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# INSURANCE AND RESCUE IN THE MOUNTAINS

French legislation and the prospects of European harmonisation.

## INTRODUCTION

The fact that winter sports have evolved into an image of our society may be translated into a refusal of fatality and in a growing need for safety. The current trend is to extend cover for risks and to turn to mechanisms which combine insurance, responsibility and solidarity, at different levels.

Analysis of the insurance regimes and of taking responsibility for the rescue costs constitutes an interesting point in the evaluation of the attempts made to combine this need for safety with the freedom inherent in taking part in winter sports.

Besides the example of the French system, it is essential to ask how harmonisation of these provisions is progressing at European level.

## THE INSURANCE

### I- LIMITS AND DEVELOPMENTS IN RISK COVER

Third party liability insurance which covers damages caused to others is optional, in principle, nor is it compulsory for the user of the slopes or for off-piste skiers. In compensation, specific texts make it compulsory in some situations linked to frequenting the ski resort.

#### 1- FIRST OF ALL, ONE CAN DISTINGUISH THE SPECIFIC CASE OF MOTORISED VEHICLES

With the application of the law dated July 5, 1985, known as the Badinter, insurance cover is compulsory for each person whose third party liability can be binding, due to damages suffered by third parties which are a result of harm towards persons or goods involving a terrestrial motorised vehicle.

In the ski resort, as elsewhere, this legal provision shall only be applied if the incident was caused by a terrestrial motorised vehicle, the notion of which is clearly intended.

In this hypothesis, which involves for example, incidents caused by snow-cats or motorised toboggans, article L 211-9 of the Insurance Code obliges the insurer to inform the victim of his/her rights (copy of the inspection report, assistance by a lawyer chosen by the victim and by a physician) and to let him/her have the offer of compensation within a maximum term of eight months from the date of the incident.

The victim on his/her part, must prepare a statement of the incident for his/her own insurance company, during the same month that the accident occurred.

If the insurance company's offer is accepted, a transaction is formalised. The victim is allowed a period of fifteen days in which he/she can declare the transaction.

Should the injury get worse, the victim can ask for supplementary compensation within a term of 10 years.

## 2- CASES INVOLVING SPECIFIC, COMPULSORY INSURANCE FOR MOUNTAIN SPORTS

### A- Obligations for sports groups and similar

The law of July 16, 1984, amended on July 6, 2000, makes third party insurance compulsory for sports groups, the managers of physical and sports activities establishments and the organisers of sports events. In particular, insurance must be taken out for ski races to cover the damages resulting from errors committed by the managers themselves, as well as from incidents caused by participants during training or the competitions. The guarantee also applies to members of sports clubs when travelling for matches.

Article 30 of the law of July 6, 2000 states that: “those card-holders and those taking part are considered to be third parties between themselves”. The guarantee of third party insurance must therefore also be applied even if the damages are caused by a card-holding member to another card-holding member.

With regard to sports associations, they must describe all their activities to the insurance company and notify it in the event of new activities (art. L 113-2 of the Insurance Code), the penalty for failure to do this will mean the guarantee is rejected.

B- the obligation to take out an insurance is also valid for establishments and reception centres which host minors during the school holidays, and for the hobby centres with no accommodation, for sports groups for young people as well as for state infant and junior school trips and for optional school trips.

C- **Managers of ski-lifts**, other than state-owned facilities, must have public liability insurance.

The insurance must guarantee compensation for both the users of the facilities and for everyone else, for personal injuries or material damages resulting from:

- Incidents, fires or explosions caused by the plant
- Falls of people, materials, accessories, products, objects or substances.

D- **For freelance ski instructors and guides** there is no specific law which makes it compulsory for them to take out public liability insurance for damages caused to others.

As we have shown previously, article 30 of the law of July 6, 2000, requires organisers of sporting events and managers of physical and sports activities to subscribe to such guarantees.

Art. 43 is applied “to persons who teach, entertain, train or organise, against payment, a physical activity or sport, as their main or secondary occupation, on either a regular, seasonal or part-time basis”.

In practice, the professional public liability of ski instructors and guides is covered by group insurance.

E- If the insurance is not mandatory, the exceptions above and the voluntary subscription to a public liability contract are such that in most accidents, the person responsible is insured.

Consequently, the courts are called to decide more often on accumulative insurance rather than the lack of insurance.

According to article L 121.4 subsection 4 and 5 of the Insurance Code, in the event of cumulative insurance taken out without fraud, the beneficiary can obtain compensation from the insurer of his/her choice.

Cumulative insurances are considered to be those which are drawn up for the same interest and against the same risk.

Therefore insurance signed by an individual and insurance signed by an insurance company and an association on behalf of its members are part of this.

## **II – SPECIFICITY OF PERSONAL INSURANCE**

1/ This is a strictly personal insurance which covers injuries suffered by the victim during his/her spare time activities or when playing sport, according to the contractual clauses which generally guarantee cover for death, permanent disability and the reimbursement of medical treatment or even temporary disability and the costs of search and rescue, the cover of which varies according to each contract.

It is often taken out in the context of sports groups or associations.

After amendment, article 38 of the law of July 6, 2000 requires the Sports Federation to specify the information which it must provide to its members in the following way:

- a) To formulate the insurance proposal in a document which indicates the price of joining, specifies that it is not mandatory and indicates that those signing up to the collective contract may also take out supplementary individual guarantees.
- b) to attach to this document a warning written by the insurer conforming to the second subsection of art. L 140-4 of the Insurance Code.

The Law has confirmed the obligation to respect free competition (decisions of April 19 1988 and March 29, 1989 by the competition Council) and consequently, each member of a sports federation must be freely able to draw up the cover which is most appropriate to his/her requirements, after having received all useful information available on the proposed guarantees from their federation.

## **2/ Appearance of guarantees specific to winter sports**

Some insurance contracts include, for example, reimbursement for rescue costs. Even though they are usually free of charge (see the following section), the cost of the work carried out by the rescuers may in some cases be invoiced, and this has led to the interest in guaranteeing the reimbursement with a specific insurance.

However, it is useful to define with precision the type of rescue covered (e.g. helicopter) as well as the criteria for choice.

These guarantees can be limited to a maximum amount and include an undertaking of the cost of repatriation to the Hospital nearest to the place of domicile of the injured person.

Connected guarantees can also cover:

- Reimbursement of the lump sum for the ski lifts for the victim and his/her family
- Breakage of skis
- Interruption of ski lift service due to bad weather.

There are also other, more particular guarantees proposed for participants and managers of the French Ski Federation, and also for the ESF ski instructors. Specific contracts have also been offered for cross-country skiing and tour skiing. Some insurance companies offer a daily rate.

However it is possible that the victim is refused an exclusion of cover.

The exclusion clauses are a direct result of law (intentional negligence for example) and also of the writing of the contract.

However, with regard to damages, article L 121-2 of the Insurance Code requires the nullity of the exclusions of cover which deal with the persons to whom the insured is liable.

This is the case of maintaining the cover to benefit the insured parents, who are civilly liable for the actions of their children, by virtue of article 1384, subsection 4, of the Civil Code.

No contractual clause which specifies the exclusion of intentional negligence of persons for whom the insured is liable, due to the nullity effect, which would not prevail against the insured.

The corollary of the generalisation of the insurance is the role of the insurer in the management of the file.

Lastly it should be noted that, without insurance, a victim of bodily injuries can turn to the guarantee fund for compensation.

MOUNTAIN RESCUE

## I- ORGANIZATION AND RESPONSIBILITIES

The mayor and secondly the prefect are authorised to organise mountain rescues.

This particular task requires material means which can be mobilised in case of necessity.

### 1- Responsibility:

According to article L 2212-° of the General Code of Territorial Collectives, the mayor has responsibility and must take the necessary measures in order to “urgently take steps to ensure that the means of rescue and assistance are mobilised and if necessary request the intervention of higher authorities”.

The Prefect has an accessory role (art. L 2212.1.1) and also a supervisory role (art. L 2212.1 of the General Code of Territorial Collectives).

The mayor’s responsibility with regard to rescue is stated in article 3 of law no. 96.369 of May 3, 1996, relating to fire and rescue services, which states that fire-fighting and rescue facilities “shall be available for use under the authority of the mayor or the prefect, acting in the context of their respective police powers”. Furthermore, article 97 of law no. 98.30 of January 9, 1985, relating to the development and protection of the mountains, indicates that the expenses relating to the fire-fighting and rescue services are part of the commune’s mandatory costs.

### 2- The Prefect’s responsibility :

**The legislative picture:** firstly, by virtue of article L. 2215.1.1°, of the General Code of Territorial Collectives, the Prefect “may take all the measures relating to the maintenance.....of public safety, for all communes in the department or for some of them and in all cases in which the municipal authorities have not already taken steps to do so”.

According to article L 2215-1-3°, the Prefect is the only competent person to take the measures relating .....to public safety, the field of action of which extends beyond the territory of a commune”.

When he/she acts by virtue of these texts, the Prefect is exercising his/her own power in the name of the state of which he/she has the possibility, where needed, to undertake responsibility.

### 3- For the material means of rescue.

With regard to the organisation and the setting up of rescue operations, it is necessary to distinguish between the case in which the commune has its own facilities and the case in which it must acquire external facilities. The mobilisation of significant rescue facilities is subject to specific planning.

- if the commune has its own means, the material, particularly for the transportation and evacuation of the victims, and the personnel are managed directly by the commune for the organisation of first aid thanks to the intervention of the ski station patrols for example.

- otherwise, the commune will have the use of external means entrusted (after resolution by the council) to other public services (gendarmes, police) or to other private bodies (ambulance companies, helicopter companies, etc.) who have specialist training. They can be placed at the communes' disposal permanently or temporarily and use healthcare services such as the S.A.M.U. (emergency medical care service).

Private individuals can be the ambulance companies, helicopter companies, the ski lifts, or the associations.

The use of private helicopters to ensure emergency evacuation is subject to specific legislation instituted by decree no. 73.384 of March 27, 1973.

As a general rule, the director of the station ensures the setting up of the rescue operations and prepares the intervention of complementary means which may be used within the context of an emergency plan made by the Prefect, who will oversee the operations, either directly or through a person authorised by him/her.

## II- THE DELICATE QUESTION OF FINANCE

Since the order dated March 11, 1733, the principle is free of charge. In principle the rescue operations are the commune's responsibility, except for alpine and cross-country skiing.

On the other hand, article L 2321.2.7° of the General Code of Territorial Collectives includes the cost of the personnel and materials for the rescue services amongst the obligatory costs of the communes.

These texts only repeat the constant principle of French Law, according to which the financing of the public service of administrative policy is free to those who benefit from it. As this is an obligatory public service, it cannot be financed through taxes.

Article 97 of the law dated January 9, 1985 introduced an exception to the free of charge principle (L2321.2.7) of the General Code of the Territorial Collectives, for rescues relating to sports, a list of which is established with a decree by the State Council.

In the same way, law no. 96-369 of May 3, 1996 (art. 42 : Journal Officiel of May 4, 1996 – General Code of Territorial Collectives, art. L. 1424-42) states that the conditions in which participation may be requested in costs for activities which are not directly connected with exercising its principal missions.

The list of the mandatory expenses of the communes is in the General Code of Territorial Collectives, art. 2321-2, 7° and, according to art. R 2321-6 “the following sporting activities may be subject to reimbursement of the rescue costs specified by subsection 7 of article L.2321-2”:

- 1- Alpine skiing
- 2- Cross-country skiing »

The Ministry responsible for the Territorial Collectives emphasised, during the National Council for the Mountains of 29.08.2006, that this possibility would be kept.

## THE REGIME OF RESPONSIBILITY

As a guide, the commune is liable for damages which occur during the rescue operations, whatever the type of organisation, be it public or private.

However, article 91 of law no. 83-8 of January 7, 1983 states that there is a system of reduction of this liability (article L 2216-2 of the General Code of Territorial Collectives). ... “in the event that the damage is the result either totally or in part of negligence by a person in charge or due to the malfunctioning of a service which is not dependant on the commune...”

This is the case, for example, when the Prefect stands in for the mayor without knowing the conditions and the methods prescribed by law with regard to setting up police measures.

## **APPLICATION**

### a. If the victim is the rescued person:

He/she is obliged to demonstrate the existence of the commune's negligence. Due to the rescue operations, collective public liability is only used in the presence of gross negligence. However evolution tends to replace serious negligence with simple negligence.

The victim must therefore establish a causality connection between the negligence committed by the organisation and the functioning of the rescue operations and the relevant prejudice.

The main question is the time taken for the rescue operations to be set up.

### b. If the victim is a rescuer:

Compensation will be paid according to the legislation applicable to the statute to which it depends (Accident at work, public law or private law).

For the casual worker, either voluntary or paid, this is liability without negligence due to the risk he/she undertakes by virtue of his/her participation in a public service.

Lastly it is useful to remember that the competent court is the Administrative Court.

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The general regime of mountain rescue is characterised by:

- The evolution of techniques, for greater speed and efficacy
- The increase in the measures used by the commune in the name of the sacrosanct principle of precaution
- An evolution towards the multiplication of “comfort rescues”, due to the development of “commercial” rescue and to the spread of personal insurance cover.

## CONCLUSION

In conclusion, two themes have emerged:

### **1/ raising awareness of responsibility**

the evolution of insurance cover and the regime of responsibility has had a perverse effect and has led to the risk of trivialising responsibility.

Certainly, evolution, over time, has passed from rescue towards solidarity.

Certainly the notion of risk has changed with the opinion that all damages must be compensated.

Certainly the regime of responsibility has changed with the increase in the importance of responsibility.

However, it is not economically acceptable to simply watch this increase without limits to the funds for insurance cover and solidarity, the burden of which weighs upon society in general, whereas taking risks is personal and sometimes also inconsiderate.

It therefore appears reasonable:

- To link the cover for risk with the sport practised as much as possible and to not systematically “socialise” it; with regard to this, the trend towards the need to take on one’s own civil responsibility and the relevant rescue costs, is positive.
- To not trivialise any personal responsibility taken and on the contrary, to promote the emphasis on the fundamental rules of responsibility.

## 2/ European harmonisation.

Due to the internationalisation of risk as well as to the fundamental legislative contribution made by the European directives in other insurance sectors (cars for example), the harmonisation of the regimes of responsibility is an essential requirement.

Several directives harmonise, in the name of the principle of the free provision of services, the conditions for exercising insurance services. The requirements connected to the free circulation of persons and to the notion of “imperative motives of general interest”, have allowed the Commission to intervene decisively when defining contractual cover and cover funds in the automobile sector.

The protection of consumers and of insured persons, who are also skiers, justifies the same type of intervention, particularly for insuring against liability and the guarantee Fund. Nothing would stop the incitory and commercial procedure which has led to the generalisation of liability insurance, from ending up with a European provision making it finally mandatory.

Besides a saving on the socialised undertaking, this would result in skiers becoming more responsible.

More technical measures could mean the harmonisation of taking on the cost of rescues with the obligation to favouring the balance between skiers becoming more responsible and the obligation to rescue.

The task is complex, as it is dealing as always with setting up in a balanced manner the requirements and the insurance principles of responsibility and solidarity.

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