

Merely an Advisor?

The Legal Status of a Statutory Pilot

1. It is axiomatic that a statutory pilot is engaged in an advisory capacity. So also are a brain surgeon, a Queen's Counsel, a gas-fitter and any number of men in other fields whose services are sometimes considered necessary. This short article shows that a pilot is also legally expected to order matters properly and effectively in accordance with his own advice.

2. A factor which is common to all people who provide necessary services by statutory regulation (in medicine, law, dangerous utilities, dangerous navigation and other areas) is that Parliament has recognised the need for such services and has made provision for the qualifications of the people who provide them. In certain circumstances, Parliament has also determined that the use of such services should be compulsory – not, of course, to enhance the status of the person providing the service but because it is recognised that public risk arises if such services are not used. Subject to statutory provisions Parliament does not allow people other than duly qualified lawyers to represent others in Court, or people who are not medically qualified to practice medicine, or a DIY man to fix his own gas-appliance or an unqualified person to perform pilotage in a compulsory pilotage area. Parliament has laid down the relevant provisions for public protection and for no other reason.

3. This principle was once elegantly summarised by Lord Simon of Glaisdale in the House of Lords:-

“In some fields the law finds it expedient to enforce qualification and regulation before services are performed. Many villages have crones wise in the concoction of simples; nevertheless Parliament has placed restrictions on the professionally unqualified engaging in the practice of medicine or pharmacy. It is a byword that barrack rooms and forecastles have their lawyers, and there are others who fancy their skills at drafting or advocacy; nevertheless professional practice is limited to those examined and approved by and subject to the discipline of the Inns of Court or the Law Society. Similarly, Parliament has provided for the licensing of pilots and made provision for their use.”

Crouch v MacMillan – Weekly Law Reports 1972

4. In order to protect the public, Parliament expects that the people who have been authorised to do certain things should actually do them, even though they do them in an advisory role. The lawyer must speak in accordance with the rules of Court in order to enable the judicial system to function at all; the medic must actually use the skill of his hands and brain in order to preserve life: the gas-fitter must do exactly the same and so must the statutory pilot. In the case of the

pilot, parliamentary provisions have entrusted him to conduct the pilotage of any ship which he serves.

5. In the case of a man who provides any necessary service under parliamentary provision, the law provides that such people should not merely be duly qualified but should also be trusted in normal circumstances. At the same time, the law recognises that where the element of trust breaks down (as sometimes it does) the person receiving the service may intervene and carry on, taking upon himself the responsibilities, liabilities, stresses and risks which parliament has intended should normally be borne by the qualified person. A litigant may dismiss his lawyer at any time and present his own case; a man may perform his own brain surgery (difficult, but legally permitted); a householder may dismiss the gas-man if he turns out to be manifestly incompetent and dangerous circumstances are arising; and likewise the shipmaster may dismiss the pilot if he can see that the pilot is incompetent. None of those circumstances, however, begin to suggest that a properly qualified man should not normally do the thing which the relevant parliamentary provisions have qualified him to do.

6. In the case of pilotage, the following article illustrates that the function of the pilot as a man who is expected to act (and not merely to advise) has long been recognised by the Courts:-

Master- Pilot – who is in charge?

Statute law defines a pilot as "any person not belonging to a ship who has the conduct thereof": see Section 742 of the Merchant Shipping Act 1894. The interpretation provisions of the Pilotage Act 1987 specifically prescribe this definition: see Section 31. You should note that the telling phrase is "has the conduct thereof".

Apart from this basic explanation, Parliament has not laid down with any precision what is the status of a pilot when acting in that capacity. However, inferences may be drawn from the wording of statute law and regulations, and the judges have left no doubt that the pilot is in charge of the ship's navigation, not the master.

There are numerous cases which illustrate the point, most of comparative antiquity, but nonetheless still binding. A few have been chosen which unambiguously emphasise the position of the master vis-à-vis the pilot.

"The Tactician" (1907)

The judge stated: it is a cardinal principle 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.

"The Nova" (1916)

Considered the meaning of the word "conduct". It means that the Pilot is considered in charge and is entitled to all assistance he can get from the master and crew.

"The Mickleham" (1918)

Considered the meaning of the word "conduct" within the context of Defence of the Realm regulations, although the judicial definition would apply equally well to Section 742. A provision which stipulates that a ship is to be conducted by a pilot does not mean that she is to be navigated under his advice: it means that she must be conducted by him.

Babbs V Press (1971)

Decided *inter alia* that a pilot can only act in such a capacity when he personally has the conduct of the ship, i.e. the control of its navigation and handling. Hence if the Master supersedes the Pilot for whatever reason the Pilot ceases to be a pilot and is not responsible for the actions of the Master.

Although by statute the Pilot has charge, under common law the Master may still intervene to express his misgivings as to the wisdom of the Pilot's proposed course of action, and in a situation of immediate peril he is entitled to take the navigation out of the hands of the Pilot provided he can show justification: see The Tower Field (1950)

By inference the Pilotage Act 1987 has not changed the position. For example, Section 15(2) deals with penalties which may be levied against a master who fails to ensure his ship is under pilotage "after an Authorized Pilot has offered to take charge of the ship".

The Regulations for Prevention of Collision at Sea have the force of law by nature of statutory instrument made under Section 21 and 22 of the Merchant Shipping Act 1979. The regulations provide that contravention of the regulations is a criminal offence and among those who may be prosecuted is "any person for the time being responsible for the conduct of the vessel", i.e. a pilot. This is yet further evidence that the pilot is a principal actor and not simply a passive advisor when acting as a pilot.

(The above article was kindly provided by Captain Joe Wilson, Chairman of UKMPA.)

7. Recent cases in Court have confirmed that :-

(i) "A pilot is an independent professional man who navigates the ship as a principal" – The *Esso Bernicia* – House of Lords [1989] 1 All ER

(ii) The *Cavendish* – Admiralty Court [1993] Lloyd's Law Reports – *Confirms the Esso Bernicia*, even following the introduction of the 1987 Pilotage Act

(iii) In the *Sea Empress* – Cardiff Crown Court [1999] Lloyd’s Law Reports (Admiralty Judge presiding) it was observed that in the context of compulsory pilotage:-

“Shipowners and masters must needs engage a pilot. They have to take the training, experience and expertise of the pilot provided at face value. While the master remains nominally in command, it has to be recognized the pilot had the con and a master can only intervene when a situation of danger has clearly arisen.”

8. The words “*can only intervene when a situation of danger has clearly arisen*” call for some clarification. They might more helpfully have been expressed as “*can only properly intervene when a situation of danger has clearly arisen*”. It may safely be assumed, however, that the learned judge omitted the word “properly” from his judgment on the basis that matters at Court are only ever judged properly. There are earlier cases in which it has been held that where a situation of danger has arisen but confidence in the pilot remains undiminished, then the very last thing that a shipmaster should do, in the heat of the moment, is to intervene.

9. It can equally safely be assumed that Parliament does not provide for compulsory pilotage to be imposed upon shipowners in many places if at the same time Parliament’s own statutory pilots are not to be trusted. If there is any implication to be read into the written law of pilotage, it is the simple and natural rule that pilots should generally be trusted to exercise the qualifications granted to them; and that intervention by the shipmaster should only happen if and when trust in the pilot has broken down. It cannot be supposed that Parliament would make provisions for authorised pilotage if it expected visiting shipmasters to conduct the pilotage themselves.

10. ***Samskip Courier/Skagern Collision – 2006 - MAIB Report of April 2007***

The Report states the facts as found by the MAIB Inspectors. In the Analysis (Section 2, para 2.2,) causes of the accident are attributed to:-

Poor bridge team interaction, exacerbated by poor communications between key persons..... This was highlighted by the masters’ total trust in their pilots and their reticence to take navigational control when it became apparent that an emergency situation was developing.

11. It is difficult to see that this can be attributed to anything other than bad piloting. If it is suggested (which is not wholly clear) by MAIB that either shipmaster should have taken over before the collision, then this remains a severe criticism of the pilotage. The reticence of the shipmasters to take over is entirely normal. In general terms Parliament expects pilots to have a

better grasp of all the circumstances relating to local pilotage than it expects a visiting shipmaster to have. That is why Parliament makes any provisions for pilotage at all. It seems pertinent to speculate, in the case of this collision, what might have been the view of the MAIB if (a) each master had taken the con substantially before the collision (b) one or both vessels had been carrying hazardous/inflammable/explosive cargo and (c) the collision had occurred with substantial loss of life (as happened in a collision at Montevideo some years ago). It seems that the masters might well have been criticised for not trusting their respective pilots; just as in the present case they appear to be criticised for trusting them. The legal obligations of a pilot are not merely to advise. A pilot is obliged also to show practical and proper leadership in putting his advice into effect.

12. Nothing arising out of the recent collision alters the legal status of a pilot. An authorised pilot is a man qualified by specific statutory provision to conduct the pilotage of any ship within the limits of his qualification. He is qualified not merely to advise how the pilotage should be conducted. As a matter of law, he is qualified to conduct it in practice; and in law and practice he is expected to do so. Amongst Spanish-speaking nations, the pilot is known as “El Practico.”

13. The general term “advisory” frequently means, in practice, rather more than uninformed people might interpret it to mean. A further useful analogy with pilotage is seen by reference to the well-known expression “Doctor’s orders”. Legally a medical doctor, being merely an advisor, does not give orders. He merely gives advice in the form of orders. It is accepted in general terms in the general public interest, however, that the advice of a doctor should be regarded as an order. So also does the law recognise, in the public interest, that it is proper that a pilot should “take charge” of the pilotage of a vessel, which necessarily involves giving orders. That is the only way in which accurate helm and engine orders can be communicated. It is also the only way in which courses can be set, anchors can be worked, tug-boats can be directed or pilotage can be conducted at all. The pilot is necessarily the leader of the team which carries out all of those tasks. When a ship is under pilotage, whether it is compulsory pilotage or voluntary pilotage, none of those things can happen without a direct order from the pilot. As was observed in *Babbs v Press* (above), if the Master supercedes the pilot (i.e. countermands the pilot’s orders) then the pilot is no longer piloting. His function ceases to exist and the ship is no longer under pilotage.

14. As to whether a pilot should report by VHF to the CHA whenever a shipmaster supercedes him, it is entirely proper that he should do so; and it might well be a sensible precaution. It

would certainly be honest. In an extreme case, (e.g. a “Montevideo” collision) the words of the VHF report might be the last recorded words of the pilot.

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