

ACCORDING TO THE EUROPEAN JURIDICAL FORUM ON SNOW

Personal Responsibility and Safety Obligation on Ski Slopes

- The *de jure* condition in Germany -

I. Preamble

In the classification of civil liability trials within the ski sphere, the legal actions filed by skiers against the managements of ski slopes due to violation of safety obligations on ski slopes occupy a certainly remarkable place. This is my report based on my twenty-five years experience in treating civil and penal proceedings in German and foreign courts <1>. During all these years, I came to realize that many legal actions had been from the start totally or partially groundless since the prosecution, erroneously, was always attributing the cause and the fault of the suffered damage to the counterpart. In actual fact, these proved to be blind and not to recognize their human errors. An old German saying, certainly renowned at international level, is perfectly suitable for this phenomenon: if a man stumbles and falls while walking, the latter does not get up to move on, but remains on the ground and tries to find somebody to blame.

The evolution of a univocal juridical body on civil liability in Europe within the ski sport sphere offers the great possibility to clearly elaborate the standards and limits of skiers' personal responsibility <2> on one hand and safety obligations on ski slopes by managements on the other hand, establishing them in a binding way for all the countries involved. Through the creation of univocal European juridical standards, it is possible to improve safety in the ski sphere in a permanent way, reduce the number of groundless disputes for reaching a faster solution.

II. An example describes the conflictual sphere

A skier goes descends at high speed, in an "egg" position, in a specific area; he jumps on the ski slope without braking even if he cannot see what is below him. At that point, a run-tracer is going up the mountain and the skier, still flying, collides head on with that snow equipment and gets seriously injured. The legal action that the skier files against the management of the ski slope

with the purpose to obtain full compensation for damages has only a partial positive outcome; the court in fact, rejects the remaining accusations due to the joint personal liability of the skier <3>. On a methodical juridical level, personal fault represents an injury obligation of damage reduction <4>.

III. Individual fault represents a lack of personal liability

The skier's personal liability, included within the safety sphere on ski slopes ("organized ski area" <5>), is defined in the application of current laws in Germany through a series of concrete accuracy criteria that above all, are summarized in some of the 10 standards of conduct issued by the FIS (Federazione Italiana Sci = Italian Ski Federation) for skiers and snowboarders, in addition to DSV's (German Ski Federation's) suggestions for skiers that use chair lifts and ski lifts and with regard to the behaviour in relation to run-tracers.

1. 10 standards of conduct of the FIS for skiers and snowboarders

The standards of conduct established by FIS <6> were mainly envisaged to safeguard other skiers. First of all, during the creation phase the "*neminem laedere*" principle was pointed out, already valid also for alpine sports: these standards regulate natural conduct models that a skier must follow, also for other people's safety. To this effect, these standards constitute the linguistic realization of a concrete accuracy criterion for skiers. Since 1967 when they came into effect, these standards became fundamental in civil trials on ski subjects of penal and civil courts, for the evaluation of causes and fault. Despite these standards were not introduced by a legislator but were defined independently from the association, these proved anyway, within our juridical practice, to be defined in a juridical manner as standards of accuracy (same as, for example, the standards on road traffic). In particular, FIS standards 2 and 8 also deal with personal safety and therefore describe the **correct, responsible conduct of an individual**.

Within the conflictual sphere between personal liability and safety on ski slopes, questions about limits are asked on a regular basis, in relation to the validity of FIS standards <7>.

1.1 Individual validity sphere of the FIS standards

To this effect, no further attribution characteristics are present, other than the **participation** to alpine sports. In this sphere, each individual must comply with the standards established by the FIS, whether adult or youngster, expert or inexperienced, alone or in a group (for example, during a ski course). In particular, no privilege is recognized to skiers that show particular or scarce skills.

Certainly, every skier or snowboarder has the right to **choose the ski slope freely** to descend to valley. In case an inexperienced skier or snowboarder, over estimating his skills, does not comply with FIS standard no. 8 and selects the black ski slope, this will no longer be able to comply with FIS standard no. 2; and if, during the descent he loses control and crashes into a well visible pillar, he cannot deem the management of the ski slope responsible for his personal fault.

Parents and Other Tutors

The obligation of assistance by parents and tutors includes also teaching a child the compliance with the FIS standards or grant custody to others (for example, a ski teacher). In general, also in this case, the principle according to which the adult is fully responsible for the child's conduct is valid, at least until the child due to age or lack of ability to understand, is unable to act responsibly <8>. However, regarding the management of the ski slope, these differences are not so relevant: in case a child is injured the management is responsible only if **guilty** for non fulfilling safety provisions on the ski slope and this situation must be defined objectively. Aprioristic physical or mental conditions of the child are not relevant in this situation. The behaviour of a child that skies is therefore considered the same to that of an adult with respect to compliance with the FIS standards.

1.2 Actual validity of the FIS standards

The new version of the 10 FIS standards, published in 2002, imposes that in addition to skiers, also snowboarders must officially comply with these standards; however, this validity sphere has not yet expressly been described. The following is the abstract definition:

The FIS standards are valid for all types of sports equipment that, due to their sliding properties and within the context of their relative use along slopes, through sliding according to the force of gravity, allow a descent that may be compared to that of a skier.

Equipment for sliding on snow

To this effect, the following question is asked: which is the necessary equipment to be able to use on a ski slope in compliance with what established by German laws? The answer has a double meaning.

The first meaning describes the essential requirement for participating to the management of ski slopes, that is that all users of ski slopes must be

objectively able to comply with the **FIS standards**. Only in this way it is possible to avoid accidents due to collision and those caused by the same user of the sky slope without involving third parties.

The second meaning is inevitably derived: it is possible to comply with the FIS standards only if a compliant conduct with the ski-technical standards is kept. The above mentioned standards which regulate the movement (standards FIS 2 – 5) establish that the equipment used to perform a ski sport must be able to be controlled and stopped in a reliable way. This guarantee can be met exclusively when a suitable mechanical condition (edges) is present, therefore regarding skis, snowboard tables, snow bikes and any other means for practicing sliding sports on snow, which can be controlled in a similar way. Therefore, various equipment which slides on snow, for example Snow-tubes (rubber tires used as sleighs) or small sleighs, are not included since they are considered “unsuitable for ski slopes”. As a consequence, the individual who disposes of this equipment and descends the ski slope commits a substantial violation of his personal responsibility.

1.3 Validity at occupation level of spaces set forth by the FIS standards

The most important safety principle concerns the application validity of the main elements defined by the FIS standards, useful to reduce accidents in all organized ski areas in which skiers may run suddenly into another skier. Differently from what foreseen regarding the safety obligations on ski slopes, the validity level of space occupation is not therefore limited to an organized ski area. As a consequence, it must be taken into consideration that many skiers and snowboarders are also present in the high snow or free riding area, precisely as on the ski slope. Whoever accesses these areas must know that no laws are in effect in these spaces.

2. Suggestions issued by DSV

The Deutsche Skiverband (German Ski Federation) published its suggestions valid not only for its members but also for all skiers who have access to ski slopes in Germany <9>. The suggestions issued by DSV concern:

- ? skiers that use chair lifts
- ? skiers that use ski lifts
- ? behaviour towards run-tracers.

Differently from what is defined in the FIS standards, DSV's suggestions have the **main purpose of personally safeguarding** skiers, by integrating the same FIS standards which concern the behaviour models to follow in

standard situations which occur repeatedly. Consequently, these are suggestions for safety defined and formulated by DSV's experts from a sporting, psychological and juridical point of view. In this way, DSV's suggestions also appear to be concrete accuracy criteria, referred to specific situations, for a correct conduct in terms of personal liability. Obviously, their application, mainly limited to the German national territory, does not confer them great relevance compared to the FIS standards at national level. However, it has been a while since German juridical practices apply these suggestions, together with the FIS standards, to civil liability trials against managements of ski slopes and are used as guidelines for limiting personal liability and for safety obligations on ski slopes.

IV. Safety obligations on ski slopes: range of action and limitations

1. Juridical validity

Compliance with safety obligations on ski slopes by the enterpriser (mainly by the management of ski slopes and lifts equipment) involves the fact that the latter shall not only offer the uphill transport service upon payment of a fee, but also provide suitable facilities to practice sports on snow. <10>. By stipulating the contract relative to transport towards the station on top of the mountain, the skier acquires the juridical and civil (additional) right to be able to descend towards the station downhill along safe slopes without prejudicing his physical well-being and life. However, for the parties involved, it appears even more important than the obligation foreseen in such a contract, the fact that whoever must comply with the safety obligations on the slopes, in case of negligent violation, may be deemed responsible at penal level <11> and therefore liable in the pertaining relative session <12>.

2. How and when does the obligation regarding safety on the ski slopes start?

Simply said, personal liability starts when the obligation to follow safety obligations on ski slope ends. To this effect, it must be said that the skier must obviously check, through the above mentioned conduct models, any situation deemed **typical** for whoever participates to activities on ski slopes. The skier practices this wonderful sport surrounded by nature in order to experience the feeling linked to the overcoming of the challenge related to it.

The manager of the ski slopes may, from his part, expect that the skier:

- ? uses the lifting equipment in an appropriate way according to the situation
- ? accepts and descends the ski slopes such as they are presented to him
- ? that his behaviour on the ski slope be such as to be able to perceive ahead of time, the recognizable and foreseeable hazards and hence react accordingly.

These, in any case, are typically immanent needs (**relative to the ski slopes**) linked to situations that occur from time to time when practicing skiing or on the ski slope (considered objectively). This obviously does not exclude the fact that a typical situation may be dangerous for the single skier (considered subjectively). Also in this case, his attention is required exclusively, since he must avoid running into dangerous situations for his safety (for example by complying with colour signs that indicate the degree of difficulty of the ski slope – Standard FIS 8), and also he must descend the ski slope properly and carefully (Standard FIS 2). In addition, it must be reminded that many skiers are aware of their limits and wish to exceed them: some to improve and others to experience greater sensations. Everything is permitted as long as the safety of other skiers is not jeopardized. However, these skiers must consider the risk that they have chosen to face or be subject to the consequences.

3. **Obligation of safety on ski slopes only for atypical hazards**

The justified interest for skiers' safety and as a consequence, the compliance with the obligation of safety on the ski slopes by the management of the organizers, occurs only when the sources of danger no longer concern ski slopes but appear **atypical**. In this case, these are dangers that a skier, even if he keeps a responsible behaviour, is not able to avoid since the danger cannot be recognized or foreseen and therefore is a **trap** <13>. The skier cannot expect to be safeguarded by standards against this type of danger, but can only have faith (expression used in this case: **faith on ski slopes**).

The management assumes therefore two obligations:

Firstly, the skier must **promptly recognize** an atypical danger. To this effect, the skier must define the necessary organizational and personal measures among which to hire suitable staff, foresee relative training and supervision.

A recognized danger must be immediately **eliminated** <14>. Undoubtedly, this means that the source of danger must not be eliminated literally: often it is sufficient to make it visible so that the skier can see it ahead of time and therefore avoid it (standard FIS 2). Whoever is responsible for safety on ski slopes must therefore only regularly incur required and reasonable expenses.

Decisive is anyhow the fact that the result must take into consideration the justified interest for skiers' safety. In this case, it may therefore occur that their personal responsibility is "activated".

4. Validity of safety obligations on ski slopes

In a different way than established by the FIS standards, in this case there is the question regarding the validity **level of the occupation of spaces**. And, also in a different way from the validity with no limits of the FIS standards in terms of occupation level of areas, safety obligations on the ski slope are limited to the above mentioned **organized ski spaces** <s.5>. To this effect, it is even clearer that all required safety obligations must be complied with; however, in addition to the above mentioned organization freedom in terms of facility, even with regards to space occupation, only those measures that are reasonably sustainable at economical level are compulsory.

Despite the majority of damages occurs within the boundaries of ski slopes, safety obligations on ski slopes and skier's faith, is extended to a **certain marginal area of about 2 metres**. In any case, the skier must remain within the limit of this additional area at all times. If this is not possible, in case of accident, it is not considered the management's fault, but the infraction of the skier or snowboarder of his own personal responsibility. In case the causes of the accident are verified, it must not only be considered the point in which the accident occurred therefore the boundaries which delimit the ski slope. On the contrary, it is necessary to go back to the space and ask oneself if the skier descended the ski slope in compliance with standard FIS 2. At this point, it is often possible to establish from the start that only the skier is responsible for the events that caused the fatal accident to the absence of care <15>.

4.1 Fun parks

These areas which are particularly equipped with artificial obstacles and half-pipes are often integrated into regular ski slopes: skiers and snowboarders here practice and test movements undisturbed, especially with the awareness of not getting hurt. The use of fun parks is consequently characterized by two phenomena: firstly, it is possible to go up and down in a risky way and secondly, training is often interrupted by the loss of control after a fall or a failed landing.

Compliance with laws is based on the fact that the FIS standards are also valid for users of fun parks: jumps are more acrobatic and landing on the ski slope is more difficult, therefore it is important to know that no other skier is present in an invisible landing area. In compliance with the principles

established by FIS standard 2 (integrated by FIS standard 6), these conditions must be met exclusively by the user and not by the management of the ski slope.

In addition, within this context, rule 5 is particularly important: even if the fun park is integrated into the area of the ski slope, in any case, it is a special area since there are remarkable differences between the **typical behaviour of the ski** inside and outside the path. At this point, safety obligations must be complied with, since only those who wish to do so will enter the fun park: all others must be prohibited access to the area, whether this occurs accidentally or intentionally. Consequently, entry of the pathway and its borders must be marked in due time and mechanical barriers may be positioned to avoid access in confining areas or to the descending ski slope itself.

4.2 Excursionists on Ski Slopes – Preparation with winches

The trend to go up the ski slopes as excursionists in the last years is being taken up also in Germany: although this practice is not prohibited in Germany, however it is allowed only if a series of general advised conditions are complied with <16>.

At juridical level, it is important to remember the following details:

As long as the **ski slopes are open** skiing activities prevail: normal users of ski slopes (skiers) must take into consideration the possibility that at any moment, a climber who is walking on the slope may appear in front of him. These must be urged to comply with standard FIS 7 and walk in line at the edge of the ski slope. If due to the condition of the ground the ski slope must be crossed transversally, excursionists must act according to standard FIS 6 and avoid narrow or scarcely visible places. In addition, in this case, they must proceed at a distance from each other such that the skier descending the ski slope may be able to pass among these excursionists and hence avoid them without any danger to anyone. In this case, expecting organizational and perfectly safe obligations by the managements would be useless. However, it cannot be denied that these users of ski slopes (moreover numerous!) are so to say intruders in those areas that skiers paid to use. The above mentioned FIS standards 6 and 7 represent as a consequence, in terms of personal safeguard of whoever goes up the mountains, a particular form of accuracy criteria in their own personal interest.

- ? Once the **ski slope is closed** the obligation for the safety of the ski slopes ends and maintenance works generally begin. Therefore, this is also the moment in which, perhaps also in view of an evening event, numerous excursionists go up the ski slopes which sooner or later they will have to descend: their lives are in danger not as much for the

presence of run-tracers that, equipped with head lights and emergency lights can see the excursionists walking in the dark on the ski slopes, and therefore avoid them. The danger consists in steel wires, often long 1,000 metres, used during the **maintenance of the winch**: these are laid on the snow and are not visible and they can also be raised up as whips during particular manoeuvres of the run-tracers.

Generally, in Germany excursionists are not prohibited to walk on ski slopes even in the following conditions: substantially each excursionist is deemed responsible for all measures that must be adopted in order to avoid injuring anybody. Moreover, an incessant information campaign is under way (for example, the advices issued by DSV regarding the behaviour in relation to run-tracers <s.10>) with ongoing appeals to the judgment of sportsmen and sportswomen.

In addition, with the purpose to be safeguarded from the start against possible legal actions for damage refunds, the managements of ski slopes have positioned warning signals in key positions (parking, starting points of uphill or of downhill, side accesses, etc.) to stimulate once again the excursionist's personal responsibility towards ski slopes.

Notes

- <1> The author drafted also the comment on the rights applied to snow sports entitled "PISTE UND RECHT" (SKI SLOPE AND RIGHT), as well as a number of other publications that deal with arguments concerning the right in terms of responsibility on snow. He is a member of the Juridical Committee and President of the Juridical Commission instituted inside the Deutsche Skiverband (DSV – German Ski Federation); within the FIS he covered the assignment of German judge at the FIS court until 2006, while he is currently member of the Juridical and Safety Committee.
- <2> The term "skier" is used to indicate skiers and snowboarders within the text, according to the accuracy criteria.
- <3> Examples indicated in the Dambeck/Pichler SpuRt1996, 6ff, Dambeck SpuRt 1999, 138 ff study as well as PISTE UND RECHT (SKI SLOPE AND RIGHT), Rdn 275.
- <4> § 254 BGB
- <5> German standard DIN 32912:
Ski slopes are generally paths, which can be accessed for suitable descent and foreseen for skis, marked, controlled, and ensured against atypical dangers, in particular avalanches, and organised according to the possibilities.
Ski itineraries are generally paths, which can be accessed for suitable descent and foreseen for skis, only guaranteed against avalanche hazards, but they must be not prepared or controlled. As a marker, the use of such signs as "Ski itineraries" is advised.
- The so called "organized ski area" includes: ski slopes plus about 2 metres of marginal area of the ski slope itself.
- <6> The 10 standards of behaviour of the FIS for skiers came into effect in 1967 on the occasion of the FIS congress held in **Beirut**. When they were validly drafted and approved on the occasion of the FIS

Congress held in 2002 in Portoroz (Slovenia), these standards included expressly also snowboarders.

- <7> The details regarding the field of validity are available in PISTE UND RECHT (SKI SLOPE AND RIGHT) Rdn 49 ff; see also my report on the occasion of the first Forum held in 2005.
- <8> Civil liability for the supervision staff: § 832 BGB; these principles are also valid for the disabled.
- <9> DSV's suggestions exist since 20 years. These have been updated in 2005 under the author's responsibility and can be consulted free of charge at Deutsche Skiverband, Haus des Ski (German Ski Federation - Ski House), D-82152 Planegg. In ski areas, all lift and transport facilities display them with large signs on top of the mountains.
- <10> The details regarding safety obligations on ski slopes are available in PISTE UND RECHT (SKI SLOPE AND RIGHT) Rdn 201 ff; see also my report on the occasion of the first Forum held in 2005.
- <11> § 823 BGB
- <12> § 222 StGB
- <13> For **atypical hazards** it is intended for example holes and deep depressions at the edges of the ski slope, an ice formation with extended surface on which it is possible to slip; avalanche hazards in the area of the ski slopes or advised ski paths. For **typical hazards** it is intended on the contrary, surface irregularities, partial ice formation and slabs, deep snow formations (snowfields) on the prepared ski slopes, and all visible obstacles.
- <14> Juridical definition: without malpractice (§ 121 Abs.1 S.1 BGB).
- <15> A tragic ski accident which occurred in April 2004 near Nebelhorn, in Bavaria: a 9-year old skilled skier falls on the ski slope that she had descended many times and which that day was hard, but practicable (category of Black ski slope = difficult). Probably, and due to the high descending speed, the little girl falls hard and slips for 152 metres towards the margin of the ski slope, then for another 111 metres, until subjected to a 30 metres jump from a cliff resulting fatal. The answer to the question of whether it would have been necessary a protection at the margin of the ski slope was negative (details in SpuRt 2005, 28 ff with author's notes).
- <16> DAV's standards for excursionists on ski slopes.

Notes on the literature and abbreviations

BGB	Bürgerliches Gesetzbuch (German Civil Code)
DAV	Deutscher Alpenverein e.V. (German Alpine Federation)
Forum	Bormio European Juridical Forum on Snow
PISTE UND RECHT	Volume 6 of Deutsche Skiverband's collection, 3rd edition 1996, available for sale at Deutschen Skiverband, Haus des Ski, D-82152 Planegg
SpuRt	Sports and Law Magazine (Sport und Recht), Editor C.H. Beck, Munich / Frankfurt on Mein., Stämpfli Verlag AG Bern
StGB	Strafgesetzbuch (German Penal Code)