CA 4530/91

Ports and Railways Authority

v.

Zim Integrated Shipping Services, Ltd.

The Supreme Court sitting as the Court of Civil Appeals

[October 10th, 2000]

Before Vice-President S. Levin, Justices T. Or, E. Mazza, M. Cheshin, I. Zamir

Appeal on the Judgment of the Haifa District Court (Justice T. Strassberg-Cohen) on September 1, 1991 in CC 1195/86.

Facts: The present case raises the question of liability for damage caused during the course of pilotage of a ship. A ship and a dock were damaged during the course of the pilotage of a ship in the dock. The owner of the Ship, Zim Integrated Shipping Services, Ltd. repaired the damage that was caused to the Ship, and demanded that the Ports and Railways Authority reimburse it for the cost of the repair. The owner based the demand on the negligence of the Ports and Railways Authority and the negligence of the pilot for whose actions it was claimed the Ports and Railways Authority bore vicarious liability. The two central questions that were addressed were: do the owners of a ship have a cause of action against the employer of a pilot who caused damage to a ship in the course of piloting in the area of a port? And, if so, how is the liability to be distributed between the owners of the ship and the pilot's employer if the damage was caused by the joint fault of the pilot and the ship's crew. The District Court imposed two thirds of the liability for the damage on the pilot, and the remaining third on the captain. The court, based on vicarious liability attributed the liability of the pilot to the Ports and Railways Authority and the liability of the captain to Zim. The practical ramification of this distribution is that Zim's suit against the Ports and Railways Authority was successful only in part and the Ports and Railways Authority was required to pay Zim two thirds of the cost of repair of the ship. The Ports and Railways Authority appealed this decision.

Held: The Court partially allowed the respondent's appeal. The court determined that the Ports and Railways Authority alone is liable to Zim by way of vicarious liability for the pilot's negligence. However, the pilot, were he to be sued to compensate Zim for the damage caused to the Ship, would only be obligated, given the contributory negligence of the captain, for half the damage. Therefore, the Ports and Railways Authority is only obligated to compensate Zim for half of the damage. The appellants were ordered to pay the respondent's fees in the sum of NIS 30,000.

Legislation cited:

Torts Caused by Ships in Pilotage Ordinance 1939 ss. 1, 2.

Torts Ordinance [New Version], ss. 2, 11, 13, 13(A) (2) (B), 14, 35, 36, 84(A), 84(B).

Ports Ordinance [New Version] 5731-1971, ss. 13, 53.

Shipping (Sailors) Law 5733-1973, ss.1, 36.

Import and Export Ordinance [New Version] 5731-1971, s. 1.

Addition to the Law Extending the Emergency Regulations (Supervision of Sailing Vessels) (Consolidated Version) 5733-1973, r. 29.

Magella

Ports and Railways Authority Law, 5721-1961, s. 24(A).

Regulations Cited:

Haifa Port Regulations [January 7, 1933].

Ports Regulations 5731-1971, rr. 1, 37, 47, 47(a), 69, ch. 6.

Ports Regulations (Pilotage of Vessels in the Ports) 5724-1964.

Ports Regulations (Pilot Licensing) 5724-1964.

Addendum to the Ports Regulations (Prevention of Collisions in the Sea) 5737-1977.

Prevention of Contamination of Sea Water with Oil (Implementation of the Treaty) Regulations 5747-1987, r. 1.

Shipping (Sailors) Regulations 5736-1976, rr. 22(A), 23.

Israeli Supreme Court cases cited:

[1] CA 804/80 *Sidaar Tanker Corporation v. Eilat-Ashkelon Pipeline Company* Ltd., IsrSC 39(1) 393.

[2] CA 542/73 *Cargo Ships "El Yam" Ltd. v. Ports Authority* IsrSC 30(1) 173.

[3] CA 502/78 *State of Israel v. Nisim* IsrSC 35(4) 748.

[4] CA 360/80 *Michon LeMateh Ltd. v. Karnit-Fund for Compensation of Victims of Road Accidents* IsrSC 35(2) 383.

[5] CA 22/75 *Edri v. Azizian* IsrSc 30(1) 701.

[6] FH 38/75 *Cargo Ships "El Yam" Ltd. v. the Ports Authority* IsrSC 30(2) 645.

[7] CA 817/81 *Ports Authority in Israel v. Zeno* (unreported).

[8] CA 469/64 *Shiphart and Eskorant Genelsheft, A Ross and Kwo v. the Ports Authority in Israel* IsrSC 19 (2) 207.

[9] CA 582/71 *National Insurance Institute v. the Ports Authority* IsrSC 27(1)650.

[10] CA 85/60 *Water Works Company Ltd. v. Segel* IsrSC 14 1939.

[11] CA 197/58 *Eylon v. Yadi* IsrSC 12 1459.

[12] CA 54/64 *Peretz v. Keren Kayemeth LeIsrael Ltd.* IsrSC 18(3) 387.

[13] FH 15/88 *Melekh v. Kurhauser* IsrSC 44(2)89.

[14] CA 1170/91 *B'chor v. Yehiel* IsrSC 48(3) 207.

[15] CA 145/80 *Waknin v. Bet Shemesh Local Council* IsrSC 37 (1) 113.

[16] CA 243/83 *Jerusalem Municipality v. Gordon* IsrSC 39(1) 113.

Israeli District Court cases cited:

[17] CC (Haifa) 786/87 *Zim v. Ports Authority* (unreported).

American cases cited:

[18] *United States v. Port of Portland*, 147 F. 865 (1906).

[19] *City of Long Beach v. American President Lines*, 223 F.2d 853 (9th Cir., 1955).

[20] *National Development Company v. City of Long Beach,* 187 F.Supp. 109 (1960); 70 Am.Jur. 2d sec. 443 (1987)).

English cases cited:

[21] *Workington Harbour and Dock Board* v. *Towerfield* (Owners) [1950] 2 All. E. R. 414

[22] *The Esso Bernicia* [1989] 1 All E.R. 37, 58-60

Australian cases cited:

[23] *Oceanic Crest Shipping Co. v. Pilbara Harbour Services Pty. Ltd.* 160 C.L.R. 626

Israeli books cited:

[24] Barak, *Vicarious Liability in Tort Law* (1964)

Israeli articles cited:

[25] G. Tedeschi 'Employer Immunity and the Liability of the Employee', *Mishpatim* 13 (1983) 81.
[26] Englard 'Half a Jubilee to the Civil Torts Ordinance – Problems and Trends' *Mishpatim* 5 (1973-1974) 564.
[27] D. Freedman 'The Law of Property and the Law of Fault' *The Sussman Book* (1984) 241.
[28] Gilad 'Forty Years of Israeli Law – Chapters in Tort Law' *Mishpatim* 19 (1980) 647.
[29] D. Mor 'Liability for Defective Products – Policy Considerations' *Iyunei Mishpat* 6 (1978).
[30] Y. Bahat (Buchhalter) 'Dual Vicarious Liability for the Acts of an Employee – As of When?' *Iyunei Mishpat* 4 (1975) 478.

Foreign books cited:

[31] R.P.A. Douglas, G.K. Geen, *The Law of Harbours and Pilotage* (London, 4th ed., 1993).
[32] A.L. Parks, E.V. Cattell, *The Law of Tug, Tow and Pilotage* (London, 3rd ed., 1994).
[33] G. Gilmore, C.L. Black, *The Law of Admiralty* (New York, 2nd ed., 1975).
[34] C. Hill, *Maritime Law* (London, 4th ed., 1995).
[35] G.K. Geen, R.P.A. Douglas, *The Law of Pilotage* (London, 2nd ed., 1983).
[36] T.J. Schoenbaum, *Admiralty and Maritime Law* (Minnesota, 2nd ed., 1994).
[37] R.G. Marsden, *On Collisions at Sea* (London, 12th ed., S. Gault and others (eds.), 1998).

Foreign articles cited:

[38] G.C. Stephenson "A Pilot is a Pilot: Compulsory Pilots – Vessel Owner's Responsibilities for Intervention and Personal Injury" 70 *Tulane L. Rev.* (1995-1996) 633.

Other:

[39] 70 *Am. Jur.* 2d (Rochester and San Francisco, 1987).

For the appellant—Ilan Orli.
For the respondent—Shlomo Freedman.

JUDGMENT

Justice I. Zamir

The Questions

1. This appeal raises two fundamental questions as to the law which applies to pilotage of ships within the area of a port:

[a] Do the owners of a ship have a cause of action against the employer of a pilot (in fact, against the Ports and Railways Authority) who caused damage to a ship in the course of piloting within the area of a port?

[b] Assuming the answer is in the affirmative, how is the liability to be distributed among the owners of the ship and the pilot's employer, if the damage was caused by the joint fault of the ship's crew and the pilot.

The questions stem primarily from the Torts Caused by Ships in Pilotage Ordinance 1939 (hereinafter: "the Pilotage Ordinance"). And this is the language of the ordinance in its entirety, as it was originally (in its translation to Hebrew) and as it remained without amendment (even without a new version in Hebrew) from that day until today.

"An ordinance that imposes liability on a vessel's owners and captains for damage caused as a result of pilotage in the ocean.

1. This ordinance shall be titled Torts Caused by Vessels in Pilotage Ordinance 1939.

2. Irrespective of what is said in any Ottoman law or any other law or ordinance, the owners or captain of any vessel in pilotage, whether the pilotage is compulsory or otherwise, will be liable for any loss or damage caused by the vessel or by an error in the navigation of the vessel."

The Occurrence of the Damage

2. The damage in this case occurred to the ship Yaffo (hereinafter – "the Ship") at the Ashdod Port (hereinafter – "the Port") on September 8, 1979. That day the Ship entered the port carrying security equipment. Due to the type of cargo, the Ship had to be turned (in an elliptical motion) and tied to the dock with its bow pointing to the exit. This maneuver took place, as is customary, with the help of a pilot employed by the Ports and Railways Authority (hereinafter – "the Ports Authority" or "the Authority"). The pilot was assisted by two of the Authority's tugboats, which stayed close to the bow and stern of the Ship. He boarded the Ship prior to its entry into the Port, and gave orders to the two tugboats and the Ship's crew. The captain, together with the pilot, was on the navigation bridge of the Ship, and supervised the execution of the orders that the pilot gave to the Ship's crew.

As the Ship approached the dock it became necessary to brake its advance. The braking was achieved by activating the motors against the direction of the sail. The speed of braking was determined by the pilot, in accordance with the distance of the Ship from the dock. Reports as to the distance were sent to the pilot from two sources: the one source, the workers of the Ports Authority, some of whom waited for the Ship on the dock and some of whom drove the tugboats; the second source, the Ship's captain, based on reporting that he received from the first officer of the Ship who was at the bow of the Ship.

At a certain stage in the maneuver the pilot ordered a speeding up of the braking speed. Half a minute after that the pilot changed the order, and ordered a reduction in the speed of the braking. Suddenly the pilot received a report that the location of the Ship was at a distance of only 5 meters from the dock. This distance did not fit the Ship's speed of advancement. Therefore, the pilot attempted to execute an emergency braking of the Ship. But this braking also did not succeed in stopping the Ship on time. The bow of the Ship collided with the dock. As a result of this collision the Ship and the dock were damaged.

The owner of the Ship, Zim Integrated Shipping Services, Ltd. (hereinafter – "Zim"), repaired the damage that was caused to the Ship, and subsequently demanded that the Ports Authority reimburse it for the cost of the repair. The reason for the demand was the negligence of the Authority and the negligence of the pilot for whose actions the Authority bears vicarious liability. After the Authority denied the request, Zim filed suit in the Haifa District Court (in 1986).

The Proceedings in the District Court

3. The Ports Authority defended itself from the suit with various claims. For the purpose of this appeal, it will suffice to mention four of the claims. First, the Ports Authority claimed that there was no negligence on the part of the pilot, as the insufficient braking speed was determined by the pilot on the basis of an erroneous report supplied by the first officer of the Ship as to the distance of the Ship from the dock. Second, in addition to the negligence of the first officer, the collision was caused by the negligence of the captain, who blindly adopted the guidance of the pilot to reduce the braking speed, and did not fulfill his duty to employ independent discretion when authorizing such an instruction. In this situation, according to the Authority's claim, the relatively large contribution to the damage on the part of the first

officer and the captain severed the causal link between the negligence of the pilot and the damage. Third, even if there was negligence on the part of the pilot, the vicarious liability for this negligence is placed on Zim, which was assisted by the pilot for the maneuver, and in this framework supervised (via the captain) his actions. Fourth, the law in Israel imposes strict liability on a ship's owner for the damage caused to a ship or by a ship during the course of pilotage, whether the responsibility for the damage is placed on the ship or the ship's crew or whether the responsibility is placed on another party. The source for this law, the Ports Authority explained, is to be found in the Pilotage Ordinance. See paragraph 1 *supra*.

4. Evidence as to the details of the event was brought before the District Court. After examining the evidence, the Court (Justice Strassberg-Cohen) decided to dismiss both the factual claims and the legal claims of the Ports Authority which countered its fundamental liability for the damage.

In the factual realm, the court found that the pilot played a part in causing the collision. It established that the pilot did not have a good reason to reduce the braking speed immediately after he decided, in light of the nearing of the Ship to the dock, to increase the braking speed. The pilot enabled the Ship to move at a faster speed than the speed that was necessitated by the distance of the Ship from the dock, and thereby contributed to its late stopping. The claim, that sees the pilot as one who only assists or advises the Ship's crew, was also dismissed. The court ruled that during the course of the maneuver the pilot gave the Ship's crew orders, and not advice, as to the speed of the Ship.

Despite these determinations, the District Court did not attribute full fault for the damage to the pilot. It attributed a portion of the fault to the Ship's captain. According to the judgment, the captain's fault stems from the fact that he refrained from intervening in an order that was given by the pilot to reduce the braking speed. The captain received a report as to the real distance of the Ship from the dock, both from the first officer of the Ship and from the people on shore. Therefore, he was capable, on the basis of the knowledge and qualifications that he had acquired, to deduce from these reports that the speed of advance that the pilot ordered is too high and may end in a collision. He even was capable of translating this conclusion to a practical result, as the necessary status within the ship of orders given by the pilot does not take the reins of command over the ship out of the captain's hands, which includes the ability to fix or cancel a mistaken command which is directed from the pilot to the ship's crew.

After weighing the pilot's fault against the captain's fault, the District Court decided to impose two thirds of the liability for the damage on the pilot, and the remaining third on the captain. The court translated this liability to the vicarious liability of the employers of the pilot and of the captain, and accordingly attributed the liability of the pilot to the Ports Authority and the liability of the captain to Zim. The practical ramification of this distribution is that Zim's suit against the Ports Authority was successful only in part, such that the Ports Authority was required to pay Zim only two thirds of the cost of repair of the Ship.

5. To reach this result the District Court had to overcome another claim of the Ports Authority. This is the claim which attributes liability for the entire damage to Zim, not based on the regular principles of Tort Law, but by power of a special law, which is expressed in the Pilotage Ordinance, according to which the owners of a ship bear liability for any damage that is caused in the course of the pilotage of the ship. See *supra* paragraph 1. The court accepted the Authority's claim that the liability of a ship owner according to the Pilotage Ordinance is strict, but dismissed the claim that such strict liability prevents the suit of the owners against those who damaged the ship. It explained this by the fact that strict liability according to the Pilotage Ordinance adds a cause of action, but does not detract from existing causes of action. It was intended to make it easier for one who suffered damage from a ship during the course of pilotage, and to enable him to defray his full damages from the ship, without having to get into the distribution of liability between the ship's crew and the pilot. However, at the same

time, all the other causes of action which emerge in the framework of the general law due to the occurrence of the damage continue to exist, whether to the benefit of the injured party against the tortfeasor, or whether to the benefit of the one tortfeasor against other tortfeasors. On the basis of this determination the Court concluded that the Pilotage Ordinance does not detract from the right to sue which Zim has vis-à-vis the Ports Authority for the damage caused to the Ship. This right, said the District Court, is founded in the general principles of Tort Law, as they were established in the Torts Ordinance [New Version], and the Pilotage Ordinance does not gnaw away at this right at all.

The Appeal

6. The Ports Authority is appealing the judgment. In the original appeal it challenged the determinations of the District Court on all fronts, both the factual front and the legal front. Later, in the course of hearing the appeal, the dispute was narrowed. The Ports Authority agreed to withdraw its reservations against the factual findings included in the judgment. It also agreed with Zim, in order to simplify the proceedings, that the negligent conduct of the pilot and the captain was equal.

7. After removing the factual obstacles from the pathway of the appeal, only the legal claims of the Ports Authority against the judgment of the District Court remained. The claims are concentrated on these issues: first, the Pilotage Ordinance; second, the status of a pilot who is on a ship. These issues, although they differ from one another, are tied to one another. The Ports Authority does not accept the construction that the District Court gave to the Pilotage Ordinance, primarily because it disagrees as to the way in which the District Court conceived of the relationship between the owner of the ship, the captain and the pilot. It does not agree with the approach of the District Court, which sees the primary purpose of the Pilotage Ordinance to alleviate matters for a third party who suffers damage from a ship in pilotage, but rather is of the view that the primary purpose of the ordinance is to encourage the captain of a ship to intervene in mistaken decisions of a pilot and thereby to lessen the dangers posed by pilotage. The duty placed on the captain to supervise the pilot, stems, in the opinion of the Ports Authority, from the division of roles between the two, in the framework of which the pilot advises the captain, and the captain alone carries command responsibility. According to the Authority's claim, recognition of the existence of a cause of action in favor of a ship, outside of the Pilotage Ordinance, will undermine the duty of supervision placed on the captain.

This and more. According to the Authority's claim, to the extent that it is a matter of the tort of negligence (from which the District Court drew the liability of the Ports Authority vis-à-vis the Ship), it is not even necessary to go as far as the Pilotage Ordinance in order to deny the liability of the pilot toward the ship owner. Since the tort of negligence is based on the existence of a duty of care, and in consideration of the hierarchical distribution of roles between the captain and the pilot, it is not proper to impose on the pilot a duty of care toward the ship owner. Such a duty will not encourage the captain to prevent damage during the course of pilotage and will erode discipline on the ship, in the face of foreseeable conflicts over authority between the pilot and the captain.

The Ports Authority claims, alternatively, that even if a duty of care was imposed on the pilot toward the ship owner, such a duty would not have the power to justify the result reached by the District Court. This is so, first, because vicarious liability for negligence of the pilot during the course of the pilotage is imposed on the ship owner and not on the employer of the pilot; second, since the increased duty of care of the captain increases his degree of liability, as compared with the degree of liability of the pilot, to the point of severing the causal connection between the negligence of the pilot and the damage; third, because the increased duty of care of the captain, must, at the very least, increase the liability of the captain, and impose the majority of the damages on him and not the pilot.

8. Given the importance of a determination on these claims, which in part are coming up in this Court for the first time, the judges on the original panel considering the appeal decided to continue the proceedings before an expanded panel of judges.

9. The cornerstone in the appeal of the Ports Authority is the claim as to the status of the pilot in the relationship between the ship owner, the captain and the pilot. This claim may also have ramifications as to the construction of the Pilotage Ordinance. Therefore, we will clarify it first. For this purpose it is appropriate to first clarify the essence of pilotage and the law that applies to it.

Pilotage

10. Pilotage was intended to assist in the movement of vessels in narrow, closed, or winding waterways. Vessels may end up in such a path in the course of sailing (for example in straits, a channel or river) and is bound to find itself in such a path at the beginning of its sail or at its conclusion, when it sets sail from the port or is about to anchor in it. In fact, pilotage in a port is more common than pilotage in other places. In many countries, including Israel, pilotage only takes place in a port. This being the case, we will limit ourselves to pilotage in a port.

The area of a port poses before a vessel, especially a large vessel, dangers unlike those in sailing in open waters: breaking waves, shoals, palisades, wharfs, other vessels, shallow waters, low tide, and more. The success of the maneuver which is executed in these conditions is very much dependent on recognizing the territorial and weather conditions particular to one port or another. As a result, the permanent crew of a vessel does not have sufficient knowledge and ability to cope with the particular dangers of a given port. In many cases, the permanent crew is also lacking sufficient knowledge as to the work patterns and rules of behavior particular to a port. Therefore, the permanent crew requires help from a skilled agent, who has proficiency in the facts that are particular to the port. Ostensibly, such assistance can be given to vessels as it is given to aircraft, via the transmission of data and guidance from ashore. However, in fact, this method is not sufficient for successful pilotage of vessels. Unlike with aircraft, which is done entirely by the crew members, navigating a ship in a port is often done with the integration of people from within the ship and outside of it: the ship's crew; operators of tugboats which are harnessed to the ship and which lead it within the port; people on shore who assist in tying the ship and undoing the tie; and more. The need to coordinate between all these entities, which requires special knowledge and training, with the ground conditions particular to the port and the requirement for maximum precision of the movement in it, does not enable making do with remote control of the ship. The safety of the pilotage requires direct and close guidance and supervision. That is the role of the pilot. The pilot who is generally a captain, who has undergone training in pilotage, is expert in data that is particular to the port. He stays on the ship from the moment of entry to the area of the port until it is anchored at the dock, and later from the beginning of the sail until leaving the borders of the port. During the course of the pilotage he checks the location and speed of the ship relative to other objects in the area of the port, stationary and mobile, and guides the ship's crew, those in the tugboat and those on shore, accordingly, as to the alignment, timing, and speed of the ship. As to the essence of the pilotage and the roles of the pilot see further in CA 804/80 *Sidaar Tanker Corporation v. Eilat-Ashkelon Pipeline Company Ltd*., [1] at 410-417.

11. Pilotage duties and the status of the pilot are regulated in various countries by an extensive system of statutory law, including special laws. See, for example, in England, the Pilotage Act 1987. On the other hand, in Israel, there are no more than a few statutory provisions in these matters: the Pilotage Ordinance, which deals with liability for damage caused during pilotage, and two sections of the Ports Ordinance [New Version] 5731-1971, which establish a duty of licensing of pilots (section 13) and offenses of pilots (section 53). The rest of the matters which relate to pilotage were left to regulations. The first topic which

was regulated in the regulations, still in the Mandate period, was the duty to be assisted by pilotage services in the area of the port. See the Haifa Port Regulations (January 7, 1933). The regulations have been improved from time to time and were applied to additional matters. Today, the sixth chapter of the Ports Regulations 5731-1971 is dedicated to pilotage. This chapter includes provisions as to competence of pilots, licensing of pilots, the duty of pilotage and clearing the way for a ship in pilotage. These provisions, like the rest of the provisions in the Ports Regulations, apply only in the realm of the Haifa Port, the Ashdod Port, and the Eilat Port. See the definition of "port" in regulation 1 of the Ports Regulations. The pilotage in other ports is regulated, to date, in previous regulations: Ports Regulations (Pilotage of Vessels in the Ports) 5724-1964, and Ports Regulations (Pilot Licensing) 5724-1964. See further, as to all the ports, regulation 29 to the Addendum to the Ports Regulations (Prevention of Collisions in the Sea) 5737-1977.

The arrangement that was established in the law and the regulations as to the duty of pilotage and the status of the pilot generated criticism. The criticism pointed to the fact that the arrangement is outdated and does not coordinate with the developments that have occurred in the field of maritime, that it leaves important questions without an answer and that as a result of the deficiencies in the legislation there is occasionally a lack of accord between law and practice.

The criticism led to the establishment of two committees for examining the law of pilotage in Israel. The first committee was appointed by the Minister of Transportation in the mid eighties and presented a report in 1990. It found deficiencies in the legislation which relates to pilotage, and recommended a series of amendments in various areas, including on the question of liability for damages in the course of pilotage. It was of the view, in contrast to the existing situation, that it would be proper to establish primary arrangements as to pilotage in primary legislation. But the recommendations of the committee were not implemented.

In 1994 the Minister of Transportation appointed a second committee to re-examine the same matter. This committee also found various topics requiring amendment, including liability of the pilot for damages in the course of pilotage. However, even though the committee's recommendations were submitted to the Minister already in 1994, to date there has still not been a decision made in the Ministry of Transportation to adopt them.

The recommendations of the two committees were formulated after thorough and comprehensive work, including comparison of the laws in other countries. They point in a clear and convincing manner to the need to change the outdated law, which has gone almost entirely unchanged for decades, and to adapt it to the situation on the ground that has developed steadily. Freezing the law weighs down the activity in the ports and also, as the present case proves, determinations in conflicts which stem from pilotage.

The present case, which raises the question of liability for damage caused during the course of pilotage, exemplifies the need for change in the legislation. This question should have been answered in the framework of the Pilotage Ordinance from 1939 which deals, as its name indicates, with "torts caused by ships in pilotage". However, in fact, the answer provided in the Ordinance to this question is partial and opaque. The shortcomings of the Pilotage Ordinance were described in the report of the two committees which examined the issue of pilotage. But despite the recommendations of those committees the Ordinance has not, to date, been amended. If the recommendations had fallen on attentive ears, it probably would have simplified and shortened the proceedings in the present case. However, as the recommendations have not been addressed, and the Pilotage Ordinance has been left unchanged, the court has been left with the task of clarifying what the Ordinance states and filling in what the Ordinance has left lacking as to liability for damage caused during the course of pilotage.

A preliminary question to this end, which has no answer in the legislation, relates to the essence of the relationship between the pilot and the captain of a ship.

Pilot and Captain

12. Pilotage places the captain of a ship in an unusual situation. The captain is the commander of the ship. His authority to give orders on the ship gives him responsibility for every act and omission on the ship. This responsibility assumes that the captain has the knowledge and ability in all areas of operation of the ship. Therefore, he can supervise what occurs on the ship, guide the ship's crew and prevent errors by any person operating the ship.

This presumption is corrupted in the case of pilotage. The need for the services of an external pilot stems from the inability of the ship's crew, including the captain, to pilot the ship independently. As a result, a difficulty is created in subordinating the pilot to the command of the captain: since the pilot is more expert and more qualified than the captain in pilotage, whether and when is it to be required of the pilot to comply with commands given by the captain as relates to pilotage? Whether and when is it to be expected that the captain interfere in orders given by the pilot relating to pilotage?

These questions have been dealt with more than once by courts overseas. Generally, they have avoided the extreme position which imposes responsibility for the pilotage only on the pilot or only on the captain, and have defined the relationship between the captain and the pilot as a relationship of cooperation and reciprocity. In this type of relationship, the authority and responsibility for pilotage is divided between the captain and the pilot. However, the authority and responsibility for pilotage are not equally divided. The authority of the captain, and as a consequence his responsibility, need to take into consideration the priority that the pilot has in terms of the expertise that is required for pilotage. Therefore, the authority and responsibility of the captain must be limited to unusual circumstances. So too, the authority and responsibility of the pilot, while justified in terms of the expertise required for pilotage, must take into account the special status of the captain as the commander of the ship. As the commander of the ship the captain has close familiarity with the ship's crew and the ship's systems, and it gives him information the pilot does not have as to the technical and human abilities and limitations of the ship, which may influence executing the pilotage. Therefore the authority and responsibility of the pilot is to be limited to circumstances which do not jeopardize the command status of the captain and do not ignore the special knowledge and experience he has regarding the ship. The right integration of the various considerations leaves the pilot a wide range of discretion in piloting the ship, and with that preserves the captain's ability to intervene in this discretion in unusual cases, in which the behavior or decision of the pilot appear to the captain to be dangerous or especially erroneous. In any case, even if the captain decides not to interfere in a decision made by the pilot, he still must alertly follow the pilot's functioning, and pass on to him any information necessary to ensure that the ship's crew fulfills the pilot's orders and draw the pilot's attention to any mistake in pilotage. This was the approach of the courts in England and the United States already in the 19th century, and this is also the accepted approach in various countries in case law and legislation, until today.

(See R.P.A. Douglas & G.K.Geen, *The Law of Harbours and Pilotage* (London, 4th ed., 1993) 199-220[31]; A.L. Parks & E. V. Cattell, *The Law of Tug, Tow and Pilotage* (London, 3rd ed., 1994)[32] 1008-1010; G. Gilmore & C.L. Black *The Law of Admiralty* (New York, 2nd ed., 1975) [33] 597-598; C. Hill *Maritime Law* (London, 4th ed., 1995) [34] 512; G.C. Stephenson 'A Pilot is a Pilot: Compulsory Pilots - Vessel Owner's Responsibilities for Intervention and Personal Injury' [38] 633, 635-636.)

13. The right reserved to the captain to intervene in decisions of the pilot must be used with great restraint and care. There are two reasons for this. The first reason is the proficiency of the pilot. For this reason the captain must exercise extra caution before

deciding to give preference to his opinion over the opinion of the pilot, all the more so when he seeks to take the piloting reins from the pilot and pilot the ship himself. The second reason lies in the confusion that contradictory commands sow among the ship's crew. A central condition for the success of the operation of the ship, including pilotage, is the certainty of the ship's crew as to the source authorized to give commands on the ship. Interference by the captain in the pilot's orders may sabotage this certainty.

With that, in extreme cases, the captain's right to intervene not only justifies his intervention but may also demand such intervention, and imposes liability on the captain for failure to intervene.

14. Is the formula for the relationship between a captain and a pilot similar in Israel to the accepted formula in other countries? The District Court, after examining the law and hearing evidence answered this question in the affirmative and stated as follows:

> "Pilotage is placed – both by law and in fact – in the hands of the pilot, the port person, and his status is not the status of an advisor alone. His orders are commands which the ship's people follow while it is in pilotage. Despite this, this status does not neutralize the status and responsibility of the captain. The captain does not let the reins of command of the ship out of his hands, and he has in his power and in the knowledge he is favored with, enough to enable him to intervene when necessary."

The Ports Authority, the appellant, does not accept this determination. In its view, the pilot does not have practical authority on the ship, and only has the status of advisor to the captain. It claims that this is the law not only in Israel but also outside of Israel.

But the Ports Authority errs as to the law outside of Israel. In many countries, in particular in common law countries, which serve as a central source of inspiration for pilotage law in Israel, the captain and the pilot divide between them authority and responsibility for pilotage. The Ports Authority relies, *inter alia*, on a report (from 1911) of a committee that was appointed in England in order to examine the subject of pilotage. One of the recommendations of the committee was that the law define the legal relationship between the captain and the pilot in a manner that will increase the authority of the captain. However, in contrast to the impression that the Ports Authority is creating, this recommendation was not accepted by the English legislature and was not implemented, not in the Pilotage Law of 1913 (that was legislated pursuant to the committee's recommendations) and not in later incarnations of this law. (See Douglas and Green, paragraph 12 *supra*, [31] at pp. 162, 201-203). Moreover, even the committee in England did not seek to reach the situation the Ports Authority is headed toward, meaning expropriating control of the pilotage of the ship from the pilot. All that was recommended was to increase the (parallel) control of the captain over the pilotage, with the goal of encouraging him to intervene in the pilotage. (See G.K. Geen & R.P.A. Douglas, The Law of Pilotage (London, 2nd ed., 1983) [31] at 81).

Does the law in Israel deviate from the accepted approach throughout the world? The Ports Authority hangs on to two provisions in the Ports Regulations 5731-1971, which show, in its view, that in Israel the pilot is no more than an advisor to the captain. The first provision is in sub-regulation 47(a). The sub-regulation established the duty of pilotage in the port:

> "A captain will not bring a vessel into the port and will not remove a vessel from the port, and will not tie mooring gear or detach it and will not execute any other maneuver with a vessel in the port, unless there is a pilot on the vessel with whom he is consulting."

The Ports Authority emphasizes "consulting". In its view, that is the essence of the relationship between the captain and the pilot.

The second provision is found in regulation 69. This regulation defines the duties of the captain during mooring at the port:

> "A captain of a vessel will prevent any damage that may be caused to the dock or to any other structure in the port as a consequence of pilotage, mooring, or fettering of a vessel, or during loading or unloading."

According to the claim of the Ports Authority imposing the duty to prevent damage during pilotage on the captain alone, and not on the pilot as well, means that the pilot is not in charge of pilotage, but only assists the captain with advice.

I believe that the Ports Authority has gone too far in the conclusions it draws from the two regulations. These regulations were not meant to regulate the relationship between the captain and the pilot. They deal with matters which have no connection to this relationship: the duty of a ship to be assisted by a pilot (regulation 47) and the duty of care of a captain toward the port (regulation 69). Therefore, it is not proper to build castles on these regulations regarding the relationship between the captain and the pilot. It is to be presumed that the formulator of the regulations, if indeed he wanted to establish anything as to this question would reveal his intention in a more detailed and explicit manner. In any event, the conclusions of the Ports Authority are not even necessitated by the regulations themselves. Sub-regulation 47(a) which deals with the advice that the captain receives from a pilot does not rule out the possibility that this advice has binding status on the ship. Indeed, there is nothing preventing the advice of the pilot having the character of a command, as long as the captain has decided not to make use of his (rare) authority to give a contradictory command. As Justice Berinson explained in CA 542/73 *Cargo Ships "El Yam" Ltd. v. Ports Authority* [2] at 178:

> "In theory, even when a ship is in pilotage the pilot is merely the advisor of the captain and the final responsibility for piloting the ship does not fall out of the captain's hands. In fact, during the normal course of events, he need not do more than listen to the 'advice' of the pilot and fulfill it."

Justice Netanyahu said similar things in the *Eilat – Ashkelon Pipeline* case [1] at 406-407:

> "He [the pilot] does not replace the captain but only advises him, although taking into consideration the proficiency unique to him, this is advice that is to be taken, but the captain remains responsible, and in unique and exceptional cases is entitled to act in contradiction of the advice."

Even regulation 69 which requires the captain to prevent damage to the port's structures, does not state that the pilot does not bear a similar duty. The duty of a pilot to prevent such damage does not require a legislated provision, as in Israel the pilot is a port employee, and thus is required to act with care with his employer's property.

Moreover, as opposed to the regulations presented by the Ports Authority as a sign that the pilot does not have authority in pilotage of a ship, a series of laws and regulations can be pointed to which specifically support the status of the pilot as the holder of authority on the ship. Thus, for example, when the legislator had to, on a number of occasions, define the term "shipmaster"; he took care to exclude the pilot from the definition (which focuses on control or command of a vessel). See section 1of the Shipping (Sailors) Law 5733-1973; Section 1 of the Import and Export Ordinance [New Version] 5739-1979; section 1 of the Addition to the Law Extending the Emergency Regulations (Supervision of Sailing Vessels) (Consolidated Version) 5733-1973; regulation 1 of the Ports Regulations 5731-1971; regulation 1 of the Prevention of Contamination of Sea Water with Oil (Implementation of the Treaty) Regulations, 5747-1987. If the Ports Authority is correct in the claim that in any event the pilot does not have status to issue commands on a ship, why did the legislator find it necessary to exclude the pilot from the definition of a commander of a vessel? Additional proof against the Ports Authority is found in the Shipping (Sailors) Regulations 5736-1976.

Regulation 22(a) of these regulations requires that one who serves as a shipmaster of a vessel will have certain certification. But regulation 23 establishes an exception to this. It says: "regulation 22(a) will not apply to the service of a pilot certified for vessels, when the vessel is required, by any law, including foreign law, to make use of his service, and the pilot has responsibility for navigating the vessel". This is a clear statement, which attributes to the pilot, at least if it is compulsory for him to be on the ship, responsibility for pilotage.

15. Since the text of the legislation does not support the approach of the Ports Authority as to the status of the pilot, the question is to be asked whether there is a substantive reason which supports this approach. The Ports Authority presents two such reasons. First, it claims, recognition of the authority and responsibility of the pilot weakens the willingness of the captain to take precautionary measures during the pilotage and thereby increases the danger posed by the pilotage. I do not accept this claim. As has already been said, the authority and responsibility of the pilot do not come at the expense of the authority and responsibility of the captain, but only complement it. The captain, even when he brings a pilot aboard the ship, does not absolve himself of any duty of care which generally applies to the shipmaster of a ship, including the duty to monitor orders coming from the pilot and the duty to examine the degree of accord of the orders with the reality on the ground. The captain who is assisted by a pilot also does not absolve himself of the duty to intervene in a particularly dangerous or clearly erroneous decision of the pilot. Indeed, recognition of the authority and responsibility of the pilot may discourage the captain from intervening in borderline cases, when he is not convinced of the error of the pilot. But, such discouragement is intended and welcome, in light of the professional advantage of the pilot over the captain in all that relates to pilotage. See paragraph 12 *supra*.

The second reason is the fear of creating dual authority over the ship. Dual authority brings on contradictory commands, and contradictory commands destroy the certainty and discipline on the ship. However, the solution that the Ports Authority provides to prevent splitting the authority, meaning, denying the pilot's authority, is not the only solution to be considered. Another possible solution is limiting the (residual) authority of the captain. Such limitation prevents contradictory commands during the routine course of pilotage, and at the same time ensures the intervention of the captain in exceptional cases, when the proximity or magnitude of the danger justifies the price entailed in contradictory commands. This solution is preferable to the solution of the Ports Authority, as it gives weight to the proficiency of the pilot and enables gleaning from it the maximum benefit during the normal course of events.

16. In conclusion, in Israel, as in other countries, the pilot, in particular if his services are imposed on the ship, is not just an advisor to the captain. He carries operational authority as to pilotage. The orders he gives obligate the ship's crew. Excluding exceptional cases, they also obligate the captain. This being the case, the pilot bears responsibility for pilotage. This responsibility obligates him to execute the pilotage with care. The responsibility of the pilot does not stand alone. Alongside it there is the responsibility of the captain. This responsibility stems from the roles placed on the captain during the course of pilotage: to assist the pilot, to ensure that his orders are implemented, and to intervene in his decisions if they display special danger. The captain also must fulfill these roles with care.

17. The roles that are imposed during the course of pilotage, on the pilot on the one hand and the captain on the other hand, and in any case distribution of responsibility which is derived from these roles, do not necessarily match the degree of liability of the captain and the pilot for damage caused as a consequence of pilotage. In the area of pilotage, the translation of authority and responsibility to liability in torts is not simple, as the distribution of liability in torts involves additional considerations, which are not tied to the division of roles among those causing the damage. It would have been possible, in order to understand the significance of these considerations to hold a separate hearing on the question of the relative liability of the pilot and the captain. However the Pilotage Ordinance, which is a

central source in Israel for establishing liability as a consequence of pilotage, does not take that route. It regulates the liability of the captain together with the liability of the ship owner, and imposes on both of them equal degrees of liability. The reason for this is rooted, it appears, in the vicarious liability of the ship owner for the actions of the captain. Since the liability is routed, in the end, to the ship owner, it is preferable to examine the distribution of liability from the perspective of the relationship between the pilot and the ship owner. We will now turn to that question.

Pilot and Ship Owner

18. The ship owner, as distinguished from the captain, is not on the ship at the time of pilotage, and does not have the necessary proficiency to execute the pilotage. Therefore, according to the general law, it is not possible to hold the ship owner personally liable for torts which occur during the course of the pilotage. On the other hand, the ship owner is the captain's employer, and therefore has vicarious liability for torts that the captain carries out during the course of his employment. See section 13 of the Torts Ordinance [New Version]. See also section 36 Shipping (Sailors) Law 5733-1973. However, does the ship owner also have vicarious liability for torts carried out by the pilot?

Vicarious liability, according to the Torts Ordinance, is conditioned on the existence of an employment relationship or agency relationship between the tortfeasor and the one on whom liability is being imposed. See sections 13-14 of the Ordinance; CA 502/78 *State of Israel v. Nisim* [3] at 753-754. Does such a relationship exist between the ship owner and the pilot? When this question is examined against the background of the Torts Ordinance, we find the Ordinance relates differently to the two types of pilots: on the one hand, a pilot whose services the ship owner, himself or via the captain, uses on his own initiative or by his own free will (hereinafter – "voluntary pilot"); and on the other hand a pilot whose services the ship owner is required to use, and has no control over the choice of the pilot (hereinafter – "compulsory pilot"). The difference in relating to the two types of pilots is expressed in section 13(a)(2)(b) of the ordinance which absolves "one who was forced by law to use the services of a person the choice of whom is not given to him" from liability for the act or omission of that person. The language of the section is clearly limited to a compulsory worker and this includes a compulsory pilot, and does not encompass a voluntary pilot. The legislative history of the section points to the fact that its purpose was to apply the common law rule that absolves ship owners from vicarious liability for a compulsory pilot, in Israel. (See G. Tedeschi 'Employer Immunity and the Liability of the Employee', [25] at 94-96). Indeed, today, such immunity, which stems from the common law, is given to ship owners in the United States. (See Parks & Cattell [32](*supra* paragraph 12) at pp. 1023-1025; Gilmore & Black [33] (*supra* paragraph 12), at p. 520; 70 Am. Jur. 2d sec. 443 (1987) [39]).

Were section 13(a)(2)(b) of the Torts Ordinance to stand alone, it would, in accordance with a construction based on its text and purpose, be sufficient to almost entirely preclude the attribution of vicarious liability to ship owners for acts and omissions of pilots. This is so, because pilotage in Israel is primarily carried out based on a duty imposed in regulation 47 of the Ports Regulations 5731-1971 and the identity of the pilot is determined by the Ports Authority, the pilot's employer. However, section 13(a)(2)(b) is not the only piece of legislation which deals with vicarious liability of a ship owner for the pilot. Another piece of legislation on the same matter is the Pilotage Ordinance. The Pilotage Ordinance obligates the ship owner (together with the captain) to pay for damage caused during the course of the pilotage of the Ship, even if the pilotage was compulsory. This obligation appears in section 2 of the Ordinance, which says as follows:

> "Despite all that is said in any Ottoman law, or in any other law or ordinance, the owners or the captain of any ship in pilotage, whether the pilotage is by compulsion or whether in another way, will be responsible for all loss or damage caused by the ship or by an error in driving the ship."

This provision, according to its opening text, establishes an exception to the regular law that should have applied to the liability of the ship owner for damages caused in pilotage. It also places vicarious liability on the ship owner for a tort caused by a compulsory pilot, although the regular tort law does not recognize such responsibility. Moreover, in 1939, when the Pilotage Ordinance was passed, the liability it placed on the ship owner and the captain was an innovation, not only for a compulsory pilot, but also for a voluntary pilot. The explanation for this was that, until 1947, which is the year of commencement of the Torts Ordinance, tort law (which was based on the Magella) did not recognize the principle of vicarious liability, and as a result vicarious liability could not be attributed to the ship owner even for a tort of a voluntary pilot. Imposing such vicarious liability required a special law, and the Pilotage Ordinance in fact created this law, without distinguishing between a compulsory pilot and a voluntary pilot, "regardless of what is said in any Ottoman law or any other law or any other ordinance." This intention of the Pilotage Ordinance also emerges clearly from the explanatory notes to the proposed ordinance (Palestine Gazette 867 (16) p. 146) which state as follows:

> "The ordinance was passed in order to also apply to cases where the guidance [meaning pilotage] is not compulsory, as in Palestine (the Land of Israel) the principle of 'transferring responsibility to another' according to which the ship owner or its captain is responsible for the act of the guide [pilot] is not recognized as there is not an explicit law to this end here."

In the continuation of the explanatory notes it is stated that the ordinance is based on section 15 of the English Pilotage Law of 1913, which was in force at the time. And so, this section as well, according to its text as well as its legislative history, imposes vicarious liability for acts and omissions of a compulsory pilot on a ship owner: prior to the legislation of the article (in the year 1913) it was not possible to attribute to the ship owner anything other than vicarious liability for torts of a voluntary pilot, and the owners were immune from liability for the torts of a compulsory pilot. This immunity caused significant difficulties, and weighed heavily upon both the execution of the pilotage and managing legal proceedings related to pilotage. Due to these difficulties various countries agreed in 1910, in the Brussels International Convention for the Unification of Certain Rules with Respect to Collision of Vessels (of 1910) to rescind this immunity (article 5 of the treaty). A year later a national committee in England decided to adopt the approach of the treaty and change the pilotage law in England accordingly. This recommendation was adopted in section 15(1) of the Pilotage Law of 1913, which came into force in 1918. In accordance with the recommendation of the committee, the amendment of the law did not have the intention of imposing on the ship owner personal liability for the damage caused in pilotage, but only to rescind the immunity that owners had from vicarious liability for a compulsory pilot. The text of the amendment clearly reflects this intent, as it only equalizes, as to owner liability, compulsory pilotage to non-compulsory pilotage.

> "... the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory."

Indeed this is also how the courts in England, including the House of Lords, understood section 15(1) of the law from the year 1913. (See *Workington Harbour and Dock Board v. Towerfield (Owners)* [1950] 2 All. E. R. 414 at 433-432 (hereinafter: "*Towerfield* ")[21]; *The Esso Bernicia* [1989] [22] at 58-60; a similar approach was taken by the Supreme Court of Australia, when it interpreted the relevant local law, which is phrased (with minor changes which are not substantive) like section 15(1) of the English law. (See *Oceanic Crest Shipping Co. v. Pilbara Harbour Services Pty. Ltd.* [23] at 644-645, 684-685).

Since the Mandatory Pilotage Ordinance was based, as the proposed ordinance shows us, on section 15(1) of the English law, there is an additional reason to see in this ordinance, as the courts in England saw in section 15(1), a source for vicarious liability of a ship owner for the tort of a pilot, even where he is a compulsory pilot. This conclusion has two glaring consequences. The first consequence is that the liability of the ship owner is conditioned upon the existence of liability on the part of the pilot. This consequence stems from the essence of vicarious liability, which does not form until after the personal liability of the employee or the agent has formed. [See CA 360/80 *Michon LeMateh Ltd. v. Karnit-Fund for Compensation of Victims of Road Accidents* [4] at 387; A. Barak, *Vicarious Liability in Tort Law* (1964)[24] 71.] The second consequence is that the liability of the ship owner does not cancel and does not reduce the liability of the pilot toward the injured party, but is only added to it. This consequence stems from section 11 of the Torts Ordinance, according to which the tortfeasor and the one bearing vicarious liability for the tortfeasor are seen as two who "are jointly liable for the same act as joint tortfeasors and can be sued for it jointly or severally." (See CA 22/75 *Edri v. Azizian* [5] at 707-709; CA 502/78 [3](*supra*) at p. 761).

19. It can be said that the Pilotage Ordinance imposes on the ship owner vicarious liability for the tort of a compulsory pilot, even if the pilot is considered for this purpose a compulsory employee of the ship owner. If this is so, the Pilotage Ordinance, being a specific law, establishes an exception to the provision in section 13(a)(2)(b) of the Torts Ordinance, which is a general law. It is also possible to say that the vicarious liability of the ship owner for the tort of the pilot, by authority of the Pilotage Ordinance, is liability for the tort of an agent as opposed to an employee. If so, such liability is consistent with the provision in section 14 of the Torts Ordinance, which establishes vicarious liability of a principal for the tort of an agent, and does not exclude a compulsory agent from the rule. It appears that it is preferable, from among the two possibilities, to regard the pilot, for the purpose of the vicarious liability of the ship owner, as the agent of the ship owner and not the employee of the ship owner.

The El Yam Ruling

20. In opposition to the conclusion which stems from that which is said above that the Pilotage Ordinance imposes on the ship owner vicarious liability for the tort of the pilot, there is the judgment of this court in CA 542/73 *Cargo Ships "El Yam" Ltd. v. The Ports Authority* [6] (hereinafter – "*El Yam*"). In the *El Yam* case the Supreme Court dismissed the approach as to the vicarious liability of the ship owner, and ruled that the Pilotage Ordinance imposes on the ship owner absolute (personal) liability for any damage caused in pilotage. In that case the ship owner was sued to compensate the Ports Authority and the insurer of the Authority for damage that the ship caused during pilotage to a barge which belonged to the Authority. The ship owner sent a third party notice to the pilot as the cause of the damage, and to the Ports Authority as the employer of the pilot. The District Court, and following it the Supreme Court, presumed that the barge was not damaged due to the negligence of the ship's owner, the captain or the pilot. Without fault on which to base the cause of action for the suit it was necessary, ostensibly, to dismiss the suit. However, despite this, the court allowed the suit. It saw in the Pilotage Ordinance a source for the liability of the ship owner even without fault on the part of the ship's crew or the pilot. Justice Witkon, who wrote the main opinion, was aware of the fact that it is not necessary to interpret the Pilotage Ordinance in this way. He presented and analyzed (at pp. 175-177) the history of the Ordinance as well as the different interpretation that the parallel provision in England received, according to which there is no more in the law than attribution of vicarious liability. He even noted (at p. 177) that "I would therefore say that until now I would tend to accept the claim of the ship owner that the liability is not absolute but only vicarious". However, this interim conclusion did not remain the final conclusion of the judgment. It was decided on the basis of another rationale which supports the opposing interpretation that Justice Witkon chose to prefer "not without hesitation". And what is the rationale? That the phrasing of the Pilotage Ordinance

("responsible for any loss or damage") is very similar to another statutory provision in England that regulates the liability for damages that a ship causes to the structures of the port: section 74 of the Harbours, Docks and Piers Clauses Act, 1847. That provision was interpreted in English case law as imposing on the ship owner strict liability for the damages to the port, even without fault. Lacking a hint in the language of the Pilotage Ordinance to the distinction between the liability established in it and the liability established in the English law of 1847, Justice Witkon preferred to compare the Ordinance to the English law, and to also see the Ordinance as imposing strict liability that does not require fault. Justices Berinson and Kister agreed with Justice Witkon. Justice Berinson admitted (at pp. 178-179) that the result of the judgment is "unusual" and may "occasionally bring about strange results". He also was willing to presume that this result does not reflect the original intent of the legislator of the Pilotage Ordinance. Despite all this he decided to join the interpretation of Justice Witkon, for its accord with the language of the Ordinance, and taking into account the fact that it does not lead to a complete absurdity.

The ship's owner, who was held liable for the damage caused to the barge, petitioned for a further hearing on the judgment. President Agranat denied the petition: FH 38/75 *Cargo Ships "El Yam" Ltd. v. the Ports Authority* [7]. He too was of the opinion that the interpretation that was given in the judgment to the Pilotage Ordinance is anchored in the text of the ordinance and was justified given the background of the English law from the year 1847.

It is worth noting that the historical tie and the textual similarity between the Pilotage Ordinance and section 15 of the English pilotage law from the year 1913 do not enable the reconciliation of the judgment in the *El Yam* case and English case law, which interpreted section 15 only as a source of vicarious liability. (See paragraph 18 *supra*). Indeed, Justice Witkon related (at p. 178) to the Pilotage Ordinance and to section 15 in one breath, and his determination as to the similarity to the English law from the year 1847 is applicable to the Pilotage Ordinance and section 15 equally. It turns out, therefore, that the judgment in the *El Yam* case also challenges the interpretation that was given by the House of Lords in England to section 15 of the English pilotage law.

Criticism of the Ruling

21. The ruling that was made in the *El Yam* case generated criticism. The criticism also came from this court: CA 804/80 *Sidaar Tanker Corporation v. Eilat-Ashkelon Pipeline Company Ltd.* [1] (hereinafter: "*Eilat-Ashkelon Pipeline Company*"). A company that held the rights to run the oil port in Ashkelon sued the owners and the operator of a ship for damage caused by the ship, with a pilot on board, to the port's structures. This suit relied, *inter alia*, on the cause of action that was recognized in the *El Yam* case, meaning, the personal and strict liability of the ship owners in pilotage according to the Pilotage Ordinance. Use of this cause of action raised the question of the defenses which defendants have against such a suit. Since this question arose following the ruling in the *El Yam* case, which brought the law of strict liability of ship owners into the world, the Supreme Court considered it appropriate to precede and clarify this ruling. It did so as it had doubts as to the correctness of the ruling. In light of these doubts the panel of justices was expanded, and the parties, to which the Attorney General was joined, were invited to argue before the expanded panel on the question whether this ruling was to be deviated from. However, by the time the moment of decision on this question arrived, the original parties approached the Court and informed it that they were willing, for the purpose of resolving the appeal, to view the ruling in the *El Yam* case as binding. The Court adopted this agreement, and presumed as well, for the purpose of that case, that the ruling stands as is. On the basis of this presumption the court ruled that the strict liability does not deny the ship owner the defenses which are available to any person causing damage according to the Torts Ordinance. However, the court did not make do with this. It considered it appropriate, beyond that which was necessary, to point to

the difficulties that the ruling in the *El Yam* case raises. Justice Netanyahu presented a number of queries as to the ruling, both in term of the substantive perspective and the historical perspective, and summarized (at p. 405) as follows:

> "All these are questions of rationale, and all that I can answer is just this, that the text of the ordinance appeared to the judges who ruled in said CA 542/73 [2] so clear and unequivocal such that they preferred its literal interpretation as imposing a strict liability in light of the English case law as to section 74, although, as the hon. Justice Berinson has shown. . . this brings about strange results. . . this ruling prefers the literal interpretation not only over the historical interpretation but also over the interpretation according to the legislative aim."

See also her words continued at p. 422-423.

Justice Barak also did not spare criticism from the ruling in the *El Yam* case. He noted (at p. 427) that the result that emerges

> "is surprising, as generally in the shipping world the principle is followed according to which the liability (at least in a collision between ships) is based on fault, and only in exceptional cases (such as damage to public ports) is this deviated from. . . The Supreme Court was aware of the fact that its approach may 'occasionally lead to strange results' . . . and contain some confusion but considered itself compelled to reach this result, as 'when the text itself is sufficiently clear, we can do no more than apply the law as is and allow the Israeli legislator to straighten things out if and to the extent that they are not pleased with it. . . For myself I am of the opinion that it is not to be said that the text is clear, if it does not fulfill a goal that was made clear to the interpreter."

Later Justice Barak explained the unreasonableness in the distinction that the ruling in the *El Yam* case creates between a ship which does damage during the course of pilotage and a ship that does damage outside of the course of pilotage. He added:

> "Indeed, the interpretation of the Supreme Court in CA 542/73 [2] is a difficult one. . . It is to be hoped that a way will be found to repair the situation, whether by way of changing case law or by way of legislation. Of the two, the latter is preferable, which can take account of special situations that require special regulation."

This call, inasmuch as it was directed at the legislature, did not bear fruit. See *supra* paragraph 11. To date, there has not been before this court a good opportunity to re-examine the continued validity of the ruling in the *El Yam* case. This being so, this ruling is still valid. From time to time it created difficulties before the courts, but in all cases the case law has managed, in one way or another, to overcome the strict liability and, in addition, impose liability on one who is not the ship owner, while leaving the ruling intact. See CA 817/81 *Ports Authority in Israel v. Zeno* [7](hereinafter – "*Zeno*"): the strict liability according to the Ordinance does not prevent the owners of the ship from suing the Ports Authority and the Pilot for participation in the compensation that the owners were obligated to pay the third party that suffered damage from the ship; CC(Haifa) 786/87 *Zim v. Ports Authority* [17]: the strict liability according to the Ordinance does not rule out a suit by the ship owner against the pilot and his employer for damage that was caused to the ship in pilotage as a result of the negligence of the pilot. In the judgment the subject of this appeal as well, the District Court was able to bypass the ruling in the *El Yam* case: it saw in strict liability, which is imposed according to the ruling in the framework of the Pilotage Ordinance, an additional but not exclusive cause of action that the damage gives rise to. On the basis of this determination the District Court saw nothing to prevent the injured party (in this case the Ship) basing its suit against the tortfeasor (in this case the pilot and his employer) on a general tort in accordance with the Torts Ordinance (in this case the tort of negligence). See paragraph 5 *supra*.

22. In theory, the rationale of the District Court in this case, if it is correct, makes the need to examine the ruling in the *El Yam* case superfluous in this instance as well. However, Zim, the respondent in this appeal, while it supports the rationale of the District Court, does not miss out on the opportunity that has been created to examine the ruling. It claims that this court, as opposed to the District Court, has a better rationale for reaching the same conclusion that was reached by the District Court. How so? While the District Court was compelled to give deference to the ruling in the *El Yam* case, and therefore was forced to give a limiting interpretation, in a manner that does not block causes of action outside of the Pilotage Ordinance; on the other hand, this court does not have to pave its way between the challenges created by the ruling, but can eliminate the ruling from the road. This, according to Zim's claim, is how the Court should rule. If this would occur, and the liability of the ship owner and the captain according to the Pilotage Ordinance will be as it was meant to be, vicarious liability for the pilot, it will no longer be necessary to invest efforts in order to bypass strict liability. The road to a suit by a ship owner against the pilot will then be paved and simple, like in any torts lawsuit of an employer or principal against an employee or an agent that caused damage.

A Change in the Ruling

23. Indeed, in my view, it would be appropriate for this court to take the path suggested by Zim. The ruling in the *El Yam* case was made some time ago. Already then the court noted that the path of historical construction of the Pilotage Ordinance, which apparently reflects the legislator's intent, leads to a different ruling, meaning, that the responsibility imposed according to this ordinance on the owners and the captain of the Ship is not strict liability but vicarious liability for the pilot. Despite this the court preferred a literal interpretation which led it to impose strict liability. The court was aware that strict liability is "an unusual result" and that it may "at times lead to strange results". And the court even presented these results explicitly. However, as the Court said, in the words of Justice Berinson (p. 179) "if the legislator chose to use a text whose literal translation is strict liability, and it is not entirely absurd, I am of the opinion that we must give it force." See *supra* paragraph 20.

Ten years later, in the *Eilat Ashkelon Pipeline Company* case, the Supreme Court was willing to re-examine the validity of the ruling in *El Yam*. The panel of the court was even expanded for this purpose. In the end, the court did not examine the ruling as the parties expressed their willingness to accept the ruling as binding law. Despite this, the court did not refrain from sharp criticism of the ruling, and even recommended amending the law. See *supra* paragraph 21. Since then more than fifteen years have passed and the law has remained as it was.

Two government committees were appointed by the Minister of Transportation to examine the law in this matter: the first submitted a report in 1990; the second – in 1994. The two committees recommended changing the existing law regarding the damage caused during the course of pilotage. The recommendations of both committees have remained as unturned stones until today. See *supra* paragraph 11.

This time as well the court decided to expand the panel in the appeal. Indeed, the time has come to deal head-on with the criticism that has been voiced against the ruling in the *El Yam* case, including by this Court, and to examine this law at its core. Indeed, for just such a situation as this, the legislator exempted the Supreme Court from the principle of binding precedent.

24. The essence of the criticism that has been voiced against the ruling in the *El Yam* case relates to the results that stem from the ruling. Already in the *El Yam* case Justice Berinson said that this ruling may lead to strange results. That would be an understatement. The ruling leads to inappropriate results. Here, for example, are a number of results that stem from the

strict liability that was imposed in the *El Yam* case on the owners and the captain of the ship for any damage caused by the ship during the course of pilotage.

First, strict liability such as this creates a dissonance between the law in Israel and the law in the rest of the world. It is an established rule in the maritime law of other countries, that liability for damage in which a ship is involved (apart from damage to port structures) is determined by the fault principle. (See Gilmore & Black (*supra* paragraph 12) [33] at p. 486; T.J Schoenbaum *Admiralty and Maritime Law* (Minnesota, 2nd ed., 1994) [36] at 714; Marsden, *On Collisions at Sea* (London, 12th ed., by S. Gault, 1997) [37] at 61-62).

Second, strict liability creates a distortion within the law in Israel. It is more severe, without good reason, specifically with the owners and the captain of a ship that is in pilotage. As for a ship that is not in pilotage, the law for the owners and captain is equal, in principle, to the law for any tortfeasor, whose liability is limited to the damage caused as a result of personal fault (in the category of negligence or in another category). Indeed, liability in torts generally requires fault. (See I. Englard 'Half a Jubilee to the Civil Torts Ordinance – Problems and Trends' [26] at 572; D. Freedman 'The Law of Property and the Law of Fault' [27] at 241.) What is the justification for deviating from this principle specifically when the ship is piloting its way in the port with the assistance of an external pilot? In order to answer this question it is necessary to turn to the considerations which normally justify liability without fault in torts: creating an unusual risk; a special need for deterrence; possibility of distributing damage using insurance; insufficient economic capacity of the person at fault for causing the damage; and the like. (See I. Gilad 'Forty Years of Israeli Law – Chapters in Tort Law' [28] at 649-650; D. Mor 'Liability for Defective Products – Policy Considerations' [29] at 78). However, these considerations cannot support distinguishing between a ship in pilotage and a ship in another situation. The pilotage does not create an unusual risk, but in fact reduces the risk that arises from the ship's presence in the area of the port. The pilotage also does not change the situation in terms of insurance, as the circle of those potentially suffering damage from a ship in pilotage is similar to such a circle from a ship that is not in pilotage. Considerations of prevention and deterrence also do not justify relinquishing the fault requirement: the level of care of the pilot, which is a central tier in the safety of pilotage, will not increase as a result of imposing strict liability on the owners and the captain. On the other hand, the level of care of the captain during the course of pilotage which is expressed in the level of his supervision over the functioning of the pilot, will not be reduced if there is imposed on him (and on the ship owner) only vicarious liability for the pilot's actions. Such vicarious liability provides sufficient security as well for the payment of compensation, as it frees the person suffering the damage from the dependence on the economic capacity of the pilot. Therefore, deterrence and collection needs also do not justify imposing strict liability on the owners and the captain.

Third, strict liability is not justified even according to the English law which the court relied on in the *El Yam* case. Indeed section 74 of the English law of 1847 imposes on the owners of a ship strict liability for any damage to a port's structures. See *supra* paragraph 20. However, this unusual liability was established by the English law in order to provide special protection to the port which serves the public. Therefore, even if we presume that it is appropriate to adopt such liability in Israel, despite the absence of a law equivalent to the English law of 1847, the liability should have been limited to the circumstances in which it applies in England, meaning, the damage that the ship caused to a structure in the port. But the court in Israel broadened the strict liability to any type of damage caused by a ship in pilotage in any location.

This is only a partial list of inappropriate results which stem from the ruling in *El Yam*. (See further in the *El Yam* case, pp. 178-179, and the *Eilat Ashkelon Pipeline Company* case, at pp. 405, 427, 444).

25. These results are not a decree from above. They are not even a decree from the legislator. The legislator of the Mandate period, as stated, did not intend to impose strict liability in the Pilotage Ordinance, but rather, as in the parallel English law of 1913, to impose vicarious liability. See *supra* paragraph 18. The court in *El Yam* also admitted this. However, it preferred to rule in accordance with a literal interpretation, as though the text of the Ordinance left it no choice.

This is surprising. As already in those days, years ago, the court was not enslaved to literal interpretation. Generally, it avoided to the best of its ability a literal interpretation when such interpretation led it to a substantively inferior result. In particular when the text of the law was not unambiguous. And here, the text of the Pilotage Ordinance on the question of strict liability is not unambiguous: the Ordinance does not explicitly state that it imposes strict liability. See the version of the Ordinance *supra* paragraph 1. Even the English source, from which the court drew the strict liability, is not unambiguous. It is true, as the court noted that the House of Lords interpreted section 74 of the English law of 1847, which uses language similar to the language of the Pilotage Ordinance, in such a way that creates strict liability. See the *Towerfield* case, *supra* paragraph 18. However, even the House of Lords did not adhere to this interpretation. In the same judgment it interpreted the same language, this time in section 15 of the Pilotage Law of 1913, in a manner that creates vicarious liability and not strict liability. (See **Ibid**.) The House of Lords proved thereby that the language tolerates vicarious liability or strict liability in equal measure. What, if so, led the court in the *El Yam* case to specifically impose strict liability? It is possible that the reason is that in the *El Yam* case no fault was proven on the part of the pilot, the captain or the owners of the ship that caused the damage. See paragraph 20 *supra*. In such a situation, in which there was no fault on which to hang the damage, vicarious liability was not sufficient to compensate the person suffering the damage. It is possible, therefore, that the desire to compensate the injured party is what influenced the court in the *El Yam* case, in a conscious or unconscious manner, to choose the path of strict liability.

However, whether or not this is the case, the ruling in the *El Yam* case has been perceived as a sweeping law that imposes strict liability on the ship owner and the captain in general, even when there is fault, including when there is fault on the part of the pilot. (See *Eilat Ashkelon Pipeline Company* case and the *Zeno* case, *supra* paragraph 21.) This broad conception is the source of the problem. And what is the solution to the problem?

26. As is known, over the years a change has occurred in the interpretive policy of the Court. The keystone of construction, for some time now, is not literal construction but purposive construction. Meaning, to the extent allowed by the text of the law, the Court strives to interpret the law in such a manner that will advance the purpose of the law. The purpose of the law is to establish a good and logical rule, according to the matter under consideration, which will integrate with the broader network of legal rules and social values. It is also proper to interpret the Pilotage Ordinance accordingly.

If so, then what is the proper interpretation of the Pilotage Ordinance? The history of this ordinance teaches us clearly that the intent of the Ordinance, as was the intent of the parallel English law from 1913, was to impose liability for the fault of the pilot on the owners and the captain of the ship as vicarious liability. This and no more. There is nothing in the history of the English law or the Pilotage Ordinance which justifies imposing strict liability on the owners and the captain even in the absence of fault. See paragraph 18 *supra*. Moreover, the strict liability is also not justified from other aspects. It is not justified from the aspect of the purpose of the Ordinance, it leads to strange, if not inappropriate, results, and it is not consistent with the accepted rules as to liability for damage in similar contexts. See paragraph 24 *supra*. Therefore, there is no reason to say that the Pilotage Ordinance imposes strict liability on the owners or the captain for damage caused in the course of pilotage. It imposes vicarious liability on them and that is all.

However, it is to be asked whether this conclusion is consistent with the language of the Pilotage Ordinance which imposes dual liability: first, liability "for any loss or damage caused by the vessel" (hereinafter – "the first paragraph"); second, liability for "any loss or damage caused . . . by an error in the navigation of the vessel" (hereinafter – the "second paragraph")? The second paragraph speaks explicitly of damage caused as a result of fault, while the first paragraph speaks in broad language of any damage, and not necessarily damage caused as a result of fault. Is it to be concluded from this that there is also a difference in the law as to the liability imposed on the owners and the captain, between damage caused as a result of fault in driving the ship (in which case vicarious liability is imposed) and damage caused without such fault (in which case strict liability is imposed)? The answer is negative, as the history of the Ordinance is one, as is the purpose and they lead to one clear conclusion: that the intent of the Ordinance is to impose only vicarious liability. However, if this is so, what is the explanation and what is the reason for the existence of two paragraphs one next to the other? The answer is that the dual language of the Pilotage Ordinance was copied from the dual language of the parallel law in England, meaning section 15 of the English Pilotage Law of 1913. And here, the courts in England, which interpreted the liability according to section 15 of the Pilotage Law as vicarious liability only, applied this interpretation not only to the second paragraph in this section ("for any loss or damage caused. . . by any fault of the navigation of the vessel") which parallels the second paragraph in the Pilotage Ordinance, but also to the first paragraph in the section ("for any loss or damage caused by the vessel"), which parallels the first paragraph in the Pilotage Ordinance. See the language of the section and the interpretation of the section *supra* paragraph 18. Meaning, the dual language, as it was interpreted by the courts in England, is none other than a matter of format, which was intended to clarify or generalize, and not a matter of substance, and in any event it was not meant to distinguish between strict liability in one paragraph and vicarious liability in the second paragraph. Such is the law in England. There is no basis to presume that the legislator of the Mandate period, who copied the language from England, intended a different interpretation. Therefore, this is also the law in Israel. The conclusion is that absent personal liability for the damage on the part of the pilot or on the part of another person on the ship's crew, there also is not vicarious liability of the owners or the captain of the ship and the Pilotage Ordinance does not impose any other liability on them.

It is worth noting that this conclusion is consistent with the judgment handed down by this court ten years before the ruling was made in the *El Yam* case: CA 469/64 *Shiphart and Eskorant Genelsheft, A Ross and Kwo v. the Ports Authority in Israel* [8] at 216-217.

27. This being so, in conclusion, the Pilotage Ordinance, according to its original intention at the time and according to its correct meaning today, does not impose on the owners and on the captain of the Ship strict liability, as was ruled many years ago in the *El Yam* case, but only vicarious liability. And it is one and the same whether, as in the language of the Ordinance, the damage was caused "by the vessel or by an error in the navigation of the vessel". This is the law from here on in.

This being so, what is the inherent benefit in the Pilotage Ordinance? When the Pilotage Ordinance was passed, in 1939, it not only contained benefit it contained innovation. The innovation, which was copied from the English law, was in the very idea of vicarious liability, which was absorbed as a general principle in the Land of Israel only eight years later, with the coming into force of the Torts Ordinance in 1947. However, since then, of course, this innovation has dissipated. What, then, is left today of the Pilotage Ordinance.

The Pilotage Ordinance still has benefit. As according to section 13(a)(2)(b) of the Torts Ordinance, vicarious liability is not imposed on an employer "who was forced by law to use the services of a person the choice of whom is not given to him." While the Pilotage Ordinance also imposes on the ship owner vicarious liability for damage caused by a compulsory pilot.

28. Subsequent to all of this, what is the result that emerges from this ruling in the case before us? In the case before us it is agreed that the pilot was negligent. Zim can sue the pilot for his negligence. For this purpose the Torts Ordinance is sufficient, and there is no need for the Pilotage Ordinance. However, Zim, of course, does not make do with the personal liability of the pilot. It wishes to impose liability on the Ports Authority as well, by force of the vicarious liability of the Authority for the pilot. This being so, the question arises whether the Ports Authority can defend itself from Zim's lawsuit, with the claim that Zim itself bears vicarious liability for the negligence of the pilot. At this stage, therefore, the question of the vicarious liability of Zim for the negligence of the pilot according to section 2 of the Pilotage Ordinance, enters the picture.

But, prior to examining the question of the vicarious liability of Zim for the negligence of the pilot, it is appropriate to clarify the question of the relationship between the pilot and the Ports Authority. Does this relationship produce vicarious liability of the Ports Authority for the negligence of the pilot?

The Pilot and the Ports Authority

29. All agree that the pilot, when he was navigating the Ship, was an employee of the Ports Authority: he was bound to it by an employment contract, was integrated in its operations, received a salary and benefit from it, executed the pilotage with equipment supplied by it, and so on as to signs indicating an employment relationship. The status of the pilot as an employee of the Ports Authority even received recognition in the Ports Regulations 1971: they define (in regulation 37) the representative of the Ports Authority as an "employer" of the pilot in the ports of which the Authority is in charge. However, the existence of an employment relationship, in the standard sense, is not a sufficient condition, nor a necessary condition, for the existence of vicarious liability according to section 13 of the Torts Ordinance. In order for vicarious liability to exist, it is necessary that the tortfeasor be an "employee" of the liable one, in the unique sense attributed to this term in the ordinance. This sense requires, in accordance with the definition in section 2 of the ordinance, "complete control" of the employer as to the manner in which the employee conducts the work for him. As to the complete control test see, for example, CA 582/71 *National Insurance Institute v. the Ports Authority* [9] at 654-656; CA 502/78 *State of Israel v. Nisim* [3] 758-759. The Ports Authority claims that according to this test it does not bear vicarious liability for the pilot. And why? Because the pilot is subject, when he is executing the pilotage, to the control of the captain, as to the manner of execution, and in any case the Ports Authority, as the permanent employer of the pilot, does not have "complete control" of the execution of the pilotage. The Ports Authority supports this claim with references from other legal systems, which refused to recognize vicarious liability of the authority in charge of the port for the torts of a pilot, even where he was compulsory.

As did the Ports Authority, I too will discuss this claim in two stages. In the first stage I will examine the result that arises from the Torts Ordinance. After that I will examine the well-known impact of comparative law on this result.

30. As stated, the Ports Authority claims that it does not have "complete control" of the pilot, as is required by the Torts Ordinance, in order to formulate vicarious liability of an employer for an employee. I do not accept this claim. Let us presume, for the purposes of this discussion, that the captain has no authority over pilotage, and that the pilot controls the pilotage exclusively. In this situation is vicarious liability imposed on the Ports Authority for the damage that the pilot caused during pilotage? According to the logic of the Authority, the answer must be in the negative, as the authority does not have control, not even partial control, of the decisions the pilot makes during pilotage. Indeed, the Authority is entitled, and at times even must, draw conclusions against a pilot who shows lack of care, including ceasing to employ him or filing a complaint against him to the Pilot Licensing Committee, which was established in accordance with the sixth chapter of the Ports Regulations 5731-

1971. However, it does not have authority to intervene in the professional discretion of the pilot during pilotage. Does this mean that it does not have "complete control" over the pilot as required for the purpose of vicarious liability? Certainly not. Countless judgments have imposed vicarious liability on employers for torts of professional employees such as, for example, vicarious liability of medical institutions for torts of doctors. What, if then is the proper test for the existence of complete control for the purpose of vicarious liability of an employer for an employee?

> "The complete control of the manner of execution is expressed in the fact that the employer determines the organizational and technical framework in which the employee will work . . . the employee is not free to perform the work he is given as he wishes. He must perform it in the organizational and technical manner which is established by the employer. It is true, the employer is not permitted to interfere in the professional discretion of the employee, and is not permitted to instruct him as to how to use the tools and materials which are at his disposal, but he still is permitted to tell him which tools and materials to use" (A. Barak *Vicarious Liability in Tort Law* (1964) [24] 131. See also at pp. 132-135, 167).

See also CA 85/60 *Water Works Company Ltd. v. Segel* [10] at 1949; CA 502/78 [3] (paragraph 29 *supra*) at pp. 758-759.

According to this test, it is clear that the Ports Authority must bear vicarious liability for the pilot.

However, in addition to the vicarious liability of the Ports Authority for the pilot, by force of the status of the Authority as an employer, there is also, by force of the Pilotage Ordinance, vicarious liability of Zim for the pilot. Does the vicarious liability of Zim cancel out the vicarious liability of the Ports Authority? It would have been proper to examine this question seriously if the vicarious liability of Zim had also stemmed from employer status. In this situation it is to be asked whether it is proper to have vicarious liability of a permanent employer and of a temporary employer, simultaneously, for the tort of one employee. (As to this question see on the one hand, CA 197/58 *Eylon v. Yadi* [11], at 1460-1461; CA 54/64 *Peretz v. Keren Kayemeth LeIsrael Ltd*. [12] at 392; on the other hand see CA 502/78 [3] (paragraph 29 *supra*), at p. 761. See also Barak, (*supra*), at pp. 137-138, 152; Y. Bahat (Buchhalter) 'Dual Vicarious Liability for the Acts of an Employee – As of When?' [30]) However, in my view, vicarious liability of the ship owner for the pilot based on the Pilotage Ordinance does not stem from an employment relationship but from an agency relationship, see *supra* paragraph 19. Vicarious liability of a principal for an agent, as distinguished from vicarious liability of an employer for an employee, is not conditioned upon control by the principal of the agent, but in the substitution of the principal with the agent, and it does not impinge on the complete control that the Ports Authority, as the permanent employer of the pilot, has over the work of the pilot. Therefore, Zim's vicarious liability does not prevent the vicarious liability of the Authority. Compare CA 502/78 [3] (*supra* paragraph 29) at p. 761.

31. The Ports Authority also seeks to release itself of vicarious liability for the negligence of the pilot on the basis of the law in other common law countries. Indeed, England, Canada, New-Zealand and Australia do not recognize vicarious liability of the entity in charge of the port for damage caused by the pilot. However, the law in these countries has grown against the background of special legal arrangements, different from the arrangements practiced in Israel. *Inter alia*, the body in charge of the port in these countries is not authorized in pilotage, but pilotage is the independent business of the pilot, while in Israel, as has been established in section 24(a) of the Ports and Railways Authority Act, "The Authority is permitted to work, whether on its own or via others, in any service provided at the port," and the pilotage services are included in this. Detailed comparison among the legal arrangements common in those countries and the legal arrangements common in Israel would require a long and detailed discussion, and I do not see fit to lengthen and complicate matters further, when

they are already complex and exhausting. Therefore, I will say only this, the different background to the laws that apply in the matter at hand, in Israel on the one hand and in other countries on the other, very much weakens the weight that is to be given to comparative law. I will say further that there are also common law countries that recognize vicarious liability of the entity in charge of the port for the damage caused by the pilot. (See, as to the United States, *United States v. Port of Portland*, 147 F. 865 (1906)[18]; *City of Long Beach v. American President Lines*, 223 F.2d 853 (9th Cir., 1955)[19]; *National Development Company v. City of Long Beach*, 187 F.Supp. 109 (1960)[20]; 70 Am.Jur. 2d sec. 443 (1987) [39]). Therefore, comparative law cannot change the conclusion that the Ports Authority bears vicarious liability for the pilot.

However, since Zim also bears vicarious liability for the pilot, the question arises as to the distribution of liability between the pilot, the Ports Authority and Zim. In order to answer that question we will now examine the relationship between the ship owner and the Ports Authority.

The Ship Owner and the Ports Authority

32. The joining of the ship owner and the Ports Authority in vicarious liability for the pilot means that each one of them carries liability together with the pilot. As a result, one who was injured by the pilot can sue the pilot, the ship owner, and the Authority, whether jointly or severally. See Torts Ordinance section 11 and section 84(a). (See also CA 22/75 *Edri v. Azizian* [5] at 709-710; FH 15/88 *Melekh v. Kurhauser* [13] at 103.)

The joint liability of the pilot, the ship owner and the Ports Authority frees the party suffering damage from dealing with distribution of liability between the three responsible parties. Distribution of liability between the three only comes up in the internal relationships between them. Generally, from a practical standpoint, there is importance to the distribution of liability between these two: the ship owner and the Ports Authority. What, if so, is the distribution of liability between these two? Like in any case of joint tortfeasors, here too the court must, according to section 84(b) of the Torts Ordinance, ensure distribution of liability "according to justice and integrity, taking into account the degree of responsibility of the person for the damage." This section, as it has been understood in the case law, requires that the distribution be done on the basis of moral blame of each of those responsible in a proportional manner. See, for example, CA 1170/91 *B'chor v. Yehiel* [14] at 218. What, then, is the relation between the moral blame of the ship owner, who bears vicarious liability for the pilot and the moral blame of the Ports Authority which also bears vicarious liability for the pilot?

It is difficult to attribute moral blame for one who bears vicarious liability and therefore it is also difficult to distribute the liability on the basis of moral blame between two who bear vicarious liability for the same person. Thus, there is a temptation to distribute the liability between them equally. However, the question is, will equal distribution of liability between the Ports Authority and the ship owner achieve, in the words of section 84(b) of the Torts Ordinance, justice and integrity, taking into account the degree of responsibility of each of them for the damage.

33. There is a difference in the essence of the vicarious liability of the Ports Authority and the ship owner. The vicarious liability of the Ports Authority is the regular employer-employee vicarious liability. It is based on reasons which generally justify vicarious liability: distribution of the damage, ability to supervise the employee, the benefitting of the employer from the employee's work, and more. On the other hand, the vicarious liability of the ship owner for the pilot is special vicarious liability: it does not stem from an employment relationship; it also does not stem from a common agency relationship; it stems from a temporary relationship which has been imposed on the ship owner by law. See *supra* paragraphs 18-19. Indeed, for these reasons the common law released ship owners from

vicarious liability for a compulsory pilot, and for these reasons ship owners in the United States enjoy such a release until today. See *supra* paragraph 18. Why, therefore, did the English legislator (in 1913) and following it the legislator in the Land of Israel (in 1939), cancel the release from vicarious liability which the common law gave to ship owners in compulsory pilotage? The English legislator adopted the recommendations of the national committee (from 1911) which was established following the Brussels International Convention for the Unification of Certain Rules with Respect to Collision of Vessels (of 1910). Therefore, we can learn about the considerations of the English legislator from the considerations of the committee and the treaty. These considerations, as emerges from the legal literature were two:

[a] The legislator sought to make it easier for a third party, who suffered damage from a pilot, to be compensated for the damage. As the pilots in England operated (until 1987) as independent contractors, and the Port Authority was not responsible for their actions, it was important for the person suffering damage that liability for the damage be imposed on the ship owner. However, a lawsuit against the ship owner was liable to encounter difficulties, based on the need to point to the fault of the ship owner or the captain. In many cases the ship owner would defend himself against such a lawsuit by redirecting the fault onto the pilot; the pilot would redirect the fault to the captain; and the person suffering damage would have difficulty determining where the fault lay, and was even likely to leave the proceedings empty-handed. Therefore the law came and established that the person suffering damage was entitled to sue the ship owner, by way of vicarious liability, for compensation of damage caused by the fault of the pilot. See Douglas and Green (paragraph 12 *supra*) [31] at p. 199.

[b] The legislator sought to increase the safety of pilotage. Prior to amending the law, the captain did not have a good incentive to follow the course of the pilotage and supervise the pilot's work, as there was no concern that the captain or the ship owner would be held liable for damage that the pilot was at fault for. The opposite: it was specifically the involvement of the captain in pilotage that would expose him (and the ship owner) to liability for such damage. However, it is clear that the involvement of the captain in pilotage advances the safety of the pilotage. See G.K. Geen & R.P.A. Douglas *the Law of Pilotage* (London, 2nd ed., 1983) [35] at 81.

In light of the historical background of the Pilotage Ordinance, it is appropriate to say that these two considerations were the considerations that were also at the basis of the vicarious liability of the ship owner (and of the captain) for a pilot in Israel.

But these considerations which are sufficient to impose on the ship owner liability toward the person suffering damage for damage caused by the pilot, should not necessarily determine the distribution of liability for damage between the ship owner and the Ports Authority. As, in terms of the person suffering damage, after he is ensured that he will be able to receive the compensation he is entitled to from the ship owner, it is not his concern whether and how the ship owner shares liability with the Ports Authority. For the purpose of distribution of liability between the ship owner and the Ports Authority for damage caused by the pilot, it is to be remembered that according to the regular rules of the Torts Ordinance, the ship owner did not need to bear any liability for damage caused by compulsory pilotage; the liability imposed on the ship owner by the Pilotage Ordinance does not come to exempt the Ports Authority from liability, but to benefit the person suffering damage; as in general there is no substantive reason to exempt the Ports Authority from the vicarious liability imposed on it as with any employer, or to reduce the liability imposed on it, for damage caused by its employee, meaning, by the pilot.

Even in terms of the safety of the pilotage, there is no reason to determine, in the relationship between the ship owner and the Ports Authority that the ship owner needs to bear part of the damage caused by the pilot. In any case, as has already been stated, the captain must supervise the pilot, and if he is negligent in his supervision he bears direct liability for

the damage, and the ship owner bears vicarious liability, according to the degree of responsibility of the captain. See *supra* paragraphs 14-16.

What if then is the conclusion as to the distribution of liability between the Ports Authority and the ship owner in light of section 84(b) of the Torts Ordinance, which establishes that the court will determine the distribution according to justice and integrity taking into consideration the degree of responsibility for the damage? The conclusion is that in general the responsibility for the damage caused by the pilot will be imposed, in the relationship between the Ports Authority and the ship owner, fully on the Ports Authority.

This is generally the case, but not necessarily always so. The question as to what is required based on justice and integrity taking into consideration the degree of responsibility for the damage is also dependent on the circumstances of the case. Therefore, the possibility is not to be ruled out that in special circumstances the court will have a special reason to deviate from the rule, and to impose on the ship owner some of the responsibility for the damage that was caused by the pilot.

34. In the case before us Zim sued the Ports Authority for damage caused to Zim itself. To the extent that the damage was caused by the fault of the pilot, Zim can sue the Ports Authority, which bears vicarious liability for the pilot, for compensation of Zim for this damage. In theory, the Ports Authority can go back to Zim, which also bears vicarious liability for the pilot in accordance with the Pilotage Ordinance, and demand distribution of liability for the damage that was caused by the pilot between the Ports Authority and Zim. However, as said, in the relationship between the Ports Authority and Zim, the liability for the damage caused by the pilot is generally imposed on the Ports Authority only. Therefore, and absent a special reason to impose some of the liability on Zim, the Ports Authority cannot build on the claim that Zim also bears vicarious liability for the pilot, in order to reduce some of the compensation that it is liable for in light of its vicarious liability for the pilot.

Under these circumstances the Ports Authority is left with only two claims against Zim: the first, that the damage to the Ship was not caused by the negligence of the pilot; and the second, that the damage to the Ship, even if it was caused as a result of the negligence of the pilot, was also caused by the negligence of the captain, and therefore the compensation that the Ports Authority must pay Zim is to be reduced according to the proportion of the negligence of the captain.

The Negligence of the Pilot and the Captain

35. The District Court determined that the Ship was damaged as a result of the joint negligence of the pilot and the captain. The court attributed two-thirds of the damage to the pilot and one third to the captain. See *supra* paragraph 4. In the framework of the appeal hearing the Ports Authority and Zim agreed that the captain and the pilot were equally negligent, and that the negligent conduct of the captain and the pilot is what caused the Ship to hit the dock. See paragraph 6 *supra*. This is sufficient to determine that two of the elements of the tort of negligence in accordance with section 35 of the Torts Ordinance were fulfilled regarding the captain and the pilot: "negligent conduct" and "damage". However, this still is not sufficient to impose personal liability in negligence on the captain and the pilot. In order for joint negligent conduct that caused damage to lead to joint liability in negligence, it is necessary according to section 35 of the Torts Ordinance, that the two people whose conduct was negligent have a duty of care toward the person suffering the damage. Did the negligent conduct of the captain and the pilot breach a duty of care of each of them toward Zim.

The central pillar of the duty of care, as stated in section 36 of the Torts Ordinance, is foreseeability. The ability to foresee brings with it, generally, a duty to foresee. In order to deviate from this rule, special considerations of legal policy must exist against imposition of

the duty. See, for example, CA 145/80 *Waknin v. Bet Shemesh Local Council* [15]; CA 243/83 *Jerusalem Municipality v. Gordon* [16].

In the case before us the Ship collided with the dock as a result of the speed of braking which was not coordinated with the distance of the Ship from the dock. The District Court determined, as a factual matter, that the captain and pilot could have known, and perhaps even knew in fact, what the distance was, what the speed was, and what was the foreseeable result of an error in coordinating the speed with the distance. See *supra* paragraph 4. Zim never challenged this determination. As said, the Ports Authority also now reconciles itself to this result. See paragraph 6 *supra*. Therefore, there is no reason not to affirm it. The consequence is that the captain and the pilot were able to foresee the occurrence of the damage. This concludes the factual portion of the negligence.

The District Court further determined that the captain and the pilot were not only able to foresee the occurrence of the damage but also should have foreseen its occurrence and taken precautionary measures to prevent it. The Ports Authority claims that the District Court erred when it applied such a duty to the pilot. See *supra* paragraph 7. However, as we have already stated, the Authority is mistaken: the law in Israel, as in the rest of the world, is that a pilot is responsible for pilotage along with the captain. See *supra* paragraphs 14-16.

The conclusion is that the joint negligent conduct of the captain and the pilot violated a joint duty of care of the captain and pilot, and this breach is what brought about the collision of the Ship with the dock. Absent contrary considerations, it is to be said that the joint duty of care is distributed equally between the captain and the pilot. Meaning, in light of the fact that the negligent conduct was equal and there was a single damage, the (personal) liability of the captain and the pilot for the negligence is also equal.

The Result

36. The result is that the Ports Authority alone is liable to Zim by vicarious liability for the pilot's negligence. However, the pilot, were he to be sued to compensate Zim for the damage that was caused to the Ship, would be obligated, in light of the contributory negligence of the captain, for only half the damage. The same applies to the Ports Authority.

Accordingly, the appeal is to be partially affirmed in the sense that the Ports Authority must pay Zim for only half of the damage and not two thirds as the District Court ruled.

Orders to pay expenses and attorneys fees in the District Court will remain in force as ordered by the District Court.

Since adjustment of the amount of compensation stems from the parties' agreement as to the degree of negligence that each party is liable for, while on the fundamental realm the claims of the Ports Authority were dismissed, the Authority must pay Zim's court costs in this appeal in the total sum of NIS 30,000.

Vice-President S. Levin

I agree.

Justice T. Or

I agree.

Justice E. Mazza

I agree.

Justice M. Cheshin

I agree.

Decided as per the decision of Justice I. Zamir.

11 *Tishrei* 5761

October 10, 2000