
Notes and Commentaries



Apportioning Blame: The Liability of Port Authorities in Light of the *Sea Empress* Incident

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1. Background

On 15 February 1996 the Panamax tanker *Sea Empress* ran aground on the Mid-Channel Rocks while sailing into Milford Haven waters under the supervision of a pilot appointed to the ship and employed by the Milford Haven Port Authority (the Port Authority). As a result of the grounding 71,800 tons of crude oil and a further 500 tons of fuel oil were lost. The pilot on board the vessel at the time of the grounding was considered to have made a serious navigational error which caused the incident. As a result the Port Authority was charged under Section 85(1) of the *Water Resources Act 1991* (UK).

Subsequently the IOPC Fund¹ and Skuld P & I threatened to sue the Port Authority in order to recover over £34 million of the funds provided in order to fulfil obligations under the *International Convention on Civil Liability for Oil Pollution Damage*.² The argument put forward by the two bodies was that the Port Authority 'failed to make a reasonable case to avoid the risk of a laden tanker grounding and spilling oil'. An out of court settlement was reached in regards to this in October 2003, when the Port Authority agreed to pay £20 million to the Fund in "full and final settlement of all aspects of the recourse action".³ However, it is the criminal prosecution case with which this note is concerned.

2. Principles arising out of the case of *R v Milford Haven Port Authority*⁴

This criminal prosecution case has applicability in Australia and New Zealand and its outcome establishes principles that are pertinent to port authorities regarding their duty in general. This may also extend to other statutory bodies in the Australian maritime context.

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¹ International Oil Pollution Compensation Fund, formed under the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage*, dated 18 December, Brussels, 1971.

² *International Convention on Civil Liability for Oil Pollution Damage*, dated 29 November, Brussels 1969.

³ International Oil Pollution Compensation Fund 1971, Press Statement '*Sea Empress*' 20 October, 2003, to be found at <http://www.iopcfund.org/pr-pdf/sea_empress.pdf>.

⁴ *R v Milford Haven Port Authority ('The Sea Empress')* 2 Cr. App. R (S) 423; to be found at <<http://web.uct.ac.za/depts/pbl/jgibson/iczm/cases/seaemp2.htm>> pp.1-11 ; *Environment Agency v Milford Haven Port Authority and Andrews (the Sea Empress)* [1999] 1 Lloyd's Rep.673, Cardiff Crown Court; to be found at <<http://web.uct.ac.za/depts/pbl/jgibson/iczm/cases/seaemp1.htm>> pp.1-9.

In brief, the Port Authority was charged with contravening Section 85(1) of the *Water Resources Act 1991*, which provides that any person who causes or knowingly permits any poisonous, noxious or polluting matter to enter controlled waters has contravened the Act. The Section creates strict liability with the only defences being lack of causation or the statutory defence under Section 89, which deals with emergency situations.⁵ The main question that arose was whether the Port Authority had caused or knowingly permitted the pollution. The Port Authority did not admit guilt and was particularly to emphasise this in the submissions made. The basis of the plea was that the pilot in charge when the *Sea Empress* ran aground was providing his services according to the non-delegable duties and responsibilities of the Port Authority, being a competent harbour authority.⁶

Extensive reference was made to *Empress Car Company (Albertilly) Ltd v National Rivers Authority*⁷ in relation to the meaning of 'causes or knowingly permits', which involved a company found guilty under the same section although the pollution was caused by a stranger. In order to prove causation it has to be established that the defendant did something and that this occurrence caused the pollution.⁸ The House of Lords held that the act did not have to be the immediate cause of the occurring incident, but rather it was enough if the defendant did something 'which produced a situation in which the polluting matter could escape',⁹ meaning that even if the escape was caused by a third party, the defendants could still be held liable for the damage if the result was not something out of the ordinary.¹⁰

*R v Milford Haven Port Authority*¹¹ was decided on the basis that the Port Authority had produced a situation in which the polluting matter could escape. The points leading to this conclusion by both the Crown Court and the Court of Appeal can be summarised as follows:

1. The Port Authority operated the port;
2. It was compulsory for all vessels entering the port to have a pilot onboard, especially on ships such as the *Sea Empress*;
3. The Port Authority was responsible for training, authorising and supervising the pilots;
4. A rota system was in place at the Port Authority and the allocation of the pilot was according to this rota system, thereby putting the pilot in a position as to being able to make a navigational error. The incident was therefore a direct result of how the Port Authority managed the port and what system it used;¹²
5. The Port Authority was responsible for the categorisation of vessels in order to ensure that the manoeuvrability of the vessel would suit the pilot's skill;
6. The Port Authority in order to address this matter provided a special program by increasing the pilot's responsibility according to their skills;
7. The Port Authority was responsible for regulating the passage of the vessel;¹³
8. The grounding was a normal fact of life even if the negligent act was by the pilot

⁵ *Water Resources Act 1991* (U.K.), s89.

⁶ <<http://web.uct.ac.za/depts/pbl/jgibson/iczm/cases/seaemp2.htm>> pp.1-11, at pp.2-3

⁷ *Empress Car Company (Albertilly) Ltd v National Rivers Authority* [1999] 2 AC 22, to be found at <<http://www.bailii.org/uk/cases/UKHL/1998/5.html>> pp. 1-12

⁸ <<http://www.bailii.org/uk/cases/UKHL/1998/5.html>> pp. 1-12, at 10

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *supra* note 7.

¹² <<http://web.uct.ac.za/depts/pbl/jgibson/iczm/cases/seaemp1.htm>> 1-9 at 3

¹³ *Supra* note 7, 2.

himself;

9. The subsequent loss of more crude oil during the salvage operation was due to bad weather and the general uncertainties that have to be taken into account when dealing with salvage operations and therefore these should also have been regarded as normal incidents of life.¹⁴

Finally, the court stated that when compulsory pilotage was called for, the master's reliance on the pilot's skill was paramount due to his inability to intervene until danger was apparent. The master's reliance on the pilot, together with the Port Authority's ability to charge for pilotage and treat the pilot as a shipowner's employee in regards to civil liability, was considered enough to expect the highest possible standard of a port authority.¹⁵

3. Implications

The case makes it clear that a port authority can be strictly liable for offences committed under certain Acts unless causation is lacking or statutory defences are applicable. Furthermore, points 1 to 8 imply that port authorities have a duty of care in relation to incidents that are a result of a pilot's negligence within their scope of employment by port authorities. This is mainly due to their function as the training and supervising entity of pilotage services and the imposition of a system for pilotage services. It is important to emphasise that this issue will only be relevant in the event that the port authority is prosecuted, since the pilot at the time of the pilotage is under employment of the shipowner and therefore the shipowner will be liable. Practically, looking at the successful outcome for the prosecution in the case and the hefty fine of £4 million, although substantially reduced to £750,000 in the Court of Appeal, it seems clear that this new avenue of regaining funds as a result of pilot negligence has the potential to be probed and utilised more frequently in the future.

In the Australian jurisdiction it is noteworthy that an incident occurred at Wallaroo, South Australia when the bulk carrier *Amarantos* crashed into the jetty as the result of the alleged misjudgement of speed by the port's pilot.¹⁶ In the statement of claim filed on the behalf of *Amarantos* Corporation it was pleaded that the South Australian Ports Corporation had failed in its duty of care to the shipowners and engaged in misleading and deceptive conduct under Section 52 *Trade Practices Act 1974 (Cth)* (TPA) by representing the harbour facilities were suitable, adequate and safe for the berthing of ships the size of the *Amarantos* and that the port should have known that this representation was likely to be relied on.¹⁷ The case has not yet been concluded,¹⁸ but it raises the issue of port or pilot employer liability in Australia and the question of whether TPA can be used against a port authority or other like statutory authorities.

Although *R v Milford Haven Port Authority* focuses on the training and authorisation of port authorities in relation to pilots, its effect may be far reaching. For instance, the port authority, being the operator of the port is responsible for all work that is carried out within it and includes not only pilotage services but rewards, towage services and Vessel Traffic Services. In some Australian States, there are various structures, from government departments, government owned corporations through to

¹⁴ Supra note 13.

¹⁵ Ibid, 7.

¹⁶ Lloyd's List DCN, 'Port hit by claim over grain loader collision' Thursday, January 17, 2002.

¹⁷ Supra note 17.

¹⁸ A number of preliminary questions of law have been decided. See *Amarantos Shipping v State of South Australia* (2004) 205 ALR 459. The case has yet to go to trial.

private operators that conduct these operations in their own right or in the State's name.¹⁹ For these, the clarion warning may be sounding.

The implications can be seen in the UK, where as a direct consequence of the *Sea Empress* prosecution new guidelines were issued in relation to the categorisation of ships and time limits for entering ports, and as a result of the public outcry following the incident, changes were made to the *Pilotage Act 1987 (UK)* and the *Port Marine Safety Code*²⁰ (Code) was developed and introduced in March 2000. The aim of the Code is to represent a national standard for port functions and to cover all safety issues in relation to this.²¹ It is compulsory²² and expressly states that port authorities in the UK have not only statutory and common law duties, but also fiduciary obligations to ensure the conservation, maintenance and facilitation of safe usage of the harbour, and a duty of care in cases where loss has occurred by the authority's negligence.²³ The Code adopts principles that relate to the content and implementation of safety systems²⁴ and extensive documentation has to be kept to prove the successful implementation of these systems.²⁵

It could be argued that although Australia has not developed a code similar to that of the UK Code, the standard of care for port authorities should be that as stated in the Code. Furthermore, arguments have been made²⁶ that there seems to be a similar trend in Australia, to that in the UK before the Code was adopted, where High Court cases have extended the scope of the duty of care to third parties²⁷, looked at the duty of care in respect to statements not to cause economic loss²⁸ and extended the liability of a statutory authority for failing to undertake works for which it has sole responsibility.²⁹ On the basis of this a port authority may be liable to vessels and their owners and charterers, other parties such as terminal operators, stevedores, tug and towage contractors, arguably importers and exporters and other business entities and in relation to the environment, the community at large.³⁰

4. Conclusion

There is a real need for Australian jurisdictions to consider a code similar to that used in the UK in order to provide a clear focus on safety management issues and thereby give transparency and certainty as to the liability of port authorities, before cases such as the settlement effected following the prosecution of Milford Haven Port Authority become common.

¹⁹ For the Australian law on the liability of port authorities and pilots, see White, Michael "Salvage, Towage, Wreck and Pilotage", Chap. 9 in White, Michael (Ed) "Australian Maritime Law" Federation Press, 2000.

²⁰ The full text of the *Port Marine Safety Code 2000* (U.K) can be found online at <http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/page/dft_shipping_505324.hcsp>.

²¹ *Ibid*, Introduction, [13].

²² *Ibid*, [2] and [11].

²³ *Ibid*, [6].

²⁴ *Ibid*, [14].

²⁵ *Ibid*, [15].

²⁶ Harper Steven, 'Port Channel Blockage' AMSA/AAPMA Safe Havens and Salvage Conference and Workshop, 19-20 February 2002, 5. This paper can be found on the website of the Australian Maritime Safety Authority at <<http://www.amsa.gov.au/amsa/haven/papers.htm>>.

²⁷ *Perre v Apand* (1999) HCA 36.

²⁸ *Tepko Pty Ltd v Water Board* (2001) 178 ALR 634.

²⁹ *Brodie v Singleton Shire Council* (2001) 75 ALJR 992.

³⁰ *Supra* note 27, 6-7.