ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7510 SENATE LABOR & COMMERCE

Page 9 (b) Change to read "A licensed pilot who has not piloted in the region covered by his/her license at lease sixty (60) days during the two years prior to - - - - - - - - -"

Sec. 08.62.160 - Mandatory Employment of Licensed P' ts.

Page 11 Add sentence - "The State licensed pilot will be on duty at all times the vessel is underway, while on the waters covered by this chapter."

Sec. 08.62.175 - Pilot Organizations.

This section as written says nothing. The only reason that I can see for the proposed "Sec. 08.62.040-(a)(6) review and approve the bylaws and the operating rules of pilot association" should be that the state would recognize pilot associations in such a manner that they would be protected from anti-trust suits. This is the section that should sanction associations as long as their bylaws and operating rules are approved by the state.

Sec. 08.61.180 - Exemptions.

Page 13 (5), Change to Read - "Vessels of Canada, including Canadian built cruise ships under the Canadian flag, engaged in frequent trade between ----------"

Sec. 08.62.190 - Penalites.

Page 14, (a), Remove the words "when a pilot is available". This is another exception that needs to be removed. The section gives the vessel the right to proceed if the perils or hazards of sea prevent a pilot from reaching her, that is all that is appropriate. It is up to the board to see that there are an adequate number of pilots for the trade.

Also, the fine in this section needs to be raised to an amount that the state will be willing to enforce. In the past, pilots have reported sighting foreign vessels in Alaska waters without pilots, but the state has done nothing about them.

Sec. 19 - Transition.

Page 15, Sec. 2 - This section magnifies the problem raised by Sec. 08.62.120, (a)(2). Many of the presently licensed pilots in Alaska do not have the background that meets the requirements. Unless they are grandfathered, they will not be able to renew.

One very important item is not approached in Sec. 08.62.040. The section should set the criteria to be used by the board in determining the tariff for a pilotage district. Because the State of Alaska must compete with other areas for qualified applicants to become pilots, I suggest that the state establish a desired income for pilots equal to that of other Pacific Northwest pilots. The income should compare to that of the Columbia River Pilots, Columbia River Bar Pilots, Port Angeles Pilots, Grays Harbor Pilots, or Coos Bay Pilots. Perhaps an average of all of those association would be appropriate.

Thank you for your consideration of the above items.

Respectfully,

Capt. H. K. Elsensohn

Oct 30, 1990

ATTN:
Mary Lou Madden
Brad Pierce

Following seven pages are comments from Capt. Stuart Mack. We have discussed these on the telephone.

Looking forward to seeing you in Anchorage!

Bob Boyd

FAX # 619-423-0667

To: AMP
From: Stuart

If I were writing to Marilou Madden to respond to the advisory group's study and the proposed changes to the Alaska Statutes, I would say something like the following. I would also send copies to SEAPA and SWAPA.

Dear _____

Thank you for sending the copy of the Alaska Marine Pilotage Study. I was very pleased with the extent of the research and background material and the obvious care the analysts took to objectively study marine pilotage issues in the state of Alaska and to compare them to the situation in other states and how problems were resolved there.

Before commenting on the proposed changes to the Alaska statutes published by the Attorney General's office, I'd first like to make some observations on the material in the study itself. In reading the study it seems that all pilots and those associated with the shipping industry agree that the first obligation of pilots is "to protect lives, property and the environment of the state". The question then of how to achieve this goal becomes the dividing issue among all the concerned parties.

In the study there is one section devoted to the investigation of competition among pilots. Competition, both within and between associations--along with the topic of pilot qualifications--is the foundation of the problems within the pilotage service in Alaska.

As mentioned in the study competition does bring increased responsiveness to industry needs. However, responsiveness cannot be measured simply in terms of cost efficiency. For example, the two dissident pilots that broke away from SEAPA are surely providing a very cost efficient service to their employers. The pilots are happy because they have no overhead to speak of in their operation so a large percentage of the tariff collected goes to the pilots. The shipowners are happy because they have unrestricted availiblity of their pilots with. I suppose, low travel and per diem expenses.

But pilotage is a service. By not being part of a group these two pilots are not able to provide pilotage to other ships requiring pilots, such as those that arrive in the winter, or those that call on a random basis. The cost of providing a full pilotage service in southeastern Alaska falls on those willing to provide it, whether it is as profitable as the company work or not. In addition, an association of two pilots cannot meet the state mandate of providing an adequate training program. Pilots working on only one class of ship cannot train others to become fully

qualified pilots capable of working on all types of ships under all conditions.

There is a difference between serving as a pilot and serving as what amounts to a company employee.

The other aspect to consider in this situation is that the breakaway pilots were given extensive training by the other pilots in the SEAPA group. Without the opportunity to obtain a license and upgrade it provided by SEAPA, these two pilots would not have been able to form their own group. It seems as though the study recommends that all pilots be trained by the associations, meaning all independent pilots must come from their former associates.

This example also brings into focus the assertion that company pilots are unduly under the influence of the company, at the expense of safety. Two breakaway pilots are not nearly as able to resist company pressure as an association. If the two pilots lose their contract, they are quite restricted in their opportunities for further employment as pilots.

This situation is not, however, comparable to what SWAPA asserts about AMP. In the Western region it is SWAPA (which accounts for perhaps 20% of the pilotage service in the area) providing the threat of competition to an established organization. If SWAPA were not in the Western region, obviously, it would not be possible for a company to pressure AMP.

The pilotage situation in the Western region is unique in Alaska. It is only there that two pilot groups are working in the same area. That is, in southeast Alaska SWAPA does not compete for business, and in the remainder of the state SEAPA does not compete with other associations for work. It is only in AMP's primary revenue center (Dutch Harbor) that two associations are working.

Beside the issue of competition, the other important concern facing the state of Alaska is the qualifications of pilots, and the state's "certification of competency" in granting a pilot's license. It appears that the study and resulting proposals are trying to say that the state will grant a license as pilot--that indicates competency--but that the new pilot will not be truly competent until he has trained through an approved association training program.

The study notes vastly different opinions on the topic of trainee qualifications. On one hand are those that state that pilots must have "extensive sea experience on large vessels" in order to be an unlimited pilot, while elsewhere in the study (Attachment B) it is noted that through the apprentice system of pilot training as practiced primarily on the east coast no sea experience is required at all. Both routes lead to competent pilots.

Since the state will be approving rigorous training programs provided by the associations then the need for increasing the entry level requirements of pilots is not as great as it might appear. The issue is not so much the qualifications of trainees before they become pilots, but how well qualified and capable they are to serve as pilots once they have completed their training and examination.

Perhaps the state should consider the concept of licensing as a discretionary power and not an individual right. Another possibility is that the granting of a license is conditional upon completing an approved association training course.

The heart of the study is the explicit social contract established between the state and the pilots. As noted by Mr. Kirchner and Mr. Cloudy, the pilots will become instrumentalities of the state, serving in a quasi-public capacity. The benefits that will accrue to the state include the training provided by the pilot associations, the power to charter associations and regulate them through approval or disapproval of bylaws (and thus the selection of potential trainees), and the oversight of pilots' financial statements.

In effect, then, the state has modified its approach of administrating by enforcing regulations authorized by statute into a system whereby a third level is established. Under this system the state will now regulate the bylaws of the pilot associations, making them subject to Board of Marine Pilot regulation, which is subject to Alaska Statute. This system should provide the flexibility necessary to meet the divergent pilotage needs in the various parts of the state.

To the pilots' benefit the state will limit by statute their liability for accidents and help to protect them from anti-trust litigation.

What the study has not recommended and the proposed changes to the statutes do not accomplish is to stabilize the pilotage industry in Alaska. I do not believe it is in the state's best interest at this time to limit the number of pilots. What I do believe will best serve the state of Alaska, the shipping industry and the pilots themselves is to limit the number of pilot associations (and in this an independent pilot working for only one company could be considered an "association").

In Alaska, three pilotage areas are sufficient, each one served by only one association that is responsible for training and dispatching pilots, collecting tariffs and operating under their respective bylaws as approved by the state.

To expand upon the limited entry to the fishing industry analogy mentioned in the study, it is possible to consider

the entire fishing industry as similar to pilotage in Alaska. To limit competition for a finite resource the state has instituted limited entry. But instead of seeing this as limiting the total number of permits it is necessary to look at limited entry as requiring fishermen to belong to an association of fishermen in a specific geographical region, say the Bristol Bay District, or the Chignik District. Fishermen from one district cannot fish in another district.

Within each district there are regulations determined on a local basis, depending on the conditions and requirements of that area, giving the state very good control over the fishing in each district. As conditions change so do the regulations. The situation could easily be the same for pilots. The state sets policy by statute and regulation and then tailors more specific regulations for each pilotage area through the approval of association bylaws.

This way, situations unique to each area can be dealt with regionally instead of statewide. For example, southwest and western Alaska have no need for channel licenses, yet southeast does. Southeast and western Alaska have no need for VLCC requirements, but southwest does. Why have statewide regulation when regional regulation is so much more flexible? In this system, if a problem develops the pilot coordinator, in conjunction with the Board, can deal with only one group--the association for the area--instead of an assortment of pilots and associations, giving the state better control over the pilotage industry.

The other benefit of this system is that it eliminates competition, or the threat of competition from pilotage. No longer would pilots be unwilling to give dockings or other training to pilots for fear that they would break away and form competing groups. Pilots of one association could not be threatened by owners with replacement by another association. Restraint of trade and entry to association issues could be dealt with in the bylaws that are approved by the state.

As the study states "State pilot licenses can be considered both a certificate of competency and a franchise to perform a public service...". The dictionary (Webster's), as well as business practice, define a franchise as "the right or license granted to an individual or group to market a company's goods or services in a particular territory; the territory involved in such a right". Along with the duties and obligations conferred with the pilot's license should come the territorial benefits of the concept of franchise.

By its very nature a franchise involves exclusion and the state, through statute, should accept this. By becoming chartered (charter:"a grant, or guarantee of rights, franchises or privileges from the sovereign power of a state...; a special immunity, privilege or exemption"),

associations should also become franchised. As Mr. Cloudy states in Attachment C, "The State must realize that competition is not the goal of marine pilot regulation and that, to the extent monopoly promotes the goals of marine pilotage (e.g., safety and a reasonable return for professional effort expended), such should be recognized and accepted as legal and appropriate.".

I don't know about other boards in Alaska, but I once had a real estate salesmans's license in Colorado. As one of the conditions for licensure every salesman had to be employed, or maybe under the supervision (I don't remember the wording), of a real estate broker. I don't see why Alaska couldn't require a pilot (salesman) to work under the authority of an association (broker) and its bylaws.

In addition to comments on the study and its recommendations, the proposals put forth by the Attorney General's office also merit comment.

Sec. 08.62.010
The clause in this section requiring pilot members of the board to have 5 years of active service as pilots is an unfair burden on the members of Alaska Marine Pilots. Many of the members of this group have only three years service. I recommend either changing the requirement to pilots of record as of 1-1-88, to begin the 5 year rule in 1993, or to eliminate the service requirement. Also, as written, this regulation does nothing to prohibit a member of SWAPA from representing the western Alaska region, thereby giving them two pilot members on the board.

If the state is going to require board members to be residents of Alaska, it must define resident for purposes of this regulation. Many of the pilots in the western area do not live in the Aleutians, nor do many of the contract pilots working in southeast Alaska live in Alaska. The work schedules in these areas require months of duty at a time, with corresponding periods of vacation time, allowing these pilots more flexibility in their choice of residence. Some provision must be made to allow for this pool of expertise and experience to be part of the decision making process in Alaska state pilotage.

Sec. 08.62.040 (a)(4)
I'm not sure what the purpose of the clause "...provided that the board may adopt different tariffs within a region if justified" is. Does this mean that the tariff will be set by class of vessel? Without further clarification, I would eliminate this clause.

Sec. 08.62.040 (a)(5)
In the implementation of any body of regulation there are

always going to be interpretations and standard operating procedures used. In the past the board has used SOP's that had the effect of becoming regulations. I think this is unavoidable, but the existence of these procedures should be clearly stated in the statutes. Paragraph (5) seems to be an appropriate place to insert this notice.

Sec. 08.62.040 (a)(6)
This paragraph requires the approval of the board for the bylaws of each association. It does not provide for an appeal process for bylaws that are not approved. The clause should not only provide for an appeal, but it should also require re-approval at specified time intervals, or whenever changes are made. The question of the bylaws of pilots outside the associations is not addressed. If the state allows pilots to work outside the association system, it is in effect creating two classes of pilots: those in the associations that must adhere to the "social contract" and those outside of the associations that don't.

Sec. 08.62.080 (c)
This clause negates the whole attempt at resolving the competition issue in Alaskan pilotage. Paragraph (b) standing alone, would be much better. Areas or ports near the boundaries of two areas should be made part of both areas. These special areas should be limited to Yakutat, Chignik and Alitak.

Because of past practices in the westward area causing the inability of AMP pilots to increase the tonnage limits on their licenses, there must be a transition period in that area during which SWAPA pilots would be allowed to work in Dutch Harbor. The pilots allowed to work there should be limited to those showing a certain amount of recent pilotage in the area. There should be no blanket grandfathering of all pilots with western Alaska coverage.

At this point it must be emphasized that adoption of paragraph (b) does not regulate a certain class of pilots out of work. The pilots most effected by this change, those in SWAPA who have been willing to work in Dutch Harbor, will still have an ample amount of work to do in their primary region of southwest Alaska.

Sec. 08.62.100 (a)
As mentioned in the marine pilotage study, maybe Alaska should adopt a "discretionary" policy toward granting licenses. This would help to alleviate the problem of "regulation by exception" that is plaguing Alaskan pilotage.

Sec. 08.62.100 (b)
In this section I would add to paragraph 5 the clause "while holding master of 1,600 gross ton license".

I would also add a paragraph (6) two years of active service as a pilot in another pilot association.

I would add a seventh paragraph stating that a combination of the above service would be acceptable.

An eighth paragraph would provide for a mechanism for those candidates not meeting the above requirements to enter a pilot training program. This could include increased training at the association level, similiar to the apprentice pilot program as used on the east coast.

Sec. 08.62.120 (a)(2)
This paragraph must be rewritten. A pilot currently working in Alaska who has not met these new standards will have no opportunity to obtain more sea time without quitting piloting for a time. The inclusion of a new paragraph (6) in 08.62.100 (b) would resolve this problem. Otherwise, grandfathering will be necessary.

Sec. 08.62.120 (b)
The definition and purpose of the familiarization trips mentioned in this paragraph must be stated explicitly. As it reads, the paragraph implies that these trips are described elsewhere.

Sec. 08.62.150 (a)(8)
Currently, there is an inequity in the state tariffs. In the outport areas it can be less expensive for a ship to make a harbor shift for $250.00 rather than to pay a standby day of $600.00. This must be addressed before changing this clause from its current wording.

Sec. 08.62.175
A better wording of this clause might be to include the phrase "independent contractor" after the word associations. This would give statutory authority to the fact that pilots are independent within their associations for liability purposes.

The TRANSITION paragraph allows two renewals to meet the new requirements. As stated under the comments on Sec. 08.62.120 (a)(2), a currently working pilot will not have the opportunity to gain more sea experience without leaving the piloting business.

MAJOR ISSUES IN NEW LEGISLATION

1. REQUIRED PILOTAGE

A. Existing Law: AS 08.62.160 requires vessels navigating the "inside coastal waters of Alaska as determined by regulation" to employ a licensed pilot.

B. Board's Proposal: Section 14 of the Board's bill (pg. 9) would amend AS 08.62.160 to require pilots for vessels navigating "certain waters in, around and adjacent to the State of Alaska as determined by the board..."

C. Pilots' Proposal: Section 15 of the Pilots' bill (pg. 8) would amend AS 08.62.160 to require pilots for vessels navigating the "water of or adjacent to, to the extent permitted by federal law, the state as determined by regulation..."

COMMENTS: Either of the proposals would expand mandatory pilotage in the State. The Pilots' Proposal, however, appears to be the ultimate make work bill for pilots by requiring pilots in all Alaska waters, even in places where there is no good reason to have pilots (open seas).

2. PILOT ORGANIZATIONS

A. Existing Law: has no references to marine pilot organizations.

B. Board's Proposal: Section 16 (pg. 10) adds AS 08.62.175 to permit pilots to form themselves into pilot organizations. Section 5 (pgs. 2-4) amends AS 08.62.040 by adding paragraphs (6), (7) and (8) which give the Board power to review and approve organization bylaws and operating rules, audit the organizations and review and approve organization training programs. Section 15 (pgs. 9-10) adds AS 08.62.165(c) to provide that these organizations are not liable for the acts or omissions of their members nor are the members liable for the acts or omissions of the organization or the other members. Section 20 (pgs. 11-12) amends AS 45.50.572(a) by attempting to extend state antitrust immunity to these organizations.

C. Pilots' Proposal: Section 18 (pg. 9) adds AS 08.62.175 permitting pilots to form organizations. It goes on, however, to permit only ONE organization within each region. It further goes on to give the organization control over significant aspects of pilotage (dispatching, training and "other functions that the organization may assume"). Finally, it attempts to significantly circumscribe the power of the Board to review the articles, bylaws and rules of the organization by specifying narrow criteria to be applied by the Board in its review.

Section 5 (pgs. 2-4) repeals and reenacts AS 08.62.040 to give the Board various rights and obligations as to the organizations: (i) paragraph 3 requires the Board to recognize the organizations; (ii) paragraph 7 makes it clear that the training programs will be the

exclusive province of the organizations; (iii) paragraph 9 gives the Board power to review and approve articles, bylaws and rules of organizations but requires that they be approved if they meet the narrow criteria described above; and (iv) paragraph 10 gives the Board the power to audit the organizations. Section 16 (pg. 8) essentially follows the Board's approach regarding liability for acts or omissions. Section 24 (pgs. 10-11) covers the antitrust immunity for extends it only to "licensed" marine pilot organizations.

COMMENTS: The obvious purposes of the Pilots' Proposal are: (1) to put Alaska Coastwise Pilots out of business (that is the pilots organization that has just been formed to compete with Southeast Pilots Association (SEPA)); (2) to gain monopolistic powers for these organizations over the pilotage industry thereby effectively making it impossible for any pilot to exist outside of these organizations (somewhat ironic given the stated need in the legislative intent for pilot independence); and (3) to effectively allow these organizations to operate as a quasi-governmental entity with all the privileges that allows but without any of the oversight normally extending to governmental agencies. It would effectively put the shipping industry at the mercy of these organizations since no pilot could hope to work in Alaska unless they belonged to the organizations. The true power these organizations will have needs also to be understood within the context of the next item discussed; that being the fact that the pilot organizations will hold 3 of the 7 seats on the Board.

C. PILOT BOARD CONTROL

A. Existing Law: AS 08.62.010 provides for a 7-person Board to consist of 2 pilots, 2 representatives of the shipping industry, 2 public members and the Commissioner or his/her designee.

B. Board's Proposal: No change.

C. Pilots' Proposal: Section 2 (pg. 2) amends AS 08.62.010 to retain the 7-person Board but requires that it consist of 3 pilots, 2 shipping industry representatives and 2 members of the public.

COMMENTS: The proposal speaks for itself. The pilots seek to expand their power on the Board from 2/7ths to 3/7ths. Under existing law, they need to find 2 other members to agree with their positions. Under their proposal, they need to only find one.

D. PILOT RATES

A. Existing Law: AS 08.62.040(4) gives the Board the power to adopt regulations under the Administrative Procedure Act establishing standards by which pilotage fees may be established.

B. Board's Proposal: Section 2 (pg. 1) adds AS 08.62.005(a) in which it states that there is need to give the Board of Marine Pilots authority to establish pilotage tariffs. Section 5 (pg. 3) amends AS 08.62.040(a)(4) to give the Board authority to set pilotage tariffs.

Section 12 (pgs. 8-9) amends AS 08.62.150(8) to give the Board the power to discipline a pilot that charges, collects or receive an amount for pilotage services which is below tariff.

C. Pilots' Proposal: It is similar to the Board's Proposal except that the proposed AS 08.62.040(5) (pg. 3) seems to also put the Board into the business of approving training charges. It is not clear as to whether these are charges imposed on the pilots or to be passed through to the shipping industry.

COMMENTS: Existing law has been interpreted to preclude the Board from actually establishing tariffs. There is no good reason why pilots need to have their fees set by government. There is nothing about the pilot industry which suggests that the free market system cannot adequately address the problem of determining how much pilots should be paid. Government controlled pricing becomes appropriate when it is the government trying to restrain private industry from utilizing monopolistic power to price gouge (e.g., regulation of utilities). What we have here is a situation where the pilots are trying to use the government in order to gain more from the shipping industry than they could obtain through direct dealings. In other words, this is not a case of the government protecting the public from a monopoly; it is a group of people trying to form a monopoly by getting the government to protect them from the public. The mistake of this approach is only compounded when one appreciates that under the Pilots' Proposal, the Board setting the rates will, in all likelihood, be controlled by the pilots.

E. PILOT LIABILITY

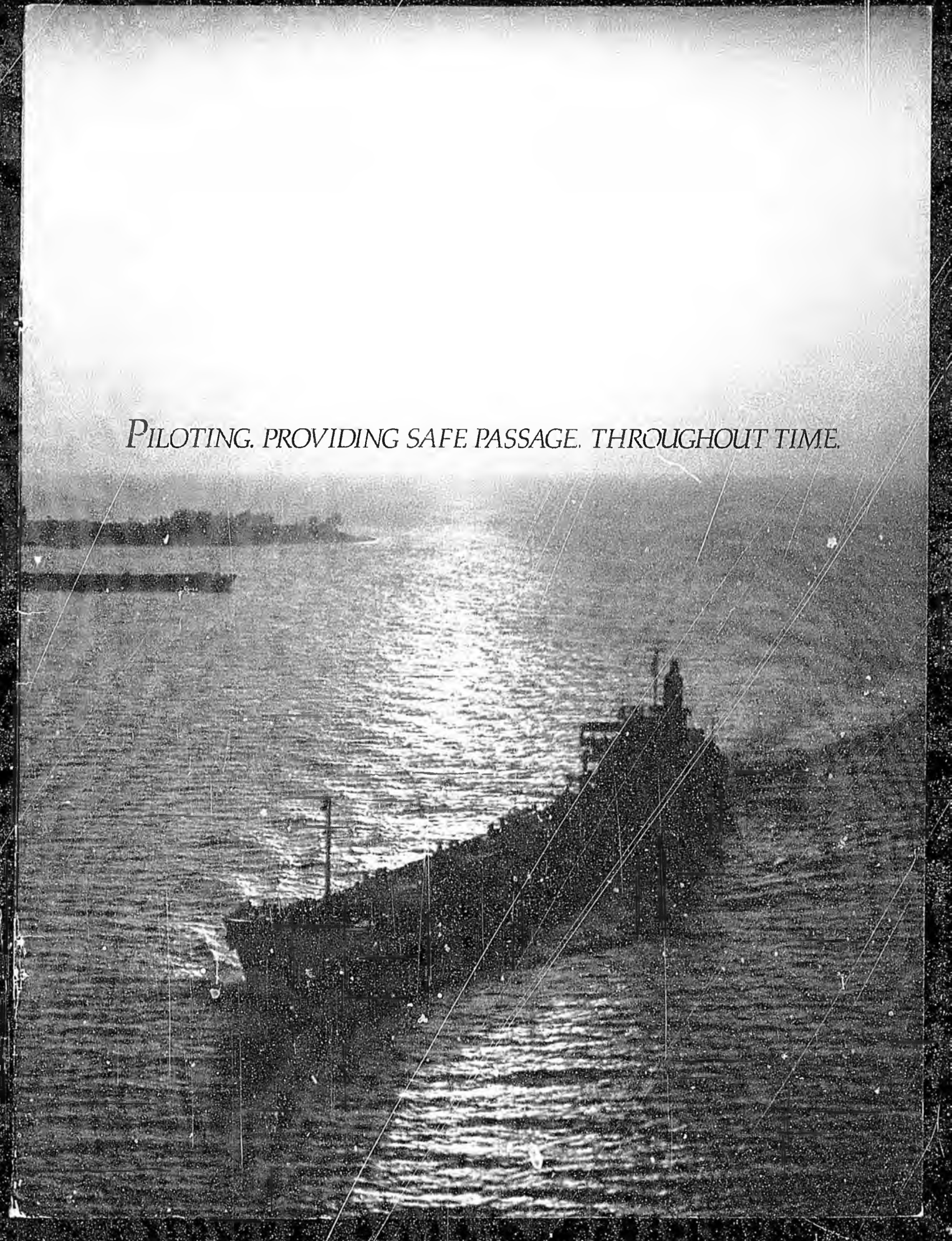
A. Existing Law: no limitation on pilot liability for errors or omissions.

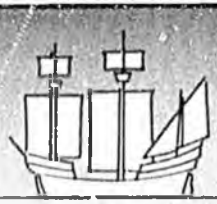
B. Board's Proposal: Section 15 (pgs. 9-10) adds AS 08.62.165 to limit individual pilot liability to $5,000 per incident (except in cases of gross negligence of wilful misconduct) while at the same time making it clear that the vessel and its owner are fully liable. Finally, pilot organizations are not liable for the acts or omissions of their members nor are members of organizations liable for the acts or omissions of other members or of the organization.

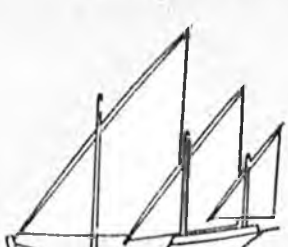
C. Pilots' Proposal: Section 16 (pg. 8) adds AS 08.62.165 which essentially tracks the Board's proposal except that it limits pilot liability to $5,000 even in cases of gross negligence.

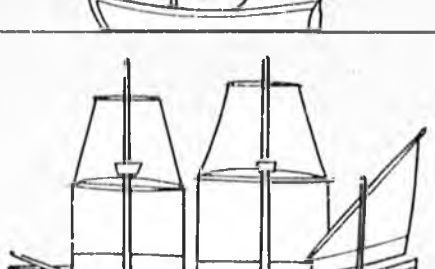
COMMENTS: This provision essentially brings us full circle. The required use of pilots is expanded; rates are arbitrarily controlled; the organizations gain monopoly power; and the pilots take control of the Board of Marine Pilots. Having done all this to force the shipping industry to accept the pilots on their terms, this last provision now makes it clear that the pilots have all the rights but none of the liabilities.

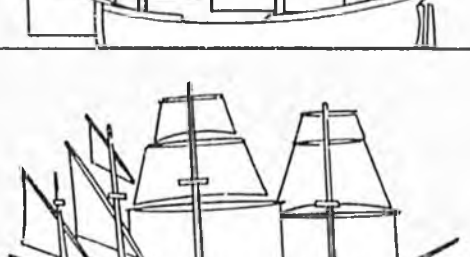
91-B/PILOTS.LEG - 2/21/91

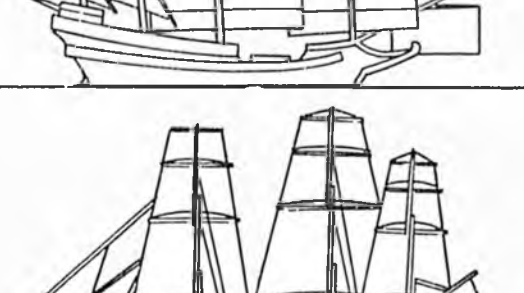

PILOTING. PROVIDING SAFE PASSAGE. THROUGHOUT TIME.

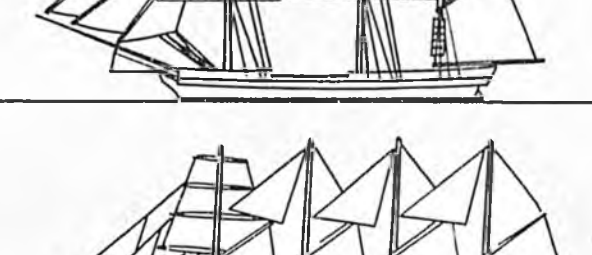






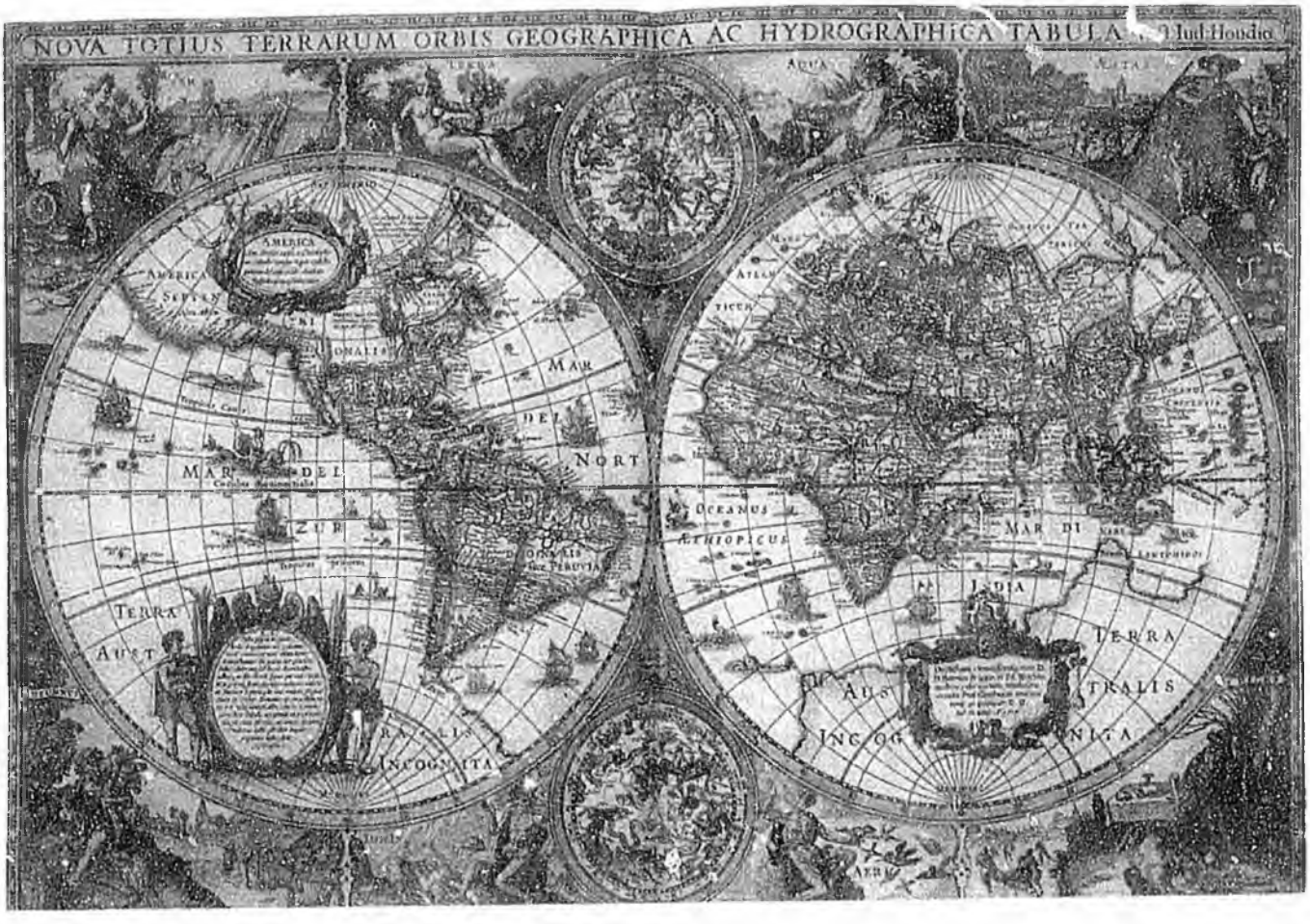






COVER: Pilot on Board.

THE HISTORY OF PILOTING



From the earliest records of civilization, man traveled the waters and relied upon the expertise of pilots to assure safe passage both when nearing and leaving the seacoast.

In the Holy Bible *(27, Ezekiel)* and in the writings of Homer and Virgil, there are references to pilots and the roles they played in assisting vessels that navigated close to shore.

Thus, from the cradles of civilization, the profession of piloting remains relatively unchanged. Today, pilots offer the same critical judgement and unsurpassed familiarity with land, sea, and the ever-changing elements, as they have since the dawn of history.

Early explorers realized the need for pilots and frequently engaged them in their travels. Both Marco Polo and Vasco da Gama used the services of Arabic pilots. These pilots exhibited superior navigational knowledge and used exceptionally sophisticated equipment, such as the al kamal, precursor of the octant and sextant, for determining a ship's latitude.

Seafarers in different parts of the world exhibited very specialized skills. The Mediterranean seafarers, for instance, most notably the Genoese and Venetian, were influencial because of their navigational skills. Early maps of the waters in the New World reflected an Italian and Jewish-Majorcan influence.

When Christopher Columbus first landed at tiny Conception *(or at Watling Islands)*, after crossing the then unknown western region of the Atlantic Ocean, he had Juan de la Cosa on board as his chief pilot. This same pilot also accompanied Columbus on his second voyage this time also acting as chief cartographer. Also aboard this voyage was Juan Ponce de Leon, who twenty years later in his search for

the Fountain of Youth, sighted the mainland of Florida on March 27, 1513.

The Spaniards explored both the Atlantic and Gulf coasts of Florida and had on board one of the very first pilots, identified as Anton de Alaminos, who not only offered extensive coastal experience, but also discovered the Gulf Stream.

Because current local knowledge was so crucial to the safe navigation of ships through reefs, bars, channels, and shifting sands these *"pilotos"* or pilots eventually specialized in handling vessels just in the confined waters of the ports.

By 1500, the Spanish maritime influence was felt everywhere from Spain to the Caribbean. The first seat of local government and the most important regional port was Santo Domingo, la Hispanola. Later Havana, Cuba became the center of Spanish regional government. San Juan, Puerto Rico followed as an important center too.

During that period, ships of the Spanish fleet serviced the areas under their control. They made stops from St. Augustine to St. Helena Sound *(once known as Rio Dulce)* and employed local pilots to guide their ships.

Even in the early years, American seaports used pilots. In fact, along the Mississippi River lived one of the world's most famous pilots— Samuel L. Clemens, better known as Mark Twain (1835-1910). He took his pen-name to demonstrate his devotion to the time he spent on riverboats. By the "mark twain" represented twelve feet or two fathom mark used by pilots in sounding shallows for the minimum depth considered safe for most river craft of that period.

About the Word "Pilot..."

Interesting to note, that the English word *"pilot"* is purported to have originated from the Dutch words *"piil"* and *"lood."* *"Piil"* means pile or pole and *"lood"* means lead. Today, the Dutch word for pilot is simply *"loods."* According to the Dutch, a pilot is one who uses a lead suspended from a line or pole to ascertain the water's depth. Even in today's more advanced system of piloting, the sounding lead remains an essential tool for those vessels not equipped with fathometers or other electronic navigational equipment.

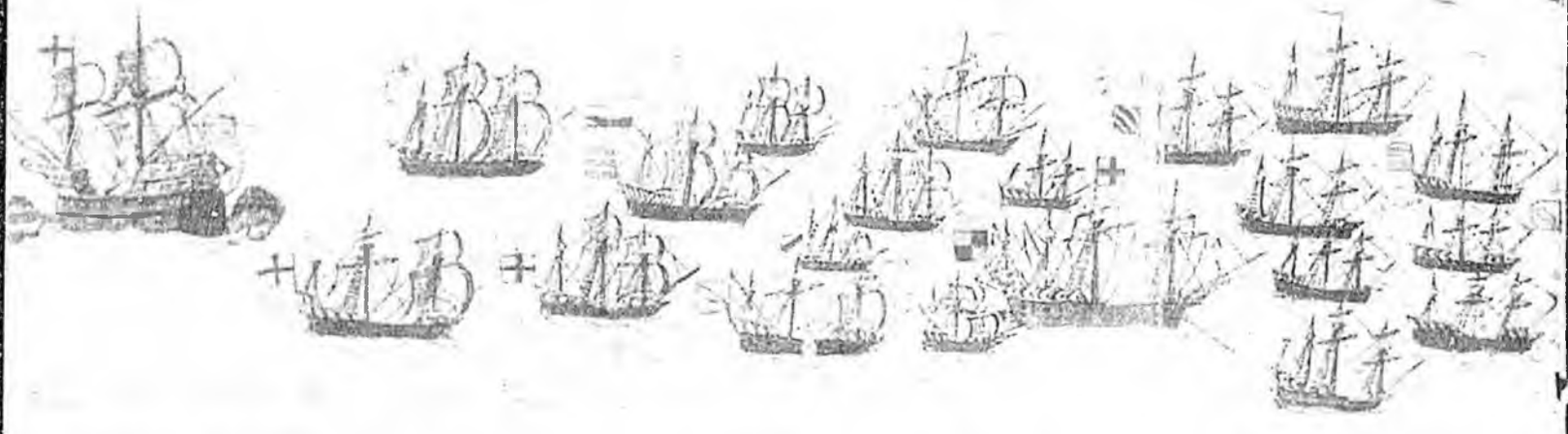
Actually, the Spanish used the word *"piloto"* long before the 1500's. At that time, pilots were responsible for navigation both on the high seas and near the coast. The name for these all-around high seas pilots was *"pilotos de altura"* and *"pilotage"* was their profession.

Piloting During the Spanish Rule. 1507-1819.

Spain, a major political power with one of the largest fleets in the world, was the first country to pass and enforce navigational regulations.

Laws regarding the employment of local pilots in the Florida "Presidios" (the name given to Spanish citadels) were generally known and accepted throughout the colonies. Slight modifications were dictated by the individual ports.

Beginning in 1507, most of the regulations were left to the authority of the "Casa de Contratacion" (the Oceanographic/Geographic Institute). Any modifications were created and enforced through the "Cedulas Reales" (or royal edicts).




GOLFE DE MEXIQUE

These first maritime regulations, which later applied in Florida, were compiled from a book of laws entitled "Consulado del Mar" and explained the duties of the local pilots.

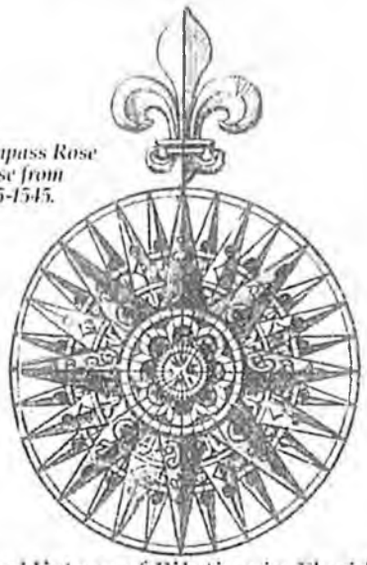
In February of 1522, the "Ordenanzas de Carlos V" (Ordinances of Charles V of Spain), also known as "de Sevilla," described the requirements of local pilots with special emphasis on those pilots engaged in piloting from the sea to the developing maritime centers upriver. For the most part, these ordinances were applied in all river ports.

In Father Escobedo's epic poem, "La Florida," many pilots are mentioned. According to the poem, one pilot distinguished himself as the "expert and famous pilot who enjoyed the full confidence of the King." This pilot, Gines Pinzon, was the very pilot who, in 1587, led the voyage from Havana, then the center of trade, to St. Augustine, Florida and sailed with 12 terrified Franciscan Friars, including the poet Father Escobedo. A year later, in 1588, Pinzon again was the pilot, for a vessel commanded by Capt. Vincente Gonzalez, traveling from St. Augustine to the coast of Virginia.

Based on these early epics, Spanish pilots were skilled navigators and mariners and possessed in-depth knowledge of the waters in and around Florida.

Despite the fact that the Dutch are frequently credited with having originated modern day harbor piloting in 1749, records of these early expeditions indicate the Spanish and Portuguese were using local "pilotos" hundreds of years before the Dutch. In fact, by 1460, the Nautical School of Sagres at Cape San Vicente existed and trained both navigators and pilots. In 1508, the position of "Piloto Mayor" was established in Seville.

In June 1586, Sir Francis Drake and his fleet faced St. Augustine, Florida, but he dared not enter because of his lack of local knowledge of the harbor. He anchored outside the bar and later, after acquiring the necessary marine knowledge, entered the waters, attacked the fort and occupied the town.
He wanted to conquer the towns surrounding the St. Johns River and St. Helena Sound, but without the assistance of a local pilot, he was forced to abandon his plans, thereby sparing those settlements his cruel plundering and looting.



Compass Rose in use from 1345-1545.

The History of Piloting in Florida.

Between 1608 and 1620, the Spanish explorers completed their coastal survey of the east and west coasts of Florida and prepared the first reliable "mapas" (or charts) of coastal Florida.

These charts, many of which were prepared in part by "Piloto" Diego Gonzalez, allowed other navigators to travel the waters with some safety.

On one of the earliest maps of Florida, an area of Maimi, now known as Lake Okeechobee, had the same sounding name as Miami. It was called Maimi River and Maimi Bay (also called Bocas de Miguel de Mora) but unlike today's pronunciation, Miami was pronounced My-me, following the Calusa Indians' pronunciation.

Events surrounding 1513:

Bartolome Diaz sailed around Cape of Good Hope	1500
Ferdinand & Isabella of Spain sponsored the voyage of Christopher Columbus to the New World	1492
Vasco de Gama sailed to Calicut, India	1498
The Casa de Contratacion, Seville, was founded for administrative purposes. A geographic and cartographic branch was added for the teaching of pilots	1503
The position of "Piloto Mayor" was created and Amerigo Vespucci was the first, followed by Juan Diaz Solis and Sebastian Cabot	1508
America's east coast explored from Los Martires (the area now known as Key West) to Cape Fear	1510
Juan Ponce de Leon explored the coast of Florida	1512
Michelangelo begins "Moses" part of tomb of Julius II	1513

Events surrounding 1507:

Nostradamus, Fr. astrologer, born	1503
Columbus returns from his last voyage	1504
Christopher Columbus died (born c. 1451)	1506
Maximilian I assumes title of emperor without being crowned	1508

LEFT: Early maps of Florida.

By the end of the 17th century, several forts were built close to the seacoast to provide greater defense of the region and the growing lumber industry. Forts were established in Tampa, Pensacola and Apalachicola. Local pilots were engaged to help ships navigate the coast with maximum safety.

In 1698, the first map of Pensacola was prepared.

About this time, Pensacola became the busiest coastal region in Florida, functioning much like a modern-day port. A bustling trading area, Pensacola was often counted on as an important defense of the Florida coast.

In 1763, Florida was transferred to British rule for a period of 20 years (until just after the American Revolutionary War). Florida pilots, for this short period of time, came under British pilotage laws.

In 1774, the "Recopilacion de las Leyes de Indias" (recompiling of the Laws of the Indies) was published in Madrid. It regulated piloting and navigation. Later these laws were also applied to Florida when the colony was returned to Spanish rule in 1783.

Between 1781 and 1810 Spain suffered tremendous defeats at sea and met with great political uprisings in America. This led to the independence of most of Spain's colonies. Ultimately, in 1818, Andrew Jackson led a United States invasion of the area and Spain ceded Florida to the United States in 1819.

By 1822, Florida became a territory, established a governor and legislative council. Seventeen years later, in 1839, the legislative board began licensing pilots.

Between 1837 and 1838 the American "Mosquito Fleet" was formed. This was a fleet of small, shallow draft ships that were manned by the U.S. Navy to maintain communications among the military outposts along the perimeter of the Everglades, to penetrate the swamps and develop the art of riverine warfare.

Events surrounding 1522:

Magellan begins voyage around the world — 1519

Charles V crowned Holy Roman Emperor at Aix-la-Chapelle — 1520

Luther finishes translation of New Testament. Wittenberg printer, Hans Luft, produces 100,000 copies over next 40 years — 1522

Events surrounding 1586:

Dominican Friars, led by Fr. Luis Cancer, landed in Tampa Bay to preach the gospel — 1549

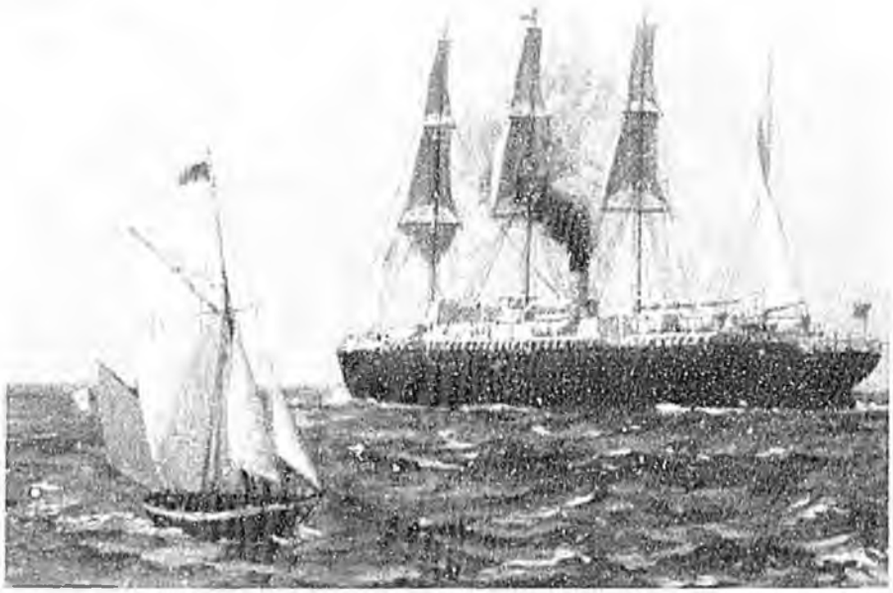
San Augustine founded — 1565

English Royal Navy gets graduated pay according to rank — 1668

Sir Francis Drake attacks Vigo and Santo Domingo Antwerp loses its importance as international port to Rotterdam and Amsterdam — 1585

Pope Sixtus V promises financial aid to send Spanish Armada against England — 1586

Henry III, King of France, assassinated Henry IV becomes King of France — 1589



LEFT: Pilot boat returning from station.

"Riverine warfare," a means to reach adversaries, extended naval power to restricted coastal and inland waters. It enabled the Mosquito Fleet to travel across Florida's extensive river system of interior waterways, through coastal areas with deep bays leading to populated areas, and into east swamplands which served as a refuge as well as a base of operations for enemy camps.

Florida's first comprehensive statute regarding Pilot Commissioners, pilots and pilotage dates back to August 3rd, 1868, when Chapter 1670 (the precursor of the present Chapter 310) was approved. Pilot associations, after 1868, were finally formed to unify pilot efforts, coordinate the safety of vessels and to stabilize pilot service.

Before pilot associations were formed, piloting was a highly competitive and often dangerous mad race to the sea. The need to maximize the safety of life, ship and property, as well as the need to preserve the natural environment, has never changed through the centuries. The Florida State Pilots' Association has, since its very beginnings, focused on those very objectives.

Before regulation, the competition among pilots was fierce, even comical at times. A law required each pilot boat to carry a light of prescribed brightness. But to display this light betrayed the boat's location to rivals. So each night, pilots would diligently light the lantern. Then, they pulled the light up under a bucket where it couldn't be seen. Their behavior was forgiveable. After all, they were fighting for their livelihood. They obeyed the law by carrying a lit lantern. But, according to the pilots, the law didn't state that the light had to be visible!

Until 1872 ships paid "offshore pilotage." This meant that if a pilot "spoke a ship" and boarded beyond the arc of visibility of the port's outermost and highest navigational aid, he was paid an additional sum which equaled one-fourth the customary rate. Gradually offshore pilotage was abandoned in favor of the bar pilot system in which pilots are engaged at the harbor entrance.

The evolution of pilot regulation was three fold. First, the licensing of the pilots. Second, the expansion of government regulation as needed. And third, the development of the pilot associations.

Today, more than ever, protecting Florida's natural resources, including its waters, harbors and ports, is crucial to the preservation of its residents' property, safety, and environment.

Piloting in Florida.

Among Florida's many distinctive features, are its 1140 miles of coastline, with 472 miles fronting the Atlantic Ocean and 674 miles along the Gulf of Mexico.

LEFT: Pilot heading out to board vessel.

ABOVE: Passenger vessel approaching her berth.

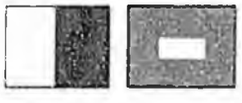
Surrounding 1608-1620

Galileo invents proportional compass Portuguese navigator Luis Vaez de Torres sails between New Guinea and Australia	1606
Founding of Jamestown, Va., 1st English settlement on American mainland	1607
Dutch scientist Johann Lippershey invents telescope Galileo constructs astronomical telescope	1608
Henry Hudson, English navigator, was abandoned by his crew and, along with his son, was set adrift and perished	1611
John Smith "A Map of Virginia"	1612
English colonists in Virginia destroy French settlement at Port Royal, Nova Scotia	1613
Francis Bacon created Lord Chancellor	1618
Pilgrims land at New Plymouth, Mass. under Miles Standish	1620
Dutch West India Company founded New Amsterdam, in the present New York	1621

Florida's seemingly endless coastline is served by 15 seaports: Fernandina, Jacksonville, Port Canaveral, Fort Pierce, West Palm Beach, Port Everglades, Miami, Key West, Boca Grande, Tampa, Port Manatee, St. Petersburg, Port St. Joe, Panama City and Pensacola.

The pilots of all Florida ports have the following things in common.
1. They all operate under Florida law (Chapter 310 F.S. and its amendments).
2. They all are controlled, regulated and governed by the Board of Pilot Commissioners and the Department of Professional Regulation under Florida State law.
3. Each pilot group has a special interest in the growth and development of its own port.

Any distinctive problems peculiar to certain ports have been met by legislative changes targeted to resolve these specific problems. On the whole, however, there remains a remarkable uniformity in the law affecting the 15 ports.

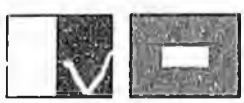


ABOVE: Docking between two vessels.

LEFT: Pilot boarding a freighter at sea.

RIGHT: Pilot boat returning to station.

BELOW: Vessel approaching port in foul weather.



Economic Importance of Ports.

A close look at Florida's seaports today reveals their enormous economic impact, broad ecological responsibility and the wide scope of cargo and cruise transportation. In a recent one-year period, over 15,000 cargo and cruise ship arrivals were recorded at

Florida's ports, transporting over 75 million tons of cargo and almost 3 million passengers.

All but a small percentage of all the tonnage handled in these ports is served by Florida State pilots. In addition, Florida pilots are responsible for the safe delivery of cargo and the smooth arrival and effortless departure of large numbers of cruise passengers.

Keeping Florida's numerous cargo and cruise ships running trouble free in the ports helps generate over 56 million dollars in state revenue with over 19 billion dollars in international trade to over 130 countries around the world. Because of the combined efforts of pilots, legislators and environmentalists, Florida's ports rank among the highest in the country for environmental concern.

This includes the smallest ports, like Boca Grande, as well as some of the largest, from Jacksonville, the nation's number one port for auto imports, and Port Everglades, Florida's largest port in petroleum products, to Miami, the world's largest port in cruise passengers, handling nearly 3 million a year.

Tampa, the largest port in the state in tonnage, handles its 780 million dollars in imports and exports with the same attentive care as its 100,000 plus passengers.

All totaled, Florida's 15 pilot-manned seaports provide over 129,000 jobs. More important, however, is that every call for pilot assistance from every vessel, must be answered. Day or night. Fair weather or foul.

The Florida State pilots meet the perils of the sea around the clock, preserving and protecting each vessel, each port's natural environment, as well as the property and lives of the general populace.

ABOVE: "Tug's all fast."

The pilot's responsibility is enormous. That's why it takes many years of study and training to become a fully licensed pilot.

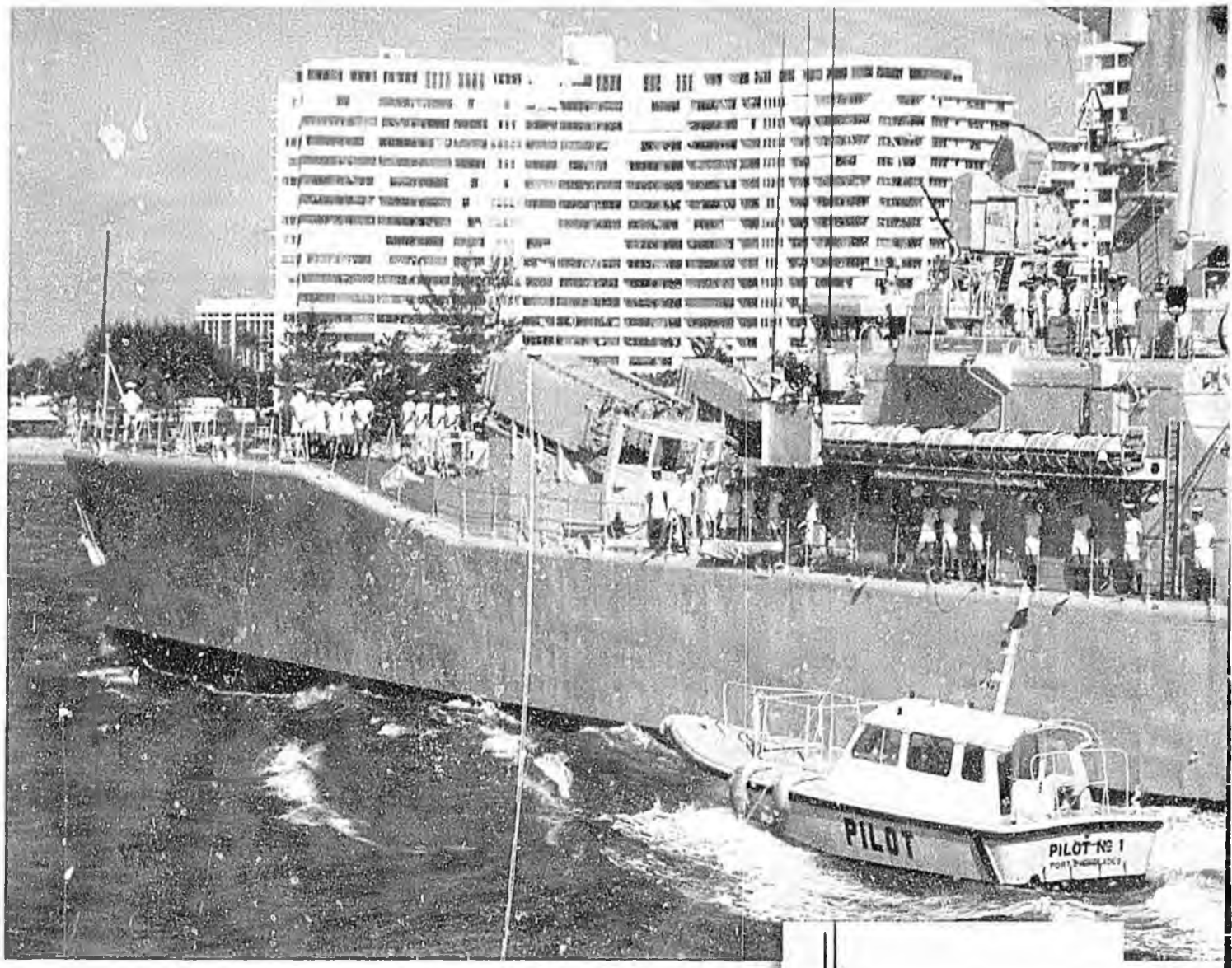
There's too much at stake to allow less than a fully trained person to navigate a ship into and out of port. The impending risk to life, cargo, ship and seaport function is too great to leave to anyone less than a state pilot operating under the strictest legislative ordinances. Insurance companies agree that vessels operating without a pilot may even be considered unseaworthy.

Events between 1781 and 1819

England takes possession of Florida	1763
Bernardo de Galvez recaptures from British, what is now known as the entire U.S. Southeast, from Baton Rouge to Florida and the Bahamas. This offensive ended with the recapture of Pensacola in May of 1781.	1779-81
Spain regains Florida	1783
First 10 amendments to U.S. Constitution ratified (Bill of Rights)	1791
Louis XVI and Queen Marie Antoinette were executed Holy Roman Empire declares war on France	1793
U.S. Navy established	1794
Napoleon appointed commander-in-chief, Italy	1796
Napoleon proclaimed emperor & crowned 12th amendment to U.S. Constitution	1804
U.S. declares war on Britain Louisiana becomes state of U.S.	1812

Events surrounding 1774

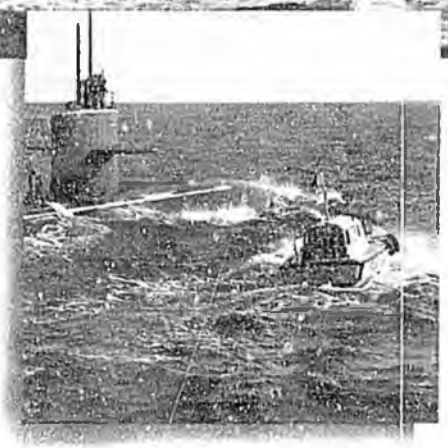
Boston Assembly demands rights of colonies, threatens secession	1772
Boston Tea Party	1773
American Revolution—Paul Revere's ride	1775



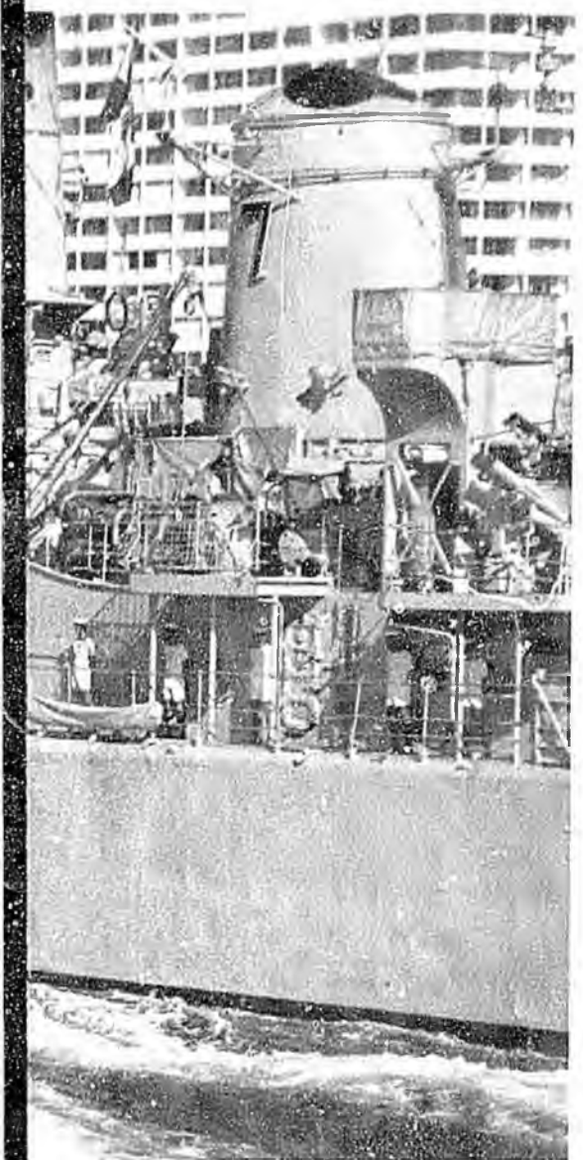
The Making of a Pilot in Florida.

The training program specified under Florida State Law (see appendices) is rigorous, thorough, and purposefully demanding. By the time a candidate becomes a full pilot he has proved his competence again and again.

A typical Florida state pilot has actively served in a leadership position with the merchant service as a ship's officer or captain. To attain those positions, he has had either to attend a four-year maritime college or work a minimum of six years "up through the hawse pipe" to become the lowest deck officer rating. After a minimum of two years and having run the gamut of responsibility and on-the-job training as a Junior Officer, he is eligible "to sit" for the U.S. Coast Guard's examination for Second Officer. Although, he now has the minimum requirements to make application for the Florida State Pilots' Examination, given by the state of Florida, many go on to become Chief Officers and Shipmasters before *they* consider themselves ready to take on the mantle of responsibility required of a pilot.



Pilot boarding a submarine.



ABOVE: Inbound "Man of War."

As you can see, only the most seasoned ships' officers are eligible to take the highly competitive exams, and only candidates with the highest scores are selected.

Although many candidates were drawn to the sea because of their sense of adventure, they soon realize that what is needed to be a full pilot is intelligence, experience, sound navigational skill and nautical know-how; excellent health, endless determination, and the command ability to quickly assess a dangerous situation and take timely and accurate action.

The Role of Pilots.

Because the special demands of piloting require instantaneous and correct assessment in the face of ever-changing conditions, every pilot must rely on navigational experience and keen judgement.

Pilots must have at their fingertips a complete background of extensive nautical knowledge. They must apply tides, currents, and wind effect with the basic dimensions of piloting to precisely calculate speed, drift, set, position, depth, height, and maneuvering characteristic.

Special Master Judge John Upchurch, before a Senate Economic, Community and Consumer Affairs Committee stated, "I came away with the impression that our state is blessed with a group of highly professional, highly trained and highly qualified harbor pilots. Our system seems to be working very well in practice. We have an excellent safety record, and I think this is something that we should work to preserve and protect."

Pilots are painfully aware that one slight miscalculation could cause millions of dollars in damage. With massive tankers, giant ocean liners and today's huge container vessels, there are no "small mistakes."

Employing the services of a pilot will not completely eliminate all casualty, but risk is markedly minimized if one is on board.

Pilots today use many sophisticated instruments to utilize fully existing conditions of tide. Tidal prediction tables and real time measurement systems accurately determine oceanographic parameters to give a ship owner maximum revenue draft and to improve a seaport's competitive advantage.

As early as 1789, when our country just established its new government, the first legislation regarding piloting was adopted. It delegated authority over all matters concerning to piloting to the states.

1789 — The French Revolution starts
The First U.S. Congress meets in New York
First steam-driven cotton factory in Manchester

Events surrounding 1872:

1870 — *Franco-Prussian War*

1871 — *Treaty of Washington settles differences between Britain and U.S.*

1872 — *Edison perfects the "duplex" telegraph*

1880 — *T.A. Edison and J.S. Swan independently devise the first practical electric lights*

In addition to navigating ships safely through Florida waters, pilots also contribute both time and effort in protecting Florida's fragile environment, encouraging the need of quality education, enhancing seaport marketability, and supporting a myriad of public service projects. A Florida pilot is assumed to be not only a total professional, but also an involved member of the community.

During World War II, the Navy in the northern area of Key West, created a mine field to protect an anchorage for convoy ships. They set mines, then surrounded them with netting, leaving only 2 channels to pass into the anchorage. Because the pilots were the only ones who knew exactly where the mines were, only they could safely guide ships in and out. On several occasions, enemy submarines tried and failed to enter. The numerous ships remained safe from harm.

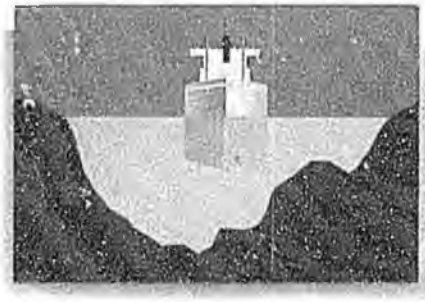
While the shipmaster's allegiance is to owner and company, the pilot represents the people of Florida and must remain beyond the ship owner's ability to influence risk.

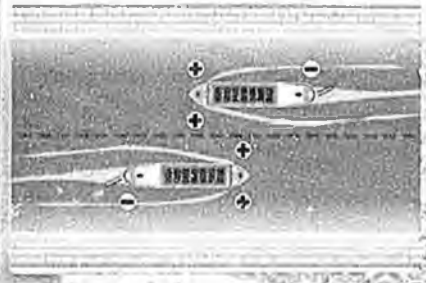
"They do not want to hear about all the storms you encountered at sea. They just want to know if you brought the ship in safely."—Anonymous

Pilots have always rendered invaluable service both in peace and during war. For instance, under Admiral Emory Land's advice, pilots were considered so important during World War II, that all pilots who entered the naval reserves were automatically promoted to "Lieutenant Commanders" by the U.S. Navy.

LEFT: Illustration of Bottom Effect.

RIGHT: Passing in narrow channels. Bow, Bank, and Prop Effects.

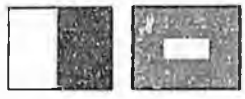




How Pilotage Rates are Fixed in Florida.

Because pilotage regulations are uniquely complex and require a great deal of particular knowledge, Florida, like other states, has created a special governing body (the Board of Pilot Commissioners), just to analyze and regulate pilotage.

Whenever rates are adjusted, a Rate Hearing Board is appointed and a hearing is held in the port where the rate is to be modified. This Board considers optimum pilot number to adequately service the



The High Demands of Piloting.

A closer look at Florida's piloting legislation, namely Ch. 310 F.S., clearly reveals how Florida's laws focus on the protection of public interest. For instance, Ch. 310.001 reads:

"The legislation recognizes that the waters, harbors and ports of the state are important resources, and it is deemed necessary in the interest of public health, safety, and welfare to provide laws regulating the piloting of vessels utilizing the navigable waters of the state in order that such resources, the environment, life and property may be protected to the fullest extent possible. To that end, it is the legislative intent to regulate pilots, piloting and pilotage to the full extent of any congressional grant of authority, except as limited in this chapter."

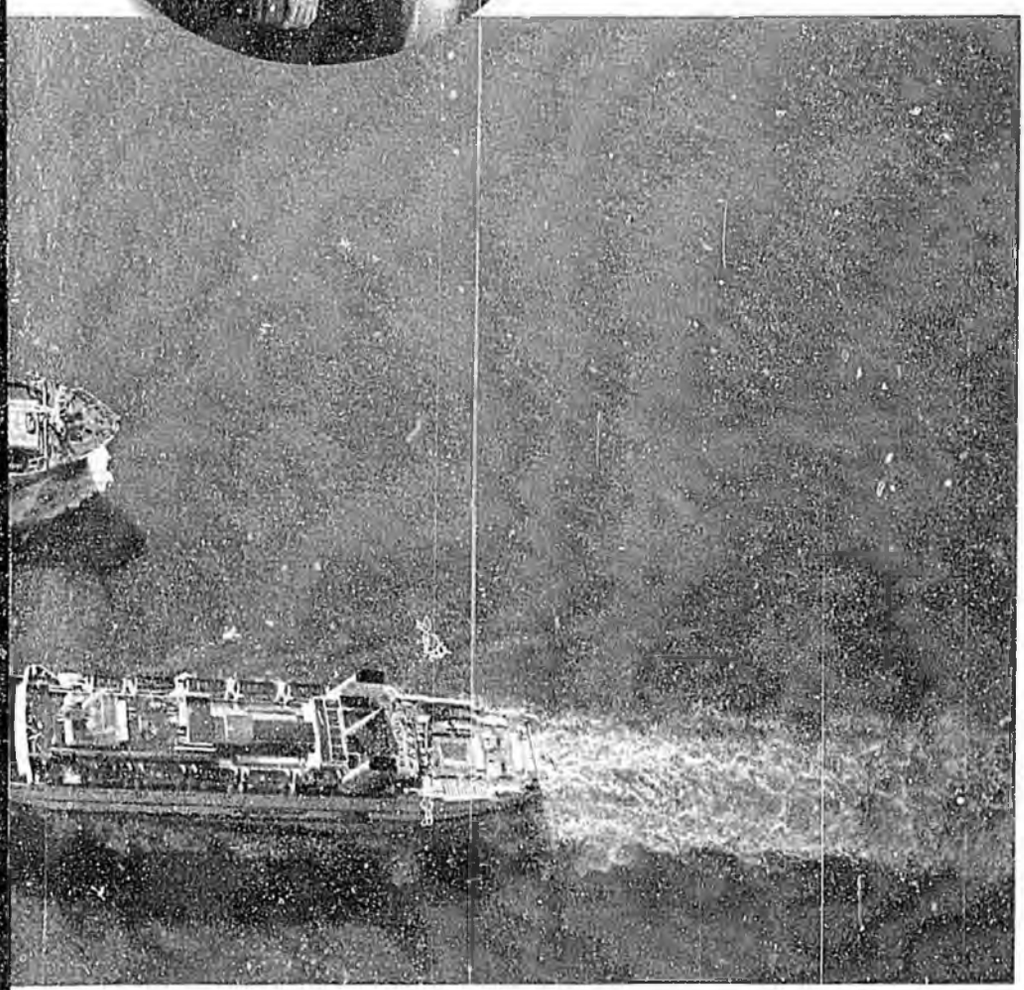
needs of a particular port versus equitable compensation to determine appropriate pilotage rates for that port.

Because all sectors are equally represented on a rate hearing board (one pilot, one representative of industry, and three consumer representatives), it is reasonable to assume that neither the pilot nor industry are dissatisfied with the objectivity of the Board of Commissioners' rate setting.

On August 20th, 1821, in Pensacola, Florida, Major General, Andrew Jackson, Governor of Florida, issued an ordinance on piloting and pilotage.
It established a Board of Commissioners, namely the "Commissioners of Pilotage," appointed by the Governor to establish fees, investigate and analyze all complaints filed against pilots, and to make certain that anyone acting as a pilot had passed certain examinations and had been approved by the Governor.

LEFT: Pilot coming vessel.

BELOW: Starboard to starboard passing.



SIGNIFICANT DATES IN DECADES 1940-1986.

World War II begins	1939
Penicillin successfully used in the treatment of chronic diseases	1943
World War II ends *First atomic bomb detonated in New Mexico*	1945
First hydrogen bomb (U.S. exploded at Eniwetok Atoll, Pacific, Nov. 6th	1952
Eisenhower inaugurated as President of U.S.	1953
Dr. Jonas E. Salk (U.S.) developed antipolio serum	1954
U.S.S.R. launches 1st earth satellites: Sputnik I and II	1957
First U.S. satellite launched from Cape Canaveral (Explorer I) *Alaska becomes 49th state*	1958

The Importance of Legislative Regulation.

Pilot boards have provided an invaluable service to shipowners, property owners and environments in every port, both in Florida and across the country—at no expense to the taxpayer. Boards of Pilot Commissioners have functioned satisfactorily under the law for nearly 200 years. Obviously, this system has passed the test of time.

An issue that has been discussed since the first pilot laws were enacted is deregulation and its effect on the safety of our ports and the results of a conflict of interest between a vessel owner's economic needs and a pilot's judgement of acceptable risk.

If pilots are forced to compete with each other, it is possible that a pilot will compromise safety considerations in order to accommodate the financial interest of the shipowner. And in so doing, he will try to establish a competitive edge over another pilot.

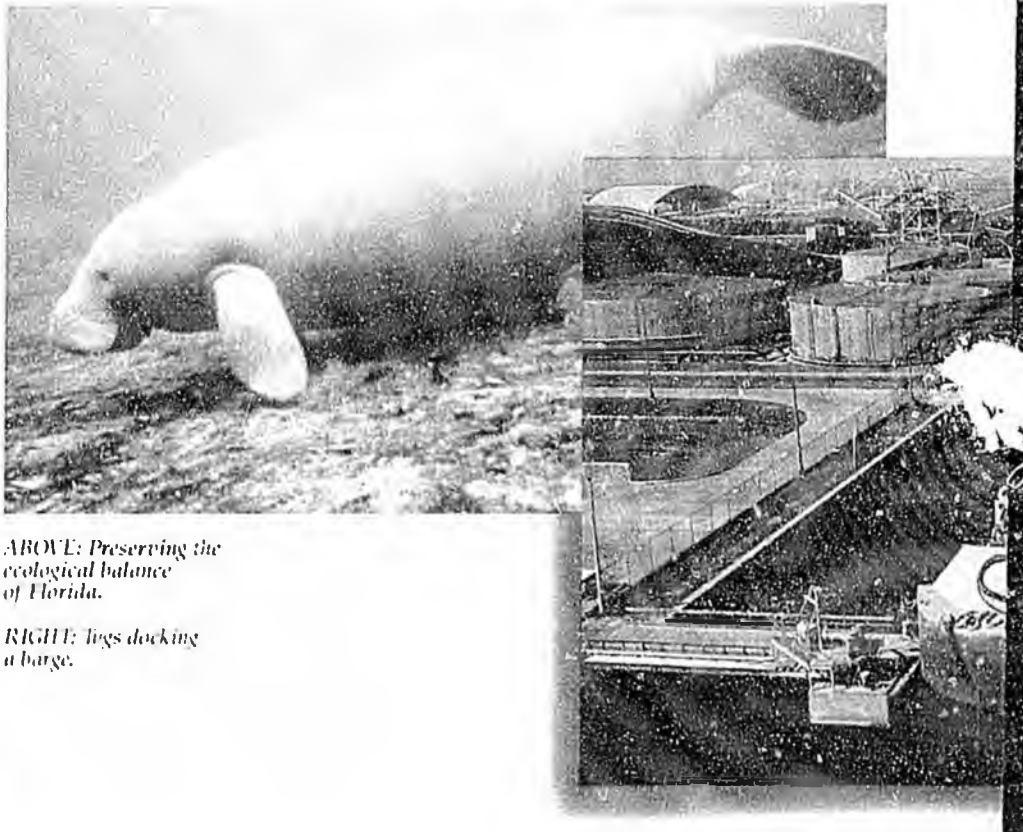
In a recent legislative presentation, Captain George Quick, President of Masters, Mates and Pilots; Pilot Division, best summed up the reasons to keep legislation as it now stands. He stated: "It is fundamental to an effective compulsory pilotage system that the selection, control, and compensation of the pilot be non-negotiable and beyond the shipowner's ability to influence or the essential independent judgement of the pilot will be compromised in his assessment of what risks are acceptable."

He continued, "The pilot's independent judgement and decision making on issues affecting the safety of ship movements should not be compromised by pressures from shoreside business managers. To give the shipping industry the right to negotiate with pilots gives them the ability to control the pilots' actions at the expense of the state's interest in maritime safety."

Eugene F. Sweeney, Vice-President of Hvide Shipping, Inc., in addition to being a consumer of piloting services, came to the same conclusion when he testified before Judge John J. Upchurch, Special Master for the Florida Senate, Sunset Review of Chapter 310, Florida's Pilotage Statutes, on September 20, 1985, in Miami, Florida.

An excerpt of Vice President Sweeney's testimony included this comment "The concept of a state pilot excludes any right of the shipowner and pilot to mutually agree on the terms of their relationship. The right as to selection and control are not properly the subject of negotiation. They are established by the state to serve the state's superior interest."

It is clear that keeping legislation regarding piloting as it now stands, eliminates the temptation to forfeit safety because of profit. Current law, then by its very nature, assures the integrity of the pilots and the safety of our harbors.



ABOVE: Preserving the ecological balance of Florida.

RIGHT: Tugs docking a barge.

20th Century M[illegible]stones in Florida P[illegible]ag.

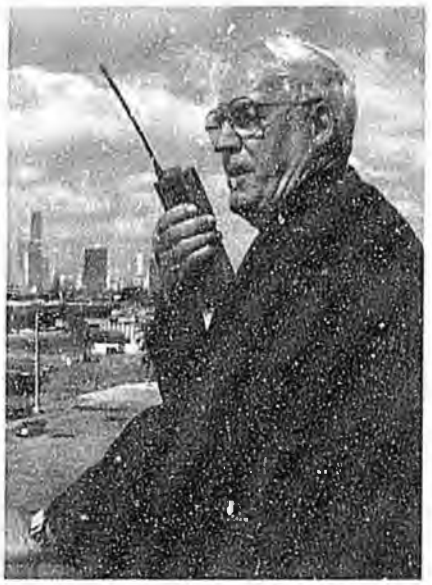
Between 1880 a[illegible] 1970, Statutes remained essentially intact with minor changes. In 1975, Florida was the first state to centralize the regulation of pilots within the state.

1978 ushered in the First Sunset Review of Piloting Statutes, followed by a Second and Third Sunset Review in the '80's. These statutory alterations, along with new implementations of changes in the rules, revised Chapter 310 and brought modifications in the composition of the Board, upgrades in pilot requirements including more extensive examinations, and changes in rate making procedures. Even the law mandating the maximum number of pilots in each port was modified to allow the Board to set pilot number by supply and demand.

The Future of Piloting.

Despite the advances of technology, the growing concern for ecology and the ever-increasing economic development of the cruise and shipping industries, the preservation of Florida's navigable waters still relies strongly on the experience, skill and expertise of pilots, as well as upon the statutes and regulations of the State of Florida governing them.

"I want to meet my pilot face to face before I cross the Bar." —Alfred, Lord Tennyson (1809-1892)



ABOVE: Pilot directing tugs.

From man's beginnings at sea, mariners around the world recognized the need for pilots. They realized the necessity of regulation and the need for enforcement.

Those same objectives are as applicable today as they were hundreds of years ago. It is interesting that in a world that constantly changes, some things remain constant. Like the importance of preserving the environment, providing safe passage and protecting life and property.

By continuing a close legislative watch on all matters pertaining to piloting, we can rest assured that our waters, harbors and ports will continue to remain safe from harm—not just for us, but for future generations to come.

"Familarity with danger makes a brave man braver, but less daring. Thus with seamen: he who goes the oftenest around Cape Horn goes the most circumspectly." —Herman Melville (1819-1891)

Fidel Castro assumes total power as Prime Minister of Cuba

Berlin Wall constructed

President John F. Kennedy assassinated

Richard M. Nixon inaugurated as 37th U.S. President

U.S. Army and Navy intervened in Vietnam War

U.S. Apollo 11 and 15 crews become 3rd and 4th groups to explore the moons surface

Gerald F. Ford becomes 38th President of U.S.

Jimmy Carter inaugurated as 40th U.S. President

Ronald Reagan becomes 41st U.S. President

Reagan wins 2nd term in office

"The History of Piloting," commissioned by the FLORIDA STATE PILOTS ASSOCIATION, INC.
"Serving the Ports of Florida Since 1868"

Special recognition and gratitude to

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for his tireless efforts in steering this historical record
and to
Captain Jorge Navarro Custin
Captain William A. Arata
Captain John R. Gonzales
for their technical assistance and support in this endeavor

Grateful appreciation to Florida Historical Museum and Peabody Museum

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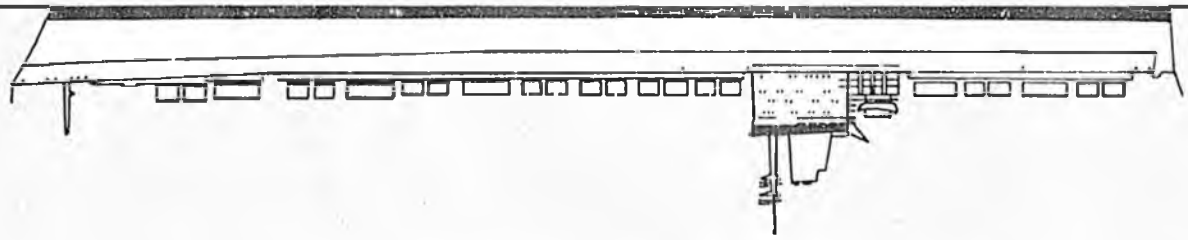

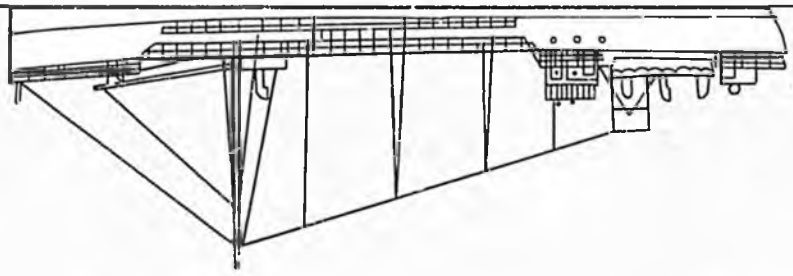

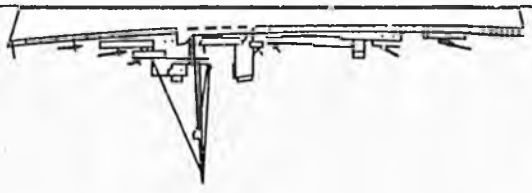

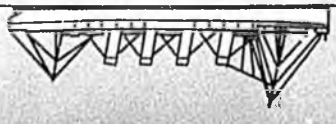

SECOND EDITION

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THE LAW OF TUG, TOW, AND PILOTAGE

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must be deemed surplusage, or, at best, an attempt to clarify what may have been deemed an ambiguity in the 1933 Act. Under no circumstances, may it be construed to modify or repeal the 1933 amendment.

In *Ralph E. Havens,* 1964 A.M.C. 1759, 335 F2d 185, the court commented on *Ace Waterways* and noted that the present Coast Guard interpretation of Section 361, as evidenced in its regulations implementing that section and others relating to inspection of vessels "seemed at odds with Judge Holtzoff's thesis in *Ace Waterways.*"

About the best guess that can be made is that the phrase "this Act" was meant to be "this Title," meaning Title 52, Revised Statutes. See, in this connection, *Bryant v. Rucker,* 1953 A.M.C. 833, 111 F.Supp. 309. Unless this interpretation is made, 46 U.S.C.A. 215 (a part of Title 52 but not a part of Chapter 14) would apply only to "steam" vessels and not at all to the many motor-propelled ships which today ply our waters.

The subject of Federal versus state jurisdiction over pilotage came before the U.S. Supreme Court again in *Ray v. Atlantic Richfield Co. et al.,* 1978 A.M.C. 527, 435 U.S. 151 (1978). That case involved a clash between the Federal Ports and Waterways Safety Act of 1972 (PWSA), 33 U.S.C.A. 1221 *et seq.* and 46 U.S.C.A. 391a on the one hand, and the Washington Tanker Law, RCW 88.16.170 on the other. The PWSA in essence authorized the Secretary of the Department of Transportation to establish and operate vessel traffic services and systems for ports subject to congested traffic as well as to require ships to comply with the systems and to have the equipment necessary to do so. Exercising this authority, the Secretary, through his delegate, the Coast Guard, issued navigation safety regulations and promulgated general rules, communication rules, vessel movement reporting requirements, a traffic separation system, special rules for ship movements in Rosario Strait of Puget Sound, descriptions and coordinates of separation zones and traffic lanes, etc. The Washington Tanker Law had three operative provisions: (1) a requirement that every oil tanker of 50,000 deadweight tons or larger employ a pilot licensed by the State of Washington while navigating Puget Sound and adjacent waters; (2) a requirement that every oil tanker of from 40,000 to 125,000 deadweight tons either possess certain safety features or

utilize tug escorts while operating in Puget Sound; and (3) a size limitation, barring tankers in excess of 125,000 deadweight tons from the Sound.

The District Court held that under the Supremacy Clause of the Constitution the state Tanker Law was wholly invalid. The Supreme Court affirmed in part, reversed in part and remanded.

The Supreme Court agreed that the requirement of the state law compelling the employment of a state-licensed pilot was invalid insofar as it applied to enrolled and licensed vessels but held that the state was free to require registered tankers in excess of 50,000 DWT to take on a state-licensed pilot. The Supreme Court likewise agreed that the design requirements, *standing alone,* were invalid in light of the PWSA and its regulatory implementations but upheld the alternative requirement of tug escorts. Finally, the Court struck down the size limitation contained in the state law. Justices Marshall, Brennan and Rehnquist concurred in part but felt that the size limitation was valid. Justices Stevens and Powell concurred in part but felt that the tug escort provision was invalid.

For other decisions involving the distinction between Federal jurisdiction over enrolled and licensed vessels and state jurisdiction over registered vessels, see *People v. MacDonald,* 1972 A.M.C. 2090 (NYM); *Blair v. Blue Spruce,* 1970 A.M.C. 1298, 315 F.Supp. 555 (D,Mass.); *Soriano v. U.S.,* 1974 A.M.C. 283, 494 F2d 681 (CA-9); *Ohrn v. R.I. St. Pilotage Comm.,* 1975 A.M.C. 327 (St.,R.I.); and *Jackson v. Marine Explorations Co., Inc.* (1979), *supra. Jackson* contains a scholarly exposition of the history and ramifications of the Federal-state dichotomy in the inimitable style so characteristic of Chief Judge John R. Brown of the Fifth Circuit.

Summary

In summary, the status of Federal versus state regulation of pilotage may be stated as follows:

1. All coastwise seagoing vessels (i.e., all vessels not under register) when navigating within the jurisdiction of the United States must be under the direction of a pilot licensed by the United States Coast Guard.

2. All vessels other than those engaged in the coastwise trade (i.e., vessels sailing under register and "public vessels") are subject to the licensing regulations of the state whose waters they are plying.

having given a bond in conformity with an applicable by-law may limit his liability for "neglect or want of skill" to a maximum of £100. Similar provisions exist under the laws and regulations of the Commonwealth Nations. See discussion, *infra*, under heading "Boards of Pilot Commissioners."

Duties and Responsibilities of Pilots

No better description of the duties and skills of a pilot can be found than that set forth in *Atlee v. N. W. Packet Co.* (1874), 88 U.S. 389, in which Justice Miller stated:

> The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning, and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality and is made aware of the dangers of such locality if any exist. But the pilot of a river steamer, like the harbor pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees, and its openings between trees, are all landmarks by which he steers his vessel. The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand-bars, snags, sunken rocks or trees or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand-bars newly made, of logs or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously, in the course of a long voyage. He should make a few of the first "trips," as they are called, after his return, in company with other pilots more recently familiar with the river.

> It may be said that this is exacting a very high order of ability in a pilot. But when we consider the value of the lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high.

Later cases citing *Atlee* are: *Ralli v. Troop*, 157 U.S. 386; *Davidson Steamship Co. v. U.S.*, 205 U.S. 187; *General Petroleum Corp. v. City of Los Angeles*, 1941 A.M.C. 510; *Matheson v. Norfolk & North American S.S. Co.*, 1934 A.M.C. 1451, 73 F2d 177 (CA-9); *Newfoundland Export & Shipping Co. v. United British S.S. Co.*, 1934 A.M.C. 272, 69 F2d 300 (CA-5); *Essex County Electric Co. v. M/S Godafoss*, 1955 A.M.C. 755, 129 F.Supp. 657 (USDC, Mass.); *Utility Service Co. v. Hillman Transp. Co.*, 1956 A.M.C. 2005, 142 F.Supp. 473 (USDC, Pa.); *Barbey v. S.S. Stavros*, 1959 A.M.C. 1542, 169 F.Supp. 897 (USDC, Ore.); *Johnson Construction Co. v. S.S. Rio Orinoco*, 1966 A.M.C. 791, 249 F.Supp. 182 (USDC, Pa.); *Dampsk. Atalanta v. U.S.*, 1929 A.M.C. 851, 31 F2d 497 (CA-5); *Transportes Maritimos de Estados v. Roth*, 1923 A.M.C. 696, 289 F2d 155 (USDC, Mass.).

His responsibilities are admittedly great. As Justice Curtis put it in *Cooley v. Board of Wardens for the Port of Philadelphia*, 12 How. (U.S.) 289:

> . . . A pilot, so far as respects the navigation of the vessel in that part of the voyage which is his pilotage ground, is the temporary master charged with the safety of the vessel and cargo, and of the lives of those on board, and intrusted with the command of the crew. He is not only one of the persons engaged in navigation, but he occupies a most important and responsible place among those thus engaged. . . .

Justice Story stated as early as 1836 in *Hobart v. Drogan*, 10 Pet. (U.S.) 108 that, "His is properly the duty to navigate the ship over and through his pilotage limits." And in *Ralli v. Troop*, 157 U.S. 386, the court stated:

> . . . to the pilot . . . temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course and speed and the time, place and manner of anchoring her. . . .

Where the piloting is required to be done upon waters which serve as the boundary between two states, the pilotage laws of both states apply.[8]

3. No state may discriminate in its pilotage laws in the rate of pilotage or half-pilotage between vessels sailing between the ports of one state and those sailing between ports of different states, nor may any state discriminate against any vessel propelled in whole or in part by steam, nor may any state discriminate against a national vessel of the United States.

4. No state or municipal government may impose upon coastwise pilots other or additional requirements than those provided for by the Federal government.

5. Pilotage on the Great Lakes is governed by a reciprocal arrangement between the United States and Canada, pursuant to legislation enacted in 1960. Essentially, registered vessels of the United States and "foreign vessels" navigating certain designated portions of the Lakes must have in their service a United States registered pilot or a Canadian registered pilot for the waters concerned. In undesignated portions, there must be on board such registered vessels and "foreign vessels" a United States registered pilot or a Canadian registered pilot, or "other officer qualified for the waters concerned." The authority for Canadian pilots to serve in United States waters in the Great Lakes is in effect only so long as Canada extends like reciprocity to United States licensed pilots. So-called "lakers" (vessels which navigate exclusively on the Great Lakes) may have officers on board who are licensed by the appropriate agency of either the United States or Canada. Provision is also made for the formation of voluntary "pools" by voluntary associations of pilots to provide the facilities and arrangements necessary for rendering the pilotage services required by the Act. Thus, a new Federal system of pilotage has engrafted upon it certain salient features of state pilotage systems. For the full text of the Act, see 46 U.S.C.A. 216–216(i).

Bonding of Pilots

A number of state pilotage acts require that pilot licensees be bonded and it is not unusual for such a bond to be required as a prerequisite to the issuance of a license.

8 See special provisions relating to Great Lakes pilotage, *infra*.

Since such bonds relate to the doing of a maritime act, it has been held that admiralty jurisdiction applies. *Fort Armstrong*, (USDC, Ga.) 1931 A.M.C. 1145, 51 F2d 1063. See also, *Haller v. Fox*, 51 F2d 298 (USDC, Wash.), and *Insurance Co. v. Dunham*, 78 U.S. 1.

Such bonds are ordinarily strictly construed in favor of the obligor—the party giving the bond. *Leggett v. Humphreys*, 62 U.S. 66; *Washington v. London and Lancashire Indemnity Co.*, 10 Fed. 641; *Moody v. McGee*, 1930 A.M.C. 1677, 41 F2d 515; *McGrath v. Nolan*, 1936 A.M.C. 724, 83 F2d 746 (CA-9).

While the bond may run to a state, an officer thereof, a pilot board or other person designated by statute, the party injured by reason of the negligence of the pilot may be compensated under the bond if the intent of the statute is clear and its language shows, expressly or by implication, that it is intended for the benefit of the injured party rather than to the obligee. *Fort Armstrong*, 1931 A.M.C. 1145, 51 F2d 1063 (USDC, Ga.).

On the other hand, it was held in *Moody v. McGee (The Eldean)*, 1930 A.M.C. 1677, 41 F2d 515 (construing a Texas bonding statute for pilots requiring the giving of a bond for the faithful performance of the duties of his office), that there had been no breach of the condition of the bond since in piloting a ship the pilot was not discharging an official duty. The court stated, in part:

> . . . A pilot, after receiving his license, is at liberty to pursue his vocation or not, as he sees fit. He is under no legal obligation to accept employment from anyone. In piloting a vessel he is not discharging any official duty. . . .

This view was followed in *McGrath v. Nolan*, 1936 A.M.C. 724, 83 F2d 746 (CA-9). There the condition of the bond was that the pilot and his sureties were liable to the persons interested, i.e., the vessel or her cargo. Hence, a seaman seeking recovery for injuries sustained by reason of the negligence of the pilot was not one of the beneficiaries intended to be covered by the statute.

As a practical matter, the amount of such a statutory bond is usually set so low that an opportunity to recover is more illusory than real. This was recognized in Oregon in 1957 when the pilotage act was amended to delete any reference to a requirement of a bond.

The system is different in Great Britain and the Commonwealth Nations. Under the Pilotage Act, 1913, by virtue of Sec. 35, a pilot

See also, *The Oregon*, 158 U.S. 186; *McGrath v. Nolan* 1936 A.M.C. 724, 83 F2d 746 (CA-9); *Dampsk. Atalanta v. U.S.*, 1929 A.M.C. 855, 31 F2d 961 (CA-5); *Union Shipping & Trading Co. v. U.S.*, 1942 A.M.C. 709, 127 F2d 771 (CA-2); *Grays Harbor County v. The Brimanger*, 1933 A.M.C. 368, 18 P2d 25, 171 Wash 396; *State v. Turner*, 34 Or. 173, 56 Pac. 145; *The Christiana* (1850) 7 Moo. P.C. 160, 13 E.R. 841; *The City of Cambridge* (1874) L.R. 5 P.C. 451; *The Tactician* (1907) P. 144, [1904-7] All E.R. Rep. 743, 10 Asp. M.L.C. 534, C.A. Compare, for example, the language of the court in *Ralli v. Troop, supra*, with the decision in *The Christiana, supra*, where the court said:

> The duties of the master and the pilot in many respects are clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipment, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances we think that his commands are to be implicitly obeyed. *To him belongs the whole conduct of the navigation of the ship*, to the safety of which it is important that the chief direction should be vested in one only. (Emphasis supplied)

The pilot's responsibility is manifold and includes many duties. See, for example, *The Agricola* (1843) 166 E.R. 659 (time and manner of dropping anchor exclusively within the province of the pilot); *The Gipsey King* (1847) 166 E.R. 858 (method of "catting" the anchor, preparatory to bringing up a vessel at her anchorage ground, within the province of the licensed pilot); *The Oakfield* (1886) 5 Asp. M.L.C. 575 (pilot should decide whether to proceed in fog); *Shaw Saville and Albion Co., Ltd. v. Timaru Harbour Board* (1888) 6 N.Z.L.R. 456 (NZ) (duty to make a proper start where a pilot is in charge of a ship which is being towed); *The Octavia Stella* (1887) 57 L.T. 632, 6 Asp. M.L.C. 182; *Re The Lotus* (1861) 11 L.C.R. 342, 2 S.V.A.R. 58 (Can.) (anchoring); *The Monte Rosa* [1893] P. 23, 7 Asp. M.L.C. 326 (position anchor carried); *The Schwalbe* (1860) 14 Moo. P.C. 241, 15 E.R. 295 (to give orders to the helm); *The Lochlibo* (1851) 7 Moo. P.C. 427, 13 E.R. 945; *The Carrier Dove* (1863) 2 Moo. P.C. (N.S.) 260, 15 E.R. 899; *The Ocean Wave* (1870) L.R. 3 P.C. 205, 16 E.R. 812, P.C. (to decide when to get underway or to hove to); *The Batavier* (1854) 9 Moo. P.C. 286, 14 E.R. 305; *The Calabar* (1868) L.R. 2 P.C. 238 (to determine the speed of the vessel); *The Princetor* (1878) 3 Asp. M.L.C. 562 (to let go a second anchor); *The Julia* (1860) 14 Moo. P.C. 210, 15 E.R. 284 (to advise as to the necessity for employing a tug); *Gerwi (Grounding)*, 1973 A.M.C. 383, 467 F2d 456 (CA-3) (pilot about to take a deeper draft vessel into a channel which had been used for vessels of a lesser draft under a stronger duty to check depths); *Canal Barge Lim. Procs.*, 1973 A.M.C. 843, 480 F2d 11 (CA-5) (pilot required to inform himself of special current conditions arising from circumstances known to him); *Alter Co. v. Federal Barge*, 1976 A.M.C. 2357 (ND,Ill.), *aff'd* 544 F2d 522 (CA-7) (pilot chargeable with knowledge of changes in river conditions when the means of obtaining such information are available).

Since the pilot is clothed with an aura of competency, he must bear the burden of fulfilling that obligation with proficiency. He is required to possess qualities of expertness and dexterity in the domain of his pilotage area and he must use careful navigating skill in the performance of his duties. Upon his failure to possess the requisite skills, or if possessing them he neglects to use them, he is held liable for any injury or damage caused thereby. His negligence may often, therefore, be more readily premised than those who are not charged with such a degree of expertise. Stated simply, since he is considered an "expert" or a "specialist," he is held to a higher degree of care by reason of his proficiency. The court stated it concisely in *Barbey Packing Co. v. S.S. Stavros*, (USDC, Ore.) 1959 A.M.C. 1542, 169 F.Supp. 897, at 1550 and 1551, as follows:

> The reason a vessel employs a pilot is because of the pilot's particular knowledge of local conditions. . . . *Compagnie de Navigation Francaise v. Burley*, 183 Fed. 166, *aff'd* 194 Fed. 335. . . .
>
> Under the rationale of *City of Long Beach v. American President Lines*, 1955 A.M.C. 1548, 223 F2d 853, the contract for the highly personal services of the pilot contained an implied covenant that such service would be performed with the necessary skill and without neglect. *The City of Long Beach* case, *supra*, involved a pilot hired under a compulsory pilotage act, as contrasted to the non-compulsory act here involved. . . . If a pilot was hired to move a vessel from one point to another it is difficult to see how different standards of care would be imposed on the pilot, depending upon whether he was hired under a compulsory or non-compulsory pilotage act. Logic would seem to dictate that for the safety of the vessel, her crew, and such

> property as might be affected by the ship's movement, the pilot should be held to a high standard of skill and care for the safe passage of the vessel.
>
> . . . A showing of ordinary negligence on the part of a pilot in the performance of his duty is a maritime tort within the jurisdiction of this Court. Furthermore, the situation is analagous to an obligation on the part of a stevedore to perform his services in a workmanlike manner. See *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, 350 U.S. 124, 1956 A.M.C. 9. The failure of the pilot in this case to conform to the standard demand of his profession breached an implied covenant that his services would be performed with all necessary skill and care.

See, also, *Selim v. Naviera Aznar*, 1976 A.M.C. 673 (ND,Ohio) where the court noted that a tug, a ship's master and the pilot owed to the vessel towed a similar duty, i.e., to exercise reasonable care and maritime skill in performing their services commensurate with that which prudent navigators performing similar services would employ. However, once a pilot's training and capacity have been established, the burden shifts to those attacking his competency to prove the shipowner's lack of due diligence in accepting him. *Grace Line, Lim. Procs.*, 1975 A.M.C. 991, 517 F2d 404 (CA-2).

Duty of Shipowner, Master, and Crew

Even though the pilot has "charge of" the ship and to him belongs the whole conduct of the navigation of the ship, the owners of the vessel are responsible for the sufficiency of the ship and her equipment, the competency of the master and crew, and their obedience to his orders which, under ordinary circumstances, must be explicitly obeyed. *The Christiana* (1950), *supra; The City of Cambridge* (1874), *supra; The Ape* [1916] P. 303, C.A.; *The Batavia* (1854), *supra; The Velasquez* (1867) L.R. 1 P.C. 494, 16 E.R. 378, P.C.; *The Iona* (1867) L.R. 1 P.C. 426, 16 E.R. 344, P.C.; *S.S Alexander Shukoff v. S.S. Gothland* [1921] 1 A.C. 216, 15 Asp. M.L.C. 242, H.L.; *The Tactician* [1907], *supra; The Elysia* [1912] P. 152, 12 Asp. M.L.C. 198; *The Yorkmar*, 1977 A.M.C. 805, 434 F.Supp. 715 (D,Md.); *Gypsum Carrier Lim. Procs.*, 1979 A.M.C. 1311, 465 F.Supp. 1050 (SD,Ga.); *Nippon Yusen v. Zepher Shipping*, 1971 A.M.C. 949 (D,Mass.).

In *The Batavier, The Velasquez, The Iona*, and *The Alexander Shukoff, supra*, it was noted the paramount duty of the master and

the ship's crew was to keep a good lookout and inform the pilot of anything occurring in navigation which may require his attention. In *The Iona*, the court noted that the duty of the pilot was to attend to the navigation of the ship and the master and crew to keep a good lookout. In *The Alexander Shukoff*, the court pointed out that the pilot is entitled to the same assistance from a lookout as would in the ordinary course be given by the lookout to the officers in charge of the vessel.

In *The Tactician, supra*, the court held that the pilot was entitled to the active assistance of the master, not by way of interfering with the navigation but in pressing upon his attention such a matter as the nature of the lights of another vessel about which the pilot had apparently formed a mistaken opinion involving risk. In *The Elysia, supra*, it was held that though the pilot was negligent, so was the vessel by reason of the master's failure to call to the pilot's attention that another vessel was at anchor and his failure to remind the pilot of the desirability of sound signals.

In *The Yorkmar, supra*, although the pilot was "compulsory," the vessel owner was not permitted to escape liability *in personam* for a bridge collision where the vessel's unseaworthiness (inoperable radio transmitter) was a contributing factor. In *Gypsum Carrier Lim. Procs., supra*, the vessel owner was held 80% at fault in a collision with a railroad drawbridge for failure to have a proper lookout and to have the vessel's radar properly manned.

Attention is called to *The Fina Canada*, [1962] 2 Ll.L.Rep. 113, where the court held that where an efficient officer is keeping a radar watch and passing along information to the pilot, the pilot is not obligated to keep the radar watch himself.

In *The Mobile* (1856) 10 Moo. P.C. 467, 166 E.R. 1024, a collision occurred while the pilot was unavoidably below for a few minutes. The vessel owners were held liable.

Master's Duty to Intervene

Notwithstanding the relatively awesome responsibility attached to the pilot, the master of the vessel is nonetheless still in command of his vessel and, in appropriate circumstances, must relieve the pilot if the latter is manifestly incompetent. Consequently, if the master observes or discovers the incompetency of the pilot it is his duty to

interfere with, warn, or even to take over and relieve the pilot. As Justice Swayne said in the *China*, 74 U.S. 53 (1868):

> . . . It is the duty of the master to interfere in cases of the pilot's intoxication or manifest incapacity, in such cases of danger which he does not foresee, and in all cases of great necessity. . . .

In *The Oregon*, 158 U.S. 186, the court stated:

> . . . While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the master is not wholly absolved from his duties while the pilot is on board, and may advise with him, and even displace him in case he is intoxicated or manifestly incompetent. He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties.

See also, *The City of Canton*, 1925 A.M.C. 887, 6 F2d 6 (CA-5); the *Brenta II*, 1929 A.M.C. 897, 32 F2d 209 (CA-2); *Union Shipping and Trading Co. v. U.S.*, 1942 A.M.C. 709, 127 F2d 771 (CA-2); *Dampsk. Atalanta v. U.S.*, 1929 A.M.C. 855, 31 F2d 961 (CA-5); *McGrath v. Nolan*, 1936 A.M.C. 724, 83 F2d 746 (CA-9); *City of Los Angeles v. Standard Transfer Co.*, 1929 A.M.C. 1287, 32 F2d 988 (CA-9); *The Framlington Court*, 1934 A.M.C. 272, 69 F2d 300 (CA-5); *Tankers and Tramps Corp. v. Jane McAllister*, 1964 A.M.C. 2551 (USDC, NY); *Fort Fetterman v. S.C. Highway Bridge*, 1958 A.M.C. 1735, 155 F.Supp. 359; *Barbey Packing Co. v. S.S. Stavros*, 1959 A.M.C. 1542, 169 F.Supp. 897; *Canal Barge Co., Lim. Procs.* 1971 A.M.C. 2577, 323 F.Supp. 805 (ND,Miss.); *Sydney Ferries Ltd. v. The Ship Tahiti* (1930) 30 S.R. (N.S.W.) 360, 47 W.N. 130 (Aus.); *The Tactician* [1907], *supra; The Prinses Juliana* [1936] P. 139, 54 Ll.L.Rep. 234; *Tower Field (Owners) v. Workington Harbour and Dock Board* [1950] 84 Ll.L.Rep 233, [1950] 2 All E.R. 414, [1951] A.C. 112.

In *Tower Field*, Lord Normand stated the rule succinctly:

> The master is not merely entitled but bound to point out to the compulsory pilot that he may be mistaken in an opinion he has formed (*The Tactician* [1907] P. 244). He is also entitled, in order to avoid immediate peril, to take the navigation out of the hands of the pilot, but if he does so he must be prepared to show justification (*The Prinses Juliana* [1936] P. 139, 54 Ll.L.Rep. 234).

Dr. Lushington, in *The Peerless* (1860) 167 E.R. 16 said:

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

In *Sydney Ferries, Ltd., supra*, the master was held to be negligent in giving no warning to the pilot as to the possibility of danger or as to the breach of regulations as to speed.

While the master may be required to assume control and supersede the pilot in certain circumstances, it is equally clear that he does so literally at his own peril. Since the pilot is employed because of his greater familiarity with local waters and conditions, the master who displaces him must be certain that his action is correct and proper in the circumstances then existing. *Homer Ramsdell v. Compagnie Generale Transatlantique*, 63 Fed. 845, 182 U.S. 406; *White v. Lavergne*, 2 Fed. 788 (1880) (SDNY); the *Sierra Leone*, 1929 A.M.C. 855, 31 F2d 961 (CA-5); *Union Shipping and Trading Co. v. U.S.*, 1942 A.M.C. 709, 127 F2d 771 (CA-2). He is presumptively entitled to rely on the pilot's special knowledge and skill. *White v. Lavergne, supra; Homer Ramsdell v. Compagnie Generale Transatlantique, supra; Waterman S.S. Co. v. U.S.*, 1969 A.M.C. 2100. And see *The Peerless* (1860), *supra; The Hans Hoth*, [1952] 2 Ll.L.Rep. 341; *The Saltaro* [1958] 2 Ll.L.Rep. 232. In *The Hans Hoth, supra*, the collision occurred through negligence of the pilot in disregarding a local signal. The defendant, the master and a part owner of the vessel, sought to limit his liability. The plaintiffs contended he had contributed to the accident because he had not familiarized himself with the local regulations. The court, in granting limitation, said:

> It would be, in my judgment, putting too much upon a master, and would be asking him to exercise more than ordinary care, to regard

> him as being under a duty to know all the local signals when he has a pilot on board, or to expect him to be ready to query the pilot's actions in relation to such local signals. In my judgment, on such matters of purely local knowledge, a master exercising ordinary and reasonable care is entitled to rely on the guidance which he obtains from the local pilot.

The question is one of fact, not law, and in jury cases is, of course, a jury question. The *Sierra Leone, supra;* the *Brenta II,* 1929 A.M.C. 897, 32 F2d 209 (CA-2); and *Hinman v. Moran Towing & Transportation Co. (The Savoia),* 1934 A.M.C. 544.

Liability of Pilots

A pilot is not held liable merely because a disaster occurs providing he uses sound judgment in the carrying out of his duties. This is true even though that judgment may have proven erroneous on hindsight. *Dampsk. Atalanta v. U.S. (Sierra Leone),* 1929 A.M.C. 858, 21 F2d 966 (CA-5); *Andros Shipping Co. v. Panama Canal Co.,* 1962 A.M.C. 870, 298 F2d 720 (CA-5).

To hold the pilot liable, he must be shown to have been negligent, since negligence is the *sine qua non* of liability. The burden of proving his negligence is upon the one alleging it. See the *Manchioneal,* 243 Fed. 801 (SDNY) (1917) (CA-2), where the court said:

> . . . But a pilot is responsible only for his personal negligence and that must be affirmatively shown. . . . Beebe (the pilot) cannot be held without clearer proof than is here presented of his personal responsibility for the error.

See also, *The China v. Walsh,* 74 U.S. 53; *Andros Shipping Co. v. Panama Canal Co., supra; U.S. v. Soriano,* 1967 A.M.C. 41, 366 F2d 699; *Mariblanca N.S.A. v. Panama Canal Co.,* 1962 A.M.C. 601, 298 F2d 729; *Mathieson v. Norfolk & North American S.S. Co.,* 1934 A.M.C. 1451, 73 F2d 177; *Barbey Packing Co. v. S.S. Stavros,* 1959 A.M.C. 1542, 169 F.Supp. 987 (D,Ore.); *U.S. v. Sigfridson,* 1964 A.M.C. 2341 (D,Ore.); *Storts v. Clements* (1792) Peake, 107, 170 E.R. 109, N.P.; *Lawson v. Dumlin* (1850), 137 E.R. 811; *The Octavia Stella* (1887) 57 L.T. 632, 6 Asp. M.L.C. 182; *Re The Lotus* (1861), 11 L.C.R. 342, 2 S.V.A.R. 58 (Can.).

As noted hereafter, however, suits against pilots are relatively rare either because of low limits of statutory liability (such as Sec. 35 of the Pilotage Act, 1913), or because the pilot is usually without sufficient financial resources to make it worthwhile to attempt to pursue recovery from him.

Voluntary Versus Compulsory Pilotage

Since the liability of those employing pilots depends upon the relationships among the pilot, the vessel he is piloting, and the owner of that vessel, it is important to make a distinction between whether the pilotage is "voluntary" or "compulsory."

In a sense, of course, it is compulsory pilotage when a vessel is required by federal law to employ a federally-licensed pilot. See 46 U.S.C.A. 364, discussed *supra.* On the other hand, an owner of a small vessel exempted from inspection (and thus the requirement of carrying a licensed pilot) may, if he chooses, employ a federal pilot or state pilot merely because of a belief that such an individual possesses a higher degree of competence. Clearly, this is a "voluntary" type of pilotage, *National Grocery Co. v. Olsen,* 1941 A.M.C. 376, 108 P2d 320.

Neither of these situations involve voluntary pilotage nor compulsory pilotage in the narrow sense in which it is used in the present context.

"Compulsory" pilotage, as used here, refers only to the situation where a vessel is compelled by statute to take on a licensed pilot to conduct the vessel over certain well-defined pilotage grounds, or upon failure to do so, be liable for the payment of half-pilotage, or the entire pilotage fee, or subject the owner and/or master to criminal penalties, whichever may be required by the particular statute involved.

"Voluntary" pilotage, as used here, refers to jurisdictions which, by statute, permit the owner or master of the vessel to pilot his own vessel, there being no provision requiring him to take on a licensed pilot, or to pay half or whole pilotage for not doing so.

As the Supreme Court stated in *Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique,* 182 U.S. 406, describing true "voluntary" pilotage:

> . . . And it will make no difference . . . that the pilot, if any is employed, is required to be a licensed pilot; provided the master is at liberty to take a pilot, or not, at his pleasure; for in such a case the master acts voluntarily, although he is necessarily required to select from a particular class.

Contrast this language with that of the Supreme Court in *The China v. Walsh,* 74 U.S. 53, where it was said:

> . . . If it be said the master had the option to pay the pilotage and proceed without the pilot, the answer is that he would have had the same option if the consequence had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined and an obligation is imposed. The alternatives presented are to receive the pilot or to refuse and take the consequences. . . . It seems to us clear, in the light of both reason and authority, that the pilot was taken by the steamship upon compulsion.

See also, *Newfoundland Export and Shipping Co. v. United British S.S. Co. (Framlington Court),* 1934 A.M.C. 272, 69 F2d 300 (CA-5); *Mattina v. Commercial Cable Co.,* 1956 A.M.C. 327, 137 F.Supp. 472 (SDNY); *Standard Oil Co. of N.J. v. U.S.,* 1928 A.M.C. 1419, 27 F2d 370 (DC, Ala.).

In several cases, it was stated by way of dicta that not only must a statute require the taking of a pilot but must also carry the penalty of a fine in order for it to be considered compulsory. *Martin v. Hilton,* 2 Metc. (Mass. 371); *The Merrimac,* 20 L.ed. 873. However, other cases both prior and subsequent have disagreed. *The China v. Walsh, supra; Homer Ramsdell Trans. Co. v. La Compagnie Generale Transatlantique, supra; Anderson v. Pacific Coast S.S. Co.,* 225 U.S. 167; *Sprague v. Thompson,* 118 U.S. 90; *Huus v. N.Y. and P.R.R. Co.,* 182 U.S. 392; *Standard Oil Co. v. U.S., supra; State v. Ring,* 122 Or. 644, *aff'd* 276 U.S. 607.

Section 11 of the Pilotage Act, 1913, states the requirement of compulsory pilotage in Great Britain as follows:

> (1) Every ship (other than an excepted ship) while navigating in a pilotage district in which pilotage is compulsory for the purpose of entering, leaving, or making use of any port in the district, and every ship carrying passengers (other than an excepted ship) while navigating for any such purpose as aforesaid in any pilotage district (whether pilotage is compulsory or not compulsory in that district) shall be either—
>
> (a) under the pilotage of a licensed pilot of the district; or
>
> (b) under the pilotage of a master or mate possessing a pilotage certificate for the district who is bona fide acting as master or mate of the ship.

> (2) If any ship (other than an excepted ship) in circumstances in which pilotage is compulsory under this section, is not under pilotage as required by this section, after a licensed pilot of the district has offered to take charge of the ship, the master of that ship shall be liable in respect of each offence to a fine not exceeding double the amount of the pilotage dues that could be demanded for the conduct of the ship.

Section 41 provides that when a ship is navigating in a district and has on board a pilot licensed for that district, or a master or mate holding a pilotage certificate for that district, the master shall cause a pilot flag to be exhibited; failure to do so without reasonable cause subjects the master to a fine not exceeding fifty pounds.

Section 42 provides for a like fine if a pilot flag (or one so nearly resembling the pilot flag as to be likely to deceive) is displayed on a vessel not having a pilot on board or a master or mate holding a pilotage certificate.

Section 43 requires the master of a vessel (other than an excepted ship) when navigating in circumstances in which pilotage is compulsory to display a pilot signal and keep it displayed until a licensed pilot comes on board. The same requirement is imposed where the vessel is being piloted in a pilotage district by a pilot not licensed for the district. Failure to comply subjects the master to a fine not exceeding twenty pounds.

Section 44 requires the master of a vessel, whether in circumstances in which pilotage is compulsory or not, to facilitate the pilot getting on board. Violation subjects the master to a fine not exceeding double the amount of pilotage dues that could be demanded.

The Charlton (1895) 8 Asp. M.L.C. 29, states very clearly one of the principal reasons for compulsory pilotage:

> This doctrine of compulsory pilotage is an enacted doctrine no doubt. It was not enacted for the protection only of ships, it was enacted for the protection of ports; of commercial ports in particular because if a vessel is wrecked and lost and sunk near to the entrance, or within the entrance of a commercial port, she is not only lost herself, but she is a great danger and obstruction to the port and to other vessels, and would interfere with the commercial business of the port.

Equally clearly, another strong reason is to provide financial support for the pilotage service.

Under the Pilotage Act, subject to any provision of a Pilotage Order [by Sec. 7, the Board of Trade was authorized, *inter alia,* to provide by order that pilotage be made compulsory or non-compulsory in pilotage district], compulsory pilotage was continued in any district where it was compulsory at the effective date of the Act, and non-compulsory pilotage was also continued under the same terms.

For illustrative cases involving compulsory pilotage statutes and regulations, see discussion, *infra,* under that heading.

Whether pilotage is compulsory or voluntary is of great concern in the United States (as will be shown in the discussion which follows) for the reason that in the United States the doctrine prevails that neither the master nor owner of a vessel being piloted by a compulsory pilot is liable *in personam* for the negligence of that pilot. In Great Britain and the Commonwealth Nations the defense of compulsory pilotage has been abolished by statute.

Recovery for Negligence of the Pilot

(A) AGAINST THE PILOT HIMSELF:

The pilot, whether voluntary or compulsory, is individually liable for his own negligence. However, since he is rarely of sufficient affluence to respond in heavy damages, the injured party generally looks elsewhere for the source of his recovery. As was said in *The China v. Walsh, supra:*

> . . . The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment—especially if the amount recovered were large. . . .

Possible inability to pay the judgment has not, however, always prevented suits being brought against pilots. See *Donald v. Guy,* 127 Fed. 228 (ED, Va., 1903); *Barbey Packing Co. v. S.S. Stavros,* 1959 A.M.C. 1542, 169 F.Supp. 897 (DC, Ore.); *U.S. v. Joyce,* 1975 A.M.C. 1498, 511 F2d 1127 (CA-9). This has been particularly true where pilot associations have carried liability insurance covering their respective pilot members [such policies have usually been procured through the pilot associations, but coverage is limited to the individual pilot members and no coverage is provided with respect to

the pilot association *per se;* in practice, the pro-rata premium applicable to each individual pilot has been deducted from his share of income from the association's "pooled income" derived from pilotage fees]. When the pilots have procured such individual liability insurance, its availability to interested litigants soon becomes known. As a result, interested litigants (usually shipowners or third parties injured by reason of a collision by the ship while being piloted) have frequently filed suits *in personam* against the involved pilot, in the hope that the pilot's liability underwriter could be persuaded to contribute something toward a settlement. Recognition of this factor has led some pilot associations and individual pilots in the United States to abandon liability insurance altogether.

The pilot associations in Oregon in 1959 (which at that time had voluntary pilotage only; i.e., either the master or the owner of the vessel was privileged to pilot the vessel and need not hire a pilot) adopted an ingenious system which was sanctioned [insofar as it was legally permissible to do so] by the state legislature. The system adopted was on the theory that state pilotage rates must directly reflect the cost to the pilots of doing business; consequently, if they were required to pay high premiums to procure adequate insurance to protect themselves against a high degree of liability, the pilotage rates would necessarily have to be increased. Since all vessel owners carry P & I insurance on their vessels, which insurance protects the vessel owner with respect to negligence of the pilot aboard it, if the pilots likewise carry liability insurance, the vessel owner is paying for his liability coverage twice—first in connection with the P & I premium and second in paying an increment in the pilotage fee to reflect the cost of liability insurance for the pilot.

In 1959, in a rare show of unanimity and enlightened self-interest, the pilot associations and the Steamship Operators' Association combined forces to lobby an act through the state legislature reading as follows (ORS 776.520):

> Special contracts or tariffs limiting liability of licensed pilots. Pilots licensed by this state are authorized to limit their liability by special contracts or tariffs containing substantially the terms and provisions of the following form:
>
> The rates and charges named in this tariff do not include marine insurance insuring the vessel, its owners, agents or operators from the consequences of negligence or errors in judgment of the particular pilot supplying the services.

Upon reasonable notice from the vessel, its master, owners, agents or operators, pilots parties hereto will provide such insurance on a "trip" basis to the value of the vessel and its cargo, the premium of which will be assessed in addition to the rates and charges specified herein.

The election of the vessel, its master, owners, agents or operators not to request pilots parties hereto to procure such insurance and to elect to have the pilots parties hereto perform services on the rates and charges specified herein shall constitute a binding and irrevocable agreement on the part of the vessel, its master, owners, agents or operators to the terms and conditions of the following:

It is understood and agreed, and is the essence of the contract under which services of the pilot are tendered to and accepted by the vessel, its master and owners, that:

(1) The services rendered hereunder are rendered by a pilot duly and regularly licensed by the State of Oregon pursuant to ORS chapter 776, or (with respect to domestic vessels) the holder of a valid license issued by the Federal Government;

(2) Such services have been voluntarily requested and are voluntarily rendered;

(3) Such services are advisory in nature only, the master of the vessel remaining at all times in full command of the vessel;

(4) The services of the pilot are accepted on the express understanding that when he goes aboard the vessel he becomes the servant of the vessel and its owners and operators, and the master, owners and operators of the vessel expressly covenant and agree not to assert any personal liability against the pilot to respond in damage (including any rights over) arising out of or connected with, directly or indirectly, any damage, loss or expense sustained by the vessel, its master, owners, operators and crew, and any third parties, even though resulting from acts or omissions of the pilot in respect to the giving of orders to any tugs furnished to or engaged in assisting services and in respect to the handling of the vessel; and provided, further, that to the extent only to which liability is legally imposed against the vessel, taking into consideration any limitation thereof to which the vessel or its owners is entitled by reason of contract, bills of lading or any statute or rule of law in force, the said master, owners and operators further covenant and agree to indemnify and hold harmless the pilot in respect to any liability arising out of suits or actions directly against the pilot by third parties by reason of errors or omissions of the pilot in the performance of pilotage services; excepting, however, such personal liability and rights over as may arise by reason of the wilful misconduct or gross negligence of the pilot; and

(5) The fees charged for the services rendered by the pilot under this agreement have been computed and are assessed in accordance with and based upon the above stipulations.

The system appears to have worked admirably. The pilot associations arranged through London underwriters to provide so-called "trip" insurance at relatively nominal rates. If the vessel owner requests such trip insurance, the associations notify their local broker who, in turn, arranges for the issuance of a "trip certificate" and charges a premium on an audit basis. Thus far, to the best of the author's knowledge, only the Federal government has requested such trip insurance. Such trip insurance was involved in *U.S. v. Sigfridson*, 1964 A.M.C. 2341, involving a collision with a pile dike by a United States Navy tug and barge flotilla under the command of a Columbia River pilot. The court held the pilot negligent as well as the crew of the tug and thus divided the damages. (The fact that "trip" insurance was involved does not appear from the reported decision.) The voluntary "insurance option" pilotage agreement appears to have virtually eliminated suits against individual pilots in Oregon.

Logically, of course, notwithstanding a tendency on the part of the Supreme Court to strike down clauses exculpating one from the consequences of his own negligence (see the discussion with respect to *Bisso, supra*, Chapter III), there appears no reason why individual pilots as well as individual towboat companies in harbor pilotage situations should not be able to exculpate themselves wholly or at least partially from the consequences of negligence if:

(a) The parties occupy relatively equal bargaining positions;

(b) The agreement between them is freely and openly negotiated;

(c) The rates charged do properly reflect the allocable cost of providing—or not providing—liability insurance, and the party agreeing to absolve the other from liability has a free choice to grant absolution or not, based upon the economic cost of liability insurance; and

(d) Voluntary pilotage is involved as distinguished from compulsory pilotage.

The foregoing conclusion received judicial approval in *U.S. v. President Van Buren*, 1974 A.M.C. 1844, 490 F2d 504 (CA-9). That case involved provisions in a tariff of the City of Long Beach,

California relating to pilotage which provisions were essentially identical in all respects to the provisions of ORS 776.520 quoted above. [It is quite apparent that the City of Long Beach became aware of the actions taken in Oregon in 1957 and accordingly adopted a similar tariff.]

The Ninth Circuit, relying upon *The Merrimac*, 81 U.S. 199 (1872), held that the assessment of three-fourths of the applicable pilotage fee if a vessel did not take a pilot, did not render pilotage compulsory in the City of Long Beach. It further sustained the validity of the City's exculpatory tariff provisions, particularly in light of the privilege accorded to vessel owners to take or not take out "trip" insurance, stating:

> Because of the voluntary nature of the pilotage and the availability of trip insurance at a nominal cost, the provisions of the tariff of the Port of Long Beach exculpating the pilot and his employers from liability are valid and enforceable.

In 1957, when the Oregon pilots set up their legislatively-sanctioned system, the Oregon Pilotage Act read (with respect to the obligation to take a pilot) as follows:

> ORS 776.405. No person shall pilot any vessel upon any of the pilotage grounds established under ORS 776.025 or 776.115 without being a licensed pilot under this chapter *unless he is the master or owner of the vessel.* (Emphasis added)

Incomprehensibly, in 1973, the Oregon pilots instigated an amendment to ORS 776.405 which, in effect, made pilotage compulsory in Oregon. The amended version of 776.405 reads:

> 776.405. Except as expressly exempted by federal statute, no person shall pilot any vessel upon any of the pilotage grounds established under ORS 776.025 or 776.115 without being a licensed pilot under this chapter.

Thus, the phrase "except as expressly exempted by federal statute" was added and the phrase "unless he is the master or owner of the vessel" was deleted.

The addition of the first phrase was unnecessary in light of the many decisions holding that state pilotage laws have no effect on vessels sailing under license or enrollment on which the master or officer in charge has a federal license. The deletion of the second

phrase quoted above destroyed the voluntary nature of pilotage under state laws and, in effect, undermined the theory through which Oregon pilots since 1957 have been free of lawsuits.

The validity of the scheme was premised upon two basic factors: i.e., that pilotage was *voluntary* and that vessel owners could, if they wished, elect to have the pilots procure for their account "trip" insurance against the pilot's negligence for a nominal charge. Elimination of the voluntary nature of the pilotage destroyed one of the essential elements of the scheme.

To the best of the author's knowledge, no Oregon pilots have been sued since the 1973 amendment. Whether this has been due to a lack of knowledge concerning the 1973 amendment, or the admitted reluctance on the part of the admiralty bar to file suits against pilots, is not known. In any event, clearly it is only a matter of time until someone challenges the exculpatory scheme.

(B) AGAINST THE VESSEL OWNER, *IN PERSONAM*:

If the pilot is a voluntary pilot, in the narrow sense used herein, the owner of the vessel *(in personam)* and the vessel *(in rem)* are also liable if he is negligent. This is upon the theory that the master or owner of the vessel, of his own volition, chose the pilot, notwithstanding that the choice may have been restricted from among a designated class—licensed pilots. Having thus chosen, the relation of master and servant arises and the maxim *"qui facet per alium facet per se"* applies. Literally translated the term means, "He who acts for another acts for himself." Consequently, suit may be brought against the owner *in personam* and against the vessel *in rem*. *White Ash v. W.S. Holbrook (The Helen)*, 1925 A.M.C. 267, 5 F2d 54 (CA-2); *Consolidated Coastwise Co. v. Lee Towage Co. (The Maren Lee)*, 278 Fed. 918 (CA-2); *Logue Stevedoring Corp. v. Tugs Dalzellance*, 1952 A.M.C. 1297, 196 F2d 1369; *Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique*, 182 U.S. 406. This principle was well stated in *Homer Ramsdell, supra:*

> The liability of the owner at common law for the act of a pilot on his vessel is well stated by Mr. Justice Story in his Treatise on Agency, 2d ed.§456a: "The master of a ship, and the owner also, is liable for any injury done by the negligence of the crew employed in the ship. The same doctrine will apply to the case of a pilot employed by the master or owner, by whose negligence any injury happens to a third person or his property; as, for example, by a collision with another

Hondurena v. Bank Line, 1977 A.M.C. 1944, 434 F.Supp. 602 (SDNY); *Burgess v. Tamano,* 1977 A.M.C. 1892, 564 F2d 964 (CA-1).

In *Burgess v. Tamano, supra,* the court held that the Federal Water Pollution Control Act (33 U.S.C.A. 1321 *et seq.*), in exempting shipowners from liability for act or omission of a "third party," did not refer to independent contractors hired by the shipowner, and consequently held that the ship was liable for the negligent navigation of compulsory pilot inasmuch as the statute does not recognize any distinction between the ship and her owner.

Compare, however, *The Yorkmar,* 1977 A.M.C. 805, 434 F.Supp. 715 (D,Md.), where the court held that although a Chesapeake and Delaware Canal pilot was "compulsory" under 46 U.S.C.A. 364 and 224, the vessel owner could not escape *in personam* liability for a bridge allision where the vessel's unseaworthiness (inoperable radio transmitter) was a contributing cause.

In short, the fact that the owner or the master was compelled to take a pilot by virtue of the applicable state pilotage law is no defense to a suit against the vessel *in rem.*

What is the effect of this rule with respect to the rights of a libelant in a both-to-blame case where the vessel of the libelant is under the control of a compulsory pilot? Logically, it would seem to make a difference if the suit is *in personam* rather than *in rem.* [If the suit were brought *in rem,* under the rule in *The Barnstable, supra,* the libelant should recover only proportionately because the vessel was being navigated by a pilot (even though a compulsory pilot) who was lawfully in charge. On the other hand, if the suit were *in personam,* the owner would not be liable for the fault of the pilot.] This question was raised in *Harrison v. Hughes,* 125 Fed. 861 (CA-3), *cert. den.* 191 U.S. 575, where the vessel, under the command of a compulsory pilot, ran into an unlighted breakwater at night. The master of the vessel sued the owner of the breakwater *in personam.* There was no cross libel but the court held that both parties were at fault. The Court of Appeals, disregarding the fundamental distinction between suits *in personam* and *in rem,* nonetheless held that the vessel could only recover half damages. The result is difficult to understand.

Pilot must be solely at fault if owner is to avail himself of defense of compulsory pilotage.

Obviously, a defense based upon the fact that the pilot was compulsory should apply only if the fault imposed upon the vessel was solely that of the pilot. And the courts have so held. *The China,* 74 U.S. 53 (1868); *The Paris,* 1930 A.M.C. 153, 37 F2d 734, *aff'd* 44 F2d 1018; *The Savoia,* 1934 A.M.C. 544; *City of Canton,* 1925 A.M.C. 887, 6 F2d 6 (CA-5); *Charente S.S. Co. v. U.S.,* 1926 A.M.C. 1115, 12 F2d 412 (CA-5). If a contributing cause of the failure is the failure of the master or the crew of the vessel being piloted to do some proper act (or the doing of something which should not have been done) then the defense of compulsory pilotage fails. See, for example, *The Yorkmar,* 1977 A.M.C. 805, 434 F.Supp. 715 (D,Md.).

Liability of Port and Harbor Authorities, Canal Companies, and Municipalities Employing Pilots

As might be expected, in the absence of statutory limitations or exculpatory measures, the doctrine of *respondeat superior* (where the principal or master is held responsible for the acts of his servant or employee) imposes liability upon those organizations employing pilots.

In *U.S. v. Port of Portland,* 147 Fed. 865 (DC, Ore.), *aff'd* 176 Fed. 866 (CA-9), the court held the Port of Portland liable for the negligence of a pilot employee, stating:

> The Port of Portland was created by act of the Legislative Assembly of the State of Oregon with power to make all contracts, to hold, receive and dispose of real and personal property, and do all other acts and things which might be requisite, necessary or convenient in carrying out the objects of the corporation, to sue and be sued, plead and be impleaded, and to improve the channel of the Willamette and Columbia Rivers, between Portland and the sea and to that end was duly authorized to employ engineers, superintendents, mechanics, clerks, and other persons at such rates as it might deem just. . . .
>
> But the present [case] is even a stronger case because the responsibility of the Port of Portland is more nearly analogous to that of an incorporated city having the control and charged with the supervision and care of the public streets; . . . If negligent in the manner as alleged in the libel, the tug and tow might be regarded as a dangerous and perhaps unlawful obstruction in the navigable channel of the Co-

lumbia River; so that in view of the closer analogy to the case of a city, in respect to the repair of its streets, the Port of Portland would then be amenable upon the same principle.

The same question was raised in *The Thielbek*, 241 Fed. 209 (CA-9), where the Ninth Circuit stated:

> . . . the further contention in behalf of the municipality that the pilot was not the servant of the port, but really a servant of the vessel for whose negligence the Port of Portland was not responsible, is sufficiently answered by the cases of *Workman v. Mayor, etc. of New York City*, 179 U.S. 522, 21 Sup. Crt. 214, 45 L.ed. 212 and *U.S. v Port of Portland*, 147 Fed. 865, *aff'd* by this court in 176 Fed. 886. . . .

In *Workman, supra*, the city was sued by Workman to recover damages suffered by his vessel when it was hit by a fireboat belonging to the City of New York while in the custody and management of its fire department. It was charged that the fireboat was negligently handled while being used to assist in putting out a fire. The Supreme Court said:

> . . . [I]t unquestionably appears that the fire department of the City of New York was an integral branch of the local administration and government of that city. The ministerial officers who directed the affairs of the department were selected and paid by the city; all the expenses of the department of every kind and nature were to be borne by the city, which was bound by all contracts made for such purpose; all the property of the department, including the fireboats, belonged to the city; . . .
>
> That upon such a state of things, the relation of master and servant existed between the City of New York and those in charge of the fireboat is clear. And that under the general maritime law, where the relation of master and servant exists, an owner of an offending vessel committing a maritime tort is responsible, under the rule of *respondeat superior* is elementary. . . .

To the same effect is *Boston, Cape Cod and New York Canal Co. v. Chadwick and Co.*, 266 Fed. 775 (CA-1), where the pilotage fees were derived from the tolls charged for passage through the canal. The court stated, in part:

> By its charter the canal company was authorized to maintain and operate steamers and other vessels or use any other means or methods for assisting vessels in the approach to and passage through and from the canal . . . and this assistance would include the furnishing of pilots as well as tows.

In *The Dona Aurora*, 1961 A.M.C. 1105, 289 F2d 586 (CA-9), the City of Long Beach and a compulsory pilot hired by the city were held liable for the negligence of the pilot in entering the harbor, with resultant grounding on a breakwater. Compare, however, *Standard Oil Co. of New Jersey v. U.S. (Bostwick-Casey)*, 1928 A.M.C. 1419, 27 F2d 370 (DC, Ala.), where the dock commission of the city was exonerated from liability even though the pilot, a harbor master of the dock commission, was negligent in piloting the vessel. The decision appears to be out of line with all other decisions.[9]

Prior to 1950, the United States was not held liable for damages in the Panama Canal, except in the locks, caused by fault on the part of Canal pilots unless the Governor determined otherwise. 48 U.S.C.A. 1319; *The Wisconsin*, 1937 A.M.C. 1035, 90 F2d 225 (CA-5). The Federal Tort Claims Act, 28 U.S.C.A. 921-946 expressly provides that the act does not apply to any claim arising from injury to vessels, cargo, crew or passengers of vessels, while passing through the locks of the Panama Canal or while in Canal Zone waters.

In 1950, Congress amended the Canal Zone Code (see text of amendatory act in 1950 A.M.C. 1931) to provide that the Panama Canal Company is liable for payment for injuries to vessel, cargo, crew or passengers arising out of passage of the vessel through the locks under the control of officers and employees of the Company. Further, the Canal Company is liable for such injuries to vessels, etc., in other waters of the Canal, other than the locks, when such injuries are proximately caused by negligence or fault on the part of any officer or employee acting within the scope of his employment and in the line of his duties in connection with the operation of the Canal; provided, however, that in the case of a vessel required to have a Panama Canal pilot on duty aboard, no damages are payable

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9 In *Pacific Transport Lines v. Hawaii*, 1963 A.M.C. 1321 (St. Haw.), the court held that although the territory had waived immunity in contract actions, it had not waived such immunity with respect to torts. The court further held that whenever a compulsory pilot hailed an inbound vessel, an implied pilotage contract arose. However, such implied pilotage contract did not compel a conclusion that there was an implied warranty that the Territory would indemnify the shipowner for a failure on the part of the pilot to perform his job with workmanlike skills.

unless at the time of injury the navigation or movement was under the control of the Panama Canal pilot.

In the *Aurora Borealis*, 1960 A.M.C. 266, 272 F2d 726, and in *Victorias Milling Co. v. Panama Canal Company*, 1960 A.M.C. 251, 272 F2d 716, the Fifth Circuit construed the amendatory act. In the latter, the Company was exonerated on the grounds that the negligence lay in the failure of the vessel's personnel to execute the pilot's orders promptly and properly; in the former, the Canal Company was held liable due to the failure of the pilot to use two tugs instead of only one and in the failure of the tugmaster to cooperate with the pilot and obey his orders. See, to the same effect, *Dreyfus & Cie. v. Panama Canal Co.*, 1954 A.M.C. 652, where the trial judge applied the doctrine of *res ipsa loquitur*. In *Victorias Milling, supra*, the Fifth Circuit stated it felt the doctrine was "generally inapplicable" to strikings and groundings in the Canal.

In the *Mariposa*, 1960 A.M.C. 1607, 182 F.Supp. 369 (CZ), the Canal Company was exonerated from liability on grounds that the pilot was not at fault and that the striking of the vessel against the bank was due to negligence on the part of the vessel's employees. The court held the doctrine of *res ipsa loquitur* could not be applied and that the vessel had failed to prove specific acts of negligence against the pilot. And in the *Andros Venture*, 1960 A.M.C. 2348, 184 F.Supp. 246, the court exonerated the Canal Company, finding the pilot not at fault but the vessel at fault—she had an improperly designed rudder, her draft was not properly reported to the pilot, her turbine nozzle power was improperly managed by the engine-room personnel and her throttle movements did not obey commands from the bridge. In so doing, the court commented that while the Canal Zone pilot was not an insurer of the vessel's safety, he was required to exercise such care and expert skill as would be commonly possessed by others in his profession.

In *Gulf Oil v. Panama Canal Co.*, 1970 A.M.C. 2410, 311 F.Supp. 1307 (CZ), on remand the Panama Canal Co. was held liable for rudder damage sustained by a transiting vessel which struck the canal bank due to the compulsory pilot's failure to exercise the required degree of skill.

In *Waterman S.S. Co. v. U.S.*, 1969 A.M.C. 2100, 304 F.Supp. 401 (WD,Wash.), the United States was held liable for the negligent action of its pilot resulting in damage to a merchant vessel being docked at Da Nang, Vietnam, caused by the assisting tug's pushing

rather than pulling in turbulent waters. And in *American Foreign S.S. v. U.S.*, 1974 A.M.C. 1557 (SDNY), the court, in view of wartime controls exercised by the Military Sea Transportation Service in Saigon in 1967, imputed the negligence of compulsory river pilots to the United States rather than to the Republic of Vietnam.

In *Mathiesen v. Panama Canal Co.*, 1977 A.M.C. 981, 551 F2d 954 (CA-5), the Panama Canal Co. did not challenge its liability —only the reasonableness of a settlement—in an indemnity action by a Norwegian shipowner which had settled a collision suit brought against it by a Dutch shipowner. The collision was found to have been caused by the negligence of the Company's pilot. The appeals court held that the district court did not err in judging the reasonableness of the settlement of the Dutch litigation on the basis of opinions of Dutch attorneys who settled the case as to the likely result if the case had been tried.

Pilotage Authorities and Harbor Authorities

Section 19 of the Pilotage Act, 1913, precludes any liability being imposed upon a pilotage authority for negligence or fault of a pilot. But such an authority may be held liable for damages caused by reason of a failure to provide adequate pilotage service. *Anchor Line (Henderson Bros.), Ltd. v. Dundee Harbour Trustees, Ellerman Lines, Ltd. v. Same, etc.*, (1922) 38 T.L.R. 299, 10 Ll.L.Rep. 47, H.L. In that case, the plaintiffs' vessels were damaged by striking a submerged wreck when they attempted to enter the River Tay after having waited vainly for pilots to tender their services. The plaintiffs claimed that the authority was negligent in not taking reasonable steps to secure the attendance of pilots and in not properly buoying the estuary so as to apprise vessels coming in of the presence of the wreck. The court held that in each action the damage was caused by negligence in both particulars.

Under the Pilotage Authorities (Limitation of Liability) Act, 1936, a pilotage authority's liability for damage caused without the actual fault or privity of the authority may be limited to £100 multiplied by the number of pilots holding licenses in the district at the date the damage occurs.

In *Workington Harbour & Dock Board v. S.S. Towerfield (Owners)* [1950] 2 All E.R. 414, [1951] A.C. 112, 84 Ll.L.Rep. 233,

H.L., the House of Lords had before it a case in which the harbor authority was negligent in not fulfilling their obligations by sounding and dredging the channel and in not insuring that the pilot and master were warned of the state of the channel. A compulsory pilot was aboard and he also was found negligent. The vessel struck bottom and subsequently broke her back. The owners sued to recover, alleging that the harbor authority had breached its duty to take reasonable precautions that the approaches were safe or to give warning that they were not and alleging further that the condition of the harbor was not in accordance with the chart.

The House of Lords imputed the negligence of the compulsory pilot to the vessel owners on the ground that Section 15 of the Pilotage Act applied to the claim by the shipowners whether it sounded in tort for negligence or in breach of contract. On that basis and the finding that the harbor authority was also negligent, the court held neither could recover from the other. However, under Section 74 of the Harbours, Docks & Piers Clauses Act, 1847, the ship's owners were held liable for damage caused to the harbor notwithstanding the contributory negligence of the harbor board, but such damages were limited to actual physical damage and did not include loss of revenue.

It is apparent from the case that if a harbor board provides compulsory pilots and damage is caused by reason of the compulsory pilot's negligence or fault, the shipowner has no recourse as the negligence of the compulsory pilot will be imputed to him.

No case can be found in the United States in which liability has been imposed upon pilotage authorities for negligent acts of pilots licensed by them. To the contrary, in *State of Washington v. M/V Dilkara,* 470 F.Supp. 437 (WD,Wash., 1979), a defense of vicarious liability on the part of the State for having licensed a pilot was stricken on motion, where the only function of the State was to license pilots and it did not otherwise benefit from the contract between the vessel and the pilot or control the pilot's actions.

For other cases involving liability of harbor authorities in England and the Commonwealth Nations where negligence of a pilot was not involved, see *Mersey Docks Trustees v. Gibbs, Mersey Docks Trustees v. Penhallow* (1866) 11 H.L. Cas. 686, 11 E.R. 1500, H.L.; *R. v. Williams* (1884) 9 A.C. 418, 51 L.T. 546, P.C.; *Reney v. Kirkcudbright Magistrates* (1892) A.C. 264, 7 Asp. M.L.C. 221, H.L.; *Anchor Line Ltd. v. Dundee Harbour Trustees* (1922), *supra;*

Thompson v. North Eastern Ry. Co., (1862) 31 L.J.Q.B. 194, 121 E.R. 1017, Ex.Ch.; *Dormont v. Furness Ry. Co.* (1883) 11 Q.B.D. 496, 5 Asp. M.L.C. 127; *The Bearn* [1906] P. 48, [1904-7] All E.R. Rep. 315, 10 Asp. M.L.C. 208, C.A.; *Thompson v. Sandwich Corp.* (1901) 1 O.L.R. 407, 21 C.L.T. 206 (Can.); *Hood v. Toronto Harbour Commissioners* (1872) 34 U.C.R. 87, *aff'd* (1876) 37 U.C.R. 72 (Can.); *Robertson v. Portpatrick & Wigtownshire Joint Committee* [1919] S.C. 293, 56 Sc.L.R. 173, [1918] 2 S.L.T. 56 (Scot.).

Attention is called to *Otago Harbour Board v. Cates* (1883) 2 N.Z.L.R. 123 (N.Z.), where it was held that under the Harbours Act, 1878, the harbor board was not responsible for the negligence of a duly licensed pilot appointed by the Board.

For cases involving attempts to hold pilot associations liable for acts of their individual members, see discussion *infra.*

Harbor Pilotage
(Pilots Supplied by Tug Companies)

Much of the litigation involving pilotage has arisen from collision damage occasioned while vessels are under command of local, non-compulsory harbor pilots. In many American ports, the local pilots are customarily masters of one of the assisting tugs who go aboard the vessel to be piloted and act as the pilot during the maneuver.[10]

The legal principles applicable to such harbor pilotage are fairly well delineated, absent a specific "pilotage clause" under which the various liabilities vis-a-vis the respective parties are materially affected. In order to present logically these legal principles, it is necessary to understand what principles are applicable in the absence of a "pilotage clause." Thereafter, the application of a "pilotage clause" and the manner in which the respective liabilities are altered or shifted can be more readily grasped. In the discussion which follows, cases in which pilotage clauses have been involved are frequently cited in support of the basic legal principle. The impact of the pilotage clause upon the basic principle will then be set forth in a

10 In some states, notably Oregon and Washington, pilots licensed by the state pilot commission perform such harbor pilotage services; as such, they are members of the local, independent pilot associations and are not employed by tug companies although the members of the pilot associations are customarily drawn from the ranks of former tugmasters.

separate section, thereby, to some extent, resulting in multiple citations of the same cases.

Essentially, harbor pilotage cases break down into rather clearly defined categories, outlined as follows:

(1) Those instances in which the tug company undertakes to take charge of and control the entire movement, whether by furnishing merely the motive power by way of its tugs without furnishing a pilot, or by furnishing both tugs and a company "loaned" pilot. These cases involve both the handling of "dead" ships (ships without power) or "live" ships (ships with power whether or not the power is applied in terms of assisting in the maneuvering and shifting).

(2) Those instances in which the pilot is employed by the shipowner and the tug company merely provides the assisting tugs.

Each of the foregoing categories is further subdivided into those situations in which the tug company was found liable and those in which the tug company was not found liable.

Taking these categories *seriatim:*

Tug Company in Complete Charge As Independent Contractor

DEAD SHIPS

Clearly where the agreement between the tug company and the assisted vessel involves the tug company accomplishing the movement as an independent contractor, either with or without the help of a pilot, and the vessel is without power, the assistance is straight towage and the principles enunciated in *The John G. Stevens,* 170 U.S. 113 (1898), and *Stevens v. The White City,* 1932 A.M.C. 468, 285 U.S. 195 (1932), apply. [See discussion, Chapter III, *supra.*] Consequently, since a bailment does not exist, if negligence on the part of the tug company or its employees is shown, the assisted ship is not liable for damages sustained during the movement. As the Supreme Court said in the *Eugene F. Moran,* 212 U.S. 466 (1909), there is a difference between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached. As the tug company and its

servants are not the agents of the assisted vessel, the latter is not liable *in rem* nor are her owners liable *in personam.* See also, *Sturgis v. Boyer,* 65 U.S. 110 (1861).

The foregoing principle is illustrated in the following cases in all of which the tug company was found liable:

The Barendrecht, 1925 A.M.C. 1121, 9 F2d 614; *Edward G. Murray,* 278 Fed. 895 (CA-2, 1922); *The Caspian,* 1925 A.M.C. 1407, 14 F.Supp. 1013; *Syria,* 1927 A.M.C. 216 (EDNY); *Wyethville,* 1927 A.M.C. 216 (SDNY); *Bird City—Ozaukee,* 1930 A.M.C. 1526 (EDNY); *William Rockefeller,* 1932 A.M.C. 427, 57 F.Supp. 897 (EDNY); *Norfolk—Berkley Bridge Case,* 1928 A.M.C. 1636, 29 F2d 115 (ED,Va.); *Corozal,* 1929 A.M.C. 1787 (Arb.); *Ora Ellis—Primavera,* 1952 A.M.C. 1291, 197 F2d 607 (CA-2); *Marjory—Jos. E. Wing,* 1952 A.M.C. 545, 102 F.Supp. 391 (SDNY); *Nicholson Transit v. Great Lakes Towing,* 1960 A.M.C. 962, 185 F.Supp. 685 (ND, Ohio); *Har Canaan—Pipe Line Damage,* 1961 A.M.C. 703, 287 F2d 852 (CA-5); *Sands Point—Abogado,* 1968 A.M.C. 668 (D,Md.)[11]; *Penn Vanguard,* 1971 A.M.C. 1547, 440 F2d 193 (CA-5) (pilot found liable).

In the following "dead ship" cases, the tug company was exonerated from fault, either based on the facts involved or the existence of an exculpatory pilotage clause.

Barranca, etc., 1929 A.M.C. 687, 31 F2d 963 (CA-5) (ship had steam up but used tug as motive power; ship's pilot negligent and tug properly obeyed the pilot's orders); *Hagood,* 1925 A.M.C. 1646 (SDNY) (ship's steering engine broke down and ship drifted; tugs and pilot aboard not negligent); *Southern Cross,* 1927 A.M.C. 457 (SDNY) (uncontrollable sheer; tugs who did their best *in extremis* not liable); *Otsego—Fox—McNaughton,* 1930 A.M.C. 1156, 40 F.Supp. 925 (EDNY) (shipowner failed to sustain burden of proving negligence); *West Wauneke—Willowpool,* 1933 A.M.C. 836, 65 F2d 385 (CA-2) (strong following wind; ship failed to follow the tug and took sheer); *Papoose,* 1935 A.M.C. 1090, 1579, 79 F2d 2 (CA-2) (navigation of tug without negligence); *North Atlantic, etc. v. U.S. (Samcree),* 1954 A.M.C. 363, 209 F2d 487 (CA-2) (tug and tug company pilot not negligent; vessel's equipment defective); *Spokane, P. & S. Ry. Co. v. Fairport,* 1953 A.M.C. 1638, 116 F.Supp. 549 (D., Ore.) (tug not negligent; assisted vessel held solely liable).

[11] Liability predicated, in last case at least in part, on breach of warranty of workmanlike service, discussed in depth, *infra.*

(SDNY) (pilotage clause); *Otto M. Reiss,* 1948 A.M.C. 1636, 79 F.Supp. 1 (D, Minn.) (ship's personnel negligent; effect of pilotage clause not considered); *N.J. Bell Tel. Co. v. Standard Oil Co.,* 1950 A.M.C. 136, 88 F.Supp. 806 (SDNY) (pilotage clause); *Port Republic,* 1953 A.M.C. 1898, 118 F.Supp. 832 (EDNY) (assisted vessel proceeded too fast; tugs not negligent; pilotage clause applicable); *Sealand D. & T. Co. v. Zion,* 1962 A.M.C. 391 (SDNY) (assisted ship's personnel found negligent); *Patterson Terminals v. Johannes Frans,* 1962 A.M.C. 2623, 209 F.Supp. 705 (ED, Pa.) (pilotage clause); *Sun Oil Co. v. Dalzell Towing Co.,* 1933 A.M.C. 35, 287 U.S. 291, 53 Sup. Crt. 135, 77 L.ed. 311 (1932); *U.S. v. Nielson,* 1954 A.M.C. 2231, 349 U.S. 129, 75 Sup. Crt. 654, 99 L.ed. 939 (1955); *Nippon Yusen v. Zepher Shipping,* 1971 A.M.C. 949 (D,Mass.) (pilotage clause obligates owner of assisted tanker to indemnify towing company for its tug captain's negligence, even though towing company had a virtual monopoly in Boston, there being no evidence that it acted to exclude competition); *C.G. & T. Lim. Procs.,* 1974 A.M.C. 261 (SDNY) (assisting tug's action in casting off towline 30 seconds before collision with bridge abutment will not be condemned on the basis of hindsight); *American Oil Co. v. Lacon,* 1973 A.M.C. 1900, 337 F.Supp. 1123 (SD,Ga.) (where vessel was found 75% negligent and docking master 25% negligent in ship-pier collision, not necessary to apply divided damages rule because the tugowner entitled to full indemnity from shipowner; pilotage clause binding where evidence showed it was included in "Schedule of Rates, Terms and Conditions" which was presented to the master of the vessel who signed a receipt acknowledging the performance of tug services "as per" the Schedule); *A/S Atlantica v. Moran T. & T. Co.,* 1974 A.M.C. 555, 498 F2d 158 (CA-2) (pilotage clause excuses tug company from liability for undocking pilot's negligence; Second Circuit will not follow the doctrine that undocking pilot's failure to request adequate tug power breaches the workmanlike service warranty implied in the towage contract and is therefore outside the protection of the pilotage clause); *Reederei Franz Hagen v. Resolute,* 1976 A.M.C. 2133, 400 F.Supp. 680 (D,Md.) (pilotage clause exempts tug company from liability for stranding damage sustained by assisted steamship and proximately caused by the negligence of the tug company's employee while acting as undocking pilot; the employee was fully competent, his negligent maneuver resulted from a decision made on board the steamship

rather than a faulty preconceived plan, and the assisting tugs were seaworthy and adequately manned); *Consolidated Edison v. Orion Comet,* 1970 A.M.C. 224 (SDNY) (tug, working in tandem with another tug, not negligent for following the orders given by the undocking pilot; the tugs had sufficient power to carry out the maneuver if proper orders had been given and no breach of warranty of workmanlike service was established); *H. Schuldt v. Standard Fruit,* 1978 A.M.C. 2061 (SDNY) (under pilotage clause, all negligent acts of the pilot are attributed to the shipowner and not to the assisting tug; *semble* charterer/pier lessee cannot file a third party complaint against the tug based on the pilot's negligence but may assert liability of the tug, her owner and her pilot based on unseaworthiness).

The question has arisen as to the liability of the tug whose regular master goes aboard the assisted vessel to act as harbor pilot and does so negligently. In the *Algic and Capillo,* 1936 A.M.C. 415, 13 F.Supp. 834 (SD, Fla.), the contract provided that "your tugs" shall be liable for the fault of "tug or tug master." The court properly held that the innocent tug was not liable *in rem* for the negligence of its regular master while acting as a "harbor pilot" aboard the assisted vessel.

It should be emphasized that the pilotage clause runs between the tug company and the person contracting for the pilot's service. It does not bind a third party who was not party to the contract.[13] This is illustrated in *Niels Finsen,* 1931 A.M.C. 1014, 52 F.Supp. 795 (SDNY), where the charterer under a Government Standard Form time charter contracted for the services of a harbor pilot under the usual pilotage clause. The pilot was negligent and as a result damage was caused to the dock. The court held that the owner of the vessel was not bound by the pilotage clause; that the vessel was, however, liable *in rem;* that the assisting tugs which obeyed all orders properly were not liable; but that the towing company was secondarily liable. To the same effect, see *People of California v. Jules Fribourg,* 1956 A.M.C. 939, 140 F.Supp. 333 (ND,Cal.); *Victory Carriers v. Sea Scout,* 1959 A.M.C. 2164, 272 F2d 463 (CA-9); *American Oil Co. v. Lacon,* 1973 A.M.C. 1900, 337 F.Supp. 1123 (SD,Ga.) (pilotage

13 While it may not "bind" a third party, it does create a factual situation, or is evidence of a factual situation, by which the tug company limits the area in which its general employee is doing the tug company's work, beyond which he is or becomes someone else's employee; i.e., the assisted vessel's.

clause does not affect the tort liability of a tug company who furnishes the docking master to a dock owner who is not a party to the contract between the tug and the vessel).

Where two tugs were engaged in a joint enterprise in towing a large vessel under the direction of the master of one of them and through faults on the part of both tugs damage was caused, the court held that the master in charge was in effect the master of both tugs and that both tugs constituted the unit to be surrendered in limitation proceedings. *Henrik Ibsen, etc.*, 1930 A.M.C. 513, 38 F2d 980 (CA-4). This result conflicts, however, with other decisions relating to *in rem* liability of tugs for negligence on the part of tugmasters who go aboard the assisted vessel as "harbor pilots." In this connection, it should be emphasized that the liability of an assisting tug ordinarily must rest upon some negligence on its part. A tug is not liable nor does her owner assume liability and subject it to a maritime lien for collision damage even when the negligence was that of other tugs of the same owner or of the harbor pilot whom the tug company supplied. The *Gallia*, 196 Fed. 509 (1910); the *W. G. Mason*, 142 Fed. 913 (1905); *Edward G. Murray*, 278 Fed. 895 (1922); the *Sarnia*, 261 Fed. 900 (1919); *The Coamo*, 267 Fed. 686 (1920); *Gypsum Express*, 1968 A.M.C. 616 (DC,La); *Consolidated Edison v. Orion Comet*, 1970 A.M.C. 224 (SDNY).

Pilot Employed Directly by Shipowner—Tugs Merely Assisting

If the pilot is employed directly by the shipowner and a tug company is called upon to supply assisting tugs under the direction and control of the pilot, the tug company is not responsible for negligence on the part of the pilot. *Spokane, P. & S. Ry. Co. v. Fairport*, 1953 A.M.C. 1638, 116 F.Supp. 549 (D, Ore.); *Sturgis v. Boyer*, 65 U.S. 110, 16 L.ed. 591 (1861); *In re Walsh*, 136 Fed. 557 (CA-5, 1905); The *Stella*, 278 Fed. 939 (1922); *Georgia Ports Authority v. Bilderdyk*, 1976 A.M.C. 525, 402 F.Supp. 706 (SD,Ga.); *Gypsum Empress*, 1968 A.M.C. 616 (ED,La.).

Obviously, if the tugs do nothing to contribute to the damage, they are not liable. But equally obviously, the tugs may themselves be at fault, either by failing to carry out the pilot's orders properly, or for carrying out an obviously dangerous order, or for proceeding on their own initiative without waiting for appropriate instructions and directions from the pilot. *Edward G. Murray*, 278 Fed. 895

(CA-2, 1922); *Great Lakes Towing Co. v. American S.S. Co.*, 1948 A.M.C. 249, 165 F2d 368 (CA-6); *Maryland—Yale*, 1933 A.M.C. 1117, 65 F2d 543 (CA-6); *Gypsum Queen—Peerless*, 1953 A.M.C. 2071 (ED, Va.); *Lykes Bros. v. Whiteman*, 1956 A.M.C. 1192, 138 F.Supp. 725 (ED, La.); *National Defender v. Abqaiq*, 1970 A.M.C. 213, 418 F2d 1241 (CA-2); *Universal Tramp v. Irish Salt*, 1970 A.M.C. 1783 (D,Mass.); *Thor—Lindenwood Victory*, 1969 A.M.C. 1962, 305 F.Supp. 570 (WD,Wash.).

Effect of Pilotage Clause[14]

The so-called "pilotage clause" is like Topsy—"it just growed." Originally, tug captains began to board vessels in harbors to act as docking and undocking pilots at the invitation of the shipowners. A small gratuity was usually given them in recognition of the fact that they were acting on their own, beyond the scope of their duties to their regular tug company employers and that they were, in fact, analogous to the well-known "loaned employee" situation.

Being a verbal understanding, it is not surprising that some courts became confused over the relationship of such harbor pilots and, in some instances, their regular tug company employers were saddled with liability by reason of the negligence of their "loaned" harbor pilots.

As a consequence, the pilotage clause came into being. Its validity was subsequently upheld in *Sun Oil Co. v. Dalzell*, 1933 A.M.C. 35, 287 U.S. 291 (1932), and the decision has never been overruled or distinguished. That the Supreme Court correctly grasped the nature of the services rendered by the harbor pilot and the inapplicability of the doctrine of *respondeat superior* as respects his "regular" tug company employer clearly appears from the following quotation from that case:

> Respondent's [the tug company] responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage. The provision that its tug captains while upon the assisted

14 The author wishes, in the discussion which follows, to acknowledge his indebtedness to Eugene Underwood (now retired), formerly of Burlingham, Underwood, Wright, White & Lord, New York City, for most helpful suggestions, comments and background information on the origin of pilotage clauses, as well as penetrating observations on the applicability of the doctrine of warranty of workmanlike service.

> ship would be the servants of her owner is an application of the well-established rule that when one puts his employe at the disposal and under the direction of another for the performance of service for the latter, such employe while so engaged acts directly for and is to be deemed the employe of the latter and not of the former. [Citing *Denton v. Yazoo & M.V.R. Co.*, 284 U.S. 305, 308.] It would be unconscionable for petitioner [the shipowner] upon occurrence of a mishap to repudiate the agreement upon which it obtained the service.

While the statement by the Supreme Court would seem to be perfectly clear, and wholly dispositive of the question, considerable confusion has arisen among the courts in later decisions, thus creating what might be considered "exceptions" to the general proposition or, depending upon the language of the court, palpable error in construing the effect of the pilotage clause.

To simplify discussion, the later decisions adhering to the rule in *Sun Oil* are set forth below, followed thereafter by a discussion of those cases which either create apparent exceptions, or which reveal erroneous concepts.

Those cases adhering to the rule in *Sun Oil* are:

Brenta II, 1937 A.M.C. 981, 92 F2d 37 (CA-2) (also allowing indemnity over to the tug company for sums it was required to pay out); *William Wirt—Barge YC-749*, 1950 A.M.C. 2043, 93 F.Supp. 654 (SDNY); the *Carrabulle*, 1955 A.M.C. 604, 134 F.Supp. 194 (D, Mass.); *Atlantic Mut. Ins. Co. v. Bulkcrude*, 1952 A.M.C. 1400, 107 F.Supp. 771 (SD, Tex.); *Cayuse*, 1953 A.M.C. 1108, 118 F.Supp. 927 (SDNY); *Gypsum Queen—Peerless*, 1953 A.M.C. 2071 (ED, Va.) (pilotage clause held effective to make tugmaster the servant of the assisted vessel; tug company's tug also liable; tug company entitled to indemnity from vessel for one-half paid to dock owner); *International Term. Op. v. Naviera Aznar*, 1961 A.M.C. 1758, 198 F.Supp. 214 (SDNY); *Patterson Terminals v. Johannes Frans*, 1962 A.M.C. 2623, 209 F.Supp. 705 (ED, Pa.); *Transpacific v. Ellen F. McAllister*, 1964 A.M.C. 2570, 336 F2d 371 (CA-2); *Farrell Lines v. Birkenstein*, 1963 A.M.C. 1846, 207 F.Supp. 500 (SDNY); *El Salvador—Russell No. 18*, 1966 A.M.C. 1777, 248 F.Supp. 15 (SDNY); *Lyons Creek—Sister Katingo*, 1967 A.M.C. 1561 (SDNY); *Consolidated Edison v. Orion Comet*, 1970 A.M.C. 224 (SDNY); *Federal Steam Navigation Co. v. Savannah*, 1970 A.M.C. 115, 305 F.Supp. 1293 (SD, Ga.) (tugowners provided only docking master

services in port of Savannah and had no competition; its position created superior bargaining position but did not create a monopoly so as to invalidate clause); *U.S. v. Neilson*, 1954 A.M.C. 2231, 349 U.S. 129 (1955); *Hagen v. Resolute*, 1976 A.M.C. 2133, 400 F.Supp. 680 (D,Md.); *Nippon Yusen v. Zepher Shipping*, 1971 A.M.C. 949 (D,Mass.); *A/S Atlantica v. Moran T. & T. Co.*, 1974 A.M.C. 555, 498 F2d 158 (CA-2); *American Oil Co. v. Lacon*, 1973 A.M.C. 1900, 337 F.Supp. 1123 (SD,Ga.); *H. Schuldt v. Standard Fruit*, 1978 A.M.C. 2061 (SDNY)."

Notwithstanding *Sun Oil*, some courts have simply refused to treat the tugmaster-harbor pilot as a "loaned" employee of the ship, notwithstanding the existence of a pilotage clause, and have held the tug company liable for the negligent acts of its "loaned" employee:

West Eldara, 1939 A.M.C. 977, 104 F2d 670 (CA-2) (contract entered into by charterer; shipowner unaware of pilotage clause. No agency relationship established between charterer and owner, and tug company held solely liable for damage to pier and vessel being assisted); *Patterson v. Curtis Bay*, 1953 A.M.C. 1371, 205 F2d 694 (CA-3) (pilotage clause improperly pleaded by way of answer rather than cross libel; apparently, had it been properly presented, effect might have been given to it); *Elmer A. Sperry—Tower Grange*, 1948 A.M.C. 1885, 80 F.Supp. 461 (D,Md.) (tug company held "secondarily liable" on theory of principal and agent; i.e., "loaned" harbor pilot nonetheless considered servant of tug company); *Otto M. Reiss*, 1948 A.M.C. 1636, 79 F.Supp. 1 (D,Minn.) (pilotage clause defense simply not considered); *People of California v. Jules Fribourg*, 1956 A.M.C. 939, 140 F.Supp. 333 (ND,Cal.); *Har Canaan—Pipe Line Damage*, 1961 A.M.C. 703, 287 F2d 852 (CA-5) ("dead ship" case; apparently court felt the tug company was in complete charge (straight towage contract), including providing assisting tugs and pilot as well); *State Marine Co. v. Victory Carriers*, 1959 A.M.C. 2164, 272 F2d 463 (CA-9) (pilotage clause not effective to bind shipowner when contract arranged by charterer; indemnity over against charterer allowed for breach of its warranty that it had authority to bind shipowner); *Tankers and Tramps v. Jane McAllister*, 1966 A.M.C. 1205, 358 F2d 896 (CA-2) (failure on part of tug company to prove that pilotage clause was part of the contract or embodied by virtue of prior dealings); *Traverse*

15 Citing the First Edition of this text.

County—Coppedge Tugs, 1966 A.M.C. 1809, 251 F.Supp. 47 (MD, Fla.) (repair company by an oral contract had no authority to bind vessel owner to a pilotage clause).

While not directly involving the validity of a pilotage clause, as apparently there was no pilotage clause embodied in the contractual arrangements between the respective parties, it is important to note *Sands Point—Yacht Abogado (Baker-Whiteley Towing Co. et al v. Tebbs)*, 1968 A.M.C. 668, 271 F.Supp. 529 (D, Md.), *aff'd* 1969 A.M.C. 275 (CA-4), in which the court for the first time in a case involving a docking and undocking pilot applied the doctrine of breach of warranty of workmanlike service, recently applied in several towing cases in the face of the contrary doctrine that negligence must be proved against the tug company (enunciated in *Stevens v. White City*, 1932 A.M.C. 468, 285 U.S. 195 (1932), and innumerable later decisions following it).

The applicability of the doctrine of warranty of workmanlike service apparently first arose in *James McWilliams Blue Line, Inc. v. Esso Standard*, 1957 A.M.C. 1213, 245 F2d 84 (CA-2). In that case, a barge was damaged while being turned. Its owner sued the charterer for damage and, some time later, the charterer impleaded the tug company. The court having held that the charterer was liable to the owner for any damage caused to the barge by the negligence of those to whom it entrusted the barge, the issue then was whether or not the tug company was liable to the charterer. The tug company raised the three-year statute of limitations applicable to negligence actions in the state in which the damage occurred, contending that the failure of the charterer to implead within the three-year period barred the charterer by reason of laches. The Second Circuit held that the tug company owed a warranty of workmanlike service to the charterer and operator of the barge and that the six-year contract statute of limitations applied. Apparently, the rule in *Stevens v. White City, supra*, was neither briefed nor considered by the court or counsel.

In *Dunbar, Admx. v. H. Dubois' Sons Co. and Bronx Towing Line, Inc.*, 1960 A.M.C. 1393, 275 F2d 304 (CA-2), the Second Circuit, in a wrongful death action against the owner of the barge in tow, who in turn impleaded the tug company, cited the *James McWilliams Line* case, *supra*, with approval, stating in part:

> . . . it becomes clear that appellant has set forth a cause of action against Bronx Towing by alleging that the unseaworthy condition of the *Trenton* which led to Dunbar's death was brought into play by the negligent manner in which the tug *Cortland* performed its towing operations.

In its decision in *Sands Point—Yacht Abogado, supra*, the court cited *James McWilliams* and *Dunbar, supra*, with approval, as well as the stevedoring cases upon which they were predicated (*Ryan Co. v. Pan-Atlantic Corp.*, 1956 A.M.C. 9, 350 U.S. 124; *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 1958 A.M.C. 501, 355 U.S. 563; *Crumady v. J. H. Fisser*, 1959 A.M.C. 580, 358 U.S. 423, etc.). *James McWilliams* and *Dunbar, supra*, have also been cited as authority in a straight towage situation. *Singer v. Dor Towing Co.*, 1968 A.M.C. 146, 272 F.Supp. 931 (ED, La.), again without either court or counsel apparently being aware of the contrary rule in *Stevens v. White City, supra*. Cf., *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, etc.*, 1970 A.M.C. 1147, 424 F2d 684 (CA-5).

See, discussion, Chapter VI, *Collision and Limitation of Liability*, under heading *Personal Contracts*, for additional cases applying the doctrine of "warranty of workmanlike service," although not in a context of the pilotage clause. See, also, *Stevenson v. Whiteman Towing*, 1971 A.M.C. 345, 331 F.Supp. 1038 (ED,La.).[16]

It is submitted that an extension of the warranty of workmanlike service to towage and harbor pilotage situations is in error from many standpoints:

(1) It runs counter to the well-established rule in *Stevens v. White City, Supra*, that negligence must be proved; i.e., an action for damage arising from a towage situation is *ex delicto*, not *ex contractu*;

(2) If the liability in either a towage or harbor pilotage situation is truly based on warranty, then the tug company cannot limit liability for damages flowing from its breach although it could limit against the same claims if they sound in negligence. *The Cullen No. 32*, 1933 A.M.C. 1584, 290 U.S. 82 (1933). That is, the warranty even though implied and not express, would be construed as a pe

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16 Note, however, *A/S Atlantica v. Moran T. & T. Co.*, 1974 A.M.C. 5 498 F2d 158 (CA-2), where the court stated that the Second Circuit will not foll the doctrine that the undocking pilot's failure to request adequate tug po breaches the workmanlike service warranty implied in the towage contract and therefore outside the protection of the pilotage clause.

sonal contract of the owner against which the right to limit is precluded.

As noted above, the courts have created apparent exceptions to the broad doctrine enunciated in *Sun Oil,* and, in some instances, have simply ignored the basic premise underlying it; i.e., that the harbor pilot is a "loaned employee" who, for the time being, becomes the employee of the assisted vessel for all purposes.

For example, in a number of cases the courts have found tug companies liable for what appears to be "antecedent negligence" on the part of the tug company or its employees. In *American South African Line v. Sheridan,* 1936 A.M.C. 287 (ED, Pa.), the court found that the pilot went aboard the vessel to be assisted with knowledge of the lack of power on the part of the assisting tugs; that the tug company was responsible for his negligence in doing so despite the existence of the usual pilotage clause and the fact that the ship was proceeding under her own power; and that his knowledge would not be imputed to or bind the shipowner.

In *William J. Worth,* 1949 A.M.C. 121, 171 F2d 48 (CA-3), the court held that the tug company's managerial employees on shore were aware that the assisting tugs were inadequately powered for the task at hand before the pilotage job was undertaken, and that the tug company was liable.

In *Luckenbach v. Weatherbee,* 1955 A.M.C. 1606 (SD, Tex.), the tugs had been ordered to assist a steamship entering Galveston from Houston. One tug, paralleling the vessel's course before putting a line on her, collided twice with the vessel's port side, causing damage. The court held that the contract exemption was ineffective because the steamship had not yet been taken "in tow" at the time of the collision.

In *People of California v. Jules Fribourg,* 1956 A.M.C. 939, 140 F.Supp. 333 (ND, Cal.), the court found that the harbor pilot's negligence lay in his failure to order a second tug for use in case of need. As such, his negligence was not "in respect to the giving of orders to" any assisting tugs and "in respect to the handling of the vessel" and, therefore, the pilotage clause was ineffective.

In *Penna. R.R. v. Beatrice,* 1958 A.M.C. 1612, 161 F.Supp. 136 (SDNY), the court simply misunderstood the status of the harbor pilot. There, a vessel, using her own propelling power and assisted by two tugs, with a docking pilot on the bridge, pinned one of the assisting tugs against an adjacent barge, causing damage. The court found that the tug, the docking pilot and the ship's crew were all negligent and divided the damge three ways. The difficulty with the decision is that the court found the tug company negligent only because of the negligence of the docking pilot, stating,

> Dalzell *through its employe, the pilot or tug captain, on board the Beatrice,* was negligent in the operation and maneuvering of the flotilla in the following respects (enumerating). . . . (Emphasis supplied.)

Notwithstanding that the court found that the docking pilot was an employee of the tug company (in the face of the usual pilotage clause), the tug company was nonetheless granted indemnity over against the assisted vessel based upon the indemnity provisions of the pilotage clause. As a consequence, the shipowner paid two-thirds of the damage and the tug company bore one-third because of the negligence of its tug *in rem.* The court obviously overlooked the fact that the basic understanding, even before the advent of the pilotage clause, was that the docking pilot was a "loaned employee," doing the shipowner's work, under the supervision of the master and was not doing the tug company's work when piloting a vessel under its own power. To the same effect, see *Booth S.S. Co. v. Dalzell No. 2,* 1966 A.M.C. 2615 (SDNY).

In *Great Lakes Towing Co. v. American S.S. Co.,* 1948 A.M.C. 249, 165 F2d 368 (CA-6), the court held a pilotage clause ineffective because the assisting tug proceeded on its own initiative without requesting directions from the harbor pilot or furnishing an opportunity for directions to be given.

In *Tankers and Tramps v. Jane McAllister,* 1966 A.M.C. 1205, 358 F2d 896 (CA-2), the court ignored the well-established "loaned employee" custom, and held that the existence of a pilotage clause had not been established as a part of the original oral contract or embodied in prior dealings between the parties. The same result was essentially reached in the *West Eldara,* 1938 A.M.C. 282 (SDNY), modified on appeal in 1939 A.M.C. 877, 104 F2d 670 (CA-2).

Pilotage Clause Ineffective as to Third Parties

Clearly, the pilotage clause does not protect the tug company from liability to third parties if its assisting tugs are negligent, or, in those instances in which the pilotage clause is held ineffective (whatever

the reason), for the negligence of the harbor pilot.[17] If the pilotage clause is held effective, however, the tug company can obtain indemnity over against the assisted vessel. *William J. Worth,* 1949 A.M.C. 121, 171 F2d 48 (CA-3); *Brenta II,* 1937 A.M.C. 981, 92 F2d 37 (CA-2); *Patterson v. Curtis Bay,* 1953 A.M.C. 1371, 205 F2d 694 (CA-3); *Gypsum Queen—Peerless,* 1953 A.M.C. 2071 (ED, Va.); *People of California v. Jules Fribourg,* 1956 A.M.C. 939, 140 F2d 333 (CA-9); *Penna. R.R. Co. v. Beatrice,* 1958 A.M.C. 1612, 161 F.Supp. 136 (SDNY); *International Term. Op. v. Naviera Aznar,* 1961 A.M.C. 1758, 198 F.Supp. 214 (SDNY); *Nippon Yusen v. Zepher Shipping,* 1971 A.M.C. 949 (D,Mass.).

The pilotage clause, *unless properly drafted,* does not provide indemnity to the tug company for damages sustained by its assisting tugs. *Atlantic Mut. Ins. Co. v. Bulkcrude,* 1952 A.M.C. 1400, 107 F.Supp. 771 (SD, Tex.); *State Marine Corp. v. Victory Carriers, Inc.,* 1959 A.M.C. 2164, 272 F2d 463 (CA-9); *El Salvador—Tug Russell No. 18,* 1966 A.M.C. 2392, 364 F2d 118 (CA-2); *U.S. v. Neilson,* 1955 A.M.C. 935, 349 U.S. 129 (1955). It should be noted, however, that in *Neilson, supra,* Justice Black, in writing the opinion for the majority observed:

> An agreement that one shall not be liable for negligence of a third person cannot easily be read as an agreement that one is entitled to collect damages for negligence of that third person. And there is no reason to stretch contractual language to force payment of damages under circumstances like these. A person supplying his own employes for use by another in a common undertaking cannot usually collect damages because of negligent work by the employe supplied. *Clear contractual language might justify imposition of such liability.* But the contractual language here does not meet such a test and we do not construe it as authorizing respondent to recover damages from petitioner. (Emphasis supplied.)

Compare *Dalzell v. New York,* 1948 A.M.C. 1230, 77 F.Supp. 793 (EDNY) (decided before *Neilson, supra*) where the court allowed recovery against the assisted vessel for damage to an assisting tug. See, also, *American Oil Co. v. Lacon* (1973), *supra,* and *Nippon Yusen v. Zepher Shipping* (1971), *supra.*

17 As noted heretofore, it does so protect the tug company when properly understood; not as a private contract term but as a declared limitation of the boundaries beyond which the tug company does not permit or authorize its servants to work.

Pilot Individually Liable

It goes without saying, of course, that the general rule applicable to all pilots applies and the harbor pilot is still responsible individually to injured parties for his own negligence. *Gypsum Queen—Peerless,* 1953 A.M.C. 2071 (ED, Va.); *Barbey Packing Co. v. S.S. Stavros,* 1959 A.M.C. 1542, 169 F.Supp. 897; *U.S. v. Joyce,* 1975 A.M.C. 1498, 511 F2d 1127 (CA-9); *Bethlehem Steel v. Yates,* 1971 A.M.C. 577, 438 F2d 798 (CA-5).

Ship Not Bound by Pilotage Clause If the Person Accepting the Same Is Without Authority to Bind the Vessel

On clear agency principles, courts have refused to bind vessel owners to pilotage clauses where the acceptance of such clauses was by one having no authority to bind the vessel owner. If, however, the person accepting the clause warrants an authority he does not have, the tug company is entitled to indemnity from him. *States Marine Co. v. Victory Carriers,* 1959 A.M.C. 2164, 272 F2d 463 (CA-9); *West Eldara,* 1939 A.M.C. 877, 104 F2d 670 (CA-2) (no indemnity against charterer as charterer did not warrant authority to bind the vessel owner); *Traverse County—Coppedge Tugs,* 1966 A.M.C. 1809, 251 F.Supp. 47 (MD, Fla.); *A/S Acadia v. Curtis Bay Towing,* 1969 A.M.C. 648, 304 F.Supp. 1050 (ED,Pa.).

Great Britain and the Commonwealth Nations

Harbor pilotage in Great Britain and the Commonwealth Nations appears to be handled by the duly licensed pilots for the pilotage area in question, and the "pilotage clause" is of academic interest only. One of the primary reasons, of course, is that the defense of compulsory pilotage has been abolished and the vessel owner is liable for the pilot's negligence whether the pilot is compulsory or voluntary.

The responsibility for the hiring of tugs in ordinary circumstances appears to rest upon the master and not the pilot. *The Julia* (1860), *supra.* However, as a practical matter, the master should and usually does consult the pilot beforehand.

In making fast, it is the duty of the assisting tugs to keep clear and avoid a collison. *Contest v. Age,* (1923) 17 Ll.L.Rep. 172; *Assistance and Others v. Lagarto* (1923) 17 Ll.L.Rep. 264. But the

assisted ship also has to exercise due care, cannot ignore the presence of the tug, and cannot expect her to bear the full brunt of looking out for her own safety. *Harmony v. Northborough* (1923) 15 Ll.L.Rep. 119. Compare *Academy Tankers v. Steuart Transp.*, 1971 A.M.C. 1382, 441 F2d 724 (CA-4), where it was held that an assisting tug was not bound to warn the assisted vessel of its dereliction of duty by excessive speed or improper rudder orders unless the tug knew or by reasonable care should have known that such derelictions would occur, and *Thor—Lindwood Victory* (1969), *supra*, where it was held that while generally an assisting tug in a docking or undocking maneuver is held to know that the assisted vessel's engines may be reasonably used and without notice thereof to the assisting tug, the assisted vessel is under a duty to see that its maneuvers do not place the tug in a position of peril, and if the vessel engages in an unexpected maneuver which it could foresee would place the tug in a position of peril, it is liable for the resulting damage.

It is also the duty of the assisting tug during maneuvering to keep out of the way, and this includes the duty of shifting the towing hawser as appropriate. *The Alexander (Newport and South Wales) Docks and Railway Company v. Cape Colony* (1920) 4 Ll.L.Rep. 116.

While it is not the obligation of the pilot to be constantly giving orders to the assisting tug, failure to give proper and timely instructions is a fault. *The Energy* (1870) L.R. 3 A. & E. 48. Compare, however, *Smith v. The St. Lawrence Tow Boat Company* (1873) L.R. 5 P.C. 308, 2 Asp. M.L.C. 41, P.C. with *The Sinquasi* (1880) 5 P.D. 241, 4 Asp. M.L.C. 383. In the former it was held that the tug was responsible for the course of both vessels so long as no orders were given by the pilot in charge of the tow; in the latter, a collision occurred because the tug made a wrong maneuver. It was held that the fact that the pilot had given no instructions to the tug before the collision did not relieve the assisted vessel's owners from liability. And see *The Panther and the Ericbank, Steam Barge Trishna* [1957] 1 All E.R. 641, [1957] 1 Ll.L.Rep. 57, where the assisting tug failed to stop her engines when collision was imminent and her revolving propeller was the single largest contributing factor to the damage to the colliding vessel. It was held that while it was the duty of the pilot on the assisted vessel to give general directions to the officer in charge of the tug, such as to start or stop towing, the detail of the maneuvers by the tug was left to the discretion of the tugmaster.

In *Smith v. St. Lawrence Tow Boat Company* (1873), it was also held to be negligence on the part of the pilot in not ordering the assisting tug to stop in order that the vessel assisted could come to anchor in a dense fog.

Attention is also directed to *The Saratoga* (1861) 167 E.R. 140, where a tug was assisting a vessel into a dock basin and was lashed alongside. The tide forced the vessel and the tug close to a landing stage and the pilot ordered the tug to hold on and go ahead, which the tug did. In doing so, it was forced against the landing stage and was damaged. The court held that if, during towing, an extraordinary peril arises, the tug is not at liberty to abandon the towed vessel but is bound to render her the necessary assistance, and if she does, she is entitled to a salvage award including repayment of all damages thereby incurred.

Collateral Decisions of Interest

In at least one decision, a harbor pilot was denied maintenance and cure for injuries sustained by him while aboard the vessel being assisted. *Bonnewell v. U.S.*, 1948 A.M.C. 842 (ED, Va.). The decision is difficult to understand if the pilotage clause is to be given its full effect.

Of interest with respect to preservation of the tug company's right of indemnity is *Moran T. & T. Co. v. U.S.*, 1944 A.M.C. 784, 56 F.Supp. 104 (SDNY). In that case, the litigation originated in state courts and involved damage to shore structures (prior to the 1948 Extension of Admiralty Act). Because of the procedural difficulties involved, the tug company brought a "protective" libel in Federal court to establish its right to indemnity prior to the running of the applicable statute of limitation, and prior to final resolution of the state court proceeding. The court refused to dismiss the libel and stated it presented a claim cognizable in admiralty.

In *Sears v. American Producer*, 1972 A.M.C. 1647 (ND,Cal.), no custom was proven that San Francisco harbor tugboats, assisting distressed vessels without salvage contracts, charge only for towage and not salvage.

In *Grace Line v. Todd Shipyards*, 1974 A.M.C. 1136, 500 F2d 361 (CA-9), a steamship under control of a pilot collided with a con-

cealed underwater obstruction of a drydock. It was held that the pilot's knowledge of prior accidents caused by the obstruction did not necessarily establish his *actual* awareness on the date of the collision as he may have forgotten about the hazard or believed that it had been eliminated. The duty of the negligently constructed drydock was either to eliminate the danger or give notice of it.

Economic Considerations Compel a Recognition and Enforcement of a Pilotage Clause

Aside from moral considerations which should preclude a shipowner from attempting to disavow a contract freely entered into by which he consents to accepting as his own employee a harbor pilot who is "loaned" to him, there are highly persuasive economic reasons why shipowners should, in their own enlightened self-interest, concede the validity of pilotage clauses and proceed with caution in attempting to have them declared invalid or inapplicable.

For example:

(1) It must be remembered that literally every ship being piloted has already procured P & I insurance insuring the liability of its owner to third parties for negligent acts of its master, crew *and pilots*. If the "loaned employee" status of the harbor pilot is to be ignored, then the tug company, both with respect to its assisting tugs and its "loaned" harbor pilot, must procure insurance in an amount equal to the full value of the largest vessel handled and her cargo. The cost of such insurance necessarily must be included in the ship assistance rates charged, *in which case vessel owners will be paying twice for insurance against the same risks.*

(2) If the "loaned employee" status is ignored, it could easily result in the owner of the assisted ship losing his immunities under Cogsa and bill-of-lading clauses. To illustrate: A ship strikes a submerged object, resulting in heavy damage to both ship and cargo. Cargo owners file suit against the ship and the tug company providing the harbor pilot and the assisting tugs. If the actions of the harbor pilot are attributed to the tug company, cargo interests could recover against the tug company. In turn, however, the tug company, under the pilotage clause, could require the shipowner to indemnify it, including the costs of defending the suit. The shipowner would therefore be in the unfortunate position of having to pay for damages to cargo on his own ship resulting from errors in

navigation which it would not otherwise have had to pay under the immunities granted by Cogsa and the bill-of-lading clause.[18]

(3) While a shipowner can, in appropriate circumstances, limit his liability against negligence claims, he cannot limit as against contractual indemnity claims arising under the pilotage clause. Thus, if a harbor pilot's negligence results in damage serious enough to invoke the limitation of liability statutes, the shipowner can limit his liability only if the harbor pilot is construed as his employee. If the harbor pilot is held to be doing the tug company's work, in whole or in part, the tug company could be liable to third parties but could then claim indemnity over against the shipowner—who, in turn, cannot limit against an obligation which he has contracted to pay.

It was to clarify the status of harbor pilots and to reemphasize their "loaned employee" relationship, that the first paragraph of the pilotage clause was recently revised so that it now reads:

> We do not furnish pilots or pilotage to vessels making use of or having available their own propelling power so that whenever any licensed pilot, or a captain of a tug which is furnished to or is engaged in the service of assisting a vessel making use of or having available her own propelling power, participates in directing the navigation of such vessel, or in directing the assisting tugs, from on board such vessel or from elsewhere, it is agreed that he becomes the borrowed servant of the vessel assisted and her owner or operator for all purposes and in every respect, his services while so engaged being the work of the vessel assisted, her owner and operator, and being subject to the exclusive supervision and control of the vessel's personnel. Any such service performed by any such person is beyond the scope of his employment for us and neither those furnishing the tugs or lending any such person, nor the tugs, their owners, agents, charterers, operators or managers shall be liable for any act or omission of any such person. The provisions of this paragraph may not be changed or modified in any manner whatsoever except by written instrument signed by an officer of this company.

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18 This situation was almost litigated in the *Alkaid*, 1968 A.M.C. 748 (SDNY), where cargo owners sued both the ship and the tug company. The latter had provided tug services to "assist" the ship and one of its docking pilots was on the ship's bridge. The tug company filed an answer, claiming in substance that the tug captain on the bridge of the ship was doing work beyond the scope of his duties for the tug company. After several depositions were taken, the cargo owner dismissed as to the tug company.

Liability of Pilot Associations for Negligence of Member-Pilots

The general form of a pilot association is that of a loose partnership, in which the various members maintain a central accounting and dispatch office and operate out of a "pool"; that is, the individual pilot members take turns in piloting vessels on a rotation basis. Revenues derived from the individual members piloting such vessels are put into a common bank account, the expenses of operating the association are then paid, and the balance distributed. The distribution may not be exactly equal and, in fact, is usually pro-rated on the basis of the number of trips made by each pilot. Also, apprentice or "cub" pilots usually received a lesser share. It is not uncommon for the common bank account to be completely paid out at the end of each month.

As a pilot association is clearly a species of partnership, one would normally expect that the association could be held liable for the negligence of its individual members. Such is not the case. Almost without exception recovery has been denied.

The leading case on this point is *Guy v. Donald*, 203 U.S. 399, where Justice Holmes said:

> . . . The substance of the case is this: A man who is responsible before the law is alleged to have committed a tort. It is proposed to make other men pay for it who not only have not commanded it or any act of which it was the natural consequence, but who would have prevented it if they could, and who have done what they could to prevent it, so far as the qualifications and employment of the pilot were not taken out of their hands by law. Why they should have to pay is the problem recurring through agency in all its forms, and whatever may be thought of some of the reasons that have been offered when the obligation has been imposed, it is certain that something more and better must be found than that the defendants divide the pay for the work that they have done, or that it is a convenience to the party aggrieved to discover a full purse to which to resort.
>
> . . . If we imagine such a pilot performing his duties within sight of the assembled association, he still would be sole master of his course. If all of his fellows passed a vote on the spot that he should change, and shouted it through a speaking trumpet, he would owe no duty to obey, but would be as free as before to do what he thought best. (Citing *The City of Dundee*, 108 Fed. 679.)

Among the many other cases adhering to this rule with respect to pilot associations are: *Mason v. Ervine*, 27 Fed. 459 (1886); *Mobile Bar Pilots Association v. Commissioner of Internal Revenue*, 1938 A.M.C. 1052, 97 F2d 695 (CA-5); *McGrath v. Columbia River Bar Pilots Association (The Childar)*, 1936 A.M.C. 724, 83 F2d 746 (CA-9); *Damp. Atalanta v. U.S.*, 1929 A.M.C. 855, 31 F2d 961 (CA-5); *Nelson v. U.S.*, 1928 A.M.C. 887, 25 F2d 312 (USDC, Tex.); *United Fruit Co. v. Mobile Towing & Wrecking Co.*, 1960 A.M.C. 115, 177 F.Supp. 297 (DC, Ala.); *Liv. General, Admx. v. Pilots Association*, 1966 A.M.C. 1734, 254 F.Supp. 447; *Manchioneal*, 243 Fed. 801 (CA-2); *O'Hare v. U.S.*, 1950 A.M.C. 182 (WD, Wash); *Steinhort v. Commissioner of Internal Revenue*, 335 F2d 496 (1964) (CA-5); *Port of Seattle v. Maria Rubicon*, 1976 A.M.C. 109, 404 F.Supp. 302 (WD,Wash); *In re China Lines, Ltd.*, 342 F.Supp. 426, *aff'd sub nom C. & G. Boat Co. v. Crescent River Port Pilots Ass'n*, 456 F2d 1290 (CA-5); *McKeithen v. Frosta*, 1978 A.M.C. 2653, 441 F.Supp. 54 (ED,La).

There appears to be only one case holding that a pilot association is liable for the acts of its individual members and, in that case, the facts were somewhat unusual. *Santiago v. Morgan*, F. Cas. #12331 (DC, Cal.). There, the pilot associations were restricted to six members each and each of the six-member associations owned its own pilot boat. Also, the bills for pilotage were made out in the name of the association and payments collected by it. The court said, in part:

> . . . Under these circumstances I am unable to conceive any definition of the partnership which would not include an association like the one described. Any member of it would be clearly entitled to an account, and each participated in the profits, as such, and was liable for his proportion of the losses. It follows that the partnership must be liable for malfeasance or negligence committed by one of the partners in the course of his employment and within the scope, and while engaged in performing, the business of the partnership.

In *The Joseph Vaccaro*, 180 Fed. 272 (DC, La., 1910), the pilot association sued a vessel for damages inflicted to property of the pilot association. The vessel at the time the damage occurred was being piloted by one of the members of the pilot association. The court denied recovery on the grounds that "a partnership is suing to

recover damages to the partnership property occasioned by the fault of one of its members." The implications of the holding are clear; if, on the one hand, fault on the part of one of the pilots is to be imputed to the pilot association of which he is a member (when suing for damages to partnership property), by a parity of reasoning, damages sustained by a third party by reason of the negligence of a pilot-member of a pilot association ought also to be recoverable.

These two cases are of dubious authority in view of the fact that the Ninth Circuit (which embraces California) must be deemed to have overruled *Santiago v. Morgan* by its later decision in *McGrath v. Columbia River Bar Pilots Association, supra,* and the Fifth Circuit (which embraces Louisiana) overruled by implication *The Joseph Vaccaro* in its later decision in *Damp. Atalanta v. U.S., supra.*

The pilot associations are indeed fortunate that the rule of non-liability of such associations seems so firmly established. It must be conceded, as a matter of logic, that it is difficult to harmonize the rule of non-liability of pilot associations with the repeated liability imposed upon "associations" of physicians practicing in a common medical clinic whose *modus operandi* as respects division of profits and expenses does not significantly vary.

As noted heretofore, in Great Britain and the Commonwealth Nations, the "pilotage authorities" in those countries are governmental bodies. Apparently, no case has arisen in which actions have been prosecuted against pilots' associations or unions seeking to impose liability upon the associations or unions for the acts of the individual members.

Recovery by Pilot for Negligence of Others

Obviously, pilots may be and often are injured during the course of performance of their piloting duties. If injured through the negligence of others, they are entitled to recover for their injuries.

In *Ingo Peterson, Admx. v. American Diumond Line (Black Gull),* 1936 A.M.C. 334, 1937 A.M.C. 175, 1937 A.M.C. 846, 82 F2d 758 (CA-2), the steamship *Black Gull* was in charge of a Sandy Hook pilot. When his piloting job was completed, the steamer signaled the pilot boat to come alongside and take the pilot off the steamer. A heavy gale was blowing and visibility was very poor.

During the transfer, the pilot was drowned. Suit was brought to recover from the *Black Gull* for its negligence in transferring the pilot. The steamer was found at fault for moving on too soon, without seeing to it that the pilot's transfer was safely made.

More recently, in *Magnolia Towing Company v. Pace,* 1967 A.M.C. 2079, 378 F2d 12 (CA-5), a pilot employed by a towing company was in an accident while being driven from his home to work in an automobile owned by his employer towing company. The court held he was an employee of the towing company and, as such, was a "seaman" under the Jones Act. See also, *Mason v. U.S.,* 1949 A.M.C. 1800, 177 F2d 352 (CA-2) (defective Jacob's ladder; pilot severely injured); *Maryland Casualty Co. v. Toups,* 1949 A.M.C. 994, 173 F2d 542 (CA-5) (Texas Workmen's Compensation law applicable to employee of Sabine Pilots' Association who drowned by falling off the association's dock); *Browne v. Makin,* 1950 A.M.C. 114, 177 F2d 753 (CA-5) (Savannah bar pilot's loss of middle finger and index finger permanently incapacitated him from acting as pilot and entitled him to his share of benefits under the association's pooling agreement); *U.S. Lines v. Cummings,* 1952 A.M.C. 608, 195 F2d 221 (CA-9) (harbor pilot coming aboard was injured on the Jacob's ladder; vessel held at fault); *Southard, Admr. v. Independent Towing,* 1972 A.M.C. 116, 453 F2d 1115 (CA-3) (action for death of a docking master who fell to his death while boarding a vessel. At the trial court level, a verdict was directed in favor of the ship but on appeal it was reversed on the grounds that the plaintiff's evidence was sufficient to go to the jury); *Robinson v. Grancolombiana,* 1970 A.M.C. 1781, 430 F2d 645 (CA-5).

Compensation for Pilotage Services

Pilots are, of course, entitled to recover compensation for their services whether such pilotage is compulsory or voluntary.[19] In all states, the rates for pilotage are set either by statute or by rule and regulation of the state pilot commission. *Powell v. State Board of Pilot Commissioners,* 224 Or. 122, 355 P2d 224; *Portland Steamship*

19 In Maine, the master of a vessel may act as pilot. All other states having pilotage laws impose compulsory pilotage when a vessel has been properly "spoken" by the pilot, either on the basis of the full pilotage fee or "half-pilotage" (Texas and California).

Operators' Association v. Oregon State Board of Pilot Commissioners, 1963 A.M.C. 1872, 232 Or. 495, 375 P2d 420. This, however, is not true with respect to "harbor pilotage" where docking and undocking masters are provided by the tug companies. Such rates are set by the employing companies in most instances, but may be subject in some instances to collective bargaining rates fixed by contract between their employers and the pilots' union-bargaining representatives. See, for example, *Treakle v. Pocahontas S.S. Co.,* 1969 A.M.C. 33, 406 F2d 412 (CA-4), in which it was held that tugboat pilots employed by towing companies at Hampton Roads, Virginia, whose collective bargaining agreement in addition to an hourly wage rate provided added compensation of $8.50 per day to "cover the service of docking and undocking ships," were not entitled to claim compensation as "docking pilots" and to assert maritime liens against oceangoing vessels assisted by them in addition to the compensation fixed by the collective bargaining agreement.

In *Daniels et al v. U.S.,* 1969 A.M.C. 1247 (CtCl), the authority of the Secretary of the Navy to prescribe a salary formula for civilian pilots employed by his Department was upheld even though the rates of pay might be lower than those of non-Government pilots in the area or port.

See, also, *Blair v. Blue Spruce,* 1972 A.M.C. 1298, 323 F.Supp. 79 (D,Mass.), where, even though the ship's master refused to accept a compulsory pilot's services, the pilot was held to have a maritime lien for the statutory fees for his tendered service. The court also held that pilotage services are "other necessaries" under the 1920 Federal Maritime Lien Act, which lien superseded that of a local Massachusetts statute also conferring a lien for pilotage services. With respect to the last point, see, also, *Ajubita v. Piek,* 1970 A.M.C. 1463, 434 F2d 1345 (CA-5).

In *Powell v. State Board of Pilot Commissioners,* 224 Or. 122, 355 P2d 224 (1960), the Oregon Supreme Court struck down the pilots' association's attempt to assess extra charges for ancillary services such as docking and undocking vessels, moving vessels within harbors, etc. on the ground that such ancillary services were embraced within the term "pilotage" as used in the Oregon Pilotage Act.

Under the Pilotage Act, 1913, Sec. 50, a pilot is prohibited from demanding or receiving, and the master shall not offer or pay to the

pilot, pilotage dues in respect of pilotage services at any other rates, whether greater or less, than the rates which may be demanded by law.

In *Muller v. Trinity House (Deptford Strond)* [1925] 1 K.B. 166, [1924] All E.R. Rep. 706, 16 Asp. M.L.C. 458, 20 Ll.L.Rep. 56, the term "pilotage services" under the Act was interpreted as meaning "services rendered" and the pilotage authority could not by by-law impose a charge upon a ship when, in fact, no pilotage services were performed. See, with respect to "separate services," *Humber Conservancy Board v. Massey Sons Ltd.* (1937) 58 Ll.L.Rep. 98, C.A.

Section 17(g) of the 1913 Act provides that if and so far as it appears to the pilotage authority to be generally desired by the pilots concerned, the authority may provide for the "pooling" of pilotage dues earned by the licensed pilots or by any class of pilots in the district. Pursuant to that authority, the Forth Pilotage Authority adopted a by-law providing that should any question arise regarding the distribution of the Authority's pooled earnings among the pilots entitled to share therein, the question would be referred to the Authority whose decision would be final. The by-law was stricken down as being *ultra vires* and beyond the authority of the pilot authority. *McAlister v. Forth Pilotage Authority* (1943) 76 Ll.L.Rep. 32.

See, generally, with respect to earlier decisions relating to a right to compensation, *The Servia, The Carinthia* [1898] P. 36, 8 Asp. M.L.C. 353; *The Adah* (1830) 166 E.R. 262; *The Clan Grant* (1887) 12 P.D. 139, 6 Asp. M.L.C. 144. See, also, *The Ambatielos, The Cephelonia* [1923], *supra.*

Compulsory Pilotage

In those states having compulsory pilotage, either full pilotage fees or half pilotage fees, as the case may be, are recoverable when such services have been properly tendered and refused. The compulsory fee is recoverable by the pilot who first properly "speaks" the vessel at a point within a reasonable distance of the pilotage grounds. *Cooley v. Board of Wardens,* 53 U.S. 299 (1851); *Pacific Mail S.S. Co. v. Joliffe,* 69 U.S. 450 (1864); *Ex Parte McNeil,* 80 U.S. 236; *Anderson v. Pacific Coast S.S. Co.,* 225 U.S. 187; *The Glenearne,* 7 Fed. 604 (D,Ore.) (1881); *Fordham v. Munson S.S. Line,* 1934 A.M.C. 49, 6 F.Supp. 435 (1934); *The Francisco Garguilo,* 14 Fed.

495 (EDNY) (1882); *The S. & B. Smith* (DC, NY) Fed. Cas. #12291; *Horton v. Smith,* Fed. Cas. #6709 (DC, NY); *The Swift Arrow,* 1923 A.M.C. 1012, 292 Fed. 651 (D,Mass.); *Weldt v. Howden,* 39 Fed. 877 (SD,Cal.) (1889); *Craig v. Gulf Barge and Towing Co.,* 201 N. C. 250, 159 S.E. 24; *Wilson v. McNamee,* 102 U.S. 572.

To properly "speak" a vessel means simply to make a valid and proper tender of pilotage services. In *The Ullock,* 19 Fed. 207 (D,Ore., 1884), the court explained it as follows:

> . . . The usual signal by which an offer of pilot service is made in the daytime is a flag at the masthead. This, of course, will be the flag of the country in which the offer is made, or that modification or portion of it called the "Jack." In the United States it is a blue flag charged with a star for every state in the Union, and called the "Union Jack."
>
> . . . But the burning of "flare-ups," or a flashing light, over the side of the boat, at short intervals, is also the customary method of making an offer of pilot service at night. It follows that the libelant made a proper tender of his service as a pilot to the *Ullock,* both in the daytime and after night, provided he did so within the distance prescribed by the ninth pilot rule. . . .

To the same general effect are *The Mascotte,* 39 Fed. 871 (SD, Fla. 1889); *Beebe v. Yummari,* 68 Fed. 930 (D, N.Y.); *The Swift Arrow,* 1923 A.M.C. 1012, 292 Fed. 651 (D, Mass.). And in *The Queen,* 206 Fed. 148 (CA-9) (1913), *aff'd sub nom Anderson v. Pacific Coast S.S. Co., supra,* the court stated that merely because a statute provided for certain methods of tender, this did not necessarily exclude other methods. It cannot be doubted, for example, with practically all vessels having voice communication with other vessels by radio, that an exchange of radio signals would constitute a valid offer and acceptance of pilotage services.

In *Campos v. Puerto Rico Sun Oil Co.,* 1976 A.M.C. 2629, 536 F2d 970 (CA-1), a pilot licensed for Vicques Sound of Puerto Rico "spoke" to defendant's vessel, but the services were refused as the vessel already had aboard it a harbor pilot whose harbor license was endorsed "from sea to Puerto de Yabucoa." In order to reach Puerto de Yabucoa, it was necessary to transit Vicques Sound but the harbor pilot had not been "tested" for Vicques Sound. At first instance, the district court held that the pilot licensed for Vicques Sound was entitled to the compulsory pilotage fee but on appeal the First Circuit reversed, holding the Coast Guard and the Puerto Rico

Ports Authority had licensed the first pilot to board and his license was not subject to collateral attack where neither the Coast Guard, the Ports Authority or the rival pilot were joined as defendants.

In *Jackson v. Marine Explorations,* 1979 A.M.C. 1331, 583 F2d 1336 (CA-5), the Fifth Circuit held that a pilot "speaks" a dumb barge under tow by "speaking" the personnel aboard the towing tug.

In *Babbs v. Press* [1971] 2 Ll.L.Rep. 383, [1971] 2 All E.R. 654, and in *Montague v. Babbs* [1972] 1 All E.R. 240, [1972] 1 Ll.L.Rep. 65, the pilots claimed that a pilot flag displayed at Trinity House pilot station at Gravesend two miles downriver from where the vessel commenced its movement was an "offer" to pilot. The court disagreed, holding that such a "global offer" could not be seriously considered as an "offer" for purposes of Sec. 30(3) of the Pilotage Act, 1913.

In additon to "speaking" the vessel properly, the tender must be made in the proximity of the pilotage grounds. When the subject is covered by statute or by regulations promulgated pursuant to statute, the tender must be made within the limits set forth in the statute or regulation (*Moore v. Heide,* 152 N.C. 625, 68 S.E. 173), but in the absence of a statute or regulation clearly defining the area where tender must be made, the tender may be made within a reasonable distance of the pilotage grounds. In *Beebe v. Yumarri,* 68 Fed. 930 (SDNY) (1895), the court stated:

> I find that the pilot boat approached the *Yumarri* within the customary cruising grounds for incoming vessels, and displayed the blue flag as a signal which was recognized, or ought to have been recognized, by the master and mate of the *Yumarri* when the pilot boat was within a reasonable distance and that this was, in legal effect, a tender and offer of service to pilot the *Yumarri.*

See, also, *The Mascotte* (1889), *supra; The Ullock* (1884), *supra; The S. and B. Smith* (1832), *supra; Horton v. Smith* (1827), *supra; Wilson v. McNamee* (1876), *supra;* and *Babbs v. Press* [1971], *supra.*

Attention is directed to *Ajubita v. Peik,* 1970 A.M.C. 1463, 428 F2d 1345 (CA-5), where the court stated that pilots are entitled to refuse to offer their services except on a cash basis where a ship operator had not established good credit, and *The Frederick* (1838) 166 E.R. 480, where the court held that a pilot was entitled to refuse

to board a disabled vessel for mere pilotage dues, if the circumstances would otherwise entitle him to salvage. See, in this connection, *Akerblom v. Price* (1881) 7 Q.B.D. 129, 50 L.J.K.B. 629, 4 Asp. M.L.C. 441, C.A., where the court held that when a pilot has assisted in navigating a vessel from a dangerous situation to a safe anchorage, the test whether he is entitled to be remunerated for salvage services is not, on the one hand, whether the vessel was at the time of succour in distress, or, on the other hand, whether she was then damaged; but the test is whether the risk attending the services to the vessel was such that the pilot could not be reasonably expected to perform them for the ordinary pilot's fees, or even for extraordinary pilotage reward.

The subject of pilots claiming salvage is discussed in detail in Chapter XII, *Salvage*, under heading "Salvage Services Rendered by Pilots."

Illustrative Cases Involving Compulsory Pilotage

In *People v. McDonald*, 1972 A.M.C. 2090 (NYM), the New York statute, providing that only a Hell Gate pilot could be used by foreign vessels in certain New York harbor waters, was repealed because of a drastic shortage of pilots. In light of the legislative history, the court refused to impose liability upon vessels violating the statute during the five-month period before the repeal date.

In *Blair v. Blue Spruce*, 1970 A.M.C. 1298, 315 F.Supp. 555 (D,Mass.), it was held that even though the master rejected a compulsory pilot's offer of services, the pilot was deemed to have "furnished" them and was entitled to assert a federal maritime lien against the vessel.

In *Jackson v. Marine Explorations* (1979), *supra*, the court approved recovery of pilotage fees under Florida's compulsory pilotage law where the operator of registered tugs and barges engaged in foreign trade had refused to accept state licensed pilots.

In *Baeszler v. Mobile Oil*, 1974 A.M.C. 85, 375 F.Supp. 1220 (SDNY), it was held that where the New York and New Jersey statutes required employment of Sandy Hook pilots only by vessels entering or leaving New York harbor by way of Sandy Hook, a vessel shifting from Stapleton anchorage to Port Mobil, Staten Island, was not obligated to pay a pilotage fee even though she crossed the

Sandy Hook bar area in doing so. See, also, in this connection, *The Stranton* (1917) P. 177, 14 Asp. M.L.C. 280.

In *Los Angeles v. U.S.*, 1973 A.M.C. 722, 355 F.Supp. 461 (CD, Cal.), it was held that the Supremacy Clause of the U.S. Constitution bars municipalities from requiring MSTS vessels belonging to, or demise chartered by, the United States to employ or pay for local pilotage services.

In *Davis v. Ester S.*, 1975 A.M.C. 1579, 509 F2d 1377, 512 F2d 1406 (CA-5), the Fifth Circuit held that by enacting 46 U.S.C.A. 391(a) to broaden the definition of "steam vessel," Congress intended to make such vessels subject to Section 364 requiring federally licensed pilots. Consequently, a non-self-propelled barge, transporting combustible cargo, was a "steam vessel" subject only to federal pilotage requirements and need not take a state licensed compulsory pilot when entering Jacksonville, Florida, on a coastwise voyage.

In *Sandoval v. Mitsui Sempaku*, 1973 A.M.C. 135, 460 F2d 1163 (CA-5), the Fifth Circuit held that the presence of Panama Canal line-handlers, bosun and pilot required by Canal Regulations to assist in navigation through the Canal did not amount to compulsory pilotage, for the errors of which a shipowner would not, under U.S. law, be liable *in personam*.

Section 11 of the Pilotage Act, 1913, established compulsory pilotage for vessels while navigating in a compulsory pilotage district . . . for the "purpose of entering, leaving, or *making use of*" any port in the district. In *Cannell & Trinity House Corp. v. Lawther, Latta & Co.* [1914] 3 K.B. 1135, 83 L.J.K.B. 1832, 12 Asp. M.L.C. 578, the vessel, under charter, was ordered to proceed to Dover to receive orders as to her port of discharge. She passed Dungeness and proceeded to Dover where she stopped for half an hour. The London pilotage district extended to Dungeness, and the port of Dover was within that district. It was held that by stopping outside the port of Dover awaiting orders the vessel had "made use of" that port within the Pilotage Act and was therefore bound to be under the pilotage of a licensed pilot for the district.

In *Thames Launches Ltd. v. Corporation of Trinity House* [1961] 1 All E.R. 26, the plaintiff corporation owned launches which were used to transport passengers on pleasure tours on the Thames within and without the London Pilotage District. The Trinity House

brought criminal proceedings by way of informations against the master of one of plaintiff's vessels for failure to have on board a qualified pilot licensed by the pilotage district. Plaintiff brought an action asking for issuance of an injunction of the criminal proceedings as there was then pending a civil action between the parties involving the same issues and the same parties. The injunction was granted. In *Thames Launches, Ltd. v. Corporation of Trinity House of Deptford Strond (No. 2),* [1961] 2 All E.R. 913, [1962] Ch. 153, [1961] 1 Ll.L.Rep. 608, the court held on the basis of legislation dating back to the reign of Henry VIII and the terms of the Pilotage Act, 1913, that the history of the legislation showed a separation between enactments dealing with the Thames as a highway navigable by the public and those dealing with the pilotage of vessels coming into or leaving the Thames and, viewed against that background, the true construction of the 1913 Act was that navigation for the purpose of using the river as a highway (which plaintiff's company's navigation was) was not navigation for the purpose of "making use" of the port within the 1913 Act; that at the time of the passage of the 1913 Act there was a custom that within the watermen's district, passenger boats plying for hire should be navigated only by licensed watermen or lightermen and should be exempt from compulsory pilotage; and that there was nothing in the London Pilotage Order superseding this custom within Sec. 59 of the 1913 Act.

For other cases dealing with the subject of compulsory pilotage with respect to "passengers," see *The Lion (Owners) v. The Yorktown (Owners)* [1869] L.R. 2 P.C. 525, 16 E.R. 688, P.C.; *The Hanna* (1866) 15 L.T. 334, 2 Mar. L.C. 434; *The Aletta* [1965] 2 Ll.L.Rep. 479; and *Clayton v. Albertsen* [1972] 3 All E.R. 364, [1972] 2 Ll.L.Rep. 457.

In *Beechgrove S.S. Co. Ltd. v. A/S Fjord of Kristiania* [1916] 1 A.C. 364, 13 Asp. M.L.C. 188, H.L., the Clyde Pilot Board by by-law attempted to extend the area of compulsory pilotage beyond the boundaries specified by the enabling act. The by-law was held to be *ultra vires.*

In *Humber Conservancy Board v. Federated Coal & Shipping Co., Ltd.* [1928] 1 K.B. 492, [1927] All E.R. Rep. 626, the vessel came within the compulsory pilotage district for the purpose of obtaining, by signalling, orders as to her port of destination from one of Lloyd's signalling stations and did not take a pilot. It was held that although the signalling station was a "place," it was not a

"port" within the Pilotage Act, 1913 and, consequently, the vessel was not navigating for the purpose of making use of any port within Sec. 11 of the Act.

In *Rindby v. Brewis* (1926) 25 Ll.L.Rep. 26, the court held that while there was no obligation on the part of a master to go out and search for a pilot, under the Act there was a continuing obligation of the navigating vessel to take reasonable steps to keep a lookout for the pilot and fly a pilot flag, noting that the whole Act would be unworkable unless such obligations were imposed.

Under English law, orders of the military and Defence of the Realm regulations with respect to the duty to take pilots are considered as compulsory pilotage. *The Nord* [1916] P. 53; *The Mickleham* [1918] P. 166, C.A.; *The Andoni* [1918] P. 14, 14 Asp. M.L.C. 326; *Humber Conservancy Board v. Grant* (1919) 85 L.J.K.B. 1699, 13 Asp. M.L.C. 421.

In *Alaska Trainship Corp., et al v. Pacific Pilotage Authority,* [1978] 1 F.C. 411 (Can.), the court had before it the question of the validity of regulations promulgated by the Pacific Pilotage Authority under the Canadian Pilotage Act, 1971, 19-20 Elizabeth II, Ch. 52. Drawing heavily on the Report of the Royal Commission on Pilotage, PC 1962-1575, November 1, 1962, the court noted that under the 1971 Act, exemption from compulsory pilotage could be obtained in only three ways, namely:

(1) By express exemption;

(2) By waiver;

(3) By a qualified master or deck officer of a ship obtaining and holding a "pilotage certificate" within the meaning of Sections 2(j) and 15 of the Act.

After consideration of the evidence, the court held that the regulations in question—by which a Japanese-built vessel owned by an American corporation, engaged in transporting principally Canadian cargoes between New Westminster, Canada, and Whittier, Alaska, was subjected to compulsory pilotage—were *ultra vires,* as they prescribed the flag of a vessel as a condition respectively of exemption and of waiver which was not within the parameters of the enabling powers contained in the Act. The court further held that the Pilotage Authority, "probably" as a result of the three pilot members, was motivated so as to make it impossible for the vessel to be exempted, knowing that the pilotage certificate route of exemption was also unavailable to the vessel by virtue of actions taken by

the Canadian Merchant Service Guild to forbid its members from applying for pilotage certificates under any circumstances. The court also found that it was unnecessary for the purpose of safety to have a pilot aboard for the run which the vessel was making, and therefore the regulation did not serve a public purpose.

On appeal, the Federal Court of Appeal, LeDain, J., varied the judgment in three respects. It held that (1) there could be no severance of the exemption and waiver provisions, and they must be held *ultra vires* in whole; (2) the various declarations in the formal judgment of the trial court should be deleted; and (3) the Pilotage Authority was entitled to recover $3,594.04 on its claim for pilotage fees. The judgment of the trial court dismissing the counterclaim of the vessel owner for pilotage fees paid in error of law was affirmed. The result, of course, was to leave the general provisions for compulsory pilotage in force without the opportunity for the vessel owner to claim an exemption or waiver.

On appeal to the Supreme Court of Canada, [1981] ___ S.C.R. ___, the appeal was allowed, and the requirement that the vessel be registered in Canada as a condition to obtain an exemption, as well as the requirement that the vessel be registered in the United States as a condition to obtain a waiver, were severed from the regulations as going beyond the powers conferred upon the Pilotage Authority. The Authority was compelled to disgorge the award for pilotage fees, and the vessel owner was allowed costs throughout.

For cases relating to various pilotage districts in Great Britain, many of which antedate enactment of the Pilotage Act, 1913, see Vol. 42, *English & Empire Digest,* Part XVI, Pilotage, pp. 1058-1060. For cases involving "Excepted Ships," see pp. 1060-1062, *idem.*

Notwithstanding the clear language of the Pilotage Act, 1971, in *Maritime Telegraph and Telephone Co., Ltd. v. The Demurra,* [1977] 15 N.R. 382, 75 D.L.R. (3rd) 766 (Can.), the owner of a vessel doing damage to a submarine cable attempted to set up a defense of compulsory pilotage as the vessel at the time of the damage was in a compulsory pilotage area and under the control of a licensed pilot. The defense was rejected at trial and the defendant vessel owner appealed. The Federal Court of Appeal held that the appeal should be dismissed because Section 31 of the Act abolished the defense of compulsory pilotage in both actions *in rem* and *in personam.*

Voluntary Pilotage

In those states in which pilotage is voluntary (Maine), if the offer of pilotage services is accepted, the rates set by statute or by regulation of the local state pilot commission apply. *Powell v. State Board of Pilot Commissioners,* 224 Or. 122, 355 P2d 224; *Portland Steamship Operators' Association v. Oregon State Board of Pilot Commissioners,* 1963 A.M.C. 1782, 317 F2d 41, 232 Or. 495, 375 P2d 420. [With respect to the authority of state pilot boards to set pilotage rates by regulation, see discussion, *infra,* under subheading "Authority to Fix Rates."]

Though not pilotage in the technical sense discussed here, there are occasions when pilots undertake to pilot a vessel for a particular voyage or a particular period of time. The compensation payable for such pilotage service is the amount contracted to be paid, and where there is no agreed price, compensation is upon a *quantum meruit* or "reasonable value" basis. *Mepham v. Biessel,* 76 U.S. 370; *Sprague v. Thompson,* 118 U.S. 90; *Beataugh v. Nicholson,* Fed. Cas. #1194 (1851); *The Glenearne,* 7 Fed. 604 (D,Ore.); *Lent Traffic Co. v. Goul,* 2 F2d 554 (CA-3); *The King Philip,* 1929 A.M.C. 296; *Boyd v. Panama Canal Co.,* 1958 A.M.C. 771, 160 F.Supp. 50; *Panama Pilot Pay Case,* 1957 A.M.C. 1395, 151 F.Supp. 929.

Discrimination in Rates

46 U.S.C.A 213 (quoted, *supra,* under *State Control*) forbids discrimination in pilotage rates between vessel sailing between ports of one state and vessels sailing between ports of different states, or between vessels, or against national vessels of the United States. This section was enacted by Congress to stop a growing practice of discrimination in pilotage rates between ships of different propulsive power, between ports of the same and of different states, and also between government and private vessels. Discriminatory rates were stricken down in *Olsen v. Smith,* 195 U.S. 332; *Sprague v. Thompson,* 118 U.S.90; and *Freeman v. The Undaunted,* 37 Fed. 662 (ND, Cal., 1889).

Only the discriminatory features of statutes setting pilotage rates are abrogated. Where the discriminatory features can be eliminated without destroying the remaining provisions of the statute, the statute continues to apply with the discriminatory provisions omitted. *Olsen v. Smith, supra.*

Lien for Pilotage in the United States

Prior to the passage of the Federal Maritime Lien Act of 1920 (46 U.S.C.A 971-975), there was no Federal statute creating a lien for pilotage. Nonetheless, the courts were unanimous in imposing a lien for pilotage under general maritime law against the vessel piloted. And, of course, the master and owner of the vessel are also liable *in personam* for the amount of the pilotage fee. *S.S. Emily Souder v. Beatty, et al,* 84 U.S. 666; *In the Matter of Walter F. Hagar,* 104 U.S. 520; *In the Matter of the State of Pennsylvania,* 109 U.S. 174.

The proposition is clearly stated in *The Glenearne,* 7 Fed. 604 (D,Ore.) (1881), where the court stated:

> Claims for pilotage are cases of admiralty jurisdiction and they may be enforced either against the owner or the vessel. An offer and refusal of pilotage services under a law giving half-fee therefore creates an obligation or contract upon the part of the owner to pay the same which may be enforced in admiralty against the vessel.

Other cases to the same effect are: *The America,* Fed. Cas. #289; *The Alameda,* 32 Fed. 331 (CA-9) (ND, Cal., 1887); *The Farnwell,* 70 Fed. 331 (CA-3); *U.S. v. Kintner,* 216 F2d 418 (CA-9); *Mobile v. Commissioner,* 1938 A.M.C. 1052, 97 F2d 695 (CA-5); *Maret Fund,* 1944 A.M.C. 1203, 145 F2d 431 (pilot and supply man in foreign port may obtain valid maritime liens for advances made for ship's preservation and safety and the general agent, upon paying the same, may be subrogated to such lien rights).

Under a state statute providing, in effect, that the "master, owner and consignee or agent" of a vessel shall be jointly and severally liable for pilotage fees, the term "agent" was construed to mean an agent for the vessel as well as agent for the owner, with the bareboat charterer being the equivalent of an owner *pro hac vice. Caples v. International Shipping Co.,* 1959 A.M.C. 1880 (D, Ore.).

In the *Northern Star,* 1925 A.M.C. 1135 (EDNY), the court held that a claim for pilotage does not come within the class of a preferred maritime lien and therefore the lien of a preferred ship's mortgage takes precedence over it.

In the *King Philip,* 1929 A.M.C. 216, 30 F2d 366 (D, Mass.), it was held that a pilot has a lien for his services and does not lose his lien by also acting as master. However, in the *Zizania,* 1934 A.M.C. 770 (D, Mass.), *Collyer v. Favorite,* 1940 A.M.C. 1051 (SDNY), and *Paradine v. Hook Mountain,* 1940 A.M.C. 1054 (SDNY), the court held to the contrary; i.e., that the master could not abandon his position as master and claim as a pilot since the vessel would thereby have no master. These decisions are probably of little value in the light of the amendment to the Federal statutes granting a right of lien to a master. 46 U.S.C.A. 600-608, 1968.

As noted heretofore, it is not clear whether there is a maritime lien for pilotage in Great Britain and the Commonwealth Nations. *The Ambatielos, The Cephelonia* [1923] P. 68. However, the Administration of Justice Act, 1956, provides that admiralty jurisdiction may be invoked to recover pilotage fees by proceedings *in rem* against the ship in question or against a sister ship. See, moreover, *Re The Premier* (1854) 6 L.C.R. 493 (Can.), holding that a pilot may claim a lien, and *La Constancia* (1846) 11 L.T. 113, 166 E.R. 829, and *The St. Lawrence* (1880) 5 P.D. 250, both of which appear to favor the existence of a lien for pilotage. See, also, *Hamilton Harbour Commissioners v. The A.M. German, Same v. The Frank Dixon, Same v. The Strathmore* [1973] F.C. 1254 (Can.).

Federal Maritime Lien Act of 1920

In 1920, Congress enacted the Federal Maritime Lien Act, 46 U.S.C.A. 971, 975. 46 U.S.C.A 971 provides:

> Any person furnishing repairs, supplies, towage use of dry dock or marine railway, *or other necessaries,* to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem,* and it shall not be necessary to allege or prove that credit was given to the vessel. . . . (Emphasis supplied.)

Does a lien for pilotage fall within the category of "other necessaries"? In the *Seathunder (Diaz v. S.S. Seathunder),* 1961 A.M.C. 561, 191 F.Supp. 807 (D, Md.), the court held that towage and pilotage are clearly included within the meaning of "necessaries." To the same effect, see *Blair v. Blue Spruce,* 1970 A.M.C. 1298, 315 F.Supp. 555 (D,Mass.), and *Ajubita v. Piek,* 1970 A.M.C 1463, 428 F2d 1345 (CA-5).

However, at the time of the decisions, 46 U.S.C.A. 973 read in part:

> . . . but nothing in this chapter shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefore.

Under the section, the courts in *Seathunder* and *Ajubita* held that the pilot was not entitled to a lien because he failed to inquire as to the authority of the agent or charterer to bind the vessel. The court also held that the requirement of the charter party that the charter "will exhibit" the charter to any person having business with the vessel and also exhibit the same to any representative of the owner on demand does not override or repeal the statutory duty of inquiry placed upon furnishers of necessaries to the vessel by the Federal Maritime Lien Act.

In 1971, Sec. 973 was amended by simply excising from it the above quoted language relating to knowledge and duty of inquiry provisions. Consequently, it now appears that only *actual knowledge* of a lien prohibition will suffice to cause a loss of a lien falling under the 1920 Lien Act.[20]

Boards of Pilot Commissioners

The legislatures of all the coastal States have, by statute, created boards or commissions to govern the operation of pilots of their respective states; for the appointment and licensing of such pilots; and, frequently, for the fixing of rates for pilots. Such boards and commissions are administrative agencies and, as such, are creatures of statute. *Civil Aeronautics Board v. Delta Air Lines,* 367 U.S. 316. The jurisdiction and authority which they assert must be found within the four corners of the statutes under which they were created. *Federal Trade Commission v. National Lead Co.,* 352 U.S. 419 (1957).

If the statutory power creating such boards or commissions grants them the power to make reasonable rules and regulations, the

20 *Lake Union Drydock Co. v. M/V Polar Viking,* 1978 A.M.C. 1477, 446 F.Supp. 1286 (WD,Wash.); *J.C. Uterwyk v. Mare Arubico,* 1978 A.M.C. 2609, 459 F.Supp. 1325 (D,Md.).

courts uniformly sustain rules and regulations insofar as they are within the general scope of the statutory authority and within the confines of due process. As the court said in *Powell v. State Board of Pilot Commissioners,* 224 Or. 122, 355 P2d 224 (1960):

> We hold that the full scope of the legislative grant of power to the board includes the power to regulate every service performed by a pilot as a pilot in accordance with his license and any acts of the pilot necessary to the ultimate performance of that service.

Jurisdiction and Authority in the United States

In order for the pilot commission to function, the commissioners must be chosen in the manner prescribed by statute and, where not so appointed, the commission is not duly constituted and has no jurisdiction to act as such; e.g., in *Opinion of the Justices* (Mass.), 31 N.E. 634, the governor appointed an incumbent who had not been recommended by the Boston Marine Society in spite of a statutory requirement that the Society should nominate members. The court held that appointments could be made only from the list of those nominated and that, therefore, the commission was not properly constituted.[21]

In *The Application of Puget Sound Pilot Association* (Wash.), 385 P2d 711, the statute required that the fifth member of the pilot commission be the Director of the State Department of Labor. The director designated one of his assistants to act for him. The court held that the commission was not organized as required and was, therefore, without jurisdiction to function.

Authority cannot be exercised where one commissioner endeavors to delegate to another commissioner the authority which by statute has been imposed upon him. In the *California,* Fed. Cas. #2313 (D, Ore.), where the statute required all three commissioners to sign their names to a license granted to a pilot, one of them could not delegate to one of the other commissioners the authority to sign for him, notwithstanding all three had agreed to grant the license.

21 Compare, however, recent decisions such as *Group Health Co-op v. King County Medical Society,* 39 Wash 2d 586, 237 P2d 737 (1961); *Bell et al v. Georgia Dental Association,* 231 F.Supp. 299 (1964). In the latter case, the governor was compelled to appoint members of the Georgia Board of Dental Examiners from a list recommended by the Georgia Dental Association. The court invalidated the law.

The term of a member continues until his successor is appointed and qualifies. *January v. Riley* (Cal.), 4 P2d 133. And the jurisdiction of the board to act continues notwithstanding an attempt to remove a member who was appointed by the governor with the consent of the state senate. *People v. Freeze,* 76 Cal. 633, 18 Pac. 812, 23 Pac. 379.

Actions of a pilot commission are void where the commission attempts to act in a manner beyond the scope of its underlying statutory authority, or beyond the scope of rules and regulations promulgated by it. *Bulger v. Benson,* 262 Fed 929 (CA-9) (1920) (pilot disregarded a penal rule and was found guilty and fined. The attempt of the pilot commission, in addition, to suspend his license was stricken down); *State v. Verden* (Del.), 43 Atl. 525 (statute authorizing licensing and governing of pilots gave no authority to regulate "apprentice" pilots); *State v. Merny,* 29 N.J. Law. 189 (pilot convicted for neglect of duty and suspended for two months; pilot commission could not punish him for same offense by outright revocation of his license); *In re Delaware Pilotage,* 22 Pa. Dist. 329 (pilot commission without authority to try a pilot on charges of misbehavior in the absence of a complaint by the person injured); *Morris v. Board of Commissioners,* 30 Atl. 667 (authority to make rules did not include authority to adopt a rule relating to revocation of licenses); *Verden v. Board of Pilot Commissioners,* 8 Del. Ch. 1, 67 Atl. 975 (board adopted *ex post facto* rules after an offense had been committed; authority to revoke a license under the new rules held lacking).

The state statute in *Patterson v. Pilot Commissioners,* 30 Or. 301, 47 Pac. 786 (1897), gave the pilot commission authority to limit the number of pilots to be licensed. However, the statute also provided that licenses would be renewed as a matter of course unless the board determined that there was good cause for withholding the renewal. The statute also required written notice of intent to deny. The court held that the authority of the commission to limit the number of pilots did not include the power to withhold renewals, without notice or hearing, stating:

> The statute makes no distinction as to the method of procedure in a case where the pilot commissioners desire to withhold the renewal of a license because of the alleged incompetency or unfitness of a particular pilot, and one where they desire to withhold such renewal on the ground that the interests of commerce require the number of pilots to be reduced. In either case the pilot to be affected is entitled to notice and an opportunity to present such reasons as he may have why the contemplated order should not be made. . . .

However, hiring an attorney to acquaint the board with the manner of conducting an investigation is not an unlawful delegation of authority. *Snow v. Reed,* 14 Or. 342.

So long as the pilot board or commission acts within the scope of its statutory authority, its decisions will be sustained. This was clearly demonstrated in *Kotch v. Board of River Port Pilot Commissioners for New Orleans,* 1947 A.M.C. 535, 330 U.S. 552 (1947). In that case, otherwise qualified applicants brought suit against the Board of Pilot Commissioners, alleging nepotism on the part of the Board in that it invariably appointed only relatives or close friends of the already licensed pilots. (The Board itself was composed of licensed pilots.) The Supreme Court stated, in part:

> The practice of nepotism in appointing public servants has been a subject of controversy in this country throughout our history. Some states have adopted constitutional amendments or statutes, to prohibit it. . . . But Louisiana and most other states have adopted no such general policy. We can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve. Thus the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment, might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve.

The Supreme Court also upheld the acts of the Louisiana Board as against attacks based on the due process clause of the Constitution and the antitrust statutes, citing *Olsen v. Smith,* 195 U.S. 332.

Justice Rutledge filed a strong and well-reasoned dissent, noting that the unconstitutional administration of an otherwise valid statute incurs the same condemnation as if the statute had incorporated the discrimination in its terms, citing *Yick Wo v. Hopkins,* 118 U.S. 356.

Although it would be assumed that the *Kotch* case laid the question to rest, the same contentions were again presented in court in *Brechtel et al v. Board of Examiners of Bar Pilots for the Port of New Orleans,* 1965 A.M.C. 1013, 230 F.Supp. 18 (ED, La.) with the same result.

Jurisdiction and Authority in Great Britain and the Commonwealth Nations

In Great Britain, the jurisdiction and authority of "pilot boards" is spelled out with particularity in the Pilotage Act, 1913, and it is to the text of that Act that reference must be made in the first instance.

As originally enacted, Part I of the Act set up a basic scheme of improvement designed (a) to obtain information and (b) to effect changes considered necessary for such improvement by making "Pilotage Orders." Through the Pilotage Orders it was envisioned that the various local Acts, charters, by-laws, regulations and provisions would be made uniform.

Under Part II of the Act, as now constituted, the Secretary of State for Trade is empowered to make Pilotage Orders defining the limits of jurisdiction of each "pilotage authority." He is empowered to confirm or reject by-laws submitted by the various pilotage authorities, require the publication of proposed by-laws, hold hearings, compel the issuance of pilot licenses or certificates and the issuance of a renewal of a revoked certificate, require, in certain circumstances, for the representation of pilots, shipowners and harbor authorities on a pilotage authority, etc.

Pilotage Orders made under Part I of the Act require confirmation by Parliament; pilotage orders made for other purposes are made only upon application by an interested party. Such orders do not require confirmation unless a petition against the order in question is received by the Secretary of State for Trade within a specified period and is not withdrawn.

Section 17(1) of the Act specifies in seventeen subsections the power of pilotage authorities to make by-laws. These may be summarized as follows: determine the qualifications of pilots; issue licenses and revoke or suspend them; fix limits on the number of pilots; provide generally for the good government of pilots; determine the system with respect to supply and employment of pilots; provide for punishments and fines; fix pilotage rates; provide for

pooling of earnings of pilots; provide for deductions for pilotage administration and pension funds; provide for bonds of pilots; establish pilots' benefit funds; and determine method of conducting examinations for pilotage certificates, who shall be issued certificates, who shall be granted deep sea certificates, etc.

The more important of these powers will be considered in relation to the subheadings set forth hereafter.

Authority to Fix Rates—United States

The authority of a pilot commission to fix rates is dependent upon the statutes creating the commission and defining its powers. In the *Chase,* 14 Fed. 854 (D, Fla.), the court said:

> Since the organization of the state governments no less than 25 acts have been passed upon the subject, and by a large majority of them, local boards have been given full power to make rules and regulations, establish rates and change the same as deemed best. . . .
>
> In my judgment it was the intention of the legislators that the local boards should have the power, not only to determine what rates should be paid by a vessel employing a pilot, but also by one spoken.

In *Virginia Pilots' Association v. Commonwealth,* 145 Va. 757, 134 S.E. 682, the statute gave to the Corporation Commissioner of the state the authority to fix and enforce rates for pilotage. Under that authority, the Commissioner fixed the rates but before they were put into effect, he lowered them. Upon challenge by the pilots' association, the court held that the Commissioner was exercising a properly delegated function and that in doing so, his actions would not be reviewed.

Probably the leading cases on authority to fix and adjust pilotage rates will be found in Oregon. The first case to arise was *Powell v. State Board of Pilot Commissioners,* 224 Or. 122, 355 P2d 224 (1960). The statute involved in that case empowered the board to "provide for efficient and competent pilotage service" and to "fix, at reasonable and just rates, pilotage fees." The Columbia River Pilot Association applied for rate increases which were granted in part. Thereafter, the pilot association published its own tariff, establishing extra or additional fees for such ancillary services as docking and undocking vessels, moving vessels within harbors, standby time, etc., on the theory that the authority to fix "pilotage

fees" embraced only fees for piloting a ship from Astoria, Oregon (on the coast) to Portland and other upriver ports.

The controversy terminated in a declaratory judgment suit. Although holding that this was an inappropriate method of review, the Oregon Supreme Court nonetheless discussed the definition of the term "pilotage" and held that it embraced the ancillary services mentioned in the pilots' tariff.

In 1962, the subject of rate fixing was again before the Oregon Supreme Court. *Portland Steamship Operators Association v. Oregon State Board of Pilot Commissioners,* 1963 A.M.C. 1872, 232 Or. 495, 375 P2d 420 (1962). On this occasion, the pilot commission had granted the Columbia River pilots an increase in rates on the grounds that a disparity in rates between the river pilots on the one hand and the Columbia River Bar Pilots on the other would attract disparate numbers of applicants for bar pilots' licenses as contrasted with applicants for river pilots' licenses. Unfortunately, the pilot commission did not base its conclusion upon any evidence. As a consequence, the increase was denied. The court said, in part:

> . . . And yet there was no substantial evidence to support this conclusion. There was no evidence closely bearing upon the supply of and demand for pilotage services. Nor is there any evidence supporting the premise that the disparity with which the board was concerned would have had any substantial effect on the availability of men for either type of pilotage. . . .

The fixing of rates by pilot commissions must be within some reasonable framework and the rates fixed must bear a reasonable relationship to the ends to be accomplished. The Oregon statute (ORS 776.115 (7)) specifically establishes guidelines for the establishment of rates which the pilot commission must follow. The statute, a model of its kind, deserves citing:

> (7) In fixing fees pursuant to subsection (6) of this section, the board, shall give due regard to the following factors:
>
> (a) The length and net tonnage of the vessels to be piloted;
>
> (b) The difficulty and inconvenience of the particular service and the skill required to render it;
>
> (c) The supply of and demand for pilotage services;
>
> (d) The public interest in maintaining efficient, economical and reliable pilotage service;
>
> (e) Other factors relevant to the determination of reasonable and just rates.

The courts are reluctant, in the area of rate-fixing, to substitute their judgment for that of an administrative body especially created for that purpose. See *Application of Puget Sound Pilots' Association* (Wash.), 385 P2d 711, where the court held that the pilot commission was authorized to change rates and, having done so, its action would not be questioned since its action was of a quasi-judicial nature and not merely a ministerial act. If the commission's decision is supported by any competent evidence, the courts will sustain it. Only where a decision is unsupported by any evidence or exceeds the statutory authority granted to the commission will the courts invalidate it. Compare *Portland Steamship Operators' Association v. Oregon State Board of Pilot Commissioners, supra,* with *Application of Puget Sound Pilots' Association, supra.*

In other areas, notably the issuance of pilot licenses, the courts refrain from substituting their judgment for that of the pilot commissions. In *Caples. v. McNaught,* 147 Or. 72, 31 P2d 780, the court held there was no ground to justify enjoining the pilot commission from issuing a license to a pilot on the premise that sufficient licenses had already been granted to satisfy the requirements of navigation on the Columbia River. The court stated, in part:

> . . . The discretion of the commissioners should be exercised in the matter, and not the discretion of the courts or the plaintiffs. . . .

To the same effect was *Ring v. Patterson,* 137 Or. 234, 1 P2d 1105, where the court refused to direct the pilot commission to issue a license, stating:

> . . . The authority to grant pilots' licenses is not an attribute of this court. It has been conferred upon the defendant [the pilot commission] exclusively. Moreover, all discretion incidental to the exercise of the power likewise belongs to the Pilot Commission and not to this court. . . .

See, also, *Snow v. Reed,* 14 Or. 342.

In *Bloomfield S.S. Co. v. Sabine Pilots' Association,* 1959 A.M.C. 368, 262 F2d 345 (CA-5), the plaintiff steamship company sought to recover pilotage fees allegedly assessed in excess of those permitted by statute. The pilots contended, on the other hand, that the statutory maximum applied only as far as Port Arthur, Texas; that vessels continuing on up the Sabine waterway to Beaumont could be charged an additional fee; and that such rates had been charged for over 27 years without protest. The court of appeals held

that the statute was clear and unambiguous; that the rate to Beaumont could not legally be charged; and that excess rates since the last rate increase could be recovered (the excess prior to that time was deemed barred by laches).

In *Portland Steamship Operators Association v. Coos Bay Pilots' Association,* 592 P2d 1060 (1979, Ore.), the steamship operators' association appealed from a decision of the Board of Pilot Commissioners increasing rates on the grounds that the Board had allegedly failed to give due regard to the number of hours worked by the pilots as compared to the work load of other pilots in other areas and the refusal of the Board to consider the pilots' outside income from the operation of a towboat company in the harbor. [The pilots had negotiated with the steamship operators for a 21% increase; the pilots asked the Board to grant a 50% increase, and the Board actually granted an increase of 28%.]

The Court of Appeal held that the Board had clearly considered the work load factor as well as many others and that the balancing of the various considerations involved was a matter of expertise for the Board, not the court. The court also noted there was no contention that the arrangements between the pilots and the towboat company was invalid, improper or against public policy and held that the charges made were reasonable, the services rendered reasonably necessary, and that the outside income of the pilots was irrelevant. The court concluded:

> The order being supported by substantial evidence in the whole record, and not being unlawful in substance, the court cannot substitute its judgment for that of the Board.

Authority to Fix Rates—Great Britain and Commonwealth Nations

The decisions in other jurisdictions do not depart from the principles enunciated above. As Halsbury notes,[22] if a by-law (or ordinance) is properly and validly made, it has the force of law within the sphere of its legitimate operation. Four elements are essential to any by-law: (1) it must be within the power of the authority which makes it; (2) it must not be repugnant to the general law; i.e., it must not "expressly or by necessary implication, profess to alter the general law by making something unlawful which the general law makes lawful,

22 *Halsbury's Laws of England,* Vol. 24, p. 510 *et seq.* (3rd Ed.).

or vice versa, or by adding something inconsistent with the provisions of a statute creating the same offence, or by depriving a defendant of a defence he would have under the general law. A by-law adds something to the general law, but it must not be contrary to or inconsistent with it"; (3) it must be certain, clear and exact; and (4) it must be reasonable; i.e., not unjust, inequitable, discriminatory, capricious or constitute oppressive interference.

See, for example, *Muller v. Trinity House* [1925], *supra* (the word "services" in Sec. 17(1) of the Act means *services rendered* and a pilotage authority could not make a by-law imposing a liability on shipowners to pay pilotage dues other than for such services); *Lower St. Lawrence Pilots Corp. v. R.* [1974] 1 F.C. 158 (Can.) (involving interpretation of Quebec Pilotage District General By-Law relating to services of two pilots during winter months on the St. Lawrence); *The Cyclops* [1923] P. 80, 16 Asp. M.L.C. 155 (interpretation of by-law of Mersey Docks & Harbour Board with respect to "berthing" and "transporting"); *The Servia, The Carinthia* [1898] P. 36, 8 Asp. M.L C. 353 (Mersey Docks & Harbour Board held to have authority, under the Mersey Docks Acts Consolidation Act, 1858, to fix a reasonable charge by way of "extra" compensation for taking an outward bound vessel and an inward bound vessel in certain circumstances); *Humber Conservancy Board v. Grant* (1916) 85 L.J.K.B. 1699, 13 Asp. M.L.C. 421 (direction of Admiralty during wartime to compel the taking of pilots on the Humber held to be *intra vires*); *Hamilton Harbour Comm. v. The A.M. German, The Frank Dixon, and The Strathmore* [1973] F.C. 1254 (Can.) (by-law authorized a pilotage fee for moving a vessel in the harbor but no by-law had been passed authorizing docking charges; held: harbor board had no authority to collect docking charges); *Re Pilots (State) Conciliation Committee* (1932) A.R. (N.S.W.) 187 (N.S.W. Indus. Comm., Full Bench) (Aus.) (although pilots in New South Wales are employees appointed and directly employed by the Crown, and although covered by regulations under the Navigation Acts, an award regulating their remuneration and conditions of employment could be made under the Industrial Arbitration Act).

Validity of Actions of Pilot Commissions

The authority of pilot commissions to take action, even in the absence of duly adopted rules and regulations covering the subject in