

THE ASTRID ANDERSEN CASE

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In March 2001, during “Le Race”, a cycling event that takes place in and around Christchurch on New Zealand’s South Island, a competitor, Vanessa Caldwell, died in a collision with a car. The personal tragedy of the Caldwell family was exacerbated when it was revealed that Mrs Caldwell had learnt shortly before the event began that she was pregnant. This apparently tragic accident was however to have ramifications far beyond its initial very personal nexus.

The race in which Mrs Caldwell was competing had first been staged in 1999 and had, in its short history, become a well regarded part of the sporting calendar in New Zealand, attracting over 1,000 competitors. It was organised by experienced event organiser, Mrs Astrid Andersen, who therefore took ultimate responsibility for participant safety in the event.

The race was held in March 2001 and Vanessa Caldwell was competing as part of a four person team. Mrs Caldwell was to cycle the final leg of the event along the Summit Road (a narrow stretch of the highway), and then onto the finish at Akaroa. Mrs Caldwell had moved over onto the “wrong” side of the road whilst she was passing other competitors and was hit by the oncoming vehicle, killing her and her unborn child.

Mrs Andersen (the event organiser) had told race entrants that there would be an “official road closure” on that particular stretch of road. At the safety briefing before the race, which took place in the main city square in Christchurch, Mrs Andersen described the provisions put in place for the section of the race that would take place along the Summit Road²:

“There is an official road closure on the Summit Road, and unless you are officially entered

in Le Race you will not get through. Now if you have a rogue cyclist in your bunch, the whole bunch will be stopped, so it’s up to you to check who’s cycling around and make sure . . . ”

What she actually had put in place at that point was a checkpoint, rather than a road closure, which covered just 200m of the Summit Road section. It is clear that this checkpoint served as an administrative rather than a safety procedure, its predominant purpose being to prevent unregistered cyclists from taking part in the race, a conclusion strengthened by the notice that appeared in the local newspaper, the Christchurch Press, prior to the event. This was reported in Court in the following manner³:

“The public notice stated that the temporary closure was ‘to provide a cycle race control point during the holding of a cycling event from Christchurch to Akaroa’, and it contained the following further information: ‘Residents, visitors and motor vehicles will be permitted to pass through the control point during the period of the proposed closure. Cyclists who are not participating in the cycle race will be asked to wait until the temporary closure has ended’.”

There is ambiguity in this statement. On the one hand there is reference to “road closure”. On the other hand, it is implied that the road will be open to other “non-race” vehicles. It was that ambiguity which was to cost Mrs Caldwell her life and provided the basis upon which Mrs Andersen was prosecuted.

The Court saw the issue of the alleged ambiguity and lack of clarity of the safety information presented by Mrs Andersen as being of crucial importance to the case. It was pointed out by the Court that⁴:

“On my assessment of all the evidential material, in my view there is evidence on which a reasonable jury could be satisfied that the pre-race written material which Mrs Andersen supplied to entrants in Le Race was not clear and unambiguous . . . Firstly, in all three relevant documents, the entry form brochure, the pre-race letter to competitors and the pre-race information sheet, there were references to the fact that support vehicles would not be allowed on the Summit Road . . . Secondly, the information sheet contained a specific reference to ‘an official road closure on the Summit

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2. *R. v Andersen* [2003] D.C.R. 506 at para.[36].

3. *ibid.*, at para.[62].

4. *ibid.*, at para.[116].

Road' . . . Thirdly, the pre-race information sheet did not differentiate between the two sections of the Summit Road."

Therefore the pre-race safety pack sent to the competitors inadequately explained the safety procedures in place for the event. In addition to the safety material, there was also a pre-race briefing held in Cathedral Square.⁵ This particular briefing was similarly inadequate. The Court stated that⁶:

"If any of the competitors or their supporters were already under the misapprehension that the Summit Road would be closed to other traffic during the event, that statement during the briefing would not have dispelled that impression."

and concluded⁷:

"It is clear that the state of the evidence is such that a jury would be entitled to conclude that the information which was given by Mrs Andersen to competitors in Le Race 2001 regarding the status of the Summit Road was not clear and was ambiguous."

The safety instructions are the single most important material that the organiser of any event must draw to the attention of all those taking part in that event. It is also of crucial importance that the competitors are given ample time to assimilate this information in an appropriate environment. This is a further area where the provision provided by Mrs Andersen was fatally flawed. The start point of the race, Cathedral Square, with all the accompanying excitement and hubbub was clearly an unsuitable venue at which to discuss safety provisions.

The start itself is a time when the attention of participants would not be on the organiser.

This issue was discussed at some length in the Canadian case, *Smith v Horizon Aero Sports Ltd*,⁸ where the duty upon a parachute instructor to ensure the assimilated learning of safe jumping technique was of crucial importance. In this case, the plaintiff, making her first parachute jump sued with respect to injuries she received after she landed in and then fell from the tree, breaking her back and rendering her paraplegic. She alleged that insufficient checks were carried out to establish that the appropriate information given had been understood and more importantly fully retained by the

students. The Court drew attention to the importance of taking extra care when imparting crucial safety information in a stressful environment. Expert witnesses testified concerning the considerations that must be taken into account where the individual may be under stress. Spencer J. reported⁹:

"Both experts testified that stress enhances performance until an optimum stress point is reached and that beyond that point performance deteriorates rapidly . . . I accept the evidence of Dr Fenz and Dr Craig,¹⁰ however, that care is needed to ensure the anxious student absorbs what is being taught and that stress under which they labour may inhibit both the initial learning process and the recall and performance of what has been learned when it is needed . . . The level of stress and degree to which it inhibits the student will differ from person to person."

The implications of this analysis are obvious. Clear, unambiguous instructions delivered in a less frenetic atmosphere may well have saved Mrs Caldwell's life and would certainly have exonerated Mrs Andersen from all liability.

Furthermore, Mrs Andersen had good reason to realise that her failure to provide unambiguous information could prove catastrophic for the competitors. Abbott J.T.M. stated¹¹:

"A reasonable jury could infer that Mrs Andersen knew, or at least would have known if she turned her mind to it, that ambiguous or misleading information regarding the status of the roads on the course for Le Race could cause danger to participating cyclists, in particular if that information led them to believe that a section or both sections of the Summit Road would be closed to other traffic when that was in fact not the case."

It is not in dispute that as race director, it was Mrs Andersen who had primary responsibility for insuring the safety of competitors. The nature of the duty owed by Mrs Andersen to the competitors can be equated to that owed by the British Board of Boxing Control ("BBBC") to Michael Watson (and indeed all boxers), who fight under their auspices. In that particular case,¹² it was held:

"Since the claimant belonged to a class of persons within contemplation of the board, which

5. Cathedral Square is the main square in Christchurch from where the race began.

6. *R. v Andersen*, cited above, at para.[127].

7. *ibid.*, at para.[131].

8. *Smith v Horizon Aero Sports Ltd*, 130 D.L.R. (3d) 91; 1981 Carswell B.C. 581.

9. *Smith v Horizon Aero Sports Ltd*, 130 D.L.R. (3d) 91 at p.7 of transcript.

10. Two expert witnesses in that particular case.

11. *R. v Andersen*, cited above, at para.[144].

12. *Watson v BBBC Ltd* [2001] 2 W.L.R. 1256.

was itself involved in an activity which gave it complete control over and a responsibility for a boxing contest which would be liable to result in injury to the claimant if reasonable care were not exercised by the board, it was fair just and reasonable to impose a duty on the board.”

It is not unknown for cyclists to perish whilst competing in races (note the periodic fatalities in the Tour de France or other high profile cycling events for example). Indeed, this fact was acknowledged by Mrs Andersen in an interview a short while before she was sentenced, when she stated¹³: “With cycling, there’s always a chance someone will get killed. You never want someone to die or be badly injured on one of your events.”

However, what was different about this particular death was the legal process which followed. Mrs Andersen was charged, and ultimately found guilty of criminal nuisance, under s.145 of the Crimes Act 1961, in relation to Mrs Caldwell’s death.¹⁴ This was not a civil action brought by Mrs Caldwell’s family, for New Zealand’s Accident Compensation Scheme¹⁵ bars legal proceedings in the event of personal injury except in certain cases where exemplary damages are sought, in such a case *recklessness* must be found to establish liability. Rather this was a criminal action with Mrs Andersen being found guilty by a collection of her peers on a charge of criminal nuisance.

The decision of the Christchurch District Court¹⁶ sent shockwaves through the New Zealand sporting community, a country which prides itself on its provision of outdoor sporting events and which until now has been ill-used to the interference of the law into incidents which take place within the sporting environment. The reaction of the community to the case has by and large been unfortunately predictable, with participants and organisers almost as one predicting dire consequences for all sports organisation in New Zealand. For example, Mike Ward, Green Party Member of Parliament and organiser of several high profile sporting events stated in the wake of the decision¹⁷:

“As organiser of New Zealand’s longest running multi-sports event, the Nelson Iron People Race, I am unlikely to proceed with next year’s event. I imagine others will feel the

same, which is sad in view of the exceptional safety record for events where there is in reality considerable scope for things to go wrong.

As has been pointed out by others, this case is not just about higher-risk sporting activities. It affects every sporting, recreational, or cultural event in this country.”

That the many doomsayers should now be predicting the demise of the multitude of sporting events which in particular have prospered in New Zealand is ironic. For these events have in no small part been protected by the existence of the Accident Compensation Scheme in New Zealand, which for the most part prohibits legal action to recover compensation in the event of personal injury. In other common law countries, the spectre of negligence liability, in the event of personal injury, is a constant worry for any event organiser. But where previously the civil law has been kept at bay by the ACC, now the criminal law apparently threatens the status of these events. Already it has affected organisers of outdoor sporting activities, with Cycling Timaru (based on New Zealand’s South Island) cancelling an historic 106-year-old event due apparently to the mountain of paperwork and logistical difficulties involved. The Christchurch Press reported the news¹⁸:

“Cycling Timaru has been forced to cancel a (sic) historic 106-year-old event in the wake of the landmark prosecution of Le Race director Astrid Andersen. Next month’s annual Christchurch to Timaru race has been shelved after concerns were raised about safety and the problems posed by a ‘paper war’ to gain race approvals. Cycling Timaru president Brent Coe said it was not easy to pull the plug on an event that started in 1897. ‘They want 42 marshals, 95 signs, and 147 cones on the course which is impossible for us.’”

From a neutral perspective, these requirements do not seem to be particularly excessive in a race which will be covering around 163 kilometres (100 miles)! This article will attempt to address the concerns voiced by people such as Mike Green and to assess to what extent their fears are realistic ones when the legal implications of the *Andersen* decision¹⁹ are correctly understood. It will also seek to analyse this case from an English common law perspective and to try and examine what impact such an incident would have, if it was litigated in England and Wales.

13. K. Welham, “Crossroads for Race Manager”, *The Christchurch Press*, August 9, 2003, p.A4.

14. Mrs Andersen has been remanded on bail and is awaiting sentence on August 29—her sentence was a fine of NZ\$10,000, (around £3,500).

15. The Scheme is administered by the Accident Compensation Commission (“ACC”) and is commonly referred to as ACC.

16. *R. v Andersen*, cited above, May 19, 2003.

17. *Christchurch Press*, August 9, 2003, p.A1. Press release, Green Party, August 10, 2003.

18. “In Brief”, *Christchurch Press*, August 22, 2003, p.A3 (New Zealand Press Association).

19. *R. v Andersen*, cited above.

In order to understand the reasoning behind this decision, it is necessary to examine the little used area of criminal nuisance in New Zealand. There have been two landmark cases, in this area, *R. v Mwai*²⁰ and *R. v Turner*.²¹ In the first of these cases, the appellant had unprotected sexual intercourse with five women at a time when he was infected with the HIV virus, causing two of them to become infected with the condition.²² Amongst several charges levelled was that of criminal nuisance, contrary to s.145 of the Crimes Act 1961. The particular provision contained in s.145(1) reading:

“Every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of an individual.”

The penalty for any breach of s.145(1) is contained in s.145(2), which reads further: “Everyone who commits criminal nuisance is liable to imprisonment for a term not exceeding one year.”

The legal duty owed in relation to a charge of criminal nuisance, is covered by s.156 of the Crimes Act, which states:

“Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.”

The appellant in *R. v Mwai*²³ contended that there could be no liability as it could not be proved that the HIV virus was under his control. However, as stated in *Mwai*, and reiterated in *Andersen*,²⁴ the Court expressed the opinion that²⁵:

“This is really no more than a particular aspect of the more general common law duty not to

engage in conduct which one can foresee may expose others to harm.”

Based upon this particular assessment of the statutory provision, it was clear that the appellant had under his control the seminal fluid infected with the HIV virus, and that he could foresee that unprotected sexual intercourse with the women would indeed expose them to harm. In order to prove guilt, the Crown only had to show that the appellant put the complainants in peril, or at risk of contracting HIV, which obviously they could accomplish without difficulty.²⁶

It can clearly be seen that when applying this scenario to the case in hand, Astrid Andersen, as Race Director had the safety provision of the race under her control and that it was possible to foresee that if that provision was ambiguous or unclear, then this would be sufficient to expose all the competitors in the race to harm, (or at least potential harm). Therefore, in order to gain a conviction, the prosecution had only to show that the safety instructions were indeed flawed in the manner outlined above.

In *R. v Turner*,²⁷ the appellants, the managing director and general manager of a mussel processing factory, were convicted of criminal nuisance following the contamination of some mussels from the plant with the listeria bacteria. These mussels were subsequently sold through retail outlets causing serious illness amongst those members of the public who ate the contaminated products. The defence contended that the mussel processing plant could not be classified within the confines of s.156 of the Crimes Act 1961, which, to reiterate, stated:

“Every one who has in his charge or under his control **anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life** is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger.”²⁸

The defence claimed that the mussel processing plant did not fit within the definition of “anything whatever” and on the basis submitted there could be no guilty verdict. However, the Court of Appeal gave short shrift to this argument, contending that²⁹:

“The phrase ‘anything whatever’ has, in our view, been deliberately chosen as a phrase of

20. [1995] 3 N.Z.L.R. 149.

21. (1995) 13 C.R.N.Z. 142.

22. It is interesting to note that in a case decided recently, Mohammed Dica became the first person in England to be successfully prosecuted for inflicting grievous bodily harm in connection with a sexual disease. In this particular case, he tricked two women into having unprotected sexual intercourse with him even though he knew that he had been diagnosed with HIV.

23. [1995] 3 N.Z.L.R. 149.

24. [2003] D.C.R. 506.

25. *ibid.*, p.8 of transcript.

26. *ibid.*, p.7 of transcript.

27. (1995) 13 C.R.N.Z. 142.

28. Emphasis added.

29. At p.149.

wide import. This is emphasised by 'whatever'. The only qualification to the phrase is that to be within the section it must be 'anything whatever' which, in the absence of precaution or care, 'may endanger human life'. Qualified in that way, the phrase is apt to describe for example a metal quarry, a hospital theatre or a factory that produces food for human consumption."

Having clarified in *R. v Turner* that a manufacturing plant would therefore fall within the jurisdiction of the Crimes Act 1961, the Court in *R. v Andersen*³⁰ felt no difficulty in extending the decision so as to include an organised cycling event within the boundaries of the definition stated in s.156 of the Crimes Act. The Court stated³¹:

"In my view there is no logical basis on which an organised cycling event on public roads should not come within the definition of 'anything whatever' in s.156 . . . If a mussel processing factory, (*i.e.* a building within which a number of different processes may be undertaken at different times by different people) can be 'anything whatever', there is no reason why the phrase should not also include a racecourse or a cycling velodrome. If a racing or cycling club owns or leases or has a licence to use premises for its activities, there is no reason why the organisation of such activities should not be governed by s.156. There is certainly no reason why such premises should not be 'anything whatever', while a mussel processing factory and fluid within one's own body are."

The Court continued in the same vein³²:

"If the officers of a racing club decide not to cancel racing when the weather conditions render the course unsafe, there is no logical reason why s.156 should not apply. Secondly, if the organisers of a race meeting on a public beach make a similar decision, knowing that the sand is unstable and therefore dangerous to horses and jockeys, there is equally no reason why s.156 should not apply. Finally, if a bungy jump operator could be prosecuted for criminal nuisance because his equipment is faulty and potentially dangerous, there is no logical reason why the organiser of a cycle race should not be prosecuted if his or her planning of the event has been defective and if, as a result, the safety of competitors is put at risk."

30. [2003] D.C.R. 506.

31. *ibid.*, at paras [85], [90].

32. *ibid.*, at para.[91].

When examined from this point of view, Mrs Andersen was clearly going to encounter substantial problems in securing an acquittal. It was the control of the event *per se* that was established to be of crucial importance, rather than the control of the individual competitors in taking part in the event. As was pointed out in Court, Mrs Andersen accepted all entry fees and retained the right to alter the course or even cancel the event, with no right of redress for any of the competitors. In addition, she retained the right to disqualify any competitor who broke the stated rules of the event.³³ This point was addressed at length by the Court, which stated:³⁴

"Mrs Andersen's intention to retain control over the event while it was in progress was put into effect. There was a checkpoint on the Christchurch section of the Summit Road near the Sign of the Bellbird, the purpose of which was to identify rogue cyclists who had not paid an entry fee. There were cones and marshals at the change stations at Motukarara, Little River and the Hill Top . . . In such a situation the competitor could be removed from *the event* which was the activity which was under Mrs Andersen's control. Conversely, in the absence of any fault on her part, Mrs Andersen would not be personally liable for any irresponsible conduct by a competitor."

Criticism has been extended to Mrs Caldwell for her catastrophic failure to observe the ordinary laws of the road. When she was involved in the fatal collision, she was at least a metre beyond the central line of the road. If she had been following the ordinary laws of the highway, then the collision would never have happened. However, as was pointed out by several witnesses who had been competitors in the race, they too had misunderstood the safety instructions furnished by Mrs Andersen and believed that the stretch of road in which the accident happened was closed for the duration of the race, so that it was indeed safe to use the entire width of the highway rather than merely one side of the road. Despite this, the defence attempted to lay responsibility for her actions squarely at the feet of Mrs Caldwell.³⁵ Counsel for the defence submitted:

"The structure of the event and the administration may remain with the race organiser, but from the moment the race begins, each individual competitor begins their own act of practising that sport. They alone are in control of their actions from that time, within the rules and

33. *ibid.*, at para.[95].

34. *ibid.*, at paras [96]–[97].

35. *ibid.*, at para.[79].

guidelines provided by the event, and they alone are individually responsible for the way they will ride the race.”

However, in light of the unclear and ambiguous safety instructions furnished by Mrs Andersen, the fact that Mrs Caldwell was apparently riding in violation of the normal laws of the road is immaterial. It was perfectly reasonable for Mrs Caldwell to believe that it was safe for her to cross the white line in the manner that she did. She had no reason to foresee that there would be any vehicles on the road, other than the bicycles which she was racing with and against. No blame could thus be attached to Mrs Caldwell. She behaved at all times in a responsible and reasonable manner.

This verdict should not open any floodgates. It will only be of concern to the imprudent organiser.

England and Wales perspective

This section, although addressing briefly the possible implications from any hypothetical criminal prosecution in this country will however concentrate on the possibility of an action in negligence, had the event taken place in England or Wales. Although the charge and outcome may be different in the event of a criminal prosecution in England and Wales, the fundamental principles are closely linked. By contrast it is in the area of a possible negligence action where the differences between the two jurisdictions are most starkly illustrated.

It is likely that for any action to proceed in criminal law in England and Wales, in the case in hand, it would be under a charge of either *gross negligence* manslaughter or *reckless* manslaughter. This would therefore hinge on whether or not Mrs Andersen was in the one case *grossly negligent*, or in the other case *reckless*, in the care she attached to the safety provision in the race. In order for her to be guilty of *gross negligence* manslaughter, it would have to be shown that Mrs Andersen owed Mrs Caldwell a duty of care, that she had breached that duty of care, that this breach had caused the death of Mrs Caldwell and that this breach could be characterised as *grossly negligent*, that being an objective test.³⁶ Now duty and causation would be easily established. However, it is more doubtful whether Mrs Andersen exhibited a sufficient lack of care to be in breach of duty. MacKay L.C. commented on the appropriate standard to be applied³⁷:

“In cases of manslaughter by criminal negligence involving a breach of duty, it is a sufficient direction to the jury to adopt the gross

36. *R. v Adomako* [1994] 1 A.C. 171.

37. *ibid.*, at 188.

negligence test set out by the Court of Appeal in the present case following *R v Bateman* (1925) 19 Cr App R 8 and *Andrews v DPP* [1937] 2 All ER 552 . . . and it is not necessary to refer to the definition of recklessness in *R v Lawrence* [1981] 1 All ER 974, [1982] AC 510, although it is perfectly open to the trial judge to use the word ‘reckless’ in its ordinary meaning as part of his exposition of the law if he deems it appropriate in the circumstances of the particular case.”

In assessing the appropriate standard to be *grossly negligent* in *Adomako*,³⁸ MacKay L.C. drew attention to the influence of older cases in supporting the judgment. In *R. v Bateman*,³⁹ Lord Hewart C.J. commented:

“The facts must be such that in the opinion of a jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.”

The question that would need to be addressed therefore is whether or not Mrs Andersen was so *grossly negligent* as to be deserving of criminal sanction. Factors which may be considered in that context include the seriousness of her breach of care, the extent to which that breach departed from the proper standard of care and also the risk of death due to the breach of care. When all of these factors are taken into account and the question of Mrs Andersen’s guilt or otherwise of *gross negligence* manslaughter is addressed, it appears, in the light of the case law that she would not be found guilty of such a charge.

As regards *subjective reckless manslaughter* and, the necessary standard of behaviour is as Smith and Hogan explain⁴⁰:

“Where [the defendant] kills by an act (not unlawful apart from the fact that it is done recklessly) knowing that it is highly probable that he will cause serious bodily harm . . . it must be manslaughter.”

Mrs Andersen must have realised that had she failed to furnish clear unambiguous safety instructions that this failure would certainly have the potential to cause serious bodily harm or death. However, it is far more doubtful that her behaviour could possibly be classified as *reckless*. This writer

38. See n.36 above.

39. (1925) 19 Cr. App. R. 8 at p.12 of transcript.

40. J.C. Smith, *Smith and Hogan: Criminal Law* (10th ed., Butterworths, London, 2002), p.387.

believes that at worst, her actions could be described as careless, leaving the criminal law in England and Wales an unsuitable mechanism for further action. It has been clearly stated in various dicta that mere inadvertence is not sufficient for a guilty verdict, and whilst Mrs Andersen may have been careless it would be harsh in the extreme to suggest that her conduct amounted to anything more than mere *carelessness*, and that therefore this would be insufficient to lead to a successful conviction under gross negligence manslaughter or reckless manslaughter. Indeed it is for analogous reasons that there will almost certainly be no action taken by Mrs Caldwell's family to attempt to recover *exemplary* damages under New Zealand's Accident Compensation Scheme. The appropriate standard to be applied in that scenario is *recklessness* (albeit objective, rather than subjective).

Since the 1967 Woodhouse Report⁴¹; and the resultant legislation which enshrined most of its recommendations into New Zealand law with the enactment and subsequent amendment of the Accident Compensation Act 1972; an action to recover damages for personal injury in New Zealand has not been available where that injury falls within the ambit of the Act. The latest incarnation of the legislation covering what became identified as the social compact set up between the New Zealand people and their government is the Injury Prevention, Rehabilitation and Compensation Act 2001. The major point of interest lies in the elimination of the right to sue for personal injury, which was established by the compensation scheme in the original statute, in 1972, and maintained in all subsequent enactments. Thus, where personal injury is suffered, there can be no action in negligence unless *exemplary damages* are sought. In such a scenario, the claimant must show that the defendant was grossly negligent or *reckless* as to the safety of the claimant.

In *A v Bottrill*,⁴² a claimant contracted cervical cancer after the misreading of her smear tests by the defendant. The majority in the Privy Council reversed the earlier majority decision of the New Zealand Court of Appeal,⁴³ and held that the appropriate standard should be *objective recklessness*, rather than *subjective recklessness*. It is unlikely, for reasons given earlier, that any such action, even if brought against Mrs Andersen, would have any chance of succeeding in New Zealand. If such an incident had happened in England or Wales, however, there would be no such bar on an action for

compensatory damages and any such action could proceed in negligence.

The first duty of any sports organiser is to ensure that there is appropriate safety provision at the event in question. The event organiser clearly owes the participants a duty of care to ensure this.⁴⁴ In some respects this requirement may be equated with the responsibility of employers or occupiers of premises, who must ensure that systems of work or their premises are safe for the purposes for which they are designed.

The principle that sports organisers must have adequate safety procedures and systems in place was most emphatically aired in *Watson v British Boxing Board of Control Ltd.*⁴⁵ In this particular case, Michael Watson suffered catastrophic brain injuries in a World title fight against Chris Eubank on September 21, 1991. From the point of the conclusion of the fight, (when Watson was bludgeoned unconscious to the canvas by his opponent), seven minutes elapsed before he was examined by the attending doctors, who, it subsequently emerged, lacked experience in dealing with brain trauma and resuscitation. In addition they were not in possession of the appropriate equipment to deal with Watson's injuries, which were of a kind which could reasonably be expected to occur in a boxing match, and therefore should have been accounted for by any reasonable organiser, or in this case, governing body. A further 23 minutes elapsed before Watson arrived at North Middlesex Hospital. However, the lack of a neurosurgical department at that hospital necessitated his transfer to St Bartholomew's Hospital, where an operation was carried out to evacuate a subdural haematoma (a blood clot in the brain). Unfortunately, by this time Watson had suffered serious brain damage and it is due to these injuries and what he viewed as serious flaws in the safety provisions put in place by the governing body that he brought his case. As Lord Phillips M.R. explained⁴⁶:

"He, (Mr Watson), claimed that the board had been under a duty of care to see that all reasonable steps were taken to ensure that he received immediate and effective medical attention and treatment should he sustain injury in the fight. He contended that they were in breach of this duty with the consequence that he did not receive the immediate medical attention at the ringside that his condition required."

41. The Royal Commission of Inquiry—"Compensation for Personal Injury in New Zealand" (December 1967)—became better known as the Woodhouse Report after the Commission Chairman.

42. Privy Council Appeal No.10 of 2002; [2002] UKPC 44; [2002] 3 W.L.R. 1406.

43. *Bottrill v A* [2001] 3 N.Z.L.R. 622.

44. Based on *Caparo v Dickman*, there would be no doubt that a duty is owed—issues of proximity, foreseeability and that it is just and reasonable are all clearly satisfied.

45. [2001] Q.B. 1134.

46. *ibid.*, at 1141.

The Board was found to have failed to ensure that its rules provided for adequate medical supervision, which would have meant, had it been present, that Mr Watson would have received the appropriate medical care for what was clearly, under the circumstances, a foreseeable injury. Lord Phillips M.R. continued⁴⁷:

“The injuries which are sustained by professional boxers are the foreseeable, **indeed inevitable**, consequence of an activity which the board sponsors, encourages and controls. . . . As Mr Morris⁴⁸ accepted, by reason of its control over boxing the board was in a position to determine, and did in fact determine, the measures that were taken in boxing to protect and promote the health and safety of boxers.”

It was held that it was reasonable for Mr Watson to rely on the board to look after his safety adequately and that the board, in failing to institute appropriate safety protocol should be held liable for the injuries that Mr Watson received at the hands of Mr Eubank. Now clearly, this can be applied directly to Mrs Andersen. It is reasonable for the cycle race competitors to rely on her, as race organiser, to look after their safety appropriately. It is also reasonable for them to expect there to be adequate safety protocol in place—and part of that necessary safety protocol is obviously the provision of clear and unambiguous safety instructions. Lord Phillips M.R., spoke in *Watson* about the importance of the British Board having “control” over boxing in general and that event in particular. This can be equated to the notion of Mrs Andersen’s “control” over her event and that the duty she owed was extended due to this notion of control.

The *Andersen* and *Watson* decisions might on one view open the floodgates to challenges to the governing bodies from sports competitors injured during the course of their sports. Particularly vulnerable would seem to be those governing bodies that provide directions for safety provision within their sports (such as Rugby Union via the International Rugby Board and Formula One via the Federation International Automobile). James M. commenting on this issue writes⁴⁹:

“Potentially more dramatic for sport would be the possibility that liability could be imposed on a governing body for the inadequacy of its in-game safety rules. Where a specific injury, or injury from a specific act was a common occurrence in a sport, it is now possible that a governing body will be liable for such injuries as

are so caused. The court in *Watson* held that one of the reasons why governing bodies exist is to provide guidance, conduct and disseminate research and educate all those involved in its sport about safety issues. If it is known that stamping in rugby, or elbowing in football, or bouncers in cricket are dangerous and can cause injury unless the rules are either changed or more rigorously enforced, an incremental development of the law from *Watson* would see governing bodies liable for their failure to ensure the safety of their sport’s participants.”

Astrid Andersen does not represent a governing body. However, her role for the race in question could clearly be equated to that of a governing body in that she would have a direct responsibility for participant safety. It was the risk of a collision between competitors and other road users in the absence of unambiguous instructions. As this was an obvious danger, there is a heightened duty to protect the participants from it.⁵⁰ Furthermore, as was acknowledged in court, a common practice in cycle races is for competitors to use the whole road, where they believe it is safe to do so. Mrs Caldwell was not the only competitor who was under the mistaken understanding that the particular stretch of road was closed. It was reported that⁵¹:

“Firstly, it is common for riders to be bunched across the road, often a number abreast. Secondly, it is also common for cyclists to use all the available roadway when they believe that it is safe to do so, which means that crossing the white line is a well-recognised phenomenon.”

Mrs Andersen, as race director was holding herself out as the individual with ultimate responsibility for all matters concerning the event, including safety. She therefore owed a duty to provide a reasonable standard of care to all participants, just as a St John’s Ambulance person, attending an event in their medical capacity, would owe a duty of care to those to whom they render first aid.⁵²

In *Gillon v Chief Constable, Strathclyde Police*,⁵³ a policewoman, who was in attendance at a football match, was injured when a player accidentally collided with her as he careered off the pitch. She brought an action alleging that she should have been instructed by her superiors to keep an eye out for such dangers (she had actually been instructed to keep her attention focussed on the crowd).

47. At 1161 (emphasis added).

48. Mr John Morris, President of the British Boxing Board of Control at the time.

49. S. Gardiner *et al.*, *Sports Law* (2nd ed., London, Cavendish Publishing, 2001), p.714.

50. *Bolton v Stone* [1951] A.C. 850.

51. At paras [47]–[48].

52. *Cattley v St John’s Ambulance Brigade*, 87 N.J. 1140 (1986), c.133, p.4 of transcript.

53. 1997 S.L.T. 1218.

Although Mrs Gillon lost the case there are nevertheless important points to make in terms of its implications for the case in hand. Johnston L.J. held in *Gillon* that:

- “(1) That the risk of such an accident occurring was so minimal that it was reasonable not to take precautions against it.
 (2) That in the circumstances any instruction by the first defender to the pursuer to keep an eye on the pitch would not have prevented the accident from happening.”

These findings can be contrasted with the case under discussion. Mrs Caldwell was involved in an accident that in the circumstances was entirely foreseeable and it was reasonable to take precautions against such an accident from occurring. Whether Mrs Caldwell would have taken any notice of proper instructions could have been another issue as *McWilliams v Sir William Arrol*⁵⁴ demonstrated, if it could have been shown that Mrs Caldwell was in the habit of ignoring safety instructions, particularly with regards to road etiquette then it may have been possible for Mrs Andersen to escape liability despite the fact that her own instructions had been inadequate and that this inadequacy had caused Mrs Caldwell's death. However, Mrs Caldwell's pregnancy suggested that she would have been particularly careful in the race. This may have dissuaded Mrs Andersen making any attempt to use the *Arrol* case in her defence.

It is well established by authority,⁵⁵ that the greater the risk of an incident occurring then the greater the steps need to be to guard against that event. Furthermore, the greater the likelihood of serious consequences, then there is a heightened responsibility to guard against them.

This principle was developed in *Bolton v Stone*, where a cricket ball was hit out of the ground and struck a passer-by, causing injury.⁵⁶ Lord Porter stated “The quantum of danger must always be a question of degree. It is not enough that there is a remote possibility that injury may occur; the question is, would a reasonable man anticipate it?”

Lord Reid further opined on the same subject⁵⁷:

“In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck.”

In the case at hand, it is obvious that there was, in the event of unclear instructions with regards to the

54. [1962] 1 All E.R. 623.

55. *Bolton v Stone* [1951] A.C. 850.

56. *ibid.*, at 860.

57. *ibid.*, at 866.

possible closure of the particular stretch of road, a foreseeable risk of riders colliding with motor vehicles and moreover and in the event of a collision, the likelihood that the consequences would be potentially catastrophic for one or both of the parties involved. In this respect therefore, the legal implications for Mrs Andersen would be very serious indeed.

It is likely that the *Andersen* case, caused events organisers to look again at their safety provision. It is certainly arguable that if this is the end result, then this will lead to improved safety provision. It is also possible that the case will have a “chilling effect” on participation rates as organisers become concerned that they may end up facing criminal charges if an accident occurs at one of their events, and that consequently they may decide to withdraw from sports and leisure organisation completely.⁵⁸

So this case (and others like it)⁵⁹ clearly represent very much a double edged sword. On the one hand any advance in safety provisions for people in any walk of life including sports competitors should be applauded. On the other hand it must be acknowledged that sport constitutes a unique environment and that the law should adapt to it.

Three recent cases from foreign jurisdictions shed further light on the legal position of governing bodies (and sports organisers in general) in the face of negligence claims by participants. In the first, *Hamstra v British Columbia Rugby Union*,⁶⁰ Mark Hamstra broke his neck, consequently suffering permanent quadriplegia, whilst playing in the front row of a scrum, which collapsed in a match in 1986. He sued the referee, his school and the British Columbia Rugby Union (“BCRU”). In exonerating the Rugby Union, Hollinrake J. rejected a submission from counsel for the British Columbia Rugby Union that the standard to be applied was that of a rescuer. He stated⁶¹:

“In my opinion the standard of care the law imposes on the BCRU is a greater one than that of a rescuer. In saying this I am not taking a different view of that standard than Spencer J. did in the *Horizon* Aero sport case.⁶² I think the facts before me are different than in that case . . . While I think that standard of care of the BCRU in this case is higher than that of a

58. Anecdotal evidence, such as that outlined earlier, already exists which suggests that organisers are reconsidering their positions following the guilty verdict.

59. *Hamstra v British Columbia Rugby Union*, 16 A.C.W.S. 3d 352; *Watson v British Boxing Board of Control Ltd* [2001] Q.B. 1134; *Haylen v New South Wales Rugby Union Ltd* [2002] N.S.W.S.C. 114; *Agar v Hyde*; *Agar v Worsley*, 173 A.L.R. 665.

60. 1989 Carswell B.C. 619; 16 A.C.W.S. 3d 352.

61. *ibid.*, at para.30.

62. *Smith v Horizon Aero Sports Ltd*, 130 D.L.R. (3d) 91.

rescuer I do not think it is the standard of the careful or prudent parent. I think the best way to put it is that the BCRU owes a duty of care to take reasonable care in all the circumstances, those circumstances being that it is a voluntary non-profit organisation that has taken upon itself the promotion and organisation of the game of rugby as a member of the governing body in this country, the CRU.⁶³ In my opinion the standard of care it must exercise is more in keeping with the standard of care that I have found the law imposes on Rigby."⁶⁴

The question of any liability of the governing body was clearly affected by the availability of information to them regarding the potential threat of serious neck injuries occurring in the kind of incident that caused Mark Hamstra's injuries. Similarly, Mrs Andersen would have been well aware of the practice of cyclists to use the full width of available road wherever they believe it to be safe, and therefore this should have been an important consideration in her mind when she was putting forward the safety instructions. Although there had been a memorandum from the Rugby Football Union in England concerning safety issues surrounding the set scrummage in rugby union, as far back as 1981 and experimental rules were being implemented in New Zealand, designed to deal with the issues of collapsed scrummages, the court was satisfied that with all the information available to them, the BCRU had acted reasonably. Hollinrake J. commented⁶⁵:

"The degree of the standard of care must be commensurate with the gravity of the risk. Here the plaintiff asserts that the defendants all ought to have known of the risk of a collapsed scrum in the game of rugby leading to the very type of injury suffered by the plaintiff. The knowledge, the plaintiff says, should carry with it a very high degree of care. I am satisfied on the evidence before me that those involved in the game of rugby in May 1986 in British Columbia did not have before them, nor as reasonable persons ought they to have had, sufficient knowledge as to the risk of serious cervical spine injury resulting from a collapsed scrum, to factor that knowledge into an increased standard of care. With a contact sport such as rugby, if one were to pause and reflect upon it, the possibility of a

serious neck injury is there. However, in my opinion, on the basis of what the defendants knew or ought to have known in May 1986, that possibility was sufficiently remote that it did not require a warning to the players or their parents from any of the defendants, nor has it any significance to the standard of care to be exercised by them."

Significantly however, the court reaffirmed the duty of governing bodies to keep abreast of medical and scientific evidence and to alter their laws and procedures accordingly if safety necessitates this. Hollinrake J. concluded⁶⁶:

"The evidence shows that the rugby community's awareness of serious cervical spine injury is now much greater than it was prior to the plaintiff's injury. I want to make it clear in these reasons that the standard of care as it relates to the risk of serious debilitating cervical spinal injury in B.C. in May 1986, is in my opinion, a lower one than the court would apply in B.C. were the same injury to occur today in similar circumstances."

So had the court concluded that the relevant safety information had been reasonably available to the defendant rugby union then it would have found liability established.

For Mrs Andersen, there was no uncertainty about the possible consequences of inadequate action on her part. If there was confusion about safety instructions then it was obvious to any reasonable person that disastrous consequences may follow.

In two Australian cases⁶⁷ heard at the same time with similar circumstances to those seen in *Hamstra*, two players, who had each suffered broken necks as a result of collapsed scrums sued in negligence. The defendants included, amongst others, certain individual members of the International Rugby Football Board ("IRFB").⁶⁸ Of some importance to the case, in contrast to the finding in *Watson v British Board of Boxing Control*⁶⁹ was the emphasis placed by the court on the possibility of virtually indeterminate liability. Gleeson C.J. stated⁷⁰:

"The extent of the potential liability is confined only by the number of people who choose to play the sport anywhere in the world . . . Such

63. Canadian Rugby Union.

64. The coach of the team that the claimant played for—the standard applied was to act with the ordinary skill and care of a selector/coach in the circumstances he found himself in. It was further acknowledged that as long as he acted in accordance with the Laws of the Game as promulgated by the CRU then he would have no reason to fear liability.

65. At para.[19].

66. *Hamstra v British Columbia Rugby Union*, 1989 Carswell B.C. 619 at para.[23]; 16 A.C.W.S. 3d 352.

67. *Agar v Hyde*; *Agar v Worsley*, 173 A.L.R. 665; 74 A.L.J.R. 1219.

68. The governing body of rugby union worldwide to which all individual member bodies are affiliated.

69. [2001] Q.B. 1134.

70. *Agar v Hyde*, 201 C.L.R. 552 at 563; [2000] H.C.A. 41.

an amateur sport may be played in many countries, in widely differing circumstances, ranging from organised competitions to casual games, by people of different ages, physical abilities, vulnerabilities, and degrees of skill, enthusiasm, recklessness and courage. It is said that there is a duty, in relation to the rules of the sport, to take reasonable care to protect them all against unnecessary risk of injury. For practical purposes, the liability is indeterminate.”

Whereas the possible number of litigants under the British Boxing Board of Control ran to less than 500 people (the number of registered professional boxers in Great Britain), the numbers of would be litigants in rugby union ran to hundreds of thousands (potentially every person who plays rugby union worldwide).

A further issue of importance was the inability of identifiable *individual* members of the International Board to bring about changes in the laws of the game—clearly not an issue where Mrs Andersen was concerned as she had sole power to apply and amend any particular rule governing the event in question.

Gaudron, McHugh, Grummow and Hayne JJ. commented⁷¹:

“No individual member of the Board could bring about a change without the assent of others. The most that an individual appellant could do was make a proposal to a member union or a committee of the Board and vote in favour of any proposal that was put to the Board. So the case against each member of the IRFB must be that he owed a duty of care to every person who played the game to propose an amendment that would protect that player from injury and, when such an amendment was proposed, to vote for it. Presumably, the IRFB member would have discharged his duty of care by voting for the amendment even though it was rejected by the majority of members . . . Not only did no individual member of the IRFB have the power to change the laws of the game, the IRFB itself did not have the power to ensure that the rules if promulgated were adopted. The participation of individuals in any particular match was regulated by whatever association organised the match . . . It follows that in no relevant sense did the Board of the IRFB, or those who attended its meetings as delegates control what happened in the matches in which the respondents were injured.”

71. *Agar v Hyde; Agar v Worsley*, 173 A.L.R. 665; 201 C.L.R. 552 at 580; [2000] H.C.A. 41.

The voluntary nature of participation in rugby union was further considered as another barrier to any finding of liability. As the court summed up⁷²:

“The decision to participate is made freely. That freedom, or autonomy, is not to be diminished. But with autonomy comes responsibility. To hold that the appellants owed a duty of care to Mr Worsley would diminish the autonomy of all who choose, for whatever reason, to engage voluntarily in this, or any other, physically dangerous pastime. It would do so because it would deter those who fulfil the kind of role played by the IRFB and the appellants in regulating that pastime from continuing to do so lest they be held liable for the consequences of the individual’s free choice. The choices available to all would thus be diminished.

Separate questions may arise about school age children whose decisions are made or affected by others.”

The third case, again from Australia, involved an injury received by a player in another game of rugby union.⁷³ The question arose as to whether or not the defendants, New South Wales Rugby Union Limited (“NSWRU”), owed a duty of care to the plaintiff to organise and regulate the game so as not to expose the plaintiff to unnecessary risk of injury. The incident actually occurred in 1982, and once again involved a front row forward breaking his neck in an incorrectly engaged scrum, rendering the plaintiff paraplegic. An extensive analysis of the *Agar and Hyde* case was carried out in which the Court stressed the importance of the very nature of the sport of rugby union. The judgment of the Chief Justice was cited by Einstein J.⁷⁴:

“What is an unnecessary risk in an inherently dangerous sport? When an obviously risky activity is engaged in, voluntarily, for pleasure, by an adult, how does a court determine whether a certain level of risk is unnecessary . . . It cannot be the case that all avoidable risks have to be eliminated. The only way to avoid risk of injury is not to play. No doubt the rules of the game could be altered in many respects to make it safer, but people who enjoy playing, or watching, rugby football have other priorities.”

Herein lies the fundamental difference between these cases and the case under discussion. By no

72. 173 A.L.R. 665; 201 C.L.R. 552 at 283, [2000] H.C.A. 41.

73. *Haylen v New South Wales Rugby Union Ltd* [2002] N.S.W.S.C. 114.

74. *ibid.*, at p.10 of transcript.

stretch of the imagination should Mrs Caldwell have been exposed to the risk of being hit by an oncoming car. If the road had indeed been closed then no car would have been present to collide with her. Equally, had the safety instructions stated that it was a checkpoint rather than a road closure then Mrs Caldwell would almost certainly have been cycling on her own side of the road, and consequently would not have collided with the vehicle in question.

In the opinion of this author, the concerns voiced earlier by James M. (see above) will prove to be needless. The decisions in *Hamstra v British Columbia Rugby Union*,⁷⁵ *Agar and Hyde v Worsley*⁷⁶ and *Haylen*,⁷⁷ should go some way towards soothing the fears within the sports community in the wake of the decision in *Watson v British Boxing Board of Control*.⁷⁸ It is clear from that decision that liability was limited to very restrictive circumstances and that any responsible governing body (or event organiser) maintaining reasonable vigilance with regards to matters of safety provision within their sport or event has nothing to fear from the courts.

If the instructions in the *Andersen* case had been delivered with reasonable regard for competitor safety then it is doubtful that Mrs Caldwell would have perished in the race. Abbott D.C.J. acknowledged this fact when addressing Mrs Andersen, he stated⁷⁹:

“It is clear from the trial that cycle events require careful planning. As a comparative novice in that field, you made crucial decisions about a checkpoint on the Summit Road to enable non-paying cyclists to be weeded out and on the content of pre-race information, without consulting with your experienced safety manager. In my view, that was your most significant failure.

75. See n.66 above.

76. See n.71 above.

77. See n.73 above.

78. See n.69 above.

79. From *Christchurch Press*, August 30, 2003, reported on www.stuff.co.nz/stuff/0,2106,2643082a11,00.html.

As a result of ambiguous information given by you, Mrs Caldwell thought the road was closed and she was killed in a collision with a car.”

If the instructions had been clear Mrs Caldwell would still be alive today.

There has been much concern expressed amongst the sporting community in New Zealand about the implications of this case. Abbott D.C.J. addressed these concerns directly when he stated⁸⁰:

“There have been comments in the media that the verdict on criminal nuisance is the death knell on sporting culture in this country as we know it. That is utter nonsense and nothing could be further from the truth. There is no reason whatever to suggest that people who are involved in organised sport or other events have any justified cause for alarm as a result of this verdict.”

This statement has clear echoes of that made by Curtis J. at first instance in the case heard in England involving the injury of a rugby player following the collapse of a scrum and the subsequent finding of liability in negligence against the referee who officiated in that particular match⁸¹:

“I see nothing objectionable in the law seeking to prevent and protect rugby players from unnecessary and potentially highly dangerous if not lethal aspects of the game by the imposition of a duty of care. No responsible player and no responsible referee has anything to fear.”

If this case has the effect of driving irresponsible organisers out of the industry, then it will have provided an outstanding service to all those who organise and take part in such events. The decision should thus be welcomed by all those involved in the leisure and sports industry, rather than being the object of fear and suspicion as seems to be the case at present.

80. *ibid.*

81. *Smoldon v Whitworth* [1997] E.L.R. 115; *The Times*, April 23, 1996, at p.5 of unreported transcript.