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**‘THE PRIVATISATION OF PILOTAGE SERVICES; A PANACEA FOR
SOUTH AFRICA’S PILOTAGE ILLS?’**

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THE PRIVATISATION OF PILOTAGE SERVICES: A PANACEA FOR SOUTH AFRICA'S PILOTAGE ILLS?

Abstract

Does the creation of a deemed servant-master relationship, between pilot and ship-owner or master through section 76 (2) of the National Ports Act (hereafter the NPA);¹ accurately reflect the de facto relationship in which the parties stand?

Can the provision's importation of the doctrine of vicarious liability and consequent foisting of liability on the ship-owner be defined as logical, just and practical?

It will be argued after having had recourse to the manner in which these roles have come to be defined and understood in South African labour jurisprudence, the governing law, respective positions occupied by ship-owner and port authority, broad-based considerations of policy, and key tenets of the rationale underpinning the concept of vicarious liability; that the answer to the above-raised questions is a resounding no. In addition, the writer will submit that the privatisation of pilotage services presents a solution, alternate to the irrational imposition of the doctrine of vicarious liability, which is palatable to government, ship-owning interests and pilot.

a) Introduction

Typically, claims arising from consequences of pilot error satisfy the definition of a 'maritime claim' contained in s 1 (1) (e)² and s 1 (1) (l)³ of the Admiralty Jurisdiction Regulation Act.⁴ As a result thereof; a South African court sitting in admiralty has jurisdiction to hear such claims.⁵ As to the identification of the appropriate law; s 6 (2) dictates that South African statute, if relevant, trumps pre-existing English admiralty law and is the law to be applied. The NPA, chiefly through sections 75 and 76, regulates the extent of the pilot's⁶ liability for his/her acts or omissions whilst a vessel is under compulsory pilotage.⁷ Thus, the Act is applicable to disputes arising from pilot error, before a South African court sitting in admiralty.

It is s 76 (2) of the Act that provides the primary focus for this dissertation. The section reads as follows:

¹National Ports Act 12 of 2005.

²The subsection reads: '[any claim for, arising out of or relating to] damage caused by or to a ship, whether by collision or otherwise'.

³The subsection reads: '[any claim for, arising out of or relating to] towage or pilotage'.

⁴Admiralty Jurisdiction Regulation Act 105 of 1983.

⁵Section 2 (1).

⁶Note, unless the contrary is indicated, use of the term 'pilot' refers to a pilot licensed in accordance with section 77 of the NPA.

⁷Note, in accordance with section 75 (1) of the NPA, all major South African ports are compulsory pilotage areas.

‘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’.

Its effect is clear; through placing the pilot and owner or master of the vessel under pilotage in a servant-master relationship, the provision imports the doctrine of vicarious liability. In doing so, it ensures that the latter is liable for the acts or omissions of the former. However, it is the writer’s assertion, that this *schema* of responsibility doesn’t accurately reflect the relationship in which pilot and master/owner actually stand. Rather, the provision creates a fiction, borne out of the state’s desire to avoid liability for the acts or omissions of its erstwhile employees.

It is, at this juncture, necessary to map-out the ownership structure of South Africa’s commercial ports. Hare is instructive in this regard:

‘South African commercial ports are owned by the National Ports Authority of South Africa (the authority). All the assets, liabilities, rights and obligations that Transnet had under the previous dispensation (the Legal Succession Act, repealed by the National Ports Act) vest in this corporate entity. However, the sole member and shareholder of this entity is Transnet Limited, which in turn is wholly owned by the state’.⁸

This dissertation commences with a dissection of the actual relationship of pilot and master or owner, whilst simultaneously determining whether said relationship is akin to that of employer and employee, the foundation upon which the traditional interpretation of the doctrine of vicarious liability rests, or conversely; that of principal and independent contractor.

b) Analogous to an independent contractor

The distinction between an employee and independent contractor has its roots in Roman law.⁹ In terms of which, two specific forms of contract were contemplated. First, the *locatio conductio operis* [a contract of work] which governed the letting and hiring of a specific piece of work, akin to the modern-day contract in terms of which an independent contractor is appointed to complete a particular body of work.¹⁰ Second, the *locatio conductio operarum* [a contract of service] which governed the letting and hiring of personal services in exchange for remuneration, akin to the modern-day contract of employment.¹¹

⁸JE Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2ed (2009) 500.

⁹AC Basson *et al Essential Labour Law* 5ed (2009) 22.

¹⁰*Ibid.*

¹¹*Ibid.*

It is trite that the distinction and underlying principles set out above were well received by the Roman Dutch jurists and have, in turn, formed an integral part of our own modern-day labour law.¹² Indeed, the term ‘contract of work’ has become synonymous with the *locator operis* or independent contractor, whilst the term ‘contract of service’ has become synonymous with the *locator operarum* or employee. Yet, labour legislation does not provide conclusive definition of these terms and, as such, it has fallen to the courts to develop tests in order to draw the distinction.¹³

The dominant impression test is widely regarded as the standard means employed by our courts in distinguishing between employees and independent contractors.¹⁴ Essentially, the test poses a question; as held in the case of *Medical Association of SA & Others v Minister of Health & Another*:

‘The dominant impression test, it seems, entails that one should have regard to all those considerations or *indicia* which would contribute towards an indication whether the contract is that of service or a contract of work and react to the impression one gets upon consideration of all such *indicia*’.¹⁵

It is apparent then that the dominant impression test requires the consideration of a multitude of factors, dismissing the relatively narrow control test that preceded it. However, this is not to say that the presence of the right of supervision and control is no longer a decisive factor in determining whether an individual can be said to be an employee, this much is evident from the following passage taken from the judgment of Joubert JA in *Smit v Workmen’s Compensation Commissioner*:

‘[O]ne of the most important legal characteristics of *locatio conductio operarum* in Roman Dutch Law is the duty of the employee irrespective of whether he happens to be a domestic servant or any other type of employee, to obey the lawful commands, orders or instructions of his employer in regard to the performance of his services. It follows that the employer has a concomitant right to supervise and control the manner in which the employee is to perform his services’.¹⁶

‘The presence of such a right of supervision and control is indeed one of the most important *indicia* that a particular contract is in all probability a contract of service [as distinct from a contract of work]. The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the

¹²*Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A) at 58 G-H.

¹³Basson *Labour Law* 26.

¹⁴*Ibid* 27.

¹⁵[1997] 5 BLLR 562 (LC) at 569F-G.

¹⁶*Smit v Workmen’s Compensation Commissioner* at 60 G.

stronger the probability will be that it is a contract of work [as distinct from a contract of service]'.¹⁷

What is meant by the employer's right of supervision and control in this context? In *Colonial Mutual Life Assurance Society Ltd v Macdonald*¹⁸ the learned judge held:

'[O]ne thing appears to me beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words, unless the master not only has the right to prescribe to the workplace what work has to be done, but also the manner in which such work has to be done'.¹⁹

Supervision can be defined as: 'the right of the employer to inspect and direct the work being done by the employee'.²⁰ Control signifies a wider concept, expressed by Joubert JA in the following terms:

'It includes *inter alia* the right of an employer to decide what work is to be done by the employee, the manner in which it has to be done by him, the means to be employed by him in doing it, the time when and place where it is to be done by him'.²¹

Can it be said that the owner or master of the vessel has the right of supervision and control over the pilot? Since the parties' relationship is governed by statute, it stands to reason that it is necessary to have recourse to the relevant legislation, the NPA, in order to provide a suitably informed answer.

Section 75 of the Act is instructive in determining the dynamic of the relationship in which pilot and owner or master stand. The provision's salient effect is as follows; it is the pilot's function to navigate a vessel into port, to direct its movements and to determine and control the movements of the tugs assisting the vessel under pilotage.²² It falls to the pilot to determine the number of tugs required for pilotage with the concurrence of the master of the vessel.²³ However, in the event of a dispute between pilot and master of the vessel with regard to the amount of tugs required, the harbour master (an employee of the authority), not the master of the vessel, has the final say.²⁴ In addition, s 75 (6) is of critical importance, it dictates that:

¹⁷*Ibid* at 62 D-G.

¹⁸1931 AD 412.

¹⁹*Ibid* at 434-435.

²⁰*Smit v Workmen's Compensation Commissioner* at 60 H- 61 A.

²¹*Ibid*.

²²Section 75 (3).

²³Section 75 (4).

²⁴Section 75 (5).

‘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* [my emphasis], 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’.

It is clear, upon analysis of the above, that the pilot is not subordinate to the master of the vessel in several respects. It is conceivable that the pilot may proceed in terms of s 75 (4) without the master’s approval, as a result of s 75 (5). Whilst s 75 (6) may, on the face of it, appear to guarantee the right of supervision and control to the master, it does no such thing. The provision is something of an anomaly; it runs contrary to logic to state that whilst under pilotage, the command of the vessel vests in the master and to simultaneously hamper the master in the exercise of his/her command by restricting it to situations of emergency. Yet, this is precisely what s 75 (6) does. Whilst the vessel is under pilotage, the master may only interfere with the navigation or movement of the vessel, ‘*in an emergency where necessary to preserve the safety of vessel, cargo, or crew* [my emphasis]’. Section 75 (6) does not provide the master with the *de facto* authority that it initially and outwardly claims to. Additionally, the provision is not in keeping with the fundamental import of the Act evidenced by s 76 (2), that the pilot is deemed to be the servant of the owner or master. This view finds support in the work of Hare:

‘The provisions leaving the master in “overall command” run counter to the statutory injunction not to “interfere” with the pilot’s navigation, *virtually emasculating that command* [my emphasis]’.²⁵

Notwithstanding inconsistencies within the Act itself; s 75 (6) poses a very real practical problem. Through limiting the master’s right of supervision and control over the pilot to instances of emergency, the provision casts a duty, negative in its construct, upon the master; not to interfere with the pilot’s command unless there is an emergency. However, in so doing, the master incurs an obligation that is two-fold in its construction; to use his/her discretion to identify whether the circumstances are such so as to constitute an emergency and to take action, which he/she deems reasonable, to avert the danger in question. This, it is submitted, places the master in an unenviable and somewhat counter-intuitive position. This is so due to the following factors: First, it is settled law, as per the Supreme Court of Appeal in *The*

²⁵Hare *Shipping Law* 489.

Stella Tingas,²⁶ that the master is entitled to assume that the pilot in question is a competent one.²⁷ Second, the primary quality that a pilot is expected to possess, and is indeed employed for, is a superior knowledge of the local conditions and obstacles posed in the course of entry into the port in question.²⁸ Third, the very real and well-documented danger posed by divided command.²⁹

To expect the master to overrule the pilot, an individual specifically employed for his/her superior knowledge of the prevailing conditions, pursuant to his/her s 75 (6) discretion is to simultaneously place an overwhelming burden upon the master and a failure to take cognisance of the unique role that the pilot is employed to perform. The master and, by extension, the owner is forced into a statutorily imposed game of 'stick or twist'. And in either instance, should damage result, it is with the ship-owning interests that liability rests. Hare succinctly illustrates the provisions' effect and the master's resultant dilemma in the following terms:

'Confronted with the decision as to whether circumstances are such as to permit him/her to interfere with the pilot's conduct of the vessel, the master's concern not to contravene the statutory prohibition on intervention unless there is an emergency might cause him to refrain from countermanding the pilot's orders until it is too late to avert damage. If the master fails to interfere in an emergency, timeously or at all, he/she may be found to have been at fault for such failure. If the master intervenes to interfere with the pilot's control of navigation prematurely, he/she may be in contravention of the statutory injunction not to interfere with the pilot's control of the navigation of the vessel. The master's dilemma may be compounded by the fact that in an emergency the period within which the master could take action to avert the danger may simply be too short for any effective evasive action to be taken'.³⁰

As to the dynamic of the *de facto* relationship in which pilot and master stand and the dangers of divided command, the view of Alverstone CJ in *The Tactician*, subsequently endorsed by Scott JA in *The Stella Tingas* is instructive:

'The cardinal principle to be borne in mind in these pilotage cases, that raise difficult questions of law, and very often difficult questions of fact, is that the pilot is in sole charge of the ship, and that all directions as to speed, course, stopping and reversing, and everything of that kind, are for the pilot'.³¹

'[A]s to the danger of interference with the conduct of the pilot; and that if anything of that kind amounts to an interference or a divided command, serious risk is run of the ship losing the benefit of compulsory pilotage'.³²

²⁶*Transnet Limited t/a Portnet v The Owners of The MV 'Stella Tingas'* 2003 (2) SA 473 (SCA).

²⁷*Ibid* para 32.

²⁸Hare *Shipping Law* 477.

²⁹See in this regard: *The Tactician* [1907] P 244 (CA) at 250.

³⁰Hare *Shipping Law* 490.

³¹*The Tactician* at 250.

³²*Ibid*.

This view is endorsed and elaborated upon by Rajadurai in his critically acclaimed work on compulsory pilotage services rendered in the Australian state of Victoria.³³ The maritime lawyer and master mariner provides an illustrative account of the realities that govern the interaction between pilot and master:

‘When a pilot boards a vessel, the [m]aster has to assume that the pilot is in all respects competent to do the task intended. Technically, ships masters must accept the pilot assigned to their ship and in most, if not all cases, the [m]aster/[s]hip-owner has no choice with regard to the particular pilot assigned to the vessel. The owner is rarely if ever, in a position to evaluate independently the relative competence or fitness of the pilot and in any case operational considerations make it impractical for the competence of the pilot to be checked before the “conduct” of the vessel is handed over’.³⁴

It cannot be gainsaid that the master or owner lacks the requisite authority to prescribe to the pilot specific tasks to be completed, nor can he/she stipulate the manner in which the pilot is to act. It suffices to say that the extent to which the pilot is subject to the supervision and control of the owner or master differs substantially to that which has been envisioned by the courts as a hallmark of a relationship of employment. In accordance with the provisions of the Act, the pilot is able to act independently of the master. Employing the rationale of the court in *Smit*, such a finding militates towards a conclusion that the pilot is not an employee of the master or owner, but rather an independent contractor.

However, as has been made clear, in order to satisfy the dominant impression test; other considerations must be taken into account. As a result, it is necessary to look beyond the concept of supervision and control.

In addition to the right of supervision and control, the labour appeal court in *SABC v McKenzie*,³⁵ identified several features which mark the distinction between a contract of service and contract of work:

‘The object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract. The object of the contract of work is the performance of a certain specified work or the production of a certain specified result’.³⁶

‘Services to be rendered [by an employee] in terms of a contract of service are at the disposal of the employer who may in his own discretion subject, of course, to questions of repudiation decide whether or not he wants them rendered. The independent contractor is *bound* [my emphasis] to perform

³³A Rajadurai ‘Vicarious Liability for Negligent Pilotage in Victoria’ (2002) 16 *Austl & NZ Mar L.J* 39.

³⁴*Ibid* at 41 – 42.

³⁵[1991] 1 BLLR 1 (LAC).

³⁶*Ibid* at 5-6.

certain specified work or produce a certain specified result within a time fixed by the contract or within a reasonable time where no time has been specified'.³⁷

'A contract of service terminates on the expiration of the period of service entered into while a contract of work terminates on the completion of a specified work or on production of a specified result'.³⁸

It is the production of a specified result, typically the safe navigation of the vessel in or out of port; that provides the object of the agreement between the owner or master and the pilot. The services rendered by the pilot are not at the disposal of the owner or master; he/she cannot decide whether or not he/she wants them rendered. To the contrary, they are foisted upon him/her in terms of the Act.³⁹ The pilot, on the other hand, is bound to perform certain specified work or produce a certain specified result. Any agreement which can be said to exist between owner and the pilot terminates upon the production of that result. These are characteristics common to both the independent contractor's contract of work and the relationship in which owner or master and pilot stand.

In addition, the following factors are relevant to the distinction between independent contractor and employee and, it is submitted, should be taken into account in analysing the relationship of pilot and master or owner:⁴⁰

The pilot does not render his/her services exclusively to the owner or master, typically, in accordance with a contract of employment; one would be precluded from working for another.⁴¹ The owner/master does not have the right to discipline the pilot, a further indication of the absence of supervision and control.⁴²

These factors reveal the true dynamic of the relationship in which the parties stand. Crucially, after taking cognisance of these factors, the dominant impression that one is left with is that the pilot is not an employee of the owner or master. To the contrary, the dominant impression is that the pilot and owner/master stand in a relationship akin to that of independent contractor and principal. In sum, the relationship in which pilot and owner or master stand is analogous to that of independent contractor and principal, not employee and employer, or as the Act declares, servant and master.

³⁷*Ibid.*

³⁸*Ibid.*

³⁹See in this regard; section 75 (2).

⁴⁰Basson *Labour Law* 26.

⁴¹*Ibid.*

⁴²*Ibid.*

A rebuttable presumption was added to the Labour Relations Act⁴³ in 2002.⁴⁴ In accordance with s 200A, a number of factors are listed and if one or more of those factors is present a rebuttable presumption of employment is triggered. Basson is of the view that the presumption amounts to a restatement of the labour law principles previously espoused by the courts.⁴⁵ Section 200A reads as follows:

‘Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:⁴⁶

‘[T]he manner in which the person works is subject to the control or direction of another person’.⁴⁷

‘[T]he person’s hours of work are subject to the control or direction of another person’.⁴⁸

‘[I]n the case of a person who works for an organisation, the person forms part of that organisation’.⁴⁹

‘[T]he person has worked for that other person for an average of at least 40 hours per month over the last three months’.⁵⁰

‘[T]he person is economically dependent on the other person for whom he or she works or renders services’.⁵¹

‘[T]he person is provided with tools of trade or work equipment by the other person’.⁵²

‘[T]he person only works for or renders services to one person’.⁵³

When viewed in the context of his/her relationship with the ship-owner or master, the pilot fails to satisfy any of the factors that have been listed above.

c) A relationship akin to employment, the foundation of the doctrine of vicarious liability

It is settled law, in South Africa, that liability may only arise vicariously if a relationship akin to that of employment is present. Therefore, as a logical consequence, the doctrine of vicarious liability does not apply at common law to the relationship of principal and independent contractor. This much is made clear by Nugent JA in the case of *Chartaprops v Silberman*:⁵⁴

⁴³Labour Relations Act 66 of 1995.

⁴⁴Basson *Labour Law* 31.

⁴⁵*Ibid.*

⁴⁶Section 200A (1).

⁴⁷Section 200A (1) (a).

⁴⁸Section 200A (1) (b).

⁴⁹Section 200A (1) (c).

⁵⁰Section 200A (1) (d).

⁵¹Section 200A (1) (e).

⁵²Section 200A (1) (f).

⁵³Section 200A (1) (g).

⁵⁴2009 (1) 265 (SCA).

‘Where liability arises vicariously it is because the defendant and wrongdoer stand in a particular relationship to one another. It is also well established that the relationships to which the rule applies do not include the [principal’s] relationship with an independent contractor’.⁵⁵

This is not to say that a principal may never be held liable for the acts or omissions of an independent contractor. However, if such liability is to arise, it does not do so vicariously. Rather, it follows as a consequence of the principal’s own negligence, in keeping with the application of the general tenets of delictual liability.⁵⁶

It is apparent then that s 76 (2) constitutes a radical departure from the position at South African common law, through holding the master or owner vicariously liable for the acts or omissions of the pilot, notwithstanding the absence of a relationship akin to employment.

d) Additional criticism

Section 74 (1) (d) of the NPA is an unambiguous provision; it casts a clear and non-delegable duty on the port authority. The content of which is as follows:

‘[The authority must, for the purpose of ensuring safety of navigation and shipping in ports] provide or procure pilotage services and *regulate the safe provision of pilotage services by licensed pilots* [my emphasis]’.

Section 77 (1) of the Act identifies the bodies responsible for the certification and licensing of pilots:

‘No person may perform the functions of a pilot in a port without having been duly certified by the South African Maritime Safety Authority and licensed by the Authority to do so’.

It is apparent, upon analysis of the above-cited provisions, that the port authority is vested with the responsibility of determining the level of expertise required from pilots to gain entry into the profession. In addition, it is the port authority that is tasked with ensuring, on a regular basis, that pilots deliver their services in such a manner so as to be deemed safe. As a result thereof, it is submitted that, due to the level of control that it is able to exercise with regard to both the standards expected and expertise required of pilots, the authority and not the ship-owner is best placed to act against the occurrence of negligence on the part of pilots and the consequent damages thereof. If one is to accept this maxim then it must surely follow that it is counter-intuitive to place liability for negligent pilotage with

⁵⁵*Ibid* para 6.

⁵⁶*Ibid* para 12.

the ship owner. This is so, in addition to the points of law previously raised, due to a number of broader policy-based concerns.

Rajadurai identifies the deterrence theory as one of the key tenets that provides justification for the imposition of vicarious liability on employers.⁵⁷ The deterrence theory states that the ability or capacity to manage risk should attract an equal level of accountability.⁵⁸ Proponents of the theory contend that liability should rest with the individual or body most able to guard against harm occurring. A consequence of allocating liability in such a manner puts pressure on the employer to implement best practice principles in guarding against the occurrence of harm due to the knowledge that if harm should result, as a consequence of the negligence of one of its employees, the employer will incur economic sanction. By way of summation, it is logical to hold those with the capacity to prevent damages from occurring accountable when damage does in fact occur. It is the presence of the knowledge that liability will rest with the employer that provides the necessary impetus for the employer to take steps, at its own expense, to actively guard against the occurrence of harm.

The imposition of vicarious liability on ship-owners is incompatible with the constraints of the deterrence theory. In addition, through absolving the port authority of liability for damage occurring as a result of negligent pilotage, s 76 (1) of the NPA has removed a key source of impetus for the authority to comply with its non-delegable s 74 (1) (d) duty to ensure that pilotage services are conducted in a safe manner. It is conceded that in instances where the authority has flagrantly failed to comply with its duty to safely regulate the provision of pilotage services; there may remain scope for the institution of an action against the authority. The following passage by Hare is instructive in this regard:

‘[T]he statutory exclusion of liability should be limited to those instances in which the pilot’s good faith acts or omissions in performing his or her functions are the sole proximate cause of the resulting damage. If the Authority itself is negligent or if its employee, other than the pilot, causes or contributes to the damage suffered, the exclusion from liability should not apply’.⁵⁹

However, that the Act has not firmly shut the door on litigants who would look to recover damages from the authority for an obvious breach of its duty does

⁵⁷Rajadurai 2002 *Austl & NZ Mar L.J* 61.

⁵⁸*Ibid.*

⁵⁹Hare *Shipping Law* 493.

not, it is submitted, sufficiently counteract the diminished responsibility that occurs as a result of shifting liability from the authority, the body charged with the regulation of the safe provision of pilotage services, to the ship-owner.

There are sound economic reasons for imposing vicarious liability on employers. It is trite that, as a general rule, an employer is far better placed than an employee to satisfy a claim for damages. The employer, due to the comparatively larger resources at its disposal, can be said to be a far better risk absorber than the employee.⁶⁰ Thus, the claims of innocent third parties may not be defeated by the financial impotence of an employee; they may, by law, look to the employer for redress. However, it is not easy to marry this key component of the underlying rationale behind the doctrine of vicarious liability with s 76 (2).

It is incredibly difficult to accept that the ship-owner is better placed to satisfy the claims of third-parties, for damages suffered as a result of incidences of pilotage, than the authority.

In addition, it would be nonsensical to suggest that ship-owners provide a more practical source from which to seek satisfaction of claims than the authority. In fact, as posited by Rajadurai,⁶¹ the converse is true. Through limiting third-parties' rights of recourse to the ship-owner, through s 76 (2), the ability of third-party victims to acquire sufficient compensation is severely limited. This is borne out by the application of the relevant provisions of the NPA to a scenario of collision; as took place in the case of *The Stella Tingas*:

A vessel (hereafter referred to as ship A), navigated by a pilot supplied by the port authority in accordance with s 75 (1), enters Durban harbour in order to take on bunkers. In the course of doing so it collides with another vessel (hereafter referred to as ship B), moored at its berth for the purpose of loading cargo, due to the negligence of the pilot. Both vessels are damaged in the collision.

Provided it is unable to prove that the pilot acted in bad faith, a concept that will be discussed in due course, s 76 (1) precludes the owner of ship B (hereafter referred to as owner B) from looking to the port authority for compensation. By

⁶⁰M Loubser *et al The Law of Delict in South Africa* 1 ed (2009) 368.

⁶¹Rajadurai 2002 *Austl & NZ Mar L.J* 61.

virtue of s 76 (2), owner B must seek redress through claiming its damages from the owner of ship A (hereafter owner A).

The above-mentioned *schema* of liability may, notwithstanding its counter-intuitive nature, not pose owner B any fatal problems and allow it to recover adequate compensation. On the facts of *The Stella Tingas*, where the collision was described as merely ‘a glancing blow’ and relatively minor, it is likely that a litigant proceeding in terms of s 76(2) would be able to obtain redress through the arrest of ship A and a subsequent action *in rem*.

However, one does not have to tweak the facts of *The Stella Tingas* a great deal in order to envisage an altogether different result.

It is neither unconceivable nor uncommon that a ship-owner making use of a South African port may have only one asset within South Africa’s territorial limits ; a single vessel in respect of which pilotage services have been employed. As a result, owner B would have only one asset against which judgment could be executed.

It is also conceivable that a collision could be far more serious than that which took place in *The Stella Tingas*, not a mere glancing blow. It follows that ship A and its cargo could have been sunk in the collision. In such an instance owner B’s right to claim compensation from owner A would be rendered nugatory; there would be nothing for it to arrest or attach.

Let us posit an alternate scenario, neither vessel sinks but, due to the severity of the collision, the damages suffered by both vessels are significant. Prior to the collision, the value of ship B exceeded that of ship A and, in addition, the consequences of the accident were such that the value of owner B’s claim now exceeds the value of the damaged ship A. Owner B may arrest ship A and institute an action *in rem* but, since the value of the claim exceeds the value of the *res*, it is in a position of significant risk. Owner A may simply decline to defend the action. In such an instance, execution would be limited to the proceeds of the sale of the damaged *res*.⁶² Owner B would not receive adequate compensation. Proceeding *in personam* would not materially alter owner B’s prospects. It may attach ship A in order to found jurisdiction and proceed *in personam* against owner A. However, owner B continues to occupy a position of risk. Owner A may leave the claim

⁶²Hare *Shipping Law* 92.

undefended, decline to put up security and, in the absence of any alternate assets within the court's jurisdiction, owner B's compensation would, for the immediate future and perhaps permanently, be reduced to the value of the damaged vessel.

In addition, the plight of owner B is further complicated by the clandestine nature of vessel ownership. In certain instances, it may well be put to the proof of attesting ownership of the offending vessel, by no means a straight-forward task. This much is expressed by the writer and investigative journalist Rose George:

'Most ship owners operate decent ships that are safe, and pay their crews properly. But if you are unscrupulous, there is no better place to hide than behind a flag. The ITF [International Transport Workers Federation] calls flags of convenience a "corporate veil". *The Economist*, a supporter of free markets, and so surely a supporter of this freest market of all, calls them "cat's cradles of ownership structures". I call them a back door, easy to slip through if necessary'.⁶³

George's concerns are exacerbated when applied to the South African context. Not a single merchant vessel is listed on South Africa's shipping register.⁶⁴ All commercial vessels making use of South Africa's ports are flagged to the registers of foreign states.

To place an innocent third-party victim such as owner B in this onerous and tenuous position, as s 76 undoubtedly does, is wholly inequitable. The following passage, taken from the judgment of Deane J in the Australian case of *Oceanic Crest Shipping Co. v Pilbara Harbour Services Pty Ltd.*⁶⁵ is of some persuasive value:

'It would be quite contrary to justice if such an injured party were unable to obtain redress from the trading corporation whose employed pilot had caused the injury by his negligence in the course of his ordinary duties performed for reward to the trading corporation merely by reason of the facts that pilotage in the port was compulsory..... If that were so, such an injured party would.... be left to seek redress either from a ship which, if it was not on the bottom of the port, may well have long since departed the country or from a shipping owner who may well be in some foreign land whose laws are framed to afford maximum protection to those whose ships fly its flag'.⁶⁶

⁶³R George *Deep Sea and Foreign Going* (2013) 86.

⁶⁴South African Press Association 'Only Foreign Ships Transport SA's Exports', 01 October 2013, available at <http://mg.co.za/article/2013-10-01-only-foreigners-transport-sas-export> , accessed on 24 August 2014.

⁶⁵(1986) 66 ALR 29.

⁶⁶*Ibid* at 63.

e) *Section 76 (1) and the concept of good faith; a road to nowhere*

The extent of the authority's and pilot's exemption from liability, contained in s 76 (1), is for all acts or omissions done or omitted by the pilot *in good faith*; whilst performing his/her functions in terms of the Act.

This signifies a marked distinction from the corresponding provision in the Act's predecessor⁶⁷ (hereafter referred to as the Legal Succession Act) which held both pilot and authority blameless for *negligent* acts or omissions on the part of the pilot.

In the absence of a statutory definition of the term 'good faith', Hare's contestation is instructive:

'The words must therefore be given their ordinary meaning, which, in this context, is that the pilot, in carrying out his or her functions as a pilot, must have acted in the honest belief that the course of action he or she followed was correct and appropriate in the circumstances'.⁶⁸

Whereas once a claimant would have to establish gross negligence on the part of the pilot in order to defeat the exemption contained in the Legal Succession Act it must now, in accordance with 76 (1), establish bad faith on the part of the pilot in question; on a balance of probabilities. Hare states that this would necessitate an inquiry both subjective and objective in its construct:

'Although the determination of whether an individual has acted in good faith posits an essentially subjective inquiry, the person's state of mind must be ascertained not only by their evidence but also by reference to the circumstances giving rise to the loss or damage. Understood in this way, the pilot might be considered to have acted in good faith even though negligent and, in fact, grossly negligent. Conversely, bad faith would cover instances in which the pilot had intentionally inflicted the damage, and it is submitted, where the pilot had acted recklessly, in the narrow sense of having acted with *dolus eventualis*'.⁶⁹

It is apparent then that Hare has effectively fused the concepts of bad faith and intention, in the context of s76 (1). If one were to accept this maxim, it is similarly clear that in order to defeat the exemption contained in s 76 (1) and in so doing hold the authority liable for damages resulting from the services provided by its pilots, one would have to prove intention to cause harm on the part of the specific pilot in question.

⁶⁷Section 10 (7) Legal Succession to South African Transport Services Act 9 of 1989, Schedule 1.

⁶⁸Hare *Shipping Law* 493.

⁶⁹*Ibid* at 494.

For purposes of this analysis it will be presumed that pilots servicing the ports of South Africa do not intentionally set out to cause damage to port users or infrastructure, thus rendering discussion of direct intention or *dolus directus* superfluous.

It will also be presumed that pilots do not harbour alternate unlawful ambitions, the realisation of which requires the infliction of damages on port users or infrastructure, thus rendering discussion of indirect intention or *dolus indirectus* superfluous.

It is Hare's conflation of the broadest form of intention - *dolus eventualis*- with bad faith that is of some interest. A person is said to have acted with *dolus eventualis* if:

'[T]he commission of the unlawful act or the causing of the unlawful result is not his main aim but he subjectively [foresaw] the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and he reconciles himself to this possibility'.⁷⁰

In seeking to establish the necessary *dolus* a claimant incurs an onus two-fold in its construct.⁷¹ First, he/she must establish that the individual in question subjectively foresaw that his/her actions might cause harm.⁷² Second, that the individual reconciled himself / herself with the realisation that harm might occur and nevertheless persisted with his/her actions or failure to act.⁷³

The distinction between the concepts of *dolus eventualis* or recklessness and gross negligence is subtle; this much is illustrated by the following passage taken from the judgment of Scott JA in the case of *The Stella Tingas*:

'If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence. If, of course, the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, *dolus eventualis*; but it would then exceed the modern-day understanding of gross negligence'.⁷⁴

It is trite that the onus incurred by a claimant seeking to establish recklessness or *dolus eventualis* is significantly stricter than that which is incurred by its

⁷⁰CR Snyman *Criminal Law* 5ed (2008) 184.

⁷¹Loubser *The Law of Delict* 107.

⁷²*Ibid.*

⁷³*Ibid.*

⁷⁴Paragraph 7.

counterpart seeking to establish ordinary or indeed gross negligence. This is undoubtedly so as the former must prove the existence of subjective knowledge, on the part of the tortfeasor, that harm might occur whereas the latter does not. The subjective knowledge of the tortfeasor is irrelevant, in establishing negligence, as the primary yardstick employed is an objective one; the standard set by the reasonable man or *diligens paterfamilias*.⁷⁵ In establishing gross negligence it is the deviation from that objective standard that is of relevance; the act or omission must deviate to such an extent so as to be considered gross.⁷⁶

Through the promulgation of the NPA, government has significantly increased the level of protection available to the authority; when met with claims for damages resulting from incidences of pilotage. It is however unnecessary to discuss the manner in which a claimant might establish bad faith on the part of a specific pilot and, in so doing, defeat the exemption contained in s 76 (1).

This is due to s 76 (2) which is set-out below:

‘Notwithstanding any other provision of this Act (my emphasis), 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’.

The language of the above-cited provision is abundantly clear. Regardless of a claimant’s hypothetical ability to surmount the steep hurdle of establishing bad faith on the part of the pilot, the pilot continues to be an employee of the ship-owner and, as a result thereof, the ship-owner’s liability for the acts or omissions of the pilot persists. It logically follows that s 76 (1) and the requirement of good faith contained therein is wholly unnecessary; a road to nowhere.

f) The rationale behind the National Ports Act

In analysing the rationale behind the NPA, and particularly section 76, it is first necessary to discuss English admiralty law relating to the subject of compulsory pilotage as distinct from voluntary pilotage. This is so as the drafters of the NPA’s predecessor (the Legal Succession Act) elected to follow the English position at common law and, in so doing, eschewed the disruption of that common law by British parliament. Therefore, as will be considered in due course, the promulgation of the NPA signalled a clear break-away from English common law (pertinent for so

⁷⁵See in this regard: *Kruger v Coetzee* 2000 (1) SA 827 (SCA).

⁷⁶*The Stella Tingas* para 7.

long in South Africa) aligning South African law with English legislative development and, as a result, a rejection of the defence of compulsory pilotage.

The enactment of the Pilotage Act of 1808 saw the introduction of compulsory pilotage, in designated areas, in the United Kingdom.⁷⁷ Rajadurai expresses the impact of this development in the following terms:

‘The introduction of legislation imposing compulsory pilotage raised doctrinally complex questions regarding the liability of the ship-owner in situations where damage by and/or to the vessel was caused solely through the negligence of the pilot. Whereas the ship owner’s liability for the negligence of pilots engaged voluntarily was accepted, ship-owners sought exemption from liability when pilotage was compulsory, under the so called “compulsory pilotage defence”’.⁷⁸

The defence of compulsory pilotage was underpinned by a distinction between pilotage services provided voluntarily and those that were not.⁷⁹ Proponents of the theory behind the defence contended that a master-servant relationship could only be formed voluntarily. Therefore, in instances where a ship-owner was compelled to take on and utilise the services of a pilot; a master-servant relationship could not be said to exist. This distinction acted as a shield at common law; preventing ship-owners from incurring liability for the acts or omissions of the compulsory pilot. The position is neatly encapsulated by Dr Lushington in the case of *The Maria*:⁸⁰

‘If the taking [of] a pilot on board was compulsory, and the collision was occasioned by the fault of that pilot, I shall hold the owners of the “Maria” exempt from responsibility; upon general principle, without reference to acts of Parliament, for in that case the pilot was not their servant, and the maxim *qui facit per alium facit per se* does not apply. If, on the contrary, the taking [of] a pilot was voluntary, then he was the servant of the owners, and the owners are responsible’.⁸¹

The common law defence of compulsory pilotage was reinforced and afforded statutory recognition through the enactment of various pieces of 19th century legislation, culminating in the Merchant Shipping Act.⁸² Section 633 of which reads as follows:

‘An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law’.

⁷⁷‘The History of the Corporation of Trinity House of Deptford Strond: 500 years young’, available at http://www.trinityhouse.co.uk/th/about/detailed_history, accessed on 02 November 2014.

⁷⁸Rajadurai 2002 *Austl & NZ Mar L.J* 45.

⁷⁹*Ibid* at 46.

⁸⁰(1839) 166 E.R. 508.

⁸¹*Ibid* at 513.

⁸²Merchant Shipping Act 1894 (United Kingdom).

The statutory protection enjoyed by ship-owners was however relatively short-lived. The distinction at law between compulsory and voluntarily pilotage was eroded by Section 15 (1) of the Pilotage Act of 1913⁸³:

‘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 in the navigation of the vessel in the same manner as he would if pilotage were not compulsory’.

The impact of the above-cited provision is identified by Scott JA in the case of *The Stella Tingas*:

‘The effect of the section is to render the ship-owner liable for loss or damage caused by the fault of the compulsory pilot in the same way as the ship-owner would be liable at common law for loss or damage caused by a voluntary pilot. For the purpose of the present case it is important to emphasise that the basis of such liability is that a voluntary pilot (and now by statute a compulsory pilot) is regarded as the servant of the ship-owner’.⁸⁴

Whilst the defence of compulsory pilotage was categorically expunged, from the British legal landscape, by the 1913 Pilotage Act; the defence remained available to the South African litigant until the commencement of the NPA. That is to say that the distinction between voluntary and compulsory pilotage and the consequences that flowed from that distinction remained good in South African law right up until the year 2006.

It is submitted that the legal distinction between pilotage services provided on a voluntary basis and those that are provided by compulsion of law, as embodied in the defence of compulsory pilotage, was a sound one. This is so after having recourse not only to the traditional notion of vicarious liability, the original justification of the defence as expressed in *The Maria*; but also to the modern day concept of vicarious liability. The latter, as meticulously explored by Morgan,⁸⁵ is considerably broad. Whilst broad enough to include within its ambit volunteers and various non-contractual employees,⁸⁶ the modern day concept of vicarious liability, it is submitted, presupposes a voluntary association or linkage between the individual or entity held liable (A) and the tortfeasor (B). That a voluntary linkage is a prerequisite, in accordance with both the traditional and modern notions of vicarious liability, is a logical consequence of the importance afforded to the concept of

⁸³Pilotage Act 1913 (United Kingdom).

⁸⁴At page 33.

⁸⁵P Morgan ‘Recasting Vicarious Liability’ (2012) 71 (3) *Cambridge Law Journal* 615.

⁸⁶*Ibid* at 622.

control. As contended by Morgan, control by A over B in itself may be sufficient to found vicarious liability.⁸⁷ However, the converse is similarly true. That is to say in the absence of control on the part of A over B, vicarious liability may not be founded. This much is expressly admitted by Morgan:

‘[A]n employer who pays you, and with whom you have a contract of employment ceases to be vicariously liable for you if they cease to have control over you’.⁸⁸

The absence of control over the day to day activities of the compulsory pilot, rendering services in accordance with the NPA, on the part of the master or owner has already been discussed at length.⁸⁹ Notwithstanding an absence of control in this immediate sense, it is the writer’s broader submission that the master or owner cannot truly exert control over the pilot, in the manner that the doctrine of vicarious liability requires, without a voluntary association between the two. If one is to accept this maxim as correct, it logically follows that the master or owner is unable to exercise control over the pilot as it is trite that the linkage between the individuals or entities is not voluntary. The individual pilot(s) in question is / are selected by the port authority in accordance with its mandate contained in s 74 (d) of the NPA. The master or owner is then typically compelled (should the s 75 (2) exemption not apply), as a result of s 75 (1) of the NPA, to take the pilot on board and to place the vessel in his/her hands.

The consequences of this framework talk further to an absence of control. The legal basis upon which the master or owner is able to object to the appointment of a particular pilot is unclear. If however, for argument’s sake, it was accepted that such a legal basis exists; further difficulties remain. The master or owner is removed from the pilots’ certification and training process, is likely to be ignorant as to the competency of the pilot in question and therefore lacks the necessary factual basis to make any objection. This dynamic is compounded by the nature of the business of shipping, the owner, and by extension the master, is typically under a strict deadline in a foreign jurisdiction and, as a result, lacks the time or means to satisfy itself as to the competency of the individual pilot in question.

⁸⁷*Ibid* at 630.

⁸⁸*Ibid*.

⁸⁹See in this regard: Chapter b.

The above is strikingly different to the typical *schema* of vicarious liability; where A engages voluntarily with B (whether by way of contract or other means), since the basis of association between the two is voluntary, A is afforded the opportunity to assess the viability of the transaction in question before engaging with B. If A is not satisfied as to the competency or suitability of B he/she/it may withdraw from the proposed arrangement. If A is satisfied and thereafter engages with B or indeed fails to embark on the necessary enquiry and nonetheless engages with B; A may well be liable for the acts or omissions of B. In this sense the risk of liability is a consequence of the decision. The critical point is one of opportunity on the part of the master or owner, an opportunity present in the context of voluntary pilotage and absent in its compulsory counterpart.

In order to provide a complete analysis of the manner in which the NPA deals with the issue of pilot liability, it is necessary to explore the provisions' underlying motive. That is to ask, why those responsible for the drafting of the legislation have found it necessary to alter the previous dispensation. Perhaps, a more revealing question, posed under the auspices of the broader question of 'why?' is similar to that of the 'but-for' enquiry, commonly used to establish factual causation, a necessity in establishing delictual liability. To borrow this construct, but for s 76 (2) of the Act where would liability for the acts or omissions of the pilot fall?

Since the NPA was promulgated relatively recently one does not need to revert far into the annals of time to gather the legal position that went before the current dispensation. The NPA's predecessor, through s 10 (1), dictated that the pilot was the employee of the port authority and, by extension, the state.

Therefore, in lieu of s 76 (2) of the NPA, the pilot would have remained an employee of the authority. The motive behind the provision is, as is the case with the majority of issues pertaining to the interaction of public bodies and private interests in the broader context of trade, pecuniary in nature. A means, when viewed in conjunction with the expansion of the authority's exemption for the acts or omissions of the pilot in terms of s 76 (1) and removal of the defence of compulsory pilotage, to definitively avoid liability, and therefore expenditure, for the negligent acts or omissions of pilots and to shift that liability upon ship-owning interests.

It is submitted that the rationale of s 10 (1) of the Legal Succession Act, identifying the pilot as an employee of the state, remains intact. Notwithstanding subsequent legislative flux, the provision accurately reflects the dynamic of the relationship in which port authority and pilot stand. Despite their *raison d'être*; to shift liability from the port authority to ship-owning interests, the provisions of the NPA governing pilotage still admit that the authority has a strong right of supervision and control over the pilot:

‘[The authority must] provide or procure pilotage services, license pilots and regulate the safe provision of pilotage services by licensed pilots.’⁹⁰

‘The Harbour Master [an agent of the authority] is, in respect of the port for which he or she is appointed, the final authority in respect of all matters relating to pilotage’.⁹¹

‘In the event of a disagreement between the pilot and the master of the vessel regarding the number of tugs to be used, the Harbour Master [an agent of the authority] takes the final decision’.⁹²

‘No person may perform the functions of a pilot in a port without having been duly certificated by the South African Maritime Safety Authority and licensed by the Authority to do so’.⁹³

In addition to the right of supervision and control there are other *indicia*, which point toward a relationship of employment: The services rendered by the pilot are at the exclusive behest and disposal of the authority. The legislature decrees that all South African major commercial ports are compulsory pilotage areas⁹⁴ and the authority, as an organ of state, ensures that the decree is observed. The pilot is precluded from working outside this legislative framework, overseen by the authority. Any agreement which can be said to exist between the authority and pilot is an enduring one, it does not terminate upon the production of a specified result; a hallmark of the contract of service or employment. It is solely with the authority that the power to discipline the pilots rests, as an extension of its statutory duty to: ‘regulate the safe provision of pilotage services’.⁹⁵

In sum, the Legal Succession Act and pre NPA common law accurately reflected the genuine relationship(s) of authority, ship-owner or master and pilot. The result was uniformity in both the *de jure* and *de facto* positions. Through the

⁹⁰Section 74 (1) (d).

⁹¹Section 74 (3) (a).

⁹²Section 75 (5).

⁹³Section 77 (1).

⁹⁴See in this regard: section 75 (1).

⁹⁵Section 74 (1) (d).

promulgation of the NPA, that uniformity has been disturbed. The result is a vacuum, disparity between the *de jure* and *de facto* positions; a gulf between the import of the Act and the realities at hand. That is to say that the law does not accurately reflect the true nature of the sphere or relationship that it governs. Whilst irrational and a source of frustration for ship-owning interests, this *schema* cannot be attacked on grounds of legal invalidity. The state does not wish to foot the bill for damages resulting from incidences of pilot error. As a consequence thereof, it has through legitimate means, ensured that the financial burden falls elsewhere. Within this framework, the choice available to ship-owning interests is a simple one; comply and incur potential liability as a result or sail elsewhere. This rather cursory assessment evidences an undeniable truth; if a solution is to be found, a bridge straddling the interests of state and ship-owner; one must look outside the prevailing matrix.

g) Forms of port privatisation

Privatisation, in the context of port and ports services, takes place in two broad forms; comprehensive or partial. For the sake of convenience, a summary of these variants will follow.

The typical rationale behind comprehensive privatisation is as follows:

‘The public entity that has final responsibility for the port sector wants to privatise the entire sector, including responsibilities that generally are considered belonging to the public domain. Ownership of port-land, planning, investment and management are all transferred to private-sector entities, which have no formal commitments to any public institution’.⁹⁶

This form of privatisation is the exception rather than the rule.⁹⁷ It requires the outright sale of port-land together with the transfer of all port functions, from the public to the private sector.⁹⁸ It necessitates the enactment of new legislation, governing the transfer of ownership of the port-land as well as responsibility for port functions.⁹⁹

The primary focus of this dissertation is out of necessity restricted to the contemplation of the privatisation of pilotage services and, as such, the concept of comprehensive privatisation is beyond its scope. Rather, it is the alternate, most

⁹⁶The World Bank ‘Alternative Port Management Structures and Ownership’ (2007) 2ed Module 3 *Port Reform Toolkit* 69 at 109.

⁹⁷*Ibid* at 107.

⁹⁸*Ibid* at 120.

⁹⁹*Ibid*.

common form of privatisation, partial privatisation that is of relevance. The motivation for the state to implement a program of partial privatisation is as follows:

‘The public authority in charge of the port sector wants to restrict its public role by privatising cargo handling operations and other non-landlord activities. In this case, existing operations have to be privatised’.¹⁰⁰

It is apparent that partial privatisation is the product of a public-private partnership and, is typically coupled with the introduction of a landlord port authority.¹⁰¹ The landlord port is a product of its mixed public-private construct.¹⁰² In accordance with this framework, the port authority acts as regulator and landlord, whilst port operations are conducted by private companies.¹⁰³ Leasehold arrangements provide the port authority with a significant portion of its income. Typically, a lease concluded between a landlord port authority and a private company is consistent with the following general outline:

‘[I]nfrastructure is leased to private operating companies or to industries such as refineries, tank terminals, and chemical plants. The lease to be paid to the port authority is usually a fixed sum per square meter per year, typically indexed to some measure of inflation. The level of the lease amount is related to the initial preparation and construction costs (for example, land reclamation and quay wall construction). The private port operators provide and maintain their own superstructure including buildings (offices, sheds, warehouses, container freight stations, workshops). They also purchase and install their own equipment on the terminal grounds as required by their businesses’.¹⁰⁴

Bosch-Domenech and Garcia-Montalvo provide an illustrative summary in the following terms:

‘[Landlord ports] where port authorities limit their role to the building and owning of the infrastructure, leaving superstructure, pilotage, cargo operations and towage to be conducted by private operators’.¹⁰⁵

h) A summation of the case for privatisation

Commenting on the results of the Napier survey¹⁰⁶, a questionnaire targeted at representatives of the top 100 container ports in the world (accounting for 80 percent

¹⁰⁰*Ibid* at 109.

¹⁰¹*Ibid* at 107.

¹⁰²*Ibid* at 83.

¹⁰³*Ibid*.

¹⁰⁴*Ibid*.

¹⁰⁵A Bosch-Domenech and J Garcia-Montalvo (*Universitat Pompeu Fabra*) ‘Maritime and Port Services in South America. Where from here?’ at 5 available at <http://www.econ.upf.edu/~montalvo/wp/Maritime.pdf>, accessed on 16 February 2014.

¹⁰⁶Note: Of the 100 ports consulted, 48 ports returned the questionnaire. The respondent ports’ collectively accounted for 108 million TEU in 1999, equivalent to 50% of global container port traffic that year.

of global container trade), Baird notes that, according to the participant port authorities, private-sector intervention bears the following advantages:

‘The sharing of investment was considered by most ports (50 [percent]) to be the main advantage of private-sector intervention, followed by benefits gained through improved productivity (44 [percent]). Helping trade growth was mentioned by 38[percent] of ports, with management expertise mentioned by (31 [percent]). “Other” [specific] advantages given by ports included making terminals profitable, [facilitating] competition between terminals [in a port], improved management, and better facilitation of development’.¹⁰⁷

The results of the Napier survey are consistent with subsequent findings of the World Bank.¹⁰⁸ The organisation’s paper identifies a number of factors as cornerstones of the rationale behind privatisation:

First, the removal of trade barriers and cumbersome administrative procedures.¹⁰⁹ A combination of outdated work practices and inadequate institutional structures result in a climate of inefficiency, posing potential obstacles to foreign trade.¹¹⁰ This is disadvantageous to both state, in an obvious sense as less trade will go through its ports therefore resulting in a loss in revenue, as well as private individuals:

‘Indirectly, the entire population of a country pays for port inefficiencies, which are reflected in the prices of both import and export commodities’.¹¹¹

State-owned firms, constrained by their rigid bureaucratic construct are ill-suited to an increasingly specialised port-industry.¹¹² This, they submit, is compounded by the relatively meagre cash generation of, and lack of market orientation on the part of, state-owned firms.¹¹³

Second, the elimination of political interference. The appointment of inexperienced government officials, to lofty positions within government-owned ports, is something of an anomaly.¹¹⁴ The privatisation of port operations presents an alternate model as it generally results in the appointment of experienced individuals with superior expertise and an ‘undiluted focus’ on the market.¹¹⁵

¹⁰⁷AJ Baird ‘Privatization trends at the top-100 container ports’ (2002) 29 *MARIT. POL. MGMT.* 271 at 279.

¹⁰⁸The World Bank ‘Alternative Port Management Structures and Ownership’ (2007).

¹⁰⁹*Ibid* at 107.

¹¹⁰*Ibid.*

¹¹¹*Ibid.*

¹¹²*Ibid.*

¹¹³ *Ibid.*

¹¹⁴*Ibid.*

¹¹⁵*Ibid.*

Third, the reduction of the demand on the public-sector budget:

‘Partial privatisation does not necessarily mean a total withdrawal of the government from port investments. However a large [often major] part of port investments can be undertaken by the private sector without compromising wider social and economic benefits. [The] development of a modern port still requires a balanced public-private financial package with balanced risk sharing’.¹¹⁶

Bosch-Domenech and Garcia-Montalvo contend, in the context of port reform in South America, that the ultimate goal should be:

‘To promote policies of non-discriminatory access to ports and the participation of the private sector in all aspects of port investment and operation. [T]he private sector should be encouraged to invest in port facilities and heavy port equipment and to share the risk and rewards of these massive investments’.¹¹⁷

Haarmeyer and Yorke contend that, by their very nature, private enterprises boast a number of structural advantages when compared to their state-owned counterparts. Crucially, the link between effective-management and revenue is evident with regard to the former.¹¹⁸ They expand on this premise in the following terms:

‘In all cases, the theoretical underpinning for privatisation remains the same: compared to publicly owned enterprises, private companies face a fuller set of market disciplines to operate efficiently. Publicly owned and operated enterprises have diffused ownership structures in the form of individual taxpayers or ratepayers who have little incentive to monitor performance. By contrast, in the private sector, ownership is generally concentrated and hence control and accountability are clearer’.¹¹⁹

Consistent with the views espoused in the previously-cited study compiled by the World Bank, Haarmeyer and Yorke identify improved efficiency as a cornerstone of the rationale behind privatisation. The authors’ emphasis on the structural advantages of private enterprise is, once again, central to their thinking:

‘[W]hether it is full or partial, privatization (sic) generates efficiency improvements. Because it enables an enterprise to take advantage of the stronger incentives associated with private ownership, reduces the potential for political interference, and exposes the enterprise to the full range of capital market disciplines and financing alternatives’.¹²⁰

¹¹⁶*Ibid.*

¹¹⁷Bosch-Domenech and Garcia Montalvo ‘Port Services in South America’ at 5.

¹¹⁸D Haarmeyer and P Yorke ‘Port Privatization: An International Perspective’ *Policy Study No. 156*, April 1993 at 5, available at <http://www.reason.org/files/6a983123788632131171e022e6466a7a.pdf> , accessed on 09 February 2014.

¹¹⁹*Ibid* at 4.

¹²⁰D Haarmeyer and P Yorke ‘Port Privatization’ at 5.

In addition, they expand on their theory that the exposure of private firms to competition and the impetus brought about by such exposure; is crucial to the success of privatisation:

‘Studies by the World Bank and others indicate that private firms have stronger incentives to manage resources [more] efficiently than public enterprises because they are exposed to competition in the product and capital markets [which] can go bankrupt’.¹²¹

i) A summation of the case against privatisation

Conversely, participants of the Napier survey identified the following disadvantages:

‘Most ports (31 [percent]) stated the loss of control as an issue, with 21[percent] mentioning political and commercial ambiguity as a problem. Difficulties in operator selection (15 [percent]) and the lengthy process for securing concessions (8 [percent]) were also highlighted. [S]ome ports mentioned other disadvantages such as inadequate income for the state, the possibility of an oligarchy developing, difficulties coordinating public and private investments, and the potential for unfair competition or preferential treatment’.¹²²

Privatisation of any number of port-services brings with it the risk of creating a private monopoly, replacing the public monopoly that went before it. However, the very nature of the role that is played by the pilot and the importance of that role means that the risk of a private monopoly occurring as well as the consequences of such an occurrence take on a greater significance:

‘[The privatisation of pilotage services] carries the risk of creating a private sector monopoly in pilotage services, especially when the pilots are privatised on a national or regional scale. Pilotage is an essential part of traffic management, and safe passage of vessels through a port area requires [the] expert teamwork of a vessel traffic management organisation, tugs, mooring gangs and pilots. A private-sector pilot monopoly that has the ability to bring port operations to a complete and rapid stop represents a significant risk for ports, carriers and shippers alike’.¹²³

j) The privatisation of pilotage services; case studies

The Dutch experience

The Netherlands pilotage service was converted into an independent organisation in 1988, resulting in state-employed pilots morphing into private entrepreneurs.¹²⁴ The government’s rationale behind such a move was two-fold in its construct; to reduce its executive and administrative burden (incurred in the course of supplying pilotage

¹²¹*Ibid* at 18.

¹²²Baird 2002 *MARIT. POL. MGMT.* 279-280.

¹²³The World Bank ‘Alternative Port Management Structures and Ownership’ 126.

¹²⁴*Ibid* at 127.

services) together with the pursuit of improvement in the efficiency and adequacy of the services provided by pilots.¹²⁵

The framework, in terms of which, the privatisation of pilotage services in the Netherlands was achieved necessitated the organisation of pilots along regional and national lines. A synopsis follows:

‘A public entity, the Nederlandse Loodsen Corporatie (Netherlands Pilot Corporation hereafter NLC) was created to manage the register of licensed pilots and [to] be responsible for the education and training of licensed pilots. In every region, the licensed pilots have set up a legal entity, the Regionale Loodsen Corporatie (Regional Pilot Corporation hereafter RLC). The licensed pilots are all shareholders of the Loodswezen Nederland BV (Pilotage Service of the Netherlands Ltd.), which is responsible for the exploitation of the independent private enterprise. All supporting staff is provided by this company. The company collects the pilotage fees and makes payment to the pilots in accordance with the financial statute. The ownership of capital goods used by the pilots is incorporated in the Loodswezen Materieel BV (Pilotage Services Materials Ltd.). Individual pilots, united in regional partnerships [known as pilot associations] render the pilotage services. Supporting services are provided by the Loodswezen Nederland BV. Five foundations are responsible for education, social allowances, management of pension funds, and allowances for special situations’.¹²⁶

All registered pilots are members of the NLC.¹²⁷ In addition to responsibility for the training of pilots, the NLC is tasked with ensuring that pilotage services are conducted in a satisfactory manner.¹²⁸ The NLC is comprised of three bodies: the president, board and general assembly.¹²⁹ The four regional presidents and president of the NLC sit on the board. It is with the board, as a component of the NLC, that responsibility for training and professional standards rests.¹³⁰ The general assembly provides the framework within which the board operates; it drafts rules, formally known as decrees.¹³¹ The primary purpose of the general assembly’s decrees is to ensure and maintain a high standard of pilotage services.¹³² Existing decrees cover the following spheres *inter alia*:

‘[P]rofessional conduct, service provision, finances, [training schemes] for aspiring pilots and inclusion in the pilot registry’.¹³³

¹²⁵*Ibid.*

¹²⁶*Ibid.*

¹²⁷‘The Dutch Pilots’ Corporation’ available at <http://www.loodswezen.nl>, accessed on 03August 2014.

¹²⁸*Ibid.*

¹²⁹*Ibid.*

¹³⁰*Ibid.*

¹³¹*Ibid.*

¹³²*Ibid.*

¹³³*Ibid.*

Furthermore, the general assembly plays a crucial advisory role in matters related to the Dutch Pilotage Act, a specialised piece of legislation, crystallizing the state's role in the public-private partnership.¹³⁴

In so far as the regional organization of Dutch pilots is concerned, the Netherlands is divided into four regions: Noord (North), Amsterdam-IJmond, Rotterdam-Rijnmond and Scheldemonden.¹³⁵ Each region has its own RLC. The RLCs' structure is near identical to that of the NLC; they too are comprised of a board, president and general assembly. The respective boards (of the RLCs) are tasked with the intake of aspirant pilots, ensuring that the required numbers of registered pilots are available.¹³⁶

The impact of the privatisation of pilotage services in the Netherlands has been generally positive. There is an admission from the government that its primary objectives have been met; it has successfully rid itself of its prior executive burden. Also, the increased amount of pilot activity, viewed in conjunction with the reduced number of licensed pilots, is indicative of an improvement in pilot efficiency.¹³⁷ However, there is a concern that privatisation has brought with it the monopolisation of pilotage services. In addition, the cost-structure of the pilotage organisation has attracted criticism as it is not transparent. The pilots' fees are non-negotiable and steep, this, detractors have argued, has had a negative knock-on effect on other port-service providers as they have come under pressure to reduce their fees as a result.¹³⁸

The Mozambican experience; Maputo

The partial privatisation of the Mozambican port of Maputo has resulted in something of a renaissance. A consortium by the name of Maputo Port Development Company (MPDC), which consortium is chiefly financed by the Mersey Docks and Harbour Company together with the Standard Corporate and Merchant Bank, is now responsible for the operation of all port activities; including *inter alia* the provision of pilotage services.¹³⁹ Port regulation has however remained under government

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ The World Bank 'Alternative Port Management Structures' 126.

¹³⁸ *Ibid.*

¹³⁹ A Newman *Privatisation of Ports* MCom (UNISA) (2013) 66.

control, following the archetypal construct of the public-private model.¹⁴⁰ In the African context, it is novel.¹⁴¹

MPDC's mandate was and remains a multi-faceted one, secured by the granting of a 25 year concession in April 2003, with the overriding theme being one of economic recovery.¹⁴² The Mozambican government identified private involvement as a vehicle for necessary reform:

‘[I]mproving not only the port's status as a cargo and passenger port, but also to lead its *port services and operational improvement strategy* [my emphasis].’¹⁴³

It is however worth noting that the port of Maputo was ravaged by years of civil war and neglect, consequently it was in a state of severe disrepair at the commencement of MPDC's mandate.¹⁴⁴ Such an observation, it is conceded, is undeniably pertinent when considering the results of the public-private interaction that has taken place.

MPDC has launched a 70 million (U.S dollar) priority works programme focusing on the improvement of port infrastructure and services.¹⁴⁵ Continuous, reliable port operations have been introduced and new training schemes implemented.¹⁴⁶ Albeit with the above-mentioned caveat, progress has been achieved, resulting in a steady increase of trade:

‘The concession has increased efficiency and handling volumes at the Maputo Harbour from 4.3 million tonnes in 2002 to 5.54 million tonnes in 2004.’¹⁴⁷

‘In January 2002, sea freight throughput in the Port of Maputo had dropped to 1.2 million tonnes per annum, but as a result of new investment and increased interest in the port, 6.2 million tonnes was achieved in July 2005.’¹⁴⁸

It is trite that the above-cited figures cannot be attributed to the privatisation of pilotage services alone. However, the case of Maputo does provide proof of concept for a broader proposition. That private-sector investment and the consequent adoption of private commercial principles can have a dramatic effect in a relatively short space of time:

¹⁴⁰*Ibid* at 69.

¹⁴¹*Ibid*.

¹⁴²*Ibid* at 67.

¹⁴³*Ibid*.

¹⁴⁴*Ibid* at 66.

¹⁴⁵*Ibid* at 67.

¹⁴⁶*Ibid*.

¹⁴⁷South African Institute of International Affairs Nepad Policy Focus Report No 2: *Working Together Assessing Public-Private Partnerships in Africa* 13.

¹⁴⁸A Newman *Privatisation* 68.

‘With more recent investment in the Port of Maputo, industries such as automotive imports, fresh produce exports, and bulk mineral exports have increased Maputo’s competitiveness with the Port of Richards Bay, which falls under the control of Transnet Port Terminals. Faced with challenges, a previously under-developed port has now provided an alternate nodal point for ships wishing to access South[ern] Africa at a competitive price, providing handling services comparable with South African ports, as well as with significantly less port delays and no port congestion’.¹⁴⁹

Lessons taken from the comprehensive privatisation of British ports

Whilst the subject of comprehensive port privatisation necessitates a debate that exceeds the scope of this dissertation, it is submitted that there is some value to be extracted from the British experience, and in particular Baird’s critique thereof; in the course of considering the partial privatisation of South Africa’s ports.

The United Kingdom is one of the few nations to have implemented the comprehensive privatisation of a number of its ports.¹⁵⁰ Through offering shares in February 1983, the U.K privatised nineteen of the nation’s state-owned ports.¹⁵¹ Britain’s lengthy exposure to and subsequent experience of commercial port privatisation provides a useful point of reference.¹⁵²

The primary means of comprehensive privatisation in Britain was the Ports Act.¹⁵³ A glimpse into its *schema* provides an illustrative example of the manner in which comprehensive privatisation was achieved:

‘This law provides for the formation of harbour authorities [as] limited companies under the Companies Act, and for the subsequent sale of their shares. All property, rights, liabilities and statutory functions are transferred to the new port-companies. Ministerial approval is required for the sale of shares and the subsequent dissolution of the harbour authority. The company has to pay the government fifty percent of the proceeds of the sale of shares, less any amount set aside for assistance to maximise employee participation. If the company later sells port-land, a twenty five percent levy is charged on the proceeds of the sale during the first five years, twenty percent for the next two years and ten percent for the years eight through till ten’.¹⁵⁴

Haarmeyer and Yorke submit that the rationale behind privatisation in the United Kingdom was three-fold in its construct:

‘One, before 1980, most port services were controlled by public harbour boards and trusts that restricted competition and increased the cost of port services. Two, to remain competitive with European ports and other British cargo transport systems, ports had to be able to quickly adapt to market conditions and

¹⁴⁹*Ibid* at 68 – 69.

¹⁵⁰The World Bank ‘Alternative Port Management Structures and Ownership’ (2007) 122.

¹⁵¹D Haarmeyer and P Yorke ‘Port Privatization’ at 10.

¹⁵²*Ibid*.

¹⁵³Ports Act 1991 (United Kingdom).

¹⁵⁴The World Bank ‘Alternative Port Management Structures and Ownership’ (2007) 122.

implement new technology such as containerization. [Three], under the control of public harbour boards or trusts, the business that ports could enter was restricted. This meant that not only could publicly controlled ports not diversify into more profitable commercial ventures but that the real-estate assets owned by the British ports could not be transferred to more economically valuable uses'.¹⁵⁵

Can the British privatisation experience be regarded as a success? Albeit writing in 1993 the answer provided by Haarmeyer and Yorke is categorically in the affirmative. The authors identify a number of beneficial economic impacts brought about by the privatisation of the nations' ports:

First, 'a more co-operative and productive workplace'.¹⁵⁶ This, they contend, was brought about by an increase in labour productivity, borne out by the downsizing of the labour force and increase in cargo tonnage handled.¹⁵⁷

Second, 'privatisation eliminated the restrictions on diversification imposed by the 1962 Transport Act and hence provided opportunities for profitable investment outside core port functions'.¹⁵⁸

Third, 'by accessing private capital markets and facilitating the disposal of assets, privatisation made more resources available for capital investment'.¹⁵⁹

The second and third benefits identified by Haarmeyer and Yorke are inextricably linked. The authors point to a rise in the Associated British Ports' share price, from an original offer price of 112 pence in 1983 to 386 pence in 1993, as proof of increased investment and profitability.¹⁶⁰

As to the market value of the shares, Haarmeyer and Yorke note that:

'market capitalization went from 44.5 million pounds in 1983, to over 720 million pounds ten years later – an over sixteen fold increase in value'.¹⁶¹

In addition, the authors identify a number of further, specific spin-off effects:

The expansion of ports and upgrading of port facilities, allowing for an increase in port capacity.¹⁶²

¹⁵⁵D Haarmeyer and P Yorke 'Port Privatization' at 10.

¹⁵⁶*Ibid* at 15.

¹⁵⁷*Ibid.*

¹⁵⁸*Ibid.*

¹⁵⁹*Ibid.*

¹⁶⁰ *Ibid* at 16.

¹⁶¹*Ibid* at 17.

¹⁶²*Ibid.*

‘Port asset diversification through property development’.¹⁶³ Housing developments, leisure parks, hotels and shopping malls, developed on port land, boosting and widening revenue streams.¹⁶⁴

Has this undoubtedly positive conclusion been dimmed by the cumulative weight of time and experience? Baird, writing some seven years later,¹⁶⁵ contends so.

Baird argues that ports were sold, by the public sector to the private sector, at prices that failed to take their true market value into account. Ports, the author submits, were sold at an incredibly low price:

‘Subsequent trading in port shares in the post-privatisation period suggested that almost all UK ports were sold at prices approximating between only 5% and 25% of their “real” market value. There are a number of noteworthy examples: Medway ports, sold to an MEBO¹⁶⁶ in 1992 for a levy of 13.2 million pounds, was acquired by Mersey Docks & Harbour Company in 1993 for 104 million pounds; Clydeport was sold to an MEBO in 1992 for 11.6 million, and subsequently floated on the stock market three years later with a market capitalisation approaching 60 million pounds’.¹⁶⁷

This disparity in market value and sale price can be attributed, according to Baird, to the fact that:

‘Port valuations relied on advisor’s assumptions and perceptions of the market for ports at the time of privatisation, a market that until then had not existed, therefore rendering valuations judgmental’.¹⁶⁸

In addition to criticising the lack of foresight on the part of British government with regard to the valuation of ports, the most salient point to be taken from Baird’s critique is his questioning of the suitability and indeed viability of comprehensive privatisation as a concept:

‘As UK ports were sold at significantly discounted prices, relatively little money was actually raised from their sale. *This begged the question why there was a need to dispose of ports in this way as opposed to using alternative methods of privatisation (e.g. port and terminal concessions), which could have raised significantly greater revenues for the public sector over the longer term and generated private sector investment in new port facilities* [my emphasis]’.¹⁶⁹

¹⁶³*Ibid.*

¹⁶⁴*Ibid.*

¹⁶⁵AJ Baird ‘Port Privatisation: Objectives, Extent, Process, and the UK Experience’ (2000) 2 *Int. Journal of Maritime Economics* 177-194.

¹⁶⁶‘MEBO’ refers to the sale of port assets through a competitive tender, ‘whereby a sale is open to any company or consortia to bid and the sale is made to one bidder ... a management and employee buyout’. See in this regard Baird at 184.

¹⁶⁷*Ibid* at 184 – 185.

¹⁶⁸*Ibid* at 184.

¹⁶⁹*Ibid* at 185.

Baird argues that the comprehensive privatisation of British ports merely replaced a public monopoly with a private one, with the entire port capacity of the majority of ports being sold to a single successor company.¹⁷⁰ As such, he posits that the position of consumers, those that make use of ports and ports services in order to further their respective interests, have remained largely unaffected.¹⁷¹

Baird's disapproval extends beyond the means of privatisation employed to the manner in which it was executed. He contends that:

'Some ports were crying out for investment and redevelopment, but that was not what the UK privatisation experiment was about. Privatisation led to an injection of cash, but only in terms of purchasing existing assets. There were no *formalised commitments* [my emphasis] made by buyers to significantly modernise and invest in replacement port facilities to improve the economy, this being a fundamental objective of privatisation in other countries'.¹⁷²

In attempting to reconcile the views of Haarmeyer and Yorke with those of Baird it is apparent that there is some disparity between that which the comprehensive privatisation of Britain's ports promised to achieve and that which actually transpired. It is however crucial to acknowledge that Baird does not dismiss the concept of privatisation entirely:

'This paper in no way seeks to criticise the concept of port privatisation, far from it. When carried out properly, and for the right reasons, port privatisation offers port users and the economy as a whole many benefits. However, when port privatisation schemes are badly designed, inadequate, and implemented for the wrong reasons, then port users (and the economy) are unlikely to receive any benefits'.¹⁷³

Pertinently, in dismissing comprehensive privatisation, Baird espouses that a public –private partnership should be the bedrock upon which a successful privatisation venture is built:

'Most forms of privatisation, with the exception of the outright sale method adopted in the UK, have the potential to bring about positive outcomes with respect to port investment, port competition, port planning and control, and port organisation. *The outright sale method and subsequent withdrawal of the state from its ports industry does not appear to generate any of these benefits* [my emphasis]'.¹⁷⁴

'[P]rivate sector investment in ports should not be regarded as a complete substitute for public sector investment. Public sector support, particularly in

¹⁷⁰*Ibid* at 186.

¹⁷¹*Ibid*.

¹⁷²*Ibid* at 189.

¹⁷³*Ibid* at 193.

¹⁷⁴*Ibid* at 194.

regard to provision of *certain elements of new port infrastructure* [my emphasis], is still likely to be necessary to a greater or lesser extent'.¹⁷⁵

'There appears to be no good reason for a country to withdraw entirely from its ports industry, as the UK has done. This is reflected in the reality of international port investment today, with by far the majority of port privatisation initiatives still involving some form of public sector investment'.¹⁷⁶

k) Privatisation of pilotage services in South Africa; the practicalities

How does the privatisation of pilotage services, as a specific form of partial privatisation, take place? Pilots constitute a select group of professionals upon whom the successful management of vessels is heavily reliant.¹⁷⁷ Keenly aware of their importance, pilots are often the first group, within the context of those performing port services, to demand privatisation.¹⁷⁸

A report on the subject, compiled by the World Bank identifies two scenarios:

'There are two ways of privatising the pilotage function. Pilots can be self-employed and work under the oversight of a maritime authority that serves as the regulator and licensor of the individual pilots, or pilots can organize themselves into a private company'.¹⁷⁹

It is somewhat trite that there is little merit or use in seeking to hold an individual pilot liable for the consequences of his / her negligence. The quantum of claims resulting from pilot error is typically vast and, by comparison, the resources available to a pilot as an individual are slim. This point is made by Yuen:

'The imposition of liability on the pilot, even to the point of bankruptcy, is unlikely to have any significant impact on the payment for the damage suffered by various parties'.¹⁸⁰

However, it is contended that the above-cited maxim does not apply to commercial entities providing pilotage services for financial gain.¹⁸¹

It is submitted that the Dutch model of privatisation, specifically the organisation of pilots on both a national and regional scale, presents a viable blueprint for the privatisation of pilotage services in South Africa. The application of the Dutch model and adoption of the principles espoused therein would provide the structure for a new framework of liability, transferring liability from the ship-

¹⁷⁵*Ibid* at 193.

¹⁷⁶*Ibid*.

¹⁷⁷The World Bank 'Alternative Port Management Structures' 126.

¹⁷⁸*Ibid*.

¹⁷⁹*Ibid*.

¹⁸⁰CS Yuen 'Marine Pilotage in Australia: Sydney Ports Case Study' (2003) 17 *Austl. & N.Z. Mar. L.J* 80 at 91.

¹⁸¹Yuen 2003 *Austl. & N.Z. Mar. L.J* 94.

owner to a National Pilots' Corporation (NPC). The proposed *schema* would be predicated on the NPC obtaining insurance cover, on behalf of its members, for the purpose of satisfying claims stemming from pilot error. The cost of insurance would be satisfied through one of the following sources:

An annual levy raised by the NPC, an equivalent of the Dutch Nederlandse Loodsen Corporatie, of which all registered pilots must be a part, to be paid by its members; as a pre-requisite of their membership.

Deduction from the pooled income derived from pilotage fees, held in trust by an equivalent of the Loodswezen Nederland BV.¹⁸²

It is submitted that this shift is consistent with the fundamental principles of the doctrine of vicarious liability. This is apparent upon an analysis of the relationship in which pilot and the proposed NPC would stand; employing the dual prism of South African labour law and the contemporary notion of vicarious liability encapsulated in the work of Morgan.

Whilst it has been previously argued that the factual relationship in which ship-owner or master and pilot stand is not consistent with that which is required in South African law for vicarious liability to result,¹⁸³ that is to say a relationship akin to employment, it is submitted that the proposed relationship between NPC and pilot would not suffer the same fate. This is primarily so as the dominant impression obtained after dissecting the latter differs from that which is obtained after analysing the former.

The extent of control that the proposed NPC would exert over its member pilots differs markedly to the extremely limited amount of control that a ship-owner or master is able to exert over a pilot under the current dispensation.

Whilst it is conceded that the NPC would not exercise direct control over the day to day activities of the pilot, it would control entry into the pilotage profession. In accordance with the decrees drafted by its general assembly, the board would dictate the requirements with which aspirant pilots would have to comply and thereafter the standard to which its member pilots would have to adhere to; in the course of providing pilotage services. In this sense, the association would exert a

¹⁸²Yuen 2003 *Austl. & N.Z. Mar. L.J* 91.

¹⁸³See in this regard: Chapter b.

considerable amount of control over the behaviour of its pilots through dictating the manner in which its pilots would have to act. Fundamentally, it is submitted that the extent of control the NPC would wield is consistent with the definition of an employer's right of control in *Smit*.¹⁸⁴

The NPC would have a clear right of supervision, evaluating the conduct of its member pilots against the standard set by its board; supplemented by continuous training and evaluation programs. This, it is contended, is consistent with the definition of an employer's right of supervision in *Smit*.

In addition, it is submitted that the following factors are relevant to the dynamic of the relationship in which the NPC and pilot would stand and are further *indicia* that said relationship is akin to one of employment:

The pilot would render his/ her services exclusively to the association.

In accordance with its decrees, the NPC would have the authority and power to discipline its member pilots.

Through its financial services affiliated company, of which all licensed pilots would be shareholders (an equivalent of the Loodswezen Nederland BV), the association would collect pilotage fees and distribute them to the pilots in accordance with its financial statute. In sum, the association would pay the pilots' wages.

By way of summation, after having recourse to the above, it is submitted that the dominant impression obtained is that the pilot is an employee of the NPC. Employing the yardstick provided by South African labour law, it can be said that the NPC and pilot would stand in a relationship akin to employment.

It should further be noted that the proposed relationship of NPC and pilot would, in contrast to the relationship of ship-owner or master and pilot, trigger the rebuttable presumption of employment contained in s 200 A of the Labour Relations Act. This is so *inter alia* as the manner in which the pilot works would be subject to the control or direction of the NPC. The pilot would be a member of the NPC and therefore form part of the pilot association. The pilot would render his / her services exclusively to the association.

¹⁸⁴1979 (1) SA 51 (A).

The recalibration of liability in the proposed form is similarly consistent with the modern notion of vicarious liability. In accordance with the deterrence theory, the body with the ability to best guard against harm occurring, the NPC, would be accountable should harm transpire.

This pairing of the ability to guard against the occurrence of harm with accountability provides a positive spin-off effect. The resultant synergy provides the pilot with a clear vested interest in ensuring that pilotage services are conducted in a safe manner. This is undoubtedly so, as the standard of the services supplied will have a bearing on the premium charged by the pilots' underwriters. It is trite that ensuring that pilotage services are conducted in a safe manner stands to benefit a vast array of groups and stake-holders including port-users, government and the citizenry as a whole. The pilot incurs a similar impetus in so far as efficiency is concerned. It is he / she that stands to benefit through improved efficiency in the form of increased revenue and ultimately income. This is borne out by the Dutch experience, which resulted in a dramatic increase in productivity. In simple terms, 'less pilots carrying out more activities'.¹⁸⁵ This streamlining of the pilotage enterprise resulted in a significant increase in income for the privatised Dutch pilots.¹⁸⁶ Those pilots that buy into the South African privatisation model would stand to gain similarly. As per the observation of Haarmeyer and Yorke,¹⁸⁷ the meshing of risk and reward in this sense is a key component of private ownership in the commercial realm and yields potentially massive benefits for stakeholders.

The proposed re-calibration is similarly consistent with another underpinning principle of vicarious liability; the concept of enterprise liability. As Morgan succinctly states:

'Enterprise liability justifications are based on the idea that with benefits comes burdens, he who takes the profit of the enterprise should take the loss'.¹⁸⁸

Pilots, as individuals, benefit from the services that they provide in an obvious and very tangible sense through their share of the fees generated. It is therefore logical that the burden of liability is shouldered by the pilots as a collective.

¹⁸⁵'From State Pilot to members of Private Pilot Associations, Backgrounds 1859-2000' at 3, available at <http://www.loodswezen.nl> accessed on 03 August 2014.

¹⁸⁶*Ibid.*

¹⁸⁷D Haarmeyer and P Yorke 'Port Privatization' at 5.

¹⁸⁸Morgan 2012 *Cambridge Law Journal* 618.

Such a premise admittedly provides scope for an argument that the state should subsidise the activities of the pilots' operation; as it too stands to benefit from the positive spin-off effects generated by an improved pilotage service. It is however submitted that, for the purposes of this piece, a discussion of the merits of a potential state subsidy are premature.

Ultimately, it should be noted that Morgan distances himself from an over-formulaic analysis of the doctrine of vicarious liability, instead favouring a broad approach.¹⁸⁹ Indeed, the archetypal question posed by Morgan is relatively simple in its construct; for whose team does the individual in question play? It is submitted that this rhetoric is underpinned by the presence of a voluntary linkage between team and individual, the entity held liable (A) and tortfeasor (B). As has been argued at some length,¹⁹⁰ the writer contends that such a voluntary linkage is indeed a prerequisite for vicarious liability to result. Whilst it is absent in the relationship of ship-owner or master and pilot, it would undeniably be present in the relationship of NPC and pilot. Aspirant pilots would make an application for association membership and the NPC would either approve or decline such an application.

To revert to the seminal question posed by Morgan, in the system of privatisation proposed the pilot is, in essence, playing for him or herself. However, for the reasons advanced, he or she cannot be held accountable as an individual. Yet, whilst it may be the accepted norm in a number of jurisdictions, such an eventuality does not provide a sound rationale for imposing liability on the ship-owner. Rather, as provided for by the national organisation of pilots, accountability can be shared by the collective. In so doing, this recognises the pilot for what he/she truly is; a highly specialised professional.

That the pilot would operate under the supervision and control of the NPC provides a sound rationale in law for shifting liability in the manner proposed. It is a compromise borne of pragmatism. Through its consistency with both the traditional and contemporary notions of vicarious liability it removes the need to create a legal fiction, irrationally and inaccurately naming the pilot as an employee

¹⁸⁹*Ibid* at 619.

¹⁹⁰See in this regard: Chapter f.

of the ship-owner. The result is the removal of the disjuncture of the previous dispensation and a consequent uniformity in the *de jure* and *de facto* positions.

It is not just the pilot that stands to gain from the privatisation of pilotage services as proposed and the resultant adoption of a *modus operandi* that is in line with the principles of commercial enterprise.

The authority would be released from a substantial administrative and financial burden and the port-user would be subjected to an altogether more accessible, transparent and predictable process.

It is submitted that the rights of third party victims, suffering harm as result of incidences of pilot error, would be strengthened through the privatisation of pilotage services as proposed; and the consequent transfer of liability from the ship-owner to the NPC. Third-parties would no longer be at the mercy of the conscientiousness of ship-owners. The compensation obtainable by third-parties would no longer be potentially reduced to the value of the offending *res*. In addition, claimants would be relieved from the undertaking of establishing the ownership of a particular vessel; an incredibly onerous and potentially far from straight-forward task. Crucially, this shift would be in keeping with one of the key tenets of the doctrine of vicarious liability; to safeguard the claims of innocent third-parties.

In transferring risk from the ship-owner to the pilot association, the benefit obtained by ship-owning interests is obvious. However, it is submitted, that such a move also has the potential to generate benefits which are less obvious in nature. It is contended that a reduction in the risk of the ship-owner, when viewed in conjunction with a more efficient pilotage service, constitutes a very real incentive for ship-owning interests to use South Africa's ports; expanding trade and revenue streams in the process. This point is made by Baird:

'Seaports are necessary to enable regions and nations to trade. But in today's global environment, seaports must be able to offer levels of efficiency and costs that are comparable with other ports. Ports at variance in a negative sense from what might be regarded as the industry 'norms' in term of costs and efficiencies will obviously be disadvantaged relative to other ports. In turn, this will render a region's or nation's industrial output at a competitive disadvantage to other regions and nations which enjoy access to more cost effective and advanced seaports'.¹⁹¹

¹⁹¹Baird 2000 *Int. Journal of Maritime Economics* 178.

It is necessary to stress that the partial privatisation of South Africa's ports – specifically the privatisation of pilotage services – is a viable means of compromise. It is somewhat trite that the state has a legitimate interest in ensuring that pilotage services are conducted in a safe and efficient manner. Through a specialised Pilotage Act, the state would be able to maintain a necessary degree of control. Privatisation along the lines proposed would not rob the state of its supervisory and regulatory capacity. Far from it, the absence of competition in the *schema's* tentative, preliminary stages requires a strong state presence to militate against market abuse.

It is contended then that the port authority should retain a degree of responsibility and subsequent control over the services delivered by pilots. The authority has a crucial role to play in providing oversight and regulation in a number of spheres including *inter alia*:

‘Training requirements and pilot qualifications, standards for obtaining a certificate or license and its revocation, operation of a vessel traffic management system, communication equipment and channels, investigation of incidents and follow-up actions, pilotage tariffs and financial record keeping, medical fitness and continued proficiency, reporting requirements to the relevant port authority’.¹⁹²

This is consistent with the results of the Napier survey,¹⁹³ the results of which provide a synopsis of the public port authority's role in the following terms:

‘The role of a public port authority is considered to include creating basic infrastructure (63[percent]), regulation and safety (46[percent]), ensuring fair competition and pricing (42[percent]), and the public good (40[percent])’.¹⁹⁴

Crucially, the involvement of the state through the port authority, in the above-mentioned spheres, and the resultant private-public partnership would guard against a loss of control; the primary concern raised by those opposed to privatisation.¹⁹⁵

The framework for this dynamic is provided by the partnership that lies at the root of the relationship between public and private interests. Baird identifies the schema set out above as the ‘PRIVATE/I model’ and is instructive in this regard:

‘Countries adopting the PRIVATE/I model tend to stress the need for efficient and advanced ports to help expand trade, to allow the state to withdraw from port operations, and to reduce pressure on the public sector budget from port expenditure. Experience of the PRIVATE/I model suggests it is possible for the

¹⁹²The World Bank ‘Alternative Port Management Structures’ 126.

¹⁹³See in this regard: Chapter h.

¹⁹⁴Baird 2002 *MARIT. POL. MGMT.* 282.

¹⁹⁵*Ibid* at 280.

state to leverage private sector investment in its ports without losing control of its ports industry or ultimate property rights in respect of port land'.¹⁹⁶

l) Obstacles to the privatisation of pilotage services in South Africa

It is trite that the most effective driver of reform is political will. However, in the South African context, it is difficult to envisage the necessary driving force required from government to facilitate the privatisation of pilotage services in the immediate future. South Africa has shown a general resistance toward privatisation as a concept.¹⁹⁷ The reason, or indeed reasons, for which are not entirely clear:

‘Few of South Africa’s, and even Africa’s, core SOCs, which dominate economies have been privatised or even partially divested. This may be partly because certain existing ideological and political environments prefer state control over that of free markets, and privatisation on a broader scale in South Africa seems highly unlikely over the next few years’.¹⁹⁸

An institutional hesitancy to support a proposal for the privatisation of pilotage services presents a very real and potentially insurmountable hurdle. This is particularly so as the best evidence shows that a solid and clearly defined public-private partnership is necessary for a scheme of privatisation to succeed. Simply put, both public and private interests must buy into the idea. Government co-operation and indeed support is a pre-requisite:

‘Privatisation works best when governments simultaneously adopt an effective regulatory regime, and promote competition and new entry into a deregulated market’.¹⁹⁹

If the government is to come to the table it must ultimately be convinced, ‘[that] the efficiency gain [is] larger than the societal loss’.²⁰⁰ That is to say that it must be satisfied that any short-term loss, be it in the loss of public-sector jobs or revenue, will be sufficiently offset by the positive long-term effects of privatisation; a streamlined pilotage service reducing public expenditure and facilitating an expansion in trade. The prospects of such an exercise are predicated upon the possession of a long-term view on the part of decision makers and – given the aforementioned climate of hesitancy – may prove to be no mean feat.

¹⁹⁶A Baird ‘Privatisation Defined; is it the Universal Panacea?’ 27 June 1999 at 9, available at <http://www.siteresources.worldbank.org/INTPRAL/Resources/338897-1117630103824/baird.pdf> accessed 07 September 2014

¹⁹⁷A Newman *Privatisation* 96.

¹⁹⁸*Ibid.*

¹⁹⁹*Ibid* at 98.

²⁰⁰*Ibid* at 108.

It is submitted that the pilots themselves, spurred on by the prospects of greater profit margins, present the most likely source of impetus for the privatisation of pilotage services.

Such is the breadth of the debate surrounding privatisation in the context of port services and ownership that it is somewhat problematic to view the privatisation of pilotage services and analyse the potential impact thereof in isolation. Whilst such discourse is beyond the scope of this piece, it is submitted that if the privatisation of pilotage services in South Africa were to take place it is likely and indeed logical that it would transpire as a product of a broader discussion ; a public-private partnership resulting in the privatisation of the majority if not all port operations.

m) Conclusion

After having recourse to South African labour jurisprudence, it is submitted that the creation of a servant-master relationship, between pilot and ship-owner or master, through section 76 (2) of the NPA does not accurately reflect the *de facto* relationship in which the parties stand.

After having recourse to the governing law, respective positions occupied by ship-owner and port-authority, broad-based considerations of policy and key tenets of the rationale behind the doctrine of vicarious liability; it is submitted that the provision's importation of the doctrine of vicarious liability and consequent foisting of liability on the ship-owner is illogical, unjust and impractical.

It is submitted that the privatisation of pilotage services in South Africa presents a solution alternate to the irrational imposition of the doctrine of liability; negating the need for the dynamic of the relationship of ship-owner or master and pilot to be dramatically altered by way of statute.

It is submitted that the re-organisation of pilots, as proposed, presents a viable framework for the shifting of liability, from ship-owning interests to pilot association, in a manner consistent with South African labour law together with the traditional and contemporary interpretations of the doctrine of vicarious liability.

It is submitted, as a result of its potential to yield a number of multi-faceted benefits, that the privatisation of pilotage services as proposed provides a solution palatable to government, ship-owning interests and pilot.

It is further and finally submitted that partial privatisation is preferable to comprehensive privatisation. Whilst conceding that the privatisation of pilotage services should ideally take place as a key element in a broader movement of the partial privatisation of South Africa's ports, an initial privatisation of pilotage services could provide both a driving force and working yardstick for the further privatisation of port services. And, in so doing, provide the foundation for South Africa to reap a number of wider, long-term benefits stemming from the partial privatisation of its ports.

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