THE PILOT - ONLY AN ADVISER?

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UDK 347.793.7
izvorni znanstveni rad
primljeno (received):
siječanj, 1993.

The author argues through an analysis of maritime practice, legal theory and statutory enactments that the pilot is not only an expert adviser, but that he takes charge of and conducts a vessel. He distinguishes between conducting and commanding and points out, that by recognizing that the pilot conducts a ship no change in the nowadays widely accepted regime of liability would ensue. He proposes, consequently, a rewording of art.34 of the Maritime and Internal Waters Navigation Act presently in force in Croatia.

INTRODUCTION

If we were to judge by the opinions expressed in legal theory and by the provisions of laws and by-laws on this matter, the relation between pilot and master and the exact role of the pilot on a piloted ship are still far from clear.

The "lodeman",[1] as he was called in earlier times, if cought in plundering or deliberately wrecking the entrusted vessel, was,

1 Because he was skilled in the use of the "lodestone" or the magnetic

according to the Laws of Cleron, to be taken to the windlass and there beheaded by the crew, and the crew were not to be answerable to any judge. Later, when the lawgiver was nagged by a twinge of conscience, the enactments were more humane: defaulting pilots were hanged at the yard-arm. The main task of these lodemen or hovellers, was to steer a ship or barge through narrow channels or entrances, using their knowledge of the local tides, depths and dangers. And because of this regrettable history of plunder and wrecking it was thought necessary to train pilots to be skilled, bold and fearless to conduct ships safely through narrow passages or into harbours, but also to require that they be "honest" and God-fearing". Although today pilots are not punished so cruelly for their negligence or misconduct as in ancient times, the loss of prestige and of profit could be very great indeed, the more so, because in the words of Joseph Conrad, to every seaman a pilot is "trustworthiness personified".

In this article we shall try to define more precisely the relation between pilot and master on a piloted vessel and the exact nature of the pilot's services and to see how this reflects on the nature and scope of the pilot's liability. We shall then suggest some modifications in Croatian law de lege ferenda regarding the definition of a pilot and of his services.

WHAT IS A PILOT?

According to the classic definition of English law, any person not belonging to the crew of a ship who has the conduct

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ore, a primitive form of compass or direction-finder. But the word could also have been derived from "loadsman", "lootsman", "lotsemann" (in modern German the pilot is called "Lotse") designating the one who steers a loaded ship or barge on navigable waterways. The word "pilot" comes from the Greek "pedon" (steering rudder), in the plural "peda", through the Italian "pedotta" or "pilota".

of her is a pilot.[2] Since the conduct of a vessel is her navigational behaviour relating to her movement on the sea, to conduct a vessel means to control her navigation. Although, according to this view, the pilot has exclusive control and conduct of the ship, this does not mean the command of her. The master's position and authority on board a piloted vessel remain unchanged. The master retains the command over the vessel and has always the power and authority to interfere with the pilot's actions. This interference, however, must be clear and decisive, an act either revoking the pilot's order or correcting and modifying it. Because even when a pilot is on board and has the conduct of the ship, the master remains responsible for the vessel, the persons and cargo on board and for the safety of navigation. It is, moreover, the master's duty to state unequivocally his opinion regarding the monoeuvres of the vessel to the pilot and when he deems it necessary he must correct or alter the pilot's orders. There could be no question, therefore, of a divided command and authority. In the English Pilotage Act of 1983 it is expressly stated that the pilot "takes charge of" resp. "obtains charge of" the ship. These expressions would be very strong if they were merely intended to denote the advisory capacity of the pilot. The master has a duty to assist the pilot in navigation, especially by drawing the pilot's attention to the technical or constructional peculiarities of the ship which could influence her navigational behaviour, but the master is not expected to know the matters of local significance. This may have implications regarding the master's negligence and his right to limit his liability if he is an owner or part-owner of the vessel. The case of the ship "Hans Hoth" is very instructive in this respect. In a collision between a British and a German ship at the entrance to Dover

2 Merchant Shipping Act 1854.

harbour the latter vessel was solely to blame. There was a compulsory pilot on her who has disregarded the signal put up by the harbour authority prohibiting vessels to enter while another vessel was leaving. The master, who was a part-owner of the vessel, was in control of the engines and was on the bridge. The question before the court was whether the master was personally at fault and thus unable to limit his liability. It was held by the court that although the master was under a duty to assist in navigation when a compulsory pilot was on board, this duty did not extend to matters of local significance. The court held that it would be too much to expect the master to question each of the pilot's actions in regard to his interpretation of local port signals[3].Only an urgent necessity, such as manifest incapacity of a pilot, could justify a master taking his ship out of the pilot's charge, or contradicting the navigational dispositions of a compulsory pilot. From what has been said it could be concluded that in maritime practice a pilot is actually "in charge of" the vessel which he "conducts", and that when on the bridge he is in actual fact more than a mere adviser of the master, or that he is an adviser whose advice, barring some very grave reasons, must be followed[4].This does not relate only to the manoeuvres of the vessel which he is conducting, but also to the need and direction of an assisting tug. The pilot knows best whether the assistance of tug or tugs is necessary because of the peculiarity of the harbour, berth, tidal conditions or local winds, and his opinion as to whether such assistance is required could be contradicted by the master only at the latter's grave risk. In practice it is usual that the pilot who is on the tow gives direct commands to

3 The Hans Hoth (1952) 2 Lloyd's Rep.341.

4 Chorley and Giles, SHIPPING LAW, London, 1982, p.257.

the tug, because it is frequently the case that the tug's skipper does not speak the language of the tow's master or has a very imperfect command of English. The correct procedure when piloting a ship is for the pilot to pass the orders to the master of the piloted vessel who is with him on the bridge of the piloted ship, who, in turn, gives them to the helmsman. This procedure, however, is sometimes dispensed with when the helmsman understands the pilot's language, in which case the pilot gives direct orders to the helmsman. Or it may happen that the master of a vessel is under the influence of drink. In such a case the pilot should not take charge unless he can be sure the captain will not interfere with his navigational orders. Once having taken charge it is the pilot's duty not to give in to the manifestly unreasonable orders of the tipsy master, if by them other vessels or harbour installations are likely to be endangered. If tact does not avail him here, he should ask, if feasible, the port authority to intervene.

While the practice gives the pilot the actual charge of the vessel which he conducts, thus making him more than a mere adviser,[5] statutory regulations frequently stress his advisory role on board the piloted vessel, mainly in order not to prejudice the question of the shipowner's liability to third parties for damage caused by a piloted ship. It is, however, our contention which we shall try to justify, that by making more explicit in legal enactments the pilot's role in conducting a vessel, and thus by giving to his office the dignity it requires, no alterations of the nowadays widely accepted regime of liability would be implied.

5 It is only with warships that the captain has the option either of using the pilot in an advisory capacity, or of directing him to take full charge and conduct of the warship.

The Italian Navigation Code somehow tries to navigate the middle road by stating that the pilot suggests the course and assists the master in determining the manoeuvres necessary to follow it[6]. German law distinguishes between the pilots who only advise the master while a ship sails through their area and those who conduct a ship. However, according to article 1 of the German Seelotsgesetz (Pilot Act) pilots are only "shiffahrtskundige Berater" (advisers expert in navigation)[7].The Maritime and Internal Waters Navigation Act (1978) enacted in the former Yugoslavia and now still applicable in the sovereign Republic of Croatia states in article 34 that a pilot gives expert advice to the master in the conduct of the vessel. Although the words "vođenje" (conduct) and "upravljanje plovidbom" (directing the navigation) are therein distinguished[8], the term "vođenje" denotes more than merely the giving of expert advice. It implies a skill or dexterity in actually handling or leading someone or something, of conducting. Therefore it is well that article 38 of this Croatian law states that "pilotage does not exempt the ship's master from the duty of directing the navigation and manoeuvres of the vessel and from the liability ensuing therefrom", but we suggest that article 34 of this law should qualify pilotage as the conducting of a vessel by expert persons who do not belong to the crew, with the view of the safety of navigation in ports, harbours, channels and narrow passages and other parts of the coastal sea resp.internal waters of the Republic of Croatia.

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6 Codice della Navigazione Marittima e Aerea, Milan, 1980, art.92.

7 Abraham, DAS SEERECHT, 4th ed., Walter de Gruyter, 1974,p.96.

8 Cf.articles 34 and 38 of The Maritime and Internal Waters Navigation Act.

PILOT'S LIABILITY

This mention that the pilot conducts the piloted vessel should have no influence on the liability regime. The shipowner could still remain liable to third parties for damage caused by the pilot's negligence, regardless of whether the pilotage was compulsory or not. This principle set forth in the 1910 Collision Convention for collision damage has been widely accepted in maritime law even for other causes of loss or damage. Because the master retains the command of navigation notwithstanding the pilot's presence on board. Whilst acting within the scope of his authority a pilot is considered to be an agent of the shipowner and the crew must obey him. But he does not supersede the master. And unless the shipowner in the causing of this damage to third parties is guilty of a personal act or default, he can limit his liability. The vicarious liability of the owner of the piloted vessel for a pilot's negligence is not based on any presumed negligence of the owner, either in the choice, supervision, control of the pilot, or in wrong instructions or directions given to him. It is based on the owner's liability for his agents or employees when they cause damage in the course and within the scope of their employment resp.authority. This means that if a pilot causes loss or damage to third parties even while he is on board the piloted vessel but outside the scope of his authority (e.g.by stealing an object from a passenger or by committing some other punishable offence against him) the pilot will be directly responsible to the injured or damaged party. The shipowner in such a case could be coresponsible only if his contributory negligence were proved[9]. As regards the contractual

9 A pilot can also be directly liable to the person who suffered damage when he is responsible in accordance with the general principles of liability of employees who caused damage within the scope of or in connection with their employment. If in such a case a pilot has not caused damage

liability of a pilot towards the owner of the piloted vessel, he can be either personally liable or his firm or professional association (the pilot's authority) could be liable for damage caused by his negligence to the piloted ship. They could also be liable to the shipowner of the piloted ship in a recourse action for damages which the latter had to pay to third parties due to the pilot's negligence. In the Maritime Pilotage Act of the Republic of Croatia (National Gazette No.15/1974) a pilot is personally liable to the shipowner if he gives wrong advice or incorrectly conducts the piloted ship, if during the time he is in charge he does not give the required expert advice or refuses to conduct the ship, if he stops with the piloting of the vessel before the end of compulsory pilotage, if he leaves the piloted vessel which arrived from abroad before she obtains free pratique, and in some other cases such as accepting to pilot a vessel whose draught does not correspond to the depth of the sea at the place of berth or anchorage, or piloting a vessel which is unseaworthy or which has not received from the competent harbour authority permission to depart. The civil liability of the pilot or his firm is nowadays mostly subject to their right of limitation. In England, for instance, a pilot gives to the pilotage firm or authority a bond, and in case of negligence he will not be liable in respect of any one accident beyond the penalty of the bond and the amount due as pilotage fee for the voyage in question.[10] According to art.55 of the Pilotage Act of 1983, a pilotage authority, unless it is guilty of actual personal fault or privity, has the right to limit its liability for a pilot's act or default to a certain sum multiplied by the number of pilots currently

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intentionally (dolus) he is allowed to limit his liability (cf.Branko Jakaša, PELJARENJE (Pilotage), in Marine Encyclopedia, tome 6, Zagreb, 1983, p.9-10.

10 Christopher Hill, MARITIME LAW, Lloyd's of London Press Ltd.,1985,p.355.

in possession of licences for that particular district at the date when the loss or damage happened.[11] Article 39 of the Maritime and Internal Waters Navigation Act applicable in the Republic of Croatia for damage or loss caused to the managing owner of the piloted vessel by a pilot, will be liable the firm in which the pilot is employed at the date when the loss or damage occurred. This firm has the right to limit its liability for the pilot's act or default to the amount of the pilotage fee of that particular voyage multiplied by 300. This limitation also applies to the pilot when the damaged party has the right to demand damages directly from him, but he cannot limit his liability if he caused the loss or damage intentionally.[12] According to the latest state legislature of Washington, USA, to mention yet another example, a compulsory pilot licenced by the state is not personally liable for his acts, neglects or defaults above a fixed sum per incident. Beyond that he is to be regarded as a "borrowed servant" of the shipowner, and the latter is vicariously responsible for the pilot's fault and is able to limit his liability for damage caused by the pilot. Prior to this enactment the rule had been that a compulsory pilot was liable to third parties without limit, but that he could take out insurance and pass the premium on to the shipowner who engaged him. If the shipowner refused to accept the charge he had to indemnify the pilot fully in respect of all losses he might suffer, and the shipowner could not limit against the pilot as he could limit his liability if sued directly by the third party which suffered damage.[13]

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11 Provision of article 35 of the english Pilotage Act 1913 accepted also by Pilotage Act 1983.

12 Article 40 of the Maritime and Internal Waters Navigation Act. By the damaged party within the meaning of this provision are to be understood the shipowner or the operator of the piloted vessel.

This regime of liability would remain the same whether a pilot only gives advice to the master or conducts the vessel, bacause conduct does not mean command. And if we take into consideration the knowledge, skill, experience and qualifications which a pilot must possess, it is almost an insult to him to be considered only an adviser. Because a pilot is "a person whose profession calls for initiative, clear thinking, sound judgement, quick decision, great tact and a practical knowledge of handling ships in all conditions of weather, by day or night".[14] He is a man who takes charge of the piloted vessel.

Sažetak

PELJAR - SAMO SAVJETNIK?

Kroz komparativan prikaz pravne teorije i pomorske prakse autor dolazi do zaključka, da kvalifikacija pomorskog peljara uključuje mnogo više nego samo davanje stručnih savjeta zapovjedniku. Bitno je za peljara vođenje peljarenog broda, a pojmovi davanja savjeta i vođenja nisu istoznačni, kao što nisu istoznačni ni pojmovi vođenja, upravljanja i zapovijedanja. Autor zatim prikazuje režim odgovornosti peljara i brodara peljarenog broda pa zaključuje da se kvalifikacijom usluge peljara kao usluge vođenja broda ne mora mijenjati danas općenito prihvaćeno načelo odgovornosti brodara peljarenog broda za radnje i propuste peljara. Autor zatim sugerira de lege ferenda redefiniciju pojma peljarenja iz čl.34 ŠPUP-a.

13 Christopher Hill, op.cit., p.357.

14 W.Bartlett-Prince, PILOT - TAKE CHARGE, Glasgow, 1970, p.7.