



Managing risk in adventure tourism operations in New Zealand: a review of the legal case history and potential for litigation

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Abstract

The growth of adventure tourism in New Zealand has contributed to its image as an activity destination, reflected in the growth of the adventure tourism sector since 1992. There has also been a growing concern over the safety and management of these activities within the New Zealand government and tourism industry. This paper examines the changing legal framework for tourism in New Zealand, where the no-fault accident compensation legislation no longer covers all tourist accidents and injuries within its scheme. The paper reviews both the accident compensation legislation, recent legal precedents as evidenced in court cases and judgements which challenge the perception that no-faults compensation covers all accident eventualities. The consequences for adventure tourism operators in relation to tourist accidents and injuries is discussed and implications for health and safety are highlighted. © 2003 Elsevier Science Ltd. All rights reserved.

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1. Introduction

Accidents are acknowledged to be a leading cause of injury, mortality and morbidity among tourists travelling to foreign destinations (Page & Meyer, 1996). Previous studies have found accidents to be the second largest cause of death among Scottish (Paixao et al., 1991) and United States overseas visitors (Hargarten et al., 1991), and among the main reason for overseas tourist hospital admissions in Queensland, Australia (Nicol et al., 1996) and a serious problem in New Zealand (Bentley & Page, 2001). The potential for events such as accidents to negatively impact on the tourism industry is also well understood (Clift & Page, 1996; Greenaway, 1996; Wilks et al., 1996), and safety is recognised as a key factor in the selection of tourist destinations (Bovet, 1994; World Tourism Organisation, 1996). This issue was exemplified in a survey, reported in the New Zealand Press (New Zealand Herald, 15 February, 1999), in which safety concerns were found to be the major hindrance to Japanese overseas travel to

New Zealand. New Zealand was ranked behind Hawaii, Australia, Switzerland, Canada, Singapore, Britain and Guam as a safe destination. These perceptions are believed to have been strongly affected by media reports in Japan concerning New Zealand scenic flight crashes in which Japanese tourists were killed (also see Greenaway, 1996; Page & Meyer, 1997). This issue has been reinforced by the events in New York in September 2001 which have had a global impact on the tourism industry.

Accidents involving tourists have been the subject of a limited number of academic publications in either the safety management or tourism literature, despite the obvious scale of the tourism safety problem, and the potential for injuries and fatalities to seriously damage the tourism industry and the economies of countries who rely on tourism (Clift & Page, 1996). Research that has been undertaken on tourist safety has identified unfamiliarity with foreign marine and road environments as important risk factors for accidents and injuries involving overseas visitors (e.g. Hartung et al., 1990; Nicol et al., 1996; Wilks & Watson, 1998; Page, Bentley, Meyer, & Chalmers, 2001). At the same time there is a growing concern globally on the issue of litigation as a result of tourist injuries and fatalities (Berryman, 1997), with the onus on the tourism industry

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to provide a safe environment and to ensure all necessary precautions are taken to ensure tourist well being is assured (Bentley & Page, 2001).

This paper examines the expanding interest in the legal implications of tourist safety and litigation in relation to the growing adventure tourism industry in New Zealand. New Zealand is an interesting context to examine, since previous research (e.g. Page & Meyer, 1996; Bentley & Page, 2001) highlighted the no-fault legislation provided in New Zealand which has recently seen a range of conditions where personal injury claims may now be valid. The paper commences with a brief review of the adventure tourism sector in New Zealand, and the significance of the Accident Rehabilitation and Compensation Insurance Act (1992). The recent legal cases in New Zealand that illustrate the potential for personal injury litigation are then discussed and the implications for the tourism sector are then reviewed.

2. The New Zealand adventure tourism industry

Adventure tourism is a burgeoning sector of the tourism industry internationally and has been a major driver of tourism activity growth in New Zealand (Bentley, Page, Meyer, & Chalmers, 2001b). The adventure tourism sector encompasses a wide range of diverse activities, and may be defined as commercially operated activities involving a combination of adventure and excitement pursued in an outdoor environment. Adventure tourism is also often taken to include more passive activities associated with ecotourism (e.g. safaris and trekking in difficult terrain). New Zealand is regarded as a major destination for overseas visitors wishing to participate in active adventure tourism activities, and the adventure tourism industry has expanded in recent years as a major niche sector within New Zealand's tourism industry (Berno & Moore, 1996). Approximately 10% of visitors to New Zealand participate in adventure tourism of some form, according to the International Visitor Survey, 1992–1993 which is now around 18% of all tourist activities among an inbound visitor population of 1.5 million per annum (Page & Meyer, 1996; Bentley & Page, 2001). The most popular of these activities include scenic flights, jet boating, white water rafting, mountain recreation and bungy jumping and the significance of accidents and injuries within this sector have been examined from both a visitor perspective (Bentley et al., 2001b; Bentley & Page, 2001) as well as from the adventure tourism operator perspective (Bentley, Page, & Laird, 2001a). Indeed, a pressing reason for opening a wider debate on these issues is reflected in Page and Meyer's (1996) assertion that the existing compensation regime in New Zealand provided a culture of minimum safety standards for adventure tourism in the absence of a direct

route for litigation and damages following accidents. This is important given the growing data with a limited number of publications on the risk factors and likely scale and impact of accidents and injuries among visitors in this sector of the tourism industry. This therefore raises questions as to the agencies and legislation associated with the well being of visitors. For this reason, attention now turns to the Accident Rehabilitation and Compensation Insurance (hereafter ACC to use its popular New Zealand acronym) legislation and the wider legislative framework pertinent to the tourism sector in New Zealand.

3. The accident rehabilitation and compensation insurance legislation

The ACC legislation, originally formulated in 1972, was a landmark statute since it established a no-fault compensation scheme for accidents, subsequently modified in 1982 and 1992 (Campbell, 1996). The Accident Rehabilitation and Compensation Act (1992) was subsequently revised in 1998 to provide a tighter definition of the nature of claims and extent of accident cover, due to escalating costs for the government agency administering this area of welfare cover. From a tourism perspective, the legislation is novel as Page and Meyer (1996) noted, since it provides cover for overseas tourists on a no-fault basis during their visit to New Zealand. To receive cover (i.e. the cost of treatment for an accident), visitors must see a doctor and complete the appropriate claim form. Cover for overseas tourists include costs of medical treatment, hospital treatment, transport expenses and some rehabilitation costs. No attempt was made by ACC to recover tourist costs from medical insurers overseas, and Page and Meyer (1996) and Bentley and Page (2001) outlined the costs to the New Zealand taxpayer based on available data. Tourist activity in New Zealand is also subject to the conditions of the Health and Safety in Employment Act (1992) which may also establish the civil basis for action where a breach of statutory duty occurs in a tourism activity. Page (1997) also reviewed the wider responsibilities of different government departments in regulating and investigating accidents in the diverse adventure tourism sector which spanned the Maritime Safety Authority for water based activities, the Land Transport Safety Authority for land-based activities and the Civil Aviation Authority for air-related activities (Page, 1997). In this respect, activities in the adventure tourism sector are subject to a variety of bodies with a concern for safety in a preventative and care context, making regulation and planning for the entire sector difficult. It is against this background that the ACC legislation is influential as the Accident Rehabilitation and Compensation Insurance Act 1992 (ARCIA) introduced major

changes to the nature and extent of cover provided for victims of personal injury by accident. The changes were so substantial both in relation to the amounts of compensation now provided and the much narrower definitions of what is covered by the Act, that there is now a very strong incentive for those who have suffered personal injury by accident to attempt to pursue claims for damages based on such causes of action as breach of contract, negligence and breach of a statutory duty. It is also evident that some significant cases that were decided under the 1972 and 1982 legislation would have had quite a different result if decided on the basis of the 1992 Act, *ACC vs. E* [1992] 2 NZLR 426 being a prime example.

The ARCIA excludes rights of action for damages for personal injury under s14, subs (1):

No proceedings for damages arising directly or indirectly out of personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is suffered by any person shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or enactment.

“Personal injury covered by this Act” exists where the conditions set out in s8 are met. This requires that the injury occurred in New Zealand after 1 July 1992 [subs (1)]. Under s8 (2) and (3), cover is provided for personal injury which:

- (2) (a) is caused by an accident to the person concerned;
- (b) is caused by gradual process, disease, or infection arising out of and in the course of employment as defined in Section 7 or Section 11 of this Act; or
- (c) is medical misadventure as defined in Section 5 of this Act;
- (d) is a consequence of treatment for personal injury covered by this Act
- (3) cover under this Act shall also extend to personal injury that is mental or nervous shock suffered by a person as an outcome of any Act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person,

and Section 7(4) states:

Notwithstanding anything in subsection (1) of this section, personal injury that is related to non-physical stress shall be deemed not to have been caused by gradual process, disease, or infection arising out of and in the course of employment.

The ARCIA creates a bar to actions for damages for “personal injury covered by this Act” but does not remove the right to bring an action for damages for personal injury that is not “covered by this Act” (Harrison, 1993, p. 12). The breadth of the bar to actions is again narrowed by the provision of detailed definitions of the phrase “personal injury” and the word “accident”, neither of which were defined in the previous legislation beyond specifying various types of mishap or damage (Todd, 1997). Section 3 of the Act defines “accident” as follows:

- (a) A specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury, but does not include any gradual process; and the fact that a personal injury has occurred shall not of itself be construed as an indication or presumption that it was caused by any such event or series of events;

In Section 4, “personal injury” is also now given a detailed definition:

- (1) for the purposes of this Act, “personal injury” means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by Section 8(3) of this Act.
- (2) for the purposes of this Act, no cardio-vascular or cerebro-vascular episode shall be regarded as personal injury unless:
 - (a) it is a result of medical misadventure
 - (b) it is a work injury by virtue of Section 6(1) of this Act.

Given these provisions, there would seem to be a number of types of personal injury accidents that would not be covered by the ARCIA. Therefore, it is pertinent to examine recent legal case histories that may now lead to adventure tourism operators being sued by tourists.

4. Tourism and the potential for litigation for adventure tourism accidents: case history evidence

One interesting landmark case which highlighted the potential of operators facing actions for compensatory damages emerged on 2 November 1998 when Justice Thomas delivered the Court of Appeal’s judgement in the cases of *Queenstown Lakes District Council vs. Mark Thomas Palmer* and *Danes Shotover Rafts Limited vs. Mark Thomas Palmer* Unreported CA83/98 and CA81/98. 2/11/98 (heard concurrently) where he observed:

“the application of the Act and the corresponding scope for common law proceedings automatically adjust as and when the scope of the cover provided by

the Act is extended or contracted. To the extent that the statutory cover is extended, the right to sue at common law is removed; to the extent that the cover is withdrawn or contracted, the right to sue is revived. So it is in this case”.

In this case, Mr. Palmer and his wife, while visiting Queenstown, undertook a rafting trip on the Shotover River with Danes Shotover Rafts, licensed by Lakes District Council. Mr. Palmer was a United States citizen. During the rafting trip the raft encountered a rapid known as the “Toaster” and capsized. Mrs. Palmer was thrown into the water where she became trapped against an underwater obstruction and subsequently drowned. She was the only member of the party who did not survive. Mr. Palmer suffered no physical injuries but suffered serious mental injuries; post-traumatic stress disorder, major depressive disorder and an associated speech impediment (see Tobin, 1992). As a result of these events Mr. Palmer commenced proceedings against the appellants in negligence, claiming \$150,000 for general damages, special damages, and exemplary damages of \$50,000. Both parties accepted that the claim for exemplary damages could proceed but the interpretation of Section 14 of the ACC Act given by Master Venning in *Palmer vs. Danes Shotover Rafts Ltd.*, 3/1/97, HC Invercargill CP10/97, was that it created a bar to proceeding with respect to the mental injuries suffered by Mr. Palmer after witnessing his wife’s death. In light of this ruling Mr. Palmer applied to the High Court to review the decision, at which time it was reversed by Justice Pankhurst who reinstated Mr. Palmer’s claim for compensatory damages. The appellants then appealed against the decision.

In delivering the Court’s judgement Justice Thomas considered in detail the application of Sections 14, 8(1), (2)&(3), 4(1) and 10(1)&(2). His honour stated that Section 14 must be read in conjunction with Section 8(1) and (2), noting that the Act applies to personal injury “in respect of which there is cover under this Act”, and that “cover under the Act is extended to personal injury which....Is caused by an accident to the person concerned”. In describing Mr. Palmer’s situation, it was made clear that Mr. Palmer sought damages for mental injuries suffered by himself as a result of an alleged breach of a duty of care owed to him by Danes Shotover Rafts Ltd. and the Queenstown Lakes District Council. The judge stated that Mrs. Palmer’s death “was part of a sequence of events which provides the factual basis for Mr. Palmer’s claim” that the defendants owed him a duty of care which had been breached and as a result he had suffered an injury: the point being, that it was not Mrs. Palmer’s death that created the basis of her husband’s claim against the defendants, but the nervous shock suffered by Mr. Palmer himself. Justice Thomas went so far in emphasising this point to say that if she

had lived and Mr. Palmer had suffered the same injuries due to seeing his wife being thrown into the turbulent water, his “cause of action would remain intact”.

Mr. Palmer was a secondary victim in relation to the death of his wife, but as his claim related to his own injuries it would seem he was viewed by the Court as a primary victim. He did not suffer an “accident” in terms of the definition in Section 2 of the Act which requires “the application of a force or resistance external to the human body and that results in personal injury”. There was no such force applied to Mr. Palmer, rather, his injuries resulted from “the trauma of personal experience”.

Justice Thomas emphasised that the legislation in all its forms “denied those persons covered under the Act access to the courts at common law in return for the perceived advantages of the statutory scheme”, but that it did “not proscribe common law claims arising out of accidents”. The purpose of Section 14 and its predecessors in the 1974 and 1982 Acts’ barring common law claims “is to prevent persons who suffer injury being compensated twice over, once under statute and then at common law. The bar is not designed to prevent them recovering any compensation at all”. Justice Thomas also pointed out that “in accordance with the traditional principle, which enjoys status in our free and democratic society, that citizens are not to be denied access to the courts, save in rare and appropriate circumstances, and then only pursuant to explicit statutory language”, alluding to the statement in the policy document accompanying the 1991 budget which noted: “it may be possible that (in cases not covered by the scheme) there will be more court action than in the past”. This interpretation clearly suggests that Parliament recognised that claims for common law damages in relation to personal injury were permissible where the injuries were not covered by the Act. In his conclusion Justice Thomas said that Section 14(1) did not prevent Mr. Palmer bringing a proceeding at common law to recover compensatory damages for the mental injuries that he had suffered in the rafting accident. He stated: “The critical phrase in that subsection is ‘personal injury covered by this Act’. Unless the personal injury for which damages are sought is covered by the Act, the right to bring proceedings at common law remains”.

Although it seems quite clear that such claims as Mr. Palmer’s may proceed, there has yet to be a case in New Zealand of a similar nature where the plaintiff has succeeded with such a cause of action and obtained a judgement for compensatory damages. Cases to date, including Mr. Palmer’s, have been settled out of court so there is still not a definitive statement on the issue with respect to the awarding of compensatory damages for personal injury, although the right to bring such an action is established.

If it is now possible to bring actions for common law damages for personal injuries that are not covered by

the ARCIA, it is necessary to explore to some extent, the nature of injuries that are not covered by the Act. These are injuries that may provide grounds for actions against adventure tourism operators who, through their negligence, breach of contract or breach of a statutory duty become responsible for injuries to tourists, or anyone else, injured as a result of such negligence.

The Act quite specifically excludes certain types of personal injury, including personal injury to teeth that is caused by natural use [s10(2)(b)]; non-physical stress [s7(4)]; nervous shock as a result of anything other than the causes listed in the first schedule of the Act [s8(3)]; inhalation or ingestion of a virus, bacterium, protozoa or fungi unless it is the result of a criminal act by another person [s3(b)]; exposure to extremes of temperature or environment for a period of more than one month, burns caused by exposure to the elements (this would appear to exclude sunburn or windburn from cover under the Act) [s3(c)]; the absorption of any chemical over a period of more than 1 month [s3(e)]; disease caused by infection that is not the result of criminal conduct [s3(b)]; skin cancer caused by long exposure to the sun [s3(c)]; personal injury attributable to air-conditioning systems and passive smoking [s7(3)]; and cardio-vascular or cerebro-vascular episodes [s4(2)].

The Act provides coverage for medical misadventure as a result of treatment by a “registered health professional” (Hodder & Pepperell, 2001) which would suggest that there is no coverage for medical misadventure by those who are not “registered health professionals”. This could include people such as paramedics, or a doctor or nurse who has omitted to ensure that his/her practising certificate is current (Harrison, 1993). This list is considerable but not exhaustive. There have been a number of cases, both in New Zealand and overseas, which provide an indication of the likelihood of success in a proceeding for compensatory damages in relation to several of these personal injuries that are not covered by the ARCIA.

An accident is defined as a “specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury” [ACRIA s4(2)]. In the case of *ACC vs. E* a 49-year-old woman, who held a senior management position in a large organisation, was sent on a management training course by her employer. The course was very demanding, and confrontational in style, with participants working from 8.30 a.m. until 11 p.m. *E* was the first female employee of the organisation to be sent on the course, and other employees indicated to her that it would be very strenuous. On the fourth day *E* suffered a psychiatric breakdown and was admitted to the psychiatric unit at Wellington Hospital. Subsequently, she suffered depressive symptoms that required treatment, and terminated her employment for health reasons. No particular incident during the course could

be identified as triggering the psychotic episode, but evidence confirmed that she was fit and well before going to the course. The management course was instrumental in her mental breakdown. As the psychotic episode occurred prior to July 1992 it was covered by the 1982 Act, and it was on this basis that *E* had lodged a claim for compensation that was rejected by ACC. The Court of Appeal quoted from its decision in *Willis vs. Attorney-General* [1989] 3 NZLR 574, 577 where it stated:

“Personal injury by accident” is an integrated phrase, to be seen and applied as a whole and without an unnatural breaking down which would rob it of the impact it makes as a whole. Perhaps it can be called holistic, in that the sum is more than the parts”.

On the basis of this holistic interpretation *E* was granted cover under the 1982 Act. The holistic interpretation no longer applies to the phrase “personal injury by accident” since, both “personal injury” and “accident” have been given exhaustive definitions within the 1992 Act which lead legal commentators to believe that *E* would no longer be covered by the Act. She would therefore be able to sue for compensatory damages from her employer if it could be shown that the employer was negligent in sending her on the course (Todd, 1997). It is now a popular team-building exercise to send staff in many sedentary occupations on courses that involve significant amounts of challenging outdoor activities utilising the expertise of adventure tourism operators to facilitate the process. If the strain of unaccustomed fear from exposure to heights and physically demanding activities which produces that “gripped” feeling on the part of the novice participant leads to a similar psychotic episode as suffered by *E* it seems reasonable to expect that both the employer and the facilitator of such a course may face an action for negligence on the basis that they should not have subjected a novice to such a fearful experience.

Many adventure tourism activities such as sea kayaking, tramping, mountaineering and mountain biking, are undertaken over a period of days and include meals and accommodation. Food poisoning is not covered by the Act, nor was it under the 1982 Act (Todd, 1997). In *ACC vs. Booth* [1990] NZAR 529 a sailor, Booth, became very ill after eating contaminated saveloys and sought cover under the provisions of the 1982 Act. His claim was denied, as food poisoning was not regarded as “personal injury by accident”. In the Consumer Guarantees Act 1993, Section 6 states that goods supplied to a consumer must be of “acceptable quality”, and in Section 7 “acceptable quality” is defined as “fit for all the purposes for which goods of the type in question are commonly supplied” and “safe” (s7). Food is supplied for human consumption and must be of a quality that is suitable for such consumption. So far as implied terms are concerned, food is not treated

by the law as being different from other goods (Halsbury's Laws, Vol. 18, cited in Pelling, 2000, p. 9).

Biting into food that results in breaking a tooth due to the presence of a foreign object within the food, may give rise to an action against the retailer or manufacturer based on the provisions of the Consumer Guarantees Act (S6,7,9, & 25). In *Partner vs. ACC* unreported, February 1995, Blanchard J, HC Auckland HC180/93, Partner, a food taster, endeavoured to obtain ACC cover for a broken tooth, claiming that it was covered as the tooth broke in the course of his employment. It was not covered by the Act. The provision of meals and accommodation by an operator provides additional potential for litigation in relation to personal injuries that are not covered by the ARCIA.

The New Zealand bush and coastal waters, where many popular adventure tourism activities take place (Know, 1999), may give the visitor a false sense of safety. In many of New Zealand's most pristine recreational environments (e.g. Fiordland), the protozoa *Giardia* is present in rivers and lakes. *Giardia* causes gastroenteritis and can be very debilitating to the point of destroying the pleasure of a tourist's adventure in these beautiful places. Evidence from the New Zealand wilderness, confirmed by ongoing microbiological studies of *giardia* transmission and spread has shown that it is a growing problem in the bush environment, especially National Parks. The main causes which are attributed to its spread are the growing numbers of visitors to the bush environment and faecal contamination of water supplies. Tourist operators in these areas clearly have a duty of care to anyone under their supervision to give precise information about such dangers. Failure to do so could potentially give rise to actions in negligence or breach of contract under the implied terms of the Consumer Guarantees Act 1993 Section 28, which requires "reasonable care and skill" on the part of suppliers of services. The last area of significance for adventure tourism operators is the Health and Safety in Employment Act.

5. Health and safety in employment act

The Health and Safety in Employment Act 1992 (HSE Act) states that it is an "Act to reform the law relating to the health and safety of employees, and other people at work or affected by the work of other people". Part II of the Act sets out the duties of employers towards their employees and others along with the duties of persons in control of places of work, self-employed people principals and employees. Section 6 provides a general duty to take all practicable steps to ensure the safety of employees by providing a safe working environment. In the subsequent Sections 7–14 the duties of employers

in relation to hazard management, the provision of information to employees and the provision of training for employees, are detailed. The HSE Act provides for a variety of fairly severe penalties but does not specify the option of civil actions for breach of a statutory duty. However, historically there has always been a presumption that in industrial safety legislation civil actions for damages for breach of a statutory duty are allowed (Brooker's, 2001: D1.6.07). In *Culter vs. Wandsworth* [1949] AC 398 (HL) (Slappendel, 1995), Lord Simmonds stated that:

"The only rule which in all circumstances is valid, is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law in which it was enacted".

And this is confirmed by the Statute Interpretation Act 1999 Section 5 which emphasises the purposive approach. The purpose of the HSE Act is set out in Section 5 of the Act as follows:

(1) This Act's principal object is to provide for the prevention of harm to employees at work.

Bringing a civil action is not inconsistent with the purpose of the HSE Act, and the imposition of damages may actually encourage employers and employees to be more careful in relation to the future management of the visitor experience. To determine the intention of Parliament two tests may be applied (Todd, 1997): the class test and the alternative modes test. The class test, which has been described as the cardinal test (*Solomons vs. R. Gertzenstein Ltd.* [1954] 2 QB 243, 256 CA), asks whether the statute was passed for the benefit of a defined class of persons, and if so, it is actionable by members of that class. Section 5 of the HSE Act indicates that it is clearly focused on the prevention of harm to employees at work, and so the test would suggest that civil actions by employees are permitted. The alternative modes of enforcement test states that if the statute does not expressly provide for a remedy then a damages action is allowed. In *Gardiner vs. McManus* [1971] NZLR 475,481, Williams J. said "there has been a tendency in more recent years to attach less significance to the existence of a criminal remedy". Add to Justice Williams' statement the fact that industrial safety legislation has always been enforced by penalties but has also been a major source of civil actions (prior to 1974), it would seem likely that such actions can proceed once again (Slappendel, 1995).

When accident compensation legislation provided cover for all types of work accidents such civil actions were not possible, but now that there are some work injuries that are not covered (e.g. stress), bringing a common law action for damages for breach of a

statutory duty as laid down in the HSE Act could be possible if the plaintiff can prove:

- that the statutory duty was on the defendant;
- that the duty was owed to the plaintiff; and
- that there was a breach of that duty, which caused the damage suffered by the plaintiff (Brooker's, 2001).

The identification, elimination, isolation and minimisation (Anderson, 2000) of hazards is an area of considerable concern for anyone involved in adventure tourism since the hazards are an integral part of the adventure. Page and Meyer (1996, p. 668) observed that: "Anything which may inhibit the thrill, excitement, or the danger and risk of adventure tourism pursuits is currently viewed as unnecessarily burdensome and bureaucratic by this nascent industry sector". The adventure tourism market in New Zealand has generally operated within a self-managing code of practice rather than a mandatory set of guidelines (Page, 1997; Tourism Policy Group, 1996). This is an area which is under review by the Tourism Industry Association and Qualmark (a joint venture of Tourism New Zealand and the Automobile Association) to develop a set of tourism industry standards focussing on seven components:

- compliance with regulatory requirements including health and safety,
- service delivery,
- staff training,
- quality facilities,
- environmental management,
- cultural management,
- business skills and practices (Anderson, 2000).

Several areas of the industry have developed or are developing their own industry specific standards to "bolt on" to the generic standards that are being set in association with Qualmark. These include: rafting and jet boating which are also covered by the requirements of Rule 80 of the Maritime Transport Act 1994, horse-trekking, sea kayaking and all-terrain vehicles. It is intended that the standards will operate as "national best practice standards" which will provide an industry standard which may be considered in any action for negligence, breach of contract or breach of a statutory duty. Section 20 of the Health and Safety in Employment Act provides for the development of codes of practice that are a "statement of preferred work practices" which the Minister may approve. This may be a way forward for these standards.

One of the key motivating factors behind the development of these best practice standards, along with the clear marketing benefits, must surely be the EC Package Travel Directive which has set very high standards of consumer protection for any pre-arranged

tours which include no fewer than two of the following three elements:

- transport;
- accommodation; and
- other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package (see Downes, 1993).

This definition of a travel package includes any pre-arranged combination of the above travel products and includes business travel packages, "provided that the package is 'sold or offered for sale in the territory of the Community' (Downes, 1993, p. 72). There is no equivalent of the EC Package Travel Directive in New Zealand, but the fact that it applies to all European visitors who book package travel into New Zealand, means that the rights and liabilities it contains significantly affect New Zealand suppliers. The Directive is not a global convention but it does lead to a orienting the duties and obligations of suppliers and tour operators to its standards that it lays down. Article 5 of the Directive requires member states to make a choice of fixing liability on either the tour operator or the travel agent (Cordato, 1994, p. 31). Whatever choice is made, should a consumer complain, the tour operator or the travel agent will seek to recover damages from the supplier of the tourism product who failed to provide what the consumer had been led to expect by the brochures and contractual arrangements. New consumer protection laws being developed in Japan are also likely to impact on New Zealand operators.

No cases have yet come before the courts in New Zealand in relation to the Directive, and those in other jurisdictions to date seem to have been settled out of court (Kilbey, 2000, p. 22). De Vial (1997, p. 155) notes that the tour operator's liability (and consequently the supplier's liability) is in terms of the "improper performance" of the package, rather than the negligence of the tour operator or its suppliers. This surely puts a much higher standard of duty upon adventure tourism operators to ensure that the descriptions in their advertising when compared with the product received by the customer do not leave them open to claims of "improper performance" in relation to personal injury suffered by customers.

6. Risk, the adventure experience and the legal arguments

Whilst risk is a vital element of the adventure tourism experience, from a legal perspective, the debate is over how much of the risk rests with the operator and how much rests with the willing participant. The maxim of *volentia non-fit injuria* has little application to cases where negligence is involved and is unlikely to succeed as a defence. In the case of *Rootes vs. Shelton* (1967) 116

CLR 383 an action was brought by a water-skier who suffered injuries when the driver of the boat towing him steered too close to a stationary boat and the skier collided with the stationary boat. The defence pleaded *volentia non-fit injuria* on the basis that what happened was part of the risks of water-skiing. The defence failed because the collision occurred due to the negligence of the driver and not because of any inherent risk in the sport.

Two elements must be established for a person to be held to have assumed the risk of harm:

1. that he or she was fully aware of the factual circumstances and of the danger to which it gave rise, and
2. that he or she freely and voluntarily decided to incur the danger.

In *Bowater vs. Rowley Regis Corp* [1944] 1 KB 476 (CA) Scott LJ described the test for voluntary assumption of risk as follows:

“[A] man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint, so that nothing shall interfere with the freedom of his will”

This test is of a very high standard and makes the *volens* defence especially hard to establish in a negligence action. Having actual knowledge of danger, such as when someone enters an occupier's property, does not mean that they are willingly assuming the risk of harm arising out of the danger (Todd, 1997). It would thus be unwise for operators of adventurous and dangerous activities to assume that a *volens* defence is open to them. An operator is able to include in any contractual agreement with customers an acknowledgement of the risk involved which clearly draws it to the customer's attention, but it should be noted that the Consumer Guarantees Act 1993 (s43) prevents the use of even the most clearly worded exclusion clauses in relation to the guarantees provided by the Act. These include, as noted above, the exercise of “reasonable care and skill” (s28) in the supply of services.

The final area of liability that needs to be addressed is that of exemplary damages. In *Donselaar vs. Donselaar* [1982] 1 NZLR 97, Cooke J quoted O'Regan J (*Howse vs. Attorney-General* (Palmerston North, A 132/75, judgement 22 December 1977) when he said:

“punitive damages could still be awarded, on the grounds that they arise ‘from the acts done contrary to law and not from the harm caused to the plaintiff by such acts. The harm done him is met by the award

of aggravated compensatory damages. It is the act contrary to law which is punished by punitive (exemplary) damages and it is recurrences of such which are deterred by such damages”

Exemplary damages are available in the context of a negligence claim for personal injury if a proper case is made (*McKenzie vs. Attorney-General* [1992] 2 NZLR 14), and the court may register its condemnation of the defendant's conduct where the conduct is deserving of moral retribution (Heilbronn, 1992, p. 333). There is no bar to awarding exemplary damages where personal injury is covered by the ARCIA under s14(1) because they do not arise out of “personal injury covered by this act” but rather from the actions of another which caused the injuries. Section 396 of the Accident Insurance Act 1998 states:

- (1) nothing in this Act, and no rule of law, prevents any person from bringing proceedings in any court in New Zealand for exemplary damages for conduct by the defendant that has resulted in;
 - (a) personal injury covered by this Act; or
 - (b) personal injury covered by the former Acts.

Subsection (2) clearly states that the court may make awards of exemplary damages whether or not the defendant has been charged and convicted or discharged without conviction, or has not been charged with any offence relating to the personal injuries covered by the Act or its predecessors. Subsection (3) indicates that the court may have regard to whether a penalty has been imposed in relation to the offence, and if so the nature of the penalty in determining any award of exemplary damages.

In 1996 in the case of *McLaren Transport Ltd. vs. Sommerville McLaren Transport Ltd. vs. Sommerville* [1996] NZLR 424, Justice Tipping was willing to award exemplary damages for negligence causing personal injuries if the negligence amounted to “outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment”. An employee of the defendant had deliberately inflated a tyre to twice the safe pressure without using a tyre cage that resulted in serious injury to the plaintiff. An award of \$15,000 exemplary damages was made.

In *Palmer vs. Danes Shotover Rafts Ltd.* Master Venning considered *Ellison vs. L* [1998] 1 NZLR 416; (1997) 11 PRNZ 401 (CA) where the Court of Appeal stated that:

“in some cases of negligence exemplary damages may be awarded. But because negligence is an unintentional tort those cases are likely to be rare indeed. Exemplary damages are awarded to punish a defendant for high handed disregard of the rights of a plaintiff or for acting in bad faith or for abusing a public position or behaving in some other outrageous

manner which infringes the rights of the defendant. Negligence simpliciter will never suffice”.

Master Venning considered that the claim for \$50,000 exemplary damages would be appropriate if it could be shown that the defendants knew that certain sections of the river posed serious risks to customers’ safety in certain conditions, yet made the decision to continue for monetary reasons. Thus knowledge of the risk that an operator is putting customers under for the sake of personal gain may give rise to actions for exemplary damages. Mr. Palmer could not bring an action for exemplary damages in relation to his wife’s death but only his own injuries (The Law Reform Act 1936 Section 3(2).) This was confirmed in *Re Chase* [1989] 1 NZLR 325 (CA).

Bottrill vs. A (unreported) CA 75/001 3 June 2001 provides the most recent statement of the requirements for an award of exemplary damages, which was delivered in a 4/1 majority decision by the Court of Appeal. The majority concluded that:

“exemplary damages may be awarded for negligence only in those cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly taking that risk. The inquiry involves an objective assessment of whether the defendant’s conduct amounted to deliberate or reckless risk taking and so whether in the latter situation he or she was subjectively reckless. The test of conscious risk taking will be satisfied where on an objective assessment the defendant had an actual appreciation of the risk or was recklessly indifferent to the consequences and must be taken to have been content for the consequences to happen as they did. And where the particular risk was obvious but there is an absence of evidence as to the defendant’s actual state of mind, the circumstances may justify the inference that she or he was aware of it and accepted the risk that it could well happen”.

The Court reiterated that it should not be the role of exemplary damages to compensate for the inadequacies of the accident compensation scheme, saying that to do so would be “to subvert the social and economic policies underlying the scheme and require insurance cover or self-cover against compensation liability intended to be paid for by ACC premiums”.

Justice Thomas, in his dissenting judgement, argued strongly that it was in society’s interest to allow the award of exemplary damages for purposes wider than just the punishment of the defendant. These purposes include the education of others and the deterrent effect, vindication, condemnation, appeasement of the victim and the avoidance of the abuse of power.

The high standard of awareness of risk and flagrant disregard of this risk that was required in *Bottrill vs. A*

should not cause adventure tourism operators to relax in terms of their potential liability for exemplary damages in negligence. As experts in their individual fields, they are well aware of the risks that surround their activities. It is often the case that the risk is what attracts the customers to the activity.

The European Commission takes the view that limitation of damages for gross negligence would be unreasonable (Cordato, 1994, p. 19). This interpretation may have the potential to put pressure on New Zealand courts to make larger awards than have been acceptable to date. This is again a warning of the potential for financial ruin for any operator who is not well protected against such action. Even where operators take the precaution of having insurance to cover public liability, with extensions including punitive and exemplary damages, they must still be very careful to adhere to their duties to their insurer. A failure to give notice to the insurer of any event that occurs from which a claim might arise, puts them at risk of having the claim refused by the insurer.

7. Conclusion

There are a number of conclusions that may be drawn from the foregoing analysis of the potential for adventure tourism operators to face actions for common law damages due to their acts or omissions that have led to personal injury. In many other parts of the world, tourism operators have begun to use disclaimer clauses to minimise common law damages. This may be one area for consideration for adventure tourism operators in New Zealand. Yet these will not absolve operators from conducting their operations in a safe manner. More specific conclusions in the New Zealand context are also apparent. First, since the ARCIA became law in 1992, the courts have clearly indicated that there are a considerable number of types of personal injury that are not covered by the Act; consequently no compensation is available to those who suffer such injuries. Along with this reduction in cover there is also a considerable reduction in the compensation that is available, which has perhaps encouraged injured parties to attempt to pursue common law solutions to compensate for their loss. But, as noted above, the judiciary has been quick to point out that it is not the Court’s function to develop the law of exemplary damages so as to remedy the perceived inadequacies of the statutory scheme (Todd, 1997).

Secondly, there is a significant growth in the Court’s willingness to recognise mental injuries as having equal right to compensation as physical injuries. This concession may be partly due to the improved medical understanding of mental illness and its potentially devastating effects on the injured person’s quality of

life, and also to the increased incidence of stress related injuries. This has an important implication for tourism, especially where the tourist experience is recognised to be a psychological construct that is based on the ability to provide a service or product with an experiential element, within a safe manner with a duty of care. In the case of adventure tourism, this experience involves a high degree of risk as Bentley et al. (2000, 2001a,b) observe and this now adds a further dimension to the potential for operators to be sued in a number of ways.

Thirdly, the law in relation to the assumption of risk is such that it is very unlikely that an adventure tourism operator could successfully use the volens defence in any situation where injury had resulted from his or her negligence. The generic and activity specific quality standards that have been developed by the industry go some way to providing a process of audit and attestation that operators are providing safety standards that meet the requirements of the Health and Safety in Employment Act 1992 and other legislative responsibilities they may have, but such quality standards are not yet completed for all areas of the industry (Bentley et al., 2000).

Finally, the development of higher standards of consumer protection for tourists by the European Union and Japan create the potential for operators in New Zealand to face actions from organisers whose products are marketed in these countries, and whose customers have suffered personal injuries that are not covered by accident compensation. The requirement in Adventure Tourism Council's (2000) Generic Standard for the adventure tourism operators to "ensure they are covered for...public liability including punitive and exemplary extensions" would seem to be very sound advice. Operators must become much more risk aware, both from a physical and a legal perspective, as these areas have enormous potential to impact on the level of financial risk and viability of their businesses. It is in this context that recent research highlighting the scale, nature and risk level for specific adventure tourism activities provides the tourism sector with a research base upon which risk assessment and minimisation of litigation can be considered.

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