

The liability of non professional accompanying persons in mountaineering and ski-mountaineering

by Leonardo Lenti*

SUMMARY: 1. Preamble – 2. Accompanying on mountains, entrusting and fault – 3. The various categories of voluntary non professional accompanying – 4. Grounds for liability - 5. Mountaineering, ski-mountaineering and liability for dangerous activities – 6. The various types of entrusting – 7. The causality link

1. Preamble

The subject of liability for mountaineering and ski-mountaineering accidents is not studied in depth by civil juridical law, even because during the years the number of suits in civil session was extraordinarily limited compared to the number of accidents that took place¹, and differently from relative suits in penal session (where the public prosecutor mainly performs the action), which had not been many but had

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¹ See mainly for completeness, the in-depth study and skill to grasp the problems related to practice, thanks also to mountaineering and ski-mountaineering experience of the authors, V. TORTI, *Responsibility in accompanying on the mountains*, CAI, Milan, 1994; R. CHABOD, *Responsibility in mountaineering injuries*, in *Rev. sports law*, 1959, 372 and subsequent (it must be remembered that Renato Chabod was one of the best Italian mountaineers during the 30s and 40s of the last century).

See also, in chronological order, R. CHABOD, *Accompanying person agreement*, in *Rev. sports law*, 1959, 270 and subsequent; Ant. ROSSI, *Regarding penal and civil liability rising from the mountaineering activity*, in *Arch. liability*, 1963, 89 and subsequent; A. GAMBARO, *On mountaineering accompanying person's liability* in *Prev. liability*, 1978, 460 and subsequent; J. and P. MAZEAUD, *Montagne et responsabilité*, in *La montagne et alpinisme*, 1980, 253 and subsequent (Pierre Mazeaud, in addition of being one of the renown members of the Mazeaud family of jurists, he was one of the most talented and renown French mountaineer during the 50s and 60s of the last century); V. BAROSIO, *Penal and civil liability of the rope climbers' accompanying person*, in *Lo Scarpone*, 1982, No. 7, 9; C. CARRERI, *Penal and civil liability of the instructor in C.A.I. schools*, in *Giur. mer.*, 1999, 154 and subsequent; B. TASSONE, *Extreme sports and liability*, in *Damage, liability*, 2002, 1179 and subsequent.

greater frequency, and also differently from suits in civil session related to accidents occurred on ski slopes and lifting facilities, which had much greater frequency².

This data suggests a preliminary consideration: firstly, in my opinion, it expresses deep acceptance by mountaineers and skiing mountaineers of the fact that these activities imply risks that can never be fully eliminated. In addition and above all, it shows a typical psychological attitude, very widespread among those who go on mountains: their behaviours are ruled by reciprocal solidarity and by a sense of responsibility for one's own actions, mainly with respect to ethics, based on experience. In my opinion, educating to solidarity and being responsible for oneself and perhaps even for others represents is one of the main ethical values of this activity, which does not fall under common definitions of *sport* or *ludic activities*. The consequence is the widespread conviction that each illegality must be solved, and eventually sanctioned, not only with respect to the social and moral framework, but also the juridical. In final summary: the more you are in contact with true *mountaineers* (whether equipped with skis or not), the more reduced is the inclination towards legal disputes between one another.

A question rises, to which I cannot give a certain answer, but it highlights a substantial problem: the insurance for civil liability, that each mountaineering and ski-mountaineering school of CAI *must* stipulate, introduces a new element in the above mentioned solidarity relation, which is *ethically new*, and different in terms of principles and values, and therefore has a disturbing effect. More precisely, the insurance constitutes an incentive to legal action: it generates in cases in which most likely it will not be brought forward. I am in fact convinced that the injured party – who, in the name of solidarity would never think to sue the person that accompanied the former on the mountain, even if the former deemed the latter responsible for the damages suffered – is instead interested in initiating a proceeding, without considering any ethical dilemmas, when the injured party is aware that indemnification will not be paid by the accompanying person or CAI to which the latter belongs, but by the insurance company.

This document is articulated as follows: first of all, I define what “accompanying” means, the different types and what is the main consequence, that is to say the entrusting of the person being accompanied. Later on, I will analyze the various types of entrusting and their object, paying particular attention to the various methods and degree with which safety guarantee is offered to the person being accompanied who looks forward in the accompanying person; at the end, I will examine the various circumstances in which an accident could occur subject to indemnification, trying to define the degrees of diligence, prudence, expertise expected by whoever organizes excursions and by whoever actually carries them out, and also the causality link that binds the conduct of one or more of these subjects with the damage suffered by the accompanied person.

² See, for last and for all, the ample collection of legislation and jurisprudence of many European countries by U. IZZO and G. PASCUZZI, *Skiing liability. Jurisprudential analysis and comparative views*, Giappichelli, 2006. I also point out collection *The mountain, risk and liability*, published by Courmayeur foundation, the volumes of which – unfortunately not properly distributed and therefore not well known – are of great interest on this subject: I point out in particular for Italy Numbers 3 (1994), 7 (2001), 10 (2004); for other countries Numbers 8 (France, 2002), 9 (Spain, 2003), 13 (Switzerland, 2006).

2. Accompanying on the mountains, entrusting and fault

An *accompanying person* is whoever accepts to join other persons to carry out or finalize an excursion³, thus assuming, also implicitly, the responsibility to offer them *collaboration and protection* in a proportional measure to the difference in ability and experience between accompanying person and persons being accompanied; the former also assumes, in relation to this and compulsorily, a *managing power*, to which persons being accompanied must be subject to⁴. For the latter, as a consequence, at least with respect to intentions, the actual risk is decreased or at least the risk subjectively perceived; in many cases, it is also possible to perform an excursion that they would be unable to take under a technical point of view⁵.

Instead, for the purposes of assigning the relative responsibility, it is not considered as *accompanying person* – except for different and explicit agreement between the parties, founded on a significant difference between technical skills, training level and experience levels of both - the simple rope or excursion accompanying person⁶: in this case, entrusting consists only in the ordinary reciprocal help, which allows decreasing the risk substantially, only for the fact to be in a group instead of alone, especially if tied by a rope⁷. In any case, accompanying does not take place if the difference between the skills of two or more excursion companions is scarce and the overall skill of the weakest is in any case sufficient to face difficulties and dangers of the excursion, in conditions of reasonable safety.

Essential consequence of accompanying is to *entrust* the persons being accompanied, to which the accompanying person's *protection duty* corresponds. The entrusting level and relative protection duty is subject to a series of variables, related to different factors⁸:

? eventual accompanying fee: the entrusting level is different according to whether it is compensated (professional activity) or free of charge (social attitude, friendship, courtesy); I only deal with free accompanying in this document;

? qualification of the accompanying person: the entrusting level is different according to whether the accompanying person's skill is certified by an institutional body envisaged for it (as it is for CAI's national accompanying persons and instructors) or not; if certified, what is the level and the certifying body;

³ With the generic term of *excursion* I refer to any excursion or ascent on the mountains, regardless the grade of difficulty, type of ground, with or without skis; I also refer to the so-called sports climbing, performed on cliffs which are easy to access, or artificial structures.

⁴ See V. TORTI, *op. cit.*, 25 and subsequent; see also court of Trento, 6 December, 1949, in *Rev. Sports Law*, 1950, 119, with note of R. Rossi.

⁵ This latter advantage for the excursionist is very evident and frequent in rock climbing, while it is rarer in ski-mountaineering, where it is possible to have it in an important way only at high altitudes.

⁶ See V. TORTI, *op. cit.*, 19 and subsequent.

⁷ This conclusion is reached by App. Turin, 5 January, 1983, in *Rev. sports law*, 1984, 336, with note of M. CHEVALLARD.

⁸ See example cases, which resemble reality, by V. TORTI, *op. cit.*, 43 and subsequent.

? the entrusting grade is different according to the level of difficulty, physical commitment and risk of the excursion, evaluated according to the skills of the persons being accompanied;

? the entrusting grade is different according to the gap between accompanying person's overall skills (mountaineering and ski-mountaineering technique, experience, resistance to fatigue, ability to remain lucid in difficulties, ability to perform first-aid techniques) and those of the persons being accompanied;

? the entrusting grade is different according to whether the persons being accompanied are suitable or not to undertake that the excursion without an accompanying person and face risks in conditions of reasonable safety.

The crucial problem of the accompanying person's responsibility lies in fact in *entrusting*: the accompanying person's responsibility and the rigour in evaluating the fault vary according to cases and are strictly related to the nature of the relation that binds the parties and also to the degree of entrusting. Entrusting and fault are therefore linked to each other: in general, the greater is the legitimate entrusting of the person being accompanied and relative protection duty of the accompanying person, less is the extent of the accompanying person's fault in relation to the indemnification obligation.

3. The various categories of voluntary non professional accompanying

a) *Mountaineering and ski-mountaineering schools*

Accompanying can be carried out during excursions having institutionally the purpose to *educate*: I refer to those carried out within courses of mountaineering, ski-mountaineering, climbing on cliff or artificial structures, organized by *CAI's mountaineering and ski-mountaineering schools*. The activity of these schools is expressly permitted by law, in accordance to two articles with the same content: art. 20 of law dated 2 January, 1989, no. 6 on the profession of a mountaineering accompanying person, with respect to mountaineering schools, and art. 21 of law dated 8 March 1991, No. 81, on the profession of ski instructor, with respect to ski-mountaineering schools. The activity is regulated by CAI's regulations and does not constitute abusive performance of (protected) professions of a mountaineering accompanying person and ski instructor⁹, provided that it is carried out *free of charge*: the second paragraph of the two above mentioned twin articles prohibits in fact any compensation.

The free character must be specified. What must be free of charge, therefore only with *associative purpose*, is the instructors' activity, consisting in accompanying the students and teach them. Registration to the courses, as is known, might be burdened by a price and generally it is: the student pays in fact a subscription cost to attend the course. This is intended only to cover the expenses, such as those for technical materials such as ropes, insurance for accidents and liability, eventual expenses for excursions, informative materials on the activity programme distributed to potential interested persons, illustrative and educational materials distributed to the students registered in the courses.

⁹ This is obvious, but in view of criticisms recently brought about by AGAI, I think it is appropriate to mention it once again also in this document.

b) Sectional excursions

Accompanying may be carried out during excursions organized by CAI's divisions, within an official programme, which indicates them as *sectional activities*. This indication is essential: if lacking, the excursion falls outside the division's institutional activities. For example, those excursions published on the sectional bulletin are not considered as sectional excursions, but it is expressly indicated that those are private initiatives of single associates, for which the bulletin gives only information. Even accompanying in sectional excursions must be free of charge, otherwise it would constitute abusive performance of the profession of an accompanying person or ski instructor: in fact there is not any particular legislative exemption which can justify it.

c) Accompanying for friendship or courtesy

Accompanying can take place also within a non institutional relation among single persons: it can constitute object of a private agreement, for *friendship or courtesy*, with no element relative to institutional factors. This type of accompanying must also be free of charge, otherwise it would constitute abusive performance of the profession of an accompanying person or ski instructor.

4. *Grounds for liability*

To distinguish among the different cases of accompanying mentioned above, the transport discipline offers useful basic indications. Despite agreeing on the best doctrine, which excluded the applicability of this discipline to the relations in object¹⁰, I think that it is possible to obtain useful basic indications from the distinction between free transport, contractual relation, courtesy transport, non contractual relation, source of an eventual liability in tort. Even if in the latter a patrimonial value of the service is found, indicated by the value that this would have on the market, other negotiation indexes are in any case lacking, therefore it is simply considered as a non contractual relation: the willingness to bind oneself in a juridical sense, thus originating an actual binding relation is lacking or it is not sufficiently net and certain; a patrimonial interest by the vector to carry out transport is lacking, even if free of charge, as it is also lacking a commitment in such sense, perhaps established with others.

If a similar research on *negotiation indexes* is conducted compared to the various cases of accompanying mentioned above, then the conclusion is that there are different types of liability.

a) Mountaineering and ski-mountaineering schools

In this case there are three different relations:

- that between the school and the student: it is a relation based on an *agreement* bound to a fee;
- that between the school and the instructor: it is a relation based on an *associative* attitude, which constitutes the final reason that brings the instructor to perform the activity;
- that between the instructor and the student: it a *courtesy* relation, outside the contractual framework.

In the relation between the school and the student, negotiation indexes are present which are sufficient to appoint it the contractual nature: the intention of the school is to commit itself to supply

¹⁰ See A. GAMBARO, *op. cit.*, 461.

training to the student and the burdensomeness for the student towards the school. The school has also an obvious and relevant, non patrimonial interest: that to function, teach, since it is a typical, institutional, associative activity of CAI, as it is also implicitly set forth in paragraph 1 of the above mentioned twin articles (art. 20 law 6/1989 and art. 21 law 81/1991). I do not think instead that it has a patrimonial interest, because the subscription fees only cover the course's expenses, without offering any further patrimonial advantage to the school. By analyzing the purpose of the agreement, it comes out how the fee paid by the student is not sufficient to reasonably justify the school's service, differently from that paid by the client to the accompanying person or ski instructor: it must be integrated by an additional element of subjective character, that I would define as "associative attitude", that is to say the intention of the school to pursue one of CAI's institutional purposes, which belongs to the same structure.

It is therefore possible to conclude that the school has a liability of *contractual* type, with everything related to it mainly with respect to student's *entrusting*, which guarantee it is a contractual obligation of the school, and to *proving the burden* of fault: this burden falls on the accompanying person, who must prove to have performed the service with due diligence, prudence and expertise, that is to say not to have incurred fault. More precisely, two aspects of service due by the school must be distinguished, one to guarantee teaching and the attainment of the excursion's destination and that of guaranteeing safety which can be reasonably expected: the second one, which is the only aspect relevant in this context, falls within the category of result obligations, in which the debtor is liable if in fault, with the consequent full application of the evidence as set forth by art. 1218 of the c.c.

The instructors' position is not that of an employee, therefore art. 2049 cannot be applied. Their position is that of third parties, in charge to perform the accompanying and teaching service on behalf of the debtor, that is to say the school: instructors have therefore the role of debtor's assistants in fulfilling the task and the debtor is objectively liable for their actions (art. 1228)¹¹.

Instructors are liable in any case of unjust damages caused to the student through their conduct, in virtue of *extra-contractual* responsibility, as anybody else in any circumstance¹².

In these cases therefore, it can be joint liability: the contractual of the school and the extra-contractual of the single instructor of Board of instructors, or school's director, according to what I will describe hereunder.

b) Sectional excursions

In this case, I think that a contractual relation is not present, since the only negotiation index is the interest of non patrimonial character of CAI's division to perform an important aspect of its institutional associative activity. The only type of liability supposable in this case in my opinion, is therefore the *extra-contractual* one, which falls on the persons that organize the excursion, to subscribe the participants and provide accompanying service on land, according to what I will describe hereunder.

¹¹ See B. TASSONE, *Extreme sports*, cit., 1187 and subsequent.

¹² In compliance with the configuration proposed in the text of the various grades of liability of the school and instructor, it refers to French law concerning a similar case, that is to say a very serious accident occurred to a minor in a cliff climbing school: Cass., 6 March, 1996, in *Dalloz, jur.*, 1997, 92.

c) *Accompanying for friendship or courtesy*

Also in this case and even more than in the previous, there is no contractual relation: the principles of general character on which the conceptual elaboration is based, concerning courtesy transport, prove this point in an unmistakable way. Therefore, even in this case, the only assumable liability is the *extra-contractual* one, related to the degree of entrusting required and guaranteed, according to the considerations hereunder.

5. *Mountaineering, ski-mountaineering and liability for dangerous activities*

A fairly discussed issue, often source of misunderstandings, is that based on whether mountaineering and ski-mountaineering can be qualified as *dangerous activities*, in order to apply to the persons that practice them, the provisions set forth by the civil code for such activities (art. 2050).

First of all, a general consideration must be made: the fact to perform a certain activity consciously and willingly implies the acceptance of a certain degree of risk, and precisely the typical risk that implies that activity.

This obviously concerns the mountain as well. Mountaineering and ski-mountaineering imply a risk degree higher than that characterizing the so-called "normal" life; or at least, this is the general belief. This risk cannot be fully eliminated: the mountaineer and the ski-mountaineer, only for the fact to go on mountains, accept it, even if in a different measure; it is an inevitable and unmistakable consequence of their actions¹³. Establishing that mountaineering and ski-mountaineering imply risks which vary according to the different places, methods and times in which they are frequented, may also allow attributing them the qualification of dangerous activities, but only according to the most *common* language and method. Nevertheless, this does not imply that they shall be qualified as dangerous activities also in *juridical* terms, according to the technical language of law, and more precisely as activities to which it is possible to apply rules on liability for dangerous activities (art. 2050), in order to regulate the consequences of accidents which occur while practicing them.

On the other hand, it is also obvious as the above mentioned acceptance of risk does not allow excluding, in general, any mountaineer's and ski mountaineer's liability for their negligent conducts, from which damages are suffered by other mountaineers or ski-mountaineers, since injured persons had also accepted the risk related to the practiced activity: the common acceptance of risk can never imply an area of full immunity from prosecution, as it is clearly inferred from the wide elaboration on the subject of damage that whoever practices sports may cause to one another¹⁴.

¹³ See, clearly, R. CHABOD, *Liability for mountaineering accidents*, cit., 373 and subsequent.

¹⁴ The elaboration on risk related to sport can be applied to mountaineering and ski-mountaineering with some considerations, since we are not talking about a fight as in boxing, or a physiological risk related to a physical competition between participants as car racing or football: in mountaineering and ski-mountaineering "a new factor is present, the mountain, and the competition is between this and the man who wishes to overcome it": so R. CHABOD, *Responsibility*, cit., 374; see also J. and P. MAZEAUD, *op. cit.*, 254. With respect to risk related to sports in general see, recently and for all, G. VISINTINI, *Short Treaty on liability*, Cedam, Padova, 2005, 624 and subsequent.

To support the inapplicability of the regulation on liability for dangerous activities to the damages that whoever practices mountaineering and ski-mountaineering cause to one another are based on an argument of teleological character and one of textual character¹⁵.

In my opinion the teleological character has greater relevance and is conclusive. The basic reason of what set forth by art. 2050 of the c.c. consists in aggravating the responsibility of whoever, with their activity, introduces a greater risk to the society, imposing it at least partially to all associates, therefore to persons that would be completely not affected by it and from which they do not obtain any direct use. This aggravation, as is known, is carried out by configuring it as an *objective* liability, with a rather limited justification (having adopted all suitable measures to avoid damages) and with an inversion of proving evidence on the same justification. The aggravation of liability according to art. 2050, compared to the general parameter set forth by art. 2043, is reasonable since it is based on an obvious *difference of position* between whoever *performs* the dangerous activity for their benefit, or pleasure, and who *suffers* from it, without being able to influence on the method in which it is carried out: this is needed to recognize a more intense protection to the latter. In case of mountaineering and ski-mountaineering we are dealing with full, free and conscious consent of all participants to the activity, therefore no difference of position between whoever causes damages and whoever suffers it exists: therefore applying art. 2050 to mountaineering, in reciprocal relations between excursion companions, is unjustified in teleological terms, even if an accompanying relation had been established among them.

Even the textual argument appears to me to be founded. Art. 2050 of the c.c. clearly indicates where the activity's *dangerousness* lies, with which the regulation intends to deal with: an activity is *dangerous* "for its nature" or the "nature of the means adopted". Mountaineering and ski-mountaineering are certainly not dangerous for the nature of the means adopted: no one can consider a pair of skis, an axe or a rope as dangerous. The other aspect may be questioned further. Nevertheless, considering mountaineering and ski-mountaineering as dangerous activities due to their nature, would most like hinder the possibility to delimit the boundaries of activities which are qualified as dangerous by virtue of their nature: it is obvious to mention that crossing a very busy road is quite dangerous, but nobody would qualify such an action as a dangerous activity, with the purpose of applying art. 2050 to whoever, crossing the street, would cause damage to others. Dangerousness relative to mountaineering and ski-mountaineering rises from the conduct of the human beings that practice them, since these fall exclusively under the general rule of extra-contractual liability set forth by art. 2043¹⁶.

¹⁵ In general, with respect to this point see, for all, P.G. MONATERI, *Liability*, in *Treaty on Civil Law*, Utet, Turin, 1998, 1016 and subsequent.

¹⁶ In agreement, V. TORTI, *op. cit.*, 130 and subsequent, to which extensive document I refer; see also M. FLICK, *Point on legislation, jurisprudence and law doctrine, 1994-2004*, Courmayeur Foundation, 2004, 108 and subsequent. See for opposite topics, in an apodictic and non inferred manner: with reference to a novice, Court of Milan 21 November, 2002, in *Milan Jurisprudence*, 2003, 80; with reference to a student in a course with an accompanying person (therefore a quite expert mountaineer), Court of Verbania, 17 February, 1994, *Rev. of law on sports*, 1999, 545.

There is still one last consideration to make, completely empirical: applying the regulation of dangerous activity to accompanying relations on mountains would assign an objective liability to whoever causes damage, except in case where it is proven to have adopted all suitable measures to avoid damage: in my opinion, this is an excessively rigorous consequence, which barely takes in consideration the psychological and social peculiarity of the relation between two or more persons that go on an excursion together. Nevertheless, at the same time, it is immediately understood that there are cases of accompanying in which it does not seem fair, considering the type of relation based on which the two persons go on the mountain together, to assign the burden of proving the fault of the accompanying person that caused damage to the party who suffered it: the cases in which there is a contractual relation in fact, as mentioned above, are the ones in which the regulation of liability for non-fulfilment (art. 1218 of the c.c.) gives a reasonable juridical foundation to an intuitively fair solution¹⁷.

Whatever has been stated until now on the liability for dangerous activities concerns the relations between whoever practices mountaineering and ski-mountaineering when the accident that causes damage occurs. It could be stated that it would be different if a person who does not practice these activities shall be injured, that was exposed in any case to the risks generated by whoever practices them: in this case, we could not in fact mention the above mentioned teleological argument, since according to art. 2050, only the textual argument can be referred to.

These cases are not realistic with respect to ski-mountaineering and mountaineering, since in my opinion a sufficient spatial contiguity cannot be assumed, such to render actually possible the occurrence of damage¹⁸. They could instead be realistic with respect to *out-of-path skiing*, close to ski slopes: whoever skis on the ski slope could be swept away by an avalanche caused by the imprudence of a skier located beyond the ski slope. Perhaps these could be realistic also for a *climber in an artificial training gymnasium*: whoever is located under the walls equipped for climbing simply as a spectator may be hit by a climber falling down or by an object that slipped from the latter's hands. They could also be realistic for *climbing on a cliff*, at the bottom of which there is an area equipped for games or snacks, a road or a parking: whoever is in that area may be hit by stones disturbed by climbers climbing the cliff, or by climbing material such as nuts, snaplinks, nails slipped from their hands. In any case, the damage caused during the mountaineering and ski-mountaineering activity to whoever is not performing the same activity falls totally beyond the subject of an accompanying persons' liability, object of this document.

Also in these cases, I deem it reasonable in any case to exclude the applicability of the regulation on liability for dangerous activity which burdens the skier located beyond the ski slope or the climbers: their liability also falls in the general figure set forth by art. 2043. It is in any case clear the co-liability of the manager of the ski slope, in case of beyond the ski slope skiing; or the manager of the artificial climbing facility in case the fall that causes damage is due to the detachment of a wall anchoring.

¹⁷ With respect to the uselessness in many cases, of the reference to liability for dangerous activities, see App. Turin, 19 December, 1997, in *Rev. Law on sports*, 1999, 545 (reformed by the Court of Verbania, 17 February, 1994, cit.).

¹⁸ Therefore it is rightfully rejected by V. TORTI, *op. cit.*, 131 and subsequent.

6. The various types of entrusting

It is now necessary to go back to the distinction previously made in paragraph 2 between accompanying in mountaineering and ski-mountaineering schools, accompanying in CAI's sectional excursions and accompanying for friendship or courtesy. The entrusting degree of the person being accompanied expected from the accompanying person must be in fact evaluated according to the reason which justifies the accompanying person's commitment of the context in which it is assumed. The accompanying person's responsibility is structured hierarchically, since a different entrusting grade derives from the different circumstances.

a) In case of accompanying in mountaineering and ski-mountaineering schools, the student's entrusting generated from registering to the school and from participating to its activity is more than an assumption: it is an essential and necessary element of the legal relation between school and student, to which it corresponds a precise *contractual obligation of protection*, in addition to instruction, which burdens the school and is actually carried out by each instructor, as a person that must fulfil the obligation¹⁹.

It ensues that in this case a very ample entrusting is created, which makes the person being accompanied perceive a sense of safety stronger than in any other case examined in this context²⁰, mainly due to the educational purpose, and also due to the institution, CAI, and the well known, undisputed social importance that it covers. In particular, the responsibility for the choice of the excursion and of the moment in which carrying it out based on the students' skills, and also the responsibility to admit them to the same excursion, must be evaluated with greater accuracy compared to the cases examined hereunder, since the instructor must institutionally know the students and their skills and spot possible false or untruthful curriculum, as I will better explain later on.

b) In case of accompanying in CAI's sectional excursions, the entrusting generated by the participation to the social excursion must be considered as *assumed*, since it consists of an associative activity, linked to a body called CAI, which has the main purpose to bring persons closer to mountains and favouring a conscious and safe attendance²¹. Whoever subscribes to a sectional excursion means to exploit CAI's experience and technical skills and therefore of persons who, since are part of it, organize and conduct it, with the purpose of undertaking it with greater safety; in some cases, undertaking it because unable to perform it by themselves without the division's organizational help.

An ample entrusting is also created in this case, due to the institution whose name is questioned and the associative attitude at its basis, even if the comparison is lesser with respect to the previous case, since no educational purpose is present.

The opposite proof, aiming at excluding entrusting in this case, is obviously admissible. In general, I think that no entrusting is justified in favour of whoever *does not need it*, having in fact sufficient skills

¹⁹ V. TORTI, *op. cit.*, 48 and subsequent, qualification as assumed entrusting.

²⁰ As already highlighted above, I do not take into consideration in this context entrusting generated in the professional relation between the client and accompanying person or ski instructor.

²¹ Agreement with V. TORTI, *op. loc. ult. cit.*

under any point of view, to undertake the excursion; in other words, whoever does not obtain any greater safety from the fact of undertaking the excursion within the organization of the sectional activity.

c) In case of accompanying for friendship or courtesy, where no instructional factor is present, *there is no assumption*: entrusting rises only if there is an actual *agreement* between the accompanying person and the person being accompanied, with which the former guarantees help and protection to the latter, thus contextually assuming and managing power²²; obviously, this agreement must be proved by the person being accompanied who suffered damages.

In this case, if entrusting was established, it is less relevant compared to the other previous cases, since it is based only on an individual expectation, not related to expectations of associative or social character in general, neither referred to institutional activities of social utility of public or private bodies.

The evaluation of accompanying person's fault is strictly linked to the type and degree of entrusting established with the person being accompanied. In general, as already mentioned in paragraph 2, the greater is the entrusting grade of the person being accompanied and the relative accompanying person's protection duty, the less is the fault's seriousness of the latter related to its indemnifying obligation.

7. The causality link

In case of an accident during an excursion, it must be asked whether this is due to a mistake (negligence, imprudence, lack of expertise) performed during the same excursion by the accompanying person, the person being accompanied or by a third party (whether part of the same group or not), or if it is due to a mistake in choosing the excursion's destination or its exact itinerary, or to the choice of the day, based on meteorological conditions, snow layer or time, or even if it is due to a mistaken evaluation of the overall skills of the persons being accompanied (in relation to technique, physical resistance, speed, reaction in case of difficulty).

The first hypothesis to consider is that of a mistake related to organization, therefore in the *choice* to undertake an execution, *where, when and with whom*; the second is that of a mistake relative to the execution, therefore carried out *during* the excursion.

a) The organization of the excursion

In the *selection and decision* phase of the excursion, in general, the main evaluations to be considered concern the following aspects which are strongly bound to one another:

? relation, in objective terms, between difficulty and risks relative to the excursion (obviously considering the actual conditions of the mountain, weather during the selected day and established time) on one hand, and overall skills (technical, physical, psycho-emotional) of the person being accompanied on the other: the closer the excursion is to its limits, the more the accompanying person is burdened by responsibility;

? the same relation of the person being accompanied in subjective terms: the lesser is the subjective availability, shown explicitly by the latter, to face difficulties and risks, the greater is the entrusting to the accompanying person;

²² Agreement with V. TORTI, *op. loc. ult. cit.*

? the level of technical skills, experience, “strength”, as it is stated in the mountaineering jargon, of the person being accompanied and accompanying person and the difference between them: the greater is such difference, the more important is the presence of the accompanying person to the person being accompanied and therefore, the former is more subject to responsibility;

? the relation between difficulties and excursion’s inborn risks and accompanying person’s skills; with respect to this, the presence of a specific institutional qualification of the accompanying person is certainly more relevant as factor that justifies higher entrusting, as for example that of CAI’s mountaineering and ski-mountaineering national instructor.

From the relation between these aspects, some regulations arise, which express the elementary common sense deriving from experience, therefore obvious for whoever – as is the case of the writer – is familiar with mountains and accompanying. These regulations are the following:

? the more the excursion is subject to difficulties and risks close to the limits of the excursionist’s skills, the greater the accompanying person’s skills must be and therefore the difference of skills between the two subjects; in these cases in fact, most likely it is possible that the excursionist might be in difficulty or danger, from which the accompanying person shall help him out;

? the more the excursion is subject to difficulties and risks close to the limits of the accompanying person’s skills, the greater the excursionist’s skills should be and therefore the difference of skills between the two subjects should be less: in these cases in fact, the accompanying person is lacking partially or totally those additional skills compared to the excursionist, which would be necessary to help out the latter to overcome difficulties and risks.

In case of institutional accompanying (CAI’s schools, sectional excursions), the responsibility for the excursion’s selection (and its date and time) falls on the school’s administration and managing bodies of the section that organize it. The same is valid when deciding to admit the participants to the same excursion: admitting them would obviously imply a positive evaluation of their feasibility to perform it. The school’s administration bodies select in fact the excursion and the persons to accompany, in terms of quality and number; they have the right and duty not to carry out an excursion that is too difficult or dangerous based on the skills and number of excursionists, or based on the mountain’s objective conditions or weather; they also have the right and duty to impose the excursionists, at the beginning or during the excursion, to renounce or to return before the end of the excursion due to weather, the conditions of the mountain, or psychological or physical conditions of the participants.

Also in this case of non institutional accompanying, whether for friendship or courtesy, I deem it reasonable that responsibility for the choice falls on the accompanying person, even if the proposal of the excursion and its procedures originated by the person being accompanied: this is assigned to the former only by the fact that it is being accepted to be undertaken, aware that the person being accompanied relies on the former’s skill and experience and therefore puts full trust in the accompanying person.

I shall now analyze the various aspects in more depth. With respect to that *objective*, whoever assumes responsibility for accompanying must know where to go, what is the exact itinerary, which are the difficulties and risks, whether constant or specific according to the moment, also based on weather conditions and time: hazards of avalanches and landslides, existence of exposed falling rocks, wind walls, unsafe conditions of snow and slopes in general, snow conditions which render difficult or hazardous

skiing, for example crusted snow where it is possible to sink, or heavily frozen, or high and very deteriorated snow. The latter also must know whether there are orders from authorities and fulfil them, for example a mayor's ordinance which forbids crossing specific places due to objective danger.

With respect to the *subjective* aspect, whoever assumes responsibility for accompanying must know the essential characteristics of the excursion in relation to the persons being accompanied: their technical skills, psychological preparation and resistance to fatigue and their way of acting before difficulties and unexpected dangers. The accompanying person must know how to correctly evaluate all of this and therefore refuse to accompany persons which are not suitable for the excursion. With reference to the accompanying person's knowledge about the excursionist's skills, the former operates the entrusting principle in good faith: the accompanying person is not liable if the excursionist supplied untruthful information, for example if the person being accompanied boasts skills which the latter does not have or declared false activities and experiences in the curriculum, or even if misleading information was stated.

From all this it ensues that whoever assumes the responsibility for accompanying, is liable for the damages deriving from accidents due to natural events – such as avalanches, wind walls, landslides – if they were reasonably foreseeable, in view of the conditions of the mountain and by keeping into consideration any other useful element, as weather conditions, snow conditions, the time of the excursion, and possible orders from the public authorities. The accompanying person is also liable for damages deriving from accidents due to unsuitability of the skills of the excursionists with respect to the selected excursion, for example the inclination of the ski slope or conditions of snow layer²³.

The accompanying person's fault (due to imprudence, non expertise, negligence) must be evaluated rigorously in relation to the entrusting established, as already repeated more than once previously. This is valid, provided that the accident which causes damage *actually* due to the above mentioned factors and no other factors intervened at the same time, such to interrupt the causality link, such as for example the total incapacity of the excursionist to control his behaviour within reasonable limits due to an excessive unforeseen fright or tiredness.

b) Carrying out of the excursion

With respect to the *carrying out* of the excursion, the accompanying person is liable, in case the accident which causes damage is due to a technical mistake that the latter performed during the excursion, therefore ascribable to the latter as fault.

With the purpose to evaluate diligence, prudence and expertise of the accompanying person, useful information is supplied from collections of technical regulations which are periodically coded within CAI, through the publication of manuals mainly intended to be used in mountaineering and ski-mountaineering schools: they do not only have the function of educating students, but also that to set *parameters* for evaluating the instructor's liability. Also, since these are arguments of general character they also educate on what means conducting an excursion cautiously and correctly under a technical point of view, even in case of an activity with non educational character, and they constitute reference parameters for any accompanying activity even for that motivated by friendship or courtesy.

²³ In compliance J. and P. MAZEAUD, *Montagne et responsabilité*, cit., 257.

As already mentioned previously in paragraph 4, I would like to remind that different grades of liability correspond to different regulations on the burden of proof with respect to fault: in case of the existence of a contractual relation, as for example in case of accompanying in schools, the accompanying person must prove to have adopted a conduct in compliance to what is requested (remembering that guaranteeing safety is a result obligation, of which a person is liable in terms of fault); in case that no contractual relation is present, as for example in the other two types of accompanying, the excursionist must prove negligence, imprudence and non expertise of the accompanying person.

The accompanying person's liability is excluded in case the accident is due to a fortuitous case or force majeure, or when the causality link between the latter's conduct and accident which caused damage is *interrupted* by a conduct of the same person being accompanied or by another excursionist or a third party not belonging to the group or rope climbers. In addition, it may occur that, due to their behaviour, an excursionist or a third party are liable jointly with the accompanying person (art. 1227). The collections of technical regulations which I mentioned above may constitute a suitable parameter also to evaluate possible behaviours of the excursionists, in order to determine if they can be considered as interruptive of the causality link and therefore such to exclude the accompanying person's liability, or at least as justifying cause in joint liability (art. 1227 of the c.c.).

In order to determine whether interruption occurred to the causality link, various cases must be distinguished:

a) the causality link is interrupted if the accident is due to the excursionist's behaviour due to the latter's *negligence, non compliance with the accompanying person's orders and macroscopic imprudence*: for example, the person being accompanied performs a movement which is obviously dangerous and not reasonable to expect prohibition from the accompanying person, as for example disassembling the safety lock at a rest place without the accompanying person's consent, who is the first of the group of rope climbers²⁴;

b) the causality link is not interrupted instead if the accident is due to the behaviour of the excursionist, caused by the latter's *non expertise, or imprudence* deriving from the fact that the latter does not have enough experience for the current excursion: as already mentioned, in fact, the excursionist's suitability to the excursion must be previously evaluated by the accompanying person who assumes liability.

Should the accident be due only to a *negligent or macroscopically imprudent* behaviour of the excursionist (prudence that must be expected by the latter must be related to skills and experience), the liability for the damage suffered cannot be shifted to other subjects, as for example to the accompanying person. Should the accident be due instead to the excursionist's conduct by the accompanying person's *non expertise of imprudence*, liability falls on the accompanying person according to the reasons and within the limits mentioned above.

²⁴ For a case of this kind, but concerning the relation between a client and an accompanying person, see Court of Bolzano, 24 January, 1977, in *Prev. liability*, 1978, 459, with note by A. GAMBARO, cit.

During the excursion, unforeseen events may occur that affect the carrying out of the excursion, causing the group or rope climbers to find themselves in a place and at a specific time for example, in which an avalanche detaches or rocks fall, while according to the second foreseen programme this would have not happened: for example, a sudden and unforeseen change of weather conditions that obstacles progress, as fog or technical or physical accident occurred to one of the excursionists, that causes loss of time or slows down the pace, such to cause delays for the entire group.

In addition, the entrusting generated by the presence of the accompanying person has certainly as aim, the maximum reduction of risks deriving from events as those mentioned above. A skilful and prudent accompanying person must take them into consideration and maintain a low risk level throughout the excursion and in its methods of carrying it out, such to face the consequences of these events, preventing relevant damages to other excursionists.

Nevertheless, an accident such as for example the fracture of a leg due to a fall, belongs to the regular and inevitable dangers of any ski-mountaineering excursion: the likelihood of this risk always imposes the accompanying person to foresee suitable means for the first aid of the group; nevertheless, at the same time, every excursionist is certainly aware, as a normal and typical risk of the activity performed, that a fracture can occur to anyone of the excursionists and this would cause delay.

Another type of unforeseen event, which could affect the regular carrying out of the excursion, is constituted by the *help given to others*, who are not part of the group of rope climbers of the accompanying person by the accompanying person himself, which the latter is committed to do, during the excursion, with the inevitable involvement of the persons being accompanied, perhaps even only passively, therefore simply waiting, which rises anyway a potential danger caused by the elapsing of time²⁵.

There are two data from which to start: first of all, there is the entrusting of the excursionists to the accompanying person, whose main duty is to guarantee the safety of the persons entrusted. In addition, also in these circumstances, the solidarity value cannot be overlooked, not only in general terms, but mainly keeping into consideration the quality and intensity in ethical terms of the mountaineering and ski-mountaineering activity: in order to determine the legality of the damage caused to the excursionists who assist a third person, in application of the general principle set forth by art. 2045 of the c.c., the seriousness of the excursionists' risk, deriving by carrying out the first-aid operation, must be compared to the seriousness of the consequences that would derive to the injured person, if not aided. This comparative evaluation of interests must be performed according to different criteria, which take into consideration the intensity of entrusting generated by the type of relation between accompanying person and excursionist.

In the case of mountaineering accompanying persons art. 11 c. 2 law No. 6/1989 expressly establishes that these must "aid excursionists or skiers individually or within first-aid operations, in case of injuries

²⁵ In general, with respect to civil aspects of first aid to persons, see law doctrine, by last P. SIRENA, *Management of someone else's affairs. Altruistic interference, egoistic interference and return of profit*, Giappichelli, Turin, 1999, in particular 287 and subsequent, with useful comparative indications; see also P. D'AMICO, *Private aid*, Esi, Naples, 1981, especially 59 and subsequent.

on the mountain or in any case, in case of danger for mountaineers, excursionists or skiers, in relation to their duty to keep conditions of maximum safety for their clients". The duty to guarantee the clients' safety is therefore clearly dominant: any first aid action to others is generally admissible (and therefore it is a duty of the accompanying persons) only when it does not worsen the clients' *risk* in a relevant way. In case of mountaineering and ski-mountaineering schools, due to the intensity of the entrusting of the students accompanied, I think it can be compared to the priority of the duty to guarantee their safety; nevertheless, it must be taken into consideration the fact that the instructors do not have a precise and specific duty to aid third parties similar to that of accompanying persons. The assimilation appears to me rather doubtful, in the case of other on professional accompanying persons: the less is the intensity of entrusting, the less its weight is in altering the general regulations of the above mentioned comparative evaluation, even if by taking into consideration the particular solidarity element which characterizes mountaineering, with or without skis.