ASPECTS OF PILOTAGE - IS THERE A NEED FOR REFORM?

B H Giles QC

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B H Giles QC

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1. Introduction

1.1 This paper examines aspects of the law of pilotage. As requested by those in command, it addresses the question of reform or, more correctly, whether there is any need for reform.

1.2 It is appropriate to disclose at the outset that much of my career in the law has been as principal solicitor or counsel to the Auckland Harbour Board and, more latterly, Ports of Auckland Limited. It might therefore be thought that I have a certain predisposition in favour of regulation of pilotage and for limitation of liability. The counter balance lies in the fact that the other half of my maritime practice was as adviser to P&I Clubs. On that footing, it might therefore be thought that I have a certain predisposition in favour of maximising recovery rights for owners. This heritage is accordingly disclosed. Hopefully, the paper will be no less objective by virtue of past involvement for each side of the fence.

2. Scope of this Paper

2.1 It is not possible in the time available to review every aspect of the law of pilotage. Nor is that within my competence. Pilotage is a narrow but important aspect of maritime law. It is not free from complexity. It has an international aspect as part of the maritime industry.

2.2 In the course of this paper I propose to examine three principal areas:

i) Pilotage Regimes.

ii) Compulsory Pilotage.

iii) Liability implications.

2.3 I have found it instructive to adopt a comparative approach in the course of research and to examine systems adopted in other jurisdictions; to compare those with our own: and then to ask objectively whether there is anything seriously deficient about the current system which militates in favour of reform.

3. Pilotage - A Brief History

3.1 As the learned authors of **The Law of Tug, Tow and Pilotage**[1] note, pilots and laws requiring vessels to employ them have existed for hundreds of years. The US Supreme Court provides a pocket history in *Ex parte* **McNeil**[2]:

> The obligation of the captain to take a pilot, or be responsible for the damages that might ensue, was prescribed in the Roman Law. The Hanseatic ordinances, about 1457, required the captain to take a pilot under the penalty of a mark of gold. The maritime law of Sweden, about 1500, imposed a penalty for refusing a pilot of 150 thalers, one-third to go to the informer, one-third to the pilot who offered, and the residue to poor mariners. By the maritime code of the Pays Bas the captain was required to take a pilot under penalty of 50 reals, and to be responsible for any loss to the vessel. By the maritime law of France, ordinance of Louis the XIV, 1681, corporal punishment was imposed for refusing to take a pilot, and the vessel was to pay 50 livres, to be applied to the use of the marine hospital and to repair damages from stranding. In England (3 George, c.13), if a vessel were piloted by any but a licensed pilot, a penalty of £20 was to be collected for the use of superannuated pilots, or the widows of pilots.

3.2 It appears that as early as 1514 pilotage legislation or control (some might say monopoly) was granted by Henry VIII to Trinity House of Deptford Strond (colloquially "Trinity House") by way of a Royal charter giving that organisation all the powers necessary to control the operations of shipmen, pilots and mariners not only in the River Thames but throughout England[3]. In

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1 Parks and Cattel, **The Law of Tug, Tow and Pilotage** (3rd ed.,) 1994, 981. This volume is commended to those seeking access to a detailed and thorough review of pilotage generally.

2 **Ex parte McNeil** 80 US (13 Wall) 624 (1872)

3 Geen & Douglas, **The Law of Pilotage** (2nd ed) 1983 Chapter 1 generally. This edition precedes the current English legislation but covers English law up until 1983 most succinctly. The publication is now in 4th edition (a volume to which I have not had access).

the United Kingdom. Trinity House was effectively the leading and primary organisation administering pilotage from 1514 through until the enactment of the Pilotage Act 1983 when its powers were somewhat diminished.

3.3 Local Acts were also enacted in England for the purpose of establishing pilotage concessions similar to those enjoyed by Trinity House in other areas. The first Act relating to pilots appears to be 3 Geo 1 c.13 in 1717 which created the Dover Trinity House. In 1808, 48 Geo III c.104 was passed whereby London Trinity House became the largest pilotage authority in Great Britain. It was empowered to appoint sub-commissioners to examine and licence pilots at "such ports and places in England as they may think requisite", except where pilotage was already under the control of some statutory authority. This regime remained until the enactment of the Merchant Shipping Act 1854, Part V of which was devoted specifically to pilotage and which re-enacted most of the general provisions contained in earlier statutes.

3.4 In 1909 a Departmental Committee of the Board of Trade was appointed to conduct an inquiry into the law and administration in respect of pilotage. It made recommendations which saw the enactment of the Pilotage Act 1913 (UK), a general Act designed to lay down the principles governing pilotage; to define the constitution and limits of each pilotage authority; and to authorise bylaws applying to particular districts under the control of pilotage authorities. This legislation introduced the concept of compulsory pilotage in all districts, except in respect of certain categories of masters (those holding pilotage certificates) and vessels (naval and those under 100 tonnes GRT).

3.5 The English legislation was consolidated by the Pilotage Act 1983 (UK) and then reviewed in the form of the current legislation, the Pilotage Act 1987 (UK). The English regime has been influential throughout the Commonwealth, not only because of the close relationship many of our countries have enjoyed with Britain, but also, no doubt, because as one of the leading maritime centres of the world, its views, as reflected in legislation affecting matters maritime, have always been deserving of respect.

4. Historical Perspective - New Zealand

4.1 Some form of pilotage licensing and control has been part of the New Zealand legislative scene since at least 1863, when the Marine Boards Act 1863[4] was enacted. Prior to this the Merchant Shipping Acts (UK) applied. The 1863 legislation enacted specific provisions designed to continue the provisions of the Merchant Shipping Acts of 1854, 1855 and 1862 (UK). Successive enactments of the General Assembly of New Zealand continued or expanded pilotage regimes - refer Marine Act 1866[5]; Marine Act 1867[6]; Marine Act Amendment 1870[7]; Harbours Act 1878[8]; Harbours Act 1908[9]; Harbours Act 1923[10]; Harbours Act 1950[11].

4.2 It is the Harbours Act 1950, as last amended by the Harbours Amendment (No 2) Act 1988[12], which provides for pilotage in New Zealand as at the present time.

4.3 Throughout the period from the establishment of New Zealand as a colony until 1988, harbours have been administered and controlled either by commissioners or by harbour boards constituted under general or special Acts, such entities being a form of local government. Where no harbour board was appointed, harbours were administered under the provisions of the Act by the Minister of Transport.

4.4 In 1988 that regime changed with the enactment of the Port Companies Act 1988[13]. This legislation provided for the "port related commercial

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4 1863 No.28 (Paragraph 92 of the **Report of the Commission of Inquiry into Harbour Pilotage**. Coates, Chair, 1975 contains a useful summary of the early NZ position).

5 1866 No.52

6 1867 No.32

7 1870 No.42

8 1878 No.35

9 1908 No.75

10 1923 No.40

11 1950 No.34 now reprinted in RS Vol.2

12 1988 No 92

13 1988 No.91

undertakings"[14] of harbour boards to be vested in and transferred at value pursuant to an approved "port company plan"[15] to corporatised public companies (port companies), the entire shareholding which was initially retained by the predecessor harbour board. In the following year, as an aspect of a reform of local government undertaken throughout New Zealand, harbour boards were abolished and their residual responsibilities (together with residual property not transferred to port companies) became vested in regional councils[16]. Subsequently, some port companies have introduced an element of private shareholding and at one time the Government contemplated directing the eventual sale of local government shareholdings in the port companies, although that foreshadowed legislative philosophy was not warmly embraced by some communities and has not been implemented.

4.5 It is the advent of corporatised partly privatised port companies and the restructuring of the Ministry of Transport (Marine Division) which gives rise to the rhetorical question: "Should the regime of the past 150 odd years

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14 This term is expansively defined by s.2 as follows:

"Port related commercial undertaking", in relation to any Harbour Board -

(a) Means the property and rights of the Harbour Board that -

i: Relate to the activities of commercial ships and other commercial vessels, and commercial hovercraft and commercial aircraft, or to the operation of facilities on a commercial basis for ships, vessels, hovercraft, and aircraft of any kind, or

ii: Facilitate the shipping or unshipping of goods or passengers; and

(b) Without limiting the generality of paragraph (a) of this definition, includes -

i: The provision by a Harbour Board of any building or facility wherever situated for use in connection with the handling, packing, or unpacking of goods for shipping or unshipping through any port; and

ii: Items such as breakwaters and dredges and other items that, although they may not themselves be revenue producing and may have a number of purposes or uses, are nevertheless related to the operation of the port on a commercial basis; but

(c) Does not include any undertaking that is a statutory function or duty of the Harbour Board relating to safety or good navigation"

For a discussion on the interpretation of this section, see **Auckland City Council v Minister of Transport** [1990] 1 NZLR 264 C.A

15 Refer, s.22 Port Companies Act 1988

16 For example, in relation to the Auckland Harbour Board, see the Local Government (Auckland Region) Reorganisation Order 1989 [1989] NZ Gazette 2247

continue or is there need for and merit in reform?" Earlier this year the Ministry foreshadowed its intention to review pilotage and in September 1995 it issued a discussion paper on the topic[17].

4.6 In section 7 of its discussion paper, the Ministry addresses the appropriate framework for future law governing pilotage. It raises the question whether the function of pilotage could be performed effectively without specific legislation, minimum standards and liability provisions. In support of this approach it asks whether contractual arrangements, with attendant liabilities for non-performance, might provide the necessary incentive to achieve effective pilotage without legislation, given the interests of ship owners and port service providers to ensure that pilots are provided and used to protect their assets and to minimise insurance costs. The insurer's interest in encouraging the use of pilots to minimise the same liabilities and risk to properties insured is also seen as a factor, together with the added incentive arising from potential for third party claims[18].

4.7 The Ministry discussion paper then goes on to contrast those private law possibilities with the case for regulation based on:

- Reduced incentives in an unregulated system because of limitation of liability: "one ship companies" minimising exposure to compensation claims.

- The operation of insurance markets.

- High transaction costs.

- Unacceptability of even rare failure of market incentives - for example, a large oil spill.

- Variations in ship owner attitudes to discretionary pilotage[18].

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17 The discussion paper focuses on the Review of the Harbours Act 1950 which is available from the Ministry of Transport, Wellington.

18 Ministry Discussion Paper, s 7 2

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4.8 The Ministry concludes, and I agree with its tentative conclusion, that some form of pilotage regulation is necessary to ensure navigation safety and to avoid potential significant financial, safety and environmental consequences which can arise from shortcomings in the performance of pilotage functions[18].

4.9 From my consideration of the various texts[19] and reports[20] which have been conducted into pilotage, it is possible to identify the primary objectives of a regulatory pilotage regime. They are:

i) To promote the safe navigation of ships in restricted, congested and dangerous waterways, usually close to land.

ii) To reduce the risk of major accidents such as groundings and collisions.

iii) To protect property, in particular, ship and cargo.

iv) To maintain the commercial and public interest associated with the maintenance of an open and safe port. The wider financial and social implications arising from closure or blockage of a port by reason of a shipping casualty are far reaching.

v) To establish a system for the examination and licensing of competent pilots and their subsequent discipline.

vi) More latterly, to recognise and protect the environment.

vii) To remove or restrict distortions created by limitations of ship owner liability and lack of private market incentives to voluntarily engage in

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19 Parks & Cattell; Geen & Douglas, 43 Halsbury's, Laws of England, **Shipping** 4th ed, 1982 Laws of Australia **Transport**, 34.3, **Shipping**, **Merchant Shipping Acts** (British Shipping Laws Vol 2), Abbot, **A Treatise of the law relative to Merchant Ships and Seaman** (14th ed) to mention a few

20 Reference can usefully be had to The Board of Trade Report 1911 (Cd 5571); The Department of Trade Report "Marine Pilotage in the UK" 1974; The Royal Commission on Pilotage Report, Canada, 1968, the **Report of the Commission of Inquiry into Harbour Pilotage** Coates, Chair (1975)

safety measures by providing for compulsory pilotage where the public interest so requires.

5. What is a "Pilot"?

5.1 Before turning to a consideration of the three topics selected for discussion, it is useful to see how the law describes a "pilot".

5.2 Section 2 of the Harbours Act 1950 defines a pilot as follows:

> "Pilot" means any person not belonging to a ship who has the conduct thereof.

The source of this definition appears to be s.742 of the Merchant Shipping Act 1894 (UK) which provides an identical definition. This definition also appeared in the Pilotage Acts 1913, 1983 and 1987 (UK).

5.3 In **The Andoni**[21] Hill J endorsed the meaning given by Baron Tenterden (as recorded in the 2nd edition of Abbot) as:

> The name of a pilot, or steersman, is applied either to a particular officer, serving on board a ship during the course of a voyage, and having the charge of the helm and the ship's route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port.

5.4 It seems to be accepted by the cases[22] that the pilot must be actively involved in performing some function, generally described as "navigating". "To conduct" has been held to be synonymous with the verb "to navigate".

5.5 In my view the most helpful analysis is that contained in the Canadian Royal Commission Report[23] :

> This is composed of two elements:
>
> a) having the conduct of the ship, that is the action of navigating the ship;

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21 (1918) 14 Asp M.L.C. 326 at 328

22 **The "Nord"** (1916) 13 Asp M.L.C. 606. **The "Mickleham"** [1918] P 166. **Babbs v Press** [1971] 2 Lloyds Rep 383

23 **Report of Royal Commission on Pilotage**. Ottawa. 1968

b) not belonging to the ship, that is the relationship towards the ship.

"The expression 'having the conduct of the ship' is not defined and, therefore, it should be construed in its normal meaning, that is to have charge and control of navigation, in other words, of the movement of the vessel. Hence the substantive 'pilot' is synonymous with 'navigator' and the verb 'to pilot' is equivalent to 'to navigate' ... The verb 'to pilot' and the noun expressing the action of piloting, i.e. 'pilotage' are synonymous with 'to navigate a ship' and 'the action of navigating a ship' ... Therefore to be a pilot as defined in the Act is not a question of qualification, profession, certificate or licence: it is the fact of actually navigating a vessel (and not of being capable or authorized to navigate a vessel). A pilot, whether licensed or not, ceases to be 'pilot' when, for any reason, he is superseded by the Master or by the person in command. Similarly, if anyone is merely used as an adviser and is not entrusted with the navigation of the ship, he is not the pilot of that ship. Therefore the general provisions concerning pilots do not apply to him under such circumstances.

The first component of the definition is, therefore, the ordinary sense of the term, i.e. the person who at a given moment is navigating the ship is the pilot at that time. It is by the second component of the definition that the legislature has restricted the general meaning of the term to those navigators who are not part of the normal complement of the crew. Therefore, a 'pilot' as defined in the Act in addition to navigating the ship must also be a stranger as far as that ship is concerned.[24]

5.6 The question of who is in ultimate control of a vessel under pilotage has been the subject of much debate. Is the pilot "in command" or is the pilot advising by way of navigating, but subject to the master's overall right of command?

5.7 Whilst this subject is almost a topic in itself, it is my view that the weight of authority favours the latter approach. I suspect that this is a topic of interest and relevance more to lawyers than to masters and pilots. There is nothing to suggest that the relationship between master and pilot is other than[25]:

One of cordial professionalism and mutual respect.

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24 Part I, pp 23.24

25 Geen & Douglas, *op cit* ftnt 3 p 81

5.8 As stated by Miller J in **Atlee v The North Western Packet Co**[26]:

> The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean. In this latter case a knowledge of the rules of navigation, with charts which disclose the places of hidden rocks, dangerous shores, or other dangers of the way, are the main elements of his knowledge and skill, guided as he is in his course by the compass, by the reckoning, and the observations of the heavenly bodies, obtained by the use of proper instruments. It is by these he determines his locality and is made aware of the dangers of such locality if any exist. But the pilot of a river steamer, like the harbour pilot, is selected for his personal knowledge of the topography through which he steers his vessel. In the long course of a thousand miles in one of these rivers, he must be familiar with the appearance of the shore on each side of the river as he goes along. Its banks, towns, its landings, its houses and trees and its openings between trees, are all landmarks by which he steers his vessel The compass is of little use to him. He must know where the navigable channel is, in its relation to all these external objects, especially in the night. He must also be familiar with all dangers that are permanently located in the course of the river, as sand-bars, snags, sunken rocks or trees or abandoned vessels or barges. All this he must know and remember and avoid. To do this he must be constantly informed of changes in the current of the river, of sand-bars newly made, of logs or snags, or other objects newly presented, against which his vessel might be injured. In the active life and changes made by the hand of man or the action of the elements in the path of his vessel, a year's absence from the scene impairs his capacity, his skilled knowledge, very seriously, in the course of a long voyage. He should make a few of the first "trips", as they are called, after his return, in the company with other pilots more recently familiar with the river.

5.9 Notwithstanding that high onus of skill, it has always been accepted that the master does have the right, and on occasions the duty, to countermand the pilot, albeit that that would be undertaken rarely. Thus, Dr Lushington, in the *Peerless* said[27]:

> There may be occasions on which the master of a ship is justified in interfering with the pilot in charge, but they are very rare. If we encourage such interfering, we should

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26 88 US (21 Wall) 619 (1875. See also Parks & Cattel, *op cit* ftnt 1p.1003

27 (1860) 1 Lush 30; (1860) 167 ER 16

have a double authority on board, a *divisum imperium*, the parent of all confusion, from which many accidents and much mischief would probably ensue. If the pilot is intoxicated or is steering a course to the certain destruction of the vessel, the master no doubt may interfere and ought to interfere, but it is only in urgent cases.

In **Towerfield**, Lord Normand stated the rule to be[28]:

> The master is not merely entitled but bound to point out the compulsory pilot that he may be mistaken in an opinion he has formed (*The Tactician* [1907] P.244). He is also entitled, in order to avoid immediate peril, to take the navigation out of the hands of the pilot, but if he does so he must be prepared to show justification.

In the **Prinses Juliana**, Bucknill J observed[29]:

> ...if the master sees fit to take the navigation out of the hands of the pilot and countermands his orders, he must satisfy the court that he was justified in so doing, and the action which he took was at all events more calculated to avoid a collision that the manoeuvre which he countermanded.

5.10 Again, the Canadian Royal Commission Report draws the distinction between the pilot's "conduct of the ship" and the master's "command of the ship" in the following way[30]:

> 'To conduct a ship' must not be confused with being 'in command of a ship'. The first expression refers to an action, to a personal service being performed; the second to a power. The question whether a pilot has control of navigation is a question of fact and not of law. The fact that a pilot has been given control of the ship for navigational purposes does not mean that the pilot has superseded the master. The master is, and remains, in command; he is the authority aboard. He may, and does, delegate part of his authority to subordinates and to outside assistants whom he employs to navigate his ship, i.e. pilots. A delegation of power is not an abandonment of authority, but one way of exercising authority.

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28 [1951] AC 112

29 (1936) 18 Asp M L C 614

30 Report of Canadian Royal Commission pp.26-27 op cit note 20

5.11 This analysis is helpful in understanding the confused signals given in some of the cases as to the rights of the pilot and the desirability of avoiding divided control[31]. The 1911 **Report on Pilotage** recognised that division of control was a vexed question and it recommended:

> i) that the immunity from liability of the shipowner for the loss or damage caused by the compulsory pilot should be abolished.
>
> ii) that the legal relationship between the master and the pilot should be altered, i.e. "that the master should at all times be legally responsible for steering and safe conduct of the ship, and the pilot, whether he actually handles the ship or not, should be the master's expert assistant[32]

5.12 As we shall see shortly, that recommendation was accepted and has been a feature of most Commonwealth regimes ever since. It provided certainty and uniformity. But, irrespective, it is my view that the Canadian distinction reflects practical reality. The pilot's knowledge is obviously to be respected, but whether pilotage be voluntary or compulsory, the master retains an overriding responsibility and has the right to countermand[33].

6. Pilotage Regimes

6.1 Against that background, it is constructive to examine how the subject of pilotage is implemented in other jurisdictions. It has not been possible to access the Scandinavian and Japanese jurisdictions. It would be interesting to have some understanding as to how those countries, with significant maritime fleets, approach the subject. What becomes clear from a review of countries sharing some common heritage with New Zealand is that no-one leaves pilotage to "the free market" or to the "private law of contract".

New Zealand

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31 An interesting selection of conflicting dicta can be found in Geen & Douglas, ftnt 3 pp 89-90.

32 Report of Departmental Committee, 1911 p 78

33 For a discussion on responsibility for various areas (keeping a lookout, observing the Collision Regulations, Signals; whether to proceed; anchoring; radar; refer Geen & Douglas ftnt at 91-101.

6.2 The present New Zealand regime is contained in Part V of the Harbours Act 1950. As noted previously, this Act was amended in 1988 to accommodate changes made necessary by the advent of port companies. The present legislation recognises that the provision of the services of pilots in a pilotage district can be provided by "any person (including a harbour board or a port company)"[34]. "Pilotage districts" are declared by the Governor-General on the recommendation of the Minister of Transport[35]. No person may act as a pilot unless that person has been appointed or licensed by the relevant harbour board to act as a pilot within the nominated pilotage district[36]. The overall aim of s.212(1) was to remove the monopoly previously enjoyed by harbour boards and to introduce elements of competition by enabling any person to "provide the services of pilots". (These words are not unimportant when we come to examine the issue of liability). In **Commerce Commission v Port Nelson Ltd**[37]. McGechan J held that competition in pilotage was one of the objectives of the Port Companies Act 1988/Harbours Amendment (No 2) Act 1988 reforms and that Port Nelson Ltd had used its dominant position to try to prevent competition in refusing to hire tugs unless its own pilots were also hired.

6.3 The function of appointing and licensing pilots remains with the relevant harbour board or, in the absence of a harbour board, the Minister of Transport. An "appointed pilot" is one appointed by a harbour board, whether as an employee or otherwise. A "licensed pilot" is a qualified pilot licensed by the relevant harbour board, but employed by a port company or other person or who is self-employed[38]. Subsection (4) of 212 provides that no liability shall be imposed upon a harbour board in respect of any act or omission of a pilot by reason of the fact that the pilot was appointed or licensed or paid by the board. Nor is the board to be liable for acts and defaults of its own harbourmaster duly qualified and acting as pilot.[39]

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34 Harbours Act 1950, s.212(1)

35 *Op cit*, s.211

36 Supra n34 s.212(2)

37 (1995) 5 NZBLC 99-352, 103, 762:

38 Harbours Act 1950, s 212(3)

39 *Op cit*, s.212(5)

6.4 To be appointed or licensed, pilots must first pass examinations prescribed by the General Harbours (Nautical and Miscellaneous) Regulations 1968[40].

6.5 The licensing and examination procedure for pilots is contained in Part IX of the Regulations. There is rightly an emphasis on local knowledge. An examination board independent of the harbour board is appointed by the Director of Maritime Safety[41]. The board is to be composed of not less than two nautical officers, each of whom is to possess a certificate of competency as a master of a foreign going ship, and of at least one member who "must have a thorough knowledge of the harbour, river, or roadstead and its approaches in respect of which the candidate is to be examined". This recognises the reality of the comments of the US Supreme Court in **Atlee v N.W. Packet Co**[42] previously noted.

6.6 The qualifications required are specified by reg 59. It will not be productive to examine the technical requirements, all of which involve a working knowledge of general laws, bylaws, international signals, quarantine, collision, and handling and manoeuvring of ships. But there is focus on local knowledge. Regulation 59(2)(l) requires the candidate to be examined as to his knowledge of:

> (l) The harbour, river, or roadstead where it is proposed to employ him, the approaches thereof, the existing depths and the rise and fall of the tide in the harbour, river, or roadstead, the rate and direction of the tidal stream at various stages of the tide and any other sets and currents likely to be experienced, and the proper time of tide to get under way.
>
> (m) The lines of soundings
>
> (n) The banks, rocks and other dangers in the area where it is proposed to employ him, with directions for clearing them
>
> (o) The description and position of lights, buoys beacons

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40 SR 1968/239. Regulations 57-59 apply

41 *Op cit*, reg 58

42 Supra ftnt 26

6.7 This local knowledge component is an important factor and justification in both the licensing regime and the role of pilots. The place of pilotage in the maritime community is directed at safety - life, property and environment. As Miller J states in **Atlee**[43], it is unrealistic to expect any master of a foreign going ocean vessel to procure or retain detailed localised knowledge of the kind possessed by a pilot. Local idiosyncrasies cannot be permanently portrayed on charts or in computer bank memories, because they are susceptible to natural change - moving sand banks, altered currents, changing navigable channels, changing wind configurations, sunken trees and obstructions - to mention just a few.

6.8 It is worth stressing that notwithstanding the significant shift from local authority to corporatised commercial port entities, the licensing regime has remained, with regional councils administering the provisions of the Harbours Act 1950. In my view, this is as it should be. Port companies were established to operate as successful commercial businesses; to operate commercial ports. Their expertise is in port management and operation, not the examination and licensing of local pilots. Apart altogether from the anti-competitive implications of conferring a licensing regime upon the operator of a port entitled to employ pilots in competition with other providers of such services, it is, in my view, desirable to maintain an objective and independent licensing system. This provides users of the service with at least *prima facie* assurance as to quality and competence of pilots independently assessed against established criteria, something that may be lost in a completely unregulated environment.

6.9 To complete the narrative, the New Zealand regime requires a pilot to give a bond to the licensing authority (either, the board or the Minister) in the sum of $2,000 supported by an approved surety or sureties and conditioned to secure the liability of the pilot for any neglect or want of skill. Section 214B (which was enacted in 1959) expressly provides that a pilot who has given a bond shall not be liable for neglect or want of skill beyond the sum in the bond together with the amount payable to him on account of pilotage in respect of the voyage in which he was engaged when he became so liable.

43 Supra ftnt 26

6.10 Pilotage exemption certificates may be granted by a board to a master able to demonstrate his competency to pilot ships within the pilotage area attached to the harbour under the control of the Board. Section 232(46) authorises a harbour board (not a port company) to enact bylaws making pilotage compulsory in any specified part or parts of a pilotage district.

Australia

6.11 A comprehensive summary of the Australian regime can be found in Vol 34 of the Laws of Australia. **Transport**. paragraph 191 *et seq.*

6.12 The Australian regime is not dissimilar from that applying in New Zealand.

6.13 It appears that the licensing regimes are established by State and Northern Territory legislation. The licensing of pilots is accordingly regulated and the concept of compulsory pilotage is embraced, particularly in (and for understandable reasons) the Great Barrier Reef area.[44]

6.14 The relevant legislation is as follows:

i) New South Wales - Maritime Services Act 1935; Pilotage Act 1971.

ii) Northern Territory - Darwin Port Authority Act 1981; Marine Act 1981.

iii) Queensland - Harbours Act 1955; Marine Safety Act 1994.

iv) South Australia - Harbours Act 1936.

v) Tasmania - Marine Act 1976.

vi) Victoria - Marine Act 1988.

vii) Western Australia - Pilots Limitation of Liability Act 1962; Shipping and Pilotage Act 1967.

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44 34 *Laws of Australia*. **Transport**. Section 34 3 para 193

6.15 Not all of this legislation has been available to me to analyse. It is clear though that each State provides for a system by which pilots are examined and become "qualified" or "licensed". Compulsory pilotage is provided for and pilots are given immunity from liability.

The United Kingdom

6.16 The current legislation is the Pilotage Act 1987 (UK).[45] Section 2 obliges each "competent harbour authority", as defined, to keep under consideration whether any, and if so what, pilotage services need to be provided to secure the safety of ships navigating in or in the approaches to its harbour and whether, in the interests of safety, pilotage should be compulsory for ships navigating in any part of that harbour or its approaches. A harbour authority is obliged by s.3 to provide such pilotage services as it considers necessary.

6.17 Unlike the New Zealand regime, the appointment and approval of pilots is left to the harbour authority itself. Section 3(1) provides that a harbour authority may authorise such persons to act as pilots in any area within its jurisdiction as it considers are suitably qualified to do so. By s.3(2) the Authority may determine the qualifications in respect of age, physical fitness, time of service, local knowledge, skill, character and otherwise to be required from persons applying for authorisation, and provide for the examination of such persons. A harbour authority is empowered to suspend or revoke any authorisation granted if it appears that the authorised person has been guilty of any incompetence or misconduct affecting his capability as a pilot, or if the person has ceased to have the qualifications required. (s.3(5)).

6.18 The British legislation also recognises a person known as a "recognised assistant pilot", being a person who acts as an assistant to pilots in a pilotage district, but who is not the holder of a licence.[46] There is no provision for bonds, but a limitation of liability regime is enacted.

6.19 Part II of the Act provides specifically for pilotage in areas declared by the harbour authority under s.7(1) to be compulsory pilotage areas.

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45 1987 c21

46 Supra note 45, Section 3(10)

Canada

6.20 The current legislation is the Pilotage Act R S.C. 1985. Chap. p-14.

6.21 This legislation establishes a pilotage authority whose objects are to establish, operate, maintain and administer, in the interests of safety, an efficient pilotage service within pilotage regions set out in a schedule to the Act. Section 20 authorises the Authority to make regulations for, *inter alia*, establishing compulsory pilotage areas, prescribing ships or classes of ships subject to compulsory pilotage, and providing for exemptions.

6.22 The Authority is also empowered to prescribe the qualifications necessary for a pilot's certificate, to determine whether a person who applies for a licence or certificate meets the requirements, and to provide for the circumstances under which holders of certificates may be required to undertake further training to meet new qualifications.

6.23 Provided the Authority is satisfied that the applicant has a degree of skill and local knowledge of the waters of the compulsory pilotage area applicable to that in which the applicant will operate, the Authority issues licenses or pilotage certificates where the qualifications established by the Authority and by the Governor in Council are met

6.24 The Authority is given express disciplinary powers by way of suspension or cancellation of a licence or pilotage certificate upon specified grounds under the provisions of s.27.

6.25 The Canadian legislation does not make any provision for bonds although s.40 limits the liability of a licensed pilot for damages or loss occasioned by fault, neglect or want of skill to $1,000.

The United States

6.26 The American regime necessarily recognises the overlapping jurisdiction of both federal and state governments in relation to pilotage. Federal regulation is authorised by the Commerce Clause of the US Constitution.[47]

[47] See, Parks & Cattel, supra ftnt 1 p 992

However, from the time of the First Congress in 1789, regulation of local pilotage grounds has been left to individual states. This is in recognition of the fact that different schemes and standards may be required depending upon local geographic and commercial conditions.

6.27 Vessels engaged in coast-wise trade must be piloted by holders of Coast Guard issued licences (Federal), while vessels involved in foreign trade (including US flag vessels sailing on register) must employ state licensed pilots. State governments licence "independent persons who go on board at a particular place for the purpose of conducting a vessel through a particular stretch of waters or pilotage grounds".[48] The most recent affirmation of constitutionality is contained in **Jackson v Marine Exploration Co Inc.**[49] The report notes that as at 1979 at least 23 states have such laws as part of a comprehensive pilotage regulatory system.

6.28 It has not been possible to gain access to pilotage regulations of individual states. But it appears that the common thread running through the varying systems is one whereby commissioners examine and licence pilots, set pilotage rates and promulgate regulations, including those for compulsory pilotage for ports within their jurisdictions.

6.29 It appears that some states have embraced the concept of bonding licensed pilots as a means of compensating any party injured by reason of the negligence of a pilot[50]

7. Reforms in this Area : Is there a Case?

7.1 That comparative analysis demonstrates a degree of commonality or uniformity as to philosophy. In each of these jurisdictions, the state has maintained some form of regulatory control over both the licensing of pilots and the enforcement of compulsory pilotage in particular areas.

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48 *Op cit.* p.992

49 583 F 2d 1336 (5th Cir 1978), 1979 AMC 1331

50 Parks & Cattel, supra ftnt 1 p 1013

7.2 The reason for that is, I suggest, obvious. As was stated in **Jackson v Marine Exploration Co Inc**:

> As a profession, pilotage owes its existence to infinite variety of navigation hazards - current, tides, sand bars, submerged objects, weather conditions and the like - that mark the harbours and rivers open to commercial vessels. No matter how competent the Master of a ship is at open sea, he cannot be expected to be familiar with the local navigation hazards of each harbour and river that he encounters as he conducts the ship in the course of the maritime trade

7.3 A pilotage regime recognises that in the interests of life, safety, the environment and the economy, local conditions are best left to those with local knowledge and local skills. In my view, the state has a legitimate interest in regulating and maintaining up to date qualification requirements for pilots. Equally, the state has an interest in ensuring that ship owners be compelled to use pilots possessed of local knowledge, where safety and the public interest so requires.

7.4 There must be some system for licensing in order to set standards and to give confidence to the users of pilotage services as to the competence of the individuals upon whom they depend. There must also be some system independent of employment (especially in New Zealand which now permits self-employed pilots) for discipline by way of suspension and/or cancellation of pilot licences.

7.5 It is unlikely, in my view, that the desirable objectives of pilotage would be embraced on a voluntary contractual basis. It is an area where the free market will not operate. From the ship owner's perspective, especially the marginal operators, there will be financial cost saving incentives to avoid incurring the cost of pilotage in reliance upon the competence of masters and chief officers and the adequacy of charts and computer programmes.

7.6 In the New Zealand climate with corporatised port companies, and others now entitled to provide the services of pilots, there will, I believe, be real difficulties in leaving pilotage to the law of contract. There are obvious practical difficulties in the contractual context. Pilots and their employers can be expected to address limitation or exclusion of liability. This will require certainty. Written contracts are the only effective means of providing for

certainty. But pilotage services are ordinarily ordered up through agents. Masters can be expected to be rather disinterested in reading and/or negotiating written contracts prior to entering port. Standard term contracts require notice to and acceptance by all users.

7.7 It seems to me that:

i) Given the informality of the way masters/agents/pilots operate, the introduction and administration of a written contract system will render it unlikely of success. Oral contracts will be full of uncertainty.

ii) Whether port agents would have actual or ostensible authority to bind all interests will be open to question, especially on limitation/exclusion of liability issues. The port agent may be the agent of the owner or of one or other of the charterer or sub-charterer - but not of all.

iii) Requiring a master to sign a contract prior to providing the service of a pilot is unrealistic. In case of refusal, is the vessel to be turned away? How does that facilitate trade and the economy? If the master signs, is there a duress argument? How can persons affected be sure that there will be an ability to recover if loss occurs?

iv) The master may not necessarily be the agent of the owner. This will depend on the kind of charter - bareboat, time, voyage. How will losses be adjusted between owner/charterer if recovery rights are forgone? Would accepting limited or no liability be within the masters authority in any event?

v) Pilots/port companies will not necessarily know or have access to information as to who owns or controls a vessel entering port.

vi) Standard terms and conditions must be brought to the attention of the person to be bound prior to providing the service.

7.8 I conclude that technical standards for pilotage should be set by legislation and maintained. The licensing of a pilot should remain with a body independent of port operators and providers of pilots. The Canadian

legislation has much to commend it with the introduction of apprenticeships for pilots and ongoing re-education programmes. Whether regional councils are the most appropriate bodies to licence pilots is debatable. Harbour boards at least had the advantage of consisting of people whose focus was harbour administration and port operation. Regional councils have much broader responsibilities. I incline to the view that it might be wiser for the state to administer the licensing regime itself. This must include ability to suspend or revoke licenses and, in appropriate cases, provide penal sanctions.

7.9 There must be room to debate the need for the pilot bond which New Zealand, together with some American States, has retained. This was contemplated by the 1975 Commission of Inquiry, at para 128 of its report. It is unlikely that $2,000 (the amount currently specified by s.214A and being the maximum amount of liability of a pilot for neglect or want of skill pursuant to s.214B) makes any meaningful contribution to damage or loss resulting from pilot negligence. The British and Canadian systems of simply specifying a statutory maximum liability would seem to me to be more sensible.

7.10 The fact that all of the jurisdictions with whom we share some heritage have legislation governing licensing of pilots and compulsory pilotage is evidence that different sovereign powers have identified the public need for such control. Whilst we should not slavishly follow others we should, I think, be cautious about change for change's sake. I can see no benefit, but considerable risk, in moving to a free market philosophy. I conclude that the Ministry's tentative view is correct and no case for far-reaching reform can be made out in the area of licensing and compulsion.

8. Liability Regimes

8.1 The question of liability for pilot negligence has been the subject of much consideration by both the Courts and Parliaments over the last century. Three areas arise for consideration:

i) The pilot's personal liability.
ii) The owner/master's liability.
iii) The pilot's employer's liability.

The last two categories can be dealt with together and involve a consideration of voluntary and compulsory pilotage.

9. As to the Pilot

9.1 It is noteworthy that most Commonwealth regimes examined have statutory provisions protecting pilot from open-ended liability for fault or negligence.

9.2 Thus in:

United Kingdom - By s.22(1) Pilotage Act 1987 (UK) the liability of a pilot for any loss or damage caused by any act or omission whilst acting as a pilot shall not exceed £1,000 and the amount of pilotage charges in respect of the voyage during which the liability arose.

Canada - Section 40(1) Pilotage Act R.S.C. 1985 limits a licensed pilot's liability in damages for loss occasioned by fault, neglect or want of skill to C$1,000.

Australia - States provide either no personal liability or a maximum of A$200 plus the amount of pilotage.

New Zealand - Provided the pilot has given a bond in accordance with s.214A (NZ$2,000) he shall not be liable for neglect or want of skill beyond the sum in the bond, together with the amount payable to him on account of pilotage in respect of the voyage in which he was engaged when he became so liable - s.214B.

United States - At common law a pilot is liable for personal negligence. However, a number of States have enacted legislation to provide various forms of protection to the pilot. In some States the bonding system has been adopted; others have opted for statutory limits.[51]

9.3 Professor Parks provides details of the approach of some of the US States:

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51 *Op cit.* p.1011, 1014

i) Texas - limits liability to US$1,000.

ii) South Carolina - excludes liability other than for gross negligence or wilful misconduct. (This formula is, with respect, unhelpful. It leaves the pilot open to suit on an allegation that the degree of negligence was "gross" or that the misconduct was "wilful", and raises the vexed question as to the difference, in the civil law context, between negligence and gross negligence.)

iii) Delaware - No limitation of liability except where operating under a specified system known as Vessel Traffic System (by which the pilot provides guidance to incoming ships from a fixed tower) in which case the pilot is only liable for gross negligence or wilful misconduct.

iv) Oregon - Has enacted an interesting system whereby the vessel owner has an election. He may take up pilotage (whether voluntary or compulsory) on the basis of a tariff which includes pilot liability insurance up to a sum specified by the vessel, in which case the pilot becomes liable up to that sum for negligence. Alternatively, the vessel may take up the pilot's service without insurance cover, in which case the pilot is deemed to be in a master/servant relationship with the owner and is indemnified for all loss or damage other than any caused by gross negligence or wilful misconduct.

9.4 I believe there are sound practical and policy grounds for limiting or exempting the pilot from personal liability for negligence.

9.5 At a practical level, reality should prevail. The prospects of an individual pilot being possessed of assets or resources capable of making any significant contribution to potential damage to ship, cargo, port, environment and third parties in a casualty situation must be fairly remote. It should not be the aim of the law or the maritime community to punish or penalise human error to this degree in this context. This is particularly so if there is a system for review of the pilotage licence or criminal sanction.

9.6 At a policy level, it is desirable to encourage the establishment and maintenance of a professional and competent body of pilots. Personal liability is likely to be inimical to that objective, and that objective is in the

public interest - using that concept broadly to include owner, cargo interest, port operator, and the public generally.

9.7 The availability of insurance does not provide a complete answer. For the individual the cost of liability insurance, if available, will be significant. The potential liability is huge - the pilot has to take cover for worse case scenario involving a valuable ship, cargo, pollution impact and potential third party liability. In the New Zealand climate as created by the Port Companies Act 1988 and the Harbours Amendment (No 2) Act 1988, it would seem that competition in the provision of pilot services (no longer the monopoly of the port operator) is to be encouraged. That will hardly be achieved if individuals or small companies desiring to provide pilotage services have to carry the overhead cost of liability insurance or assume the risk of potentially ruinous personal liability regardless of the extent of fault. The difficulty of securing cover at manageable cost was a feature in **Commerce Commission v Port Nelson Ltd.**[52] Without cover the community is at risk.

9.8 One also has to recognise the very real disparity between potential income derived from the provision of the services of pilots and the potential liability exposure, which will be measured on the basis of value of vessel, cargo, environment etc. Without some form of liability protection, entry into the pilotage profession is hardly likely to be commercially attractive. Public interest considerations in the maintenance of such a service therefore require the continuation of some form of protection. Without it, the reforms mentioned above (elimination of monopolies) may well be frustrated.

9.9 As already noted, whether the New Zealand bonding philosophy, abandoned in England under the Pilotage Act 1987 (UK), serves any real purpose, is open to debate. On one hand the availability of access to the bond once liability is established may be seen to give some comfort to claimants. But is this realistic given the potential claims? It has not been possible to procure information of the number of occasions resort to the pilot bonds has been had, but I have not encountered such a situation in 25 years of advising harbour boards, port companies and P & I Clubs. There is, I think, much to be said for the simplicity of the English and Canadian approach whereby a maximum limit of liability is specified by statute.

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52 Supra, ftnt 37

10. The Position of the Owner/Master/Employer of the Pilot - Voluntary Pilotage

10.1 The law is clear that where pilotage is voluntary, the owner is liable for any negligence of the pilot.[53] The position is succinctly stated in **The Esso Bernicia**[54] :

> At common law a shipowner was liable for the negligence of a pilot voluntarily engaged just as he was for the negligence of the Master. Such a pilot was treated as the servant of the owner

10.2 In **The Esso Bernicia** an attempt was made to challenge this established judicial approach on the basis that the Courts had incorrectly categorised the voluntary pilot as a servant of the owner. It was argued (in reliance upon observations of Lord Denning in **Cassidy v Minister of Health**[55]) that the pilot was an independent contractor and that the shipowner owed a non-delegable duty to third parties to navigate carefully, such that for any default by the pilot causing loss to third parties the shipowner was responsible, but not as master of the pilot. It was contended that the pilot remained the servant of his employer (Shetland Islands Council as harbour authority) who remained vicariously liable. This argument did not prevail upon their Lordships, who preferred to adhere to the established position. Lord Jauncey stated[56]:

> The critical question is whether the owner can recover from a general employer of the pilot. My Lords, I do not consider that the observations of Denning LJ warrant the proposition which counsel sought to derive therefrom. *Cassidy v Ministry of Health* was a case of negligent medical treatment in which Denning LJ made passing reference to a pilot "under a contract for services." There is no doubt that a pilot was in many cases an independent contractor to the extent that he made his services

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53 See, for example, **The "Neptune the Second"** (1814) 1 Dods 467; 165 ER 1380; **The "Eden"** (1846) 2 W Rob 442 166 ER 822. **The "Cavendish"** [1993] 2 Lloyds Rep 292; **Thom v J&P Hutchison Ltd** 1925 S C 386 at 393

54 [1989] 1 AC 643 at 682

55 [1951] 2KB 343

56 [1989] 1 AC 643 685

available to a shipowner and received not a salary but pilotage dues payable in respect of his services under such deductions as the pilotage authority had determined by byelaw made under section 17 of the Act of 1913. However, the fact that he was an independent contractor did not alter the common law rule that when he had been engaged voluntarily by a shipowner he was, so far as any acts or omissions on his part were concerned, the servant of the shipowner. The rule operated whether he was in the general employment of a pilotage authority or whether he was an independent contractor. Denning LJ neither referred nor had occasion to refer to the foregoing rule nor to the line of authority which I have mentioned above. In these circumstances his observations cannot be taken as in any way qualifying the general statement of Lord Porter in *Workington Harbour and Dock Board v Towerfield Owners* [1951] A.C. 112, 133-134, that in terms of section 15 of the Act of 1913 an owner is responsible for damage to his own ship due to faulty navigation of a compulsory pilot. My Lords, nothing that has been said on behalf of Hall Russell persuades me that the rationale of the line of authority to which I have referred was wrong or that there is any exception to the general application of section 15 of the Act of 1913 to damage suffered by a ship under pilotage. Subject only to what I have to say in the context of Hall Russell's second submission, the pilot is to be considered for all purposes as the servant of the owner. I would only add that if Hall Russell's argument were correct there would follow the curious result that the doctrine of respondent superior would apply to two different masters in respect of two different claims of damage arising out of a single act of negligence. It is a well recognised principle exemplified in cases involving crane-drivers, that a servant in the general employment of A may, for a particular purpose be treated as in the *pro hac vice* employment of B. However, there is no principle which permits a servant to be in the de jure employment of two separate masters at one and the same time. As Lord President Emslie said in this case, 1988 S L T 33, 48: 'no man can serve two masters.' For all these reasons I reject Hall Russell's first argument as unsound.

10.3 Closer to home, the High Court of Australia adopted the same approach in **Ocean Crest shipping Company and Pilbara Harbour services Proprietary Limited**[57]. Gibbs CJ accepted that "the law does not recognise a several liability in two principals who are unconnected"[58] relying on **Laugher v Pointer**.[59] Professor Atiyah is critical of this offered

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57 (1985) 160 CLR 626

58 641

59 (1826) 5B & C 547; 108 ER 204, 208

justification and maintains that both employers could be liable when a servant is acting independently for both of them, because the servant may be acting in the course of his general employment and his temporary employment. Atiyah does, however, accept that the question is settled the other way on the authorities.[60]

10.4 Gibbs CJ preferred to adhere to the traditional line that where the services of the servant of one employer are temporarily used by another, both employers will not be liable. The liability may transfer *pro hac vice* to the temporary employer such as to render him liable for any negligent acts.

10.5 A similar position was adopted by New Zealand as long ago as 1883, where Williams J held in **Otago Harbour Board v Cates**[61]:

> If pilotage is not compulsory, I think that the pilot in taking charge of the ship would take charge of it as the deputy of the owners, and that the Board would not be responsible for injuries done to other vessels by his negligence. It is abundantly clear that in such a case the owners would be responsible for the acts of the pilot, because they voluntarily gave their vessel in charge to a person of their own selecting. The owners being liable, and the maxim "*respondeat superior*", applying as between them and the pilot, I do not see how the Board could also be liable, although the pilot were the general servant of the Board

11. The Position of the Owner/Master/Employer - Compulsory Pilotage

11.1 At common law the owner was not liable for the negligence of a pilot taken on board in a situation of compulsion. The rationale for this was that the necessary master/servant relationship could not be said to exist where the owner/master was denied any choice.

11.2 This position was eventually enshrined in s.633 of the Merchant Shipping Act 1894 (UK) which stated:

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60 Atiyah Vicarious Liability in the Law of Torts (1967) p 156-157

61 (1883) 2 NZLR 123

> An Owner or Master of a ship shall not 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 that ship within any district where the employment of a qualified pilot is compulsory by law

11.3 A complementary provision relating to damage to harbour works was contained in s.74 of the Harbours, Docks and Piers Clauses Act 1847.

11.4 These provisions did not find public favour. Hardship was not infrequently visited upon innocent third parties whose property was damaged, but who had difficulty in making any effective recovery.[62] Following the consideration of the law of pilotage in 1911, the UK Parliament enacted s.15(1) of the Pilotage Act 1913 (UK) 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 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.

11.5 This provision was re-enacted as s.35 of the Pilotage Act 1983 (UK). A similar but not identical provision was enacted as s.16 of the Pilotage Act 1987 (UK) as follows:

> 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.

11.6 Before examining the judicial treatment of these sections, it is useful to consider the legislative approach of other maritime nations with whom we share a common heritage.

11.7 Australia introduced an identical provision as s.410B(2) of the Navigation Act 1912. In 1959 New Zealand enacted a similar provision as s.231A of the Harbours Act 1950. (There is little helpful guidance in Hansard as to why we took so long to abolish the defence of compulsory pilotage.) The Canadians

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[62] Green & Douglas p 70, supra ftnt 3

currently have very comprehensive provisions exempting all and sundry except the owner or master. The following provisions of the Pilotage Act 1970-72 demonstrate both the clarity and breadth of their regime:

> 39. Her Majesty, or an Authority is not liable for any damage or loss occasioned by the fault, neglect, want of skill or wilful and wrongful act of a licensed pilot or the holder of a pilotage certificate.
>
> 40. (1) A licensed pilot is not liable in damages in excess of the amount of one thousand dollars for any damage or loss occasioned by his fault, neglect or want of skill
>
> 41. Nothing in this Act exempts the owner or master of any ship from liability for any damage or loss occasioned by the ship to any person or property on the ground that:
>
> a) The ship was under the conduct of a licensed pilot; or
>
> b) The damage or loss was occasioned by the fault, neglect, want of skill or wilful and wrongful act of a licensed pilot.

11.8 The United States appears to maintain the defence of compulsory pilotage abrogated by Commonwealth legislation. In the absence of the free choice which compulsory pilotage removes, neither the master nor owner is liable *in personam* for the negligence of the compulsory pilot - provided the pilot is solely at fault. However, any contribution by the master or crew renders the owner vulnerable *in personam*.[63]

11.9 But this apparent exemption is illusory more than real because the US Courts maintain liability against the personified vessel *in rem* - whether pilotage be compulsory or non-compulsory.[64]

11.10 Courts of different jurisdictions have construed the s.15(1) Pilotage Act 1913 (UK) equivalents as imposing responsibility upon the owner for acts or defaults of the pilot under a situation of compulsory pilotage.

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63 Parkes & Cattel, p.1025, supra ftnt 1

64 *Op cit* at 1023

11.11 In **Fowles v Eastern & Australian Steamship Co Ltd**[65] the Privy Council had taken the view, even in the absence of the statutory provision just referred, that the Government (which licensed pilots and also employed some as civil servant employees of the Marine Board) had no greater obligation than to provide qualified pilots. The fact of their being the licensing authority, was not considered relevant. What was relevant, was that the pilot was to be regarded as an independent professional man in discharging his skilled duties and accordingly the Government did not attract liability as employer.

11.12 In **Towerfield**[66] the effect of s.15(1) was considered by the House of Lords. Much turned upon the meaning to be given to the word "answerable". It had been argued by the owners that the section did not apply to claims made by the shipowner, only to claims made against him. Their Lordships held[64]:

> In the present case the damage to the *Towerfield* was undoubtedly caused by faulty navigation. but when the Act says that the owner shall be answerable for the faulty navigation. it has to be determined whether 'answerable' means more than damage done by the ship. Either view, no doubt, is theoretically possible. but I do not think that read in its context the use of the word 'answerable' would naturally convey the suggestion that though the shipowner is liable for any damage done by the pilot's fault. yet he can recover his own damage in full. 'Answerable' as I think, simply means responsible and a shipowner who through a compulsory pilot is responsible for faulty navigation is responsible for damage to his own ship as well as for injury to the property of another. It follows that neither pays for the damage which has been done to the other, nor can either recover his own damage from the other who is implicated.

(The harbour authority was ultimately held entitled to recover from the shipowner the cost of damage to harbour works pursuant to s.74 of the Harbours, Docks and Piers Clauses Act 1847)

11.13 In **Pilbara** the High Court of Australia gave very careful consideration to the Australian equivalent, s.410B Navigation Act 1912. The case is interesting in the context under consideration because the Port of Dampier was being operated by a private company under statutory authorisation. In an effort to

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65 [1916] AC 556

66 (1950) 84 Ll.L.R. 223, 254-255

overcome **Fowles**, it was argued that Pilbara, as operator of the port, employer of the pilot and sole provider of the pilot services, was ultimately responsible for any neglect by the pilot. **Fowles** was sought to be distinguished on the basis that Pilbara was a private enterprise and had embarked upon the business of pilotage.

11.14 The majority of the Court adhered to the approach in **Fowles**, although each on slightly differing bases. Gibbs CJ considered that the vital question was whether the person who committed the tort (the pilot) was acting in the performance of a duty imposed by law, or whether his authority to act was derived from his employment. It did not matter whether the pilot was a public officer. The Chief Justice did not consider **Fowles** was in conflict with modern principles as to vicarious liability. Even though the person who committed the tort was employed under a contract of service, the employer would not be liable if the tortfeasor was executing an independent duty which the law cast on him, (following **Field v Nott**[67] and **AG v Perpetual Trustee Co Ltd**[68]). His Honour was comforted by the separate existence of s.410B, holding that it recognises that a servant cannot have two masters, and that its intent was to transfer responsibility to the owner. In addition, Gibbs CJ held that it was possible to reconcile compulsory pilotage within the general/temporary dual employer test preferred by Professor Atiyah. At page 642 he held:

> It might be thought at first sight that it is difficult to reconcile the fact that the shipowner is liable for the negligence of the pilot with the proposition that the pilot while navigating the ship is executing an independent duty that the law casts upon him. It may be that originally liability was imposed on the shipowner for reasons of policy, so that a person injured by the negligence might have recourse against a defendant more likely to be able to meet an award of damages than the individual pilot himself would be. However, a reconciliation of the two propositions may be effected: so far as the pilot's general employer is concerned, the pilot is executing an independent legal duty conferred on him by law and his powers are not derived from the general employer; on the other hand, it may be said that the pilot's power does derive at least in part from the authority given by the shipowner - in that regard it will be remembered that the master has (though only in exceptional circumstances) power to

67 (1939) 62 CLR 660, 675

68 (1952) 85 Lloyd's Rep 283-284

take control of navigation out of the hands of the pilot (see cases cited in Geen and Douglas. *Law of Pilotage*. 2nd ed (1983). pp.89-90 · a power confirmed by sub-s.(1) of s.410B. Even if the liability of the shipowner is anomalous. there is nothing in the judgments of the cases that dealt with the liability of the shipowner that casts any doubt on the principle applied in *Fowles v Eastern and Australian Steamship Co. Ltd.*

11.15 Wilson J had no difficulty in upholding shipowner liability in the light of s.410B. His Honour did not accept that the fact of Pilbara being a private company made any difference. The provision of compulsory pilotage and the levying of pilotage rates were all dealt with by legislation outside of the control of Pilbara. It provided pilotage services as required by law in the form of employing qualified pilots. Nor did Wilson J agree that developments in vicarious liability required any different decision. He stressed that, at page 650:

> Captain Hammonds did not derive his authority to navigate the 'Oceanic Crest' from his employment by Pilbara, for Pilbara had no such authority. His authority as a pilot came from his appointment as such by the Governor in accordance with s.4(b) of the *Shipping and Pilotage Act 1967*. It was his personal authority, and his alone. This consideration invites the further comment that it is the statutory authority possessed by the servant that renders the employer immune to vicarious responsibility for the conduct of the servant in the exercise of that authority and not the character of the employer. It is immaterial whether the employer be the Crown, as in *Fowles*, a statutory corporation, as in *Stanbury v Exeter Corporation*, or a private company, as in this case.

11.16 Dawson J also considered s.410B to provide the complete answer. He considered **Fowles** was indistinguishable. Whilst acknowledging that in some situations the law might take a different view between public and private employment, he did not consider that arose with pilots. The pilot's private employment did not exclude the independent exercise of his function as pilot. He had been appointed by the State to be a pilot and had duties at law which were unaffected by his employment. Nor, in His Honour's view, could it be said that Pilbara was in the business of piloting ships. Pilbara did not provide a service different in kind to that which would otherwise have been provided by the Government or an appropriate statutory authority.

11.17 Brennan J dissented. His Honour accepted that in a compulsory pilotage situation no contract existed. He was persuaded that the private trading corporation status of Pilbara made a real difference and that the fact that the pilot employee had an independent source of authority and was not amenable to control by his employer when discharging his independent statutory duty did not create any difficulty. Because, in Brennan J's view, the pilot was still discharging his employer's obligations. His Honour considered that authorities shifting the emphasis from "actual exercise of control" to "the right to exercise it so far as there is scope for it" enabled the Court to depart from **Fowles**. His Honour did not consider s.410B justified the exclusion of vicarious liability.[69]

11.18 Deane J was concerned at moving away from a tradition of 70 years. But he too considered that the fact of a private company being involved, and the possibility of injustice arising to third parties unable to sue the negligent pilot merely because of pilotage being compulsory, entitled the Court to depart from **Fowles**.

11.19 As previously indicated, the House of Lords re-examined the question of vicarious liability and compulsory pilotage in the **Esso Bernicia**. It was there argued that the rationale for earlier decisions which appeared to impose liability on the shipowner for negligence of a voluntary pilot on the basis of a master/servant relationship was no longer correct and that the true position was that the shipowner owed a non-delegable duty to third parties to have his ship navigated carefully - a duty he could not discharge by delegating it to a pilot. Looked at in that light, it was submitted that s.15(1) did not alter the common law as between shipowner and pilot which remained that of employer and independent contractor. It followed that the pilot remained the servant of the port authority (Shetland Island's Council). It was then argued that SIC was the principal in carrying out the business of pilotage, that the pilot was carrying out that function on their behalf and that they remained vicariously liable.

11.20 Lord Jauncey was unimpressed. (Refer the extracts of his judgment to which reference has already been made.) His Lordship reaffirmed **Towerfield**, approved the majority in **Pilbara** and held that there was nothing to indicate

69 (1985) 160 CLR 622, 663

that there is any exception to the general application of s.15. observing that "the pilot is to be considered for all purposes as the servant of the owner."

11.22 As to the second argument (SIC provided pilot services) His Lordship said:

> The critical question is whether SIC had assumed the obligation of piloting ships ... in which event they would bear responsibility for any negligence in navigation by a pilot in their employ or whether they had merely assumed the obligation to provide the services of a qualified pilot, in which case he would be the principal and SIC would not be liable for his negligence.

11.23 On the averments made, it was held that SIC simply provided the services of a pilot and could not be liable.

11.24 The slightly amended s.16 of the 1987 Act then fell for consideration before Clarke J in **The Cavendish**[70]. The Port of London Authority provided pilotage services within the meaning of the Pilotage Act 1987 (UK). Plaintiff owners requested the services of a pilot in a compulsory pilotage area. The vessel suffered damage due to his negligence.

11.25 The owners argued that the PLA was vicariously liable because it owed positive duties to provide pilotage services. They also claimed in contract under an implied term that such services would be performed with reasonable skill and care. Seeking to take something out of the altered wording to s.16 they argued that liability was not precluded by s.16.

11.26 Section 2 of the Act provides:

> **2. General duties as to provisions of pilotage services**
>
> (1) Each competent harbour authority shall keep under consideration -
>
> (a) whether any and, if so, what pilotage services need to be provided to secure the safety of ships navigating in or in the approaches to its harbour; and
>
> (b) whether in the interests of safety pilotage should be compulsory for ships navigating in any part of that harbour or its approaches and, if

70 [1993] 2 Lloyd's Rep 292

so. for which ships and in which circumstances and what pilotage services need to be provided for those ships.

2) Without prejudice to the generality of subsection (1) above, each competent harbour authority shall in performing its functions under that subsection have regard in particular to the hazards involved in the carriage of dangerous goods or harmful substances by ship.

3) Each competent harbour authority shall provide such pilotage services as it considers need to be provided as mentioned in subsection (1)(a) and (b) above.

11.27 The judgment in this case is well worth a read. It traverses the historical development of the law in regard to voluntary and compulsory pilotage.

14.28 His Honour reviewed the leading authorities and concluded:

i) That the modernised wording in s.16 was not intended to alter the substance of s.15.

ii) Following the reasoning of Brennan J in **Pilbara**, that in compulsory pilotage situations there was no contract between the parties.

iii) That s.2 did not really alter the existing law in that it did not impose a duty upon PLA to "pilot ships" - merely to provide the services of a pilot. **Fowles** therefore applied.

11.29 Clarke J agreed[71] with the earlier observations of Lord Loreburn in **Fowles**[72] . with which Lord Jauncey agreed in **Esso Bernicia**[73], that:

In their Lordships' opinion these Acts of Parliament did not alter the original status of a pilot, which is, in effect, that he must be regarded as an independent professional man in discharging his skilled duties. If it had been intended to alter this old and familiar status, it is to be supposed that the Legislature would have done it more

71 [1993] 2 Lloyd's Rep 292. 298

72 [1916] 2 AC 556. 562

73 [1989] 1 AC 643. 690

explicitly. What it has done is more consistent with a different and limited purpose, namely, to secure a proper selection, a proper supply, a proper supervision, and a proper remuneration of men to whose skill life and property is committed, whether the ship-owner likes it or not.

(For additional comment on **Pilbara**[74])

11.30 The argument in relation to s.16 hinged on the difference in wording between s.16 and s.15 (of the 1913 Act) and s.35 (of the 1983 Act). You will recollect that the earlier wording provided:

> **35.** 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.

Whereas, s.16 provides:

> The fact that a ship is being navigated in an area and in circumstance 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.

11.31 It was contended that the use of the word "liability" was apt to refer only to liability to third parties. This argument was bolstered by reference to the absence of the words "in the same manner as he would if pilotage were not compulsory".

11.32 This submission did not find favour with Clarke J who held that the new language had the same effect as the earlier section. **Towerfield** applied.

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74 The Dethridge Memorial address delivered to this Association and reported at (1993) 67 ALJ 14 expresses regret at the failure of the **Pilbara** Court to "bring the law into the twentieth century" on this topic. However, the majority approach in **Pilbara** continues to find favour.

12. The Position of the Owner Master/Employer - The New Zealand Position

12.1 There is no New Zealand authority directly on point. New Zealand enacted s.231A of the Harbours Act 1950, which is our equivalent of the English s.15 Pilotage Act 1913 in 1959.

12.2 Following the enactment of the Port Companies Act 1988, and the accompanying amendments to the Harbours Act 1950, there was some confusion, shared by various interests in New Zealand, as to the state of the law on pilots' liability and vicarious liability of pilot employers. This arose from the way in which s.212 had been amended, in particular the wording of s.212(4). The section currently provides :

> 212. **Further powers of appointment, licensing, and employment of pilots** - (1) Subject to subsection (2) of this section, any person (including a Harbour Board or a port company) may provide the services of pilots to act within a pilotage district.
>
> (2) No person may act as a pilot within any pilotage district attached to any harbour in respect of which there is a Harbour Board unless that person has been appointed or licensed by that Harbour Board to act as a pilot within that pilotage district and holds a certificate to that effect.
>
> (3) Harbour Boards may, in accordance with this Act, appoint and license pilots in accordance with regulations made under section 214 of this Act. An appointed pilot shall be a duly qualified pilot who is appointed by the Harbour Board whether as an employee or otherwise. A licensed pilot shall be a duly qualified pilot who is licensed by the Harbour Board but is employed by a port company or other person or is self-employed.
>
> (4) No liability shall be imposed on the Board in respect of any act or omission of any appointed or licensed pilot by reason of the fact that the pilot was appointed or licensed or paid by the Board
>
> (5) Where the Board's Harbourmaster acts as a pilot and is a duly qualified pilot, the Board shall not be further or otherwise liable for his or her acts or omissions whilst so acting than it would be for acts or omissions of a duly appointed pilot.

The noticeable absence of reference to the port company or any other person providing the services of pilots in ss(4) was perceived as having some impact on s.231A.

12.3 This uncertainty seems to have been encouraged by some comment made by the then Minister in a speech to this Association in Wellington on 23 March 1988 when the Bill was at Select Committee stage. The Minister apparently expressed the view that the immunity enjoyed by harbour boards would not carry over to port companies.

12.4 In **Commerce Commission v Port Nelson Limited**[75], McGechan J traversed the New Zealand position at pages 65-69. (These sections of the judgment are not reproduced in the report at (1995) 5 NZBLC 103, 762.) At page 65 of the full judgment, His Honour refers to **Fowles**, **Pilbara** and **Esso Bernicia** and concludes:

> However any conventional and predictable view of New Zealand law in Harbour Board days was strongly against liability on the part of the Harbour Board as general employer of a competent pilot making the latter available for service as such. That view would be reinforced for those inclined to consult the **Report of the Commission of Inquiry into Harbour Pilotage** (1975) and Parliamentary Debates on the Harbours Amendment Act 1959. Vicarious liability, even in case of compulsory pilotage, clearly was seen to lie upon the owner of the vessel under pilotage.

11.5 Later in his judgment at page 68, having traversed a number of legal and insurance views held by various harbour boards, the New Zealand Merchant Service Guild and the Ministry of Transport which was to the effect that:

> Pilots remain liable only to the extent of bond under s.214B and while Port Companies under the principle of 'competitive neutrality' would not have the benefit of s.212(4), and would therefore be vicariously liable, at common law vicarious liability would be identical to that of the pilot and therefore likewise limited.

His Honour concluded that "it is easy now to dismiss some of these 1988 concerns as untenable".

12.6 I remain unconvinced that the amendments to s.212 impliedly repealed or amended the provisions of s.231A. Section 212 is concerned with the appointment, licensing and employment of pilots. The clear intention of the

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75 Commerce Commission v Port Nelson Limited (High Court, Nelson, CP 12/92(NN), 2 June 1995, McGechan J).

section was to remove the monopoly of harbour boards in respect of pilots and to open the provision of those services to harbour boards, port companies, any other person (or corporate entity) and to self-employed pilots. Section 212(4) is, in my view, designed to ensure that the mere fact of appointment or licensing by a board of pilots who might be employed by other persons does not render a board liable.

12.7 But the fact is that no change was made to s.231A of the Act; the section is capable of being given meaning and effect along with the other amending provisions, (especially s.212) and it is a section of general application in the context of compulsory pilotage. It was my view at the time of enactment and still is that s.231A continues to apply and renders the owner or master of a ship navigating under circumstances of compulsory pilotage liable for the acts or defaults of the pilot, irrespective of who is the employer of such pilot.

12.8 The High Court of Australia did not see any reason to depart from the established approach in **Pilbara** (where the service was provided by a private limited company similar to a port company): the majority decision in **Pilbara** found the support of the House of Lords in **Esso Bernicia** and the most recent statement in the **Cavendish** reaffirms the principle of statutory interpretation that if Parliament intends to significantly alter long standing law, it can be expected to say so. For whatever reason, Parliament did not see fit to amend s.231A. It would have been a simple exercise to state categorically that any employer, other than a harbour board, would be liable or would not be entitled to the exemption conferred, yet it did not do so. Given the courts general reluctance to apply the doctrine of "implied repeal", I consider that the New Zealand regime has not changed. I believe our courts would follow **Pilbara** and the **Cavendish**.

12.9 One also has to bear in mind that the wording of s.212(1) places the emphasis on providing "the services of pilots to act within a pilotage district" in contra-distinction to the "provision of pilot services" which is, in essence, the wording of s.2 of the Pilotage Act 1987 (UK). Although, as interpreted in the **Cavendish**, that section does not contemplate anything different from that which prevailed under earlier legislation.

12.10 Harbour boards did not provide pilotage services; they provided the services of pilots. The "port related commercial undertakings" of harbour boards

which port companies assumed likewise relate to the provision of the services of pilots, not pilot services.

12.11 Finally, and importantly, one has to acknowledge that port companies have no ability to declare compulsory pilotage areas. That remains the function of a regional council exercising bylaw making powers which it has, but which port companies do not have. Also, the amendments made to the Harbours Act 1950 in 1988 do not in any way alter the established law that pilots have independent professional duties to discharge when acting as pilots, such as to remove the necessary master/servant link vital in vicarious liability.[72] Furthermore, when one considers the authorities which acknowledge the overriding right of the master of the vessel to countermand the pilot, albeit that that will occur in rare circumstances, the difficulties in the way of establishing the ingredients for vicarious liability, whether one adopts the actual control or ability to exercise control test, become clear.

13. Liability Regimes - Is there a need for reform?

13.1 I can see no necessary or valid reason for reform in this area.

13.2 In the first place, there is no recurring mischief highlighting a problem with New Zealand pilots calling for a changed regime. We are not visited with a regular parade of incidents where ships, property or environment have suffered damage as a result of the negligence of a pilot. The only major case of which I am aware in recent years relates to the **Mikhail Lermontov**. There is nothing to suggest that the standard of New Zealand pilots is inadequate such that compulsory pilotage places vessel owners at risk. Nor is there any empirical evidence to suggest that making pilots or their employers liable would have any direct impact on performance.

13.3 Next, in support of change, one might ask whether the New Zealand regime is out of step with the rest of the world. This is not an unimportant consideration in the maritime law which has a very international perspective. But clearly, from the review conducted, we are in step with the rest of the world with the regime which has existed with certainty up until 1988 and which, I submit, continues today. To change that regime would put this

country, which can hardly be described as a leading maritime nation, out of step with our trading partners.

13.4 There are then negative impacts from change. If, as McGechan J held in the **Port Nelson** case, one of the objectives of the 1988 reforms was to introduce greater competition into the provision of the services of pilots, we should be careful about placing any impediment in the way of achieving that objective. To impose personal and vicarious liability on individual pilots and their employers is hardly likely to encourage that objective. The cost of very significant liability insurance is a factor; the ability of persons not having a track record in the industry to secure cover might well be another factor; the potential for ruinous personal liability is another. If we are to encourage a profession of competent and dedicated pilots upon whose shoulders rests a huge responsibility, then, in my view, we ought to retain and adhere to the example of the past almost 100 years on the issue of liability.

13.5 The policy behind the abolition of the defence of compulsory pilotage would seem to be the desirability of ensuring that if a casualty occurs those who suffer will have access, more likely than not, to a financial defendant. By imposing liability on the shipowner there is a reasonable prospect of that. It is a policy that has been embraced for over 80 years.

13.6 For my part, I do not see that it matters much which entity employs or provides the pilots - the State, local government, statutory corporations, a port company, any other private company or individual. What matters is that qualified licensed pilots be made available. The cases to date have not recognised the need for a different regime influenced by the status of the provider of the service.

13.7 Insofar as voluntary pilotage is concerned the owner has always been liable. When the State intervenes in the interests of the citizen to impose compulsory pilotage, it merely removes choice, but the quality of service will not alter. I see no reason why the owner should enjoy a release from liability in those circumstances.

13.8 It does have to be acknowledged, however, that there is room for debate over the meaning and impact of the 1988 legislation. At the present moment the only beneficiaries of that uncertainty are insurers. Port companies have

had to take liability insurance "just in case": ship owners, well used to the environment of this century and the need to insure, ordinarily have cover as a matter of course. There is little point in continuing this uncertainty in the interests of the insurance world. The cost of dual cover must inevitably be reflected in port charges and freight rates, to the ultimate disadvantage of the consumer - the importer or exporter of goods.

13.9 As the majority observe in **Pilbara**, we should hesitate to change a regime upon which the commercial community has relied for some 70-80 years unless there is good cause. I do not see any such "good cause" and on that basis, save in the limited way I have highlighted in the course of this paper, I see no need for return other than clarifying legislation and reaffirming the applicability of the regime first introduced in England in 1913 and adopted by most of our Commonwealth partners.