

MARINE PILOTAGE IN NAMIBIA

ABISAI KONSTANTINUS[†]

Director at Ndatara Surveys and marine pilot at Namport

As Namibia implements the strategy of expanding its ports to achieve the strategic goal of becoming the regional logistics hub of choice, a clear and urgent need exists to upskill pilots. To that end, this article examines the Namibian law on pilotage in three areas: (i) the master-pilot relationship; (ii) the vicarious liability for pilot error; and (iii) the standards of training and certification of pilots. It does so having regard to case law, best practices of leading maritime nations and international standards. The article ends by recommending the urgent revision of the primary legislation and the regulations that govern the Namibian Ports Authority.

[Keywords] Pilotage, shipping, Namibian Ports Authority

I INTRODUCTION

For Namibia, the development of its two major ports in Walvis Bay and Lüderitz represents a key strategic objective in its national development plan.¹ The success of that strategy depends on the safe operation of the ports. An evaluation of the law and practice of pilotage is therefore essential. This article examines critically the Namibian law on pilotage, including the Namibian Ports Authority Act, 1994 (NPAA),² with regard to the core issues of the master-pilot relationship, the vicarious liability for pilot error and the standards for pilot training and certification.

As both an object of study and litigation, pilotage has received little attention in Namibia. Until now, no cases have been brought before the Namibian courts and one of the two studies

[†] NDip: Maritime Studies, MPhil: Shipping Law, PQE:ICS, MSC: Shipping Management and Logistics PhD, Pilotage Certification, Chief Mate CoC and Marine Pilot (15 000 GRT) Walvis Bay and Lüderitz. Although the author is currently an employee of the Namibian Ports Authority (Namport), the views expressed in this article do not necessarily reflect the views of Namport. The author is grateful to Judge Nate Ndauedapo of the High Court of Namibia and Dr Stanley Shanapinda, a research fellow at La Trobe University in Melbourne, Australia for comments and suggestions on an earlier draft of this article. Special appreciation is also owed to Prof Patrick Vrancken and Mr Siqhamo Yamkela Ntola for extensive editing. The responsibility for any errors is, of course, the author's alone.

¹ In 2004, Namibia adopted Vision 2030, a document that spells out the country's socio-economic development programs and ambitions to be achieved by the year 2030 (the document is available at <http://gov.na/vision-2030>, accessed on 8 June 2020). In order to achieve these goals, the country rolls out a national development plan (NDP) in every cycle of five years, the latest being NDP5. One of the key goals in NDP5 is to have 'a sustainable transport system supporting a world-class logistics hub connecting SADC to international markets' by the year 2022 (see p 38 of the NDP5, which is available at https://www.npc.gov.na/national-plans-ndp-5/?wpfb_dl=293, accessed on 14 January 2021). To that end, in 2015, the Namibian government commissioned the Namibia Logistics Master Plan (available at https://www.npc.gov.na/?wpfb_dl=224, accessed on 14 January 2021), a key part of which is the enhancement of port-related services.

² Act 2 of 1994.

on the subject matter is by Kalulu,³ who compared the pilot training and licensing procedures in Namibia with those in Denmark. That study employed a qualitative survey presented to pilots and maritime professionals involved in the issuance of certificates of pilotage in the two countries with the aim of determining the gaps in Namibian practices and, on that basis, recommended that the Namibian government, through the Directorate of Maritime Affairs (DMA),⁴ develop and set the necessary rules for pilot certification. Kalulu did so after ascertaining the minimum standards for pilot training and certification and identifying the gaps between the practices in Namibia and in Denmark.⁵ Subsequently, Konstantinus, in his study of the development of short-sea shipping in the Southern African Development Community of which Namibia is a member,⁶ makes reference to speedy pilotage services as a strategy for improving port efficiency. However, pilotage is referenced only with regard to overcoming the hurdles currently faced by regional maritime transport.

Like Kalulu's study, the general argument in this article is that there are good reasons to revisit the legislative provisions on pilotage. The article postulates that a case concerning pilotage would be difficult for the Admiralty Court of Namibia to adjudicate under current legislation and that most cases would unduly inconvenience the Namibian Ports Authority ('Namport'), both as a service provider and as the pilot's employer. Against this backdrop, the aim of this article is three-fold. First, it aims to examine the law and practice regarding compulsory pilotage. Second, it aims to interrogate the legal position of the pilot in terms of the master-pilot relationship during pilotage, the vicarious liability for pilot error and the responsibilities of Namport as the pilot's employer. Third, the article interrogates the practice and regulations for the training and certification of pilots.

This article engages its discussions on the subject on two fronts. The first entails a critique of the legislative and common-law provisions that govern pilotage in Namibia. Secondly, policy and regulation in reference to the practice of leading maritime nations, notably South Africa, Australia and the United Kingdom, are examined. This level specifically applies to the training and licensing of pilots.

The study is structured as follows. Section II provides the background of pilotage. This is followed in section III by an outline of the statutory regime governing the pilotage regime in Namibia. Section IV analyses critically the master-pilot relationship, vicarious liability for pilot error and the responsibilities of Namport as the pilot's employer. Section V reviews the training and licensing of pilots with reference to statutory law and the practices employed by leading maritime nations. In section VI, recommendations flowing from the discussions are presented,

³ S N Kalulu *An Analysis of the Maritime Pilot Training and Certification: A Comparative Study between Denmark and Namibia* (MSc thesis, World Maritime University, 2018) (available at https://commons.wmu.se/cgi/viewcontent.cgi?article=1652&context=all_dissertations, accessed on 8 June 2020).

⁴ The DMA was established in 1995 as the executive arm in the Ministry of Works and Transport (MWT) responsible for ensuring safety of life at sea, preventing marine pollution and promoting Namibia's maritime interests. For an outline of the MWT's objectives, strategic and tactical maps, see MWT 'Directorate of Maritime Affairs' (available at <http://www.mwt.gov.na/directorate-of-maritime-affairs>, accessed on 7 June 2020).

⁵ Kalulu op cit note 3 at 4.

⁶ A Konstantinus *Opportunities for Short-sea Shipping in the Southern African Development Community (SADC) Region: Evidence Based on Discrete Choice Modelling* (PhD Thesis, University of Cape Town 2019) (available at <https://open.uct.ac.za/handle/11427/3136>, accessed on 8 June 2020).

followed by the conclusion that revisits the research aims and the extent to which they have been addressed.

II BACKGROUND

A pilot is a seafarer who takes control of a vessel at a particular place to guide it safely into and out of a port.⁷ The trade of pilotage, like seafaring, is ancient and spans far back in the history of maritime trade. Pilots have always existed around the world to provide ships with safe passage into harbours and through dangerous waters.⁸ Pilots were typically experienced mariners and fishermen with specialised knowledge of the oceans.⁹ To navigate, they relied to evade hazards on retained experience of ship handling and the knowledge of geography and topography. In areas where a ship is likely to be stranded on a shallow patch or a sandbank,¹⁰ pilots would typically use the hand lead-line¹¹ as the means of navigating or directing the vessel. For this reason, a pilot was originally known as a ‘lodesman’, which is a term derived from the ancient German word for compass,¹² and from this the term ‘pilot’ is said to have emerged from its Anglo-Saxon synonym, ‘peil-lood’, meaning the hand lead-line.¹³

To appreciate the setting today, one must imagine a ship arriving at a port. So far, the master or the captain has brought the ship to a safe point in the port of destination referred to as the pilot boarding point.¹⁴ From here onwards, the waters are shallow and narrow, while navigational hazards are numerous and in close proximity. The pilot, who has the necessary local knowledge and the skills to safely maneuver the ship in the port, would now be employed to manage the enormous risk to life, property and the environment. This risk is posed by a giant ship carrying potentially dangerous cargo, which is being navigated in confined waters in which the likelihood of error is high and the ensuing consequences potentially catastrophic.

The law recognises two distinct forms of pilotage: compulsory pilotage and voluntary pilotage.¹⁵ Voluntary pilotage is where the pilot is engaged by choice, without it being legally compulsory, whereas compulsory pilotage is where a pilot is employed by compulsion of statute or by a legal directive from a competent authority.¹⁶ Namibian law is primarily

⁷ See HG Ward *Pilotage – State Legislation Thereon* (1883) 17 *American Law Review* 372–397.

⁸ See J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 2.

⁹ See A Collins ‘River and harbour pilotage in the UK mariners’ (1999) (available at <http://www.mariners-l.co.uk/UKPilots.html>, accessed on 14 January 2021).

¹⁰ See P S Sharp *Pilot* (1972) 60. See also Atlantic Pilotage Authority ‘History’ (no date) (available at <https://www.atlanticpilotage.com/about-us/history/>, accessed on 16 January 2021).

¹¹ See D J House *Seamanship Technique: Shipboard and Marine Operations* 3 ed (2004) 331. The hand lead-line is a line of about 25 fathoms in length fitted with a lead cone at the end. It is a means of ascertaining the depth of water and the nature of the seabed. It is at times used by the mariner to indicate when the ship drags her anchor.

¹² Atlantic Pilotage Authority op cit note 10.

¹³ Sharp op cit note 10.

¹⁴ The Recommendation on Training and Certification of Maritime Pilots other than Deep-sea Pilots’ (IMO Resolution A.960 (23)) was adopted in 2003 by the International Maritime Organization (IMO) in consultation with the International Maritime Pilots Association (IMPA). There are two requirements for the pilot boarding point: (1) it should allow safe boarding conditions; and (2) it should be situated at a place allowing for sufficient time and sea room to meet the requirements of the master-pilot information exchange.

¹⁵ Hare op cit note 8 at 491–492.

¹⁶ See J Van der Linden *Regtsgeleerd Practicaal en Koopmans Handboek* (1806) 4.1 (In order to sail the sea with greater safety, especially in the neighbourhood of land, where through ignorance of the depth of the

concerned with compulsory pilotage, particularly compulsory harbour pilotage that occurs within port limits.

Compulsory pilotage is rooted in public policy and the international customary law principle of sovereignty. Article 2(1) of the 1982 United Nations Convention on the Law of the Sea (LOSC)¹⁷ provides that ‘the sovereignty of a coastal State extends, beyond its land territory’, to its internal waters. As a result, States have absolute regulatory control over access to their ports¹⁸ and, just as each State is free to deal with its land, it is free to deal with its internal waters, including granting or denying port access to any foreign ship.¹⁹ This position is confirmed in Namibia by the Marine Traffic Act, 1981 (MTA).²⁰ The latter provides for the entry of ships into the internal waters of Namibia²¹ by restricting access to Namibian territorial waters to ships that have valid permission, except in cases of immobilisation where a ship requires a safe haven.²² In those cases, Namibia must comply with its duty, in terms of article 192 of the LOSC, ‘to protect and preserve the marine environment’. The Namibian coastline is notoriously nicknamed the ‘Skeleton Coast’ because of its perilous topography and weather conditions, which make pilotage essential in the ports along it.²³ Recognising the need for improved maritime safety along its shores, Namibia upgraded its maritime distress and safety system in October 2019 with the introduction of a navigational telex (NAVTEX)²⁴ transmission system in Walvis Bay.²⁵

III THE LEGAL FRAMEWORK

(a) Introduction

Pilotage cases often present peculiar conflict issues because two distinct sources of law must sometimes combine to determine the outcome of a case. These sources of law are municipal

water, one is very liable to be stranded on a sandbank, the aid of pilots is made us of. The master is liable, in all places where it is necessary or customary to take a pilot).

¹⁷ 1833 *UNTS* 3, (1982) 21 *ILM* 1245; adopted: 10 December 1982; EIF: 16 November 1994. Namibia (South-West Africa then) ratified the LOSC in 1983 represented by the United Nations Council for Namibia.

¹⁸ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* merits judgment of 27 June 1986, 1986 *ICJ Reports* 14 par 212–213 (‘The basic legal concept of State sovereignty in customary international law [...] extends to the internal waters and territorial sea of every State [...]’ and it is ‘by virtue of its sovereignty that the coastal State may regulate access to its ports’).

¹⁹ See L De La Fayette ‘Access to ports in international law’ (1996) 11 *IJML* 1–22.

²⁰ Act 2 of 1981.

²¹ See s 4(1).

²² See A Konstantinus *The Need to Implement the IMO Guidelines on Places of Refuge in Namibia and the Conditions Applying thereto* (MPhil thesis, University of Cape Town, 2013).

²³ Navigational risks are further posed by passing ships in close proximity, narrow channels of navigation and changes in weather and topographical conditions. Weather conditions are characterised by recurring dense fog that restricts visibility, swells with heavy range action that causes shifting sand shoals and strong winds that are often beam-on to the entrance of the port channels. For an anecdotal insight into early pilotage in Namibia (see Sharp *op cit* note 10 at 61).

²⁴ The NAVTEX system broadcasts marine safety information (MSI) to ships at sea in the form of text messages over radio frequencies. NAVTEX is part of the IMO/IHO Worldwide Navigation Warning Service (WWNWS) and the Global Maritime Distress Safety System (GMDSS). See further NOAA National Weather Service ‘GMDSS’ (no date) (available at <https://www.weather.gov/marine/gmdss>, accessed on 24 September 2020).

²⁵ D Matthys ‘Namibia integrates global maritime safety by upgrading navigational telex system (22 October 2019) (available at <https://economist.com.na/48408/extra/namibia-integrates-global-maritime-safety-by-upgrading-navigational-telex-system/>, accessed on 8 July 2020).

laws found in national statutes and the *lex maritima* or admiralty law, which is often rooted in common law. This section considers these sources of law as they apply to pilotage cases in Namibia.

(b) Statutory law

The necessity, functions, appointments and, to an extent, the liabilities of a pilot are prescribed by Namibian statutory law. The principal statutory instrument governing pilotage in Namibia is the NPAA, which establishes Namport as the juristic person to undertake the management and control of ports, lighthouses and the provision of facilities and services related thereto.²⁶ The provision of port facilities and services is extended in the Act to include the management and control of tug and pilotage services.²⁷ The Port Regulations, 2001 (PR),²⁸ which were made in terms of section 29 of the NPAA, provide for the administration of ports.

The compulsion to employ a pilot stems from section 23(1) of the NPAA, which designates all the ports of the Authority (i.e. Lüderitz and Walvis Bay) as compulsory pilotage ports. Any person operating as a pilot in those ports must be an employee of Namport and licensed by the Authority.²⁹ It follows that a master who wilfully enters a compulsory pilotage area without a pilot (except in circumstances where the master is pilot-exempted) is guilty of an offence as set out in the PR.³⁰

(c) Admiralty jurisdiction

Namibian law on admiralty originates from English admiralty law. The whole body of 19th century English admiralty law became part of the law of Namibia subsequent to South Africa taking responsibility for Namibia (then South-West Africa) as a League of Nations C-mandate territory of South Africa in terms article 22 of the 1919 Covenant of the League of Nations.³¹ As a result, the laws regarding the administration of admiralty affairs in South Africa became applicable to Namibia. This was made possible by virtue of the Administration of Justice Proclamation 21 of 1919, which also made Roman-Dutch law applicable to Namibia.³² Since then, Namibia applies a hybrid system of Roman-Dutch civil law and English common law.³³ However, for admiralty cases, Namibia is only bound to apply English law, with Roman-Dutch

²⁶ See s 2(1). The NPAA is the first and only statute dealing with marine pilotage that has been enacted to date. It repealed the Legal Succession to the South African Transport Services Act, 1989 (Act 9 of 1989) (SATSA).

²⁷ See s 3(14) NPAA.

²⁸ GN 117 in GG 2549 of 5 June 2001. The Regulations repealed the Regulations for the Harbours of the Republic of South Africa and of South West Africa promulgated under GN R562 in GG 8124 of 26 March 1982.

²⁹ In terms of s 23(2) NPAA, the word 'pilot' means 'any person duly licensed by the Authority, or any other authority approved by the Authority, to act as a pilot at a particular port'.

³⁰ Regulation 110 PR provides that '[a] person commits an offence, if such person contravenes or fails to comply with any of th[e] regulations, and is liable on conviction to a penalty not exceeding a fine of N\$20 000 or imprisonment for a period of five years'.

³¹ (1919) 13 AJIL Suppl 128; adopted: 28 April 1919; EIF: 10 January 1920.

³² *Namibia Ports Authority v Rybak Leningrada* 1996 NR 355 (HC) 361.

³³ R Zimmermann & D Visser 'South African law as a mixed legal system' in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 2–30 at 3.

law being persuasive, at most.³⁴ Nevertheless, the statutory and inherent jurisdiction, common law and judicial precedent concerning pilotage in Namibia today bear close resemblance to those of South Africa.

In South Africa, the Colonial Courts of Admiralty Act, 1890 (CCAA), was repealed and replaced by the Admiralty Jurisdiction Regulation Act, 1983 (AJRA),³⁵ section 6 of which provides for the determination of maritime claims by the South African High Court exercising its admiralty jurisdiction. The AJRA is however not applicable to Namibia. The primary reason for this is that Namibia became a party to the 1952 International Convention Relating to the Arrest of Seagoing Ships,³⁶ which precludes the AJRA from being enacted. Doing so would violate Namibia's obligations under the Convention, particularly in relation to the provisions of the AJRA that allow for the arrest of associated ships as well as the provision that allows 'the ship of one company to be arrested in relation to the claim that arose against the ship of another company, given common control of the companies'.³⁷ In line with this, the continuing application of the CCAA in Namibia has been confirmed in three decisions of the High Court and one decision of the Supreme Court,³⁸ the latest of these cases being *MV MCP Pachna*,³⁹ wherein the Namibian High Court reiterated that,

by virtue of s 1(i) of Proclamation 21 of 1919 all statutes which applied in the Province of Cape of Good Hope as at 1 January 1920 were made applicable to the then South West Africa. The Colonial Courts of Admiralty Act 1890 was part of the statute law of the Province of Cape of Good Hope as at 1 January 1890 and thus became part of Namibia.⁴⁰

(d) Case law and pilotage

The Namibian High Court's authority to preside over maritime claims was firmly established in *Freiremar SA v Prosecutor-General of Namibia & Another*,⁴¹ wherein the court ruled that '[t]he Namibian High Court exercising its admiralty jurisdiction derives its jurisdiction from the English Statutes, [...] namely the Admiralty Court Act of 1840, the Admiralty Court Act of 1861 and the Colonial courts of Admiralty Act of 1890'.⁴² Whether or not the English Admiralty Court had jurisdiction in 1890 to hear pilotage disputes is a question for further deliberation. The CCAA currently excludes a number of claims relating to, or arising out of, charter parties, marine insurance, containerised cargo, claims for loss of life and personal injury, which must be dealt with under admiralty jurisdiction. As far as it is concerned, pilotage was not expressly mentioned in either the 1840 Act or the 1861 Act and, accordingly, it was

³⁴ For the position in South African law, see Hare op cit note 8 at 353.

³⁵ Act 105 of 1983. See s 16(1).

³⁶ 439 UNTS 193; adopted: 10 May 1952; EIF: 24 February 1956.

³⁷ H Staniland 'Theory versus policy in the reform of admiralty jurisdiction' (2013) 6(4) *International Journal of Private Law* 418–437 at 422.

³⁸ See *Banco Exterior de Espana SA & Another v Government of the Republic of Namibia & Another* 1992 (2) SA 434 (Nm) 442C; *Freiremar SA v Prosecutor-General of Namibia & Another* 1996 NR 18 (HC) 27H-J and 28C; *International Underwater Sampling Ltd & Another v MEP Systems Pty Ltd* 2011 (1) NR 81 (SC) para 6–7.

³⁹ *Blue Sky Shipping Ltd and Another v Hellenic Bank Public Company Ltd: MV MCP Pachna* 2019 (4) NR 997 (HC).

⁴⁰ Ibid par 19.

⁴¹ See note 39 above.

⁴² *Freiremar* supra note 39 par 27H-J.

not expressly mentioned in the CCAA either. Hare opines however that pilotage was one of the causes of actions covered and, therefore, claims in relation to pilotage were governed by the CCAA in terms of section 2(2) of the Act.⁴³ Hare argues that this is the reason for the numerous 19th century Admiralty Court judgments that concern pilotage, including the judgment in *The Temora*.⁴⁴

Seeing that case law on pilotage in Namibia is non-existent, reliance needs to be placed on old English statutes and judgments. English legislation governing admiralty jurisdiction passed subsequent to 1890 was not applicable in South Africa⁴⁵ and, by implication, it was also not applicable in Namibia. However, decisions handed down in England after 1890 are applicable in so far as they expound or clarify English admiralty law as it was prior to 1890.⁴⁶ In addition, South African judgments delivered before 2005 when the Legal Succession to the South African Transport Services Act, 1989 (SATSA),⁴⁷ was repealed by South Africa's National Ports Act, 2005 (NPA),⁴⁸ notably the judgments in *Stella Tingas*,⁴⁹ *Inyati*⁵⁰ and *Yung Chun No 17*,⁵¹ are relevant for the purpose of interpreting section 23 of the NPAA.

IV ASPECTS OF PILOTAGE UNDER NAMIBIAN LAW

(a) Introduction

The pilot occupies a special position in law when navigating a ship.⁵² He or she is considered to be acting as an agent of the ship owner and not that of his or her employer (the port authority). Accordingly, it is the ship owner who bears the responsibility for the pilot's actions.⁵³ However, there are circumstances when the liability for pilot error is shared with the port authority. The subsections below discuss the master-pilot relations, the ship owner's vicarious liability due to pilot error and the liability of a port authority as employer.

⁴³ Hare op cit note 8 at 484. See also D van Niekerk *SA Maritime Law and Marine Insurance: Selected Topics* (1983) 24 ('the recovery of pilotage fees was apparently inherent in admiralty jurisdiction, but may probably also be recoverable in admiralty because pilotage dues, like dock and harbour charges, may be considered to be necessities').

⁴⁴ Hare op cit note 8 at 484–485. See *Temora* [1860] 167 ER 9.

⁴⁵ See *Magat v MV Houda Pearl* 1983 (3) SA 421 (N) 426.

⁴⁶ Staniland op cit note 37 at 422 argues that, 'where a decision subsequent to 1890 clearly radically changed the English as at 1890, it was held in South Africa not to be applicable to the Colonial Court of Admiralty; and there is no apparent reason why the High Court of Namibia would adopt a different approach'. Furthermore English cases post 1890 are 'not binding upon South African courts, but d[o] have considerable persuasive force' (P J Schwikkard & S E Van der Merwe *Principles of Evidence* (2009) 24).

⁴⁷ See note 24 above.

⁴⁸ Act 12 of 2005.

⁴⁹ *MV Stella Tingas: Transnet Limited t/a Portnet v Owners of the MV Stella Tingas & Another* 2003 (2) SA 473 (SCA).

⁵⁰ *The Inyati: JT Rennie & Sons v Minister of Railways & Harbours* 1913 34 NPD 396.

⁵¹ *The Yung Chun No 17: Yung Chun Fishery Co Ltd v Transnet Ltd t/a Portnet* 2000 AC 30/97.

⁵² *The Cavendish* [1993] 2 *Lloyd's Reports* 292 (the pilot is the employee of the ship owner *pro tempore* during the time of the navigation of the ship). See also G K Geen et al *The Law of Harbours, Coasts and Pilotage* 5th ed (1997) 293.

⁵³ Porter LJ in *Tower Field v Workington Harbour and Dock Board* [1947] 81 *Lloyd's Reports* 419 clarified that 'a ship owner 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'.

(b) The master-pilot relationship

As a start, the practical setting within which pilotage is conducted will first be examined by interrogating the master-pilot relationship under Namibian law. The relationship between the master and the pilot as defined in statutes is instrumental to determine the extent of vicarious liability that is visited upon either the ship owner or the port authority ensuing an incident involving a pilot.

The duties of the master and the pilot in Namibia are delineated in section 23(1) of the NPAA, in terms of which it is ‘the pilot’s function to navigate a ship in the port, to direct its movements and to determine and control the movements of the tugs assisting the ship under pilotage’,⁵⁴ while ‘[t]he pilot shall determine the number of tugs required for pilotage in consultation with the Port Captain, whose decision shall be final’.⁵⁵ As far as he or she is concerned, the master is required to retain command of the ship⁵⁶ and may intervene only in circumstances in which the safety of the ship is under threat, where a clear emergency is imminent.⁵⁷ In that case, the master must ‘immediately inform the pilot thereof and, after having restored the situation, he or she [must] permit the pilot to proceed with the execution of his or her duties’.⁵⁸

The balance sought by the NPAA in this regard is to harness the respective competencies of both the master and the pilot while avoiding the dangers of divided command.⁵⁹ Nevertheless, the question of when the master must interfere in law is subject to a time limitation and, in that regard, it has been a subject of much legal controversy.⁶⁰ On the one hand, should the master fail timeously, or at all, to intervene in a situation leading to a clear emergency, he or she might be found to be at fault for such failure. On the other hand, should the master intervene prematurely, he or she might equally be found in contravention of the law.⁶¹

To deal with this issue, it is necessary to clarify the meaning of the technical expression ‘to have the conduct of the navigation of a ship’, which is not defined in the NPAA. ‘Conduct of navigation’ means being in charge of all the movements made by the vessel, including the

⁵⁴ Section 23(1)(b).

⁵⁵ Section 23(1)(c).

⁵⁶ Section 23(1)(d).

⁵⁷ Section 23(1)(e).

⁵⁸ Section 23(1)(f).

⁵⁹ See International Chamber of Shipping *Bridge Procedure Guide* 5 ed (2016) 49. Efficient pilotage is chiefly dependent on effective communication and information exchanges between the pilot and the master. The pilot is the most qualified person on the bridge team to appraise the situation in the particular port in which he or she is authorised to operate, but mariners are reminded that ‘the presence of a pilot on the ship does not relieve the master or officer in charge of the navigational watch from their duties and obligations for the safe conduct of the ship’.

⁶⁰ See, for example, *Jones v Randle* (1862) 1 *Roscoe* 64; *The Nord* [1916] P 53.

⁶¹ See, for example, *The Christiana: Hammond v Rogers* (1850) 13 ER 841.

determination of ‘course and speed’, berthing, unberthing and anchoring of the vessel.⁶² In *The Christiana*,⁶³ Baron Parke J remarked that

[t]he duties of the master and the pilot in many respects are clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiency of the ship under her equipment, the competency of the master and crew, and the obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in only.⁶⁴

Taking into account that, in terms of section 23(1), the pilot is charged of navigation and the master assumes a support role as far as navigation is concerned, it is clear that the pilot does have the conduct of navigation,⁶⁵ except when the master intervenes, in which case the pilot is merely an advisor and ceases to be a pilot under law. This is however not what the Namibian Port Regulations in Annexure A Form 1 Part C suggest when they oblige the master to declare:

I [the Master] acknowledge that I will remain in full command of this vessel throughout all of its maneuvers within the port limits, even when there is a pilot on board and when tugs are in attendance. I fully understand that the pilot advises me and I order all movements of this vessel under my command.

This declaration creates an ambiguity in defining the master-pilot relationship. In referring to the pilot as merely an advisor, the PR do not accurately reflect the de jure relationship in which the parties stand under the NPAA. There is thus a need to amend the PR to reflect the same position as the NPAA, i.e. that the pilot has the conduct of the navigation of the ship and all its movements. Failure to do would perpetuate the apparent contradiction can lead to the situation of divided command where the duties of the pilot and those of the master overlap and contradict each other.

(c) The ship owner’s vicarious liability due to pilot error

By virtue of the statutory limitation in section 23(1)(h) of the NPAA on the part of the pilot and the port authority for ‘liability for loss or damage caused by a negligent act or omission of the pilot’, the ship owner is the party who is vicariously liable for pilot error. In this subsection,

⁶² See, for example, *Jones* supra note 61; *The Alex Schuffoff: Owners of SS Alexander Schuffoff v SS Gotland* (1921) AC 216 (HL) 223; *Australian Oil Refining v Miller* [1968] 1 *Lloyd’s Rep* 448. Conduct of navigation is furthermore clarified in *Fowles v Eastern & Australian Steamship Co* (1913) 17 CLR 149 at 157–158, where Chief Justice Barton held that ‘[t]he master of every vessel not exempt from pilotage, arriving at or off any port whereat any pilot shall have been appointed for the purpose of entering any of the said ports or harbours, shall deliver and give in charge such vessel to the duly qualified pilot who shall first board or go alongside of such vessel in order to conduct the same into port, and such pilot shall if required by such master produce his authority to act as such pilot, and no master of any such vessel shall proceed to sea from any of the said ports or quit his station or anchorage in any port, without receiving on board the harbour master or some pilot appointed as aforesaid to move or conduct the said vessel to sea’.

⁶³ See note 61 above.

⁶⁴ *Ibid* at 845–846.

⁶⁵ In *Braverus Maritime Inc v Port Kembla Coal Terminal Ltd* [2005] FCAFC 256, the Federal Court of Australia concluded that the statute considered the pilot as the servant of a ship owner who does not belong to, but has the conduct of, a ship. See also C Hill *Maritime Law* 3 ed (1989) 376.

the ship owner's vicarious liability due to pilot error is investigated under three probable outcomes: (i) the ship under pilotage has been damaged; (ii) other ships and property have been damaged; and (iii) port infrastructure has been damaged.

In the first instance, i.e. where the ship under pilotage is damaged, the ship owner appears to be without remedy for damages because the pilot whose actions resulted in the damage is regarded as the employee of the ship owner under English common law.⁶⁶ Recourse might be sought by the ship owner against the Authority and/or the pilot. However, this would fail owing to both the pilot and the Authority being absolved from any 'liability for loss or damage caused by a negligent act or omission of the pilot' in terms of section 23(1)(h),⁶⁷ negligence being the handling of 'vessels in a manner which nautical experience and good seamanship would condemn as unjustifiable at the time'.⁶⁸ The exemption is, however, only where cause of the damage is owing to the pilot's 'negligent act or omission' alone. There is no exemption when the pilot is 'grossly negligent'.⁶⁹

In the second instance, i.e. where other ships and property have been damaged, third parties may seek damages against the ship in rem against the ship owner⁷⁰ or in personam against the Authority.⁷¹ The extent of the ship's liability will be determined by the principles of English common law as they were in 1890,⁷² which the Namibian High Court of Admiralty is bound to apply. English common law exempted the ship owner from liability for damages caused by a compulsorily employed pilot under the compulsory-pilotage-defence principle codified in section 388 of the Merchant Shipping Act, 1854.⁷³ The exemption applies when the damage was caused by the actions of the pilot alone, i.e. when there was no contribution to that cause by the actions or failure to act of the master or the crew. The ship owner has the burden of proof in such a case and, if there was contribution to that cause, an apportionment of liability is required. Otherwise, there would be no claim against the ship owner because the pilot was the servant of the ship owner.⁷⁴

⁶⁶ See *Inyati* supra note 50. The compulsory-pilotage-defence shield was lost in the UK in terms of the Pilotage Act, 1913. However, the shield is still present in Namibia.

⁶⁷ See further *The Aluco: Shell Tankers Ltd v South African Railways and Harbours* 1967 (2) SA 666 (E). The standard of care is the objective diligent paterfamilias (the reasonable prudent person).

⁶⁸ *General Petroleum Corp v City of Los Angeles* 42 Cal. App. 2d 591.

⁶⁹ Gross negligence is a concept that develops from delict. The distinction between ordinary negligence and gross negligence comes down to a matter of degree. See *Stella Tingas* supra note 49 para 7. See further section IV(c) below for a discussion on gross negligence.

⁷⁰ *Staniland* op cit note 37 at 437.

⁷¹ *Homer Ramsdell Transp Co v. La Compagnie Générale Transatlantique* 182 US 406 (1901).

⁷² *The Peerless* (1860) 15 ER 1 82. See further *Geen et al* op cit note 53 at 199.

⁷³ Merchant Shipping Act 1854 (17 & 18 Vict c. 104). Even though still applicable to Namibia, the compulsory pilotage defence was short-lived in the United Kingdom. The English Pilotage Act, 1913, redressed the position making the ship owner answerable for damages whether pilotage was compulsory or voluntary. The ship owner can also claim for damages based on its vicarious liability under the principle. See *Geen et al* op cit note 53 at 199. In South Africa, compulsory pilotage defence was removed with the enactment of the NPA.

⁷⁴ Two prominent cases on compulsory pilotage defence in English law are *Peerless* supra note 72 and *The Killarney* (1861) 15 ER 1 82 wherein precedence for compulsory pilotage defence is firmly justified and established. Two South African cases are *Table Bay Harbour Board v City Line Ltd* (1905) 22 SC 511 and *Stella Tingas* supra note 50 at 29B et seq. See also D J Bederman 'Compulsory pilotage, public policy, and the early private international law of torts' (1989–1990) 64 *Tulane Law Review* 1033–1083 at 1052; *The Mobile* (1856) 14 ER 568.

Third parties would as recourse bring a case against Namport as a claim in delict (tort). Such a claim would be an aquilian action based on Namport's duty of care and its vicarious liability for the acts and omissions of its servants.⁷⁵ As a defence, Namport could attempt to activate the exemption clause under section 23(1)(h) of the NPAA, but this would place some obstacles in the way for Namport. Namport will have to raise a special defence, the onus of which will rest upon it to show that such defence is valid. The defence would entail proving to the court that there is no pattern of influence on the part of Namport or its employees (not limited to pilot error) in the sequence of actions that resulted in the damage.⁷⁶ This would necessitate a full factual enquiry in the causes of the damage or loss. Assuming that Namport successfully proves that there is no pattern of influence on its part or that of its employees, it will leave the aggrieved parties, an innocent party, without any remedy and no recourse to obtain damages for the losses suffered. This logic is reiterated in South African jurisprudence in *The Stella Tingas*⁷⁷ and *The Yung Chun No 17*.⁷⁸

In the third instance, i.e. where the port authority has suffered damages, there would be no claim against the ship or the ship owner because the pilot is under the employ of the Authority. Section 23(1) of the NPAA provides that 'every ship must be navigated by a pilot who is an employee of the company [Namport]'. This provision reads similar to section 10(1) of the now repealed SATSA, which provided that 'every ship [...] shall be navigated by a pilot who is an employee of the company [...]'. This position was said to be the sole obstacle in the port authority's action for recovery of damages in the South African *Inyati* case.⁷⁹ In casu, the authority (Transnet) sought compensation for damages to its harbour tug, *The Richard King*, after it collided with *The Inyati*, which was under pilotage. The South African court of admiralty held that 'the government which compels a ship to take the government's servant as pilot cannot recover damages where, through negligence of that servant, damage is caused to government property.'⁸⁰

What is apparent from the discussion is that vicarious liability for pilot error can sway either side between the ship owner and the Authority, depending on the identity of the party that suffered damages, being either the ship under pilotage, the Authority whose employee caused the damage or an innocent third party external to the pilotage operation. Moreover, the law does not cater for all potential losses that can ensue due to pilot error, a situation that often leaves injured plaintiffs without remedy. For those reasons, there is a need to re-examine the rules. The policy issues underlying the question of liability in the compulsory pilot case must be explicitly reconsidered and, ideally, the compulsory pilotage defence enjoyed by the ship owner be removed. In South Africa, the compulsory pilotage defence was removed with the enactment of the NPA,⁸¹ which now leaves the ship owner vicariously liable for all damages as a result of pilot error in terms of section 76(2). The South African position under section

⁷⁵ *Aluco* supra note 67 at 673.

⁷⁶ See Hare op cit note 8 at 493 ('if the authority is itself negligent or if its employee, other than the pilot causes or contributes to the damage suffered, the exclusion from liability should not apply').

⁷⁷ *Stella Tingas* supra note 49.

⁷⁸ *Yung Chun No 17* supra note 51.

⁷⁹ See note 50 above.

⁸⁰ *Ibid* at 415.

⁸¹ Act 12 of 2005.

76(2) of the NPA now also exempts the port authority from liability to third parties in the event of damage caused to other ships whilst under the control of a pilot.⁸² This setting has reportedly shielded the South African government from potential claims, which would have succeeded under the previous dispensation of the SATSA.⁸³

(d) Liability of port authority as general employer

The liability of the port authority was examined in *The Stella Tingas*.⁸⁴ The *Stella Tingas*, a tanker, was safely berthed in the port of Durban when she was struck by the *MV Atlantica*, which was under compulsory pilotage. The owners of the *Stella Tingas* brought a case against the owners of the *Atlantica* in rem and against the port authority in personam for damages suffered as a result of the collision. The issue before the court was whether a ship owner of an innocent vessel would be able to recover damages from the port authority. The court turned to English common law and found that, as per the common law, a ship owner is not be liable for the actions of a compulsory pilot on board its vessel.⁸⁵

The owners of the *Stella Tingas*⁸⁶ subsequently contended that the port authority was liable for the actions of the pilot, which they furthermore alleged to be grossly negligent. In order to ascertain whether the port authority was liable, the court had to analyse whether the pilot's actions, if proved, amounted to mere negligence, in which case the liability of the pilot and the port authority was excluded by the SATS Act, or they amounted to gross negligence, in which case the exclusion of liability did not apply.⁸⁷ Booysen J, ruling against the port authority held the port authority liable for the damages because the pilot whose act caused the damaged was the employee of the port authority and whose actions amounted to gross negligence. The port authority successfully appealed the decision. In the court of appeal, Scott JA held that,

to qualify as gross negligence the conduct in question [...] must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care.⁸⁸

In the case at hand, Scott JA held that the speed of the *Atlantica* was 'excessive to the extent that it contributed to the "squat" and "bank effect", which, in turn caused the sheer to port' that resulted in the collision.⁸⁹ He also held that the pilot's actions were negligent in the ordinary sense and not grossly negligent. Thus, the port authority was not liable for the actions of the pilot.

⁸² Section 76(2) NPA.

⁸³ See Hare op cit note 8 at 495–496. See also B Robertson 'Who is liable when a marine pilot causes a crash landing?' (21 May 2017) (available at <https://www.bowmanslaw.com/insights/shipping-aviation-and-logistics/liable-marine-pilot-causes-crash-landing/>, accessed on 4 June 2020).

⁸⁴ *Stella Tingas* 2002 (1) SA 647 (D) and, on appeal, supra note 49.

⁸⁵ *Stella Tingas* supra note 49 at 487.

⁸⁶ Ibid at 478.

⁸⁷ Ibid at 480A–B.

⁸⁸ Ibid at 481A–C.

⁸⁹ *Stella Tingas* supra note 49 at 485

It is not only matters of pilot conduct that require consideration when considering the liability of the port authority as the pilot's general employer. Common law also requires the port authority to be accountable for managing operations within the port safely as well as set the conditions and standards for safety and quality service as advertised.⁹⁰ Particularly, a warranty of accessibility to the port is implied if the port authority, in the exercise of its statutory powers, represents to the public that the port has certain safety features, including the provision of 'suitably trained and licensed pilots'.⁹¹ In *Mersey Docks Trustees v Gibbs*,⁹² the port had accumulated mud and, as a result, became unfit for navigation. The common law duty of the port authority was restated as meaning that,

[w]hen such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damaged occasioned by neglect in not keeping the works in proper repair [...]. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property.⁹³

When a port charges dues for pilotage services, it creates a special relationship between the port authority and the users of the port that imposes duties analogous to the common law duties existing between inviter and invitee to take reasonable care.⁹⁴ As a consequence, the port authority's capacity to manage risk could attract an equal level justification for the imposition of vicarious liability on employers under the deterrence theory in delict (or tort).⁹⁵ A definite consequence of allocating liability in such a manner is that the port authority will be put under pressure to implement best practices that guard against the occurrence of unsafe pilotage. This point takes the discussion to the next section which reviews the training and certification of pilots in Namibia.

V TRAINING AND LICENSING OF PILOTS

(a) Introduction

In Namibia, there are no specific statutory provisions setting out the requirements for granting a pilot licence. The only statutory qualification is contained in regulation 19(2) of the PR, which provides that '[n]o licence to act as a pilot at a port shall be issued to any person unless such person has passed an examination conducted by a board of examiners appointed by Namport'. With this provision, the State aims to place an obligation on Namport to take reasonable care,⁹⁶

⁹⁰ See A Mandaraka-Sheppard *Modern Maritime Law* 2 ed (2007) 820.

⁹¹ In *Carisbrooke Shipping CV5 v Bird Port Ltd* [2005] 2 *Lloyd's Rep* 626, the port was held liable in respect of damages while the ship was docked. The courts held that the underpinning cause was the lack of safe operations by the port, which required a system of regular inspection.

⁹² *Mersey Docks Trustees v Gibbs* (1866) LR 1 HL 93.

⁹³ *Ibid* para 726–729.

⁹⁴ See Mandaraka-Sheppard *op cit* note 90 at 822.

⁹⁵ See for example M A Geistfeld 'The coherence of compensation-deterrence theory in tort law' (2012) 61 *DePaul Law Review* 383–418 at 395–396.

⁹⁶ See Mandaraka-Sheppard *op cit* note 90 at 823.

but provides no further guidance on how such an examination is to be conducted and how the board of examiners is to be appointed.

(b) Process for licensing pilots

Namport considers, as a foundation, the possession of the Master Mariner Certificate of Competency (CoC) as prima facie evidence of qualification for admission as an apprentice pilot (trainee pilot).⁹⁷ The Master Mariner CoC is the highest qualification for purposes of the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW).⁹⁸ A newly admitted candidate (referred to as a ‘trainee pilot’) is required to understudy existing pilots by accompanying them on various pilotage assignments. In other words, the trainee pilot is expected to learn on the job, by observation and by piloting under the supervision of a qualified pilot. This process continues until the supervising pilot is satisfied that the trainee pilot is capable of piloting, at which stage the supervising pilot issues a motivation for the certification of the trainee pilot. The trainee pilot must then submit an official application to the port captain, via the office of the senior pilot (the marine training officer), specifying the class of tonnage applied for.⁹⁹ The application must be accompanied by signed motivations from all the pilots under which training was conducted. Thereafter, the trainee pilot undertakes an informal oral exam before a panel consisting of at least the port captain, senior pilot and one other pilot. The exam does not follow a strict curriculum and the questions are random, spanning diverse subjects such as ship handling, port geography and emergency procedures. After successfully defending his or her application in the oral exam, the trainee pilot is issued a pilot’s licence.¹⁰⁰

As indicated earlier, the process for licensing pilots is not regulated. It is also not endorsed by the DMA, which is the body empowered to verify and endorse the issuance of maritime qualifications in Namibia. In the absence of regulation, Namport follows the recommendations of its pilots in most aspects of pilot certification, instead of seeking to govern the pilots according to specified standards.

From the above, what becomes apparent is the need to legislate standards of training and certification for marine pilots in Namibia. To that end, Muhia compiled a draft pilot code for the Namibian ports containing training procedures and a code of conduct.¹⁰¹ Kalulu also highlights the urgent need to improve marine pilot training and standardise certification procedures, in particular by incorporating the IMO Recommendations on Training and Certification and on Operational Procedures for Maritime Pilots other than Deep-sea Pilots

⁹⁷ See vacancy advert for marine pilots for Namport, available at <https://www.namport.com.na/files/files/Marine%20Pilot%202019.pdf> (accessed on 16 January 2021).

⁹⁸ 1361 UNTS 2; adopted: 7 July 1978; EIF: 28 April 1984. See Table A-II/2 of Chapter II of the STCW Code as last amended by Resolution 2 adopted by the Conference of Parties in 2010 (‘the Manila amendments’). The provisions of the STCW are part of Namibian domestic law in terms of Chapter 3 of the Merchant Shipping Act, 1951 (Act 57 of 1951). The Education, Training and Certification of Namibian Seafarers Regulations, 2004 (GN 41 in GG 3164 of 5 March 2004), made under s 356 of the Act, set special training requirements for personnel on certain types of ships (see reg 28–33).

⁹⁹ The licence issued falls into one of six different categories, based on gross tonnage: 3 000, 5 000, 10 000, 15 000, 20 000, 250 00, 30 000 and open licence (unlimited).

¹⁰⁰ This process is repeated until the candidate attains an open licence. Provision is made for candidates with lower CoCs whose licences are limited at the discretion of the port captain.

¹⁰¹ F Muhia *Draft Marine Pilot Code for Namibia* (2010), a copy of which is held by the author.

(‘the TC Recommendations’).¹⁰² Such standards, it is argued, would allow the port authority to comply with its duty of care owed to third parties under the common law.

(c) Regulations for licensing pilots in law

When one compares Namibia’s practices on the licensing of pilots to that of leading maritime nations such as South Africa and Australia, great discrepancies emerge.

In South Africa, as a first layer, the basic requirement is the Officer of the Watch CoC.¹⁰³ The requirements for pilot certification are prescribed in the NPA, which prohibits any person from piloting without the certification prescribed by the South Africa Maritime Safety Authority (SAMSA).¹⁰⁴ The latter, whose Namibian counterpart is the DMA, is the body established under the South African Maritime Safety Authority Act, 1998 (‘the SAMSA Act’),¹⁰⁵ that is charged with ensuring the safety of life at sea and the prevention of pollution of the marine environment by ships.¹⁰⁶ The standards of training and certification for pilots must further be set by the line ministry, in consultation with SAMSA and the port authority.¹⁰⁷

A similar procedure is followed in the case of the Sydney ports.¹⁰⁸ The first layer is the Marine Safety Act, 1998 (New South Wales) (MSA),¹⁰⁹ which provides that the pilot licence is a type of marine safety licence.¹¹⁰ The MSA provides that specific regulations may be made with respect to the eligibility of candidates, pilot training, licensing and continued education and training.¹¹¹ In the second layer, the Marine Pilotage Licensing Regulations, 2016 (MPLR),¹¹² made under section 52(1)(c) of the Marine Pilotage Licensing Act, 1971 (New South Wales),¹¹³ provide that a pilot is required to be in good health including good eyesight, be physically capable of navigating a ship in the prescribed port and suitably qualified as master for the vessel sizes to be piloted.¹¹⁴ The specific standards of training and certification are prescribed in the 2011 Marine Pilotage Code (New South Wales) (MPC),¹¹⁵ and specific reference is made particularly to the TC Recommendations.¹¹⁶ Having satisfied these pre-conditions, an applicant for a pilot licence is required to pass competency tests both in practical

¹⁰² IMO Resolution A.960 (23) of 5 December 2003. See Kalulu op cit note 3 at 44.

¹⁰³ See South Africa Qualifications Authority ‘Requirements for the National Certificate Marine Pilotage’ (no date) (available at <https://allqs.saqg.org.za/showQualification.php?id=57714>, accessed on 16 January 2021).

¹⁰⁴ See s 77(1) NPA. In terms of s 42(1) of the Port Rules, ‘no person may be licensed as a pilot unless such a person is certified by SAMSA’.

¹⁰⁵ Act 5 of 1998. See s 2(1).

¹⁰⁶ See s 3(a)–(b) SAMSA Act.

¹⁰⁷ See s 77(4) NPA.

¹⁰⁸ See C S Yuan ‘Marine pilotage in Australia: Sydney ports case study’ (2003) 17 *Maritime Law Association of Australia and New Zealand Journal* 80–100.

¹⁰⁹ Act 121 of 1998.

¹¹⁰ See s 29(f).

¹¹¹ See s 37 (d)–(f).

¹¹² Available at <https://legacy.legislation.nsw.gov.au/~pdf/view/regulation/2016/308/whole> (accessed on 17 January 2021).

¹¹³ Act 56 of 1971.

¹¹⁴ Clause 108 MPLR.

¹¹⁵ Available at https://www.transport.nsw.gov.au/sites/default/files/media/documents/2017/Marine_Pilotage%20Code%20Volume_One%20_20170202-ACC_0.pdf (accessed on 17 January 2021).

¹¹⁶ Paragraph 3.1 of Schedule 1.

ship handling and local knowledge following a training period of simulator training, manned models, and on the job training when he or she is accompanied by an experienced pilot.¹¹⁷ Once licensed, a pilot is subject to annual re-examination for fitness.¹¹⁸

(d) The Master Mariner CoC as the basis for a pilot licence

The Master Mariner CoC requirement as a basic qualification is explained by the experience gained during the long sea service leading up to the issuing of the CoC, which is believed to equip the pilot to handle any difficult situation that might arise during pilotage. This is needed in the absence of a structured training program for pilots.¹¹⁹ There are, however, three major shortcomings to this requirement. First, the Master Mariner CoC is a certificate of competency that allows the holder to take command of ships at sea and it is not necessarily prima facie evidence of capability to work as a pilot. Secondly, the TC Recommendations, which form the international guide for the training and licensing of pilots, make no reference to a CoC, let alone the Master Mariner CoC. Thirdly, the Master Mariner CoC that Namport currently requires must be issued in a foreign country because Namport does not recognise the CoCs issued in Namibia. This is because Namibia is not on the IMO White List as a result of it not being recognised as a State party giving full and complete effect to STCW.¹²⁰ This means that Namport can only employ foreign-trained pilots or must train Namibian pilots in foreign States on foreign ships. As a result, most pilots in Namibia are still foreign nationals, with only a single open-licence pilot certified since independence. There is thus a shortage of local pilots made particularly acute by various port development projects.¹²¹ One way of addressing this shortfall is by developing regulations specifically for training and licensing pilots in Namibia.

In the United Kingdom, for example, the 2012 Port Marine Safety Code¹²² was enacted following the 1997 *Sea Empress* incident, during which the improperly qualified pilot caused the ship to run aground and spill crude oil in the bay of Milford Haven. The Code is supplemented by the 2016 Guide to Good Practice on Port Marine Operations,¹²³ incorporating expansion plans by the port authority. In the Code, duties to ensure safety of marine operations

¹¹⁷ Paragraph 2.2 of Schedule 1.

¹¹⁸ Paragraph 4.1.3 of Schedule 1.

¹¹⁹ There are currently a number of leading maritime nations where a lower basic requirement is used. For example, the US Coast Guard requires only a candidate to have a second mate licence (officer of the watch) (see Florida Harbour Pilots ‘Training and qualifications’ (2021) (available at <https://floridapilots.com/about/training-qualifications/>, accessed on 17 January 2021).

¹²⁰ The IMO White List is a list of States that comply with the provisions of Part A of STCW. See IMO Doc. MSC.1/Circ.1163/Rev.12 of 9 July 2019 (available at <https://wwwcdn.imo.org/localresources/en/OurWork/HumanElement/Documents/MS.1-Circ.1163-Rev.12.pdf>, accessed on 17 February 2020)

¹²¹ The projects include the construction of the SADC Gateway Port, north of Walvis Bay, and the expansion of the container terminal in the Port of Walvis Bay. See, for example, African Development Bank ‘New Port of Walvis Bay container terminal project: Project appraisal report (July 2013) (available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Namibia - The New Port of Walvis Bay Container Terminal Project - Appraisal Report.pdf>, accessed on 12 June 2020).

¹²² Available at <https://www.gov.uk/government/publications/port-marine-safety-code> (accessed on 4 June 2020).

¹²³ Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854521/MCGA-Port_Marine_Guide_to_Good_Practice_NEW-links.pdf, accessed on 4 June 2020.

are matched with general and specific powers to enable the port authority to discharge them.¹²⁴ The duty of the port authority is restated, notably to ensure that pilots are suitably qualified and fit for the job.¹²⁵

An approach similar to the one enumerated above for Namibia would be effective in standardizing the process of training marine pilots, and allow the rapid training of Namibian pilots. Notably it would also allow the base qualification to be lowered to chief mate or officer of the watch CoC. A notable advantage in doing so is the rapid training of pilots and employment creation as the practice in South Africa has shown.¹²⁶ Lastly, it would also show that the port authority has done due diligence in the offering services as stipulated in the Namport Act, and complying thereto.

VI RECOMMENDATIONS AND CONCLUSION

The discussion revealed first that there is a need to reform the practice of admiralty law in Namibia by divorcing it from the antiquated English admiralty statutes that are currently applicable.¹²⁷ The fact that a case on pilotage would require the Namibian High Court to dredge English law decisions from the 19th century to determine the applicable common law at the time would be an arduous task. Compounded to this, determining a comprehensive span of jurisdiction to which the CCAA has would be a laborious task of uncertain outcome, which the Namibian High Court must be currently subject to. A draft Admiralty Jurisdiction Bill is awaiting tabling in Parliament at the time of writing. Such a move is indeed long overdue.

The article further investigated the Namibian law on pilotage with regard to three specific aspects: the master-pilot relationship, the vicarious liability for pilot error and the standards of training and certification of pilots. The article reviewed the practical and legal setting within which pilotage is practised and how cases of marine pilotage would be adjudicated. Subsequently, policy and regulation with reference to the practice of leading maritime nations, notably South Africa, Australia and the United Kingdom, were examined and from these three recommendations are submitted.

First, it is recommended that the provisions of section 23(2) of the NPAA be amended to adopt a provision similar to section 76(2) of the NPA, which makes the pilot an employee of both the port authority and the ship owner. Doing this will allow Namport to be excluded from liability for damages ensuing from pilot negligence and will shield Namport from liability to third parties, something which the current dispensation does not allow. More so, it will open avenues for Namport to obtain compensation for loss or damage to its property from the ship owner whose ship was under pilotage when the loss or damage was caused by its pilots' actions

¹²⁴ Port Marine Safety Code op cit 122 at s 3. See also Mandaraka-Sheppard op cit note 90 at 811.

¹²⁵ Mandaraka-Sheppard op cit note 90 at 847 ('it is possible the general employer (port authority), may be liable if it assumes responsibility for safe pilotage').

¹²⁶ SA News 'Female marine pilot making waves in Saldanha' (25 August 2017) (available at <https://www.sanews.gov.za/south-africa/female-marine-pilot-making-waves-saldanha>, accessed on 4 June 2017). See also R Maota 'South African women marine pilots make history' (1 August 2011) (available at <https://www.brandsouthafrica.com/people-culture/people/maritime>, accessed on 4 June 2020).

¹²⁷ See Staniland op cit note 37 at 424 ('the current jurisdiction of the High Court of Namibia is some 120 years out of date, having been described 30 years ago in South Africa as filled with many anachronisms').

or omission.¹²⁸ A consideration of the port authority's liability is critical as Namibia considers privatisation of ports and terminals, where different port operators could now become party to a case involving pilotage.¹²⁹

Secondly, it is recommended that the Namibia Port Regulations be amended to read, in line with section 23(1)(b) of the NPAA, in such a way as to confirm that the pilot has conduct of navigation and is not an advisor, as they appear to suggest at present. This will avoid the dangerous situation of divided command where both the master and the pilot could have overlapping duties, which the current setting makes probable.

Thirdly, it is recommended that a structured system for pilot training and certification, which are backed by sound regulations, be implemented. These regulations must take guidance from the TC Recommendations which, even though they offer only guidelines, provide a set standards that can be codified, audited, verified and compared with other countries. Incorporating the TC Recommendations will furthermore allow the standardisation of training and licensing of pilots and, possibly, the lowering of the basic qualification from the Master Mariner CoC to even an Officer of the Watch CoC. This is currently needed to create local capacity in line with Namibia's development plans.

The central argument in this paper is that there are good reasons to revisit the law on pilotage. The paper argues a need to reform the law and practice of pilotage, notably to speak to the pilot's employer under the law and the master-pilot relationship. It also reveals a need to regulate pilot training and certification in line with the Namport Act. Particularly, the paper revealed that there is no legal basis to require the master certificate of competency as a base qualification for marine pilots, but rather sound regulations on pilot training and certification would better serve the country to meet its development objectives and maritime safety needs.

¹²⁸ See Hare op cit note 8 at 495–6 for discussion of s 76(2) of the NPA. See also G R Kaye *An Investigation of the Liability of Transnet National Ports Authority and Ship-owners for the Conduct of Pilots in the Compulsory Pilotage Ports of South Africa* (LLM thesis, University of KwaZulu-Natal, 2013) (available at <https://researchspace.ukzn.ac.za/xmlui/handle/10413/10919>, accessed on 8 June 2020), who suggests that liability should not extend to the master but rather the master should only be held liable for his own actions or omissions. Kaye adds that, when the master's liability includes liability for the pilot's actions, this 'may be moot as in most cases the master would not be able to afford to pay any of the damages caused during compulsory pilotage as the costs could run into hundreds of millions' at 55.

¹²⁹ See I Shinovene 'Namibia: Privatised Walvis Port Terminal – World Bank' (22 May 2018) (available at <https://www.namport.com.na/news/294/namibiaprivatise-walvis-port-terminal-world-bank/>, accessed on 8 June 2020); T Mongudhi & M Haufiku 'Goeiemann favours Dubai firm to run N\$4,2 billion port terminal' (4 March 2020) (available at [https://www.namibian.com.na/198729/archive-read/Goeiemann-favours-Dubai-firm-to-run-N\\$4,2-billion-port-terminal](https://www.namibian.com.na/198729/archive-read/Goeiemann-favours-Dubai-firm-to-run-N$4,2-billion-port-terminal), accessed on 8 June 2020)