a *divisum imperium*, the parent of all confusion, from which many accidents and much mischief would probably ensue. If the pilot is intoxicated, or is steering a course to the certain destruction of the vessel, the master no doubt may interfere and ought to interfere, but it is only in urgent cases.'

8.4.4 The *Inyati*[102] is a South African Case and based on the facts[103], the relationship between the master and pilot was examined as well as the question whether

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[99] Douglas and Geen *The Law of Harbours and Pilotage* (4th edition), Lloyd's of London Press Ltd, 1993 at page 210

[100] *The Tactician* [1907] P 244 CA

[101] See *The Peerless* [1860] 167 ER 16 at p. 17 at Douglas and Geen *The Law of Harbours and Pilotage* (4th edition), Lloyd's of London Press Ltd, 1993 at page 206

[102] *Supra* note 55

[103] 'The S.S. "Inyati" left the wharf of Durban in charge of a pilot in the employ of the Union Government. The port of Natal was a compulsory pilotage harbour. The "Inyati" was preceded by the "Richard King" a government steam tug who was being navigated by a Union Government employee, the master. It was later argued that the "Richard King" should not have preceded the "Inyati", but should rather have followed it since it was only present to collect the pilot once his duties onboard the "Inyati" was complete. 'The owners of the "Inyati" sued the Union Government for the damages sustained, basing their claim on the alleged improper and negligent navigation of the master of the

the Port Authority could claim for damages done to its property by its own employees.

8.4.5 The pilot of the "Inyati" was in a difficult position when he was approaching the "King Richard" at a high speed. He gave an order in what he thought was an emergency situation to avoid a collision. The master at this point was placed in an even more difficult situation. He had to anticipate what the pilot was doing with the vessel and his split second decision to avoid a collision in fact resulted in just that.

8.4.6 The court when having to decide whether the master was negligent, found that 'he could not reasonably be expected to anticipate that she would keep on at full speed when making her lee, and when close to the tug pull up sharp under an order which would cause her suddenly to swerve to port'.[104]

8.4.7 The case of "*The Roanoke*"[105] was cited by the learned judge and in view of that case the following was held. 'But though England could not be expected to anticipate the sudden swerve to port – the result of the order "Full speed astern, hard a starboard," yet when he perceived it, it was his duty to do his best to avoid a collision, or if that was impossible, to act so as to minimise the force of it. His duty was not to rely on the "Inyati" alone to avoid the consequences of her mistake; he had to do his best to escape a collision'.[106] In conclusion the court found that there was no negligence on the part of the "Richard King" and that the "Inyati" was solely to blame for the collision. The case only touched on the time that had passed during which the orders were given by the pilot, Lindsay at the time of the collision. It was concluded that only one minute had lapsed from the time the order was given of "full speed

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"Richard King" and the Union Government claimed damages in reconvention for injuries done to the "Richard King" through improper and negligent navigation on the part of the "Inyati".'

[104] *Supra* note 55 at 412

[105] In the *Roanoke* [1908] PD 321 it was held that, "No seaman is justified in assuming that a vessel that has been and still is, signalling for a pilot, and is bearing down on the pilot's dinghy, a short distance ahead of him, is going to run up to her at nine or ten knots, but ought to assume that she is going to slacked speed and stop her engines in the manner in which a good seaman would act for such a purpose".

[106] *Supra* note 55 at 413

astern hard a-starboard" and the time of the collision. There was simply no time for the master of the "Inyati" to have intervened and countermanded the orders of the pilot.

8.4.8 The master in this situation always was restricted not to interfere with the navigation of the vessel by the pilot unless it was an emergency situation. This however in view of the Act has a slight change, because the pilot is deemed to be the employee of the shipowner. The master is now in an even more responsible position, since the pilot falls under his command due to the fact that he is deemed the servant of the shipowner. Once again a situation has been created by legislation which is confusing. The Act has remained the same as far as the duties of the master and the pilot is concerned, even though it is inconsistent with the fact that the pilot is deemed to be the employee of the shipowner. If the Act is fully executed then the master would be able to be both in control and command of the vessel.

8.4.9 The shipowner as employer of both the master and pilot are liable for both their acts and omissions, and the employees have to act in the best interest of the employer. The master and pilot would have to work together to achieve this. The effect of the section is that there can no longer be that divided control between the master and the pilot which is inconsistent with section 75 in which the previous provisions have been retained. Even though they have separate duties to fulfil, the master is responsible for the vessel and the pilot will be answerable to the master. This means that the same relationship still remain between the master and the pilot irrespective of section 76(2).

8.4.10 In the end all the dangers of divided control and command fall on the shipowner, and section 76 (2) in a sense substantiates what section 75 has set out to achieve.

9 QUALITY OF SERVICE: NATIONAL PORT AUTHORITY

9.1 According to the Act the pilots that are provided by the Port Authority to navigate vessels are certified pilots. Section 77[107] however indicates that the certification is done by SAMSA and licensed by the Port Authority as pilots. It also states the SAMSA makes recommendations to the Minister as to the minimum requirements for a person to be licensed as a pilot, and finally SAMSA also consults with the Port Authority about the minimum requirement for licensing these pilots before the recommendation is made to the Minister in this regard. The Port Authority has legislated and excluded themselves as well as the employees specifically the pilots from liability for loss or damage caused, but in the same breath that they exclude themselves they also legislate that [Port Authority] licence these pilots. There is a lack of impartiality when it comes to the training and licensing of the pilots for which [Port Authority] as employer take no responsibility, yet they expect the shipowner to do so without a fair choice of even being afforded the courtesy of choosing an experienced pilot suitable for his needs.

9.2 Pilots used to be professional masters who upon retirement would offer their services to the masters of vessels and/ or shipowners that wished to enter compulsory pilot harbours. These individuals have many years of experience and they were familiar with the quirks of the harbour and that knowledge made them experts in their field.

9.3 Initially the National Port Authority sent all trainee pilots on the Apprentice Pilot Training Programme in Rotterdam, in the Netherlands. The South African Qualifications Authority now provides for the official training of marine pilots to

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[107] (1)'No person may perform the functions of a pilot without having been duly certificated by the South African Maritime Safety Authority and licensed by the Authority to do so'
(2) 'The Minister may prescribe requirements for the licensing of pilots'
(3) 'The South African Maritime Safety Authority may recommend to the Minister the minimum qualifications required for any person to be licensed as a pilot, including the content and nature of examinations, if any, to be undertaken.'
(4) 'The South African Maritime Safety Authority must consult with the Authority regarding the content of the minimum qualifications referred to in subsection (2), before any recommendations are made.

obtain a National Certificate in Marine Pilotage. The qualification is aimed at the relevant learners in possession of an undergraduate qualification and learners with experience as deck officers. In addition the learners has to be medically fit, more specifically eyesight, hearing and physical fitness to meet the standards in line with standards required for masters and officers certification in charge of a navigational watch under the International Convention on Standards of Training, Certification of Watchkeeping for Seafarers (STCW 1995).[108] It is my understanding that the qualification also caters for the relevant practical training and consists of 120 credits.[109]

9.4 With South Africa not training the pilots and ceasing outsourcing to Europe, why not just use existing pilots to teach and in that way transfer all that knowledge to the trainee pilots. According to the SAQA website, this has in fact been done successfully in Turkey, however such training did not make any provision for the benefits of modern technical equipment such as bridge simulators which could have ensured that the training were more efficient.

9.5 Even though the Port Authority is addressing the issue of training pilots, one has to wonder if [Port Authority] in fact are replenishing sufficiently with fully experience and qualified pilots. The Act in Chapter 2, section 4 (1) provides for the National Port Authority (Pty) Ltd to be converted to a public company. The

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[108] South African Qualifications Authority Registered Qualification : National Certificate Marine Pilotage Available at http://regqs.saqa.org.za/showQualification.php?id=57714 [Accessed on 8 August 2007]

[109]

No	Subject	Credits
'1.	Communicate with role-players to perform pilotage	8 credits
2.	Manage bridge resources	8 credits
3.	Apply local, national and international codes, regulation and statutory reporting	8 credits
4.	Apply knowledge of Hydrodynamics in pilotage	15 credits
5.	Understand the principles of ship stability in piloting a vessel	10 credits
6.	Pilot a tow into Port	10 credits
	Embark and disembark a vessel by helicopter or using a pilot ladder	
	Pilot a vessel within port limits	24 credits
		10 credits
7.	Conduct VTS remote pilotage	10 credits
	Provide support to manage marine environment risk in the port	
	Demonstrate an understanding of stress in order to apply strategies to achieve optimal stress levels in personal and work situations	5 credits
		5 credits'

rules[110] governing public companies are more than those which govern a private company. South Africa has a high unemployment rate and the need for pilots would provide for the creation of job opportunities and for the Port Authority as a private company which will soon be converted to a public company, to satisfy their Social Responsibility by training previously disadvantage individuals as pilots.

9.6 In a manner of speaking it does benefit the county, but it does not leave much reassurance as to the quality of pilot that the shipowner would receive. Other than the benefit that the National Port Authority itself has, it does not appear to have any incentive built into the legislation to ensure that the pilot whom the shipowner receives is in fact of a high enough standard for them to trust their vessel to such pilot. There needs to be definite independence between the licensing authority and the pilot so licensed. More transparency is needed and in addition one should consider as will be discussed below, the possibility for the Port Authority also having the benefit which the shipowner currently has of the limitation of liability with respect to loss or damage claims. In the event of the Port Authority then ensuring itself, it would allow for an incentive for [Port Authority] to ensure that the Port pilots are of top quality and minimise human error.

9.7 In other jurisdictions, such as the United States of America[111] the matter of liability of the Port Authority has been exhausted, specifically around the issue of damage or loss suffered as a result of a failure to provide adequate pilotage service. Even though the Port Authority deem the pilot the employee of the shipowner while [pilot] navigates the vessel, the question of whether the pilot so provided before deeming it the employee of the shipowner is in fact a competent pilot as certified by the Port Authority. The shipowner may not be able to claim damage or liability against the Port Authority on the grounds that the pilot is the employee of the Port Authority, but it can claim for loss or damage suffered if proven that the pilot who is certified a competent pilot by the Port Authority in fact was not.

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[110]Public Companies are normally listed on the Johannesburg Stock Exchange and they are governed by the Companies Act as well as the JSE Listing Requirements which are updated regularly.

[111] Alex L Parks and Edward V Cattell, JR, *The Law of Tug, Tow and Pilotage*, (3rd edition), Sweet & Maxwell, 1994 at page 1029

9.8 The possibility of this action should prompt the Port Authority to consider possibly limiting its liability which in turn would provide an incentive to the Port Authority to provide competent pilots. Under those circumstances, section 76 would not be such a bitter pill to swallow, because the shipowners, other third parties and the Port Authority would know that it is an even load to bear.

10 LIMITATION OF LIABILITY

10.1 As shipowners, they are allowed to limit their liability when claims are brought against them. This is insurance cover that is taken out by the shipowner to ensure that in the event of a claim for damages against the shipowner, such shipowner could limit its liability against such parties.

10.2 The Merchant Shipping Act[112] ("MSA") in section 261 makes provision for the circumstances in which the shipowner would not be liable for all damage so suffered by third parties.

10.3 Section 261 of the MSA enacted and incorporated the essential elements of the 1957 Brussels Limitation Regime.

10.4 The MSA in section 261 makes provision for three categories of claims and each are calculated on a slightly different basis. The first subsection deals with the liability of the shipowner with respect to the loss of life or personal injury caused without his or her actual fault or privity, which shall be in an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's[113] tonnage.

10.5 Subsection (b) of the MSA states that the shipowner shall not be liable if without his actual fault or privity loss or damage are caused for property to an

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[112] No 57 of 1951

[113] *Supra* definitions 'ship' means any kind of vessel used in navigation by water, propelled or moved, and includes-

(a) a barge, lighter or other floating vessel;
(b) a structure that is able to float or be floated and is able to move or be moved as an entity from on place to another, and
(c) a dynamically supported craft; and 'vessel' has a corresponding meaning.

aggregate amount exceeding 66,67 drawing rights for each ton of the ship's tonnage.

10.6 Subsection (c) of the MSA provides that the shipowner shall not be liable if without his actual fault or privity loss or damage are caused in respect of loss of life and personal injury as well as claims for damage to property to an aggregate amount exceeding 206,67 drawing rights for each ton of the ship's tonnage.

10.7 In view of the above sections, the shipowner has the right to limit its liability against claims brought against [shipowner] for loss or damage and the three subsection specifically deals with different circumstances in which the liability may be limited and to what extent.

10.8 The Port Authority does not have this right to limit its liability with regard to claims for loss or damage suffered which may be brought against it by third parties. The Act that deems the pilot the employee of the shipowner is the Port Authorities way in which to exclude themselves from liability for the acts or omissions of the pilot. The issue is that if the reason for shifting the liability to the shipowner was to allocate it to a party who has the benefit of limitation, then would it not have been a viable alternative to section 76 to legislate a limitation of liability clause in the Act for the Port Authority.

10.9 That way both the Port Authority and the shipowner would have carried the same amount of risk with regard to pilot services and they [Port Authority] may have been more comfortable knowing that their risk could be limited. In addition such an enactment would have provided that incentive as mentioned earlier to the Port Authority to provide quality service to the Port users, because they would have had some limited amount of exposure should loss or damage occur as a result of pilot's actions and/or omissions.

10.10 Another alternative has been legislated in other jurisdictions and has proven to work just as efficiently as what I have suggested above. In the United States, specifically in the State of Oregon, a statute was adopted which provides for the limitation of liability. The act provided permission for pilots to file special

contracts or tariffs to state that the rates that are charged do not include marine insurance insuring the vessel, owners, agents or operators for negligence by the pilot rendering pilot services.

10.11 The pilot in terms of the legislation could offer 'trip insurance' in any amount which the vessel owner requested. If the shipowner accepted the insurance it then the premiums would be paid extra to the standard pilotage charges. This 'trip insurance' covered the pilot in the event of damage or loss suffered while the vessel was under pilotage and the liability would be covered by the insurance policy that pays out.

10.12 In the event of the shipowner declining the 'trip insurance' then in terms of the legislation the pilot would be the borrowed servant of the shipowner. This meant that in the event of loss or damage suffered by the negligence of the pilot while the vessel was under pilotage, the shipowner became liable and would indemnify the pilot from any claims against him as a result of the pilot's negligence. The legislation applies to both voluntary and compulsory pilotage.

10.13 The Singapore Port Authority has also proven to work just as efficiently. With respect to Pilotage, the Singapore Port Authority in section 71[114] of the Maritime and Port Authority of Singapore Act ("MPAS Act) holds liable the master or owner of a vessel which navigate under compulsory pilotage for loss or damage caused by a vessel or by any fault of the navigation of the vessel in the same way as if the pilotage was voluntary. The pilot's liability in section 72[115] is limited when a bond is given. Section 72(1) of the MPAS Act provides that:-

> An authorised pilot who has given a bond in accordance with subsection (2) shall not be liable for neglect, want of skill or incapacity in office beyond the penalty of such bond and the amount payable to the Authority on account of pilotage in respect of the voyage in which he engaged when he became liable

and section 72 (2) provides:-

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[114] Maritime and Port Authority of Singapore Act (Chapter 170A)
[115] *Supra* note 114 at section 72

'Every pilot shall give a bond in the sum of $1000 in favour of the Authority for the proper performance of his duties under this Part of any regulations made thereunder.'

10.14 In addition the Singapore Port Authority also excludes its liability in section 90, but in section 91 provide for the limitation of the Singapore Port Authority liability. Section 91 provides that"-

The Authority shall not, where, without its actual fault or privity, any loss, damage or destruction is caused to any vessel or to any goods or other thing whatsoever on board any vessel, be liable to damages beyond an aggregate amount not exceeding in the currency of Singapore the equivalent of 1,000 gold francs for each ton of the vessel's tonnage.

10.15 Even though the Singapore Port Authority hold the shipowner liable for the damage or loss caused by the fault of the pilot, it also allows for a bond to be given limiting it liability in such a way as well as providing for a limitation of liability for itself. In having the pilot providing the bond, it also simultaneously ensures that the quality of service provided by the pilot is of good standard. Section 91 of the MPAS Act relates directly to the claims that will come from innocent parties who were not under compulsory pilotage in the harbour at the time that the loss or damage occurred. Even though this is not the ideal scenario, it does allow some liability to the Port Authority.

10.16 The first option would be to use the provisions of the Merchant Shipping Act 57 of 1951 should be used as a basis to afford the Port Authority the same kind of protection by way of limitation of authority. In order to do so the Port Authority would have to insure themselves. They [Port Authority] would be able to limit it liability for loss or damage suffered as a result of the pilot's act or omissions and the benefit out of that would be that the Port Authority would have an added incentive to provide competent pilots to the shipowners. This is an aspect of the legislation which at present if flawed, because with the complete exclusion of liability that is legislated in the Act, specifically in section 76 it does not provide the shipowner who takes on the risk with any assurance that the pilot who will navigate the vessel is in fact competent to fulfil such a duty. At present the Act does not afford the Port Authority the protection that it allows for the shipowner,

but perhaps if that was be addressed then the Port Authority may not be reluctant to share some of the risk. The fact that the liability of the Port Authority would be capped at a specific amount by way of limitation would also allow for insurance premiums to be lower than if the liability of the Port Authority were unlimited.

10.17 The second option of offering a similar product as the 'trip insurance' could also be considered as an alternative to this current blanket exclusion in section 76 of the Act. Once either of these options is affected the Port Authority could possibly keep the pilot as an employee, but also enjoy the same benefit as that the shipowner currently have. To the advantage of the Port Authority would be the fact that it could still deem the pilot the employee of the shipowner, in the event that the shipowner does not take up the insurance offered.

10.18 Lastly as an option one could follow the Singaporean way of limitation of liability for Port Authority, however this should a last resort.

11. CONCLUSION

11.1 The National Port Act has given the industry and academics much to think about. It would seem that the Port Authority is not taking on any of the risks associated with negotiations and general business practice when it comes to the Port users at present. Both these Port users and the Port Authority benefit from the use of the Port by off loading or on loading of goods to ensure that international trade and the country economy are sustainable and in light of that parties should be able to meet each other half way. The Act has included relevant sections that will certainly ensure that the South African legislation conforms to the legislation of other countries, which in itself makes it easier for foreign vessels to use our ports, because they would encounter familiar procedures. Having deemed the pilot the employee of the shipowner has been the case for centuries as has been illustrated earlier and is not a unusual concept, but one that South Africa also has incorporated rightfully so in order to exclude liability for the Port Authority. Finally the exclusion of liability clause included in section 76 of the act once again is not unfamiliar to other countries and it should be treated as progressive and forward moving action on behalf of the country.

11.2However, the question of insurance for the Port Authority is one which should be addressed, but one has to wonder at what expense that may be realisable. In order for the Port Authority to ensure against claims from third parties for loss or damage suffered due to a port employee such as a pilot may mean that the shipowners would still have to pay the bill in the form of Harbour fees and pilot fees. As some compromise it is suggested that the Port Authority having included all the benefits for themselves, at least meet the shipowners halfway with respect to liability for loss or damage caused by a pilot on board a vessel under pilotage as well as independent licensing for pilots. With regard to the licensing and training of the pilots, I suggest that an independent body should be in charge of licensing and training to ensure the successful functioning of the act.

11.3Overall, the act seems to be in line with the laws governing pilotage in countries such as the United Kingdom, Australia and the United Stated of America. One has to wonder if South Africa as a developing country is ready to effectively implement the new legislation and adhere to all the supporting functions to ensure the effectiveness thereof. This remains to be seen.

BIBLIOGRAHY

PRIMARY SOURCES

TABLE OF SOUTH AFRICAN CASES

Bank of Lisbon and South Africa Ltd v De Ornelas 1988 (3) SA 580 (A)

Brady Hamilton Stevedore Company and Others v Kalantiao 1987 (4) SA 250 (D)

Cape Town Municipality v Payne 1923 AD 207

Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371 (D)

Central South African Railways v Adlington & Co 1906 TS 964

Gavin Weir v Union Steamship Co (1874) NLR 61

Drifters Adventures Tours cc v Hircock 2007 (2) SA 83 (SCA)

Government RSA (Department of Industry) v Fibre Spinners and Weavers (Pty) Ltd 1977 (2) SA 324 (D)

Minister van Polisie v Ewels 1975 3 SA 590 (A)

Mv Stella Tingas v mv Atlanica and Another 2002 (1) SA 647 (D)

S v Dhlamini 1988 (2) SA 302 (A)

S v Van Zyl 1969 (1) SA 553 (A)

Shell Tankers Ltd v SA Railway and Harbours 1967 (2) SA 606 (E)

S.A.R.H. v Lyle Shipping Company Ltd 1958 (3) SA 416

Shipping Corporation of India Ltd v Evdomon Corporation and Other 1994 (1) SA 550 AD

The Andrica Unity 1989 (4) SA 325 AD

The Inyati: JT Rennies and Sons v Minister of Railways and Harbours 1913 NPD 396

Transnet Limited t/a Portnet v The owners of the mv Stella Tingas and the mv Atlantica 2003 (2) SA 473 (SCA)

Trivett and Co (Pty) Ltd and Others v WM Brandt's sons & Co Ltd & Ors (Waikiwi Pioneer) 1975 (3) SA 423 AD

Yung Chun Fishery Company Limited v Transnet Limited t/a Portnet (C) case number 30/97 1 September 2000 unreported

TABLE OF FOREIGN CASES

Esso Petroleum Company v Hall Russell and Company 1989 (1) All E.R. 37

Field v Nott (1939) 62 C.L.R

Fowles v Eastern and Australian Steamship Company Limited [1916] 2 AC 551

Holman v Irvine Harbour Trustees (1877) 4 R 406

Lennard's Carrying Company Limited v Asiatic Petroleum Company Limited [1915] AC 705

Oceangas (Gibrartar) Ltd v Port of London Authority (The "Cavendish") [1993] 2 Lloyd's Rep 292

Oceanic Crest Shipping Company v Pilbara Harbour Sevices Proprietary Limited (1986) 160 C.L.R 626

The Peerless [1890] 167 ER 16

The Roanoke [1908] PD 321

The Tactician [1907] P 244 CA

The Waziristan [1953] 2 AllER 1213

TABLE OF SOUTH AFRICAN STATUTES

Admiralty Jurisdiction Act No 105 of 1983

Government Gazette 24261 of 17 January 2003

Government Gazette 27863 Volume 482 of 4 August 2005

Legal Succession to the South African Transport Services Act No 9 of 1989

Merchant Shipping Act No 57 of 1951

National Ports Act No 12 of 2005

Regulations of Port and Harbour of Port Natal Act 3 of 1894

Ship Registration Act No 58 of 1998

South African Maritime Authority Act No 5 of 1998

South African Transport Services Act No 65 of 1981

TABLE OF FOREIGN STATUTES

International Convention for the Unification of Certain Rules of Collisions adopted at Brussels, September 23, 1910 and in force as of March 1, 1913

Maritime and Port Authority of Singapore Act (Chapter 170A)

Maritime Safety Act of 1998 (NSW)

Merchant Shipping Act of 1846

Merchant Shipping Act of 1984 (UK)

Navigation Act of 1912 (Cth)

Pilotage Act of 1913 (UK)

Shipping and Pilotage Act of 1967

United Kingdom Pilotage Act of 1983

LIST OF WORKS AND ARTICLES REFERRED TO

SECONDARY SOURCES

Abbott, *Merchant Ships and Seamen* (14th Edition), 1901

Alex L Parks and Edward V Cattrell JR, *The Law of Tug, Tow and Pilotage*, (3rd edition), Sweet & Maxwell, 1994

Douglas and Geen, *The Law of Harbours and Pilotage*, (4th Edition), Lloyd's of London Press Ltd, 1993

Duckworth & Freeman, *Principles of Marine Law*, (4th Edition), London, 1930

Michael White, *Australian Maritime Law*, (2nd edition) The Federation Press, 2000

Chris S Yuen *Maritime Pilotage in Australia: Syney Port Case Study* (2003) 17 MLAANZ Journal

Christie, *The Law of Contract in South Africa*, (3rd Edition)

Damien J Cremean, *Admiralty Jurisdiction Law and Practice in Australia and New Zealand*, (2nd edition), The Federation Press, 2003

Halsbury, *Laws of England* (4th Edition Reissue) Vol 31 (1) 758

Hare, *Shipping Law and Admiralty Jurisdiction in South Africa*, Juta & Co, 1999

Maxwell, *Interpretation of Statutes*, (12th Edition) Sweet and Maxwell Limited, 1969

Neethling Potgieter Visser, *Deliktereg* (3rde uitgawe), 1996

Neethling Potgieter Visser, *Law of Delict* (5th edition), Butterworths, 2006

Sarah Tulloch *The Readers Digest Oxford Complete Wordfinder*

Roger Browsword et al *Good Faith in Contracts Concept and Context* (1999) Ashgate Publishing Limited

Van der Walt, Midgley, *Principles of Delict*,(3rd edition), Lexis Nexus Butterworths, 2005