

1st EUROPEAN LAW FORUM ON WINTER SPORTS

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ASPECTS OF CRIMINAL RESPONSIBILITY

I have only been allotted a very short time to present this paper on aspects of criminal responsibility, so I will not be able to develop and discuss in depth the many legal problems (of procedure and substance, but also in terms of regulations) which would be worth discussing.

I therefore decided that, in view of the many professions represented in the audience, to put a practical emphasis on my paper. For this reason, I will look at **CASE RECORDS** relating to skiing accidents examined by the Crown Prosecutor, but also at the criteria which should, in my opinion, be used to assess the conduct of people involved and to determine any **CRIMINAL RESPONSIBILITY**.

To this end, I will refer to the most common case in point that the Crown Prosecutor (firstly) and sometimes also the Criminal Judge (later) is called upon to judge; namely cases involving culpable injuries covered by article 590 of the Italian Penal Code.

I am qualified to speak on this subject having been a Magistrate for over twenty years. In addition, I personally have dealt with every crime involving culpable injuries that has been passed from the jurisdiction of the Court to the jurisdiction of the Judge of the peace at the Bolzano Public Prosecutor's Office (which has jurisdiction over the whole province of Bolzano) since the 2nd January 2002. Among these crimes is, of course, that of culpable injuries. For four winters, then, all the proceedings for personal injuries attributable to culpable behaviour while skiing have been examined by myself as Crown Prosecutor. Of course, this exclusivity permits uniformity in the assessment of similar cases of behaviour, about which I am going to speak.

In addition to this legal qualification, I have two other qualifications which legitimize my speech on this subject. These qualifications, while not essential, no doubt influence my assessment of the facts I examine, in terms of knowledge, practicality and concrete experience. I have skied since I was a child, and am very lucky, never having held others responsible for my own accidents.

THE CASE RECORDS of skiing accidents which can – from the perspective of the complainant – involve criminal responsibility are numerous and varying.

These cases relate, for the vast majority, to accidents resulting, directly or indirectly, from the practice of skiing or snowboarding.

I believe that this vast number of cases, if regarded objectively, may be divided into three broad categories, two of which have fairly uniform content and a third which contains all cases of personal injury which do not fit into the first two:

- The first category relates to accidents resulting in personal injuries from collisions between two or more piste users, i.e. skiers or snowboarders;
- The second category relating to events causing personal injuries where the manager of the ski area or lift installations is the defendant and may be held responsible;
- The third category is miscellaneous and contains all cases of behaviour in which, from the viewpoint of the accident victim/complainant, a third party is held responsible, for example:
 - Ski instructors who make a poor choice of piste or selection of course participants;
 - Ski equipment rental companies who have not provided equipment appropriate to the requirements of the renter/claimant or have provided him/her with defective equipment;
 - The manager of a ski park for children who is responsible for injuries suffered by the parents using play equipment designed for children;
 - The managers of a sledge track, blamed by people using the track for injuries suffered.
- The first two categories of accident can be subdivided further:

The first into personal injuries resulting from a collision between two skiers in motion, and where one skier in motion who crashes into another skier who has stopped on or at the end of the piste;

the second into personal injuries resulting from falling on the piste due to insufficient piste markings advising of a danger or of imperfections to the preparation of the piste by the manager of the ski area, and accidents which in some way involve the use of the lift installation and where the responsibility is attributed to the manager of the lift.

Thus, cases of skiing accidents fall into these three broad categories. Before moving on to talk about **DETERMINING CRIMINAL RESPONSIBILITY** and therefore the Crown Prosecutor's approach to assessing the cases, I must set out two brief premises.

The first is that the crime of culpable injury can be prosecuted only subject to private prosecution and that the lawsuit must be filed within three months of the incident.

The second is that, as already stated, the crime of culpable injury is dealt with by the Judge of the Peace and therefore, as per established regulations, the investigation into the verification of the facts and assigning of responsibility is dealt with by the judicial police, who report to the Crown Prosecutor within four months of being notified of the event.

In both these incidences, the Crown Prosecutor must, for purely procedural reasons, pay particular attention to deciding whether to go ahead with criminal punishment or to close the case.

As far as the prosecution is concerned, it is clear that the complainant's real interest is not in the criminal punishment of the person presumed responsible, but in financial compensation for damages incurred.

Although this financial interest is perfectly legitimate, the Magistrate must, in my experience, pay close attention to ensure that the complainant is not using a very minor, everyday episode as an opportunity to claim "compensation" for "damages" which do not really exist, in order to pay for his skiing holiday.

For this reason, particular attention must be paid to proceedings where "significant confusion" or "concussion" are claimed, or the classical "whiplash", which can result from a very minor incident.

Also belonging to this category are cases where a subject has suffered a personal injury resulting from skiing, but, rather than admit his own responsibility, he desperately looks for a third party to blame and hold responsible, with the intention of winning financial "compensation".

I have noticed an increasingly widespread inability to recognise one's own mistakes, combined with a lack of awareness that winter sports carry a certain degree of danger, which go hand in hand with and a tendency to be opportunistic and seize accidents as a chance to capitalize as much as possible in financial terms.

Cases of behaviour such as those described above can be found in all three of the categories I mentioned initially, but especially in the second and third categories, in which the defendant tends to be the subject likely to provide most financial "compensation".

With regard to the second premise I mentioned, i.e. the fact that, in cases of culpable injury, the judicial police investigate for up to four months without having to inform the Crown Prosecutor about it, I stress that the judicial police called to give their own assessment - not only of the facts (by reconstructing the event) but also of the criminal responsibility due to those whom they deem guilty (article 11 D.Lvo 274/2000) -, are often doing so voluntarily and not under legal obligation, while it is much more rarely that the police come forward to the Crown Prosecutor to propose closing a case.

It can be clearly summarised, therefore, that the Crown Prosecutor examining and evaluating (often months after the event) criminal proceedings relating to supposed

culpable injuries resulting from a skiing accident must critically evaluate the case taking into account certain factors, for example:

The possibility that the damage no longer exists and that the accident needs to be simulated, as in cases where the claimant is primarily responsible for the event resulting in personal injuries and may or may not be capable, in my view, of neutrality, but is in a position to help reconstruct the events.

However, the Crown Prosecutor must also critically examine the outcome of the police investigations. These are, in most cases, crucial, since it is always extremely difficult to reconstruct the events exactly, due to a lack of evidence or objective elements to “photograph” the event and environmental conditions. Similarly, it is difficult to find reliable eyewitnesses and a reliable reconstruction is absolutely necessary in order to attribute criminal responsibility.

On the subject of establishing responsibility, the conclusions reached by the police are normally tautological and therefore useless, since subjective evaluation is not the business of the judicial police.

I can assure you that 50% of skiing accident cases examined by the Crown Prosecutor according to the above criteria are immediately closed by the Judge.

Moving on to cases that are relatively clear and which pass the critical examination of the Crown Prosecutor and which end in criminal prosecution of the party held responsible for the accident and therefore the injuries.

The vast majority of these cases fall into the first of the initial categories, i.e. where the collision between skiers who are found to be guilty of culpable behaviour and therefore negligence, inexperience, lack of caution, failure to respect the laws, regulations and rules of the well-known FIS now, above all, law 363/03, referring in particular to the rules of conduct described in articles 9-13, regarding specific culpability.

The most frequent episodes of this kind involve skiers or snowboarders who, overestimating their own ability, crash into other skiers who are in motion, have stopped on the piste or are queuing for the chairlift.

Much rarer are cases of lawsuits against the managers of the lift installations and ski areas, where these, in spite of years of experience, demonstrate insufficient safety standards and are held responsible by the Crown Prosecutor. On the other hand, the law has now set out relatively precise parameters to avoid criminal prosecution in case of accidents.

Many debates, seminars and conferences on skiing, however, organised often on the initiative of the managers of the ski areas themselves, have helped to make the pistes safer from a structural point of view.

If, then, it is easy to sue managers of ski areas for not providing adequate cushioning for the tree or stone which the complainant collides with after going off piste or for not securing the edges of pistes near precipices with safety nets, for not marking a bump in the piste, it is difficult to see how these claims are justified (e.g. 294/04).

I wanted, however, to look at a few cases in which the Crown Prosecutor proceeded with criminal prosecution. These cases relate, above all, to accidents caused by unmarked accumulations of artificial snow on the piste, while I only found one case of a serious accident resulting from inadequate piste preparation.

STATISTICS

There were 391 skiing accidents resulting in culpable personal injury dealt with by the Bolzano Public Prosecutor's Office from the 2nd January to the 30th November 2005, and around 100 proceedings per year. These make up 27% of all cases of culpable injury judged in that period. 203 cases were closed. In 115 cases, the Crown Prosecutor proceeded with criminal prosecution, and a verdict was reached even though a cash settlement for the damages was agreed. Lastly, 63 proceedings are still being investigated.