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LIABILITY IN OFF-TRACK SKIING COMPETITIONS

- REPORT by Attorney Mario Porta -

Off-track skiing, as described by the pioneers at the beginning of last century, consists in the combination of two great mountain sports, mountain climbing and skiing. Two sports that integrate each other, since skiing in the presence of snow, was used as a means to approach the mountain in an easier way and therefore climb on its faces and ridges.

However, also in off-track skiing, as in other sports performed on the mountain, human weakness for competition found its outlet also in the organisation of competitions among single competitors or, as it happens more often, in teams. I used "also" because there has always been a certain competition on the mountain for conquering peaks or to be the first to climb on the mountain faces or ridges, but these were and are presently competitions among single individuals that have independently faced and are still facing the difficulties of a mountain, or a mountain face, for accomplishing for the first time a feat to which their name will be linked for ever.

While in the first case (that is to say, in competitions), the competition itself has no purpose, in the second case it is only the means for something much more important.

In the present report I obviously intend to deal only with the first type of off-track skiing competition, namely that which is organised and specifically that which concerns the relevant aspect in the sphere of law on liability with respect to these competitions.

There is no doubt that in these competitions there is not much left of the cultural-philosophical aspect of off-track skiing and the mountain in general, besides those related to the harshness of the environment in which they are performed, the solidarity in case of need not only, as it is obvious, among the

members of the same team, but also among different teams, and the agonistic sports aspect certainly prevails.

In my opinion, it is within this agonistic sports sphere that the implications and liabilities must be examined with respect to whoever participates in various ways to this sporting activity, keeping well into consideration the characteristics (environmental, equipment, etc.) that make it stand out.

The damaging events that may occur during sports activities are classified in the so-called "sports liability".

Basic, unifying, and characteristic principle of sports liability is the so-called "allowed risk", essentially distinguished by the fact that whoever practices a sport accepts to expose himself, even if within specific limits and margins, to events that may cause him damage.

The law studied the principle of allowed risk, of the acceptance of risk during sports competitions relative to the agonistic activity by those participating in it, so that the damages for which they are subjected and which fall within the normal risks of the specific sports activity, fall exclusively on the participants themselves.

In the theory of allowed or accepted risk, the precautionary rules cannot obviously be conceived based on traditional principles of predictability and accident prevention of the event, but must allow the performance of the sports activity, which is in any case a permitted activity, constitutionally recognised and protected, keeping at the same time the level of risk within acceptable limits that constitute the margins of allowed risk, the excess of which may be source a of liability due to fault.

Substantially, the sports offence which cannot be punished infers the consent of the claimant meant as acceptance of the risk related to the probability of being injured in relation to the type of sport and applies when the offending conduct is introduced in the context of a sports activity. Liability due to fault will be applied when the offending conduct exceeds the allowed risk and results in disregarding the physical integrity of others, while liability due to malicious intent will be applied when the competition only represents the occasion of the offending action.

I will not deal with the liabilities arising from competitors for damages caused to other competitors during an off-track skiing sports competition, which could in any case exist and generate juridical issues, but I will be dealing with the liability arising from the organisers of such competitions.

According to a fairly unanimous definition, the organiser is the subject (individual status person, legal status person, association, committee, etc.) who promotes the meeting between two or more athletes with the purpose of attaining a result in one or more sports disciplines, independently from the presence of spectators and therefore apart from a public show.

The organiser's liability can be applicable

- towards athletes
- towards other subjects who are not competing athletes but participants to the sport activity (referees, inspectors, etc.)
- towards third parties (spectators).

Before examining the liability and which is the necessary condition, the obligations of an organiser of an off-track skiing competition must be identified.

In brief, these obligations may be summarised as follows:

- **checking** the suitability and safety of the places and path in which the competition will take place;
- **checking** the adequacy, efficiency and compliance with the safety principles relative to the technical means used by the athletes (skis, fastenings, ski-boots, clothing, ARVA, ice axe, crampons, probe, shovel, rope, etc.);
- **checking** that the athlete is in suitable psycho-physical conditions for the competition.

Now, regarding the **psycho-physical conditions**, the organiser will only need a sport-medical certificate specific for the activity, while for the **equipment**, the organiser must inspect it before the competition, by proceeding with the relative punching in order to be able to inspect it also during the competition without prejudicing the athlete, and he may and must also check that the equipment is properly used for safety reasons (ARVA start-up, correct arrangement of rope, etc.).

Regarding the **suitability of places** and the safety of paths, the organiser must choose the path by arranging for those safety measures suitable to contain the risk within the limits relative to the specific off-track skiing sports activity: thus, he must take into consideration the conditions and the exposure of slopes for avalanche hazard, weather conditions, the situation of ice for any possible crevasses, adequately notifying the tracts on which to transit, the presence on ridges of narrow ledges and their suitability to transit, by arranging for equipment (ladders, etc.) in case the crevasse bridges do not give enough reliability on their solidity, properly position any necessary fixed ropes, report the presence of obstacles on slopes, make arrangements for schedules on the maximum time to be observed for the various passages (gate schedules).

The evaluation of these common hazards, in the harsh environment in which these competitions take place, is not certainly an easy task.

However, it is deemed that the suitability of the evaluation must be ascertained with an evaluation *ex ante* and not *ex post*.

Having said this, now we can examine the organiser's liability towards the various subjects involved.

Competing athletes

Regarding competing athletes, the acceptance of risk theory is undoubtedly extremely important; and the damages to which they have been subjected in case these are within the normal hazard linked to off-track skiing fall on the athletes themselves. The organiser must prove to have made the arrangements for those normal measures able to contain the risk within the limits of each single sport activity and therefore those measures that the cautious off-track skier would adopt in the absence of the competition.

In fact, in this case it must be taken into consideration how during a competition the off-track skier, who should be able to evaluate by himself the dangerousness of a path, to choose when and whether to fasten himself, to decide when removing the skis, to fit crampons, etc., humanly overlooks the evaluation of such risks and requirements by relying on what the organiser has assessed and disposed for him and therefore also assuming a role of guarantee towards him, also

because by not respecting the organiser's indications, the competitor may be penalised or obliged to abandon the competition.

The evaluation of the suitability of the precautionary measures must be carried out as previously mentioned *ex ante* and not *ex post*.

Other subjects who are not athletes but are necessary for the competition

In the same way as for athletes who are participating in a competition, precautionary measures must also be taken for all those subjects who are involved in the sport activity in different ways such as **inspectors, competition managers, referees, etc..**

The allowed risk theory must also be applied to them, since they are present on the competition field just as the athletes, not to compete but to render indispensable services, strictly related to the competition, and they are necessarily exposed to the risks linked to the competition that also apply to them such as, for example, that of risking to be run over by an avalanche or simply by falling athletes.

Moreover, very often the location is selected by them in order to carry out better their task of ensuring the good performance of the competition, compliance with the rules, correctness of behaviour and transparency of results.

Spectators

Finally, the **spectators** of off-track skiing competitions are not considered a welcome element by organisers, but these are enthusiasts that intend to follow the competition on the field and for whom the organiser does not have any power if not that to avoid their presence if it obstructs the participants or the subjects involved in the competition itself.

In other words, these are off-track skiers who move independently on the competition field and who must be able to take care of themselves as if the competition is not taking place and they must take into consideration that they cannot use the competition path at that moment and therefore they must independently and safely circulate at their own risk, outside the competition field or anyhow behave with respect for the competition in progress.

Think for example about the transit on a narrow ridge or on a crevasse area: spectators must give the right of way to competing athletes if it is not possible to transit through another area.

In this case the organisers' liability may subsist only if they allowed spectators to transit on the competition field or they did not highlight the presence of the competition to whoever is not a spectator but must pass by that area for other personal reasons.

Otherwise, it does not appear that there could subsist any liability by the organisers of an off-track skiing competition towards the spectators of the competition who could be off-track skiers themselves and who must circulate in such environments with adequate training, accepting as a matter of fact the additional risks, besides the ordinary risks, related to the performance of the competition and who wish to watch or are present on the tour path or mountain climb that was planned by themselves.

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While recognizing the limits of my present intervention, I appreciate the opportunity offered to me in giving my contribution for more space also to the legal sphere of my enthusiasm for the mountain and in particular for off-track skiing.

Attorney Mario Porta