



“COMPULSORY PILOTAGE: THE DIVIDED COMMAND”

Peter Dawson

Peter Dawson is an International Consultant with Oceanlaw New Zealand, and is based in Nelson. He is the founding partner of Dawson Edwards & Associates in South Africa.

At the risk of suffering a similar fate to the messenger, given the recent discussion in this magazine, I thought it appropriate to make some legal observations regarding pilotage and more specific observations regarding the “divided command” between a Pilot and the Master of a vessel. I will also look at the statutory exclusion of liability for acts or omissions of pilots.

A 1698 Dutch Ordinance sets out in graphic terms the (then) penalty for dereliction of a Pilot’s duty:

“If a Pilot runs a ship aground through wilfulness, by accident, through carelessness or bad reckoning, he is punished by the suspension of his Certificate, removal, banishment, corporal punishment, or even death, according to the aggravating or mitigating circumstances...”

Whilst corporal punishment has some appeal to Masters of vessels that have suffered at the hands of Pilots, the law has developed somewhat since then. Pilotage in England has been regulated since 1514 when Henry VIII issued the first Royal Charter to the Pilots of “Trinity House” at Deptford, granting them the sole licence to act as pilots on the country’s waterways. A succession of pilotage Acts regulate the position of the Pilot in England, culminating with the Pilotage Act 1987. This Act codifies and clarifies many aspects of pilotage and has the effect of making compulsory pilotage a function of individual harbour authorities.

In New Zealand the statutory provisions relating to Pilots are spread through several Acts and Rules.

Compulsory pilotage is a function of regional authorities, it being mandatory to navigate in a pilotage district with a pilot (under the Local Government Act 1974). A “*pilotage district*” was defined under the old Harbours Act 1950 and continued in force by s15(3) of the Local Government Amendment Act (No 2) 1999.

Part 90 of the Maritime Rules (“Pilotage”) (issued in terms of the Maritime Transport Act 1994) require the Master of a ship to ensure that a Pilot is carried on board the ship in a pilotage district unless the Master holds a Pilotage Exemption Certificate. Compliance with the rules relating to pilots is required under s60A of the Maritime Transport Act. Failure to comply with the provisions can expose a Master or owner to a \$10,000.00 fine (\$100,000.00 if the owner is a Company) or 12 months in prison.

The legislation is silent, however, as to the precise ambit of the Pilot’s function in respect of the navigation of the ship, the direction of its movements and the determination and control of the movements of the tugs assisting a ship under pilotage. This is in contrast to some overseas jurisdictions where the ambit of functions of the Pilot are statutorily regulated.

The “Divided Command”:

Much has been written of the relationship between the Master and Pilot and this relationship has been the subject of a number of reported decisions in English law jurisdictions. As a general rule, it can be stated that the Master always remains in command: “*Master’s orders, Pilot’s advice*” is the maxim. Delegation of the navigation of a vessel does not constitute an abandonment of command. The Pilot’s duties include the determination of course and speed, the berthing and anchoring of the vessel, the control and direction of the tugs. The Pilot “*has the con*” (an abbreviation of the word “*conduct*”) from the time he presents himself to the Master on the bridge until he leaves the bridge and hands over to the Master. During that period he has sole control of navigation. This gives rise to traditional log-book entries such as: “*Helm and engine to Master’s orders and Pilot’s advice.*” A

pilot however is not merely an advisor and various expressions are used to describe his role – these include “*he takes charge of*”, “*obtains charge of*” and “*has charge of*”.

The Master (as long as he acts reasonably) is free to question any action taken by the Pilot and even to countermand any order given by the Pilot, should he feel that the ship is being endangered. A further question then arises, which has been discussed in English law: (“*The Tactician* 1907 PD 244 relating to the duty to countermand the orders of a manifestly incompetent or even intoxicated Pilot”) and that is, does the law impose a duty to intervene upon a Master in appropriate circumstances where a Pilot is manifestly incompetent? English law appears to find that there is a duty upon a Master to intervene, but this is best described as a “residual” duty on the Master. This is not designed to govern circumstances where for example the Pilot is sober and not obviously incompetent. The question of when the Master should interfere is always a question of fact and dependent upon the individual circumstances of each case.

This rule of common law (to intervene) can place a Master in an invidious position where, for example, a Master or his officers are familiar with the handling, characteristics and the peculiar idiosyncrasies of their vessel and are required to stand back and allow the pilot to navigate the vessel. This problem is often compounded where there is ineffective communication between the Master of the vessel and the Pilot, owing to an inability to understand each other’s language.

Put differently, there must be a balance between the Pilot’s peculiar knowledge of the port and its local conditions and the Master’s knowledge of the idiosyncrasies of the vessel.

The Limitation of Liability:

In these circumstances the legislator intervenes to absolve the Pilot, and his employer, from liability for negligence or want of skill on the Pilot’s part (see s60B Maritime Transport Act). This skews the “*balance*” of the divided command in favour of the port authorities, as the Master hands over the conduct of the vessel to the Pilot, but cannot hold him accountable for any failure to discharge his duty. In fact, pursuant to s60B of the Maritime Transport Act the owner or Master can be liable for damage caused by the ship as a result of any fault in navigation, even when the vessel is under pilotage.

The exemption of liability contained in s60B for the Pilot only applies where the damage or loss arises from pilot error alone. Where other factors are involved it is the writer’s view that the port authority would lose its shield against civil claims. An example of this would be where incorrect tide data is given by a port authority to a Pilot, who then relied on the data in manoeuvring a vessel, with the result that the vessel went aground. The exemption of liability contained in s60B would not protect the port authority in these circumstances.

Conclusion:

We have merely referred to some aspects of an ostensibly simple, but in reality a complicated, legal issue. The subject of the divided command and the exemption of liability of Pilots and their employers has been the subject of considerable debate in the international maritime community. There has been much criticism of the current situation, particularly with the skew in the balance in favour of port authorities and there have been some suggestions that pilotage be subject to the ISM code. Alternatively, that policies of marine insurance be amended to make specific provision for pilotage error; or that a distinct IMO Convention be drafted to attempt to regulate the position. It is anticipated that the maritime rules now being re-drafted should provide clarity on the “divided command” and where liability should vest in the event of pilot error. It is suggested that useful recourse can be had to the 1987 Pilotage act in the UK in drafting these rules. It is also understood that the current investigation into the grounding of the “*Jody F Millennium*” will discuss some of the issues relating to pilots.