



COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW

UNIT OF MARITIME LAW AND MARITIME STUDIES

**AN INVESTIGATION OF THE LIABILITY OF TRANSNET
NATIONAL PORTS AUTHORITY AND SHIP-OWNERS FOR
THE CONDUCT OF PILOTS IN THE COMPULSORY
PILOTAGE PORTS OF SOUTH AFRICA.**

by

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the degree of Master of Laws in Maritime Law.

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List of Abbreviations

AJRA	Admiralty Jurisdiction Regulation Act 105 of 1983
BMLA	British Maritime Law Association
CCAA	Colonial Courts of Admiralty Act of 1890
Collision Convention	Convention for the Unification of Certain Rules of Law with Respect to Collisions Between Vessels 1910
LLMC	Convention on Limitation of Liability for Maritime Claims 1976
MSA	Merchant Shipping Act (United Kingdom)
NPA	National Ports Act 12 of 2005
PA	Pilotage Act (United Kingdom)
RHCM Act	Railways and Harbours Control and Management (Consolidation) Act 70 of 1957
SATS Act	Legal Succession to South African Transport Services Act 9 of 1989
VACA	Vice-Admiralty Courts Act of 1863
The Authority	National Ports Authority

Abstract

South African ports are regulated by a compulsory pilotage system. This means that when a vessel enters or leaves any of the South African Ports regulated by Transnet National Ports Authority, this vessel is obliged by law to utilize a pilot to navigate the vessel safely into and out of the port. The reason for doing so is to reduce the risk of incidents that occur within the ports due to the fact that the pilots have specialized knowledge of the port's specific conditions. However, collisions may still occur in these ports. One such incident is the collision of the *MV Stella Tingas*.

The case of the *MV Stella Tingas* brought to light the unacceptable situation created by the *lacunae* in the Legal Succession To The South African Transport Act of 1989, where the innocent vessel that was involved in a collision with a vessel under compulsory pilotage could not get satisfaction for damages from either the ship-owner of the guilty vessel or from the Port Authority. In order to resolve this position, the Legislature enacted the National Ports Act 12 of 2005, specifically section 76, to resolve this problem. Section 76(2) states that the ship-owners of vessels under compulsory pilotage will be liable for all actions of a pilot, whilst section 76(1) provide that the Port Authority will not be liable for actions of the pilot done in good faith. The National Ports Act has however not defined good faith and the courts have not interpreted this concept since the commencement of the Act.

This dissertation will investigate what good faith is, by examining exclusionary clauses and by exploring the concepts of gross negligence and intention in order to ascertain whether good faith excludes these concepts. Thereafter the dissertation will seek to discover a test that can be used in order to assess whether the actions of the pilot were done in good faith or not.

The dissertation will trace the history of compulsory pilotage from its origins in English Law to South African law. It will also examine the relationship between the master and the pilot as well as the circumstances where the master can intervene in the affairs of the pilot, by ascertaining what an emergency is, as contemplated by the National Ports Act.

Chapter 1

Introduction

1.1 Background and Rationale

Trade by sea is the lifeblood of world trade, and it accounts for approximately for 90% of all world trade.¹ SAinfo reporter² estimates that:

“approximately 96% of [South Africa’s] exports are conveyed by sea, and the eight commercial ports [of South Africa] are the conduits for trade between South Africa and its Southern African partners as well as hubs for traffic to and from Europe, Asia, the Americas and the east and west coasts of Africa.”³

When vessels arrive at any of the commercial ports, a pilot is sent from the port to the vessel, in order to navigate the vessel into the harbour confines, and the same applies to vessels leaving the harbour. These ports are known as compulsory pilotage ports.⁴ Compulsory pilotage is regulated by the National Ports Act (“NPA”),⁵ which makes it mandatory for all vessels entering, leaving or making use of the ports under the jurisdiction of the National Ports Authority (“the Authority”)⁶ to use the services of a pilot which is provided by the Authority.⁷ In terms of rule 41 of the Port Rules,⁸ the functions of the pilot are *inter alia* “[to] navigate a vessel in the port, determine its movements and to determine and control the movement of the tugs assisting the vessel under pilotage”.⁹

The aim of these provisions are to minimize the risk of collisions of vessels that enter, leave or make use of the ports through the pilot’s knowledge of the port’s specific

¹ Cluster maritime François ‘*The Importance of the Sea*’, available at: <http://www.cluster-maritime.fr/article.php?lang=Uk&id=2>, accessed on 11 October 2013.

² SAinfo Reporter ‘*South Africa’s Transport Network*’ available at: <http://www.southafrica.info/business/economy/infrastructure/transport.htm#.UpJKHaUhHwI>, accessed on 6 September 2013.

³ *ibid*, the eight commercial ports are Richards Bay and Durban in KwaZulu-Natal; East London, Port Elizabeth and the Port of Ngqura in the Eastern Cape; and Mossel Bay, Cape Town and Saldanha in the Western Cape.

⁴ John Hare ‘*Shipping Law and Admiralty Jurisdiction in South Africa*’ 2nd ed (2009) 481; The Port Rules published in terms of National Ports Act 12 of 2005, published as GN 1090 in the Government Gazette Number 31986 of 6 March 2009, Rule 40

⁵ National Ports Act 12 of 2005, extracts of the Act are provided in Annexure A

⁶ Transnet National Ports Authority, a division of Transnet SOC Limited.

⁷ Hare (see Note 4 above) 481; the Port Rules (see Note 4 above), Rule 40

⁸ The Port Rules *ibid*, Rule 41

⁹ *ibid*, Rule 41 read with section 75(3) of the NPA (see Annexure A)

conditions. These pilots are familiar with the local conditions of the ports, such as the levels of the water, sand banks and other conditions, that masters of foreign vessels would not otherwise have insight into. During the phase of navigation by the pilot, the master remains in command of the vessel.¹⁰ However, the master cannot interfere with the activities of the pilot and must assist the pilot in his execution of his duties.¹¹

Despite these precautions there may be situations whereby collisions occur whilst vessels are under compulsory pilotage. An example of this is the case of the *MV Stella Tingas*¹² where the *MV Atlantica*, which was under compulsory pilotage, collided with the *MV Stella Tingas*, which was berthed at the time of the collision. In the circumstances where a collision does occur whilst the vessel is under compulsory pilotage, the Authority and the pilot will not be liable for actions done in good faith by the pilot as the pilots are deemed to be the servant of the ship-owner whilst navigating the vessel, and accordingly the owner of the vessel will be liable for the actions of the pilot.¹³ The NPA, however, is silent on what good faith entails and whether it will include intentional harm or gross negligence. There are therefore issues around the liability for compulsory pilotage, which is important to examine and address and this is the aim of the dissertation.

1.2 Structure of the Dissertation

This dissertation will take an in-depth look at compulsory pilotage in South Africa. It will begin with a historical background in Chapter 2. This will be achieved by explaining what compulsory pilotage entails as well as by providing an understanding of the reasons for compulsory pilotage. Subsequently, paying particular attention to section 6 of the Admiralty Jurisdiction Regulation Act (“AJRA”),¹⁴ the chapter will explore compulsory pilotage within the United Kingdom, as South African maritime history largely traces its roots to the United Kingdom. After this exploration is undertaken, the history of South African compulsory pilotage will be examined in

¹⁰ The Port Rules *ibid*, Rule 43 and 44 read with section 75(8) of the NPA *ibid*

¹¹ *ibid*

¹² *MV Stella Tingas: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another* 2003 (2) SA 473 (SCA)

¹³ The NPA (see Annexure A), section 76(2)

¹⁴ Admiralty Regulation Jurisdiction Act 105 of 1983

order to understand the reasoning behind the enactment of the NPA, specifically regarding the liability of ship-owners and the Authority.

Chapter 3 will then commence with an examination of the responsibilities of the pilot, such as the navigation of the vessel into and out of a port. The relationship between the pilot and master of the vessel will be explored, specifically regarding the divided command, where a double authority between the master and the pilot may exist. This chapter will then conclude with the circumstances in which the master can intervene in the affairs of the pilot with references to cases, from the 19th century, decided by Dr. Lushington of the High Court of Admiralty in the United Kingdom as well as a look at section 75(6) of the NPA, which regulates this position in South Africa.

Chapter 4, which is the core chapter of the dissertation, will analyse the liability for damages when there is an incident while the pilot is in charge. This chapter will begin with an examination of the ship-owner's liability specifically with reference to section 76(2) of the NPA as well as with reference to the case of the *MV Stella Tingas*. Thereafter, the liability of the Authority will be analysed in-depth, starting with a consideration of exemption clauses and the way in which the courts have interpreted them. An investigation of the three important and relevant concepts, namely, gross negligence, intention and good faith, will be undertaken. Chapter 4 will subsequently examine a case study of the *MV Smart* that grounded just outside of the Richards Bay harbour and will conclude with recommendations for compulsory pilotage liability.

The purpose of the study is to assess the laws governing compulsory pilotage, looking closely at the relationship of the master and pilot as well as the aspect of liability in circumstances where the actions of the pilot are either grossly negligent or intentional.

1.3 Problem Statement

The NPA introduces a new concept of “good faith” within the context of liability, where the ship-owners will be liable for acts of the pilot that were done in good faith. The NPA does not define the concept of good faith. Thus the concept is left open to interpretation in order to determine what “good faith” encompasses.¹⁵ The question

¹⁵ Hare (see Note 4 above) 493

therefore is whether such pilot is still acting in good faith where his actions constitute intentional harm or gross negligence.

1.4 Keys Questions to be answered

The dissertation will be centered on the investigation of the following questions:

- 1.4.1 What is the relationship between the master and the pilot?
- 1.4.2 At what point and under what circumstances can the master intervene with the affairs of the pilot?
- 1.4.3 What is the extent of the liability of owners and masters where pilotage is compulsory?
- 1.4.4 When will the Authority be liable for acts of the pilot?

1.5 Research Methodology

The research for this paper is desktop based. The dissertation will be focused primarily on the analysis of case law and legislation. The dissertation will also seek journal articles and textbooks in order to unearth the history of compulsory pilotage and its development in South African law.

1.6 Conclusion

The dissertation will conclude by summarizing the position of compulsory pilotage within South Africa and demonstrate how liability for the pilot's actions is placed upon the ship-owner. It will also put forward recommendations as to measures that could be put in place such as making it mandatory for the Authority to create an insurance policy that caters specifically for situations of collisions, where infrastructure of the port is damaged, that are caused by the pilots during their services whether these actions are done in good faith or not.

Chapter 2

History of Compulsory Pilotage

2.1 Introduction

This chapter will begin by explaining what compulsory pilotage is. Before tracing the history of compulsory pilotage in South Africa, its development in the United Kingdom will be examined, tracing its roots as far back as the 19th century. The reason for choosing the United Kingdom for comparison will be expounded upon with specific reference to section 6 of AJRA, which was highlighted in the case of the *MV Stella Tingas*.¹

The history of compulsory pilotage in South Africa will then be addressed, starting with an analysis of the Legal Succession To The South African Transport Services Act (“SATS Act”),² which governed compulsory pilotage ports and briefly examining the cases which were considered under this Act, such as the *Banglar Mookh*,³ *Yung Chun Fishery*⁴ and the *MV Stella Tingas* as these cases will be analysed in depth in Chapter 4 of the dissertation. The *MV Stella Tingas* is particularly important as it highlighted the *lacuna* that had been created by the SATS Act. The Act resulted in the situation in which innocent ship-owners would not be able to get any satisfaction for damages caused to their vessels in the event of a collision caused by the pilot of the guilty vessel, because neither the ship-owners of the guilty vessels or the Authority would be liable for the actions of pilots while the vessels were under compulsory pilotage.

The chapter will conclude with a discussion of the NPA, which was created in order to solve the problems created by the limitations in the application of the SATS Act. However before an examination of the history is started, an exploration of what compulsory pilotage is will be undertaken.

¹ *MV Stella Tingas: Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another* 2003 (2) SA 473 (SCA); Admiralty Regulation Jurisdiction Act (“AJRA”) 105 of 1983, section 6

² Legal Succession To The South African Transport Services Act 9 of 1989

³ *MV Banglar Mookh; Owners of MV Banglar Mookh v Transnet Ltd* 2012 (4) SA 300 (SCA)

⁴ *The MFV Yung Chun No 17: Yung Chun Fishery Company Limited v Transnet Limited t/a Portnet* (Reportable as WCC case No AC 30/97, 1 September 2000), available at: <http://web.uct.ac.za/depts/shiplaw/fulltext/yungchun.pdf>, accessed on 25 June 2013.

2.2 Compulsory Pilotage

Before examining what compulsory pilotage entails, it is important to understand what a pilot is. The NPA does not define what a pilot is, but merely states that a pilot is a “person [who is] licensed in terms of section 77 to provide pilotage services”.⁵ According to Parks and Cattell⁶ a pilot is “a person taken on board [a ship] at a particular place for the purpose of conducting a ship through a river, road or channel or from or into a port”.⁷

In South Africa, the NPA regulates compulsory pilotage within the jurisdiction of the Authority.⁸ There are two types of pilotage, namely voluntary and compulsory pilotage.⁹ The focus in this dissertation is predominately on compulsory pilotage ports as all of the South African ports are compulsory pilotage ports, but for completeness voluntary pilotage will be briefly discussed. In voluntary pilotage, the master has the discretion whether or not to use a pilot when navigating into or out of the harbour.¹⁰ Hare¹¹ suggests that it is rare for voluntary pilotage to occur, due to the fact that there are no ports under the Authority’s jurisdiction that are voluntary. He goes on to state that, “although... it is permissible to engage the services of a pilot voluntarily outside the compulsory pilotage areas, circumstances giving rise to the need for a voluntary pilot are limited”.¹²

In contrast to this, in compulsory pilotage, a master is compelled by law to use a designated pilot provided by the harbour authority.¹³ When a vessel arrives at a port, a pilot with local knowledge and skills must navigate the vessel into the harbour.¹⁴

⁵ National Ports Act 12 of 2005, section 1, read with section 77 of the NPA, which covers the certification and licensing of pilots

⁶ Alex L. Parks and Edward V. Cattell Jr *‘The Law of Tug, Tow and Pilotage’* 3rd ed (1994) 983

⁷ *ibid*

⁸ The NPA (see Note 5 above), section 10, states that all ports fall under the jurisdiction of the Authority.

⁹ John Hare *‘Shipping Law and Admiralty Jurisdiction in South Africa’* 2nd ed (2009) 480

¹⁰ NJJ Gaskell, C Debattista and RJ Swatton *‘Chorley and Giles’ Shipping Law’* 8th ed, (1987) 347

¹¹ Hare (see Note 9 above) 480

¹² *ibid*

¹³ *ibid* 482

¹⁴ Gaskell *et al* (see Note 10 above) 342

Jarvis¹⁵ indicates a number of reasons for why compulsory pilotage is necessary within ports; these are as follows:

“First, the amount of running room a ship has is restricted. Sudden turns, adjustments to course, and short stops can be made, if at all, only at great risk. Second, there are a number of obstructions, which are found only in a harbour. Such obstructions include buoys, channel markings, cable lines, and navigational lights. Although these items are designed to help the mariner, they also act as an obstacle course, which must be navigated around. Third, the number of boats near a maneuvering ship is greatly increased. Not only are there other seagoing ships coming into or leaving the harbour, but there are other vessels- tugs, barges, fireboats, ferries and local patrol boats-which will never be encountered except in the harbour. In addition, pleasure crafts, many of them steered by casual or weekend boaters with little or no experience in the rules of the road, will be present. Because of their small size, many of these vessels will never venture far from land and are therefore unknown in ocean traffic. All of these ships, from the ferry boat engaged in her usual run, to the yacht cruising up and down the shore, have the potential for causing a collision with an ocean-going ship trying to leave or enter local waters. Finally, there are natural conditions, which make navigating in a harbour difficult and potentially dangerous. Sandbars, which can quickly ground a ship, are just one example of a local condition not found in open water.”¹⁶

Hill¹⁷ in agreement to Jarvis’ submission, suggests that there is an additional reason, which is that “compulsory pilotage was based on the need for national security and the protection of life and property in [the] harbour and port areas... [although] some say... that this is nothing more than... a means of raising revenue.”¹⁸

2.3 Reason for Choosing the United Kingdom

The reason for choosing the United Kingdom as a comparator is due to the fact that most of South African maritime law originated from the United Kingdom; this can be observed by considering the history of maritime law within South Africa.¹⁹ In the 19th century, all maritime matters arising in South Africa had to be adjudicated by the Admiralty courts in England; however this became unfeasible and accordingly the

¹⁵ Robert M. Jarvis ‘*Confusion in the Harbour: Compulsory Pilots Collide with the Motorship FSIA*’ (1985) 16 *Northwestern Journal of International Law & Business* 1010, available at: <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1185&context=njilb>, accessed by 5 May 2013.

¹⁶ Jarvis *ibid* 1013; David J Bederman ‘*Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts*’ 64 (1989-1990) *Tul. L. Rev.* 1033 1989-1990, at 1042

¹⁷ Christopher Hill ‘*Maritime Law*’ 2nd ed (1985) 349

¹⁸ *ibid*

¹⁹ For a detailed discussion on the reasoning for using maritime law of the United Kingdom, see Hare (see Note 9 above) 483- 486

Vice-Admiralty courts were established in all the British colonies including South Africa.²⁰ The Vice-Admiralty Courts Act (“VACA”)²¹ gave the Vice-Admiralty Courts the powers to adjudicate all maritime matters that were exercised by the English High Court of Admiralty.²² When the Vice-Admiralty Courts were established in South Africa in 1863, it brought about a similar problem to that experienced in England, that being the creation of two courts with concurrent jurisdiction.²³ The common law courts in South Africa essentially applied Roman Dutch law whereas the Vice-Admiralty Courts applied English admiralty law, meaning that, depending on the court chosen, different outcomes could be possible for the parties involved.²⁴

In order to resolve this problem, the English legislature enacted the Colonial Courts of Admiralty Act (“CCAA”),²⁵ which repealed the Vice-Admiralty Courts Act. The CCAA gave jurisdiction to the Colonial Courts of Admiralty to exercise the same jurisdiction as the High Court of England in 1890.²⁶ The CCAA essentially conferred upon such courts the same jurisdiction as the High Court of England, as it existed at the time when the Act was passed.²⁷ The CCAA not only conferred the same jurisdiction that was exercised by the English High court upon the Colonial Courts of Admiralty but also determined the law to be applied by the court, namely English admiralty law.²⁸

²⁰ Gys Hofmeyr *Admiralty Jurisdiction Law and Practice in South Africa* 2nd ed (2012) 3

²¹ Vice-Admiralty Courts Act, 1863 [26 & 27 Vict. c. 24]

²² Hofmeyr (see Note 20 above) 1

²³ *ibid* 3

²⁴ *ibid*

²⁵ The Colonial Court of Admiralty Act, 1890 [53 & 54 Vict. c. 27]

²⁶ *ibid*

²⁷ *Malilang and others v MV Houda Pearl* 1986 (2) SA 714 (A), where the issue before the court was whether the CCAA conferred the trial court and appeal court with admiralty jurisdiction; *Yuri Maru, the Woron* [1927] AC 906 (PC) at 915-6, also having to decide on this point, held that the court, as a Colonial Court of Admiralty, has the same jurisdiction as the admiralty jurisdiction which the High Court of England had at the passing of the Act.

²⁸ *Crooks & Co Appellants v Agricultural Co-Operative Union Ltd Respondents* 1922 AD 423; see also *Tharros Shipping Corporation SA v The Golden Ocean* 1972 (4) SA 316 (N): this case concerned an action *in rem* where a writ of summons *in rem* was issued against *The Golden Ocean*, *The Golden Ocean* was not the ship against which the claim arose. The defendant’s attorney entered an appearance to defend the action, which was filed under protest, without prejudice to the defendants right to object to the jurisdiction of the court either to sit as a court of admiralty or to exercise the powers of a court of admiralty in respect of this action. The court held that it is a court of admiralty by virtue of the provisions of the CCAA of 1890, even though Natal is no longer a British possession. The court also submitted that the manifest intention of the legislature was to continue in force all laws in the colonies at the material time in any part of the Union of South Africa and thereafter the Republic or in any territory in respect of which parliament is competent to legislate; see also *Trivett & Co (Pty) Ltd v WM Brandt’s Sons & Co Ltd* 1975 (3) SA 423 (A), an application for an order granted in the trial to be set aside on the grounds that Republic of South Africa having ceased to be a “British possession” and were no longer

Hare²⁹ submits that the jurisdiction of the Colonial Courts of Admiralty included “claims ‘for, arising out of, or relating to... damage caused by or to a ship, whether by collision or otherwise’” and were to be decided by that court according to English admiralty law.³⁰ He further submits that although claims pertaining to pilotage are not as clear as all other maritime claims due to the fact that it was not specifically mentioned in either the 1840 Act or the 1861 Act, they nevertheless will still fall within the jurisdiction of the High Court of England. He reasons that this is the case due to the numerous 19th century Admiralty Court judgments including the *Temora*.³¹

Subsequently the Admiralty Jurisdiction Regulation Act (“AJRA”)³² was enacted which also included a provision that English law must be used when dealing with certain maritime claims within South Africa. Section 6 of AJRA, which deals with law and rules to be applied, states in the relevant sub-sections, the following:

- “6(1) Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall-
- (a) With regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
 - (b) With regard to any other matter, apply the Roman-Dutch law applicable in the Republic.
- (2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any of the matters contemplated in paragraph (a) or (b) of that subsection.”³³

The section above means that where there is a South African statute that regulates a maritime claim, that Act must be applied; however, if that statute is limited and does

Colonial Courts of Admiralty with jurisdiction conferred upon such courts by the said Act. The court held that S107 of Act 32 of 1961 imported to continuity of laws in the Republic, and this therefore is in accordance with the general policy of the Act, namely that, except for the fact that Union of South Africa became a Republic and ceased to be in possession of the British, everything was to continue as before, including all statutory institutions which operated in the Union of South Africa.

²⁹ Hare (see Note 9 above) 484

³⁰ The CCAA (see Note 25 above), did not give the Colonial Court of Admiralty exclusive jurisdiction over maritime claims, thus it was possible for a claimant to bring a delictual action in the ordinary courts, where it would be decided according to Roman Dutch common law.

³¹ Hare (see Note 9 above) 484; the *Temora* [1860] 167 ER 9

³² AJRA (see Note 1 above), section 6

³³ *ibid*

not cover certain legal issues, section 6(1) will be applied.³⁴ Thus for claims relating to collisions and pilotage which fell within the jurisdiction of the Colonial Courts of Admiralty, section 6(1)(a) of AJRA would apply.

This analysis of the law to be applied was set out in the case of the *MV Stella Tingas*, which was an appeal brought by the owners of the *MV Stella Tingas* and the Authority.³⁵ The owners of the *MV Stella Tingas*, alleged *inter alia* that the owners of the *Atlantica* were liable on the basis that according to section 6 of AJRA, the United Kingdom Pilotage Act of 1983 (“PA 1983”)³⁶ was applicable, specifically section 35, which provided that the ship-owner would be liable for the actions of the compulsory pilot, or in the alternative that the ship-owner was liable by virtue of the fact that the master failed to intervene in the affairs of the pilot according to English common law.³⁷

The court, having analysed section 6, found that the United Kingdom’s PA did not apply within this context to the Authority’s liability because the SATS Act regulated the position of liability of the Authority in terms of section 6(2).³⁸ Even though the court found that the PA 1983 did not apply, it did not consider whether any other statute after 1891 would apply in any case. By way of comparison, according to Schwikkard,³⁹ on the law of evidence, the English law that existed at 30 May 1961 will be applicable in South Africa, where the local statutes are silent on specific issues. This will however, be limited to statutes that were applicable to the British colonies.⁴⁰ English law after 30 May 1961, according to Schwikkard, is “not binding upon South African courts, but does have considerable persuasive force.”⁴¹ Thus the United

³⁴ Hare (see Note 9 above) 484

³⁵ *MV Stella Tingas* (SCA) (see Note 1 above) at 479 para 5B, the Authority brought the appeal in regard to the finding of the court *a quo* against them and the owners of the *MV Stella Tingas* brought a counter appeal against the decision in the court *a quo*, arguing on appeal that the owners of the *Atlantica* were liable according to the admiralty laws of England, in anticipation that the appeal court would find in favour of Transnet.

³⁶ The United Kingdom’s Pilotage Act, 1983 c. 21, available at: http://www.legislation.gov.uk/ukpga/1983/21/pdfs/ukpga_19830021_en.pdf, accessed on 25 June 2013.

³⁷ *MV Stella Tingas* (SCA) (see Note 1 above) at 478 para 2, the ship-owners of the *MV Stella Tingas* also contended that the Authority was liable for the actions of the pilot, which they alleged to be grossly negligent or reckless. This will be considered later in this chapter, and in greater detail in Chapter 4.

³⁸ *ibid* at 488 para 31G

³⁹ Schwikkard *et al* ‘Principles of Evidence’ (2009) 24

⁴⁰ *ibid*, these are also limited to Acts which are not incompatible with South African law or which are inconsistent with constitutional provisions

⁴¹ *ibid* 29

Kingdom PA probably did not apply in South Africa in any event as it was not expressly applicable to the colonies.

In this case, the courts also examined the aspect of liability on the part of the ship-owner of the guilty vessel on both grounds contended by the *MV Stella Tingas*' owners. The court stated that the SATS Act did not regulate the position of liability of the ship-owner of the guilty vessel and therefore, according to section 6 of AJRA, the law of the United Kingdom as at 1983 would be considered in relation to South African maritime claims that are not specifically covered by statute.⁴² The court firstly looked at the PA 1983 and found that due to section 10 of the first schedule of the SATS Act read with section 6(1) of AJRA, section 35 of the United Kingdom's PA 1983, which the owners of the *MV Stella Tingas* relied on, was not applicable in this case.⁴³ The courts then turned to the common law of the United Kingdom and found that according to the common law a ship-owner will not be liable for the actions of a compulsory pilot on board its vessel.⁴⁴ This case will be discussed in greater detail in Chapter 4.

Accordingly, although compulsory pilotage is now governed by the NPA,⁴⁵ Hare⁴⁶ submits that:

“To the extent, limited though that may be in relation to compulsory pilotage, that any legal issue arising in such claims might not be covered by these provisions, the law applicable would, in the present context, generally fall to be determined by reference to the provisions of section 6(1) of the Admiralty Jurisdiction Regulation Act”⁴⁷

Thus it is clear that South African law is deeply rooted in the law of the United Kingdom and therefore it is important to examine English law in order to understand issues of compulsory pilotage. The next section will focus on the history of compulsory pilotage within the United Kingdom, by looking firstly at the

⁴² Hare (see Note 9 above) 483

⁴³ *MV Stella Tingas* (SCA) (see Note 1 above) at 488 para 31G

⁴⁴ *ibid* at 487 para 29C

⁴⁵ The NPA was enacted as a solution to the void that had been created by the SATS Act, particularly with regard to the liability of ship-owners of vessels that are involved in any incidents during navigation of the vessel whilst under compulsory pilotage. This will be discussed in greater detail in Chapter 4.

⁴⁶ Hare (see Note 9 above) 483, the applicable law is the common law of the United Kingdom as at 1983

⁴⁷ *ibid*

Jurisprudence of the United Kingdom's compulsory pilotage system and then examining the United Kingdom's PA 1913 and 1983.

2.4 Compulsory Pilotage in the United Kingdom

Compulsory pilotage in the United Kingdom will be examined in two categories, the first being related to the jurisprudence of compulsory pilotage in the United Kingdom, which will be dealt with briefly, and the second being related to the statutes that governed compulsory pilotage thereafter, namely, *inter alia* the PA 1913 as well as the PA 1983. Each will be examined in turn.

2.4.1 Jurisprudence of the United Kingdom's Compulsory Pilotage System

Compulsory pilotage has existed in the United Kingdom since the 1500's, and was regulated through various successive charters.⁴⁸ As Hare⁴⁹ points out, these early laws indicate both the necessity for and the functions of a pilot. The first charter in 1514 was granted to the Trinity House of Deptford Strond ("Trinity House") by Henry VIII.⁵⁰ This charter gave certain powers to Trinity House to "control the operations of ship men, pilots and mariners" throughout the United Kingdom.⁵¹ Subsequent charters were given by James I in 1604, which, according to Douglas and Geen,⁵² were more comprehensive than the 1514 charter but was dissolved by parliament in 1647. Thereafter a charter was passed in 1685 by James II which basically provided that a pilot must navigate all vessels in the river Thames, extending the area of pilotage.⁵³

After this period, numerous Acts were passed which regulated compulsory pilotage,⁵⁴ namely, Act 3 Geo. I. c. 13 in 1717,⁵⁵ Act 5 Geo. II c.20 in 1732,⁵⁶ Act 48 Geo. III c.

⁴⁸ Douglas and Geen *'The Law of Harbours and Pilotage'* 4th ed (1993) 155

⁴⁹ Hare (see Note 9 above) 479

⁵⁰ Douglas and Geen (see Note 48 above) 155; Bederman (see Note 16 above) 1041

⁵¹ Douglas and Geen *ibid*, this charter was thereafter confirmed by Edward VI, Queen Mary and Queen Elizabeth I. For an in-depth look at the history of pilotage see Douglas and Geen chapter 15.

⁵² *ibid*

⁵³ *ibid*

⁵⁴ For an in-depth analysis of the statutes enacted in this period, see R. G. Marsden *'Compulsory Pilotage'* 4 (1888) L. Q. Rev. 51, available at: <http://heinonline.org>, accessed on 5 May 2013.

⁵⁵ Act 3 Geo. I. c. 13 in 1717, "regulated... pilots of the Trinity House of Dover, Deal and the Isle of Thanet, who have always had the sole piloting and load management of all ships and vessels from said places up the river Thames and Medway"; Marsden *ibid* 52, an important section from this Act was that according to section, the ship-owner could chose the pilot to navigate the vessel.

104 in 1808⁵⁷ and Act 52 Geo. III c. 39 in 1812.⁵⁸ The last mentioned Act is the most important out of all the Acts passed; this is because section 30 of this Act provided that “the owner or master of a ship would not be answerable for any loss or damage caused by ‘the incompetence or incapacity of any pilot taken on board’.”⁵⁹ This defence could be raised by a ship-owner where damage had been caused solely due to the negligence of a pilot on board a vessel during compulsory pilotage.⁶⁰ This defence was known as the ‘defence of compulsory pilotage’ and essentially meant that where the damage was caused by the fault of the pilot, the ship-owner would escape liability because the ship-owner was forced to take on the employment of the pilot.⁶¹ According to Jarvis,⁶² “this result had been thought to be fair because it was felt that the *respondeat superior nexus* between the ship-owner and the crew had been broken by the presumably unwanted presence of the compulsory pilot.”⁶³

In 1825, Act 6 Geo. IV c. 125 repealed the 1812 Act, nevertheless keeping the compulsory pilotage defence and extending the application of the exemption from compulsory pilotage, “to British vessels engaged in a variety of trades”.⁶⁴ Marsden⁶⁵

⁵⁶ Act 5 Geo. II c.20 in 1732; Marsden *ibid* 53, states that the Act did not make it compulsory for “outward-bound ships through Downs, and ships entering or leaving the Thames by the Swin (or North) Channel... [Although] the intention of the Legislation was [to make] pilotage in other cases compulsory.”

⁵⁷ Act 48 Geo. III c. 104 in 1808; Marsden *ibid* 53, this Act brought about a penalty upon ships that refused to take a pilot

⁵⁸ Act 52 Geo. III c. 39 in 1812; Marsden *ibid* 53, the penalty from the 1808 Act continued in this Act.

⁵⁹ Douglas and Geen (see Note 48 above) 156, Marsden *ibid* 53, the defence of compulsory pilotage was a new feature brought about by this Act; Bederman (see Note 16 above) 1056; Act 52 Geo. III c. 39 in 1812 *ibid*, section 30 states that, “[N]o owner or master of any ship... shall be answerable for any loss or damage ... for or by reason or means of any neglect, default, incompetency or incapacity of any pilot taken on board of any such ship... under or in pursuance of any of the provisions of this Act.”

⁶⁰ Ambrose Rajadurai ‘*Morella Calder Trust Winning Essay 2001 Vicarious Liability for Negligent Pilotage in Victoria*’ (2002) 16 Austl. & N.Z. Mar. L.J. 39, available at: <http://heinonline.org>, accessed on 5 May 2013; *The Mobile* (1856) 14 ER 568

⁶¹ Hare (see Note 9 above) 480

⁶² Jarvis (see Note 15 above) 1018; Kay J *et al* ‘*The Law Relating to Shipmasters Seamen: Their Appointment Duties Powers Rights and Liabilities*’ 2nd ed 1 (London: Stevens And Haynes, 1894) Chapter XII, available at: <http://heinonline.org>, accessed on 5 May 2013 at 447

⁶³ Jarvis *ibid*

⁶⁴ Douglas and Geen (see Note 48 above) 157, these trades include vessels trading to either Norway, the Kattegat or Baltic, and vessels “wholly laden with stone from Guernsey, Jersey, Alderney, Sark or Man and being in production thereof”; Act 6 Geo. IV c. 125 of 1825, section 55 contains the exemption of the ship-owners from liability; this was previously limited to only vessels engaged in the coal trade in the 1732 Act, and before this Act, the Act of 1717, limited the exemptions to the master, mate or part owner of any vessel, who was a resident of either Dover, Deal, or the Isle of Thanet.

suggests that this Act made it compulsory for every in-ward bound ship to the Thames to take a pilot “who shall first offer and [the master] ‘shall give charge of his ship’ to such pilot”,⁶⁶ this statement he claims is the very cause for the “mischievous doctrine”⁶⁷ known as the divided command, which will be examined further in Chapter 3.

Kay⁶⁸ stated that the laws pertaining to compulsory pilotage were a “confused mass of statutes, local and general, orders in council, by-laws and cases”.⁶⁹ In addition the Royal Commission’s report in 1836 about the state of existing laws, regulations and practices proposed changes that needed to be made in order to clarify the current state of compulsory pilotage.⁷⁰ The Committee stated that there were certain problems pertaining to compulsory pilotage, such as the fact that vessels were obliged to receive on board a pilot “if he shall present himself”, which essentially made what was meant to be compulsory pilotage in fact voluntary pilotage; this the committee noted would “only hold out a boon to the foolhardy”.⁷¹

The report recommended a general Act be enacted to be applied in the United Kingdom, which would repeal all the existing pilotage Acts.⁷² However, according to Douglas and Geen⁷³ the report was ignored and two further Acts, namely, Act 3 & 4 Vict. c. 48 in 1840 and the Pilotage Amendment Act of 1853 were passed. Subsequently thereafter, the Committee’s recommendations were finally followed, with the enactment of two Acts.⁷⁴ The first of these was the Merchant Shipping Repeal Act of 1854, which repealed all previous Acts relating to pilotage, and the second was

⁶⁵ Marsden (see Note 54 above) 53, the divided command is a doctrine where the relationship of the pilot and master over the vessel is blurred, thus it is said that the “pilot supersedes the master in the charge the ship, with the collar that the owner is not liable for the pilot’s negligence.”

⁶⁶ *ibid*

⁶⁷ *ibid*

⁶⁸ Kay *et al* (see Note 62 above) at 437

⁶⁹ *ibid*

⁷⁰ Report from the commissioners appointed to inquire into the Laws and Regulations relating to Pilotage in the United Kingdom (1836) [56] xxviii referred to in Douglas and Geen (see Note 48 above) 157. In addition the committee noted that different ports applied different regulations which would be completely distinctive from each other, the Committee also recommended that in order to avoid abuses by port authorities, that a single body should be created to oversee all the ports regulations.

⁷¹ Douglas and Geen *ibid*

⁷² *ibid*

⁷³ *ibid* 158

⁷⁴ *ibid*

the Merchant Shipping Act of 1854 (“MSA 1854”),⁷⁵ which replaced all the Acts dealing with pilotage, specifically Part V dealing with compulsory pilotage.⁷⁶ The defence of compulsory pilotage still existed at the time, which was provided by section 388 of the MSA 1854,⁷⁷ and became one of the agendas in the Select Committee meetings examining pilotage in 1870 and 1888, with the view to abolishing the defence of compulsory pilotage.⁷⁸ The reasoning *inter alia*, according to White⁷⁹ who contemporaneously proposed the abolition of the defence of compulsory pilotage, was in order to promote careful navigation, as the ship-owner would be liable for the pilot’s neglect just as though the pilot was an employee. At the time ship-owners were exempt from liability because the pilot was not the employee of the ship-owner. The liability of the Authority in most instances was rarely in dispute, but if it were to be in dispute, the approach for finding liability would be based on the principles of employment, which is that the Authority would be liable by virtue of vicarious liability because the pilot was an employee of the Authority acting within the course and scope of his employment. The recommendation of the committee that the compulsory pilotage defence be abolished was ignored by the legislature at the time.

With regards to the jurisdiction of courts to hear claims involving pilots, and therefore, where in certain circumstances a collision would occur whilst a vessel was under compulsory pilotage, the Admiralty Court would deal with the issues surrounding compulsory pilotage.⁸⁰ Hare⁸¹ submits that, although confusion existed about whether the Admiralty Court had jurisdiction to hear matters arising out of a collision involving a pilot, this was dissipated by the 1873 Supreme Court of Judicature Act, “that gave the

⁷⁵ The Merchant Shipping Act 1854 [17 & 18 Vict. c. 104], available at: https://ucadia.s3.amazonaws.com/acts_uk/1800_1899/uk_act_1854_merchant_shipping.pdf, accessed on 5 May 2013.

⁷⁶ Douglas and Geen (see Note 48 above) 158

⁷⁷ The MSA 1854 (see Note 75 above), section 388 states that: “no owner or master of any ship shall be answerable to any person whatever for any loss or any or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.” This Act applied to the British colonies as well.

⁷⁸ Douglas and Geen (see Note 48 above) 158, the Select Committee recommended that the compulsory pilotage defence should be abolished but this finding however, was ignored by Legislature, with the result that the compulsory pilotage defence continued to exist.

⁷⁹ J. Dundas White ‘*Compulsory Pilotage in the London District*’ 29 Law Mag. & Rev. Quart. Rev. Juris. 5th Ser. 278, available at: <http://heinonline.org>, accessed on 5 May 2013 at 284

⁸⁰ Hare (see Note 9 above) 479

⁸¹ *ibid* 485

Admiralty Division ‘all the jurisdiction of the High Court of Justice... and a Kings Bench action in *personam* against a pilot’.”⁸²

After the MSA 1854, several Select Committee meetings were set up in 1860, 1862, 1870 and 1888, to inquire about the situation of compulsory pilotage, which Douglas and Geen⁸³ describe as a strong reaction to the defence of compulsory pilotage. Thereafter the Merchant Shipping Act of 1894 (“MSA 1894”)⁸⁴ was enacted, the purpose of which was to repeal and replace the MSA 1854. However, the MSA 1894 did not abolish the defence of compulsory pilotage.⁸⁵ White⁸⁶ argued that the state of pilotage within the United Kingdom was in an unsatisfactory state particularly with regard to the “question of pilotage and exemptions from pilotage”.⁸⁷ Thus in 1911, after a report from yet another Committee was released with proposed changes regarding the liability of ship-owners, the Pilotage Act of 1913 (“PA 1913”)⁸⁸ was passed.⁸⁹ This Act resolved the issues raised in these Committee meetings, such as what the legal relationship between the master and pilot was and the abolition of the defence of compulsory pilotage.⁹⁰

2.4.2 United Kingdom Pilotage Acts 1913 and 1983

On the 1st of February 1913, the United Kingdom acceded to the Convention For The Unification Of Certain Rules Of Law With Respect To Collisions Between Vessels (“Collision Convention”),⁹¹ which was concerned with the “uniform rules of law with respect to collisions”.⁹² According to Article 5, “the liability imposed by the preceding Articles⁹³ attaches in cases where the collision is caused by the fault of a pilot, even

⁸² *ibid*

⁸³ Douglas and Geen (see Note 48 above) 161

⁸⁴ The Merchant Shipping Act of 1894 [57 & 58 Vict. c. c. 60], available at: <http://www.legislation.gov.uk/ukpga/Vict/57-58/60/enacted>, accessed on 5 May 2013.

⁸⁵ *ibid*, section 633

⁸⁶ White (see Note 79 above) 278

⁸⁷ *ibid*

⁸⁸ The United Kingdom’s Pilotage Act of 1913, c 31

⁸⁹ Douglas and Geen (see Note 48 above) 161

⁹⁰ *ibid* 160

⁹¹ Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels signed on 23 September 1910 adopted in Brussels, Belgium, available at <http://cil.nus.edu.sg/rp/il/pdf/1910%20Collision%20Convention-pdf.pdf>, accessed on 5 May 2013.

⁹² *ibid*

⁹³ *ibid*, this refers to Articles 3 and Article 4, which state the following, Article 3: “If the collision is

when the pilot is carried by compulsion of law.”⁹⁴ The signing of this convention played a pivotal role in the change of liability regime from one where the ship-owner was not liable for the actions of the pilot to the situation where the ship-owner was now liable for the actions of the pilot.⁹⁵

The PA 1913 was enacted in order to give effect to the provisions of the Collision Convention. The most important change brought about by the PA 1913 was the abolition of the defence of compulsory pilotage.⁹⁶ This essentially placed compulsory pilotage in the same situation as that of voluntary pilotage because ship-owners were now liable for any actions performed by the pilot whilst under compulsory pilotage, even though the pilot was the employee of the pilotage authority and not the ship-owner.⁹⁷ Douglas and Geen,⁹⁸ however, submit that this Act “did not include any provision altering or defining the legal relationship between master and pilot”.⁹⁹ The relationship between the master and the pilot will be explored in greater depth in Chapter 3.

The PA 1983 repealed and replaced the PA 1913 as well as the Merchant Shipping Act of 1979 (“MSA 1979”),¹⁰⁰ which was enacted after the PA 1913. The PA 1983 followed along the lines of the PA 1913 by including the provision that a ship-owner will no longer be exempt from liability for the actions of the pilot and accordingly will be liable for the actions of the pilot as though the pilot had been employed voluntarily by the ship-owner.¹⁰¹ This exemption is provided for in section 35 of the PA 1983, which states the following:

caused by the fault of one of the vessels, liability to make good the damages attaches to the one which has committed the fault” and Article 4: “If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.”

⁹⁴ *ibid* Article 5

⁹⁵ Gaskell *et al* (see Note 10 above) 352

⁹⁶ *ibid*; Bederman (see Note 16 above) 1061

⁹⁷ PA 1913 (see Note 88 above), section 15

⁹⁸ Douglas and Geen (see Note 48 above) 495

⁹⁹ *ibid*

¹⁰⁰ The Merchant Shipping Act of 1979, c. 39. This Act established a pilotage commission to deal with pilotage in general.

¹⁰¹ PA 1983 (see Note 36 above), section 35; the pilot however, is still considered to be the employee of the Authority whilst performing his duties as a compulsory pilot.

“Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.”¹⁰²

This section above is particularly relevant in the South African context, as it was analysed in the case of the *MV Stella Tingas*.¹⁰³ An important feature of the PA 1983 was that it made it an offence to fail to employ the services of a pilot; following along the lines of the previous Acts of 1913 and the Merchant Shipping Act of 1979 (“MSA 1979”)¹⁰⁴ in this regard.¹⁰⁵ In addition to this, the PA 1983 was particularly important as it made provision for the limitation of the authority’s vicarious liability.¹⁰⁶ Section 17 of the Act provided that:

“The grant or renewal of a licence to a pilot by a pilotage [A]uthority under the powers given to them by this Act does not impose any liability on the [A]uthority for any loss occasioned by any act or default of the pilot.”¹⁰⁷

The authority could also limit its liability, for “neglect or want of skill of the pilot,” and for neglect or want of skill “by the authority in employing the pilot” according to section 42(1) of the PA 1983, to an amount not exceeding £100 as well as the pilotage charges for that particular voyage.¹⁰⁸

Subsequently thereafter, a further Act was passed, namely, the PA 1987,¹⁰⁹ which is not relevant in the South African context because in looking to section 6 of AJRA, the courts will only apply English law as it was immediately prior to the enactment of AJRA, which is 1 November 1983. Thus the courts will not apply the PA 1987.

¹⁰² *ibid*

¹⁰³ *MV Stella Tingas* (see Note 1 above), 487 para 29D-G

¹⁰⁴ MSA 1979 (see Note 100 above)

¹⁰⁵ PA 1913 (see Note 88 above), section 11(2), provides that if a ship is not under pilotage, the master shall be liable; this was also a followed principle from the MSA 1854 (see Note 75 above), section 355, which states: “... every master of any unexempted [or exempted] ship navigating within any such district, who, after a qualified pilot has offered to take charge of such ship... [and] either himself pilots such ship without possessing a pilotage certificate enabling him to do so, or employs or continues to employ an unqualified person to pilot her... shall for every such offence incur a penalty of double of pilotage demandable for the conduct of such ship; *The Earl of Auckland* [1862] 15 ER 509.

¹⁰⁶ Douglas and Geen (see Note 48 above) 188; Hill (see Note 17 above) 355

¹⁰⁷ PA 1983 (see Note 36 above), section 17

¹⁰⁸ *ibid* section 42; Douglas and Geen (see Note 48 above) 188; Hill (see Note 17 above) 352

¹⁰⁹ The United Kingdom’s Pilotage Act of 1987 c21, available at: http://www.legislation.gov.uk/ukpga/1987/21/pdfs/ukpga_19870021_en.pdf, accessed on 25 June 2013.

However, with regards to compulsory pilotage, the PA 1987 has not changed any features, particularly with respect to the incidence of liability of either the ship-owner or the Authority, from the previous PA 1913 and 1983. Thus according to the PA 1987, section 16¹¹⁰ regulates the liability of the ship-owner, who will be liable for the actions of the pilot and, section 22(8)¹¹¹ regulates the liability of the Authority, which will not be liable for the actions of the pilot. Section 22(3), however, does make substantial changes to the amounts of limitation of liability available both to the pilot and the competent harbour authority.¹¹² Section 22(3) provides the following:

“Where, without any such personal act or omission by a competent harbour authority as is mentioned in Article 4 of the Convention [on Limitation of Liability for Maritime Claims], any loss or damage to any ship, to any property on board any ship or to any property or rights of any kind is caused by an authorised pilot employed by it, the authority shall not be liable to damages beyond the amount of £1,000 multiplied by the number of authorised pilots employed by it at the date when the loss or damage occurs.”¹¹³

Accordingly, the PA 1987 has increased the amount of liability from £100, together with the pilotage charges for that particular voyage, to £1000 multiplied by the number of authorised pilots. Thus in following the Convention on Limitation of Liability for Maritime Claims (“LLMC”),¹¹⁴ particularly Article 4, the PA 1987 has not only capped the liability of the authority but has also set out the requirements for which the limits of liability can be broken.¹¹⁵ In order to break these limits, the burden of proof rests upon

¹¹⁰ *ibid*, section 16 states the following: “The fact that a ship is being navigated in an area and in circumstances in which pilotage is compulsory for it shall not affect any liability of the owner or master of the ship for any loss or damage caused by the ship or by the manner in which it is navigated.” Although the wording of section 16 has changed somewhat from section 35 of the PA 1983, it has made no significant difference in the liability of the ship-owner as the ship-owner will still be liable for the actions of the pilot.

¹¹¹ *ibid*, section 22(8) states that “A competent harbour authority shall not be liable for any loss or damage caused by any act or omission of a pilot authorised by it under section 3 above by virtue only of that authorisation.”

¹¹² *ibid*, section 22(3)

¹¹³ *ibid*

¹¹⁴ Convention on Limitation of Liability for Maritime Claims signed on the 19th of November 1976 adopted in London, United Kingdom, available at: <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CEIQFjAC&url=http://www.emsa.europa.eu/%2Fmain%2Fenforcement-eu-legislation%2Ftopics-a-instruments%2Fdownload%2F974%2F595%2F23.html&ei=-RahUp6wMMnxhQfH1YAI&usg=AFQjCNGECvY3joK4OkCu4ehKqKo-vJ3KTQ&sig2=mPs7sZOXsAxGFYP38PZGYQ&bvm=bv.57155469,d.ZG4>, accessed on 9 November 2013.

¹¹⁵ Britannia News Conventions ‘Convention on Limitation of Liability for Maritime Claims (LLMC), 1976’, Number 3, June 2011 available at:

the claimant alleging that the authority cannot rely on the limitation set.¹¹⁶ According to Article 4 of the LLMC, which provides that:

“A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result.”¹¹⁷

This limit, according to the Britannia News Conventions,¹¹⁸ is virtually unbreakable due to the elements set out in this Article of the LLMC, namely, a personal act or omission, intentional or reckless conduct and, knowledge that loss would probably ensue.

2.5 Compulsory Pilotage in South Africa

The focus of the dissertation is on the NPA, which is a relatively new Act in South Africa, as it is the current legislation applicable to compulsory pilotage. It will be explored with reference to the relevant sections pertaining to compulsory pilotage. However, before this examination can be done, an exploration of the SATS Act will be performed due to the fact that compulsory pilotage was governed primarily by the SATS Act, which regulated all compulsory pilotage ports before the enactment of the NPA. The relevant provisions of the SATS Act have now been repealed by the NPA.¹¹⁹

This section of the chapter, therefore will examine the relevant sections in the SATS Act, which existed prior to the enactment of the NPA, as they are necessary in order to understand the liability for the pilot’s actions, and this chapter will briefly deal with the relevant cases leaving a more detailed examination of these cases to Chapter 4.

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&ved=0CHsQFjAJ&url=http%3A%2F%2Fwww.britanniapandi.com%2Fdownload.cfm%3Fdocid%3D08B73EDC-66CB-4A10-9A38C949A77A8807&ei=zBahUo7WGc6ThQfms4CQCg&usg=AFQjCNEGqcNBXeEfKD3jYebzyhjGC_r_KVg&sig2=MMeQ8mGsqo9YuL3HOxgS8w&bvm=bv.57155469,d.ZG4 accessed on 9 November 2013.

¹¹⁶ *ibid* 8

¹¹⁷ LLMC (see Note 114 above), Article 4

¹¹⁸ Britannia News Conventions (see Note 115 above) 8

¹¹⁹ The NPA (see Note 5 above), section 89, states the following: “(1) The [SATS Act] is hereby repealed in so far as it relates to any provision for the management and operation of the ports referred to in this Act. (2)(a) Despite subsection (1), the port regulations made under section 21 of the [SATS Act] and which were in force immediately prior to the commencement of this Act remain in force in so far as they are not inconsistent with this Act, until amended or repealed under this Act.”

However before this examination is done, a brief account will be given to the state of compulsory pilotage before the SATS Act came into force.

At common law, the ship-owner was not liable for the actions of the pilot.¹²⁰ This view finds support in the case of *Table Bay Harbour Board v City Line Ltd*,¹²¹ where the courts found that the ship-owners were not liable by virtue of English law, specifically section 388 of the United Kingdom's MSA 1854,¹²² which exempted ship-owners from liability for the actions of pilots. The issue before the court was whether a local by-law¹²³ that regulated the port of Table Bay, which placed liability on the master and owners for damages although it did not mention whether this applied where the vessel was under compulsory pilotage, could override the application of section 388.¹²⁴ The court per Hopley J concluded that by virtue of the provisions of Cape Statute 8 of 1979 it was required to apply English law to the matter, specifically section 388 of the MSA 1852, although the Court recognized that this section merely made clear the position that applied under English common law. Hopley J held that:

“...a ship, while under compulsory pilotage within the jurisdiction of this Court, would be similarly exempt from liability unless there be some statute in force at the place when the damage is done to deprive the owners of such ship of the benefits of such exemption”¹²⁵

Having found that the by-law in question did not alter the position the Court found in favour of the defendants.

¹²⁰ Hare (see Note 9 above) 495

¹²¹ *Table Bay Harbour Board v City Line Ltd*. (1905) 22 SC 511

¹²² The MSA 1854 (see Note 75 above), section 388 states that “no owner or master of any ship shall be answerable to any person whatever, for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by-law”.

¹²³ *Table Bay Harbour Board v City Line Ltd* (see Note 121 above), Harbour Board Regulation No. 4, section 6, “which makes the masters and owners of vessels liable to pay for all damage done to any quays or other property belonging to the Board, ‘whether such damage shall be done directly or indirectly by their vessel or by themselves or any of them, or by the sailors, or servants, or other persons whatsoever belonging to such vessels, or engaged or assisting in bringing them into or taking them out of dock or basins, or in executing repairs or other works thereon, or in putting on board or discharging their cargoes, or connected therewith in any other way whatever’.”

¹²⁴ *ibid* 521

¹²⁵ *ibid* 520-521

Thus it is clear that at common law the ship-owner was exempt from liability for the pilot's actions performed during compulsory pilotage. The SATS Act did not contain any provisions which altered the law on this issue.

2.5.1 The SATS Act

The SATS Act had regulated all the compulsory pilotage ports within South Africa since 1989.¹²⁶ It regulated the functions of a pilot as well as the exemption of liability of the Authority for the actions of pilots carried out during compulsory pilotage.¹²⁷ This will be a brief examination as the liability of ship-owners and the Authority will be further examined in Chapter 4.

Section 10(7) of the first schedule of the SATS Act states that the “[authority] and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot.”¹²⁸ Thus the authority will not be liable for any loss or damage caused by a pilot's negligent act or omission. However, the courts in numerous cases, where the pilot's actions went beyond the mere negligent act and encompassed either gross negligence or recklessness, held that the authority would be liable.¹²⁹

In addition the liability of ship-owners was examined in the case of the *MV Stella Tingas*. Here the issue before the court was whether a ship-owner of an innocent vessel, involved in a collision with another vessel that is under compulsory pilotage at the time, would be able to recover damages from either the authority or the ship-owner

¹²⁶ The SATS Act (see Note 2 above), section 11 of the first schedule sets out the relevant powers of the harbour authority which included: the management of port structures such as lighthouse beacons, maintaining the effective running of the harbour by *inter alia*, ordering the removal of wrecks and other such vessels that may cause an obstruction in the harbour confines, as well as to recover costs from persons liable for such removal. In addition, the harbour authority has the power to order or move any ship, that have been either arrested or attached, to another place and it can also order vessels which, the harbour authority believes in their opinion, are unseaworthy to vacate the harbour confines as these are likely to become an obstruction or wreck in the harbour.

¹²⁷ *ibid*, section 10(7) of the first schedule

¹²⁸ *ibid*

¹²⁹ *Banglar Mookh* (see Note 3 above) and *Yung Chun Fisheries* (see Note 4 above). The former case the courts found the pilots actions not to be grossly negligent whereas the later case found the actions of the pilot to be grossly negligent. In addition the *MV Stella Tingas* (SCA) (see Note 1 above) also decided upon the Authority's liable, this case is the most important of the cases as it was decided by the SCA and as such is authority for the liability of the Authority where the actions of the pilot are found to be grossly negligence.

of a guilty vessel for actions carried out by the pilot.¹³⁰ The Court concluded that the SATS Act did not provide for the liability of ship-owners and thus the courts would have to look to the United Kingdom pilotage laws, as discussed above. Regarding the ship-owner's liability, the court concluded that the United Kingdom's PA 1983 did not apply because section 6(2) of AJRA, read with section 10 of the first schedule of the SATS Act, precluded the use of section 35 of the PA 1983 and thus the courts had to look to the common law of the United Kingdom.¹³¹ The liability at common law, as already stated above, was that the ship-owner was not liable for the actions of the pilot whilst the vessel was under compulsory pilotage.¹³² Thus, the owner of the ship was not liable for the actions of the pilot.¹³³ In addition, the authority was also not liable because the pilot's actions were found not to be grossly negligent and thus the exemption provided in section 10(7) of the first schedule applied.

Therefore, according to the SATS Act, if innocent ship-owners were involved in a collision with a vessel under compulsory pilotage, the innocent ship-owners would find themselves in the unacceptable position of being unable to seek satisfaction from the ship-owner of the guilty vessel or the authority. Thus there was a need for change, and this was addressed by the NPA.

2.5.2 The NPA

The NPA was enacted as a solution to the void that had been created by the SATS Act, particularly with regard to the liability of ship-owners of vessels that are involved in any incidents during navigation of the vessel whilst under compulsory pilotage. Following the United Kingdom's PA,¹³⁴ which placed liability upon the ship-owner of the vessel under compulsory pilotage, the NPA included section 76(2). This section provides the following:

“Notwithstanding any other provision of this Act, the pilot is deemed to be the servant of the owner or master of the vessel under pilotage and such owner or master is liable for the acts or omissions of the pilot.”¹³⁵

¹³⁰ *MV Stella Tingas (SCA) ibid* at 479 para 5C

¹³¹ *ibid* at 488 para 29G

¹³² *ibid* at 487 para 29B

¹³³ *ibid* at 489 para 32D

¹³⁴ PA 1987 (see Note 109 above), section 16

¹³⁵ The NPA (see Annexure A), section 76(2)

The main difference between the above section and the United Kingdom's PA is that, according to the NPA, the pilot is deemed to be the employee of the ship-owner while in charge of the vessel whereas, according to the United Kingdom's PA, the pilot is still the employee of the Authority while in charge of the vessel. The significance of this will be explored fully in Chapter 3.

Thus, where a vessel under compulsory pilotage is involved in a collision, the ship-owner will be liable due to the fact that the pilot is automatically deemed to be the ship-owner's employee whilst on board the vessel, even though in reality the pilot is the employee of the Authority. However the Authority will not necessarily be liable for the actions of its employees. Therefore, a ship-owner of an innocent vessel involved in a collision will be able to get satisfaction for damages caused by the collision from the ship-owner of the vessel, which was under pilotage at the time of the incident.¹³⁶

Although the legislature saw the need to provide a solution to the above issue created by the SATS Act, it needed to also address the liability of the Authority as the Act did not sufficiently exempt the Authority from liability in all instances, according to the perspective of the Authority, particularly where the pilot's actions were found to be grossly negligent, as had been emphasized in the case of the *MV Stella Tingas*.¹³⁷ This second issue was addressed by including section 76(1) of the NPA, which states that:

“Neither the Authority nor the pilot is liable for loss or damage caused by anything done or omitted by the pilot in good faith whilst performing his or her functions in terms of this Act.”¹³⁸

This section went beyond section 10(7) of the first schedule of the SATS Act by including the concept of good faith. Therefore the Authority would not be liable for the actions of the pilot carried out in good faith.¹³⁹ The question, however, is whether in addressing the problems that had been created by the SATS Act; the legislature had in fact created a solution or simply a new problem. This question will be dealt with in Chapter 4.

¹³⁶ *ibid*; Hare (see Note 9 above) 495, states that section effectively abolishes the common defence of compulsory pilotage.

¹³⁷ *MV Stella Tingas* (SCA) (see Note 1 above) at 480 para 7B

¹³⁸ The NPA (see Annexure A), section 76(1)

¹³⁹ Hare (see Note 9 above) 492

Since the inception of the NPA, there have been no cases that have come under consideration by the courts; therefore this concept is relatively unknown with regards to compulsory pilotage and what good faith entails. The concept of good faith will be further discussed in Chapter 4, which deals with the issue of liability of the ship-owner and the Authority in greater detail.

2.6 Conclusion

It has been necessary in this chapter to examine the laws of compulsory pilotage of the United Kingdom because of section 6 of AJRA. It is clear from the history of the United Kingdom that the defence of compulsory pilotage which was previously available under certain Acts, had to be abolished. Even though the PA 1913 had abolished this defence in the United Kingdom, it still applied in circumstances where collisions occurred within South Africa due to the *lacuna* that had been created by the SATS Act not regulating the position of ship-owners' liability, by the inclusion of a provision such as that contained in the PA 1913, which made the ship-owner liable for the actions of the compulsory pilot. This *lacuna* was cured by the enactment of the NPA, which deemed the pilot to be the ship-owner's employee for the purposes of compulsory pilotage; thus the ship-owner would be liable for any actions carried out by the pilot. Although section 76(2) does not expressly refer to a 'good faith' requirement there are two possible interpretations of this section.

Firstly, that the ship-owner is liable for the actions or omissions of the pilot, whether they are performed in good faith or not. Secondly, that section 76 should be read as a whole, meaning that both sub-section (1) and (2) must be read together. The effect of this is that where the pilot is acting in good faith, the ship-owner or master will be liable for any acts or omissions. This then begs the question as to whether the ship-owner should also be liable for the actions of the pilot carried out in bad faith. If the Authority cannot bring itself within the ambit of section 76(1), for instance where the pilot is not acting in good faith, the Authority accordingly cannot rely on this section to exempt itself from liability. Therefore in such circumstances the Authority will be liable for the acts or omissions of the pilot, as the pilot is in fact the employee of the Authority. Whether the ship-owner is jointly liable with the Authority in such cases, and how the requirement of 'good faith' is to be interpreted will be addressed further in Chapter 4.

Another issue is that of the divided command and the circumstances in which a master can intervene in the affairs of the pilot while in charge of the vessel under compulsory pilotage. Therefore an understanding of the functions of the pilot is very important to address this issue. The functions of the pilot and the relationship between the pilot and the master will be examined in the next chapter.

Chapter 3

Current Position of Compulsory Pilotage

3.1 Introduction

The NPA regulates compulsory pilotage within the jurisdiction of the Authority,¹ as discussed in chapter 2. The focus of this chapter is predominately on these ports and not on private ports.² This chapter will explain the pilot's responsibilities according to the NPA and demonstrate how compulsory pilotage generally operates, by analysing how the NPA regulates the relationship between the master of a vessel and a compulsory pilot. In addition, it will also consider the danger of the divided command, which is essentially the way in which the functions of the master and pilot can be become blurred creating a double authority. This chapter will analyse the divided command by considering the old cases, as far back as the 19th century, which were decided by Dr. Lushington in the High Court of Admiralty, such as the *Lochlibo*,³ the *Prinses Juliana*,⁴ and the *Tactician*.⁵ These cases highlighted the dangers of the divided command.

Section 75(6) of the NPA provides that a master can intervene in the affairs of the pilot when there is an "emergency".⁶ Despite the fact that the legislature has specified the point at which the master may intervene in the affairs of the pilot, it has not clarified or defined what constitutes an emergency. This section has however created a dilemma for the master, as the law prohibits the master from intervening with the pilot's orders unless there is an emergency.⁷ Nevertheless the master would want to act before an emergency occurs to avert any collisions so that the ship-owner will not have to be liable for the actions of the pilot as detailed in Chapter 2. It is therefore necessary to investigate what an emergency means within the context of compulsory pilotage and this chapter will do so by exploring what circumstances will be classified as an

¹ National Ports Act 12 of 2005 ("NPA"), section 10, states that all ports fall under the jurisdiction of the Authority.

² The reason for doing so being that private ports are not regulated by the NPA and thus compulsory pilotage is not applied in these ports

³ The *Lochlibo* (1850) 166 ER 978

⁴ The *Prinses Juliana*: Owners of the Motor Ship or Vessel "*Esbjerg*" v Owners of the Steamship or Vessel "*Prinses Juliana*" [1936] 1 All ER 685

⁵ The *Tactician* [1907] P. 244

⁶ The NPA (see Annexure A), section 75(6)

⁷ *ibid*

emergency as well as the implications of the master intervening.

The aim of this chapter is therefore to examine the relationship of the pilot and the master in more detail, comparing their respective duties whilst the vessel is under compulsory pilotage, and examining the situations where the master may intervene in the operation of the vessel. This chapter will also consider the practical relevance of the master intervening in the operations of the vessel as the ship-owners are now liable by law for the actions of the pilot in any event whether the master intervenes or not. In contrast to this, the position at common law meant that the ship-owner was not liable for the actions of the pilot as the pilot was not the ship-owner's employee, because he was not appointed voluntarily due to the fact that it was a compulsory pilotage port.⁸ Dealing with the issues of whether the master was independently at fault is important in consideration of the fairness of section 76(1) and (2) of the NPA.

3.2 Pilots' Responsibilities

There is a general assumption that pilotage commences at the time that the pilot boards the vessel.⁹ Woonings¹⁰ accepts this position as true and to support this view, she examined the case of the *Andoni*,¹¹ where the court stated that where a pilot is placed on board a vessel, his duties commence at that point.¹² Although the court in the South African case of *J.T. Rennie & Sons v Minister of Railways and Harbours* ("the *Inyati*"),¹³ did not clarify when pilotage commences, it did however circumscribe the duration of pilotage, when it stated in passing that "a pilot is responsible for the navigation of a vessel until he leaves the bridge and hands over to the master".¹⁴ It is only during this period that the pilot has control of the vessel; after the pilot leaves the

⁸ Kay J *et al* 'The Law Relating to Shipmasters Seamen: Their Appointment Duties Powers Rights and Liabilities' 2nd ed 1 (London: Stevens And Haynes, 1894) Chapter XII, available at: <http://heinonline.org>, accessed on 5 May 2013 at 447

⁹ John Hare 'Shipping Law and Admiralty Jurisdiction in South Africa' 2nd ed (2009) 487; Kerryn Woonings 'The Plot of the Pilot': Pilotage and Limitation of Liability in Maritime Law' (2010) 24 Austl. & N.Z. Mar. L.J. 126, available at: <http://heinonline.org>, accessed on 5 May 2013. 127

¹⁰ Woonings (see Note 9 above)

¹¹ The *Andoni* [1918] P 14.

¹² Woonings (see Note 9 above) 127; Kay *et al* (see Note 8 above) 466

¹³ *J.T. Rennie & Sons v Minister of Railways and Harbours* (1913) 34 NPD 396, this case dealt mainly with the issue of collision regulations in situations where a vessel is being overtaken. At the time of the collision between *The Inyati* and *The Richard King*, the *Inyati* was under compulsory. The pilot on board the *Inyati* was found to be at fault for causing the collision that occurred between the vessels.

¹⁴ *ibid* at 415

vessel, the master and crew resume their normal responsibilities.¹⁵

The pilot is tasked with the duty to navigate a vessel safely in and out of a harbour. In support of this, Gaskell *et al*¹⁶ states that the pilot is “charged with the safety of the ship, being bound to use diligence and reasonable skill in the exercise of his important function”.¹⁷ The pilot’s role in the vessel is an important one as their expertise and specialized knowledge of local rules and customs ensure that a collision does not occur or in the very least reduce the likelihood of such a collision occurring.¹⁸ It is for this very reason that most port states protect their interests by making it mandatory for a pilot to navigate the vessel into and out of the harbour.¹⁹ The reasons for protecting their interests is due to the fact that the consequences should an allision occur in the port where infrastructure such as a berth is damaged, although the ship-owner will be liable by virtue of section 76(2) of the NPA, would be costly on the Authority due to the inoperability of a berth until it has been re-constructed or fixed, thus losing out on profits that they would have been made had the vessel not damaged the berth.²⁰ The same reason exists with regard to the consequences if the vessel collides with another vessel in the port, the damaged vessel would take up space in the port, which could be used for another vessel.²¹

The pilot in ensuring the safety of the vessel has various responsibilities, some of which were stated in the *Tactician*,²² where Lord Alverstone, C.J stated that “the pilot is in sole charge of the ship, and that all directions as to speed, course, stopping and reversing and everything of that kind are for the pilot”.²³ The responsibilities of the

¹⁵ Kay *et al* (see Note 8 above) 445

¹⁶ NJJ Gaskell, C Debattista and RJ Swatton ‘*Chorley and Giles’ Shipping Law*’ 8th ed, (1987) 350

¹⁷ *ibid* 350; Kay *et al* (see Note 8 above) 446

¹⁸ Christopher Hill ‘*Maritime Law*’ 2nd ed (1985) 346; Gaskell *et al* (see Note 16 above) 351; *The Lochlibo* (see Note 3 above) at 982

¹⁹ George A. Quick ‘*Master / Pilot Relationship, The Role of the Pilot in Risk Management*’ available at: <http://www.impahq.org/admin/resources/article1228231036.pdf>, accessed on 27 July 2013.

²⁰ David J Bederman ‘*Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts*’ 64 (1989-1990) Tul. L. Rev. 1033 1989-1990, at 1042

²¹ *ibid* 1042, states that, “the risks posed by errant navigation in ports were well known to all. If a collision occurred, one or both ships involved would likely come to grief, cargo would be destroyed, and the lives of some hands perhaps lost. Until salvaged, a wrecked or grounded vessel could have hindered or obstructed the traffic in and out of a port. The entire economic life of a city could be disrupted if a vessel made such a mistake.”

²² *The Tactician* (see Note 5 above) at 537,

²³ *ibid*

pilot are set out in section 75²⁴ of the NPA, which clearly sets out that a pilot is tasked with the functions of navigating the vessel and controlling the movements of the tugs whilst the vessel is within the limits of the harbour.²⁵ The Port Rules²⁶ also reiterate these functions of the pilot that are provided for in the NPA. Rule 41 provides the following:

“In terms of sections 75(3) to (5) of the Act:

- (a) The pilot's function is to navigate a vessel in the port; to direct its movements and to determine and control the movements of the tugs assisting the vessel under pilotage;
- (b) The pilot must determine the number of tugs required for pilotage with the concurrence of the master of the vessel.”²⁷

Where there is a dispute between the pilot and master about the number of tugs to be used, the harbour master will make the final decision.²⁸ Therefore the responsibilities of the pilot that are set out in the NPA and in the Port Rules are clear and unambiguous. The functions of the pilot are in most circumstances not in issue when a collision occurs. In most instances what is at dispute is the relationship between the master and the pilot in fulfilling the respective roles or, as it has been commonly known, the divided command.²⁹

3.3 The Divided Command

The relationship between a pilot and a master has been said to create what is more commonly known as the divided command between the two parties.³⁰ The divided command has been considered as a dangerous notion as a vessel cannot be said to have two persons who are primarily in charge of the vessel, as this would cause confusion and could ultimately lead to a collision.³¹ Hill³² best describes the danger by using the example of a car when driven at the same time by the husband and the wife who is

²⁴ The NPA (see Annexure A), section 75

²⁵ Hill (see Note 18 above) 345

²⁶ The Port Rules published in terms of National Ports Act 12 of 2005, published as GN 1090 in the Government Gazette Number 31986 of 6 March 2009, Rule 41

²⁷ *ibid*

²⁸ The NPA (see Annexure A), section 75(5); The Port Rules (see Note 26 above), Rule 41(c)

²⁹ Hill (see Note 18 above) 345

³⁰ Hare (see Note 9 above) 481

³¹ Hill (see Note 18 above) 346; Woonings (see Note 9 above), agrees with this view that the divided command created by compulsory pilotage can leave the vessel susceptible to great risk of danger

³² Hill *ibid* 346

sitting beside him. He suggests that this is a cause of disaster and that conflict would unsurprisingly ensue. This view can be supported by looking at the case of the *Peerless*³³ where Dr. Lushington stated that, “if we encourage such interfering [by the master], we should have a double authority on board, *a divisum imperium*, the parent of all confusion, from which many accidents and much mischief would most surely ensue”.³⁴

It is in this regard that the responsibilities and roles of the master and the pilot need to be clearly distinguished, so as to avoid the situation that Dr. Lushington had warned against in the *Peerless*. Douglas and Geen³⁵ submit that:

“The legal relationship between the master and the pilot is based on principles, which are contradictory:

- i) That division of authority is inimical to the safety of navigation;
- ii) That the pilot, by definition, has the conduct of the ship;
- iii) That the master, by definition, has command or charge of the ship, a definition which specifically excludes the pilot”.³⁶

They further submit that these inconsistencies can only be overcome once ii and iii above have been differentiated. Quick³⁷ states that the relationship between the master and the pilot can be best described if there is a distinction between power and authority. He explains this by stating that:

“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.”³⁸

In agreement with this, Dawson³⁹ submits that “there must be a balance between the pilot’s peculiar knowledge of the port and its local conditions and the master’s

³³ The *Peerless* [1860] 15 ER 1 82, at 17

³⁴ *ibid*

³⁵ Douglas and Geen ‘*The Law of Harbours and Pilotage*’ 4th ed (1993) 668

³⁶ *ibid*

³⁷ Quick (see Note 19 above) 3

³⁸ *ibid*

³⁹ Dawson P ‘*Compulsory Pilotage: The Divided Command*’ available at: <http://203.86.194.7/Gems/oceanlaw/Compulsorypilotage.pdf>, accessed on 5 May 2013.

knowledge of the idiosyncrasies of the vessel”.⁴⁰ He further submits that this balance is skewed in favour of the pilot and his employers.

It is clear that the situations that Dr. Lushington warns against must not be allowed to occur, and the way in which to prevent this, as Douglas and Geen⁴¹ suggest, is to make sure that the roles and functions of the pilot and master are clearly set out. The NPA does this by distinguishing the roles of the master and the pilot by stating that the master shall remain in command of the vessel whilst the vessel is under pilotage, but he must however assist the pilot in carrying out his duties.⁴² Therefore it can be seen that the role of the pilot has changed from a pilot being in command over the vessel to an advisory role.⁴³ Dawson submits that the role between the pilot and the master is better described through the maxim of “*masters command, pilot’s advice*”, although he is of the view that the role of pilot is more than that of an advisory role.⁴⁴ His reasoning for this view emerges from the fact that the pilot has sole control over the navigation of the vessel, which in his opinion amounts to more than an advisory role.⁴⁵

In addition to the NPA distinguishing the roles of the master and pilot, rule 44 of the Port Rules sets out the ways in which the master can provide assistance to the pilot.⁴⁶ It states that, “the master of the vessel must ensure that the officers and crew are at their posts, that a proper lookout is kept and that the pilot is given all assistance necessary in the execution of his or her duties”.⁴⁷ This list is not a closed list of ways in which the master and crew can assist the pilot; it mainly sets out the most important ways that the master and crew can assist the pilot.⁴⁸

The relationship between the master and pilot is therefore one of a complicated nature. The master is primarily in command of the vessel whilst the pilot is navigating;

⁴⁰ *ibid*

⁴¹ Douglas and Geen (see Note 35 above) 668

⁴² Kay *et al* (see Note 8 above) 444; The NPA (see Annexure A), section 75(6)

⁴³ Dawson (see Note 39 above) 1

⁴⁴ *ibid* 1; Douglas and Geen (see Note 35 above) 662

⁴⁵ Dawson *ibid* 1

⁴⁶ The Port Rules (see Note 26 above), Rule 44

⁴⁷ The NPA (see Annexure A), section 75(6) and section 75(8); The Port Rules *ibid*, Rule 43 and 44

⁴⁸ Kay *et al* (see Note 8 above) 445, it lists more duties of the master and crew whilst the vessel is under compulsory pilotage.

however, during the navigation period, the pilot is in charge of vessel with the assistance of the master and crew of the vessel.⁴⁹ The words ‘in command over’ and ‘in charge’, as discussed above, can be distinguished by reference to the terms ‘power’ and ‘authority’. The master who is in command of a vessel has both the power and the authority over a vessel generally whilst at sea, however when the vessel is within the port, the authority aspect shifts from the master to the pilot. The power remains with the master at all times. Section 75(7)⁵⁰ of the NPA also assists with differentiating the roles of the master and the pilot. It does this by adding a requirement that the master must first inform the pilot before he intervenes. In addition, the master must also permit the pilot, after the emergency has been averted, to proceed with the execution of his duties.

The master as already mentioned, must assist the pilot in his duties and is always in command of the vessel; however, he cannot intervene in the affairs of the pilot unless there is an emergency.⁵¹ Before an examination of what constitutes an emergency can be undertaken, the circumstances and case law that discusses the circumstances in which the master can intervene will be analysed.

3.3.1 The circumstances in which the master may intervene with the affairs of the pilot

In the 19th century⁵² the pilot was seen as the commander of the vessel during his charge and the pilot’s orders had to be obeyed by the master. Thus the master could not interfere with the orders of the pilot save for instances where the pilot was said to be “incompetent to discharge his office”.⁵³ This however caused numerous problems because if the master did not obey the orders of the pilot and a collision ensued, the owners of the vessel were liable; the same could be said where the master intervened in the duties of the pilot.⁵⁴ Douglas and Geen⁵⁵ state that there was essentially a double

⁴⁹ The NPA (see Annexure A), section 75(8); The Port Rules (see Note 26 above), Rule 44

⁵⁰ The NPA *ibid*, section 75(7)

⁵¹ *ibid*, section 75(6)

⁵² See for e.g. the *Lochlibo* (see Note 3 above) at 982

⁵³ Thomas Brett ‘*Towage and Pilotage*’ (1891) 2 Thomas Brett Commentaries on the Present Laws of England 2nd ed. 1076, available at: <http://heinonline.org>, accessed on 5 May 2013; Bederman (see Note 20 above) 1054, the “master had the duty to remove a pilot who was drunk or otherwise impaired.”

⁵⁴ Brett *ibid* 1077

⁵⁵ Douglas and Geen (see Note 35 above) 673

edged sword with which the owner's compulsory pilotage defence⁵⁶ could be destroyed; on the one hand, if the master intervenes without good reason, the owner will be liable, whilst, on the other hand, if the master fails to intervene to avert danger, the owner will be liable in this instance as well.

This position changed in the *Argo*,⁵⁷ where the court stated that "a master has no right to interfere with the pilot, except in cases of the pilot's intoxication or manifest incapacity, or in cases of danger which the pilot does not foresee, or in cases of great necessity".⁵⁸ Thus, there was a move away from the absolute powers of the pilot whilst he was in charge of the vessel, to a few circumstances in which the master could intervene. The starting point in considering what these circumstances are is to look at the old English cases that expounded upon instances where the master ought to have interfered in order to avert danger.

The finding in the case of the *Prinses Juliana*⁵⁹ was that the master was liable where he interfered with the instructions of a pilot without just cause.⁶⁰ The facts of case being that the *Prinses Juliana*, which was entering the Harwich harbour area, and the *Esbjerg*, which was leaving, collided; both vessels were under compulsory pilotage at the time of the collision.⁶¹ According to local by-laws, the vessel leaving the harbour should ease speed or stop if need be, to allow a vessel which is entering to pass clear of it.⁶² The *Esbjerg* did not do this, and the master of the *Prinses Juliana* seeing that a collision might occur, took charge of the vessel away from the pilot to try and avert a collision from occurring; unfortunately the master then gave the wrong orders in the circumstances and a collision nevertheless ensued.⁶³

Bucknill J stated that, "if the master sees fit to take the navigation out of the hands of

⁵⁶ The compulsory pilotage defence was a defence, which existed under the United Kingdom's MSA 1854 and 1894, which exempted the owners of a vessel from loss or damage caused by a pilot whilst the vessel was under compulsory pilotage.

⁵⁷ *The Argo* (1859) Swa. 462, at 464

⁵⁸ *ibid*

⁵⁹ *The Prinses Juliana* (see Note 4 above)

⁶⁰ Hill (see Note 18 above) 349

⁶¹ *The Prinses Juliana* (see Note 4 above) 685

⁶² *ibid*

⁶³ *ibid* at 688

the pilot and countermands his orders, he must satisfy the court that he was justified in so doing”.⁶⁴ He stated that the master of the *Prinses Juliana* in countermanding the orders of the pilot did so in the belief that a collision would ensue and so acted to avoid such collision, in order to avoid loss of life to the passengers and crew on board the vessel. However, these actions were wrong in the circumstances.⁶⁵ Bucknill J found that although the master of the *Prinses Juliana* took the wrong actions, ultimately causing the collision, it was “the negligence of the *Esbjerg* [that] contributed to the collision, because it was her negligent proximity which led the master of the *Prinses Juliana* to give a wrong order”.⁶⁶

The principles of intervention were discussed in the case of the *Lochlibo*. The issue before the court was whether the master in the *Lochlibo* should have intervened to avoid a collision that occurred as a result of the pilot colliding with the *Aberfoyle*, which was anchored at the time of the collision.⁶⁷ Dr. Lushington stated that in order for the owners of the *Lochlibo* to escape liability, the “*onus probandi*” rested upon them to establish either that the *Lochlibo* was not to blame or that the pilot in charge of the *Lochlibo* at the time was the sole cause of the collision.⁶⁸ He went on to state the following:

“...[courts ought not to] sanction the interference of the master in any way in the performance of those duties which the pilot must be considered more peculiarly competent to discharge, and of which the master, in the majority of cases, must be a very inferior judge. I do not of course in these observations intend to go the extraordinary length of saying that under no possible state of circumstances is the master justified in interfering with the pilot. If the latter was utterly incompetent to the proper discharge of his duties, it would clearly be incumbent upon the master to interfere for the protection of the lives and of the property on board his vessel. Such, however, would be a case of extreme necessity... I am clearly of opinion that it was entirely within the province of the pilot to determine whether the vessel should proceed or not, and that the master is in nowise culpable in not having interposed or interfered in the matter in question.”⁶⁹

Dr. Lushington found that in the circumstances that the *Aberfoyle* was “not to blame

⁶⁴ *ibid* at 689

⁶⁵ *ibid* at 688

⁶⁶ *ibid* at 691

⁶⁷ The *Lochlibo* (see Note 3 above) at 978

⁶⁸ *ibid* 981

⁶⁹ *ibid* at 982

for the collision, as she was anchored in a proper situation; that she was not bound, being so anchored, to have kept a light fixed; and that she exhibited a light as soon as the *Lochlibo* was seen”.⁷⁰ In addition he found that the pilot of the *Lochlibo* was not exclusively to blame for [the collision]... but that there was undue interference with him on the part of the master and crew of the *Lochlibo*”.⁷¹ The owners of the *Lochlibo* had not established that the *Lochlibo* was not at fault or that the pilot was the sole cause of the collision; therefore they could escape liability for the collision that occurred.⁷² He went on to pronounce in favour of the *Aberfoyle* for damages and costs of suit.⁷³

Thus the view that a master could not intervene at all in terms of common law has changed considerably over time. It became permissible for a master to intervene but only in certain circumstances, and if such master did not intervene where he ought to have, he would be disregarding his duties to assist the pilot.

This was the point that was made in the *Tactician*,⁷⁴ which concerned an appeal from the court *a quo*. The *Tactician*, which was under compulsory pilotage at the time, collided with the *Leander* that was at anchor.⁷⁵ The master of the *Tactician* had not drawn the pilot’s attention to certain lights, which the master had observed.⁷⁶ Lord Alverstone C.J stated that it is the duty of the master to call to the attention of the pilot any obstacles that may arise where the vessel will be at risk of being involved in a collision, and the master will be disregarding his duties to assist the pilot in navigating the vessel if he fails to do so.⁷⁷ He agreed with the arguments of the counsel for the appellants, who emphasized that, “to encourage interference with the pilot in the performance of his duties would lead to grave and disastrous consequences”.⁷⁸ He further submitted that a “distinction [should be made] between interference and

⁷⁰ *ibid* at 985

⁷¹ *ibid*

⁷² *ibid*

⁷³ *ibid*

⁷⁴ The *Tactician* (see Note 5 above)

⁷⁵ *ibid* 245

⁷⁶ *ibid* 247

⁷⁷ *ibid*, Lord Alverstone held that the pilot “is entitled to the fullest assistance by a competent master and crew, of a proper look out, and a well founded ship”. This principle he stated sits side by side with the principle of the divided command.

⁷⁸ *ibid* at 249

bringing to the pilot's notice anything which the pilot ought to know".⁷⁹ The court dismissed the appeal, finding that the master was the sole cause of the collision as he could have averted the risk of collision with the stationary vessel if he had made his anxieties known to the pilot; had he done so and the pilot did not use this information to avert the danger, then the master would be not be liable in that instance.⁸⁰

Thus it is clear from the cases discussed above that there is a resonating argument throughout these cases, that the master shall not interfere with the duties of the pilot unless there is good reason for doing so, such as the incompetence of the pilot in his ability to carry out his duties, or necessity in order to prevent loss of life of the passengers and crew aboard the vessel.

In South Africa, the issue of when a master can intervene is stipulated in the NPA, where section 75(6) of the NPA provides that the master may intervene "to preserve the safety of the vessel, cargo or crew and take whatever action he or she considers reasonably necessary to avert the danger".⁸¹ It is clear from the wording of section 75(6) that the point at which the master can intervene with the affairs of the pilot is when there is an "emergency".⁸² However it does not define what an "emergency" is.⁸³ Kay⁸⁴ reiterates this point by stating that the master can interfere with the duties of the pilot and resume his duties in order to protect the interests of his owners as well as everyone concerned, when there is an emergency. He further provides the instances which could be classified as an emergency, these being:

"In cases of great danger, which the pilot does not foresee, or great necessity; - and in cases of obvious danger, where it is clear either that the pilot has become incompetent to command, from sudden illness, or from intoxication, or from any other cause; or that he is acting in such a manner or steering such a course as would cause the certain destruction of the ship and endanger the lives and property of others"⁸⁵

⁷⁹ *ibid* at 251

⁸⁰ *ibid* at 248

⁸¹ The NPA (see Annexure A), section 75(6), The Port Rules (see Note 26 above), Rule 43(c)

⁸² The NPA *ibid*

⁸³ *ibid*, does not define what an emergency is in section 1 of the definition section

⁸⁴ Kay *et al* (see Note 8 above) 445

⁸⁵ *ibid*

In the case of the *Inyati*, Hathorn J⁸⁶ asked the question, where the emergency was.⁸⁷ The facts of the case were that the *Inyati* was leaving Durban harbour under compulsory pilotage when it collided with a tug, the *Richard King*, whose purpose was to escort the pilot off the ship and back to the confines of the harbour.⁸⁸ Hathorn J stated that he did not think that the order “full speed astern hard a starboard’ [could be considered as] an emergency order given in consequence of any danger [the pilot] then anticipated...”⁸⁹

Gardiner A.J. whose judgment was read by Carter, J, found that the *Richard King* was not negligent in its actions to try and avoid the imminent collision, even though the collision still occurred, and thus it was not responsible for the collision. The court unanimously held that the *Inyati* was the sole cause of the collision.⁹⁰ Gardiner A.J reasoned that:

“We are satisfied that the effect of the order "full speed astern hard a starboard," in the position in which the "Inyati" was then relative to the tug, and at the speed at which she was going, was to involve collision or imminent risk thereof, Lindsay, by proceeding to this position at an unusual speed brought upon himself the giving of this order, the effect of the order was to involve collision or imminent risk thereof, and we are therefore forced to the conclusion that for the accident which occurred about a minute after the order was given, the "Inyati" was to blame.”⁹¹

Gardiner, A.J. held that the master of the *Inyati* was not negligent in not interfering with the pilot’s order. He looked to the case of the *Tactician* as authority for his finding, stating that a master who does not “countermand or remonstrate against the unseamanlike orders of the pilot” where the pilot is in his sound and sober mind would not be responsible for the actions of the pilot.⁹² If he were to go against the orders of the pilot in that situation, it would give rise to the divided command, which *the Tactician* warned against.⁹³

⁸⁶ The *Inyati* (see Note 13 above), Hathorn J agreed with the reasoning of judgment of Gardiner A.J and Carter. J but on different grounds

⁸⁷ *ibid* at 419

⁸⁸ *ibid* at 401

⁸⁹ *ibid* at 419

⁹⁰ *ibid* at 414

⁹¹ *ibid* at 412

⁹² *ibid*

⁹³ *ibid* at 415

The NPA, according to section 76(2), deems the pilot to be the employee of the ship-owner, whereas the position at common law, of the United Kingdom, was that the pilot remained the employee of the Authority.⁹⁴ The significance of this difference is that where the pilot's actions are the cause of an incident, the ship-owner is liable by virtue of the NPA, which essentially means that ship-owners will be vicariously liable for the actions of the pilot as he is considered to be the servant of the ship-owner for the duration of compulsory pilotage. Thus the question of whether the master should intervene at all is merely an academic one in terms of liability, due to the fact that the ship-owner is now liable in any event whether the master intervenes or not.⁹⁵ This situation has therefore created a dilemma for the masters of vessels who generally will want to protect the interests of the ship-owner.⁹⁶ Hare⁹⁷ submits that:

“The master's concern not to contravene the statutory prohibition unless there is an emergency might cause him or her to refrain from countermanding the pilot's orders until it is too late to avert damage. If the master fails to interfere in an emergency, timeously or at all, he or she may be found to have been at fault for such failure. If the master intervenes to interfere with the pilot's control of navigation prematurely, he or she may be in contravention of the statutory injunction not to interfere with the pilot's control of the navigation of the vessel.”⁹⁸

Accordingly, the argument made by Hare could lead to a situation where the master of a vessel might not intervene in the affairs of the pilot until an emergency situation occurs and a collision could occur when it could have been avoided if the master had intervened before an emergency occurred and not necessarily when the vessel was already in the precarious situation.

3.4 Noting up of the 19th century cases

Although Chapter 3 examines mainly the 19th century English cases, these cases are still applicable as the principles that have been decided upon can be used as guidance. In addition, none of the decisions have been overturned. These cases will be noted up in order to show that the principles are still relevant with regards to the current position of compulsory pilotage.

⁹⁴ The NPA (see Annexure A), section 76(2)

⁹⁵ Douglas and Geen (see Note 35 above) 199

⁹⁶ Hare (see Note 9 above) 490

⁹⁷ *ibid*

⁹⁸ *ibid*

1. The *Lochlibo*⁹⁹ was approved in the *Oakfield*.¹⁰⁰
2. *The Argo*¹⁰¹ was referred to in the *Tactician*.¹⁰²
3. The *Peerless*¹⁰³ was referred to in the *Oakfield*,¹⁰⁴ the *Tactician*¹⁰⁵ and the *Ape*.¹⁰⁶
4. The *Tactician*¹⁰⁷ was referred to in the *Larenberg v Gothland; Alexander Shukoff v Gothland*¹⁰⁸ and the *Towerfield*.¹⁰⁹ In the *Hans Hoth*,¹¹⁰ the court distinguished the *Tactician* on the facts. The *Tactician* was also referred to in the *Irish Stardust*.¹¹¹
5. The *Andoni*¹¹² was approved in the *Arum*¹¹³ and referred to in the *Waziristan*¹¹⁴ and *McMillan v Crouch*.¹¹⁵
6. The *Prinses Juliana*¹¹⁶ was referred to in the *Towerfield*.¹¹⁷

⁹⁹ The *Lochlibo* (see Note 3 above)

¹⁰⁰ The *Oakfield* 1886 WL 14678. The court in this case held that the master cannot intervene with the orders of the pilot unless the order is manifestly dangerous.

¹⁰¹ The *Argo* (see Note 57 above)

¹⁰² The *Tactician* (see Note 5 above)

¹⁰³ The *Peerless* (see Note 33 above) [1860] 15 ER 1 82

¹⁰⁴ The *Oakfield* (see Note 100 above)

¹⁰⁵ The *Tactician* (see Note 5 above)

¹⁰⁶ The *Ape* [1916] P. 303. The Court held that the master must not interfere with the pilot, except in cases of great urgency.

¹⁰⁷ The *Tactician* (see Note 5 above)

¹⁰⁸ *Larenberg v Gothland; Alexander Shukoff v Gothland* (1920) 5 Ll.L.Rep. 237. The court reiterated the dangers of the divided command.

¹⁰⁹ *Workington Harbour and Dock Board v Owners of the Towerfield (The Towerfield)* [1950] 84 Lloyd's Rep. 233. Lord Normand stated that the master is bound to point out to the pilot that he may be mistaken in an opinion that he has formed.

¹¹⁰ The *Hans Hoth* [1952] 2 Lloyd's Rep. 341

¹¹¹ *Irish Shipping Ltd. v The Queen (The "Irish Stardust")* [1977] 1 Lloyd's Rep. 195. Mr. Justice Dube, using the authority of the *Tactician* stated that the pilot is in sole charge of the vessel, and that to allow undue interference with the pilot's duties would be cause for danger and that the principle of the divided command sits side by side with the principle that the pilot is entitled to the fullest assistance by a competent master and crew.

¹¹² The *Andoni* (see Note 11 above)

¹¹³ *Rossano v Swan, Hunter & Wigham Richardson, Ltd ("Arum")* [1920] 5 Ll.L.Rep. 25

¹¹⁴ *Waziristan* [1953] 2 Lloyd's Rep. 361

¹¹⁵ *McMillan v Crouch* [1972] 2 Lloyd's Rep. 325

¹¹⁶ The *Prinses Juliana* (see Note 4 above)

¹¹⁷ The *Towerfield* (see Note 109 above). Lord Normand reiterated that the master can take the vessel out of the navigation of the pilot, but he must show justification for doing so.

3.5 Conclusion

It is clear that, although the relationship between the master and the pilot is complicated in nature, the NPA now provides that the master is at all times in command of the vessel. However, whilst the pilot is on board the vessel performing his duties, the master and crew must assist the pilot to ensure the safe navigation of the vessel into and out of the harbour. It is clear that the NPA has followed the idea that a master may not intervene in the affairs of the pilot from the old English cases. However it has clarified the situation where the master can intervene, this being in an emergency. It would seem that the reason the legislature omitted to define what an emergency would entail is that it wished to leave the scope of what an emergency could be open to interpretation due to the fact that there can be no closed list of emergencies.

The NPA not only governs the position of when a master can intervene in the affairs of the pilot, it also deals with the aspect of liability, whereby the ship-owners will now be liable for actions or omission of the pilot while performing his duties in good faith. This will be dealt with in the next chapter.

Chapter 4

Limitation of Liability

4.1 Introduction

This chapter will consider the extent of the liability of ship-owners whose vessels have been involved in a collision whilst their vessels are under compulsory pilotage. This chapter is the most important aspect of the dissertation as it looks mainly at the concept of liability in situations where collisions occur when the vessel is under compulsory pilotage within the jurisdiction of the Authority. In order to do this, it will examine section 76(2) of the NPA, which deals specifically with liability of ship-owners. According to this section, the owner of the vessel that is under the control of the pilot will be liable for the actions of the pilot. This chapter also will examine the potential unfairness of the situation that is created, as the owner is statutorily obliged to make use of the services of the pilot within the Authority's jurisdiction as though the owner had voluntarily employed the use of the pilot.

In addition, this chapter will also explore the situations in which the Authority will be liable for actions of the pilot. This exploration will be undertaken by examining three different concepts; namely the concept of gross negligence; the concept of intention; and the concept of good faith. The reason for examining these concepts is due to the cases, which will be examined in great depth further in this chapter, which interpreted the exemption provision in section 10(7) of the first schedule of the SATS Act, which excluded either grossly negligent or intentional actions of the pilot. If the pilot's actions were found to be either grossly negligent or intentional then the Authority could not rely on this provision to exclude its liability. Therefore, it is necessary to establish whether the concept of good faith, in terms of section 76(1) of the NPA, would also exclude either gross negligence or intentional actions. These concepts will be set out in the following way:

The first concept, which is gross negligence, will be examined with reference to case law, in order to determine its meaning as well as to understand how the courts have distinguished between gross negligence and *dolus eventualis*. As already discussed in Chapter 2, prior to the enactment of the NPA, the SATS Act regulated compulsory pilotage. According to section 10(7) of the first schedule of the SATS Act, "the

Company and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot”.¹ This section of the SATS Act was examined in the case of the *MV Stella Tingas*² where Scott JA held that “the exemption [in section 10(7) of the first schedule] would not apply if the pilot were found to have been grossly negligent”.³ Therefore in order for Authority to incur liability for actions caused by the pilot, gross negligence on the part of the pilot needed to be proved, and thus the meaning and scope of gross negligence needed to be further developed within the context of compulsory pilotage.

Along with the *MV Stella Tingas*, the cases of the *Yung Chun Fishery*,⁴ and the *MV Banglar Mookh*⁵ have also dealt with the issue of gross negligence within the context of compulsory pilotage under the SATS Act, and these cases will be dealt with in more detail in this chapter so as to illustrate how the courts have dealt with exemption clauses within the context of compulsory pilotage.

The second concept that will be examined is intentional acts, which will be investigated by distinguishing the different types of intentional acts, namely *dolus directus*, *dolus indirectus* and *dolus eventualis*. The section will also enquire as to what recklessness entails with reference to case law in order to ascertain how the courts have defined recklessness and the difference between *dolus eventualis* and recklessness.

The last concept that will be elucidated is the concept of good faith, which will be examined in two ways, namely by providing the ordinary dictionary meaning of good faith and by examining the concept of good faith with reference to case law which has been expounded upon in other areas of law such as the law of contract and maritime insurance in order to ascertain its meaning and its application. This section will attempt to assess whether the concept of good faith should exclude acts of gross negligence.

¹ Legal Succession To The South African Transport Services Act 9 of 1989, section 10(7) of the first schedule

² *MV Stella Tingas; Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another* 2003 (2) SA 473 (SCA)

³ *ibid* at 480 para 7B

⁴ *The MFV Yung Chun No 17: Yung Chun Fishery Company Limited v Transnet Limited t/a Portnet* (Reportable as WCC case No AC 30/97, 1 September 2000), available at: <http://web.uct.ac.za/depts/shiplaw/fulltext/yungchun.pdf>, accessed on 25 June 2013.

⁵ *MV Banglar Mookh; Owners of MV Banglar Mookh v Transnet Ltd* 2012 (4) SA 300 (SCA)

This chapter of the dissertation will consider ways in which the situation of perceived unfairness, of placing liability of a ship-owner for making use of a pilot which is statutorily placed on him, can be remedied, as well as examine the position of the United Kingdom and how it makes use of compulsory pilotage, more specifically in relation to its treatment of the liability of the ship-owners.

4.2 Liability on the Ship-Owner

As discussed in Chapter 2; according to the common law of compulsory pilotage in the United Kingdom, a ship-owner was not liable for the acts of the pilot that were carried out during the compulsory pilotage period. Kay⁶ submits the following reasons that the ship-owner was not liable:

“...that wherever the employment of a pilot is by law compulsory, that is to say, wherever a statutory penalty is incurred if a pilot is not employed, the owners and masters are not liable for injuries arising solely from the acts of such pilot so employed; as the Courts consider it unjust to hold the owners and master responsible for the skill, sobriety and caution of one whom they have not selected, whom they are compelled to employ, and over whom they have scarcely any control.”⁷

He further proposes that in order for ship-owners to avail themselves of this exemption, a burden would be placed upon them to prove that two requirements existed; the first being that the pilot must have been employed compulsorily at the time that the loss or damage occurred, and the second being that the pilot must have been the sole cause of the loss or damage.⁸ Thus where a master or crew in any degree contributed to the loss or damage, the ship-owner would be liable for such loss or damage.⁹ This is supported in the case of the *Maria*,¹⁰ which came before Dr. Lushington in the United Kingdom’s High Court of Admiralty where it was held that “the owner of a ship is not responsible in proceedings *in rem* for damage done by his ship, occasioned solely by default of a licensed pilot employed by compulsion of

⁶ Kay J *et al* ‘*The Law Relating to Shipmasters Seamen: Their Appointment Duties Powers Rights and Liabilities*’ 2nd ed 1 (London: Stevens And Haynes, 1894) Chapter XII, available at: <http://heinonline.org>, accessed on 5 May 2013 at 447

⁷ *ibid*

⁸ *ibid* 448; David J Bederman ‘*Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts*’ 64 (1989-1990) Tul. L. Rev. 1033 1989-1990 at 1052; *The Mobile* (1856) 14 ER 568

⁹ Kay *et al* (see Note 6 above) 448; Bederman *ibid* 1052; the liability of the master will be determined later in this chapter.

¹⁰ *The Maria* (1839) 166 ER 508; *MV Stella Tingas* (SCA) (see Note 2 above) at 487 B

law.”¹¹ This position changed with the enactment of the PA 1913, which abolished the defence of compulsory pilotage, making the ship-owner liable for any damages caused while the vessel was under compulsory pilotage.¹² Thus it is clear that the ship-owner is liable for damages caused by the vessel during compulsory pilotage in the United Kingdom.

In South Africa, however, the position of liability of the ship-owner was less clear than that of the United Kingdom. At common law the ship-owners were not liable by virtue of English law, specifically section 388 of the United Kingdom’s MSA 1854,¹³ which exempted ship-owners from liability for the actions of pilots; which was discussed at length in Chapter 2. However, the MSA 1854 could no longer be applied in South Africa by virtue of the fact that the SATS Act was the applicable law to be applied in all matters pertaining to compulsory pilotage, according to section 6 of AJRA.

The SATS Act, however, did not cater for the liability of ship-owners; therefore, it was left to the courts to decide whether or not a ship-owner would be liable for the actions of the pilot during the period that the pilot was in charge of the vessel. The courts in determining the ship-owner’s liability stated that according to section 6 of AJRA, English law should be considered in order to ascertain the liability of ship-owners. Thus in the case of the *MV Stella Tingas*,¹⁴ which concerned an appeal from the court *a quo*,¹⁵ where the owners of the *MV Stella Tingas* had brought an action *in rem* against the owners of the *Atlantica* and an action *in personam* against the Authority.¹⁶ Booysen J, in the court *a quo*, held that the Authority was liable because the pilot’s action equated to gross negligence. However, with regard to the owners of the *MV Stella*

¹¹ The *Maria* *ibid*; *The Annapolis and the Johanna Stoll* [1861] 167 ER 1 28 at 128

¹² NJJ Gaskell, C Debattista and RJ Swatton ‘*Chorley and Giles’ Shipping Law*’ 8th ed, (1987) 352

¹³ The Merchant Shipping Act 1854 [17 & 18 Vict. c. 104], available at: https://ucadia.s3.amazonaws.com/acts_uk/1800_1899/uk_act_1854_merchant_shipping.pdf, accessed on 5 May 2013, section 388 states that “no owner or master of any ship shall be answerable to any person whatever, for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by-law”

¹⁴ *MV Stella Tingas* (SCA) (see Note 2 above), one of the issues before the court was whether the ship-owners of the *Atlantica* would be liable for the damages caused to the *MV Stella Tingas*, which occurred during the compulsory pilotage phase.

¹⁵ *MV Stella Tingas: Owners of the MV Stella Tingas v MV Atlantica and Another (Transnet t/a Portnet and Another, Third Parties)* 2002 (1) SA 647 (D)

¹⁶ *MV Stella Tingas* (SCA) (see Note 2 above) at 478

Tingas' claim against the owners of the *Atlantica*, Booyesen J concluded that the owners of the *Atlantica* were not liable.¹⁷

The Authority appealed against the order. The liability of the Authority will however be examined later in this chapter.¹⁸ The owners of the *MV Stella Tingas* in reply to the Authority's appeal brought a counter appeal against the owners of the *Atlantica*, which was conditional upon the Authority succeeding in its appeal against the *MV Stella Tingas*.¹⁹ This aspect of the ship-owner's liability will now be addressed.

The facts before the court of appeal were that the *Atlantica*, which was being transported into the harbour by a compulsory pilot, namely Captain Buffard, collided with the *MV Stella Tingas*, which was berthed alongside loading cargo at Island View berth 3.²⁰ The plaintiffs, the owners of the *MV Stella Tingas*, averred that the ship-owners of the *Atlantica* were liable for the damages caused, on two grounds, the first being that the collision was caused by the negligence of the pilot and accordingly section 35 of the United Kingdom's PA 1983 applied in the circumstances.²¹ Section 35 of the PA is as follows:

“Notwithstanding anything in any public or local Act, the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.”²²

Scott JA, in determining whether English law applied in the circumstances, analysed section 35 of the PA and the English common law, where the defence of compulsory pilotage²³ existed, as well as section 10 of the first schedule of the SATS Act. Scott JA concluded that a distinction had to be made between the English laws, both the PA and

¹⁷ *ibid* at 479

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ *ibid* at 478 para 1B

²¹ *ibid* at 478 para 2E

²² The United Kingdom's Pilotage Act, 1983 c. 21, available at: http://www.legislation.gov.uk/ukpga/1983/21/pdfs/ukpga_19830021_en.pdf, accessed on 25 June 2013, section 35

²³ A ship-owner will not be liable for the actions of the pilot due to the fact that the ship-owners were forced by compulsion of law to make use of the pilot in order to enter or leave the harbour.

the common law, and the SATS Act.²⁴ He reasoned that according to English laws the pilot was considered to be the employee of the ship-owner at all times, including the compulsory pilotage phase, whereas the pilot according to the SATS Act was expressly stated to be the employee of the ship-owner during compulsory pilotage.²⁵ He held that according to this distinction, the provisions of the SATS Act:

“...are wholly inconsistent with the position in England where the pilot, whether voluntary or compulsory, is *pro hac vice* the ship-owner's servant... It follows that the effect of s 6(2) of [AJRA], read with [section] 10 of the First Schedule to the Succession Act, is to preclude the application of s 35 of the 1983 Pilotage Act in South Africa.”²⁶

In agreement with the court's findings regarding the application of the United Kingdom's PA 1983, Adams and Adams²⁷ state that in addition the PA did not apply outside the geographical territory of the United Kingdom, therefore section 35 of the PA did not apply in these circumstances.

The second ground upon which the ship-owners of the *MV Stella Tingas* relied was that the master of the *Atlantica* was negligent for not interfering with the affairs of the pilot, in order to prevent the collision from occurring.²⁸ As was discussed in Chapter 3 of the dissertation, a master can only intervene with the affairs of the pilot were there is an emergency. This was reiterated in this case as Scott JA, using the case of the *Tactician*²⁹ as authority, stated that in the circumstances the master of the *Atlantica* was not negligent by reason of not intervening in the pilot's affairs.³⁰ In addition, he concluded that the master did not foresee an emergency occurring and even if he did, any actions that the master could have taken would not have averted the danger from ensuing.³¹ Therefore, the owners of the *Atlantica* were not liable for the damages that had occurred during compulsory pilotage and the counter appeal failed.

²⁴ *MV Stella Tingas* (SCA) (see Note 2 above) at 487 para 30

²⁵ *ibid* at 487 para 29E-G

²⁶ *ibid* at 488 para 30E-F

²⁷ Adams & Adams Attorneys 'Case Report - Collisions in Compulsory Pilotage Harbours' 23 December 2002, available at: http://www.ports.co.za/legalnews/article_2003_01_3_0230.html, accessed on 5 May 2013.

²⁸ *MV Stella Tingas* (SCA) (see Note 2 above) at 488 para 32

²⁹ The *Tactician* [1904] P244

³⁰ *MV Stella Tingas* (SCA) (see Note 2 above) at 489 para 32D-E

³¹ *ibid* at 489 para 32A-B

The liability of a ship-owner has since changed from the position as provided in the above case due to the enactment of section 76(2) of the NPA, which specifically states that the pilot is the servant of the owner or master of the vessel during the pilotage phase.³² In terms of this section, a ship-owner or master is now liable for the actions or omissions of the pilot, carried out in performance of his duties under compulsory pilotage.³³ This section has thus introduced the liability of a master in addition to the ship-owner.³⁴ The first question is whether this section allows a claimant to hold the master and the ship-owner liable for the actions of the pilot, jointly and severally, or whether the master can be held liable to the exclusion of the ship-owner. The second question is whether the section places strict liability upon the ship-owner for all acts of the pilot, whether committed in good faith or not.

In order to assess this, section 76(2) must be interpreted to assess whether the provision imposes strict liability, which is a form of liability that makes certain parties liable for the actions of another, such as vicarious liability.³⁵ Du Bois³⁶ submits that a starting point to interpret a statute is to give the language of the provision its ‘ordinary grammatical meaning’. This was reiterated in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* (“*Natal Joint Municipal Pension Fund*”),³⁷ but the case makes it clear that words cannot be interpreted in isolation. The context to the enactment must always be considered when determining what the words used mean. Wallis JA held that:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process

³² The National Ports Act 12 of 2005, (see Annexure A), section 76(2)

³³ *ibid*

³⁴ Gaskell *et al* (see Note 12 above), 354

³⁵ Francois du Bois *et al* ‘*Wille’s Principles of South African Law*’ 9th ed (2007) 1214; also known as no fault liability. Vicarious Liability is a common law form of strict liability.

³⁶ *ibid* 57

³⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.”³⁸

Upon a proper interpretation of the wording of section 76(2), the ordinary grammatical meaning of the words leads to the suggestion that section 76(2) imposes strict liability in the form of statutory vicarious liability due to the fact that the section deems the pilot to be the servant of the ship-owner or master. However, in following the *ratio* of *Natal Joint Municipal Pension Fund supra*, this section cannot be interpreted in isolation, it has to be interpreted within the context of the NPA as a whole, looking at determining factors such as the reasoning behind the enactment of the NPA. As already mentioned in Chapter 2, the NPA was enacted to cure the defect created by the SATS Act, which did not cater for the ship-owners’ liability, leaving an innocent party with no recourse to obtaining satisfaction for damages or loss caused whilst the guilty vessel was under compulsory pilotage.

Although the ordinary grammatical meaning leads to the conclusion that section 76(2) imposes strict liability, the question that arises is to whom does this strict liability lie, is it the ship-owner or the master. It is clear that in case of the ship-owner, strict liability can be imposed, as the reasoning behind the enactment of the NPA, was to provide for the liability of a ship-owner. As set out at the end of Chapter 2, one interpretation of the section is that since it makes no reference to the requirement of ‘good faith’, the ship-owner would be liable for the actions or omission of the pilot whether the pilot was acting in good faith or not. However, a competing interpretation is that if section 76(2) is read with section 76(1) the ship-owner would only be liable for the actions or omissions of the pilot committed in good faith, since in terms of section 76(1) the Authority would be liable for the action or omission of the pilot if the pilot was not acting in good faith.

The favoured interpretation would be the second interpretation due to the fact that section 76(1) specifically states that the Authority will not be liable for the actions of the pilot performed in good faith, therefore because this section is silent on whether the

³⁸ *ibid*, at 603 Para 18

Authority will be liable or not when the pilot is not acting in good faith, this section should be restrictively interpreted against the Authority, which will be examined further in this chapter under the liability of the Authority. In addition the ship-owner would want to rely on this to be able to avoid liability or at the very least limit its liability. The ship-owner could argue that since the pilot was not acting in good faith, and was ultimately the cause of the collision, the ship-owner is not liable on that basis. This will be discussed further at the end of the examination of good faith later in this chapter.

With regards to the master, section 76(2) does not indicate that the Master's liability is to be any different to that of the owner. This ultimately leads to ambiguity as it means that the pilot is deemed to be the servant of the ship-owner and the master simultaneously. This cannot be a reasonable interpretation of section 76(2), due to the fact that the master is himself the servant of the ship-owner.

A reasonable interpretation of section 76(2), taking into account the words used in the NPA and the context formed by the master's employment relationship with the ship-owner as well as his common law liability, should be that the master is not strictly liable, but his liability should be based on whether the master was at fault in some way, such as wrongful interference with the affairs of the pilot, or failure to intervene or supply information or assistance when he should have done so. Gaskell³⁹, who discusses the United Kingdom's PA 1983, submits that this Act has brought about the liability of the master, suggesting that:

“...the master can no longer escape liability by abstaining altogether from watching the navigation. When and how far he is bound to interfere depends on the circumstances of each case. If the pilot was negligent, the owners are now always liable. So whatever the master does or omits to do while a pilot is on board is material with regard to his own personal liability.”⁴⁰

South African compulsory pilotage followed along the lines of the United Kingdom's PA 1983⁴¹ with regards to liability of the ship-owner. The wording of section 35 of the United Kingdom's PA merely says that the master is liable “in the same manner as he

³⁹ Du Bois *et al* (see Note 35 above) 57

⁴⁰ *ibid*

⁴¹ This was discussed in Chapter 2; the United Kingdom's PA 1983, specifically section 35.

would be if pilotage were not compulsory”. Although the wording is thus not the same as section 76(2) of the NPA, which went further by deeming the pilot to be the servant of the ship-owner or the master, Gaskell’s reasoning can still be used as guidance within the South African context as it clarifies the position of liability in general of the master. This general position would be important context for a court interpreting section 76(2).

Thus in principle it is submitted that on a proper interpretation of section 76(2) the master can be held liable for his own actions or omissions. However in practice the master’s liability, even if it includes liability for the pilot’s actions, may be moot as in most cases the master would not be able to afford to pay any of the damages caused during compulsory pilotage as the costs could run into hundreds of millions.

Therefore where a collision occurs whilst the vessel is under compulsory pilotage, the ship-owner or master will be liable.⁴² This then begs the question as to the circumstances in which the Authority will be liable for the actions of the pilot, if any. The liability of the Authority will be examined next.

4.3 Liability of the Authority

In order to ascertain whether the Authority will be liable, it is necessary to analyse three concepts, namely, gross negligence, intention and good faith. In addition, the cases dealing with these three concepts will also be examined. These will be discussed in turn. However before examining these concepts, a brief outline shall be given about how an exemption clause that purports to limit liability should be interpreted.

4.3.1 Exemption Clauses

In order to ascertain when the Authority will be liable, if ever, it is necessary to understand how courts have interpreted exemption of liability clauses. This enquiry will begin with a consideration of the repealed Railways and Harbours Control and Management (Consolidation) Act (“RHCM Act”),⁴³ specifically looking at section 43 of the RHCM Act which provided that “the [Authority] and a pilot who is a servant thereof... [shall be exempt] from liability for any loss or damage that may arise or be

⁴² The NPA (see Annexure A), section 76(2)

⁴³ Railways and Harbours Control and Management (Consolidation) Act 70 of 1957

caused through the act, omission or default of such pilot”.⁴⁴ This provision was considered in the case of *Shell Tankers Ltd v South African Railways and Harbours* (“the *Aluco*”).⁴⁵ The main consideration of the courts concerned concurrent wrongdoers and whether the Authority would be liable where the pilot was not the sole cause of damage.⁴⁶ The facts before the court were that the *Aluco*, under the charge of Captain Brewin a compulsory pilot, was grounded twice before successfully being berthed in the East London Port.⁴⁷ It was alleged that the pilot was not the only cause of the grounding as the port pilot, Captain Lindsay, was aware of a shallow sand bank in the vicinity of the oil berth and also had knowledge of previous vessels grounding on the same sand bank.⁴⁸ He nevertheless gave orders that the *Aluco* should be brought into port to be berthed at the oil berth.⁴⁹

Cloete J, in assessing the liability of the Authority, stated that an exemption clause such as the one under consideration in that case “is concerned to limit liability normally existing in the common law. It interferes with, and is designed to curtail and limit rights, which would otherwise be available under the common law.”⁵⁰ He concluded that where an exemption clause purports to limit liability, a restrictive interpretation should be given to such clause, and in this instance he held that the exemption clause “does not extend to the case where damage is caused by concurrent wrongdoers one of whom was the pilot and one another servant of the [Authority].”⁵¹ Thus the finding of the court was that the Authority would be liable for damages caused to the *Aluco* by virtue of the fact that the exemption clause did not exempt the Authority from the negligence of concurrent wrongdoers.⁵²

⁴⁴ *Shell Tankers Ltd v South African Railways And Harbours* 1967 (2) SA 666 (E) At 671

⁴⁵ *ibid*

⁴⁶ *ibid* at 673

⁴⁷ *ibid* at 669

⁴⁸ *ibid* at 682

⁴⁹ *ibid* at 688

⁵⁰ *ibid* at 647; *Van Der Westhuizen v Arnold* (414/2000) [2002] ZASCA 82 at para 40, states that “in the absence of legislation regulating unfair contract terms, and where a provision does not offend public policy or considerations of good faith, a careful construction of the contract itself should ensure the protection of the party whose rights have been limited, but also give effect to the principle that the other party should be able to protect himself or herself against liability insofar as it is legally permissible.”

⁵¹ *The Aluco ibid* at 673

⁵² *ibid* at 687

This approach above, of restrictively interpreting an exemption clause to exclude concurrent wrongdoers, in Hare's⁵³ opinion could be applied to prohibit the Authority from exempting liability for loss or damage occasioned during the compulsory pilotage phase if the cause of such loss or damage was not caused solely by the pilot, but was caused jointly by another employee of the Authority.⁵⁴ However, Hare fails to take into account the provisions set out in section 85 of the NPA, which provides that:

“Neither the Authority nor an employee or a representative of the Authority is liable for loss or damage caused by anything done or omitted by the Authority, the employee or the representative in good faith whilst performing any function in terms of this Act”⁵⁵

Thus even where the loss is caused through concurrent wrongdoers, the Authority would not be liable as the NPA has specifically excluded liability for all its employees, whilst performing their duties in good faith, in terms of the Act. However, it could be argued that where either one of the concurrent wrongdoers has not performed their duties in good faith, then the exemptions provided in either section 76(1) or section 85 of the NPA will not be applicable as the exemption clause will be interpreted narrowly by the courts and the Authority would be liable in that event.

This approach of the court in the *Aluco*, namely a restrictive interpretation of an exemption clause, was approved and followed in the cases of the *Yung Chun Fishery* as well as the *MV Stella Tingas*. Hare⁵⁶ also agrees with the judgment of the court in the *Aluco*, stating that the findings illustrate two essential features, firstly, that an exemption clause should be interpreted restrictively, and secondly, that where the Authority attempts to use an exemption clause, it is raising a special defence and thus the onus of proof rests upon the Authority to show that the defence is valid. Mukheibir⁵⁷ submits that where there is doubt as to whether an exemption clause excludes certain conduct, such as negligence or gross negligence, the courts will interpret the clause in favour of the person against whom the clause operates.

⁵³ John Hare ‘*Shipping Law and Admiralty Jurisdiction in South Africa*’ 2nd ed (2009) 493

⁵⁴ *ibid*, thus in Hare’s opinion, the Authority would not be able to rely on the exemption clause contained in section 76(1) of the NPA.

⁵⁵ The NPA (see Annexure A), section 85

⁵⁶ Hare (see Note 53 above) 492

⁵⁷ A Mukheibir *et al* ‘*The Law of Delict in South Africa*’ 2nd ed (2012) 202

The next step to ascertain whether the authority could be liable is analyse the three concepts, gross negligence, intention and good faith, specifically with reference to exemption clauses, in order to ascertain the liability of the Authority with regards to the NPA, starting with gross negligence.

4.3.2 Gross Negligence

Didcott J best describes the notion of gross negligence as not being “an exact concept lending itself to a neat and universally apt definition.”⁵⁸ However, in the case of *S v Dhlamini*,⁵⁹ gross negligence, otherwise known as *culpa lata*, was described as including an attitude or state of mind characterized by “an entire failure to give consideration to the consequences of one’s actions, in other words, an attitude of reckless disregard of such consequences”.⁶⁰ Although this case does not fall within the scope of compulsory pilotage, it is useful in order to define what gross negligence is.

With that being said, the concept of gross negligence has been before the courts on numerous occasions whereby the courts had to ascertain what gross negligence is specifically pertaining to compulsory pilotage.⁶¹ The first of these occasions presented itself in the case of the *Yung Chun Fishery*, where the issue before the court was whether the compulsory pilot, Captain Pullen, was grossly negligent in his duties, which lead to the *Yung Chun No 17* colliding with berth A in the port of Cape Town.⁶² The vessel was being brought into the harbour in a heavy fog, thus it was essential for Captain Pullen to use radar to bring the vessel safely into port.⁶³ There was much debate about the three radars on board the vessel, however, the fact that the pilot had doubts as to whether the radar was in fact working, and nevertheless continued on his course was considered to amount to gross negligence.⁶⁴

The defendants alleged that section 10(7) of the first schedule to the SATS Act

⁵⁸ *Government RSA (Department of Industry) v Fibre Spinners and Weavers (Pty) Ltd* 1977 (2) 324 (D & CLD)

⁵⁹ *S v Dhlamini* 1988 (2) SA 302 (A) at 308 D - E

⁶⁰ *ibid*

⁶¹ *Inter alia, Banglar Mookh* (see Note 5 above), *Stella Tingas (SCA)* (see Note 2 above) and *Yung Chun Fishery* (see Note 4 above)

⁶² *Yung Chun Fishery ibid* at 1

⁶³ *ibid* at 1

⁶⁴ *ibid* at 10

exempted them from liability for the actions of the pilot and that this exemption applied in respect of all “forms of civil negligence including gross negligence or recklessness”.⁶⁵ Therefore the courts had to assess whether according to the defendant’s contention the exemption provided in section 10(7) of the first schedule to the SATS Act included all forms of civil negligence.⁶⁶ Davis J, in ascertaining the liability of the Authority relied on the case of the *Aluco* as authority for interpreting exemptions. He stated that according to the *Aluco* the exemption clause must be interpreted restrictively and accordingly that:

“...only the express wording of the section should provide an exemption from liability. As the express wording of the exemption provides that only negligent acts or omissions on the part of the pilot are exempt from liability it must follow from a restrictive approach to such clauses that willful, reckless or grossly negligent acts or omissions on the part of the pilot fall outside the exemption.”⁶⁷

Davis J further held that in the circumstances Captain Pullen was grossly negligent because he had misgivings as to whether or not the hooded radar was functional due to the fact that it had no heading marker, was heavily scarred and the checks that were performed by himself showed that it was not working properly.⁶⁸ However, Captain Pullen made no attempt to utilize another radar, such as the Furuno radar, which according to the witnesses was on the bridge and accessible to the pilot at all times, or the other hooded radar.⁶⁹ Davis J went onto to state that:

“Not to have insisted that the other radar should be switched on before piloting the vessel or examining the bridge a little more carefully in order to ascertain the location of the Furuno radar was to hazard a chance. At no time did Captain Pullen or any other witness who testified on behalf of defendant suggest that the pilot could not have waited 5-6 minutes to power up the other hooded radar before moving the vessel.”⁷⁰

In summarizing the above case, Adams and Adams⁷¹ submit that the Authority was held liable on the basis of the “principle of vicarious liability of an employer for acts

⁶⁵ *ibid* at 1

⁶⁶ *ibid*

⁶⁷ *ibid* at 3

⁶⁸ *ibid* at 10

⁶⁹ *ibid*

⁷⁰ *ibid*

⁷¹ Adams and Adams (see Note 27 above)

carried out by his employee during the course and scope of his employment.”⁷² Thus now that it has been ascertained that gross negligence cannot be excluded from liability and that the pilot’s actions were grossly negligent, the Authority will be liable.

The next case before the court was the *MV Stella Tingas*, where section 10(7) of the first schedule to the SATS Act was deliberated over. Thus to this extent, both the cases of the *Yung Chun Fishery* case and the *MV Stella Tingas* are similar as they both had to examine the extent of section 10(7) of the first schedule to the SATS Act with reference to gross negligence.

The facts of the *MV Stella Tingas* that had been described earlier in this Chapter pertained to the liability of the ship-owner, thus this section will deal with the relevant facts pertaining to the Authority’s liability. In addition to the facts mentioned above, it had been disputed that Captain Buffard, the compulsory pilot in charge of the *Atlantica*, had been speeding.⁷³ The court, therefore, had to decide whether this fact, if proved, amounted to mere negligence, the occasion of which would exclude liability of the pilot and the Authority according to the SATS Act, or if it amounted to gross negligence, which according to the case of the *Yung Chun Fishery* was excluded from the ambit of the exemption clause.⁷⁴

Scott JA, proposed, rightly so, that:

“...[T]o qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care.”⁷⁵

⁷² *ibid*

⁷³ *MV Stella Tingas* (SCA) (see Note 2 above) at 482 para 14

⁷⁴ *ibid* at 480 A-B; *MV Stella Tingas* (court *a quo*) (see Note 15 above) at 478, the court *a quo* had found the pilot’s actions had amounted to gross negligence, thus the Authority was liable for the damages to the *MV Stella Tingas*.

⁷⁵ *ibid* at 481 A-C

Neethling⁷⁶ approves this definition of gross negligence as correct, although he states that in the law of delict, specifically the *Aquilian action*, the difference between ordinary negligence and gross negligence is irrelevant. He further states that it will become relevant with regards to certain “statutory provisions that limit liability to instances of gross negligence and some contractual exclusionary clauses also refer to this concept.”⁷⁷

Returning to the decision of the *MV Stella Tingas*, Scott JA held that the speed of the *Atlantica* was “excessive to the extent that it contributed to the ‘squat’ and ‘bank effect’, which, in turn caused the sheer to port”.⁷⁸ He however, stated that although this ultimately contributed to the collision, the pilot’s actions were negligent in the ordinary sense and not grossly negligent.⁷⁹ Thus the Authority was not liable for the actions of the pilot, which were found to be negligent and not grossly negligent in the circumstances.⁸⁰ Thus the appeal from the Authority was upheld.⁸¹

The final case to be discussed under gross negligence is the case of the *Banglar Mookh*,⁸² which was the last case to be decided under the SATS Act. This case like the previous two that have been expounded upon, also concerned the limitation of liability with regard to the concept of gross negligence. This case was an appeal from the court *a quo* where the Authority was not liable for the actions of the pilot because his actions did not amount to gross negligence.⁸³ In looking at the authority of previous cases, *Yung Chun Fishery* and the *MV Stella Tingas*, Binns-Ward J stated that the “appeal court had assumed, without deciding, that the exemption provided in [section] 10(7) of the [first] schedule [of the SATS Act] would not apply if the pilot were found to have been grossly negligent”⁸⁴ Although he had reservations about whether the previous courts had in fact construed the interpretation of the exemption clause properly, Binns-

⁷⁶ Neethling, Potgieter and Visser ‘*Law of Delict*’ 6th ed (2010) 119

⁷⁷ *ibid*

⁷⁸ *MV Stella Tingas* (SCA) (see Note 2 above) at 485

⁷⁹ *ibid*

⁸⁰ *ibid* at 486

⁸¹ *ibid*

⁸² *MV Banglar Mookh* (SCA) (see Note 5 above)

⁸³ *ibid*

⁸⁴ *Owners of the MV Banglar Mookh v Transnet Ltd* [2010] ZAWCHC 485 at p5 para 7

Ward J did not depart from the previous courts' approach.⁸⁵ Thus his enquiry was whether the pilot's actions amounted to gross negligence, and having found that they did, as such the exemption in section 10(7) of the first schedule of the SATS Act would not apply.⁸⁶

The Appeal court focused mainly on whether Binns-Ward J had misdirected his mind with regards to the witness testimonies, by concluding that the testimony of the master of the *Banglar Mookh*, Captain Islam should be preferred over that of the compulsory pilot, Mr. Grelecki.⁸⁷ Farlam JA and Wallis JA, with Cachalia JA, Tshiqi JA and Plasket AJA concurring, held that Binns-ward J had in fact misdirected his mind in rejecting the pilot's version and accepting the master's version of events.⁸⁸ They concluded that the fact that the Authority had not preserved the VTS for evidence, should litigation ensue, was not unfair.⁸⁹ Thus the Authority was not liable for the actions of the pilot, as the pilot's actions were found not to be grossly negligent.

Thus it clear that exemption clauses, such as the section 10(7) of the first schedule to the SATS Act, must be interpreted restrictively to exclude acts of gross negligence. The next question then is whether this also applies to intentional acts of the pilot.

4.3.3 Intention

Intention or *dolus* can be construed as the will that is directed at a particular result, and Neethling⁹⁰ suggests that this must be done with consciousness of the wrongfulness of the conduct in question. There are essentially three types of intention, namely, *dolus directus*, *dolus indirectus* and *dolus eventualis*.⁹¹ This chapter is mainly concerned with the application of *dolus eventualis* and the way in which it has been interpreted within exemption clauses, but for clarity, the former types of *dolus* will be briefly discussed.

⁸⁵ *ibid* p5 and 6 para 8

⁸⁶ *ibid* p6 para 8

⁸⁷ *MV Banglar Mookh* (SCA) (see Note 5 above) at 303 F

⁸⁸ *ibid* at 321 C

⁸⁹ *ibid* at 321 D

⁹⁰ Neethling (see Note 76 above) 112; CR Snyman 'Criminal Law' 4th ed (2002) 180; PQR Boberg 'The Law of Delict' 1 (1984) 268

⁹¹ Neethling *ibid*; Du Bois *et al* (see Note 35 above) 1129

Dolus directus is present where a person willfully desires the consequence of his conduct, whereas *dolus indirectus* is present where a person desires the outcomes of one consequence and “at the same time has knowledge that another consequence will unavoidably or inevitably also occur.”⁹² The final form of intention is *dolus eventualis*, which according to Joubert⁹³ is a more common type of intention.

Dolus eventualis does not relate to the will of the desired outcome and/or the unavoidable consequence that comes with it.⁹⁴ According to Neethling,⁹⁵ *dolus eventualis* is present where the “wrongdoer not desiring a particular result, foresees the possibility that he may cause the result and reconciles himself to this fact; that is, he nevertheless performs the act which brings about the consequence in question.”⁹⁶ In addition to these requirements set out by Neethling, Joubert⁹⁷ suggests that *dolus eventualis* includes an element of recklessness. Snyman⁹⁸ proposes that the accused must have been “reckless in respect of the prohibited result”.⁹⁹ He further accepts that this means consciously accepting a risk.

The concept of recklessness, however, is not an easy concept to reconcile because, on the one side of the spectrum, it can be regarded in the narrow sense as *dolus eventualis* but on the other side, it can be considered in the wide sense as gross negligence.¹⁰⁰ Thus the dividing lines between the two can be blurred. In support of this view, Snyman¹⁰¹ points out that some authors are of the opinion that recklessness should not form part of *dolus eventualis*, as the foreseeability of the consequence ensuing is

⁹² Neethling *ibid* 113; Mukheibir (see Note 57 above) 110; Du Bois *et al ibid* 1129; Snyman (see Note 90 above) 181

⁹³ WA Joubert ‘*Criminal Law*’ *The Law of South Africa* 2nd ed 6 (2010) 79

⁹⁴ Neethling (see Note 76 above) 113; Snyman (see Note 90 above) 181, states that this type of intention is also known as legal intention or constructive intension.

⁹⁵ Neethling *ibid* 113; Boberg (see Note 90 above) 269; Du Bois *et al* (see Note 35 above) 1129; Mukheibir (see Note 57 above) 110; Snyman *ibid* 181

⁹⁶ Neethling *ibid*

⁹⁷ Joubert (see Note 93 above) 80; Snyman (see Note 90 above) 184

⁹⁸ Snyman *ibid*; Joubert (see Note 93 above) 86, states that “recklessness also includes not caring what the result might be... and may consist in the deliberate abstention from making enquiries in order to avoid the confirmation of one’s suspicions.”

⁹⁹ Snyman *ibid*

¹⁰⁰ *ibid*; *MV Stella Tingas* (SCA) (see Note 2 above) at 480 E;

¹⁰¹ Snyman *ibid*

sufficient. This is evident from the fact that some writers such as Smith,¹⁰² who has tried to analyse whether recklessness is either gross negligence or *dolus eventualis*, suggest that on the one hand, recklessness exists where a person's conduct was unreasonable, which can sometimes be classified as 'advertent negligence' or gross negligence. Smith,¹⁰³ considered the case of *S v Du Preez*,¹⁰⁴ where Ogilvie Thompson CJ held, in a murder trial, that "to shoot with a pistol in the direction of a moving human being, leaving so small a margin for safety may indeed fairly be described as reckless conduct; but reckless conduct *per se* is not necessarily to be equated with *dolus eventualis*".¹⁰⁵

Neethling's¹⁰⁶ view seems to be in keeping with Smith's submissions on this point, as he puts forward the idea that *dolus eventualis* must not be confused with recklessness, because recklessness:

"may also refer to a serious degree of negligence, [t]hus confusion between *dolus eventualis* and [gross] negligence may occur. The distinction between these two concepts can be explained as follows: in the case of [gross] negligence the question is whether the consequence objectively seen, was reasonably foreseeable, while in the case of *dolus eventualis* the question is whether the wrongdoer actually subjectively foresaw the possibility of the consequence."¹⁰⁷

On the other hand, Smith¹⁰⁸ suggests that there are other views that recklessness is in fact *dolus eventualis*; in support of this, he looks at the case of *S v De Bruyn*,¹⁰⁹ where Holmes JA held "that one of the characteristics of *dolus eventualis* was an insensitive recklessness (which has nothing in common with *culpa*)".¹¹⁰ The test for recklessness was proposed in the case of *Philotex (Pty) Ltd and Others v Snyman And Others*;

¹⁰² Paul T Smith 'Recklessness in *Dolus Eventualis*' 96 (1979) S. African L.J. 81, available at: <http://heinonline.org>, accessed on 17 November 2013, at 85; *Philotex (Pty) Ltd and Others v Snyman And Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 143E-F

¹⁰³ Smith *ibid* 88

¹⁰⁴ *S v Du Preez* 1972 (4) SA 584 (AD), the accused's conduct was found to be grossly negligent in the circumstances

¹⁰⁵ *ibid*

¹⁰⁶ Neethling (see Note 76 above) 113

¹⁰⁷ *ibid*

¹⁰⁸ Smith (see Note 102 above) 90

¹⁰⁹ *S v De Bruyn* 1968 (4) SA 498 (AD)

¹¹⁰ *ibid*

Braitex (Pty) Ltd and Others v Snyman and Others (“*Philotex*”),¹¹¹ where Howie JA stated that:

“The test for recklessness is objective insofar as the defendant's actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge.”¹¹²

It had also been noted by Howie JA that the “expression ‘reckless disregard of the consequences’ in *Dhlamini* must not be understood as pertaining to foreseen consequences but unforeseen consequences - culpably unforeseen - whatever they might be.”¹¹³

The preferred view of what recklessness entails, within the context of compulsory pilotage, is from the case of the *MV Stella Tingas*, where Scott JA accepted the definition and the test that had been proposed in the case of *Philotex*, and accordingly stated that recklessness is present:

“If a person foresees the risk of harm but acts, or fails to act, in the unreasonable belief that he or she will be able to avoid the danger or that for some other reason it will not eventuate, the conduct in question may amount to ordinary negligence or it may amount to gross negligence (or recklessness in the wide sense) depending on the circumstances... [or if] the risk of harm is foreseen and the person in question acts recklessly or indifferently as to whether it ensues or not, the conduct will amount to recklessness in the narrow sense, in other words, *dolus eventualis*; [thus] it would then exceed the bounds of our modern-day understanding of gross negligence”¹¹⁴

Thus it is clear that in certain situations, recklessness could be either, in the wide sense gross negligence or, in the narrow sense *dolus eventualis*. Where an exemption clause attempts to exclude liability for *dolus*, whether *dolus directus*, *dolus indirectus* or *dolus eventualis*, it would be against public policy and therefore void.¹¹⁵ On the other hand it

¹¹¹ The *Philotex* (see Note 102 above) at 143G-H, thus where the consequences were foreseen this would amount to *dolus eventualis*

¹¹² *ibid*

¹¹³ *ibid* at 143I-J

¹¹⁴ *MV Stella Tingas* (SCA) (see Note 2 above) at 480 E

¹¹⁵ Philip N Stoop ‘*The Current Status of the Enforceability of Contractual Exemption Clauses for the Exclusion of Liability in the South African Law of Contract*’ 20 (2008) SA Merc LJ 496–509, at 502, states that “exemption clauses that can be struck down because they are contrary to public policy include

is not against public policy to exclude liability for gross negligence if the exemption clause is sufficiently clearly worded to achieve this result.¹¹⁶ However, in considering cases such the *MV Stella Tingas*, it can be seen that in practice it is difficult to distinguish between recklessness in the narrow sense and recklessness in the wide sense.

Thus where a pilot who is compulsorily in charge of a vessel acts recklessly in the narrow sense, in that he actually foresaw the possibility of harm ensuing and acted or failed to act, being indifferent as to whether the harm ensued or not, his actions would amount to *dolus eventualis*. In such circumstances it would be against public policy to allow the Authority to exclude liability for acts done intentionally by the pilot, which could cause damage to property or loss of life of any of the persons on board the vessel.

The last concept to be examined is the concept of good faith which is the most important concept pertaining to the compulsory pilotage according to the NPA.

4.3.4 Good Faith

Good faith becomes particularly relevant where a collision occurs and there are disputes between the parties as to what good faith entails. At this point in time there are no cases that have been decided under section 76(1) of the NPA. Section 76(1) of the NPA provides that “neither the Authority nor the pilot is liable for loss or damage caused by anything done or omitted by the pilot in good faith whilst performing his or

clauses exempting a party from liability for fraud, liability for intentional breach of contract and other intentional conduct”; Mukheibir (see Note 57 above) 201; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 15, the court stated that “it is trite law that a party to a contract may validly exempt himself from liability for negligence, even gross negligence. Whether he may do so for a deliberate act or a willful default is open to doubt...I shall assume, without deciding, that he cannot”; University of Pretoria ‘*Law of Contract: Selective Principles Influencing the Law of Contract and Impacting on Medical Contracts*’ Chapter 12, available at: <http://upetd.up.ac.za/thesis/available/etd-05252009-215044/unrestricted/06chapter12.pdf>, accessed on 6 September 2013, at 809, the same applies to a contractual clause, which excludes liability for intentional breach of contract

¹¹⁶ Mukheibir *ibid*; *Durban's Water Wonderland (Pty) Ltd v Botha and Another* 1999 (1) SA 982 (SCA) at 989H, the court held that “if the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning”; *First National Bank of SA Ltd v Rosenblum and Another* 2001 (4) SA 189 (SCA) Para 26G-H, “there [is] no reason, founded on public policy, why a clause exempting a person from liability for gross negligence should not be enforceable”

her functions in terms of this Act.”¹¹⁷ Looking at this section, it is clear that the Authority will not be liable where the pilot’s actions or omissions were done in good faith.¹¹⁸ In addition to section 76(1) of the NPA, the concept of good faith is followed in other sections of the NPA, not specifically dealing with compulsory pilotage; these include section 85 dealing with the liability of the Authority in general.¹¹⁹ However, the NPA does not elaborate upon what good faith entails, and as Hare¹²⁰ correctly points out, that the legislature has not defined the concept of good faith. Thus in the future, if an event were to occur, the concept of good faith will be the deciding factor as to whether the Authority will be liable for the actions or omissions of the pilot. Therefore it is left open for debate as to what constitutes good faith and whether the Authority will be liable for acts, which are not intentional but are caused through gross negligence of the pilot.

It is clear that good faith is a relatively new concept, specifically in relation to maritime law in South Africa. Hare¹²¹ agrees with this statement and submits that there are two other recent shipping Acts that contain “exemptions from liability for loss or damage for good faith acts or omissions”,¹²² he further states that these Acts have not defined what good faith entails. Thus what good faith entails is more difficult to ascertain than either gross negligence or intention. Therefore this section of the chapter will attempt to unpack this concept of good faith by looking at the ordinary dictionary meaning of good faith as well as examining how this concept has been interpreted in other aspects of law in South Africa such marine insurance law, in order to ascertain its meaning and application as a form of guidance, to establish what good faith means within the context of compulsory pilotage. It will then discuss how this concept could be interpreted with respect to the section 76(1) of the NPA.

¹¹⁷ The NPA (see Annexure A), section 76(1)

¹¹⁸ *ibid*

¹¹⁹ The NPA (see Annexure A), section 85

¹²⁰ Hare (see Note 53 above) 493

¹²¹ *ibid*; South African Maritime Safety Authority Act 5 of 1998, section 46(1) which states that: “[t]he Authority, its officers and any person or body acting on its authority are not liable for any loss or damage suffered by any person by reason of anything done or not done in good faith in the carrying out of the Authority's duties referred to in section 4”; Ship Registration Act 58 of 1998, section 13 which states that: “[t]he State, the Minister, the Authority, any person in the service or acting on the authority of an organ of state or the Authority, or any person appointed to exercise any power or to perform any duty in terms of this Act, is not liable in respect of any loss or damage resulting from anything done or not done in good faith in terms of this Act.”

¹²² *ibid*

The definition of good faith according to the English Oxford Dictionary is “honesty or sincerity of intention.”¹²³ The Legal Information Institute goes further by stating that good faith in certain circumstances could “require [*inter alia*], an honest belief or purpose, faithful performance of duties, observance of fair dealing standards, or an absence of fraudulent intent.”¹²⁴ Hare¹²⁵ states that in the context of compulsory pilotage, the ordinary meaning of the words ‘good faith’ is that “the pilot, in carrying out his or her functions as [a] pilot, must have acted in the honest belief that the course of action he or she followed was correct and appropriate in the circumstances.”¹²⁶

This can be contrasted to the definition of negligence and gross negligence offered by Scott JA in the case of the *MV Stella Tingas*, where the act was performed or the omission occurred because even if the harm was foreseen the pilot had an unreasonable belief that the harm would not ensue. This immediately raises the question of whether a person can be said to be acting in good faith if their belief was honest, but was unreasonable, or even grossly unreasonable. Before this question is answered, the way in which good faith must be interpreted will be analysed.

When a statutory provision such as section 76(1) of the NPA, which specifically provides for a curtailment of an individual's rights, it has been submitted by Burchell¹²⁷ that it must be narrowly interpreted in order to give it a restrictive meaning. However, because the concept of good faith is relatively new within maritime law, this interpretation will be ascertained with regards to how the concept of good faith has been interpreted within other areas of law. In the context of exemption clauses, Brown¹²⁸ postulates that on the basis of a public policy argument, exemption clauses cannot apply to conduct done fraudulently or in bad faith. It has, however, been argued that good faith should not be formulated on the basis that where a person's actions

¹²³ ‘Oxford Dictionary for English’, available at: <http://oxforddictionaries.com/definition/english/good-faith?q=good+faith>, accessed on 30 July 2013.

¹²⁴ Cornell University Law School, Legal Information Institute (19 August 2010), available at: http://www.law.cornell.edu/wex/good_faith, accessed on 30 July 2013.

¹²⁵ Hare (see Note 53 above) 493

¹²⁶ *ibid*

¹²⁷ Jonathan Burchell ‘*Beyond the Glass Bead Game: Human Dignity in the Law of Delict*’ 1988 SAJHR 1 at 12

¹²⁸ Liam Brown ‘*Gross Negligence in Exclusion Clauses: Is There an Intelligible Difference from Ordinary Negligence*’ (2005) 16 Insurance Law Journal 1, [http://www.listgbarristers.com.au/site_media/uploads/liam_brown/\(2005\)_16_insurance_law_journal_175.pdf](http://www.listgbarristers.com.au/site_media/uploads/liam_brown/(2005)_16_insurance_law_journal_175.pdf), accessed on 6 September 2013, at 10

were in bad faith, it would therefore mean that good faith would not exist in that situation.¹²⁹ Thus the approach should be formulated on a different basis, hence the need to look to other areas of law to approach the interpretation of the concept of good faith.

Within the context of marine insurance, good faith is an important and prominent feature, which can also be said to be a pre-requisite of marine insurance.¹³⁰ Hare¹³¹ suggests that good faith goes beyond the duty of the insured to disclose information, but courts have been reluctant to accept the concept of good faith as a free standing pre-requisite.¹³² This point was emphasized by Hare,¹³³ in an address to the British Maritime Law Association (“BMLA”) at Trinity House in London, titled ‘*Of Black Books, White Horses, and Scared Cows: The Quest for International Uniformity in Maritime Law*’ where he made the statement that “our law has been reluctant to embrace good faith fully”.¹³⁴ This is also evident from the decision in the case of *Barkhuizen v Napier*,¹³⁵ which concerned a constitutional challenge of a time limitation clause in a short term insurance contract; the court stated the following:

“Good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law. In this instance, good faith is given effect to by the existing common law rule that contractual clauses that are impossible to comply with should not be enforced.”¹³⁶

¹²⁹ Andrew D Mitchell ‘*Good Faith in WTO Dispute Settlement*’ (2006) 7 Melbourne Journal of International Law 2, available at: <http://www.law.unimelb.edu.au/files/dmfile/downloadb3081.pdf>, accessed on 6 September 2013, at 4; John Hare ‘*Good Faith, Disclosure, Misrepresentation and the Omnipotent Warranty: South African Perspective*’ Paper presented to the BMLA Tulane Conference, Maritime Law in an International Setting London, May 2000, available at: <http://web.uct.ac.za/depts/shiplaw/tulanfrm.htm>, accessed on 30 July 2013

¹³⁰ Hare (see Note 53 above) 870

¹³¹ *ibid* 866

¹³² Hare address at the Tulane Conference (see Note 129 above), to approach good faith and the duty to disclose as one and the same concept is as common as it is incorrect

¹³³ John Hare ‘*Of Black Books, White Horses, and Scared Cows: The Quest for International Uniformity in Maritime Law*’, address to the BLMA, Trinity House dated 11 November 1999, available at: <http://web.uct.ac.za/depts/shiplaw/bmlafram.htm>, accessed on 6 September 2013, at 12

¹³⁴ *ibid*

¹³⁵ *Barkhuizen v Napier* 2007 (5) SA 323 (CC), this case concerned a constitutional challenge of a time limitation clause in a short term insurance contract, which required that court proceedings be instituted within 90 days after a claim is rejected by an insurance company. The court *a quo* found that the clause had purported to limit section 34 of the Constitution, which guarantees the right of access to courts, unfairly. The court on appeal found that the clause was not unfair or unreasonable in the circumstances.

¹³⁶ *ibid* p 37 para 82

The court, however, did not venture too far into interpreting the concept of good faith, but remarked that:

“[T]here is a compelling argument for the proposition... [that] the requirement of good faith should be applicable to the enforcement of time limitation clauses, [however] the applicability of these common law principles will depend on the reason advanced for non-compliance.”¹³⁷

Hare¹³⁸ further states that the only time that the courts are willing to accept the concept of good faith applicable to contracts as a free standing concept is in instances of fraud, where the innocent party to the contract will be able to avoid liability due to a breach of good faith. The case of the *Star Sea*¹³⁹ is a good example of this in practice. The court, as per Leggatt LJ, pointed out that a contract of marine insurance is based upon the utmost good faith, which is a continuing duty.¹⁴⁰ The court went further by stating that where one party brings a claim, the duty of the utmost good faith entails that such claims must not be made fraudulently, and where such claim is fraudulent, the innocent party has the right to avoid liability.¹⁴¹

Hare¹⁴² puts forward the proposition that the concept of utmost good faith was an invention of the English legal system and that according to the case of *Mutual & Federal Insurance Company Limited v Outdshoorn Municipality* (“*Outdshoorn Municipality*”),¹⁴³ the court, as per Joubert JA, dismissed the need for South African courts to use the principle of utmost good faith, due to the fact that the Roman Dutch principle of good faith will suffice according to South African law.¹⁴⁴ In addition,

¹³⁷ *ibid* p 37 para 83

¹³⁸ Hare (see Note 53 above) 866

¹³⁹ *The Star Sea* [1997] 1 Lloyd’s Rep 360

¹⁴⁰ *ibid* at 365; Hare (see Note 53 above) 870, utmost good faith is an English notion that parties to an insurance contract must act with the utmost good faith, which entails something more than mere good faith but with the ‘greatest good faith’.

¹⁴¹ *The Star Sea* at (see Note 139 above) 365; Trine-Lise Wilhelmsen ‘*Duty of Disclosure, Duty of Good Faith, Alteration of Risk and Warranties*’ Marine Insurance CMI Yearbook (2000), available at: <http://web.uct.ac.za/depts/shiplaw/fulltext/singapore.pdf>, accessed on 6 September 2013, at 69.

¹⁴² Hare (see Note 53 above) 873; Hare address at the Tulane Conference (see Note 129 above)

¹⁴³ *Mutual & Federal Insurance Company Limited v Outdshoorn Municipality* 1985 (1) SA 419

¹⁴⁴ *ibid* at 433 E-F; Hare (see Note 53 above) 873, this applies to all non-marine insurance contracts

Joubert JA pointed out that there is “no good, better or best faith, there is only good and bad faith.”¹⁴⁵

Good faith becomes particularly relevant in the prevention of loss or damage, which according to English marine insurance provides “that it is the duty of the assured to take such measures as may be reasonable for the purpose of averting or minimizing a loss.”¹⁴⁶ Hare¹⁴⁷ suggests that this principle can be used in the South African context, which would involve the concept of good faith necessitating an insured person to take steps to avert the happening of a risk. He further proposes that:

“If a reasonable assured, acting in good faith, could have taken steps to avert the happening of the risk altogether, or, once it happened, to reduce the effect thereof, the insurer should be able to argue that the assured has acted in breach of its obligation of good faith.”¹⁴⁸

This test above however, is similar to the test for ordinary negligence as set out in the case of *Kruger v Coetzee*,¹⁴⁹ which is based objectively on the reasonable person test. If this test above were to be followed as a form of guidance in order to ascertain what good faith is for the purposes of compulsory pilotage, it would follow that the test is not sufficient enough to prove that the pilot did not act in good faith because as noted above good faith entails an aspect of honest belief in the performance of one’s duties. Thus if the test above were to be followed, it would need to be supplemented with additional criteria. In assessing what this criterion is and how it would apply to compulsory pilotage, regard must be had to other contexts of law where the concept is used.

Burchell,¹⁵⁰ who assesses good faith within the context of delict, suggests that “good faith is something essentially within the knowledge of the actor”,¹⁵¹ that being so, the

¹⁴⁵ *Outdshoorn Municipality* *ibid*; Hare address at the Tulane Conference (see Note 129 above); this was approved of in the case of *Silent Pond Investments CC v Woolworths (Pty) Ltd and Another* 2011 (6) SA 343 (D) at 358A-B, where the court stated that “there is no magic in the expression *uberrima fides* [and that] there are no degrees of good faith.”

¹⁴⁶ Marine Insurance Act 1906 (United Kingdom), section 78(4); Hare (see Note 53 above) 886

¹⁴⁷ Hare *ibid* 887

¹⁴⁸ *ibid*

¹⁴⁹ *Kruger v Coetzee* 1966 (2) SA 428 (A)

¹⁵⁰ Burchell (see Note 127 above) 13, he also states that the onus of proof should rest on the person who relies on the legislative justification.

additional criteria can be based on subjective factors. In support of this, Bouwman,¹⁵² who analyses good faith in the context of a directors duty and skill, states that although the Companies Act¹⁵³ has not specifically included clause 91(1)(b) of the 2007 Companies Bill,¹⁵⁴ it is a good reference as to how good faith should operate within the circumstances of a directors fiduciary duties. She submits that clause 91(1)(b) would have codified the director's common law fiduciary duties and that:

“...in terms of this clause a director is subject to a fiduciary duty 'to act honestly and in good faith, and in a manner that the director reasonably believes to be in the best interests of and for the benefit of the company'.”¹⁵⁵
(Author's emphasis added)

It is clear from the above section that good faith means that the director's fiduciary duties requires that there is a reasonable belief that their actions would be in the best interest of the company. Within the context of WTO dispute resolutions, Mitchell,¹⁵⁶ states that:

“‘Good faith’ is often used interchangeably with ‘bona fides’, which is defined as ‘freedom from intent to deceive’. The touchstone of good faith is therefore honesty, a subjective state of mind, but the principle can also incorporate notions of fairness and reasonableness, both of which concern an objective state of affairs. Unfortunately, terms like honesty, fairness and reasonableness are almost as vague as good faith.”¹⁵⁷

Hare,¹⁵⁸ accepts this idea, and suggests that in order to determine whether the pilot acted in good faith, a subjective and an objective approach should be taken. He states that the “subjective enquiry entails ascertaining the pilot's state of mind not only with reference to his or her own evidence but also with reference to the circumstances

¹⁵¹ *ibid*

¹⁵² Natasha Bouwman ‘An Appraisal of the Modification of the Director's Duty of Care and Skill’ 21 (2009) S. Afr. Mercantile L.J. 509, available at: <http://heinonline.org>, accessed on 25 November 2013, at 528

¹⁵³ The Companies Act 71 of 2008

¹⁵⁴ The Companies Bill 2007, was published as GN 166 of 2007 in the Government Gazette number 29630 of 12 February 2007, available at: http://discover.sabinet.co.za.ezproxy.ukzn.ac.za:2048/webx/access/ggaz_pdf/2007/jan/gg29630_nn166.pdf, accessed on 25 November 2013.

¹⁵⁵ *ibid*

¹⁵⁶ Mitchell (see Note 129 above) 2

¹⁵⁷ *ibid*

¹⁵⁸ Hare (see Note 53 above) 494

giving rise to the damage or loss.”¹⁵⁹ He further submits that the objective inquiry is to ascertain whether the pilot had acted with “reasonable grounds for holding [his or her] belief as to the appropriateness of the course of action [that he or she] followed”.¹⁶⁰ However, according to Hare’s interpretation, the Authority will almost never be liable for the actions of the pilot, due to the fact that this would mean that even if the pilot acted negligently or even grossly negligently, the Authority would not be liable as long as the pilot’s actions were done in good faith.¹⁶¹

Thus it is best to have an inquiry that is based on both an objective and a subjective approach. Thus a similar view should be taken with regard to the compulsory pilotage. However, in order to avoid such a consequence that follows from Hare’s proposition above, where the subjective approach is used, it would be best to give more weight to the evidence of the circumstances surrounding the pilot’s actions rather than the pilot’s own version of events, because if reliance is placed more on the pilot’s version, he could possibly be found to be acting in good faith even where his actions amount to gross negligence.¹⁶²

At this point, the question of whether a person can be said to be acting in good faith if their belief was honest, but was unreasonable, or even grossly unreasonable must be addressed. To answer this question, it is important to have regard to the concept of recklessness in the wide sense, of gross negligence, and in the narrow sense, of *dolus eventualis*, which have been discussed at length earlier in this chapter.¹⁶³ With regards to recklessness, in the case of the *Philotex*,¹⁶⁴ the court as per Howie JA, described recklessness as “the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such, having regard to all the circumstances, that the taking of that risk would be described as ‘reckless’.”¹⁶⁵

¹⁵⁹ *ibid*

¹⁶⁰ *ibid*

¹⁶¹ *ibid*

¹⁶² Burchell (see Note 127 above) 12

¹⁶³ See Chapter 4, at heading 4.3.2 and 4.3.3

¹⁶⁴ The *Philotex* (see Note 102 above) at 143D

¹⁶⁵ *ibid*

In addition Howie JA rejected the decision from the case of *Ex parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation)* (“*Ex Parte De Villiers*”) ¹⁶⁶ which was relied on in the court *a quo*, and stated that “consequently, the genuine belief referred to [in the case of *Ex Parte De Villiers*]... [will] not avail if objective considerations nonetheless established recklessness.” ¹⁶⁷ It had also been noted by Howie J that the “expression ‘reckless disregard of the consequences’ [means]... consequences [that are] culpably unforeseen” ¹⁶⁸.

Therefore in answering the question above, the approach to interpreting good faith is to construe it narrowly. Thus where the actions or omissions of the pilot are either reckless in the wide sense of grossly negligent, or reckless in the narrow sense of *dolus eventualis*, which would be excluded as it is against public policy to exempt liability from intentional acts. Thus the Authority should not be able to rely on the exemption of liability clause due to the facts that the belief of the pilot, although subjectively honest, will not avail if the objective factors show that the pilot’s actions were reckless. Consequently he cannot be said to be acting in good faith where his actions caused the happening of the risk and he did not in any way avert or reduce the happening of the risk. In addition, if the consequences of the pilot’s actions were foreseen then this amounts to *dolus eventualis*, or where the consequences were culpably unforeseen, amounting to recklessness in the wide sense of gross negligence, then the pilot will not be acting in good faith. Burchell ¹⁶⁹ proposed that:

“An inference of bad faith can in certain circumstances be drawn from the existence of grossly unreasonable conduct. The actor’s motive, for instance, may be so obviously improper or based on such irrelevant considerations, or the actor may have acted from such spite or vindictiveness, that an inference of bad faith can be drawn... If the servant of the state knew or foresaw the possibility that his conduct was unlawful he could not justifiably claim to have acted in good faith even if he genuinely believed that his action was necessary for some other reason.” ¹⁷⁰

¹⁶⁶ *Ex parte De Villiers and Another NNO: In re Carbon Developments (Pty) Ltd (in Liquidation)* 1993 (1) SA 493 (A)

¹⁶⁷ The *Philotex* (see Note 102 above) at 148D-E

¹⁶⁸ *ibid* at 143I-J

¹⁶⁹ Burchell (see Note 127 above) 12

¹⁷⁰ *ibid*

Therefore it is clear that from the analysis of good faith within other areas of law that the test should be whether the belief of the pilot was honestly held by comparing his evidence to the circumstances, objectively seen, and whether in those circumstances a pilot could reasonably have formed that belief. Therefore the test looks for objective indications of the existence of a rational honest belief held by the pilot and where the pilot's actions are irrational in the circumstances, in the sense that the consequences are reasonably foreseeable and are culpably unforeseen, he will not be acting in good faith.

It could also be argued, depending on the circumstances of the case, that the ship-owner and the Authority could be liable jointly. However in this case the question then arises whether they are to be held liable proportionately for the damages caused by the pilot's actions.¹⁷¹ The reasoning for this is twofold; firstly, if the pilot's actions were not in good faith, the Authority cannot rely on the exemption in section 76(1), and secondly, section 76(2) provides that the pilot is the servant of the owner or master, thereby making the ship-owner or master vicariously liable for the actions of the pilot. In support of this Hare¹⁷² submits that:

“The effect of the subsections of section 76 read together would... appear to be that where the Authority cannot bring itself within the ambit of the exemption from liability in section 76(1), both it and the [ship]-owner or master of the vessel under [compulsory] pilotage, as deemed employer in terms of section 76(2), may be vicariously liable as joint wrongdoers under the Apportionment of Damages Act.¹⁷³ The failure to specify in section 76(2) that the owner or master of the vessel under [compulsory] pilotage is liable for the pilot's acts or omissions in good faith only appears to produce this result, rather than to allocate vicarious liability for the pilot's bad or good faith acts or omissions as between the Authority and the [ship]-owner or master of the vessel under [compulsory] pilotage respectively.”¹⁷⁴

According to Hare's submission above, two positions exist. The first is that where the pilot is acting in good faith, the Authority will be exempt of liability whilst the ship-

¹⁷¹ Hare (see Note 53 above) 495

¹⁷² *ibid*

¹⁷³ Apportionment of Damages Act 34 of 1956, section 2(1) states that: “Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.” However the actual apportionment is made by the court after a determination of the degree to which each wrongdoer was at fault in relation to the incident.

¹⁷⁴ Hare (see Note 53 above) 495

owner will be liable. The second position that exists is that where the pilot's actions are found to be in bad faith, the Authority, who cannot rely on the exemption clause in section 76(1), and the ship-owner will be liable jointly. However, Hare does not examine how the liability of the ship-owner or master and the Authority would be apportioned in such circumstances. Thus if a court were to find the Authority and the ship-owner or master liable for an equal amount, i.e. on a 50:50 basis, this would create an unfair situation as the Authority will never be liable for more than half of the damages that had been caused by a pilot, who in reality is the Authority's employee, that is forced upon the ship-owner or master to use. This interpretation of this exemption clause goes against the way in which the courts interpret exemption clauses, namely restrictively. This was discussed at length earlier in this chapter.

Where the pilot is not acting in good faith, the ship-owner could argue that since the pilot was not acting in good faith, and was ultimately the cause of the collision, the ship-owner is not liable on that basis. This argument is based on the fact that the NPA does not make provision for the situation where the Authority and the ship-owner are jointly liable.

It is submitted that where the pilot's actions are intentional, there is an even stronger argument that the Authority should be liable for the damages to the exclusion of the ship-owner. Support for this interpretation can be drawn by reference to Boberg¹⁷⁵ who states that, "there can be no apportionment where the defendant acted intentionally and the plaintiff was merely negligent in common cause." Although this statement does not deal specifically with compulsory pilotage, the principle of apportionment postulated by Boberg can be applied to compulsory pilotage where the ship-owner is the plaintiff, whose negligence contributed to the damages, and the Authority is the defendant, whose pilot has acted in bad faith. For example the ship-owner may be suing for damage to his own ship, caused in a collision whilst under compulsory pilotage. In this scenario, it can be argued that the ship-owner should not be contributorily liable for the actions of the pilot done in bad faith and the ship-owner should accordingly not be barred from claiming damages against the Authority. As already postulated earlier in this chapter, good faith should not include either intentional actions or gross

¹⁷⁵ Boberg (see Note 90 above) 663

negligence, therefore the proposition above that applies to intentional actions should also apply to instances where the pilot's actions are found to grossly negligent.

Thus where the pilot does not act in good faith, the ship-owner would want to rely on this to be able to avoid liability or at the very least limit its liability. This can be done by interpreting section 76 so as to include an implied limitation to the effect that the ship-owner will only be liable where the pilot is acting in good faith. The reasoning for this is to resolve an undesirable situation created by the NPA providing the pilot with two employers, namely the Authority as the actual employer and the ship-owner as the deemed employer. To interpret section 76(1) and (2) in this way would mean that the ship-owner, who is the plaintiff, and is suing the pilot's actual employer, is nevertheless himself liable as the deemed employer of the pilot for the pilot's intentional conduct.

The next section will be a look at a case study of the recent grounding of the *MV Smart*. Although this incident does not relate to compulsory pilotage, it is nevertheless important to explore because it deals with the harbour master's actions of allowing the vessel to leave the harbour. The liability of the Authority will depend on whether the harbour master performed his or her duties in good faith, according to section 85 of the NPA, a similar provision to that on compulsory pilotage.

4.3.4.1 Case study of the *MV Smart*

On the 19th of August 2013, the *MV Smart*,¹⁷⁶ a 230m long bulk carrier fully laden with +/-148 000 tons of coal, upon leaving the Richards Bay harbour, ran aground and broke up.¹⁷⁷ This was due to swells of waves reportedly up to 10m in height, causing the vessel's stern to hit the bottom of the seabed resulting in the steering and engines of the vessel seizing.¹⁷⁸ This caused the master and crew to lose control of the vessel,

¹⁷⁶ Panamanian-flagged ship registered to Alpha Marine Corporation

¹⁷⁷ Kevin Lancaster "Vessel Should Not Have Left Harbour" The Mercury 28 August 2013, available at: <http://www.iol.co.za/news/south-africa/kwazulu-natal/vessel-should-not-have-left-harbour-1.1569407#.UjYORxYTFSU>, accessed on 15 September 2013; Vesselfinder 'MV Smart Bulk Carrier Runs Aground Up Near Richards Bay' 20 August 2013, available at: <http://www.vesselfinder.com/news/1391-MV-Smart-bulk-carrier-runs-aground-up-near-Richards-Bay>, accessed 10 November 2013.

¹⁷⁸ Mike Schuler 'MV Smart Grounding: Owners Rule Out Mechanical Failure... Before Ship Hit Bottom' 9 September 2013, available at: <http://gcaptain.com/smart-grounding-no-mechanical-failure-before-ship-hit-bottom/>, accessed on 15 September 2013; Lancaster *ibid*

which then drifted towards the shallow sandbank near the entrance of the harbour.¹⁷⁹ Dold,¹⁸⁰ states that the vessel was drawing 17.4m of water in a 22m channel, thus resulting in a very small margin of error in rough conditions.¹⁸¹ The port Authority claimed that the vessel was not under compulsory pilotage at the time, as the pilot had already disembarked from the vessel.¹⁸² Immediately after the incident, port authorities closed the harbour due to the swells caused by the weather.¹⁸³

The question that has been posed with regards to the grounding of the *MV Smart* is whether the vessel should have been allowed to leave the harbour.¹⁸⁴ Comments have been made that it was a bad judgment call for the harbour master to allow the vessel to leave the harbour in those conditions.¹⁸⁵ Dold¹⁸⁶ suggested that the reason why the vessel was allowed to leave could possibly have been due to the consideration of the costs involved if the vessel had not left. However, this reasoning is not sufficient enough to allow a vessel of that size or depth, while being fully laden, to leave the harbour, whilst the conditions for leaving were not conducive due to swells of that magnitude.

In terms of section 85 of the NPA, the Authority will not be liable for the actions of the harbour master, allowing the vessel to leave the confines of the harbour in such weather conditions, or for the harbour master's omissions, in not preventing the vessel from leaving the harbour, if done in good faith during the performance of his or her duties.¹⁸⁷ Thus the question that arises yet again is what good faith means and entails.

¹⁷⁹ Quinten Schutte 'Bulk Carrier *MV Smart* Breaking Up After Running Aground In South Africa (Richards Bay)' 20 August 2013, available at: http://www.koi4u.co.za/index.php?option=com_kunena&func=view&catid=47&id=42953&itemid=115, accessed on 15 September 2013; Lancaster *ibid*; Schuler *ibid*; Vesselfinder (see Note 177 above)

¹⁸⁰ Di Dold, chairwoman of Coastwatch

¹⁸¹ Lancaster (see Note 177 above)

¹⁸² Schutte (see Note 179 above)

¹⁸³ 'Failure Of The Propulsion System Is Not The Reason of *MV Smart* Grounding' 10 September 2013, available at: <http://sea-jobs.net/newsen/333>, accessed on 10 November 2013; Schuler (see Note 176 above); Schutte *ibid*; Vesselfinder (see Note 177 above)

¹⁸⁴ Lancaster (see Note 177 above)

¹⁸⁵ *ibid*

¹⁸⁶ *ibid*

¹⁸⁷ The NPA (see Annexure A), section 85

The inquiry should, as mentioned above, be based on both an objective and subjective enquiry into whether or not the harbour master acted in good faith. In applying the test that was formulated above, which is, *mutatis mutandis*, whether the belief of the harbour master was honestly held by comparing his evidence to the circumstances, objectively seen, and whether in those circumstances a harbour master could reasonably have formed that belief. In considering whether the harbour master acted in good faith by allowing the *MV Smart* to leave or by its omissions in not stopping the *MV Smart* from leaving, the following circumstances objectively seen, must be taken into account in order to ascertain whether the harbour master could have reasonably have formed that belief and also whether that belief in the circumstances is a rational belief.

These circumstances are *inter alia*, that firstly, there were waves of excessively high magnitude, and secondly, that the vessel was fully laden vessel drawing approximately 17.4m of water in a 22m channel. Accordingly, these circumstances are not conducive to allow a vessel of its size to leave the harbour, and that where the harbour master had formed the belief that in letting the vessel leave the harbour, the vessel will be able to leave the harbour confines safely without incident would be irrational due to the adverse weather conditions. If it is found that the harbour master had breached his obligation to act in good faith, where the belief of the actions taken are irrational in the sense that the occurrence of an incident such as this one, would not occur, as it is reasonably foreseeable that damage could ensue due to the magnitude of the waves in a small channel resulting in the vessel hitting the bottom of the seabed, which could have been averted by not allowing the vessel to leave the confines of the harbour until the storm had passed.

In addition, if it were found that by allowing the vessel to leave, the harbour master's conduct was reckless in the wide sense of gross negligence, where his belief could be considered in the circumstances to be "an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences",¹⁸⁸ then in the light of the surrounding circumstances the consequences will be culpably unforeseen by the harbour master. Consequently, the harbour masters

¹⁸⁸ The *Philotex* (see Note 102 above) at 143I-J

actions would fall short of acting in good faith and thus the Authority would not be able to rely on the exemption from liability.

It follows from the reasoning above that it would not be reasonable for a harbour master to have formulated his belief that the consequences would not eventuate and thus his actions will be reckless. Therefore the harbour master's actions or omission will not be performed in good faith and in that event, the Authority would be liable for the loss and damage caused to the vessel. Another inquiry that could be made is to determine whether the ship-owner or the master were independently at fault, this can occur where the ship-owner or master, despite the weather conditions, were reconciled to leave the harbour due to financial considerations such as demurrage. However, an analysis of the possible apportionment of liability that would need to be undertaken in such a case, is a completely separate issue to the difficult questions that arise around apportioning liability between a ship-owner and the Authority for the actions of a compulsory pilot.

4.4 Recommendations.

The reason for the inclusion in the NPA of the requirement of good faith could possibly be because if an incident occurred whilst under compulsory pilotage, the vessel more often than not will be insured for loss or damage; the same goes for the cargo on board the vessel.¹⁸⁹ It would be unfair for the Authority to be liable at every instance where an incident involving the vessel under compulsory pilotage occurred, especially as the loss or damage is covered by the ship-owner's insurance. However, this does not mean that the Authority should never be liable at all for loss or damage to a vessel or its cargo.

Thus a recommendation could be that it should be mandatory for the Authority to create an insurance policy that caters specifically for situations of collisions that are caused by the pilots during their services where their actions are done in good faith. This policy can be limited to instances where the incident caused damage to the harbour infrastructure only, thus the costs of loss or damage is shared by both the ship-

¹⁸⁹ Most ship-owners carry P&I insurance to cover third party liabilities.

owner, for damages towards their vessel, and the Authority, for damage towards the infrastructure.

The ship-owner in most cases is insured against losses as stated above, therefore the next recommendation is that were the ship-owner is found liable, his liability should be limited, in order to solve the perceived unfairness of making the ship-owner liable for all incidents caused by the pilot. In addition, the Authority will also be protected to the extent of the ship-owners liability.

The next recommendation is that where the pilot's actions are not in good faith and the ship-owner or master is also at fault, the Authority and the ship-owner could be proportionately liable for the damages. However, where the ship-owner is not liable and the pilot is the sole cause of the loss, as he was not acting in good faith due to his actions being either grossly negligent or intentional, the Authority should be liable fully in those circumstances.

The final recommendation is to put in place certain forms of punishment, such as fines, for the pilots who have been negligent whether or not their actions were done in good faith or not as this would curb pilot-related incidents of navigation, thereby reducing the costs of damages or loss for potential incidents.

4.5 Conclusion

Thus it can be seen from the investigations above that the ship-owner will be liable for the actions of a pilot performed in execution of his duties in good faith. The position regarding the Authority's liability is provided for in section 76(1), which states that the Authority will not be liable for the actions or omissions of the pilot performed in good faith. However, the concept of good faith is a vague concept and the legislature has not helped to give clarity on the concept as the meaning of good faith has been left silent in the NPA. Thus it is necessary to find out how courts have examined exclusionary clauses. According to the *MV Stella Tingas*, an exemption clause must be construed narrowly.

With regards to compulsory pilotage, the exemption contained in section 76(1) should also be interpreted narrowly, and the test to ascertain whether the pilot acted in good

faith or not should be based on the test formulated above. In addition, where the actions of the pilot are not intentional, but amount to gross negligence, it should be excluded from good faith as gross negligence entails “an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences”. Therefore, if gross negligence were excluded from the ambit of good faith, the Authority would be liable for pilot’s actions or omissions when the pilot was grossly negligent.

Chapter 5

Conclusion

5.1 Introduction

Compulsory pilotage is a system where a ship-owner by compulsion of law has to use the services of pilot to navigate vessels into and out of the harbour. This system is used by states in order to reduce the likelihood of collisions or allisions. However, there are circumstances where collisions do occur in the port. When such events occurred in the past, the Authority, in accordance with the SATS Act, was not liable for negligent actions or omissions of the pilot. The Act did not regulate the position regarding the liability of the ship-owner. This was the issue in the case of the *MV Stella Tingas*, the result of which was that neither the Authority nor the ship-owner were found liable for the actions of the pilot. This created a *lacuna* in the law and, as a result, innocent ship-owners were not able to get satisfaction for damages sustained to their vessel by a guilty vessel which was under compulsory pilotage at the time. The solution was the enactment of the NPA, which provided that the ship-owner would be liable for actions of the pilot, and the Authority would not be liable for the actions of the pilot performed in good faith. The dissertation asked the question whether the inclusion of the concept of good faith actually solved the problem or created a new one. Thus the main objective of this dissertation was to analyse the liability according to the NPA.

5.2 Summary of the Findings

A comparison of the compulsory pilotage system in the United Kingdom and the South Africa was made in Chapter 2. It was found that, according to the common law of the United Kingdom, a ship-owner would not be liable for the actions of the pilot because the pilot was not the employee of the ship-owner on the basis that it would not be fair for a ship-owner to be held liable for the actions of a pilot that they were forced to take on board to render pilotage services. The position changed to one where the ship-owner was not liable to one where the ship-owner was liable for the actions of the pilot when the Pilotage Act of 1913 abolished the defence of compulsory pilotage. The position in South Africa is now regulated by the NPA, with section 76(1) providing that the Authority will not be liable for the pilot's actions or omissions made in good faith, and section 76(2) expressly stating that the pilot is deemed to be the employee of

the ship-owner during pilotage and that the ship-owner will be liable for the actions of the pilot.

The dissertation also explored the situations where a divided command over the vessel was the cause of many collisions. This issue has been solved by the NPA, which provides that the master is in command whilst the pilot is merely an advisor during the compulsory pilotage phase. In addition, the circumstances in which the master may intervene in the affairs of the pilot, namely, where there is an emergency, are also provided in the NPA, which was discussed in Chapter 3.

Chapter 4, which is the main chapter, examined the liability of both the ship-owner and the Authority, with the focus being on the liability of the Authority. It is clear that the Authority will be liable where the pilot did not act in good faith in performing his duties. The concept of good faith is a relatively new concept within an exemption clause, in the context of maritime law and according to numerous authors is a vague concept. Hence the need for it to be interpreted so as to avoid disputes as to what circumstances will be excluded from good faith. The way forward in interpreting the concept of good faith is to interpret it narrowly to exclude actions of gross negligence, as well as to use an objective and subjective approach discussed above.

5.3 Conclusion and Recommendations

It has been demonstrated in this dissertation that compulsory pilotage is an important aid that reduces the incidents of collisions by making it mandatory for all vessels entering and leaving the harbour to use the services of a pilot. However, there are issues with what good faith entails such as whether it is merely a simplistic meaning of honesty and whether good faith excludes certain concepts such as gross negligence. It is clear from the analysis in this dissertation, particularly chapter 4, that the concept of good faith must be taken to be an honest belief in the performance of duties.

The recommendation made in Chapter 4 as a means of balancing the competing interests of both the ship-owner and the Authority were:

1. The Authority is liable, where the pilot acted in good faith, for damage to infrastructure in the ports and must take out insurance to cover such damages, and the ship-owner will be liable for the damages to their vessel.

2. A limitation of the liability of the ship-owner under section 76(2). The Authority will also be protected, as the ship-owner will be liable, albeit for a limited amount, for damages caused to other vessels.
3. Apportionment of damages between the Authority and the ship-owner where the pilot was not acting in good faith and the ship-owner or master was also at fault.
4. Where the pilot's actions were not in good faith, the Authority will be liable.
5. Penalties be applied against pilots so as to curb pilot-related incidents.

Finally the test formulated in this dissertation to prove whether the pilot acted in good faith or not, should be based on both an objective approach and a subjective approach. However, more weight must be given to the circumstances surrounding the pilot's actions than on the evidence of the state of the pilot's mind. If the latter were given more weight, this would in all cases lead to good faith being distorted, as a pilot cannot be said to be acting in good faith where his actions are grossly negligent. The exemption would apply to widely if it only excluded conduct amounting to *dolus eventualis*. Therefore the test is whether the belief of the pilot was honestly held by comparing his evidence to the circumstances, objectively seen, and whether in those circumstances a pilot could reasonably have formed that belief. In this way, where the pilot's actions are grossly negligent, his belief in those circumstances will not be reasonable and therefore it will be excluded from the concept of good faith.

Annexure A

Extracts of the National Ports Act 12 of 2005

Section 75: Pilotage

(1) Subject to subsection (2), a pilot must navigate every vessel entering, leaving or moving in a port.

(2) Pilotage is not compulsory in respect of any vessel or class of vessels that have been exempted from pilotage by the Authority in writing.

(3) The pilot's function is to navigate a vessel in the port, to direct its movements and to determine and control the movements of the tugs assisting the vessel under pilotage.

(4) The pilot must determine the number of tugs required for pilotage with the concurrence of the master of the vessel.

(5) In the event of a disagreement between the pilot and the master of the vessel regarding the number of tugs to be used as contemplated in subsection (4), the Harbour Master takes the final decision.

(6) The master of the vessel must at all times remain in command of the vessel and neither the master nor any person under the master's command may, while the vessel is under pilotage, in any way interfere with the navigation or movement of the vessel or prevent the pilot from carrying out his or her duties, except in an emergency, where the master may intervene to preserve the safety of the vessel, cargo or crew and take whatever action he or she considers reasonably necessary to avert the danger.

(7) Where the master of the vessel intervenes as contemplated in subsection (6), he or she must immediately inform the pilot of the vessel and, after having restored the situation, must permit the pilot to proceed with the execution of his or her duties.

(8) The master of the vessel must ensure that the officers and crew are at their posts, that a proper lookout is kept and that the pilot is given all assistance necessary in the execution of his or her duties.

Section 76: Liability of pilot

(1) Neither the Authority nor the pilot is liable for loss or damage caused by anything done or omitted by the pilot in good faith whilst performing his or her functions in

terms of this Act.

(2) Notwithstanding any other provision of this Act, the pilot is deemed to be the servant of the owner or master of the vessel under pilotage and such owner or master is liable for the acts or omissions of the pilot.

Section 85: Liability of Authority

Neither the Authority nor an employee or a representative of the Authority is liable for loss or damage caused by anything done or omitted by the Authority, the employee or the representative in good faith whilst performing any function in terms of this Act.

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