

A synopsis of relevant legislation and industry practice, that impacts on the provision of risk recreation and adventurous activities.

Outdoor Safety Institute

In recent years much legislation has been deregulated and revised. By and large the immediate effect of these changes is to place more responsibility and accountability on operators and organisations for compliance to new and changed legislation. In some cases the changes to legislation have given new emphasis to old legislation and placed it in a new light (eg Land Occupiers Liability Act and the role of negligence).

However much of the new legislation is untested and it appears many new scenarios now exist which are untested under New Zealand's civil law.

It is important to note that no agency, person or organisation is exempt from litigation.

Safe Operation

- **Accident Rehabilitation and Compensation Insurance Act 1992** - defines work related accidents and injuries and explains how accident compensation claims are made. Employers are obliged to pay premiums to Inland Revenue against the prospect of employee claims.
The Act provides for all who suffer personal injury as a result of accident. In terms of legal liability, no action for damages or for personal injury resulting from accident should lie against any provider or operator. The legislation covers the very large majority of cases in which responsibility for negligence and liability would arise.
If an accident occurs and the tutor/participant/visitor is injured then this person can make a claim for personal injury under A.C.C. (the Accident Rehabilitation and Compensation Insurance Act 1992) and receive payment for rehabilitation and treatment.
If this occurs the claimant cannot sue the organisation for compensatory damages
except if the personal injury is not covered under the A.C.C. Act, in which case the person can sue. There are situations where this may occur.
- **Building Act 1991**- provides for the control of building work and the use of buildings and ensuring buildings are safe and sanitary. An operator considering the construction, alteration or demolition of a building requires a consent under the Act. All building works are also to comply with building codes prepared under the Act.
- **Crimes Act 1961 and the Children, Young Persons and their Families Act 1989** - impose a duty on those with responsibility for others to provide the necessities for life, including food, clothing and medical treatment (see following section "Duty of Care"). A further duty is imposed on those in charge of dangerous things: to use all reasonable care to avoid danger to human life. In extreme cases, and where negligence is established, criminal

proceedings may be brought against a tutor, or provider, under the Crimes Act 1961 or the Children, Young Persons and their Families Act 1989. Where a duty of care exists, the duties embodied in legislation impose both a responsibility and a liability on the staff member or provider to provide such necessities of life as to prevent the participant's death or impairment of health and well-being. A further responsibility, when in charge of dangerous things, is to take all reasonable precautions to avoid danger to human life (see later section on Duty of Care).

Anyone who negligently omits to discharge these duties may be criminally liable. The most conspicuous example of a crime where negligence is the gist of the offence is manslaughter (see later section on Negligence).

- **Employment Contracts Act 1991** - provides for employers to negotiate working conditions with employees. This will include conditions of work, remuneration and other terms of employment. Safety is addressed by determining what areas of work are within a job description and those outside of it. Employers and employees need to be clear that recreation and adventurous risk activities are specified in the contract for employment and they are always working within the terms agreed on. Working outside of these parameters will expose organisations and workers to situations where, if loss occurs, they may become liable.
- **Food Hygiene Regulations 1974**- cover specific preparation and storage of food. People preparing food are required to have a certain level of food hygiene certification (minimum: a six hour course).
- **Health Act 1956** - relates to public health in matters including the pollution of water courses and activities which are offensive or likely to be injurious to health under this Act. Operators must comply with requirements for matters such as the cleanliness of an office, trade or business, and the avoidance of crowding in a building.
- **Health & Safety in Employment Act 1992**- relates to the health and safety of employees and other people at work or affected by the work of others. Employers are required to ensure the safety of employees, to identify potential hazards and take preventative action. It also requires steps to be taken to protect other people in the workplace which includes **participants**.

In terms of risk recreation activities and adventure learning all activities involve an element of risk. Practically, this reinforces the requirement to have and be working with standards and codes of practice.

As employers, organisations have obligation under the Act towards employees such as tutors and ancillary staff as well as other persons, such as participants and visitors.

This requires that the operator/organisation, by law, must ensure the safety of all employees at work (this means a safe working environment, providing work facilities to safeguard safety and health, all equipment used is designed and maintained to be safe, employees are not exposed to hazards, develop procedures for dealing with emergencies). This includes the requirement to:

- identify and eliminate all hazards by implementing a hazard management programme
- provide information about emergency procedures
- ensure all staff are adequately trained in all things the employee is required to do
- ensure that all practicable steps are taken so that employees are managed in such a way as not to cause harm to themselves or others.
- ensure no visitor or participant is exposed to foreseeable hazard or risk

The organisation will need to identify all foreseeable hazards or consequences of their recreation activities, be it facilities, equipment or training.

It is required to put in place appropriate measures monitoring programmes and if necessary eliminate the hazard. These steps include training teachers, providing information, hazard identification and management, and a programme for regular safety audits. The adoption or production of Safety Guidelines and Procedures available to all staff and users is mandatory.

If the organisation contracts or subcontracts its activities or facilities to others, the contractor has an obligation to ensure all people in the vicinity of the place of work must be safe, but it is incumbent on the contractee to ensure that the contractor can deliver appropriate standards of safety.

The Act is administered by the Occupational Safety and Health Service (OSH) of the Department of Labour whose inspectors have power to issue improvement and prohibition notices. Penalties for breaches of the Act are severe, ranging from up to \$25,000 fines to \$100,000 fines and/or one year's imprisonment depending on the seriousness of the offence.

The responsibilities on not-for-profit and voluntary organisations have undergone recent review, with revisions currently before the house. The implications of this review are included in the attachment from Bell Gully at the end of this document.

- **Industry Training Act 1992** -Sets in place the New Zealand Qualifications Framework and creates Industry Training Organisations (ITOs). ITOs ensure the training is employer driven and provides resources for upskilling workers. Safety is addressed because the ITO sets the skill standards for workers in the industry. OSH uses these standards as the yardstick by which compliance with the Health and Safety Act is measured. In the subfield outdoors there are almost 200 Unit Standards covering all outdoor recreation activities. These standards are the bench marks of safety for outdoor instructor/tutor/teacher competency accepted by the HSE Act and measured by OSH.
- **Land Transport Act 1993** - promotes land transport safety. Sets vehicle standards and defines the responsibilities of vehicle drivers and owners, including the need for limits on driving hours, vehicle loading and defined methods for the use of safety equipment.

- **Occupiers Liability Act 1962** - relates to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property. The liability is for damage or injury from dangers due to the state of the property or to things done or omitted to be done there. An operator providing facilities for visitors is liable for the safety of those visitors arising from the state of those facilities.

Environmental Care

- **Conservation Act 1987** - promotes conservation of New Zealand's natural and historic resources and provides for the establishment of the Department of Conservation to manage public conservation lands. An operator requiring access to and use of conservation areas needs to comply with the requirements of the Act, including applying for a concession to operate on or over land managed by the Department.
 - **Historic Places Act 1993** - promotes the identification, protection, preservation and conservation of the historic and cultural heritage sites. The Historic Places Trust can verify if your property and surrounding areas include historic or cultural sites of national importance. Checks must also be made with regional and district councils for sites of regional and local significance. If a site is protected, activities on or adjacent to the site are likely to be restricted.
 - **Local Government Act 1974** - provides for the functioning of local government, including bylaws to regulate public health and well-being, roads, land and buildings, recreation and community development and coastal activities. If an operator seeks to undertake activities such as erecting signs, operate in a public place, or operate a mobile store a local bylaw will be needed. Checks with city or district councils for applicable bylaws must be made.
 - **Marine Reserves Act 1971** - provides for the setting up and management of areas of the sea and foreshore as marine reserves so they are preserved as habitats of marine life for scientific study. Operators seeking to undertake activities in a marine reserve must comply with the requirements of the Act and controls administered by the Department of Conservation.
 - **National Parks Act 1980** - relates to the control and management of national parks and includes principles to be applied in national parks. Operators must comply with the requirements of the Act and any specific controls administered by the Department of Conservation in the management of the Parks.
 - **Reserves Act 1977** - provides for the preservation and management of areas (outside National parks) for the benefit and enjoyment of the public. Included are requirements for the management and control of reserves, which an operator must comply with if seeking to undertake an activity within a reserve.
 - **Resource Management Act 1991** - promotes the sustainable management of natural and physical resources. Powers and functions are given to regional and district councils to achieve the integrated management of the effects of the use, development and protection of land and associated natural and physical resources. An operator considering undertaking activities such as
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building or taking water from a stream, must comply with the objectives, policies and rules in the regional and district plans which seek to manage the natural and physical resources of the area.

Customer Service

- **Commerce Act 1986** - defines restrictive business practices, such as price fixing. Established the Commerce Commission and sets rules for its investigations.
- **Consumer Guarantees Act 1993** - provides consumers with guarantees, including redress from a supplier where a good or service is not of an acceptable quality. An operator could be subject to a damage claim from a consumer where a service fails to meet the standards set out in a guarantee.
- **Fair Trading Act 1986**- prohibits misleading conduct, false representation and unfair practices. An operator must not advertise in a misleading way or use words which cannot be substantiated (eg. "We are the best and the safest.....").

As well as the above legislated requirements there are aspects of civil law that directly effect operators in the provision of risk recreation activities. These are summarised as follows:

Duty Of Care - is owed the participant in adventure activities. The Duty is the standard of care required when measured against a "reasonable and prudent professional". This infers skill levels and practices that are contemporary and expert. It also infers adequate supervision at all times, quality equipment, activities that take into account the physical and mental capabilities of the participant and that these activities are taught by means of a suitable progression.

The Duty Of Care Owed Minors ('In Loco Parentis') - Operators with minors in their care are considered to be acting in place of a parent. This doctrine of 'in loco parentis' requires these tutors to ensure that participants receive at least the degree of care to be expected from a reasonably careful and prudent parent. While the doctrine applies strongly to the school sector, the basis for the rule is applicable to all training programmes that include those under the age of 18.

Duty of care continues for as long as the tutors have charge of the participants, whether inside or outside the training centre, or out of normal hours. It continues even when outside helpers or instructors are involved, and when participants (as part of their approved programme) participate in course packages offered by commercial operators.

Participants are minors until age 18. The age at which participants cease to be minors is currently interpreted by some providers at 16 and by others as 18. As the position of young people under law varies it is not possible to give a fixed ruling. The age of majority for instance is still 20. However, under legislation young people gain increasing degrees of adult responsibility from the age of 16 onwards. Consequently, in establishing guidelines for situations where parental approval may be required, it is more pertinent to consider the implication of 'in loco parentis'.

At 16 the majority of young people are likely to be living in a controlled environment with their parent(s) and most will be at school. Further, legally, they cannot engage in the full spectrum of adult activities. By 18, however, many are likely to be living increasingly independent of their parents, and most will have left school. Legally they have a greater range of adult responsibilities.

For activities involving minors, where a degree of risk or hazard may be involved,, and parental approval required, providers should err on the side of caution. As a general rule, they should regard 18, rather than 16, as the age up to which parental approval is required but remember that under the HSE Act they have an obligation to all under their care.

The Duty Of Care Owed Adults - The duty of care owed adult participants in recreation programmes is governed by the general principles established by the HSE Act, civil and criminal legislation and by sound professional practice. A particular responsibility exists for any activity that because of its nature, or the age, experience and ability of participants, could be hazardous. Teachers responsible for programmes of this nature have a particular responsibility to ensure that they have taken all practicable steps to minimise risks and hazards to life.

Standard of care owed - Juries in the past have set the standard of care required from providers and tutors at a very high level. If negligence is alleged, and court action follows, then the courts will take notice of previous decisions in this field. They will to some extent be influenced by decisions made under previous legislation or similar cases under similar laws overseas.

While the nature of care required will vary with the age of the participants, the standard will not. The age, ability and experience of participants, and the degree of risk and hazard involved, are all key factors in deciding the degree of professional care necessary.

The general rule, however, is to ensure that all practicable steps have been taken to minimise, isolate or eliminate risks and hazards and to take such care as is reasonable and in accordance with sound professional practice.

Contracts - Contracts are enforceable written agreements. If the terms of a contract are not met or are violated and loss occurs, the law may provide remedy in court. Contractual agreements also are a way to protect the organisation by transferring risk to another party.

Torts - are wrongs or injuries to another person. Under law compensation must be paid by the wrong-doer to the injured person. An organisation and/or its employees can, under some circumstances, be held liable for the acts of others.

This would occur when, for example, an organisation was not careful in checking the back-ground of an employee or volunteer who caused injury to others. In such circumstances the organisation could be liable for the acts of that person.

The responsibility of persons and organisations is imposed by law and applies to personal injury, bodily injury and property loss or damage to a third party due to the negligence of the organisation, its employees or volunteers.

Negligence - If there is evidence of negligence, who is liable or responsible or obligated according to law? The organisation is generally responsible for the actions of its officers, directors, employees and others acting on its behalf as long as they are acting within the scope of their duties. It becomes clear why job descriptions and employment contracts become crucial in determining responsibilities and their scope.

The following conduct may (and have been) be the basis for alleging negligence or failure to provide the expected level of care.

- carelessness in hiring or recruiting practices including failure to screen, select, train and/or supervise staff and volunteers in a manner consistent with contemporary industry standards, codes of practice, or accepted peer practices.
- Failure to provide training in emergency procedures and on any procedures for any incident that was foreseeable.
- Failure to provide appropriate instructor supervision ratios for activities in which people have little training or experience.
- Failure to provide safe transportation by qualified drivers, or operate a safe vehicle.
- Entrustment of equipment to a person who is too young or for other reasons is not equipped or trained to handle the equipment.
- Failure to have safety procedures or failure to teach, instruct or practice procedures.
- Inadequate warning of hazards or warning not appropriate for the age or physical or mental capability of the participant.
- Failure to take action on identified hazardous conditions.
- Failure to provide proper or adequate equipment in good condition and appropriate for the intended use.
- Failure to prevent secondary injury through the actions or inaction or treatment of the injured.
- If the programme provider assumes the duty to render aid the law imposes a duty of competent and appropriate action.

In order to prove NEGLIGENCE **four elements** must exist.

1. Duty of care - owed by the person in charge to the participant or employee. The duty is a relationship or obligation recognised by law to exercise a standard of care against unreasonable risks. The duty of the organisation would be to protect the participants and staff from unreasonable risk of injury. For minors, the doctrine of in "loco parentis" means that the organisation or an individual assumes the rights, duties and responsibilities of parents with regard to children in their care.

2. Breach of duty - if the accident was foreseeable and inadequate protection was provided then this is considered a breach of duty.

This means that the organisation or individual must do everything possible, based on the current body of knowledge for that activity, to prevent an accident or incident occurring. Operators are held responsible for knowing the current contemporary standards of care, including legal requirements.

The standard of care would be measured by that expected of a person in the capacity of a professional for the nature of the activity type of participation and the environmental conditions.

This is determined by what other organisations operating similar programmes would consider minimum standards of operation.

It is again also determined by codes of practice, minimum industry standards and accepted peer practices.

3. The breach of duty or substantial act must be **directly related** to the loss or injury.

The injured must be able to show that what the operator/tutor/ staff member did or did not do was the proximate cause of injury or loss.

4. There must be **actual damage or loss sustained**. This can be very broad and include economic loss, physical pain and suffering, physical impairment and emotional distress.

Changes in A.C.C . now mean that most of these are currently given little coverage and wide interpretation could see negligence becoming a pathway to compensation unless legislation is further revised.

Sound Professional Practice - All accepting a leadership role in recreation activities as part of their employment are implying that they are competent. As discussed previously what constitutes 'competence' will be judged in relation to professional standards or accepted practices laid down by industry and legislation. What is accepted practice may not be sound professional practice. Accepted practice may not always meet the required contemporary industry standard. Sound professional practice guidelines have been established for the Sport, Fitness and Recreation Industry Training Organisation(SFRITO) to be used by the NZQA Units Standards, and by the national safety councils and controlling or advisory bodies concerned with various recreation disciplines. Management, leaders and tutors should assess the risk and hazards involved in recreation activities and ensure their involvement fits within accepted minimum standards.

Where, because of special circumstances, significant deviation from the guidelines occurs, the reasons must be well documented.

Where appropriate procedures have been followed, and all approval requirements met, a high level of legal protection is accorded a provider or teacher.

Liability for property damage - The Accident Compensation legislation does not cover all property damaged as a result of accident. In very rare situations and where negligence is established, proceedings could be brought against a provider (or teacher, acting as a servant), for negligence resulting in damage to property not covered by provisions of the Accident Compensation Act 1992.

Under common law all employers have responsibilities concerning the negligence of their employees. Providers should ensure that their insurance provisions in this respect are adequate.

The Responsibilities Controlling Authorities - Providers of education and training programmes are considered the controlling authorities They have the ultimate legal responsibility for the participants in their care. This applies equally to community

providers as to large organisations or government departments. In particular, they should ensure that this is clearly understood by all they **contract** to provide training. It must be outlined in the provider's contract.

With regard to risk recreation activities, controlling authorities are normally liable for the actions of their staff, whether employed directly or on their behalf. The principles embodied in civil and criminal legislation and in sound professional practice impose a duty to ensure that all reasonable precautions are taken to minimise danger to life.

Controlling authorities have a legal responsibility to acquaint themselves with all the circumstances surrounding any recreation event or programme and to ensure that all reasonable precautions have been taken. In particular they should consider the proposed programme, its objectives, location, the ease and means of access, the nature of the supervision planned and the age, experience and ability of those involved.

Legal Responsibility For Participants from Volunteer Staff - Where, as part of an approved programme, outside helpers or instructors are involved on a voluntary or paid basis, or participants take part in a venture organised by a commercial concern, it is still the responsibility of the controlling authority or provider to take all reasonable steps to ensure that participants receive the appropriate standard of care. A particular responsibility exists for activities that because of their nature, or because of the age, experience and ability of those participating, might be considered hazardous.

The Responsibilities Of Outside Helpers, Instructors And Commercial Operators - The responsibilities of outside helpers, instructors and commercial operators working with participants, are those established by criminal and civil legislation for people with responsibility for others, or in charge of dangerous things. In accepting a course package offered by a commercial operator, the provider must ensure that it is in all respects compatible with the aims and objectives established for their recreation programmes. They must further ensure that the operator is aware of, and meets, the required safety and supervision standards. Outside helpers, instructors and commercial operators must be briefed, as appropriate, on their role in the programme, and on safety and supervision requirements. They must be provided with such information on individual participants as may be required for sound decisions concerning party or individual safety.

On any occasion when injury or damage has occurred, and negligence is alleged, it is possible that helpers, instructors and commercial operators may be included in proceedings brought against a provider or tutor. In extreme cases they may be the subject of such proceedings. It would be for the courts to decide their degree of culpability in relation to that of the staff, or the controlling authority.

Various factors would be taken into account in determining if action or omission on the part of a helper, instructor, or operator constituted negligence. These include whether:

- They acted in accordance with sound professional practice for the activity concerned.
 - They exercised the standard of care required by the controlling authority or provider.
 - The controlling authority or provider had taken every reasonable precaution to prevent the situation occurring.
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- The incident was indeed reasonably foreseeable and preventable.

A higher standard of responsibility, and therefore a greater degree of culpability will normally apply to professional instructors and commercial operators than to volunteer helpers assisting paid staff.

All helpers, instructors, and commercial operators involved with recreation programmes must be aware of sound professional practice for the activities they are involved in. They must regard this as the minimum standard acceptable.

When working with providers of recreation activities, they should establish clearly their part in the overall programme, the roles of staff, the experience and ability of those involved, the standard of care required, and the safety and supervision procedures to be followed.

Professional instructors and commercial operators in particular should consider carefully their legal responsibilities, the negligence requirement and the situations in which they could be held culpable. In this respect they should consider carefully the safety standards and procedures established for the programmes that they are to be employed with.

Waivers - A method used by events/activities/programmes to protect against liability suits is to have participants sign releases or waivers of responsibility. These are based on the legal principle of “volenti non fit injuria” which may be translated to “no harm is done to one who consents”. These forms are an attempt by the organisation to transfer the responsibility of risk to the participant. It must be understood however that signing these forms does not take away the rights of the individual. A person can not agree to take responsibility for risks that they do not begin to understand and appreciate. Nor can participants accept responsibility for hidden risks.

For releases to be most effective the risks have to be explained carefully to the participant so that they understand them, the participant should be given the opportunity to ask questions, and then activities have to be entered into voluntarily. For novices to adventure activities, and minors, and intellectually impaired individuals in particular, their ability to assume responsibility for the risk is extremely doubtful because they have no understanding of the nature of the risks involved. However the release form acts as a good means of disclosing the potential risk to these people or their guardians so that they are more educated. For an adult improving skills in a particular activity, willingly taking part in that activity of which they have previous experience, the assumption of responsibility is much clearer. This does not release the organisation from its responsibilities towards negligence however. A standard of care is still owed, quality equipment is still expected, instructors need to be trained and qualified, emergency procedures need to be planned and activities supervised.

Codes of Practice - Codes of practice are the establishment of a “standard” of operation, process or manufacture that an organisation, industry or governing body (Local, territorial or otherwise) has agreed will be the minimum level of compliance that those involved with the standard will adhere to. Once the code is accepted as policy by organisations or statute by government then it becomes measurable by common law principles. This means that the application of the code requires organisations and individuals bound by the code to demonstrate that the relevant standard complies with HSE and all other legislation and is sufficient to reasonably protect people from injury or damage that is foreseeable.

This would also be the case for any draft standard that identifies new hazards or changes that better manage old risks and hazards.

Litigation - If the organisation can be shown to be negligent in its safety management a person could sue for exemplary and punitive damage. Exemplary in lay terms means that bringing a conviction will “provide an example” that will deter other operators and punitive means that bringing a conviction will “punish” the organisation for its actions.

These types of prosecution will stand a high chance of success if a conviction has already been achieved by OSH. (e.g. If OSH gain a conviction for breach of H.S.E. compliance then the litigant would have a good cause for establishing **gross negligence** and therefore exemplary or punitive damages).

If the organisation has contracted to a third party for an activity or supply and up-keep of equipment and facilities, and an injury results, then the injured person could bring an action against both the contractor and the organisation for exemplary damages.

Definition of Terms:

“Accident” means an event that:

- a) causes any person to be harmed; or
- b) in different circumstances, might have caused any person to be harmed.

“Activity Specific Code of Practice” is a set of guidelines for the safe operation of an adventure tourism operation of a particular type.

“All practicable steps” refers to those steps that may be taken to achieve safe operation. The severity of harm that may be suffered and the cost of each risk reduction strategy need to be taken into account in developing these procedures.

“Certification” is the official approval an operator must have before they can legally offer an activity.

“Client / Customer” is a person who has agreed to be a part of a risk recreation activity.

“Could” refers to practices that go beyond recommended practices and which may improve a company’s operational standards. They are not mandatory to comply with the code.

“Equipment” includes the items needed to outfit clients and staff to safely participate in an activity.

“Harm” means illness, injury, or both; and “to harm”, “harmed” and “unharmed” have corresponding meanings.

“Hazard” means an activity, arrangement, phenomenon, process, situation, or substance that is an actual or potential cause of harm. “Hazardous” has a similar meaning.

“Incident” is an event where personal injury or structural damage to equipment is narrowly avoided.

“Industry Code of Practice” is a statement of preferred work practices or arrangements and a set of generic guidelines for the safe operation of all adventure tourism activities.

“Minimum standards” are skill levels and practices which must be sustained for safe operation.

“Minor injury” or harm, is one which is not serious enough to require hospital treatment.

“Operator” includes the owners and management of a company, trust, charitable institution.

“Participant” is a person who has agreed to be a part of a risk recreation activity/programme.

“Registration Workbook” is the application section to register with a code of practice. This is in essence an operations manual with written company practices for safe operation.

“Risk” is the relationship between the severity, frequency and occurrence loss in a given hazardous situation.

“Serious harm” means death, or an injury which requires hospital treatment.

“Shall” refers to practices that must be complied with to meet the safety standards in this code.

“Should” refers to practices above the minimum standard, which are advised or recommended, and are important considerations in assessment.

“Significant Hazard” is a hazard with high risk, or a hazard that in an actual or potential cause or source of:

- a) serious harm; or,
- b) harm (more than trivial harm); or,
- c) harm that does not usually occur, or usually is not easily detectable, until a significant time after exposure to the hazard.

“Skills and Competencies” are the abilities staff must have to lead or help lead a trip safely.

“Tutor” is the staff, instructors, teachers or employee with direct responsibility for clients.