Risk Management by Ship Masters and Pilots

By Calvin Hunziker in conjunction with George Quick

It is widely recognized that one of the primary duties and tasks of a ship's Master is to recognize, evaluate, and minimize foreseeable risk to his vessel, cargo, and crew. In so doing, he in turn, eases the burdens on himself and insures the safe passage of his ship and its cargo.

A prudent Master will make himself or herself aware of such things as the passage plan, currents, weather, and known routing and dangers on or near said routing. These dangers include but are not limited to rocks and shoals, traffic choke points, fishing areas, and piracy. In the Pacific, since Fukushima, things such as floating trash that is capable of damaging the ships propeller or rudder if struck. In the winter and early spring, ice reports along the planned route.

The Master must also be aware of the capabilities of his officers and crew. Is that new third officer capable of standing the mid watch by themselves, or should they be shifted to a different watch until they have proven themselves capable? I, and I'm sure most of you in this room have been in a situation where you've had to sit up through the night waiting for "that phone call" from the bridge, "Captain can you please come immediately!" Unfortunately for me, the call didn't come. I felt the ship make a major course change in the South China Sea, where a course change wasn't called for, and went to the bridge, to find that the "new" mate had made a safe starboard to starboard passing situation into a dangerous crossing. His excuse was that because it was less than a two mile CPA and that at his school the instructor said that you always turn to starboard in a meeting situation. The collision was avoided but reinforced my decision not to leave him on his own.

Masters, like pilots, can make hundreds of safe passages, but they are quickly forgotten, if he makes one mistake. We have example after example of career ending situations, and we really don't have to go far back in time to bring up a few.

Captain Francesco Schettino and the Costa Concordia for example. The Master ignored the risks of passing so close to the shoreline, with a rocky peninsula at the other end of the bay. Had he stayed further off shore, or turned earlier, we would have never heard of the incident. Instead, poor risk management cost 32 lives, at least one career, the ship, and hundreds of millions of dollars.

Another example, that I was involved in, I was the pilot into the shipyard of the APL China. Caught in the remains of Typhoon Babs, instead of slowing down and riding out the storm, as did the other three vessels that were in close proximity, the Master decided that schedule was more important. Maintaining schedule cost: two days late arrival, the loss of 406 containers overboard, the destruction or damage of 1,000 other containers, and the vessel taken out of service for two weeks. Oh and yes, by the time the lawyers got done, $100 million in damages. And as to those other three vessels that were in the same area, and slowed down? They arrived one day behind schedule and continued their voyages.

The last example I wish to raise is again one I was involved in as CAMM Vice President. On March 2, 2006 the Zim Mexico III, under the command of Captain Wolfgang Schroeder and a Mobile pilot, was shifting from pier 2 down river to another pier. During the manoeuvre, while

turning the ship, using only the bow thruster, rudder and engine, the ship's bow came in contact with the leg of a container crane on the pier, knocking it over and killing a maintenance man working on the crane. The US Coast Guard, in its initial investigation, found no fault with the vessel or its equipment. Unfortunately for Captain Schroeder, an overzealous prosecutor pursued the case, charging that Captain Schroeder failed to notify the pilot that the vessel's bowthruster had failed over a year before. She had Captain Schroeder arrested three months later in Houston Texas and tried in Mobile Alabama, under the United States "Seaman's Manslaughter Act", where gross negligence is not necessary to gain conviction. Captain Schroeder was already tried and convicted by the time the Council of American Master Mariners learned of the case. He contacted Captain Chick Gedney on January 7, 2007, via collect phone call from jail. That set our American company, the Council of American Master Mariners, in motion to win his release. CAMM contacted IFSMA, and found that Captain Schroeder was a much decorated captain, having saved many lives in a cross channel ferry sinking off the Belgium coast. CAMM presented this information along with other to the court and with CAMM's help and assistance, on February 7, 2007 Captain Schroeder walked out of the Mobile Alabama Federal holding facility a free man. I give this example to show the importance of belonging to both your local Masters association and to IFSMA.

Once the vessel reaches a pilot station, the risks associated with the voyage does not change, some of those risks are shifted to the pilot's shoulders. The Master does not relinquish all responsibility, as he is bound to inform the pilot of all the problems and quirks of his vessel. He must also insure that all equipment and navigation electronics are working and continue to work properly. Failure to do so can earn the Master the same fate as Captain Schroeder mention above.

It is beyond my capability to discuss the role of the pilot under all the variations that exist globally, so this paper will only address pilotage in my region of the world - principally the USA, and to a lesser extent Canada and the United Kingdom. In the United States alone there are 25 separate Pilotage Acts in the various coastal states. Some are more extensive than others, but most follow a common concept that permits discussion of them in principle. Since the shipowner/ Master/ pilot relationship cannot be understood without reference to these national or local laws and their interpretation by the courts, I've placed some citations of legal authorities and other material I believe form the basis of our public policy on pilotage in the End Notes and they should be read as part of this paper.

In most areas of the United States all aspects of pilotage and the relationships between the parties are extensively regulated (1).

Although the laws and regulations are in place they are not generally well understood by shipping management and Masters, and not all pilots are as well versed as they should be in their obligations and responsibilities under our laws.

Shipping and risk have been associated since man began venturing upon the water in some ancient craft. Early on in the history of commerce the economic consequences of maritime casualties began to be managed through risk distribution with marine insurance (2). The actual causes of casualties and the physical losses of ships and cargoes, and damage to the marine environment have proven to be more difficult to manage. Construction and equipment standards can be established by a classification society. Regulations can prescribe training and competency standards for crews. But, well found ships with competent crews still come to grief

along with the substandard ship and its indifferent crew. It is apparent that human error is not limited to incompetent humans and the focus of attention has shifted to methods of minimizing human error.

Well trained competent individuals can still have faulty situational awareness, imperfect judgment, insufficient experience with new situations, or be burdened with multiple tasks or problems in a crisis that overcome their ability to cope. This is not due to any shortage of laws and regulations. What we have a shortage of is an understanding of existing laws and a clear view of what practices or policies should be adopted to improve safety. This is particularly true in the current public dialogue dealing with pilotage that seeks to utilize or improve upon human relationships to minimize human error rather than relying solely on equipment or competency standards.

It is generally recognized that managing and navigating a ship upon an ocean requires a different set of skills and experience than piloting in confined waterways. In pilotage waters the workload on the bridge increases, the time between error and consequences is reduced to a very short interval, and specialized knowledge in close quarters ship handling and local conditions are required. In the confined or restricted waters of port approaches, where the margins of error are small and the activity intense, most Port States protect their interests by requiring the presence onboard of a local compulsory pilot.

Compulsory pilotage is probably one of the first systems of laws that had as their purpose a public policy to manage or reduce physical exposure to risk in an industrial or commercial endeavour. It has existed as a regulation of shipping to protect commerce, the waterways in harbour approaches, and port facilities since ancient times (3). The regulation of pilotage and the role of the pilot and his relationship with the shipowners, Masters and the regulatory authorities is complex and not easily described accurately in a few sentences. While on a global basis there are many similarities in how pilotage functions, there are also variations in national pilotage laws that have developed in consideration of public policy concerns by the legislatures and courts of separate maritime States (4).

What these local laws contain and how they are interpreted reflect the public policy decisions of the Port State on their views of pilotage as a risk management system. Although from the shipowner / Master viewpoint pilotage is a service that protects the ship from the hazards of the port, from the Ports States perspective pilotage exists to protect the ports from the hazards of the ship. Since the ship is entering the territorial waters of the Port State and accepts their sovereign jurisdiction as a condition of entry, it is the Port State that establishes the relationships between the shipowner / Master and the pilot by their laws and policies.

Depending upon the degree of control the Port State believes is appropriate, pilotage may vary from optional voluntary pilotage that is advisory in nature to compulsory pilotage where the responsibility for the direction and control of navigation is placed upon the pilot.

There has always been a tendency in shipping management to ignore the regulatory aspects of pilotage and view it as just another service for hire that should be purchased and controlled or managed like all other services. The emphasis is on the ship manager’s needs or objectives, or more recently, on defining the Master/pilot relationship in terms that fit the company's "Bridge Team Management" plan or guide. They seek to define the role and function of the pilot on their own terms and conditions with their priorities or viewpoint given paramount consideration.

In North America pilotage is viewed as both a service that expedites the smooth flow of shipping and a regulatory control over shipping that reduces risk (5).

We try to emphasize that the pilots primary obligation should not be to the shipowner or Master as a private service provider, but to the public represented by the Pilot Authority that appointed him and the Legislature that created the pilotage system. The State has defined the terms and conditions of the pilots service in statutes and regulations (6). These pilotage laws do not allow the shipowner or Master to select, control or negotiate with a compulsory pilot for reasons that serve the States interests. It is recognized that the pilot's future employment should not depend upon how well he satisfies the shipowner's commercial interests. This freedom from selection and control by the shipowner and the need to negotiate terms and conditions of service insulates the pilot from the commercial pressures that could be brought to bear in a negotiated contractual agreement. As a result the pilot is at liberty and encouraged to apply independent judgment in pilotage decisions that weigh risks against commercial concerns (7).

The Master as the employee of the owner and the manager of a commercial enterprise is by necessity concerned with economic considerations and they can colour his judgment in weighing the acceptability of risks (8). To claim no responsible shipowner would pressure a Master to take undue risks ignores the fact that irresponsible shipowners have been known to exist and that many pressures are brought by agents and charterers that may have little or no shipboard experience or appreciation of the risks involved. It is part of the pilot's role to act as a buffer to those pressures and as long as he is shielded from management retaliation by the pilotage statute he can serve a vital public function (9).

On the bridge of a ship the Master/ pilot relationship might best be understood if we make a distinction between Power and Authority. Power can be defined as the ability to act without regard to the right to act, while Authority can be described as the right to act without regard to the means or ability to complete the act. At sea the Master has both the power and the authority over the ship and its crew, but on entering pilotage waters the authority to direct and control the movement of the ship shifts by operation of our laws to the pilot (10). What binds their relationship together is that the pilots authority can only be exercised in co-operation with the Masters power to command the crew, and the Master's power to have the ship moved can only be lawfully exercised in co-operation with the pilots authority to direct and control the movement of that ship.

In order for a ship to undertake a transit in compulsory pilotage waters the power of the Master and the authority of the pilot must coincide. There must be a common agreement or concurrence between the Master and pilot on the acceptability of the intended transit, as neither can or should move without the other.

There is also a balancing of the interests involved. The Master is accountable to the flag state for his actions and represents the shipowner's interests. The pilot is accountable to the local pilotage authority and must take into consideration the Port States interest in maritime safety. In a properly regulated pilotage system there exists an understanding of the need for checks and balances in the Master/ pilot relationship and an awareness of the interests represented on the bridge of a ship underway in pilotage waters.

Confusing the issue on checks and balances in the relationship is the mistaken perception that the pilot is aboard in an advisory capacity. This is not true in actual practice in pilotage waters

or in the law as applied in North America. The pilot "conducting" the ship gives all the directions concerning the ships movement and it is the Master who may advise the pilot as to the capabilities of the ship or its equipment or crew. If the Master was actually giving the directions with the pilot's advice the ship would not be under pilotage and in compliance with the local laws (11).

The distinction is important because if the pilot were merely an advisor whose assessment could be accepted or rejected at will he could not fulfil his role as an independent judge of acceptable risks. He might be persuaded to go along contrary to his personal judgment under the belief that the Master would have the final or ultimate responsibility for accepting the pilot's advice in the event of an accident.

Although no American legal decision has ever held that compulsory pilotage was advisory in nature, confusion on this issue could undermine the pilot's perception of his role. The "pilot as advisor" myth persists reinforced by the entry in some log books "Proceeding to Master's orders and pilots advice" that could have its basis outside our legal system in some decisions of the courts in Continental Europe (12).

The entry doesn't change our local laws in North America or confuse our courts after a casualty as to the actual relationship, but it may cloud the issue on the bridge as to responsibility and accountability between Master and pilot.

The law being practical and realistic recognizes that situations could arise where the Master would be justified in displacing a compulsory pilot and court decisions dealing with the issue have developed guidance. If the pilot is manifestly incompetent, or is intoxicated or otherwise incapacitated, or if the pilot's actions are placing the ship in dear and imminent danger the Master can intervene and if the safety of the ship is in jeopardy he has a duty to intervene (13).

Although it is understood that the Master can displace a pilot for cause and never relinquishes responsibility for the safety of his ship, that does not mean he has unbridled discretion to substitute his judgment for that of the pilot or relieve the pilot at will (14). If the Master acts to displace the pilot he is not free to proceed on his own, but must request another pilot or resolve the issues with the pilot onboard before proceeding. As a practical matter if a differing judgment on a situation arises the Master will express his concern and the matter resolved before any imminent danger arises.

Since there is confusion over the difference between authority, responsibility and liability any discussion of the shipowner/ Master/ pilot relationship needs to address the issue of liability for damages that occur while a ship is under compulsory pilotage. At one time the courts of the United Kingdom, Canada and the United States applied general principles of Agency Law and absolved the ship from liability for damages caused solely by the actions of a compulsory pilot. Since the shipowner did not have selection or control over a compulsory pilot there was no Master/ servant or agency relationship that could attribute liability to the ship for the acts of the pilot. Considering the extremely high monetary losses that can be sustained in a maritime casualty and the relative financial resources of the shipowner, ship, cargo and pilot it was clear that the application of pure legal theory limiting the liability of the "deep pockets" in the relationship created a dilemma for damaged parties. In comparison to the potential liability pilots were the proverbial "shallow pockets" and a damaged party was left with no effective recourse after collision if it could be proved the compulsory pilot was solely at fault.

This obvious injustice and the conflicts between the laws of different maritime nations on how they handled the liability of shipowners and ships when a ship was under compulsory pilotage was resolved in the Brussels Convention of 1910 which provided in part (15):

"liability.....shall attach, in cases in which the collision is caused by the fault of a pilot, even when carrying of the pilot is obligatory"

The United Kingdom conformed their pilotage laws to the provisions of the Brussels Convention in the Pilotage Act of 1913. That Act also went one step further and placed a limitation on the liability of a compulsory pilot with the result that the ship became the primary source of compensation for damages. The compulsory pilot remained liable in theory but his financial contribution was limited to a nominal amount. Canada followed the lead of the United Kingdom. The United States through a combination of court decisions and legislation have arrived at the same result, though not all States have limited the liability of the compulsory pilot to the same extent as the United Kingdom and Canada.

The rationale of placing liability on the ship regardless of the status of the pilot is consistent with modern public policy in areas of distributing the cost of risks in industrial activities. The economic consequences of industrial accidents are a cost spread over society through the medium of insurance. The cost of insurance is a factor in the final price of a product or commodity and passed on to the ultimate consumer or society as a whole. Underlying the decision of whether the ship or the pilot shall be financially liable for the consequences of an accident is the policy decision of whether the cost of insurance should be passed through the ship side of the relationship or through the pilot side. The pilot fees that support the pilotage system are paid by the ship and any insurance costs needed to cover pilot liability would by necessity be passed on or accounted for in a substantial increase in pilotage costs. It is unlikely the insurance premiums for the ship would be reduced a like amount if the pilot also carried liability insurance and the net result would be the ship paying twice for the same covered risk. Also entering into the rationale is the issue of proportionality. Spreading the cost of insurance over the relatively large revenue base of the ship has a minimal impact on operating costs, placing the same costs on relatively low pilotage fees would have a dramatic impact and distort the economics of providing an effective service. While pilotage is a good way to minimize physical risks, it would be a poor vehicle for distributing the economic consequences of casualties.

The present relationship between shipowner/ Master and pilot has evolved over centuries as one of the primary means of Port States protecting their interests in maritime safety (16). The law is settled and how it operates should be acknowledged and form the starting point for any discussion of improvements in pilotage procedures (17). Some in the industry do not have a full appreciation of the present role compulsory pilotage plays in managing risk through checks and balances in the Master/ pilot relationship and want to begin restructuring and managing the relationship through new globally applied International regulations (18).

Aside from our reservation that pilotage is primarily a Port State responsibility that regulates shipping on territorial waters under a right of sovereignty; pilotage is an area where we feel it is not appropriate to act hastily in mandating by regulation global solutions. The world contains a great deal of cultural, political, economic and legal diversity. The issues and consequences are not sufficiently well understood by all parties to the dialogue and there is no common agreement as to the extent of any problem or the appropriate solution.

Any change in bridge procedures for pilots have to be based on concepts or principles that recognize the real conditions found aboard ships in the international maritime world. They cannot be based upon an idealized view of operating conditions that supposedly exist on the ships of some tightly managed shipping companies. Without going into a discussion of the many problems that effect international shipping, it is sufficient to say that there is a wide disparity in both personnel and equipment standards found aboard ships transiting pilotage waters. The overwhelming majority of ships are under flags of convenience offering the least regulation and taxation. Many operate under economic competition that rewards owner with the smallest and lowest cost crews who invest the least physical plant and maintenance. It has been my observation over the years that the tramp or bulk sector of the industry generally gravitates towards the lowest cost areas of the world for crews, and maintains equipment to the minimum that will satisfy the regulatory demands imposed upon them. They are not driven by a search for quality, but rather a need to survive in a ruthlessly competitive economic environment. The liner trades differ in that quality of service may be a factor in competition that could justify the cost of maintaining standards. The oil companies have only recently changed from a tramp mentality that favours the lowest cost operator to a recognition that quality may be worth a premium. The motivation has not been idealism, but rather the public outcry directed towards them after high profile accidents, and in the United States, the strict liability imposed upon them by Congress in The Oil Pollution Act of 1990.

Becoming proactive in improving standards and widening the circle of responsibility to include pilots, port authorities, terminal operators, VTS operations, channel maintenance and navigation aids, and all the various regulatory agencies in the circle of blame after a casualty appears to some of us as a public relations strategy to reduce the focus on the tanker owner after a casualty. We are sympathetic to their plight, but fear the dialogue of change is being driven by the wrong agenda.

We suspect that therein lies the recent impetus for Intertanko's campaign on pilotage and for acknowledging shared responsibility and the involvement of the pilot in a Team effort. What concerns pilots is that a system of checks and balances based on concurrent responsibility of the Master and pilot is already in place under existing pilotage procedures and laws. It only needs to be fully recognized and implemented properly with some minor adjustments to become more effective.

In the dialogue that has taken place up to this point between the ship management side of the industry and pilot representatives it is very apparent that there is not a common understanding of the role and function of the pilot. This is of great concern to us as it is possible that operational procedures could be recommended, or even mandated, based on notions of the pilots role that from our perspective are clearly wrong and potentially damaging to effective pilotage systems. It is absolutely essential that before any discussion of operational procedures takes place, that we reach a common understanding on the role and function of the pilot. Recognizing how pilots are regulated, the purpose of pilot associations, why the pilot is on the Bridge, what he actually does, and how he goes about doing it has to be a priority that comes before discussion of operational routines or procedures to be followed. In an attempt to begin dosing this gap in perceptions so that a dialogue can begin from a common basis the American Pilot Association adopted a policy statement on the respective roles of the Master and pilot that can be found in the Endnotes (18).

A very difficult communications problem arises if we are in fact discussing the role and function of the pilot in the guise of procedures. Once a common understanding is reached and we have a shared concept of the pilots role a productive dialogue may be possible on Bridge Procedures or Resource Management, the Master/ Pilot Information Exchange, Pilot Passage Planning and other issues.

I believe it is possible to make a very substantial improvement in maritime safety if shipping management and pilots can bridge the communications gap and begin discussions from a common viewpoint and I look forward to participating.

ENDNOTES

The legislature of the State of Florida in the Preamble to its Pilotage Act expressed their public policy concerns in the following statutory language:

"310.001 Purpose:

The Legislature recognizes that the waters, harbours, 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.

310.0015 Piloting regulation; general provisions-

Piloting is an essential service of such paramount importance that its continued existence must be secured by the state and may not be left open to market forces.

Because safety is the primary objective in the regulation of piloting by the state and because of the significant economies of scale in delivering the service, the requirement of a large capital investment in order to provide required service, and the fact that pilots are supplying services that are considered to be essential to the economy and the public welfare, it is determined that economic regulation, rather than competition in the marketplace, will better serve to protect the public health, safety, and welfare.

The rate-setting process, the issuance of licenses only in numbers deemed necessary or prudent by the board, and other aspects of the economic regulation of piloting established in this chapter are intended to protect the public from the adverse effects of unrestricted competition which would result from an unlimited number of licensed pilots being allowed to market their services on the basis of lower prices rather than safety concerns. This system of regulation benefits and protects the public interest by maximizing safety, avoiding uneconomic duplication of capital expenses and facilities, and enhancing state regulatory oversight. The system seeks to provide pilots with reasonable revenues, taking into consideration the normal uncertainties of vessel traffic and port usage, sufficient to maintain reliable, stable piloting operations. Pilots have certain restrictions and obligations under this system, including, but not limited to, the following...

CHAPTER 310, FLORIDA STATUTES

"Marine insurance is the oldest form of indemnity of which there is any record..... Several nations have claimed the honour of having invented this system of indemnity, but the best evidence indicates that the Jews, at the time of their banishment from France in the latter part of the twelfth century, introduced such a scheme of insurance for the protection of their property during its removal from France. Villani, a fourteenth-century historian, is the authority for this theory, stating that the system was devised in Lombardy in 1182. Whether this is correct or not is of little moment..... the fact remains that early in the development of commercial intercourse the need arose for some system of distributing marine losses, and the present method of insuring came into use."

MARINE INSURANCE. ITS PRINCIPLES AND PRACTICE. 2nd EDITION WILLIAM D. WINTER. McGRAW-HILL BOOK CO.

"For as long as men have taken to the sea, pilots have guided their journeys.

Pilots were known to antiquity, and rules for their conduct were provided as early as Roman times and the middle ages. The first instance of mandatory pilotage was probably made in the Ordonances de Wisbuy, a set of rules propounded by Danish authorities in the twelfth century. In the sixteenth and seventeenth centuries, all the major maritime nations of Europe had some law or regulation providing for the mandatory pilotage of vessels in certain areas. In England, the history of organized pilotage began with the chartering of Trinity House by King Henry VIII in 1514. The first case of a collision involving a compulsory pilot in charge of a vessel arose in England twenty-seven years later, in 1541."

COMPULSORY PILOTAGE. PUBLIC POLICY. AND THE EARLY PRIVATE INTERNATIONAL LAW OF TORTS. DAVID J. BEDERMAN VOL 64. TULANE LAW REVIEW, 1041

"This consideration of what made pilotage compulsory revealed that nineteenth-century authorities self-consciously weighed matters of public policy. They realized that any policy must answer three elemental questions: Who benefits? Who decides? and Who pays? As discussed above, the risks of unaided navigation into busy and crowded ports far outweighed the costs of instituting a system of compulsory pilotage. The entire maritime community benefited from such a system: port authorities, vessel and cargo owners, and innocent bystanders alike.

Compulsory pilotage was, therefore, a risk distribution mechanism. It was also a tax because the system of compulsory pilotage was imposed by a sovereign through statutory enactment. In short, it was the government that decided whether the benefits outweighed the risks. In its taxation aspects, compulsory pilotage law also manifested some transnational tendencies. The very character of maritime commerce required extraordinary sensitivity to the realities of competition. The tax of compulsory pilotage imposed on foreign and non coastal vessels, if pegged too high, could drive shipping away from a nation's ports. As it turned out, all the principal maritime nations of the world weighed the costs and benefits in much the same way and imposed policies of compulsory pilotage."

COMPULSORY PILOTAGE. PUBLIC POLICY. AND THE EARLY PRIVATE INTERNATIONAL LAW OF TORTS, DAVID J. BEDERMAN VOL. 64. TULANE LAW REVIEW. 1046.

In discussing the justification of compulsory pilotage in Canada the "The Royal Commission on Pilotage" commented:

"From the service point of view, pilotage has been defined as the ultimate means to enhance safe and speedy transit of ships through confined waters. It is a public service in the full sense of the world when it is controlled, maintained or provided primarily to serve the superior interests of the State; it is a private service when its main purpose is to serve private needs, but safety remains the principal aim in both cases: in the former, "safety or navigation" through Canadian waterways; in the latter, "safety of the ship", including safety of privately owned port installations."

CANADA. REPORT OF THE ROYAL COMMISSION ON PILOTAGE. PART 1. Pa. 473

The United States Supreme Court in a landmark case involving the nature of pilotage regulation stated:

"The State pilotage system, as it has evolved since 1805, is typical of that which grew up in most seaboard states and in foreign countries. Since 1805 Louisiana pilots have been State officers whose work has been controlled by the State. That Act forbade all but a limited number of pilots appointed by the governor to serve in that capacity.....

Thus in Louisiana, as elsewhere, it seems to have been accepted at an early date that in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage."

KOTCH v. BOARD OF RIVER PORT PILOT COM'RS. (67 S.Ct. 910)

(7.1) After conducting hearings throughout Florida a Report to the Florida Senate contained the following recommendation:

A. Competition Among Pilots

A shipowner incurs economic loss when a vessel is substantially delayed in entering or leaving a port. Movement of a vessel through a port is impacted by weather conditions, winds, currents, tides, nature of cargo, port traffic, and visibility, together with draft limitations due to channel depths. Conservative assessments of the above conditions can be costly. In addition, the heavier the vessel, the greater the draft, and also the greater profit to the shipowner. However, the greater the draft, the lesser the keel bottom clearance, and therefore, the greater the opportunity for grounding or hull damage and accident.

Consequently, the pilot is constantly called upon to weigh the competing considerations of safety versus cost to shipowner. The state interest is best served if the safety factor is given priority over the shipowner's profit and loss statement.

Consumers of pilot services are foreign flag vessels entering ports of the state whose owners are concerned with profits. There is a significant conflict of interest between a vessel owner’s economic needs and the public interest in safe passage. It is in the public's best interests for the pilot’s judgment to be absolutely free of economic consideration to the shipowner when piloting his vessel. If pilots must compete against one another to win assignments, there is likelihood that a pilot will compromise safety considerations in order to accommodate the financial interest of the shipowner, for in so doing, he will have a competitive edge over another pilot."

SUNSET REVIEW OF CHAPTER 310. FLORIDA STATUTES. PILOTS. PILOTING AND PILOTAGE - JUDGE JOHN J. UPCHURCH. SPECIAL MASTER

BY APPOINTMENT OF HONORABLE HARRY JOHNSTON, PRESIDENT, FLORIDA SENATE

(7.2) In another decision of the United States Supreme Court dealing with the relationship between shipowners, Masters and pilots it was decided:

"Pilots hold a unique position in the maritime world and have been regulated extensively both by the State and Federal Government. Some state laws make them public officers, chiefly responsible to the State, not to any private employer. Under law and custom they have an independence wholly incompatible with the general obligations of obedience normally owed by an employee to his employer. Their fees are fixed by law and their charges must not be discriminatory. As a rule no employer, no person can tell them how to perform their pilotage duties."

BISSO v. INLAND WATERWAYS CORP. (349 U.S.85)

In discussing human factors and their impact on ship casualties Mr. William 0. Gray when managing safety for the Exxon Corporation stated:

"The in-depth survey provided several instances where risk taking contributed to a casualty or near casualty. For instance, when asked to select among 12 criteria used by companies for grading a captain’s performance, 40 percent of those responding to the question indicated that making schedules was the prime criterion. When asked how companies feel about meeting schedules in poor conditions, 50 percent of those responding said that there was strong pressure to meet schedules. Almost all of those responding reported sailing on a ship that they personally knew to be unseaworthy.

Perhaps the most revealing disclosure from the interviews was that of a company that in 1969 dropped a safety program that offered a good bonus to tugs and crews with the least accident claims, because the program resulted in decreased productivity and a slowdown in task completion."

OIL COMPANIES INTERNATIONAL MARINE FORUM. SAFE NAVIGATION SYMPOSIUM.

SESSION 2. PAPER NO. 3. HUMAN FACTORS BY W. GRAY. PRESENTED AT WASHINGTON. D.C. 17-18 JANUARY. 1978.

In a position paper submitted to the International Maritime Organization (IMO), INTERTANKO has acknowledged that commercial pressures on pilots have caused accidents and that there is a need for pilotage systems to insulate pilots from such pressures:

"There is a further aspect of responsibility which INTERTANKO would like to see addressed within this sub-committee, and that is that a pilot should never be put under commercial pressure to make any decision which may be counter to the safe judgment of the pilot. In the past, a number of accidents can be attributed to such influence upon a pilot. The pilot must have support from the pilotage system to ensure that the pilot’s assessment overrides any commercial requirements and the pilot is not under any pressure to bend to commercial requirements. This would be in addition to the comments made in Resolution A.485, Annex 2,

paragraph 5, regarding the right of a pilot to refuse to pilot a ship he considered unseaworthy, which should also be addressed."

IMO PAPER. STW 29/7/5. SUBMITTED BY INTERTANKO, 10 NOVEMBER, 1997

United States Supreme Court Justice Learned Hand discussed the role of the pilot in the following decision:

"It is of course true that a master does not surrender his ship to a pilot and that there remain occasions when he must interfere and even displace him. The first case, so far as we know, came up in England in 1817, soon after the compulsory pilotage act was passed. (The Gipsey King, 2 W. Robinson 537). It chanced to concern the proper catting of an anchor on a vessel in charge of a pilot, and Dr. Lushington, in excusing the owner because the catting was the pilots spoke as follows (p. 547):

“It is, I apprehend, an established principle of law that the mode, the time, and place of bringing a vessel to an anchor, is within the peculiar province of the pilot who is in charge.”

Only three years later the Privy Council, speaking through Baron Parke (The Christiana, 7 Moore P.C. 160, 172), said of a compulsory pilot:

“It was his sole duty to select the proper anchorage place, the mode of anchoring and preparing to anchor.”

And still earlier on the same page:

“The Pilot has, unquestionably, the sole direction of the vessel in those respects where his local knowledge is presumably required; the direction, the course, the manoeuvres of the vessel, when sailing, belong to him.”

In 1857 Dr. Lushington in The Argo. Swabey, 462, announced the limitation upon this which is generally accepted and which the Supreme Court recognized obiter in The China: and again in somewhat truncated form in The Oreqon. It was this:

“a master has no right to interfere with the pilot, except in cases of the pilots intoxication or manifest incapacity, or in cases of danger which the pilot does not foresee, or in cases of great necessity.”

He said further:

“The navigation of the ship is taken out of the hands of the master and transferred to the pilot.”'

UNION SHIPPING V. U. S. 127 F. 2D 775 (1942)

(11.1) The "Report of the Royal Commission on Pilotage" contains a detailed analysis of the British and Canadian statutory definition of the term "pilot":

“pilot” means- any person not belonging to a ship who has the conduct thereof."

The Royal Commission further considered the meaning of the word "conduct" and decided it means:

"to have charge and control of navigation; in other words, of the movement of the vessel. Similarly, if anyone is merely used as an advisor and not entrusted with the navigation of the ship, he is not the pilot of that ship."

The Royal Commission, after reviewing the actual practices followed aboard ship concluded:

"The pilot does not act as an advisor to the Master but actually navigates the ship. In point of fact the Master is then, to a certain extent, an advisor to the pilot when he points out the peculiarities of the ship. ....This factual situation which corresponds to the legal definition of 'pilot is, in fact, the only realistic solution because, if pilots were used merely as advisors, navigation would be very hazardous and, at times, it would be impossible to proceed safely..... The first course a ship is committed to is frequently the last. If bad judgment has been used, the result is inevitable and swift..... The legislation of most countries recognizes the realistic situation that there is not time for advice, consultation and deliberation between

the pilot and Master and that the pilot must navigate the vessel himself. How this situation is covered in legislation is a question of semantics ..."

CANADA, REPORT OF THE ROYAL COMMISSION ON PILOTAGE. PART 1. PG. 22. ET SEQ.

(11.2) See also a legal reference which defines "conduct' as follows:

"Conduct (verb): A regulation having statutory force which provides that a ship is to be conducted by a pilot does not mean that she is to be navigated under his advice; it means that she must be conducted by him, and that makes pilotage compulsory"

WORDS AND PHASES LEGALLY DEFINED. SECOND EDITION. SAUNDERS

(12) In comparing the pilotage laws of Continental Europe with those in Britain and North America the following observation was made:

"Under the mercantile practice of most European nations, a pilot, even though required by law, was deemed only advisory and was never considered to supersede the authority of the master. In this sense, compulsory pilotage was unknown in continental Europe." COMPULSORY PILOTAGE. PUBLIC POLICY. AND THE EARLY PRIVATE INTERNATIONAL

LAW OF TORTS. DAVID J. BEDERMAN. VOL 64. TULANE LAW REVIEW. 1060

(13.1) The United States Supreme Court in discussing the pilots role in maritime commerce stated:

"Now, 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 entrusted 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."

COOLEY V. BOARD OF WARDENS, 12 HOW(US) 288. 13 L ED. 996 (1851)

(13.2) In a later United States Supreme Court decision the role of the pilot was described in the following words:

"To the pilot, therefore, temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course and speed, and the time, place and manner of anchoring her.....But the master still has the duty of seeing to the safety of the ship, and to the proper stowage of the cargo. For instance, the duty to keep a good lookout rests upon the master and crew."

RALLI V. TROOP.1 US 386, 15 S. CT. 657 (1894)

(13.3) In a case involving the role of the pilot the Supreme Court of the State of Washington commented:

"A pilot while in charge of a ship supersedes the master, in so far as the navigation of the vessel is concerned, but the master is at all times in command, and may and should advise with the pilot, and can displace him in case of intoxication or manifest incompetence. Any power of command exercised by the pilot is limited to the navigation of the ship.... While exercising his functions a pilot is in sole control of the navigation of the ship, and his orders

must be obeyed as in effect orders of the master. But the master is still in command of the vessel, as distinguished from its navigation, and may properly displace an obviously incompetent or intoxicated pilot, although he is not bound to do so unless the pilot is making an obvious mistake."

GRAYS HARBOR V. THE BRIMANGER, 18 P. 2D 29 (1933)

(14.1) G. K. Geen, the author of "The Law of Pilotage," includes in his excellent work a review of the British case law on the division of control between the master and pilot. He has concluded:

"The attitude of the courts to the master-pilot relationship is based on precedents created more than a century ago, the guiding principle of which has been throughout that the paramount danger to a ship under pilotage is that created by a 'divided authority.' Attention was drawn to this danger on innumerable occasions, but was perhaps put most succinctly by Dr Lushington in the case of THE PEERLESS in 1860:

'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.' "

G. K. Geen then goes on to analyze and cite British cases pertaining to the genera! duties of the master and pilot regarding the legal meaning of interference, keeping a lookout, observance of collision regulations, sound signals, private sound signals, whether to proceed, anchoring, speed, and the use of radar.

From his analysis, it is apparent that the British and American law respecting the role and function of a compulsory pilot are consistent. He is to be placed in navigational control of the ship and give all orders effecting the navigation of the ship, i.e., rudder orders, courses, speed, anchoring, weighing anchor, whistle signals, and the like. He is entitled to the cooperation of the master and crew, and they are to see that his orders are carried out and are not to interfere with his control of the navigation unless the pilot is manifestly incapacitated, incompetent, or placing the ship in dear and imminent danger.

THE LAW OF PILOTAGE. GEEN. G.K., LLOYD'S OF LONDON PRESS, 1977

The Brussels Convention of 1910 is officially titled:

"INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW WITH RESPECT TO COLLISIONS BETWEEN VESSELS", SEPT. 23, 1910

Reprinted in 6 Bender on Admiralty at 3-11

In still another United States Supreme Court decision dealing with the role of the pilot it was recognized that:

"Studies of the long history of pilotage reveal that it is a unique institution and must be judged as such. In order to avoid invisible hazards, vessels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters. The

pilot’s job generally requires that he go outside the harbour’s entrance in a small boat to meet incoming ships, board them and direct their course from open waters to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the cost and time expended in port calls, and in some measure, the competitive attractiveness of particular ports. Thus, for the same reasons that governments of most maritime communities have subsidized, regulated, or have themselves operated docks and other harbour facilities and sought to improve the approaches to their ports, they have closely regulated and often operated their ports' pilotage system."

KOTCH V. BOARD OF RIVER PORT PILOT COM'RS. (67 S.CT. 910)

In a case where a shipowner stubbornly refused to acknowledge the effect of pilotage laws, a federal court judge was moved to comment:

"To be sure, state compulsory pilotage is not a body of law familiar to most legal practitioners, much less one at the forefront of public attention. Yet it is not a particularly difficulty body of law. Indeed, unlike the state of flux that characterizes many areas of contemporary law, pilotage law is remarkably straightforward and firmly established." JACKSON V. MARINE EXPLORATION CO. INC. 583 F. 2D 1350 (1978)

Resolution adopted by the Board of Trustees of the American Pilots’ Association on October 8, 1997.

AMERICAN PILOTS' ASSOCIATION

The Respective Roles and Responsibilities of the Pilot and the Master

Navigation of a ship in United States pilotage waters is a shared responsibility between the pilot and the master/bridge crew. The compulsory state pilot directs the navigation of the ship, subject to the master's overall command of the ship and the ultimate responsibility for its safety. The master has the right, and in fact the duty, to intervene or displace the pilot in circumstances where the pilot is manifestly incompetent or incapacitated or the ship is in immediate danger ("in .extremis") due to the pilots actions. With that limited exception, international law requires the master and/or the officer in charge of the navigational watch to "cooperate closely with the pilot and maintain an accurate check on the ship's position and movement."

State-licensed pilots are expected to act in the public interest and to maintain a professional judgment that is independent of any desires that do not comport with the needs of maritime safety. In addition, licensing and regulatory authorities, state and federal, require compulsory pilots to take all reasonable actions to prevent ships under their navigational direction from engaging in unsafe operations. Because of these duties, a compulsory pilot is not a member of the bridge "team." Nevertheless, a pilot is expected to develop and maintain a cooperative, mutually-supportive working relationship with the master and bridge crew in recognition of the respective responsibility of each for safe navigation.