



# KAYAKERS MUST NOT LOSE SIGHT OF THE LAW

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In a time when recreational water craft are a common spectacle on all of our inland and coastal waterways, commercial operators are faced daily with an array of vessels that are rarely constructed with any standard visibility safety features at all.

One of the fastest growing in popularity is kayaks. Due to their very limited visibility profile, they are almost as hard to spot on the water as a waterlogged fencepost.

Imagine for a moment that you are the skipper of one of Auckland's fast ferries operating at dusk, approaching the Rangitoto Channel and the city. A kayaker crossing the shipping lane from left to right who has no radar reflector, does not show up on the radar and is not displaying either the recommended fluoro flag or white light 1m above the water is hit and passes between the hulls. Unfortunately there is a fatality, and Maritime New Zealand elects to prosecute the skipper for:

- failing to keep a lookout under Maritime Rules Part 22 - Collision Prevention Rule 22.5
- failure to give way to a hand-propelled craft under Rule 22.18, and
- operating a vessel in a manner causing unnecessary danger or risk to any other person under s65 of the Maritime Transport Act 1994.

Under s65 of the act, offences are strict liability, meaning there is no prosecution requirement to prove intent. The breach of a maritime rule is not required as an element of any offence described in section s65.

However, s66 states that where any person is charged with any offence against s65, and their act or omission constitutes a breach of a relevant maritime rule, then, in the absence of proof to the contrary, it shall be presumed that the act or omission caused unnecessary danger or risk to another person or to property, regardless of the outcome.

The penalty in the case of an individual is imprisonment for up to 12 months or a fine not exceeding \$10,000. In the case of a body corporate the fine cannot exceed \$100,000.

As the act covers a vast array of offences, the range of fines can vary significantly. The offences range from vessel, crew and passenger safety to non-compliance matters. In cases of serious disabling injury or death, the focus may be on the degree of fault involved. It is more probable that reparation would be the most likely means of compensating personal injury.

It must be said that Maritime Rule 22.5, to keep a lookout, applies to every vessel equally regardless of size or method of propulsion, and recreational craft users do not have a legitimate legal expectation that only commercial craft have the responsibility to keep a lookout.

Rule 22.25 (3) (b) requires that after sunset and before sunrise a vessel under oars must have ready an electric torch or lighted lantern showing a white light strong enough to be seen two miles

(about 4km) away, which must be exhibited in sufficient time to prevent collision. It is also a requirement of Auckland Regional Authority Navigation Safety Bylaws 3.12 for every vessel to keep out of the way of any vessel of UMS gross 500 tonnes or upwards within Auckland's pilotage limits.

A large vessel has few options to manoeuvre in a narrow channel, and other vessels crossing should be aware and not impede its progress Rule 22.9 (4). A vessel less than 20m overall must not impede the passage of a vessel that can safely navigate only within a narrow channel or fairway Rule 22.9(2)

However, while on the face of it the skipper failed to give way to a hand-propelled craft, Rule 22.18 (1) (d), he could avoid liability by establishing that he probably was not at fault. There is a responsibility on the kayaker to make an effort to be visible, even if conditions conspire against him. And I would argue that self-responsibility would be a factor if a kayaker decided to go out in conditions where his or her visibility would be compromised.


So, to be able to give way, the skipper must first have been able to see the kayak. In this scenario the kayak was not visible either on the radar or by a lookout, and at sunset was certainly in breach of the marine rule to carry a torch or lantern showing a white light, let alone the other arguable breach of ARA navigation safety bylaws.

On the other hand, even if the kayaker had had the required equipment, it was highly likely that a small incandescent light or a flag at dusk could have been easily missed. Such is the problem with a vessel like the kayak that has such a low profile and no standard radar reflector.

On the surface it seems that there are already rules to cover the visibility and conduct of small craft like dinghies and kayaks, but the problem is more in the sudden explosion of numbers of these craft and the thrillseekers who wish to use them in all conditions. This seems to parallel the definition by our legal system of skateboards as vehicles, thus enabling them to use our roads without any safety equipment at all.

When it comes to traffic, the old adage that if you play on the road you are going to get run over, applies. This is true for the sea also, as it is not just a playground, it supports one of our oldest means of transport.

I suspect that any new legislation that makes recreational boaties more responsible for their own safety will serve to protect the careful from the careless, and there are those who will welcome that.

Still, I think that it is fair to say that the publications by Maritime New Zealand to educate kayak users in the limitations of their craft are comprehensive, and maybe any thought towards legislation should be at the top of the cliff whereby retailers are required to bring the safety issues to the attention of the purchasers of kayaks. This need not be an extra cost, as Maritime NZ already has a vast array of this material available. 

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