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Employer liability for the Norwegian State pilots

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Table of contents

1 Topic of this dissertation

March 2nd, 2012. A Committee[1] was appointed by Royal Decree to conduct a review of the Norwegian pilot service and regulations.[2] The Committee was composed by various interest groups involved with the pilot service, and was headed by Bjørn Solbakken, Chief Justice of Gulating Court of Appeal.

One of the topics that were discussed by the Committee was the liability for the Norwegian State pilots.

In 1969 the Tort Liability Act[3] (Skl.) was passed with a provision, § 2-1, which imposed an objective liability for an employer. This was the first clear provision to regulate employer liability for both public and private entities. In 1989 a new Pilotage Act[4] was passed. This Act contained an exception rule, the Pilotage Act § 24, which legislated that a State pilot, with regard to Skl. § 2-1, is considered to be in the service of a ship during pilotage. The general employer liability stipulated in Skl. § 2-1 is thus transferred from the State to the shipowner during pilotage. The consequence of the exception rule is that the State, as the pilots' employer, is exempt from liability when a State pilot negligently or intentionally causes damage during pilotage.

In the preparatory works of the Pilotage Act (Ot.prp.nr.43 (1988-1989)) the Ministry of Justice claimed that § 24 would entail an enactment of legal practice.[5] The Ministry referred to a Supreme Court case from 1963, Rt.1963.622 Prince Charles, where a shipowner was held liable when two State pilots negligently caused damage during pilotage. The main

[1] Losutvalget.
[2] NOU 2013:8, page 2
[3] Law of June 13. 1969, no. 26 (lov om skadeserstatning)
[4] Law of June 16. 1989, no. 59 (lov om lostjenesten)
[5] Ot.prp.nr 43 (1988-1989), page 34 - 35

legal basis for the Pilotage Act § 24 therefore originates from 1963; a time before the Tort Liability Act and the general employer liability rule.

The Norwegian Shipowners' Association (NSA), which represents the main users of the pilot service, believes that it is time to change the current state of law. It is not reasonable that the shipowners bear the full liability for damages caused by the State pilots' negligence in service. The NSA claims that the Pilotage Act § 24 is outdated and lacks relevance today, and that the employer liability for the State pilots does not harmonize with the State's employer liability in other areas of law.[6] According to the NSA, a thorough review of the Pilotage Act § 24 is necessary. A review should also be done in conjunction with the Maritime Code[7] (MC) § 151, which imposes a vicarious liability for a reder[8] (referred to as "shipowner" in the following discussions). MC § 151 takes the shipowner's liability one-step further than the general employer liability stipulated in Skl. § 2-1. MC § 151 sets no requirements as to a direct employment relationship between the shipowner and the servant for the shipowner to be liable; the only requirement is that work is performed in the service of the ship. The consequence of this provision is that a shipowner in certain situations will be liable for the work performed by someone else' employees, e.g. when a pilot, employed by the State, performs work in the service of the ship.

June 10th, 2013. The Committee submitted its Norwegian Official Report (NOU) 2013:8 "*Med los på sjøsikkerhet*", office translation "*With a pilot on maritime safety"*[9]. The Committee proposed in section 14.2.4.2 that a review of the liability for State pilots should be conducted.

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[6] Draft resolution and bills: 65 L (2013–2014) section 19.3.3
[7] Law of June 24, 1994, no. 39, lov om sjøfarten
[8] Definition: A reder is the person (or company) that runs the vessel for his or her own account, typically the owner or the demise charter. Cf. Marius no. 393
[9] Meaning "on the path to maritime safety"

April 11th, 2014. The Ministry of Transport and Communication released its draft resolutions and bills[10], 65 L (2013–2014). The Ministry proposed to retain the current state of law without conducting a thorough analysis of the topic.

The objective of this dissertation is to discuss whether there are grounds to consider a modification of the current state of law. The discussion will be based on a presentation of the rules governing the liability for the State pilots and a presentation of the rationale that underlies the current state of the law.

[10] Draft resolutions and bills (Prop.) form the basis for the Storting's consideration of proposed resolutions, new legislation or amendments to legislation, the budget, or other such matters that require a decision by the Storting. (Regjeringen.no)

2 Structure

Chapter 3 will give a presentation of the legal sources that pertain to this dissertation and how these sources have been used.

Chapter 4 will conduct a historical review of the pilot service. This review will illuminate changes in the structure and organization of the service, and highlight important events that underlie the current system.

Chapter 5 will continue with a presentation of the current pilot service, including a presentation of the work and tasks that fall upon the State and the Norwegian Coastal Administration (NCA) as the employer and provider of the pilot service. The objective of this chapter is to give the reader an overview of the organization and operation of the pilot service, and to illustrate the pilots' role and function.

Chapter 6 will conduct a review of the three provisions regulating the liability for the State pilots. This includes the general employer liability rule stipulated in Skl. § 2-1, the exception rule stipulated in the Pilotage Act § 24, and the vicarious liability of a shipowner[11] stipulated in MC § 151. It will become evident from this review that the pilots are the only group of public employees who are currently not subject to their employer in terms of liability.

After having presented the current state of law, I will look into the background of the current state of law and analyze why the pilots are considered to be in the service of a ship during pilotage. Chapter 7 will present a historical review where I will highlight important events and arguments that underlie the current state of law. It will appear from this review that the Supreme Court case, Rt.1963.622 Prince Charles, has been emphasized considera-

[11] Definition of a reder/shipowner: Footnote 8

bly in regards to the enactment of the shipowner's liability for a pilot, cf. the Pilotage Act § 24. In this context I will conduct a thorough review of the Prince Charles case where I will discuss the main arguments and legal sources the judgment is based on.

According to the NSA, it is time for a change of the current state of law. Chapter 8 will present different arguments put forward by the NSA and the shipowners in regard to why they believe it is time for a change, and how they think the liability for the pilots should be today.

After having presented the industry's view of the current state of law, chapter 9 will give some concluding remarks where I discuss whether I believe there are grounds to consider a modification of the current state of law.

3 Legal sources

3.1 Introduction

This dissertation is mainly based on general sources related to tort law. This includes laws, regulations, preparatory works, case law, and legal theory. In addition, the NCA's internal instructions will supplement the general legal sources. The next sections will give a presentation of the legal sources that pertain to this dissertation and how these sources have been used.

3.2 Laws, regulations and preparatory works

Laws, regulations and preparatory works are used in two different contexts within this dissertation:

Laws and regulations are first and foremost used in regard to the review of the current state of law. Three liability provisions from three different laws will in this case be discussed: The Tort Liability Act[12] and the general employer liability rule stipulated in § 2-1, the Pilotage Act[13] and the exception rule stipulated in § 24, and the Maritime Code[14] and the vicarious liability of a shipowner[15] stipulated in § 151.

Behind the three laws are a number of preparatory works and government reports. The preparatory works discuss the legal principles and the purpose of the laws. The preparatory works are also significant when interpreting legal text. The most prevalent preparatory works used in this dissertation are the preparatory works of the Pilotage Act, Ot.prp.nr. 43 (1988-1989) *(Om lov om lostjenesten m.v.)* and the preparatory works of the Tort Liability Act, "*Innstillingen II fra komitéen til å utrede spørsmålet om barns og foreldres ar-*

[12] Law of June 13. 1969, no. 26
[13] Law of June 16. 1989, no. 59
[14] Law of June 24. 1994, no. 39
[15] Definition of a reder/shipowner: Footnote 8

beidsgivers erstatningsansvar m.m. 1964" and Ot.prp.nr.48 (1965-1966) *(om lov om skadeserstatning i visse forhold).*

Secondly, laws and regulations are used in this dissertation when assessing the behavioral norms that regulate the operation of the pilot service. This includes rules that specify how the NCA and the employees of the pilot service should perform its designated work and duties. In this case, Law of June 24, 1994, no. 39 The Pilotage Act and associated regulations are essential. The most prevalent regulations used in this dissertation are the Regulation of October 9, 1981 no. 1 *Forskrift om lossertifikat og losutdanning*,[16] and the Regulation of June 8, 1993 no. 553 *Forskrift om kvalifiksajonskrav for losaspiranter.*[17]

3.3 NCA's internal instructions

The NCA has a well-developed system of internal procedures and instructions that provide guidelines to individual employees on how to perform their work assignments. The internal instructions are not one of the traditional sources of law but will supplement the Pilotage Act and associated regulations, which can be vague in regard to details concerning the employees' work and duties. One of the most important instructions relating to the work and tasks performed by the pilots is the Instruction of July 7, 2010 (Instruction Pilot 9.4), which regulates the performance of pilotage.

3.4 Case law

As elsewhere in tort law, case law will constitute a central legal source. There is a handful of cases relating to liability for State pilots, several which have had a law-making function.[18] These cases will be used as explanatory examples and will illuminate the research question. One of the most important cases in this context is Rt.1963.622 Prince Charles, which constitutes the main legal basis for the exception rule stipulated in the Pilotage Act § 24.

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[16] Office translation: Regulation on pilot certification and pilot education
[17] Office translation: Regulation on pilot qualifications
[18] Office translation: Rettsskapende funksjon, Lødrup, (2009), page 67

3.5 Legal theory

Legal theory constitutes an important source for this dissertation, both in regard to the understanding of general principles of Norwegian tort law, and in regard to the interpretation of the three essential liability provisions. There are a number of books relating to this topic. Three books of importance for this dissertation are, Erling Selvig, *Det såkalte husbondansvar* (1968), Viggo Hagstrøm, *Offentligrettslig erstatningsansvar* (1987), and Peter Lødrup, *Lærebok i erstatningsrett* (2009).

3.6 Other sources

The NSA represents the Norwegian shipowners, who constitute the main users of the pilot service. In order to get insight as to the industry's view of the current state of law, I have interviewed two lawyers from the NSA, Viggo Bondi and Kristin Mørkedal, and two representatives from the shipowners, Knut W. Aanesen from Hagland shipping AS and Toralf Ekrheim from Norlines AS. During the last two years, both Hagland Shipping AS and Norlines AS have suffered huge losses due to pilotage errors. They have contributed to this dissertation by sharing their thoughts and personal experiences concerning liability for pilotage errors. Their contribution will be presented in chapter 7 and 8.

4 The Norwegian pilot service - A historical review

4.1 Introduction

This chapter will conduct a historical review of the pilot service. The aim of this review is to illuminate changes in the structure and organization of the service, and to highlight important events that underlie the current system.

Norwegian pilot history is not considered a part of well-known Norwegian history and there are few sources relating to this topic. Most of the pilot history is based on stories that have been passed down through generations by means of oral presentation. The reliability of the sources may therefore be questioned. One of the main sources used in this review is the book "Los ved Færder"[19], office translation "Pilot at Færder", written by *Einar Chr. Erlingsen* who is an author, editor, and journalist from Hvasser, Norway. *Erlingsen* is related to 7 generations of pilots and has gathered much of his knowledge of pilot history from his relatives.

4.2 1274 "The man who gives advice about the path"

Norwegian pilot history goes back to the early medieval time period. The oldest written legal source that mentions the Norwegian pilots is Magnus Lagabøters Landslov of 1274.[20] A pilot was at this time called a *leidsogumadr*[21], which in old Norwegian means "The man who gives advice about the path". [22]

During the late 1200 the pilots in Bergen started to work within designated associations. The pilot associations were called *Gild* or *Laug*, which is defined as an association of equal members entitled to mutual support and promotion of a common interest.[23] Each Gild was

[19] Færder is a place located in Vestfold county, south east in Norway
[20] NOU 2013:8, page 31
[21] NOU 2013:8, page 31
[22] Office translation: Mannen som gir utsagn om leden, cf. NOU 2013:8, page 31
[23] Office translation: Erlingsen, (2010) page, 20

lead by an *oldermann*, thereby the term *losoldermann*, office translation *master pilot*[24], which is in use today. The oldermann had the overall responsibility to coordinate and regulate pilots in one area.[25] The new associations gave the pilots a strong position with a possibility to control parts of the sea traffic to and from Bergen. Wanting to reduce the pilots' rising influence, King Erik Magnusson, son of Magnus Lagabøter, made a prohibition against the Bergen pilots' attempt to organize themselves in local Gild or Laug.[26]

4.3 1561 With life at stake

Frederik II's law of May 9th, 1561 called Sjørett[27], made further changes for the pilots. In order to raise the quality of the pilot's shiphandling skills and fortitude, this law set strict requirements for the pilot's liability conditions. The conditions were harsh; a pilot who caused damage to a ship due to a negligent action had to replace the damage himself. These amounts were naturally beyond what most people at this time were able to pay. The penalty was clear; if a pilot could not pay for the damage, the captain of the ship would gain authority of the pilot's life. In other words, a pilot risked the death penalty. [28]

4.4 1700 – 1800 The establishment of the Norwegian pilot service

The first establishment of the Norwegian pilot service was formalized in the early 1700's. The "Nordic war"[29] (ca. 1709 to ca. 1720) proved the importance of people with special knowledge of the Norwegian coast.[30] That knowledge was necessary when defending against foreign attacks along coastal waters. The Nordic war also marked the 25 year old naval officer, Gabriel Christensen's initiative to create a separate Norwegian pilot service.[31] His naval experience had given him an overview of the unorganized pilot system through-

[24] A master pilot is in charge of the pilot service within each traffic center. He/she is responsible for the daily management and coordination of the pilot service.
[25] NOU 2013:8, page 31
[26] Erlingsen, (2010) page, 20
[27] Office translation: The Maritime Act
[28] Erlingsen, (2010) page, 21
[29] A conflict in which a coalition led by the Tsardom of Russia successfully contested the supremacy of the Swedish Empire in Central, Northern, and Eastern Europe.
[30] NOU 2013:8, page 31
[31] NOU 2013:8, page 31

out the country. He wanted to establish a system with Royal pilots that were going to be educated and tested in order to get an official pilot license. On April 29th, 1720, Christiansen received acceptance from the King to create a separate Norwegian pilot service.[32] Christiansen was appointed as *head pilot*[33] in Sønnafjelske (the area south of Dovre and east of Langfjella).[34] He was the head of 28 master pilots[35], who were responsible for the coordination and regulation of the pilots within their designated area. The day that the Norwegian pilot service was founded is said to have been May 24th, 1720. [36]

Despite that the pilots were now organized by the State and approved by the King, the conditions for each individual pilot were not changed.[37] The pilots were considered to be self-employed, meaning that each individual pilot fought for every inbound and outbound vessel. The pilot who "hijacked"[38] the vessel first got the job. Each pilot was responsible for his own job and income, while the State issued certificates and stipulated rules and fees for the service. [39]

4.5 1800 – 1889 The breakthrough

The next step towards a more organized system was the establishment of the association "Færderlosene" in 1889.[40] They desired to revise the pilot system by introducing a common fund for the pilots called "common pilotage".[41] The aim with the fund was to reduce the hard competition and unjust treatment of the pilots. The common pilotage system was not well received at first, but after 10 years of struggle came a breakthrough and a common pilotage system was developed.[42] This meant that the pilots cooperated and agreed on pi-

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[32] NOU 2013:8, page 31
[33] Office translation: Overlos
[34] Norsk Historisk Leksikon
[35] Office translation: Losoldermenn. See definition: footnote 24
[36] www.kystkultursamlingen.no – Trekk fra losvesenets historie del I
[37] NOU 2013:8, page 31
[38] Translation: "kapret" Cf. NOU 2013:8, page 31
[39] NOU 2013:8, page 31
[40] NOU 2013:8, page 31
[41] Office translation: Felleskasseprinsippet - Losing til felles kasse
[42] NOU 2013:8, page 31

lotage issues relating to security and ship operation, and shared the profits they earned within their local groups.

July 20, 1893, The Maritime Code[43] was passed with a provision that imposed a "householder liability"[44] for a shipowner. According to § 8 in the Act, a shipowner was liable for damage caused by commanders and crew, and those who occasionally were used to perform tasks for the vessels account, e.g. pilots.[45] This provision is the precursor for the shipowner's[46] vicarious liability stipulated in the current Maritime Code § 151.

4.6 1908 – 1930 New challenges

The new common pilotage system led to a safer and more efficient operation of the pilot service. However, the pilots met new challenges. Improved technology and motorized vessels led to increased vessel traffic, both in terms of domestic and international voyages.[47] The ratio of pilots to ships gaining access to local ports became skewed. This resulted in the use of local seamen and other local experts without formal certification guiding the vessels to and from port. The new trend was obviously not acceptable. The maritime industry and the pilots convened in 1908 and agreed to a new intermediate solution with a special law called "Lov om bruk av kjentmann"[48], which covered the use of local experts for pilotage. The new system resulted in the formation of different groups of pilots with different skills. The certified pilots had preference over all pilotage that took place in their pilot district, while the local experts specialized on pilotage of domestic route transport, also

[43] Office translation: Law of July. 20, 1893, no 1. Lov om Sjøfarten (sjøloven)
[44] Office translation: Husbondansvar, cf. The Norwegian Act of 1687 (NL) 3-21-2. A householder was considered objectively liable for damage caused to a third party due to an unjustifiable action by someone under his service. This mainly concerned the householder's servants.
[45] Office translation: "…(befälhafvare ock besättning), utan gäller jämväl sådana, som tillfäldigvis användas, för att utföra ett eller annat görmål för fartygets räkning (t.ex. lotsar, stufvarer o.d)". Cf. Selvig (1968), page 69
[46] Definition of a reder/shipowner: Footnote 8
[47] NOU 2013:8, page 32
[48] Office translation: Law for the use of local experts

called “route pilots”[49]. Some of the local experts were employed by private shipping companies and sailed with the vessels as so-called “company pilots” [50]. [51]

4.7 1940 – 1983 The pilots become State employees

The resolution that finally united the various pilot groups was the occupation in 1940, and the subsequent war. The pilots were gathered in the resistance, and when the war was over the pilots and the authorities convened to find a solution for a new and improved pilot system.[52] A new Pilotage Act came into force on April 9th 1948[53]. The new Act resulted in drastic changes in the pilot service. The system with head pilots[54] was discontinued and replaced with a centralized Pilot Directorate[55], led by a Pilot Director[56]. The Pilot Director was the head of the Pilot Board[57], which consisted of three representatives from the shipowners, two State certified pilots, one company pilot, and one representative from the Ministry[58]. The Board’s role was to ensure that the new pilot organization was based on a smooth and well-regulated relationship between the government, the industry, and the pilots.[59]

After the establishment of the Pilot Directorate, the pilots were fully employed by the Norwegian State.[60] Despite this, the pilots were not incorporated in the State's annual payroll. The pilots collected their revenue through direct payment for execution of pilot quests[61]. In 1974, the Norwegian Coastal Administration (NCA) was established as a merger between the Lighthouse Authority, Port Directorate, and the Pilot Directorate. The goal was to

[49] Office translation: Rutelos
[50] Office translation: Rederilos
[51] NOU 2013:8, page 32
[52] NOU 2013:8, page 32
[53] Law of April 9, 1948 no. 2 Lov om losvesenet
[54] Office translation: Overlos
[55] Office translation: Losdirektoratet
[56] Office translation: Losdirektør
[57] Office translation: Losstyret
[58] From 1948 to 1952, it was a representative from Industry, crafts and Coastal Affairs, and from 1952 it was a representative from the Ministry of fisheries. Cf. NOU 2013:8, page 32
[59] NOU 2013:8, page 32
[60] NOU 2013:8, page 32
[61] Translation: Losoppdrag, cf. NOU 2013:8, page 32

achieve efficiency gains by merging key maritime businesses that were representing the State. The establishment of the NCA, structural changes in the shipping industry, technological developments, and changes in laws and regulations resulted in a thorough review of the pilot service in 1983. A major reorganization took effect the following year; everyone in the pilot service was now fully employed and paid by the State.[62]

4.8 Summary

The historical review shows that the pilots have been an important part of the Norwegian maritime industry as far back as the late 1200's. One can see from this review that the pilot service has undergone major changes from its very beginning. One of the most important changes is the development from a system with self-employed pilots without any formal education, to the current system where the pilots are educated State officials, employed and paid by the NCA. The following chapter will look closer at the organization and operation of the current pilot service.

[62] NOU 2013:8, page 32

5 The current Norwegian pilot service

5.1 Introduction

This chapter will give a presentation of the current pilot service and the work and tasks that fall upon the State and the NCA as the employer and provider of the pilot service. I will begin with a brief presentation of the NCA, including the internal organization of the agency and its position in the State hierarchy. I will also present the central elements in the pilot service, including the pilot dispatcher, the pilot transportation service, and the pilots. The main focus will be on the pilots' role and function.

5.2 The Norwegian Coastal Administration

The NCA is a national agency for coastal management, organized as an administrative body subordinate to the Ministry of Transport and Communication. As an administrative body, the NCA is part of the Norwegian State as a legal person and subject to the government and the Ministry's organization and management authority.[63]

The NCA has around 1000 employees in total, and around 700 of these employees are engaged in operative activities. The Director General[64] is the head of the NCA, which exists of eight operative units: the head office, which is the highest governing body, five regions, the NCA's Rederi (shipping company), and a center of preparedness for acute pollution.[65] The next section will give a brief presentation of the main units relating to the operation of the pilot service.

The head office is divided into three different departments: The Department for Maritime Safety, The Department for Planning and Coastal Administration, and The Department for Emergency Response. The Department for Maritime Safety is the responsible entity for the

[63] NOU 1995:5, page 29
[64] Translation: Kystdirektøren
[65] www.kystverket.no – organization

pilot service. This Department operates its services through offices located in the five different regions: Southeast (Arendal), West (Haugesund), Mid-Norway (Ålesund), Nordland (Kabelvåg), and Troms and Finnmark (Honningsvåg). [66] Each region offers pilot services through different pilot stations located in various traffic centers[67]. A master pilot[68] manages each traffic center; he/she is responsible for the daily management and operation of the service. This involves coordinating and dispatching the pilots and making sure that laws and regulations are followed at all times. The master pilot is also responsible for the certification of the pilots and to control that the pilots at all times are qualified and updated on important matters relating to their service. [69]

5.3 The pilot service and the role and function of the pilots

The pilot service is regulated by Law of June 16, 1989, no. 59 (Losloven) The Pilotage Act and 13 additional regulations pursuant to the Act, one of the most important being the Regulation of December 23, 1994 no.1129 regarding compulsory pilotage.[70] This regulation stipulates that all vessels over a certain size (length of 70 meters or greater, or a breadth of 20 meters or greater) and/or vessels carrying certain types of cargo,[71] are required to have a pilot onboard when navigating in waters within the Norwegian sea boundary[72]. [73]

The goal and philosophy of the pilot service is to safeguard traffic at sea and to protect the environment by ensuring that vessels operating in Norwegian waters have navigators with

[66] www.kystverket.no – regioner
[67] Translation: Sjøtrafikkavdeling
[68] Office translation: Losoldermann
[69] NOU 2013:8, page 36
[70] Office translation: Forskrift om plikt til å bruke los i norsk farvann
[71] Vessels that carry substances regulated by the INF Code, Passenger vessels with a length of 24 meters or more, Nuclear-powered vessels. Cf. Regulation on compulsory pilotage § 6, no. 7,8,9
[72] Translation: Grunnlinjen. The Sea boundary is a coastal state's demarcation to the ocean
[73] Regulation on compulsory pilotage §§ 5-6

adequate qualifications for safe navigation.[74] Today the pilot service is one hundred percent user funded by fees paid by the shipping companies who utilize the service.[75]
The pilot service consists of three central elements: the pilot dispatcher, the pilot transportation service, and the pilots. The next sections will give a presentation of the three different elements to get a better understanding of the overall pilot service.

5.3.1 The pilot dispatcher

The pilot dispatcher is the shipping trade's point of contact for sailing to and from Norwegian ports and in transit along the coast. The NCA has three pilot dispatch centers located in Horten, Kvitsøy and Lødingen. The pilot dispatch centers are staffed at any given time with two people who plan and coordinate each pilotage assignment.[76]

The pilot dispatcher monitors assignments from when the pilot booking is received until the pilot has been sent to a new vessel after completion of the assignment.[77] The pilot bookings are made electronically in the SafeSeaNet Norway messaging system, which is a national reporting system for vessels arriving and leaving Norwegian ports. The pilot dispatcher will register the pilot booking and find a pilot with the necessary qualifications and certifications to guide the specific vessel.[78]

5.3.2 The pilot transportation service

The purpose of the pilot transportation service is to transport pilots to and from the designated boarding marks in the most efficient and safe manner. The pilot transportation service consists of pilot boats owned by the NCA, hired transportation boats from private companies, and chartered helicopter services. The NCA has 18 pilot boat stations with a total of 25 boats and 116 pilot boat operators. [79]

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[74] www.kystverket.no - Lostjenester
[75] NOU 2013:8, page 38
[76] NOU 2013:8, page 39
[77] NOU 2013:8, page 38
[78] NOU 2013:8, page 38
[79] www.kystverket.no - Tilbringertjenesten

5.3.3 The pilots

A pilot is considered to be a water and navigation expert in the area he/she has a certificate for. [80] A pilot's mission is to provide expertise on the bridge by guiding the Master and the navigators of a vessel safely to and from port. Nationally, the NCA has approximately 290 pilots in service, stationed at 18 different pilot stations. [81]

To get further insight as to the work and tasks performed by the pilots it is necessary to look into the qualifications and requirements set for the pilots.

5.3.3.1 Requirements and education process for pilots

In order to become a certified State pilot, a candidate must qualify for the NCA's yearly pilot trainee program.[82] A qualified candidate must fulfill the strict requirements of certification and sailing time, as well as health conditions and physiological tests. The Pilotage Act § 19 no. 1, stipulates that a candidate must be under 38 years of age in order to qualify for the trainee program. The candidate must also fulfill the requirements of competence and experience stipulated in the Regulation of October 9, 1981 no. 1, regarding pilot certification and pilot education.[83] The requirement of competence implies that the candidate has the navigational certificates entitling him/her to be a chief officer of any ship and any size, anywhere in the world. The candidate must also have passed the required exam to be a Master of any ship and any size, anywhere in the world.[84] The requirement of experience implies that the candidate must have at least three years of service as an officer in charge of the bridge or as a chief mate on ships over 200 gross tons (GT), three years naval experience in similar positions, or effective service on board such a vessel. [85]

After the admission process, the qualified candidates will be placed at one of the NCA's 18 pilot stations. The candidates will be educated through a license program existing of a theo-

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[80] www.kystverket.no - Lostjenester
[81] www.kystverket.no - Lostjenester
[82] www.kystverket.no - Hvordan bli los
[83] Translation: Forskrift om lossertifikat og losutdanning
[84] Regulation on pilot certification and pilot education § 2
[85] Regulation on pilot certification and pilot education § 2

retical part and exam, and practical training onboard a ship with an experienced State pilot supervising the candidate.[86] After the education is completed the candidate will take a final exam and receive a pilot certificate proving his/her experience and expertise within the specific geographical area.[87] When the candidate receives a pilot license, he/she will start a three level education process to become a fully certified State pilot. This education process is based on a quality system[88] designed by the NCA. After a period of 3-5 years, the pilot shall be qualified to conduct pilotage of any ship within the certified area.[89] In order to maintain a valid pilot license the pilot needs to be updated on charts and navigational marks and must fulfill the requirements concerning navigational knowledge within his/her area. The pilots must also go through and pass periodic health checks. [90]

5.3.3.2 The pilot's work and duties

The Pilotage Act § 3 no.1 define pilotage as "*Guidance for a vessel during navigation and maneuvering" [91]*. The Pilotage Act itself gives no specific indication as to what pilotage is or how pilotage should be performed. More specific regulations regarding the pilotage mission are however found in the quality system developed in connection with the pilot's education program, and the internal instructions issued by the NCA.[92]

The most essential internal instructions are "Instruction, Pilot 9.4"[93], which specifically regulate the pilotage mission and which describe how pilotage should be performed in a safe and efficient manner.[94] These instructions state that the pilot shall prepare him or herself for every act of pilotage and shall plan the pilotage mission together with the person in command of the vessel. Ship specifications and equipment, as well as the nationality of the

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[86] Regulation on pilot certification and pilot education § 4
[87] Regulation on pilot certification and pilot education §§ 7 and 9
[88] Translation: Kvalitetssystem
[89] NOU 2013:8, page 41
[90] Regulation on pilot certification and pilot education § 10
[91] Office translation
[92] NOU 2013:8, page 35
[93] Instruction of July 7, 2010
[94] NOU 2013:8, page 35

crew and Master will in this case be essential. The instructions also stipulate that the pilot is obliged to cooperate and communicate with the Master when he/she makes navigational decisions.[95]

5.3.3.3 The pilot's responsibility during pilotage

The pilot's responsibility during pilotage is stipulated in the Pilotage Act § 8 no 1. This provision reads as follows, "*The Act does not cause any changes in the rules governing the responsibility of the Master or the person placed in command...*" [96] The use of navigational guidance from a pilot will not change the position of the Master or the person in command of the vessel; he/she will still bear the responsibility for the vessel's safe navigation.[97] In situations where there is a disagreement between the Master and the pilot in regards to navigational decisions, the Master will have the final say.[98] The Master may however delegate to the pilot the authority to issue guidelines on the vessel's behalf cf. the Pilotage Act § 8, no. 2. The pilot will in this case issue guidelines in regard to the vessel's propulsion, navigation, and maneuvering. However, the Master will still have the overall command of the ship and bear the responsibility for the pilot's actions. According to the preparatory works of the Pilotage Act[99], § 8 must be seen in light of the exception rule for liability stipulated in the Pilotage Act § 24. § 8 will in this case elaborate the shipowner's liability for a pilot during pilotage.[100] I will conduct a thorough review of § 24 in section 6.3.

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[95] NOU 2013:8, page 36
[96] Office translation
[97] Cf. Maritime Code § 132
[98] NOU 2013:8, page 35
[99] Ot.prp.nr.43 (1988-1989)
[100] Ot.prp.nr.43 (1988-1989) page 17

5.3.4 Summary

Under current Norwegian law there is statutory compulsory pilotage. This means that all vessels over a certain size or of a certain type are obliged to carry a certified pilot onboard when navigating in waters within the Norwegian sea boundary. The aim of the pilot service is to safeguard traffic at sea and to protect the environment by ensuring that vessels operating in Norwegian waters receive navigational guidance from certified pilots. The Norwegian pilots are State officials fully employed by the NCA, which is a governmental agency subordinated to the Ministry of Transport and Communication. The Norwegian State is therefore responsible for the pilot service, including the education, management, operation and supervision of the pilots.

Despite that the pilot's mission is to lessen the risk for accidents and to safeguard traffic at sea, it is not possible to eliminate all risks. A pilot can commit a navigational error due to miscalculation or poor preparation prior to a pilotage mission. Also, the pilot dispatcher responsible for the dispatch of the pilots may assign a pilot without the required qualifications to perform the specific pilotage mission. If a pilot commits an error during pilotage, a natural consequence will be damage. Damage to a ship or property, or injury to people or the environment are some examples of damages that may occur. The next chapter will look into the liability for damages caused by the pilots.

6 Liability for the Norwegian State pilots

6.1 Introduction

This chapter will conduct a review of the three essential liability provisions regulating the liability for the State pilots. I will begin with a review of the general employer liability rule stipulated in the Tort Liability Act § 2-1, and discuss the conditions that follow from this provision. Furthermore, I will discuss the consequence of the exception rule stipulated in the Pilotage Act § 24, and see this provision in relation with the shipowner's[101] vicarious liability for a pilot stipulated in the Maritime Code § 151. The purpose of this review is to give an overview of the current state of law, and illuminate why the liability for the State pilots is a debated topic.

6.2 The main rule: The Tort Liability Act § 2-1

The Tort Liability Act (Skl.) § 2-1 regulates an employer's liability for an employee. This provision imposes a liability without fault for an employer when an employee causes damage in service due to a negligent or intentional action. Skl. § 2-1 consists of both a subjective and an objective element.[102] The requirement of negligence or intent (culpa) is based on a subjective element, while the principle of liability without fault is based on an objective element. An employer is therefore objectively liable for an employees' subjective negligence.[103]

The main rule for employer liability is stipulated in Skl. § 2-1, no.1. This provision reads as follows:

"An employer is liable for damage caused willfully or negligently by an employee who performs work or duties for the employer, and where it is taken into account whether the re-

[101] Definition of a reder/shipowner: Footnote 8
[102] Lødrup (2009) page 205
[103] Lødrup (2009) page 205

quirement that the claimant can reasonably expect by the entity or service is disregarded. The liability does not include damage caused by an employee who goes beyond what is reasonable to expect by the nature of the business or subject matter, or by the nature of the work or the duties to be performed" [104]

According to Skl. § 2-1 no. 1, three conditions must be met in order to impose employer liability. The first condition is a requirement for an employment relationship between the tortfeasor and the responsible entity.[105] The second condition is a requirement of culpa; the employee must have acted with negligence or intent in regards to the requirements that the claimant can reasonably expect by the business or the service that is offered.[106] The third condition is a requirement that the damage is caused by an employee in service, i.e. when the employee performs work or duties for the employer. [107]

The following sections will interpret the three conditions for employer liability and see them in connection with the employer liability for the employees of the pilot service, including the employer liability for the State pilots.

6.2.1 The first condition: Requirement for an employment relationship

The first condition that follows from Skl. § 2-1 no.1 is a requirement for an employment relationship between the employer and the employee. An employment relationship is defined as a contractual relationship in which one party (the employee) undertakes an obligation to perform work for another party (the employer) under his/her leadership.[108] In order for the State to become liable for damage caused by an employee of the pilot service, there is a need for an employment relationship between the NCA and the tortfeasor.

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[104] Office translation
[105] Lødrup (2009) page 194
[106] Lødrup (2009) page 205
[107] Lødrup (2009) page 206
[108] Jakhelln (2013) *oversikt over arbeidsretten*

The concept of an "employer" and an "employee" are further defined in Skl. § 2-1 no. 2 and 3. The next sections will interpret the two terms and discuss whether the State cf. Skl. § 2-1 no. 2, is considered to be an employer, and whether the State pilots cf. Skl. § 2-1 no. 3, are considered to be employees.

6.2.1.1 Skl. § 2-1 no. 2: The employer

"*An employer is the public and any other person who, in or outside of business activity has someone in their service…"* [109]

This provision distinguishes between two groups of employers: the "public" and "any other person". The "public" constitutes all governmental, municipal, and county municipal enterprises. "Any other person" includes any person who has someone performing work or duties in their service, e.g. legal persons, associations, State enterprises, and private individuals.[110] The nature of the business that is offered is of less significance, as the position of an employer arises both in and outside of business activity. The only requirement is to have someone in service.[111] The concept of an employer cf. Skl. § 2-1 no. 2 is therefore very comprehensive.

6.2.1.2 Special rule for governing bodies

If an employer is a legal person, typically a corporation or an association, or the State or municipality, the position of an employee will be delineated against those who represent the governing bodies.[112] In a limited company, the governing bodies will be the General Assembly, the Board, the Chairman, and the Managing Director. The representatives of the Norwegian State will be the Parliament, cabinet ministers, and the King in Council.[113] Fault or neglect committed by such representatives will be identified as fault or neglect committed by the State or the company itself. The liability that may arise in this context will not be

[109] Office translation
[110] Lødrup (2009) page 201
[111] Lødrup (2009) page 201
[112] Lødrup (2009) page 202
[113] Lødrup (2009) page 205

attributed to the general employer liability rule.[114] The special rule for governing bodies will not be discussed further in this dissertation, as the pilots do not constitute a part of the NCA's top management.

6.2.1.3 Skl. § 2-1 no. 3: The employee

"An employee is anyone who performs work or duties in the service of an employer…"[115]

In order to be considered as an "employee" cf. Skl. § 2-1 no. 3, there is a need for an employment relationship between the employer and the employee where the employee performs work or duties for the employer. What is considered as work or duties is not further defined in this provision. However, according to the preparatory works of The Act[116], the work performed by an employee is less significant as long as the requirement of an employment relationship between the employer and the employee is fulfilled.[117] There are no requirements stating that the employment must be permanent; hired individuals working only temporarily are also considered to be employees.[118] The position of an employee therefore extends over many levels, including everything from part time workers and officials, to the top management personnel within a company.

6.2.1.4 Special rule for independent contractors

The work performed by an employee must be recognized as different from the work performed by an independent contractor.[119] An independent contractor is a person who agrees to do work for another person according to his/her own processes and methods; the independent contractor is not subject to another person's control except for what is specified in the mutually binding agreement for that specific job.[120] One example would be when someone pays a removal company to move furniture from one house to another. In this

[114] Lødrup (2009) page 202
[115] Office translation
[116] Ot.prp.nr.48 (1965-1966)
[117] Ot.prp.nr.48 (1965-1966) page 79
[118] Lødrup (2009) page 195
[119] Lødrup (2009) page 197
[120] www.jusinfo.no – Levert av advokatfirma ROV

case the removal company will be an independent contractor.[121] A contracting authority will not be liable cf. Skl. § 2-1, if damage is caused by negligence of the independent contractor or his/her employees.[122] This can be explained in part by the employer's ability to control and give instructions to their own employees. This does not apply to independent contractors. [123]

However, Norwegian law contains certain exceptions from the general rule. One example is the Maritime Code (MC) § 151.[124] According to this provision, a shipowner[125] is liable for damage caused by "…*master, crew, pilot, tug, or others performing work in the service of the ship…"* In this case there are no requirements stating that the people who perform work are the shipowner's own employees. The only requirement is that work is performed in the service of the ship. A shipowner is thus liable when an independent contractor or his/her employees cause damage while performing work in the service of the ship.[126]
I will conduct a thorough review of MC. § 151 in section 6.4.

6.2.1.5 The employer and the employees of the pilot service

After having explained the definition and concept of the terms "employer" and "employee" in regard to Skl. § 2-1, I will in the upcoming paragraphs present the employer and the employees of the pilot service.

As mentioned in chapter 5, the Norwegian pilot service in its entirety is governed by the NCA. The NCA is a governmental agency, which is part of the Norwegian State as a legal person. According to Skl. § 2-1, no. 2, an employer is "…*the public and any other person*…" The Norwegian State is therefore considered to be the employer and responsible entity for the employees of the pilot service cf. Skl. § 2-1.

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[121] Lødrup (2009) page 197
[122] Lødrup (2009) page 197
[123] Lødrup (2009) page 198
[124] Lødrup (2009) page 200. Another example is the Petroleum Act § 10-9
[125] Definition of a reder/shipowner: Footnote 8
[126] Lødrup (2009) page 200

The employees of the pilot service constitute everyone in an employment relationship with the NCA. The work and tasks performed by the employees are of minor significance as long as the requirement of an employment relationship is fulfilled. The employees of the pilot service are first and foremost everyone involved with pilotage. This includes the pilots, the master pilot, the pilot dispatchers, and the pilot transportation service. Additionally, everyone working within the pilot office or in the pilot administration, including various office workers such as accountants and personnel in charge of mailing duties and other secretarial tasks are considered to be employees.

6.2.2 The second condition: Requirement of culpa

The second condition that follows from Skl. § 2-1 no. 1 is a requirement of culpa. An employer will only be liable when damage is caused *"...willfully or negligently by an employee..."*[127]

In order to decide whether an employee's action is prudent or negligent, a culpa assessment is necessary.[128] A culpa assessment is based on a detailed review of the tortious action. The review is especially important when deciding whether the tortfeasor could have acted in a different way, or even refrained from the action completely.[129] A common starting point for a culpa assessment is to ask the question, "What could one reasonably expect by a normal and insightful person in that specific situation?"[130] An overall consideration of the case is important in this instance. The requirement of due care and normal behavior must be seen in conjunction with the tortfeasor's role and function. Behavioral norms and rules of conduct, the risk and extent of a potential damage, and the tortfeasor's alternative course of action are other important factors to consider when carrying out a culpa assessment.[131]

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[127] Office translation
[128] Lødrup (2009) page 130
[129] Lødrup (2009) page 134
[130] Lødrup (2009) page 131
[131] Lødrup (2009) page 130 - 136

In regard to an employer's liability for an employee, the starting point of a culpa assessment will be the general employer liability rule.[132] Skl. § 2-1 no. 1, first comma, stipulates a limitation for an employer's liability. According to this sentence, an assessment of the employer's liability should *"...take into account whether the requirement that the claimant reasonably can expect by the entity or service is disregarded..."*[133] The intention of this provision is to narrow down the employer's liability by emphasizing that not every unjustifiable action will lead to liability for an employer; the action must be seen as unjustifiable in relation to the claimant's expectations of the business, or to the individual employee.[134]

This provision was specifically developed in consideration of the State's control and service businesses.[135] The preparatory works of The Act[136] discuss the need for a "milder" culpa norm in relation to the State's liability for so-called "disaster damages"[137] in the pilot and lighthouse and beacon service. However, legal development in recent years show that the use of a milder culpa norm for the State's control and service businesses is less relevant today, and that the Supreme Court has gradually distanced itself from this practice.[138] The idea of a milder culpa norm for the State may seem unfortunate towards the community in that the State not are expected to act as prudent as other actors on similar areas.[139] *Lødrup* states in his book "Textbook in Tort Law"[140] that the mild culpa norm should not apply as a general principle, but rather as an exception rule.[141] Whether the employees in the pilot and lighthouse and beacon service have acted with negligence should therefore be based on the general culpa norm, including what follows from Skl. § 2-1. The requirement of due care

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[132] Lødrup (2009) page 135
[133] Office translation
[134] Ot.prp.nr 48 (1965-1966), page 79
[135] Hagstrøm (1987) page 383
[136] Ot.prp.nr 48 (1965-1966)
[137] Office translation: Katastrofe skader. Meaning particularly extensive injuries, cf. Ot.prp.nr. 48 1965-1966, page 53
[138] Lødrup (2009) page 222
[139] Lødrup (2009) page 224
[140] Office translation: "Lærebok i erstatningsrett" (2009)
[141] Lødrup (2009) page 222

must be seen in conjunction with what the claimant reasonably can expect by the entity or service.[142]

After having explained the contents of culpa, I will in the following paragraphs discuss what a claimant can reasonably expect from the pilot service. The discussion is based on my own considerations.

The pilots is in a peculiar position when it comes to an assessment of what a claimant can reasonably expect from a pilot in service. According to the exception rule stipulated in the Pilotage Act § 24, a pilot is considered to be in the service of the ship during pilotage. The State is therefore not responsible for the actions performed by a pilot onboard a ship. The consequence is that the claimant cannot set any requirements as to the pilot's work during the pilotage mission, neither the pilot's navigational tasks nor the pilot's navigational knowledge.[143] The Pilotage Act § 24 will be discussed further in section 6.3.

On the other hand, the State and the NCA are the employer and provider of the pilot service. The NCA therefore bears a responsibility to maintain a safe and efficient pilot service with qualified working pilots. In order to fulfill its responsibility, the NCA must conduct a certain control and supervision of its employees.[144] This involves to hire competent candidates and ensuring that the pilots at all times are qualified to perform their designated duties. If the NCA fails to fulfill these obligations, this will contradict what a claimant can reasonably expect by the pilot service.[145]

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[142] For more information regarding the mild culpanorm a reference is made to: Ot.prp.nr. 48 (1965-1966) page, 53-57. Relevant case law: Rt.1970.1154 (Tirrana)
[143] Master thesis, *Statens erstatningsansvar for navigasjonstjenesten: Ansvarsgrunnlaget* (2012), page 81. Referred to as: Master thesis (2012)
[144] Cf. Regulation on pilot certification and pilot education §11
[145] Master thesis (2012), page 82

6.2.3 The third condition: The damage must be caused in service

The third and last condition that follows from Skl. § 2-1 no.1 is that the damage must be caused by an employee's negligence during *"work or duties performed for the employer"*[146]. This sentence sets an outer frame for the employer's liability; there must be a factual connection and proximity between the tortious act and the employee's function.[147] It is the performance of the employee's work or duties that is the connection between the employer and the incident. The employer will not be liable for an employee's negligence outside of his/her service, e.g. during the employee's leisure time.[148]

The above-mentioned must also be seen in conjunction with Skl. § 2-1 no.1, second sentence, which contains a limitation of the employer's liability.[149] According to this sentence, an employer's liability will not include damage caused by an employee who "*goes beyond what is reasonable to expect by the nature of the business or subject matter, or by the nature of work or duties to be performed*" [150]. This means that an employer will only be liable if the employee causes damage in service as a result of an action that was reasonable to expect from the specific employee in regards to his/her work duties.

It may be difficult to determine what an action that is considered to be *"beyond what is reasonable to expect"* actually is. According to the preparatory works of the Act[151], this provision should be strictly interpreted.[152] This means that the employee's conduct must be clearly beyond what is reasonable to expect from a person in that position. Lødrup states in his book, "Textbook in Tort Law"[153], that the assessment of what is considered as *"reasonable to expect"* should be based on an objective evaluation. Both the employer's and the

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[146] Office translation
[147] Lødrup (2009), page 206
[148] Lødrup (2009), page 206
[149] Lødrup (2009), page 208
[150] Office translation
[151] Erstatningskomiteen - Instilingen II
[152] Instillingen II, page 45
[153] Office translation – "Lærebok i erstatningsrett" (2009)

claimant's point of view should be considered.[154] Some key elements of this evaluation are whether there is any relation between the harmful act and the employee's actual duties, if the employee has acted contrary to the instructions given by the employer, and if the claimant had any possibility to control the tortfeasor during his/her work or duties.[155]

In light of what is stated above, the State will be objectively liable when an employee of the pilot service causes damage in service as a result of an action that is reasonable to expect by the nature of work or duties performed by that specific employee.

As mentioned in section 6.2.1.5, the pilot service consists of a variety of employees with different work assignments. Some examples are the dispatchers and those in charge of transporting the pilots to and from ships, along with office and secretarial workers. In order for the State to be liable for damage caused by an employee, the damage must be caused during the employee's performance of work or duties for the NCA. An employee's action during leisure time will not be subject to the State's employer liability. However, if there is a factual connection and proximity between a tortious act and the employee's function, e.g. if a captain of a pilot boat causes damage when performing work for the NCA after business hours or during leisure time, the State may be held liable cf. Skl. § 2-1.

As stated previously, the above-mentioned must also be seen in conjunction with Skl. § 2-1 no.1, second sentence, which contains a limitation for the employer's liability. The State will not be liable if an employee causes damage due to an action that is considered to be beyond what is reasonable to expect by the nature of the employee's designated work or duties. One example that illustrates a situation where an employee's action clearly was beyond what an employer reasonably could expect is Rt.2007.1665. In this case, Securitas AS was exempted employer liability when one of its security guards intentionally set fire to a building which he had responsibility for. The Supreme Court stated that the damage was

[154] Lødrup (2009), page 210
[155] Lødrup (2009), page 208 - 210

caused as a result of a risk with the specific employee and not something the employer could reasonably expect.

I have now conducted a review of the State's employer liability cf. Skl. § 2-1, when an employee of the NCA causes damage in service. The pilots are however in a peculiar position when it comes to damage caused in service, i.e. when the pilot performs pilotage of a vessel. According to the exception rule stipulated in the Pilotage Act[156] § 24, a pilot is considered to be in the service of a ship, and subject to a shipowner's liability during pilotage. The State is thus exempt from employer liability when a pilot causes damage due to a negligent or intentional action during pilotage. The next section will give a presentation of the exception rule and discuss the liability that falls upon the shipowner as the pilot's responsible entity during pilotage.

6.3 The exception rule: The Pilotage Act § 24

The Pilotage Act § 24 reads as follows: "*With regard to the Tort Liability Act § 2-1, a pilot is considered to be in the service of a vessel during pilotage…*" [157] According to this provision, the employer liability stipulated in Skl. § 2-1 is transferred from the State to the shipowner during pilotage. The extent to which a shipowner is liable for a pilot cf. The Pilotage Act § 24, depends on what falls within the term "pilotage". I will in the following sections discuss in what situations a shipowner may conceivably be liable for a pilot cf. The Pilotage Act § 24.

6.3.1 The shipowner is liable for a pilot during pilotage

The Pilotage Act § 3 no.1 defines pilotage as *"Guidance for a vessel during navigation and maneuvering"*[158]. This provision must be seen in conjunction with the Pilotage Act § 9 regarding the performance of pilotage; "*During pilotage, the pilot shall be present on the*

[156] Law of June 16, 1989 no. 59
[157] Office translation
[158] Office translation

bridge or at a place where pilotage can be performed in the best possible manner…"[159] Given the wording in §§ 3 no. 1 and 9, pilotage involves navigational guidance from a pilot who is present on a vessel's bridge or at the location where navigational guidance can be given in the best possible manner. As a general rule, navigational guidance will be given by a pilot who is present on a vessel's bridge. However, according to the preparatory works of The Act[160], pilotage also includes navigational guidance where a pilot is not physically onboard the vessel, e.g. in situations where bad weather is preventing the pilot from getting onboard.[161] What matters is whether the vessel receives any form of navigational guidance in a way that allows the pilot's activities to be described as pilotage.[162] Considering this, a shipowner is liable cf. The Pilotage Act § 24, when a pilot causes damage during pilotage. The pilot can be present on the vessel's bridge or at a location outside of the vessel, e.g. a pilot boat.

Another question and concern is what entity will be held liable when a pilot causes damage during pilotage as a result of the pilot's negligence prior to the pilotage mission.[163] A typical example is when a pilot has been negligent with regard to maintaining his/her certificates or knowledge about the waters.[164] Another example is where a pilot is not physically prepared for the pilotage mission,[165] e.g. if the pilot suffers from lack of sleep or is intoxicated. In the following sections I will present different arguments indicating a State liability, and arguments indicating a shipowner liability. I will further present the solution seen in case law.

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[159] Office translation
[160] Ot.prp.nr. 43 (1988-1989)
[161] Ot.prp.nr. 43 (1988-1989) page 47
[162] Ot.prp.nr. 43 (1988-1989) page 47
[163] Master thesis (2012), page 33
[164] Office translation: Regulation on pilot certification and pilot education § 10 A pilot "... must maintain his knowledge of the waters and has a duty to be updated on any public announcements regarding beacons and lighthouses, sea cables etc. within its certificated area, and otherwise be updated on laws relating to his service as a pilot"
[165] Office translation: Law of February 16, 2007 no. 9. The Ship Security Act §§ 17 and 20 "…The persons working on board must be physically and mentally fit for the service and not pose a threat to others on board..."

An argument indicating a State liability is that the pilot's negligence occurs prior to the pilotage mission, i.e. before the pilot is considered to be in the service of the ship and subject to the shipowner's liability, cf. The Pilotage Act § 24. Another argument indicating a State liability is that the NCA is responsible to monitor and control that the pilots are sufficiently qualified to perform their duties, and at all times updated on important matters related to their service. [166]

On the other hand, an argument indicating a shipowner liability is that the pilot's negligence transpires during the pilotage mission, i.e. when the pilot is subject to the shipowner's liability, cf. The Pilotage Act § 24. An additional argument indicating a shipowner liability is that the pilot's preparation for pilotage is considered as crucial to conduct safe pilotage of the shipowner's vessel. The pilot's preparation may therefore be considered as an essential part of the actual pilotage mission.

The solution in case law is that the shipowner is also liable in situations where the damage can be traced back to the pilot's negligence prior to the pilotage mission.[167] This can be illustrated by a statement made by the Court of Appeal in LB-2009-163221"Rocknes"; "…that a pilot is obliged to update his knowledge of the waters before he boards a vessel for pilotage, i.e. when the pilot is on land, is not decisive. The Court of Appeal agrees with the State; the pilot's error in guidance during pilotage must be subject to a shipowner's liability, regardless of the underlying cause for error."[168] (Page 26)

In light of what is stated above, a shipowner is liable cf. The Pilotage Act § 24, when a pilot's error during pilotage can be traced back to the pilot's negligence prior to the pilotage mission. However, if a pilot's error during pilotage can be traced back to fault or neglect from a different person than the pilot itself, the liability situation will be different. This will be discussed further in the next section.

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[166] Regulation on pilot certification and pilot education § 11
[167] Master thesis (2012), page 39
[168] Office translation

6.3.2 The State is liable for other employees of the pilot service

As previously mentioned, the NCA bears the responsibility to maintain a safe and efficient pilot service and to control that the pilots at all times are qualified to perform their designated duties.[169] This means that when a pilot's error during pilotage can be traced back to fault or neglect committed by other employees of the NCA, e.g. the pilot administration, the State may be held liable cf. Skl. § 2-1. A case that can illustrate this situation is ND.1972.93 "Stella Altair", where the State was held liable for damages caused by a pilot's navigational error during pilotage. Due to lack of available pilots, the pilot office sent onboard a supposed local expert without any formal piloting education. The local expert had navigational experience but was not qualified to perform pilotage of a vessel of that size in that area. The Supreme Court stated: "it is due to an error made by the pilot office that the ship's crew came to believe they had a fully qualified State pilot onboard, and that they acted in reliance to that perception."[170] (Page 435)

6.3.3 Summary of the shipowner's liability cf. The Pilotage Act § 24

In light of the above review, a shipowner is liable cf. The Pilotage Act § 24, when a pilot causes damage during pilotage. A shipowner is however not liable when the pilot's negligent action can be traced back to fault or neglect from other employees of the pilot service.

Another important question to consider is whether a shipowner will also be liable when a pilot onboard causes damage while performing work other than the sole duty of performing pilotage. This will be discussed further in next section.

[169] Regulation on pilot certification and pilot education §11
[170] Office translation

6.4 The shipowner is vicariously liable for a pilot: The Maritime Code § 151

According to the Maritime Code (MC) § 151, a shipowner[171] is liable to compensate damage caused in the service by *"fault or neglect of the master, crew, pilot, tug or others performing work in the service of the ship…"*[172] MC § 151 sets no requirements for a direct employment relationship between the shipowner and the servant for the shipowner to be liable. The only requirement is that work is performed in the service of the ship.[173] The consequence of this provision is that a shipowner in certain situations will be liable for the work performed by someone else' employees, e.g. when a pilot, employed by the State, performs work in the service of the ship.[174] The extent to which a shipowner will be vicariously liable for a pilot is not stated in the provision. I will in the following sections discuss in what situations a shipowner may conceivably be liable for a pilot, cf. MC § 151.

6.4.1 The shipowner is liable for a pilot during pilotage

It cannot be disputed that a shipowner will be liable, cf. MC § 151, when a pilot negligently causes damage during performance of his/her general duty i.e. to provide navigational guidance to a vessel's Master or navigators.[175] In most cases, a pilot will be present on a vessel's bridge during pilotage. However, as seen from the discussion in section 6.3.1 a pilot may provide navigational guidance from a location outside of the vessel, e.g. in situations where bad weather is preventing the pilot from getting onboard. A question that arises in this context is whether a shipowner will also be liable cf. MC § 151 in situations where the pilot provides navigational guidance to a ship from a different location than the vessel's bridge. According to the wording of MC § 151, there are no requirements as to a physical connection between the shipowner and the servant for the shipowner to be liable; the only requirement is that work is performed in the service of the ship.[176] Navigational guidance given to a vessel's Master or navigators is clearly considered as work performed in the ser-

[171] Definition of a reder/shipowner: Footnote 8
[172] Marius 393, cf. MC § 151
[173] Lødrup (2009), page 193
[174] Master thesis (2012), page 32
[175] Master thesis (2012), page 32
[176] Master thesis (2012), page 33

vice of the ship. Considering this, a pilot's location will be of less significance as long as the ship makes use of the pilot's guidelines. As I see it, a shipowner will be liable cf. MC § 151, for a pilot during pilotage - also in situations where the pilot gives navigational guidance from a different location than from the vessel's bridge.

Another question is whether the shipowner will be liable cf. MC § 151, when a pilot causes damage during pilotage as a result of a negligent action caused prior to the pilotage mission, e.g. when the pilot lacks knowledge about the waters or is intoxicated. As seen from the discussion in section 6.3.1, the Court of Appeal stated in the Rocknes case that a shipowner is liable for a pilot's error in guidance regardless of the underlying cause for error. The fact that a pilot's preparation is done when the pilot is on land is not decisive. Another important factor is that the pilot's error transpires during the pilotage mission, i.e. when the pilot performs pilotage, which is clearly considered to be work in the service of the ship. Considering this, a shipowner may be liable cf. MC § 151, when a pilot causes damage during pilotage as a result of the pilot's negligence prior to the pilotage mission.

6.4.2 The shipowner is liable for a pilot during performance of other work in the service of the ship

The discussion above concerns the shipowner's liability when a pilot causes damage during the performance of his/her general duty of performing pilotage. The pilot's work onboard a ship may however involve other tasks than solely the general duty of performing pilotage. One example is when a pilot takes over the helm and conducts the navigation and maneuvering of the vessel directly by steering it. A question that arises in this context is whether a shipowner will also be liable cf. MC § 151, when a pilot causes damage due to an action that falls outside what is considered as pilotage.

As seen from section 5.3.3.1, requirements and education process for pilots, every pilot is obliged to have the required certificates to be a chief officer of any ship and any size, anywhere in the world. A situation where a pilot takes over the helm and navigates the vessel directly by steering it is therefore not an inconceivable situation in practice. If a pilot, in

accordance with the Master, takes over the helm and conducts the vessel's navigation by physically steering the ship, it is difficult to believe that a shipowner will be exempt from liability; the pilot is still performing work in the service of the ship.[177] The same is conceivable when a pilot helps with other work onboard the vessel, e.g. if a pilot helps the crew with the loading and unloading operations.[178] The essential factor is that work is performed in the service of the ship.

6.4.3 The shipowner is liable for a pilot outside of service

Lastly, it is worth mentioning situations when a pilot causes damage onboard as a result of a negligent action performed outside of the pilot's service i.e. during the pilot's leisure time. This is a situation that may occur when a pilot performs coastal pilotage[179]. In this case the pilot will be onboard the vessel throughout the entire voyage, consequently it may be difficult to distinguish between the pilot's work and leisure time.[180] A question that arises in this context is whether a shipowner will be liable cf. MC § 151, when a pilot causes damage outside of his/her service, e.g. if a pilot negligently causes damage to a passenger while eating dinner onboard the vessel.[181] The situation today seems to be that a shipowner is liable for the foreseeable consequences of using servants.[182] This means that if a pilot causes damage due to an extraordinary action[183] that falls outside of what is considered to be foreseeable, a shipowner may be exempt from liability. On the other hand, a shipowner cannot expect exemplary behavior from his/her servants at all times.[184] A case that illustrates this is Rt.1972.815 "Alkejakt", where a shipowner was held liable when the chief

[177] Master thesis (2012), page 34
[178] Master thesis (2012), page 34
[179] Coastal pilotage is typical for pilotage of cruise ships where the ship will sail through difficult waters several times during a short period. The pilot will in this case be onboard the vessel during the entire voyage. Cf. Master thesis (2012), page 34
[180] Master thesis (2012), page 34
[181] Master thesis (2012), page 32
[182] Falkanger/Bull (2010), page 157
[183] One example of an extraordinary action would be a chef poisoning a passenger out of spite due to a preexisting conflict. Cf. Brækhus (1968), page 315
[184] Falkanger/Bull (2010), page 157

officer was hunting razorbills[185] from the ship's deck and accidentally shot one of the people onboard the ship. The Supreme Court stated that since the ship's crew is bound to be onboard the ship during their work and leisure time, the shipowner should bear the risk for the crew's actions, even though the action is not in the ship's best interest, and when the action does not fall outside what is considered as foreseeable.[186] (Page 817)

6.4.4 Summary of the shipowner's liability cf. MC § 151

Considering what is discussed above, a shipowner is liable cf. MC § 151, when a pilot causes damage during performance of work in the service of the ship. The shipowner's vicarious liability encompasses the foreseeable consequences by using a pilot. This includes liability for damage caused during pilotage and during performance of other work relating to the operation of the ship.

6.5 The implications of the current state of law

In this chapter I have conducted a review of the three essential provisions regulating the liability for the State pilots. The implications of the current state of law are that the State, as the pilots' legally liable employer cf. Skl. § 2-1, is exempt from liability when a pilot causes damage during his/her performance of work in the service of a ship. A shipowner is considered to be the pilots' employer during pilotage. Consequently the shipowner cannot claim compensation from the State cf. Skl. § 2-1, when a pilot negligently or intentionally causes damage during pilotage. A question that arises in this context is why the State is exempt from employer liability for the pilots, when one can see that the State's employer liability is not transferred for any other groups of public employees. The next chapter will look into the background of the current state of law, and discuss why the pilots are subject to a shipowner's liability during pilotage.

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[185] Translation: Alke
[186] Office translation

7 Background of the current state of law

7.1 Introduction

I will begin this chapter with a chronological timeline where I highlight important events and arguments that underlie the current state of law. The layout of the timeline is based on a review made by the Norwegian Shipowners' Association (NSA) as an input to the Committee in conjunction with the consultation of the NOU 2013:8. I will present important remarks and comments from the preparatory works of the Tort Liability Act and the Pilotage Act. Arguments that speak for and against the imposition of a shipowner liability for the pilots will in this case be important. The main focus will be on arguments put forward by the Ministry and by the NSA, which represents the shipowners as the main users of the pilot service. Furthermore, I will present relevant case law, with special emphasis on the influence of Rt.1963.622 Prince Charles. I will conduct a thorough review of this case in section 7.4.

7.2 Historical review

1893. The first provision that legislated a specific liability for a pilot was § 8 in Law of July 20, 1893 no.1, The Maritime Code.[187] This provision imposed a liability for a shipowner for damages caused by "…commanders and crew, and those who occasionally are used to perform tasks for the vessel's account e.g. pilots…"[188]. MC § 8 stipulated a responsibility for maritime business activities,[189] which first and foremost aimed to protect third parties who could become harmed by the maritime activities.[190] MC § 8 is known as a shipowner's "householder liability"[191] and is the precursor of the current provision regarding the shipowner's[192] vicarious liability stipulated in the Maritime Code § 151.

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[187] Office translation: Lov om sjøfarten (sjøloven)
[188] Selvig (1968), page 69
[189] Office translation: Sjørettslig virksomhetsansvar, cf. Selvig (1968), page 61
[190] Selvig (1968), page 61
[191] Definition: See footnote 44
[192] Definition of a reder/shipowner: Footnote 8

In 1893 when the Maritime Code was passed, the Norwegian pilots were considered to be self-employed, meaning that each pilot was responsible for his own work and income. This shows that the shipowners liability for a pilot cf. MC § 151 was established at a time when the pilot service was still considered a private enterprise.[193]

1948. The Pilot Directorate was established, and a new Pilotage Act[194] came into force April 9th, 1948. The State was now responsible for the organization, administration, and financing of the pilot service. The only statement regarding liability for a pilot in the Pilotage Act of 1948 was § 21: *"A pilot is obliged to compensate for damage caused by fault or neglect in service, as stated in the current liability rules cf. The Tort Liability Act § 2-3"*[195] This shows that the Pilotage Act of 1948 did not contain a provision stating that the pilot was considered to be in the service of the ship during pilotage.

1963. Rt.1963.622 The Prince Charles case was pronounced. The central question in the Prince Charles case was whether the Norwegian State could be held liable for damages caused by the State pilots' negligence during pilotage. At this time, the Tort Liability Act had not been passed, and accordingly, no rule was in place to impose an objective liability for a public employer. Consequently, the extent to which the State could be held liable for the pilots' negligence during pilotage was largely unclear. [196]

One of the arguments that was put forward by the leading vote was: "As I see it, to train the pilots, to give them certificates, and to maintain a certain level of control over the pilots' activities - in short, to manage the pilot service, falls within the State's realm. However, based on this one cannot assume that the State has undertaken the responsibility for the pilot's activities." [197]

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[193] NSA consultation letter - NOU 2013:8, page 2
[194] Law of April 9, 1948 no. 2, (lov om losvesenet)
[195] Office translation. The reference to Skl. § 2-3 was implemented in the provision when the Tort Liability Act was passed in 1969.
[196] NSA consultation letter - NOU 2013:8, page 2
[197] Rt.1963.622, office translation, paragraph 4, page 629

The Supreme Court found that the State would not be held liable for the pilots' negligence, and that the shipowner should bear the liability for its own and the third-party's loss. I will conduct a thorough review of the Prince Charles case in section 7.4.

1965. A proposal for a new Tort Liability Act (Skl.) was submitted. In the preparatory works (Ot.prp.nr. 48 1965-1966) it was asked whether a new provision regarding an employer's liability should be established, and if so, to what extent this provision should include liability for so-called "disaster damages"[198] within the pilot and lighthouse and beacon service. The Ministry of Justice claimed that an enactment of a general public employer liability would be in line with the development seen in case law in recent years.[199] However, in regards to liability for disaster damages in the pilot service, the Committee stated that the arguments put forward in the Prince Charles case was still considered valid.[200] The result being that the State would be exempt from liability for disaster damages in the pilot service even though this was not legislated in the Tort Liability Act.

The NSA[201] and Skibsfartens arbeidsgiverforening[202] argued that there should not be an exception for disaster damages resulting from pilotage errors. They claimed that recent development was moving towards a general employer liability for the State and its officials. And as a consequence of the recent development, the State should accept the responsibility for fault and neglect committed by the pilots' during pilotage.[203] Skibsfartens arbeidsgiverforening further stated that the current legal situation led to court decisions, which were clearly unreasonable.[204] In this regard, a reference was made to a case from Tromsø City Court in which the State claimed compensation from a Dutch shipping company for damages to State property (telegraphic cables) as a result of pilot error. The City

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[198] Office translation: Katastrofe skader. Defined as particularly extensive injuries, cf. Ot.prp.nr. 48, (1965-1966) page 53
[199] Ot.prp.nr. 48 (1965-1966), page 48
[200] Ot.prp.nr. 48 (1965-1966), page 57
[201] Norges Rederforbund, today Norges Rederiforbund
[202] Office translation: Shipping Industry's Employer Association
[203] Ot.prp.nr. 48 (1965-1966), page 86
[204] Ot.prp.nr. 48 (1965-1966), page 86

Court imposed liability for the shipowner and the case was brought directly to the Supreme Court (Rt.1965.1335). The Supreme Court reached a unanimous decision; the shipowner was liable for the damages caused to the State's property. The leading vote stated: "The Maritime Code § 8 clearly stipulates a liability for a shipowner where a pilot in his service causes damage. Likewise, in the Prince Charles case, cf. Rt.1963.622, it is assumed that the State is exempt from liability where a pilot's negligence during pilotage causes damage to a third party. In this case the question is whether the State is also exempt from liability when a pilot causes damage to the State's own property. I have come to the conclusion that the general liability rule cf. MC § 8, also applies in this case..." [205] (Page 1336)

1969. On June 13th, 1969 the Tort Liability Act was passed with a provision, Skl. § 2-1, which imposed an objective liability for the public and private employers. However, in regards to the State's liability for disaster damages in the pilot service, the arguments put forward in the Prince Charles case remained valid. The result being that the State is exempt from liability for disaster damages in the pilot service.

1988. A proposal for a new Pilotage Act was submitted. The Ministry of Fisheries submitted a proposal for a new provision in the Pilotage Act which legislated that a State pilot, with regard to Skl. § 2-1, was considered to be in the service of a ship during pilotage. The Ministry of Justice claimed that this provision would entail an enactment of legal practice.[206] The Ministry referred to the arguments put forward in the Prince Charles Case, and to the preparatory works of the Tort Liability Act in which the Ministry of Justice also emphasized the importance of these arguments.[207]

The NSA and Skibsfartens arbeidsgiverforening came with several counterarguments to the new proposal. The NSA pronounced that it was no longer natural to consider a pilot to be in the service of a shipowner as a provider of navigational guidance for a vessel's Master or

[205] Office translation: Rt.1965.1335
[206] Ot.prp.nr 43 (1988-1989), page 34
[207] Ot.prp.nr 43 (1988-1989), page 34 - 35

navigators.[208] The NSA referred to the strong position of the pilot stipulated in the Pilotage Act § 20: "*The master or the officer in command shall let the pilot's guidelines be performed fast and accurately and shall not interfere with the pilot's guidelines, without clearly expressing, or immediately declaring that he is taking the pilot's position.*" [209] The NSA claimed that since the State had given the pilot such a strong position onboard, the State should bear the liability for the pilots' errors in service.

The NSA proposed the following text for the new provision: "*The State is responsible for damage caused willfully or negligently by a State pilot during pilotage, cf. the liability rules stipulated in Law of June 13, 1969, the Tort Liability Act nr. 26, § 2-1 and § 2-2.*" [210]

1989. On June 16, 1989, the Pilotage Act was passed with the exception rule cf. The Pilotage Act § 24, which legislated that a pilot, with regard to Skl. § 2-1, is considered to be in the service of a ship during pilotage. The result being, the shipowner is liable for the pilot's negligence during pilotage.

2012. On March 2, 2012, a Committee[211] was appointed by Royal Decree to conduct a review of the Norwegian pilot services and regulations. The Committee proposed in NOU 2013:8 section 14.2.4.2, that a review of the Pilotage Act § 24 should be conducted. The Committee stated that the liability for the pilots is of great importance for the industry and for the State. It also has international dimensions.[212] The Committee therefore proposed that a review should be done by a group existing of people possessing expertise in tort law, maritime law and marine insurance, shipping, pilots, and international aspects of the topic.[213]

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[208] Ot.prp.nr 43 (1988-1989), page 34
[209] Office translation: The Pilotage Act of 1948 § 20
[210] Office translation: Cf. Ot.prp.nr 43 (1988-1989), page 34
[211] Losutvalget
[212] 65 L (2013–2014) section 19.3.1
[213] 65 L (2013–2014) section 19.3.1

2014. On April 11th, 2014, the Ministry of Transport and Communication released its draft resolutions and bills,[214] 65 L (2013–2014). The Ministry stated: "In the preparatory works of the Pilotage Act, the liability provision, cf. The Pilotage Act § 24, was reviewed by the Ministry of Justice who recommended a codification of the legal practice. Since then, there has been no development in the legal situation in terms of relevant case law which suggests that the provision should be changed. There has been no change in the international framework, the Maritime Code § 151, or in our neighboring Nordic countries' regulations that indicate that the Pilotage Act § 24, should be changed […] The Ministry therefore proposes to retain the current state of the law*"* [215]

7.3 Summary

The historical review shows that the shipowner's[216] vicarious liability for a pilot, cf. MC § 151 was established in 1893, at a time when the Norwegian pilot service was still considered a private enterprise. However, with the establishment of the Pilotage Act of April 9th 1948, the State took over the full administration and responsibility for the pilot service. The Tort Liability Act and the general employer liability rule cf. Skl. § 2-1, was established in 1969. Despite changes in the administration of the pilot service, and the establishment of an objective employer liability cf. Skl. § 2-1, the shipowner's liability for a pilot cf. MC § 151, has remained the same.[217]

Furthermore, the historical review shows that the exception rule concerning the shipowner's liability for a pilot, cf. The Pilotage Act § 24, was implemented with the current Pilotage Act of 1989. The Pilotage Act of 1948 did not have a similar provision. In the preparatory works of the Pilotage Act of 1989, the Ministry of Justice stated that the exception rule entailed an enactment of legal practice. The Ministry referred to the decision of the Prince

[214] Definition: Footnote 10
[215] Office translation, cf. Prop. 65 L (2013–2014), section 19.3.4
[216] Definition of a reder/shipowner: Footnote 8
[217] NSA consultation letter - NOU 2013:8, page 1

Charles case. A reference to this matter was also made by the Ministry of Transport and Communication in 2014, when the Ministry suggested retaining the current state of law.

One can see from this review that the Prince Charles case has been emphasized considerably both in case law and by the consultative bodies that argue for a continued shipowner liability for the pilots. In this context it is necessary to give a more detailed presentation of the case.

7.4 Rt.1963.622 Prince Charles

This section will look into the premises of the Prince Charles case and discuss the main arguments and legal sources the judgment is based on. The discussion will consist of input and comments from the NSA's lawyers and personal remarks from my review of the case. In addition to the Supreme Court's decision, I will present some arguments put forward in the Court of Appeal, which unlike the Supreme Court did not reach a unanimous decision. The Court of Appeal's minority will in this context show important counterarguments, both in regards to the judgment and to the current state of law.

7.4.1 Summary of the Prince Charles case

December 23, 1955. After taking onboard two Norwegian State pilots, the trawler[218] Prince Charles left Honningsvåg port. During the passage through Sørøysundet, the trawler ran aground and sank. Nine people were killed in the accident.

A total of 16 parties, including the shipowner, sued the Norwegian State for their loss. The shipowner claimed that the accident was caused by negligence from the two State pilots. He claimed that incorrect navigation, lack of observation, and poor control were the primary reasons for the accident.

[218] A fishing boat used for trawling

The central question in the Prince Charles case was whether the Norwegian State could be held liable for the State pilots' negligence during their service onboard the vessel. The Supreme Court found that the State would not be held liable, and that the shipowner should bear the liability for its own, and the third-party's loss.

7.4.2 The Supreme Court's decision

The Supreme Court's decision was based mainly on three arguments: [219]

1. "As I see it, to train the pilots, to give them certificates, and to maintain a certain level of control over the pilots' activities - in short, to manage the pilot service, falls within the State's realm. However, based on this one cannot assume that the State has undertaken the responsibility for the pilot's activities." [220]

2. "In my opinion, a party that suffers loss due to an accident caused by a pilot will not expect the State to cover a loss that is beyond what the shipowner would be liable for according to the Act, or potentially what an insurance company may cover. Furthermore, the shipowner's insurer or insurers of others with connection to the ship has no reason to believe that the State is liable." [221]

3. "Lastly, it is noted that the Norwegian Committee of 1958, who made a report ("Instillingen") regarding the State's liability, assumes that the State is not liable for a pilot's error…"[222]

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[219] NSA consultation letter - NOU 2013:8, page 3
[220] Rt.1963.622, office translation, paragraph 4, page 629
[221] Rt.1963.622, office translation, paragraph 4, page 629
[222] Rt.1963.622, office translation, page 629- 630

The 1958 – Committee's[223] report concerning the State's and the Municipality's liability justifies its view (that the pilots are acting on behalf of the shipowner and his ship and not on behalf of the State), with two main arguments: [224]

1. "The State pilot's activities are of a peculiar character, as they are subordinate to a Master's command and authority…" [225]

2. "The State has no possibility to control the pilots during their service…" [226]

These are the main arguments that underlie the current state of law wherein a State pilot is considered to be in the service of a ship during pilotage. One can see from this review that the judgment is deficient in regards to references to legal sources.[227] The arguments put forward in this case are mainly based on the leading voters' own views. The only legal source the Supreme Court refers to is the report "Instillingen" written by the 1958 - Committee. [228] The reason for this can be explained in part by the lack of legal sources relating to this topic at that time. Moreover, it can be seen as insufficient that the Supreme Court does not conduct a thorough discussion in order to weigh the benefits and consequences on either side of the decision.[229]

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[223] Committee appointed by Royal Decree. The Committee wrote a draft with motives regarding the law on the State and the municipality's liability for damages.
[224] NSA consultation letter - NOU 2013:8, page 4
[225] Rt.1963.622, office translation, paragraph 2, page 633
[226] Rt.1963.622, office translation, paragraph 2, page 633
[227] NSA consultation letter - NOU 2013:8, page 4
[228] NSA consultation letter - NOU 2013:8, page 4
[229] NSA consultation letter - NOU 2013:8, page 4

7.4.3 The Court of Appeal's minority

Unlike the Supreme Court, the Court of Appeal did not reach a unanimous decision in the Prince Charles case. Judge Tank represented the Court of Appeal's minority. Tank had a different view of the pilot's role onboard the ship and the State's responsibility for the pilots during pilotage. In the following paragraphs, I will present three of Tank's arguments, which I believe constitute important counterarguments both in regards to the judgment and to the current state of law.

1. "§ 8 in the Maritime code is based on an international collaboration from a time when the Norwegian pilot service was still considered a private enterprise; the only way the State took part in the service was by issuing regulations. The provision clearly stipulates that a shipowner is liable externally for damage caused by errors in activities that are directly connected to the ship. However, it cannot be assumed that this preclude the State from its liability for the pilots' negligence in service."[230]

2. "In my opinion, based on the rule of the Master's command and authority, and from § 8 in the Maritime Code, one cannot determine that the pilots are acting on behalf of the shipowner and his ship, and not on behalf of the State. A pilot is a State official paid by the State. He is subject to the State's instructions and control when it comes to health conditions and qualifications. When he enters a ship, he represents the State with authority and uniform. A pilot is to the Master's disposal against payment. His task is to ensure that the ship arrives safely through Norwegian coastal waters. As I see it, when a pilot is onboard a ship, he is a public representative who performs an activity on behalf of the State." [231]

[230] Rt.1963.622, office translation, paragraph 3, page 637
[231] Rt.1963.622, office translation, paragraph 4, page 637

3. "The State took over the full organization, administration, and financing of the pilot service with the establishment of the Pilotage Act of April 9th 1948. I cannot see that the State pilots are in a different position than other public officials, or that the State should not bear liability for the pilots' negligence in service." [232]

Judge Tank is clear in his statements; one cannot say that the pilots act on behalf of the shipowner and not on behalf of the State. He is of the opinion that a pilot onboard a vessel is a public representative who performs an activity on behalf of the State. As I see it, Tank indicates that a more appropriate solution would be a division of the liability between the shipowner cf. MC § 8, and the State as the pilots' employer. I find his arguments significant and question why these arguments were not emphasized more in the ruling of the Supreme Court. As I see it, Judge Tank's arguments correspond to a large extent with the industry's view on how the liability for the pilots should be today. This will be discussed further in the next chapter.

8 Input from the NSA and the shipowners

8.1 Introduction

As seen from the introduction in chapter 1, and from the historical review of the current state of law, the NSA believes that it is time for a change of the current state of law. According to the NSA it is not reasonable that the shipowners bear the full liability for the pilots' negligence in service. In this context I have interviewed two lawyers from the NSA, Viggo Bondi and Kristin Mørkedal, and two representatives from the shipowners, Knut W. Aanesen from Hagland shipping AS and Toralf Ekrheim from Norlines AS. They have contributed to this dissertation by sharing their thoughts and personal experiences concerning liability for pilotage errors. In the following sections, I will present arguments put for-

[232] Rt.1963.622, office translation, paragraph 5, page 637

ward by the NSA in regards to why they believe it is time for a change of the current state of law, and how they think the liability for the pilots should be today. These arguments were presented by the NSA as an input to the Committee in conjunction with the consultation of the NOU 2013:8. In addition, I will present two incidents that will illuminate the research question, and where the shipowners believe that a State liability should have been considered.

8.2 How should the liability for the State pilots be today?

In 1969 the Tort Liability Act was passed with a provision that imposed an objective liability for an employer. Skl. § 2-1 no. 2 specifically states *"an employer is the public and any other person who in or outside of business activity has someone in their service*."[233]

The Norwegian pilot service is one hundred percent a governmental agency in which the NCA is responsible for the organization, management, recruitment, training, control, and supervision of the pilots. Nevertheless, the Supreme Court in the Prince Charles case stated: "As I see it, to train the pilots, to give them certificates, and to maintain a certain level of control over the pilots' activities - in short, to manage the pilot service, falls within the State's realm. However, based on this one cannot, assume that the State has undertaken the responsibility for the pilot's activities." [234]

The employer liability stipulated in Skl. § 2-1 is not a liability one undertake, but rather a liability that automatically follows when one organizes a business with employees. There is nothing special with the pilot service that places the pilots in a different position than other public enterprises.[235] Judge Tank also emphasized this argument in the Court of Appeal.

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[233] Office translation
[234] Rt.1963.622, office translation, paragraph 4, page 629
[235] NSA consultation letter - NOU 2013:8, page 4

The 1958-Committee's argument regarding the State's inability to control the pilots' activities during pilotage was not emphasized by the Supreme Court in the Prince Charles case.[236] This is not an unusual situation for public businesses[237] and has not been brought up in later discussions relating to this issue.

The only remaining argument from the Prince Charles case is the pilot's peculiar position. A pilot is subordinate to a Master's command and authority during pilotage. According to the 1958 – Committee, this gives the pilot a peculiar position, and therefore will not be subject to the State's liability. One point that was put forward by the NSA in the preparatory works of the Pilotage Act was the pilots' strong position stipulated in § 20 in the Pilotage Act of 1948: *"The master or the officer in command shall let the pilot's guidelines be performed fast and accurately and shall not interfere with the pilot's guidelines without clearly expressing or immediately declaring that he is taking the pilot's position."*[238] This provision led to a significant restriction on the Master's command and authority and shows that a pilot has a completely different position than the rest of the crew working under the Master's command. This provision underscores the fact that a pilot is not one of the shipowner's regular employees but rather a person with a special position and special expertise who comes onboard a vessel to perform a statutory task. [239]

The Prince Charles case was pronounced at a time when the extent of the State's liability was obscure. When the Tort Liability Act and the employer liability rule came into force in 1969, there was no longer any doubt as to the extent of the State's employer liability. Despite this, the pilots have been left out of the State's employer liability based on the opinion that the pilots' legal position was clarified in the Prince Charles case. In this context, one may question whether it is right to hold on to the decision of the Prince Charles case when, in light of what is stated above, the underlying arguments lack relevance in relation to the

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[236] Rt.1963.622, paragraph 4, page 634
[237] E.g. Public doctors and dentists
[238] Office translation
[239] NSA consultation letter - NOU 2013:8, page 5

legal development of recent years. Today, there is no doubt as to the State's employer liability, and there is no doubt that the pilots are public employees who performs a public service. Considering this, the NSA believes that it is time for a change of the legal system, and that the State should acknowledge the statutory employer liability that follows from being an employer with employees. [240]

An additional argument indicating a State liability for the pilots is the "preventive effect" of the employer liability. An objective liability for an employer promotes the hiring of competent and skilled individuals, and the development of good routines for control and supervision of employees. The absence of efficient control over the pilots is an obvious weakness in the current pilot system. The shipowners who bear the employer liability have no authority to conduct any control or supervision of the pilots. The NCA lacks incentive to exercise necessary control because they are exempt from liability for the pilot's potential errors. Under the current system, the Master has no other choice than to rely solely on the presumption that the assigned pilot is competent and sufficiently qualified to perform safe and efficient pilotage of the vessel. This has however been proven not always to be the case, cf. Stella Altair[241]. [242]

An additional argument for transferring the employer liability to the State lies in the concept of the term "employer liability". According to Skl. § 2-1 an employer shall bear the liability for its employees. Under the current system the shipowners are responsible for the full financing of the pilot service (both the full funding and the full liability for potential damages) but have no authority to take part in the organization and management of the pilot service. The NSA states that an alternative solution is to employ pilots directly in the shipping companies. In this case the shipowners will have full control over the pilots and bear full responsibility for the pilots' actions. Another solution is to privatize the pilot service. Upon privatization of the service, the shipowners will engage pilots from private pilot

[240] NSA consultation letter - NOU 2013:8, page 5
[241] Cf. Section 6.3.2.
[242] NSA consultation letter - NOU 2013:8, page 5

companies or pilot associations. If this is carried out, a shipowner would not be the liable employer, unless the shipowner is deemed blameworthy, cf. Rt.1967.597 "Asfaltklump case"[243]. [244]

On May 22, 2014, at my meeting with the NSA, I was recommended to contact two representatives from the shipowners Hagland Shipping AS and Norlines AS, in order to get further insight as to the industry's personal experiences concerning liability for pilotage errors. During the last two years, both Hagland Shipping AS and Norlines AS have suffered huge losses due to pilotage errors. I contacted Knut W Aanesen from Hagland shipping AS and Toralf Ekrheim from Norlines AS by email and asked for their thoughts and experiences regarding the current liability system. In their response it was expressed that the shipowners believe that it is time for a change of the current state of law, and that it is not reasonable that the shipowners bear the full liability for the pilots' negligence. It was also stated that the shipowners experience that the communication and cooperation between the pilot and the Master is often an issue and a triggering factor for accidents. The Master is the person responsible for the vessel's safe navigation; he/she has a duty to intervene when a pilot conducts unsafe navigation of the vessel. However, the Master's duty to intervene is seen as more theoretical than practical. The pilots act with authority and give instructions that are difficult for the Master and navigators not to follow. To illustrate this situation, I will in the following section present Hagland's and Norlines' experience pertaining to pilotage errors. I will not conduct a thorough review of the incidents; it will be too comprehensive for this dissertation. The two incidents will however illuminate the research question. The shipowners believe that a State liability should have been considered.

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[243] During a contractor's repair work at a municipal school, a boy was hit in the head and seriously injured from asphalt that was thrown out of a window. The municipality's construction manager had given the contractor permission to utilize this irregular and dangerous way of working. It was considered as negligent of the municipality not to supervise the permissions that were given to the contractor. Security measures were planned but were not conducted. The municipality was held liable for the accident.

[244] NSA consultation letter - NOU 2013:8, page 5

8.3 Examples of incidents that relate to pilotage errors

April 29th, 2013. Hagland Chief (time chartered by Hagland shipping AS) ran aground in Høllen, southern Norway as a result of a pilot's negligence both prior to and during the pilotage mission. Knut W. Aanensen from Hagland shipping explain in his email (19.09.2014): "the pilot had not submitted a voyage plan before he came on board the vessel, so the vessel's navigators were not fully prepared for the planned sailing route. It was bad weather and poor visibility when the pilot took command. He navigated the vessel by use of the lanterns and had no control over the ECDIS or the radar. The pilot overlooked one of the lanterns and navigated the vessel through the incorrect fairway where the vessel hit an underwater rock. The shipowner was held liable for the accident. He suffered a loss of 15 million NOK and a 90 days off-hire period.

May 17th 2014. M/S Karmsund (partly owned by Norlines AS) ran aground as a result of a pilot's navigational error during a voyage through Hellefjorden (fairway 2055), close to Kragerø. The shipowners were held liable for the accident. Toralf Ekrheim, Vice president in NorLines AS, states in his email (02.09.2014): "As far as I understand, the Master believes that the grounding could have been avoided if the Master himself had decided the vessel's navigation course".

8.4 Summary: The NSA and the shipowners' point of view

In light of what is stated above, one can see that the shipowners and the NSA are clear in their statements; it is time for a change of the current state of law. The NSA is of the opinion that the arguments put forward in the Prince Charles case lack relevance today. It is no longer reasonable to base the liability for the pilots on this judgment. According to the NSA, there is nothing special with the pilot service that places the pilots in a different position than other public enterprises. The State should therefore acknowledge the statutory employer liability that follows from being an employer with employees, cf. Skl. § 2-1.

After having presented the industry's view of the current state of law, I will in the next chapter give some concluding remarks where I discuss whether I believe there are grounds to consider a modification of the current state of law.

9 Conclusion

In this dissertation I have conducted a review of the development of the pilot service from its establishment up until its current organization. Furthermore, I have presented the current state of law and relevant case law, with special emphasise on the Prince Charles case. I have interviewed the industry and examined their work on a new Pilotage Act, cf. Norwegian Official Reports (NOU) 2013:8, where it is noted that the liability for the State pilots should be reviewed more closely. In this connection I have interviewed the NSA, which represents the main users of the pilot service, and studied their contribution to the Committee in connection with the aforementioned problem. I have also looked at relevant incidents in which the shipowners believe that a State liability should have been considered.

After having reviewed and discussed the current state of law, I conclude that there are grounds to consider a modification of the current state of law. I base this on the following:

That the pilots are the only group of public employees who are currently not subject to their employer in terms of liability is due to an old case, pronounced in a period before the objective employer liability was introduced. The legal situation has subsequently remained unchanged because the Prince Charles case's arguments have frequently been emphasised and maintained as valid during the development that has occurred in the direction of a broad public employer liability. Based on the review in chapter 7 and 8, it can be stated that the judgement's arguments lack both relevance and validity in the present day. In 2014, the objective employer liability, including the State's employer liability, is a well-established and functioning system. That is also how it should be for the State's liability in relation to the pilots.

However, I am not of the opinion that the shipowners should be exempt from all liability for the pilots during pilotage. It is clear that the pilots perform work in the service of the ship and in the shipowner's interests. The shipowner should in this case also be liable for the pilot's actions onboard. It is my opinion that there should still be a guiding principle that the shipowners are liable when unforeseen incidents result in damage to a ship, cargo, or third party interests – also in cases when there is a pilot on board. This is in line with the Prince Charles case and the current legal practice. This also emerges from my conversations with the mentioned shipping companies, in which they express that they do not want to grant the entire navigation responsibility to the pilot during pilotage and thereby relinquishing the control and management onboard the ship.

However, I believe, in line with the NSA and the industry, that it is not reasonable that the State, as the pilots' employer, is exempt from all liability for any situations that might occur. It is a fact that pilotage is a mandatory service provided by the State. The pilots are State employees, educated and instructed by the NCA as a governmental agency. The pilots act with authority and give instructions that are difficult for the Master and navigators onboard not to follow. Therefore, I believe that it is reasonable that the State, as the employer and provider of the pilots, should bear liability for the pilot's service onboard in the same manner as other industries that provide a mandatory service.

On this basis, I believe that a more facilitated solution will be that the shipowner is liable externally for incidents that result in damage to a ship, cargo, or third party interests, but it should be possible to direct recourse claim against the State, in cases where the incident can be directly tied to the pilot's negligence in service. In situations where the Master or others subject to the shipowner's control contributed to the wrongful act, there should be a possibility for joint liability between the shipowner and the State.

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Correction of English grammar

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