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Pilots as Plaintiffs and Defendants

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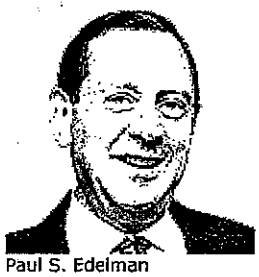
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Cases do not agree on the status of pilots and what their rights are as plaintiffs when injured. The Encyclopedia Britannica (11th Ed.) defines a pilot as:

A particular officer serving on board a ship during the course of a voyage and having charge of the helm and the ship's route, or a person taken aboard at a particular place for the purpose of conducting the ship through a river, road or channel or from or into a port.

Defining 'Pilot'

Pilots are sometimes also defined as bar pilots (guiding a ship to or from the harbor's "bar"), branch pilots, river pilots, harbor pilots and docking pilots. How you become a pilot is usually a local affair. The differences in each state are described in "Minding the Helm," National Research Council. The Longshoremen's Act early after its passage was meant to exclude pilots as most were part of an independent group or incorporated as a one person individual corporation. Longshoremen's Act, Opinion #22 (1927).[1]

Some cases have held that a pilot does work like a crew member and is entitled to a warranty of seaworthiness.[2]

Jones Act status as a "seaman", believe it or not, has been denied to a pilot in several circuits.[3]

The U.S. Court of Appeals for the Fourth Circuit held, apparently not knowing the Longshore Act history, that the pilot there was covered by the Longshore Act.[4]

There were significant dissents in both these cases. When the commission involved in the 1927 ruling decided against the pilot's status under the Longshore Act, the commission considered a pilot to be

equivalent to a master or ship's officer despite only a temporary attachment to a vessel.

The U.S. Court of Appeals for the Third Circuit in *Evans v. United Arab Shipping Co.*[5] held that a compulsory river pilot was not a Jones Act seaman/employee of the vessel piloted.

Issues have also arisen as to whether a pilot is an employee of an association of pilots if he is a member of the association.[6] On the other hand, in a very old decision, the pilot's association was held not liable because it did not control the pilot's performance.[7]

All the permutations of decisions are outlined at length in the *Evans* case, including liability of the vessel in rem. There, the pilot, Mr. Evans, did receive an award for orthopaedic injuries against the shipowner which were held causally related to his accident.

In a more recent case, a vessel owner was allowed to limit its liability even though the pilot on its tugboat caused a collision by violating a statutory navigation rule.[8]

Pilot as Defendant

As shown above, a pilot's status in pursuing an injury claim as plaintiff can be murky.

On the other hand, the role of pilot as a defendant for causing damage to ship or property has recently been clarified. A decision in September 2004 from the U.S. District Court for the Southern District of New York discussed in great detail the contract that defines a pilot's liability and the shipowner's duty vis-à-vis the pilot, commonly known in the industry as the "pilot ticket."

Piloting a ship can be a high-risk venture, often with tens of millions of dollars of vessel and cargo being transported. The pilot may earn less than $500 for each ship piloted, yet face liability for millions in damages and exorbitant defense costs. Recognizing this, one court suggested that the "economics of the shipping industry" shows the reasonableness of not holding pilots personally liable for simple negligence.[9] The small charge paid by the shipowner for a docking pilot's services indicates that shipowner's recognize "the validity of the exculpatory clause contained in the agreement and has undertaken to provide its own insurance against risk of loss occurring because of the docking master's negligence."[10]

But, as on land, maritime accidents happen, and more often than one might imagine. The damage can be minor or very significant. Ships are navigated in close quarters, narrow channels, over rocks, reefs and shoals, through tight bridges and maneuvered alongside piers and other vessels, like threading a needle.

Nonetheless, a pilot is typically uninsured and for the most part, judgment-proof. Some pilots purchase "license" insurance that provides defense against Coast Guard administrative proceedings seeking suspension or revocation of the pilot's license after a serious marine casualty.[11] Such insurance may afford coverage for lost wages as well if a mariners' license is suspended or revoked, and offer civil litigation defense costs, but rarely do pilots carry, or can afford the expense of liability coverage. For this reason, a pilot is not often the target in a civil case.

Another form of protection for a docking pilot is the aforementioned "pilot ticket" commonly used in the industry. This is the contract between the pilot and the shipowner which contains an exculpatory clause exonerating the pilot from personal liability for simple negligence. The validity of such terms and conditions and the express exception contained therein for gross negligence or willful misconduct was the question recently before Judge Allyne R. Ross of the U.S. District Court for the Eastern District of New York in *Stevens Technical Services, Inc v. Mormac Marine Enterprises, Inc., Moran Towing Corporation, Walter H. Russell, et. al.*[12]

In this case, a federally licensed docking pilot was sued as a result of damage to a U.S. government ship, the S.S. Cape Archway. The ship struck a submerged pier while attempting to dock at Erie Basin, Brooklyn, with the pilot at the con, and sustained significant bottom damage. Because of the incident, the ship's captain refused to sign the pilot ticket which contained the exculpatory terms.

Issues of Liability

Issues of Liability for Negligence and Gross Negligence. Courts in the United States have regularly upheld as enforceable and consistent with public policy, agreements in pilot tickets that exculpate pilots from personal liability for negligent performance of their services.

To defeat this defense, however, the shipowner argued that the pilot performed the docking in a "grossly negligent" manner or in a manner characterized by "willful misconduct," thus rendering the exculpatory

terms of the pilot ticket ineffective. Judge Ross' 41-page opinion was apparently the first reported decision in the nation to address these issues in the context of pilotage.

The basis of the claim of "wilfulness" was an exchange on the bridge between the pilot and ship's captain when it became evident that the Cape Archway was backing dangerously close to the submerged pier. Suspecting danger, the captain ordered "no more bells" — instructing the pilot not to give any further engine speed orders. Nonetheless, just prior to the accident, the pilot gave two engine orders in an effort to stop the ship's momentum. It was this "willful" neglect of the captain's order, that the vessel owner contended warranted finding that the pilot's performance of duty was grossly negligent. The captain did not take the control away from or relieve the pilot, and the ship was thereafter berthed without further incident.

Summary Judgment Granted

Invoking the protections of the pilot ticket, the pilot moved for summary judgment to dismiss the vessel owner's claim and to seek an order requiring that the vessel owner defend and indemnify him from third-party claims.

The pilot contract was found to be valid and enforceable. The fact that the captain refused to sign it following the grounding did not change the result. The court found that such refusal did not vitiate the vessel owner's assent to the exculpatory clause, where, as here, the contracting parties knew of the customary industry practice and fully expected the pilot to tender an agreement containing such a clause.

A more difficult issue was the shipowner's attempt to sink the pilot's defense on the basis of the gross negligence/willful misconduct exception in the pilot ticket. The court, sitting in admiralty, relied upon the common law of maritime torts, and referring to the Restatement Second of Torts §500, suggested that conduct is willful or wanton when: i) the conduct creates an unreasonable risk of very serious harm to others; and ii) the defendant is conscious of the risk and proceeds without concern for the safety of others. As for gross negligence, the court applied the standard defined in New York case law as "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing."[13]

Judge Ross discussed the historical relationship between shipmaster and pilot, noting that while the master remains in overall command of the vessel, the pilot supersedes the master, for the time being, in the command and navigation of the ship. It is the rare occasion when the ship's master is justified in interfering with the pilot because if such interference were encouraged, as Judge Ross stated, citing an 1860 U.S. Supreme Court case, "we should have a double authority on board, a divisum imperium, the parent of all confusion, from which many accidents and much mischief would probably ensue."[14]

Thus, unless the master chooses to displace the pilot, the pilot remains solely responsible for the navigation of the ship using his best judgment, experience and skill to make decisions necessary to that end.[15] Here, the captain did not step in and retake control of the navigation.

Measured against these standards, Judge Ross held that no reasonable juror could find the pilot's order, contradicting that of the captain regarding the proper way to safely dock the ship, constituted gross negligence or willful misconduct in the performance of his pilotage duties. There was no evidence to support the conclusion that the pilot asserted his own judgment of the best way to berth the ship without concern for the safety of others or was conscious that his order created an unreasonable risk of serious harm or was in reckless disregard for the safety of others in a manner that "smacked" of intentional wrongdoing.

Indeed, there was nothing to indicate that the pilot issued his order with any intent other than to protect the ship and safely berth her. No authority was cited by the shipowner or found by the court to suggest that in such circumstances the assertion by a pilot of a directive contrary to a captain could itself constitute gross negligence or willful misconduct.

In sum, it is the essence of a docking pilot's duty to make reasoned judgments, based on his expertise, about how to safely berth the vessel. According to the court, that is exactly what the pilot did here. The pilot's motion for summary judgment was granted dismissing the vessel owner's claims against him on the basis of the exculpatory clause in the pilot ticket and requiring the vessel owner to indemnify him against third-party claims.

Thus, while the pilot's status as plaintiff may remain in question, the detailed *Cape Archway* decision brings clarity to the pilot's role as a defendant.

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Rubin, Fiorella & Friedman and commissioner on the Board of Commissioners of Pilots of the State of New York. Mr. Mercante represented the pilot in the 'Cape Archway' case.

Endnotes:

1. 1928 A.M.C. 263.

2. Ringering v. Cia. Maritina De La Mancha 670 F. Supp. 301 (D.C. Or. 1987), aff'd, mem. 848 F.2d 1243, 1988 A.M.C. 2402 (9th Cir. 1988); Clark v. Solomon Navigation, Ltd., 631 F. Supp. 1275 (S.D.N.Y. 1986).

3. Bach v. Trident Steamship Co., 920 F.2d 322 (5th Cir. 1991); unseaworthiness issue not decided. Affirmed on remand from the Supreme Court, 947 F.2d 1290.

4. Harwood v. Partredereit AF, 944 F.2d 1187 (4th Cir. 1991), cert. den. 60 U.S.L.W. (1992) (independent contractor).

5. 4 F.3d 207 (1993).

6. Ray v. Great Lakes Towing Co., 92 Civ. 7034 (N.D. Ohio, 2/25/1992).

7. Guy v. Donald, 203 U.S. 399, 407 (1906).

8. Matter of MO Barge Lines, 360 F.3d 885 (8th Cir. 2004).

9. Dominion Terminal Associates v. M/V CAPE DAISY, 24 F. Supp.2d 532, 535, 1998 A.M.C. 2955 (E.D.Va. 1998).

10. Reederei Hagen v. Diesel Tug Resolute, 400 F. Supp. 680 (D.Md. 1975), 1976 A.M.C. 2133.

11. For example, MOPS Marine License Insurance, a division of Lancer Insurance Co. in New York, offers marine insurance to licensed mariners.

12. Not for publication Opinion and Order was reported in unofficial maritime reporter at 2004 A.M.C. 2513 (E.D.N.Y. 2004).

13. Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd., 81 N.Y.2d 821, 823-24 (1993); see also American Telephone and Telegraph Co. v. City of New York, 83 F.3d 549, 556 (2d Cir. 1996).

14. The Peerless (1860) 167 E.R. 16.

15. Hobart v. Drogan, 35 U.S. 108 (1836).

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