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ESSAY

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# Flying Free? Risk and Regulation in Recreational Flying Trapeze

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**ABSTRACT**

Legal and regulatory theory has been fascinated by the relationship between law and other forms of regulation in a differentiated society. While some scholars have pointed out the benefits of local regulation, especially when managing the risks of modern society, others have seen regulation in Foucauldian terms as discipline, the dark underside of liberal society. Law, in a Foucauldian approach, is usually understood as another form of constraint. There have, however, been recent suggestions that an enabling law could contain possibilities for openness and agency – much like Foucault's concept of 'technologies of the self'. At the same time, sociologists have used the technologies of the self to describe voluntary risk-taking, or 'edgework', as a form of escape from the disciplinary society. In this article, I examine these possibilities by investigating the operation of law and regulatory techniques in flying trapeze. Recreational flying trapeze is the kind of risky activity that was facilitated by the enabling law of the 2002 tort reforms. Recreational flyers, who are usually women, appear to experience a moment of freedom. Yet flyers are subject to local regulations and their own practice of self-regulation. As such, this activity provides a practical opportunity for examining the intersection of law, regulation, and the technologies of the self, and considering what they mean for the possibilities and limitations of freedom.

**KEYWORDS**

Regulatory theory; risk; Foucault; regulation; torts law; legal reform; sports law

A child posts a picture on Instagram of herself 'flying' on a trapeze rig, free from safety restraints. She adds the hashtags #burnthelines and #ownyourflying, tags which suggest freedom, agency and resistance to the local regulation of flying trapeze represented by the use of a safety harness and safety lines.[1]

Recreational flying trapeze, especially when done without the use of safety lines, is the kind of dangerous recreational activity envisaged by s 5K of the *Civil Liability Act* 2002 (NSW) or s 18 of the *Civil Liability Act* 2003 (QLD). When these Acts were drafted, it was with the intention of creating a new, more liberal, legal regime for such activities and a change in the legal conceptualisation of individuals. Advocates for the change expected

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[1]Cirque.fly, 'Catch, No Catch?' (12 August 2016) <https://www.instagram.com/p/BI_KgmahLb6>.

that the new laws would provide space for the sort of freedom, moral autonomy, and personal responsibility that they associated with voluntary risk taking. Critics feared that it would lead to an unfair, neoliberal, allocation of risk and responsibility. In many ways, these hopes and fears have been realised as the courts have developed a jurisprudence that leaves the participant in a dangerous recreational activity exposed to the 'obvious' risks caused by circumstances, their own inadequacies, or other's errors.

The debates around the civil liability regime were largely framed in terms of liberal concepts of the responsible, autonomous person. Yet, the idea of an open law, which enables individual autonomy, also chimes with recent Foucauldian accounts of law and risk-taking. Foucauldian legal and regulatory theorists have, traditionally, wrestled with the relationship between restrictive laws and disciplinary or regulatory techniques. Between the directives of law and the webs of situated regulations and disciplinary techniques, there seemed to be little scope for autonomy or freedom. All that could be found in Foucault were individual practices of self-development and self-regulation, described as technologies of the self.[2] More recent sociological accounts of risk-taking, or 'edgework', however, have built on this concept to present the individual assumption of risk as a moment of freedom – an escape from the liberal constraints of society. In an even more ambitious move, Golder and Fitzpatrick suggested that an open law could contain these same possibilities for alterity and change offered by the technologies of the self.[3]

In this article, I examine the effect of the 'open' civil liability regime on recreational flying trapeze. This is an activity that is facilitated by a permissive law and is depicted in cultural and personal accounts as an expression of freedom and autonomy. I ask: do participants 'fly free' as beneficiaries of this legal regime? To answer this question, I interviewed participants in recreational flying trapeze to draw out their perception of the law, their trapeze community's rules and their own practice of flying trapeze. In framing these questions, I was informed by legal consciousness scholarship that suggests that subjective experiences of and perception of legality can provide important insights into the nature and function of law.[4] I supplemented participants' accounts with representations of flying trapeze on social media and the small academic literature on flying trapeze.

The results showed that participants did not regard themselves as beneficiaries of an open law. They thought they operated in a gap created by an absent law, while always fearing that the law might intervene to stop their activity. In response to these fears, owners and instructors created rules and pseudo-laws to control what they perceived as the risks of flying trapeze – particularly the unruly bodies of their student, usually female, flyers. Flyers supplemented these rules with their own practices of managing risk, even while they sought autonomy and expertise. Thus, despite the imagery of freedom, despite the open law, flyers are subject to local regulations and their own practice of self-regulation. As such, this activity provides a practical opportunity for examining the intersection of law, regulation, and the technologies of the self, and considering what they mean for the possibilities and limitations of freedom.

[2]Michel Foucault, *The Care of the Self* (Random House 1998).
[3]Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Taylor and Francis 2009).
[4]Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).

## I. Law

The law of torts, with its assessment of reasonable behaviour, its vision of community, its description of risk and its allocation of responsibilities, encompasses a particular vision of law and its subjects.[5] What this vision should be, however, and how it might be changed, is deeply contested. Tort law could be used to protect vulnerable subjects by encouraging investment in health and safety, discouraging antisocial or risky behaviour, and providing compensation for victims.[6] It could be changed to create a more just or humane society that considers human relationships and needs.[7] Or it could be a way of enabling moral autonomy and personal responsibility, by allowing the pursuit of risky activities.[8]

Such conversations about the purposes of tort law and its construction of subjectivity became a matter of urgent public and political debate in the wake of an insurance crisis in Australia in 2001. Insurance premiums increased;[9] there were fears that community groups, sporting groups, tourism and recreational activities could not get insurance.[10] The media and politicians blamed the crisis on the practice of tort law. The courts, they said, had changed the rules of torts, providing too much compensation for plaintiffs and acting as a welfare institution.[11] This, they stated, had damaged law, the insurance industry, and Australian society. The 'welfare culture' of tort law created needy people, who failed to take responsibility for themselves and their choices, choosing instead to blame others.[12]

The Federal and State governments, faced with the insurance crisis, acted fast to change the law of torts, to lower premiums, and to create more robust individuals. The Ipp Review was set up and given two months to review the law of negligence.[13] The terms of reference required the Panel to 'develop and evaluate proposals to allow self-assumption of risk to override common law principles'.[14]

The Panel fulfilled this requirement, and what it considered its responsibility to correct a law in which people did not have to take sufficient care of themselves,[15] by recommending a new defence of voluntary assumption of risk. It stated that the provider of a recreational service should not be liable for personal injury or death suffered by a voluntary participant in a recreational activity due to the materialisation of an obvious risk.[16] This defence would be available 'where the recreational activity in question

[5]Mauro Bussani and Marta Infantino, 'Tort Law and Legal Cultures' (2015) 63 American Journal of Comparative Law 77, 78.
[6]See Peter Cane, 'Tort Law as Regulation' (2002) 31 Common Law World Review 305, for an account of this approach.
[7]See, eg, Emmanuel Voyiakis, 'Rights, Social Justice and Responsibility in the Law of Tort' (2012) 35 The University of New South Wales Law Journal 449, 455; Martha Chamallas, 'Importing Feminist Theories to Change Tort Law' (1996–1997) 11 Wisconsin's Women's Law Journal 389, 389; Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' [1988] 38 Journal of Legal Education 3, 31–32.
[8]Donald P Judges, 'Of Rocks and Hard Places: The Value of Risk Choice' (1993) 42 Emory Law Journal 1, 3.
[9]Reg Graycar, 'Public Liability: A Plea for Facts' (2002) 25 The University of New South Wales Law Journal (2002) 810, 814.
[10]Gabriel Perry, 'Obvious Risks of Dangerous Recreational Activities: How is Risk Defined for Civil Liability Act Purposes? (2016) 23 Torts Law Journal 57, 58.
[11]Graycar (n 9) 814; Kylie Burns, 'Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective' (2007) 15 Torts Law Journal 195, 195.
[12]ibid 217.
[13]Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 Melbourne University Law Review 649, 656; *Review of the Law of Negligence: Final Report (Ipp Report)* (Commonwealth of Australia 2002).
[14]Law of Negligence Review Panel, *Review of the Law of Negligence* (Commonwealth of Australia 2002) ix.
[15]ibid 29.
[16]ibid 4.

carried risks that would be obvious to the reasonable person, regardless of whether the plaintiff was actually aware of those risks'.[17]

The Report acknowledged that some might consider this to be a harsh rule, but it pointed out that it was limited to certain people and activities. It also stated that there was widespread and strong community support for the idea that 'people who voluntarily participate in certain recreational activities can reasonably be expected, as against the provider of the recreational service, to take personal responsibility for, and to bear risks of, the activity that would, in the circumstances, be obvious to the reasonable person in the participant's position'.[18] It was also philosophically sound because, as the Report stated, 'people who participate in such activities often do so voluntarily and wholly or predominantly for self-regarding reasons'.[19]

The Panel's recommendations were accepted and rapidly introduced into legislation. Division 4 of the NSW *Civil Liability Act* concerning the 'Assumption of Risk', and Division 5, concerning 'Recreational Activities', state that there is no duty to warn of obvious risks in a recreational activity, and that there can be no liability for harm suffered from the obvious risks of a dangerous recreational activity. A dangerous recreational activity is defined in s 5 K to mean a recreational activity that involves a significant risk of harm. These changes were described as the cornerstone of the civil liability reforms;[20] they were applauded in parliament by Premier Bob Carr as a correction of the legal view of responsibility and a way of preserving socially important activities.[21]

Not everyone, however, was happy with the reforms. Some commentators criticised the rhetoric of personal responsibility and individualism as the hijacking of the law by a 'neoliberal economic ideology'.[22] It was also said to be unfair to those participants in risky activities who relied on the expertise and knowledge of the purveyor of activity.[23] These arguments suggest that critics did not see the participant in a risky activity as the responsible, self-regarding individual described in the reforms, but as a vulnerable person[24] and a potential victim.[25] Their arguments were often illustrated by the example of an injured child.[26]

Since the introduction of the reforms, the NSW Court of Appeal and the High Court have developed a body of jurisprudence discussing what is a dangerous recreational activity and what is an obvious risk.[27] In the process, the courts have made some comments on the responsibilities and expectations of defendants and plaintiffs. This paper cannot canvass all the available case law but *Campbell v Hay,*[28] *Sharp v Parramatta City*

[17]ibid 66.
[18]ibid 63.
[19]ibid 62–63.
[20]Barbara McDonald, 'The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Common Law of Negligence' (2006) 14 Torts Law Journal 268, 286.
[21]Page: 5764 NSW Hansard Articles: LA : 23/10/2002 : #12.
[22]Burns, 'Distorting the Law' (n 11) 218.
[23]Andrew Field, 'There Must Be a Better Way: Personal Injuries Compensation Since the Crisis in Insurance' (2008) 13 Deakin Law Review 68, 80.
[24]ibid 80; Barbara McDonald, 'Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia' (2005) 27 Sydney Law Review 443, 467.
[25]Rob Davis, 'The Tort Reform Crisis' (2002) 25 The University of New South Wales Law Journal 865, 865.
[26]See eg, McDonald, Legislative Intervention in the Law of Negligence' (n 24) 467; Harold Luntz, 'Reform of the Law of Negligence: Wrong Questions – Wrong Answers' (2002) 25 University of New South Wales Law Journal Forum 18, 19.
[27]See, eg, Perry (n 10) 60.
[28][2014] NSWCA 129.

*Council,*[29] and *Tapp v Australian Bushmen's Campdraft & Rodeo Association*[30] provide useful demonstrations of how the courts have addressed questions of risk and responsibility that might be relevant to flying trapeze.

### *A. Campbell v Hay*

The plaintiff, Mr Campbell, had been taking his third flying lesson in a light aircraft with his instructor, Mr Hay. Their flight had been disturbed by a series of engine vibrations, which Mr Hay ignored. It was reported in court that Mr Hay considered himself a very lucky person, to whom nothing bad could happen; he thought fate was on his side.[31] Mr Campbell blamed this irrational belief for leading Mr Hay to continue the flight.[32] The expert evidence was mixed but suggested that Mr Hay should have aborted the flight. Eventually the engine failed, and Mr Hay had to make a forced landing during which Mr Campbell was injured.[33]

Campbell argued that he was not taking part in an obviously dangerous activity; flying with an experienced instructor should have been safe. Rather, Mr Hay's negligence and irrational behaviour had caused his injuries. The trial court[34] and appeal court,[35] however, referred to precedent to invoke 'common sense' to hold that flying in a light aircraft *was* an obviously dangerous activity. The court then used existing case law to provide the following guide to assessments of risk:

> Regard must be had both as to the nature and degree of harm that might be suffered, on the one hand, and the likelihood of the risk materialising on the other (*Falvo* per Ipp JA at [28]) … "Significant risk" has been said to mean more than trivial and does not import an "undemanding" test of foreseeability (*Fallas* per Ipp JA at [14]); it does not mean a risk that is likely to occur (*Fallas* per Ipp JA at [16]) but lays down a standard lying somewhere between a trivial risk and a risk likely to materialise (*Fallas* per Ipp JA at [18]; and as a general guide, it means a risk that is "not merely trivial, but generally speaking, one which has a real chance of materialising.[36]

Once this statement of precedent was applied to the facts, 'common sense' held that even if the risk of something going wrong in a light aircraft might be small, the consequences could be serious.[37] Moreover, when something did go wrong, 'everyday human experience would lead one to conclude that even experienced people can make mistakes particularly when under the stress of an emergency or unexpected event'. The risk, therefore, that 'an instructor would not respond reasonably to indications of impending engine failure' was an obvious risk.[38]

This reasoning in *Campbell v Hay* demonstrates how the legal system constructs risk, in a manner that is simultaneously ambiguous, technical, and dependent on 'common sense'. All these elements contribute to the mystification of the legal construction of

[29][2015] NSWCA 260.
[30](2022) 399 ALR 535.
[31]*Campbell* (n 28) [19].
[32]ibid [60].
[33]ibid [28].
[34]ibid [71].
[35]ibid [138].
[36]ibid [117].
[37]ibid [131].
[38]ibid [147].

risk.[39] This construction of risk is set against, and oversets, Mr Hay's belief in his happy fate and Mr Campbell's reliance on the expertise of his instructor. The court's construction of risk thus accepts the fallibility of the 'expert', and the danger of fate in a dangerous world.

### B. Sharp v Parramatta City Council

In this case, the plaintiff, Ms Sharp, was injured jumping off a ten-metre diving board. Her argument, on appeal, drew on her inexperience and incapacity. She argued that she should not have been allowed to jump from the board at all or that she should have been properly instructed and supervised.[40]

The trial and appeal court rejected Ms Sharp's evidence that she had been told to 'run and jump' into the pool, preferring the evidence of the lifeguard that all patrons were told to jump in the water in a controlled fashion.[41]

The appeal court found that Ms Sharp had attempted to jump vertically in the water but had been anxious and had found herself unable to control her body sufficiently. She had flexed or lent backwards at she jumped, resulting in injury.[42] The court stated that such injuries were an obvious risk of impact with the water in 'an uncontrolled or unintended way' – a risk that would have been clearly apparent to and understood by a reasonable adult in the appellant's position.[43] Ms Sharp's nervousness on the board, her inability to control her body as the lifeguard suggested, was her own failing. Here again, the law attributes responsibility to the participant, even while situating her in a world of danger which she lacks the ability to manage.

### C. Tapp v Australian Bushmen's Campdraft & Rodeo Association LTD

The NSW Court of Appeal cases show both the pliability of risk as a legal concept and the willingness of the courts to assign risk to participants in dangerous activities. In *Tapp,* the High Court further refined the legal characterisation of risk, but did so in a manner that provided recourse for the appellant, Emily Tapp.

Emily Tapp had been a young but accomplished participant in a campdrafting event – a competition in which participants corral cattle from horseback. Ms Tapp suffered a catastrophic fall from her horse, which she argued was due to the poor condition of the grounds. There was evidence of previous falls during the event; a competitor had warned officials that the grounds were unsafe. Ms Tapp argued that the respondent had breached its duty to her by failing to stop the event or improve the grounds.

The NSW Supreme Court and the NSW Court of Appeal had rejected this argument – the trial judge because campdrafting was a sport that had an intrinsic risk of falling;[44] the Court of Appeal because there was insufficient evidence that the condition of the grounds was the cause of the fall.[45] In the High Court, Chief Justice Keifel and Justice Keane, in dissent, agreed with these findings. They noted that there was no 'common sense' test

[39]See Kylie Burns, 'It's Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (2013) 21 Torts Law Journal 73, 80 for a description of the use of common sense to support the outcome of cases.
[40]*Sharp* (n 29) [3].
[41]ibid [8].
[42]ibid [24].
[43]ibid [41].
[44]*Tapp* (n 30) [32] (Kiefel CJ and Keane J).
[45]ibid [33].

of causation in this area[46] – but added that common sense would show a risk of falling.[47] More importantly, they suggested that the appeal and intrinsic nature of campdrafting was dependent on its risks.[48] Participants, they commented, are attracted to such activities *because* of the risks.

This approach echoes the other cases. Nevertheless, the majority of Gordon, Edelman and Gleeson JJ, came to a different conclusion. Ostensibly, the difference lies in the correct legal process for identifying risk. The majority stated that the risk must be defined first (at the correct level of generality) for the question of breach of duty and then the s 5L risk, for the defence of obvious risk, must be defined in the same terms. The trial judge, the majority said, had been incorrect in considering the s 5L risk first and incorrect in defining the risk at too broad a level of generality as 'the risk of falling'.[49] The more accurate characterisation was 'the risk of injury as a result of falling from a horse that slipped by reason of the deterioration of the surface of the arena'.[50]

This abstruse technical guidance was intertwined with the majority's distinct interpretation of the facts. The majority did not view campdrafting as the intrinsically dangerous activity that the other judges had described, stating that 'most campdrafting events start and end without any rider falling from their horse'.[51] Instead, the majority accepted that the surface of the arena had deteriorated and had substantially increased the risks.[52] Moreover, the majority stressed, with some vehemence, that this could not be an obvious risk as Ms Tapp had not had the opportunity to examine the condition of the grounds before she competed and had not been privy to the warnings.[53]

As such, the majority presents Ms Tapp as a competent agent, taking part in a relatively safe activity, who was denied the opportunity to make an informed decision. Even so, the judgment concludes with a reference to her youth and repeats the observation that 'teenagers are likely to be less attuned to risks that would be obvious to more experienced, settled members of the community'.[54]

Thus, *Tapp* clarified a legal process for defining risk that was able to provide recourse for this participant in an activity that the majority concluded did not have obvious dangers. It did not make the legal concept of risk any more determinate – if anything, the case demonstrates that risk can be characterised in different ways that depend on intuition, commonsense, perception of the facts, and legal process. The case also introduced another element of uncertainty about whether the legal conceptualisation of the deserving victim was the responsible, competent rider or the vulnerable teenager. Nevertheless, *Tapp* shows that all these elements are part of highly developed legal paradigm for considering risk and responsibility.

[46]ibid [46].
[47]ibid [49].
[48]ibid [57].
[49]ibid [121–22].
[50]ibid [125].
[51]ibid [79].
[52]ibid [137].
[53]ibid [152].
[54]ibid [155].

## II. Regulation

The law of torts is one form of regulation of recreational activities. Yet, as a diverse body of work shows, regulation in modern society does not only take place through the law. Regulatory theorists have emphasised that regulation has multiple sources,[55] and is often found in 'unsuspected places'.[56] While this may sound concerning, some regulatory theorists point out that local regulation can be valuable.[57] Shearing and Wood use a Hayekian model to show the benefits of using local knowledge to shape good governance.[58] A more radical approach to local regulation draws on Luhmann and Teubner's systems theory, which envisages a radically decentralised society, divided into autopoietic systems.[59] Each system develops its own forms of knowledge, codes and understanding of its environment. Information from outside the system, such as a legal direction, will have to be translated into the system's codes to be understood.[60]

Foucault's work has also pointed to the importance of alternative forms of regulation. In *Discipline and Punish*, Foucault argued that disciplinary power, not law, was the distinctive form of regulation in modernity. Unlike the top down, direct nature of law, discipline is described as a pervasive and subtle technology of power,[61] characterised by techniques of surveillance, hierarchical organisation, and reference to a norm.[62] It can be observed in the use of exercises and the repetition of tasks.[63] This form of power is directed at the body. It aims to shape a docile body and, in the process 'a 'soul' to be known and a subjection to be maintained'.[64] For Foucault, this form of power is found everywhere, in 'minute disciplines, the panopticisms of every day'.[65] This pervasive discipline is the counterpart to formal law and the liberties of the democratic state;[66] the submission it guarantees makes formal liberties possible.[67]

While regulatory theorists have been comfortable examining the relationship between law and regulation,[68] Foucauldian legal scholars have found it harder to respond to Foucault's argument that juridical power belonged a pre-modern period.[69] In the past, legal theorists dealt with this question by correcting or reinterpreting Foucault's work in a way that allowed them to argue that law and the disciplines operated alongside each other in a

[55]Clifford Shearing and Cameron Holley, 'A Nodal Perspective of Governance: Advances in Nodal Governance Thinking' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017) 163, 164; John SF Wright and Brian Head, 'Reconsidering Regulation and Governance Theory: A Learning Approach' (2009) 31 Law and Policy 192, 207.
[56]Julia Black, 'Critical Reflections on Regulation' (2002) 27 Australian Journal of Legal Philosophy 1, 1.
[57]Scott Burris, Peter Drahos and Clifford Shearing, 'Nodal Governance' 30 Australian Journal of Legal Philosophy 30, 32; Neil Gunningham and Darren Sinclair, 'Smart Regulation' in Peter Drahos (ed), *Regulatory Theory* (n 55), 133.
[58]Clifford Shearing and Jennifer Wood, 'Nodal Governance, Democracy, and the New "Denizens"' (2003) 30 Journal of Law and Society 400, 415.
[59]See, eg, Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54 Current Legal Problems 103, 107; Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993) 21; Niklas Luhmann, *Social Systems* (Stanford University Press 1995) 33.
[60]Teubner, *Law as an Autopoietic System* (n 59) 383.
[61]Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books 1977) 209.
[62]ibid 170, 193.
[63]Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press 1995) 21.
[64]Foucault, *Discipline and Punish* (n 61) 295.
[65]ibid 223.
[66]Hunt and Wickham (n 63) 48.
[67]Foucault, *Discipline and Punish* (n 61) 222.
[68]Wright and Head (n 55) 206.
[69]Vanessa E Munro, 'Legal Feminism and Foucault: A Critique of the Expulsion of Law' (2001) 28 Journal of Law and Society 546, 555; Nick Piška, 'Radical Legal Theory Today or How to Make Foucault and Law Disappear Completely' (2011) 19 Feminist Legal Studies 251, 251.

way that could be examined.[70] Recently, however, Golder and Fitzpatrick have suggested a new approach to the understanding of law and discipline in Foucauldian theory.[71] While they echo the argument that law and the disciplines are complementary, related and necessary to each other, they also suggest that Foucauldian law can also be understood to contain some of the features that are found in Foucault's concept of the technologies of the self.[72]

The technologies of the self, the work which a person does to shape her own self and subjectivity, are explored in some of Foucault's later works[73] and have been embraced by many theorists because they seem to offer something of an escape from the pervasive oppression of disciplinary power. Although Foucault emphasises that these practices do not constitute 'liberation' and that the possibilities of work on the self are still limited by the existing cultural options,[74] theorists have emphasised their potential for resistance, change and re-creation. Some feminist writers, for example, have seen in the technologies of the self a way of resisting established categories of gender.[75] Gender was an act, Judith Butler stated, and it could be performed differently.[76] This approach has been used to describe women taking part in sport and performances.[77] Peta Tait has applied Butler's theory in her history of aerial acts, using it to show how circus performance has both challenged, and been constrained by, the expectations of a natural, gendered, body.[78] '[T]he female aerialist', she states 'destabilized limits to the actions and movements of the physical body and also belief in those limits, she rearranged cultural categories of the feminine body'.[79]

Golder and Fitzpatrick draw on this same work by Butler[80] to try to shape a new understanding of Foucault's law, in which it can contain a surpassing aspect that is open to 'alterity'[81] and 'responsive to resistance'.[82] Golder and Fitzpatrick use this approach to envisage an open Foucauldian model of rights that would facilitate different ways of being human. For Golder and Fitzpatrick, endowing law with the possibilities of the technologies of the self means that they can challenge the view of Foucauldian law as a fading instrument of sovereign power and guarantee its ongoing importance in society. Their description also suggests a more optimistic view of law. Although Golder and Fitzpatrick do acknowledge the limitations of the technologies of self,[83] their description of the surpassing aspect of law suggests that it could be something promising and empowering. Indeed, they explicitly present this interpretation in opposition to Ewald's description of law in modernity as closure and restriction.[84]

[70]See eg, Hunt, 'Foucault's Expulsion of Law: Towards a Retrieval' (1992) 17 Law and Social Inquiry 1, 36–37; Hunt and Wickham (n 63) 65. Munro, 'Legal Feminism and Foucault' (n 60) 555.
[71]Golder and Fitzpatrick (n 3).
[72]See, ibid 3; Charles Barbour, 'Doing Justice to Foucault: Legal Theory and the Later Ethics' (2013) 26 International Journal for the Semiotics of Law 73, 77.
[73]Foucault, *The Care of the Self* (n 2).
[74]Michel Foucault, 'The Ethics of Concern for Self as a Practice of Freedom' in Paul Rabinow (ed), *Ethics, Subjectivity and Truth* (New Press 1997) 282, 291.
[75]Munro, 'Legal Feminism and Foucault' (n 69) 549.
[76]Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1999) 187–90.
[77]See eg, Lynda Johnston, 'Flexing Femininity: Female Body-Builders Refiguring "the Body"' (1996) 3 Gender, Place and Culture 327; Pirkko Markula, 'The Technologies of the Self: Sport, Feminism, and Foucault' (2003) 20 Sociology of Sport Journal 87.
[78]Peta Tait, *Circus Bodies: Cultural Identity in Aerial Performance* (Routledge 2005) 7, 149.
[79]Peta Tait, 'Feminine Free Fall: A Fantasy of Freedom' (1996) 48 Theatre Journal 27, 31.
[80]Golder and Fitzpatrick (n 3) 51.
[81]ibid 2, 71.
[82]ibid 124.
[83]ibid 114–15.
[84]ibid 107.

With this work, the longstanding interest in the relationship between law and regulation, or law and discipline is expanded to a question about the relationships between law, discipline and the technologies of the self. However, there has been little exegetical work to explore this.[85] Tort law is not the human rights law Golder and Fitzpatrick envision, but it was framed to operate as an open law that allowed subjects to pursue 'self-regarding' activities and develop their own agency. As such, it provides a vehicle for considering the relationship between an open and empowering law with other forms of regulation and self-regulation.

## III. Risk

The open law of the civil liability regime was intended to facilitate participation in dangerous activities with obvious risks. The allocation of risk played a central role in the reshaping of tort law and its legal subjects. The courts had to develop definitions of risk, which they did through legal techniques and 'common-sense'. Yet the concept of risk has also played an important part in Foucauldian and regulatory theories – sometimes as a characteristic example of modern governance and sometimes as a form of resistance.

Traditional Foucauldian work views risk as a form of rationality that makes events calculable and allows for specific, technical, forms of governance.[86] In Ewald's Foucauldian account of insurance and risk, the technical management of risk is considered part of the rise of biopolitical knowledge and power.[87] More recent Foucauldian work has described a shift from what Ewald described as the calculable risks of the insurance state, to a new range of socio-cultural or moral risks in neoliberal discourse.[88] These are the sort of risks that were invoked in the discussion about tort law reform – the risks of dependency or the erosion of responsibility.[89] This discourse of risk, it is argued, has led to new methods of decentralised regulation, new forms of markets and a new understanding of an individual granted, or rather burdened by, responsibility.[90]

In Luhmann's systems theory, risk is not something that exists in the world but something that is produced by a system's decisions to reduce its exposure to contingency.[91] The opposite of risk, in Luhmann's theory, is not safety but danger. Risks are the factors can be controlled and made the subject of a decision by a system; dangers are seen as external and uncontrollable.[92] When a system or a decision maker makes a decision about risk, this can then become a danger for other systems.[93] The mystifying legal discourse from the tort cases above could be seen as an example of this; it appears to

[85]Sarah Burgess, 'Foucault's Rhetorical Challenge to Law' (2012) 8 International Journal of Law in Context 297, 298.
[86]Mitchell Dean. 'Risk, Calculable and Incalculable' (1998) 49 Soziale Welt 25, 29–30.
[87]François Ewald, 'Norms, Discipline and the Law' (1990) 30 Representations 138, 141.
[88]Fiona Haines, 'Three Risks, One Solution? Exploring the Relationship between Risk and Regulation' 649 Annals of the American Academy of Political and Social Science 35, 39.
[89]David Garland, 'The Rise of Risk' in Richard Ericson and Aaron Doyle (eds), *Risk and Morality* (University of Toronto Press 2003) 62; Fiona Haines, 'Regulation and Risk' in Drahos, 'Regulatory Theory' (n 49) 182; Ian Culpitt, *Social Policy and Risk* (Sage, 1999) 148.
[90]Garland (n 89) 62.
[91]Jens O Zinn, 'Recent Developments in Sociology of Risk and Uncertainty' (2006) 31 Historical Social Research/Historische Sozialforschung 275, 281; Niklas Luhmann, *Risk: A Sociological Theory* (Taylor and Francis 2005) 9, 6.
[92]Luhmann, *Risk* (n 91) 101–02.
[93]ibid 107.

give the participant responsibility but does so in a way that exposes the plaintiff to uncontrollable and irremediable dangers.

In these and other regulatory approaches, risk is not an objective danger that exists in the world,[94] it is not something people can rationally assess.[95] Rather it is something that is constructed within specific systems of knowledge and discourse to shape a particular understanding of the world, society and individuals. Risk, in these terms, has an oppressive aspect; it is a disciplinary technique that shapes subjectivity in a way that may be limiting and disempowering.

There is, however, another approach to risk that sees voluntary risk taking as a possible form of resistance to these constraints. This approach can be found in the work of Stephen Lyng and those who use his concept of 'edgework' to frame a sociological account of voluntary risk taking. 'Edgework', Lyng explains, is a voluntary activity that takes place at the edge between order and chaos, life and death, well-being and injury, sanity and insanity.[96] The quintessential experience on the edge, between these antimonies, is a fully embodied moment of 'experiential anarchy', where the body's sensations and emotions overcome the rational mind and interrupt normal discursive processes.[97] Risk, as Kiefel CJ and Keane noted in *Tapp*, is part of the attraction of the activity.

It is not, however, the only attraction. Despite the emphasis on danger, edgework is not completely uncontrolled or necessarily undertaken purely for the risk factor. Lyng and others emphasise the role of skill and practise in edgework.[98] What edgeworkers value most, Lyng argues, is their ability to maintain control in a situation which, if it were not for their unusual levels of preparation, would be dangerous and uncontrolled.[99] When an edgeworker is injured, other members of the community will attribute their failure to lack of preparation or skill; this allows participants to maintain belief in their own ability to control the risks they face.[100]

Edgework thus involves carefully acquired skill, a perception (at least) of mastery and a phenomenological experience in the moment at the edge. In his early work, Lyng described the acquisition of skill in edgework as a response to institutional and work structures that degraded and instrumentalised labour.[101] Increasingly, however, sociologists of risk have used the Foucauldian concept of technologies of the self to understand edgework. For Lupton and Tulloch, risk taking can be seen as a particular 'practice of the self', a means by which subjectivity is expressed and developed according to prevailing moral and ethical values'.[102] This approach fits neatly with the Ipp Review's description of voluntary risk taking as a 'self-regarding' activity.

[94]See, eg, Garland (n 89) 69; Ewald, *Norms* (n 87) 142; Luhmann, *Risk* (n 91) 6.
[95]Cass Sunstein, 'The Laws of Fear' (2002) 115 Harvard Law Review 1119, 1123; Jens O Zinn, 'Heading into the Unknown: Everyday Strategies for Managing Risk and Uncertainty' (2008) 10 Health, Risk and Society 439, 446.
[96]Stephen Lyng, 'Edgework: A Social Psychological Analysis of Voluntary Risk Taking' (1991) 95 American Journal of Sociology 851, 857.
[97]Lyng, 'Action and Edgework: Risk Taking and Reflexivity in Late Modernity' (2014) 17 European Journal of Social Theory 443, 449; Deborah Lupton and John Tulloch, 'Life would be Pretty Dull without Risk: Voluntary Risk-Taking and Its Pleasures' (2002) 4 Health, Risk and Society 113, 120–21.
[98]Lupton and Tulloch (n 97) 122; Lyng, 'Edgework: A Social Psychological Analysis' (n 96) 871.
[99]Lyng, 'Edgework: A Social Psychological Analysis' (n 96) 871.
[100]Jennifer Lois, 'Gender and Emotion Management in the Stages of Edgework' in Stephen Lyng (ed), *Edgework: The Sociology of Risk-Taking* (Taylor and Francis, 2004) 126.
[101]Lyng, 'Edgework: A Social Psychological Analysis' (n 96) 853–54, 871.
[102]Lupton and Tulloch (n 97) 122.

Lyng also now sees edgework as an approach to self-creation and an ethics of the self,[103] but he goes even further in describing it as a dramatic act of resistance to the disciplinary technologies that try to turn people into docile bodies.[104] He argues that the extreme experience of embodiment that edgeworkers experience approaches the limit experience that was described by Foucault as a form of escape from the discursively constructed limits inscribed in the body.[105]

Thus, risk, when it is a decision made by other people or systems can be seen as a disciplinary or oppressive technique, but when embraced by an individual can be understood as an escape from the oppression of modern society. So how should we then understand the relationship of the *Civil Liability Act* with businesses and individuals engaged with risk? Does it defer danger to vulnerable individuals? Or is it an open law that allows people to find new ways of shaping themselves and escaping from the disciplinary society by engaging in voluntary risk taking?

## IV. Flying Trapeze

Recreational flying trapeze provides a useful case study to explore this question. Flying trapeze can be understood as a community, or a self-referential system. It has developed a specialised practice on an apparatus that imposes its own constraints. It has its own language, its own standards, and its own systems of knowledge. A flying trapeze act involves a 'flyer', who 'throws' a trick that is caught by a catcher. The catcher will then 'return' the flyer back to the fly bar and then, in a successful trick, back to the 'board' where she started. These moments in the air can be understood through Lyng's concept of edgework, as Peta Tait's research on aerialists shows. Tait points out that flying trapeze is perceived as a dangerous act – the danger increasing as the tricks become more complex.[106] Tait describes these dangers:

> Flyers explain that the biggest risk for them is missing a catch and potentially the net. While the net makes their work appear safe, in actuality if they land in the net wrongly, they can be seriously injured. Aerialists have to learn how to land properly on their backs in the net. Often aerialists in tricks like somersaults are travelling very fast and, when they realize that they are not going to make the catch, they are at risk of falling outside the net.[107]

This moment, when the aerialist is suspended between disaster and safety, is the moment that Lyng identifies as the quintessence of edgework. Tait explains that aerialists, like Lyng's edgeworkers, prepare vigilantly for such moments, using Foucauldian techniques of repetition and training to create a 'disciplined aerial body', able to control this moment at the edge. It is this sense of mastery – not the danger itself – that aerialists seek.[108]

[103]Stephen Lyng, 'Sociology at the Edge: Social Theory and Voluntary Risk Taking' in Lyng (ed), *Edgework: The Sociology of Risk-Taking* (n 100) 43.
[104]ibid 47.
[105]Lyng, 'Action and Edgework' (n 97) 454.
[106]Tait, 'Risk, Danger and other Paradoxes in Circus and in Circus Oz Parody' in Peta Tait and Katie Lavers (eds), *The Routledge Circus Studies Reader* (Routledge 2016) 531.
[107]Peta Tait, 'Risk and Danger in Trapeze Performance' (2010) 54 Bandwagon 77.
[108]Peta Tait, 'Body Memory in Muscular Action on Trapeze' *Scan* <https://scan.net.au/scan/journal/display.php?journal_id=55>.

> The thrill comes not from narrowly escaping death, but from maintaining control within an apparently dangerous situation.[109]

Tait's work focusses on professional aerialists and, indeed, for most of its history, flying trapeze only appeared in professional circus acts. In the 1980s, however, flying trapeze became available as a recreational activity as Club Med resorts began installing trapeze rigs, making flight 'safe and accessible for ordinary people'.[110] Coaches who worked at Club Med then went on to found flying trapeze schools around the world, including the three trapeze schools on the east coast of Australia. In this study, I focus on the recreational flyers at these schools.

These flying trapeze schools, and representations of trapeze generally, emphasise the kind of freedom, autonomy and empowerment that was found in the most positive accounts of risk and reform. The language of 'flying' is one part of this. 'Flying' or 'throwing' suggests freedom, ease or abandon.[111] Literature describing the experience of trapeze is entitled 'Flying Free'[112] or 'Learning to Fly'.[113] The tagline of Sydney Trapeze School is 'Learn to Fly'; the 'Fly Factory' in Melbourne is 'Awaken the Wow'; Circus Arts Australia writes:

> Circus Arts provides a safe and supportive environment for you to have fun, be creative and challenge personal limits, helping you achieve a healthy body and happy mind and inspire to you FLY in all areas of your life! (*sic*).[114]

As this comment suggests, the trapeze schools emphasise safety at the same time as they suggest freedom. When trapeze is taught in a school, students wear a harness or 'belt' that is attached to safety lines. The student can be held like 'a marionette', as one participant said, by a lines puller standing on the ground.[115] The student is taught tricks arranged in a specific order; the trapeze community recognises a hierarchy of tricks ranging from 'smaller' to 'bigger' tricks. If, however, a student continues to attend a trapeze school, there may come a point when she will be allowed, in accordance with her rig's rules, to fly without safety lines, or 'out of lines'. This permission acknowledges a degree of expertise; professional flying trapeze is always performed without safety lines. Yet it also introduces a new element of danger and a new allocation of responsibility that is discussed below.

Trapeze, therefore, exemplifies the sort of risky but valuable activity that was facilitated by the tort law reforms and which can be seen in a Foucauldian approach as the product of a surpassing law, or an edgework experience that allows an escape from the disciplinary society. At the same time, there are local safety systems and regulations, physical and administrative constraints. I explored these systems through a series of semi-structured interviews with participants at two flying trapeze schools. The interview format was informed by legal consciousness theory,[116] with the aim of eliciting participants perspectives of varied forms of legality: the legal regime that governed their practice; the local

[109]ibid.
[110]Harriet Heyman, 'A Head and Hand for Heights' *Financial Times* (London, 15 November 1997).
[111]Tait, *Circus Bodies* (n 78) 8.
[112]Lynn Braz, *Flying Free: Life Lessons Learned on the Flying Trapeze* (Research Publications 2013).
[113]Sam Keen, *Learning to Fly* (Broadway Books 1999).
[114]'Circus Arts', *Circus Arts* (2024) <www.circusarts.com.au>.
[115]Anonymous personal interview, 17 March 2017.
[116]Ewick and Silbey (n 4).

rules they created and followed; and their own methods of self-regulation or self-creation. This division was based on the schema set up by Foucauldian and regulatory theory, in order to explore the relationships posited by these theories. This schema is, I do acknowledge, something of an imposition that forces participants' experiences into a theoretical narrative; its arbitrariness and lack of applicability to the participants' understanding of their world soon became apparent in the interviews.

I interviewed two owners of the trapeze schools (School A and B), six other instructors at one of the schools (School A) and seven of their students. All of the students interviewed were women while the owners and most of the instructors and catchers were men. This division reflected the gender division that exists within trapeze schools. Most students are female. At School B, the owner reported that female students made up three quarters of the regular students.[117] At School A, a list of regular students stretching back five years included seventy women and ten men. The overrepresentation of female students has been noted in other areas of recreational circus and has been juxtaposed with male dominance in professional training and circus.[118] Moreover, even in professional circus flying trapeze, women and men tend assume different roles and throw different tricks. A female professional flyer will perform the 'easy' tricks – a splits or a single rotation.[119] 'Splits girl' is a slightly derogatory term for a female performer whose only role in an act is to throw this trick and look decorative. Men are catchers or, when flyers, would be expected to perform double or triple rotations[120] – the 'big' tricks.

Within the trapeze community, these different roles and skills have been attributed to women's physiology. Women report being told, even in recent times, that being a catcher could make them infertile.[121] Tait, however, suggests that this is a cultural development. She argues that in the early days of flying trapeze, women performed the most difficult tricks and acted as catchers.[122] But this history, she says, was forgotten – written out of the annals of circus – because of its inconsistency with cultural depictions of gender.[123] By the 1950s, women were expected only to 'do simple flying and the "necessary femininity"'.[124]

In recent years, a handful of women have begun posting videos on Instagram showing them catching flyers without the assistance of safety lines and performing the big tricks, traditionally reserved for men. This is a development which suggests both the physical potential of women and the transformative potential of performance. Nevertheless, these are still considered exceptional and historic achievements,[125] and their effect is

[117]Anonymous personal interview, 17 March 2017.
[118]Alisan Funk, *Circus Education In Québec: Balancing Academic And Kinaesthetic Learning Objectives Through an Artistic Lens* (Masters Thesis, Concordia University, 2017) 15; Alisan Funk 'Gender Asymmetry and Circus Education' (2018) 4 Performance Matters 19, 19.
[119]ibid 25.
[120]Lizzy, 'Response to a Comment About Trying to Fly Professionally' (10 July 2014) on Flying Trapeze <https://flyingtrapezeblog.blogspot.com.au/search?q=professionally#!/2014/07/response-to-comment-about-trying-to-fly.html>.
[121]Morgan Barbour, 'Flying Trapeze Won't Make Women Infertile' (19 July 2021) <https://stagelync.com/news/flying-trapeze-wont-make-women-infertile-how-victorian-era-infertility-myths-are-still-plaguing-modern-day-athletes> accessed 26 September 2024.
[122]Tait, *Circus Bodies* (n 78) 30.
[123]ibid 58.
[124]ibid 103.
[125]See eg: Katie Sokolowski, 'I DID IT' (26 April 2023) <https://www.instagram.com/reel/Creyj7AJWer/?igsh=MW1zMG5xZjU5NzE1Zw%3D%3D> accessed 26 September 2024.

only starting to trickle down into the recreational sphere. In the recreational space, the ongoing gender disparity is worth noting. First, the comparative absence of women from the authoritative positions of instructor/catcher, and the fact that women may lack the authority that comes within the trapeze community from throwing big tricks, means that most of the rules and regulation that I discuss below will have been constructed by men, but will be experienced by women. Secondly, local common-sense knowledge about the ability of female and male participants shapes the environment in which flyers may choose to work on themselves or which they might seek to resist.

Thus, despite the limited and skewed numbers of participants, they do represent a cross section of experiences in a small community. The smallness of the community, however, could create some difficulties with my own role as investigator. My position as an embedded observer within the community may have led to some misgivings about sharing personal experiences. Some participants expressed concerns about saying anything that might cause problems for themselves or for their school. There was a fear, which will be discussed below, that the laws governing the activity might be tightened.

I have tried to ameliorate some of these limitations by triangulating interview data with academic and popular literature about the cultural aspects of flying trapeze. I also refer to Instagram posts about #flyingtrapeze. Instagram is a useful tool for accessing participants' representations of their experience of trapeze. It is easily searchable and accessible, and it is a widely used platform for creating a trapeze community beyond local rigs. Indeed, it is possible to see certain hashtags and, with them, tropes and standards, diffuse through this broader community.

This type of social media is beginning to be studied more generally as a new and important platform where subjectivity is formed[126] and the self is presented.[127] There are still, however, limitations to the way the self is presented in this medium. Instagram is a public platform, where images are self-selected for display;[128] not every experience and not every representation will be appropriate for such public exposure. Yet, even this limitation can have its uses in this study. It means that posts show the kind of discourse and representations that are acceptable and expected within this community. Thus, by comparing these representations with the interview discussions, it is possible to get some understanding of how participants view law, regulation and their own experiences in flying trapeze.

### *A. Law*

I asked all participants what laws they thought governed flying trapeze, but I questioned owners and instructors more rigorously on this question. I started by asking what 'real' or 'actual' laws existed. The most common response was that there was no law. At first, I was puzzled by this response, but I eventually realised that participants took an Austinian or, perhaps a Foucauldian, view of juridical law. They saw law as a direct, clear rule, the

[126]Stephen Owen, *Governing the Facebook Self: Social Network Sites and Neoliberal Subjects* (University of Newcastle Thesis 2014) 10.

[127]E Lee and others, 'Pictures Speak Louder than Words: Motivations for Using Instagram' (2015) 18 Cyberpsychology, Behavior and Social Networking 552, 555; Lauren Reichart Smith and Jimmy Sanderson, 'I'm Going to Instagram It! An Analysis of Athlete Self-Presentation on Instagram' (2015) 59 Journal of Broadcasting & Electronic Media 342, 344.

[128]Toni Eagar and Stephen Dann, 'Classifying the Narrated #selfie: Genre Typing Human-Branding Activity' (2016) 50 European Journal of Marketing 1835, 1840.

breach of which would entail consequences. For participants it was the clarity of the rule and the consequences that made it 'law', rather than the source. Several participants pointed out the difference between rock-climbing, which they considered had 'law' because it had industry guidelines, and trapeze, which they thought was unregulated.

> I don't think there's technically any laws as such, like the net has to be able to hold x amount or it has to be x metres off the ground or anything like that, there's no – I don't think there's a governing body that's been set up to define those type of things … .[129]

In fact, participants thought that they could fly *because* there were no laws:

> [T]he whole idea of being out of lines and flying or something like that if it wasn't an unregulated sport or industry it just wouldn't happen you wouldn't … so our industry doesn't technically exist but when it does flying out of lines might become a bit tricky.[130]

As this comment suggests, participants were concerned that this situation could change. They were worried that someone, perhaps a trapeze school, might write guidelines that would then bind other trapeze schools. Or there was fear that if something went wrong, if there was some kind of accident, then 'someone' would come in and create 'laws'.

Although participants felt that they were free from legal oversight, the term 'negligence' often came up in interviews. Participants usually referred to negligence when I asked about safety measures, a question that I considered belonged to my second category of local regulation. When staff mentioned negligence, I would question them further on what sort of situations might give rise to claims of negligence. Participants varied in their responses but generally they stated that it would be very unlikely for a newer student, someone using safety lines, to get hurt in any way. If she did get hurt, it would probably be because she had not followed instructions. In that case, the instructor would not be negligent because 'there's only a certain amount of things we can do to help them or to save them if they fuck up'.[131] When asked what would happen if the lines puller was at fault, instructors replied that that would not happen – 'when I pull lines people don't get injured'.[132]

If a more advanced student, a student who flew without safety lines, got hurt, the question of negligence would not arise. An advanced student would not sue because she was part of the trapeze community, and she would understand the risks she was taking:

> Once you've gotten to that level you've seen and been taught a lot and probably come to the realisation that this is a potentially dangerous activity, if I do hurt myself it's probably going to be on me … .[133]

Some instructors referred to the waiver when discussing this issue. They were unsure about the legal status of the waiver. I asked an owner about the waiver, as it declares itself to be an 'important document which affects your legal rights and obligations'. The owner explained that neither his insurer nor his lawyer would draft the waiver. Lacking legal guidance, he took examples of waivers from rock climbing gyms and put them together to construct the waiver. For the owner the waiver was part of running a

[129]Anonymous personal interview, 26 May 2017.
[130]Anonymous personal interview, 26 May 2017.
[131]Anonymous personal interview, 30 March 2017.
[132]Anonymous personal interview, 26 May 2017.
[133]Anonymous personal interview, 26 May 2017.

professional, responsible business. Students, however, took this waiver as a sign that everything was being carried out safely and legally:

> We had to sign a waiver when I started and it used to say all the way up the ladder, have you signed the waiver? So I assumed like … they wouldn't do it unless legally it was really safe to do it in lines.[134]

Thus, owners and instructors do not see themselves as beneficiaries of an enabling law, but, instead, see the open law as a legal void always in danger of being filled. Their concept of responsibility is not markedly different from the legal conception discussed above, but it is based on their own constructions of risk and responsibility – ideas that will be discussed further in the next section. The trapeze school's particular perception of law, or its absence, points to the difficulty of fixing relationships between law and other systems of knowledge. Yet, at the same time, the rigs start to fill what they see as a legal gap with systems and symbols that suggest law – a kind of local, pseudo-law that shapes students' relationship with the rig.

### *B. Rules*

This process of filling the legal void is continued by the construction of rules, both written and unwritten, that govern the operation of the trapeze rigs. I asked owners, instructors and students what they considered the rules of their rigs to be. Students and instructors at School A were able to identify rules that limited students' use of equipment and that required students to be supervised. There were also rules about the progression of tricks and rules that governed when a student, or a newer staff member, was allowed to fly out of lines. At School B, there is a handbook listing the requirements for going out of lines.

When asked about to discuss rules, instructors and owners responded by talking about safety and risk. This is shown in the following response:

> What are the rules that have been set out by the company?
>
> Ah the focus is always on safety. Safety, safety, safety. Uh, the rules set up by the company, there's a whole, with regards to, there's rules about everything. Like any business, or company, a lot of the rules are set out to protect the interests of the company and then like I said, the safety and welfare of the students because obviously it's very bad for business if students get hurt, they can't come back and get a bad name, so safety is definitely a number one priority, and a lot of the rules the company sets out try to focus on that.[135]

This link between safety and business interests was made by several other participants at School A. At School B, the same link between rules and safety was made but here it was linked to ethical, rather than business, concerns:

> Like I said, it's ethical for me. I don't want anybody getting hurt, you know. I'm not going to do something stupid, so somebody gets hurt.[136]

Thus, the trapeze rigs' rules and attempts to control risk are not seen as a legal requirement so much as some other kind of imperative – economic, ethical or a pragmatic attempt to avoid legal regulation. Indeed, as the cases discussed above suggest, the

[134]Anonymous personal interview, 4 April 2017.
[135]Anonymous personal interview, 15 March 2017.
[136]Anonymous personal interview, 17 March 2017.

law might not require any such rules to prevent obvious risks. Nor do the rigs base their ideas about risk and safety on the legal constructions. Rather, the rules of the rigs and the comments of the participants show a very particular, local, construction of risk and safety.

When discussing safety and risk, most participants' comments were often unsure and contradictory. As other researchers have pointed out, there is little data that accurately measures circus injuries and participants tend to avoid discussing danger.[137] Instructors would make ambiguous, unquantifiable, statements about safety, saying that flying trapeze was only as risky, or possibly less risky, as martial arts, or gymnastics, or rugby, rock-climbing, surfing … Or they would compare it to crossing a road or driving a car. Yet, after making these assertions of safety, participants would refer to accidents they had experienced or seen. One instructor, immediately after describing trapeze as safe, stated:

> The net is always there, but I have broken bones landing in the net, I know lots of people who have injured themselves landing in the net, it's possible to bounce out of the net when you're not wearing safety lines.[138]

Only one participant in the study, the owner of the School B, stated unequivocally that flying trapeze was not safe.

> Look how many accidents there are. It's not safe. You could easily fly off and hit the catcher and knock the catcher out … And/or fly into the catcher, hit the net badly, over-rotate to your head, put your arm down, break your leg, fly into the back apron … .[139]

After making this comment, however, he went on to explain methods for managing these risks. These inconsistent comments suggest that instructors consider that trapeze involves risks that they cannot quite quantify but think they can manage. They also show that instructors thought that the main risks of trapeze were a collision between the flyer and the catcher, or a bad landing in the net. These are the risks that can arise when flying without safety lines. The way participants described these risks suggested that they would arise because of flyer error or lack of control. 'Flying off and hitting the catcher' can happen in trapeze when the flyer lets go of the bar too early. A bad landing can also be attributed to a flyer not controlling her body properly when landing. The danger arising from an uncontrolled student flyer comes out in many of the interviews with instructors:

> Staff normally get injured interacting with students, not interacting with staff, like I know that when you're catching, it's far less common for the staff to be injured catching other staff, because the staff are at a certain level where they're not going to let go of the bar early and crash into you, or they're not going to do something crazy and try to claw your eyeballs out.[140]

Another instructor stated:

> I don't think it's dangerous, no I don't think it's a dangerous sport. I think that if there was a person who was very high risk in the way that they came to trapeze it could be a high-risk sport but I also think [this school] specifically is very designed to not allow that to happen.

[137]Florence Legendre, 'Devenir Artiste de Cirque: L'apprentissage du Risque' (2016) 36 Travail, Genre et Sociétés 115, 118–19.
[138]Anonymous personal interview, 15 March 2017.
[139]Anonymous personal interview, 17 March 2017.
[140]Anonymous personal interview, 15 March 2017.

> We have those protocols in place that even people who aren't safe don't, aren't allowed to take the risk into their own hands.[141]

Thus, the rules are there to control and protect the uncontrolled student flyer, even though the law might place this responsibility upon the flyer herself. Yet, before discussing these protocols and rules, it is worth pointing out that the risks of trapeze could be understood differently, and responsibility could be allocated differently. Tait suggests that the main danger in aerial acts is equipment or rigging failure.[142] Rigging was mentioned in the interviews by owners, as something they had to do and something they had expertise in, but it was rarely mentioned by other instructors or students. When it was mentioned, it was not seen as a potential risk, but a given. This was the case even though most students and instructors, when asked specifically, had heard of rigging accidents. Moreover, a bad landing or a collision can result from instructor or catcher error as well as flyer error. Students are often taught to rely on an instructor or catcher to 'call their trick' – to tell them when to perform movements in the trick or release the bar. If these calls are mistimed, then an uncontrolled landing or collision can result. There can also be danger even when flying in safety lines, despite the confidence of instructors mentioned in the previous section. This can be due to instructor error or simply the limitations of the safety system. Several students related stories about experiencing or watching others experience injury while wearing safety lines.

Nevertheless, the rules are framed to control the risk posed by the crazy or stupid things that students might do. Those rules and that understanding of risk, the instructors pointed out, are just 'common sense'. While the law's common sense held that the participant should be responsible for her own body, that the student could not always trust the expertise of the instructor, the trapeze instructor's common sense insisted that the flyer's body was unruly and that the control of the instructor should keep her safe. Therefore, flying trapeze students are always supervised; this was one of the things that participants pointed out distinguished trapeze from other activities like climbing or trampolining. The owner of School B suggested that the constant supervision of students was one of the factors that deterred men from becoming students. At School A, students' use of equipment is overseen to stop them doing anything 'silly'. There are rules that stop students attaching or taking off their own safety lines and, for newer students, the safety device that harnesses them to the ladder. One instructor explained this was important because 'otherwise you know getting crazy people climbing the ladder or … unhooking themself at the top and I'm like hang on don't do that um just because it's part of the policy'.[143]

Both rigs had a lot of rules concerning what students had to do to fly without safety lines – although again these rules differed. As one instructor said, 'a lot of the rules are about getting the students who want to go out of lines to a level where we think it's safe'.[144] At School B these rules are clearly laid out in a handbook. The student has to have mastered certain techniques, including a controlled landing, and the ability to do a 'back to back', a trampolining manoeuvre, and a pull up. Most importantly, the

[141]Anonymous personal interview, 22 December 2016.
[142]Tait, 'Risk and Danger' (n 107).
[143]Anonymous personal interview, 30 March 2017.
[144]Anonymous personal interview, 22 December 2016.

student needs permission from an instructor. The owner explained that this is subjective, but he is looking for confidence and consistency in the student. 'No flailing arms', he explained.[145]

School A considered itself to be stricter about students flying out of lines than many other rigs, but the requirements were less specific. There was no explicit strength requirement, and the skill requirements appeared less complex. A student just must show that she can do her trick with good form and control and can consistently land on her back. In Tait's work, the flyer's process of learning how to land on her back is described as creating a disciplined aerial body.[146] But even once this work is done, it will finally come down to a subjective decision by an instructor as to whether the student shows the requisite control and consistency.

Thus, the rules are aimed at managing risk by transforming a student from a 'crazy' flyer, who needs to be controlled in lines, to someone who can control herself in the air. Control, good form, the ability to 'stay tight', are the attributes of the accomplished flyer; there is a constant discourse of critique and self-criticism around these terms. One of the hashtags used in Instagram representations of trapeze, #noflopsymopsy, suggests the process of overcoming what is, perhaps, depicted as a particularly feminine weakness, to become a controlled flyer. A flyer who can display such control, should, instructors say, be safe to fly out of lines. Yet, the difference in rules between rigs suggests that these safeguards against risk are local constructions, rather than obvious or always effective remedies for the unquantifiable risks of flying. For, despite all the rules and despite the instructor's common sense, it can sometimes be hard for the instructor to correctly assess and control risk:

> it definitely is a case by case basis and the instructors have to make a judgment call and that can be quite stressful sometimes, especially if, and I've done it, I've done it many times, I've made the call and it's been wrong. I've said, ok now let's do this one out of lines and that person, and I have said that because I believe that person can do the trick safely to the safety net, and they might not, and might … touch wood again, I've never had a big disaster and they've been injured severely but sometimes I've made the wrong choice and … .[147]

## C. Self-Regulation

The recreational flyer is therefore enmeshed in a web of local rules and expectations that have filled the open legal regime that was designed to promote autonomy and freedom. Given these rules, does the flyer have space to engage in some form of self-creation? Does she voluntarily engage with risk in such a way that she experiences a possibility of otherness, or freedom or a limit experience that transcends social control?

When flyers discuss their flying, or represent it on social media, it is usually presented as an achievement – a moment when they have overcome their own fears, personal limitations, and, sometimes, social expectations. Participants referred to the fear they felt when flying, sometimes as part of the attraction of trapeze, and sometimes as a challenge to be overcome:

> I used to like not eat the day that I came. I'd come on Tuesdays and I'd be so worked up for the entire day that I'd be like I can't possibly finish my lunch cos I'm so nervous and then I'd get

[145] Anonymous personal interview, 17 March 2017.
[146] ibid.
[147] Anonymous personal interview, 15 March 2017.

> here and I'd be like sweating, my hands and my feet were shaking and like, but then you catch at the end, or you do something and it'd be like the best feeling ever so then it'd make you want to come back and then a week would go and I'd be like I can't do it again.[148]

Flying can also be depicted as a way of overcoming normal social expectations, whether based on gender or age. Instagram accounts like Fierce.female.flyers showcase the strength of female flyers, publicising the achievements of women who exceed gender expectations. The youth troupe from School B went even further in challenging the restrictions placed on children at many recreational rigs. Participants, both adult and child, at this rig began using the hashtag #burnthelines – a hashtag that aggressively questions the rules of many rigs. The children explicitly announced their goal of changing the school system:

> By doing trapeze OOL we hope to inspire many other flying trapeze schools around the world to allow people below the age of 16 to fly out of lines. It shouldn't matter about your age there is no difference whether your 35 or 13years old you still have the same potential …… …… #BURNTHELINES ….[149]

This post suggests a deliberate exercise in performative action. These girls are not just flying out of lines, but they are throwing the sort of 'big' tricks that had not been considered possible by young girls. In the literature on the tort reforms, children were used to represent the weak and powerless; these girls are trying to undermine discourses that say they should be protected. Their work has had impact on other flyers, as can be seen in the spread of the use of the hashtag #burnthelines by students and staff at other rigs.[150]

It should, however, be remembered that the students using the hashtag #burnthelines would have received permission from their instructors to go out of lines and they would have done so by following the rules and meeting the expectations created by their rig. Moreover, the same posts that state #burnthelines or #ownyourflying reveal their acceptance of the trapeze schools' standards for form and control. #burnthelines will be juxtaposed next to #noflopsymopsy[151] or #netcontrol.[152] Flyers acknowledge and self-critique their failures of form in their posts, apologising for their 'crazy legs',[153] flexed feet (#pointyourtoesfucker)[154] or uncontrolled movements. In the interviews, flyers explained that their attraction to trapeze was not just the 'adrenalin', but their desire to be 'good' at flying trapeze; being 'good' meant accepting these standards of bodily control and striving to meet them by overcoming their physical as well as psychological limitations.

For flyers, the management of their bodies is also a way of addressing their fear and controlling what they consider to be the risks of flying. Although flyers said that they felt scared when flying, they also said that they thought they were safe. Flying trapeze

[148]Anonymous personal interview, 4 April 2017.
[149]Fly.high.circus, 'By Doing Trapeze … ' (17 November 2015) <https://www.instagram.com/p/-L7579sqLj>.
[150]See, eg, Circuspunk, 'Yeah, I got the back somersault OOL!!!' (17 November 2015) <https://www.instagram.com/p/-LDxLJlYsDbf3Q2G_hGzKxLhyOBQhDuKwtpg00>; Flyingtrapezeperth, 'Great advance experience session today!' (23 February 2016) <https://www.instagram.com/p/BCFyJOlkzYU>; melissanne.k, 'Proud moment' (6 March 2016) <https://www.instagram.com/p/BCmw-VrFl9n>.
[151]Wonderwomenflyers, 'Stylin' (30 October 2015) <https://www.instagram.com/p/9dXBsXuaH8>.
[152]flying_trapeze_retreat, 'If you are in LA' (25 October 2015) <https://www.instagram.com/p/9QZmSzTH6J>.
[153]rdanksiebaker, 'Something old' (4 November 2017) <https://www.instagram.com/p/BbETBrxgnV5ymQ_OfJJROpmu4WviM4wkQGPqm80>.
[154]the_flying_englishman, 'That's not flying' (21 January 2018) <https://www.instagram.com/p/BeLujkYD0jr>.

could be unsafe, participants acknowledged. They had seen other flyers make bad choices and put themselves in danger. Nevertheless, each participant felt that she, herself, was safe. Like Lyng's edgeworkers, these flyers felt that they were safe because they had practiced extensively, and they only threw tricks they knew they were capable of. As one flyer explained:

> I'm always telling myself, you've done this 100 times so you can do this, you don't even need to think about it, it will just happen.[155]

Flyers talked about moments when something went wrong, but their body was well-trained enough to turn the right way and land safely.[156] Such moments reassured the flyer that that she could control herself in the air:

> I feel safe because I know how I respond to being up in the air, I know how my body works and I know what my limits are ….[157]

One participant said she felt safe because of the many rules of the rig, but most flyers stated that it was the practise that they demanded of themselves, and their understanding of their own limits that kept them safe. They insisted that they did not just rely on the opinion of an instructor. 'Often', one flyer said, 'the boys will tell me to take my [safety] belt off and I'll be like nah not ready yet'.[158] Another said that she had limited what she would do out of lines after seeing too much 'scary shit'.[159]

These comments show that flyers accept the trapeze rigs' understanding of risk in trapeze as the risk that might arise from their own uncontrolled body. And while the rigs manage that business risk through their rules, flyers felt that they managed the personal risk through their own training and self-restraint. By adding their own rules to the rules of the rig, flyers are able to turn the dangers constructed by the rig into risks that they feel they can control; they deflect the rules imposed by the rig into a self-discipline that they have chosen. Fear becomes an irrational feeling that can be overcome, while risk is something that can be rationally and carefully managed.

The way that these flyers play with the challenges of fear, while believing in the security that their disciplined body brings them, shows how cautious we should be about the potential of the technologies of the self. These flyers do engage in some kind of self- creation, they do work on themselves both psychologically and physically, they might even express some forms of resistance – but they do so in a circumscribed manner. They are controlled not just by the rules and disciplinary techniques of their rig, but by a second layer of rules that they shape for themselves. These rules, to a large extent, echo and reinforce the rig's rules, values and constructions of risk. If we are looking for a responsible, autonomous individual as envisaged by the tort reform, we arguably have one here – in these flyers who take responsibility for themselves, control their bodies, and limit risk in the terms they understand it. If, however, we are looking for a more comprehensive form of freedom under an open law, or some kind of limit experience that defies normal social structures and power relationships, it will not be found in the disciplined and self-disciplined flyer.

[155]Anonymous personal interview, 9 May 2017.
[156]Anonymous personal interview, 9 May 2017.
[157]Anonymous personal interview, 30 March 2017.
[158]Anonymous personal interview, 26 May 2017.
[159]Anonymous personal interview, 28 February 2017.

## V. Conclusion

Recreational flying trapeze could be seen as an example of the appropriateness of the tort law reforms and the ideals behind them. In a trapeze school, we see a local community, with its own specific expertise, employing this knowledge to identify risk, introduce safety regimes and protect customers in a way that goes beyond the requirements of the law. We can also see individuals who behave carefully and take responsibility for themselves, just as the law desired, while engaging in the kind of active, risky pursuit that is considered personally and socially valuable. As such, it appears as an appropriate and successful experimentation with decentralised regulation – as well, perhaps, as an example of the inevitability of local regulation in a society of differentiated knowledge.

Recreational flying trapeze is less useful, however, for supporting the promises of openness or change that have come from those who have embraced the possibilities of the technologies of the self for understanding law or risk. The open law had little resonance in the trapeze community. If anything, the openness of the law appeared to the rigs as an absent law, a space which needed to be filled with pseudo-law, local regulations and their own, commonsense, understanding of risk. Where the law left the participant exposed to the dangers her uncontrolled body created, the rigs sought to govern that body as the locus of a risk that they could identify and manage. As a traditional Foucauldian approach would suggest, the very openness of the law, the liberty it provides, is made possible by these local disciplinary techniques that restrain the flyer. The particular gendered way in which these risks are assinged and the rules operate gives another reason for caution. The female student might seek to overcome her personal and social limitations, but she often does so in a context of male authority, supervision and standard setting focused on her body. Moreover, when, or if, the flyer overcomes her weakness, floppiness or craziness enough to be allowed to fly free, to engage in some form of edgework, she will do so by internalising and imposing on herself these same standards and disciplinary techniques.

Even the most enthusiastic work on the technologies of the self does acknowledge the limitations of social constraints and the role of disciplinary techniques, but these constraints are sometimes then subsumed in hopefulness, a vision of escape from the disciplinary society. This is just a small study, on a discrete group of people taking part in an unusual activity, but it is useful as a practical reminder of the prevalence of regulation and the limits on the escape that the technologies of the self might offer. It can be hard to even distinguish the work on the self from discipline of others, as is shown by the flyer who imposes her own set of rules that mirror her rig's rules, which in turn mimic an absent law. The flyer may fly free for a moment on the edge, but it is because of a web of rules, regulations and constraints rather than an enabling law.

## Disclosure Statement

No potential conflict of interest was reported by the author(s).

## Notes on Contributor

*Amanda Alexander* is a senior lecturer at the Australian Catholic University. This study had ethics approval from the Australian Catholic University Human Research Ethics Committee. Ethics approval

number: 2016-205E. The data was collected in 2017. Between January 2022 and June 2024, Alexander was employed as a casual coach at another trapeze rig, which was not investigated in this project.

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