

2nd European Snow Law Forum
Bormio 1st - 3rd December 2006

Dr. CECILIA CARRERI – Judge from the Court of Vicenza

The responsibility of the mountain guide outside of equipped skiing areas. Off-piste skiing and ski mountaineering. The difference between a mountain guide and a ski instructor.

The following activities can be practised outside of the equipped ski area:

- off-piste skiing, also forms of freeriding;
- ski mountaineering.

The two activities use different equipment and apply different skiing techniques.

The principle of *self-responsibility* applies to any skier that ventures out on his own beyond the equipped slopes, which means that he acts at his own risk and danger and assumes responsibility for any damages that he may cause to third parties e.g. if he triggers an avalanche.

But a different scenario applies for professionals, e.g. mountain guides or ski instructors, that go off-piste with a client or a pupil.

On a professional level, there is a distinct difference between a ski instructor and a mountain guide.

The specific skills of the mountain guide are called for every time that the use of mountaineering equipment is required i.e. they work in areas that, due to their specific environmental conditions, involve technical difficulties that can only be overcome with this particular equipment, such as the ARVA (in the event that they enter areas which are at risk of avalanches), sealskins, crampons, an ice axe and safety rope.

According to article 2, paragraph 2 of the national law No. 6 for guides dated 2nd January 1989, skiing outside of the ski resorts, as part of a *skiing excursion*, is exclusively the remit of the mountain guide if this activity should involve “the use of mountaineering techniques and equipment.”

The new regional law No. 1 for Veneto dated 3rd January 2005 attributes the “the accompanying of persons or groups of persons for ski mountaineering climbs or on skiing excursions on snow-covered mountainous areas with any equipment or on areas designated for off-piste skiing” to the **mountain guide**. Whereas the **ski instructor** is responsible for teaching skiing techniques on slopes, trails, and excursions that “do not involve difficulties which require the use of mountaineering techniques and materials, such as a rope, ice axe, crampons or similar materials”, article 3 of regional law No. 2 for Veneto dated 3rd January 2005.

From the literal tone of the provisions, it seems that the law attributes the accompaniment of clients only to the mountain guide, whilst the teaching of skiing is attributed to the ski instructor.

In reality, teaching skiing techniques also falls within the remit of the mountain guide, in the sphere of accompanying people with mountaineering equipment and, at the same time, the ski instructor can also teach skiing techniques whilst accompanying clients/pupils on “slopes, tracks and excursions.”

The fundamental question regards the fact that ungroomed snow-covered terrain, even terrain that lies outside of the equipped ski slopes, nearly always presents a risk of avalanches or the presence of a dangerous icy base and therefore requires the use of mountaineering equipment, such as the ARVA, safety rope, shovel, probe, crampons and an ice axe.

With article 17, Law No. 363 of 24th December 2003 introduced the compulsory use of “designated electronic instruments for guaranteeing a suitable level of rescue operations,” such as the ARVA, in the case of ski mountaineering with an evident risk of avalanches.

These tools are a means of insurance and rescue that require specific knowledge which is typical of the training programmes for mountain guides and are traditionally classified as mountaineering equipment.

Even a slight gradient of the snow-covered slope can be enough to trigger the risk of avalanches and therefore necessitates mountaineering equipment.

The sealskins are a simple means used for climbing. But the fact that they allow a person to reach snow-covered slopes that are at risk of avalanches, or feature ice or mixed snow and rocky slopes i.e. potentially risky and dangerous terrain, means that we should consider this equipment to be of a mountaineering nature.

Therefore freeriding and snowboarding should also be compared with ski mountaineering in the event of mountaineering-related risks.

This also brings to mind going off-piste on glaciers, with the danger of falling into crevasses.

As a result, the sphere of a ski instructor’s remit for going off-piste should be limited as he is not qualified to use mountaineering equipment under the terms prescribed.

The same problems have already been encountered for off-piste excursions with equipment such as snowshoes, which often frequently eventually require the use of mountaineering safety equipment such as the ARVA, shovel, probe, and rope.

Even in this case the professional remit required for accompanying clients/pupils is under discussion, a responsibility which should remain with mountain guides.

The civil responsibility of the mountain guide as a professional figure working on the mountains.

The mountain guide is a member of a professional association, and article 2229 of the Italian Civil Code demands that the mountain guide is registered to practise his or her profession.

In the event of an accident, his conduct during working relations with the client or the pupil is evaluated under the profile of professional negligence.

This means that whilst the mountain guide is accompanying the clients and the pupils he must respect the fundamental rules of diligence, caution and technical expertise that preside over the standard practice of mountaineering.

In this field, there are tried-and-tested technical rules (unwritten rules that are passed on and generally observed, rules that have been made official by manuals or during training courses) and technical rules proven by scientific means (the coefficient of the breakage point of ropes and materials).

The guide's professionalism demands a specific demand for determined levels of the quality of his performance as the job is risky and dangerous.

Judging by the guide's responsibilities, he should have:

Professional refresher courses, a sense of duty, risk awareness, team spirit and the want to help people, and ecological culture and respect for the environment, plus he should be willing and able to protect third parties, and behave correctly and respectfully with pupils/clients and with colleagues.

These are professional and ethical rules by which the conduct of a mountain guide can be judged.

In particular, the caution and diligence of a mountain guide, or a mountain professional, should be expressed by several fundamental points:

- ? Professional refresher courses, psycho-physical training of the guide;
- ? Respect for the profession's ethical code;
- ? Vigilance over pupils and clients, control of their conduct, prevention of unauthorised and dangerous independent initiatives;
- ? The use of suitable, approved equipment which is well maintained and efficient;
- ? Up-to-date information about the weather;
- ? Careful assessment of the risk of avalanches by using empirical criteria (surveying the snow cover) and by consulting the snow bulletins, which assess the level of avalanche hazard estimated by the official weather forecasts;
- ? The choice of a route which is suitable for the client's skills, plus the use of the right guide to client/pupil ratio.

The negligent conduct of the mountain guide originating from a breach of the rules of ethical conduct may also give rise to liability and to a disciplinary hearing within his profession; article 11, Law No. 6 of 1989.

Responsibility for serious misconduct.

For professions that carry a high technical content and therefore a high level of professional commitment such as the mountain guide, the law allows for the possibility of limiting civil responsibility to within the limits of serious misconduct (article 2236 of the Italian Civil Code).

The law actually takes into consideration the extremely difficult nature of the profession and the professional's specific commitment, and limits liability to serious misconduct.

Serious misconduct means that the person has made inexcusable technical errors, with blatant carelessness and superficiality, and has ignored the commonly recognised rules of mountaineering.

The conduct of the pupil/client may mitigate or reduce the guide's liability.

Incidents frequently occur due to an error or negligence on the part of the pupil/client e.g. when they distance themselves from the mountain guide, or make their own decisions, and disregard the orders or the instructions of the mountain guide.

From a legal standpoint, it's a question of an aetiological link. This means that it needs to be understood if the dynamics of the accident should be attributed solely to the guide's conduct or entirely or partially to the conduct of the pupil/client.

In the event of an accident, we therefore need to reconstruct the causal relationship i.e. ascertain the conduct which either entirely or partially caused the accident.

This may even be solely the fault of the pupil/client, i.e. the accident was caused by his or her autonomous and independent conduct or initiative.

The situation may even involve contributory negligence, which will be assessed in each case, e.g. a basic professional error by the guide which also led to the negligent conduct of the pupil/client.

Maybe, in light of the growing popularity of off-piste activities, including the dangerous practice of snowboarding, the time is now right for a code of conduct for off-piste skiers as there is for people who ski on standard slopes, Ministerial Decree of 20th December 2005, which will also safeguard the mountain guide.

Safeguarding third parties.

The profession of mountain guide may also cause damages to third parties that have nothing to do with the ongoing working relationship with the pupil/client.

Legally, off-piste skiing is considered to be a dangerous activity, as is mountaineering in general (article 2050 of the Italian Civil Code).

In this case the law provides for a presumption of fault, on an evidential level, which corresponds to the intrinsic danger of the job of mountain guide.

This means that, with regard to those who practise a hazardous activity, the law provides for more severe judgement in order to safeguard third parties in the event of injuries to persons outside of the working relationship, the mountain guide must prove that he has done everything possible to avoid the damages.

Also in this case however when blame is apportioned, the particular difficulty of the profession shall be considered (article 2236 of the Italian Civil Code) and any contributory negligence of the pupil/client itself should be taken into consideration.

In the case of a rescue, the mountain guide has the specific duty of acting and exposing himself to danger in order to save the client or third parties that are in difficulty, as provided for by article 11, paragraph 2 of the national law of the guides No. 6 of 1989.

Criminal liability.

From a penal standpoint, the evaluation of the negligent conduct of the professional mountain guide is based on the criteria of predictability and preventability of an accident, with regard both to third parties and to the working relationship with the client.

An accident is seen as negligence if it was predictable and preventable according to the specific rules of diligence, caution and technical expertise that must be observed by the mountain guide, as I mention earlier.

Therefore we need to verify if the accident was predictable and preventable in the personal and environmental situation in which the mountain guide found himself before the fact e.g. based on the examination of the snow cover or the weather forecasts, based on a careful evaluation of the capabilities of the pupil/client, or in consideration of the state and condition of the equipment.

Any contributory negligence of the pupil/client should also be evaluated in court and the potential exclusion of any liability due to unforeseeable circumstances or force majeure.

Natural events such as avalanches and rock falls often border on unforeseeable circumstances.

In each case we need to establish whether an event of this nature is accidental or whether the mountain guide could have predicted the event based on his technical knowledge and professional preparation and whether any mountain guide with the appropriate training could have foreseen the event.

In this regard, well-established technical knowledge used in the practice of mountaineering, the level of snow and weather science and statistical data should be considered.

The responsibility within the working relationship should be assessed with particular regard to the duty of the mountain guide to pay attention to the safety of the pupils/clients

The mountain guide is actually the client's tutor and supervisor and therefore has a legal obligation to prevent them from having an accident. Alternatively he may be held responsible for failing to prevent an event which he was obliged to prevent (article 40 of the Italian Penal Code).

The Criminal Division of the Court of Cassation stated (Division IV, 19th February 1991, Souberan):

"The mountain guide has a duty to watch over the pupils, teachers are obliged to pay attention to the safety of the pupils whilst they are under their guidance." In the presence of a gradient of 36%, on schistose soil, without any wooded vegetation, and with snow and weather bulletins that had forecast the avalanche hazard, the mountain guide should have watched over his pupils; the pupils are dead and the mountain guide is responsible."

Cecilia Carreri
Judge at the Court of Vicenza.