

1st EUROPEAN LAW FORUM ON WINTER SPORTS

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“We have published the report by Dr. Joseph Pichler with the kind permission of his family. Sadly Dr. Pichler passed away on 21st March 2006 at the age of seventy-five; he was one of Europe’s foremost experts on winter sports law.”

THE STATE OF SNOW LAW IN AUSTRIA

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I. Introduction

Skiing accidents represent the focal point around which discussions and the application of snow law (meaning the law relating to snow sports) turn. The purpose of snow law is two-fold: first of all to stop accidents occurring and, secondly, to better clear up the principles of legal liability tied to the accident event. In this sense, snow law involves a broad range of specific factors concerning on the one hand the behaviour of skiers and, on the other, the activities of those who manage ski lifts and ski pistes, which can only be referred to here in a fragmentary and partial way. Snow law concerns a whole series of legal categories in which the legal application at sports level of the concept of negligence in practice takes on a primary role. Below I shall try to outline the essential points as regards snow law in Austria and delve more deeply into two major problems concerning practical rules of behaviour.

II. The provisions of snow law in Austria

1. Austria is a federal state consisting of 9 regions. In conformity with the federal constitution, matters concerning skiing fall within the jurisdiction of the single regions, so that, as the concept of federalism implies, the single regions assume the responsibility tied to the definition of fundamental regulations on skiing. Only three regions (Vorarlberg, Upper Austria, Lower Austria) have passed a series of general laws on sport: nevertheless, these do not contain principles of concrete behaviour for skiers. In Austria then, no general legislation currently exists comprising provisions for regulating the correct behaviour of skiers on ski pistes, never mind legislation on the appropriate behaviour of ski lift and piste managers.
2. And yet, in the past, Austria had numerous regulations relating to behaviour on ski pistes but these were restricted to local level. The first series of official regulations on the subject was issued on 14 June 1937 by the regional council of Innsbruck to regulate sports activities on four downhill runs, already widely used at the time, located close to Innsbruck itself. These regulations required, *inter alia*, that expert skiers be mindful of less expert ones (above all women and children). In the 1970s, many local councils in the Austrian skiing areas took the initiative and passed regulations on how to behave on ski pistes, nevertheless, concrete rules in this respect were still few. These local laws in fact have never played a lead role in skiing activities and not even in legal proceedings relating to ski accidents and, in the meantime, many have been overruled because they clash with constitutional rights regarding who is entitled or not entitled to pass laws.

3. On 14 November 2004, the city council of the major ski resort of St. Anton am Arlberg issued a series of new regulations concerning behaviour on ski pistes that continue to be enforced and the violation of which is punished by a fine of up to € 1,820.00. The regulations contain a series of obligations and prohibitions and substantially provide that generally recognised rules concerning behaviour on ski pistes must be observed even if these have never been concretely adopted. These rules, in practise, forbid accessing ski pistes without wearing skis and with toboggans, taking animals (dogs) onto the ski pistes, moving, damaging and modifying no-access signs, markers and similar positioned near the pistes, as well as using the pistes during ski-lift winch positioning; finally regulations require immediate assistance to be provided in case of need. The point is however that not even these local legal provisions provide concrete rules for the correct behaviour of skiers on ski pistes.

4. All the regions of Austria except Burgenland, which borders on the Low Pannonic Plain and has no skiing mountains, have issued a complete set of legal norms covering ski schools and skiing teachers. These indicate the subjective and objective preambles for managing a ski school and a school for skiing teachers, as well as the rights and obligations of ski school directors and skiing teachers, in accordance with the directives issued at European level; what is more, special provisions have also been issued concerning the training, updating and inspection of these schools. The legislation on ski schools is not easy to assess according to the provisions of federal laws: a foreigner wishing to manage a ski school in Austria must necessarily carefully study the provisions on ski schools applicable in the region in which he/she intends working.

III. Cable-cars and ski-lifts

In terms of legal liability, cable-cars and ski-lifts are considered on a par with railways and are therefore subject not only to fault liability but also to the limited liability of danger in conformity with the provisions established in the Eisenbahn- und Kraftfahrzeug-Haftpflichtgesetz (EKHG – the law regulating civil liability for road and railway accidents): consequently, the person managing a ski-lift has the same precise responsibilities of someone managing a railway or the owner of a road vehicle. Such person is therefore responsible for accidents occurring during plant operation even in the event of he/she or his/her employees not being at fault.

The obligation to pay damages is not envisaged if the accident has been caused by an inevitable event due neither to lack of plant maintenance nor to an operating error. In particular, an event is considered inevitable if this is caused by the behaviour of the victim, of a third person not working for the company or of an animal, and if both the manager and his/her associates have precisely carried out all the operations that became necessary after the occurrence of the event. Experience teaches that, in practice, the manager rarely manages to provide definite proof of the actual total inevitability of an event leading to the occurrence of an accident.

Ski-lifts were included within the field of application of the EKHG in 1978, even though the risk and responsibility of accidents with this type of lifting plant is totally attributed to the behaviour of

the ski-lift user and can rarely be attributed to the manager. Hence it follows that, in Austria, liability for accidents involving ski-lifts is clearly greater than in other alpine countries. An exception to such severity as regards the application of liability is represented only by accidents caused by the condition of the route followed by the ski-lift. In these cases, only the contractual liability is valid depending on the fault of the ski-lift manager in the event of his/her being able to produce evidence of innocence.

IV. Safety on the pistes

1. No legal provisions currently exist relating to the plant, structure and safety of ski pistes. Nevertheless, piste managers, for economical and competitive reasons, are already committed to offering ski pistes that are as appealing and safe as possible. In Austria, an institution called “Pistengütesiegel” exists. This represents a quality seal for ski pistes. A certificate assigned, on request, by the regional government to specific skiing districts that show themselves to be in possession of certain basic equipment as regards cable-car and ski-lift plants, as well as ski pistes, and which comply with precise standards in terms of safety, information, assistance services, etc., as determined by a special commission appointed by the regional government.

2. The legal obligation relating to safety on ski pistes is deemed as an accessory obligation for transport agreements. Consequently, the victim of the accident must provide the necessary evidence to ascertain the presence of an atypical source of danger in the area of the pistes and to prove the connection existing between such cause of danger and the accident itself. It is up to the accused manager of the piste to take all action necessary to prove his/her innocence.

The juridical status currently existing within snow law has been defined by means of discussions of a legal nature which were decisively influenced by specialised literature on the subject and, above all, by a team of experts (consisting of jurists, cable-car and ski experts) who, since 1981, convene every year at the “Symposium on the juridical law of cable-cars” and regularly discuss the current safety problems that come to the fore in relation to the operation of pistes and cable-cars. The results are formulated in the form of theses and published together with a comment in the *Zeitschrift für Verkehrsrecht* (ZVR – transport legal gazette). The primary aim of these symposiums is not to clear up legal questions but rather, considering general legal provisions, to formulate adequate and practical solutions to the problems that have come to light. Such solutions are then put at the disposal of the piste managers as guidelines, and of the jurisdictions, as qualified opinions of experts. Experience teaches that, on the one hand, the piste managers undertake in this way to behave in a way in conformity with the provisions of such theses and, on the other, the jurisdictions tend to abide by such results.

3. In this sense, the following general theses have been formulated for the safety of pistes, in addition to numerous others (cf. the summary representation of Dittrich-Reindl-Stabentheiner in ZVR 1996, 194), theses which have also been taken up within the jurisdictions:

- a) The owner of the pistes must, substantially, make the ski area controlled by him/her safe, meaning the pistes explicitly and conclusively used for skiing and the explicitly dedicated skiing trails, in conformity with the indicated qualifications, but not the free skiing areas outside those entrusted to him/her, above all not the so-called off-piste trails.
- b) In determining the answer to the question relating to the existence or non-existence of a source of danger to be made safe, we must first of all start with the fact that the skier must look after his/her own safety and adapt his/her behaviour on skis to the recognisable danger.
- c) Despite such provision of personal responsibility, the owner of the pistes is obliged to ensure safety against atypical dangers. Considered as atypical are all those dangers which, taking into account the aspect and degree of difficulty of the piste, are unexpected or hard to avoid even for a responsible skier.
- d) For the need, type and quality of safety on pistes, most important is the general relationship between entity and probability of the atypical danger, and whether or not this can be avoided, on the one hand thanks to the general behaviour of a responsible piste user and, on the other, as a result of the behaviour of the piste owner who uses adequate means according to how the piste is conceived. The responsibility of the piste owner, on the one hand, and the personal responsibility of the user of the pistes, on the other, thus create a lively system whereby the principles of both spheres of responsibility are correlated and are in a relationship of mutual tension. In my opinion, jurisdictions often put the accent on the safety obligation of the piste owner and, at the same time, minimise the personal responsibility of the piste user. This provides food for deep thought on the issue relating to the use of the full-face crash helmet.

V. Motor vehicle on the pistes

1. Behaviour of motor-vehicle drivers (piste preparation equipment, snowmobiles) is not legally regulated. The commission of experts which addressed the issue of safety on the pistes also formulated and published a number of theses on the subject (cf. piste equipment ZVR 1987, 321 and snowmobiles ZVR 1997, 399). According to such theses and to the jurisdictional provisions, piste motorised equipment must be used as far as possible outside the system operating hours. Nevertheless, should it be necessary to use such equipment during normal system operating hours, clearly visible notices of this intention must be affixed. The beacon light must be always on during movement and, when light conditions are bad, the headlights must also be switched on; before accessing areas and pistes where visibility is bad, an acoustic warning signal **must be given and warning notices must be affixed.**

2. The use of snowmobiles must be authorised by the administrative authorities. In this respect, in some regions, laws exist that regulate the use of snowmobiles but which, nevertheless, do not contain concrete rules of behaviour as regards driving on pistes. Such principles have been summarised by jurisdiction and by the aforementioned commission of experts. Consequently, the snowmobiles must only be used for the purposes for which they are expressly intended and authorised; they must be driven away from the pistes or at least well outside the plant operating

hours, if possible at the sides of the pistes, or in an area of the piste that is clearly visible; speed should be adapted to the existing conditions; in narrow passages that are not clearly visible, speed must be as slow as possible and acoustic warning signals must be given.

3. From a legal point of view, the equipment used to prepare the pistes does not consist of vehicles in the true sense of the word, and consequently the EKHG is not directly applicable. According to current interpretation however, in Austria a similar application of this special law on liability is generally accepted. According to the general interpretation in literature, motorised equipment for preparing pistes is substantially subject to rules on liability for danger in a similar interpretation of the application of the EKHG. The OGH (the Austrian Supreme Court of Justice) has not yet been able to answer this question in any definitive way because, whenever it has been called upon to pass judgement, it has always reached, through a very rigid interpretation of the accuracy principle, an affirmative answer in relation to liability regarding fault (detailed representation of this legal problem: OGH dated 15.09.2004 ZVR 2005/30).

VI. Piste regulations

The snow law applicable in Austria has not been created by official and competent legislators, but by single authors and institutes which have tried to draw up a draft of adequate skiing regulations and to reassume the major principles concerning the accuracy of the operations necessary to practise this sport. As regards rules on behaviour, a major role is played by the FIS regulations issued in 1967 and the Pistenordnungsentwurf (POE – the draft Bill of regulations on pistes) drawn up in 1969 by the Österreichische Kuratorium für alpine Sicherheit (the Austrian Authority for Alpine Security Surveillance).

Because certain points of the rules of behaviour drawn up by the single authors and institutes were not in agreement and the volume of FIS regulations was also lacking to some extent and because the official rules of behaviour on the pistes issued by the single town councils were not at all concrete in terms of their contents and rather locally oriented and the number of accidents on the snow increased yearly between 1965 and 1975, the immediate need was felt in Austria for a general law able to regulate behaviour on the pistes. Consequently, a legal commission of the Österreichische Kuratoriums für alpine Sicherheit drew up a project for a possible set of piste regulations which was subsequently published and accompanied by a comment, including with reference to the FIS regulations (cf. Pichler, Pisten-Paragrafen-Skiunfälle, 1970, 41 and Pichler-Holzer, Handbuch des österreichischen Skirechts, 1987, 151).

Common to both sets of juridical regulations is the fact that they do not represent any kind of legal norm, but simply a series of obligations relating to the accuracy and performance of the operations deriving from the application of the “neminem laedere” natural law thesis in alpine skiing: these are usually based on the decisions of law courts with respect to accidents caused by collisions. In view of the fact that the POE contains various obligations relating to behaviour that do not appear in the FIS regulations, in Austrian jurisdiction, reference is also often made to POE provisions.

The extension of the rules contained in the POE is superior to that of the FIS regulations; nevertheless, the obligations relating to behaviour concretely formulated in the POE and which do not appear in the FIS regulations, are fully covered by the first general FIS norm. If we consider the different sets of rules and their different degree of concreteness, from the amendment made in 1990 to the contents of the FIS regulations, no actual contradictions can be found between the two sets of regulations.

Considering the FIS and POE regulations both represent regulatory instruments usable in practice and that the law courts more or less use these, from what I can see at present, no urgency would seem to exist in Austria as regards the passing of a general law regulating behaviour on pistes.

VII. Two concrete problems relating to rules of behaviour

1. The legal right of way of downstream skiers compared to upstream skiers

In compliance with the provisions of FIS regulation 3 (§ 8 POE), skiers and snowboarders coming from above must select their downhill lane in such a way as not to jeopardise the skiers and the snowboarders in front of him/her. This is alpine skiing's most important rule of behaviour and the one most considered and applied in proceedings relating to accidents caused by collisions. It is therefore easy to understand and absolutely appropriate that the rights should be upheld of the slower skier who is downstream on free slopes compared to those of the expert and faster skier, because the downstream skier cannot normally see the skier coming up behind him/her and consequently is not able to move out of the way.

The problem of perception was the decisive principle that prompted the definition of this important basic rule.

The right of way rule appears simple and clear but, who is, in the confusion of skiers on a slope, the one who is downstream and the one who is upstream? In the case of road traffic, movement is clear because the lanes are always established, while in the case of alpine skiing, the continuous changes in sense of direction and way of proceeding are part and parcel of the nature of this sport. Moving in Indian file occurs at best during skiing lessons and along skiing trails but never on normal pistes where everyone seeks their own lane. Consequently, in the case of skiing, traditional collisions, so well-known in the case of road traffic, are rare. Generally speaking collisions occur in more or less large corners, often during a turnabout when taking an arched or angled course. Collisions are generally from the rear or front side.

Due to this situation which is so typical of skiing, it becomes rather hard to explain the dynamics of an accident which has caused a collision. A decisive factor is the following: whosoever, on the basis of his/her relative approach position, is able to see – with utmost active attention – the potential obstacle long enough beforehand, in order to avoid it with a controlled manoeuvre (FIS regulation 2, § 5 POE), is obliged to do so. Whosoever recognises or is in a position to recognise the hazard only at the last moment before the collision, is usually no longer in a condition to react so as to avoid the collision. Before this occurs therefore, the approaching skier must have made use of the possibility of recognising the danger of collision and reacting consequentially. To make such

conditions clear, it is necessary to determine the position of each of the lines of approach (fundamental approach direction) during the last 30 metres approximately and the speed of movement over this section. Rather than the examination of a static and accurate position of the accident at the time of the collision, only the examination of the linear and dynamic movement during the approach phase will provide a reliable legal assessment of how the accident occurred in conformity with the provisions of FIS regulation 3 (§ 8 POE). According to this regulation, the user of the piste who is downstream at the time of the collision is not always necessarily the skier who is moving down in front. In the case in fact of an overtaking manoeuvre cutting across the path of the second skier or of an overtaking manoeuvre on the valley side, in the case of an oblique course, the faster skier on the piste who is coming from upstream could well find himself/herself in front of the slower skier.

Although during the downhill run, the viewing direction tends to be turned downstream and the skier who is in front on the piste is usually placed in relation to the skier that follows, who is proceeding “faster downhill”, the movement ratio, in conformity with the provisions of the FIS regulation 3, cannot be judged only with reference to a supposed longitudinal axis of the piste or to a transversal line because the possibility of perception mainly depends on the movement positions of the one and the other during the approach.

Consequently I consider the way the FIS regulation 3 is formulated to be as appropriate as the definition given in article 10 of the Italian law currently applicable for pistes, which gives the right of way to the downstream skier with respect to the upstream skier.

2. No obligation to observe the law – Deficiency in the FIS regulations

The FIS represents a good set of regulations, yet not still as perfect and inviolable as the ten commandments handed to Moses on Mount Sinai: consequently, I think I can risk criticising a point or two even after the amendments made in 1990. Thanks to my many years of experience as an expert in the field of legal proceedings relating to skiing events, I know that at least 8 skiers out of 10 coming down a piste bang into other skiers and absolutely fail to see these before the actual collision or at least only do so when it is too late to avoid the collision. Generally speaking, both are convinced that the other skier has come up from behind, otherwise he/she would have seen the other and avoided the collision. It must be pointed out that the phenomenon of the frequent observation and perception error is caused, on the one side, by a field of vision that is reduced by about 90 degrees for the downhill skier within the straight line of vision and, on the other, by the peculiarity of the amply irregular movement with continuous changes of lane, direction and downhill speed, but also by the concentration required during the run. Nevertheless, the actual cause of the collision is, normally, a lack of active attention: while on roads, a clear and fixed order of movement exists, on the pistes a confusion of dynamic and absolutely legal movements reigns. The attention required on very busy pistes is superior to that needed on roads and errors of distraction and perception are most definitely the most frequent causes of collision on ski pistes. Of course, these can also depend on the speed at which the skier is moving. The greater the downhill speed, the less the field of vision.

Because of these conditions, on a ski piste, during a downhill run, it is most important to observe the people around you as carefully as possible, both those in front and those at the side (active attention), in order to be able to react in good time to the movements of the skier in front. This particular observation obligation had already been explicitly addressed by a number of authors (Nirk, NJW 1964, 1835 and Pichler, ÖJZ 1966, 167) before the creation of the FIS regulations and is explicitly referred to in § 6 of the POE even though, until now, this aspect has not yet been contemplated in the FIS regulations, but is simply shown in the explanatory notes. The right of way of a skier who is downstream can only be observed by someone who sees him/her in good time: active attention is therefore a *conditio sine qua non* for the observance of the norms and rules.

In a set of international regulations, such rules must be explicitly adopted because of the important obligation of accuracy in the performance of the operations necessary for preventing accidents, and the utmost attention should be given to them. Thanks to the thesis included in 1990 in rule 2, “A skier and snowboarder must move with his eyes wide open“, this particular obligation is neither expressed directly nor indirectly; the English version reads “A skier or snowboarder must move in control“, which is not at all the same thing. The principle of “moving with your eyes open” is only effective where, in a fast approach area, the view is actually restricted: consequently it is a question of the relation between downhill speed and view. As soon as the obstacle enters the possible and acceptable field of perception for the other skier, the obligation arises to respect the skier in front (active attention). “Moving with eyes wide open” implies a problem of speed, while the prompt perception of a skier on the piste in an area where he/she is clearly visible, is a matter of attention.

It would therefore be a good idea to supplement FIS regulation 2 as follows: “A skier and snowboarder must move with eyes wide open, carefully observe the people in front in the area of possible collision, adapt his/her speed and style of skiing to his/her skills, to the ground, to the snow, to the weather conditions and to the number of people on the pistes.“

In this case, it is not only a matter of a self-evident point that need not even be underscored, but rather a clear formulation of the main obligation to be carefully observed. Such formulation is also effective for preventing accidents and for fostering the awareness of oneself. Teilhard de Chardin, the great French thinker wrote, with reference to the Omega point, in his evolutionary reveries: “The more you look, the more you see”. This simple truth is not only valid for refined visionary observations, but also adapts perfectly to the trite proceedings of everyday life, and therefore also to skiers.

VIII. The proposal

The motto of the convention “From snow rights to snow law“ is formulated in a meaningful and appropriate way and shows the right path to be followed. With regard to the completeness of the specific subjects and problems, the discussions that take place during the convention will only just manage to cover the snow law theme areas (snow sports law) and achieve a complete result. During the procedure for the unification of snow law, certain priorities will therefore have to be established. In order to avoid the occurrence of accidents, it will be most important to consider the behaviour of skiers. Consequently, it seems only right to start with a discussion on a single set of rules of

behaviour, above all because in the new Italian law on safety on ski pistes, a number of provisions have been added regarding behaviour which, with reference to certain major aspects, differ substantially from the FIS regulations applied for decades in the alpine skiing areas. Especially serious is the difference as regards how to determine right of way. In conformity with article 10, the right of way of the downstream skier is established without reservation, while no special provision has been created for skiers approaching on the piste or those who are moving towards it (FIS regulation 5, § 4 POE); for piste intersections, article 12 defines a legal right of way that has not yet been put into practice in the alpine areas, but which has been explicitly disputed by Austrian jurisdiction (see OGH 27.06.1985 ZVR 1986/135).

As regards the initiative of Italian legislators and the strong international involvement of skiing, in my opinion, priority should be given to the uniformity of the rules of behaviour because these directly affect those who practise snow sports and play a major role both with regard to avoiding and judging the accident event. The FIS regulations should therefore represent the basis of such discussion.