36

FULL NAMES: MONWABISI MANJEZI

STUDENT NUMBER: MNJMON001

DEGREE: LLM

TITLE: "COMPULSORY PILOTAGE" a system in need of reform

SUPERVISOR: Mr GB Bradfield

DATE: 18 FEBRUARY 1999

"Research dissertation presented for the approval of Senate in fulfillment of part of the requirement for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses"

BIBLIOGRAPHY

Textbooks

Bamford	The Law of Shipping and Carriage in South Africa 3rd Ed 1983
Chorley & Giles	Shipping Law 9th Ed 1995
Douglas & Geen	The Law of Harbours & Pilotage 4th Ed 1995
Hill	Maritime Law 4th Ed 1995
Parks & Cattel, JR	The Law of Tug, Tow & Pilotage 3rd 1994

Articles cited

Bederman DJ	"Compulsory Pilotage; Public Policy and Early Private International Law of Torts" *1990 Tulane Law Review Vol 64*	1033
Corbet A G Dr	"The Law of Pilotage – a brief commentary with special reference to the UK Pilotage Act 1987" *The Nautical Institute*	*24*
Masson James	"Compulsory Pilotage – Compulsory Liability" *P & I International May 1994*	14
McKerron R G	"Compulsory Pilotage: Effect of Statutory Provisons Excluding Liability for Negligence Of Pilot" *1967 South Afican Law Journal*	394
Stephenson G C	"A pilot is a Pilot: Compulsory Pilots-Vessel Owner's Responsibility for intervention and Personal Injury" 1995 Tulane Law Review vol 70	633
West W T	"Pilotage Law – legal liability for damages" *Solicitors Journal Vol 133 No 36 8 Sept 1989*	1124

Articles cited from Fairplay

21 March 1996	"Look at Port Safety! Owners ponder safe Pilotage"	29
4 April 1996	"Pilots's Licence revoked: Disability act provides no protection"	17
18 April 1996	"Blind Faith: Trust in Pilots wane"	4
	"Pilotage in the spotlight – A system ripe for reform"	18
9 May 1996	"Setting the record straight"	18
27 June 1996	"Dropped off: The price of Pilot error"	4
4 July 1996	"Cronyism on the Pilot boat: Should competence or contact rule	4
11 July 1996	"Pilots are welcome 1 and 2"	33
15 August 1996	"Sins of Father: Sparks fly on Pilotage"	13
	"Owners are responsible"	29
	"Question of trust: Pilotage back in the spotlight	3
30 January 1997	"Never off-duty: Master slammed for negligence"	17
Tradewinds 19 July 1996	"Tanker owners turn spotlight on pilots"	10

TABLE OF CONTENTS

1. INTRODUCTION

Following the grounding of John Fredriksen's 147 200-dwt tanker the *Sea Empress* earlier in 1996, for which pilot error was blamed, has again revived the debate about the liability of pilots performing a pilotage act under compulsory pilotage[1].

The independent tanker owner's association, based in Oslo representing the interests of tanker and shipowners is putting pressure on the pilots to guide ships they are navigating safely into ports. They are lobbying for the removal of the legal immunity enjoyed by pilots and make them legally liable for collisions and grounding of vessels under their guidance during compulsory pilotage. The shipowners are putting pressure on harbour authorities to be given the power to choose which pilots to use in a similar way as they appoint masters. At present under the compulsory pilotage system shipowners accept a pilot without knowledge of his record and often with no option. The shipowners argue that the past performance and training of a pilot should be public knowledge and available to the owner in advance.

During normal navigation the master of a vessel is always fully responsible for the ship and the liability for navigational errors is attached to the vessel. During compulsory pilotage his authority becomes compromised by the presence of a pilot to whom he is obligated to hand over the control of the vessel, whilst not diluting his liability for navigational errors. The shipowner through the master ultimately assumes the responsibility for the payment of the damages incurred. The pilot on the other hand is only responsible for acts or omissions under the criminal law, but does this does not mitigate the shipowner's civil liability should an accident occur. The financial exposure of a pilot involved in an accident is therefore generally negligible coupled with the fact that pilots can limit their liability. In the US, where the

shipowner now has unlimited and multiple liability, there is great concern that safety standards can be undermined by handing control to pilots operating under a system desperately in need of overhaul[2].

This mandatory pilotage scheme removes the shipowners' right as a purchaser of a service, the right to choose between competing services and severely limits their right to approve and evaluate the service prior to payment. Because of the costs associated with these accidents, the shipowners are now calling for a review of the system of compulsory pilotage. Shipowners believe the major flaw in the system is the pilot's immunity from liability, in their experience they believe legal liability is a powerful incentive for greater care.

Numerous solutions have, as a result, been mooted. Shipowners are favouring a division of liability, and recommend that the master remains liable for the vessel while the pilot assumes responsibility of his errors. On the other hand the vetting of pilots should be left to an authority with the weight of the IMO[3]. The independence of this body would give comfort to the master that they are getting a well trained pilot who is up to the job of guiding the ship through the most dangerous part of the voyage.

Pilots naturally disagree[4], claiming that making pilots liable would not sharpen their performance. It would possibly result in more restrictive practices and this would result in the whole pilotage operation becoming more expensive. The pilots would for an example require take up professional indemnity insurance, the cost of which shall in some way be passed on to pilotage dues resulting in the shipowner paying an added premium for pilotage incidents.

These diagonally opposed views shall be examined in more detail in this dissertation and to ascertain whether shipowners can obtain some relief from their liabilities.

2. HISTORICAL DEVELOPMENT

Pilotage is as old as the maritime trade, and has particular characteristics that are worldwide adopted : local character, self employment and control by the government are some of them.

The first account of compulsory pilotage was made in the ordinance *de Wisbuy* in the Twelfth century. The earliest reported case against a pilot for negligence was an English case of ***Re Rumney and Wood*** reported in Act Book No 128; August 1541[5].

The English Law is therefore rich with precedence for the development of compulsory pilotage in South Africa. There is further semblance in that both systems were established by an Act of parliament and the enactments tend to be similar in some respects.

The courts in England unlike South Africa have judiciously tested pronounced on a majority of the provisions of the English Act. Lessons from this jurisdiction shall inform us in formulating a solution where a South African court has not judiciously considered an issue of a similar point in law. A comparative analysis of the development of compulsory pilotage in both these regimes is to be undertaken for this purpose.

2.1 THE LAW APPLICABLE TO PILOTAGE IN SOUTH AFRICA

In order to establish the law applicable to pilotage regard has to be section 6 Admiralty Jurisdiction Regulation Act, No. 105 of 1983, which states that;

"Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of admiralty jurisdiction shall.

(a) With regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this act, apply the law which the High Court of justice of the United Kingdom in the exercise of the admiralty jurisdiction

would have applied with regard to such a matter at such commencement, in so far as that law can be applied;

(b) With regard to any other matter, apply the Roman Dutch law applicable in the Republic."

Pilotage was not included in either the 1841 or the 1861 Acts, and was thus not subject to the jurisdiction of the United Kingdom Colonial Courts of admiralty as at 1890. Following on the provisions section 6 of the Act therefore, unless it can be argued that pilotage was part of the inherent jurisdiction of the Lords of Admiralty, Roman-Dutch Law as applicable in the Republic will apply.

2.2 DEVELOPMENT IN SOUTH AFRICA

The development of pilotage in South Africa has its roots in Roman Dutch Law which required a master to take a pilot in all places where this was necessary or customary, especially in the neighbourhood of land where, through ignorance of the depth of water, one is very likely to be stranded on a sandbank[6]. The main rationale for compulsory pilotage is simple, navigating in and out of ports and harbours poses special hazards and requires specialised knowledge of the locality. These hazards are not prevalent to ships when sailing on the high seas. Obstructions and congestion of other vessels make the risk of collision high. Further the usual rules of navigation with which masters are familiar are altered by custom and local regulations[7] in harbours. This as a result obliges foreign vessels that are unfamiliar with local conditions to take on a pilot who is skilled and knowledgeable with these local conditions.

Under Roman Dutch Law, the duties of a pilot, qualifications and payment were regulated by an ordinance[8]. The chief head of these regulations was that a pilot before conducting a piloting exercise must first pass an examination and receives a badge. Acting as a pilot without being admitted, subjected the pilot to pay a penalty of 24 guilders. The requirement to hold a licence was carried through to the current statute and regulations applicable in South Africa, the Legal Succession to the South African Transport Services Act of 1989. Regulation 93 states that; "No person may act or exercise the employment of a pilot at a harbour under the jurisdiction of the Transport Services, unless he has been duly licensed by the Transport Services as a pilot for that harbour". The same authority in the interest of safe, orderly and efficient harbour working may revoke this licence[9].

The Act places the control of harbours under a state owned company, PORTNET. Section 10(1) of the Act, and Regulation 92 provide that "the harbours of the Company are compulsory pilotage harbours with the result that every ship entering, leaving or moving in such a harbour shall be navigated by a pilot who is an employee of the Company, with the exception of ships that are exempted by statute or regulation".

The Act in section 10(7) specifically exempts the pilot and the company from liability for loss or damage caused by a negligent act or omission on the part of the pilot. It is this anomaly that is the subject of this dissertation, that whilst the shipowner is acting under compulsion of law is still faced with the liability of paying for the omissions of an authority imposed upon him.

2.3 THE POSITION IN THE UNITED KINGDOM

The current statutory regime is contained in the Pilotage Act 1987 ("the 1987 Act"). This legislation introduced several radical changes in the organisation of marine pilotage.

1. The transfer of control of pilotage to "competent harbour authorities ("CHA"). These local harbour authorities have statutory powers in relation to shipping movements and the safety of navigation within their harbour area.

2. Where previously pilots were self-employed persons, the emphasis is now on their becoming employees of the competent harbour authorities.

Each CHA is under a statutory duty to monitor the type of pilotage services necessary to secure the safety of the ships navigating in the approaches of its harbour.

The secretary of state can now make orders, for a CHA to exercise pilotage functions both in respect of its harbour and another area. Furthermore to enable a harbour authority which is not a CHA to be treated as such [10].

Under the Act Competent Harbour Authorities have elaborate duties viz.: -

* To provide for pilotage services needed for safety if navigation of ships within and in the approaches to their respective harbours
* To approve the suitability of ships to be used as pilot boats[11]

The act further clothes the CHAs with certain powers, viz.: -

* To determine qualifications required by pilots

* To authorise persons to act as pilots (the expression "pilot's license" and "licensing of pilots" used in further legislation, have been replaced by pilot's authorisation and authorisation of pilots respectively[12])

* To revoke the authorisation to persons to act as pilots
* To make pilotage directions specifying that all ships, or all of certain types of ships, are subjected to compulsory pilotage in specified areas of the respective CHA's areas of jurisdiction.

With all these powers one would assume that it is logical for the CHAs to be held vicariously liable in some way to the ship's owner for the faults of the pilots whom they certificate and employ. Judicial pronouncements in the United Kingdom do not support this assumption[13].

Traditionally, it had been considered unreasonable for shipowners to be held liable for the fault of a pilot whom they are compelled to use and who is entitled to take charge of the navigation of the vessel. This was referred to as the defence of compulsory pilotage. However, since the coming into force of the Pilotage Act of 1913 owners have been unable to rely on the defence of compulsory pilotage[12]. Section 16 of the Act provides that the "fact a ship is being navigated by a *compulsory pilot shall not affect the liability of the owner or master for any loss or damage* caused by the ship or by the manner in which it is navigated".

2.4 STATUTORY PROVISIONS IN SOUTH AFRICA

As previously alluded to pilotage in South Africa is largely controlled by statute, the Legal Succession to the SA Transport Services Act 9 of 1989(previously the SATS Act No 65 of

1981) read with Harbour Regulations 92 – 97 which refer to pilotage. The Regulations confirm the compulsory nature of pilotage in all South African ports and give port captains a discretionary power to exempt a master of a ship from compulsory pilotage if they believe

(a) is competent to navigate his ship safely within the limits of the harbour.

(b) the ship in question is not more than 70 m in length overall or under 70 tons gross[15].

The functions of a compulsory pilot are laid down in Section 10(2) that states:
"It shall be the pilot's function to navigate a ship in the harbour, to direct its movement and to determine and control the movements of the tugs assisting the ship under pilotage"
The pilot has the con until he leaves the bridge and hand over to the master and during that period he has the sole control of the navigation. The maxim is "master's orders and pilot's advice"[16]. This maxim presupposes that the master of the ship remains in command of the vessel whilst under compulsory pilotage.

The dimension of the Pilotage service is revealed through an analysis of the master/pilot relationship. Section 10(4) of the Act provides that "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 emergency, where the master may intervene to preserve the safety of his ship, cargo or crew, and may take whatever action he deems necessary to avert the danger".
The court in ***The Lochibo (1850) 3 W. Rob 979 at 982*** ruled that "where a pilot is taken on board for the purposes of navigating a vessel all the responsibility attaches on the pilot and it is not part of the duty of the master to interfere".

This duty is imposed on the pilot based on the experience and knowledge of the local conditions he is supposed to possess. The courts are not prepared to sanction the interference of the master in anyway in the performance of those duties that the pilot must be considered more particularly competent to discharge and of which the master, in the majority of cases must be a very inferior judge.

There are circumstances, though, despite this court ruling where the master is under a duty to countermand or at least remonstrate against unseamanlike orders of the pilot. While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the master is not wholly absolved from his duties while the pilot is aboard, and may advise and even displace him in case he is intoxicated or manifestly incompetent. A master is entitled in the first instance to rely on the pilot's special knowledge and skill before countermanding its action. In ***The Princes Julliana (1936) 54 LiLR 234*** the judge remarked that "if the master takes it upon himself to take the navigation of his ship out of the hands of the pilot and countermands the latter's orders, he must show to the court's satisfaction that he was justified in doing so" if the master's action is unsuccessful it would seem difficult for him to prove that his supersedence of the pilot was justified. It is therefore largely a question of fact, not of law whether or not the master ought to supersede the pilot. In ***JT Rennie and Sons v Minster of Railways and Harbour ("The Inyathi") 1913 NPD 396*** the court ruled that even under English Law the "Inyathi" would have been held liable because the master failed to protest against unseamanlike orders of the pilot[17].

The statute in turn exempts pilot from liability for damage caused by its error. Section 10(7) provides that: "the company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or commission on the part of the pilot"

Section 10(1) stipulates that "the harbour of the company are compulsory pilotage harbours with the result that every ship entering or leaving or moving in such harbour shall be navigated by a pilot who is an *employee* of the company, with the exception of ships that are exempt by statute or regulation".

The emphasis of this section is on the pilot being an employee of the Harbour Company (Portnet). In Roman Dutch Law specific cases exist in which, upon the grounds of public policy, the praetor by legislation imposed legal responsibility upon certain types of masters for the wrongful acts of their servants. These cases were instances of true vicarious liability, not dependent upon any fault of the master and the master could not escape liability by proving the absence of fault. In ***Lewis v The Salisbury G.M. Co. (1 O.R. 1)*** Kotze, J. held that "the Roman Dutch authorities are somewhat in conflict, but the weight of authority of the law as laid down by Voet (9-4-10), that the masters are liable in solidum for the delicts of their servants whenever they inflict injury or damage *in the duty of service* , but the masters are not liable when the delict is committed outside of their duty or service. This is the rule, which has been generally acted upon in the South African courts [18], and, in my opinion, it should now be applicable in this case as the statute clearly classifies that the pilot is the employee of the Harbour Company.

Section 10(7) of the act provides that "the company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or ommission on the part of the pilot". The provisions of this section were interpreted by the court in ***Shell Tankers Ltd V South African Railways and Harbours 1967 (2) SA 666 C*** the court considered whether the

Administration is exempt from liability for loss or damage caused to a ship by negligence of pilot while entering or leaving a compulsory pilotage harbour.

Plaintiff in its claim alleged the grounding of the vessel was caused solely by the negligence of the defendant's servant. The defendant denied this allegation and pleaded negligence of pilot and accordingly was not liable to the plaintiff by reason of the provisions of section 10(7). It is clear that literally interpreted the section would exempt the Administration from liability in practically every case of compulsory pilotage, since damage would almost "arise or be caused through" the conduct of the pilot. The court per Cloete, J. held that: "The section is both an alteration of the common law and an interference with existing rights, it must be restrictively construed and against the Administration" (PORTNET). The construction of the section protected the Administration / PORTNET from liability only if the negligence of the pilot was the sole cause of the damage and not of damage of the defendant or its servants (other than the pilot) was a contributory cause thereof. This means that PORTNET will only be liable if its servant is negligent with the exclusion of the pilot even though the vessel at the time was in the course of being berthed by the pilot. In order to defeat a claim PORTNET has to prove that the damage resulted from the conduct of the pilot, and that the pilot's conduct was the sole and proximate cause.

The principle of our law is that if damage is caused by the act of two or more independent wrongdoers, then their respective liability depends upon whether the act of each was a material factor in the causation of such damage. The consequence is that each becomes liable to the plaintiff for the whole of the damage caused, who may sue either or both for the recovery thereof[19]. If the proximate or dominant cause of the damage was the conduct of the pilot the action will fail and PORTNET will have no liability.

The decision is important in the shipping law in South Africa in that the learned judge interpreted the statutory provision excluding liability at common law on which there would appear to be little or no authority in our law.

3. LESSONS FROM OTHER JURISDICTIONS

Where safety of life or property is concerned, whether at sea or otherwise, it is essential that there should be some degree of government control[20]. The United Kingdom has by central government under powers granted by statute and by local government long exercised such control. Since the sixteenth and seventeenth centuries all the major maritime nations in Europe had some law or regulation providing for the mandatory pilotage of vessels in certain areas. These laws and regulations extended to the shipowner the defence of compulsory pilotage, to be invoked in circumstances of an accident occurring under mandatory pilotage.

South Africa had no enactment providing for the defence of compulsory pilotage to be invoked by a shipowner in the event of a claim arising as a result of damage suffered by a third party whilst the vessel is under mandatory pilotage. Further there is no authority in our law on the subject. It is therefore important to extract from other jurisdictions the application of the defence to ascertain whether it could be of help to reduce the shipowner liability under mandatory pilotage.

3.1 THE COMPULSORY PILOTAGE DEFENCE

Before 1812, no nation had a definitive statutory enactment on the subject, forcing courts, when faced with the issue to rely on general principles of agency and responsibility[1]. The defence was enacted into legislation in Britain in 1812, a policy which remained in force until 1913.

The rationale for this compulsory pilotage defence, which was previously abandoned in the United Kingdom is one of equity. An owner should not be responsible for the conduct of a person taken onto a vessel under compulsion of law, but it is manifestly inequitable to deny an innocent third party any recovery whatever.

A distinction needs to be drawn between a voluntary and a compulsory pilot as any person who directs the navigation of a vessel can be said to be "piloting" the vessel.

One who is legally required to be taken by the vessel owner is a compulsory pilot. In the technical sense, a voluntary pilot simply refers to the vessel's officer licensed to navigate the vessel. The statutory definition of the word "pilot" is "any person not belonging to the ship who has the conduct thereof"[22]. The courts have defined a pilot in the ***ANDONI 1916 13 Asp MLC 606*** as a "person taken on board at a particular place for the purpose of conducting a ship through river... or from or into a port where pilotage is compulsory, the pilot is entitled and master is bound to permit him to conduct the ship".

An act where the pilot was not "taken on board" was not recognised to be a pilotage act. The decision of the court in ***State V Turner***[23]attached a particular significance to the phrase when it ruled that Turner was not a pilot in the usually accepted definition because he was not on board the vessel. The statute rectified this by specifically stating that guiding a ship from a towboat is a form of piloting even though the pilot was not taken on board in the literal sense.

The courts further interpreted the phrase "to conduct" as being synonymous with the term to navigate. In ***Baabs v Press (1971) 2 LIL Rep 383*** the court ruled that "to conduct" means that the pilot is in full charge and entitled to all full assistance he can get from the master and crew. This meant that the vessel is to be navigated under the pilot's advice.

3.2 *DISTINCTION: VOLUNTARY AND COMPULSORY PILOTAGE*

The liability of those employing pilots depends upon the relationships amongst the pilot, the piloted vessel and the vessel owner[24]. It is therefore critical to make a distinction between when the pilotage is voluntary and when it is compulsory. This distinction, as will be more apparent later, is important in jurisdictions where the defence of compulsory pilotage is still applicable.

In the United States the prevailing doctrine is that neither the master nor the owner of a vessel piloted by a compulsory pilot is liable in personam for the negligence of the pilot.

The term voluntary pilotage refers to jurisdictions which by statute, permit the owner or master of the vessel to pilot its own vessel, there being no provision requiring it to take on a licensed pilot and no punishment for non-compliance being levied[25].

The true nature of voluntary pilotage was described in the Supreme Court decision in ***Homer Ramsdell Transp. Co v La Companie Generale Transatlantique 1901 182 US 406*** "And it will make no difference ... that the pilot, if any is employed, is required to be a licensed pilot

provided the master is at liberty to take a pilot or not, *at his pleasure*, for such a case the master acts voluntarily, although he is necessarily required to select from a particular class".

Whilst a clear contrast in language is obvious in ***The China V Walsh 1869 74 US (7 Wall) 53*** Where the master is required by law to take a pilot aboard. "If it be said the master had the option to pay pilotage and proceed without the pilot the answer is that he would have had the same option if the consequence had had been a fine and imprisonment, or the visiting upon him of any other penal sanction. In each there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined and an obligation is imposed, the alternatives presented are to receive the pilot or refuse and take the consequences. It seems to us clear, in the light of both reason and authority that the pilot was taken by the steamship upon compulsion".

Though there are dicta that a statute must not only require the taking of a pilot but must also impose the penalty of a fine in order for it to be considered compulsory, there is unfortunately no unanimity on this[26].

In Great Britain Section 15 of the Pilotage Act 1987 states the requirements of compulsory pilotage.

(1) A ship, which is being navigated in an area and in circumstances in which pilotage is compulsory for it by virtue of a pilotage direction, shall be:

(a) Under the pilotage of an authorised pilot accompanied by such an assistant, if any as is required by virtue of the direction, or

(b) Under the pilotage of a master or first mate possessing a pilotage exemption certificate in respect of that area and ship.

(2) If any ship is not under pilotage as required by sub-section (1) above after an authorised pilot has offered to take charge of the ship the master of the ship shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale[27].

As if it has been shown, the US and Great Britain had different rules about the availability of the compulsory pilotage defence.

3.3 COMPULSORY PILOTAGE DEFENCE

In order for a shipowner to rely in the defence of compulsory pilotage and exonerate himself for the negligence of a compulsory pilot, certain doctrinal prerequisites have to be satisfied. The observance of these prerequisites is common to both the United States and Great Britain.

The most important requirement of the compulsory pilotage defence is that a shipmaster accepts a pilot under compulsion of law[28]. Failure to comply led to an imposition of a penalty "the double pilotage". The shipowners were encouraged to observe local pilotage requirements, to pay the requisite fees and to accept on board a licensed competent

navigator[29] who would safely bring the vessel in and out of port. In return, the shipowner would be relieved from liability if the vessel were involved in an accident. Liability would be shifted to the pilot, Harbour Authority or the victim[30].

In the ***The China*** Surayne J held that "the remedy of the damaged vessel if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment, especially if the amount recovered were large. Thus where the injury was the greatest, there would be the greatest danger of failure of justice. In essence therefore the defence left the victim being aggrieved with very little chance of obtaining full indemnification from the offender".

Furthermore the mere fact that a pilot was taken on board was not sufficient to exonerate the shipmaster. The pilot should actually have been in care of the vessel. His role should not be relegated to that of a mere advisor, he should have been for all intent and purposes been in control of the vessel's movements for the defence to succeed.

Under the compulsory pilotage regime the state only extended the defence to those vessels that complied[31]. Ships operated by pilots in areas beyond the statutory zone where compulsory pilotage was mandated, outside what were known as "pilotage grounds" were not exonerated if they were involved in a collision. The entitlement did not extend further to exempted vessels. Hence a correlae to the requirement that pilotage be imposed by law was that the vessel be a proper subject of the regime.

It was not enough for the compulsory pilotage defence that pilots were properly on board vessels. They must actually be in charge of the ship. If their role were merely advisory, if they did not conduct the vessel's movements, but instead, only providing guidance to the master, then the defence did not apply if an accident ensued[32]. It is therefore clear that for the defence to apply one had to prove negligence. One had to show that the collision was the sole and exclusive fault of the pilot. The burden of proof was on the shipowner to show that the pilot was at fault[33].

Prior to statutory enactment of the defence, courts both in Britain and the United States relied on common law principles of agency and negligence in reaching a decision on the matter[34]. English courts vacillated, one court upholding the defence whilst another reached d the exact opposite conclusion. This vacillation was brought to a halt by the enactment of Britain's Pilotage act of 1812, which recognised the defence in these terms.

"No owner or master of a ship.... shall be answerable for any loss or damage ..... for or by reason or means of any neglect, default, incompetence or incapacity of any pilot taken on board of any such ship in under or in pursuance of any provision of this act[35].

The dispute as to the application of the defence in rem or in personam proceedings was laid to rest by Dr Lushington in ***The Protector1839 Eng. Rep 490*** - He ruled that "it would have scarcely been logical for parliament to have allowed the defence in personam but not in rem". This made sense to the extent that, if a shiipmaster had no control over the selection of a pilot, then neither the shipmaster's ship nor assets should have been subject to the satisfaction of a damage award.

Whilst the evolution of the defence in Britain followed the statutory route, in America its development was the exclusive domain of judicial intervention. At first no state would even entertain it. The court viewed the compulsory pilot to be in actual service of the shipowner, in that regard rejected the defence[36]. The argument that was normally used was that, because the pilot was usually unable to satisfy a judgement, a victim should look first to the offending ship and its owner[37].

The United States Supreme Court was compelled to decide the status of the defence in American Law in ***The China***[38]. The court observed that the rule in Britain's admiralty and common -law courts was the same; both the vessel and the owner were immune from liability[39]. The court decided that the defence was a creature of statute and that absent the statute, a ship would still be liable in rem for the torts of a compulsory pilot. The court ruled that "the compulsory pilotage defence was not a defence to an action in rem by arguing that such a result was consistent with the maritime law of nations". Essential to such an assertion was the recognition that the municipal law of the place where the act occurred was applicable, "that is the law of the place makes the shipowner liable". It was then settled law in the United States that the compulsory pilotage would not be recognized in an action in rem, unless enacted by statute.

Subsequent to the court's decision there was an assumption that this ruling could be extended to apply to actions in personam. This assumption was later to be challenged in ***Homer Ramsdell Transp Co V La Compagnce Generale Transatlantique*** the supreme court agreed that the defence was good for actions brought under the common law. The court reached a decision that under US law compulsory pilotage is a defence in personam but not in rem.

The combined law of ***The China*** and ***Homer Ramsdel*** is still in force in the United States; compulsory pilotage is a defence in personam, but not in rem.

The demise of the defence came as a result of lack of recognition in Continental Europe where a pilot even tough required by law was only deemed to be an adviser and never superseded the master. As a result the 1910 Brussels Convention[81] recognized this fact and provided that "liability ... shall attach in cases in which the collision is caused by the fault of a pilot even when the carrying of the pilot is obligatory".

The United Kingdom signed and ratified the convention and enacted confirming legislation[40]. The United States though it signed the convention but never ratified it. As a consequence thereof only the US still recognizes the defence todate.

The ideals of the defence still remain desirable, that a shipowner be absolved of liability for the fault of an individual who has been placed in a position of command, not by the shipowner's choice but by operation of law. Hence the outcry by the shipowners for the retention of the defence or a complete revamp of the system in days where standards of piloting appear to continue to decline at an alarming rate. Though there is some consensus by the general body of shipowners that there are still good pilots out there but this seems not to dampen the call for uniform standards to be imposed in pilotage[41].

4. THE MASTER - PILOT RELATIONSHIP

The relationship between the master and the pilot can be a perplexing one, for during pilotage the whole conduct of the navigation of the ship, including the duty of determining her course and speed, and the time, place and manner of anchoring her belongs to the pilot. While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, the master is not wholly absolved from his duties while the pilot is aboard. The master may advise with the pilot and even displace him in case he is intoxicated or manifestly incompetent. The master is still in command of the vessel, except so far as her navigation is concerned, and is bound to see that there is sufficient watch on deck, and that men are attentive to their duties. In a sense the Pilot is a challenge to the master's authority or at least to the ostensible omniscience with which subordinates are inclined to invest him. The master normally resolves the dilemma that is posed by the presence of the pilot by going below. This practise is common in places where the pilots have a reputation for competence[42].

This practise is not only confined to the more "casual" masters but is also found with many masters of the highest calibre. This suggests that there is a widely held view that masters do not regard pilots as mere advisors, which attitude is also shared by many pilots. This therefore certainly strengthens the claim that the pilot is more than just an advisor. This of course pre-supposes the pilot's competence, and it is well known fact that pilots in some parts are chosen less for skill than for other irrelevant considerations[43].

It has further been established that in most cases the master leaves the bridge because he needs a rest. In terms of STCW 1978, the presence of a pilot does not relieve the master and watch officer from their obligation to ascertain accurate check on the ship's position and movement. If the master feels he has sufficient reason for going below and leaving his vessel with the pilot he should first exchange information regarding navigation procedures, local conditions and the ship's characteristics with the pilot[44].

Subsequent to be abolishment of the defence of compulsory pilotage in United Kingdom, many pilots became employees of the Competent Harbour Authority, whose pilots are under contracts of employment. The perplexing question is shouldn't the principals be held to be vicariously liable for damage caused by the pilots in their employ? If then the courts were to move towards that direction then the relationship between the master and pilot is very important in apportioning damages between the pilot and the master.

Cordial professionalism and initial respect characterize the relationship between pilot and master. The underlying characteristic thereof being master's instruction-pilot's advise. In ***Ralli V Troop***[45] - it was stated: "To the pilot, therefore, temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course and speed, and time, place and manner of anchoring her"... further goes on to point out that while "The master does not relinquish command of his ship by employment of a pilot" he not only may but must interfere in a case of obvious incapacity or wrong doing on the part of the pilot. In most instances the master simply feels powerless to intervene as he lacks knowledge of the local conditions.

When a collision takes place the master regards himself as the innocent victim of a system over which he has no control. Masters have therefore resigned themselves that they will be blamed in cases of a collision or damage under pilotage. The consequence of a collision to the master are very severe in that he may be punished by forfeiture of his safe navigation bonus (a practise that is fast dying out), demotion or dismissed from the company. Whichever angle one looks at the issue masters always feel damage to the vessel is a obliteration on his record.

The pilot's attitude to the interference by the master is a general display of dislike, which they interpret, as an imputation of incompetence by a person not fully qualified to judge. As a result most accidents are attributed to the masters unwarranted intrusion. The role of being an advisor is perceived as derogatory and contrary to the actual situation on board a ship, which in turn under rates the pilot's profession.

How then does one deal with the situation of countering the danger of divided authority which seems apparent as a result of these differing perceptions of the role that the master and the pilot have to play in their own right. Justice Brown in the ***Oregon 158 US 186, 194-195 (1895)***, ruled that "While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the master is not wholly absolved from his duties while the pilot is aboard, and may advise with him, and even displace him in case he is intoxicated or manifestly incompetent".

In the ***Princes Juliana 1936 54 LIR 234*** the Judge remarked that "if the master takes upon himself the navigation of his ship out of the hands of the pilot and countermands the latter's orders, he must show to the court's satisfaction that he was justified in doing so". It is therefore logical to conclude that if the master's actions were unsuccessful it would seem difficult for him to prove that his supersedence of the pilot was justified. The courts have adopted a consistent attitude that without good evidence to the contrary the master is not only entitled but required to rely on a pilot's superior knowledge of the area covered by his pilotage. Unfortunately the pressure applied by employers to "encourage" the master to take a more active role in supervising the pilots' activity can also interfere with the pilot's concentration and execution of his duties a fact alluded to earlier on. Clearly therefore countermanding of a pilot's orders is something that no master should undertake except in a "a plain case".

4.1 SHIPOWNER'S LIABILITY FOR PILOT ERROR

We now turn to consider whether the pilot's presence makes any difference in the event of claims against the shipowner for damages for negligent navigation.

Where pilotage is voluntary, common law principles apply, the pilot is treated as if he were the employee of the shipowner and therefore the shipowner is liable for any unlawful acts committed by his employee, in the course and scope of his employment.

However where pilotage is compulsory, shipowners in the past argued to be absolved of responsibility for the negligent acts of the pilot. The main argument put forth being that they did not engage the pilot of their own free will and choice, but by compulsion of the law. They as a result were forced to take anybody offering himself and were not allowed to control his

actions. Clearly in the circumstances a compulsory pilot could not be regarded as their employee[46]. Both common law and statute supported this and, as a consequence, shipowners were not liable for the compulsory pilot's negligence[47]

This immunity did not last long before the defence of compulsory pilotage was abolished, when the pilotage Act 1913 restricted the pilot's duties and master and crew were no longer divested of their obligations.

The 1983 Pilotage Act Section 35 (now Section 16 of the 1987 act) provides that:

"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 in the same manner as he would if pilotage were not compulsory"

The court in ***Tower Field (owners) V Workington Harbour and Dock Board 1950 84 LIR 233 (HL)*** considered the meaning of the wording "be answerable". The court Per Lord Porter, held that "it means responsible. A shipowner who through a company pilot, is responsible for faulty navigation is responsible for damage to his own ship as well as for injury to the property of another"

The effect of this judgement is that a shipowner is held to be vicariously liable for the pilot's wrongful actions when the pilotage is compulsory in the same way as it is voluntary. Although by the definition the pilot does not belong to the ship, he is nevertheless regarded an employee of the shipowner for the duration of the pilotage.

An earlier decision of interest is ***The Chyebassa (1919) 201*** -the court per Roche, J. held that "The owner or member of a vessel navigating under the circumstances in which pilotage is compulsory is answerable as he would if pilotage were not compulsory, and is so liable notwithstanding that there is anything in any local or public Act to the contrary. It does not appear to be material whether the pilotage is compulsory by a public or general Act or by some other method".

4.2 LIABILITY OF THE COMPETENT HARBOUR AUTHORITY

The liability of the shipowners for the wrongs of pilots applies even though they are in reality either self-employed or employed by a port or Competent Harbour Authority[48]

The current statutory regime in the United Kingdom is contained in the Pilotage Act 1987 ("The 1987 Act"). This legislation introduced several radical changes in the organisation marine pilotage. One such change was the transfer of control to "Competent Harbour Authorities") (CHA). The meaning of "CHA" and harbour are defined in the act. Briefly a harbour authority's harbour is the area over which it has statutory powers.

The Act provides that where previously pilots were self-employed persons, the emphasis is now on them becoming employees of CHA. Each CHA is now under a statutory duty to monitor the type of pilotage services necessary to secure the safety of ships navigating in the approaches to its harbour. Furthermore each CHA shall have particular regard to the hazards involved in the carriage by ship of dangerous goods or harmful substances.

The 1987 Act effectively transfers control of pilotage to the CHA. The other advent of the Act is that where previously pilots were self-employed, they are now employees of the CHA. It therefore seems logical to shipowners and by operation of law having regard to the powers, duties with which the CHAs is clothed to hold it vicariously liable for the damages suffered as a direct consequence of their employee(the pilot) operating in the course and scope of his employment.

The attempt to hold CHA vicariously liable for the negligence of the pilot in their employ came before the court in ***The Cavendish 1993 2 LIL Rep 292.*** An order was sought to interpret the obligation under Section 2 of the Act, on each CHAs to provide pilotage services to mean that CHAs were vicariously liable for the negligence of their pilots. The court per Clarke J rejected this augment. The court held that the 1987 Act did not change the previous law under the 1913 and 1983 Acts and therefore the pilot when carrying out his duties on a vessel cannot be regarded as being in the employ of the CHA. The decision reached by the court does not in any way ameliorate the burden placed on the shipowner to assume liabilty for the errors of a pilot.

The only instance where harbour authority may be held liable for damages is when it has failed to provide an adequate service. This opens an avenue for the shipowner to test the limits of the CHA's statutory duty to provide "proper pilotage services. The court in ***Anchor Line, Ellerman Lines v Dundee Harbour Authority (1922) 10 LI Rep 47*** per Lord Dunedin held that "This harbour authority published to the world that the pilots would be in attendance outside the fairway buoy. I think the non-attendance which took place in both cases was not due to the to any personal negligence of the pilot, for which the respondents would not be

answerable, but was due to their not seeing that a proper system was enforced". The pilotage authority was held liable for the damage.

4.3 LIMITATION OF LIABILITY

The shipowners may limit their liability and so may the harbour authority. The provisions of the Merchant Shipping Act 1979 Article 4 of part I Sched 4 provides "conduct barring limitation - A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly, and with the knowledge that such loss would result". In the circumstances were the CHA has negligently failed to provide a "proper pilotage service" the right to limit liability would as a result not accrue. The shipowner to succeed in an action against the CHA has to prove fault or privity on the part of the CHA. The House of Lords interpreted the meaning of "fault or privity" in ***Lennard"s carrying CO LTD V Asiatic Petroleum CO LTD 1915 AC 107 K*** per Lord Dunedin "The true criterion of the case is that the parties who plead this section (containing the words "without fault or privity") must bring themselves within its terms The owners lost the case by failing to discharge the onus which lay on them of proving that the loss happened without their actual fault or privity

The pilot as well is entitled to limit his civil liability, to the sum of f100 plus the amount of the pilotage charges in respect of the voyage during which the liability arose. This amount has for a long time remained ludicrously low, providing no incentive for the pilots to take greater care, despite the adjustment effected by Section 22 of the 1987 Act. Pilots on the other hand believe that it is not only the threat of a civil claim but the criminal liability that they are

exposed to as well that is a very powerful incentive to take care. This sanction is accompanied by the risk of the CHA revoking the authorization issued to the pilot. The consequence therefore is the risk of the loss of livelihood of a pilot as well as a shipmaster. This deterrent off course being of no benefit to the shipowner as plaintiffs continue to hold the shipowner vicariously liable, as this gives them a greater opportunity for recompense. The pilot in most instances is unlikely to match the cost of the loss and damage caused by his negligence, as a result a suit against is rarely worthwhile.

5. CONCLUDING REMARKS

It is my conclusion that the suggestion that pilots should be held liable for damages in order to enhance their performance has no substance. The chances of the pilot being able to meet the judgement debt which could run into millions of dollars is virtually non existent. The imposition of liability on the pilot is unlikely to result in any significant contribution to the payment of damages sustained by the various interests. Further the vessel's P&I insurance covers the liability of masters, mates, and indeed pilots. The vessels have therefore already paid for insurance to cover the possibility of the pilot's negligence. Nothing is therefore added to the protection of the public interest by placing the pilot at the brink of insolvency, where the licensing body itself does not pursue the matter with sufficient vigour.

The public interest could be best served thorough the employment of the best-qualified pilots available. The training of pilots should be rigorous aimed at attracting the well-qualified individuals to the profession. The prospective pilots ought to be apprenticed over a long period under a watchful eye of an experienced pilot, until such time that they are familiar with the route as well as the different types of vessels.

The licensing bodies under which the pilots operate should be willing to take what is perceived as a stern action against all those that flagrantly display incompetence and deemed to be unfit to pursue their occupation.

The licensing bodies have the powers already and if used meaningfully can result in a major overhaul to pilotage. Chief amongst these powers is the decision to revoke or suspend a licence of a pilot. The pilot as a result is deprived of the opportunity to earn a living whilst the licence is suspended, and in the case of a revocation my even have to seek new employment elsewhere. It is therefore my submission that this is the ultimate deterrent to negligence, which provides the incentive for the pilots to excel should they wish to continue their practice. This off course is subject to the licensing authority displaying the will to act against its pilots. Viewed from the perspective of the public served by the pilots, whether that of the shipowner or vessel's master, it is far better to be served by an expert professional pilot, without the prospect of recovering damages from him, than to have the services of a marginally competent pilot with a lethargic licensing body with the cold comfort of knowing that you can sue after the accident. I am a strong proponent that pilotage should be left to the pilotage bodies only if they show the will to take punitive actions against their pilots so as to imbue confidence to the rest of the public served by pilots.

FOOTNOTES

1. Tradewinds 19 July 1995 p 10. & Lloyds List No 56502 p 10. Though the competent Harbour Authority has upheld an appeal against the earlier ruling that the pilot was guilty of incompetence in Milford Haven

2. Fairplay 18 April 1996 p18.

3. Fairplay 18 April 1996 p 19. Julian Parker of the Nautical Institute points out that when IMO previously looked at a uniform training standard for pilots but was overruled because of the variety of conditions pilots face around the world.

4. Pilots however concede that instituting claims against them may be the right way forward. But there are consequences whichever way you look at it. They agree that bad pilots should be weeded out, and that ship's owner have a good case that they do not know the quality of pilots they are dealing with, although one is only talking about a small percentage of collision incidents caused by pilot error, albeit expensive when the occur.

5. Alex L Parks et al. The law of Tug, Tow, and Pilotage 1994 3rd Ed. 981. and in Attorney General V Care (1816) 146 Eng Rep 26 at 272

6. Van Der Linden 4.11.7 the master is obliged to take a pilot failing which a penalty of fifty gold reals was levied, besides he is also liable for costs, damage and interest which the merchant may have suffered by his default. The obligation to take a pilot or be responsible for the damages that might ensue is a universal phenomenon practised by most of the maritime nations of the world, Ex parte Mcneil US 74 Wall at 239.

7. In South Africa the Harbour regulations No 92 – 97 as published in Government Gazette No 8124 of 26 March 1982 shall apply.

8. V an der Linden 597 Ordinance Hall 1 October 1661 GPB 2 D Col 2691

9. Regulation 94

10. Section 1 (3) , (4) Pilotage Act 1987

11. Section 6 Ibid

12. The Nautical Institute p 24

13. This shall be examined under the heading liability of the harbour authority for the negligence of pilots.

14. The Act was as a sequel to the report of the Departmental Committee of 1909 that tabled its report in 1911. It described the existing state of pilotage law as "chaotic". The Act declared that the provision that pilotage should be compulsory in some ports and not in others should be retained. The defence of compulsory pilotage was abolished following the recommendations of the committee but no specific provision altering or defining the legal relationship between a master and a pilot was incorporated; though the committee regarded this as a necessary adjunct to such abolition.

15. Regulation 92 this exemption was also extended to masters who frequently visited the port.

16. The master can interfere under certain circumstances, but to ascertain the stage of this interference is a question of fact than law.

17. Also in Weir v Union SS Company NLR 1874 at 61 where it was argued that even under the Law of England the Inyathi would have been held liable because, the master was to blame for not countermanding or at least remonstrating against unseamanlike orders of the pilot.

18. Feldman (Pty) Ltd v Mall 1945 AD 733 at 738, see also Mkize v Martens 1914 AD 382 where the defendant was held liable for the negligence of his son and nephew to whom he had temporarily entrusted the management of his wagon and mules.

9. Except in the case of claims for injuria, where the court might apportion the damages and give separate judgements against each defendant. See Gray v Poutsma 1914 T.P.D 203 at 219; Toerien v Duncan 1932 O.P.D 180. It is submitted that this is still the rule.

20. Hill Christopher Maritime Law 1995 4th Ed at 511

21. David J. Bederman 1990 Tulane Law Review Vol 64 at 1039

22. Tulane Law Review 1990 Vol 64 1041

23. 1895 at 180

24. Parks et al at 1018

25. The liability for payment of half-pilotage or the entire pilotage fee or subject the owner and/or master to criminal penalties.

26. Parks et al at 1019 cites a series of cases pertaining thereto.

27. Section 15 of the Act. Under Section 7 a Competent Harbour Authority is clothed with power that in the interest of safety they have a duty to direct that pilotage shall be compulsory of ships navigating in any part of their harbour approaches. This power has been designed to be both flexible and discriminating, as a pilotage direction is not subject to appeal. In declaring a pilotage direction there has to be consultation with owners of ship which customarily navigate in the area.

28. Failure to comply led to an imposition of a penalty "double pilotage". Without this element of compulsion the essential purpose of pilotage would have been frustrated.

29. Recently a lot has turned around the competency of pilots and the need for a pilot vetting system by shipowners prior to engagement - see further Fairplay 21 March 1996.

30. Liability of a pilot in British Law is limited by statute. The United States as well has limitation of Liability for claims against a pilot. See Benedict on Admiralty 1988 1 - 52. To protect them from being compelled to indemnify a vessel they brought to grief, pilots often insists that the shipowner agrees to "pilotage clause" exonerating them from liability. See further Schoenbaum. T at 436 – 439

31. The vessel has to be a proper subject of the regime.

32. Early British authorities seemed to require that a pilot actually supersede the master's authority on the vessel. See Steamship Beechgrove Co. v Aktiesselskabet 1916 1 App. Cas 364 at 379. This view changed to a presumption that a compulsory pilot is in charge of a vessel. See Andoni 1918 14 at 18.

33. The Protector (1839 Adm) 166 Eng Rep 490 at 496. In America the rule seems from the onset to place the burden of proof on the shipowner. In South Africa regard has to be to the court's decision in "ALUCO" in which the court decided that for liability to be imputed to the Administration the proximate cause of the collision should be the negligence of the pilot . If another of the crew contributed to the accident, the pilot was absolved of responsibility. This is the law in SA which though does not reorganize the defence of compulsory pilotage but the requisite elements remain similar to these espoused by the defence in the UK and US.

34. Tulane Law Review 1990 at 1054

35. Similar provisions in the Merchant Shipping Act 1854

36. Tulane Law Review 1990 at 1057

37. (1869) 74 US (7Wall) 53 at 68 - 69

38. Bussy v Donaldson 4 Dall. 206 at 208

39. Nuptune The Second 1814 (Adm) 165 Eng. Rep 1380

40. The 1913 Pilotage Act

41. International Convention in standards of Training Certification and Watchkeeping for seafarers (STCW) due to be mandatory. Species that any country that fails to standardize, training, administration, certification and examination procedures could find itself unrecognized elsewhere, nearly that ships could be refused entry to ports and seafarers could find themselves ineligible for work. This is a sound policy that emanates from the (IMO) that would lift the standards of safety.

42. cf Fairplay 30 January 1997 P 17 - Never off duty Master slammed for negligence

43. Fairplay 15 August 1996 -Sins of the father - Sparks fly on Pilotage

44. The incidence of the Carabao 1 is a case in point where the Master was lambasted for his lackadaisical attitude - Fairplay 30 January 1997 Supra

45. 1889 Cited from Richard A Cahill -Stranding and their causes at P 179

46. The Chyebassa [1919] P 201 ; The Arum [1921] P 12, 22

47. Merchant Shipping Act 1894 Sec 633 - Rendered Shipowners liable if the negligence of master or crew was the sole or contributory cause of the accident, or as a result of defective equipment of the ship.

48. The Esso Bernica 1989 1 LIL Rep 8 (H L)