Introduction

Appeal against the decision of Referee Robyn Wilson in the Disputes Tribunal Wellington Case No: CIV-2006-085-001490 as to whether the organisers of the 2006 Ironman had breached the Consumer Guarantees Act in that they did not take reasonable care and skill in the development of a viable contingency plan for adverse weather conditions.

With the greatest respect, I am appealing this decision on the basis that the referee conducted the proceedings in a way that was unfair to me and prejudicially affected the result of the proceedings. The referee failed to act on the principles of natural justice and procedural fairness. In particular I believe the referee failed in the following areas:

1. Decisions to admit or exclude evidence do not always appear to be based on whether it was relevant, reliable and logically valid, and capable of being tested in some form.
2. The evidentiary basis for determination of the result was not "on the balance of probabilities".
3. New statements of fact were considered in the decision where there was no prospect for adequate preparation and no reasonable opportunity for refutation.
4. That the burden of proof was placed on the party least capable of providing it.

In the decision (point 15) the referee states:

> "It would be a difficult case for someone in Mr Williams' position to prove."

I respectfully submit that the way the referee conducted the proceeding and formulated the decision made it impossible for me (Mr Williams) to prove my case. In analysis of the decision I will make reference to the four failures listed above, labelled with bullet points of the relevant number.

Conditions Affecting the Running of the Event

Weather conditions

In the decision (point 12) the referee states:

> "… that the weather was extreme ("the worst storm in 44 years in Taupo")…"

1. They referee accepted to the respondent's claim without corroborating evidence, and without being able to assess whether it was relevant; the required planning and weather information to determine under what conditions their contingency plan was viable were not provided.

1. I provided evidence that strong winds were not unusual in Taupo. I also submitted evidence by Ian Hepenstall (the Media Director for the event) that winds over 30km/hr would disrupt the cycle. Winds over 31km/hr would have occurred approximately 500 days in the last 44 yrs (based on METservice wind readings 1998-2002 at Taupo airport); even if the weather was extreme, it didn't make it likely that its extremity was the cause of all the disruption. I also provided an email in which I had requested from the respondent the information required to determine the relevance of the inclement weather.

Shortening of the run

It was not disputed that if the run could have taken place then it should have taken place. It was not disputed by that the wind did not shorten the run – that if the weakest participants could cycle then they could run. The dispute was that the rules meant that the run had to be shortened.

1. I provided evidence, in the form of the rules, that the rule did not exist, and an email asking the respondent for a copy of the rule. On questioning the respondent, the referee appeared frustrated that they could not state where the rule existed – where it was written down. The referee's decision appears to exclude this dispute and the evidence I provided. It was mentioned in the summary of evidence but not in the weighing of evidence that lead to the finding (which started in point 12).

3. Further questioning led to a new claim by the respondent – that it was a principle; the respondent could not state where the principle existed or was written down. I disputed that any such principle existed, and their further unsupported assertion that there was precedent to the principle. I was unable to provide evidence against this claim of precedent or principle because the claim had never been made before the hearing.

4. It appears that I was required to provide proof beyond reasonable doubt. Proof beyond reasonable doubt is something the respondent could have done if they had presented the rule (or precedent), but had decline to.

2. The dispute over the reason for shortening of the run is fundamental in determining the probability that the event was shortened more than was reasonable. If it was not required that the run be shortened because the bike was, then it is probably that a lack of a viable contingency plan lead to the shortening of the run; that the organiser blamed a rule rather than the weather appears to support this assertion.

Contingency Planning and Decision Making

In the decision (point 15) the referee states:

> "[Mr Williams] providing the documents about standards of risk management does not provide me with a clear picture of what is reasonable for the organizers of this type of event to do."

It was not disputed that a standard of contingency planning was required in the organising of an event with reasonable care and skill. The respondent claimed that the Australian/New Zealand Standard (AS/NZS 4360) was one of many, and was not the standard they believed to be reasonable, did not disclose what standard they adhered to.

1. My evidence was that the AS.NZS 4360 is an internationally recognised standard created by the New Zealand and Australian government authorities, that it had been applied to sport and recreation by a Standards Australia handbook, and was taught in Event Management courses. From the decision it appears that the referee decided that the standard was not admissible.

1. The AS/NZS 4360 standard is not prescriptive of a particular standard but designed to prove negligence (as in the Tort) in decision-making. It goes through the process of identifying foreseeable risks (such as inclement weather), and assessing their consequences to determine what is acceptable and when it is reasonable to either eliminate the risk or minimise their consequences (such as with a contingency plan). It does not provide a standard of contingency planning but rather a framework for deciding what level of planning would be reasonable or negligent. Its relevance is due to the relationship between Negligence and the standard of care and skill required in the Consumer Guarantees Act (1993).

4. If the contingency planning and its process were made available then an independent expert or myself could apply the AS/NZS 4360 standard to show the respondent was either guilty or innocent of negligence. Because the referee and I were denied access to the relevant information, it was impossible to prove the standard was or wasn't met. The only party capable of providing that proof was the respondent.

In the decision (point 13) the referee states:

> "It appears from the document that planning to run a shortened event in adverse weather starting at a later time was not one of the thought out possibilities."

1. The respondent stated that the standard of planning I required was unreasonable; that their contingency planning was adequate. Given that the respondent provided no evidence of either the standard or plan there was no basis to assess the validity of this claim.

1. I provided evidence that a shortened event was reasonably foreseeable, including the weather information already discussed, as well as things such as an accident blocking the course. Although it being foreseeable does not in itself make it reasonable to have contingency for a shortened event, it would appear to be negligent not to consider it.

1. I provided evidence that a shortened contingency plan was a reasonable requirement in minimising the damaged caused by things that required a shortened event. The evidence included, as provided by the respondent, that on the day of the race the shortened event plan had to be ratified by the World Triathlon Corporation (the events ruling body). This suggested that it was reasonable that a shortened event take place, and that the pre-prepared plan was inadequate to guide the contingency committee in the running of the event.

2. It appears probably that a reasonable standard of care and skill would require that a viable contingency plan that was pre-prepared. The need to ratify a contingency plan on the day makes it improbably, if not beyond reasonable doubt, that the pre-prepared plan was of the requisite standard.

In the decision (point 11) the referee states:

> "I also think it likely that the organizers would also say that with benefit of hindsight, planning for the particular weather conditions could have been better. But 'could be better' is not necessarily a breach of the duty to take reasonable care and use reasonable skill"

1. I provided evidence of the following year's athlete contingency briefing – this had provided for an alternative cycle course to deal with strong winds. This suggests that a contingency plan that provided for strong winds was within the standard of reasonable care for an event of this nature. There is no mention of a shortened event (beyond the swim), which leads me to believe the revised plan to be viable in any conditions that it is reasonable to race. This would suggest that the revised plan was viable for the conditions the respondent claims it was unreasonable to plan for.

2. The chances of strong winds have not been increased and it is no more foreseeable; I propose that hindsight has cause the respondent to reconsider the standard of planning they employ. Without evidence of planning being provided by the respondent, it seems probable that they have breached the level of duty prescribed by the Tort of Negligence.

In the decision (point 13) the referee states:

> "The contingency plan provided is a very broad document, only really saying when and who would make decisions about the race if there were adverse conditions."

1. I provided evidence of what an adequate contingency plan consisted of in the form of contingency planning templates.

1. When the respondent was questioned about the broadness and lack of detail in the plan they stated that it was a copy of the information that was given to the competitors at the pre-race briefing the day before the event. They claimed there

were more detailed documents, but that the 353 word document was all that the referee needed to know about the contingency planning of the event. The referee expressed frustration at not having corroborating evidence of this claim, but appears to have accepted it without any way of assessing their relevance to the case, or whether they were of an acceptable standard.

2. Without being able to assess the contingency planning it appears impossible to compare it to any reasonable standard. If this decision was based on the balance of probabilities, then it suggests that there is no minimum standard, and thus no requirement in event management for contingency planning – this would not be the position of either party.

In the decision (point 14) the referee states:

> "'Left wavering' is the best description I can give of my view of the case based on the information provided and that is not at the level of being satisfied that it is probable that there was not an acceptable contingency plan in place."

2. Given that the referee appeared unable to identify a level of contingency planning reasonable for the event this decision is inevitable. It also seems inevitable that 'left wavering' they would be unable to say that it was probable that there <u>was</u> an acceptable contingency plan in place.

In the decision (point 12) the referee states:

> "It is also not appropriate to put myself in the position of the decision makers on the day when I have no basis in terms of evidence or experience to question those decisions."

and (in point 13):

> "I can only assume that the details of 'what if' depended on the experience of the people involved who could make adjustments to the plan as and when required."

1. I claimed that the adjustments to the plan that were made on the day were significantly different and outside the jurisdiction of those typically required of the decision makers; the respondent provided evidence for this claim with the need for the World Triathlon Corporation to ratify the adjustments. The decision makers were required to make contingency plan adjustments that were unreasonable due to the inadequacy of the plan.

1. Without being able to assess the plan it is impossible to assess the relevance to this case of the experience of the people who make the adjustments. If there is no limit to the adjustment required to the plan on the day that is reasonable then, logically and pragmatically, there is no requirement for the plan; the organisers only needed to provide competent race day officials to meet the requisite standard.

This logically valid conclusion is unreasonable. The way to escape this conclusion is that the adjustments are limited to those required to a reasonable plan.

1. There was no evidence provided as to what skill or experience would be required in the decision makers to meet the required standard.

Lack of Established Precedent of a Standard of Skill and Care

In the decision (point 10) the referee states:

> "…to ascertain an acceptable standard it is usually the case that there will be many examples before one can state that something is a well established principle or standard."

2. Prior to lodging this dispute, the respondent stated that the major reason they would not settle this case is that it would set an uncomfortable precedent, i.e. a minimal standard for the organising of such events; this lack of precedent appears to have been a factor in the referee's decision. There was no example of precedent presented by either party to provide guidance to the referee as to the acceptable standard.

Conclusion

If this decision is upheld then, pragmatically, events like this will fall outside of the jurisdiction of the Consumer Guarantees Act (1993). With the greatest respect, in my opinion, the complexities and potential outcomes of this case require a more senior judicial representative to adjudicate the issues. I believe based on the reasons I have set out in this appeal that the complexities of this case have resulted in natural justice being denied. It is also my opinion that it is in the public good for this case to be decided by a Judge of the District Court, and request that it be re-heard.