

## **2nd EUROPEAN JURIDICAL FORUM ON SNOW**

### ***“Investigation activities and jurisprudential guidelines on the subject of criminal liability for accidents on snow”***

#### **Preamble**

The investigation activity in penal proceedings that deal with accidents on snow is among the most delicate and complex: there is in fact a substantial difficulty in ascertaining and preserving the proof sources which assume immediate interventions, fully targeted and executed since the very first phases of the activities in question.

In fact, there is an ample range of factors that, in this case more than others, can influence negatively the course of the investigative *iter* and following trial phase, taking into consideration the existence of alternative rites such as simplified and shortened proceedings, postulating the strict completeness of the investigation activity and ensuring the truthfulness of the sources of proof right from the start.

The simplified and shortened proceedings foreseen by art. 438 of the Code of criminal procedure in fact takes into consideration the acts already acquired during the preliminary phase of investigations, assuming in those the essential requirement of trial use which can be granted only to those acts taken and carried out in compliance with procedural regulations and therefore not acquired illegitimately so as to result invalidated in their legal use, in compliance with what is set forth by art. 191 of the Code of criminal procedure.

Not envisaging the preliminary hearing, the simplified and shortened proceedings foresee that the acquired acts and therefore the investigation activity carried out by the Criminal Police upon request or delegation of the Public Prosecutor has a conclusive value regardless from that of the investigations, considering that no new element that can be recovered is invalidated by non-use and the Public Prosecutor will not even dispose of the instrument foreseen by art. 507 of the Code of criminal procedure since the conclusive integration is remitted to the accused only, as set forth by art. 438, paragraph 5, and the Public Prosecutor is only

#### **The activity of the Attorney General and the investigations**

When an accident on snow occurs, the criminal cases in question that may arise consist essentially in the offence set forth by art. 590 of the P.c. (negligent injuries) and the offence set forth by art. 589 of the criminal Code (negligent homicide).

Regarding the locations in which such events occurred, it is obvious that the primary need, in terms of the sources of evidence, is to preserve the state of these locations, documenting through photographs and better still through films and video recordings of the location of the event at the moment when this event occurred especially due to possible changes in the climatic conditions and of the extreme variation of the snow layer, not only linked to the atmospheric phenomena but also to the high density of crowding of the ski slopes that through the continuous passages of the skiers inevitably brings about cancelling of signs that may be useful for the investigations and the inspections by the Judicial Police.

Ensuring the sources of evidence in this type of crimes requires Judicial Police officers with specific training, especially those that carry out the first inspections: in fact, the place in which the accident occurred must be isolated, the objects related to the crime must be seized, the state of the locations must be documented, and the persons able to refer the relevant circumstances to reconstruct the facts must be identified, keeping into consideration that often users of ski slopes are foreigners and

therefore the acquisition of information from such subjects requires locating quickly interpreters to be appointed as assistants to the Judicial Police or requires the staff in charge to dispose of suitable linguistic knowledge in addition to specific skiing preparation in order to reach promptly the place in which the facts have occurred, recognize and descend the ski slopes, understand the dynamics of the event and develop an immediate investigation programme regarding the activities to perform immediately in order to report properly to the Public Prosecutor who will perform the investigations, thus referring in details all useful elements for the course of the investigations.

Another instrument which may be extremely useful for the investigating staff – and not only – is that offered by the technical consulting carried out with the experience and professionalism of subjects having specific technical knowledge in order to trace the exact dynamics and consequently, the causative contribution of the various subjects involved in the accident on snow. Another very valid instrument consists in the possibility to request the Judge for Judicial Investigations, as set forth by art. 321 of the Code of criminal procedure, the preventive seizing of the ski slope where the accident on snow occurred, in case there is a hazard that availability at will of the ski slope may aggregate or extend the consequences of the crime in question or facilitate reiteration.

This brings us back inevitably to the important argument of prevention activity to be carried out in order to guarantee the safety of the ski slopes and systems related to it.

## **The prevention activity**

Provided that the skiing activity presents a risk and a degree of danger inborn by its own nature, similar to other sports activities, it is in any case correct and suitable to underscore that there are preventive measures that - if adopted - would render it much safer and concern mainly cultural choices, even more than technical options.

The culture of prevention that in this sphere, as anywhere else, and in any other workplace must be chosen is that of a winning choice.

The simplest objections, more obvious and therefore more frequent are those that claim the impossibility to protect every obstacle located in the vicinity of the ski slope.

It is stated that it is not possible or logic to provide protection against, for example, all existing trees located at the edge of the ski slope, otherwise the mountain scenery would be deprived, with the enjoyment to spend a few hours surrounded by nature and in conclusion, the objection is concluded by stating that it has been decades that persons ski and nobody until today has ever thought to pad all spruce trees with mattresses!

The prevention culture is not obtusely rigorous but it keeps into consideration – and it must keep into consideration - the changed approach conditions to winter sports: it was once a privileged entertainment for inhabitants of the valleys and for a few persons fond of mountains; today it is a mass sport which takes place in a changed ecosystem and with means completely different than the original.

Today, the prevention culture deals with installations for artificial snowfalls that constitute often insidious obstacles on the slope, with hand-made objects located in the vicinity of the slope and intended to contain water tanks necessary for scheduled snow-falls, it deals with a type of snow that deposits on the ski slopes and presents compactness, hardness and hold characteristics different from those of natural snow falls.

Today, prevention culture deals with the many thousands of daily transits on systems and slopes, it deals with installations for electric power which are located near the slope's edges or close by, it deals with equipment for practicing the sport which change daily, becoming more and more sophisticated and fast, it deals with the crowding of the ski slope which multiplies exponentially the risk of collisions, it deals with the various specialties which co-exist in the same locations, such

as "snowboards" together with ski-mountaineering, thus multiplying the interferential risks among users.

One of the most important measures to be adopted regarding safety on the slopes is the correct arrangement of suitable signs, together with additional fencing of its boundaries and a rigorous discipline of mechanical means that transit on it.

Signs represent in fact one of the weakest points of the system and it is the field in which major shortcomings are found.

Regarding main signs, whether indicating information or directions, they must be as complete as possible and they must be located mainly in suitable and useful positions to warn the user - in advance - of the dangers and difficulties that the latter will encounter.

Therefore, not only suitable signs are needed, but also proper arrangements of the signs.

Considering then the multi-ethnicity of users of ski slopes, the signs must take into consideration the various languages and must not take as granted the users' knowledge of the locations since they – in the majority of cases – could be occasional visitors of such ski slopes or persons that visit it only for the first and last time.

The staff in charge of ski slopes and systems shall be suitably informed and trained so as to answer effectively to the requests of the users, so as to evaluate safety conditions of systems and ski slopes and to safeguard their well-being and that of their colleagues, thus requesting restoring or safety interventions when needed.

Users' conduct regulations on ski slopes shall also be diffused, through the use of suitable informative/popular material in terms of clearness, format and type used.

Safety of ski slopes and systems consists of an ongoing process, which is not established once and for all: it is therefore essential to constantly monitor the conditions of ski slopes and systems, verifying – even through daily investigations – the state of snow, in order to decide whether the ski slopes shall be closed in case that the presence of ice, fog or avalanche hazard renders them impracticable and dangerous.

The ski slopes' monitoring activity performed by the police force of the skiing resorts shall be assiduous and widespread in order to avoid the repeating of improper and/or dangerous conducts by users which could cause damage to third parties.

Another *dolens* point of the safety system that has been previously mentioned, is the presence of mechanical means on ski slopes, which do not consist only of run-tracers but also snowmobiles used by the slopes' managers, also employed as rescue means, or by owners of hotels, shelters and restaurants or used by ski schools.

For these means, there is no matriculation obligation, neither that of disposing a driving license nor that concerning periodical checks of suitability, neither DPI obligations (devices for individual protection) for their users.

Dedicated itineraries and paths are not foreseen – and this is one of the main problems, therefore such means, long almost three metres and with a remarkable weight, built for one or two passengers at the most, are used to transport many persons and their luggage, thanks to hooks built in a craftsman-like manner with the purpose of connecting several trailers to the snowmobile, with no regulation and no safety conditions.

In fact, there is no specific law on the subject except for art. 16 of law 363/2003 which deals in a general manner with the possibility for mechanical means intended to the service and maintenance of ski slopes to transit on them after opening hours and by adopting luminous and acoustic signs.

It is obvious that snowmobiles may fall in the category of this means in case they are used to transport users to hotels or ski schools, since they can be hardly defined - in the above mentioned, peculiar functions - as mechanical means used to the service and maintenance of ski slopes, such as instead the classical run-tracers and certainly these transit ski slopes during the opening hours of the facilities, where the tourists' flow requires their activity.

Regarding the experience of mountain Municipalities belonging to the Prosecution of the Republic of Turin, no news are available regarding technical plans among the various Administrations with the purpose to issue a standard regulation about the circulation of these means in the various municipal territories which host systems and ski slopes, waiting for a more organic discipline at state level or at least at regional level.

In one case, the Mayor of one of the aforesaid mountain Municipalities had issued an ordinance prohibiting the circulation of snowmobiles along a much frequented ski slope, mainly by children, after the complaint filed by some citizens, which had also appeared on newspapers.

In the ordinance that followed, the Mayor authorized circulation with such means exclusively to owners and/or tenants of residences located in peremptorily indicated locations and to owners or managers of companies giving out food and beverages located in such locations, with no stable ice or snow formations, provided that the use of snowmobiles and tracked vehicles would coincide with the lifting systems' closing hours (from 5:30 p.p. to 8:30 a.m. of the following day) with absolute prohibition to circulate from 8:30 a.m. to 5:30 p.p.

In addition, regarding snowmobiles used by the local ski schools, he imposed the obligation to establish an *ad hoc* path, forbidden during holidays, which had to be prepared so as to prevent mixing pedestrians and motorized means, with suitable signs for crossing and junctions.

The ordinance was disregarded, even if reiterated and then brought many times to the attention of the receivers of the ordinance.

From the notice of crime that followed, the accused were charged according to art. 437 of the criminal Code, crime punished with imprisonment from six months to five years and for which it is also foreseen the possibility to request and obtain personal precautionary measures, since it was deemed that the non compliance to ordinances and the reiteration of the forbidden conduct integrated negligence of crime related to the negligent removal or omissions of precautions against work injuries foreseen by art. 437 of the P.c., instead of the different – and less serious - infraction provided for in art. 650 of the criminal Code.

## **The figure of the manager of ski slopes and fault requirement in accidents on snow**

Whether this concept is accepted or not, the manager of ski slopes is an employer and shall guarantee safety of not only the workers that perform their tasks under the latter but also to third parties that use ski slopes.

Whoever undertakes the management activity of such facilities and ski slopes, shall know the conduct regulations to which he must comply with in performing such activity in order to avoid damages to third parties and cannot claim ignorance as an excuse.

To this it is added the common knowledge that brings users to reasonably trust in the fact that the manager of ski slopes foresees to maintain the good state of the ski slopes and its lower part, to use necessary signs, applying those precautions that allow users to venture themselves into locations unknown since then, with the certainty that in case they will not get lost and will not fall down a cliff.

It should not be forget that the user of a ski slope stipulates an agreement with the manager when the former purchases the ticket that allows using the lifting systems and then descend the ski slope accessed from such system, which must be safe, practicable and well kept since its management consists in the peculiar activity performed by the company.

In addition, as underscored by Mantovani, non written conduct regulations are based on art. 43, paragraph 1 of the criminal Code "*they are based on different types of activities and different subjects*", thus involving for users "*an ongoing and automatic adaptation of safety standards to the progressive findings of scientific-technological research of the single sectors*" and it allows "*before gaps of precautionary regulations, to better satisfy needs of rigor and certainly set by the legality principle, also*

*regarding fault and avoid this way, that the judge's intuition be based on precautionary regulations which are not scientifically proven".*

This boosts according to the author, *"the pedagogic (or orientation of human behaviours) and supporting function (of juridical assets) of conduct regulations"*.

The manager of ski slopes covers this **"warranty position"** for which jurisprudence has dealt with many times in countless verdicts on work safety based on c.d. "agent model".

The Cassation Court states that the employer of, in any case whoever performs, a peculiar entrepreneurial activity as in the case of a manager of ski slopes, must be aware that the community in which the former operates sees him as an AGENT MODEL, a model to whom the conduction of that activity is entrusted, in constitutional compliance with social solidarity.

In other words, the community expects that the entrepreneur that performs his role according to the knowledge related to the performance of that specific entrepreneurial activity, knowledge that is added to that common knowledge of an average individual, thus respecting the regulations of the role in object, envisaging the worst case scenario, since this is the agent model that the community expects from such a person covering this role and therefore according to diligence, ability, knowledge standards required for the correct performance of such a role.

The manager of ski slopes has the juridical duty to envisage a protection system of the ski slopes by using diligence not pertaining to the average individual but to the *HOMO EIUSDEM PROFESSIONIS ET CONDICIONIS*.

These considerations are linked also to the c.d. entrustment principle that, as explained by jurisprudence, brings third parties – and the subject that it is dealt with – the public of skiing users to confide in the fact that the manager of ski slopes guarantees their safety and reliability, by adopting all known safety measures, thus performing his role according to the typical diligence of the entrepreneur's model that the manager of ski slopes embodies.

Provided that, in accordance with art. 27 of the Constitution, criminal liability is personal, it is therefore necessary that the illegal event - therefore accident on snow – falls within the framework in which the agent can at least "intervene" abstractly with his powers and faculties. Therefore he shall have – as set forth by art. 40 – paragraph 2 of the P.C. - omitted to intervene in view of a juridical obligation to prevent the event, that in this case the system refers to his omission.

The negligent event must therefore be foreseeable – therefore it must consist of an ordinary consequence or at least supposable of the subject's action or omission – and preventable, that is to say this must be able to "modify" the course of events. If these elements are lacking, there is a hypothesis of objective liability, which is not admitted by the penal system.

Injuries on snow are culpable offences, for which therefore fault integration is sufficient: therefore negligence is not required with is in any case present (art. 43 of the P.C.) *"when the harmful or hazardous event which is the result of the action or omission and from which the law bases the existence of the crime, is foreseen and wishful by the agent as consequence of his own action or omission"*.

On the contrary, we are dealing with culpable offence *"when the event, even if foreseen, is not wished for by the agent and it occurs due to negligence, or imprudence or inexperience, therefore non compliance with laws, regulations, orders or disciplines"*.

It is therefore necessary to ask ourselves what does predictability mean and, keeping into consideration the Cassations' teaching, we know that "event predictability is the possibility of the conscious and cautious man, of the *homo eiusdem condicionis et professionis*, to foresee that a certain event is linked to the violation of a specific objective diligence obligation" (Cass 6.12.1990 Bonetti).

This teaching was repeated many times by the Supreme Court also in the specific sector of work safety: "the employer shall be aware that the community in which he operates considers him as *agent model*, that model to whom it is entrusted, not only the execution of a specific work, but

also the execution of the latter in compliance with the constitutional principle of social solidarity, an application of which is certainly represented by the compliance with accident prevention regulations which safeguard the worker's physical integrity (Cass 25.6.1992 Pecchia).

In this jurisprudential framework, another teaching is of remarkable interest:

“Predictability can be measured according to the agent model, *homo eiusdem professionis et condicionis*, to the agent, individual, that covers a specific role, which was assigned by the group or he assigned it to himself inside the group, a specific role which requires certain unquestionable knowledge, to which it is added the individual or agent's personal knowledge. (Cass 16.3.1992 Antonioli).

An additional indication found a precise formulation in the sentence on Stava's tragedy (Cass 6.12.1990).

“It is a renowned principle that the objective diligence duty that distinguishes the culpable offence may also include an obligation of preventive information, therefore the obligation to inform oneself, to resort to others' special competences, since whoever performs a work without obtaining all necessary data to manage it is liable for *fault due to assumption*, in the obvious case that the work becomes source of danger also due to the lack of acquisition of special data or knowledge. And in fact it is also valid regarding fault the principle that – principle that is the theoretical/logic assumption of the former – acting as member of a specific group or as holder of a specific social role, involves the assumption of responsibilities to be able to recognize and face situations and problems related to that role, according diligence, ability, and knowledge *standards* required for the correct performance of such a role”.

“For purposes related to the predictability judgment, the potential suitability of the conduct to provoke damage shall be considered and not the specific *ex ante* representation of the harmful event, which had actually occurred in all its seriousness and extent”.

## **The link to causality**

In order for the event to be linked to the acting subject, it must be related to the conduct of the latter: only in this way the agent will be liable (provided that the necessary criteria of subjective liability are present).

Our penal code established in art. 40, paragraph 1, the forecast that the harmful or dangerous event on which the offence is based, shall be the “consequence” of the acting subject's action or omission.

The conduct must therefore constitute the *necessary condition* for the event to occur.

Omissive causality is considered when the harmful or dangerous event is due to an omission and art 40 of the criminal Code, second paragraph, states: “not preventing an event that someone has the juridical obligation to prevent, is the same as causing it”.

The difficulty in improper omissive or commissive offences through omission lies in the identification of a positive conduct that, if applied, would have avoided the occurrence of the event.

According to the prevalent direction, in order to reconstruct the causal phenomenon, *relative* laws shall be used, therefore those laws that explain, subsume and “cover” the event.

The science and jurisprudential debate on omissive causality has been going on for decades due to the difficulty to identify satisfying criteria to link the omissive event in reasonable terms.

During the last two decades, legitimacy jurisprudence mainly followed – above all in verdicts on medical professional liability – a “probabilistic”, so to say, line in the sense that it deemed the material causality relation as existent always when the omitted dutiful conduct would have had probability of success and in some cases the Supreme Court also indicated the percentages.

The most recent guidelines on the subject changed such view, criticizing the previous criteria (see Cass. Section IV 28.9.2000 No. 1688, Baltrocchi and same Section 25.09.2001 No. 1652, Covili and others): Disregarding the traditional guideline, these verdicts stated that “*the judge can state that an*

*action or omission caused an event, when the latter can perform the contra-factual judgment by availing himself of a law of scientific principle that enunciates a link among events in a percentage close to one hundred”.*

The contra-factual judgment (literally “against facts”) is based on the key question: if the omitted intervention would have been adopted, would the event have occurred?

The answer that is given from new jurisprudential orientations is that the judge shall verify the omitted intervention that, if it had been carried out it would have prevented the occurrence of the event almost certainly.

Recently, with sentence 10.07.2002 No. 30328, Franzese, the Unified Appeals Division of the Cassation Court established that: *“resorting to scientifically valid considerations allows to link the contra-factual judgment, which is otherwise hindered by wide margins of discretion and uncertainty, to objective parameters able to express the actual explicative potentials of the necessary condition, also for the most complex causal developments of natural, physical, chemical or biological phenomena”, therefore “if the lack of performance of the dutiful action is mentally eliminated and substituted to the static component of a hypothetical dynamic process corresponding to the dutiful behaviour, assumed as carried out, the single harmful event, hic et nunc occurred, would have not occurred, through an explicative statement based on time scientific knowledge”.*

The solution indicated by the sentence in object and implemented later on by following verdicts (for all Cass. Section IV 06.02.2004 , Ligresti) is based on the trial ascertainment of the existence of the conditioning link similarly to the reasoning used to verify the other constitutive elements of the case and distinguished by a high degree of rational credibility”.

Therefore, it must be considered the impeditive efficacy of the dutiful and omitted conduct in relation to the occurrence of the event, thus reaching that “trial certainty” which does not necessarily imply the existence of very high probability coefficients but rather the positive trial verification of the certain incidence of factors that recognize the presence of the causality link, with the consequence that the causality relation is not granted if high statistic probability coefficients are present, when, for each single case, the trial verification did not supply positive results, therefore when there is a reasonable doubt on the actual efficacy influencing the omissive conduct in relation to the occurred event.

In brief, it can be stated that the “logic probability” must prevail on the “statistic probability” therefore the judge shall perform – for each single case – the verification of reliability of the use of the statistic law to the single event, also denying the existence of the causality link even in view of a statistic coefficient next to certainty should have this - related to the actual case - not pass the trial verification of the existence of the influencing link and therefore there is uncertainty, inconsistency or lack of trial check.

The responsibility of the manager of ski slopes exists each time the harmful event of which the skier was subject to is due to the commissive or omissive conduct of the former and proven fault.

Therefore the manager of ski slopes shall guarantee the same safety conditions.

In case of omission, death or lesions due to cause-effect would constitute the case link to the imprudent, inexpert and negligent conduct of the manager, with proven fault, as set forth by art. 43 of the penal code and that is to say in “negligence or imprudence or inexperience that is to say not compliance with laws, regulations, orders or disciplines”.

Fault that is not considered as general mere fault only, but that could become specific fault should the event be due to violations of special laws on *subjecta materia*: for example the new regulations set forth by Law 363\2003 or by regulations on work safety (mentioning among all, Legislative Decree 626/94) or by regional laws on the safety of ski slopes, where present.

## **Guidelines and jurisprudential precedents on the subject of liability for accidents on snow**

Reading the sentences on the subject of accidents on snow, it is noted – *in primis* – the elaboration of the notion of INSIDIOUS DANGER different from the same notion applicable to road accidents, for which that situation of hidden danger is defined, characterized by concurrent requirements: objective non visibility and subjective non predictability of danger.

The Court of Appeal of Trento passed a sentence along these terms (sentence of 28.02.1979), where it confirmed the liability of the manager of ski slopes for accidents occurred due to a particular conditions of the area, that is to say to presence of a non signalled cottage, which represents An insidious danger for a skier FAIRLY careful and not an average skier since it is the obligation of the manager of ski slope to prevent others' imprudence, especially in cases when users are inexperienced or children: the manager of ski slopes shall evaluate latent dangers also in view of such users, in order to establish more suitable and efficient measures.

The Court of Appeal of Turin also expressed itself along these lines, with sentence of 11 July, 1994, as reform of decision by the District Judge of Aosta, who acquitted, with sentence of 26.02.1990, the accused of the crime for negligent injuries suffered by a skier who ended up beyond the slope, and collided against a non protected, chair lift supporting pillar, distant about 8 metres from the slope's edge.

The District Judge of Aosta in fact, stated that *"the dangerous situation can be regularly faced by an average skier"* but the Court of Appeal did not admit such interpretation, stating instead that a general user of that slope, highlighted by red colour and therefore of average difficulty, could not foresee – even by using normal care – the situation of danger constituted by that single unprotected pillar, being a LATENT INSIDIOUS DANGER and therefore anomaly with respect to the predictability of accidental falls on the ski slope in question.

In order to evaluate the PREDICTABILITY criterion, reference must be made to the parameter of the model agent, *"therefore to the conscious individual eiusdem professionis et condicionis. Therefore, when the event could have been foreseen and avoided from the subject model to which the agent belongs, this subject, not only acted objectively dangerously, but also imprudently, negligently and with no experience"*, as it can be read in another sentence of the District Judge of Aosta dated 14.12.1992, regarding the death of a skier who ended up beyond the ski slope without being aware of the state of the ski slope due to fog, and died by falling into a cliff, 35 metres deep.

The Judge, after having deemed *"reasonably predictable"* that in case of fog or low clouds, and in the *de quo* case, the skier could have ended up beyond the slope, deemed also *"reasonably predictable"* the possibility to fall in a cliff, event that could have been avoided by *"adopting a few, low cost measures easy to apply: plastic meshes, wooden coloured poles, thin plastic coloured bands between the poles and so on"*.

In another case, the 4<sup>th</sup> Division of the Cassation Court, with sentence No. 1285 of 29.05.1996, cancelled the acquittal sentence of the Court of Appeal of Milan, adjourning it to the examination of another Division, based on the following law principles.

Linking an undisputed direction of the Supreme Court that states that *"general fault due to imprudence and negligence is not excluded from simple observance, even if rigorous, of laws, regulations, orders, and disciplines, since this does not cover all obligations imposed to whoever performs specific activities"*, since there is in any case the obligation *"to comply with the specific requirements which aim at preventing hazardous or dangerous situations"*, the 4<sup>th</sup> Division deemed as deceptive the consideration that the slope in question did not need any particular signs since it was free of hazards.

The same ski slope, onto which a fourteen year old skier died by falling and crashing his head against an unprotected pillar of the cableway, located on the ski slope, *"was used due to its*

characteristics by novice or inexperienced skiers” and therefore “it was even more necessary to place signals and adopt protection systems for pillars with collision hazard”.

“As deceptive”, continues the sentence in object *“is the argument according to which it was not needed to protect pillars since these were well visible and therefore did not constitute insidious danger. In fact, the need to protect pillars “at risk” does not derive from the fact that these are not visible, but from the fact that they could become a hazard, as it had in fact occurred, in case of fall or loss of control while descending, with consequent impact. The Attorney General does not claim that that impact occurred due to the “insidious” position of the pole, but because the effects of the impact, which could have been foreseen (since falling is normal when skiing), could have been mitigated”.*

There are then various sentences regarding liability for offences related to negligent homicide or negligent lesions due to omission or lack of rescue towards the victim.

The circumstance that has a major impact is the fact that a person in need who asks for help, is seen mainly as an annoying subject: for example, see the sentence of the District Judge of Aosta of 19.05.1999 which declared the liability on an agent in charge of a cable car’s station deemed guilty for not providing help towards an inexperienced skier who asked for assistance because not confident in descending due to thick fog and scarce knowledge of the surroundings, thus asking to use the system which was still running, even if formally closed to the public for returning to the valley.

The accused asked her to leave, telling her that “if she was unable to ski she should have remained home!”, so doing forcing her to descend where she suffered personal injuries, without even informing her of the possibility to be accompanied by the Mountain First Rescue or by agents belonging to the State Police force or to the Carabinieri force in service on ski slopes, by notifying them himself.

Even in the most serious case of the death of a Dutch tourist occurred on the slopes in Cervinia in March 2000, the victim’s son was insistently requesting help to find his lost mother, who was then found dead after spending the night in the open, and he was considered as “annoying” and invited “not to bother”.

In this case the Judge, after having verified that the two accused were respectively the manager of the ski slope and the rescue manager on slopes, stated: *“both have a warranty position in relation to users of ski slopes’ ... they are liable for fault in case they avail themselves, in rendering their services, of subjects who are technically not prepared or are not up to the tasks entrusted”.*

These *“acted negligently and with no experience, thus causing the accident”.*

The sentence was then confirmed by the Court of Appeal of Turin – First penal Division that during the hearing held on 19.02.2004 confirmed the *quantum* of the custodial sentence, stating in any case the aforementioned legal principles and underscoring how *“all accused were holding a warrant position for the protection of the physical integrity and life of the party that suffered damages”.*

*“It does not bring any benefit to state”* the sentence continued *“that the skier ended up voluntarily beyond the ski slope and so doing in the described dangerous condition after making an undoubtedly wrong decision...the obligation to prevent the event which derives from the warranty position is valid also if whoever can claim such obligation causes a dangerous situation. Therefore it is irrelevant that it the danger is caused by the person that must be helped. It is in fact obvious that the imprudent conduct of the victim constitutes in such a case the unprecedented event from which the obligation arises to prevent the event and does not relieve those who have the obligation to operate according to the non written regulations related to that specific activity”.*

In another case of death by sentence No. 245/00 of 09.11.2000, the single Judge of the Court of Turin - Separate Division of Susa, sentenced the General Director and technical manager of the lifting facilities of the district ‘La Via Lattea’ for the negligent homicide for Alessandro Andreolli, an eight year old child that died after a very violent impact against a reinforced concrete structure used for collecting the necessary water to feed the artificial snowfall systems, located below an

existing left-handed turn, at about 6-7 metres from the ski slope's edge, at the bottom of a fairly steep ski slope, which the ski slope was leading.

During the Carabinieri's investigation carried out the day of the accident, no signs were found that were warning the presence of the structure, neither warning meshes along the exterior edge of the turn leading to the structure, nor retaining meshes to limit or eliminate the risk to end up beyond the ski slope.

In addition, two years before the above occurrence, a ski instructor collided against the same structure, suffering a very serious skull-facial trauma. To use his description of the facts:

"Once started on the flatter tract, just before the left turn (*the same from which young Andreolli exited* (editor's note)), a boy among the last ones of the row fell ... he fell forward flat on his belly ... at about 3-4 metres and he was sliding with a straightforward direction while I had the feeling that the slope was turning leftwards ... I brought myself at the child's side trying to block him on the surface of the ski slope to stop him from sliding ... to do so I let go the ski's hold to get around the child steering lightly uphill ... from that moment I do not know what happened ... I was later told that I ended up against the manufactured concrete structure" (from the translations of the hearing dated 28.10.1999).

This Public Prosecutor, within the integrative examination carried out in compliance with art. 430 of the Code of criminal procedure stated that the ski instructor was almost at a standstill at the moment of the impact since he was helping the child while sliding for the purpose of stopping him onto the ski slope surface

The lesions suffered by the ski instructor from the accident were serious and perhaps he was lucky not to die, certainly also due to the fact that he was an adult, therefore with greater resistance to impacts and traumas thanks to a different physical structure.

Nevertheless, he suffered the fracture of his jaw, nose, zygomatic bones, brows arch, skull and a serious head injury.

He was subjected to a surgery that lasted 11 hours and resulted for him to have different features, due to the reconstruction of the facial bones apparatus.

Despite this very serious accident occurring two years before and it was well known to the managers of the company in charge of the ski slopes, no measures were taken to improve the ski slope's safety conditions.

*"Having foreseen the event and not having modified one's own conduct shows an attitude of indifference towards others and therefore", underscores Mantovani "of greater non compliance".*

Especially in relation to the quality of the accused and the quality of the ski slopes under examination, place of major traffic on which hundreds or thousands of skiers were skiing with thousands of crossings a day, the users' safety entrustment was increased and these were obviously under the impression that the ski slopes were safe, deducing that the prevention activity had been properly carried out by the manager of the ski slopes.

The Judge writes: *“the consultants .. stated to consider dangerous, or very dangerous, the location of the structure and necessary the adoption of proper and suitable measures ... they also underscored that close to the turn, the ground's shape was deceiving, since the user could foresee the turn .. the structure was dangerous or very dangerous for users and the accused should have taken proper measures to avoid damages to third parties.*

*Regarding the existence of the causality link, it arose with enough certainty, according to the consultants and the expert's investigation, that the dutiful omitted conduct (lack of arranging retaining meshes or signs along the left turn close to the structure, so as to prevent ending up beyond the ski slope and the impact against the same structure) was suitable to prevent the accident ... in the specific sectors of the accused, it is proven that the necessary protection or artificial obstacles located nearby slopes was widespread and agreed upon by operators”.*

*In fact “a careful manager will not only render evident these fixed obstacles through signs but will also protect them and render them harmless with padding material or barriers (meshes, etc.)”.*

The oral sentence was then confirmed in appeal.

In conclusion, it is possible to mention two very recent sentences of the Supreme Court, one dated 12.07.2005 (Section IV No. 1232) in which it is stated the validity – even if with no compulsory efficacy - of precautionary regulations elaborated by F.I.S. (the Italian Skiing Federation) (skier's Decalogue, Bayreuth 1967) underscoring that *“the subject is nowadays regulated by law dated 24 December, 2003, No. 363, indicating regulations on safety in practicing winter sports relative to descent and cross country”* while the other, dated 17.05.2006, (Section III No. 873) confirms the jurisprudential direction of sentence No. 428 of Section IV dated 21.3.2002, establishing that *“the receiver of the rule, if not complying to the requirement, thus substituting even partially his own judgment of predictability or avoiding to that of the Public Prosecution, obviously violates the regulations and incurs inevitably into criminal liability if damages are suffered by persons from the conduct which constitutes the violation of the regulations”.*

In this particular case, the Supreme Court did not confirm the exactness of the logical-juridical reconstruction expressed in the sentence relative to a case in which liability was recognized for serious culpable lesions with permanent damages to a skier who ended up beyond the slope which had not been delimited properly, and suffered the aforementioned injuries, considering as proven the causality link between violation and event, since it was clarified that the *“poles positioned by the accused to warn about the bridge did not constitute suitable barriers to prevent that the injured party would fall beyond the bridge ... particularly since they were located at the two ends, two or three metres uncovered, through which the skier had passed and fell from the bridge”.*

## **The manager of the ski slopes and the delegation of functions**

The delegation of functions is a jurisprudential principle conceived within the framework of sentences relative to the labour penal law which found legislative confirmation in art. 1 paragraph 4 of Legislative Decree 626/94, specifying the employer's obligation that cannot be delegated (evaluation of risks, drafting of relative document and arrangement for the prevention and protection service), meaning that - *on the contrary* – there are other different obligations which could be object of delegation.

According to the Supreme Court's jurisprudence, delegation may relieve from liability if:

- the tasks do not fall exclusively and specifically on the manager or administration;
- the delegated person is someone who is technically and professionally suitable for the task (as stated by Pen. Cass. Section III 27.01.2003 No. 3885);

- the delegated person is equipped with the necessary managerial and financial autonomy (for all C. pen. Cass. Section III 01.07.1998 No. 9160) and no interferences are present from the delegating party;
- the delegated person has voluntarily accepted the delegation, being aware of the obligations that he must fulfil;
- the delegating party fulfilled all duties of his exclusive competence;
- the delegating party has a monitoring and control function (as stated by pen. Cass. Section IV sent. No. 9297 of 14.10.1997 that states: "the administrator is liable when he is aware of the delegate's non fulfilments and did not settle them, therefore when, even if able to control the delegate's activity, did not do so voluntarily" and then Sec. Cass. IV, 25.08.2000, No. 9343: "the obligation remains valid for the employer to investigation and check that the delegated person uses the proxy according to law").
- the delegation deed shall have specific and clear content, "expressed in an undisputable and certain way, excluding the fact that the delegation may be tacit or implicit or assumed only from the company's internal division of the tasks assigned to other employers or size of the same company" (thus Pen. Cass. IV 22.06.2000 No. 9343 and at the same time Cass. Section IV 16.01.2003 No. 68).
- the delegation shall be conferred with certainty, to reliable persons able to fulfil the tasks contained in it, with decisional autonomy, with the influence of the delegating party (pen. Cass. Section IV 25.06.1990).

Obviously, the employer shall organize a control system on the delegate's activity to avoid incurring into the «*culpa in vigilando*», with the consequence that the delegating party is liable in case of non compliances, and not the delegated person.

The delegation of functions does not necessarily involve that the liability of a subject excludes that of another subject, as set forth by our system of regulations under art. 41 of the criminal Code, for which each of the aggravations shall be deemed as cause of a specific event.

It is not less important to remember that, in case of delegation by an employer of specific tasks (except, being understood, for those that cannot be delegated, such as that of the evaluation of risks), the transfer of functions to the delegates occurs, but it cannot be completely excluded a long lasting control obligation of the delegated persons.

As observed by the fundamental sentence on the subject of the non delegation of the obligation relative to the evaluation of risks (Cass., Section IV, 6 February, 2004, No. 4981, Ligresti): "it was reasonably excluded in the doctrine that this obligation also shall concern the detailed aspects of management, but it is not questioned the compliance with a monitoring duty on the general direction of management ... and it does not seem doubtful, that it refers to that general direction, therefore not the adoption of a single preventive measure to safeguard the health of one or more employees or the lack of intervention in one single production sector, but the overall company management safety".

Therefore "with the transfer of functions (as also in the delegation of functions) the content of the warranty position of the original person entrusted with it modifies and is only limited to the aforesaid control and substitutive intervention methods; in case the administrator does not fulfil these residual obligations and due to this omission, a harmful event takes place, fault will be linked to the non compliance with these obligations".

The conclusion is that “in a system based on a structure which excludes the possibility to delegate specific functions on safety, and that in any case it foresees a residual control obligation by those who originally had the role of employer, it cannot be assumed that there is an area of non-liability based on agreements, whether formal or not, or deduce a transfer of functions legally valid which do not include liability, thus relieving someone from criminal liability based on a private agreement”. (In compliance with Cass. 14 January, 2003, Macola; about the control obligation of the delegated party on the delegate, see for example Cass. 24 March, 2003 No. 13103; Cass. 14 January, 2003 No. 988; Cass. 20 December, 2002, Landi; Cass. 7 November, 2002 No. 37255; Cass. 10 October, 2002; Cass. 9 July, 2002 No. 26208; Cass. 14 May, 2002; Cass. 10 May 2001 No. 18996; Cass. 8 May, 2001; Cass. 7 December, 2000 No. 12773).

The fact that the functions of the employer cannot be delegated does not mean that “this cannot employ more competent or qualified persons in evaluating the risk and drawing up the risk evolution report, it means only that these tasks remain of the latter’s competence and the document is signed by him ... this persistence of the employer’s safety obligation, even in case that the latter resorts to external services to properly ensure prevention and protection inside the company, is set forth by paragraph 10 of art. 8 of Legislative Decree 626\1994 which expressly foresees that delegation does not relieve the employer from liability on the subject ... the employer shall evaluate the technical skills of whoever drafts the document, to previously evaluate the most significant risks inside the company, to check whether these risks were taken into consideration in the document, and if suitable solutions to prevent them have been proposed, and if the employer fulfils these obligations, he cannot be deemed liable of a wrong technical choice beyond the latter’s knowledge”: this allows to reconcile the principle of non delegation with the need to prevent violation of the principle of criminal liability, thus creating a criminal liability related to a “position” which would involve a case of objective liability” (always Cass., Section IV, 6 February, 2004 No. 4981, Ligresti).

In this particular case, sadly known for the eleven deaths in the hyperbaric chamber of the ‘Galeazzi’ nursing home in Milan, “the competent judges verified the absolute incorrectness of the risks evaluation document which did not even take into consideration the most serious risks of the hyperbaric therapy: that of fire”.

In addition, it incurs in the violation of art. 4 – paragraph 2 of Legislative Decree 626/94 of the employer who does not only omit to edit the risks evaluation document, but drafts it in an incomplete, insufficient or unsuitable manner.

Finally, the employer is also liable for the obligation to check that the precautionary measures contained in the document are actually carried out, as set forth by art. 4 – paragraph 5 letter f) of Legislative Decree 626/94 and as set forth with respect to delegation on the subject, the prohibition of delegations in sequence, ‘*delegatus delegare non potest*’.

Through this *escamotage*, in fact, a series of non controlled delegations is created, which annul the liability system foreseen by current laws, with the result that the employer and the delegated person would be entirely relieved from their liabilities, including the power-duty of control and

substitutive intervention, in favour of subjects who do not dispose of the necessary autonomy, means and resources to intervene effectively on the subject.

Sub-delegation in fact does not have the requirements deemed necessary by jurisprudence in order to acknowledge validity and efficacy of any type of delegation. The Court of Cassation states that, in order for a delegation to be valid in large sized companies, the decisional and financial autonomy of the delegate is required, which is a requirement that certainly does not incur in cases where there are predefined budget obligations

Turin, 12 November, 2006

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