

SAFETY OF SKIING AMONG THE OBLIGATIONS OF THE MANAGER AND THE REGULATIONS ON CIRCULATION

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1. PREAMBLE.

The subject of safety when practicing skiing, object of the present document, imposes, on a strictly legal level, facing and analysing the liability problem of the ski slope's manager in case of accidents on snow.

In particular, it concerns identifying on one hand the obligations burdening the manager, aimed at guaranteeing that the skiing activity takes place under safety conditions and, on the other hand, the behaviour rules with which the ski slope's user must comply with, in order to avoid damaging events both for himself and for others. This allows defining the limits of liability into which the manager may incur in case of injury on snow, for not having guaranteed such a safety level that instead must be present on ski slopes.

Therefore, we shall attempt to examine the subject of liability of the manager of ski areas without any presumption of being exhaustive, with respect to the prejudices that the skiers were subjected while performing the skiing activity, with particular focus on the penal profile.

Such an analysis, in order to be of practical use, cannot but proceed by a casuistical approach, which, by starting from the examination of jurisprudential sentences, allows outlining the boundaries of the "safety obligation" of the ski slope's manager.

For this purpose, two categories of skiing accidents appear appropriate of being distinguished, for which the manager of the ski area is often liable on the penal and civil level.

The first concerns offending events caused by the collision between two or more users of the ski slope, whether skiers, snowboarders or persons present on the ski slope that are not performing any skiing activity.

The second concerns instead accidents to which the user was subjected during the descending phase due to hazardous situations present on the ski slope, and not due to the incautious behaviour of another skier.

In both cases, the conduct of the manager stands out at an omissive level, for not having taken the necessary measures in order to guarantee that the skiing activity takes place under safety conditions,

and therefore, for not having prevented the occurrence of an offending event that he had the juridical obligation to prevent, in his specific capacity of warranty position. Nevertheless, it concerns ascertaining whether the warranty position of the ski slope's manager is extended so as to include the obligation to avoid that ski slope's users hold improper and incautious behaviours, which represent a source of danger for themselves and for the other persons who access the skiing area. Only in the case of a positive answer, in fact, the ski slope's manager can be called, on penal level, to answer for homicide offences or negligent personal injuries, together with whoever, with his own negligent conduct, caused the offending event, and on the civil level, to compensate for damages unjustly suffered by the third party.

2. PENAL LIABILITY.

2.1. THE SAFETY OBLIGATION OF THE MANAGER OF THE SKI SLOPE.

The ski slope's manager is undoubtedly holder of warranty position, in virtue of which he can be liable for homicide offences or negligent injuries, for not having prevented the occurrence of the offending event – the death or the personal injuries of a skier - that had the juridical obligation to prevent, provided that it is possible to accuse him for fault.

The warranty obligation of the ski slope's manager consists in the control over a specific source of danger, which is the ski slope, in order to protect all juridical assets exposed to it¹. The control position of the ski slope's manager is based on the existence of organization and enforcement powers relative to the source of danger, which falls within its sphere of belonging².

Since the source of danger falls in his sphere of belonging, the ski slope's manager finds himself in a situation that allows him to exercise an actual power towards such source, in order to neutralise the dangerous situations that might arise for third parties. It is due to the circumstance that the source of danger falls in the sphere of belonging of the warrantor, justifies the assumption at his charge of a control obligation³: on one hand, he has the actual power to rule over an object from

¹ Regarding control obligations, see for all: FIANCADA G.-MUSCO E., *Diritto penale* (Penal law), pt. gen., Bologna, 2007, page 551; GRASSO G., *Il reato omissivo improprio* (The inappropriate omissive offence), Milan, 1983, page 293; LEONCINI I., *Obbligo di attivarsi, obbligo di garanzia e obbligo di sorveglianza* (Obligation for getting started, obligation for warranty and obligation for supervision), Turin, 1999, page 96; MANTOVANI F., *Diritto penale* (Penal law), pt. gen., Padua, 2001, page 181; MARINUCCI G.-DOLCINI E., *Manuale di diritto penale* (Manual of penal law), Milan, 2006, page 179; PALAZZO F., *Corso di diritto penale* (Course of penal law), pt. gen. Turin, 2006, page 267; PULITANÒ D., *Diritto penale* (Penal law), pt. gen., Turin, 2005, page 268; ROMANO M., *Commentario sistematico del codice penale* (Systematic commentary of the penal code), Milan, 2004, page 386.

² As shown: LEONCINI I., *Obbligo di attivarsi, obbligo di garanzia e obbligo di sorveglianza* (Obligation for getting started, obligation for warranty and obligation for supervision), statement, page 96; ROMANO M., *Commentario sistematico del codice penale* (Systematic commentary of the penal code), statement, page 386.

³ The legislative ground of the above mentioned warranty position is generally found in article 2051 of the civil code, which establishes the extra-contractual liability for damages caused by objects in custody: it is based on the property, possession, custody, or detention of specific objects, which may constitute danger for third parties. As shown: MANTOVANI F., *Diritto penale* (Penal law), pt. gen., statement, page 181; PALAZZO F., *Corso di diritto penale* (Course of penal law), pt. gen., statement, page 267; PULITANÒ D., *Diritto penale* (Penal law), pt. gen., statement, page 268; ROMANO M., *Commentario sistematico del codice penale* (Systematic commentary of the penal code), statement, page

which dangers to third parties may derive, and on the other hand, third parties cannot adopt appropriate safety and protection measures of their own assets, without falling into someone else's juridical sphere⁴.

The ski slope's manager therefore, as holder of a control position, has a safety obligation of preventive character, in the sense that he must take measures to make the ski slope safe, so as it does not present dangers for third parties that come in contact with it⁵. Nowadays, the warranty obligation of the manager finds ground also in law No. 363/2003 which in dictating "regulations on safety when practicing winter downhill run and cross-country skiing sports", in articles 3 and subsequent, it identifies the obligations of the managers of ski areas. The regulation in particular foresees that *managers ensure to users, the practise of sports and recreational activities under safety conditions ... managers have the obligation to protect users from obstacles located along the ski slopes, by using appropriate protections for them and a signalling system that warn about a dangerous situation.*

Article 3, first paragraph, of law 363/2003, establishes for the manager, a general obligation to protect users, which is articulated in the following regulations, in a series of complementary obligations. As shown, the second paragraph of article 3 establishes the obligation to ensure the rescue and transport of the injured along the ski slopes; article 5 obliges the managers of ski areas to exhibit documents relative to the classification of the ski slopes, the signalling system and the rules of conduct foreseen by the same law, guaranteeing proper visibility; article 6 obliges the manager to make arrangements for a proper signalling system; the first paragraph of article 7 foresees the obligation to provide ordinary and extraordinary maintenance of the ski areas; the second paragraph of the same law establishes that, *in case the ski slope presents unfavourable ground conditions, these conditions must be made known. Should the conditions present objective hazards depending on the ground condition or other atypical hazards, these must be removed, or the ski slope must be closed. The manager has the obligation to close the ski slope in case of danger or non practicability.* The law also specifies that the signalling system concerning the condition of the ski slope or its closing must be located in such a way so as to be well visible to the public, at the beginning of the ski slope and also at the stations located at downstream of the cable-way facilities.

386. On the obligation of warranty of the manager, see: pen. Cass., section IV, 21 June 2004, Marchelli, in CED Cass. No. 229073, according to which there subsists the warranty obligation, certainly due to the evolution of the skiing activity as a mass sport and relative submission to the market and the competition laws, which broadened the obligation of the manager of ski lifts to provide additional services, constituting a package of services in addition for the mere transport from valley to the top and concern the entire activity of the user, such as arranging for snowgroomed, snowy ski slopes, even if it should be necessary of the artificial type, equipped with the necessary safety measures

⁴ As shown: GRASSO G., *Il reato omissivo improprio* (The inappropriate omissive offence), statement, page 320.

⁵ GRASSO G., *Il reato omissivo improprio* (The inappropriate omissive offence), statement, page 320; LEONCINI I., *Obbligo di attivarsi, obbligo di garanzia e obbligo di sorveglianza* (Obligation for getting started, obligation for warranty and obligation for supervision), statement, page 99.

The safety obligation which is incumbent on the ski slope's manager as holder of a control position as mentioned previously has preventive character in the sense that it consists in rendering the ski slope safe, so as not to present dangers to third parties that come in contact with it. This obligation can take up various meanings in reality: according to the seriousness and entity of the existing hazardous situation. The manager can comply with the safety obligations by only signalling in an appropriate manner, the danger to users, or he may remove the source of danger, in case that mere signalling is not sufficient to guarantee the safety of the attendees. In case this is not possible, the manager must close the ski slope.

With this regard, it must be observed that the Council of Ministers is examining a draft bill which includes changes to law No. 363/2003 on safety when practicing winter downhill run and cross-country skiing sports. With reference to the obligation of protection burdening the manager of the ski area, the draft bill aims at introducing some novelties. In particular, article 1 of the draft bill was initially introducing, at the second paragraph of article 3, the rule that *managers shall ensure that a supervision service must be provided in the ski areas in order to prevent conducts in violation with the behavioural regulations established by the present law*. It then established, with the introduction of two additional paragraphs, that managers, in order to fulfil the obligation set forth by paragraph 2 (concerning supervision, rescue and transport of injured persons) could stipulate suitable agreements with public or private subjects, having as object the supervision service in ski areas; the rescue activity could have also been foreseen in the said agreements. In these agreements, it could have also been foreseen the testing of an electronic system for the identification of skiers, the registration of inflicted sanctions, video-monitoring of ski slopes also for the purpose of preventing violations of the provisions set forth by the present law.

The new text of the draft bill currently foresees that the Regions and the autonomous Provinces of Trento and Bolzano represent specific figures for which to entrust rescue and supervision tasks, subject to previous agreement with the managers, also with the purpose of inflicting sanctions ... In order to improve the rescue and supervision services in Alpine ski areas agreements can be signed between managers and State Police, Corps of Forester, Italian Army Police Force, and Customs Service Police. In the absence of the latter or in the presence of subjects in a number lower than what set forth by the inter-ministerial decree, the managers of ski areas ensure the performance of the supervision and rescue tasks also through their staff.

In the opinion of the present writer, the expectation regarding to the supervision obligation which is incumbent on the manager definitely raises perplexity, having as object improper and incautious behaviours of ski slope's users rather than the presence of sources of danger of the ski slope that the manager himself has the duty to point out and remove. The expectation of a supervision duty aimed

at preventing conducts which violate conduct regulations established by law, in fact, poses the problem of acknowledging the manager's liability in case of non compliance with the said obligation with the risk to erroneously state this liability in the hypothesis in which accidents on snow occur due to the incautious behaviour of skiers. It must not be forgotten in fact that, in order to be able to deem the ski slope's manager liable for a control obligation towards whoever causes an accident through his incautious conduct – and therefore in order to recognize his liability as offence of omission with respect to such an event - the manager must hold an obstructive and enforcement power on the skier and on the situation of danger that the latter has created.

The draft bill instead, foresees on one hand a supervision obligation for the ski slope's manager and on the other hand, does not confer him actual and concrete obstructive powers towards the improper and incautious behaviours of skiers which such obligations should aim at preventing. It only establishes, with the addition of further paragraphs to article 21 of law No. 363/2003 – which conferred the task to perform the supervision and rescue service in ski areas, and also to verify the compliance with the provisions set forth by the same law and to inflict the relative sanctions on subjects in default, only to State Police, the Corps of Forester, the Italian Army Police Force, and the Customs Service Police - that the Regions and the autonomous Provinces of Trento and Bolzano represent specific figures to which entrusting rescue tasks, subject to previous agreement with managers, in order to perform supervision tasks and inflict sanctions and that the subjects in charge to perform supervision activities, lacking the qualification of public officers, are assigned immediate contention and collection powers, and also powers to draw up and undersign the relative survey as set forth by articles 2699 and 2700 of the Civil Code.

Paragraph 3 *bis* was also added to article 5 of law No. 363/2003, according to which *the managers shall display the bulletins relative to avalanche hazards issued by the Meteomont Service of the State Corps of Forester or the Italian Alpine troops on a daily basis, as well as those drawn up by the existing regional and local structures.*

2.2. JURISPRUDENTIAL CASES.

Several accidents on snow occur during the descending phase due to situations of danger present on the ski slope. The competent judges in charge of said subject must ascertain in these cases the penal liability of the ski slope's manager for not having prevented the accident - death or personal injuries of the skier - which had the legal obligation to prevent. Therefore, the entity and content of the warranty obligation of the manager must be defined in order to establish if, in the actual case, the latter violated the protection duty which is incumbent on him, or the accident exclusively occurred in violation of the conduct rules for which the skier should have complied.

Needless to say that in the competent jurisprudence the warranty obligation of the manager is that of ascertaining the absence of dangers on ski slopes, thus guaranteeing the safety of whoever uses them. Outside from the ski slope framework, the manager does not have any power on the possible sources of dangers for third parties, neither any power of organisation, intervention and supervision on them, therefore he does not have any duty to prevent the occurrence of accidents towards third parties.

As a consequence, it is not possible to define any protection obligation incumbent on the manager of the ski area, towards skiers who abandoned the outlined ski slope or that erroneously or without realising it, ended up outside the ski slope, for example due to excessive speed or lack of care. The snowy ground that is located outside the ski slope in fact, is not under the control of the ski slope's manager, with the consequence that the latter is not the warrantor or the legal assets exposed to eventual hazards that such ground may present. This is also valid in case the skier ended up outside the ski slope, starting from an outlined slope or using the ski-lifts that service it, provided that the ski slope and its boundaries are sufficiently delimited, either by the natural conformation of places or by the signalling system arranged by the manager.

Today, this is also stated under article 17 of law 2003 No. 363, according to which the *licensee or the manager of ski-lifts are not liable for accidents that may occur in paths outside the ski slopes, served by the same facilities.*

With respect to the path outside the ski slope, the manager therefore does not hold any control position, with the consequence that no safety obligation can be attributed to him since he is not obliged to monitor possible sources of danger, arrange measures to neutralize them and prevent skiers and excursionists that come into contact with them from being subjected to accidents. To this effect, it was expressed by Pen. Cass., section IV, 21 June 2004, Marchelli, in CED Cass. No. 229073, according to which the danger to be prevented, object of the warranty position of the manager of the ski lift, is that within the ski slope. There is no general protection obligation incumbent on the manager imposing him to arrange protections everywhere, so as to prevent accidents, even where these may occur outside the ski slope. In general, it must be deemed that the ski lift's manager must guarantee safety on the ski slope through constant snowgrooming and maintenance, so as to retain the technical - morphological features on which the license was based for being granted and to avoid the presence of insidious dangers and traps. Nevertheless, this concerns the internal safety of the ski slope, therefore it is not of an absolute type since skiing is performed in a scenario which is in any case dangerous, since paths are surrounded by trees, rocks, steep slopes, which constitute typical hazards, since they depend on situations present in nature, and they are also close to woodland and rocky countryside, or to areas having oreography of this type.

As a consequence, the skier's protection terminates at the edges of the ski slopes, especially when this is sufficiently wide to allow a safety descent, since it is possible to expect that the entire path should be surrounded by protective fences, since no regional regulation foresees such a provision. The manager must then prevent those physically external dangers to ski slopes, that could be incurred when exiting from the ski slope, only in case the condition of places is such to expect going outside the ski slope, due to the natural conformation of the path, facilitated by the snowgrooming of the slope until the edge (in this case, the ski slope, snowgroomed until the edge, was causing slipping since no protection fences were present, due to the inclination at the edge, in case a skier would lose control).

Similarly, see: Court of Trento, 8 November, 2000, No. 391, that acquitted the manager of a ski slope from the offence set forth by article 589 of the penal code, who had been sued for not having placed fences or a signalling system in order to avoid access to skiers on a small road used for the regular transit of run-tracers. The manager, according to competence judges, was not liable for the death of a skier, who wandered and fell of a cliff, due to the characteristics of the small road and to the fact that the snow was not snowgroomed; therefore no skiers could have mistaken it for a ski slope.

By carefully reading the competent law, it can be stated that the control obligation - which is the view of the warranty position of the ski slope's manager - concerns atypical dangers, therefore those that the skier is not expecting to find, therefore different from those inborn to such hazardous *quid* typical of the skiing activity. According to the law, there is no general protection obligation burdening the ski slope's manager, that imposes him to arrange protections everywhere, so as to prevent accidents: it is deemed that the manager must guarantee safety on the ski slope, through constant snowgrooming and maintenance, so as to retain the technical-morphological characters based on which the license was granted and that no traps and dangers shall be present. Therefore this is not safety of absolute type since skiing is performed in a scenario which is in any case dangerous, since paths are surrounded by trees, rocks, steep slopes, which constitute typical hazards, since they depend on situations present in nature, and they are also close to woodland, rocky countryside, or to areas having oreography of such a type. The measures that the manager must take cannot therefore disregard the technical characteristics of the ski slope and the preparation of the skiers that usually use it, therefore he shall only remove those characteristics that represent a trap or hazard or those situations of dangers higher than the common, to which the skier accepts to expose himself.

The skier is liable of typical dangers, such as rocky countryside, woodland, small streams, while the manager must point out or neutralise those macroscopic hazards or those which can be hardly

overcome, such as particularly narrow turns close to a cliff, sudden closures, obstacles located in the middle of the ski slope⁶.

As shown, Pen. Cass.. Section III, 13 June, 2006, No. 20214 confirmed the sentence of the manager of a ski slope for having caused serious personal injuries to a skier with permanent consequences, due to fault, for not having complied with the provisions of the consulting technical Commission of ski slopes, according to which “a barrier should have been placed in order to force the skier to stop before crossing the bridge”. In particular, the safety system arranged before the bridge consisted of wooden poles stuck in the snow and crossed with orange meshes, so as to direct skiers to the bridge and force them to slow down. Nevertheless the poles arranged by the defendant to signal the bridge did not constitute a suitable barrier to prevent that the damaged party would fall over the bridge, thus getting personally injured, since they were located at the two ends, two or three metres above ground, through which in fact the skier had passed through, falling off the bridge.

The Supreme Court therefore deemed proven the causality link between violation and accident, while the negligent conduct of the skier (excessive speed) was not considered as exclusive cause of the event, or cause that could have been enough to determine the event and therefore interruptive of the causal link as set forth by article 41, *capo verso*, penal code. The Court deemed that such negligent conduct should have been considered only for the purpose to refund the damage as set forth ex article 1227 of the civil code.

Pen. Cass., section IV, 27 October 2005, No. 39366 confirmed therefore the sentence of the ski slope’s manager for the offence of negligent homicide, for not having protected in a suitable manner, with the required protection “V” mesh, which consists of a pole located on the same ski slope, having protrusions and iron obstacles made with anchoring bolts, for not having placed the required rubber mattress at the base of the said pole (which was therefore "tilting") and also for not having snowgroomed the ski slope also in the vicinity of the above mentioned pole. The Court proved the causal link between the defendant’s conduct and the death of the skier, pointing out the situation of danger linked to the unsuitability of the safety measures envisaged, and to the lack of suitable protection for the chair lift’s pole, against which she collided after falling on the ski slope.

The competence judges deemed that the double proven circumstance – synergic to the cause of death – constituted on one hand, by having used the ski slope at the utmost, by not having excluded the area in which the cableway's pole in object was located, and on the other hand, by not having protected the poles of the cableway with “V” mesh, concurred to the claimed negligent conduct.

⁶ To this effect, expressly: pen. Cass., section IV, 21 June, 2004, Marchelli, in CED Cass. No. 229073.

The Court of Trento, detached section of Cavalese, 17 January, 2000, No. 5 sentenced the manager of the ski lift for the offence of personal injuries, since he had omitted to provide suitable maintenance to the ski slope, by not arranging for a proper signalling system and protection measures nearby the crevasse, thus causing a skier to go off the slope with serious personal injuries consequent to falling.

The Court of Appeal of Trento, 12 March, 1999, No. 151 sentenced for the offence of negligent personal injuries, the manager in charge of the maintenance of the ski slope, since he did not suitably isolate or properly signal a sudden depression, so as to cause a skier to fall who, also due to scarce visibility, was unable to see the obstacle.

The Magistrate of Trento, Cles section, 6 December, 1995, No. 127 sentenced, for the offence set forth by article 590 of the penal code, the manager in charge of the maintenance of the ski slope, who did not isolate suitably or properly signal a sudden depression location in the slope's junction, causing a lady skier to fall with said negligent behaviour who, due to the scarce visibility, did not see the obstacles and was seriously injured. The Judge clarified that it cannot be expected that every ski slope shall be equipped with protection meshes that outline that ski area, with the so called "out of ski slope", but that in any case, common caution and diligence imposes that situations of obvious danger must be rendered visible and preventable by the subject who runs the circuit for the practice of skiing activities.

The Magistrate of Trento, 6 May, 1991, No. 31, deemed that the manager of the ski slope who did not provide for covering a water pipe for artificial snowfall located on the side of the ski slope was liable according to article 590 of the penal code, who did not prevent a skier who lost control of her skis, to collide against it and be injured.

The Court of Roverete, 11 July, 2002, No. 287 and the Court of Appeal of Trento, 16 December 1998, No. 678 deemed the manager of a ski slope liable for not having covered an iron pole with the mesh outlining the ski slope, against which a skier collided and died due to the impact.

From the analysis of the legal sentences, it arises that in general, the liability of the ski slope's manager is limited only to the hypotheses in which situations of atypical danger are present, which are not inborn in the skiing activity. Only in the presence of situations of hazard greater than those common, to which the skier accepts to expose himself when he decides to practice the skiing activity, the manager has the obligation to envisage precautionary measures in order to render the ski slope safe.

In particular, as previously seen, the liability of the manager of the ski area is acknowledged when there are artificial obstacles on the path of the ski slope (pylons of a ski lift ascent, artificial snow producing equipment, etc.) which are not properly signalled or protected, against which the skier

may collide. In case of natural obstacles, the manager is liable only if these exceed the risk threshold inborn in the skiing activity, keeping into consideration that skiing is performed in a scenario which is in any case dangerous, since paths are surrounded by trees, rocks, steep slopes, which constitute typical hazards since they depend on natural conditions. Natural obstacles fall within the inborn dynamic of skiing, representing an inborn risk when descending, that the skier accepts when deciding to practice this sport activity. As a consequence, no precaution is needed regarding obvious hazards that the skier is able to face⁷.

A mere ice slab, the presence of debris, cat's backs and bumps, a section of slope not suitably snowgroomed or with scarce snow cover, fall within the normal natural conditions of the ski slope, which the skier must take into consideration.

The duty to prepare and carry out maintenance to a ski slope and arranging suitable safety systems cannot be compared to the degree of difficulty related to the ability of users to whom it is advised.

To this effect, observe the Court of Trento, 5 December, 2001, No. 522, which acquitted the manager of a ski area from the offence of negligent homicide for which he had been sued, for not having pointed out and prevented access to a difficult facility to a young skier, who had slipped and died after colliding against an anti-avalanche barrier. The non punishableness derives, according to the reconstruction of the Court, from having pointed out the difficulty of the ski slope. And in fact, in this case, the minor went on a ski lift, reserved for expert skiers, with his family. Once lost the ski-lift hook he was frightened and fell at about one metre and a half from the ski-lift where his mother went to help him and took off the ski from his foot. The child lost balance and rolled over along the slope ever steeper, passing beside the first anti-avalanche protection, then colliding against the second and third and consequently dying. With respect to the causality link, the fall towards the bottom was not due to the unhooking of the child from the ski-lift, but to his mother's attempt to help the child by removing the ski that had remained attached to the child's foot. Regarding the physiological element, if the parents deemed appropriate to bring their 6-year old child on that ski-lift, and not for the first time (where a sign was present giving warning of access to whoever was not an expert skier, and another sign indicating a 60% slope), the Judge does not see the reason why this assumption, deemed correct by the parents, should be taken as a fault for the ski lift's manager. Since no causality link is present between the defendant's conduct and the event, since no imputable psychological profile can be outlined, the Judge pronounced a sentence of acquittal.

⁷ On the contrary, see: Court of Rovereto, 9 June, 1999 No. 167, according to which the managers of ski slopes have the obligation to eliminate or limit in an acceptable manner all dangerous situations, including those which are perfectly visible, without being able to rely in the adoption of possible caution by skiers. In some cases and within certain limits, the lack of adoption by skiers of prudence and diligence must be expected, so that managers must also take this into consideration when adopting safety systems.

With respect to the possible concurrence of fault by the damaged party, the law, as previously stated, deems that the incautious conduct of the skier - who, for example, goes at an excessive speed compared to his skills, and to the conditions and degree of difficulty of the ski slope, or skis on a slope which is not suitable for his technical skills - does not constitute sufficient condition to determine the event alone as interruptive of the causal link set forth by article 41 *capo verso* of the penal code and neither a fortuitous event. As a consequence, the eventual conduct of the injured skier in violation of precautionary conduct rules does not exclude the liability of the ski slope's manager, in case it is ascertained that the negligent nonfulfillment of the obligation would have prevented the occurrence of the offending event.

Observe, for example, the Court of Appeal of Trento, 7 July, 2004 No. 349, which sentenced the manager of a ski slope for negligent homicide, for having caused the death of a minor skier who violently collided against the iron structure of the barriers at the bottom of the ski slope. In this case, the Court acknowledged that the behaviour of the minor was imprudent – since he descended the ski slope at a speed which was not suitable to the control capacity of the skis - inexperience - since he was not able to perform a quick stop manoeuvre - and non compliance with the regulation, which imposed to maintain a fairly moderate speed at the end sections of the ski slopes and in the vicinity ski lifts' stations. The event would have not occurred if the parent that was following him on the ski slope and had the task of monitor him would have taught his son to avoid the risk of losing control of his skis due to high speed. Nevertheless, according to the appeal judges, the omission of the parent did not exclude on a causal level, the concurrent omission claimed towards the ski slope's manager, since a suitable protection of the barrier would have avoided the death of the child and would allow stating therefore that the negligent supervision of the parent would have not caused alone the death of the child.

2.3. LIABILITY OF THE MANAGER IN CASE OF ACCIDENTS ON SNOW CAUSED BY THE COLLISION BETWEEN TWO OR MORE USERS OF THE SKI SLOPE.

The warranty obligation which is incumbent on the manager of the ski slope imposes him, within the limits that were outlined in the previous paragraphs, to arrange for the necessary measures in order to make the ski slope safe, so as not to present hazards for third parties that come into contact with it. The warranty position of the ski slope's manager is not extended in such a way as to cover the obligation to avoid that ski slope's users may hold improper and incautious behaviours, that may constitute a source of danger for them and other persons who access the ski area. As a consequence, the ski slope's manager is not liable for homicide offences or negligent personal injuries, in concurrence with whom caused the accident due to his negligent conduct.

First of all, the ski slope's manager has not warranty obligation with respect to the prevention of illicit actions carried out by skiers.

This warranty position in fact, depends on the circumstance that whoever commits the illicit action is not able, or lacks the necessary requirements, to control his behaviour in a responsible manner, with respect to the specific activity undertaken, and is subject to the warrantor's control and supervision power. In particular, the obligation to prevent third parties' offences is characterized by the fact that the warrantor has interference and inhibition power in relation to a third party's conduct, which constitutes ground and external limit of this warranty position. The non preventive omission can be equated to the causal action only if to the juridical obligation of preventing the event correspond actual preventive powers.

Instead, the ski slope's manager does not have the power to interfere and inhibit the behaviour of the single skiers that undertake the skiing activity thus assuming full liability.

It must be reminded also, in terms of subjective element, that in the hypothesis in which the conduct of the single subject interferes with that of other subjects, the determination of the actual rule of diligence to observe in the actual case depends on the so-called entrusting principle, in view of which each subject is not forced to adapt his conduct in relation to the risk of others' negligent conducts, relying on the circumstance that others will act legally, in compliance with the diligence obligations which are incumbent on them⁸.

These considerations justify the attitude of jurisprudence that, in ski accidents caused by the negligent conduct of ski slope's users, and not by sources of dangers present on it, far from questioning the liability of the ski slope's manager, questions which of the skiers involved in the accident is liable for having caused, with his incautious behaviour, the offending event.

However, there are cases in which, in view of accidents on snow caused by the improper behaviour of ski slope's users, gave rise the problem of the concurrent liability of the ski slope's

⁸ As shown: ALBEGGIANI, *I reati di agevolazione colposa* (Offences of culpable facilitation), Milan, 1984, page 156, the Author observes that, while for activities directly dangerous towards a specific legal asset, the ability of foreseeing the accident is sufficient to raise diligence obligations, for activities that may cause damage through an illicit behaviour of a third party; the simple ability of foreseeing it cannot be ground of fault since the general rule is to rely on the fact that each person is compliant with the diligence obligations. Regarding the entrusting principle, see: MANTOVANI F., *Colpa* (Fault), in *Dig. disc. pen.*, vol. II, Utet, 1988, page 311; MANTOVANI F., *Diritto penale* (Penal law), pt. gen., Padua, 2001, page 353; MANTOVANI M., *Il principio di affidamento della teoria del reato colposo* (The principle of entrusting in the theory of culpable offence), Milan, 1997; MARINUCCI, *La colpa per inosservanza di leggi* (Fault for nonfulfillment of laws), Milan, 1965, page 199; DI GIOVINE, *Il contributo della vittima nel delitto colposo* (The contribution of the victim in the culpable crime), Turin, 2003, page 120; BLAIOTTA, *La colpa* (The fault), in penal code, article 43, by Lattanzi-Lupi, Milan, 2000, page 326; FIANDACA-MUSCO, *Diritto Penale* (Penal Law), pt. gen., Bologna, 2002, page 499; FIANDACA, *Omicidio colposo per imprudenza professionale del giornalista?* (Culpable homicide by the professional imprudence of the journalist? in *Foro. It* (In Forum. Italy)., 1982, II, c. 245; PALAZZO, *Diritto penale* (Penal law), pt. gen., Turin, 2005, page 301; PAGLIARO, *Imputazione obiettiva dell'evento* (Objective indictment of the event), in *Scritti in memoria di Dell'Andro* (Writings in memory of Dell'Andro), Bari, 1994, page 642; PULITANÒ, *Diritto penale* (Penal law), pt. gen., Turin, 2005, page 384; CADOPPI-VENEZIANI, *Elementi di diritto penale* (Elements of penal law), pt. gen., Padua, 2004, page 303.

manager for not having prevented the offending event caused by the skier with his negligent behaviour.

As an example, it must be observed the sentence of the Court of Avezzano on 14 March, 2005. In this case, the damaged party went to a ski facility in Ovindoli, La Magnola, with her family. Her husband went to ski and she remained at the bottom of the ski slope with the small daughter. While she was standing at the edge of the ski slope, a ski hit her and wounded her left knee. After the accident, the skier whose ski had detached was blamed for the offence of personal injuries for not having verified the proper functioning of the halting system of his skis, and the legal representative of Monte Magnola Impianti Srl, who was blamed for not having equipped the terminal side of the ski slope “Canalone” in Ovindoli, managed by himself, with a system suitable to prevent skis which would unhook and fall towards the valley, from hitting persons located outside the ski slope.

By overlooking the skier’s position who with his positive conduct, had actually caused the offending event, with reference to the position of the manager of the ski slope where the accident occurred, it must be observed that the latter was blamed for having omitted to position a protection system suitable to avoid that persons located outside the ski slope would suffer damages.

The Court acquitted the ski slope’s manager since it deemed that, once arranged the protection measure to safeguard skiers and warned the public about the prohibition to access and transit ski slopes for pedestrians - prohibition set forth by article 16, Law 363/03-, he did not have the obligation to envisage a supervision and control system to enforce such prohibition, neither a protection system aimed at preventing accidents to the physical well-being of persons that, in violation of rules of common prudence and of the rule foreseen by article 16, Law 363/03, either transit or walk on the ski slope or in its vicinity. In particular, the Court deemed that the exclusive fault of the accident that took place, and consequent to which the skier was subjected to personal injuries, was attributable to the incautious conduct of the latter who, in violation with the rules of common prudence, of the rule foreseen by article 16, Law 363/03, concerning access and transit prohibition signs affixed by the manager of the ski-lift and ski slope to warn users, was standing at the edge of the ski slope itself, while the defendant could not be blamed for having violated precautionary conduct rules.

It must be observed to this effect that law No. 363/2003, paragraph III, dictates a series of provisions concerning conduct rules with which the users of the ski area must comply, foreseeing specific duty of prudence and diligence to observe when practicing the skiing activity.

The draft bill referred in previous paragraphs, intends to bring about important modifications also to paragraph III of law No. 363/2003, extending the duties of prudence to the users of ski slopes and further specifying their content.

In particular, article 9 of law No. 363/2003 must be taken into consideration, which it establishes that skiers must hold a conduct that, based on the features of the ski slope and environmental conditions, does not constitute danger for the safety other persons. The second paragraph then dictates some specific requirements in terms of speed, imposing that this must be particularly moderate in scarcely visible tracts, in the vicinity of buildings or obstacles, crossing, junctions, in case of fog, haze, scarce visibility or crowding, narrow passages or in the presence of amateurs. Article 8 of the draft bill adds an additional paragraph to article 9, establishing that each skier must hold a speed and specific conduct based on prudence, diligence and carefulness, suitable to his/her skills, type of ski slope, signalling system and existing safety requirements, and also to the general conditions of the ski slope, visibility, weather and traffic intensity. Skiers who are not familiar with the skiing technique, cannot access ski slopes classified as difficult.

In law No. 363/2003, specific conduct rules are dictated relative to right of way, passing, behaviour to hold at crossing or in case of stopping. A general prohibition to walk on the ski slope is foreseen, except in cases of emergency.

The draft bill also provides, in addition to pecuniary sanctions, to inflict to the users of ski areas that violate provisions set forth by law, also the possibility that the transit right be withdrawn, in case of particular serious violation or reiteration of the law.

The conduct rules with which users of the ski slope must comply with have the purpose to clearly protect; therefore they aim at preventing and avoiding the occurrence of accidents when practicing skiing. There is no doubt that their explicit and specific regulation confirms and strengthens the previously explained solution, regarding the manager's liability for injuries on snow that occur due to the improper and incautious behaviour or single skiers.

Should a skier cause a damage to himself or others when performing the skiing activity, exclusively due to the violation of the conduct rules foreseen by law No. 363/03, in addition to rules of common prudence, the ski slope's manager is not liable jointly.

3. BRIEF CONSIDERATIONS ON THE SUBJECT OF CIVIL LIABILITY OF THE MANAGER OF THE SKI SLOPE.

Regarding civil liability, the law and traditional jurisprudence, as is well-known, distinguished according to whether the accident in which a user of the ski slope was subjected to damages occurred during the transport on top of the mountain or during the descending phase. In the former case in fact, the manager holds a contractual liability, while in the latter case, the liability is mainly considered as extra-contractual⁹.

⁹ Part of the most recent doctrine, followed by some jurisprudential sentences, deems that manager's liability has contractual nature also with respect to skiing accidents that occurred while descending. It must be pointed out that, in this document, no position is taken with respect to the definition of the so called *ski pass* agreement and consequent

The prevailing doctrine and jurisprudence deem that the civil liability of the ski slope's manager is based on the violation of the *neminem laedere* requirement set forth by article 2043 of the civil code with the obvious consequences regarding the sharing of the burden for supplying proof. The skier, who subjected to damages when performing the skiing activity, must not prove only the existence and the entity of the damage, to which he/she was subjected, but also its source, in etiological terms, the conduct of the ski slope's manager and the fault of the latter.

Nevertheless, recently, some sentences of the Supreme Court referred to article 2051¹⁰ of the civil code with respect to the liability of the ski slope's manager for injuries occurred during the descending phase, as objects in custody.

According to the Court of Cassation, the liability of the ski lift's manager on a ski slope must be ascertained by verifying the actual dangerousness of the system and considering the fortuitous event that, according to article 2051 of the civil code, excludes the manager's liability and may also consist of the negligent behaviour of the damaged party. Notwithstanding that the competent judges welcomed the reconstruction of the claimant and admitted the abstract traceability of the liability of the ski slope's manager for accidents occurred on it, article 2051 of the civil code nevertheless confirmed the sentence of the court of appeal which instead deemed applicable the specific case provided for by article 2043 of the civil code. The Supreme Court in fact, deemed in any case to exclude the manager's liability, due to the lack of causal link between object and event, since this occurred only due to a fortuitous event, provoked by the incautious and negligent conduct of the victim¹¹.

It is considered that the recent legal trend, which tends to link the liability of the ski slope's manager to the guardian's liability, cannot be taken as sound.

Indeed, in order to apply the presumption of which under article 2051 of the civil code, three assumptions are required: a) that the claim for compensation for damages be addressed towards the "guardian" of the object; b) that the damage is not caused by a third party or by the damaged party; c) that the claimed damage must have been caused by the "object".

Therefore, it is necessary that each of these three elements must be examined to ascertain if these are present in the specific case, constituted in fact by the liability of the manager for accidents on snow which occur during the descending phase.

contractual nature of the manager's liability also for accidents that occur when descending. It should be observed, to this effect, the report dealing with the manager's civil liability.

¹⁰ To this effect: Civ. Cass., Sec. III, 10 February 2005, No. 2706; Civ. Cass., Sec. III, 18 January 2006, No. 823; Civ. Cass., Sec. III, 6 February 2007, No. 2563.

¹¹ As shown: Civ. Cass., Sec. III, 18 January 2006, No. 823; Civ. Cass., Sec. III, 6 February 2007, No. 2563.

As is well known, the guardian of the object is not only the owner, but whoever exercises a “*de facto*” power on said object. There is no doubt therefore that the ski slope’s manager, for the previously mentioned reasons, must be considered as the guardian, according to article 2051 of the civil code. Therefore in this case, the first of the tree aforementioned requirements is present.

Secondly, it must be established if the accident was exclusively caused by the conduct of the damaged party or of a third party.

In case of accident on snow, the conduct of the damaged party often did not cause the accident in an exclusive manner. In fact, falling does not cause injuries, but the fact that this is in turn determined by the source of risk present on the ski slope (for example, by referring to the cases dealt by the Supreme Court: the existence of a fence supported by wooden, not padded poles, the presence of a masonry building).

Once the existence of two of the tree assumptions required for applying article 2051 of the civil code is ascertained, the existence of the third and most important element of the case must be established, or if the damage was caused not “with the object” but “by the object. This requirement is present when the object in custody does not fall as mere element that concurs into provoking the damage, but it is the cause or the joint cause of the damage: whether provoked by the object directly, due to its intrinsic power, or provoked by an agent or damaging process which arose from the object (Cass. 12 June 1973 No. 1698).

The fact that the ski slope or artificial obstacle present on it does not have an inborn dangerous nature, since article 2051 of the civil code does not make any distinctions regarding this, and the relative discipline concerns the damage caused to any type of object, whether dynamic, inert, dangerous by nature or harmless (Cass. 23 October 1990 No. 10277; Cass. 15 November 1996, No. 10015).

In case of an accident on snow, it must be excluded that the damage was caused directly by the object, or by a damaging agent provoked by it.

In fact, the ski slope or obstacle on it has a merely passive role in co-determining the accident, the causes of which in technical terms are actually others (according to each case, the skier's high speed, his incautious conduct, the non visibility of the obstacle for which the guardian may be liable for crime of omission *ex* article 2043 of the civil code, consisting in the lack of a signalling system or non removal of the hazard, and not according to *ex* article 2051 of the civil code).

If the inert object, in order to cause damage, needs "concurrence of other causal factors", it is obvious that they are the latter, and not the object, to activate the accident, which would have not occurred without them. In addition, it must be added that considering article 2051 of the civil code applicable to these cases, would cause an inadmissible consequence: all those who, at any title,

come into contact with other objects, could omit to use caution or be careful when using said objects, claiming the law at a second moment (difficult to overcome, since it requires the positive proof of the fortuitous case or fact committed by a third party) to obtain compensation of damages eventually suffered.

The conclusion therefore is that according to the prevailing orientation of the competent judge of legitimacy and of jurisprudence, article 2051 of the civil code can only be applied when the damage is caused by the intrinsic dynamism of the object itself, or by a damaging agent arising from it. Instead, article 2051 of the civil code cannot be applied in the hypotheses in which the *res* had an inert and passive role in causing the damage, as in the case of accidents on snow due to falls or slips on ski slopes, or collision against obstacles present on it.