

THE COARSE YACHTSMAN AND THE DUTY OF CARE

Introduction

Some years ago a British author called Michael Green wrote a series of coarse books including *The Art of Coarse Sailing*. The books were very funny. *The Art of Coarse Sailing* recounted a week spent boating on the Norfolk Broads. His definition of a "coarse sailor" is one who, in an emergency, forgets all nautical terms and yells "For God sake turn left".

A definition of a "coarse yacht race officer" might be "When all else fails, consult the rule book".

Today, I intend to take a coarse race officer's approach to the important and often misunderstood area of duty of care. I say misunderstood because in my experience the term "duty of care" is often used by non-lawyers erroneously and myths have grown up as to the nature and extent of duty of care.

My purpose is two-fold. First, I shall be giving you information about the law. There is no easy way for me to impart this or you to absorb it. I have devised a series of exercises for everyone to work through in groups. This should keep your attention focussed on the practicalities of race management rather than the morass of the law.

Secondly, I have no intention of making you instant experts in liability for harm. Such a course would be dangerous. What I want to achieve is that you will leave here with an increased awareness of the issues and less fear of the unknown.

Before I commence properly, however, two caveats. I am no longer a legal practitioner and I do not intend to give any legal advice other than general information. If you are in a situation where you may attract some liability or you feel the need of advice, you will have to consult a solicitor who can advise you as to the particular matter. Secondly, although I shall be reasonably

comprehensive, I do not intend to speak about every part of the various Acts to which I will be referring.

The basis of negligence

There are many ways in which a citizen may wrongly interfere with the rights of another citizen. On some occasions, the interference of those rights may be such that the State, in the interest of preserving the peace, classifies the wrong as a criminal offence and brings action in the court accordingly. These actions are called prosecutions and I intend to say no more about them except for one passing reference later on.

In other cases, a citizen may seek compensation against another citizen by way of payment of damages for a civil wrong which has interfered with his or her rights. These civil wrongs are called torts. There are many types of torts but I intend to refer only to one particular form of tort which is called negligence although negligence probably better describes the basis of liability.

Some of you may have heard of the great case of *Donoghue v Stevenson* [1932] AC 562. This was by no means the first case of negligence but it was a landmark case because Lord Atkin, one of the Judges in the case, defined the "neighbour principle" which has come to govern the modern law of negligence. The case itself concerns a lady who went to a teahouse in Glasgow one sunny afternoon in August 1928 with a friend and said she became ill after drinking a bottle of Mr Stevenson's ginger beer. The bottle was dark and she asserted that it had the remains of a snail inside it. No-one ever knows because the appeal to the House of Lords, Britain's highest court was whether her allegations disclosed a cause of action against the ginger beer manufacturer. After his death, Mr Stevenson's executors paid £200 to settle the action. In the course of his judgment Lord Atkin set out the rule as follows:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question

'who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injury your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question."

The "neighbour principle" laid down by Lord Atkin was imported into Australian law by the High Court in a case of a man whose underpants gave him an itch: *Grant v Australian Knitting Mills* [1936] AC 85.

Had I 40 hours or so, I could usefully trace the development of that principle in English law, its migration in to Australian common law, and its subsequent defining and redefining over the years to take account of changing circumstances, particularly to acknowledge the fact that many potential defendants are insured against claims for negligence. However, I am sure to your general relief, I can quickly fast-forward over 70 years of erudite legal history because in Western Australia actions for negligence are now governed largely by the *Civil Liability Act 2002*. The *Civil Liability Act* largely codifies all the judge made law of negligence. For this reason it has been greatly welcomed by everybody – except perhaps lawyers. This West Australian Act, which has counterparts in other Australian States, was passed as a result of what was said to be a crisis of insurance and the difficulty for many persons and organisations to obtain insurance cover. Whether that was actually so or not is not a matter we need explore.

In broad terms, the *Civil Liability Act* sets out the liability for harm caused by the fault of a person, deals specifically with recreational activities and limits awards of damages. The *Civil Liability Act* applies to incidents which occur after 1 December 2003.

There is a second Act which has particular relevance to yachting and race management. That is the *Volunteers (Protection from Liability) Act 2002*. It may be that because of this Act, you will be protected from the possibility of personal liability in any event. However, your organisation is not. I want to deal first with issues of negligence and liability generally before considering the additional protection that might be offered by the *Volunteers (Protection from Liability) Act 2002*.

The *Civil Liability Act* lays down general principles of the duty of care:

"5B. General principles

- (1) A person is not liable for harm caused by that person's fault in failing to take precautions against a risk of harm unless –
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things) –
 - (a) the probability that the harm would occur if care were not taken;
 - (b) the likely seriousness of the harm;
 - (c) the burden of taking precautions to avoid the risk of harm;
 - (d) the social utility of the activity that creates the risk of harm."

The sections I have just quoted seem in general terms to reflect the common law position as it stood prior to the Act. However, subsequent sections

reflect perhaps an intention on the part of Parliament to allow greater policy considerations to be taken into account than was previously the case. This is probably while lawyers are not in the end to be bothered by the Act because uncharted legal waters open before us to be navigated by the strong of heart and deep of pocket.

"5C. General principles

- (1) A determination that the fault of a person (the '**tortfeasor**') caused particular harm comprises the following elements –
 - (a) that the fault was a necessary condition of the occurrence of the harm ('**factual causation**'); and
 - (b) that it is appropriate for the scope of the tortfeasor's liability to extend to the harm so caused ('**scope of liability**').
- (2) In determining in an appropriate case, in accordance with established principles, whether a fault that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) –
 - (a) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor; and
 - (b) whether and why the harm should be left to lie where it fell.
- (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm (the '**injured person**') would have done if the tortfeasor had not been at fault -
 - (a) subject to paragraph (b), the matter is to be determined by considering what the injured person would have done if the tortfeasor had not been at fault; and

- (b) evidence of the injured person as to what he or she would have done if the tortfeasor had not been at fault is inadmissible.
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether and why responsibility for the harm should, or should not, be imposed on the tortfeasor."

In determining liability for damages for harm caused by the fault of a person, the plaintiff always bears the onus of proving on the balance of probabilities any fact relevant to the issue of causation.

There is an interesting, but for present purposes redundant, question as to whether the *Civil Liability Act* has, in the passages I have just referred to, significantly changed the existing law. I say it is redundant because, for the purpose of this talk, we need go no further than the plain words of the *Civil Liability Act*. Sections 5B and 5C are of general application.

Recreational Activities

The *Civil Liability Act 2002* does make an important alteration to the existing law and one which is directly relevant to yacht racing. Under Division 4 of the Act entitled "Recreational Activities" the Act limits liability for harm in two important respects. These are, firstly, when a person suffers harm while undertaking a dangerous recreational activity. In the case of a dangerous recreational activity, no liability is incurred for obvious risks. The second limitation is when a person suffers harm in what I will term ordinary recreational activity to differentiate it from dangerous activity. Here liability is avoided if there has been a specific risk warning given to the person injured. So there is no liability for harm for obvious risks of dangerous recreational activities and there is no liability for recreational activity where a risk warning was given to the plaintiff or, in the case of a child between 16 and 18, the plaintiff's parents. A defendant may not rely on a risk warning given to a child

under 16 or to a person defined as an incompetent person who, because of a mental or physical disability, lacks the capacity to understand the risk warning. The *Civil Liability Act* also allows a waiver of any contractual duty of care that might be express or implied within a contract. As an aside, I note that an invitation to race which is accepted by a competitor with the payment of money or consideration may well be a contract for the supply of recreational services.

There are some important definitions supplied in the Act. By s 5E "dangerous recreational activity" means a recreational activity that involves a significant risk of harm.

"Inherent risk" means a risk of something occurring that cannot be avoided by the exercise of reasonable skill and care. Oddly, Division 4 – Recreational Activities thereafter only mentions inherent risk once, more or less incidentally: s 5I(14).

Obvious risk

"5F. Meaning of obvious risk

- (1) For the purposes of this Division, an obvious risk to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.
- (2) Obvious risks include risks that are patent or a matter of common knowledge.
- (3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.
- (4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable."

"Recreational activity" includes:

- "(a) any sport (whether or not the sport is an organised activity);

- (b) any pursuit or activity engaged in for enjoyment, relaxation or leisure; and
- (c) any pursuit or activity engaged in for enjoyment, relaxation or leisure at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure."

Although, in general, a defendant is not liable for harm caused by the defendant's fault suffered by a plaintiff while the plaintiff is engaged in a dangerous recreational activity if the harm is the occurrence of something that is an obvious risk, liability may be attracted if the plaintiff has requested advice or information about the risk from the defendant or the defendant is required by written law to warn the plaintiff of the risk.

Note that this section applies to dangerous recreational activities only. The risk must be an obvious risk of that activity. The test of an objective one, that of a reasonable person in the position of the plaintiff.

What does it mean in the case of children? It is likely that the test whether a risk is obvious will be assessed on the reasonableness of the understanding of a child of the plaintiff's age and background, not on the understanding of an adult.

Exercise 1

Break into small groups and consider the following questions:

- Can yacht racing be classified as an ordinary or a dangerous recreational activity?
- Why?
- Are there some categories of yacht racing that might be classified differently to other categories?
- Do weather conditions have a bearing?
- What are some obvious risks in yacht racing?

- Are race officials taking part in a dangerous recreational activity?
- What might be obvious risks to race officials?
- What risks might not be obvious to children?

Ordinary recreational activity

The scheme of the *Civil Liability Act*, as I have said, is to differentiate between dangerous recreational activities and ordinary recreational activities. The general principles of liability apply to an ordinary recreational activity. However, liability can be avoided if a risk warning is given.

"5I. No liability for recreational activity where risk warning

- (1) Subject to this section, a person (the '**defendant**') does not owe a duty of care to another person who engages in a recreational activity (the '**plaintiff**') to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.
- (2) If a child suffers harm, the defendant may rely on a risk warning to a parent of the child if the parent is not an incompetent person –
 - (a) whether or not the child was accompanied by the parent; and
 - (b) whether or not the child was under the control of the parent.
- (3) If a child suffers harm, the defendant may rely on a risk warning to another person who is not a parent of the child if –
 - (a) the other person is not an incompetent person; and
 - (b) either –
 - (i) the child was accompanied by that other person; or

- (ii) the child was under the control of that other person.
- (4) For the purpose of subsections (1), (2) and (3), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity.
- (5) The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.
- (6) A risk warning can be given orally or in writing (including by means of a sign or otherwise).
- (7) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).
- (8) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.
- (9) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a written law, or a law of the Commonwealth, that establishes specific practices or procedures for the protection of personal safety.
- (10) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.

- (11) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.
- (12) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from an act done or omission made with reckless disregard, with or without consciousness, for the consequences of the act or omission.
- (13) A defendant is not entitled to rely on a risk warning to an incompetent person.
- (14) The fact that a risk is the subject of a risk warning does not of itself mean –
 - (a) that the risk is not an obvious risk or inherent risk of an activity; or
 - (b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from that activity.
- (15) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.
- (16) In this section –

'child' means a person who has reached 16 years but is under 18 years of age;

'incompetent person' means a person who is under 18 years of age or who, because of a physical or mental disability, lacks the capacity to understand the risk warning."

Exercise 2

- What are the risks for competitors in racing?

- Are there different risks that may confront race officials? Are race officials taking part in a recreational activity?
- What sort of risks should carry a warning?
- What sort of risk warnings are appropriate, depending on the age and experience of competitors?
- Are risk warnings also necessary for officials?
- How should risk warnings be conveyed? How often?
- In what circumstances may a race official inadvertently or deliberately negate a risk warning? How would you prevent this?
- What sort of warnings would best minimise the risk of harm to children?
- You are the race officer on a weekend regatta for yachts where crew are all under 17. On Saturday morning after one heat the easterly drops and the yachts return to shore while racing is postponed. Do you have any responsibility to the sailors while they are waiting ashore? What if they start playing football? Are they engaged in sport while waiting ashore?

Criminal responsibility

This is the foreshadowed brief reference to crime. I do not pause to consider intentional killing known as wilful murder. In extreme circumstances, a person may be guilty of manslaughter if they unlawfully cause the death of another directly or indirectly: *Criminal Code*:

"266. Duty of persons in charge of dangerous things

It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable

precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

267. Duty to do certain acts

When a person undertakes to do any act the omission to do which is or may be dangerous to human life or health, it is his duty to do that act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

When the *Criminal Code* refers to reasonable care and take reasonable precautions, to avoid such danger, the standard of reasonable care is a much higher standard than that under the *Civil Liability Act*. The criminal standard of negligence is sometimes referred to as gross negligence and is such negligence as to go beyond mere compensation between citizens and as to amount to a crime against the State. This is essentially a subjective test for a jury.

Exercise 3

The management of a regatta or race is not the control of a dangerous thing. However, a rescue boat or other craft might be classified as a dangerous thing. Motor vehicles, for instance, certainly are. What about a gun? Or a slipway? Discuss some ways in which a race official might be guilty of criminal negligence and ways in which this possibility could be minimized.

Contributory negligence (Division 5)

The principles that are applicable in determining whether a person is liable of the kind caused by the fault of the person also apply in determining whether the person who has suffered harm has been contributory negligent and failed to take precautions against the risk of that harm. The standard of care required of the person who suffered harm is that of a reasonable person in the

position of that person and the matter is to be determined on the basis of what that person knew or ought to have known at the time.

If a person self-induces a state of intoxication at the time of harm then it is to be presumed that the person was contributory negligent unless the plaintiff establishes on the balance of probabilities that the person's intoxication did not contribute in any way to the cause of harm. "Intoxicated" means affected by alcohol or a drug or other substance capable of intoxicating a person to such an extent that the person's capacity to exercise reasonable care and skill is impaired: *Civil Liability Act s 5L*.

Exercise 4

What are some ways in which a sailor or race official should take reasonable care for their own safety?

Assumption of risk

"5N. Injured person presumed to be aware of obvious risk

- (1) In determining liability for damages for harm caused by the fault of a person, the person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.
- (2) For the purpose of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

5O. No duty to warn of obvious risk

- (1) A person (the '**defendant**') does not owe a duty of care to another person (the '**plaintiff**') to warn of an obvious risk to the plaintiff.
- (2) This section does not apply if –

- (a) the plaintiff has requested advice or information about the risk from the defendant;
 - (b) the defendant is required by a written law to warn the plaintiff of the risk;
- ...
- (3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection."

The Good Samaritan

A natural person who acts without expectation of payment or other considerations is a Good Samaritan. A Good Samaritan who comes to the aid of a person who is apparently in need of emergency assistance is exempt from personal civil liability for an act or omission made by the Good Samaritan at the scene of an emergency in assisting a person in apparent need of emergency assistance. All that is required for exemption is that the Good Samaritan acts in good faith without recklessness and is not self-intoxicated. This provision of the Act is obviously to protect someone who renders first aid in an emergency, provided they are not reckless. Would it be reckless to attempt CPR if you have not been trained or kept your qualifications current?

Damages for non-pecuniary loss

For relevant purposes, damages are divided into two kinds. The first is for non-pecuniary loss which means:

- pain and suffering
- loss of amenities of life
- loss of enjoyment of life
- curtailment of expectation of life; and
- bodily or mental harm.

There is a formula for calculating the restrictions on non-pecuniary loss but for present purposes for the year commencing 1 July 2005 the first \$13,000 of non-pecuniary loss is irrecoverable unless damages exceed \$41,000.

The second area of damages is for pecuniary loss which includes loss of earnings and provision of home care services. There are restrictions on damages for pecuniary loss so that a court is to disregard earnings to the extent that they would have accrued at a rate more than three times the average weekly earnings of the date of award. Loss of earnings means (a) past economic loss due to loss of earnings or the deprivation of impairment of earning capacity; or (b) future economic loss due to loss of prospective earnings or the deprivation or impairment of prospective earning capacity.

Damages for provisions of home care services are also greatly restricted. Damages for mental harm or shock are now restricted effectively to harm which results in a psychiatric illness. This is a significant change from the common law.

"5S. Mental harm: duty of care

- (1) A person (the '**defendant**') does not owe a duty of care to another person (the '**plaintiff**') to take care not to cause the plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.
- (2) For the purpose of the application of this section in respect of pure mental harm, the circumstances of the case include the following –
 - (a) whether or not the mental harm was suffered as the result of a sudden shock;
 - (b) whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril;
 - (c) the nature of the relationship between the plaintiff and any person killed, injured or put in peril;

- (d) whether or not there was a pre-existing relationship between the plaintiff and the defendant.
- (3) For the purpose of the application of this section in respect of consequential mental harm, the circumstances of the case include the personal injury suffered by the plaintiff.
- (4) This section does not require the court to disregard what the defendant knew or ought to have known about the fortitude of the plaintiff.

5T. Liability for pecuniary loss for consequential mental harm

A court cannot make an award of personal injury damages for pecuniary loss for consequential mental harm unless the harm consists of a recognised psychiatric illness."

Volunteers (Protection from Liability) Act 2002

There were many consequences to the collapse of HIH including a Royal Commission and the prosecution of some key players. A case could be made for saying that insurance companies had generally under-provisioned for liability. Over the years the courts had taken a wider view of what harm may be reasonably foreseeable and how a defendant may be liable in situations that may seem surprising. One of the results of the so-called "insurance crisis" was that small organisations who depended largely on contributions from members suddenly found the cost of public liability and other insurance prohibitively expensive. Many organisations simply closed even though they were engaged in behaviour that by no definition could be classed as risky. The government response was the *Volunteers (Protection from Liability) Act 2002*. Its terms are very simple and has operated since 1 January 2003. By s 6 protection of volunteers from liability:

"(1) Subject to subsections (2) and (3), a volunteer does not incur civil liability for anything that the volunteer has done in good faith when doing community work.

...

(3) The protection given by subsection (1) does not apply to a volunteer –

(a) who knew or ought reasonably to have known that at the relevant time he or she was acting –

(i) outside the scope of the community work organised by the community organisation;
or

(ii) contrary to instructions given by the community organisation;

or

(b) whose ability to do the community work in a proper manner was, at the relevant time, significantly impaired by alcohol or drugs.

(4) In this section —

'drugs' means drugs that are taken voluntarily otherwise than for therapeutic purposes;

..."

A plaintiff's right to recover damages for negligent harm inflicted upon him or her is not however abrogated or taken away entirely by the Act. Instead, the liability falls on the community organisation. By s 7:

"7. Liability of community organisations

(1) A community organisation incurs the civil liability that, but for the operation of section 6(1), a volunteer would incur for a thing done by the volunteer when doing community work organised by the community organisation.

- (2) The operation of subsection (1) is subject to any protection from liability that would have applied to the community organisation if the thing done by the volunteer had been done by the community organisation.
- (3) If more than one community organisation is involved in organising the community work referred to in subsection (1), that subsection applies to the community organisation that principally organises, or the community organisations that principally organise, that work.
- (4) Liability that would be incurred under subsection (1) by a community organisation that is a State agency, if the State agency were a body corporate, is incurred by the State.
- (5) In subsection (4) –

'State agency' means –

- (a) a State agency or instrumentality that is not a body corporate; or
- (b) a department of the Public Service."

A community organisation relevantly is an incorporated association under the *Associations Incorporation Act 1987*. I assume that all yacht clubs and most, if not all, yachting associations are incorporated associations.

So what is a volunteer? A volunteer is a person who does community work on a voluntary basis. There are exceptions which are not relevant.

By s 4(2):

- "(2) For the purposes of subsection (1), a person does community work on a voluntary basis if the person –
 - (a) receives no remuneration for doing that work other than –
 - (i) remuneration that the person would receive whether or not the person did that work; or

- (ii) the reimbursement of reasonable expenses incurred by the person in doing that work;

or

- (b) receives remuneration that is not greater than the amount, if any, prescribed by the regulations."

Community work is defined widely but for relevant purposes means work organised by community organisations to be done for the purpose of sport, recreation or amusement.

A word of caution. The *Volunteers (Protection of Liability) Act 2002* may eventually protect you from liability.

It does not necessarily protect you from being sued, especially if you have money or insurance and your club does not. Don't forget the exclusions I just talked about in s 6(3).

It would be wise to know whose insurance policy will cover your costs in defending proceedings.

The impact of insurance

Most of us carry insurance against the vicissitudes of life that affect us or for whose effects upon others we are responsible. Whenever we drive a car we are automatically covered for any negligent damage we inflict on other persons, unless we are for instance seriously intoxicated. The home insurance policies by which we protect our home from cataclysmic events such as earthquake and fire and other things usually include a coverage for accidents which may occur on the property due to our neglect. Anyone who has a mortgage will know that such policies are required as a condition of the mortgage.

All sailors should carry policies of insurance for their vessel. Such policies generally not only cover property damage but may also cover damages for personal injury caused to others by negligence. Such policies do not usually

cover paid staff who are required to be covered under workers compensation insurance.

Yacht clubs and organisations who run racing events will or should have extensive public liability cover to protect all officials who are carrying out the club events.

Exercise 5

This is an individual exercise:

- Do you know whether your club carries public liability insurance?
- Who is the insurer?
- How much is the maximum liability?
- What geographical area is covered?
- Are there any exclusions as to activity or geography?
- Are there any actions which might render the policy voidable?
- How does the policy protect you as a member of the club or race official?

Unless you are able to answer most of these questions I strongly suggest you find out the answers.

The decision to race

Fundamental Rule 4 of the Racing Rules of Sailing 2005-2008 states as follows:

"The responsibility for a boat's decision to participate in a race or to continue racing is hers alone."

In my opinion, there is a misconception as to this rule. Interestingly, the rule now speaks of the decision of a boat. Of course, a boat is an inanimate object. Parties such as "owner" or "skipper" are not specified. A boat is required to have on board a person in charge (Rule 46). The fact that this

expression is not used suggests that the rule may be couched to be deliberately ambiguous. There is no case interpreting this rule in the 2005-2008 handbook.

There is a misconception by some that Fundamental Rule 4 absolves an organising authority or its officials from responsibility. I do not think it does so. Certainly I do not think it does so in respect of crew on board a boat who may have no realistic opportunity to decide in particular whether to continue racing.

Moreover, a decision of a boat to start or continue racing is arguably to be an informed decision. We can all see the immediate weather of course. How we interpret it is dependent on our experience. Young people, by definition, have less experience. Large yachts may have access to radio or fax weather transmissions. Dinghy sailors will not. There may not be opportunity for a sailor to update weather knowledge. What about back to back races?

In the end, I do not know what is the precise purpose of Fundamental Rule 4 but I am pretty confident that it does not serve as an exoneration for an organising authority.

In any event, regardless of Fundamental Rule 4, liability will be determined in accordance with the *Civil Liability Act 2002*.

Exercise 6

Consider the following situations: Imagine you are the RO:

- You are officiating at a regatta involving dinghy sailors under the age of 15. Ten minutes before the start of the final and deciding heat, while all the boats are in the vicinity of the start line, the wind drops off. It is a cloudless day and the temperature is about 35 degrees. You think the sea breeze might come in but it may be up to two hours away. What, if any, duty do you owe the competitors? What might you do?
- 24 hours into a three day ocean race, a low pressure system intensifies to the point where a storm warning is issued for waters

through which your competitors are to sail in the next 4 to 10 hours. High swell and high seas are also expected. The weather forecast is broadcast and available to all competitors. There is a safe harbour about 3 hours sail away for the majority of the fleets.

- Before you leave the yacht club, you check the weather forecast and find that a possible thunderstorm is forecast for the afternoon. The weather seems fine, the wind is fresh and there are some dark looking clouds to the south-west.

Forty minutes later, having started the first of three fleets you are about to start the second when you notice that the clouds have intensified and that there appears to be considerable lightning activity coming closer. What should you do:

- (i) for the fleet that has already started?
- (ii) for the succeeding fleets?

Would it make any difference if the fleets are fleets of catamarans with metal masts and stays?

Conclusion

I suspect that by now some of you have decided to give away sailing or officiating at sailing events and take up something safer like golf. Let me reassure you. First, more golfers get killed by lightning or poisonous snakes annually than sailors. Secondly, Western Australia has had a record of very very few fatalities during recognised sailing events. The purpose of today has been not to alarm or dispirit you but to give you some practical information as to how you may consider making the events you run as reasonably safe for competitors as possible. It is important to understand that Parliament has recognised that life has risks. Recreational activities have such a beneficial impact on the community that Parliament has sought to protect from legal

liability those people who take part in recreational activities even at the expense of some whose injuries may go unfulfilled.

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