La colpa del danneggiato – in ambito sportivo – in Europa e negli Stati Uniti di America : convergenze e divergenze

BORMIO - 3 DICEMBRE 2016 – PIETER DE TAVERNIER

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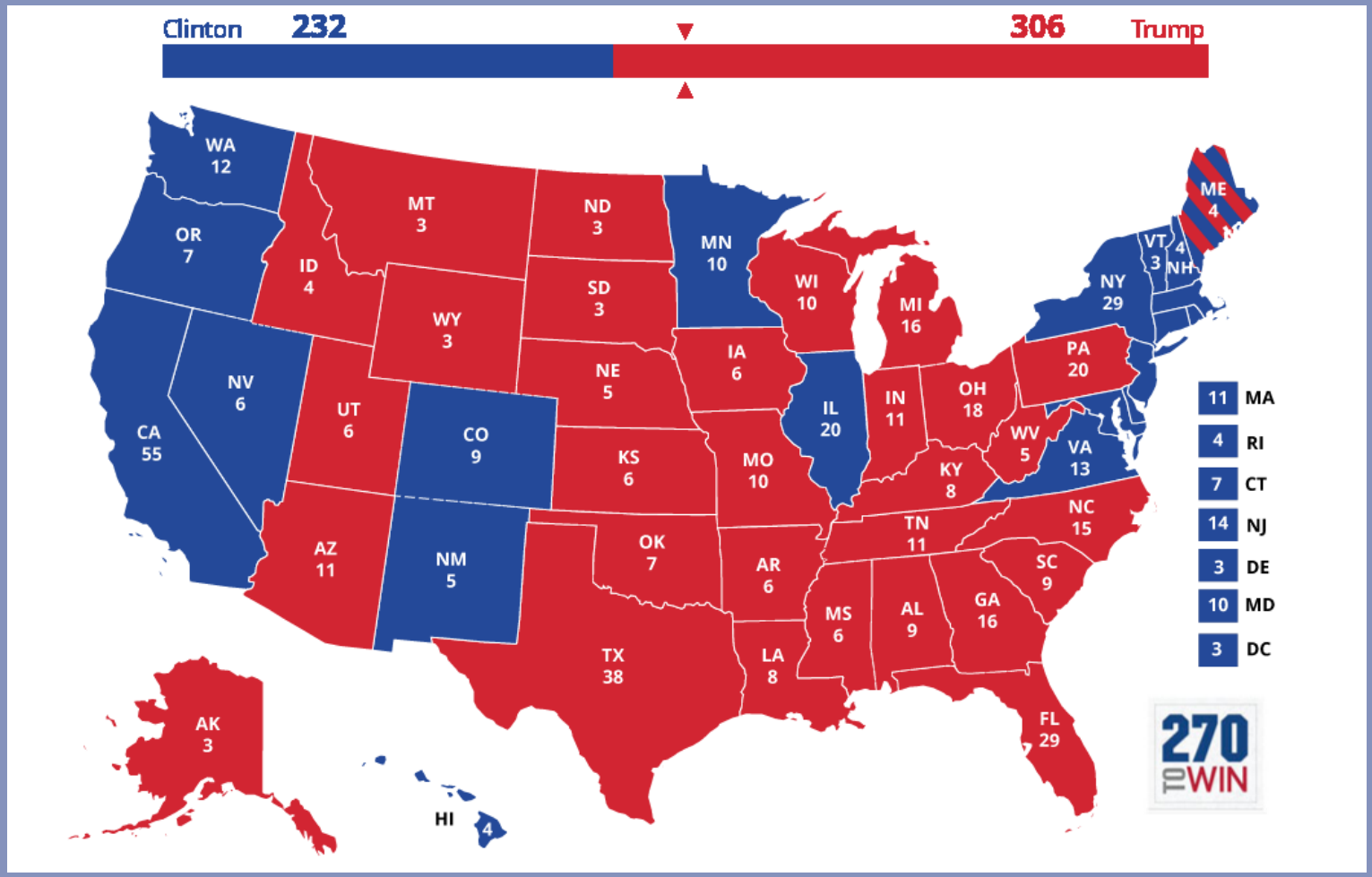
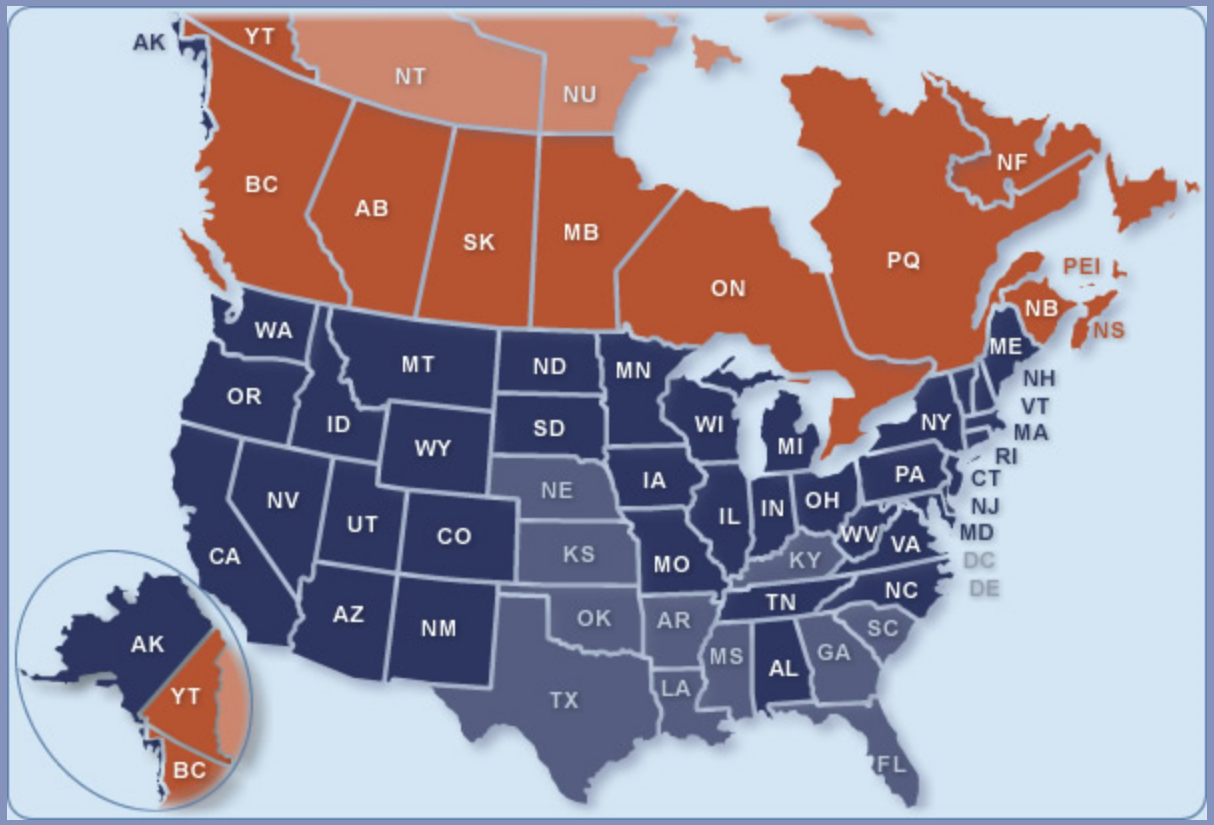
US Presidential Elections 2016



What did happen Wisconsin?

- **Washington** - Donald Trump torna a denunciare il riconteggio delle schede nel Wisconsin e lo fa ricordando la telefonata con cui Hillary Clinton concesse la vittoria nelle elezioni con cui il magnate americano conquistò la Casa Bianca e i dibattiti televisivi tra i due candidati alla presidenza. "Verranno spesi altri soldi e avremo lo stesso risultato. Non cambierà nulla", scrive il neo eletto presidente, che sembra prendersela più con la principale ex rivale che con Jill Stein, la candidata verde che ha chiesto e ottenuto il riconteggio.

US Skiing Resorts 2016



Some statistics…

- En millions de journées skieurs, vendus saison 20125-2016:
  - Etats-Unis: 53,9
  - France: 52
  - Autriche: 49,9
  - Japon: 33,8
  - Italie: 30,5
  - Suisse: 22,6
- Source: *Le Figaro* du 26 et 27 novembre 2016

Assumption of risk

- Source: Jim Chalat, *A Practical Guideline to Ski Accident Litigation*, 2012.

- "Regarding liability, the fundamental question in any ski accident case is whether the skier's injury or death relates to a skier assumed risk. Often, the nature of the accident resolves the question. When skiing downhill, skiers typically assume risks inherent in the sport. However, skiers typically do not assume the risk of another skier's negligence. The question of precisely which risks are "inherent"- especially in the context of modern, highly groomed, controlled, and heavily marketed skiing, - is debatable in many cases. If it is in question, then it is an issue for the finder of fact, if it is not a question, then the case is either disposed of summarily; or, if the hazard or accident was clearly not caused by an inherent danger, then the assumption of risk/inherent danger issue is not submitted to the jury or finder of fact."

Accettazione del rischio negli Stati Uniti

- Primary Assumption of Risk
- Secondary Assumption of Risk
- Express Assumption of Risk

Primary Assumption of Risk (1)

- The doctrine of primary assumption of risk is directly applicable to the playing field.

- The principle of tort law that a defendant must exercise due care to avoid causing injury to others "is deemed inapplicable in sports activities in which conduct that is otherwise viewed as dangerous is an integral aspect of the sport itself."

- Therefore, a defendant does not have a duty to eliminate or protect a plaintiff from risks that are part and parcel of the sport.

Primary Assumption of Risk (2)

- "An inherent risk is one that cannot be eliminated without altering the nature of the sport."
- This does not absolve the defendant of a duty to use due care to avoid increasing the sport's inherent risks.
- The defendant's conduct must therefore rise to the level of recklessness, not negligence.
- See, e.g., Kane v. National Ski Patrol System, Inc., 88 Cal.App.4th 204, 206 (2001) (Ski patrol instructor's urging his student to press the limits of his skills was not reckless, even when it resulted in the student's death).

Secondary Assumption of Risk (1st version)

- Secondary assumption of risk exists when
  - defendant owes a duty of care to the plaintiff
  - Defendant breaches it, but
  - plaintiff continued to engage the known risk caused by the defendant's breach.
- See, e.g., Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

Illustration: Assumption of Risk in Vermont (1)

- § 1037. ACCEPTANCE OF INHERENT RISKS (Vermont Ski Safety Act)

- Notwithstanding the provisions of section 1036 of this title, a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary.

Illustration : Assumption of risk in Vermont (2)

- Jim Chalat, *A Practical Guideline to Ski Accident Litigation*, 2012 on the Vermont skiing law

- The court refused strict application of the inherent danger rule, as urged by the defendant, holding: "[t]he claim is that the brush was an inherent danger of the sport… is the equivalent of, and better put as, a claim that defendant owed plaintiff no duty with respect thereto, sometimes referred to as ''primary'' assumption of risk." Id. at 402 – 403. The court applied to the ski area operator the same rule of ordinary care that business owners owe to visitors on their premises.

Illustration: Assumption of Risk in Vermont (3)

- Jim Chalat, A Practical Guideline to Ski Accident Litigation, 2012 on the Vermont skiing law

- "If the fall is due to no breach of duty on the part of the defendant, its risk is assumed in the primary sense, and there can be no recovery. But where the evidence indicates existence or assumption of duty and its breach, that risk is not one "assumed" by the plaintiff, thus, what the plaintiff "assumes" is not the risk of injury, but the use of reasonable care on the part of the defendant."

Secondary Assumption of Risk (2nd version)

- Under a comparative negligence / secondary assumption of risk analysis, a plaintiff may be 99% at fault for an accident .
- And P is still entitled to recover damages.
- In these circumstances, courts reduce the award "in proportion to the extent the plaintiff knowingly encountered the risk."

Dispositivo dell'art. 1227 Codice Civile

- Se il fatto colposo del creditore (1) ha concorso a cagionare il danno, il risarcimento è diminuito secondo la gravità della colpa e l'entità delle conseguenze che ne sono derivate.

- (2) Il risarcimento non è dovuto per i danni che il creditore avrebbe potuto evitare usando l'ordinaria diligenza.

Van Dam, *European Tort Law*, 2nd Edition

- In sports cases, assumption of risk is generally considered to be a defence against liability but not if the tortfeasor has grossly violated a rule of the game. This implies that participants only accept the 'normal' risks of the game – risks which are inherent in the game's character – provided that the risks are sufficiently clear beforehand. Participants do not accept abnormal risks (*risque anormal*), such as an intentional or manifest breach of a rule of the game.

Supreme Court the Netherlands – Dekker c. Van der Heide – 28 June 1991, NJ 1992, 622

- "After all, the participants in a sport like football must expect each other to commit actions which are dangerous to a certain extent, and which are provoked by the game, while the participants in society need not expect from each other actions that give rise to a similar danger outside the context of the sport, which actions are therefore usually unacceptable."

Van Dam, *European Tort Law*, 2nd Edition

- The French Supreme Court, like its counterparts in other legal systems, had always been reluctant to allow the defence. In the course of time, however, the *Cour de cassation* gradually reduced the scope of the defence, first in cases of voluntary transport and in sports and, since 2010, across the board. Obviously, the context of the victim's conduct (such as playing football) may still be relevant but the fact that he assumes a risk can no longer be framed in terms of a partial or complete defence.

Statutory law v. Common law

- Ski law varies from state to state within the United States. Twenty three states have specific ski liability statutes, and each differ substantially. Two states with considerable ski industries, California and Virginia determine cases on a common law basis, with attention to contributory negligence, assumption of risk and inherent danger.

- Source: Jim Chalat, *A Practical Guideline to Ski Accident Litigation*, 2012.

Michigan Ski Safety Act

- § 408.342. Duties of skier in ski area; acceptance of dangers.

- (2) Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.

Wisconsin State Legislature

- Under Wisconsin law, each participant in an alpine sport assumes the risk of injury or death to person or injury to property resulting from the conditions and risks that are considered to be inherent in an alpine sport, has a number of duties that must be met while engaging in an alpine sport, and is subject to limitations on the ability to recover damages from a ski area operator for injuries or death to a person or to property. A complete copy of this law is available for review at the main site where tickets to this ski area are sold.

Colorado Ski Safety Act

- 33-44-103. Definitions.

- (3.5) "Inherent dangers and risks of skiing" means those dangers or conditions that are part of the sport of skiing, including changing weather conditions; snow conditions as they exist or may change, such as ice, hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, (…) collisions with other skiers; and the failure of skiers to ski within their own abilities. The term "inherent dangers and risks of skiing" does not include the negligence of a ski area operator as set forth in section 33-44-104 (2). Nothing in this section shall be construed to limit the liability of the ski area operator for injury caused by the use or operation of ski lifts.

Colorado Ski Safety Act

- Extract from: Jim Chalat, Linda Chalat and Daniel Snare, *Ski Law Trends : 2016*

- In 2004, the General Assembly changed the definition of inherent dangers and risks of skiing from "dangers or conditions which are an integral part of the sport of skiing," to "dangers or conditions that are part of the sport of skiing."
- The statute thereby removed the phrase relied upon in Graven. The new language purportedly broadened the types of inherent risks covered by the SSA and decreased the liability of ski area operators. Nonetheless, in a ski case it is proper in a disputed case to tender an instruction to the jury based upon statutory inherent-danger language.

Colorado Supreme Court in: Fleury v. IntraWest Winter Park Operations Corp.

- The Colorado Supreme Court holds that an avalanche that occurs within the 15 bounds of a ski resort qualifies as an "inherent danger and risk of skiing" under the 16 Ski Safety Act of 1979, §§ 33-44-101 to -114, C.R.S. (2015). The definition of "inherent dangers and risks of skiing" in section 33-44-103(3.5), C.R.S. (2015), specifically includes "snow conditions as they exist or may change." By its plain meaning, this phrase encompasses an in-bounds avalanche, which is, at its core, the movement, or changing 20 condition, of snow. As such, section 33-44-112, C.R.S. (2015), precludes skiers from 21 recovering for injuries resulting from in-bounds avalanches.

Exculpatory agreements: illustration

- RESORT ACTIVITY, SKI SCHOOL, & EQUIPMENT RENTAL WARNING, ASSUMPTION OF RISK, RELEASE OF LIABILITY & INDEMNITY AGREEMENT

- I expressly acknowledge and assume all additional risks and dangers that may result in property damage, physical injury and/or death above and beyond the inherent dangers and risks of the Activity, including but not limited to: Falling; free skiing; following the direction of an instructor or guide; avalanches; cornices; suffocation; crevasses; equipment malfunction, failure or damage; improper use or maintenance of equipment; icy, slick or uneven surfaces; loss of balance; rugged mountainous terrain; bumps; tree wells; downed timber; rocks; holes; debris; marked and unmarked obstacles; drainage channels; varying visibility; unmaintained or unmarked trails/roads; trail obstructions; the negligence of Participant, Ski Area employees, an instructor (including selection of terrain that exceeds Participant's ability), or others; Participant's failure to comply with signage; collisions with natural or man-made objects or other people; encounters with snowmobiles and/or other motor vehicles; becoming lost or separated; lack of shelter; lift loading, unloading, and riding; storms, lightning, hail, snow and other adverse weather; limited access to and/or delay of medical attention; Participant's health condition; physical exertion; exhaustion; dehydration; hypothermia; altitude sickness; frostbite; and/or mental distress from exposure to any of the above. I UNDERSTAND THAT THE DESCRIPTION OF THE RISKS IN THIS AGREEMENT IS NOT COMPLETE AND VOLUNTARILY CHOOSE FOR PARTICIPANT TO PARTICIPATE IN AND EXPRESSLY ASSUME ALL RISKS AND DANGERS OF THE ACTIVITY, WHETHER OR NOT DESCRIBED HERE, KNOWN OR UNKNOWN, INHERENT OR OTHERWISE.

Exculpatory agreements: valutazione

- Banfield v. Louis, (Fla. 4th DCA 1991)

- The public interest factor will invalidate waivers if
- (1) Waiver concerns a business that is generally publicly regulated;
- (2) Involves a service of great public importance or necessity;
- (3) Service is available to the general public;
- (4) Since service is essential, provider has the upper hand;
- (5) Provider of service gives you a "Take it or leave it"
- (6) As a result of the arrangement, the signer is under the provider's control.

- E.g., hospitals – not ski area operator's (SAO's)