
**AN ACCIDENT WAITING TO HAPPEN: CRIMINAL LIABILITY WHEN
DEATH OCCURS DURING PARTICIPATION IN ADVENTURE SPORTS IN
NEW ZEALAND**

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**A dissertation submitted in (partial) fulfilment of the degree of Bachelor of Laws
(with Honours) at the University of Otago**

October 2009

ACKNOWLEDGMENTS

I would like to acknowledge my supervisor Professor Kevin Dawkins for his generous time, effort and wisdom put into the creation and revision of this paper.

I am indebted to Isaac Malpass, Simon Wilson and William Chisholm for their vigilant proofreading skills. Thank you.

Finally, I would like to thank my family and Jane for the encouragement and support given throughout this year and beyond.

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INTRODUCTION

This paper examines how the criminal law deals with accidental death or injury arising out of participation in adventure sports. Particular emphasis is placed on fatalities. Criminal liability for such accidents is often haphazard and undeveloped, as the applicable statutes were created without such activities in mind.

New Zealand is popularly regarded as a mecca for adventure sports. The last two decades have witnessed a proliferation in the range and availability of high-risk entertainment and current participation levels are high.¹ Opportunities for commercial gain have emerged as operators seek to expand existing activities or develop bolder initiatives.² However, as participation levels have risen so too has the risk of tragedy. There is little room for error in these dangerous activities, and recent tragedies have brought the public spotlight down upon the industry.³

“Adventure sports” is a colloquial term, used synonymously with “adventure activities” or “extreme sports”. Roughly defined, these sports have a high level of perceived risk or danger⁴ and are often pursued for the enjoyment of the activity itself.⁵ Adventure sports include the more common forms of bungy jumping, sky diving, white water rafting and jet boating, but also extend to include the more extreme activities of BASE jumping, kite surfing, river surfing, and parasailing. The term can even stretch to encompass more mundane activities such as scuba diving, kayaking, skiing, and hunting.⁶

¹ In 2008, 681,000 international visitors to New Zealand participated in some form of adventure tourism, see: M Johnston, “Adventure tourism inquiry welcomed”, 23 September 2009, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 24 September 2009).

² Consider the creation of the Sky Tower bungy jump, in Auckland, and the Sky Jump at Waitomo, see: “Tiki tour for adrenalin junkies”, 8 December 2001, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 1 September 2009).

³ Ibid; “Adventure tourism regulations need updating – IPENZ”, *Otago Daily Times*, 9 March 2009, available online at www.odt.co.nz (last accessed 22 September 2009).

⁴ A Easter, S E Hardin and T L Stenger, “Legal Issues Related to Adventure Racing” (2003) 13 JLEGASP 253.

⁵ Based on the definition of “adventure aviation” suggested under a proposed Part 115 for the Civil Aviation Rules, see: Civil Aviation Authority of New Zealand, *Adventure Aviation. Policy for the introduction of a new rule Part 115 for the regulation of the sector of the aviation industry involved in adventure aviation* (S-R 180-06 5/CAR/1/1/2 (DW1120663-1), February 2007), at p 7.

⁶ For an expansive list, visit <http://www.adventuresportsonline.com/>.

Chapter One of this paper outlines the applicable criminal law in relation to adventure sports accidents. No single statute governs adventure sports; rather, four main statutes apply. The Maritime Transport Act 1994 (MTA), the Civil Aviation Act 1990 (CAA) and the Health and Safety in Employment Act 1992 (HSEA) are regulatory in nature and deal with less serious offending. The Crimes Act 1961 (CA) applies to cases falling outside the regulatory schemes and punishes more serious offending, often via a criminal nuisance or manslaughter charge. The relevant offence provisions of each statute are discussed alongside past case examples.

Chapter Two examines inconsistencies in the existing criminal law. First, the current statutes fail to consistently punish negligent conduct that causes injury or death in an adventure sport. Such conduct is only punished if covered by a specific regulatory regime. Second, different penalties are often available to punish the same incident. Likewise, comparable conduct may be punished differently depending on the sport involved. One reason for this is that the MTA and CAA offence provisions are too broad and fail to cater for more serious offending with a ship or an aircraft. A graduated scheme of offending, similar to that in the Land Transport Act 1998 (LTA), should be incorporated into each statute. Industry codes of practice could be adopted under the schemes to provide additional guidelines for liability. Finally, the archaic criminal nuisance section is examined.

Chapter Three examines the way forward and proposes the adoption of general offences of endangerment in New Zealand law. An offence of negligent endangerment would cover the gaps where negligent offending is alleged. An offence of reckless endangerment would replace the current criminal nuisance provision. Together the two provisions would apply to cases falling outside the regulatory regimes, currently charged as manslaughter. Offending is then more appropriately labelled as endangerment of others.

The final chapter examines the issue of consent. This part considers the question of whether consent can provide a defence at common law to the infliction of harm during participation in adventure sports. Assessing the scope of consent can prove difficult, especially where negligent offending is alleged.

I. THE APPLICABLE CRIMINAL LAW IN NEW ZEALAND

This chapter outlines the various statutory regimes used to prosecute individuals, organisations or firms for their alleged involvement in causing accidental injury or death during participation in adventure sports. The scope and proper application of each statute is examined alongside examples from past case law.

1 Determining the Applicable Statute

Two general factors appear to influence the scope and application of each statute. The first is the gravity of the offending. More serious offending is usually dealt with under the CA. The criminal nuisance and manslaughter provisions⁷ deal with grossly negligent and reckless behaviour. The regulatory statutes do provide for serious offending, but tend to be confined to more docile cases.

Secondly, the location of the offending affects which statute applies. Accidents occurring on water are usually subject to the MTA and corresponding Maritime Rules. Adventure sports using the airspace are generally subject to the CAA and corresponding Civil Aviation Rules. There is no specific statutory scheme for land-based offending. The HSEA covers all workplace accidents, except those covered specifically by the CAA and MTA schemes. The CA is available regardless of location.

Location is not determinative and exceptions do apply. For a single incident more than one statute may apply. Separate jet boat accidents, for instance, have been prosecuted under both the HSEA⁸ and MTA.⁹ Coordination between government authorities¹⁰ ensures the most relevant statute is applied. Further, offending in particular locations may fall outside the otherwise applicable statute. The MTA is

⁷ CA, ss 145 and 160(2)(a)-(c).

⁸ “Jet boat driver pleads not guilty”, 19 August 2009, *Otago Daily Times*, available online at www.odt.co.nz (last accessed 20 August 2009).

⁹ “Man admits charge over girl’s waterski death”, 2 June 2009, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 14 July 2009).

¹⁰ The Civil Aviation Authority of New Zealand, the Department of Labour and Maritime New Zealand (responsible for the CAA, HSEA and MTA respectively).

limited to ships, so not all water-based adventure sports are covered. Likewise the CAA focuses on aircraft and excludes some adventure sports using the airspace.¹¹

2 The Maritime Transport Act 1994

2.1 Coverage

Under the MTA, Maritime New Zealand¹² regulates the maritime transport system in New Zealand. Specific parts focus on health and safety in the operation, use, maintenance, and servicing of marine craft.¹³ One stated aim is to “ensure that participants in the maritime transport system are responsible for their actions”.¹⁴ This statute covers accidental injury or death occurring during water-based adventure sports involving a ship. A “ship” is defined as “every description of boat or craft used in navigation, whether or not it has any means of propulsion”.¹⁵ Barges, hovercraft, submarines or other submersibles are specifically included.¹⁶

A number of adventure sports involve the use of a ship. Jet boating,¹⁷ jet skiing¹⁸ and other extreme powerboat sports are clear examples. Other water sports using mechanically powered marine craft should be included, such as wake boarding or waterskiing, as should water-sports using wind power to navigate, such as windsurfing or other extreme sailing.¹⁹ In *Thompson v Police*,²⁰ a “kayak” met the definition of a ship under the predecessor to the MTA.²¹ Sports like freestyle paddling or extreme kayaking, where people paddle off waterfalls and race down rapids in kayaks or canoes would come under the MTA.²² Rafting on rivers is covered by a specific set of maritime rules aimed at providing standards for white water rafting.²³

¹¹ MTA, s 2; CAA, s 2.

¹² MTA, s 429.

¹³ MTA, Parts 1-6.

¹⁴ MTA, long title (c).

¹⁵ MTA, s 2.

¹⁶ MTA, s 2.

¹⁷ “Man admits charge over girl’s waterski death”, *New Zealand Herald*, above n 9.

¹⁸ *R v Hare* 15/11/99, CA 332/99. (*Hare*).

¹⁹ For example, see: *Birkenfeld v Yachting New Zealand Inc* [2007] 1 NZLR 596.

²⁰ *Thompson v Police* 21/12/92, Gallen J, HC Wellington AP250/92, at p 10.

²¹ Shipping and Seamen Act 1952, s 290.

²² These sports were described fully in the findings of an inquest into the death of Eleanor Jayne Rutter, see: *Re Rutter* 30/5/05, Coroner Sullivan, Quality King’s Hotel, Mawhera Quay, Greymouth 060837, at p 1.

²³ Maritime Safety Authority of New Zealand, *Maritime Rules Part 80 Marine Craft Used For Adventure Tourism* (Wellington, September 2008).

2.2 *The offence provisions*

Sections 64 and 65 of the MTA are used to prosecute fatal accidents that occur during participation in adventure sports involving a ship. Under section 65 it is an offence to “operate, maintain, service, or do any other act in respect of a ship or maritime product in a manner which causes unnecessary danger or risk to any other person”. People who cause or permit this to happen are also liable.²⁴

The phrase “operate, maintain, service, or do any other act” creates a broad offence. Captains, operators, employees, and crew of any ship involved must take care to avoid causing unnecessary danger or risk to another person. Employers, owners or managers who cause or permit the operation of ships in adventure sports should guard against unnecessary danger to other people. Likewise, service providers must ensure work done on a ship does not later cause danger to crew, passengers or others. Section 64 provides an identical offence for holders of a maritime document.²⁵

The two sections create offences of endangerment. Actual injury or death is not an element of either offence. If an accused causes unnecessary danger or risk to another person they are criminally responsible for the consequences.²⁶ The term “unnecessary” suggests dangerous actions taken in an emergency would be exempt. Further, exposing others to a higher level of danger during adventure sports might be acceptable, as these sports by their very nature require a high degree of risk and danger. A breach of a relevant maritime rule is presumed to be an act or omission causing unnecessary danger or risk to another person.²⁷

In the absence of proof to the contrary, a person will thus be criminally responsible where the operation of a ship during an adventure activity breaches a maritime rule or creates other unnecessary danger, regardless of whether injury or death is caused.²⁸

²⁴ MTA, s 65(1).

²⁵ Defined in the MTA as: “any licence, permit, certificate or other document issued under Part 5 of this Act to or in respect of any person, ship, cargo, maritime procedure, or maritime product” (s 2) including a recognised foreign licence, permit, certificate, or other document (ss 41 and 42).

²⁶ MTA, ss 64 and 65.

²⁷ MTA, s 66.

²⁸ MTA, s 65.

Proof of a breach of a maritime rule is not a requirement of every offence.²⁹ Conversely, compliance with a rule is no excuse to an offence.³⁰ The maximum penalty for an individual under both sections is imprisonment for up to 12 months or a maximum fine of \$10,000. A body corporate faces a maximum fine of \$100,000.

The Maritime Rules are secondary legislation made by the Minister of Transport pursuant to the MTA. They detail technical standards and procedures with which certain marine craft must comply. Many of the rules concern safety and security in ship design, construction, equipment, crewing and operation.³¹ Different rules might apply to commercial and non-commercial operators.³²

For adventure sports operators or participants, the most applicable maritime rules are in Part 22, Part 91 and Part 80. Part 22 relates to collision prevention, providing the “rules of the sea” applicable to all New Zealand ships including pleasure boats, whether at sea or on inland waters.³³ Part 91 provides “basic navigation safety rules”, enforced by regional councils making consistent bylaws under the Local Government Act 1974.³⁴ Some regional variation is allowed but Part 91 provides default standards.³⁵ Part 80 covers certain marine craft used in adventure tourism.³⁶

Most prosecutions are relatively straightforward. In June 2009, John James Curtis pleaded guilty in the Taupo District Court to operating a powerboat in a manner causing unnecessary danger to another person after running over a nine-year-old girl in Lake Taupo, causing her death. The girl had crashed while water-skiing and was waiting in the water to be picked up by her towboat.³⁷ Curtis had breached a

²⁹ MTA, s 66(2).

³⁰ MTA, s 416.

³¹ For a full explanation of the Maritime Rules, visit the Maritime New Zealand website: www.maritimenz.govt.nz.

³² An example being *Maritime Rules Part 80 Marine Craft Used For Adventure Tourism*, above n 23 and discussed in Chapter One at 2.4.

³³ Maritime New Zealand, *Maritime Rules Part 22 - Collision Prevention* (Wellington, 30 July 2009) at para 22.3, and as outlined in the Part Objective at p iii.

³⁴ Maritime New Zealand, *Maritime Rules Part 91 – Navigation Safety Rules* (Wellington, 4 September 2008), as outlined in the Part Objective at p ii.

³⁵ *Maritime Rules Part 91 – Navigation Safety Rules*, above n 34, as outlined in the Part Objective at p ii.

³⁶ *Maritime Rules Part 80 Marine Craft Used For Adventure Tourism*, above n 23, as outlined in the Part Objective.

³⁷ “Man admits charge over girl’s waterski death”, *New Zealand Herald*, above n 9.

navigation safety rule, travelling over 5 knots within 50 metres of a water skier.³⁸ Curtis was fined \$3000 and ordered to pay reparation of \$20,000 to the family of the victim.³⁹

Almost any accident in these high-risk adventure sports using a ship will cause unnecessary danger to another person. In most of these sports, there is a fine line between excitement and tragedy. Both commercial operators and recreational participants must ensure their conduct does not endanger others. Commercial operators who take others into their care must be especially sensitive to safety. Use of the MTA in this context is likely to rise, as industries such as jet boating and white water rafting flourish.

2.3 Limits in application

The application of the MTA to water-based activities is not unlimited. The statute only covers water-based activities using a ship. Sports using flotation devices such as body boarding, surfing and river surfing or river boarding are probably not covered. River surfing involves navigating rapids while lying prone on a small one metre board using fins attached to feet for propulsion and steering. Life jackets, helmets, wetsuits and booties are usually worn. In commercial operations, guides offer advice and lead the way downriver.⁴⁰

A river surfing board was held not to be a “boat” in the context of a proposed District Plan for regulating commercial boating activity on the Kawarau River.⁴¹ To include a small one metre board as a boat would be to include a horse, elephant, or life jacket⁴² or, more absurdly, anyone in a backyard swimming pool with float rings. Similar reasoning must extend to the definition of a ship in the MTA, which is concerned with regulation of larger marine craft.⁴³

³⁸ C Meng-Yee, “Boat driver in torment over lake fatality”, 19 July 2009, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 1 September 2009).

³⁹ A M Eriksen, “Sentence upsets family of slain girl, 9”, 15 July 2009, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 17 July 2009).

⁴⁰ *Queenstown River Surfing Ltd v Central Otago District Council* [2006] NZRMA 1, at [3]-[4].

⁴¹ *Ibid.* At [12].

⁴² *Ibid.* At [11].

⁴³ MTA, s 2.

2.4 Maritime Rules Part 80 - marine craft used for adventure tourism

Part 80 of the Maritime Rules was enacted in response to a number of white water rafting deaths.⁴⁴ Two codes of practice based on industry standards are incorporated into the legislation. One code covers commercial jet boating. The other covers commercial rafting on rivers. The codes do not create new criminal offences, but provide special standards or guidelines for commercial jet boat and raft operators. A breach is presumed to be an act or omission causing unnecessary danger or risk to another person.⁴⁵ Further codes of practice may be added.⁴⁶ In response to a recent tragedy, Maritime New Zealand is developing a code of practice for river surfing⁴⁷ that could be incorporated into Part 80.

3 The Civil Aviation Act 1990

3.1 Coverage

The CAA applies to accidental death or injury that occurs during adventure sports using the airspace. Under this Act, the Civil Aviation Authority of New Zealand⁴⁸ monitors adherence to rules of operation to promote aviation safety.⁴⁹ The statute applies directly to any adventure sport involving an “aircraft”, defined as “any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth”.⁵⁰ Clearly this includes aeroplanes and helicopters used in extreme sports such as aerobatic displays or air racing, where high-speed racing planes fly around course markers.⁵¹ Hot-air ballooning is also covered.⁵²

The CAA applies more indirectly to other adventure sports. Specific parts of the Civil Aviation Rules regulate a number of adventure sports. Gyrogliding and parasailing

⁴⁴ “Tiki tour for adrenalin junkies”, *New Zealand Herald*, above n 2.

⁴⁵ MTA, s 66.

⁴⁶ *Maritime Rules Part 80 Marine Craft Used For Adventure Tourism*, above n 23, as outlined in the Part Objective.

⁴⁷ Maritime New Zealand, “River Rescue Training Workshop”, 19 November 2008, available online at www.maritimenz.govt.nz (last accessed 25 August 2009).

⁴⁸ As per CAA, s 72A.

⁴⁹ As explained by the Civil Aviation Authority website, www.caa.govt.nz.

⁵⁰ CAA, s 2(1).

⁵¹ For more detailed information on air racing, visit www.redbullairrace.com.

⁵² *Paalvast v Civil Aviation Authority* 28/2/06, Heath J, HC Rotorua CRI 2005-462-82, per Heath J at [18] holding that a “hot air balloon plainly falls within the definition of ‘aircraft’ in s 2”.

are covered.⁵³ Gyrogliders are non-powered aircraft towed by a boat or vehicle and capable of carrying a person. As the boat or vehicle accelerates, the aircraft maintains flight “by the reaction of the air on one or more rotors”.⁵⁴ In parasailing a rider is attached to an open circular parachute, which is in turn attached to a motorboat or motor vehicle.⁵⁵ The boat or vehicle accelerates, lifting the rider into the air.

The Civil Aviation Rules also cover parachuting and skydiving⁵⁶ and sports using microlight aircraft⁵⁷ or gliders.⁵⁸ Hang gliders, or foot-launched aircraft without motors that use a fabric wing to support an airframe and rider, come within the scope of the Act.⁵⁹ Paragliders, or foot-launched aircraft where a pilot sits in a harness suspended below a fabric wing,⁶⁰ are similarly covered.

More novel and obscure activities might also fall under the CAA. For instance, BASE jumping should be caught by the rules for skydiving and parachuting. BASE jumping involves jumping off a building, antenna, span, or part of the earth and free falling briefly before making a parachute landing. A large part of a BASE jump involves the use of a parachute. Some places overseas, like Yosemite National Park in the USA, prohibit the activity.⁶¹ The sport does not appear to be illegal anywhere in New Zealand.

3.2 *The offence provisions*

Sections 43, 43A and 44 are the main provisions used where accidental death or injury occurs during participation in aerial adventure sports covered by the CAA. Section 43A makes it an offence to operate an aircraft in a careless manner. Some

⁵³ Civil Aviation Authority of New Zealand, *Civil Aviation Rules Part 101 Gyrogliders and Parasails; and Unmanned Balloons, Kites, Rockets, and Model Aircraft – Operating Rules* (30 August 2007).

⁵⁴ *Ibid.* At p 6.

⁵⁵ *Ibid.* At p 8.

⁵⁶ Civil Aviation Authority of New Zealand, *Civil Aviation Rules Part 105 Parachuting – Operating Rules* (22 June 2006).

⁵⁷ Civil Aviation Authority of New Zealand, *Civil Aviation Rules Part 103 Microlight Aircraft – Operating Rules* (1 March 2007). For an application of the CAA to microlight aircraft, see: *Griffin v Civil Aviation Authority* 7/8/97, Paterson J, HC Rotorua AP 26/97.

⁵⁸ Civil Aviation Authority of New Zealand, *Civil Aviation Rules Part 104 Gliders – Operating Rules* (1 March 2007).

⁵⁹ Civil Aviation Authority of New Zealand, *Civil Aviation Rules Part 106 Hang Gliders – Operating Rules* (1 March 2007).

⁶⁰ *Ibid.*

⁶¹ Luong, Q-Tuan, “BASE jumping in Yosemite”, *Yosemite Rock Page* available online at www.terrageria.com/mountain/info/yosemite/base.html (last accessed 14 September 2009).

might view simple participation in adventure sports as careless behaviour, but precautions can be taken. This might mean avoiding carelessly high speeds, low altitudes, or flying too close to other aircraft. The maximum fine under section 43A is \$7000 for an individual, or \$35,000 for a body corporate.

Sections 43 and 44 create broad offences of endangerment similar to sections 64 and 65 of the MTA. Section 44 makes it an offence to operate, maintain, or service an aircraft or aeronautical product (any part of an aircraft) “in a manner which causes unnecessary danger to any other person”. Anyone who causes or permits this conduct can be criminally liable. Actual harm is not required, only the causing of unnecessary danger. Section 43 provides an identical offence in relation to holders of an aviation document.⁶²

As under the MTA, operators, participants, employers, owners, managers and service providers must avoid causing unnecessary danger to other people during adventure sports covered by the CAA. Emergency operations might be excused, as might high risk stunts that are acceptable in adventure sports but not in everyday activities. An individual is liable to imprisonment for up to 12 months or a fine of up to \$10,000. A body corporate is liable for a maximum fine of \$100,000.

The Civil Aviation Rules provide guidelines for airspace users. Part 91 provides general operating and flight rules applicable to all aircraft flying in the New Zealand aviation environment.⁶³ Part 91 is intended to ensure that “safe operation of aircraft is possible with the minimum endangerment to persons and property”.⁶⁴ Coverage extends from low flying and aircraft safety, to crewing, equipment, visual flight rules and noise limits.⁶⁵ Special rules are provided for aerobatic flight,⁶⁶ parachute-drop operations⁶⁷ and emergency parachute assemblies.⁶⁸ Every “participant in the civil

⁶² Defined in CAA, s 2, as: “any licence, permit, certificate, or other document issued under this Act to or in respect of any person, aircraft, aerodrome, aeronautical procedure, aeronautical product, or aviation related service.”

⁶³ Civil Aviation Authority of New Zealand, *Civil Aviation Rules Part 91 General Operating and Flight Rules* (23 October 2008).

⁶⁴ Civil Aviation Authority, “Part 91 General Operating and Flight Rules”, available online at www.caa.govt.nz/ (last accessed 14 September 2009).

⁶⁵ *Civil Aviation Rules Part 91 General Operating and Flight Rules*, above n 63.

⁶⁶ *Ibid.* Rule 91.701.

⁶⁷ *Ibid.* Rule 91.705.

aviation system” must comply with the Civil Aviation Rules.⁶⁹ The rules outline safe flying practices. A breach may suggest that a charge under section 43, 43A or 44 is appropriate, but is not presumed to have caused unnecessary danger as in the MTA.⁷⁰

A number of hot-air ballooning cases, some where death was the end result, have been prosecuted under the CAA. In *McKee v Civil Aviation Authority*⁷¹ a hot-air balloon operator was convicted on three counts of low flying and one of careless operation of an aircraft when forced to make an emergency landing in an Auckland intermediate school. In *Civil Aviation Authority v Begbie*⁷² the balloon operator was convicted of failing to ensure the safe operation of the craft and its occupants during flight under Rule 91.201, and of operating the balloon in a careless manner. The balloon became entangled in major electricity lines before falling to the ground. Fortunately, no passengers suffered injury.

*Kollar v Civil Aviation Authority*⁷³ involved a fatal incident. Kollar was convicted of breaching a former civil aviation regulation by flying a balloon in circumstances whereby avoidable danger to life or property was likely to ensue. Kollar was piloting the balloon when it was blown 200 metres offshore. The balloon landed in the sea and three people died. The trial judge found Kollar had failed to keep proper lookout for weather changes during the flight. Kollar was acquitted of one charge of careless flying.⁷⁴

3.3 Limits in application

The CAA does not cover all aerial adventure sports. One example is the fly-by-wire amusement ride, found in Paekakariki and Queenstown. The fly-by-wire involves what might commonly be described as an aircraft except that it remains attached to the ground. A rider is strapped into the rocket-like craft and suspended by wires at a height above the earth. The craft is released and swings rapidly back towards earth. An engine is used to keep the craft flying but the rocket never fully detaches from the

⁶⁸ *Civil Aviation Rules Part 91 General Operating and Flight Rules*, above n 63 Rule 91.707.

⁶⁹ CAA, s 12(2).

⁷⁰ MTA, s 66.

⁷¹ *McKee v Civil Aviation Authority* 3/10/06, Harrison J, HC Auckland CRI-2005-404-289.

⁷² *Civil Aviation Authority v Begbie* [2003] DCR 657.

⁷³ *Kollar v Civil Aviation Authority* 14/5/97, Hansen J, HC Christchurch AP 76-97.

⁷⁴ Under CAA, s 43A.

wires.⁷⁵ In *Clark v Dunning Thornton Consultants Ltd*,⁷⁶ a Swedish tourist was injured when the Queenstown fly-by-wire malfunctioned. Charges were laid under the HSEA, not the CAA.

3.4 Civil Aviation Rules proposed Part 115 - adventure aviation

A new Part 115 for the Civil Aviation Rules has been proposed to govern “adventure aviation”. Part 115 would cover “those activities where passengers are carried in the air for hire or reward for the purpose of the enjoyment of the flight or aerial activity itself”.⁷⁷ The proposal recognises that increased commercialisation of aviation adventure activities in recent years has led to many rules becoming outdated.⁷⁸ Part 115 could replace the rules for specific adventure sports contained in Parts 101 and 103-106.⁷⁹ Alternatively, a set of general requirements supplemented by certain sub-parts pertaining to specific activities could be provided.

4 The Health and Safety in Employment Act 1992

4.1 Coverage

The HSEA regulates workplace health and safety. It imposes a general duty of care on people involved in the workplace to take all practicable steps to ensure the health and safety of others while at work.⁸⁰ Numerous people owe duties under the statute including employers, employees, principals, contractors and sub-contractors,⁸¹ certain volunteers⁸² and even the Crown.⁸³

Any adventure sport operation involving work or a place of work is covered. Commercial water-based adventure sports that do not involve a ship are often covered by the HSEA. In August 2009, Mad Dog River Boarding pleaded guilty in the

⁷⁵ “Injured tourist recovering”, 17 November 2001, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 8 September 2009).

⁷⁶ *Clark v Dunning Thornton Consultants Ltd* 8/7/05, Mackintosh ACJ, DC Wellington CRN 2085012862, at [24]. (*Clark*).

⁷⁷ *Adventure Aviation. Policy for the introduction of a new rule Part 115 for the regulation of the sector of the aviation industry involved in adventure aviation*, above n 5 at p 7.

⁷⁸ *Ibid.* At p 1.

⁷⁹ See Chapter One at 3.1.

⁸⁰ HSEA, s 5(d)(i).

⁸¹ HSEA, ss 15-19.

⁸² HSEA, s 3C.

⁸³ HSEA, s 3.

Queenstown District Court to three charges of failing to take all practicable steps to ensure the safety of customers, employees and other clients. The charges related to the death of English tourist Emily Louise Jordan, while river boarding on the Kawarau River under the supervision of the company. A Maritime New Zealand investigation found that the company could have taken steps to manage hazards on the river that day including carrying proper ropes, using a jet ski for rescue operations and having a safe operational plan that was up to industry standards.⁸⁴

As noted already, commercial aerial adventure sports not using an aircraft might be covered by the HSEA.⁸⁵ Further, the statute applies to commercial land-based adventure sports. For instance, the Department of Labour has charged Ferg's Kayaks in Wellington with failing to take all practicable steps to avoid harm, after a teenage girl fell eight metres from a climbing wall operated by the company in December 2008.⁸⁶

4.2 Duty sections

Employers are under strict duties in the HSEA. They must take all practicable steps to ensure the safety of employees while at work.⁸⁷ This requires identification, elimination, isolation or minimisation of all hazards and appropriate training and education of employees.⁸⁸ The term "employees" excludes independent contractors but includes volunteers in some circumstances.⁸⁹ A similar duty is owed to people other than employees. An employer must "take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person".⁹⁰ Employers in the adventure tourism sector must take steps to ensure employees and operators are not unreasonably exposed to harm.⁹¹ In addition, employees must be well trained and supervised as the employer may be accountable for any unsafe

⁸⁴ Maritime New Zealand, "Conviction a wake-up call to whitewater industry", 25 August 2009, available online at www.maritimenz.govt.nz (last accessed 25 August 2009).

⁸⁵ Discussed in Chapter One at 3.3, see: *Clark*, above n 76.

⁸⁶ "Ferguson's company facing court action", 14 July 2009, *One News*, available online at www.tvnz.co.nz (last accessed 14 July 2009).

⁸⁷ HSEA, s 6.

⁸⁸ HSEA, ss 6-13.

⁸⁹ HSEA, s 3C.

⁹⁰ HSEA, s 15.

⁹¹ *Department of Labour v Sir Edmund Hillary Outdoor Pursuits Centre of New Zealand* 20/3/09, A E Kiernan J, DC Auckland CRI-2008-068-000565. (*Outdoor Pursuits Centre*).

practice on the part of the employee. Even small errors can result in tragedy and criminal liability.⁹²

Several other groups owe a similar duty to take all practicable steps to ensure workplace safety including the self-employed,⁹³ principals,⁹⁴ and employees.⁹⁵ Liability extends further under section 16. Every “person who controls a place of work” must take all practicable steps to ensure no hazard arising in the place of work harms certain people. Owners, lessees, sub-lessees, bailees, employers or others in possession of a place of work are placed under this duty. A place of work can be a place, structure, or vehicle and may be mobile or temporary.⁹⁶ Designed to cover unforeseen gaps,⁹⁷ the wide duty is owed to anyone at, or in the vicinity of, a workplace. Owners and operators of commercial adventure activities must ensure spectators are kept well back from any danger areas. If a device snaps or a boat or vehicle gets away, the owners and operators may be liable for any harm caused.⁹⁸

4.3 All practicable steps

The qualification “all practicable steps”⁹⁹ is similar to the common law test for negligence, but should be applied independently as the statutory language may be more demanding.¹⁰⁰ Essentially, a duty holder must take all steps that are reasonably practicable in the circumstances.¹⁰¹ Certain factors must be considered, including the severity of harm, the current state of knowledge about the likelihood of harm, knowledge of the means available to counter the risk, and the cost and availability of those means.¹⁰²

⁹² *Outdoor Pursuits Centre*, above n 91.

⁹³ HSEA, s 17.

⁹⁴ HSEA, s 18.

⁹⁵ HSEA, s 19.

⁹⁶ HSEA, s 2.

⁹⁷ Department of Labour, *Health and Safety in Employment Act 1992 – A Guide to* (2nd ed, July 2003), available online at www.dol.govt.nz (last accessed 1 September 2009), at para 4.1.

⁹⁸ M Smyth, “Preventing Tragedies in the Sporting Arena” in E Toomey (ed) *Keeping the Score: Essays in Law and Sport* (The Centre for Commercial and Corporate Law, 2005), at pp 188-190.

⁹⁹ For a full definition see HSEA, s 2A.

¹⁰⁰ *Mazengarb’s Employment Law Bulletin*, (LexisNexis Butterworths: 2007) para 6002A.4.1 (updated 28/08/2009).

¹⁰¹ *Attorney-General v Gilbert* [2002] 2 NZLR 342 (CA), para [83]. (*Gilbert*).

¹⁰² *Ibid.*

The foreseeability of harm and risk at the time help to determine if all practicable steps have been taken to overcome that risk.¹⁰³ A person is required to take only those practicable steps a person knows or ought reasonably to know about in the circumstances at the time.¹⁰⁴ Courts should condemn “unacceptable employment practices” assessed in context.¹⁰⁵

Determining reasonable conduct in adventure sports may be a novel assessment for the Courts. Having a high level of inherent danger, what is practicable in the adventure sport context might differ substantially from what is practicable in everyday life. Operators may be justified in exposing a participant to a higher level of harm and risk.¹⁰⁶

Voluntary codes of practice designed and developed by industry leaders can help to define reasonable conduct.¹⁰⁷ An example is the *Code of practice for bungy jumping*,¹⁰⁸ which outlines standards for the erection, use, maintenance and supervision of bungy jumping operations. Where no specific code of practice exists, Sport and Recreation New Zealand has developed general *Guidelines for Risk Management in Sport and Recreation*.¹⁰⁹ Such codes are voluntary standards and do not conclusively draw a line between acceptable conduct and criminal behaviour. However, they may outline common industry practice in relatively new and highly dangerous sports.¹¹⁰

4.4 The offence provisions

There are two main offence provisions. Section 50 makes it an offence to fail to comply with any listed provision in the HSEA. The offence is one of strict liability.¹¹¹

¹⁰³ Gilbert, above n 101, at para [83].

¹⁰⁴ HSEA, s 2A(2).

¹⁰⁵ Gilbert, above n 101, at para [83].

¹⁰⁶ M Smyth, “Preventing Tragedies in the Sporting Arena”, above n 98 at pp 180-182.

¹⁰⁷ Ibid.

¹⁰⁸ Standards Australia and Standards New Zealand, *Australia/New Zealand Standard. Code of practice for bungy jumping*, AS/NZS 5848:1992.

¹⁰⁹ Standards New Zealand, Sport and Recreation New Zealand (SPARC) and Accident Compensation Corporation (ACC), *New Zealand Handbook. Guidelines for Risk Management in Sport and Recreation*, SNZ HB 8669:2004.

¹¹⁰ M Smyth, “Preventing Tragedies in the Sporting Arena”, above n 98 at p 181.

¹¹¹ HSEA, s 53.

The maximum penalty is a \$250,000 fine, although reparation may be awarded.¹¹² Section 49 makes it an offence to take an action forbidden, or fail to do an action required, by the Act, knowing that action or failure is reasonably likely to cause serious harm to any person. The maximum penalty for this offence is imprisonment for two years, a \$500,000 fine or both

*4.5 Department of Labour v Sir Edmund Hillary Outdoor Pursuits Centre of New Zealand*¹¹³

Prosecutions are usually laid under section 50 when workplace malpractice leads to accidental injury or death during adventure sports. A recent example is the *Outdoor Pursuits Centre*¹¹⁴ case. In mid-April 2008, a group of teenage students and their teacher from Elim Christian College in Auckland were swept away in a flash flood in the Mangatepopo Gorge. The group was participating in an upstream gorge walk organised by the Outdoor Pursuits Centre when the weather turned nasty. The group became trapped on a ledge by rising floodwaters and attempted to swim to safety. Seven members of the group were swept away and drowned.¹¹⁵

The Centre pleaded guilty to two charges under section 50. First, the centre failed to take all practicable steps to ensure the safety of its employee while at work.¹¹⁶ Second, the centre failed to take all practicable steps to ensure no action or inaction of its employee while at work harmed any other person.¹¹⁷ Kiernan J held that the defendant should have closed the gorge walk on that day as heavy rain was forecast. Heavy rainfall is common in that area and the gorge has limited exit points.¹¹⁸

Furthermore, the Centre should have obtained adequate weather information by way of registration to the Met Service severe storm warning service, or by properly monitoring the Met Service website. The guide had insufficient experience to decide whether to enter the gorge in such weather and the Centre should have checked up on

¹¹² *Outdoor Pursuits Centre*, above n 91.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.* At [5].

¹¹⁶ *Ibid.* At [1]. As per the duty in the HSEA, s 6, described in Chapter One at 4.2.

¹¹⁷ *Ibid.* At [2]. As per the duty in the HSEA, s 15, described in Chapter One at 4.2.

¹¹⁸ *Ibid.* At [63]-[70].

the group when the weather closed in.¹¹⁹ The Centre was fined \$40,000 and ordered to pay reparation of \$440,000.¹²⁰

4.6 Limits in application

The *Outdoor Pursuits Centre* case demonstrates the width of the HSEA. Owners and operators of commercial adventure activities must guard against harm arising to participants, employees, spectators, passers-by or other indirectly connected persons.¹²¹ Yet the HSEA is limited to workplace health and safety. Recreational sports are not covered and in some situations neither are commercial adventure activities. These limits are explored further in Chapter Two.¹²²

5 The Crimes Act 1961

The CA is generally used in two circumstances when accidental death or injury occurs during adventure sports. First, the CA may be used when the specific regulatory regimes fail to cover a situation. Secondly, the CA provides stricter sanctions for more serious offending. The severe consequences for even minor errors in adventure sports make a prosecution under the CA an ever-present threat for both operators and participants.

Two main charges are used. A charge of manslaughter is available where accidental death is caused by an unlawful act or an omission to perform a legal duty.¹²³ A charge of criminal nuisance is available where the accused recklessly endangers the life, safety or health of any other person.¹²⁴ Naturally, other general offences against the person are available where the accused intends to injure or cause harm to another. This paper restricts discussion to criminal nuisance and manslaughter.

¹¹⁹ *Outdoor Pursuits Centre*, above n 91 at [63]-[70].

¹²⁰ *Ibid.* At [100]-[102]: reparation comprised \$60,000 to the family of each deceased victim and \$5000 to the family of each surviving victim.

¹²¹ M Smyth, "Preventing Tragedies in the Sporting Arena", above n 91 at pp 188-190.

¹²² In Chapter Two at 1.2.

¹²³ CA, ss 160(2)(a) or (b).

¹²⁴ CA, s 145.

5.1 *The legal duties*

Three legal duties, under sections 155-157, must first be examined. These overlapping duties¹²⁵ can form the basis for a charge of manslaughter or one of criminal nuisance. As they concern dangerous acts, omissions and dangerous things, the legal duties apply directly to most adventure sports.

First, section 155 imposes a legal duty on a person who undertakes to do a lawful act, the doing of which may be dangerous to life, to have and to use reasonable knowledge, care and skill in doing that act. In the adventure sport context, many commercial operators and some recreational participants would be subject to this legal duty. Adventure sports are lawful acts often pursued specifically for the element of danger to life or risk that they pose. For instance, a hang gliding pilot who carries a passenger on a flight is under a legal duty to have reasonable knowledge about how to operate a hang glider. The pilot must then take reasonable care and skill to ensure the life of the passenger is not endangered by, for instance, failing to perform a routine “hang test” to ensure the passenger is strapped in.¹²⁶

Section 156 imposes a legal duty on anyone who has anything whatever in their charge or under their control, or who erects, makes, operates, or maintains anything whatever, which in the absence of precaution or care may endanger human life. The person must take reasonable precautions against and use reasonable care to avoid such danger to human life. The section applies to inherently dangerous things and anything dangerous because of the surrounding environment or mode of operation.¹²⁷

Section 156 creates an extremely wide legal duty¹²⁸ that encompasses most adventure activities using dangerous equipment. In past cases, motor vehicles,¹²⁹ aircraft,¹³⁰ motorised farm bikes,¹³¹ powerboats,¹³² jet skis¹³³ and hang gliders¹³⁴ have been

¹²⁵ *Adams on Criminal Law*, (Thomson Brookers, 2007) para CA157.01 (updated 19/02/2009).

¹²⁶ *R v Parson* 4/6/04, Fogarty J, HC Christchurch CRI-2003-025-004488. (*Parson*).

¹²⁷ *Adams on Criminal Law*, above n 125, para CA 156.02

¹²⁸ *Ibid.* Para CA156.01.

¹²⁹ *R v Powell* [2002] 1 NZLR 666. (*Powell*).

¹³⁰ *R v Nicholson* 16/4/91, CA397/90.

¹³¹ *R v Vanner* 23/2/06, Rodney Hansen J, HC New Plymouth CRI-2005-021-1091.

¹³² *R v Myatt* [1991] 1 NZLR 674. (*Myatt*).

¹³³ *Hare*, above n 18.

regarded as things that in the absence of precaution or care can endanger human life. Such things are commonly used in adventure sports. More expansively, dangerous things might extend to intangibles such as organised cycling events.¹³⁵

Numerous hypothetical scenarios can be envisaged where a person involved in an adventure activity is subject to this legal duty. A bungee jump platform, for instance, would qualify as anything that “may in the absence of precaution or care endanger human life”. The person in charge or control of the jumping platform must ensure reasonable precautions are taken to avoid danger to human life. This may entail securely fencing off the platform, performing rigorous safety checks and ensuring safe operation. Failure to do so, causing danger to human life, might breach this legal duty. A person need not have exclusive control of the dangerous thing, and a breach of the legal duty can be found where the unlawful act of another contributes to the consequences of the breach.¹³⁶

The duties to take reasonable care under sections 155 and 156 are “predicated on danger to human life”.¹³⁷ Threat to human life is required and risk of serious harm alone is not enough.¹³⁸ What is needed is a “risk of danger to life itself”,¹³⁹ which means “a reasonable possibility of death resulting if reasonable care is not taken.”¹⁴⁰

For a charge of manslaughter (or any other under Part 8 of the CA) the accused is criminally responsible only if in the circumstances the breach is a “major departure from the standard of care expected of a reasonable person” under such a duty.¹⁴¹ The “major departure” test does not apply to sections 155-157 when used as the basis for a charge of criminal nuisance, which sits in Part 7 of the CA.¹⁴² However, as recklessness is required to prove a charge of criminal nuisance this distinction is

¹³⁴ *Parson*, above n 126.

¹³⁵ *R v Andersen* [2005] 1 NZLR 774. (*Andersen*).

¹³⁶ *Adams on Criminal Law*, above n 125, para CA 156.01.

¹³⁷ *Myatt*, above n 132 at p 681 line 22.

¹³⁸ *Ibid.* At p 681 line 22-23, citing *R v Moore* [1954] NZLR 893.

¹³⁹ *Ibid.* At p 681 line 24.

¹⁴⁰ *Ibid.* At p 681 line 24-25.

¹⁴¹ CA, s 150A.

¹⁴² *Andersen*, above n 135 at [66].

largely irrelevant.¹⁴³ Appreciation of a risk by an accused will usually show a “major departure from the underlying duty of care”.¹⁴⁴

In *R v Myatt*,¹⁴⁵ the Court of Appeal held that a person with a professional qualification is not under a duty to take any higher degree of care.¹⁴⁶ The test for negligence is objective. As the Court noted, an “ordinary person should not operate a power boat in circumstances of danger to life unless possessed of a degree of reasonable skill”.¹⁴⁷ For many adventure sports it will not be reasonable to undertake the activity unless suitably qualified or skilled. In *Myatt*, the test was whether the accused exercised the “reasonable knowledge, skill and care” expected of a “reasonable boatman or boatwoman”.¹⁴⁸

Lastly, section 157 imposes a legal duty on anyone who undertakes to do any act, the omission of which is or may be dangerous to life, to do that act. Undertakings may include a promise to give assistance or to take safe action.¹⁴⁹ Again this duty will be imposed almost routinely on people involved in adventure sports. Commercial operators in particular at least impliedly undertake to keep a person safe during participation in an adventure activity.¹⁵⁰

In *R v Crump*,¹⁵¹ Tompkins J noted that although section 157 makes no mention of “reasonable” conduct, care, or skill, the prosecution must still prove a high degree of negligence for a manslaughter charge based on this duty. The case involved a manslaughter charge based on the duty in section 157. Five youths in the back compartment of a Landrover drowned after the vehicle veered over a bank and fell into a dam. The accused was discharged before trial.

¹⁴³ *Andersen*, above n 135 at [66].

¹⁴⁴ *Ibid.*

¹⁴⁵ *Myatt*, above n 132.

¹⁴⁶ *Ibid.* At p 682 lines 20-22.

¹⁴⁷ *Ibid.* At p 682 lines 30-32.

¹⁴⁸ *Ibid.* At p 682 line 27.

¹⁴⁹ *Adams on Criminal Law*, above n 125, para CA157.01.

¹⁵⁰ *Parson*, above n 126 at [10].

¹⁵¹ *R v Crump* 24/3/70, Tompkins J, Supreme Court, noted [1970] *Recent Law Review* 191.

The duty provisions do not create criminal offences. A person is simply “criminally responsible”, or liable to punishment for an offence,¹⁵² for the consequences of failure to discharge the legal duty.¹⁵³ If death results through an omission to perform one of these legal duties, a charge of manslaughter might be appropriate.¹⁵⁴ An omission can also form the basis of a charge of criminal nuisance.¹⁵⁵

5.2 Manslaughter

Accidental death during adventure sports may sustain a charge of manslaughter. Section 160(2)(b) is used where death is caused by omission without lawful excuse to perform a legal duty, in particular one of the legal duties just outlined in 5.2.

In *R v Hare*¹⁵⁶ a person was killed as a result of a failure to perform the legal duty in section 156. The case involved the collision of a jet ski and a small runabout. Hare was an inexperienced jet ski user, who failed to read the instructions on how to turn the ski when in use. The throttle had to be engaged to turn the ski. Hare was making a “sweeping right hand turn” when he saw the runabout. He attempted to turn the ski but had throttled off and the two craft collided. The driver of the runabout died three days later.¹⁵⁷

The jury found Hare’s conduct to be a major departure from the standard of care expected of a reasonable person in charge or control of a jet ski.¹⁵⁸ The Court of Appeal agreed, citing a failure to read instructions, a failure to keep proper lookout and riding at excessive speed.¹⁵⁹ Hare was sentenced to 18 months imprisonment.¹⁶⁰ Another case, currently committed for trial, concerns a charge of manslaughter where a Massey University student was killed while bridge swinging under the supervision

¹⁵² CA, s 2.

¹⁵³ *Adams on Criminal Law*, above n 125, para CA155.08.

¹⁵⁴ CA, s 160(2)(b).

¹⁵⁵ CA, s 145; *Andersen* above n 135.

¹⁵⁶ *Hare*, above n 18.

¹⁵⁷ *Ibid.* At para 2-5.

¹⁵⁸ *Ibid.* At para 8.

¹⁵⁹ *Ibid.* At para 23.

¹⁶⁰ *Ibid.* At para 39.

of an adventure sports company. Allegedly, the rope was not properly tied off at the bridge end.¹⁶¹

A charge of manslaughter may also be available under section 160(2)(a), where the killing of another person is done by an unlawful act. The act must be a “substantial and operative cause” of the death.¹⁶² Any breach of criminal law will do,¹⁶³ but in *R v Powell*¹⁶⁴ the Court of Appeal held that an unlawful act proven by ordinary negligence is not an unlawful act for the purposes of unlawful act manslaughter.¹⁶⁵ The “major departure” test must be met.¹⁶⁶ The Court indicated that, where possible, charges be drawn up by reference to the legal duties, thereby expressly activating the “major departure” test.¹⁶⁷

In adventure sports, the unlawful act might include a breach of a local navigation bylaw, a Maritime Rule or one of the Civil Aviation Rules. *R v Myatt*¹⁶⁸ involved a collision of two powerboats on a blind arm of the Waikato River near Lake Ohakuri. Two people died and a third was injured. The boats first saw each other at a distance of about 100 metres as they rounded the bend. Both boats were travelling at a speed of 20 knots and were on a collision course. The other boat veered to starboard so as to pass port side to port side. The accused veered to port believing the other boat might be towing a water skier. The two boats collided.¹⁶⁹

One charge laid was manslaughter by an unlawful act. The Crown alleged that Myatt was travelling at an unlawful speed in breach of a local Lake Waters Control Bylaw.¹⁷⁰ Further, the Crown alleged Myatt had breached certain international

¹⁶¹ A Leask, “Fatal bridge fall victim’s final seconds”, 30 August 2009, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 30 August 2009).

¹⁶² K Dawkins, “Criminal Law” [2003] NZ Law Review 569, 570-571.

¹⁶³ *Adams on Criminal Law*, above n 125, para CA145.02.

¹⁶⁴ *Powell*, above n 129.

¹⁶⁵ *Ibid.* At [31]-[34].

¹⁶⁶ CA, s 150A; *Powell*, above n 129.

¹⁶⁷ *Ibid.* At [35].

¹⁶⁸ *Myatt*, above n 132.

¹⁶⁹ *Ibid.* At pp 675-676.

¹⁷⁰ Being regulation 56(a)(iii) and (iv) of the Rotorua District Lake Waters Control Bylaw 1979 – breached by travelling at a speed greater than five knots when passing within 200m of the edge of the water and when passing within 30m of another vessel. See *Myatt*, above n 132 at p 676.

collision regulations, adopted under New Zealand law,¹⁷¹ requiring him to avoid collision by keeping to the starboard side of the channel and passing port side to port side.

The Court of Appeal upheld the jury verdict, which acquitted Myatt of all charges.¹⁷² The Court noted that many Acts, regulations and bylaws create offences, but to form the basis of a charge of manslaughter a breach must be “likely to do harm to the deceased or a class of persons to whom the deceased belonged”.¹⁷³ Acts that are harmless to others do not qualify.¹⁷⁴ A risk of serious harm need not be created, “if the unlawful act is dangerous then the risk of some harm is sufficient”.¹⁷⁵ It is worth reiterating that most codes of practice adopted by adventure sports operators are voluntary standards. A breach of such a code, while useful in evidencing reasonable conduct,¹⁷⁶ will not qualify as an unlawful act for the purposes of unlawful act manslaughter.

5.3 Criminal nuisance

A charge of criminal nuisance is available when accidental injury or death occurs during adventure sports.¹⁷⁷ A person commits criminal nuisance who does “any unlawful act or omits to discharge a legal duty” knowing that act or omission “would endanger the life, safety, or health” of another person. Actual harm or injury is not required, but actual endangerment of life, safety or health is.¹⁷⁸ To endanger means to “put someone in peril of something untoward happening” or to materially increase the risk of peril to another.¹⁷⁹

¹⁷¹ Being the International Regulations for Preventing Collisions at Sea which applied under regulation 5(2) of the Shipping (Distress Signals and Prevention of Collisions) Regulations 1988 to every kind of vessel on any river, lake or inland water, subject to any special rules made by an appropriate authority in respect of such rivers, lakes and inland waterways. See *Myatt*, above n 132 at p 677.

¹⁷² *Myatt*, above n 132 at p 683 line 12.

¹⁷³ *Ibid.* At p 678 line 53.

¹⁷⁴ *Ibid.* At p 678 line 53.

¹⁷⁵ *Ibid.* At p 681 line 8.

¹⁷⁶ M Smyth, “Preventing Tragedies in the Sporting Arena”, above n 98 at p 181.

¹⁷⁷ CA, s 145.

¹⁷⁸ *Adams on Criminal Law*, above n 125, para CA 145.06.

¹⁷⁹ *R v Turner* (1995) 13 CRNZ 142 (CA), at p 151.

In *R v Andersen* the Court of Appeal held that the offence requires proof of recklessness.¹⁸⁰ The accused must have known there was a real risk the act or omission might endanger the life, health or safety of any other person, and decided to proceed regardless of that risk.¹⁸¹ *Andersen* involved an annual cycling event from Christchurch to Akaroa known as “Le Race”. A participant, Ms Caldwell, was struck and killed by an oncoming car as she approached a blind corner on the wrong side of the Summit Road.¹⁸²

The organiser, Astrid Andersen, was charged with criminal nuisance. The Crown alleged that Andersen, being in charge of “Le Race 2001”, omitted to discharge her legal duty under section 156 to take reasonable precautions against, and use reasonable care to avoid, endangering human life, such an omission being one that she knew would endanger the life, safety, or health of any individual.¹⁸³

The omission to discharge the duty concerned ambiguous pre-race instructions given out by Andersen. The instructions stated there would be an “official road closure” at the top of the Summit Road. It was alleged that Ms Caldwell had thought this meant the road was closed to all traffic. However, this meant that a checkpoint had been set up to catch rogue cyclists who had not paid race entry fees. The ambiguity supposedly led Ms Caldwell to believe she could safely cycle on the wrong side of the road.¹⁸⁴

Before trial, in the District Court, Judge Abbott had incorrectly ruled that all the Crown must prove was ordinary negligence. At trial, he directed the jury accordingly. Ms Andersen was subsequently convicted and fined \$10,000. The Court of Appeal overturned the conviction, holding that the offence was properly one of recklessness.¹⁸⁵ The Crown had not proven Ms Andersen knew the race instructions she had given out were ambiguous and would endanger the life, health or safety of the race participants. As such, Ms Andersen had not committed criminal nuisance.¹⁸⁶

¹⁸⁰ *Anderson*, above n 135 at [55].

¹⁸¹ *Ibid.* At [25].

¹⁸² *Ibid.* At [1]-[2].

¹⁸³ *Ibid.* At [5].

¹⁸⁴ *Ibid.* At [10]-[12].

¹⁸⁵ *Ibid.* At [55].

¹⁸⁶ *Ibid.* At [62].

The conviction at first instance in *Andersen* shook the sports industry. Diligent organisers feared criminal liability for minor errors leading to accidental injury or death.¹⁸⁷ A few years earlier, charges, including one of criminal nuisance, had been brought against a negligent track official involved in the 1998 Queenstown Classic Car Race.¹⁸⁸ A car had left the track during the race and ploughed into the embankment, killing two spectators.¹⁸⁹ Charges against the official were dropped only after Motorsport New Zealand pleaded guilty to criminal nuisance.¹⁹⁰ The Court of Appeal decision in *Andersen* assuaged the fear somewhat, but the case still highlights the potential width of criminal nuisance. In Chapter Three a new offence of reckless endangerment is considered as a replacement for criminal nuisance.

5.4 More limited use

The CA appears to be less commonly used than the regulatory statutes when accidental injury or death occurs during adventure sports. There are two reasons for this. Firstly, the regulatory statutes are often directly relevant to certain adventure sports. For instance, breach of a local waterway bylaw or a maritime navigation rule causing death seems more appropriately punished as an offence against the MTA than as a charge of manslaughter. Secondly, the CA imposes higher thresholds for liability. Manslaughter effectively requires gross negligence.¹⁹¹ Criminal nuisance requires recklessness.¹⁹² Even so, the CA remains a useful instrument to cover cases missed by the regulatory regimes and to provide higher sanctions for serious offending.

¹⁸⁷ P Charlish “The Astrid Andersen Case” (2004) 4 ISLR 85.

¹⁸⁸ *Osborne v Police* 24/11/00, Young J, HC Christchurch A191/00.

¹⁸⁹ “Track safety raised in court”, 29 May 2001, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 2 September 2009).

¹⁹⁰ “Queenstown rally death charges dropped”, 7 June 2001, *New Zealand Herald*, available online at www.nzherald.co.nz (last accessed 2 September 2009).

¹⁹¹ CA, s 150A.

¹⁹² *Andersen*, above n 135 at [55].

II. INCONSISTENCIES IN THE EXISTING LAW

Chapter One outlined the statutory regimes used to deal with criminal liability for accidental death or injury occurring during participation in adventure sports. This chapter now examines inconsistencies in the application of the criminal law in this context. There are three main issues. First, negligent conduct causing injury or death during an adventure sport is punished only if the activity involved is covered by a regulatory regime.¹⁹³ Secondly, the penalties available for similar offending, especially more serious offending, are often quite varied. Finally, criminal nuisance is reviewed as an outdated and messy crime for dealing with adventure sports accidents.¹⁹⁴

1 Negligence

Negligent conduct causing injury or death during adventure sports is punished erratically. Liability is often the exception, imposed only for certain specified activities. Where there are gaps, the CA catches reckless or grossly negligent conduct, but no general CA provision exists to punish negligent conduct.

1.1 Limits of the specific regulatory regimes

No specific regulatory statute covers land-based adventure sports. Negligent conduct leading to injury or death in such sports as snow skiing, rock climbing, mountaineering, endurance cycling or running races does not appear to attract criminal liability. Specific statutes might be available. The LTA, for instance, governs sports using a “motor vehicle”¹⁹⁵ on a “road”.¹⁹⁶ However most motor sports take

¹⁹³ CAA, MTA and HSEA.

¹⁹⁴ M Smyth, “Preventing Tragedies in the Sporting Arena”, above n 98 at pp 175-179; F. Wright “Criminal Nuisance: Getting Back to Basics” (2005) 21 NZULR 665, at p 676.

¹⁹⁵ Includes: a “street”, “motorway”, “beach” and “place to which the public have access, whether by right or not” (LTA, s 2).

¹⁹⁶ Defined as: “a vehicle drawn or propelled by mechanical power” (LTA, s 2(a)). Specifically excludes, s 2(c): a “vehicle designed for amusement purposes and used exclusively within a place of recreation, amusement, or entertainment to which the public does not have access with motor vehicles”.

place on racetracks, rally courses or other areas to which the public do not have access.¹⁹⁷

There may be no provision for negligent conduct causing injury or death during a water-based sport not involving a ship.¹⁹⁸ As already noted, the MTA fails to cover water-based sports such as river boarding or surfing.¹⁹⁹ Similarly, the CAA applies only to aircraft²⁰⁰ and other specified sports.²⁰¹ The statute does not catch aerial adventure sports such as the fly-by-wire.²⁰² As new sports develop, new gaps will emerge.

1.2 Limits of the HSEA

Negligent conduct causing injury or death during participation in commercial adventure sports can often be prosecuted under the HSEA.²⁰³ Commercial water-based sports that fall outside the scope of the MTA may be covered. An example given was the recent prosecution of Mad Dog River Boarding.²⁰⁴ The HSEA might also be used to prosecute when negligent conduct causes injury or death during a commercial adventure sport using the airspace, such as the fly-by-wire.²⁰⁵ Likewise the statute usually applies to commercial land-based sports.²⁰⁶

However, the HSEA has limits. First, the statute does not apply to recreational adventure sports. As a result, negligent conduct causing injury or death during a recreational land-based adventure sport will go unpunished. Similarly, there may also be no liability for negligent conduct causing injury or death during recreational water-based adventure sports not using a ship, or recreational aerial adventure sports not using an aircraft.

¹⁹⁷ *Sinclair v Police*, 27/03/1991, Tipping J, HC Timaru AP1/91. In this case, a co-driver was killed after the vehicle crashed during an off-road motor rally. The former Transport Act 1962, s 56(1) could not cover the incident as the vehicle was used in a place to which the public had no access.

¹⁹⁸ MTA, s 2.

¹⁹⁹ In Chapter One at 2.3.

²⁰⁰ CAA, s 2.

²⁰¹ Chapter One at 3.1 outlines a list, including: gyrogliding, parasailing, microlight aircraft, parachuting, skydiving, hang gliding, paragliding.

²⁰² *Clark*, above n 76, discussed in Chapter One at 3.3.

²⁰³ HSEA, s 50.

²⁰⁴ Discussed in Chapter One at 4.1. See: Maritime New Zealand, “Conviction a wake-up call to whitewater industry”, above n 84.

²⁰⁵ *Clark*, above n 76, discussed in Chapter One at 3.3.

²⁰⁶ “Ferguson’s company facing court action”, *New Zealand Herald*, above n 86.

Secondly, the HSEA may not cover all commercial activities. The duty in section 16 is limited to a “place of work”.²⁰⁷ This includes places, structures and vehicles,²⁰⁸ but may not include places with more obscure boundaries such as a river, a lake, or the airspace. In *Department of Labour v Diveco Ltd*²⁰⁹ a diving company was held not to have sufficient control over the water between the boat and the seabed, where divers were working, for the area to be classified as a place of work. Conversely, in *Department of Labour v G & A Gray Partnership*²¹⁰ forestry workers were held to control the forest in which they were felling trees. A charge may usually be framed under the duty on employers to take all practicable steps to ensure no action or inaction of an employee harms another person.²¹¹ However it cannot always be shown that an employee caused the death or injury.

In rare situations, accidental injury or death may occur during a commercial adventure sport involving neither a place of work nor action or inaction of any employee. For instance, a negligent co-participant may cause the death or injury. Co-participants owe no duty under the HSEA. The operator may have taken all practicable steps to guard against the hazard of co-participant negligence. The negligent conduct would then go unpunished.

1.3 Gaps in the criminal law

An example using a recreational river boarder can illustrate how a person might escape prosecution for negligent conduct causing death during an adventure sport. Suppose a recreational river boarder leaves a board in the middle of a river after use. A jet boat comes along, swerves to avoid the board and flips over. A passenger aboard the boat is killed. The CA will probably not apply as the failure to remove the board is unlikely to be deemed either a major departure from the standard of care expected of a reasonable person in the circumstances or reckless conduct. Leaving the board in the river is probably an act of ordinary negligence. The MTA, limited to ships, will not cover the situation, and the HSEA is not concerned with recreational activities. The

²⁰⁷ HSEA, s 16.

²⁰⁸ HSEA, s 2.

²⁰⁹ *Department of Labour v Diveco Ltd* 8/11/04, Glazebrook, McGrath, O’Reagan JJ, CA 98/04, at [30].

²¹⁰ *Department of Labour v G & A Gray Partnership* 14/3/03, Dalmer J, DC Masterton CRN 2035006886/87. Cited in *Mazengarb’s Employment Law Bulletin*, above n 100, para 6016.5.

²¹¹ HSEA, s 15.

negligent river boarder would escape prosecution for causing the accident under the existing statutes.

Likewise, a recreational surfer may escape liability for negligent conduct causing death. Say the surfer rides a wave too close to another surfer than is reasonably safe. The surfer crashes into the other, causing their death. The CA will not apply unless the conduct of the first surfer amounts to gross negligence or recklessness. Again the MTA or HSEA will not cover the incident, so the first surfer is not liable. However the death was not purely accidental.

1.4 A general principle of negligent endangerment

The evolving nature of adventure sports highlights the problem of using specific offences to punish dangerous conduct. Gaps necessarily emerge. Only negligent conduct that is recognised as inherently dangerous is punished.²¹² Where acts are equally culpable, the same or similar criminal sanctions should apply. Liability for negligent conduct causing injury or death should be the same regardless of the activity involved or the location of offending.²¹³ Criminal liability for negligence is now too widespread to absolve all negligent acts.²¹⁴ The best solution, explored in Chapter Three, is to introduce a general principle of criminal liability for negligence.

2 The Problem of Penalties

Using a variety of statutes to impose criminal liability for accidental death or injury caused during adventure sports results in similar types of offending being punished quite differently. First, a range of different offence provisions and penalties are usually available to cover a single incident. Second, the broad MTA and CAA provisions cater for too wide a range of conduct without providing a corresponding range of penalties. Inadequate sanctions are provided for serious offending. Graduated

²¹² K J M Smith, "Liability for Endangerment: English Ad Hoc Pragmatism and American Innovation" [1983] *The Criminal Law Review* 127.

²¹³ Although proposing a general offence of reckless endangerment, the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code – Chapter 5: Non Fatal Offences Against the Person Discussion Paper* (August 1996), at p 51, suggested a "plethora of specific offences... taken together, really indicates that a general principle and hence a general offence is involved".

²¹⁴ *Ibid.*

schemes of offence provisions for the MTA and CAA, similar to the driving offences in the LTA, may be the way forward.

In general, the actual sentences imposed appear appropriate in the cases examined. Similar cases are treated similarly, although variations do exist depending on the circumstances. However, the potential remains for incongruent sentences to be imposed for comparable conduct. A possible disparity is shown by two cases involving accidental death during water-based activities. *R v Hare*²¹⁵ involved a jet skier who was convicted of manslaughter and sentenced to imprisonment for 18 months after colliding with a runabout and killing the driver. In comparison, John James Curtis was fined \$3000 fine and ordered to pay \$20,000 reparation after running over a nine year old girl who had fallen off her water-skis.²¹⁶ Both cases were relatively similar, involving accidental loss of life, although Hare appears to have been more culpable in failing to read operating instructions, travelling at high speeds and denying fault throughout the trial.

2.1 The width of available penalties

Outlining the various penalties available offers some idea about the wide range of sanctions. The maximum penalty for causing accidental death during participation in an adventure activity ranges from a \$7000 fine to life in prison. Careless operation of an aircraft attracts a fine of up to \$7000 for an individual, or \$35,000 for a corporation.²¹⁷ Operating an aircraft or a ship in a manner causing unnecessary danger to another person attracts a maximum fine of \$10,000 for an individual, or \$100,000 for a corporation, and an individual may face imprisonment for up to 12 months.²¹⁸

The HSEA provides substantially higher monetary penalties, with a breach of any provision exposing an individual or body corporate to a fine of up to \$250,000.²¹⁹ A breach of a provision knowing that act or omission is likely to cause serious harm attracts a fine of up to \$500,000, imprisonment for up to two years, or both.²²⁰

²¹⁵ *Hare*, above n 18.

²¹⁶ “Man admits charge over girl’s waterski death”, *New Zealand Herald*, above n 9.

²¹⁷ CAA, s 43A.

²¹⁸ CAA, ss 43 and 44; MTA, ss 64 and 65.

²¹⁹ HSEA, s 50.

²²⁰ HSEA, s 49.

Offences under the CA carry liability to sentences of imprisonment, with possible terms ranging from up to one year for criminal nuisance²²¹ and three years for injuring by unlawful act²²² to life for manslaughter.²²³

This creates significant uncertainty for operators and participants in adventure sports. Consider a fatal hot-air ballooning disaster, caused by the gross negligence of a commercial operator. The operator could be exposed to a moderate fine under the CAA of up to \$35,000,²²⁴ or imprisonment for one year.²²⁵ Alternatively, a larger fine of up to \$250,000 could be imposed under the HSEA,²²⁶ provided the balloon's gondola is a "place of work" or employees were involved. More seriously, the operator could be sentenced to life imprisonment for manslaughter.²²⁷ The higher sentences are unlikely but nonetheless available.

2.2 Comparing the regulatory statutes with other enactments

An inadequately low penalty is provided for dangerous operation of a ship or an aircraft²²⁸ as compared to careless or dangerous use of a firearm²²⁹ or a vehicle.²³⁰ No good reason exists for this disparity.

a) The Arms Act 1983

Section 53 of the Arms Act 1983 is used when one hunter accidentally shoots another, usually after mistaking that hunter for quarry, causing injury or death.²³¹ Like adventure sports, hunting is a high-risk and dangerous sport. Causing bodily injury or death to another person by careless use of a "firearm" is an offence.²³² Leaving a

²²¹ CA, s 145.

²²² CA, s 190.

²²³ CA, s 177.

²²⁴ CAA, s 43A.

²²⁵ CAA, ss 43 or 44.

²²⁶ HSEA, s 50.

²²⁷ CA, s 177.

²²⁸ MTA, ss 64-65; CAA, ss 43-44.

²²⁹ Arms Act 1983, s 53.

²³⁰ LTA, ss 35-39.

²³¹ For an example of a fatal hunting incident, see: *Davies v Police* 11/07/03, HC Hamilton, Nicholson J AP35/03.

²³² Arms Act 1983, s 53(1); [firearm] = firearm, airgun, pistol or restricted weapon (see Arms Act 1983, s 2 for full definitions).

“loaded firearm”²³³ in any place without taking reasonable precautions to avoid endangering the life of another person is also an offence.²³⁴ Lastly, discharging or otherwise dealing with a firearm in a reckless or dangerous manner is an offence.²³⁵ The maximum penalty for all three offences is imprisonment for up to three years or a fine not exceeding \$4000.²³⁶

Careless or dangerous use of a firearm is more severely punished than careless or dangerous use of an aircraft or ship. An accused can spend three years in prison for endangerment by use of a firearm, but only one year for endangerment by use of a ship. Granted section 53 of the Arms Act 1983 requires actual endangerment to life, and not simply unnecessary danger to another person. Yet the provisions may apply to quite similar cases.

Higher custodial penalties under the Arms Act 1983 may be a historical reaction to the tragically common occurrence of serious injury or death caused during hunting.²³⁷ The provisions of the MTA and CAA were designed with more mundane activities in mind.²³⁸ A growing list of tragedies, many involving jet boats,²³⁹ suggests Parliament needs to reconsider the available sanctions.

Simply increasing the maximum penalties under the current offence provisions of the MTA and CAA is no solution. Minor regulatory breaches would become exposed to severe sentences. Offending is better split according to relative culpability and whether or not harm is caused. A scheme of graduated offences and penalties, as in the LTA, might be adopted.

²³³ [firearm, ammunition or part of a firearm] = firearm, airgun, pistol, or restricted weapon loaded with a shot, bullet, cartridge, missile, or projectile, whether [in] its breech, barrel, chamber or magazine (see Arms Act 1983, s 2 for full definitions).

²³⁴ Arms Act 1983, s 53(2).

²³⁵ Arms Act 1983, s 53(3).

²³⁶ Arms Act 1983, s 53.

²³⁷ Coroner Roselli noted that even today with licencing requirements for firearms users and a growing number of hunters wearing blue or orange blaze safety clothing, a “concerning number of shooting fatalities continues to occur”: *Re White* 26/10/07, Coroner Roselli, Coroner’s Court Westport.

²³⁸ As recognised by *Part 80 Marine Craft Used in Adventure Tourism*, above n 23; and *Adventure Aviation. Policy for the introduction of a new rule Part 115 for the regulation of the sector of the aviation industry involved in adventure aviation*, above n 5 at p 1.

²³⁹ A Leask and K Nash, “Extreme sports misadventures mount up”, 30 August 2009, available online at www.nzherald.co.nz (last accessed 1 September 2009).

b) The graduated scheme of the Land Transport Act 1998

The LTA provides a graduated scheme of driving offences with corresponding penalties. Lower penalties are provided where no injury or death is caused. Such provisions punish guilty conduct with a view to preventing or avoiding otherwise tragic consequences.²⁴⁰ Careless driving where no injury or death results, attracts a fine of up to \$3000 and possible disqualification from driving.²⁴¹ Reckless or dangerous driving where no injury or death is caused is punishable by a maximum fine of \$4500 or by imprisonment for up to three months. Disqualification is mandatory for at least six months.²⁴²

Where injury or death is caused, the maximum penalties are increased. Careless driving causing injury or death is punishable by a fine of up to \$4500 or imprisonment for up to three months. Again, disqualification is mandatory for at least six months.²⁴³ Aggravated careless driving causing injury or death is punishable by a maximum fine of \$10,000 or imprisonment for up to three years. Disqualification is mandatory for at least one year.²⁴⁴ Reckless or dangerous driving causing injury or death carries maximum penalties of a \$20,000 fine or imprisonment for five years. Disqualification is mandatory for at least one year.²⁴⁵

2.3 Graduated schemes for the MTA and CAA

Graduated schemes of offending would address some of the problems under the MTA and CAA. Offending causing injury or death would be categorised as more serious and higher penalties provided. Conduct would then be distinguished on the basis of careless, dangerous or reckless behaviour. Reckless behaviour would attract the highest sanction, and careless behaviour the lowest.

A graduated approach to offending has two advantages. First, sensible penalties would be preserved for minor breaches. A simple breach of a statute, rule or

²⁴⁰ C Clarkson, "Aggravated Endangerment Offences" (2007) *Current Legal Problems* 278, 278.

²⁴¹ LTA, s 37.

²⁴² LTA, s 35.

²⁴³ LTA, s 38.

²⁴⁴ LTA, s 39.

²⁴⁵ LTA, s 36.

regulation that causes no harm would be viewed as simple careless behaviour and attract a low fine.

Second, dangerous or reckless operation of a ship or aircraft causing serious injury or death could be prosecuted more appropriately under the regulatory statutes. Accidental injury or death during participation in an adventure sport involving a ship or aircraft often results in a charge being laid under the CA.²⁴⁶ By splitting the range of offending under the MTA and CAA and providing more appropriate penalties where bodily harm results, Parliament would create the means for charging under these statutes.

Further, there would be more predictability for operators and participants as to the possible sanctions available if injury or death does occur. To more clearly define criminal behaviour, lawmakers could attach existing codes of practice²⁴⁷ to the relevant statutes. Where no code for a specific activity exists, government officials and industry experts might develop one.²⁴⁸

3 Criminal Nuisance

Criminal nuisance is an unattractive provision for covering incidents where injury or death occurs during adventure sports. The maximum penalty is misplaced in the context of the CA and inconsistent when compared to offences of endangerment in other statutes. Further, the offence has been criticised as messy and outdated.²⁴⁹

In the context of the CA, the maximum penalty of imprisonment for one year is extremely low for what is effectively an offence of reckless endangerment.²⁵⁰ Manslaughter, which may be proven by gross negligence,²⁵¹ is punishable by life imprisonment.²⁵² Even injuring by unlawful act, requiring no mens rea, provides a maximum penalty of imprisonment for up to three years.²⁵³ Consequently, the

²⁴⁶ *Hare*, above n 18; *Parson*, above n 126.

²⁴⁷ For example: *Code of practice for bungee jumping*, above n 108.

²⁴⁸ Maritime New Zealand, “River Rescue Training Workshop”, above n 47.

²⁴⁹ F Wright, “Criminal Nuisance: Getting Back to Basics”, above n 194.

²⁵⁰ *Anderson*, above n 135 at [55].

²⁵¹ CA, s 150A.

²⁵² CA, s 177.

²⁵³ CA, s 190.

skydiving instructor who recklessly endangers another causing death faces at most only one year in prison. However, the instructor who causes minor harm by gross negligence, potentially faces triple that sentence.

Criminal nuisance sits uneasily alongside endangerment offences in other statutes. Despite being silent as to mens rea and only requiring the causing of unnecessary danger to another person, the MTA and CAA offences provide the same maximum penalty.²⁵⁴ Reckless driving causing injury or death is punishable by imprisonment for up to five years²⁵⁵ and discharging a firearm with reckless disregard for safety by up to three years imprisonment.²⁵⁶

In isolation, a simple solution might be to raise the maximum penalty for criminal nuisance to imprisonment for around five years. However, criminal nuisance has been criticised as archaic, messy and confusing to sports event organisers.²⁵⁷ As discussed already, criminal nuisance is effectively an offence of reckless endangerment.²⁵⁸ In light of such criticism, Chapter Three proposes replacing criminal nuisance with a more coherent general offence of reckless endangerment.

²⁵⁴ CAA, ss 43 and 44; MTA, ss 64 and 65.

²⁵⁵ LTA, s 36.

²⁵⁶ Arms Act 1983, s 53(3).

²⁵⁷ M Smyth, "Preventing Tragedies in the Sporting Arena", above n 98 at pp 175-179; F. Wright "Criminal Nuisance: Getting Back to Basics", above n 194 at p 676.

²⁵⁸ In Chapter One at 5.3.

III. THE WAY FORWARD: GENERAL ENDANGERMENT OFFENCES

This chapter proposes two general offences of endangerment in response to the problems identified in Chapter Two. The two new offences could work in conjunction with graduated schemes for the MTA and CAA suggested in the last chapter. Together, the proposals should help to deal more coherently and consistently with accidental death or injury arising out of participation in adventure sports.

1 The Way Forward

1.1 General endangerment offences

Endangerment offences punish risk taking, whether or not harm results.²⁵⁹ The rationale is to prevent harm materialising.²⁶⁰ Where harm does result a higher penalty is imposed, or a results-based offence used.²⁶¹ Historically, New Zealand has enacted specific endangerment offences. This is reflected both in the CA²⁶² and in the cases examined in this paper. Most adventure sport cases are governed by specific statutes dealing with ships, aircraft or even motor vehicles.²⁶³

However, a general endangerment offence is not a novel concept. New Zealand has a general but messy offence of reckless endangerment in criminal nuisance.²⁶⁴ Some legal duties are concerned generally with dangerous things and activities.²⁶⁵ The Crimes Bill 1989 suggested the adoption of general offences of endangerment²⁶⁶ and both Australia²⁶⁷ and the United States²⁶⁸ have enacted such offences.

²⁵⁹ B J Brown, “Culpable Homicide and Aggravated Violence: New Crimes for the Times?” [1989] NZRL Rev 299, 308.

²⁶⁰ C Clarkson, “Aggravated Endangerment Offences”, above n 240 at p 278.

²⁶¹ *Ibid.*

²⁶² The CA has a number of specific endangerment offences ranging from acid throwing to setting traps: CA, ss 198, 199, 202.

²⁶³ MTA, CAA and LTA.

²⁶⁴ CA, s 145; discussed in Chapter One at 5.3.

²⁶⁵ CA, ss 155-157; discussed in Chapter One at 5.1.

²⁶⁶ Crimes Bill 1989, clause 130 - endangering with intent to cause serious bodily harm; clause 131 - endangering with intent to facilitate crime; and clause 132 - endangering with intent to injure, etc.

²⁶⁷ Crimes Act 1958 (Vic), ss 22-23; Criminal Code Act 1983 (NT), s 154(1); Criminal Law Consolidation Act 1935 (SA), s 29(1)-(3).

²⁶⁸ Based on the 1962 draft American Model Penal Code, see: K J M Smith, “Liability for Endangerment: English Ad Hoc Pragmatism and American Innovation”, above n 212 at pp 131-133.

The criminal regulation of adventure sport tragedies shows the value of having a general offence. The fluid and shifting nature of these sports makes them hard to cover with specific legislation. Gaps and anomalies emerge as seen in Chapter Two, whereby similar conduct is punished inconsistently.

General endangerment offences would complement graduated schemes of offending for the CAA and MTA. The regulatory schemes would first deal appropriately with sports falling within their ambit. Codes of practice for recognised sports could be incorporated into these schemes for greater certainty. The general offences, focused on negligent and reckless endangerment, would then cover sports not caught by these regulatory schemes. The proposals would replace criminal nuisance, relieve the pressure on manslaughter and leave the HSEA to regulate workplace health and safety.

1.2 Alternative responses

Other less attractive responses to adventure sports accidents are available. A separate statute aimed at “adventure sports” might face the same interpretative problems encountered by the regulatory regimes. Gaps necessarily emerge. Banning certain sports in response to tragedies has occurred in other jurisdictions²⁶⁹ but would severely impinge on personal autonomy and shelve the problem rather than dealing with it. Civil liability for personal injury is not an option in New Zealand given the accident compensation scheme.²⁷⁰

Overseas jurisdictions offer limited guidance. Britain appears to rely on the general criminal law and civil remedies to deal with such tragedies.²⁷¹ The United States in general does likewise,²⁷² although Florida has enacted specific regulations for bungy

²⁶⁹ For example BASE jumping has been banned in Yosemite national Park in the United States, see: Luong, Q-Tuan, “BASE jumping in Yosemite”, above n 61.

²⁷⁰ Injury Prevention, Rehabilitation, and Compensation Act 2001.

²⁷¹ P Charlish “The Astrid Andersen Case”, above n 187 at pp 85-96.

²⁷² C B Ramsey, “Homicide on holiday: prosecutorial discretion, popular culture, and the boundaries of the criminal law” (2003) 54 HSTLJ 1641.

jumping.²⁷³ Australia however has general endangerment offences that may cover adventure sports.²⁷⁴

2 The Proposed Offences

The two draft offences are based on proposals in the Crimes Bill 1989²⁷⁵ and the Crimes Consultative Committee's *Report on the Crimes Bill 1989*,²⁷⁶ although significant amendments have been made. The first concerns endangerment by a reckless act or omission. The second offence is one of negligent endangerment.

Section 00 Reckless Endangerment

- (1) Every person is liable to imprisonment for 7 years who recklessly does any act or omits without lawful excuse to perform or observe any legal duty, and thereby endangers the life, safety, or health of any other person.
- (2) This section applies whether or not the act or omission results in death or injury to any other person.
- (3) It is no defence to a charge of manslaughter that the guilty act or omission proved against the person charged is an offence under this section.

Section 00 Negligent Endangerment

- (1) Every person is liable to imprisonment for 3 years who negligently does any act or omits without lawful excuse to perform or observe any legal duty, and thereby endangers the life, safety, or health of any other person.
- (2) For the purposes of subsection (1), the term "negligently" means departing from the standard of care expected of a reasonable person in the circumstances.
- (3) This section applies whether or not the act or omission results in death or injury to any other person.
- (4) It is no defence to a charge of manslaughter that the guilty act or omission proved against the person charged is an offence under this section.

²⁷³ Florida Administrative Code, rule 5F-8.025 (1992).

²⁷⁴ Crimes Act 1958 (Vic), ss 22-23; Criminal Code Act 1983 (NT), s 154(1); Criminal Law Consolidation Act 1935 (SA), s 29(1)-(3).

²⁷⁵ Crimes Bill 1989, above n 266, clauses 130-132.

²⁷⁶ Crimes Consultative Committee, *Report on the Crimes Bill 1989* (April 1991).

2.1 Elements of the offences

Actual injury or death would not be required as an element of the offence, rather an act or an omission to perform a legal duty that causes danger to the life, safety or health of any person. Causing potential danger to another person would suffice. This creates broad offences, justifiable for two reasons.

First, reckless or negligent operators and participants can be punished before harm materialises into actual injury or death.²⁷⁷ Second, the element of luck involved in punishing acts based on results is removed.²⁷⁸ For instance, a jet boat driver travelling upstream at a dangerous speed around a blind corner is equally culpable whether or not another person or boat is approaching in the opposite direction. A prosecution might be laid only where actual harm is caused by an identifiable act of endangerment.²⁷⁹ However, the ability to punish conduct before harm materialises provides greater consistency.

Negligence is defined in subsection (2) of the proposed offence as “departing from the standard of care expected of a reasonable person in the circumstances”. Subject to the degree of negligence required, this language is consistent with the wording in section 150A of the CA, which requires a “major departure” from the standard of care expected of a reasonable person. The proposed negligent endangerment offence must sit outside Part 8 of the CA, to which section 150A applies.

For the purpose of the reckless endangerment proposal, recklessness would carry the prevailing meaning in criminal law. Recklessness requires a subjective assessment of a person’s state of mind. The Court must be satisfied the accused knew or foresaw there was a risk that the act or omission might endanger the life, health or safety of any other person, and that the accused decided to proceed with the act or omission regardless of that risk.²⁸⁰

²⁷⁷ Similar policy reasons were behind the formation of general reckless endangerment offences for Australia in the *Model Criminal Code – Chapter 5: Non Fatal Offences Against the Person*, above n 213 at pp 47, 49.

²⁷⁸ Ibid.

²⁷⁹ B J Brown, “Culpable Homicide and Aggravated Violence: New Crimes for the Times?”, above n 259 at p 304.

²⁸⁰ Andersen, above n 135 at [25].

2.2 *The penalties*

Reckless endangerment should carry a maximum penalty of imprisonment for seven years. This is consistent with related provisions in the CA²⁸¹ and other legislation criminalising dangerous conduct.²⁸² While the penalty is substantially higher than the maximum penalty for the current criminal nuisance provision,²⁸³ this would resolve the problems associated with the criminal nuisance penalty outlined in Chapter Two.²⁸⁴ Negligent endangerment is less serious offending and would thus attract a maximum penalty of imprisonment for up to three years. The potential width of this proposal²⁸⁵ justifies the provision of a flexible discretion to impose more serious penalties, within the three year maximum, where required.

3 Consistent Punishment for Negligence

As highlighted in Chapter Two, criminal liability for negligent conduct causing injury or death during participation in adventure sports is determined largely by the sport involved.²⁸⁶ The proposed offence of negligent endangerment would remedy this inconsistency, imposing criminal liability for any failure to take reasonable care that endangers life, health or safety.

3.1 *Filling the gaps*

The examples used in Chapter Two²⁸⁷ can now be resolved by resort to the offence of negligent endangerment. The recreational river boarder who unreasonably leaves a board floating in the middle of the river would be liable if a powerboat swerved and flipped trying to avoid the board, killing a passenger. The surfer who rides unreasonably close to another surfer, crashes into that surfer and causes their death would also be criminally liable.

²⁸¹ CA, Part 8 Crimes against the person.

²⁸² LTA, ss 36 and 39; Arms Act 1983, s 53(3).

²⁸³ CA, s 145.

²⁸⁴ At 3.

²⁸⁵ B J Brown “Culpable Homicide and Aggravated Violence: New Crimes for the Times?”, above n 259 at p 302.

²⁸⁶ At 1.

²⁸⁷ At 1.3.

The qualification “in the circumstances” is important. Adventure sports are often highly dangerous pursuits that involve the taking of risks not normally undertaken in everyday life. Conduct that would ordinarily be termed negligent may be accepted.²⁸⁸ For instance, downhill ski racing involves careering down ski slopes at high speed. On normal ski slopes, this would be deemed negligent and even reckless behaviour. However, such conduct is a requirement for this sport. Not adequately fencing off the area, or failing to erect signs to warn other skiers may, however, evidence negligence.

Purely accidental deaths without an element of fault would not entail liability. Prosecutors can decide whether negligence appears to have been involved. The jury must then decide the line between reasonable and unreasonable conduct. Conduct which the jury does not believe properly involves a departure from the standard of care of a reasonable person will not incur liability.

3.2 Justification

Critics have argued that an offence of negligent endangerment is too broad, criminalising conduct without fair warning or detailed discussion.²⁸⁹ However, the current criminal regulation of adventure sports shows that the absence of such an offence is creating inconsistencies.

The alternative is to absolve all negligent acts. This is not possible as criminal liability for negligence is too widespread both in the adventure sport context and in the wider criminal law. For instance, the MTA and CAA create offences of strict liability requiring proof only of the operation of a ship or an aircraft in a manner causing unnecessary danger to another person.²⁹⁰ Likewise, the HSEA imposes a threshold similar to ordinary negligence across a wide range of commercial activities.²⁹¹ In the *Outdoor Pursuits Centre* case,²⁹² the guilty plea essentially recognised the negligent handling of the gorge walk that day.

²⁸⁸ Smyth, “Preventing Tragedies in the Sporting Arena”, above n 98 at pp 180-182.

²⁸⁹ B J Brown “Culpable Homicide and Aggravated Violence: New Crimes for the Times?”, above n 259 at p 302.

²⁹⁰ MTA, ss 64 and 65; CAA, ss 43 and 44.

²⁹¹ *Mazengarb’s Employment Law Bulletin*, above n 100, para 6002A.4.1.

²⁹² *Outdoor Pursuits Centre*, above n 91.

Further, criminal liability for negligence has become widely accepted at common law following the decisions in *Civil Aviation Department v MacKenzie*²⁹³ and *Millar v MOT*.²⁹⁴ The absence of fault defence available for offences of strict liability, falling in class two of the *MacKenzie/Miller* classification, effectively creates a standard of liability for negligence.²⁹⁵ Absence of fault is determined objectively by reference to the conduct of a reasonable person in the circumstances and must be proven by the defendant on the balance of probabilities.²⁹⁶ A sweeping range of conduct, from the care of animals²⁹⁷ to food standards²⁹⁸ is now subject to strict liability, or common law negligence.

4 Replacing Criminal Nuisance and Confining Manslaughter

A general offence of reckless endangerment would provide a more coherent charge than criminal nuisance for dealing with accidental injury or death that occurs during adventure sports.²⁹⁹ The proposed offence would reword more clearly than criminal nuisance, the requirements for a reckless endangerment provision.

In addition, together the two offences of endangerment would provide a more appropriate charge than manslaughter for dealing with cases of accidental death that occurs during adventure sports. Negligent endangerment would cover less serious offending and reckless endangerment more serious cases. The stigma of manslaughter makes it an inappropriate charge to deal with fatal accidents of this nature. Manslaughter comprises an “unduly complex ‘rag bag’ of killings-less-than-murder”.³⁰⁰ Neither intention nor foresight of harm is required.³⁰¹ This lumps accidental sporting deaths in with other more serious offending little short of murder. Under the proposals, manslaughter is preserved for extreme cases only.

²⁹³ *Civil Aviation Department v MacKenzie* [1983] NZLR 78 (CA). (*MacKenzie*).

²⁹⁴ *Millar v MOT* [1986] 1 NZLR 660 (CA). (*Millar*).

²⁹⁵ *Police v Starkey* [1989] 2 NZLR 373, 379.

²⁹⁶ *Ibid.*

²⁹⁷ Animal Welfare Act 1999, s 13.

²⁹⁸ Food Act 1981, s 11Q.

²⁹⁹ M Smyth, “Preventing Tragedies in the Sporting Arena”, above n 98 at pp 175-179; F. Wright “Criminal Nuisance: Getting Back to Basics”, above n 194 at p 676.

³⁰⁰ B J Brown “Culpable Homicide and Aggravated Violence: New Crimes for the Times?”, above n 259 at p 307.

³⁰¹ K Dawkins, “Criminal Law”, above n 162 at p 570.

4.1 Applying the proposals to past cases

Two decided cases illustrate how a charge of negligent or reckless endangerment could be used in place of the manslaughter provisions to deal more appropriately with accidental adventure sport fatalities. *Hare*³⁰² involved a fatal jet ski accident.³⁰³ The jury found Hare's conduct to be a major departure from the standard of care expected of a reasonable person in the circumstances. Clearly he could have been prosecuted under the proposed offence of negligent endangerment. He endangered the life of another, and by virtue of the jury's finding Hare's conduct was a departure from the standard of care of a reasonable person in the circumstances. The jury could have found that Hare was aware that travelling at high speed on a jet ski with insufficient knowledge on how to turn the ski carried a risk of endangerment to life, safety or health and that he proceeded regardless of that risk. If so, he would have faced the more serious charge of reckless endangerment.

*Parson*³⁰⁴ involved a failure by a hang glider pilot to perform a routine hang test to ensure the passenger was strapped in before take-off. The passenger fell out of the harness and was killed. Parson had performed earlier tests, but became frustrated by the wind in earlier attempts to take-off and omitted to perform the test a third time. Parson pleaded guilty to a charge of manslaughter. While the low sentence of 350 hours community service and \$10,000 in reparation reflected the early guilty plea, frustrated circumstances and remorse felt by Parson,³⁰⁵ he was nevertheless convicted of manslaughter. *Parson* would be more appropriately charged as negligent endangerment. The omission to perform the hang test was probably only a departure from the standard of care expected of a reasonable person in the circumstances. While Fogarty J found the incident was not a case of reckless conduct,³⁰⁶ if reckless conduct had been established a charge of reckless endangerment would have been appropriate.

³⁰² *Hare*, above n 18.

³⁰³ See Chapter One at 5.2.

³⁰⁴ *Parson*, above n 126.

³⁰⁵ *Ibid.* At [11], [22], [29].

³⁰⁶ *Ibid.* At [11].

IV. CONSENT

This final chapter considers the question of whether a victim can consent to the risk of accidental injury or even death occurring during participation in adventure sports. Assessing the scope of consent to harm, or the risk of harm, in these activities can prove difficult.

1 Consent to Death – Section 63 of the Crimes Act 1961

Participants cannot consent to the intentional infliction of death on them when participating in adventure sports. Section 63 of the CA states that “no one has a right to consent to the infliction of death upon himself”.³⁰⁷ Consent to being killed does not alter the “criminal responsibility” of any “party to the killing”.³⁰⁸ This does not exclude consent to death in all circumstances³⁰⁹ and probably only applies to intentional infliction of actual death, including murder under subsections 167(b)-(d) of the CA.³¹⁰

The section does not apply in cases of “homicide by misadventure where the common law regards consent as rendering lawful an act which otherwise would not be lawful”.³¹¹ Where accidental injury or death occurs by an unlawful act during participation in an adventure activity, consent to the otherwise unlawful act may provide a defence to manslaughter,³¹² criminal nuisance,³¹³ or endangerment.³¹⁴ Consent can also authorise risk-taking that endangers life, safety or health.³¹⁵ However, consent is no defence to manslaughter by omission to perform a legal duty³¹⁶ and is only relevant in determining whether the major departure test was met.³¹⁷

³⁰⁷ CA, s 63.

³⁰⁸ CA, s 63.

³⁰⁹ *Adams on Criminal Law*, above n 125, para CA63.01.

³¹⁰ *Ibid.*

³¹¹ *R v Lee* [2006] 3 NZLR 42, at [165]. (*Lee*)

³¹² CA, s 160(2)(a).

³¹³ CA, s 145.

³¹⁴ As proposed in Chapter Three at 2.

³¹⁵ *R v Mwai* [1995] 3 NZLR 149.

³¹⁶ CA, s 160(2)(b).

³¹⁷ *Lee*, above n 311 at [346].

2 The Common Law Position on Consent

2.1 *The position in R v Lee*³¹⁸

The general position at common law in *Lee* is that consent may be a defence to the “intentional infliction of harm short of death” unless good policy reasons exist to remove the defence.³¹⁹ These policy reasons must outweigh the social value of the activity consented to and the “high value” placed on personal autonomy.³²⁰ The same position applies to consent to the risk of being harmed short of death.³²¹

2.2 *Consent to contact sports generally*

Consent is a defence to intentional infliction of harm during established contact sports such as boxing, so long as such harm generally stays within the rules or expected violence of such sports.³²² Such sports have “social utility” in providing entertainment. They are well organised, with rules designed to minimise serious harm occurring and referees present to ensure violence is kept to acceptable levels. There is minimal risk of secondary harm to bystanders or family relations.³²³

2.3 *Balancing the policy considerations*

Consent should likewise be available as a defence to the infliction of harm short of death in most adventure sports. These activities equate with other contact sports having high social value. Most provide excitement and thrill to participants in appearing to risk life and limb in dangerous stunts, such as bungee jumping. Many, such as surfing, are physically strenuous and improve the health of participants.

One difference is that adventure sports are generally not as well regulated as an established sport such as boxing. Some operators adhere to voluntary codes of practice³²⁴ and national sporting bodies³²⁵ exist, yet for many adventure sports, such

³¹⁸ *Lee*, above n 311.

³¹⁹ *Ibid.* At [300].

³²⁰ *Ibid.* At [300].

³²¹ *Ibid.* At [305].

³²² *Ibid.* At [303].

³²³ *Ibid.* At [303].

³²⁴ *Code of practice for bungee jumping*, above n 108.

³²⁵ Such as the New Zealand Skydiving Association, visit www.nzsa.org.

as river boarding, there is no code of practice or national body to govern the activity.³²⁶ This limits the ability to restrict harm occurring.

Further, serious bodily harm is a consequence of misadventure in many of these sports. Where an activity involves intent to cause serious bodily harm or a risk of it occurring, the policy reasons may weigh in favour of removing the defence.³²⁷ The rationale is that people suffering serious bodily harm may become a “charge on society”.³²⁸ However, the degree of risk will vary between activities and across incidents. Often the actual risk of serious bodily harm may be lower than what is perceived.

A lack of rules and a real risk of serious bodily harm are unlikely to outweigh the high value placed on personal autonomy.³²⁹ Disallowing consent as a defence in risky adventure sports would severely curtail the free choice of participants. Unlike fist fighting, there is minimal risk of secondary harm resulting to bystanders or relations. Nor, as in the case of fighting in a public place, is there any risk of public disorder.³³⁰ Any harm caused is usually strictly limited to the participants involved. In *R v Jobidon*,³³¹ the Supreme Court of Canada suggested that consent can negate liability in “daredevil activities”.³³² The same should apply in New Zealand.

However, rare sports may develop where regulation is non-existent, the risk of grievous bodily harm is high and little social utility is gained from participation. In such cases, consent could conceivably be withdrawn as a defence.

³²⁶ Maritime New Zealand, “River Rescue Training Workshop”, above n 47.

³²⁷ *Lee*, above n 311 at [301].

³²⁸ *Ibid.* At [301].

³²⁹ *Ibid.* At [302].

³³⁰ *Ibid.* At [295].

³³¹ *R v Jobidon* [1991] 2 SCR 714.

³³² *Ibid.* Cited in *Lee*, above n 311 at [238].

2.4 *R v McLeod*

In *R v McLeod*,³³³ the Court of Appeal appeared to suggest that consent cannot be a defence to “inherently dangerous” acts.³³⁴ This was interpreted in *Lee* to mean that it is “more probable than not that grievous bodily harm may result”³³⁵ or that the activity carries a “grave risk out of all proportion to the nature or purpose of the activity”.³³⁶

McLeod concerned a demonstration of marksmanship. A marksman attempted to shoot the ash from a cigarette smoked by a volunteer from the audience. The marksman missed the ash and shot the volunteer in the cheek.³³⁷ Stout CJ noted that while marksmanship might be considered a sport, a lethal weapon was used in risky circumstances so consent should not be a defence to the charge.

Following *McLeod*, many adventure sports might be termed “inherently dangerous” and warrant automatic withdrawal of the defence of consent.³³⁸ Skydiving, bungee jumping and others all carry a risk of grievous bodily harm occurring although the risk is often low. Following *Lee* however, even a high risk of grievous bodily harm seems more appropriately considered as a single, non-determinative, factor in weighing the policy reasons for allowing the defence. *McLeod* will now be of only limited relevance.

2.5 Conclusion

Consent should thus be available as a defence to many degrees of harm inflicted or risked during participation in adventure sports. If a particular sport involves a very high risk of grievous bodily harm occurring, this may negate liability in some circumstances.

³³³ *R v McLeod* (1915) 34 NZLR 430 (CA). (*McLeod*)

³³⁴ *Lee*, above n 311 at [270].

³³⁵ *Ibid.* At [271]. Drawing on Adams in *Criminal Law and Practice in New Zealand* (2ed), para 615.

³³⁶ *Ibid.* At [271]. Drawing on Adams in *Criminal Law and Practice in New Zealand* (2ed), para 618.

³³⁷ *Ibid.* At [266], citing *McLeod*, above n 333.

³³⁸ *Ibid.* At [272].

3 The Scope of Consent

3.1 Fully informed consent, given freely

The more relevant issue will be determining the actual scope of consent. To be effective, consent must be “true, real or genuine” and “full, voluntary, free and informed”.³³⁹ The victim must have fully understood the activity supposedly consented to and have exercised free will in agreeing to that activity.³⁴⁰ Every case will turn on its specific facts.³⁴¹ What matters is the “nature and effect” of not having full information or the free will to exercise consent.³⁴²

3.2 Express and implied consent

Agreement to undertake the activity may imply consent to harm involved. In *Lee*, the Court of Appeal suggested that where the consenting victim understands the activity, they will be “assumed” to have consented to the risks involved.³⁴³ In the adventure sports context, a victim probably impliedly consents to the infliction of minor harms expected during such sports. A white water rafter, for example, might consent to bumping against rocks and being dunked under water; a bungy jumper to jolts from the rope or temporary dizziness.

However, a victim is unlikely to have impliedly consented to anything more than minor harm. Many participants believe adventure sports to be relatively safe, having only a high perceived risk of serious injury or death. The Court in *Lee* noted that where serious bodily harm is involved, the giving of any consent might be scrutinised.³⁴⁴ As many adventure sports carry an actual risk of serious bodily harm, it will be harder to show the victim impliedly consented to the inherent risk of serious bodily harm resulting.

Express consent to the particular harm envisaged may then be required. A waiver or release form can evidence express consent. Further, the form may fulfil the duty to

³³⁹ *Adams on Criminal Law*, above n 125, para CA63.06.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Lee*, above n 311 at [309].

³⁴⁴ *Ibid.* At [301].

correct “known information imbalances about the risks”.³⁴⁵ However such consent forms are necessarily quite general. Proving the victim really applied his or her mind to the particular risk of grievous bodily harm that occurred may be difficult, but nonetheless possible.³⁴⁶

3.3 Consent to negligence

Proving the victim consented to negligence by the accused is harder, and may not even provide a defence at law. In *R v Vaughan*,³⁴⁷ Randerson J held that consent cannot provide a defence where “the victim is exposed to a risk of serious injury or death resulting from the negligent failure of an accused person”.³⁴⁸ In *Vaughan* an elevator repairman was crushed to death after removing an oven rack placed under the lift for safety purposes, despite being warned not to remove the rack.³⁴⁹ *Lee* reviewed *Vaughan* and suggested that consent is no defence to a negligent act.³⁵⁰

A better approach is to allow consent as a defence to a negligent act where fully informed consent to the negligence is freely given. The doctrine of *volenti non fit injuria* in tort law distinguishes between negligence existing at the time the plaintiff agreed to take the risk and negligence occurring after the risk was accepted. Where negligence has already occurred when the plaintiff accepts the risk of harm or danger, knowledge and acceptance of the risk by the plaintiff is easier to establish. Conversely, consent to future negligence will usually only be proven by an existing agreement or past relationship between the parties.³⁵¹ This distinction could apply to criminal cases. A victim should be able to consent to negligence that exists at the time the victim accepts the risk.

Consider a situation where a person is injured during a hang gliding flight. The hang glider is in a run-down state before the flight, with a torn and decaying canopy. A victim who knows the condition of the hang glider, or is warned of it, and agrees to fly despite these faults must consent to negligence by the accused in using a hang

³⁴⁵ *Lee*, above n 311 at [309].

³⁴⁶ M Smyth, “Preventing Tragedies in the Sporting Arena”, above n 98 at p 183.

³⁴⁷ *R v Vaughan* 24/07/98, Randerson J, HC Auckland T121/98.

³⁴⁸ *Ibid.* At p 9.

³⁴⁹ *Ibid.* At pp 1-2.

³⁵⁰ *Lee*, above n 311 at [285]-[287], [346].

³⁵¹ S Todd “Defences” in S Todd (ed) *The Law of Torts* (5th ed, Brookers, 2009) at para 21.4.02.

glider unfit for flight. On the other hand, where a victim agrees to a flight without noting beforehand the decay in the canopy, the victim must only consent to an ordinary chance that a normal hang glider might malfunction.

One objection to employing this distinction is that it defeats the rationale of holding people to an objective standard of care. The negligent accused should be liable for operating a faulty hang glider regardless of whether a person agreed to participate in a high-risk flight. Yet, arguably consent should still be at least possible as a defence where a victim knowingly and freely accepts prior negligence.

CONCLUSION

An adventure sport accident where serious injury or death occurs is a tragedy for all involved and should be dealt with appropriately. The statutes covering adventure sport accidents were enacted without such activities in mind and their application has given rise to a number of inconsistencies. The proposals in this paper may help to rectify these anomalies.

First, there is a gap in criminal liability for negligent conduct causing injury or death in adventure sports. A new general offence of negligent endangerment could be enacted to impose more consistent liability for negligent acts. This new broad offence is justified given widespread criminal liability for negligence at common law following *Millar v MOT*³⁵² and *Civil Aviation Department v McKenzie*.³⁵³

Second, the offence provisions of the MTA and CAA are too broad and fail to cater for more serious offending.³⁵⁴ A graduated scheme of offence provisions and penalties, as in the LTA,³⁵⁵ is proposed for each regulatory statute to properly categorise and deal with different degrees of offending.

Third, more appropriate charges than criminal nuisance and manslaughter could be enacted to deal with these tragedies. An offence of reckless endangerment would replace a messy and outdated criminal nuisance provision.³⁵⁶ Together, general offences of negligent and reckless endangerment would cover fatalities currently charged as manslaughter. Offending is then more appropriately labelled as “endangerment” of others.

Finally, consent should be available as a defence to the intentional or reckless infliction of harm short of death during participation in these inherently dangerous activities. Determining the scope of consent will be case-specific. In any situation factors such as the likelihood of risk, the severity of the consequences involved, the

³⁵² *Millar*, above n 294.

³⁵³ *MacKenzie*, above n 293.

³⁵⁴ CAA, ss 43 and 44; MTA, ss 64 and 65.

³⁵⁵ LTA, ss 35-39.

³⁵⁶ F Wright, “Criminal Nuisance: Getting Back to Basics”, above n 194.

social utility of the activity and personal autonomy will be considered in determining whether to withdraw the defence.³⁵⁷

Participants should be able to experience the thrills and risks of adventure sports without exposure to unnecessary danger. Operators should have fair warning of the criminal consequences involved if something goes wrong. The criminal law must set clear boundaries. The recently announced government investigation into the regulation of the adventure tourism sector³⁵⁸ may find it opportune to examine the adequacy of criminal liability when accidental death or injury occurs during participation in adventure sports.

³⁵⁷ See, generally: *Lee*, above n 311 at [285].

³⁵⁸ M Johnston “Adventure tourism inquiry welcomed”, 23 September 2009, available online at www.nzherald.co.nz (last accessed 24 September 2009).

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