

**1st EUROPEAN LAW FORUM ON WINTER SPORTS**

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# LAW 363/2003: REFLECTIONS AND FUTURE PROSPECTS

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## 1) LAW 363/2003 AND REGIONAL LEGISLATION

Law 363/2003 attributes the regions with a series of obligations in terms of winter sports regulations. Parliament became aware of the necessity to regulate the general principles, whilst allowing that article 117 of the Constitution attributes the task of legislating in matters of sports regulations, and therefore indirectly also in matters of winter sports, to the regions. Considering that the Constitution exclusively attributes responsibility for regulating the private code to the state it is not surprising that, previous to the issue of law 363, regional legislation, although often of high quality in terms of content, was almost always incomplete. This was due to the fact that such regulations were not able to deal with, and therefore failed to deal with, the central aspects, that is to say, matters concerning the responsibility of both managers and users in the sector of mountain sports activities. Thus, what was missing were Parliamentary measures that established, at least at a rudimentary level, a series of general principles that today can partially be found in law 363/2003.

In article 2<sup>1</sup>, equipped skiable areas are defined as being snow-covered areas, including those covered with artificial snow, that are open to the public and that include ski runs, lifts and artificial snow machines, habitually used for snow sports such as skiing, snowboarding, cross-country skiing, sledging and luge sledging.

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<sup>1</sup> Thus in art. 2 of law 363.2003

*“1. Equipped ski areas are snow-covered areas, including those covered in artificial snow, that are open to the public and that include ski runs, lifts and artificial snow machines, habitually used for snow sports such as skiing, in its various forms, snowboarding, cross-country skiing, sledging and luge sledging, and other sports determined by individual regional regulations.*

*2. In order to guarantee the safety of users, areas for the specific practice of activities using equipment such as sledges and luges, and possibly other snow sports, should be determined, as should areas where snowboarding is forbidden, even temporarily.*

*3. The areas mentioned in paragraphs 1 and 2 are decided and determined by the regions. This decision amounts to the declaration of public utility, that cannot be deferred and is urgent, representing the condition for the compulsory constitution of servitude connected to the management of these areas, subject to payment of the relevant penalty, in compliance with what has been established by the regions.*

*4. Within the areas referred to in paragraph 1 with more than three runs served by at least three lifts, the municipalities involved should determine, on days during which competition events are not being held, the section of the runs to be reserved, on request, for competitive ski and snowboard training. The areas mentioned in the present paragraph must be separated, using adequate protection, from other runs and all those who use them must wear a type-tested, protective helmet, with the exception of appointed trainers.*

*5. Within the areas mentioned in paragraph 1 with more than twenty runs served by at least ten lifts, the municipalities involved should determine the areas to be reserved for acrobatic ski and snowboard evolution training (snow park). The areas mentioned in the present paragraph must be separated, using adequate protection, from other runs and must be equipped with specific structures for acrobatic evolution training, which must be regularly serviced, and all those who use the area must wear a type-tested, protective helmet”.*

Neither law 363/2003, nor the six previously-presented government bills, provided for the introduction of either a system of sanctions to enforce conduct-related regulations or special ski run supervisors or patrollers, with the latter having the same supervising responsibilities (which do not include first aid provision) as for example, the Traffic Police.

The regions should be responsible for deciding, by means of effective decrees, whether to impose more specific regulations within the field of supervisory control than those set out in article 21, which states that “*the State Police, the State Forestry Department, the Carabinieri and the Financial Police, as well as local police authorities*” should provide a “*supervision and rescue service in ski resorts*” and “*control the enforcement of the provisions of this law and apply the relative sanctions to those failing to comply with the same*”. It is worth comparing this provision to article 18<sup>2</sup>, which attributes the regions and municipalities with responsibility for introducing further restrictions to ensure safety and the optimal use of ski runs and lifts.

The question then arises as to whether such a general outline law risks leading the regions to legislate in contrasting manners, creating a less uniform situation than was hoped for on a national level. For example, the outline law makes use of terms such as “*suitable*” and “*adequate*”, that is to say, terms that refer to indefinite concepts that do not in any way delimit foreseeable possibilities, (see, for example, article 2, paragraphs 4 and 5<sup>3</sup>, and article 3, paragraph 1<sup>4</sup>).

Furthermore, the regions are often allocated the task of quantifying the entity of applicable sanctions, once again creating rather unclear circumstances and uncertain homogeneity, (see, for example, article 18<sup>5</sup>).

Therefore, these aspects, instead of leading to certainties, may give rise to varying interpretations and fail to contribute to improving the situation created in the past with the various regional laws.

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<sup>2</sup> Thus in art. 18 of law 363/2003 “ 1. *The regions and municipalities can adopt further rules designed to guarantee the safety and best use of the ski runs and lifts.*

2. *The regions determine the administrative sanctions to be applied for breach of the dispositions of article 5, paragraphs 3, 6, 9 to 13 and 15 to 17, to be set between a minimum of 20 euro and a maximum of 250 euro”.*

<sup>3</sup> Thus in art. 2, paragraph 4-5 of law 363/2003 “ 4. *Within the areas mentioned in paragraph 1 with more than three runs served by at least three lifts, the municipalities involved determine, on days during which competition events are not being held, the sections of runs to be reserved, on request, for competitive ski and snowboard training. The areas mentioned in the present paragraph must be separated, using adequate protection, from other runs and all those who use them must wear a type-tested, protective helmet, with the exception of appointed trainers.*

5 *Within the areas mentioned in paragraph 1 with more than twenty runs served by at least ten lifts, the municipalities involved should determine the areas to be reserved for acrobatic, ski and snowboard evolution training (snow parks). The areas mentioned in the present paragraph must be separated, using adequate protection, from other runs and must be equipped with specific structures for acrobatic evolution training, which must be regularly serviced, and all those who use them must wear a type-tested, protective helmet”.*

<sup>4</sup> Thus in art. 3, paragraph 1 of law 363/2003 “ 1. *Managers of the areas determined in compliance with article 2, guarantee users the possibility to practice sports and recreational activities in safety, ensuring the ski runs are safe, in compliance with the provisions established by the regions. Managers have the obligation to protect users from any obstacles along the ski runs, using adequate protection and clearly signalling any dangers”.*

<sup>5</sup> See note 39.

## 2) MANAGERS OF EQUIPPED SKIABLE AREAS IN LIGHT OF LAW 363/2003.

The managers of ski areas are regulated by articles 3, 4, 5, 6 and 7 of law 363/2003. These provisions are innovative compared to previous disciplinary rules under which, in fact, individual regions dealt with the issue in a fragmentary manner, often drafting regulations divergent from one another. In light of recent jurisprudential verdicts it is clear that the interpretation of law 363/2003 supports the doctrine and law that consider the purchase of a ski pass to be something more than simply the conclusion of a transport contract. A recent decision by the Court of Cassation in fact established that “*the manager of a ski run is the custodian of the same and is therefore, objectively responsible for any injury that can be traced back to the presence of obstacles on the same, except in cases where the fortuitous nature of the case can be proved without doubt, including the unpredicted and unpredictable culpable conduct of the injured party*”.<sup>6</sup> The provisions of articles 3, 4 and 7 confirm the role of the manager as a subject held to be civilly responsible for the good condition and safety of runs.

In fact, managers are governed by a wide-ranging and generalised obligation to protect users, in particular, article 3, paragraph 1, states that they must ensure that “*users can practice sports and recreational activities in safe conditions by guaranteeing the safety of the runs as provided for by the regions*”. In addition “*managers are obliged to protect users from obstacles present on runs by means of adequate protective devices and danger warning signs*”.

Paragraph 2 of article 3 underlines the obligation of managers to “*ensure the rescue and transport of injured users on accessible runs to the nearest medical or first aid centre*”.

Apart from the fact that it constitutes an offence, breach of the provisions of paragraph 2 carries an administrative penalty amounting to between 20,000 and 200,000 euro. Furthermore, article 7, paragraph 4<sup>7</sup> provides for the obligatory closure of runs in cases of danger or impracticality and again, apart from the fact that it constitutes an offence, non-observance of the same implies the payment of an administrative penalty of between 5,000 and 50,000 euro.

In order to guarantee the solvency of ski lift managers if sentenced to pay injury compensation, it is interesting to note that article 4, paragraph 1 allows ski lifts to be opened only if the managers have previously stipulated special insurance contracts “*in connection with civil responsibility for injury derivable to users and third parties due to facts deriving from the*

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<sup>6</sup> CIVIL CASSATION Section III, 10<sup>th</sup> February 2005, n. 2706. With notes by CALABRESE *La doppia natura della responsabilità del gestore di una pista di sci in Danno e Resp.*, 8-9, 2005, 837 ff.

<sup>7</sup> Thus in art. 7, paragraph 4 of law 363/2003 “*The manager has the obligation to close the ski runs in case of danger or impracticality. Apart from the fact that it constitutes an offence, breach of the obligation mentioned in the present paragraph implies the application of an administrative penalty of between 5,000 and 50,000 euro*”.

*responsibility of the manager*” in relation to the use of equipped skiable areas.<sup>8</sup> There is undeniably a sense of emptiness, or at the very least delusion, in discovering that the promise contained in the provision simply translates into obligatory responsibility insurance for managers and a warning of sanctions for non-observance of the same. The provision makes no reference to the nature of that responsibility.<sup>9</sup>

Prevention, however, remains the principal element in avoiding ski run tragedies. Examples of preventive safety measures include the positioning of avalanche containment devices in sites close to slopes where great quantities of snow accumulate, or micro-load or gas systems able to send snow sliding down to the valley floor when the ski centres are closed.

Ski area managers are responsible for fulfilling two obligations: on the one hand that of installing special and clearly visible signals on the runs, indicating their unevenness or closure and warning the user of the presence of danger (repeated failure to observe this regulation may lead to the withdrawal of authorisation), and on the other, that of providing for the ordinary and extraordinary maintenance of the runs (article 7)<sup>10</sup>.

### 3) SKIER RIGHTS AND OBLIGATIONS

The regulations provided for by item 3 of law 363/2003 are partially taken from the FIS (Italian Winter Sports Association) Handbook dated May 1967<sup>11</sup>.

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<sup>8</sup> Cf. CHIESI “*Note that this extract is important, as non-observance of the above mentioned obligation - which also applies to authorisation in progress - implies the application of an administrative penalty, the refusal of authorisation for the management of new ski lifts and, above all, the suspension of authorisation already issued until obviously, the insurance contract has been stipulated (art. 4)*”.

<sup>9</sup> Cf. CALABRESE *La doppia natura della responsabilità del gestore in una pista da sci* in *Danno e Resp.*, 8-9, 2005, 840.

<sup>10</sup> Thus in art. 7, paragraph 1-2 of law 363/2003:

“1. *Managers of the areas determined in compliance with article 2 provide for the ordinary and extraordinary maintenance of the areas themselves, in accordance with what has been established by the regions, ensuring they comply with the necessary safety requisites and are already equipped with the compulsory signs.*

2. *Should the ski run be in a poor condition, its uneven state must be signalled. Should the conditions present objective danger, regardless of the state of the ski run or other atypical danger, these must be removed or the run must be closed. Signs warning of the state of the run or its closure must be placed, in a position that is visible to the public, at the beginning of the run and at the valley terminals of any cable car transport services”.*

<sup>11</sup> Penalthon promoted the idea of self-regulation by ski run users after years of doctrine intervention and at the same time as the creation in other countries of similar works such as the US set of rules, the twenty rules published by KLEPPE in *«La responsabilità negli incidenti con gli sci nei paesi alpini»*, in *Riv. DIR. SPORT.*, 1968, page 343, the set of rules drafted by the German lawyer NIRK, those drawn up by Professor PICHLER in *«La lesione sportiva nel diritto penale»*, in *Riv. Dir. Sport.*, 1964, page 163, and the project elaborated by RABINOVITCH in 1967.

The definitive work, which was widely diffused because it was both clear and concise and thanks to the prestige of the organisation that produced it, was *«Rules for the conduct of skiers»*, drawn up by the Legal Committee of the FIS (International Ski Federation), comprising jurists from all the countries where skiing was practiced. The definitive and official text was approved in Beirut in May 1967 and subsequently adopted by the International Ski Federation, in its definitive version, in Famagosta in 1973.

As was previously pointed out before the issue of law 363/2003, this set of rules “*alongside the law, or rather as integration to the law, today constitutes the main source of skiing law in terms of the conduct of skiers on runs*”.<sup>12</sup>

According to item 3 of the law, in addition to various rights, users are also subject to a series of obligations and regulations, however, it is necessary to remember that “*the whole regulatory system concentrates on guaranteeing the safety and psycho-physical condition of run users (articles 5 of the Civil Code and 32 of the Constitutional Court)*”.<sup>13</sup>

The new points introduced by item 3, compared to previous codes of conduct, concern the already referred to obligatory use of protective helmets and the introduction of a number of “road traffic” rules, as set out in article 9, “*speed must be particularly moderated in stretches of reduced visibility, close to buildings or obstacles, at crossroads, at forks, in fog and mist, in poor visibility or crowded conditions, in narrow stretches and in the presence of learners*”, which is reminiscent of articles 141 and 142 of the Highway Code.

In addition, as provided for by article 2054, paragraph 2, of the Civil Code, in cases of collision, unless proved otherwise, it is to be presumed that both skiers are to be held equally responsible for any injury caused.<sup>14</sup>

In the past, doctrine sought to align skiing matters to road traffic related matters. In fact, in principle, part of the doctrine and a number of isolated judicial decisions have attempted to delineate skier responsibility as per the disciplinary regulations dictated by article 2054 of the Civil Code, equalising the trinomial “to ski, a run, skis” to that of “to travel, a road, a vehicle”, in order to allow injured parties to be able to take advantage of the presumed responsibility that the law places on the driver.<sup>15</sup>

Despite there being considerable jurisprudential and doctrinal policy as to the ample notion of what constitutes a vehicle<sup>16</sup>, in 1980 the Court of Cassation definitively established that skis, not being listed amongst the vehicles subjected to the discipline of the Highway Code, could not be regulated by article 2054.<sup>17</sup> Therefore, the reference made by the legislator (see articles 9 and 19) to types of conduct inferred by the Highway Code, after the Court of Cassation clearly established the incompatibility between the two activities, seems rather curious. Furthermore, the absence of the obligation of insurance cover in the field of skiing, in the presence of article 19, which appears to

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<sup>12</sup> PRADI in “*Sci alpino*” in *Digesto*, IV edition, Turin, 1998, 172. C.f. also *supra* note 26.

<sup>13</sup> CHIESI *op. cit.*

<sup>14</sup> Thus in art. 19 of law 363/2003 “1. In the case of a collision between skiers, it is presumed, until evidence to the contrary, that both skiers are equally responsible for any injury caused”.

<sup>15</sup> Thus ANTINOZZI in “La responsabilità dello sciatore” in *Dir e Prat. nell’ Ass.* 1987, page 863.

<sup>16</sup> Cf. ALPA and BESSONE “I fatti illeciti” in *Trattato di diritto privato* directed by Rescigno, vol. 14, UTET, TO, 1987, page 351.

<sup>17</sup> Cf. *supra* note 18.

recopy article 2054, second paragraph, could lead to significant problems in cases of accidents where no witnesses are present.

For example, consider the hypothetical case of Peter who, while skiing in line with all established conduct-related regulations, is knocked down by Paul whose conduct, on the contrary, clearly does not comply with item 3 of law 363/03. In the collision, Peter is not injured in any way whatsoever whilst, on the contrary, Paul suffers considerable injury. At this point, according to article 19<sup>18</sup>, if Peter cannot count on the support of any witnesses, he could be held responsible for paying compensation to the value of half the injuries suffered by Paul.

All three positions clearly underline a desire to some how “facilitate” the situation of the injured party, exonerating him or her from the burden of proof. In fact, articles 2050, 2051 and 2054 of the Civil Code presume that the party that causes injury is guilty.

Indeed, in so far as concerns the criminal aspects, which are not applicable here, according to the Public Prosecutor of the Republic of Turin, skiing activities should be subjected to the disciplinary rules provided for by law 626 of 1994 regarding workplace safety. The supposition on which this theory is founded is that ski runs are not only places of tourism and sports-related activities but also places of work and, as a consequence, should be regulated by law 626 of 1994. The application of this law would protect all those who, in their various roles, such as instructors or ski area or ski run employees, work in the mountains. In concrete terms this constitutes a series of regulations, mainly concerning runs, set out by the Local Health Authority. Were this point to be taken on board by the doctrine, or by the law in particular, then the companies who manage ski areas would be obliged to adopt a series of safety measures ranging from the marking out of the runs with poles, to the signalling of potentially dangerous points or more complex sections of runs such as, for example, crossroads with other runs, drops, ditches, or other particularly problematic areas<sup>19</sup>.

Another part of the doctrine and law still refers the matter back to article 2043 of the Civil Code, with the consequence that, in conformity to general principles, responsibility for providing proof falls upon those who seek to assert their rights - in this case in point, the injured party.

With the aim of rendering the skier responsible, article 17<sup>20</sup> states that neither the manager, nor the concessionary, is responsible for accidents that take place on off-piste areas that are served by ski lifts. This provision is of significant interest and yet gives rise to doubts of an interpretative

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<sup>18</sup> Cf. *supra* note 49.

<sup>19</sup> Cf. RUOTOLO in “Secolo XIX”, 30<sup>th</sup> January 2004, page 6.

<sup>20</sup> Thus in art.17, paragraph 1-2 of the law 363/03

“1. *The concessionary or the manager of the ski lifts are not responsible for accidents that may occur on off-piste areas served by the said lifts.*

2. *Whenever the weather and snow conditions present obvious avalanche risks, individuals that practice downhill skiing must be equipped with special electronic systems that can guarantee adequate rescue services”.*

nature, relating as to whether ski area managers (or concessionaries) must indicate which areas are to be considered “off-piste”. It is important to remember that runs are not only used by expert skiers able to easily distinguish between an off-piste and an ordinary run and that often, in the mountains, climatic conditions change suddenly making it difficult, in the presence of fog or snow storms, to clearly identify an off-piste run from a little used one. Therefore, a part of the doctrine holds managers responsible for rendering the signals clearly understandable to users, who should be left in no doubt as to their interpretation.<sup>21</sup>

Article 14 contains another new point according to which, if the provided present case does not integrate more serious cases provided for by article 593 of the Criminal Code<sup>22</sup>, whoever, while practising skiing or other snow sports, fails to assist a person in difficulty or to immediately inform the manager of an accident, is subject to pay an administrative penalty of between 250 and 1,000 euro.

#### **4. CONTRACTUAL OR EXTRA-CONTRACTUAL RESPONSIBILITY OF MANAGERS?**

Law 363 seems to confirm the position according to which managers do not simply transfer people from the valley bottom to the mountain top, but rather offer a wider plurality of services, with transport playing a functional and accessory role in relation to that of the successive downhill descent.

One of the criticisms aimed at this position concerns the impossibility of identifying within the act of making use of a run a continuation of the transport contract. In connection with this, article 2 of law 363, which defines equipped skiable areas, expressly confirms that this includes “runs, ski lifts and artificial snow machines”. This definition logically implies the conclusion of a contract covering not only transport but also the use of services offered in the “equipped skiable areas”, including both ski runs and lifts. The contract in question, therefore, covers not only transport but also especially the use of the runs within the whole equipped area.<sup>23</sup>

Even if law 363/03 should be considered as a step forward it is also true that this provision has only partially harmonised the disparate regulations already present. It must be questioned whether this law has dealt with the main issues that should be placed before all other difficulties relating to skiing on runs, in short, if the problems of compensation settlement in terms of

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<sup>21</sup> Cf. CHIESI *op. cit.*

<sup>22</sup> Art. 593 of the Code of Criminal Procedure establishes the penalty of imprisonment for up to a year or a fine of up to two thousand five hundred euro for anyone who “upon finding a body that is or seems to be lifeless or a person who is wounded or otherwise in danger, fails to provide the necessary assistance or immediately advise the authorities. If the above mentioned conduct of the guilty party leads to personal injury the penalty increases whilst, if it leads to death the penalty is doubled.

<sup>23</sup> Cf. CALABRESE *op. cit.* 842.

substantive law and the burden of proof in relation to the law of procedure have been concretely dealt with. For some time the problem has been faced, and partly resolved, by more sagacious law and doctrine, with the emergence of the so-called concept of the “*ski pass contract*” or “blank contract”. This is an atypical contract,<sup>24</sup> which is provided for neither by our regulations nor by the new law. Today, the purchase of a *ski pass*, necessary in order to go skiing, carries the right to ascend with mechanical means. This transaction consists of a transport contract regulated by the provisions of the Civil Code (article 1678 and ff.). In the case of accidents that occur during transport, whatever the means used, the manager of the ski centre remains free from responsibility if s/he can prove to have taken all reasonable steps to avoid the occurrence of the injury<sup>25</sup>.

At present, the aspect most closely related to skiing itself, the descent along downhill ski runs remains unregulated. According to prevailing legal opinion, a ski run is not in any way involved in the contractual relationship entered into by the skier and the manager of the ski area<sup>26</sup>. The purchase

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<sup>24</sup> Art. 1322, paragraph 2 establishes that « *The parties can... draw up contracts that do not belong to the types that have a particular discipline*». The possibility to stipulate atypical contracts “*allows privates to organise their contractual operations in the way that most complies with their requirements and therefore, is more suitable to guaranteeing their effectiveness*”, thus ROPPO in *Il contratto* Giuffrè, Milan 2001 page 422 and ff. The freedom to stipulate atypical contracts can however come up against limits with regards to certain goods, activities and interests. In these cases, the law establishes a series of typical contracts and forbids the drafting of contracts that do not comply with these as it feels that, in this sector, regulations other than standard ones would not settle the interests present in a suitable manner. The ban on stipulating atypical contracts exists for atypical matrimonial agreements and atypical agrarian contracts, but does not come from the second part of art. 1322. In fact, art. 1322 paragraph 2 establishes that individuals can conclude atypical contracts «*providing they are aimed at realising interests worthy of protection, in compliance with the legal system*». In compliance with this disposition, a contract deserves to be refused not because it is socially indifferent, but only if it is socially harmful or dangerous, in other words, if it is illegal. As a result, atypical contracts that do not «*aim to realise interests worthy of protection*» and therefore, forbidden by art. 1322, paragraph 2, are contracts that are contrary to mandatory rules, public order or good costume.

<sup>25</sup> Thus in SPAGNOLI CATALANO “*Responsabilità del gestore degli impianti*” in *Danno e resp.* n. 8-9/2000, page 909. In CASSATION LAW dated 23<sup>rd</sup> May 1997 where it was stated that the more or less active collaboration of the user constitutes a constant in all transport contracts for mechanical means and that everyone has to be included within the framework of the contract for the transport of people. There is a difference between the doctrine and the law. In cableway, gondola cableway, cable car and chair lift contracts the discipline dictated by arts. 1678 and ff Civil Codes is usually applied. Leaving aside, in part, chair lifts these particular means do not entail the active participation of the passenger. However there are other lifts, where there is a lack of, using an expression coined by Giudiceanrea *op. cit.* page 303, and “*complete entrustment to the carrier*”. This refers to ski lifts, sledge-lifts, conveyor belts and button lifts as, in these cases, they usually fall within the realm of atypical contracts (art. 1322, paragraph 2 of the Civil Code.). The following have expressed themselves in favour of the application of art. 1681 of the Civil Code, even in the case of ski lifts; the COURT OF COMO, 31<sup>st</sup> May 1972 in *Prat. ass.* 1972 page 776, the COURT OF PIACENZA, 11<sup>th</sup> December 1978 in *Riv. Dir Sport.* 1979 page 366 and the COURT OF TURIN 8<sup>th</sup> July 1999 in *Danno e resp.* 1999, page 291. The Courts recognised the responsibility of the *ski lift* manager because, due to the absence of personnel, a skier had grabbed the button alone and, due to an irregular rolling of the cable, had been yanked forward, fallen over and ended up in a ditch; *Contra* CASSATION section III 10<sup>th</sup> May 2000 n. 5953 in *Giust. Civ. Mass.* 2000 page 979 where it was reiterated that “*the transport of people contract presupposes that the passenger does not collaborate in any way in the transport: it ensues therefore, that a ski lift use contract cannot be qualified as a typical transport contract and that in fact, art. 1681 of the Civil Code applies*”; CARBONE in *Danno e resp.* n. 4/2001 page 375 upholds the theory of the atypical ski lift contract. He sustains its atypical nature because, in the relationship that follows a typical transport of people contract, the passenger must usually not collaborate in any way in transport operations, whilst in the case of a ski lift the active conduct of the passenger is clear. Therefore, in the specific case it does not merely involve transport but transport that is functional to the practice of the skiing activity.

<sup>26</sup> Cf. in this respect to the APPEAL COURT of Trento 28<sup>th</sup> February 1979 in *Resp. civ.* 1980 page 706; the COURT of Turin verdict dated 23<sup>rd</sup> April 1987 in *Riv. giur. circ. trasp* 1989 page 762.

of a *ski pass* is a tacit expression of will, also referred to as conclusive behaviour<sup>27</sup>, with the parties exclusively stipulating a contract, the cause<sup>28</sup> of which is solely the transfer, in return for payment, of the skier from the valley floor to the mountain top. According to this theory, a skier only purchases the “right to ascent”. The fact that the skier has to stipulate that contract in order to be able to ski would simply constitute a mere motive<sup>29</sup> and as such would be juridically irrelevant<sup>30</sup>.

However, a new position is emerging according to which the purchase of the ticket does not only involve a transport contract, but rather a contract that allows for the use of skiable areas. This contract covers the availability of a range of runs and ski facilities that can be freely accessed and used<sup>31</sup>.

This is the “*ski pass*” contract or “blank contract” that, at the moment, is not recognised by any real regulations, but that is currently interpreted by more innovative jurisprudence as representing an atypical contract<sup>32</sup>.

In essence, the cause<sup>33</sup> in that transaction is not so much the transport but the whole activity that consists of being able to “ascend and descend”, that is to say, “transport functional to the activity of skiing on safe runs”<sup>34</sup>. The disciplinary rules of this atypical contract can be found in

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<sup>27</sup> See ROPPO in *Istituzioni di diritto privato*, Monduzzi, Bologna 2001 IV page 345

<sup>28</sup> For a broad view of the concept of *cause* in doctrinal evolution, see ROPPO in *Il contratto* Giuffrè, Milan 2001 page 361 ff. As cause of the contract we intend «*the justificative reason for the movement of property realised through the contract*» for this reason, the cause is an essential element of the contract. The doctrine has created a complex series of theories on the cause. The first contrast concerns subjective and objective theories. The former identify the cause as a psychological element, whereas the latter as an objective and external element. With regards to objective theories, another distinction can be made between those that qualify the cause as abstract and others as concrete. According to abstract theories, the cause is the economic-social function of the contract whereas for concrete theories, closer to the demands for the evolution of the contract, the cause is the reason that concretely justifies the particular contract being examined. Cf. ROPPO in *Il contratto*, *op. cit.* page 363 and ff.

<sup>29</sup> See ROPPO in *Il contratto* *op. cit.* page 377: the motives are that “*the interests of the party that remain outside the contract because they are not part of its justificative reason*”.

<sup>30</sup> Thus VIOLA *op. cit.* page 46. In the decision of the COURT OF TURIN 23<sup>rd</sup> April 1987 *cit.* “*The contract stipulated with the ski lift manager concerns the transport service to the top of the mountain, but cannot be extended to the effects of the subsequent descent made by the skier autonomously and independently. Therefore, although ski lifts and ski runs can be closely related, it is not possible to recognise the singleness of the legal relationship and the responsibility of the lift manager*”.

<sup>31</sup> Thus in VIOLA, *op. cit.* page 47; cf. also DE BASSA in «*In tema di responsabilità del gestore di impianti di risalita e tutela dell'utente*» in *Riv. giur. circ e trasp.*, 1989, page 768; BEVILACQUA in «*Responsabilità per infortuni da difetto di manutenzione e apprestamento delle piste di sci*» in *Riv. Dir. Sport.*, 1983, page 536; CHEVALARD in the comment on the verdict of the Magistrates' Court of Aosta in *Riv. Dir. Sport.* 1990 page 201; cf. the decision of the APPEAL COURT OF TURIN, 5<sup>th</sup> July 1997, in *Arch. giur.*, 1998, page 500; the COURT OF MASSA CARRARA 14<sup>th</sup> May 1996, in *Arch. giur.*, 1996, page 1399; the Magistrates' Court of AOSTA 24<sup>th</sup> December 1993 in *Giur. merito* 1994 page 315; the COURT OF TURIN 24<sup>th</sup> October 1991 in *Arch. giur.* 1992 page 86.

<sup>32</sup> One of the interpretative exclusion policies of the profiles of contractual responsibility or default is based on the consideration that the descent is made by the skier autonomously and independently. See Carbone *op. cit.* page 377.

<sup>33</sup> In the case of the “*ski pass*” contract the cause must be found in the payment of the *ski pass* by the user, which is aimed at obtaining services that range from the transport of the skier from the valley floor to the mountain top, the preparation, covering in snow and beating of the ski runs and rescue services in the case of accidents. This is therefore, a contract for “use” of a structure designed to permit the practice of a specific sports activity, carried out thanks to efficient conduct. VIOLA *op. cit.* page 52.

<sup>34</sup> This is how, for the first time but only *incidenter tantum*, the Supreme Cassation Court decided in verdict n. 2216 (section III civil) dated 15/2/2001 est. PETTI in *Danno e Resp.*, n 4/2001, note by CARBONE page 372.

general contract regulations (article 1323 ff. of the Civil Code, and especially article 1341) and fulfilment of the same (articles 1218 ff., 1175 and 1176 paragraph 1 of the Civil Code), in the provisions of specific contracts, applicable for analogy (articles 1678 ff of the Civil Code), as well as in article 1374 of the Civil Code in terms of integration<sup>35</sup>. The unitary contractual relationship position was accepted by the Court of Modena<sup>36</sup>, which established that a ski lift manager who issues a *ski pass* assumes the role of carrier and is also contractually responsible for descents on the runs which they are held to be responsible for maintaining.

The consequences of this legal role are extremely important because they directly influence the possibility of the skier to concretely assert, or otherwise, his/her rights in legal hearings, and directly modify the rules relative to the burden of proof.

Were this “*ski pass*” or “blank” contract to be recognised by the legislator, then the user, by purchasing a *ski pass* would not simply purchase a transport ticket but rather the possibility to ascend by mean of the ski lifts and descend on the runs. As in this case it would constitute a clearly contractual responsibility, the burden of proof would be greatly facilitated in terms of the skier, who would simply need to be able to demonstrate the objective circumstances of the relationship. On the other hand, the ski run manager would have to demonstrate to have done everything possible to ensure that the accident did not happen.

This is not a secondary condition of protection, if one considers that, in the hypotheses that this contract were not recognised, we would find ourselves faced with a case of injurious damage responsibility, with the consequence that the probatory burden would be much more onerous, not to say diabolical. In practical terms the injured party, before being taken away by helicopter or toboggan, would be in the paradoxical and onerous situation of first having to gather together as much evidence as possible in order to be able to demonstrate the negligence of the run manager in relation to run maintenance.

Moreover, it is worth noting the significant legal consequences which such legislative recognition could lead to: in fact, the provisions concerning consumers would apply to skiers-users. In particular, law 281/98 establishes the fundamental rights of the consumer in terms of health and safety, therefore giving the entrepreneur-manager a correlative duty.

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<sup>35</sup> Cf. VIOLA *op. cit.* page 52.

<sup>36</sup> The COURT OF MODENA 12<sup>th</sup> November 1990 in *Dir. Trasporti* 1992, page 579. In order to back up its decision, the Court began by stating that, to the skier, the manager is an obligatory subject both for the transport phase and the subsequent descent. It is this dual position of the manager that, according to the Court, induces “*the contracting party of the transport contract to believe the obligatory counterparty to be in good faith, not only guaranteeing the safe use of the ski lifts but also a ski run devoid of dangers that had not been signalled or dangers that are not easy to cope with, even taking particular care*”. The Courts upheld that this would imply that the breach of this obligation would lead to, as well as the extra-contractual responsibility of the managers relating to his or her role as run custodian (art. 2051 of the Civil Code), a responsibility for contractual default.

The innovative, although rather isolated<sup>37</sup>, judgement of the Court of Modena was followed by a verdict of the Court of Cassation<sup>38</sup> which - in judging the case of a claim presented by a skier who slipped and injured himself on a tuft of grass - against a decision by the Appeal Court of Turin affirmed *incidenter tantum* that the transport of the skier is atypical “*given that it does not only involve transport, but transport functional to the activity of skiing on safe runs*”. The Court then rejected the claim put forward by the skier, not holding censurable the decision of the Appeal Court of Turin, which excluded in the case in question the existence of “*a clause (even implicit) or an additional safety provision (due to heterointegration) of the content of the relationship*” from which to infer the assumption of the contractual responsibility of the manager for maintenance of the runs.<sup>39</sup>

According to Petti, who was responsible for drafting the verdict, there exists an intrinsic conflict between the entrepreneurs and managers of ski areas, who create wealth, profit and employment on the one hand, and the skiers, who continue to grow in number and who are increasingly less expert and more at risk of serious traumatic injuries, on the other. It is necessary to understand how the risk should be shared out between them, as only in this way will it be possible to settle the conflict. “In fact, on the one hand there are the entrepreneurs who want to see their balance sheets in credit, while on the other there are the skiers who have the right to use sports facilities in safety. While the law takes into account the human factor of skier fault it is now also starting to consider the contractual factor that would render entrepreneurs responsible for providing safe runs”.<sup>40</sup>

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<sup>37</sup> Cf. also the COURT OF PINEROLO, 18/10/2000 *Danno e Resp.*, 2002, 75, notes by BONA.

This decision highlights that the “ski pass” contract constitutes an atypical contract due to which, following payment of a sum proportionate to the duration of the contract itself, the managing company offers the possibility to use ski lift services as well as ski runs prepared for skiing. Furthermore, as this constitutes the object of the contract, the company that provides these services must necessarily not limit itself to making ski lifts and runs available but should also offer other equipment and should maintain the same so that they can be used safely.

<sup>38</sup> CASSATION decision n. 2216 civil section III dated 15/2/2001 est. PETTI in *Danno e Resp.*, n.4/2001, notes by CARBONE page 372. “*The contract between a skier and the ski lift manager represents atypical transport as it is not an end to itself but is functional to skiing on safe runs that however, the manager is not obliged to maintain in a good state. Furthermore, if due to a maintenance fault a skier is injured, he or she cannot take action against the manger for contractual responsibility. He or she can also not take action against the same for extra-contractual responsibility, in compliance with arts. 2050 or 2051 of the Civil Code as it is necessary to exclude both the intrinsically dangerous nature of the activity of managing ski lifts - as it is not qualifiable by regulations aimed at preventing injury and ensuring public safety, nor is it caused by the nature of things or by the means used - and the quality of the custodian of the runs by the lift manager*”.

<sup>39</sup> The court then rejected the appeal of the skier as it did not hold censurable the decision of the Appeal Court of Turin, which had excluded the case of the existence of “*a clause (even implicit) or an additional safety provision (due to heterointegration) of the content of the relationship*” from which to infer the assumption of the contractual responsibility of the run manager. VIOLA *op. cit.* pages 53-54.

<sup>40</sup> PETTI speaking at the conference *Regole per un sciatore più sicuro*. Conference proceedings collected by BALLARDINI Rovereto (Tn) 2002 page 128.

## 9. REFLECTIONS AND FUTURE PROSPECTS

The problem we are faced with involves finding a balance between two different needs, without forgetting that the risk essentially lies with the mountain itself<sup>41</sup>.

Consumer protection law n. 281 dated 30<sup>th</sup> July 1998 could provide an excellent starting point for the resolution of this conflict concerning skier safety. In terms of the relationship between the skier and the entrepreneur the seven fundamental rights of the skier as a consumer, described in letters from a) to g) of the second paragraph of article 1 of that law<sup>42</sup> could take on particular importance.

This guarantee is designed to cover “public services”, but there is no doubt that a *ski pass* service in an area extending over tens, and sometimes hundreds, of kilometres, is of relevance to a multitude of users and is therefore a service of public interest, dedicated to a group of users<sup>43</sup>.

The application of the consumer protection law would make managers responsible for much more than the safe conditions of runs, giving them a special accident prevention function.

In addition, were these consumer regulations applied then they would have significant repercussions in terms of geographical area competence, in so far as article 1469 b n.19 of the Civil Code ratifies the exclusive court of the consumer<sup>44</sup>.

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<sup>41</sup> G. Sena speaking at the conference “ *Le diverse responsabilità per il rischio in montagna: le risposte del diritto civile*” in “Montagna rischio e responsabilità n.1” various authors. Conference proceedings collected by BERIA di ARGENTINE Courmayeur (Ao) 1993 page 23.

<sup>42</sup> This law was thus reformulated by PETTI based on the needs of the skier-consumer in “ *Regole per uno sci più sicuro* ” *cit.* page 128.

- a) “The right to protection of the health of the skier that poses itself towards the entrepreneur as a right to certain guarantees and safety and with a correlative contractual obligation.
- b) The right to the safety and quality of products and services that poses itself as the right to the safety and guarantees on the quality of the runs, the concrete safety measures used and in the correlative contractual obligation.
- c) The right to adequate information and correct publicity. Information and publicity that concern safety conditions, the rules for prudent conduct while skiing, the need on certain runs to be trained and possibly, to use protective helmets. Prompt and daily, or even *hourly* information, on the state of the runs, the snow cover or the possibility of encountering sheets of ice on certain stretches.
- d) The right to the education of skiers in relation to the so-called consumption of ski services; education of a preventive, informative or even a selective nature, recommending participation in courses and the attainment of permits authorising use of particularly demanding runs.
- e) The right to correctness, transparency and fairness in all contractual relations regarding ski services and the use of runs. The current situation is entrusted to verbal contracts that do not contain a single clause that guarantees the skier protection of his or her rights. Indeed the general terms and conditions are sometimes shown on almost illegible posters that have no legal value (in fact, they consist of mainly illegal clauses exempting or reducing responsibility).
- f) The right to the promotion and development of the free, voluntary and democratic formation of association between skiers, as users and consumers of the ski services, aimed at establishing exponential, zone or international, bodies to promote fair contracts with guarantee clauses.
- g) The right to being provided with the service, in compliance with certain quality and efficiency standards”.

<sup>43</sup> Thus PETTI in “*Regole per uno sci più sicuro*” *cit.* page 129

<sup>44</sup> On this point, it is worth noting the decision of the Supreme Court of Cassation (united divisions) in verdict 14669 dated 1/10/2003 that established the “*unconscionability of the clause with which the seat of the competent court in*

On the other hand, the manager would be able to calculate beforehand the compensatory risks, by means of civil responsibility insurance in favour of injured users, as in article 4 paragraph 1 of law 363/2003. This solution was already imposed with the prevision of obligatory civil liability insurance against injury caused in the presence of the poor condition and lack of safety of runs by article 5<sup>45</sup> of the Regional Law of Abruzzo n.16 dated 27/4/1994.

The matter is rather different in the case of accidents that occur between skiers on runs, where the manager can in no way be held to be responsible. The prevision of civil liability insurance covering injuries caused to other skiers, to be obligatorily sold together with ski passes would appear to be the most suitable solution in terms of compensation for the serious injury that may result from violent collisions between skiers. This solution could be valid unless one wants to make managers directly responsible, with the prevision of not-at-fault responsibility, for risks related to all types of injury-causing events on runs, regardless of whether these are due to poor maintenance of the same, or collisions between skiers.

The advantage would be that of being able to easily insure the risk with a general policy, thus guaranteeing the quick settlement of compensation to victims and immediately eliminating the serious problem of identifying the guilty party. In these cases insurers can intervene and provide solutions to meet the numerous existing exigencies, contributing to increase safety which constitutes a primary requirement both for the users and the managers. With regards to the problem of ski run safety it is worth bearing in mind the words of Hujara, the President of the International Ski Federation: “*Skiing will never be totally safe, there will always be a margin of risk*”<sup>46</sup>.

Skiing and other snow sports are so widely practised as to be considered by insurers as commonly practised sports: in fact, the professional sector aside, both accident insurance policies and private life civil liability policies hold the insured indemnified, the first in terms of the personal consequences of an accident suffered, the second from requests for compensation for injuries caused to third parties, following events taking place during the practise of this sport.<sup>47</sup>

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*relation to the controversies deriving from the contract drawn up between a professional and a consumer is decided. This should be a location other than that of residence or elective domicile of the latter” in Corriere Giur., 2003, 1427 with notes by CONTI. This decision seems to eliminate the legal conflict that had been created regarding the exclusivity of the court of the consumer. Contra CIVIL CASSATION section III, 24/07/2001 where the Supreme Court had established that «we cannot share the supposition according to which art. 1469 b, paragraph 3, n. 19 of the Civil Code had introduced an exclusive court in favour of the consumer (...).»*

<sup>45</sup> Art. 5 of the Regional Law of Abruzzo n. 16 dated 27/4/1994: “ *The company that provides the service is civilly responsible for the correctness and safety of managing the runs and, before opening them to the public and for a the entire period it is running, it must take out an insurance policy for civil responsibility in favour of users. In the absence of insurance cover, the authorisation to publicly manage the downhill runs will be temporarily suspended thanks to a provision of the director of the competent Servizio Regionale Impianti Fissi (Regional Fixed Lift Service).*”

<sup>46</sup> Thus CALANDRA di ROCCOLINO in “ *Responsabilità nello sci e profili assicurativi* ” speaking at the conference *Regole per uno sci più sicuro*. Conference proceedings collected by E. BALLARDINI Rovereto (Tn) 2002 page 52

<sup>47</sup> Thus CALANDRA di ROCCOLINO *op. cit.* page 52

Other points worthy of further debate would, as already suggested, include those subjects who should be regulated by controls. If the *ski pass contract* were made entirely private in nature it would be easier for employees to enforce respect of provisions thanks to the contractual clause extended to cover the descent phase.<sup>48</sup> Part of the doctrine proposes “ *the introduction, by means of law, of the qualification of public servant for ski lift employees and ski instructors, attributing to the same the powers of identification of subjects involved in accidents, or subjects that are singled out because of their dangerous behaviour*”<sup>49</sup>.

The content of article 21, paragraph 2 of law 363/03, which establishes that contestations relative to the violation of speed regulations are to be made on the indications of ski instructors, appears to be incoherent and difficult to apply. One asks oneself if, in cases of collision, ski instructors should assume powers similar to those of the Investigative Police. In reality, while it is conceivable that ski instructors inform the relevant authorities as to possible violations, it is rather unrealistic to assume that those who violated the regulations will wait for the agent or official of the Investigative Police to appear on the scene. Should the subject in question attempt to escape then it is not reasonable to expect the ski instructor to take on coercive powers as s/he may also be involved in his/her professional activity at that particular moment and would thus fail to fulfil his/her obligations towards clients if s/he did so. It is also a well-known fact that people on ski slopes are largely physically unrecognisable and can only be identified by their clothing and obviously in the presence of a number of people with similar clothing it would be difficult to attribute responsibility with any certainty.

Finally, in relation to the difficulty of identifying subjects involved in skiing accidents, unless each skier is made to wear a number plate, it should be questioned as to whether it would be opportune to set up a guarantee fund to settle compensation claims for injuries to those injured by non-identified subjects, on the model of that for the victims of road accidents (law 990/69 articles 19 ff.).

A number of authors, following the issue of the law, have spoken of “legislative zeal” against skiers,<sup>50</sup> feeling that it imposed too many conditions on users which were therefore, destined to be flouted.

It would seem to be more reasonable to consider the need for a law disciplining skier behaviour, and the fact that a number of rules could be drawn up in a clearer manner or simply recopied from those already described in the Skier’s Handbook.

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<sup>48</sup> It is interesting to note the innovative solution adopted by the tiny Principality of Andorra where a “security guard” corps has been set up, easily recognisable thanks to their black-green uniform, responsible for informing, educating and raising awareness amongst skiers.

<sup>49</sup> BIASI “*Regole per uno sci più sicuro*” *cit.* page 118.

<sup>50</sup> Thus CHIESI *op. cit.*

A clarifying example can be found in article 9 of law 363/03 which establishes that “*the skier must behave in such a way, in relation to the characteristics of the run and the environmental situation, so as not to constitute danger to the safety of others*”.

This formulation of the legislature is not totally satisfactory, in fact, in article 2, the handbook established a much more suitable criteria regarding the choice of speed; “*each skier must maintain a speed and behaviour suitable to his/her own capacities as well as to the general conditions and the weather*”. With the new law, which does not make any reference to controlling one’s speed on the basis of one’s ability, one could say that with restrictive almost paradoxical interpretation a person who does not know how to ski, on a sunny day, in perfect snow conditions, could launch him/herself down a slope and remain free from fault in the case of an accident because the “*characteristics of the run*” and the “*environmental conditions*” were such to permit this behaviour.

These gaps can easily be filled by national legislature or directly by the regions in the effective decree that will be issued in June, as provided for by the law itself (article 22, paragraph 1).

If the rules of conduct taken from the Italian Winter Sports Association are correctly publicised, then one could start to educate mountain users to respect the locations in point as well as other users, underlining that the element of risk in the mountains can never be completely eliminated.

In conclusion, if on the one hand it is necessary to view the regulations governing user involvement with extreme favour, on the other it seems that the laws regarding managers and public administrators have changed little or not at all.

Media coverage suggesting that there have been major new introductions in terms of manager responsibility for safety, such as the insurance established by article 4, paragraph 1 regarding civil responsibility for injuries derivable to users and third parties, can be deceptive and could lead users to believe they are covered by insurance in the case of injuries suffered or caused to other parties.

If considering the matter in terms of a set of scales it would seem that the positive aspects of the disciplinary rules illustrated greatly outweigh their negative counterparts with it being possible that, in time, the legislature will finally deal with the key problems of the matter, the “ski pass” contract and possible user insurance.

As a consequence, law n. 281/98, which regulates consumer protection, could come to be taken as a national outline law governing the safety aspects of widely-practised sports including skiing.