

THE REGULATIONS GOVERNING SOUTH AFRICA'S ADVENTURE TOURISM INDUSTRY: AN OVERVIEW

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Abstract: *It is argued here that an effective regulatory regime could assist the South African adventure tourism sector to grow, which could benefit the embattled South African tourism economy as a whole. Firstly, appropriate regulation of the industry would enable owners and employees of adventure enterprises to know precisely which laws (and sections thereof) are applicable to them, thus enabling proper planning. Secondly, it would assist clients to know the course of action they could take if they feel the enterprise is placing them at undue risk. Thirdly, without adequate legal protection the entire sector, owners, the employees and the consumers, are at risk, not only from a safety perspective but also risk commercial failure. Despite the importance of appropriate regulation, however, little is known about the regulations governing the South African adventure tourism industry. Thus, this study sought to provide an initial overview of what regulations currently exist. It was found that adventure tourism specific regulations are rare, and there are no specific policies for the sector, but a plethora of regulations and laws govern the industry. In addition, there is also common law duty of care, occupational health and safety regulations, and case law to name but a few. However, the brief overview of the regulatory regime indicates that in certain respects the sector is over regulated – and yet in other ways – under regulated, as the industry is not without incidents of client deaths. Thus, it is concluded that there is an urgent need for an in-depth exploration of the entire regulatory regime that pertains to the adventure tourism sector in order to determine if the current regulatory framework is supporting or hindering client safety and growth of the sector.*

Key words: adventure tourism; South Africa; regulatory regime; regulations; laws

Introduction

Adventure tourism is now a popular global activity – differing from other forms of tourism as risk to life and limb is its defining feature (Swarbrooke *et al.*, 2003). In particular, an adventure tourist undertakes an activity, which is substantially dissimilar from the safety and mundaneness of their ordinary, everyday life (Vester, 1987; Gstaettner *et al.*, 2016). A definition, therefore, is that adventure is an action that differs from one's regular routine. It allows for the experience

of strong emotions (such as fear and excitement) as the activity is a mix of risk, challenge, active physical involvement, and uncertainty of outcome (Vester, 1987; Foley *et al.*, 2003; Bourdeau *et al.*, 2004; Pomfret, 2006; Pomfret, 2011). The uncertainty of outcome, however, means that a crucial aspect of adventure is the possibility of misadventure (Mortlock, 1984; Mu & Nepal, 2016). Avoiding misadventure means to manage the interplay between risk (the potential to lose something) and competence (skill, knowledge, behaviour, confidence, fitness and experience) (Priest & Bunting, 1993; Gstaettner *et al.*, 2016). In particular, there is an important relationship between risk, the competence of participant and the possibility of something going wrong. The less competent the participant, the greater the risk. Thus, for most people seeking to experience an adventure, it is best to turn to adventure tourism providers, who then ‘package’ the adventure activity in such a way that risk is highly managed. So much so that many have argued that it is hardly adventure at all, that adventure has become commodified and is “increasingly contained, controlled and packaged for consumption” (Foley *et al.*, 2003: 152; Beedie, 2005, Trauer, 2006; Varley, 2006; Fletcher, 2010).

Misadventure and the commodification of adventure

However, the possibility of disastrous misadventure in adventure tourism is often ignored or glossed over. This is because, in part, adventure has become associated with great social status (Weber, 2001; Hudson & Beedie, 2006; Elmes & Frame, 2008; Kane, 2012; Gstaettner *et al.*, 2016; Pröbstl-Haider *et al.*, 2016). The media, especially social media, hails adventurers such as Roald Amundsen (1872-1928), Jacques Cousteau (1910-1997), and Sir Edmund Hillary (1919-2008) as inspirational figures. These personages used to encourage the notion that we should all aspire to seek adventure by travelling to ‘foreign’ lands, to venture into areas of snow and ice, dive the oceans, and climb mountains (Foley *et al.*, 2003; Elmes & Frame, 2008; Laing & Crouch, 2009; Kane, 2013). Social media also promotes the celebrity of international ‘adventure-heroes’ such as adventure-survivor Bear Grylls (@BearGrylls); adventure-racer Ryan Sandes (@ryansandes); adventure-swimmer Lewis Pugh (@LewisPugh); space-adventurer Felix Baumgartner (@FelixFastestMan) and Danny MacAskill (@danny_macaskill). A number of companies use adventure to promote their products, such as GoPro cameras and Red Bull, the energy drink. Thus, their marketing is intertwined with the adventure industry, and they sponsor people such as Felix Baumgartner and Danny MacAskill, and adventure events such as paragliding (Gilchrist & Wheaton, 2011; Ryan, 2012;

Fox, 2013; Sharrocks, 2013; Moore, 2014; Vanderploeg *et al.*, 2014; Cohen, 2016; Champion, 2016; Dudley, 2016; Mueller & Pell, 2016; Nambiar, 2016; Schillat, 2016a, 2016b).

Television shows and Hollywood blockbusters also promote adventure, exposing viewers to adventure programmes such as *Survivor*, the *Amazing Race*, *Man vs Wild*. There are also whole channels dedicated to adventure, such as *National Geographic* and the *Discovery Channel* (Kay & Laberge, 2002; Delisle, 2003; Staples, 2006; Govers *et al.*, 2007; Schneider & Vogt, 2012; Tessitore *et al.*, 2014; Nehring *et al.*, 2016). In terms of the big screen, characters such as James Bond, Indiana Jones, Laura Croft, and Ethan Hunt (of the *Bond*, *Indiana Jones*, *Tomb Raider* and *Mission Impossible* franchises respectively), all perform adventurous activities. These include travel to exotic locations and stunts that involve bungee jumping, sky diving, skiing, horse riding, SCUBA diving, rock climbing, abseiling, interactions with animals, and free-running to name but a few (Aronstein, 1995; Lancaster, 2004; Arnett, 2009; Kord & Krimmer, 2013). Adventure is, then, big business.

In the post-modern 'experience'-economy, being able to experience adventure and emulate (superficially at least) the adventure-heroes that they see on television, the big screen, or follow on social media, is important (Kirillova *et al.*, 2016; Richins *et al.*, 2016; Shobeiri, 2016). But, unlike ordinary people, the individuals or screen-characters undertaking the adventures are either highly competent (such as Lewis Pugh and his ilk), or have stunt doubles doing the activities. Alternatively, events are so highly choreographed and micromanaged that risks are significantly reduced. Audiences, however, may not always be aware of this (McKay, 2017). Some, however, experience misadventure despite their skills, experience and micromanagement of the activity, such as the bad crash on Table Mountain by BASE jumper Jeb Corliss in 2012¹. For the most part, ordinary people lack the skills, experience and fitness to undertake these activities (Dickson, & Dolnicar, 2004; Heshka, & Jackson, 2015). In this regard, the adventure tourism industry offers regular people a unique opportunity to undertake an adventure in a managed manner, such that the risks are significantly reduced. Thus – although risk is a defining feature of adventure, safety concerns dominate the adventure tourism literature as killing or injuring clients is unacceptable. Thus, although commercial adventure operators market an adventure activity as 'dangerous' or 'risky', actually a great deal of effort is put into avoiding incidents and ensuring client safety (Kane & Zink, 2004; Fletcher, 2010). Thus, it is to risk management that this paper will now turn.

Risk management in the adventure tourism industry

In terms of scholarly research, much work on risk management in the adventure industry has been done by Tim Bentley and Stephen Page in New Zealand and Scotland respectively (see Bentley *et al.*, 2000; Bentley *et al.*, 2001a, 2001b; Bentley & Page, 2001; Callander & Page, 2003; Page *et al.*, 2005; Bentley *et al.*, 2007; Bentley *et al.*, 2008; Bentley *et al.*, 2010; Thomas *et al.*, 2011). In a systematic series of studies, Bentley *et al.* (2000) and Page *et al.* (2005), investigated accidents in adventure tourism. On the basis of their findings they classified incidents as either (a) serious, involving death or hospitalisation for more than 48 hours, and (b) minor, which are cuts, bruises and incidents that require no hospitalisation, or hospitalisation for less than 48 hours. They found that minor incidents, because of slips, trips and falls, are far more frequent than serious incidents. Generally speaking, water-based commercial adventure activities are riskier than land or air-based activities (Bentley *et al.*, 2001b; Bentley *et al.*, 2008). Nevertheless, undertaking an activity with a commercial operator was found to be far safer than undertaking the very same activity as an adventure-recreationist.

Pomfret (2011) argues that much of the time; it is the guide who is employed by the operator, who is actively managing down these risks. But, while it is true that guides operate at the crucial interface between client and activity, the guide alone is not sufficient to prevent incidents. A significant risk factor is the level of medical fitness of their clients, or undisclosed usage of alcohol or illicit substances such as marijuana (Keyes *et al.*, 2016; Murdoch & Kelly, 2018). Usually operators have a First Aid station, and guides trained in First Aid, but access to medical evacuation is also recommended (Musa & Thirumoorthi, 2015; Hofmeyr *et al.*, 2016). Nonetheless, not all adventure tourists are necessarily honest about, or even aware of, their levels of fitness; or whether they have an undiagnosed underlying medical condition or not (Hackett & Shlim, 2002). In such instances, clients could embark upon activities such as kayaking or trekking that could seriously threaten their health and well-being (Hofmeyr *et al.*, 2016). In this regard, many adventure tourism operators rely on waivers, disclaimers and on 'at-your-own-risk' policies. However, disclaimers or waivers cannot exonerate operators from the common law duty of care. So, operators need to make certain that clients are aware of the dangers beforehand, and outline the imperative for clients to declare if they are under the influence of alcohol and the like. Thus, clients must be fully informed of the risks and, must elect to participate knowing what the risks are (Cater, 2006; Buckley, 2006). Adventure operators can also insist that tourists have medical insurance, or that they have a valid medical

certificate (e.g. in the case of SCUBA diving). Operators can also impose age limitations, or stipulate that certain skills are essential (such as being able to swim) (Buckley, 2010).

Most important however, is that operators have a set of operating procedures for both guides and clients (and ensure that they are adhered to), thereby managing the risk levels down to an absolute minimum. Thus, it is well known that many injuries are preventable by applying good safety practices and risk management programmes (Page *et al.*, 2005; Bentley *et al.*, 2010; Musa & Thirumoorthi, 2015). Thus, safety regulations form a crucial aspect of risk management, and commercial adventure tour operators must make judicious use thereof (Cater, 2006). Managing risk through regulations is essential as injuries or death can result in financial losses, reputational damage, liability claims, or an inability to secure insurance. Business may even close down. Consumer rights and the propensity for litigation exacerbate this situation (Bentley & Page, 2001; Callander & Page, 2003; Dickson & Dolnicar, 2004; Bentley *et al.*, 2010; Buckley, 2010). In addition, then, operators must have a range of insurance policies, from insurance for loss or damage to equipment, to medical and legal insurance (Buckley, 2010).

Furthermore, in terms of risk management, an emerging international trend is the launching of formal, industry specific regulations (Bentley *et al.*, 2001a; Bentley & Page, 2008; Callander & Page, 2003; Page *et al.*, 2005; Williams & Soutar, 2005; Buckley, 2006). In particular, countries, such as New Zealand and Australia, have moved to pass specific adventure tourism regulations. An example of this is the launch in 2013, by the International Organization for Standardization (ISO) of three adventure tourism standards, the purpose of which is to promote safety, competitiveness, and reliability within the adventure tourism industry. These standards are: (1) ISO 21101, which refers to safety management systems. ISO 21101 sets out requirements for safety management systems used by adventure tourism providers. It also sets procedures for risk management, personnel competencies, operational controls, and emergency preparedness; (2) ISO 21103, which outlines what, and how, information must be shared with participants and prospective participants and; lastly, (3) ISO21101, which sets out the competencies, roles, and responsibilities of adventure tourism leaders (and guides), the skills they need, and how they need to respond in emergency situations.

Problem statement and methodology

However, while internationally there is a trend to pressurise adventure operators to demonstrate that they manage risk to within globally accepted norms - in part a response to well publishedⁱⁱ incidents of client deaths - little is known about the South African adventure tourism regulatory framework (Bentley *et al.*, 2001a; Buckley, 2006). In particular, there is little scholarly work on the adventure tourism regulatory framework, save for the unpublished master's thesis of van den Berg (2016) which comparing the regulatory regimes pertaining to tour guides of South Africa to that of Canada and Australia. Little, too, is known about how dangerous it is to undertake a commercial adventure trip in South Africa. Thus, this study sought to present a large-scale overview of the regulations governing the sector, as well as document media reported deaths. To this end, regulations refer to a set of laws, policies, and guidelines that will regulate the industry. They provide order and are a means to control the sector, as it sets the legal parameters within which the sector must operate (van den Berg, 2016). In order to determine number of deaths, as well as the laws, policies, and guidelines, an internet search and law databases were used due to time and resource constraints. This involved a web-based search over an extended period, using all available search engines and multiple key words. There are limitations, however, as some case law, regulations and the like may not be digitised and available online or they may be hidden from internet search engines. Another limitation was that the study confined itself to regulations pertaining to the air and water subsectors of adventure tourism, so there was no investigation into the regulations pertaining to land-based adventure

Results and findings

Deaths associated with the South African adventure tourism industry

While deaths of commercial adventure tourists in South Africa are (thankfully) a rarity, there have been a number of them. One of the most tragic was the deaths of 13 black water tubers in 2000, due to a flash flood in the Storms Riverⁱⁱⁱ. Significantly, most of the tubers on the trip did not wear lifejackets and the trip had taken place immediately after three days of heavy rainfall. This company is still in operation, although black water tubing ceased in 2005. There were also three international shark cage diving tourist deaths (in Gansbaai) in 2008. This case took years to wind its way through the South African courts until 2016 when the operator was finally

found not guilty of negligence (MV 'Shark Team' v Tallman 2016 46 SA (SCA)). Another such incident was the death of a tourist undertaking a tandem swing in Mpumalanga in 2009. Both the managing director and two guides (a third one is a fugitive from the law), were found guilty of culpable homicide and contravening the Occupational Health and Safety Act (No. 85 of 1993). This judgement has significance for the adventure tourism industry as the judge ruled that the lack of formal regulations in the bungee industry was a causal factor (Smalman, 2012). Two deaths also were recorded in a charter boat incident in the Western Cape in 2012. In this case, the South African Marine Safety Authority found the skipper did not have the necessary permission to captain a passenger boat. Additional reports were that the boat might not have been seaworthy. Thus, the insurance company refused the claim and the owner was financially ruined. It does not appear, though, that the skipper ever faced criminal charges or was pursued^{iv} in the civil courts. Lastly, was a 2016 death of a British in a hot air ballooning accident. In this case, accusations have been made that there was no backup tracking device (the original was smashed in the accident), so emergency crews took over 90 minutes to reach the scene. There was also no emergency helicopter evacuation. The matter is still under investigation by the South African Civil Aviation Authority^v. Unfortunately, these incidents pale in significance when compared to those associated with SCUBA diving, with deaths recorded in 2013, 2014, 2016 and 2017 for example. Of concern, a number of these deaths were of international tourists, exposing the country to negative media coverage internationally and large financial claims.

Laws, regulations and policies governing adventure tourism in South Africa

In terms of policy, there are no specific policies regarding adventure tourism in South Africa, although South Africa has recently adopted the international ISO adventure tourism standards. It was not established if the more than 800 commercial adventure tourism operators are aware of this development (du Toit, 2016; McKay, 2017). In addition, the study found that there are a number of laws that adventure tourism operators must adhere to. These include the Occupation Health and Safety Act (No 85 of 1993) (and amendments); The National Environmental Management Act (No 107 of 1998) (and its various iterations and amendments); the Consumer Protection Act (No 68 of 2008), the Broad-Based Black Economic Empowerment Act (No 53 of 2003); the Companies Act (No 71 of 2008); The South African Tourism Act (No 3 of 2014), and the Basic Conditions of Employment Amendment Act (No

68 of 2014). Furthermore, the Lamprecht Judgement reveals that operators and their employees could face criminal prosecution if clients are harmed, injured or die (Smalman, 2012). There is also sector-specific regulation. The study revealed that there is heavy regulation of the^{vi} air adventure industry, with by nine Acts of Parliament. This includes the Air Services Licensing Act (No. 115 of 1990); the Air Traffic and Navigation Service Company Act (No. 45 of 1993); the Aviation Act (No. 74 of 1962); the Carriage by Air (No. 17 of 1946); Civil Aviation Act (No. 13 of 2009); the Convention on International Interests in Mobile Equipment (Act No. 4 of 2007); the Convention on the International Recognition of Rights in Aircraft Act (No. 59 of 1993); the South African Civil Aviation Authority Levies Act (No. 41 of 1998); and the South African Maritime and Aeronautical Search and Rescue Act (No. 44 of 2002). There are also 11 different documented regulations that apply to the industry, namely: Agreement entered into between Independent Communications Authority of South Africa (ICASA) and the South African Civil Aviation Authority (SACAA); Air Traffic Service Charges; Airport Charges; Airport Slot Coordination Regulations of 2012; Civil Aviation Aircraft Passenger Safety Charge Regulations of 2011; Company Airport Regulations of 1994; Domestic Air Services Regulations of 1991; Mortgaging of Aircraft Regulations of 1997; Weather Service Charges; Civil Aviation Regulations of 2011; Amendment of SA-CATS 1 of 2016. In addition, there are 23 General Technical Standards, 19 Flight Operating Technical Standards, and nine Personal Licencing Standards^{vii}.

The water adventure sector also has specific laws pertaining to it. Regulation comes in the form of 11 Acts of Parliament These Acts are: The National Water Act (No. 36 of 1998); Wreck and Salvage Act (No. 94 of 1996); South African Maritime Safety Authority Levies Act (No. 6 of 1998); South African Maritime Safety Authority Act (No. 5 of 1998); South African Maritime and Aeronautical Search and Rescue Act (No. 44 of 2002); Shipping Laws Amendment Act (No. 57 of 1998); Ship Registration Act (No. 58 of 1998); Merchant Shipping Act (No. 57 of 1951) Part 1 and 2; Maritime Zones Act (No. 15 of 1994); Marine Traffic Act (No. 2 of 1981) and the Marine Pollution (Prevention of Pollution from Ships) Act (No. 2 of 1986). There are also 10 regulations (known as Marine Notices) that govern the industry, namely the Marine Notice 25 of 2007; Marine Notice 7 of 2010; Marine Notice 13 of 2011; Marine Notice 8 of 2012; Marine Notice 17 of 2015; Marine Notice 24 of 2015; Marine Notice 7 of 2016; Marine Notice 8 of 2016; Marine Notice 9 of 2016 and Marine Notice 32 of 2016. Then there are general requirements pertaining to pleasure vessels, commercial vessels,

pontoon boats and kill switches. Importantly, for a long period of time, inland water recreational activities were less regulated than coastal recreational activities (McKay, 2017).

Discussion and recommendations

Although this is a study limited in scope, the results indicate that while there is a singular lack of adventure tourism specific legislation, it cannot be said that the industry is unregulated. Rather, South Africa's adventure tourism sector is subject to many indirect laws and regulations. What is not clear, however, is how pertinent the regulatory framework is. For example, some of the Acts governing the industry were promulgated decades ago. Others do not appear to have been written with commercial adventure tourism in mind. Importantly, the ongoing deaths in the industry may indicate that the risks of participation have not been adequately shifted from the customer to the service provider. In that regard, it is recommended that much more research be undertaken into the extent to which the industry is placing its clients at risk of experiencing a serious incident whilst undertaking a commercial adventure activity. Thus, it needs to be determined if the legislation pertaining to gross negligence is sufficient or not. It is also recommended that the currently regulatory framework be assessed from a commercial adventure perspective in order to determine if the regulatory regime is appropriate. Currently, operators appear to self-regulate or voluntarily adhere to safety precautions. Problematically, the Murphy Judgement of 2013 indicates that the regulatory framework is such that it cannot be demonstrated that government officials have any "specific statutory provision or any identified regulatory duty" to provide oversight of the adventure tourism industry^{viii}. This judgement and the other deaths indicate that specific adventure codes of practice may be required. In particular, what regulatory oversight and mandatory insurance policies the adventure tourism industry needs to be subjected to is currently unknown.

The study also found that in addition to the general Acts, such as the Consumer Protection Act, a total of 61 different types of regulations govern the air-sector, compared to 25 for the water-sector. This is a significant difference in degree of regulation, and this difference may partly explain why the air-sector is underdeveloped vis-a-vis the water-sector. In terms of size, water activities dominate, with an average of 2.11 water activities on offer for every air based one, although air activities dominate in Mpumalanga, Limpopo and the Northern Cape (see Table 1). So, heavy regulation may make it difficult for commercial air adventure operators to

flourish, but the differences in the way the two sub-sectors are regulated warrants deeper investigation in order to determine if this is the case.

Table 1: Adventure tourism by air or water activities (source: Author)

Province	Air	Water	Ratio of air to water
Western Cape	76	184	1:2.42
KZN	51	167	1:3.27
Gauteng	39	82	1:2.01
Eastern Cape	23	29	1:1.26
Mpumalanga	17	16	1:0.94
North West	17	18	1:1.06
Free State	9	20	1:2.22
Limpopo	7	6	1:0.86
Northern Cape	12	9	1: 0.75
Total	251	531	1:2.11

Conclusion

In conclusion, this study has identified that the lack of any government policy specifically tailored to the adventure tourism industry is a lacuna that needs to be filled. In addition, while the study found no specific laws or regulations pertaining to commercial adventure, it did find that the industry is subject to many indirect laws and regulations, and is thus, highly regulated. Despite the plethora of laws and regulations, however, the adventure industry has still recorded deaths, including those of international tourists. So, it is essential for South Africa to create an overarching and comprehensive system of adventure regulations and governance (including regulatory oversight) in order to protect clients and market the sector internationally. But, a caveat is that a balance between regulation, governance and promoting the sector is required. In particular, regulation and governance should be tailored to meet the unique needs of this sector. The difference in regulation and size between the air and water subsectors for example, indicate that the size and extent of the regulatory environment must be carefully managed if adventure entrepreneurship to flourish whilst simultaneously ensuring participant safety.

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- ^v British tourist dies after North West hot air balloon crash <https://www.news24.com/SouthAfrica/News/british-tourist-dies-after-north-west-hot-air-balloon-crash-20161026> [Accessed 4 July 2018].
- ^{vi} Zip lining; hot air ballooning; scenic flights; helicopter flights; aerial boardwalk; aerial cable trail; Bi plane rides; canopy tours; hang gliding; gyrocopters; abseiling; bungee jumping; gorge and bridge swinging; paragliding; micro lighting; sky diving; RAP jumping; acrobatic flights and hang gliding
- ^{vii} Sailing; snorkelling; yachting; dragon boat racing; canoeing; white and black water rafting; kayaking; SCUBA diving; river boarding; parasailing; sea kayaking; surfing; wake boarding; kite surfing; wind surfing; jet skiing; cave diving; cable water skiing; kite boarding; ocean floor walking; geckoing/water water tubing; swimming with dolphins; aquarium diving; aquarium shark diving; aquarium snorkelling; boat based whale watching; hard and soft shark cage diving, and crocodile cage diving.
- ^{viii} Samuels v Vuka Marketing (Pty) Ltd and Others (23237/12) [2013] <http://www.saflii.org/za/cases/ZAGPPHC/2013/412.html>