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Critical profiles on the subject of Ski Instructor's liabilities

The professional figure of the ski instructor is identified by outline law for the profession of ski instructor (art. 2 of law No. 81 of 1991), with a definition taken from the provinces of Bolzano, Trento and Piedmont regional laws *"A ski instructor is whoever teaches professionally, even in a non exclusive and non permanent manner, to individual persons or groups of persons, skiing techniques in all their specialisations, carried out with any type of equipment, on ski slopes, ski routes, off-track ski runs and ski walks that do not involve difficulties by requiring the use of Alpine techniques and equipment such as rope, axe and crampons"*

A special qualification must be achieved for practising the ski instructor profession and it is necessary to register in regional professional Registers.

For the purpose of setting the ski instructor's liability, the latter's due diligence obligations must be premised by specifying that such

obligations are derived by law regulations, deontological regulations and by contractual regulations.

Concerning obligations deriving by regulations, it is observed that article 9 of law No. 5 of 2001, from the Bolzano province, envisages that the ski instructor must: “teach the pupils the safety regulations by warning them against possible risks both on the ski slope and off-track ... give assistance in case of ski accidents”.

From such a regulation it is derived the existence of obligations with respect to the pupils related to the teaching of the conduct regulation: “*the safety regulations*” and obligations towards the other users of the ski slopes, “*give assistance*”, whereby the ski instructor’s function is given advertising importance.

The above mentioned function is emphasised by law No. 363/03, where under art. 21, paragraph 2, among the ski instructor’s obligations, it is envisaged that “*The disputes related to the violation of the provisions of which under art. 9, paragraph 1, occur, on principle, by the ski masters’ reporting*”.

According to this provision “*Skiers must follow such conduct, in relation to the characteristics of the ski slope and the environmental condition, that it does not raise any hazard on the safety of others*”.

This implies that among the ski instructor's obligations there is also that of keeping a check on the conduct of the other users of the ski slopes and to report to the competent control authorities (State Police, State Corps of Foresters, etc.) skiers that violate the above mentioned behaviour regulations.

Regarding the procedure of practising such reporting obligation, it must be deemed that this should occur without distracting the ski master from his teaching and protection obligations with respect to his own pupils and that he is required to carry out such reporting when, while near any of the above mentioned competent subjects an important violation occurs, in such manner as to allow the competent authority to proceed in inflicting the appropriate penalty.

Since inflicting penalties is not among the ski master's powers, it must be excluded that the latter can effect disputes in an autonomous manner.

Furthermore, inflicting of a non contextual penalty to the disputed conduct must be excluded.

As mentioned previously, diligence obligations are derived even from the contractual commitment, with reference both to the teachings aimed at increasing the user's ski technical baggage and the duty of performing

this activity with the necessary care in order to avoid increasing the typical risks involved in the skiing activities.

In fact, the ski instructor's activity implies teaching of the skiing techniques, therein included the behaviour regulations, and at the same time guiding of single persons or groups, by configuring the obligation of giving to the pupil an appropriate protection in relation to the typical risks of whoever wishes to master the skiing techniques.

Such protection obligation will be naturally proportional to the capacities, experience and age of the pupil; lower is the age and the ability of the pupil, greater will be the ski master's commitment duty to protection.

Jurisprudence, and in particular the Turin Court (Pronouncement of 28 May, 1994, in *Damage and liability* No. 8-9/2000, page 906), has identified some diligence regulations which have determined a sort of Decalogue, specifying that:

- by virtue of his own function, the ski master is required to guarantee the safety of those attending the lesson;
- he must possess that precise package of technical knowledge required from him for practising his activity;
- he must act with dutiful care;

- he must be able to evaluate the training, ability as well as the physical resistance of his pupils in facing a specific downhill descent;
- he must be able to evaluate the atmospheric conditions in relation to the ability of his pupils;
- under particular situations, he must evaluate whether it is reasonable to abstain from giving the lesson.

From the jurisprudence of the Court of Cassation more precise information is derived regarding diligence duties.

In particular, according to the Supreme Court sitting in panel, the ski master must:

- conduct the pupils on ski slopes proportional to their technical level;
- conduct the pupils, even in a case of off-track skiing lesson, on paths that do not have avalanche risks (Pen. Cass., sect. IV, 18 September, 1991, 9665).

Violation of the above identified diligence obligations, has been acknowledged as source of generic fault by the ski instructor.

Given the above, it is observed that the ski master's activity is within the services of intellectual work.

The relative teaching obligation of the skiing techniques is qualified as obligation of means and therefore configured as a contract of work

service. The obligation of means is that requiring the debtor (in the case in question, the ski instructor) only the diligent observation of the agreed behaviour, independently from its profitability with respect to the aim pursued by the creditor/pupil (and namely, the acquisition of the skiing techniques).

From this, it is derived that the pupil wishing to act by contractual liability with respect to the ski instructor, must prove and attach, in accordance with articles 1176 and 1218 of the civil code, the ski instructor's negligence, besides obviously the relationship of accountability.

Likewise, the ski instructor in his turn may provide proof of non liability towards violation of the diligence obligation (ref. Cass. Pronouncement No. 11652/90).

This, having been clarified, it is observed that at the ski instructor's charge there does not exist only the obligation (of means) relative to teaching, but also the obligation to supply a proper protection to the pupil during the course of the lesson, with reference to the risks typical of whoever wishes to learn the skiing techniques, as mentioned above; the source of such protection obligation is identified in the fulfilment of diligence (art. 1176 of the civil code).

Such guarantee obligation is indissoluble with respect to that of teaching, finds its source in the contract thereof and is born at the very moment in which the ski instructor takes charge of his pupils who are taken to the ski slopes and on the paths that according to his opinion are deemed suitable in relation to the experience and ability of these particular pupils.

From the above it follows that the protection obligation at the instructor's charge constitutes a performance obligation, by configuring the obligation of bringing back the pupils safe at the end of the lesson. In fact, in the performance obligation the fulfilment coincides with the full accomplishment of the scope sought by the creditor (his safety, as pointed out).

Once the performance obligations having been set, it follows that in case of accident or injury the pupil must only supply proof of the existence of the contractual relation, by attaching the verification of the injury during the course of the lesson, under the instructor's control.

It will be up to the ski instructor to prove that the non-fulfilment is not imputable to him, and namely of having adopted all safety measures (Cass. Div. No. 13533/01).

The evaluation to be carried out will be in any case delicate, especially in the case of the omissive type, considering that the risk factors connected to the pupil's ski activities normally elude the control ability of the ski instructor, being configured often as inevitable.

The reconstruction of the protection obligation as being contractual has found recently an interesting acknowledgement in jurisprudence, with the pronouncement of the Court of Rovereto, of 24 November, 2003 (in Ital. Jurisdiction, 2004, Part I, 2580).

This pronouncement concerns the case of an accident suffered by a lady pupil of a windsurf course, a situation having strong similarities with the ski lesson.

In this case the Court specified that *“the school ... does not only assume the obligation of teaching the sport practice but assumes also the obligation of performing the teaching obligation under conditions, from the environmental and technical point of view, of safety for the learner”*.

The Court, in particular, has taken as valid the contractual liability of the ski instructor, by virtue of the protection obligation under his charge, the source of which has been identified under the regulation for the protection of the consumer and precisely in art. 1, 2nd paragraph, law No. 281 of 30 July, 1998.

The pupil has been qualified as consumer and his “*fundamental right*” to the “*safety of the service*” has been identified.

During the interpretation, the Court has therefore considered that such a provisional regulation constitutes integration of the contract and consequently has applied the principles on the burden of proof, most favourable for the creditor, which apply in case of contractual liability: simple allegation of the scarcity of safety measures on the lady pupil’s (creditor) part and burden of proof about the adoption of the same measures at the instructor’s (debtor) charge.

The configuration as being contractual of the ski instructor’s liability implies another favourable effect to the creditor (pupil) and namely the application of the longest prescription term (ten years, in accordance with art. 2946 of the civil code), with respect to what has not been laid down by the contract liability hypothesis (five years *ex art.* 2947 of the civil code).

Ski School's liability

In case the lesson is given through a teaching structure, the contractual liability is at the charge of the School with which the relative contract is drawn up.

The school is responsible for the activity carried out by the single instructor, who has the function of assistant of the latter in the fulfilment of the service, in accordance with art. 1228 of the civil code.

In this case, it is normally indifferent whether there is not a subordination relation, as clarified by the Supreme Court with pronouncement No. 231/73.

In the case in question, a social contract liability of contractual nature by the single instructor may be conjectured if the conclusion of a guarantee relation with the entrusting of the pupils is considered implicit.

In fact, in the present case the conclusion of a contractual relation between the single instructor and the pupils may be presumed, which is born consequent to a socially standardised behaviour (taking in charge of the pupils), as in the case of boarding a public transport bus, which implies the conclusion of the transport contract.

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