

**2nd European Legal Forum on Winter Sports
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Alpine skiing and minors – Legal aspects

1.- Civil and criminal liability in general.

It is a fundamental principle of the legal system that an illicit fact, be it significant from a civil or a criminal viewpoint, may only be imputable to its perpetrator if s/he was in full possession of his/her faculties (art. 2046 of the Italian Civil Code – art. 85 Criminal Code)

Whereas criminal liability is strictly personal (art. 27, Italian Constitution), civil liability may involve or extend, either exclusively or concurrently, to a different subject besides the perpetrator of the harmful event. In this case one refers to “indirect liability”.

Minority is one of the factors, although not the only one, which has a bearing upon imputability and therefore also upon the ability to be in full possession of one’s faculties, from which the personal criminal or civil liability of the minor can be decided, or the civil liability of the other person who has entered into any particular relationship with the minor.

The criminal and civil systems follow different, independent criteria for the identification of imputability. Criminal law peremptorily sets forth the causes that exclude it, establishing for example that a minor aged up to 14 years is never chargeable (art. 97, Italian Criminal Code) nor is a person with total mental infirmity (art. 88, Italian Criminal Code); on the contrary, in civil matters it is down to the Judge to evaluate, case by case, whether the person who carried out the injurious act is in full possession of his/her faculties, taking into consideration the age, the psychophysical and intellectual development, the level of education, the actual method of carrying out the tort and any other element which is useful in establishing whether s/he was capable of conscious self-determination and was therefore aware of the fact that what s/he was doing was wrong.

Therefore even a minor may be civilly liable for carrying out deliberate or culpable wrongdoing, which caused unjust damage to others.

It should also be added that the same fact might hypothetically expose the minor to civil or penal liability (subject to the fact that in the second instance, the minor would be aged over 14 years), with the warning that the affirmation of one of them does not necessarily mean affirming the other, and vice versa.

2.- Of the damage caused by a minor not in full possession of his/her faculties (art.2047 Italian Civil Code).

This is dealt with by article 2047 of the Italian Civil Code which states that the obligation to pay compensation rests with the person who is responsible for supervising the person who is not in full possession of his/her faculties.

The obligation to supervise minors may have a legal basis, as in the case of parents or, if there are no parents, of the legal guardian or teachers (obviously during the period of time in which the custody arrangements last).

This might also arise due to an obligation of a contractual nature (this is the case of ski instructors for the duration of the lesson) and also by the free choice of a subject who, by welcoming the minor into his/her personal and family sphere, thereby assumes custody obligations towards said minor.

With regard to the content and extent of the obligation to supervise the minor, this will depend on the age of the minor and on his/her level of maturity, the circumstances of time and place and environment in which one moves and on social customs.

The liability of the person who is obliged to supervise the minor not in possession of his/her faculties is a “presumed liability” hypothesis, from which the interested party may free him/herself by providing a thorough demonstration of “not being able to prevent the fact”. Situations may be reported in which the person supervising the minor was not present at the time the damage happened, and vice versa events which occurred so unexpectedly and unforeseeably as to nullify the actual physical presence of the person supervising and as we shall see this last point can become extremely important in the field which concerns this forum.

It is laid down by law that if compensation is not paid for the damage, and this includes the hypothesis that the person obliged to supervise the minor has provided

the proof of his/her release from obligation as above, and the hypothesis of the above person's insolvency, "the Judge, in considering the economic conditions of the parties, may condemn the perpetrator of the damage to pay fair compensation". The provision, which was clearly aimed at safeguard the injured party and therefore withholding a principle of social solidarity, is intuitively of little effectiveness. And not only because it is left to the Judge's discretionary power to determine the amount of the compensation, it is mainly because, this is a person who is not in full possession of his/her faculties and if s/he is a minor, s/he will almost always have no money of his/her own, the actual payment of the compensation will be difficult to achieve or in the near future anyway, as one will have to wait for the minor to earn some money first.

3.- Of the damage caused by the minor who is in full possession of his/her faculties (art. 2048 Italian Civil Code).

Although art. 2048 of the Italian Civil Code does not explain that the legislation is aimed at a subject who is in full possession of his/her faculties, it identifies the father and the mother or the legal guardian as the persons who are held to be obliged to compensate damage caused by the illicit act of their offspring who are minors or persons subject to their legal guardianship, who live with them. The legislation also states, as in art. 2047 of the Italian Civil Code, that they may only be released from the presumed liability if they can prove that they could not prevent the fact.

The two persons held liable, as set out by articles 2047 and 2048 of the Italian Civil Code, as they have a different applicative supposition (the perpetrator of the damage is not in full possession of his/her faculties in the first case and his/her capacity in the second) are alternative and not competitive. The Judge's evaluation of the state of capacity is decisive here.

According to general principles, the capable minor is liable for the damage caused, therefore the injured party may act against him/her, and may also act against his/her parents, whose liability is added to that of the minor because of the article I have just commented upon.

Therefore the parents may themselves be summonsed for a liability which falls to them according to art. 2048 of the Italian Civil Code, and also in their capacity as

legal representatives of the minor (as the latter may not be tried in court), but for the liability which is the minor's own.

The parents, be they legitimate, natural or adoptive, are solidly liable between them.

It is assumed that for the parents to be held liable the minor must be living with them and the momentary distance of the parent or the child is irrelevant in this case. However, the parent's liability is ruled out where the minor is fostered continuously by a third party, such as in the case in which the child has been placed in boarding school. Likewise it is excluded where the child, having reached a certain economic independence, has chosen of his/her own free will to leave his/her parents' home and go to live elsewhere.

With regard to the content of the proof of release from obligation, the law has broadened its scope considerably, asking the parents not only to demonstrate that they have conveniently performed their obligation to supervise the minor, but also to demonstrate that they have given the child an adequate and correct education. Both aspects are extremely delicate and end up being combined as, on the one hand, they relate to a person who, although s/he is a minor, is in full possession of his/her faculties, and on the other hand they force people to bear in mind the evolution of society, which gives children increasingly more freedom and self-determination, there is increasing impatience towards the parents' power to educate the child and last but not least, it has watered down the obligation to supervise minors, which must be exercised in such a way as to allow the children to have human relationships correlated to their age and condition.

The same regime of parents' presumed liability is extended from the 2nd subsection of art. 2048 of the Italian Civil Code, to private tutors, amongst whom, by way of an evolutionary interpretation of a somewhat antiquated expression, we can also include ski instructors, which is of interest here. As will be seen further ahead, we shall simply remark here that in conformity with said legislation, the private tutor is liable for an illicit fact carried out by his/her pupils only in the period of time in which they are subject to his/her supervision and that the proof of release from this obligation does not involve the educational aspect, only the supervisory aspect.

4.- Minors – criminal illicit acts and administrative illicit acts.

The minor aged under eighteen years who is older than fourteen years, if judged to be in full possession of his/her faculties, may incur criminal liability for illicit acts which are specified by law as crime. Here we can highlight grievous bodily harm (prosecutable by complaint) and manslaughter (officially prosecutable).

Some institutes which are particularly favourable towards minors should be mentioned, such as the judicial pardon, the judgement of no grounds to proceed due to the irrelevance of the fact, where this is of “particular tenuousness” and the behaviour is evaluated as being occasional (art. 27 Presidential Decree no. 448 of 22/9/1988), the extinction of the crime due to the “test” being passed (art. 29 cited legislation), the application of sanctions to replace detention with semi-detention or controlled freedom.

With regard to administrative illicit acts, i.e. punishable by pecuniary administrative sanctions (for example, violation of the rules of conduct established by law no. 363 of 24/12/2003, on matters of safety when skiing), the minor is not normally held liable, unless the state of not being in full possession of his/her faculties arises from his fault or was preordained by him/her, but the relevant sanctions shall be brought to bear on the person who was responsible for supervising the minor who is not in full possession of his/her faculties, unless that person can prove that s/he could not prevent this fact happening (art. 2 law no. 689, 24/11/1981).-

5.-Alpine skiing practised by minors.

A remarkable percentage of alpine skiers are young and even very young people, including therefore many minors. If it was once rather rare to see the youngest children skiing alone, without being accompanied by a ski instructor or by their parents or in any case by an adult, nowadays this situation is absolutely normal. This clearly applies to all sport in general and not just skiing.

It is therefore necessary to ask the question whether and within which limits may this be considered compatible with the parents' duty to supervise their juvenile children, especially those who because of their age have not yet reached an adequate level of maturity, a duty which if not complied with, is a possible source of civil liability for damages caused to third parties by the children.

A correct response to the question must come from the premise that supervision should be carried out in such a way as to allow the children to pursue human relationships without danger, including those relating to sport, correlated to their age and to their condition and that the extension to this obligation is inversely proportional to different aspects, such as the character, the environment and the level of maturity of the individual.

It should then be noted that in the event of illicit facts which produce damage, the evaluation of supervision adequacy is carried out *ex post*, so the specific modalities and circumstances of the fact must be taken into consideration, in order to establish whether correct supervision, or if necessary the physical presence of the parent, would have enabled the event to be prevented.

Having said this, I believe that one of the aspects to take into consideration is certainly one relating to intrinsic and extrinsic dangers that carrying out a particular activity can entail (for third parties before the person carrying them out), and to the way they can be eliminated or contained within acceptable limits.

For example, we should agree on the fact that the behaviour of parents who allow a twelve year old child to practise target shooting with a compressed air weapon outside a shooting range and therefore without the supervision and guidance of an expert, is seriously irresponsible. On the contrary, the parent who allows his/her child, once said child has learnt to ride a bicycle, to ride it freely around the city, or to ride a motor cycle, if s/he is in possession of the relevant licence, cannot be censured.

To come to the specific theme of this paper, it should be said that skiing as a sport, although it is not intrinsically dangerous, has actually become dangerous due to a series of factors which I shall not examine here. Therefore the parent who allows a minor who has not learnt any skiing techniques to go out onto the ski slopes alone, without even giving him/her any preparation for this such as by sending him/her to a ski school or asking an expert to show him/her the minimum technical notions required to avoid dangerous situations, besides the fundamental rules of behaviour, cannot escape censure.

But the skiing incident may also occur, due to technical errors, to a sufficiently expert minor, and in this case even the presence of a parent will not be enough to prevent it happening. In this hypothesis, the injured party would only be able to act against the

minor, if s/he is in full possession of his/her faculties, as the person directly liable for the damage, or to trust in the payment of the compensation I spoke of in point 2.-

It remains to examine the case, which occurs very frequently, of skiing incidents which occur due to indiscipline, recklessness, absolute disregard for the rules of conduct, abuse of alcoholic substances and more besides. With regard to this, if the subject is in full possession of his/her faculties, the parent will be asked to prove that s/he has given the child a correct education, which is anything but easy in the presence of behaviour which indicates the contrary.

In conclusion, I should like to point out that with regard to the proof of release from the parent's presumed liability, our legislation is extremely rigorous, since in arbitration between the opposing interests, the person who has suffered the injury certainly merits more protection than the person who caused it or who is called to answer for it on behalf of that person.

6.- Ski instructors and minors.

The relationship which links the ski instructor to his/her pupil should be placed in the context of the contractual framework of the work contract. This is a contract on the basis of which a person undertakes to carry out work or a service for a fee, in conditions of absolute autonomy. It should be immediately added that the contract for the purposes of a teaching activity, in which the didactic component is greater than any other aspect of it, will apply in the specific discipline dictated for intellectual professions.

Alongside the main obligation of the contract that the instructor assumes (to provide technical instruction), there is also another obligation, no less important, of supervising the pupil's conduct in order to ensure the safety of third parties as well as of the pupil. The contract therefore actually entrusts the instructor with the pupil, and this translates into a duty to safeguard and supervise, in a graduated manner according to the pupil's age and technical capabilities and is inversely proportional to these. It is a concurrent duty which stems from the principle which states that ordinary diligence must be used in fulfilling each obligation (art. 1176 Italian Civil Code) and this, where it concerns the carrying out of a professional activity, must be evaluated according to the actual parameters of the activity being carried out.

From the above, it is clear that the ski instructor's duty of supervision must be particularly intense in the case of minors, especially if they are inexpert skiers. If the

ski instructor does not comply with this duty, s/he is exposing him/herself to civil liability, not only for the damages which the minor may suffer should the ski instructor be to blame, but also for the damages which the juvenile pupil may cause to third parties and in relation to which the ski instructor, as a “private tutor” is presumed to be liable pursuant to art. 2048 of the Italian Civil Code, as has already been mentioned at the end of point 3.

The situations which may give rise to the ski instructor being held liable for the damages caused to third parties by his/her pupils are not easy to outline, but they should in any case be correlated to those in which the criteria of diligence, skill and carefulness, which teaching must be inspired by, are not complied with. And these, to give an example, are as follows:

- To follow a correct didactic progression, taking into consideration the pupils' preparation and physical strength and choosing a terrain that is suitable for their technical means;
- To avoid extreme weather conditions, such as the absolute lack of visibility due to fog, slopes with deep, fresh snow which has not been prepared for skiing;
- To avoid slopes which due to contingent situations present objective conditions of danger (insufficient snow with obstacles surfacing, considerable presence of sheets of ice);
- To comply with a ensure that the pupils comply with the fundamental rules for behaviour on the slopes and in the use of ski-lifts;
- In training sessions, to make sure, before anything else, that the area is suitably separated, by appropriate protective devices, from the other slopes open to the public, in order to avoid dangerous interference.

Should the juvenile pupil cause damage to third parties during the lessons (for example by having a collision with a skier using the same slope), the ski instructor may be released from presumed liability by showing that s/he could not prevent this accident occurring, for example by advancing the fact that the collision occurred in a absolutely sudden and unexpected way or that the pupil culpably did not obey the instructions given to him.

In order to conclude this point, it remains to add and clarify that for the injuries suffered by the pupil due to a fact imputable to the ski instructor, the ski instructor shall respond not on the basis of art. 2048 of the Italian Civil Code, which as we

have said deals with damages caused by the pupil to a third party, but on the basis of common principles of contractual liability within the relationship.

7.- Conclusions

The excitement of speed, silly exhibitionism, indiscipline, a poor sense of responsibility and respect for others, and sometimes even psycho-physical changes are amongst the possible causes of serious skiing incidents caused by minors (and not only by them), the patrimonial consequences of which are often very heavy and fall to the parents. It is a good rule to take out adequate forms of insurance cover, but alongside this, exhortations to behave with a sense of self-responsibility should be continuous and persuasive.

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