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## PERILS OF PILOTING: CIVIL LIABILITY AND CRIMINAL PROSECUTION

By Paul G. Kirchner

Every time a pilot boards a ship, he or she knows that a moment's inattention, complacency, a wrong decision, or a simple mistake could lead to a potentially catastrophic vessel casualty with hundreds of millions of dollars in damages and/or loss of life, the end of the pilot's career, and financial ruin for the pilot and the pilot's family. Increasingly today, those types of unintentional errors can also lead to criminal charges and, possibly, a jail sentence and the public disrepute that goes along with a criminal conviction. When these are added to the physical dangers involved in piloting (every year, marine pilots around the world are killed or seriously injured on the job), no other occupation or profession presents such risks to its practitioners in the normal course of their activities.

Unbridled exposure to civil liability and to criminal prosecution can serve as a hindrance to governmental efforts to attract and maintain sufficient numbers of qualified pilots, thereby threatening a government's ability to maintain an effective compulsory pilotage system. For pilots, it can increase stress and job dissatisfaction. It can cause pilots to change how they conduct their piloting — in ways that are not in the best interests of safety or the economic health of their port. It can raise pilot fees and associated costs of the pilotage requirement and make the pilotage system less efficient and less responsive to the needs of ship operators. In sum, unrestrained civil liability and criminal prosecution of pilots for unintentional errors are not good for pilots, the maritime industry, or the public.

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## PERILS OF PILOTING: CIVIL LIABILITY AND CRIMINAL PROSECUTION

By Paul G. Kirchner

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### Civil Liability

Under the general federal maritime (judge-made) law in the United States, a pilot can be found liable in a civil suit for damages caused by the pilot's own negligence. This liability takes the form of a monetary judgment for damages found to have been proximately caused by the pilot's negligence. This is referred to as "civil liability."

In order to determine whether a pilot was negligent, the pilot's actions or behavior are compared to the standard of care to which the law holds the pilot. That is the standard of a reasonable and prudent pilot considering the function of a pilot and the services the pilot is expected to provide. This is a high standard.<sup>1</sup> "The law places a special duty on the pilot of a vessel based on his expertise and the responsibility he is charged with."<sup>2</sup> The pilot is presumed to possess superior local knowledge and advanced shiphandling and navigation skills.

On the other hand, a pilot is not a guarantor of the safe navigation of a vessel. A pilot is not responsible for acts of God, for unforeseen mechanical or equipment problems, or for the human errors of others. In addition, even where a casualty can be attributed to an action or decision of a pilot, liability is not imposed on the pilot unless the action or decision can be found to be contrary to what a reasonable, prudent pilot would have done under the circumstances. This aspect of a pilot's liability exposure has been described in a leading case on the subject as follows:

The duty of the pilot is to exercise that degree of care and skill possessed by the average pilot, and the mere fact that a different course of action might have

avoided a collision is not enough in itself to condemn him to legal liability. The pilot's decision to handle the movement as he did was that of a reasonably competent harbor pilot under the circumstances that existed. He exercised the due care and skill required of him and was not required to be infallible. Furthermore, a navigator is not charged with negligence unless he makes a decision which nautical experience and good seamanship would condemn as unjustified at the time and under the circumstances shown.<sup>3</sup>

Traditionally, vessel owners and third parties who claim to have suffered damage as a result of pilot negligence have not sought a judgment against the pilot. In most instances, U.S. pilots do not carry liability insurance in any meaningful amount. It is either not available to pilots at all or would be available only at a cost that far exceeds what pilots could afford or could be passed on to the users of pilotage services through the pilotage fees. The resources of the typical pilot are not sufficient to make recovery of damages from an uninsured pilot a worthwhile exercise, and the pilot's association has no liability for the negligence of one of its members.<sup>4</sup>

Additionally, vessel owners and their insurers have not sought to establish the pilot as the cause of an accident where, as in most accidents, there are actual or potential third-party claims. In those situations, the vessel, and

<sup>1</sup> See *Osprey Ship Management et al. v. Don Foster, et al.*, 2010 U.S. App. LEXIS 13540 (5th Cir. 2010): "compulsory pilots are held to a high degree of care. . . . This circuit has called this standard 'an unusually high standard of care.'"

<sup>2</sup> *Transorient Navigators Co. S/A v. M/S Southwind*, 524 F. Supp. 373 (E.D. La. 1981), *reversed on other grounds*, 714 F.2d 1358 (5th Cir. 1983), *on remand* 609 F. Supp. 634 (E.D. La. 1985). The district court's decision on remand contains an additional description of the pilot's duty of care: "A river pilot is required to exercise a special and high degree of care in navigating waters through which he travels." *Id.* at 637.

<sup>3</sup> *American Zinc Co. v. Foster*, 313 F. Supp. 671, 682 (S.D. Miss. 1970) (citations omitted). See also *Kingfisher Shipping Co., Ltd. v. M/V Klarendon*, 651 F. Supp. 204, 207 (S.D. Tex. 1986): "A compulsory pilot's decisions are not negligent if they are the decisions a competent compulsory pilot might make under the same circumstances; thus, due care and skill is required of a compulsory pilot but not infallibility." (Citations omitted.)

<sup>4</sup> The rule that a pilot association is not liable for the negligence of one of its members is perhaps the most venerable (and for the pilots, most cherished) principle in United States pilotage law. It was established by the U.S. Supreme Court in *Guy v. Donald*, 203 U.S. 399 (1906), and has been religiously followed in numerous cases since then. The rationale for this rule is that pilotage is a professional service provided by an individual, not by the pilot's association.

under some circumstances the owner/operator, is liable for the pilot's negligence. The vessel's insurance normally covers pilot error. As a result, even if a vessel owner or its insurance carrier succeeds in proving that an accident or other mishap was solely due to the fault of a pilot, that merely establishes the vessel's liability to injured third parties. Moreover, where there are third-party claims, it is in the vessel's interest not to be in an adversarial position vis-à-vis the pilot. In many instances, at least in the past, not only would the vessel, its owner, and the P & I carrier not proceed against the pilot and not seek contribution from the pilot for any eventual damages awarded, they would provide defense for the pilot.

These factors that have traditionally provided a disincentive to sue a pilot are present today to the same extent as in the past. Nevertheless, it is widely accepted within the U.S. piloting community that pilots are being sued more frequently than in the past. In addition, the normal calculation of the value of a civil suit against a pilot often does not apply in the case of a high-profile, major casualty such as one involving an oil spill or a death. In such a case, there are other factors that provide different incentives for vessel operators and third parties to target a pilot in a civil suit. As a result, pilots perceive a growing exposure to civil lawsuits and potentially ruinous damages awards arising from the normal pursuit of their profession.

Fortunately, a number of states that regulate pilots in the United States have recognized that unlimited exposure of pilots to civil lawsuits is not in the public interest. They have addressed the situation through statutory provisions dealing with pilot liability. These provisions, which override the general federal maritime law of liability for negligence, have been in place in a number of states for decades and in several other states are being implemented or actively considered today. Presently, ten of the twenty-four coastal states have some form of statutory mechanism to limit or allocate the civil liability of compulsory marine pilots. These ten statutory provisions can be divided into two basic categories: (1) dual rate systems, and (2) damages caps.

Two states, Oregon and California (San Francisco), have dual rate liability allocation statutes. Generally, under a dual rate system, each vessel requiring a state pilot is offered the option of two rates. The higher rate includes the cost of obtaining trip insurance covering a portion of the potential liability of both the pilot and the

ship in case of an accident caused by the pilot's negligence.<sup>5</sup> Alternatively, a vessel may elect a lower rate — and most vessels do so. The acceptance of the lower rate constitutes an irrevocable, binding agreement by the vessel, its master, owners, agents and operators not to assert any personal liability against the pilot or pilot association and to defend, indemnify, and hold harmless the pilot from third-party claims.

Seven states have opted for a simple monetary limit on the amount of damages that can be recovered from a pilot in a civil suit: Washington (\$5,000), Texas (\$1,000), South Carolina (\$5,000), Alaska (\$250,000), Maine (\$5,000), Alabama (\$5,000), and Mississippi (\$5,000). In a variant of that approach — in effect, setting the amount recoverable from a pilot for simple negligence at zero — the Louisiana statute provides: “[a]ny party seeking to hold a pilot . . . liable for damages or loss occasioned by the pilot's errors, omissions, fault, or neglect shall be required to prove by clear and convincing evidence that the damages arose from the pilot's gross negligence or willful misconduct.”<sup>6</sup> Every damages cap or dual rate statute exempts from its coverage damages due to willful misconduct, gross negligence, or certain other described higher levels of culpability.

While these provisions take different approaches to addressing pilot civil liability, the respective state legislatures, exercising the broad pilotage oversight responsibilities given to them by the federal government, have all decided that regulating civil liability for damages caused by pilot error is sound public policy. They each specifically concluded that limiting or allocating a pilot's civil liability: (1) is a beneficial component of a comprehensive pilot regulatory system; (2) is economically efficient and prevents unnecessary costs to the shipping industry; (3) will not adversely affect a third party's ability to recover damages resulting from pilot negligence; and (4) is not a disincentive to professionalism in pilot performance.

#### Criminal Prosecution

The international maritime community has been concerned for many years about the growing use of

<sup>5</sup> The amount of the insurance coverage provided with the higher rate is fixed and only covers the single pilotage assignment. These factors make this special type of insurance available—although very rarely purchased by vessel operators.

<sup>6</sup> LA. REV. STAT. ANN. § 34:1137.

criminal prosecutions in high-profile vessel casualties, particularly casualties involving environmental damage (oil spills) and deaths. In many of these cases, criminal charges have been brought against mariners for alleged unintentional errors, using negligence or strict liability theories more suited to civil suits. Often, the criminal statutes selected were never intended to apply to vessel casualties or simple human error.

One explanation for this trend is that criminal prosecution provides an outlet for public outrage and frustration over casualties that have very visible and tragic consequences. In this respect, the decision by a governmental authority to use criminal law is intensely political and often driven by the degree of media attention devoted to the casualty. Governments do not want to appear lax, unresponsive, or unconcerned. In addition, criminal prosecution of one or more individuals can provide a diversion from criticism directed at the government or at more systemic failures. Whatever the motivation and despite widespread opposition by the maritime community, however, criminal prosecution for marine casualties has become commonplace throughout the world.

Considering the indispensable role that pilots play in vessel navigation, it should come as no surprise that pilots would be included among those reached by this practice, although the number of criminal cases involving pilots is relatively small. There has been only one such case in the United States. A compulsory pilot was charged with violations of criminal laws in connection with the 2007 allision of the COSCO BUSAN with the Oakland-San Francisco Bay Bridge and the resulting oil spill. The pilot entered into a plea agreement with the federal prosecutors and was ultimately sentenced to 10 months in jail. Under the terms of that agreement, he pleaded guilty to two misdemeanor oil spill charges brought under two different statutes. Neither charge involved or alleged intentional wrongdoing.

The two criminal statutes used against the pilot in the COSCO BUSAN case are the ones typically used by federal prosecutors against mariners and other parties involved in vessel casualties resulting in oil spills. They are the statutes of choice precisely because the offenses do not require proof of criminal intent or of even recklessness or gross negligence; they are based

on simple negligence or strict liability.<sup>7</sup> Many other countries have similar statutes.

The Clean Water Act (more properly, the Federal Water Pollution Control Act, as amended by the Oil Pollution Act of 1990) prohibits any person from negligently discharging "oil or hazardous substances into or upon the navigable waters of the United States."<sup>8</sup> A violation is a "Class A Misdemeanor" punishable by up to one year in jail and a fine of up to \$100,000.<sup>9</sup> Judicial decisions have confirmed that a conviction requires proof of only simple negligence by the defendant, similar to the standard used in a civil suit seeking recovery of damages.

The other federal criminal statute often used by prosecutors for vessel casualties resulting in oil spills is the Migratory Bird Treaty Act (MBTA). The MBTA makes it illegal "at any time, by any means or in any manner," to take, kill, or possess any bird subject to a migratory bird treaty, unless pursuant to a permit issued by the federal government.<sup>10</sup> A violation is a "Class B Misdemeanor" punishable by up to six months in jail and a fine of up to \$15,000.<sup>11</sup> This is a strict liability statute. It is not necessary to prove, or even allege, negligence or any other degree of culpability. The prosecution only needs to prove that the defendant's conduct was a cause of the death of a bird to which the MBTA applies. As of 2010, 1007 species of birds had been listed by the federal government as protected by the MBTA. This includes virtually all birds typically found in or near navigable waters, and it is a fairly simple task to find one or more such birds killed by almost any oil spill.

<sup>7</sup> There are other criminal statutes that are used in the United States and elsewhere against mariners involved in vessel navigation or operations, but they are based on intentional wrongdoing or other types of traditionally recognized criminal misconduct. For example, there are federal statutes in the United States that provide for criminal penalties for operating a vessel while under the influence of alcohol or a dangerous drug, 46 USC § 2302(c), or in a "grossly negligent manner", 46 USC § 2302(b). Charges have also been brought for false statements to government officials, 18 USC § 1001(a)(2), or obstruction of justice (e.g., the destruction, alteration or falsification of records), 18 USC chapter 73, in the course of a federal government investigation of a vessel casualty.

<sup>8</sup> 33 USC § 1321(b)(3).

<sup>9</sup> 33 USC § 1319(c)(1); 18 USC § 3571(b)(5).

<sup>10</sup> 16 USC § 703.

<sup>11</sup> 16 USC § 707(a).



The use of the MBTA for criminal prosecution has been heavily criticized in cases involving oil spills from vessel casualties as well as a number of other activities that result in the unintended killing of migratory birds. The strict liability feature of the MBTA gives prosecutors wide discretion in its use. Any killing of a bird, no matter how innocent or incidental, could be prosecuted. Obviously, most such killings are not prosecuted. The decision of which bird killings to prosecute is often seen as either political or influenced by some other inappropriate consideration. In addition, there is no question that the MBTA was never meant for unintentional killing. It was enacted in 1918 in response to widespread commercial taking of birds for their feathers, which were then in great demand for women's hats.

An even older statute is the preferred choice for criminal prosecution in the case of the death of any person arising from the operation of a vessel. The Seaman's Manslaughter Statute (also known as the Mariner's Manslaughter Statute) is an 1852 law adopted as part of a series of measures to address fatal steamboat disasters. The statute provides, in pertinent part: "Every captain, engineer, pilot or any person employed on any steamboat or vessel, by whose misconduct, negligence or inattention to his duties on such vessel the life of any person is destroyed . . . shall be fined under this title [up to \$250,000] or imprisoned not more than ten years, or both."<sup>12</sup>

The standard used in applying the Seaman's Manslaughter Statute is simple negligence. "Any degree of negligence is sufficient to meet the culpability threshold, *however slight*."<sup>13</sup> For purposes of the statute, "[t]he term 'negligence' is defined as a breach of duty. A breach of a duty is defined as an omission to perform some duty, or it is a violation of some rule or standard of care, which is made to govern and control one in the discharge of some duty."<sup>14</sup>

To the author's knowledge, there has not been a compulsory pilot convicted under the Seaman's Manslaughter Statute in recent memory (although several cases misuse the term "pilot" to refer to a defendant who was a member of a vessel's crew). The most well-known

uses of the statute in recent years have been in the case of the 2003 allision of the Staten Island Ferry ANDREW J. BARBERI with a concrete pier in New York (11 passengers killed) and the 2006 allision of the ZIM MEXICO III with a container crane in the port of Mobile, Alabama (electrician working on the crane was killed when it collapsed).

In the latter case, the master of the ZIM MEXICO, Captain Wolfgang Schroder, was found to have been negligent, and thus in violation of the statute, for attempting to make a difficult turning maneuver in close proximity to the dock and crane without using a tug and with only the vessel's bow thrusters. He was sentenced to time already served in prison prior to the trial. The case received widespread coverage in the international maritime press, usually with protests over the perceived unfairness of the treatment of Captain Schroder at the hands of the U.S. criminal justice system. In the process of defending Captain Schroder and decrying the use of the Seaman's Manslaughter Statute to criminally prosecute him for alleged negligence, many press accounts of the case erroneously reported that Captain Schroder was merely relying on the advice of the local pilot. In fact, the jury hearing the case found that the unfortunate decision was the master's alone, that the pilot had wanted to use tugs, and that the master had failed to inform the pilot that use of the thrusters for such a maneuver had failed in the past and had been prohibited in various equipment manuals and operating directives.

In the ZIM MEXICO case, there was ample evidence to support the jury's finding of negligence, but that in no way detracts from the fact that using a criminal statute to prosecute an individual for simple negligence goes against traditional notions of fundamental fairness, justice, and proportionality in governmental responses to accidents. Captain Schroder may have made a mistake, but he did not knowingly or purposely commit a criminal act.

This case also provides a good example of how the inappropriate and excessive use of criminal law to respond to vessel casualties, even ones with tragic consequences, encourages those in the maritime industry to point fingers, engage in "spin," play the blame game, throw others "under the bus," and do everything else possible to avoid responsibility. In this respect, criminalization of maritime casualties is a primary contributor to the "blame culture" that

<sup>12</sup> 18 USC § 1115.

<sup>13</sup> *United States v. O'Keefe*, 2004 U.S. Dist. LEXIS 1494, 1511 (E.D. La. 2004), *aff'd* 426 F.3d 274 (5th Cir. 2005) (emphasis added).

<sup>14</sup> *O'Keefe*, 426 F.3d at 278.

currently plagues the maritime industry and stands in the way of efforts by all segments of the industry to work together toward a common goal of preventing casualties.

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