NORWEGIAN PILOTAGE
National service - liable for damages?

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1 Introduction

1.1 Background

As a Master Mariner and a former sailor, I have developed a keen interest in many aspects of the operation, navigation and handling of ships. In the area of ship handling and navigation, a sub-category can be isolated; navigation and ship handling with pilot on board. This particular field of the overall operation of a ship – under pilotage and in coastal waters – is the one closest to my heart and I have thus decided to write this thesis on the present system of pilot services in Norway.

Having executed coastal passages, arrivals and departures on various ships throughout the world, with and without pilots onboard, I consider myself to be well versed on the operational and practical aspects of such navigation - but less so on the theoretical background of the system of pilotage in a legal sense. This I shall attempt to rectify through the research for and the writing of this thesis.

1.2 Aim of the thesis and method

The general aim of the thesis is to create insight in and for me to better understand the regulatory landscape of Norwegian pilotage services today, including the associated provisions of the Norwegian Coastal Administration (NCA) that controls in detail the day-to-day operation of the pilots. This includes the training and certification of the pilots. In addition to the national system, there are several international conventions, codes, recommendations and established best practices that might or might not apply to our national system. This will be looked into and compared against Norwegian legislation and operational practices. With this as a backdrop, the specific aim of this research will be to consider if the present day system is sufficient and relevant for the task it sets out to perform, seen from my nautical point-of-view. Additionally, a review of relevant case law involving State-employed pilots where the question of liability is central will be carried out. See 1.3 below for scope of the thesis.
The main resources for this research have been www.lovdata.no and www.rettdata.no (both are legal databases) in addition to www.regjeringen.no (the government and the ministries), www.sjofartsdir.no (Norwegian Maritime Authority - NMA), www.kystverket.no (Norwegian Coastal Administration - NCA). Of international data sources some are worth mentioning specially: www.un.org (United Nations), www.imo.org (International Maritime Organization) and www.impahq.org (The International Maritime Pilots' Association). In addition to these sources, mainly electronic, printed literature has been utilized as well. NCA procedures, instructions and specifications are publicly available documents, and as such, no special permit was required to access relevant documentation regarding the pilotage system. All sources are listed in the references section enclosed.

The Norwegian pilotage system is overall governed by a number of national acts and regulations. At the more detailed, lower operational level the NCA has developed and implemented comprehensive systems, ranging from the performance of pilotage to defining the geographical limitations of the certificates of individual pilots. Many of the acts and regulations and NCA documents are not translated to English. Some unofficial translations exist and where available, they have been used. Some translation has been carried out by myself, and in some cases, where found appropriate, the original Norwegian term or title have been used. In the latter cases, Norwegian words have been denoted by text in italic type.

I feel that one cannot touch on this field of our maritime industry without a historical overview. This recapitulation takes place in 2.1 below. After a look at the history of the pilot services in Norway and its development from unorganized, rudimentary services performed by local inhabitants, to its well organized, governmentally operated services of today the focus will be on how governmental pilotage is carried out in Norway nowadays. The analysis of the present day pilotage system will include its relation to international obligations as well as the national legislations applicable thereto.
1.3 Scope of the thesis

This thesis will take a close look at today’s legal instruments regulating the pilot services in Norway. The thesis will also compare the guidelines set forth in various international recommendations and best practices on pilotage, with the way the Norwegian Coastal Administration (NCA / Kystverket) has chosen to adhere to the international recommendations (that are not legally binding). These guidelines and other resources on operational procedures are in my opinion important to review to be able to benchmark a minimum, or expected, level of the services provided. Such expected level of service provided, is important in the context of the kind of liability we are discussing here, as we shall see later.

Privately employed pilots (in Norway only found on the coastal express Hurtigruten\(^2\) in a limited number) will not be discussed here, but for reference the attention is brought to the Pilotage Act §12 (use of pilot).\(^3\) Preferred pilots\(^4\) are not found in Norway, but there is a system in place where one or more pilots may receive specialized training for a particular ship, or type of ship, for a certain project\(^5\). This type of particular specialized training will not be looked at in any particular detail either, as it is not considered a core activity within the pilotage services, but it is worth noting, a service that occurs from time to time (in some ports). These two varieties of pilotage in Norway does not alter the legal perspective regarding liability, but in the case of privately employed pilots, the ship owners vicarious liability for the pilot's faults are even clearer than for the State employed pilots.

\(^2\) The “Norwegian Coastal Express”
\(^3\) 1989 16 June no.59 Act regarding pilotage service
\(^4\) A system were ship owners might indicate a preference or request a particular pilot under a compulsory pilotage system
\(^5\) NCA Instruction LOS 9.6 - Unusual pilotage (Uvanlige losoppdrag)
2 Maritime pilot services in Norway

2.1 Historical overview

The history of governmentally organized pilot service in Norwegian waters is nearly 300 years old. The Danish-Norwegian king Frederik II issued a royal decree on pilot services in Norway on 29th April 1720. Less than a month later, on 24th May 1720, the king had also approved instructions for the pilots. The royal decree contained eighteen sections on the pilot services, hereunder duties, penalties for any wrongdoing and payment for services provided by the pilots. Possibly, the most important innovation of this decree was the introduction of formal requirements of the qualifications for persons to serve as pilots.

Although formally considered to have a history nearly 300 years old, pilots have provided services to the sailors on the Norwegian coast long before the royal decree of April 1720. Already in 1276, the city law of Bergen (then a part of the Hanseatic league), instructs masters of ships to carry pilots at their own cost, to hire pilots for arriving and departing the port of Bergen. The Bergen pilots organized themselves during the 13th century and as a consequence of this, the Norwegian king Erik II Magnusson prohibited the pilots from forming guilds or otherwise organizing themselves, by statute of March 1294/93, section 3. Most likely this prohibition was an act of protectionism from the king's side; he wanted the Crown to have control over the pilots.

Prior to the first documented history of compulsory pilotage and the prohibition of pilots forming guilds as mentioned above, one can easily imagine sailors, local farmers or fishermen providing Viking longboats with local knowledge on ports, waters and fairways as a necessity for the trade that took place along the long coast of what we know today as Norway.

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6 Allernaadigste Resolution 29de April 1720, Friederich R
7 Krohn-Holm: Losvesenet i Norge 250 år, page 17
8 See supra note 7
10 http://www.hist.uib.no/grunnfag/kjelder/1293_94_rettarboter.htm accessed 2012 08 19
Losvesenet or the Pilot's Administration does not have such an old history as the acts of maritime pilotage itself. Only in 1889 did the pilots working in the area of the outer Oslofjord, the Færder pilots, organize themselves to influence a revision of the pilotage act of that time and ten years later their primary cause, the common economy of the pilot's service, became a reality. As of that time, the pilots shared the responsibility of operating the pilot service, including running the pilot boats. The income was similarly split internally between the pilots of the organization.\textsuperscript{11}

In 1925 the principle introduced by the Færder pilots regarding sharing operational responsibilities and sharing income was finally established throughout Norway. But it was not until 1948 that the Pilot's Administration ("Losdirektoratet") was founded as a separate entity and at this time the pilots became public servants.\textsuperscript{12}

In 1948 a new Pilotage act was passed, as the previous one from 1930 was already considered to be outdated. This was mainly due to the fact that the pilot services according to the act of 1930, mainly was based on the act of 1899. In the preparatory work for the act of 1930 (meetings held and work carried out from September 1920 to June 1922), the act of 1899 was considered a “well built” act and as such, much was carried forth to the new act of 1930 – not taking into consideration the immense changes in the shipping industry, mainly due to the accelerated transition from sailing ships to steam and motor driven ships. However, when the committee for yet another new pilotage act was established in 1945, the general consensus was that the change in the trade pattern and the way ships navigated (sail vs. mechanical propulsion) needed to be reflected in the new pilotage act that was passed on 9\textsuperscript{th} April 1948.\textsuperscript{13} The main change was the need for pilotage services along the coast over larger distances, as opposed to earlier, when sailing ships would transit well clear of the coast and make landfall as close to the loading or discharging port as possible. Steam and motor ships (not in need of a lot of space to tack and jib to reach a specific position) could navigate along the coast in protected and narrow waters for long distances, not having to rely on

\textsuperscript{11} http://www.kystverket.no/Om-Kystverket/Kva-er-Kystverket/Historikk/Loshistorie/ accessed 2012 09 21
\textsuperscript{12} ibid
\textsuperscript{13} 1948 09 April no.2 Act regarding pilotage service. The preparatory works, submitted 1945 11 21
wind, before reaching their final destination. This kind of navigation obviously demanded a different kind of training for the pilots and a service organized in a different way.

Until the pilotage act of 1948, there was also an element of private pilotage still in service. The committee had knowledge that competition and in some cases “unworthy” conditions had occurred between governmentally employed and private, independent pilots. This problem should now be solved with the establishment of a governmentally run, monopolistic, pilot service.\textsuperscript{14}

The Norwegian Coastal Administration (NCA) as it is structured today is not an old organization either. The previous Lighthouse Administration ("Fyrvesenet"), The Pilot's Administration ("Losdirektoratet") and some elements of the Norwegian National Port Authorities ("Havnevesenet") have been merged and further developed into what we know as today's NCA.\textsuperscript{15} NCA in its present form was founded in 1974 and it is the Ministry's\textsuperscript{16} advisory and executive body related to the administration of ports, coast and the seaways.\textsuperscript{17}

2.2 Pilotage in general

As mentioned above, pilotage can be considered providing ships with local knowledge of a coast and its waterways. Pilot services are for obvious reasons more important for coastal navigation than for open waters, considered complicated fairways (narrow straits, shifting currents, restricted visibility, with lack of or missing navigational marks) and demand and requirements might change with seasons or time of the day (i.e. daylight restrictions or ice). In a summary report on evaluating pilotage and VTS (Vessel Traffic Services), these services (looked at separately) are seen as risk reducing measures.\textsuperscript{18} The Baltic Sea Region Programme 2007-2013 uses this definition: “Pilotage and Vessel Traffic Services (VTS) are risk reduction measures aimed at

\textsuperscript{14} ibid
\textsuperscript{15} http://www.kystverket.no/Om-Kystverket/Kva-er-Kystverket/Historikk/ 2012 20 09
\textsuperscript{16} Ministry of Fisheries and Coastal Affairs
\textsuperscript{18} Summary Report on Evaluating VTS and Pilotage as Risk Reduction Measures Baltic Seas Region Programme 2007-2013
improving navigational safety and reducing the risk of collision, grounding, and contact accidents and incidents."\(^{19}\)

The view on how much pilotage (compulsory or voluntary) actually contributes to navigational safety differs widely. One study\(^{20}\) suggests that the supporting role of a pilot on the bridge, might not necessarily have a significant beneficial effect versus remote pilotage (guiding of a ship by an authorized pilot from a position not onboard the ship\(^{21}\)). As a navigator trained and certified some years ago (prior to many of the electronic aids to navigation of today), my reliance in a solid presence of a human factor is strong, hence my belief is that in general, compulsory pilotage improves maritime safety in areas where there are additional challenges to coastal navigation due to; particular geographical conditions (i.e. narrow passages or multiple shallows), adverse currents or tidal conditions, lack of navigational aids (i.e. buoys, beacons, lights and traffic control stations) or unusually dense traffic.

3 Present system of the Norwegian pilotage service

3.1 Overview

As mentioned above, the NCA in its present form is less than forty years old. The NCA is an advisory and in some areas (including the operation of the pilotage services) an executive agency under the Ministry of Fisheries and Coastal Affairs. The idea of maritime pilotage is that of a safety-enhancing instrument. The pilot has knowledge of local conditions exceeding that of the ship’s crew and as such, the pilot reinforces the competency of the bridge team and, in theory, the navigational safety for a pilot-carrying ship should thus be improved by having a pilot on board. The NCA itself has a zero-tolerance for accidents in the sphere of what falls under compulsory pilotage. This aim of zero accidents is also set out in the allocation letter (the annual letter from the ministry to the executive body - here; from the Ministry of Fisheries and

\(^{19}\) Ibid page 4
\(^{21}\) Ibid
Coastal Affairs to the NCA\textsuperscript{22} that describes and outlines the ministry's governance of the NCA.

The organization of the pilotage system briefly explained: The NCA has divided the Norwegian coast into five regions\textsuperscript{23}, each of which has a regional head office. The regional head office of region Western is given the responsibility of administrative tasks related to pilotage and VTS-services. However, the Pilot Inspector General and his or her superior, the Director of Maritime Safety (NCA), both hold their offices at the NCA headquarters in Ålesund. This location also coincides with another of the NCA's regional head offices: Central. Each of the five regions are run by a Regional Director and below this level is the Pilot Master (administrative position) in each various number of districts that the regions are sub-divided into. Each active pilot reports to the senior pilot, which again reports to the Pilot Master.

The organizational structure seems to be well functional, although heavily hierarchical and less dynamic than one might expect of an operational service in today's modern age. An example from ship operation can be used to illustrate innovative thinking to enhance communication vertically within a system (by-passing hierarchical levels if necessary): With the introduction of the International Safety Management code (ISM)\textsuperscript{24}, a document, control and verification-based management system for ships, the Designated Person ashore (DP) was invented. The DP has a role as an intermediary between ship's crew (including the lowest ranks) and the highest level of management of the ship owner or ship operator. The benefits are obvious; a possibility even for a regular worker to point out deficiencies or raise concerns about the operation via a link to the top management.

\textsuperscript{22} Ministry of Fisheries and Coastal Affairs, NCA allocation letter 2013, ref.: 2012/817 - AKF, sec.4.2
\textsuperscript{23} South-Eastern, Western, Central, Nordland, Troms and Finnmark
\textsuperscript{24} The ISM code establishes safety-management objectives and requires a safety management system (SMS) to be established by "the Company", which is defined as the shipowner or any person, such as the manager or bareboat charterer, who has assumed responsibility for operating the ship. http://www.imo.org/OurWork/HumanElement/SafetyManagement/Pages/Default.aspx accessed 2013 05 06
In Norwegian internal waters (generally all waters inside the geographical baseline) there is a ship size-related, mandatory requirement for pilotage. The Pilotage Act\(^{25}\) requires ships of more than 70 meters length or 20 meters breadth (in addition to other ships carrying liquefied gas, hazardous substances or hydrocarbons, related to the MARPOL\(^{26}\) convention and passenger ship of more than 24 meters length) to carry a pilot in defined inshore waters, generally inside the base line.\(^{27}\)

### 3.2 Actions to satisfy the requirement of compulsory pilotage

For ships falling into the category of compulsory pilotage, there are three ways to satisfy the requirements:

- The primary, and obvious, action to satisfy the requirement is to utilize a pilot. This is the main objective of the present policy of the Norwegian government and it is reflected in the system in place.

- The requirement to carry a pilot might also be satisfied by using a pilot exemption certificate (PEC / \textit{farledsbevis}).\(^{28}\)\(^{29}\) The use of a pilot exemption certificate (PEC) is regulated by the Regulation regarding compulsory use of pilot in Norwegian waters (see above and footnote 23), chapter 3. The pilot exemption certificate is issued by the NCA based on qualifications and a combined theoretical and practical test designed to determine if a particular navigator should be allowed to sail a particular ship in a defined coastal area without a pilot. Only ships of less than 150 m. length over all can be exempted from pilot through the use of a PEC. Further, there are detailed criteria of polluting cargoes (as defined by MARPOL\(^{30}\)) that will, if carried, disqualify a ship from being able to use a PEC. Nor will nuclear powered ships be granted exemption from compulsory pilotage by PEC.

- Thirdly, the NCA can under some special circumstances, and on a case-by-case basis, exempt ships from the requirements. This general exemption is not a replacement for a PEC, but a dispensation from the requirement to carry a pilot.

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\(^{25}\) 1989 16 June no.59 Act regarding pilotage service

\(^{26}\) International Convention for the Prevention of Pollution from Ships

\(^{27}\) The United Nations Convention on the Law of the Sea (Unclos), articles 5, 6 and 7

\(^{28}\) http://www.kystverket.no/Maritime-tjenester/Lostjenester/Losloven-og-losplikt/ accessed 2012 10 19

\(^{29}\) 1994 23 December no. 1129, Regulation regarding compulsory use of pilot in Norwegian waters

\(^{30}\) IMO: The International Convention for the Prevention of Pollution from Ships
for a specific one-off sailing. The dispensation is issued in accordance with §9 in the regulation\textsuperscript{31} and it shall be based on an application from the ship's master.

Generally, dispensations shall only be granted if there is a lack of pilots or any other "special conditions" (særlige forhold) that makes it unreasonable to require use of pilot. Before granting a dispensation, a safety assessment shall determine the sailing without a pilot or a PEC to be "prudent from a safety point-of-view".\textsuperscript{32} Further, dispensations shall not be used to compensate for a general lack of qualified pilots, so that the use of dispensations contributes to uphold a statutory based pilotage system while there is a shortage of pilots.\textsuperscript{33}

3.3 NCA pilot services - internal procedures

In addition to the quality assurance (QA) system (the written system in place to ensure the operations are carried out in accordance with pre-defined goals, see 4.8 below for more on the topic) in place with NCA, the pilotage services in Norway are governed by a set of internal procedures. The procedures most central from the operational point-of-view are PILOT 9 - Pilot service - operational (LOS 9 - Lostjeneste - Operasjonell drift) and PILOT 13 - Training and certification of pilots (LOS 13 - Opplæring og sertisering av los). The procedures are on top of a hierarchical matrix, followed by (in descending order) instructions and specifications. Procedures and instructions contains references to acts and regulations relevant for the execution of the pilotage, whereas the specifications, as indicated by the name, specifies a standard, be it for training and certification or the actual qualifications needed to hold a certificate as pilot. Naturally, the various documents in this procedural system overlap and complement each other to form a system. Without going into details of the entire procedural system, I conclude that it is a comprehensive system, that I believe meet the task it is set to perform, with the exception discussed below (see 6.11.2, my comments to the "Rocknes"-case).

\textsuperscript{31} ibid
\textsuperscript{32} Report no. 47 (1998-99) to the Parliament (Storting) 1999 18 June, 6.4 Granting dispensations (Bruk av dispensasjoner)
\textsuperscript{33} ibid
4 International conventions, guidelines, best practices

4.1 Norway - a part of Europe

Through membership in the European Economic Area\textsuperscript{34} (EEA), Norway has, to simplify, a partial membership in the European Union (EU). Although not in the process of making decisions in the EU, the EEA-membership gives some way of influencing the processes in the EU. This also involves the process of developing legal instruments. When a EU-directive is adopted, the EEA-members are also committed to adhere to the directive. In Norway, with our dualistic\textsuperscript{35} legal system, this entails an implementation of the directive in a Norwegian legal act prior to it becoming enforceable.

At this time, there are no directives that contain instructions on how the EU and EEA member states shall organize their pilotage service and how the pilotage shall be conducted. However, through the Council Directive 79/115/EC (21 December 1978), there is a requirement related to deep-sea pilots in the North Sea and the English Channel, not applicable to Norway due the geographical distance from the area concerned. This directive is safety enhancing through its requirement for North-Sea coastal states to provide sufficient number of deep-sea pilots and encourage the use of such pilots. A number of directives require the administrations to implement regulations on reporting procedures for port state controls. The goals of these directives are to improve safety of ships and to reduce threats to the marine environment. Port state control (PSC) is a system of organized compliance verifications to improve adherence to applicable regulations. In Europe, the PSC is organized through the Paris Memorandum of Understanding on Port State Control (Paris MoU), of which Norway is a participant, together with 26 other maritime administrations.

\textsuperscript{34} Iceland, Lichtenstein and Norway in addition to the EU-memberstates
\textsuperscript{35} On dualism: "The starting point is that international law regulates the relationship between nations, while national law applies domestically. Such relationship between international law and national law is often called dualism." (my translation) - Smith, E., Konstitusjonelt Demokrati, 2nd ed. Fagbokforlaget 2010, p.154
Presently, a relevant initiative from the EU in respect of pilotage is a Commission communication\(^\text{36}\) on pilotage exemption certificates\(^\text{37}\) that suggests easier procedures for application and granting a PEC, no favouring of national languages (English should suffice) and the procedures should contain no elements of protectionism. Since a EU Commission communication serves as a recommendation, there is no requirement adhere to it, but the Commission suggests action to put these recommendations into effect on a national level. With this wording in mind, we might see enforceable directives on the same subject in the future.

4.2 IMO resolution 960

The international rules pertaining to pilotage service are all but a few of an advisory character. IMO has issued a resolution on the subject, not binding on the member states, and as such; it is advisory, or recommendatory. This resolution - A.960(23)\(^\text{38}\) - is a comprehensive document on training, certification and operational procedures for marine pilots. The bulk of the resolution consists of two annexes. Annex 1 relates to the recommendations on training and certification of pilots, including suggestions for maintaining the initial proficiency. Annex 2 relates to operational procedures, the actual execution of the pilotage. The recommendations on the operational procedures also include requirements on the part of the ship (master and bridge officers).

The NCA has opted not to use this resolution as a reference tool or standard. However, it appears that there is ambiguity whether it actually is a reference tool for the NCA or not: In 2006 (December 4th), the NCA was instructed by the Ministry of Fisheries and Coastal Affairs to propose a text for a regulation for compulsory pilotage in the Svalbard-area. The report was published on June 15th 2007\(^\text{39}\) and in this report a clear reference to resolution A.960(23) and its applicability to Norwegian pilotage service is made.\(^\text{40}\) It is, however, quite clear from all acts, regulations and NCA internal documents that the recommendations the resolution are not implemented by the NCA.

\(^{36}\) EU Commission, Communication and action plan with a view to establishing a European maritime transport space without barriers, 2009

\(^{37}\) The EU Commission uses "pilotage exemption certificate", while the terminology used throughout the thesis uses "pilot exemption certificate". The abbreviation PEC denotes either.

\(^{38}\) IMO Resolution A960(23), 2003

\(^{39}\) NCA, Polar pilot service Svalbard, 2007

\(^{40}\) ibid, chapter 5.3 page 11
Since Sweden is a country we might naturally compare Norway to in terms of administration and public services (and the two countries Maritime Codes are substantially the same\textsuperscript{41}), because of geographical proximity and the common history, it might be worth mentioning that the Swedish pilotage services is based on resolution A.960(23) in terms of training and certification of their marine pilots.\textsuperscript{42} That a neighboring country is pro-active regarding IMO recommendations might have influence on future adherence to the same and similar recommendations.

4.3 UNCLOS

The United Nations Convention on the Law of the Sea\textsuperscript{43} (UNCLOS) is a UN convention on the commercial trade on the oceans and the rights of coastal states in the waters of their proximity. The oceans proximity to a coastal state has different levels, in the UNCLOS mainly defined as exclusive economic zone (EEZ), territorial waters and internal waters.\textsuperscript{44} The coastal states right to establish EEZ and territorial waters is limited to 200 nautical miles (NM) and 12 NM respectively from the established baseline.\textsuperscript{45} The UNCLOS has bearing on several areas of marine and maritime law, including the resources of the oceans and the seabed, but for this thesis, it is the rights of coastal states to control traffic and for shipping to claim free passages that are of interest.

Norway has a baseline that consists of 103 points interconnected by geodetic lines. These points are the outermost land-points and reefs visible at normal low tide, defined by regulation\textsuperscript{46} pursuant to the Norwegian Constitution.\textsuperscript{47} The Norwegian baseline is in line with the relevant article of the UNCLOS and the water inshore of the baseline is considered internal waters and this is generally where compulsory pilotage applies in Norway.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{41} Falkanger, Bull, Brautaset, \textit{Scandinavian maritime law - The Norwegian perspective}, 3rd ed. Universitetsforlaget 2011 p.26
\item \textsuperscript{42} Swedish Maritime Administration, Annual report 2011, page 30
\item \textsuperscript{43} Ratified by Norway 1996 06 24, entered into force 1994 11 16
\item \textsuperscript{44} UNCLOS, part II, UN
\item \textsuperscript{45} UNCLOS, article 5; Normal baseline - "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State."
\item \textsuperscript{46} 2002 14 June no.625, Regulation on baseline for territorial waters of mainland Norway
\item \textsuperscript{47} 1814 17 May, Constitution of the kingdom of Norway
\end{itemize}
\end{footnotesize}
As mentioned above, the area between the baseline and 12 NM seawards therefrom, is considered territorial waters.\textsuperscript{48} Territorial waters are under the jurisdiction of the coastal state, but with some limitations, i.e. the right of free passage of ships of other nations.\textsuperscript{49}

The compulsory pilotage in force in Norway today requires the embarkation of a pilot outside the baseline in some instances and in other instances, a general permit (dispensation from the requirement of compulsory pilotage) is established to allow ships to sail through a "pilot free corridor" to a pilot embarkation position inside the internal waters. An example of the first case (pilot embarkation outside the baseline) can be pilots for the port of Kristiansand, southern Norway. An example of the latter can be pilots for the Oslofjord area, including port of Oslo, where pilot embarkation takes place several nautical miles inside the baseline. The significant difference between these two examples is the difference in legal status between internal waters and territorial waters: The general right of free passage through territorial waters as opposed to the general requirement to notify the Norwegian authorities for any arrival in internal waters.\textsuperscript{50, 51}

4.4 SOLAS

The International Convention for the Safety of Life at Sea\textsuperscript{52} (SOLAS) 1974, is an IMO convention and considered a cornerstone of maritime safety. The history of the convention begins in the aftermath of last century's possibly best-know maritime disaster; the foundering of the RMS Titanic following her collision with an iceberg off the shores of Newfoundland in April 1912, causing 1503 passengers and crew to perish.\textsuperscript{53} Many casualties could be contributed to the lack of sufficient numbers of lifesaving equipment. As a response to this insufficiency, international work begun to create rules to enhance safety of ships. The first version of SOLAS was adopted in 1914 and several versions later SOLAS 1974 (as amended) is now in force.\textsuperscript{54}

\begin{thebibliography}{99}
\bibitem{48} UNCLOS, articles 3, 4  
\bibitem{49} UNCLOS, articles 17, 18, 19  
\bibitem{50} 2003 27 June no.57, Act on Norwegian territorial waters and adjoining areas  
\bibitem{51} 1994 23 December no.1130, Regulation on foreign non-military vessels arrival of and navigation in Norwegian territorial waters during peace  
\bibitem{52} Ratified by Norway 1977 02 15, entered into force 1980 05 25  
\bibitem{53} McCart, Atlantic Liners of the Cunard Line, Patric Stephens Ltd. 1990, p.44  
\end{thebibliography}
The main relevance of SOLAS regarding the Norwegian pilotage services is found in chapter V, regulation 23, Pilot Transfer Arrangements. This regulation specifies in detail transfer arrangements for marine pilots, such as pilot ladders, ship's side doors, pilot hoists and associated equipment. The NCA has adopted these requirements in procedures and instructions to pilots and pilot boat coxswains, most notably instruction LOS 9-2 Embarking of ships underway or at anchor with boat.\(^{55}\)

Further implications of SOLAS for marine pilots are the International Safety Management Code (ISM, SOLAS chapter IX) and the International Ship and Port Facilities Security Code (ISPS Code, SOLAS chapter XI-2). The ISM and ISPS codes affects the practical aspects of the pilot's day-to-day work, however, to a small degree: Mainly related to papers, forms and procedures found on the various ships (ISM code) and the access to ports and to the ships in the ports (ISPS code). No direct implication towards the execution of compulsory pilotage in Norway is found in the ISM and ISPS codes.

4.5 STCW

One IMO convention that has a more direct bearing on the pilotage service in Norway is the International Convention on Standards of Training, Certification and Watch keeping for Seafarers\(^{56}\) 1978 (STCW convention). To improve and update the function of the convention a major revision was implemented as STCW 1995 (STCW code or STCW-95). The STCW code is founded on the 1978 version of the convention. In Norway the STCW code requirements for qualifications of certified personnel on board ships is enacted through regulation.\(^{57}\)

As the title indicates, this convention / code sets standards for the various maritime administrations to adhere to with regarding the training leading up to and the issuance of certificates of competency. This involves the theoretical education, examination for skills and knowledge, the practical training including sea-service and the application

\(^{55}\) NCA Instruction: *Instruks LOS 9.2 - Bording av skip underveis eller til ankers med båt* (embarking ships underway or at anchor)

\(^{56}\) Ratified by Norway 1982 01 18, entered into force 1984 04 28

\(^{57}\) 2003 9 May no.687, Regulation concerning requirements and certificate rights for personnel on board Norwegian ships, fishing vessels and mobile offshore units
and issuing procedures for personal certificates for seafarers. In the case of maritime pilots; the deck officer certificates required for entry-level competency for trainee pilots.

In Norway, the Norwegian Maritime Authority (NMA, NCA's sister-organization) under the auspices of the Ministry of Trade and Industry is the owner of regulations and procedures regarding personal certificates for seafarers. Norwegian maritime pilots are selected and employed by the NCA based on experience and documented qualifications in respect of NMA standards based on the STCW code. Present NCA requirements for apprentice pilots (navigators employed to be trained as pilots by the NCA) is deck officer certificate class 2\(^{58}\) and theoretical exam passed to be entitled to hold a class 1\(^{59}\) certificate with sufficient additional sea-service\(^{60}\) (the NMA certificate matrix is based on incremental levels of certificates based on theoretical and practical qualifications).\(^{61}\) One comment that might be worth adding is that the levels of qualifications listed by the STCW code are international minimum levels of training and certification. The NMA has adopted these minimum levels, and as such the standards of these certificates are supposed not to fall below the internationally required minimum standard for seafarer's qualifications. The requirements are set forth in a regulation on qualifications and certificates of competency.\(^{62}\)

### 4.6 Best practices

Many local pilot’s organizations have formalized their own “best practices” but since it would be too large an undertaking to look closer into all these, we shall instead look at the “International Best Practices for Maritime Pilotage” issued by the European Maritime Pilots’ Association (EMPA)\(^ {63}\) and similar relevant resources by EMPA’s

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\(^{58}\) STCW code reg. II/1 and II/2 nr.1 (Chief-officer certificate)

\(^{59}\) STCW code reg. II/1 and II/2 nr.1 (Master Mariner certificate)

\(^{60}\) http://www.kystverket.no/Om-Kystverket/Jobb-i-Kystverket/Ledige-stillinger-i-Kystverket/ accessed 2012 12 11


\(^{62}\) 2011 22 December No.1523, Regulation on qualifications and certificates of competency for seafarers

\(^{63}\) EMPA is a non-profit organization originally formed in 1963 by then European Community marine pilots. Today (2010) EMPA represents appr. 5.000 pilots from the EU and a few non-EU countries (including Norway). “The role of EMPA is to facilitate the exchange of information between its members in order to continuously improve the professional and technical proficiency of maritime pilots in the EU and surrounding countries.” (http://www.empa-pilots.org/index.php accessed 2012 09 10)
It is important to note that EMPA is a private, non-profit organization, whereas IMO is an UN specialized agency. The different in authority is quite obvious; EMPA’s / IMPA's guidelines can be adopted and followed on a voluntary basis, but such guidelines are not binding the way a resolution adopted by the IMO Assembly is on IMO member-nations. In some cases and for some areas of operation, it might be difficult to differ between a best practice and a specification, but generally best practices can been seen as guidelines, whereas a specification should be adhered to. The NCA has not adopted or developed any best practices for use in Norway.

4.7 Master-pilot-exchange

Master-pilot-exchange (MPX), is exchange of information between the master of a ship and a pilot embarking to advise on the navigation and berthing of a ship. MPX is often looked at as a crucial part of the execution of pilotage and it is not limited to the initial familiarization for the pilot upon embarking a ship. As the term implies, it is an two-way information exchange between the pilot and the ship's master, not limited to information flow from one to the other.

Both EMPA and IMPA have resources on MPX, basically built on relevant experience within their international member-mass, but also linked to the recommendations of res. A.960. Resolution A.960 deals with MPX in annex 2, ch.5. The MXP practices varies widely; some pilot stations have ample time and space in the fairway to perform a proper exchange after the embarkation of the pilot, whereas other pilot stations might have geographical conditions where the ship is actually in restricted waters at the time when the pilot embarks. In the latter case, the exchange procedure must initially be kept to a bare necessary minimum, and the remainder of the exchange might be performed during the passage to berth or anchorage. In the case of departure from port (berth or anchorage), there should always be sufficient time to perform a proper exchange procedure prior to departure and the commencement of passage.

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64 IMPA is a non-profit organization launched in 1971, representing appr. 8000 pilots from 54 countries world-wide. [http://www.impahq.org/index.cfm](http://www.impahq.org/index.cfm) accessed 2012 09 29
4.8 Quality assurance systems

Put simply, a quality assurance (QA) system is a set of written specifications and instructions on how to carry out a defined task to a certain defined level of performance. There are many international standards for quality assurance of systems and operations. Even when not required by law, today one can expect some kind of quality control or assurance system where critical operations are performed. QA systems are normally reviewed internally and audited by external actors at regular intervals. A typical review / audit frequency today is internal review annually (or more frequent) and external audit annually.

In the maritime industry (shipping) QA has its foundation in the mandatory International Safety Management code (ISM), based on IMO resolution A.741(18). Although shipping in general and coastal marine pilot services are not fully comparable with one other, the similarities of the pilot service with some of the work functions carried out on board a ship (the pilot is considered a member of the bridge team) are such that some of the practices and principles of the ISM-code must be considered a relevant guideline.

One QA system has been specifically developed by marine pilots for the use of marine pilots; International Standard for Maritime Pilot Organizations (ISPO), however it is not supported by IMPA. Actually IMPA has publicly criticized the ISPO-system.\(^\text{65}\) The criticism is thought to be due to disagreement on how a quality assurance system shall be constructed for a pilot organization and IMPA states: "A quality assurance certificate is not a sign of piloting competence." My opinion is different as my experience from the maritime industry is that there is generally a relation between QA-certification and the quality of the certified subject. However, the ISPO member organizations (10 pilotage organizations world wide) have their systems verified by Lloyd's register and DNV - world leading QA certification companies that are also classification societies. Annex 1 of the resolution A.960 gives recommendations on competent authorities for administration of safe and effective pilotage systems, suggesting that a "competent pilotage authority" can be either local groups or organizations, regional or national

governments. In Norway the competent pilotage authority is the NCA under the auspices of the Ministry of Fisheries and Coastal Affairs. There are no organizations for administration of pilotage services, except the NCA. However, there are a limited number of privately employed pilots on the coastal express (see 1.4 above), but their examination and certification is under the supervision and control of the NCA. The NCA has opted to develop its own system of quality assurance. This QA system is quite comprehensive and has important elements of feed-back of accidents, near misses and unwanted events. The system is fully digitalized through the NCA internal network solution (Intranet) and features statistical processing of the reported events. The QA system for the pilot services of the NCA is not separated from the other areas of work carried out by the administration, meaning that the system is construed to encompass pilot services and its associated transport system (pilot boats and helicopter transfer arrangements), the Vessel Traffic Services (VTS), the services of Aids to navigation (fairways, lights and beacons) and the oil spill response services. That a QA system encompasses more than one core area of operation is not necessary a negative feature, but it creates a system that is big in volume (compared to a system that has only one focus) and without doubt, such a system will be less transparent and more complicated to handle for the single user, as in our case; the pilot.

4.9 Summary

In a legal sense, the systems, recommendations and guidelines listed above might not be considered of great importance, but it has bearing on the quality of the service (in this case the pilotage service) provided by the government. The quality of a public service, and what should be expected by it, is of importance to our courts when they are discussing the question of liability for a damage arisen from neglect of an employee or a failure in the service itself.

One central supreme-court decision in this respect is the "Tirranna"-case\(^{66}\) where the government was found to have failed in providing information on an unlit navigation buoy in narrow waters (and also failed to maintain the light), thus contributing to the grounding of the cargo ship "Tirranna". However, the government, represented by the

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\(^{66}\) ND 1970.82 NSC Tirranna
lighthouse administration was cleared from liability (as was the pilot administration), in short because the neglect of the government was considered less serious than the negligent navigation of the ship.

Below we shall look at more cases with similar issues in context with quality of service provided and the users' expectations, and the legally required standard of those services. The starting point here is the Torts Act\(^{67}\) §2-1 concerning an employer's liability for employees' wrongdoing (causing damage) in a contractual and work related situation, within the limits of what can reasonably be expected from the particular service. Some of the relevant cases are not related to maritime services, but can be (and have been occasionally) applied analogical to the issue of liability in the setting discussed herein.

With the relatively large accumulation of guidelines, standards, best practices, recommendations, circulars and quality assurance systems (and their guidelines and standards as well), one can imagine how a user perceives the pilot service today; as a well founded, well organized public service. Once this perception is established, the expectations to and the amount of trust towards the system will undoubtedly be high. This perception has influence on how the users (ships officers and masters) interact with the service providers (the pilots) and higher amount of trust might contribute to more frequent occurrence of confirmation traps (also called confirmation bias).\(^{68}\)

5 The legal picture related to pilotage services & liability

5.1 Introduction

As briefly mentioned above, the question of liability arising from pilotage will be the central focus of this thesis. In this specific context, it shall be the liability resting with the Norwegian government as providers of the pilotage services. The government can be held liable for acts and omissions committed on their behalf, by employees in relation to the pilotage services. We shall however, note that pilots can be liable for

\(^{67}\) 1969 13 June no.26 Torts Act
\(^{68}\) Kirkebøen, Concept rapport Nr 17 Kapittel 9, p.188-189, NTNU, 2007
their own wrongdoing in their services, both in a civil sense and in a penal sense. Penalty for wrongdoing while performing an act of pilotage has, naturally through time, developed from hard penalties, sometimes at the hand of the ship’s master, to the more reasonable arrangement of liability made good through payment of fines. However, in the Norwegian Maritime Code (NMC)\textsuperscript{69} the pilot is considered a servant (a person performing services for) of the shipowner (\textit{reder}), within the scope of §151. The Pilotage Act §24 (\textit{erstatningsansvar}), on liability, likewise refers to the Torts Act\textsuperscript{70} §§ 2-1 and 2-3 regarding vicarious liability and recourse action, respectively. The legal relationship here is that the Torts Act is considered the general rule and the Norwegian Maritime Code (§151) and the Pilotage Act (§24) are the special rules, both being relevant for the question at hand.

On vicarious liability, the Norwegian Maritime Code (NMC) goes further than the Torts Act in the sense that a ship owner (\textit{reder}) can be held liable for the actions by persons performing work for the ship beyond the control of the ship owner, i.e.; stevedores imposed on the ship by a port or a pilot dispatched to the ship by the government as a part of a compulsory system. A Supreme Court case\textsuperscript{71} can be used to illustrate this issue: The owner of a 30-foot yacht that dragged its permanent mooring during a gale was found liable for damages to a seaplane that was hit by the drifting yacht. The mooring (a 950 kg concrete slab) was supplied by the yacht-owner, but was positioned by the local port authorities in an unsuitable position. The Supreme Court stated that the port authorities exercised neglect when positioning the mooring, but found the yacht owner liable for the negligence under the NMC §233 (present NMC; §151) liability rule since mooring was considered an "integral element of the maritime aspect of a ship owner's activities..."\textsuperscript{72}

The Torts Act defines the employee for which an employer is liable as someone who carries out work or performs duties in favor of the employer\textsuperscript{73} - as opposed to NMC

\textsuperscript{69} 1994 24 June no. 39 Maritime Code
\textsuperscript{70} 1969 13 June no.26 Torts Act
\textsuperscript{71} Rt. 1984 p.866
\textsuperscript{73} ibid §2-1
§151 where the starting point is that the ship owner is liable for; master, crew, pilot, tugboat or others performing work in the ship's service. The noticeable difference here being the adding of "others" to the list of subjects in NMC §151, and that these "others" in addition to pilots and tugboats can be (are likely to be) individuals and/or entities beyond the control of the ship owner - beyond his or her control of pre-hiring checks and selection. Another difference is that pilots and in some cases tugboats regularly are imposed on the ship by compulsory arrangements.

The main rule for liability for damage caused by or to a ship under pilotage is that the ship owner covers damage to own property and damage to third parties. The Pilotage Act\textsuperscript{74} §24 defines a pilot performing pilotage as in the service of the ship with respect to the Torts Act §2-1. The Torts Act\textsuperscript{75} §2-1 places the liability for actions by employees in the course of their work on the employer, also in cases of State employees. Finally, NMC §151 also places the pilot in the service of the ship together with the master, crew, tugboat and others who perform work in the ship's service ("utfører arbeid i skipets tjeneste."). In this respect, the pilot shall also be considered to be duty bound according to §20 c) of the Ship Safety and Security Act\textsuperscript{76} to contribute to the safe navigation of the ship. The situation outlined above does not distinguish between pilots imposed on the ship by compulsory arrangements or pilots that are engaged by the ship on a voluntary basis.

The pilots also have an obligation pursuant to the Pollution Act\textsuperscript{77} chapter 6 to notify the authorities (the closest police authority; §39) in case of an incident causing instant pollution or an incident that might cause instant pollution. Finally, there is an obligation pursuant to the Harbour Act\textsuperscript{78} chapter 5 (§34) regarding prohibition against dangerous disadvantageous use of coastal waters and harbours. Related to pilotage, this is relevant for him or her as an advisor to the navigating officer (officer of the watch / OOW) or the master of a ship. The Harbour Act also opens for emergency measures to be taken in case of imminent danger or to reduce effects accidents already happened (§38). In case

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{74} 1989 16 June no.59 Act regarding pilotage service
\item \textsuperscript{75} 1969 13 June no.26 Torts Act
\item \textsuperscript{76} 2007 16 February no.9 Ship Safety and Security Act
\item \textsuperscript{77} 1981 13 March no.6 Act on Protection of the Environment
\item \textsuperscript{78} 2009 17 April no.19 Harbour Act
\end{itemize}
\end{footnotesize}
of such intervention by the NCA, the pilot on board a ship will act on behalf of the authorities pursuant to these regulations, rather than as a pilot. The obligations outlined above will have no effect or bearing on the question regarding liability for damages as focused on in this thesis.

5.2 History of Tort - Norway

Pre-Norwegian\textsuperscript{79} tort was based on retaliation, and there was often disparity between the retaliation performed by the claimant and the damage caused. The retaliation could be considered revenge and not always be aimed at the tortfeasor or his property, but his family and/or their properties as well. Later, the principle of talion was introduced and this limited the claimant(s) to seek compensation equal to or similar to the damage or loss of property, from the tortfeasor. Succeeding talion was the principle of remedy, briefly explained by fines, payable to the claimant, imposed on the tortfeasor equal to or similar to the value of the damage caused.\textsuperscript{80}

In early Norwegian law, liability was linked to culpa in a penal sense. Without guilt pursuant to the law, a claimant could not claim compensation for a loss inflicted upon him by a perpetrator. The Criminal Code of 1842 (chapter 26, §1)\textsuperscript{81} confirms this principle and it is carried forth in the Criminal Code commencement act of 1902.\textsuperscript{82}

Later, in line with the development of European law in general, the idea of culpa, neglect or fault, as a requirement for liability, took form also in Norway. A clear example of this is found in a Norwegian Supreme Court ruling of 1900, where it is stated; "...liability occurs only when there from one side is either intent (wilful) or lack of consideration or due care."\textsuperscript{83} As mentioned, liability was closely linked to penalty, but with the introduction of the Torts Act\textsuperscript{84} in 1969, a separate law codified the question of liability independently from the Criminal Code.\textsuperscript{85}

\textsuperscript{79} The Kingdom of Norway was not given full independence until 1905, but had autonomy since 1814 - with its own constitution: 1814 17 May, Constitution of the kingdom of Norway
\textsuperscript{80} Ledrup, Peter, Læreboek i erstatningsrett, 6th ed. Gyldendals Akademisk, 2009 p.61
\textsuperscript{81} 1842 20 August, Criminal Code
\textsuperscript{82} 1902 22 May no.11 Criminal Code Commencement Act
\textsuperscript{83} Rt. 1900 p.753
\textsuperscript{84} 1969 13 June no.26 Torts Act
\textsuperscript{85} The above historical review of Tort is abstracted from Official Norwegian Reports (Norges offentlige utredninger - NOU) 2004:3 Arbeidsskademisk, chapters 3.2.1 and 3.2.2
Related to the aim of this thesis, a central point in the Torts Act is the liability of employers for damage caused intentionally or negligently by employees while performing work or carrying out tasks related to work (§ 2-1) – considering whether the requirements claimant(s) reasonably can expect from the service are adequate for such service or not. The consideration of adequacy of a service is regularly a point of dispute between the parties to a question of liability – and as we shall see later an issue where the courts often dissent on their rulings. Dissenting opinions might not necessarily indicate that controversy is the general rule for questions regarding tort, as it is often the most difficult cases brought before the Supreme Court.  

6 Relevant cases (in chronological order)

6.1 Liability for fault committed in governmental services - Norway

There are several Norwegian cases related to the question of liability for damages caused by neglect or failure to perform governmental service to the expected or required standard. Some of the cases considered to be central to the question at hand do not have any direct connection to navigational services in general or pilotage services in particular, but the decisions can be applied analogical to these types of services anyhow. The government provides various types of services and control functions. Depending on what type of service or control function we are looking at, the expectations of the users or customers might vary. The expectations might be set by a general public opinion on a perception of what a service "should be like" or more simply the actual legal function of the service or control.

Closely inter-linked with the pilotage services is the lighthouse administration (NCA’s Centre for Fairways and Aids to Navigation), formerly an independent governmental service organization, but since the re-organization of 1954 an integrated part of the NCA (see 2.2 above). Important case law in the area of lighthouse and fairways are

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86 Lødrup, Peter, Lærebol i erstatningsrett, 6th ed. Gyldendals Akademisk, 2009 p.66
“Lighthouse”\textsuperscript{87} and “Tirranna”\textsuperscript{88} – both of which involves navigational aids, the first a fixed object (lighthouse) and the latter a floating marker (light bouy).

6.2 The Lighthouse (Rt.\textsuperscript{89} 1913.656 NSC\textsuperscript{90})

The lighthouse administration was found not to be liable for damage caused to a steamship from grounding due to an erroneously placed coloured glass in a navigational light. The light was supposed to have a sector of red light towards a navigational hazard, but due to a move of the red glass in the said sector, there was a white light instead – signifying the absence of a hazard, or clear waters in other words. The inadvertent malfunction of the light was due to a lighthouse administration engineer moving the red glass during an inspection. The engineer expected the glass to be returned to its proper position by the local caretaker of the lights, but since there had been previous discussions regarding an adjustment of the sectors, the caretaker assumed that the red glass now had its new, correct position. Unfortunately a few weeks later, a steamship navigating the area used the white sector, now incorrectly calibrated, of the light and subsequently grounded. The result of the grounding was significant damage to the ship. The Ministry of Defence (at that time the lighthouse administration was a subsidiary of the MoD), was sued by the ship owner for the cost of the damage.

6.2.1 The reasoning the ruling

The Oslo city court dissented in their decision, but ruled against liability for the state. The Supreme Court upheld the decision of the city court. The decision of the court was based on a non-existing contractual relationship between the ship and the government (lighthouse administration). Since it was deemed that no contract existed, liability could not be imposed on the government. The ship that suffered the casualty was engaged in domestic coastal trade and at the time of the grounding (1913), only ships in foreign trade paid lighthouse dues that could have been used as a causal ground for a hypothetical contractual relationship between the ships and the lighthouse administration. The court anyhow rejected the notion of such contractual relationship, as it considered the operation and maintenance of the lighthouses a governmental

\textsuperscript{87} Rt. 1913 p.656
\textsuperscript{88} Rt. 1970 p.1154
\textsuperscript{89} Law report containing Norwegian Supreme Court decisions (\textit{Norsk Retstidende})
\textsuperscript{90} Norwegian Supreme Court
undertaking in the interest of the entire society - not relying on nor serving an elect group of users based on a submitted fee. Further, at this time the consensus of the city court (that was endorsed by the Supreme Court), was that the expectations of and the quality level of a public service of this kind, could not be set so high as to exclude misleading navigation lights of this kind, for whatever reason. As soon as this was established to be the opinion of the court, there was no longer a reason to establish the level of neglect by the engineer and / or the supervisor or any negligent behavior on the part of the ship. However, the court found clear causation between the faulty malfunction navigation light and the grounding of the ship, but due to the deliberation referred to above, the ship had to assume its own damages.

6.2.2 My comments

Although the ruling was founded on whether it could be considered that ships had a contractual relationship with the providers of the navigational aids (the lighthouse administration), the discussion leading to the ruling included an element of to what expectations the public (here: the ship owners and the mariners) could have to the reliability of the navigational aids along the coast. In this case: Lighthouses in general, but particularly the white sector (white sector generally denotes navigable waters) of a small sector light. No matter what level of reliable service provide by the administration, and no matter how deep a sailor's trust might be in the accuracy of a light, a light is still only one single aid to navigation. Navigators should never rely on a single source of navigational aid, and if so is the only option, cross check or verification has to take place. I quote the Admiralty Manual of Navigation\textsuperscript{91} - possibly the most authoritative written source on coastal navigation: "The limits of sectors should not be relied upon and always be checked by compass bearing." With this authoritative guideline, it can be questioned whether the navigation of the steamship was carried out in a negligent fashion. If so was the case, the outcome of the ruling would have been the same even if a contractual relationship was considered to exist between the provider and the customer (the lighthouse administration and the ship / ship owner).

\textsuperscript{91} BR 45(1) Admiralty Manual of Navigation, HMSO 1987, p.253
6.3  Gottfried (Rt. 1921.785 NSC)

While attempting to heave anchor in the forenoon of February 15th 1918, to continue a northbound passage after an overnight stop in Karmsundet south of Haugesund, the Swedish steamer "Gottfried" breaks an underwater telegraph cable (one of two cables entangled in the anchor when weighing it) and also damages a telegraph pole due to the strain on the cable(s). The ship was not under compulsory pilotage, but nevertheless carried a pilot. The incident was attributed mainly to the pilot's lack of local knowledge. The specific anchorage had just recently become a regular place to anchor due to the establishment of North-Sea convoys during the World War I. This was probably the main reason that the pilot did not have local knowledge regarding the cables. The ship owner was found liable for the full amount of the damages incurred.

6.3.1  The reasoning of the ruling

The maritime court established that the pilot lacked knowledge of the cables, despite the fact that the cables had been in the same position since 1886, and as mentioned above, the infrequent use of this position as an anchorage was deemed a cause for the pilot's lacking knowledge. However, as the dissenting Supreme Court judge points out, there was at the time no system in place to identify the position of underwater cables, at or near anchorages, for the public, nor for the pilots. This follows from the relevant legislation at the time. Contributing to the majority vote is the reference, once again, to the provisions regarding the pilot acting as a servant of the ship owner, or "performing work in the service of the ship". Not being under compulsory pilotage, but having opted to carry a pilot on a voluntary basis, was not considered to be of any importance for the decision. Finally, the court found no neglect on part of the telegraph company that owned the cables. Although it seems the telegraph company observed the ship in the vicinity of the cables prior to the incident, there were no indications to them or reasons for them to believe that the ship or the pilot did not know or should not have known of the cables.

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92 1917 14 December no.28, Act regarding coastal pilots and fisherman-pilots
93 ibid
6.3.2 My comments

The facts of this case, if compared to the present day Norwegian pilotage regime, have similarities regarding the lack of requirement for the pilot to maintain updated knowledge of the areas of which he or she is certified (see 6.9.2 below - the "Rocknes"-case). In the beginning of the 20th century, without written procedures except from statute and regulations, this approach was probably the commonly accepted norm, whereas today with QA-systems, regulations, procedures and instructions, it is basically still the norm, however hard to understand, considered the immense systematic development that has occurred in the last one hundred years. Legislation on torts has developed and so has the act on pilotage, but the attitude towards a specific part of the pilot's competency has not changed.

6.4 Consul Bratt (Rt.1955.872 NSC)

While navigating a sharp bend in the western river approach to the town of Fredrikstad, a steam ship dropped anchor to prevent colliding with a nearby pier. The ship was under pilotage and it was the pilot advising the ship to let go her starboard anchor as a preventative measure. The anchor fouled a submarine power cable and subsequently deprived the receiver of the electric power, a large shipyard, of high voltage power supply for approximately 5 hours and 11 minutes. The position of the cable was marked by warning signs either side of the river. The area was designated as non-anchorage area as per port regulations and the pilot was aware of this.

The pilot was a sea pilot assigned to bring the ship to the port entrance (in vicinity of the islet Huth), but not up the river to the area where the damage to the cable occurred. However, when reaching the port entrance and making fast the tugboat, the port pilot that was ordered, did not show up and the sea pilot continued to advice the ship on navigating the river, although he was now outside the geographical limits of his pilot certificate.

The shipyard claimed damages for the interrupted power supply and the ship owner refused to pay. The City Court found the ship liable as per the shipyard's claim and the case was brought before the Court of Appeal, which upheld the judgement. The ship owner appealed again and the Supreme Court once again upheld the judgement.
6.4.1 The reasoning of the ruling

Liability for damages without presence of fault, i.e. a type of strict liability, in this case due to an act to prevent an emergency is a legal principle established in Norway. Criminal liability does not arise from such acts, but the damages must be compensated anyhow by the tortfeasor.\textsuperscript{94}

The ship owner held that damage to the cable would have occurred also if the ship had not dropped anchor, from the ship touching the cable at the riverbank. The court found this argument to be hypothetical and would not pursue further deliberation on the matter. Nor could it be taken into account that the pilot claimed not to be aware that the damaged cable was the only one providing power to the shipyard; although the presence of other cables would have mitigated or averted the interruption to the power supply. Finally, the ship owner cited that the exposed position of the cable at a land point (the northern point of the island Kråkerøy) would entail the shipyard to be the closest one to shoulder the expenses following damage to the cable. This argument was not taken into account by the Supreme Court either, and the court referred at this point to the City Court and the Court of Appeal that noted that the cable had not been damaged prior to this incident since it was installed in 1948 - thus concluding that the position of the cable could not be particularly exposed.

6.4.2 My comments

Although not fully relevant for the exact topic at hand related to the State's liability for erroneous actions by a pilot, this Supreme Court decision is important as it clearly puts the liability for damage bluntly on the tortfeasor even when the damage occurs as a consequence of an action to mitigate or prevent casualty to own property (in this case own ship). The question of liability for the State pursuant to the pilot's actions has not even been brought up in this case, and one can assume that this is largely due to the long time established legal practise that the pilot is in the service of the ship, cf. NMC §151 (present legislation).

6.5 Prince Charles (Rt.1963.622 NSC)

A ship owner claimed compensation for damage incurred by grounding. The British side trawler "Prince Charles" grounded in coastal waters and a pilot was on the bridge at the time, assisting the third officer with the navigation. The on-duty pilot was one of several casualties in the shipwreck, and thus could not be questioned regarding the navigation leading to the grounding. However, the Supreme Court concluded that the pilot was largely to blame for the grounding. The case had several elements that the Supreme Court discussed: Firstly if there was causation between the actions of the pilot (alleged navigational errors on part of the pilot) and the grounding, secondly if the government could be held liable for the pilot's errors and thirdly if there were faults committed by the pilot administration by assigning this particular pilot to the ship due to an alleged incapacitation (the pilot had been up late, attending a party and he also suffered from tonsillitis). The "Prince Charles" carried two pilots at the time of the grounding, but only one was on the bridge on duty at any given time, except for times for change of the watches. There was inclement weather, reduced visibility and stronger than normal current at the time of the grounding, thus complicating the navigation.

6.5.1 The reasoning of the ruling

The Supreme Court found the government (pilot administration) not liable for errors committed by a pilot in service, this is much in line with the "Gottfried" case cited above. In this case, regarding the actions of a pilot, the court argued that although the government has made a commitment to administer the pilot services, to train and certify the pilots and to execute a certain control of their services, the government cannot (under the applicable law of that time) be liable for the actions of the pilots.

The court found it natural to consider the pilot a servant of the ship (in the service of the ship owner) and to consider the liability from this point of view.95 A general comparison was made with Sweden and Finland due to their governmental pilot services, and specifically Swedish applicable law, that did not recognize liability in comparable cases. Causation was established between the navigational errors attributed

95 1893 20 July no.1, Maritime Code §8, cf. 1994 24 June no. 39, Maritime Code §151
to the pilot, but with the doctrine that the pilot is in the ship's service, the ship itself is liable for the damage.

The role of the pilot dispatch office was also brought up for discussion. In the plaintiff's opinion, the dispatcher was aware of factors that might have had an effect on the pilot's ability to perform his duties. These factors included consumption of alcohol the night prior to the voyage commencing and an assumed lack of sleep compared to a regular night's sleep in addition to a health condition. Due to this knowledge, the dispatcher passed two assignments on to other pilots, so that the pilots of "Prince Charles" could have the benefit of additional sleep. The Supreme Court found that the government could not be held liable for faults committed by a pilot in their service, nor for the selection of the pilots as it was done in this particular case, as the dispatcher had a fair reason (*rimelig grunn*) to consider the pilots fit for the assignment.

6.5.2 My comments

When there was established causation between the pilot's performance related to the navigation of the "Prince Charles" and the grounding, there was only one plausible outcome of the ruling; the liability must rest with the ship as the pilot is on board as a servant of the ship owner, cf. NMC §151 - vicarious liability.96 Regarding the question of wrongdoing on the dispatcher's behalf (the pilot administration), the case was also quite clear on exonerating the state of liability. However, as we will see below ("Stella Altair"), systematic faults in the pilot administration might deem the state liable.

6.6 Tweelingen (Rt. 1968.1335 NSC)

This was a case where damage to a military telegraph cable was caused by the anchor of the Dutch ship "Tweelingen" after grounding necessitating anchoring at a location not designated as an anchorage. The ship was under pilotage by two Norwegian pilots in inshore waters, one of which was certified for the specific fairway where the anchoring took place. The ship anchored further south than originally planned by the pilots after the grounding, and there is no indication that the master had been informed of the cable. The question in this case is whether the ship owner is liable to the Norwegian state for the damage to the cable, and as such the case is a reverse one from most other cases

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96 ibid
reviewed herein. I still find this case interesting, as it is a clear example of the principle of vicarious liability in the Norwegian maritime code. A particular element in the facts of this case is that the damaged telegraph cable belonged to the military, and as such it was known by the pilots, but not by the public; it was not marked in the general sea charts. This fact would, if the ship did not carry a pilot, exempt the ship for liability - since there was no general information (sea charts, sailing directions) about the cable and the area was not denoted as a non-anchorage area.

6.6.1 The reasoning of the ruling

The Supreme Court found the crew of the ship not to have acted negligently, so the case focused on liability for damage to state property when the damage is caused by acts of a person employed by the government (the pilot). The court restates the effect of §8 of the maritime code (§151 of the present maritime code), that it is clear that the ship owner is liable for faults committed by a pilot in the ship's service. Further, the "Prince Charles" (see 6.2 above) case was referred to, citing it as precedent for the proposition that the state shall not be liable for faults committed by a pilot for damage to the ship owner or third parties. The Supreme Court found that also in this case with damage to state property due to faults committed by a state employed pilot, the principle of vicarious liability of the maritime code should apply.

6.6.2 My comments

As referred to above, there was no likely way for the ship (crew, officers and master) to have knowledge of the position of the underwater cable. The cable was shrouded with secrecy due to it belonging to the military. The only resource onboard that should have knowledge of the cable was the pilot that was certified for this particular area (only one of the two pilots was certified for this area), and he failed to convey this information, including the potential risk of anchoring in this position to the ship's master. When vicarious liability arises under conditions like these, it might seem unjust and harsh. In many cases, there is local information that cannot be read from a chart or a sailing direction that only the pilot possesses. This information might not always be shared to a great extent with the ship, but it forms a kind of knowledge bank from which the pilot dispenses the information deemed necessary for a particular ship or task. In such settings it is of great importance that the pilot actually share relevant information.
continuously. Once again I direct the attention to "Stella Altair" (below), and the systematic failure or faults of the pilot administration itself.

6.7 Tirranna (Rt. 1970.1154 NSC)

When "Tirranna" grounded under pilotage on a southbound passage through the Finnsnesrenna narrows in northern Norway, in January 1966, a case arose with similarities to the "Lighthouse"-case discussed previously (see 6.1 above). At the time of the grounding a navigational light-buoy was unlit mainly due to the local caretaker having neglected the established control and maintenance routine of the said buoy. The ship was beached soon after the grounding, but due to severe damages to the hull and a heavy cargo of ore, she sank completely and was later declared a total loss. The unlit light-buoy was a central reference mark for an alter-course position, and when the pilots (the off-duty pilot had remained on the bridge after change of watches) realised that the buoy was unlit, the ship had advanced past the point where the course should have been changed. The delayed course change caused the ship to sail off the intended track and too close to the Bjørnehiskjærøet shallow where it struck the bedrock.

6.7.1 The reasoning of the ruling

In the District Court, the ruling entailed an apportionment of liability. The government made an appeal and the ship owner made a counter appeal. The Court of Appeal cleared the government of liability and the ship owner appeal once again. The Supreme Court exonerated the government, but the decision was a 4-1 dissent. The main argument for the majority vote was that the ship, i.e. the pilots and the master had navigated negligently prior to the grounding. However, the lighthouse administration, represented by the caretaker of the unlit buoy, was also found to have neglected established routines and duties expected by him. The neglect was considered to have little effect on the events leading to the grounding of the ship. Or in other words not representing a significant deviation from the safety of navigation for seafarers the light buoy was supposed to provide.

6.7.2 My comments

Without entering into an in depth lecture in coastal navigation, I will only concur with parts of the arguments of the Supreme Court on how the "Tirranna" was held to navigate negligently, in particular with reference to the excessive speed and the use of
floating buoys as reference points for the navigation. As mentioned above (see 6.1.2), lighthouses are to be treated with caution when used for navigation. More so floating buoys and light buoys since their position is not absolute (the bottom moorings give them leeway so they swing around their anchor point) and their lights, if fitted, are of a lesser construction and they are subject to the movement of a floating object, might be considered unreliable compared to a light point fixed ashore. I quote the Admiralty Manual of Navigation: "Remember in particular that buoys can quite easily drag or break adrift; that they are frequently moved as shoals extends; and that they may not always display the correct characteristics."...use but do not rely implicitly on buoys." With this clear note of caution in mind, it seems like a very dubious practice to rely on one light buoy for fixing the position of the ship for a crucial alteration of course in a narrow channel. This information coupled with the fact that she was sailing with excessive speed, confirms that the navigation of the "Tiranna" was carried out with a great deal of neglect on this occasion.

The grounding took place in 1966, prior to the Torts Act that came in force in 1969, but the Supreme Court decision was made in October 1970, thus the dissenting judge made and interesting dictum related to the new Torts Act §2-2 nr.1, second sentence; that liability can be mitigated "when taken into account the extent of the damage, the insurance policies and any insurance options and that under the circumstances otherwise in particular is reasonable that the claimant fully or partially carries the cost." This statement was subsequent to a deliberation where the judge concluded that the navigation buoy was unlit, not only due to the neglect of the local caretaker, but also due to the systematic failure of the control function of the administration ("en svikt i selve tilsynsordningen"). This judge held that due to this fact, the State should be held liable for 1/3 of the damages.

6.8 Stella Altair (Rt. 1972.431 NSC)

The "Stella Altair" grounding occurred under a passage inbound for Harstad with a fisherman-pilot (a person with local knowledge, but not certified as a pilot - but sometimes used as a substitute for pilots if these are unavailable), in lieu of a pilot.

Pilots certified for this particular area was not readily available at the time of "Stella Altair" arriving, requiring a pilot. The fisherman-pilot brought with him a piece of paper on board, intended to explain the situation for the ship's master. Due to language barriers, the paper was not handed over to the master in due time - but left for after the planned arrival in Harstad. Before the ship got that far, she grounded shortly after passing the Kjeøy navigation light, where an alteration of course to starboard had taken place.

It is assumed that the main contributing factor for the grounding was the fisherman-pilot's lack of experience with larger ships and radar-navigation, and his lack of attention during and immediately after the change of course.

### 6.8.1 The reasoning of the ruling

The district court found the government not liable for damages and the case was brought before the court of appeal. Here, the result was different; the damages were apportioned 50/50 between the ship and the government. In addition to the fisherman-pilot, the duty officer of the ship was also to blame. The Supreme Court upheld the decision from the court of appeal. The decision was in dissent 3/2, with the two dissenting judges voting for two thirds of damages allocated on the government due to "the much more severe fault of the fisherman-pilot than that of the officer of the watch".

As we have seen above (i.e. 6.3.1 above), the pilot or a person acting as a pilot, is in the service of the ship and as such, the ship owner should according the Maritime Code be liable for faults committed by such a servant. Although a clear causational link was found between the (relative) incompetence of the fisherman-pilot and the grounding of the ship, the apportionment of the damages came about as a result of the systematic errors in the local office of the pilot administration. The master and his officers were never aware that the ship was not carrying a properly certified and qualified pilot.

### 6.8.2 My comments

The apportionment of the damages clearly emerges from the fact that the ship itself contributed to the grounding by negligent navigation, or lack of close supervision of the pilot's performance and execution of the passage. It is a long-standing and accepted
principle at sea, that navigating with a pilot on board does not exempt the navigating officer (officer of the watch / OOW) or the master from the normal duties and responsibilities connected with the safe passage. Today this is statutory by regulation,\textsuperscript{98} pursuant to the Ship Safety and Security Act. According to the legal picture today and from what we have seen in other cases, there would have been no liability for damages on part of the State if there had been a certified pilot on board, nor if the fisherman-pilot had identified himself and his lacking formal qualifications properly.

A likely outcome of the case if there had been no negligence on part of the ship would be that the State had been found liable for the full amount of damages. As support for this, I draw the attention to the fact that two dissenting judges of the Supreme Court voted for 2/3 of the damages be attributed to the State in addition to my comments above regarding the negligent navigation of the ship.

6.9 Tsesis (ND\textsuperscript{99} 1983.1 SSC\textsuperscript{100})

The 1977-grounding of the oil tanker “Tsesis” in Swedish internal waters might be considered slightly apart from the main issues of the other court cases referred to. The vicarious liability (NMC §151) has been central in the previous cases, but the Tsesis-case involved damage arising from oil spill from breached cargo tanks, and thus strict liability applied (and still applies under both Swedish and Norwegian legislation).

Swedish maritime law is based on the same principles as Norwegian maritime law, and for reasons of simplicity the NMC will be used as referral. Strict liability for the ship owner for oil spill other than bunker oil follows from NMC §191, but with important exemptions according to §192. The Tsesis-case also has factual similarities with the Rocknes case (see 6.9 below). Unpublished information on known shallows, or known deviations from the depth information published in the sea charts. In the end, differences in the facts of the cases made the court decide in favour of the ship owner in the Tsesis case, and vice versa for the Rocknes case. The Tsesis grounded on an

\begin{itemize}
\item \textsuperscript{98} 1999 27 April no.537, Regulation on watchkeeping on passenger ship and cargo ship, Appendix A, part 3-1/49
\item \textsuperscript{99} Law report containing maritime law decisions from the Scandinavian countries (Nordiske Domme i Sjøfartsanliggender)
\item \textsuperscript{100} Swedish Supreme Court
\end{itemize}
unmarked rock, discovered years before, while sailing according to the normal routine of the local pilots in the white (safe) sector of a navigational light. The state claimed negligent conduct of the pilot and the ship owner claimed negligent behaviour of the hydrographer and the same for the failure to update the chart and to re-align the sectors of the navigational light.

6.9.1 The reasoning of the ruling

When the case was tried before the Swedish Supreme Court, it had been through two lower courts that had both acquitted the state and found the ship owner liable for the cost of the oil spill (strictly liable) and salvage award for the work done to limit the oil spill, limit the damage to the ship and to bring her afloat and move her to a repair yard. The Supreme Court overturned the previous decisions and stated that the grounding would not have taken place if the rock had been marked in the chart and the sector of the light had been adjusted accordingly. The Supreme Court found the hydrographer to have acted negligently when the rock was discovered during a hydrographic survey 1969 and he subsequently did not follow established procedures to initiate a process where the newly discovered information would have been included in Notice to Mariners (NtM), the navigational light would have been re-sectored and the local pilots would have been informed. This failure to inform was partly attributed to a misperception by the hydrographer; he estimated the shallow to be on the side of the fairway, inside a 10-metre depth contour; which is was not. Under the present circumstances and with the information available on the fairway and the charted depths, the court found no fault on the navigation of the ship by her crew or by the pilot. The Supreme Court found the navigational chart to fall within the category "other navigational aids." of the maritime code (NMC §192, letter c), thus abating the strict liability for oils spill incurred by the same regulation (NMC §191).

6.9.2 Comments

An important element for the outcome of this case is obviously the negligent omitting by the hydrographer of the depth information discovered during the 1969-surveys. Possibly equally important, or even more important, was the fact that the pilot and the

101 Notice to Mariners: A regular information bulletin distributed to inform mariners of any new or altered information important to navigation. New or altered hydrographic information is a central part of NtM.
ship's officers and master navigated the ship according to the updated charts, the local sailing directions and the pilot's training and correct local knowledge. The passage was thoroughly planned by the ship's navigator and it was executed in a textbook way. Criticism of the navigation of the Tsesis from the Swedish State's lawyers was futile; there was no negligence on the ship's part. If negligent performance of the duties of the pilot or the officers and master of the Tsesis had been established, the exemption of the strict liability for oil spill ("the negligence or other wrongful act by a public authority in connection with the maintenance of lights or other navigational aids."\textsuperscript{102}) would probably not have been seriously considered by the Supreme Court.

6.10 Furunculosis (Rt. 1992.453 NSC)

This case has no connection to the maritime transport industry and the NMC, albeit having strong links to the maritime environment - coastal fish farming. We are now in the business of seawater-based fish farming and this Supreme Court ruling is an important decision regarding governmental liability concerning services provided. It is one of few cases after the Torts Act came into force in 1969\textsuperscript{103} and the only one in addition to the Rocknes-case that I have opted to look into in this particular research work that is post-1969. The government was found to be liable for damage caused to salmon farmers from the inadvertent arrival of furunculosis from import of small salmon from Scotland. The small salmon, smolt,\textsuperscript{104} was permitted imported to a number of fish farms due to the lack of capacity of Norwegian salmon hatcheries to produce smolt in quantities large enough to satisfy the demand of the salmon farmers.

The government executes a control function for import of fresh water fish. In this instance, the Ministry of Agriculture could grant exemption from a general import ban issued pursuant to the Act on action against freshwater fish diseases.\textsuperscript{105} In 1984 and 1985 several smolt-farming facilities abroad was scrutinised based on requests for import to Norwegian fish farms. One Scottish facility (Landcatch) was turned down once in 1984 as a supply source for smolt due to disease in their stock. In 1985 a new request was submitted and this time import permission was granted. Prior to this, in

\begin{itemize}
  \item \textsuperscript{102} NMC §192 c)
  \item \textsuperscript{103} "Spanor" Rt.1991 p.954 and "Selbusjøen" Rt.1999 p.1517 are also central Supreme Court decisions regarding governmental control functions and governmental services.
  \item \textsuperscript{104} Salmon hatched and fed to a size and age where it can be transferred from fresh water to sea water.
  \item \textsuperscript{105} 1968 6 December no.2 Act on action against freshwater fish diseases (\textit{Lov om tiltak mot sjukdommar hos ferskvannsfisk})
\end{itemize}
1982 and 1983 outbreaks of furunculosis was discovered on numerous occasions, both in the freshwater and seawater parts of the facilities. The furunculosis seemed more or less permanently present in the seawater parts in this time period.

The import of smolt (240,000 smolt out of a given permit for 282,000) that caused the outbreak of furunculosis in Norwegian salmon farms was carried out in 1985 and it included smolt from the Landcatch facilities.

In 1985 furunculosis was discovered in 17 out of 24 Norwegian fish farms having imported smolt from Landcatch in Scotland. Fish farms that did not import smolt were also struck by furunculosis. The state reacted by imposing an import ban and requiring full scale slaughtering of all fish stock in the effected facilities. The initial lawsuit against the state was brought before the court by 35 fish farms and fish feed and salmon processing plants having suffered from the effects of the disease.

6.10.1 The reasoning of the ruling

The decision of the Supreme Court came after a dissenting opinion by two judges against a majority vote of three. Previously, the District Court had awarded full compensation for all plaintiffs. The Court of Appeal later found no grounds for liability and subsequently absolved the state from liability. The Supreme Court, however, in their ruling, found that the importance of a control function such as this particular one (control of import to prevent diseases on in fish stocks, both in natural habitats and in fish farms), was relatively high due to the potential grave effects on wild and domestic fish if furunculosis was introduced. Additionally, the level of the standard of care should in this instance be set higher than what follows from the Torts Act due to a higher expected standard from the authorities pursuant to the Act on fresh water fish diseases. The preparatory work of this act stresses the importance of a strict legislation and the adherence to it by using an example of an outbreak of furunculosis in a river with a subsequent high death rate of the salmon, suggesting no leniency in the enforcement of the act.106

6.10.2 My comments

This case exemplifies the relationship between the general rule (Torts Act) and the special rule (in this case the Act on action against freshwater fish diseases). The standard of care expected of a service provider is amongst other elements related to the special rule and its intentions. Of the determining factors for the outcome of this case was the intention of the special rule. An additional factor was, as mentioned above, the grave effects of the introduction of furunculosis in Norwegian fish stocks - biological effects but also the economical effects on the businesses that had fish stock that contracted the disease.

6.11 Rocknes (2009.163221 CoA107)

The "Rocknes" was a 25000 tdw FFP108 bulk carrier that grounded on January 19 2004 in coastal waters south of Bergen while under pilotage. The grounding caused the ship to take on water and rapidly list to starboard and capsize. She remained floating bottom up, but 18 out of a total of 30 persons on board succumbed in the harsh conditions. The only survivor from the ship's bridge team (helmsman, navigating officers, master109 and pilot) was the Norwegian pilot.

The primary reason for the grounding was erroneous navigation of the ship by the ship officers and the pilot. Several additional and accumulative factors contributed to the grounding, none of which gave reason for the court to award damages to the ship owner based on state liability.

A central point in the case was a shallow rock protruding from the seabed further from a land point than what was anticipated by the pilot and the ship's officers. A 9,4 metre rock had been discovered by The Norwegian Hydrographic Service in a position 20 metres further off land than the 6 metre dotted depth quota, which itself was marked approximately 35 metres off the shore line, in an area of the chart where no depths where given, except the said 6 metre quota line. In the 1:50.000 scale chart the distance

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107 Norwegian Court of Appeal (Lagmannsretten)
108 Free Fall Pipe - a self discharging bulk carrier able to drop bulk cargoes (typically rock aggregate) to the seabed through a pipe.
109 At the time of the grounding, there were two masters on the bridge; one for familiarisation with the ship and due to take command a few days later.
from the shoreline to the 9,4 metre shallow represented only 1,1 millimetres, making it challenging to discern the details without using a magnifying glass or have prior local knowledge of the area.

6.11.1 The reasoning of the ruling

The Rocknes-case origins from the Court of Appeal, and as such the result of the case cannot be considered as a general legal rule as if was a decision from the Supreme Court, and later cases of similar nature might have a different outcome. A decision from a high status court is more likely to form a legal rule than from the lower level. Or as the textbook on Scandinavian Maritime Law puts it: "For instance, a decision of the Supreme Court will normally be considered to be as certain a legal rule as if the rule had been in statutory form."110

However, I have opted to include the case in this research as it contains several elements that are relevant: Governmental service (both Hydrographic Office and the pilot services), vicarious liability of the employer under the Torts Act and vicarious liability of the ship owner according to the NMC. Further, it has some similarities with the Tsesis-case, but factual differences that made for a different conclusion. This differences of facts were mainly: Firstly, no negligent act on the part of the Hydrographic Office how the previously unknown 9,4 metre shallow was announced and secondly, erroneous navigation of the ship by the bridge team (including the pilot). In this situation, it then follows from the Pilotage Act §24 that related to the Torts Act, a pilot is considered to be in the service of the ship while performing pilotage. This is also in line with NMC §151.

Regarding the detailed charts, where symbols are only fractions of millimetres apart might appear daunting and confusing to some, but as the Supreme Court points out; navigators are expected to be able to make out details of the charts and even use magnifying glasses if needed because of the density of information printed in the chart.

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6.11.2 My comments

The deliberation of the court is mainly in line with previous cases of similar nature, and as such, one can possibly consider this court decision an additional "force" in one direction. However, there are some arguments that can be disputed from a professional (nautical) viewpoint:

- Firstly, the Court of Appeal maintains that it is not the responsibility of the NCA to make sure that the pilots are updated on new information on the areas for which they are certified, but rather a personal responsibility of the pilots themselves. This cannot be correct. Every single pilot receives highly specialised training and coaching before being subjected to very comprehensive theoretical and practical testing procedures leading to certification. Post-certification the pilots are required not to exceed (typically) one year of absence from any particular geographical area within their area of service. Additionally, like all other navigators subject to the certification regime of STCW-code, pilots are subject to regular health checks - for pilots also pursuant to special provisions. That no other form for verification of the competency of a pilot certified for service shall take place on a regular basis is at best, doubtful. This is supported by the IMO Resolution A.960(23), that suggests a system to be in place for "maintaining the initial proficiency" of a pilot.

- Secondly, the Court of Appeal agrees with the defendant's (the Government) argument that the pilots through their education (possibly meant to be "training") and work practice are "particularly competent navigators"(særlig kompetente navigatører). This is an exceedingly generous characterisation of the pilots as a professional group. The pilots are recruited from active navigators from the merchant fleet and to some degree from the Royal Norwegian Navy. Requirement of competency as chief officer (STCW-code deck officer certificate class D2 and passed theoretical qualifications (passed the exam) to become a Master Mariner (holder of a deck officer certificate class D1). There

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111 1974 28 June no.03, Regulation on medical examination of pilots and trainee pilots

112 NCA Specification LOS 13.1.1 - Training syllabus for pilots (does not contain any formal requirement for maintenance of competency for senior pilots; pilots with > 5 years service).

113 "Initial proficiency" = Entry level qualifications - my comment

114 http://www.kystverket.no/Maritime-tjenester/Losjenester/Hvordan-bli-los/ (in Norwegian)
are no requirements for past commands, specialized ship handling courses- or experience, nor any specific requirements for experience in coastal navigation. But the pilots have received specialized training on local knowledge within a specific geographical area - and this local know-how is of invaluable importance in many narrow and challenging fairways in a coastal state like Norway. As a pilot accumulate service and experience over years, he or she might become somewhat of a specialized navigator, but at entry level, with today's systems and requirements in place that is not a general rule.

Thirdly, and connected to the previous point of accumulating experience over years, is the question of being updated regarding new information, such as NtMs and new issues of charts, discovered deviations from existing chart data and other new or updated navigational information.

With a public service of expected high professional standard, it might seem unreasonable that after the issuance of a pilot certificate based on a rigid and comprehensive training program, the NCA cease to perform or govern the validity of a pilot's competency. This, in my opinion, borders on "risk-entailing arrangement" (uforsvarlig ordning) or possibly "technical imperfection" (teknisk ufullkommenhet) and should be seen in conjunction with the theory of the public's expectations to the quality and standard of a particular governmental service.

6.12 Godafoss (2011 grounding, case not yet concluded)

Through my line of work as a pilot boat coxswain I had first hand information of a 2011 grounding involving pilot services. Due to this research, I looked closer at the conditions surrounding this grounding: The grounding occurred in a fairway subject to compulsory pilotage requirements, but without a pilot on board. Godafoss had no PEC or dispensation from the requirements to carry a pilot, but had a pilot on board prior to the grounding.

\footnotesize

115 "Etterretninger for sjøfarende" ("Norwegian Notices to Mariners") is published twice a month and contains information which enables mariners to keep their charts and Sailing Directions up-dated. Source: Norwegian Mapping Authority "Notices to Mariners" (description found in all issues).


117 Rt. 1948.1111 NSC

118 Pilot Exemption Certificate
In addition to the master's misconception of the identity of a navigational light, a contributing factor of the grounding was considered to be the pilot's premature disembarkation (early disembarkation without the master's consent has connection to what is discussed in the preceding section).\textsuperscript{119} The premature disembarkation of the pilot in inshore waters was discovered to be part of an unwanted routine, previously reported through the non-conformity section of the NCA's QA-system. Since the non-conformity reports had not resulted in a concrete action to prevent these early disembarkations\textsuperscript{120} the grounding can be looked upon as a result of a systematic failure in the NCA pilotage system - thus having the potential to impose liability for the NCA for damages resulting from the grounding. However, since the grounding resulted in an accidental release of heavy bunker oil (pollution), the ship is anyway claimed to be strictly liable for the cost of the oil spill (clean up operations), cf. NMC §183. The case has not yet been concluded.

\textsuperscript{119} Accident Investigation Branch Norway report \textit{Sjø 2012/09}, issued June 2012, sec. 2.2, 2.3 and 3.3
\textsuperscript{120} ibid
7 Conclusion

7.1 General conclusions

As we have seen, there are few ways the NCA can be liable for the services provided under the Pilotage. This research project has focused on the potential liability for the government for pilotage as a public service. The topic of whether the pilotage service in Norway is a core business of the NCA / government or not, has not been discussed.

Although a monopolistic performance by the NCA, the service today is not of such a character that it might be kept this way for an unforeseeable time into the future. This is my opinion, and it is partly based on the fact that the present pilotage act has little foundation in a military motive of a maritime defense strategy, as the previous pilotage act had.\textsuperscript{121} The act of 1948 made pilotage compulsory in Norwegian naval jurisdictional waters - inshore waters. The present act has a similar demarcation, and uses the baseline as the limit as from where compulsory pilotage applies. Potential future changes might include partial or full privatization of the services - similar to the Finnish pilotage service organized as a Ltd. since 2011.\textsuperscript{122}

As mentioned above, there are several reasons for organizing the pilot service the way it was through the 20th century, up until how it is today. The question of liability for the government for any wrongdoing in the performance of pilotage by the individual pilot was probably not the main influencing factor of the development, but it was likely to be influential.

Further on the organization of the Norwegian pilots, as seen above, the NCA has a comprehensive system in place, to satisfy international requirements (i.e. the STCW-code requirements of certification as a navigator prior to be recruited as a trainee pilot) and national legislation while executing the task of the pilot services. Apart from my comments on the lack of continuous training requirements for senior pilots (6.9.2

\textsuperscript{121} 1948 9 April no.2 Act on pilotage service
\textsuperscript{122} http://www.finnpilot.fi/www/ajankohtaista/tiedotteet_2012/en_UK/financial_result_2011/ accessed 2013 05 06
above), the NCA appears to be in charge of a well run, in most aspects satisfactory service of pilotage offered to their customers, the ship owners.

An Official Norwegian Report (NOU - Norges offentlige utredninger) is expected to be complete and issued by the end of this spring (2013) on the subject of the entire pilotage services.\textsuperscript{123} This NOU on the pilotage services will most likely institute projects to apply changes, if any changes are suggested by the report. The report is motivated by a concern by the State to have a modern, cost-efficient and user-friendly pilot service that maintains the wanted level\textsuperscript{124} of maritime safety.\textsuperscript{125} Potential suggestions for changes from this report might not have influence on the question of liability as discussed herein, since any suggested changes most likely will be related to economy and efficiency rather than the way the pilotage system is arranged today.

In the initial section of this chapter, I state that there are few ways the NCA can be held liable for damage occurring from a fault committed by a pilot. This is due to the way the pilot is considered a servant of the ship, or "performing service for the ship" by the Pilotage Act and the NMC alike. Thus, the employer's liability for a pilot is shifted from the State to the ship owner the very moment the pilot commences an act of pilotage on board a ship, or even from the moment he embarks the ship.

As we saw from the grounding of the "Stella Altair" (6.8 above), to be found liable for damage from an act of pilotage, the State must be found to have committed wrongdoing in way of systematic failure. I.e. as in this particular case, to have dispatched a person that was not a certified pilot, without informing the ship or the ship owner of the status of the person - the ship firmly believed they had embarked a certified pilot.

The use of fisherman-pilots is not a regular occurrence today. On request, the NCA has informed that fisherman-pilots are used to a very little extent ("veldig lite benyttet").\textsuperscript{126} However, if a fisherman-pilot (or a pilot outside the area where certified) is used, the

\textsuperscript{123} Ministry of Fisheries and Coastal Affairs, press release 2012 02 March, no. 21/2012
\textsuperscript{124} see supra note 23
\textsuperscript{125} ibid
\textsuperscript{126} e-mail of 29 April 2013
NCA has no way of receiving the ship's (Master's) acknowledgement that he or she is accepting the lack of qualification. This is due to the fact that since the last version of the hard-copy master's receipt (Skipperbevis)\textsuperscript{127} containing such a waiver-clause, has been disused and replaced by electronic processing of the form in a version where the master's signature is no longer required. This might entail conditions similar to the facts in the Stella Altair-case if a casualty occurs outside the geographical limits of a pilot's certificate or while a ship is utilizing a fisherman-pilot for any reason. Cf. the Act on Pilotage §12, 3rd sentence, permitting allocation of pilots outside the geographical limits of their certificates if no certified pilots for such area are available.\textsuperscript{128}

7.2 Final notes

Finally, I will argue that some factors might cause the system of liability presently in place for pilotage in Norway seem unjust for the customers (ship owners) or exceedingly favorable for the government:

- The pilots are imposed by a compulsory system and for many ships there are no way to be exempt from the requirement.
- The pilotage is paid for and as such, there is an establishment of a quasi-contractual agreement\textsuperscript{129} between the NCA and the ship when an act of pilotage commences.
- The pilots are not selected, nor screened or tested by the ship prior to embarking and the entire verification process of the competency of a pilot rests with the NCA.

With this as a backdrop, the pilot performs services as a servant of the ship owner according to NMC §151, exonerating the State for any wrongdoing he or she might do in the line of service.

Maybe the time is ripe to re-think the role of the maritime pilot in relation to State liability?

\textsuperscript{127} NCA form LB 0014 Master's receipt
\textsuperscript{128} 1989 16 June no. 59, Act on Pilot services
\textsuperscript{129} cf. 6.1.1 above, 3rd sentence / Rt.1913.656 NSC
8 References

8.1 Literature

J. W. Krohn-Holm, Losvesenet i Norge 250 år, Trekk fra stiftelsestiden 1719-25
McCart, Atlantic Liners of the Cunard Line, Patric Stephens Ltd. 1990
Smith, E., Konstitusjonelt Demokrati, 2nd ed. Fagbokforlaget 2010

8.2 Cases

Rt. 1913.656 NSC
Rt. 1921.785 NSC
Rt. 1955.872 NSC
Rt. 1963.622 NSC
Rt. 1965.1335 NSC
Rt. 1970.1154 NSC
Rt. 1972.431 NSC
ND 1983.1 SSC
Rt. 1984.866
Rt. 1992.453 NSC
Rt. 2003.1546 NSC
2009.163221 CoA

8.3 Statutes

1814 17 May, Constitution of the kingdom of Norway
1842 20 August, Criminal Code
1893 20 July no. 1, Maritime Code
1902 22 May no. 11, Criminal Code
1902 22 May no. 11, Criminal Enactments Act
1917 14 December no. 28, Act regarding coastal pilots and fisherman-pilots
1948 9 April no. 2, Act on pilotage service
1968 6 December no. 2, Act on action against freshwater fish diseases
1969 13 June no. 26, Torts Act
1974 28 June no. 03, Regulation on medical examination of pilots and trainee pilots
1981 13 March no. 6, Act on Protection of the Environment
1981 09 October no. 1, Regulation on certificates and training for pilots.
1989 16 June no. 59, Act on Pilot services
1994 24 June no. 39, Maritime Code
1994 23 December no. 1129, Regulation regarding compulsory use of pilot in Norwegian waters
1994 23 December no. 1130, Regulation on foreign non-military vessels arrival of and navigation in Norwegian waters during peace
1999 27 April no. 537, Regulation on watchkeeping on passenger ships and cargo ships
2002 14 June no. 625, Regulation on baseline for territorial water of mainland Norway
2003 9 May no. 687, Regulation concerning requirements and certificate rights for personnel on board Norwegian ships, fishing vessels and mobile offshore units
2003 27 June no. 57, Act on Norwegian territorial waters and adjoining areas
2007 16 February no. 9, Ship Safety and Security Act
2009 17 April no. 19, Harbour Act

8.4 International conventions / directives
MARPOL - International Convention for the Prevention of Pollution from Ships
Paris MoU - The Paris Memorandum of Understanding on Port State Control
IMO Resolution A.960(23), 2003
SOLAS - International Convention for the Safety of Life at Sea, 1974
STCW - International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978

8.5 NCA internal documents

**Prosedyre**: LOS 9 - Lostjeneste - Operasjonell drift (operation)
**Instruks**: LOS 9.2 - Bording av skip underveis eller til ankers med båt (embarking)
**Instruks**: LOS 9.4 - Utførelsen av losingen (execution)

**Prosedyre**: LOS 13 - Opplæring og sertifisering av los (training and certification)
**Instruks**: LOS 13.1 - Losopplæring og sertifisering (training and certification)
**Instruks**: LOS 13.2 - Lossertifikatsdekning (geographical area for pilot's certificate)
**Spesifikasjon**: LOS 13.1.1 - Utdanningsplan for loser (training syllabus, pilots)
**Spesifikasjon**: LOS 13.2.1 - Bestemmelser om krav til geografisk dekningsområde for statslosers sertifikater (geographical area for pilot's certificate)

**Prosedyre**: LOS 14 - Rekruttering - Los (Recruitment)
**Instruks**: LOS 14.1 - Rekruttering av losaspiranter (Recruitment, trainee pilots)
**Spesifikasjon**: Stillingsbeskrivelse statslos (job description state employed pilot)

*LB 0014 Skipperbevis / Master's receipt* (disused, now; electronic master's receipts)

8.6 Web resources

With complete addresses and access dates in the footnotes where cited:

http://www.lovdata.no/
http://abo.rettndata.no/main.aspx
http://www.imo.org/Pages/home.aspx
http://www.regjeringen.no/nb.html?id=4
http://www.sjofartsdir.no/
http://www.kystverket.no/
www.parismou.org/
http://www.un.org/
http://www.empa-pilots.org/
http://www.impahq.org/
http://www.hist.uib.no/
8.7 Abbreviations / acronyms / vocabulary

AIBN Accident Investigation Branch Norway
Bridge team The complement of people manning a ship's bridge. Under
pilotage, normally a helmsman, an OOW, the master and a pilot
CoA Court of Appeal (Norway; Lagmannsretten)
IMPA International Maritime Pilot’s Association
EEA European Economic Area (EU and in addition Iceland,
Lichtenstein and Norway)
Efs Etterretninger for sjøføre - Norwegian version of Notice to
Mariners (NMs)
EU European Union (former European Economic Community or
EEC)
Fisherman pilot An uncertified person with special local knowledge acting in
lieu of a pilot (kjentmann)
IMCO Inter-Governmental Maritime Consultative Organization
(IMCO)
IMDG The International Maritime Dangerous Goods code
IMO International Maritime Organization
ISPO International Standard for Maritime Pilot Organizations
MARPOL The International Convention for the Prevention of Pollution
from Ships
MS Motor Ship
NCA Norwegian Coastal Administration
NMC Norwegian Maritime Code
NSC Norwegian Supreme Court
OOW Officer of the watch
QA Quality Assurance
PEC Pilot Exemption Certificate
SSC Swedish Supreme Court
STCW International Convention on Standards of Training, Certification
and Watchkeeping for Seafarers, 1978
VTS Vessel Traffic Service