

## **FREEDOM OF MOVEMENT, PERSONAL LIABILITY OF THE SKIER AND THE SNOWBOARDER AND SAFETY OBLIGATION ON THE SKI SLOPE ON THE PATHS FOR SPORTS ON THE SNOW**

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### **1. Absence of special legislation – Civil and penal right – FIS standards and SKUS and FUS (Swiss Cableways) directives<sup>3</sup>**

Starting from the publication act of Italian law<sup>4</sup> No. 363 of 24 December, 2003 on "*Standards on the subject of safety when practicing winter downhill and cross-country sports*", to SKUS President, it has been asked repeatedly whether also in Switzerland, a law would be issued to regulate safety when practicing skiing and snowboard.

For an answer, the referent could refer to what declared by the Federal Government on 30 May, 2001 when this Government requested the abrogation of the longed for motion <sup>5</sup> concerning a juridical regulation of extreme sports.

The Federal Government, taking this position, appealed to the fundamental right of personal freedom and explicitly to the **freedom of movement** (Art. 10 BV<sup>6</sup>), and also to the inviolability of the main content of fundamental rights (Art. 36 BV<sup>7</sup>). After having presented the current provisions concerning civil and penal liability in case of *Threat by third parties* (Art. 97 ff OR i.V. with Art. 2

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<sup>1</sup> Since 15.11.1989 SKUS is a public foundation in accordance with article 80ff of the Swiss Civil Code.

<sup>2</sup> KRS-SBS, since 1974.

<sup>3</sup> Visit [www.skus.ch](http://www.skus.ch) ? entry "FIS Rules and SKUS directives" or [www.seilbahnen.org](http://www.seilbahnen.org) ? entry Publikationen ? Pisten- und Rettungsdienst (Publications ? Service on ski slope paths and first aid).

<sup>4</sup> Initially special legislations were present at regional level, for example in the autonomous region of Valle d'Aosta: Regional law dated 17 March, 1992, No. 9, *Standards on the subject of public use of ski slopes*; Regional law dated 26 March, 1993, No. 15, *Authentic interpretation and changes to regional law dated 17 March, 1992*; Regional regulation dated 22 April, 1996, No. 2, *Regulation in execution of regional law dated 17 March, 1992, No. 9*.

<sup>5</sup> Motion of Donzé Walter, dated 21.03.2001 (01.3128). Similarly, on 01.07.1998, the Federal Government replied to an interpellation presented by Günter Paul, Schweizer Skipisten (Swiss ski slopes). Motion "Serious injuries and deaths" (98.3148).

<sup>6</sup> Art. 10 paragraph 2 BV: "*Anyone has the right to personal freedom, especially regarding own physical and moral integrity and freedom of movement.*"

<sup>7</sup> The preambles mentioned in Art. 36 BV regarding the "*Restrictions to essential rights*" represent legal principles, public interest, feasibility and safeguard of fundamental contents.

ZGB, Art. 41 ff OR; Art.129, 125, 117 and 237 StGB) and having made explicitly reference to the directives issued by SKUS, the Federal Government concluded by summarizing:

*"Below are indicated the fundamental juridical principles used suing, at civil and penal level, the single individuals that jeopardized or caused damage to third parties, and also organizers and managers that were involved in minor offences. An additional law should confirm the already existing definitions. It is therefore more appropriate to supply additional clarifications and cover, consequently any existing possibility of civil and penal nature such as for example suspension of the drivers' license of particularly reckless drivers (Art. 3 No. 2 of the Public Transport Ordinance)"<sup>8</sup>.*

From the issuing of the Italian framework law, the Federal Government did not change its interpretation. On 14 September, 2005, in the dismissal judgement of motion "Stop reckless skiers"<sup>9</sup>, the following is indicated:

*"Generally, the Federal Council shares with the motion's author, the concern about the increase of the number of serious accidents of ski slopes. Indeed, it is necessary to adopt all possible safety measures and reduce the incidence of such accidents. Nevertheless, new law provisions or competences are not needed to attain this objective. Swiss Commission's directive on the prevention of accidents on the ski slope setups for the practice of sports on snow (SKUS) requires since now the managers of the ski slopes to adopt preventive measures. Fro their part, users of ski slopes must comply with the conduct rules set forth by the International Ski Federation (FIS). The Swiss office for the prevention of accidents (UPI) and SKUS organize information campaigns on a regular basis.*

*For the above mentioned reasons, the behaviour on ski slopes must not be object of further regulations by the Confederation. It is not necessary to introduce police operating on ski slopes, authorized to give out fines or sanctions. The juridical bases in the civil and penal spheres are sufficient".*

In evaluating **injuries to third parties and third parties' threats**, the Swiss jurisdiction focuses on FIS standards and SKUS and FUS directives to determine competent spheres and obligations. The conduct standards drawn up by FIS are binding in accordance with the laws, while SKUS and FUS directives are recognized by the Federal Court as *safety and accuracy criteria*.

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<sup>8</sup> In compliance with Art. 3 paragraph 2 of the mentioned regulation dated 05.11.1986 (SR 742.401), a company has the right to "deny transport to persons for the practice of a sport and, in case of recidivism or serious cases, withdraw the ticket if, according to the company, these would endanger other persons through their conduct, in particular, a) by violating elementary care regulations; b) by descending a slope exposed to avalanches; c) by not complying with instructions or prohibition signs; d) by ignoring orders of supervision and rescue service agents."

<sup>9</sup> Motion presented on 28.02.2005 (05.3012) by Günter Paul. The author of the motion was asking rigorous regulatory measures on slopes, eventually a new law and the introduction of a policy operating on slopes.

*“The accuracy criterion to be observed in single cases refers first of all to these provisions, when prevention of accidents and safety standards impose a specific conduct (BGE 130 IV 7 E. 3.3; 127 IV 34 E. 2a with notes). The same is valid for conduct standards recognized at general level, even if these were issued by a private or state-controlled association and do not have the same effects as juridical standards. This was approved, in the sphere relative to sports on snow, by the jurisdiction for conduct standards concerning skiers issued by the International Ski Federation (FIS standards; BGE 118 IV 130 E. 3a; 106 IV 350 E. 3a and relative notes) and regarding the safety obligation on ski slopes as set forth by the directives issued by the Swiss Commission for the Creation, Operation and Maintenance of Path for Sports on Snow (SKUS; BGE 115 IV 189 E. 3b). In case such a regulation is not present, the charge of negligent conduct can be also based on fundamental juridical principles as the general assessment of risk (BGE 106 IV 80 E. 4b).”<sup>10</sup>*

SKUS<sup>11</sup>, which groups together all non professional associations <sup>12</sup> and institutions <sup>13</sup> active in the ski and snowboard sector, was founded in 1960<sup>14</sup>, while current KRS-SBS<sup>15</sup> in 1974. FIS Congress approved the first version of FIS standards on 27 May, 1967, while the current version was approved on 7 June, 2002.

Every skier and snowboarder must know and comply with conduct standards issued by FIS and recognized in 1980 by law as behavioural conduct criteria to follow.<sup>16</sup>

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<sup>10</sup> uBGE 6P.31/2005 u. 6S.107/2005, Sentence of the Supreme Court of Appeal of 03.07.2005, E. 5.1.

<sup>11</sup> SKUS national advertising campaigns: 1994 *Kein Huckepack - Ihrem Kind zuliebe* (No pony, for the love of your son); 1999 *Vergnügen und Sicherheit* (Fun and Safety); 2004 *Control your speed*. SKUS communicates in three/four languages.

<sup>12</sup> (FUS, VöV) managers and (Swiss Ski, SWISS SNOWSPORTS) users of paths for snow sports

<sup>13</sup> BAV, IKSS, SLF, BASPO, bfu, suva.

<sup>14</sup> Under the presidency of the drafter, up to now 51 SKUS sessions and 17 foundation councils were held.

<sup>15</sup> Commission for juridical issues on paths for sports on snow of Swiss Cableways (FUS - Seilbahnen Schweiz (SBS), presided by Dr. Hans-Kaspar Stiffler.

In **June 1976** the former “work group in charge of explaining the juridical position of ski slopes” published the report drawn up by the reporter entitled “Die Verkehrssicherungspflicht für Skiabfahrten und Skiwanderspuren” (Safety obligation on ski slopes and those for excursions on snow”, and also the abridged version “Die Verkehrssicherungspflicht für Skiabfahrten” (Safety obligation on ski slopes) available to ski slopes’ managers and managers of the first-aid service.

At the opening of the commission’s works, the following “**SKUS recommendations and directives**” were in force: “Organization of slopes and first-aid service with particular focus on regulation relative to ski slopes” (1969); “Directives for the construction and maintenance of path for sports on snow” (1972).

<sup>16</sup> BGE 106 IV 352; 118 IV 133 E. 3a; 122 IV 20

## 2. The principle of personal Liability – Freedom of movement

**“Skiing and snowboarding at own risk<sup>17</sup>”**. As it occurs for the practice of any other type of sport, the principle of personal liability is also valid for ski and snowboard: who decides to practice these sports assumes the risk of all hazards relative to such sport. As a consequence, a responsible and careful athlete *prepares himself, trains and acquires information*. The personal liability is the price to pay for the freedom of movement: *“Control your speed”<sup>18</sup> and “Enjoy sport - protect yourself”<sup>19</sup> campaigns are oriented to personal liability and keeps reminding it.*

Among personal responsibilities of skiers and snowboarders and the safety obligation on ski slopes in path for sports on snow, there is a form of conflicts represented by an interaction.

In each accident, the judge must identify the *accuracy sphere of the safety obligation on the path and the damaged party, and separate them*. This limit creates the basis for a suitable refund.

## 3. Safety obligation on ski slopes – including safety on delimited ski slopes<sup>20</sup>

The obligation of companies that manage transport facilities on the mountains with regards to safety on ski slopes and maintenance of first-aid services constitutes an *additional contractual obligation*. The civil liability that derives from the transport agreement<sup>21</sup> is based on the **guarantee of trust and trust principle<sup>22</sup>**. Trust represents the most important principle for human cohabitation and as a consequence, the indefeasible principle of the legal system. There is a relation between business reason, safety and liability: safety towards alpine hazards (avalanches and falling hazards) on **delimited** path (ski slopes, itineraries, and paths) is included in the ski-pass price.

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<sup>17</sup> With this fundamental note, begin the SKUS directives for skiers and snowboarders.

<sup>18</sup> SKUS campaigns since 2004.

<sup>19</sup> Bfu campaigns in collaboration with Schweizerischen Versicherungsverband SVV (Swiss Insurance Association).

<sup>20</sup> With regards to jurisdiction see [www.skus.ch](http://www.skus.ch) ? at entry Jurisdiction, and also annual reports of the reports archived under ? Recent events or ? Archive and refer to “Law and Jurisdiction”.

<sup>21</sup> BGE 113 II 246 E. 3-10 S. 247 ff; 126 III 113 E. 2a/bb S. 115; 130 III 195 E.2.2.

<sup>22</sup> For the understanding by persons not familiar on legal subjects, it is reminded, as further examples of additional and behavioural obligations, additional contractual obligations in effect with regards to the role of architect, and builder, for stipulating an insurance for civil liability (BGE 111 II 72), or doctor that must clarify the lack of coverage of an intervention (BGE 119 II 456).

The companies that manage transport facilities on the mountains can be sued also for *general civil liability for illicit acts*<sup>23</sup> (Art. 41 OR) and for the *civil liability of the facility's owner*<sup>24</sup> (Art. 58 OR). The matter concerning whether ski slopes can be considered as facilities is debated.

The Federal court explicitly defines the safety obligation on ski slopes so that it is necessary to dispose of *admissible safety and caution measures for danger safeguarding*. "*The admissibility principle excludes that what must be otherwise considered, is not admissible*"<sup>25</sup>. Safety measures can be required only based on needs and possibilities in practicing the sport<sup>26</sup>.

The *development of the safety obligation on ski slopes in terms of content* is described as follows:

- ? SKUS directives for the construction, operation and maintenance of paths for sports on snow (2006)<sup>27</sup>
- ? FUS directives for paths for sports on snow (2006)<sup>28</sup>.

The reasons for which SKUS and FUS directives aim at the safeguarding of responsible and aware ski slopes' users must be referred in the same way, to the evaluation of the matters on liability:

- ? FIS conduct standards for skiers and snowboarders (2002 version)<sup>29</sup>
- ? SKUS directives for skiers and snowboarders<sup>30</sup> (2006)<sup>31</sup>, page 3 with **brief version of FIS standards**, subdivided into *Fundamental Standards (1), Circulation Standards (2-5), Stop/Ascent (6 and 7), Signals (8), and also in case of accident (9 and 10)*

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<sup>23</sup> BGE 130 III 195 E. 2.2.

<sup>24</sup> A causative civil liability, for which "*safety of transport facilities in relation to natural hazards as liability of the owner of the facility, is compared to feasibility and admissibility criteria (BGE 129 III 65 E. 1.1 S. 67; 126 III 113 E. 2b S. 166)*" (BGE 130 III 196 E. 2.2 at the end).

<sup>25</sup> BGE 117 IV 416. "*protection measures can only be requested in view of the need and possibility to practice a sport, even if minimum safety must be guaranteed (...)*", BGE 130 III 196 E. 2.3.

<sup>26</sup> BGE 121 III 258 E. 4a S. 361; 115 IV 189 E. 3c S. 193.

<sup>27</sup> In three languages (German, French, Italian).

<sup>28</sup> In three languages (German, French, Italian).

<sup>29</sup> [www.fis-ski.com](http://www.fis-ski.com) ? entry Standards and Publications (English, German, French). FIS standards were interpreted in an authentic manner (comment).

<sup>30</sup> Already on the occasion of the first conference dated 31 January, 1990, SKUS elaborated the **Directives for skiers and snowboarders**. These special directives were published through bulletin dated 8 March, 1990 and were preceded by the principle according to which the 10 FIS standards are valid for skiers and also for snowboarders.

<sup>31</sup> In four languages (German, French, Italian, English).

#### 4. Fundamental concepts of civil and penal liability

- ? **Trust guarantee**<sup>32</sup> and **trust principle, "Trust on ski slope"**: From a point of view of trust guarantee, companies must avoid at any extent, through notice<sup>33</sup>, to arise wrong safety expectations in the skier based on trust<sup>34</sup>. The commercial reason may constitute base for liability. Ski slopes' users must therefore be confident in the fact that they will not incur into any dangerous point or hidden and atypical obstacles, as set forth to **what indicated**.

The trust guarantee is efficient even when **ski slopes for cross-country ski, paths reserved to sleights, excursions on snow and paths for excursions with snow rackets** were created and delimited, which must be

**Delimited paths**<sup>35</sup> – **Uncontrolled areas**<sup>36</sup>: **Delimitation = Safety against alpine hazards**. Distinction between *paths for sports on snow delimited and protected against alpine hazards* (ski slopes, down-hill paths, paths in general) and the *non controlled area for the practice of sports on snow other than ski slopes and down-hill paths, not delimited or protected against alpine hazards*, it is a clear message for skiers and snowboarders. **As set forth by law**: in Germany and Austria, distinction is defined as follows "*organisierter (gewidmeter) Skiraum / freier Skiraum*", in France *domaine aménagé / domaine non aménagé*, in Italy "*aree sciabili attrezzate / percorsi fuori pista*".

- ? **Use compliant with provisions**: no liability in case of unusual use, contrary to provisions. Descent is reserved to *skiers and snowboarders*, down-hill slopes to *expert* users.
- ? **Opening of down-hill slopes**: Down-hill slopes are open during the operational period of facilities, unless they are closed on purpose (for example, due to avalanche hazard). The same is valid also for paths and parks for sleights, and also for areas reserved to excursions. This must be indicated on relative warning signs as follows:

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<sup>32</sup> Refer to BGE 120 II 331 (Haftung aus Konzernvertrauen); 121 III 350; 123 III 220.

<sup>33</sup> Signs for orientation and, tables, paths' plans, advertising

<sup>34</sup> BGE 130 III 345 E.2.1 S. 349: "*Trust relative to safeguarding foresees the injurer's conduct, suitable to sufficiently support certain and concrete expectations of the injured (.....). If the injured identifies non suitable provisions, the injurer is responsible for the damage provided that, the non realized expectation in regards to this appears to have been causative.*"

<sup>35</sup> Descentes balisées, discese demarcate, marked runs.

<sup>36</sup> Domaine non contrôlé, zona non controllata, off slope areas

*“Out of business hours, ski slopes are closed and no protections of any kind are set up against dangers such as the artificial detachment of avalanches or run-tracers with winch. **Death hazard!**”.*

- ? **Validity in terms of space occupation:** By *slope’s margin and safety at slope’s margin, and area of immediate boundary* is intended those strips of land with *maximum width of two metres* and also *an exceptional and accurate extension of the safety obligation* on the slope, to a more limited area beyond which falling hazards are present<sup>37</sup>.

**It is not necessary to create actual spaces for falls**, intended as guaranteed parts of areas beyond the slopes setup in order to trace the fall dynamic until coming to a halt.

- ? **Character of artificial obstacles or hazards:** the falling hazard includes all dangers that the user is not able to foresee ahead of time, despite s/he pays the due attention required by circumstances. *“Slopes’ users must be protected against atypical hazards, which cannot be foreseen in any way and appear therefore as fact, compared to other dangers which cannot be avoid, despite keeping a cautious descending conduct”<sup>38</sup>.*
- ? **Safety measures:** Directive bodies (administrators, executives, managers of slopes and first-aid service) can be deemed responsible in the moment in which they select their staff in a non accurate manner, do not supply sufficient training, do not give out the necessary orders, do not check the compliance with instructions or in general, do not sufficiently organize their activity. *A sole safety measure is necessary*, in compliance with what set forth by the Federal Court, *with a regulation of liability with no gaps*<sup>39</sup>.
- ? **Lack of organization:** the penal right for companies, which came in effect on 1 October, 2003, regulates in Art. 100 fourth paragraph 1 of StGB, the so called *subsidiary liability* of companies. From the moment that this penal right concerns the *fault of the organization and safety provisions, the registration of obligations and structures* of the companies which must guarantee safety on ski slopes is required. Starting point of the penal consideration of the safety obligation on ski slopes is, and remains, the principle of the personal relation of penal

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<sup>37</sup> BGE 130 III 198-200, E. 2.4.1 – 2.4.3

<sup>38</sup> uBGE 6P.31/2005 e 6S.107/2005 of 03.07.2005, E.5.2 with relative notes aBGE 130 III 193 E.2.3; 126 III 113 E. 2a/aa; 122 IV 193 E. 2a; 121 III 358 E. 4a S. 360; 115 IV 189 E.3a and c; 111 IV 15 E.2.

<sup>39</sup> BGE 125 IV 9, Registries: *“The manager of a company that manages ski lifts must define safety measures such to reduce the avalanche hazard.”* The ski lifts’ administrator was declared guilty of negligent homicide and negligent disturbance to public traffic. See also uBGE 6S.379/2002 dated 27.11.2002, Sentencing of manager of winter facilities of X-Bahn.

liability. The first thought concerns the application of the subsidiary liability, when the offence of an individual is established, but it is not clear who is *actually* the person at fault. The subsidiary-collective liability *does not* represent a substitute of certain individual fault.

- ? **Hazardous behaviour: Own fault - Joint fault in case of conduct not compliant with circulation.** FIS standard 2 (Ski exposed, keep a conduct a speed suitable to your own skills) and FIS standard 8 (Compliance with limits and signs). Starting from 1999, in compliance with fundamental provisions, SKUS started a communication campaign of FIS 2 and 8 standards at national level based on advertising posters outdoors. During 2004/2005 winter season, it launched the **Control your speed** campaign: the skier who does not have a descending conduct in compliance with the situation must assume the consequences of own risky behaviour.
- ? **No fault compensation is envisaged in penal law, suitability:** Contrarily to what set forth by civil laws, penal laws do not provide for fault compensation. Liability falls exclusively on the *unreasonable behaviour of the injured or third parties*. The main assumption for liability in case of negligence is the forecast of the consequence: the course of events that lead to a consequence must be foreseen to establish fault, at least in general. To resolve the matter of predictability or acknowledgement, the **suitability** criterion is valid: the behaviour of the person at fault must be suitable so as to *“lead or at least favour an outcome on how the event occurred, based on the course of events and life experiences. The suitability criterion must be rejected only in case extraordinary conditions are present, as joint third party’s fault or problems linked to materials and constructions, which are appear as aggravations that must not absolutely be considered and that are so relevant such to constitute the most probable and direct causes of the outcome and therefore, push onto a secondary level, all other aggravations, that is to say the defendant’s behaviour”*<sup>40</sup>.
- ? **Insurance against accidents: reduction of performance in case of risk**<sup>41</sup>. The administrative court <sup>42</sup> of Bern Canton had to judge the case of a skier who, at the end of

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<sup>40</sup> uBGE 6S.379/2002 of 27.11.2002 E. 3.1 with related note BGE 127 IV 34 E. 2a; 122 II 315 E. 3c; 122 IV 17 E. 2c/bb; 121 IV 10 E. 3 and 286 E. 3; 120 IV 300 E. 3e.

<sup>41</sup> In accordance with articles 39 UVG and Art. 50 UVV. jurisdiction distinguishes absolute from relative risk. An *absolute* risk is present when an action, based on a specific condition, is related to a hazard that, independently from the subjective qualities of whom performs the action, cannot be reduced considerably. The *relative* risk is present when the insured is not able to reduce the particularly serious hazard due to lack of abilities, skills and knowledge.

<sup>42</sup> Juridical division of social security, sentence dated 19.02.2003, BVR 2003 500-503.

January 2000, together with other three snowboarders, crossed a protection barrier, jumping on top of a barbed wired fence located behind it. As third member of the group, the thirty-year old man went down a slope covered by about 50 cm of fresh snow. The skier was then pulled and buried under a slab of snow: the dead body of the skier was recovered at a depth of about 1.5 m. SUVA (the biggest insurance company in Switzerland), with the skier had signed a policy in case of accident, reduced by 50% the insurance premium due to the widow and daughter. The court left open the matter concerning the actual presence of an absolute risk since the evaluation of facts, in terms of relative risk, brought to the same result. The appeal against the decision was rejected.

## 5. Special matters

- ? **Principles for warning about avalanche hazard and measures to be adopted – Up-dating of signs:** slopes (delimited) subject to avalanche hazard must be *immediately barred*. Barring of delimited slopes represents the most important measure to adopt and implies the exclusion of liability. The principle of topicality mentioned above concerns the *topicality of warnings of avalanche hazards*. The evaluation at *local level* of the avalanche hazard, which must be performed at best from a trusted person, expert of local conditions, precedes the evaluation of the condition at *regional and general level* performed by SLF. The legal practice, also assigns a quite relevant informative function to the evaluation of conditions at general level performed by SLF's experts.
- ? **Off Ski Slopes and Free-riding: the non controlled and non protected area is not an area where no standards are present!** The area *away* from delimited and paths reserved to sports on snow is not protected. The signs indicating avalanche hazard indicate the warning starting from hazard degree 3 "*marked*" with a luminous flashing sign in case of avalanches. **Free-ride-Checkpoints** remind the user that s/he can practice his/her own activity beyond the limited and safe slopes *exclusively* at his/her own risk and danger. In addition, **SKUS** suggests to skiers and snowboarders some particular behavioural standards to comply with in non controlled areas, while the companies responsible for safety on slopes suggests delimiting ski slopes. **The behavioural standards of FIS** are also valid in non controlled areas.

- ? **Special facilities as Fun Park and Half Pipe:** These are slopes *which must be separated* from slopes *and marked clearly*. Fun Parks and Half Pipes can be used only after an expert's opinion and during acrobatics, it is necessary to make sure that the landing area is free. **FIS' behavioural standards** are also valid for the users of these special facilities.
- ? **Sleighs, skiing, mountain-climbing and paths for snow rackets:** Slopes are reserved to skiers and snowboarders, and *not* to those that use sleighs, practice cross-country skiing, perform mountain biking, pedestrians and those excursionists with snow rackets. Those that use ski slopes *against what are set forth by the provisions* shall be aware of the fact that they represent a *foreign body*, must adjust to the path of skiers and snowboarders, and must comply with behavioural standards established by FIS. Obviously, the companies in charge of safety on ski slopes shall create *special systems separate* from ski slopes (paths for sleighs and excursions on snow, itineraries for excursions with snow rackets) and indicate them properly: the paths for sleighs are indicated for example in *blue-lilac* colour, while those for excursions on snow and with snow rackets are indicated in *pink*.
- ? **No State police operating on ski slopes, a private supervision service assumes tasks which are usually entrusted to the police force:** Police operating on ski slopes having the faculty to hand out fines and sanctions, which exercised the direct state power of command and control on ski slopes, can be introduced exclusively by issuing a proper legislation. Since laws on this subject are lacking, in Switzerland, no police officer can sanction reckless and daring skiers and snowboarders. What concerns police's tasks, it is regulated in the directives issued by SKUS and FUS, and also (with regards to companies of the Swiss Confederation that obtained the relative grants) by the public transport body.<sup>43</sup> Point 47 of SKUS' directives for the realization, operation, and maintenance of paths for sports on snow sets forth what follows: "*The service relative to ski slopes and first aid is carried out by the supervision service*". Point 48 of SKUS' directives regulates the authorizations granted to those who offer a supervision service relative to ski slopes and first-aid, similarly to that established by the public transport body. In compliance with the proportion principle, *first of all* it is instructed and warned and *then* the driver's license is suspended. *At last*, the sanction for having caused inconvenience to the public traffic<sup>44</sup>. Ski slopes are public circulation areas, while in fact, a *concrete danger* is implied.

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<sup>43</sup> See note in foot-note of page 8.

<sup>44</sup> Art. 237 of StGB.

? **Involvement of police – Registry of Accidents – Storing of traces.**

Since in case of accidents while practicing sports on snow, the appropriate ascertainment and storing of the proofs relative to the offence must take place immediately, point 45 of SKUS' directives has an even more important meaning regarding the assumption of police roles by the members in charge of services relative to ski slopes and first aid:

*“In case of mortal accident or other serious accidents, in particular in case of collisions, the service relative to ski slopes and first-aid must warn immediately the police authority competent in terms of place and subject, in order to ascertain and store proofs”.*

In case of accidents, the following is *generally* in force: the form envisaged by Swiss Cableways regarding the expert's opinion on the location of the accident must be directly filled out on site by the police patrol which intervened. In case of collisions, the relative form must be used.

## 6. Jurisprudence (from 2004 and 2005 annual reports by the president of SKUS)

- ? **uBGE dated 1 June, 2004 (4C.54/2004);  
Accident with involvement of a snowboarder  
Non controlled areas, “Actual ski slope”, Adjacent areas to slopes, Rocks  
Aspect of mountain slopes**

The First Civil Division had to evaluate the accident (tetraplegia) of a 17-year old snowboarder which took place on 23 January, 1995 in the Grigione Canton.

Firstly, the drafter observes with satisfaction that the First Civil Division of the Federal Court is followed by two sentences in six months, based on SKUS' directives and those issued by KRS-SBS. The authority of both institutions on safety obligation on ski slopes, Swiss Model, was widely recognized and their work, long and coherent, was compensated.

As in the case of **BGE 130 III 193** (Glärner Case) sentence, it was denied the compliance with the safety obligation on ski slopes. The plaintiff was claiming the payment of a refund set forth by contract (OR Art. 47 i.V. 99, paragraph 3), having declared that the accident that she was subjected to, occurred on an “*actual ski slope*”, eventually on an *area adjacent to the same slope*.

In point E. 2.4.1., the Chamber discusses the safety obligation on ski slopes and on its margins on both sides, in the area adjacent to the same slope.

With regards to adjacent areas, safety obligation is in effect only in the measure in which “*skiers and snowboarders must be protected from particular hazards that are located on the slope by posting relative clear signs which ensure them to be aware of the hazards of official slopes (.....)*”.

After the court, as set forth by point E. 2.4.2., explains terms “ski slopes”, “slopes reserved for skiing”, *delimited slopes* and “wild” slopes (variant: “free-ride area”), and also the *non controlled area*, as set forth by point E. 2.5.1., clearly establishes that the place in which the accident occurred is at about 80 mm from ski slope Y., as a consequence “*clearly beyond official and protected slopes and the area adjacent to the slope*”. “*In this case, the accident occurred in a non controlled area. Therefore the defendant was not obliged to remove the obstacles present on the slope with the purpose to safeguard skiers and snowboarders. In particular, the defendant was not obliged to remove the rock onto which the plaintiff collided*”.

Further fundamental principles are the following:

*“The cantonal court agrees with no doubts, with the chamber’s opinion according to which rocks constitute integral part of the natural framework which characterizes the aspect of mountain slopes. From the sentence passed, it should not be inferred that the rock, in its position, constituted an obstacle that could have caused falling. Also in the case in which this would have been fully covered with snow on the day of the accidents, things would not change. The plaintiff should have kept in considering that natural obstacles covered by snow could have been located on a non protected slope.*”

**Result:** Since the injured person was not present by mistake on a “wild” slope where the accident occurred, the latter acted at her **own risk and danger**. The slope where the accident took place was a **non controlled area**.

? **Sentence of the XI Legal District of Interlaken-Oberhasli region dated 10 February, 2004 (Judge of Court 2);  
Accident on skis, places where snow is melted, rise, FIS 2 standards, warning sign**

In view of the civil proceeding limited to the subject on liability, in the subpoena it was declared that the plaintiff, on 1 February, 1998, suffered an accident with serious injuries on a slope prepared in ski area X. According to an investigation of non general character, it was possible to indicate a grassy area as cause for the fall. The snow conditions were very good, as a consequence it was not expected the presence of an area not covered by snow. No barring was placed and neither any warning sign.

The judge of Court 2 rejected the claim due to lack of violation of the agreement: that is to say, of an illicit condition. The sentence acquired legal value.

In the sentence, it is established that snow and weather conditions on the day in which the accident occurred were certainly good, however there were *no ideal snow conditions*. It was also stated:

*"In particular, the presence in the ski slope of various areas in which the snow was melted did not constitute an exception. Therefore, the plaintiff also should have kept in consideration as all the other skiers, that she could have found several grassy areas on that day. Furthermore, she should have considered the fact that such area could have been found behind a very steep surface, exposed to the sun.*

*The defendant, in turn, considering the general state of the slope, could have expected that skiers would have studied the area in front of them and as a consequence, would have kept that in mind when skiing. In addition, a skier must comply with what set forth by FIS 2 standard (Descend by keeping the path in sight; keep a speed and a behaviour suitable to own skills). In particular, a suitable behaviour must be kept when descending in areas where a rise is present, especially when the area immediately after the rise is not visible. As a consequence, the plaintiff should have stopped before the rise or go around it or, perhaps, go over it at a speed such to be able to stop and avoid the obstacle. This area, absolutely not identifiable as difficult, would have certainly allowed this type of behaviour. The plaintiff should have also not considered only the points in which the snow was melted but for example, also the fact that an injured person could have been laying in the area after the rise (see BGE 122 IV 17)."*

In the sentence, it is finally declared that the sued company warned about the presence of areas in which the snow had melted at the station on top of ski-lift A. *"The fact that the plaintiff did not see the warning sign is due to her behaviour since she left the official slope, crossed the path of ski-lift A and went to the red slope"*.

? **Sentence of the XIII Legal District of Obersimmental-Saanen region dated 1 September, 2004 (Judge of Court 2):  
Collision of a skier with a run-tracer**

The collision between a 14-year old skier and a run-tracer took place in February 2003. The youngster, an advanced student of the group, during the last descent around 4:00 p.m. went through a bushy path (a short-cut of a blue ski slope) and jumps about 20 metres over a road, colliding with a run-tracer that was ascending the blue ski slope towards the station on top of the mountain. The driver and manager of the facilities were declared guilty due to the serious physical injuries of the body and fined with a sanction of Fr. 500.00, to refund the injured party and for court fees.

The *sentence of guilt of the run-tracer's driver* was therefore based on the fact that, violating the safety measures set forth by FUS and SKUS directives, was ascending the slope with the run-tracer in a point characterized by scarce visibility and during facilities' operating hours.

The *manager of the facilities* was instead accused, of having given the **order** to the driver of the run-tracer to ascend the slope until the top during the facilities' operating hours, thus violating the safety measures (barring or intervention of a support person) set forth by FUS and SKUS directives.

The result of the investigation was the following: the short-cut through the path in the woods, which does not allow seeing the next tract of slope up until just prior to the turn in the blue slope, did not belong to the delimited slope and as a consequence, was not prepared. The "wild" slope nevertheless, is often and regularly run and is not different from the delimited slope in terms of aspect and frequency of use. The slopes' managers did not do anything to make the "wild slope" more difficult or impossible to use, by placing signs or barring. Both the parties convicted were aware of the fact that the short-cut was run as a regular official slope.

At the moment of handing out the sanction, the court judge kept in consideration the circumstance for which the serious collision is mainly to be attributed to joint liability of the injured party. The student indeed violated standard FIS 2, by skiing a steeper area at high speed and jumping over a rise without knowing what was beyond that.

? **Sentence of the Schwyz Cantonal Court dated 21 December, 2004;  
Accident with snowboard (fall) of a 16-year old student during a sky outing  
organized by the school  
Teacher's liability, causality, avoidable means**

As already sentenced by the district court of Schwyz (sentence dated 26 March, 2003), also the Cantonal Court absolves the teacher from the charge of culpable homicide.

The student falls along a red ski slope and loses his snowboard: the board slides along the slope and gets stuck in an upright position in a bush, at the corner of an area where behind lays the projection of a rock and a cliff. Looking for his board, the young man leaves the delimited slope, goes through the area delimited by the yellow and black cord; then slides on a snowy, icy, and steep surface, loses grip and finally falls for 80 metres along a rocky wall, losing his life.

The teacher is accused for not having fulfilled sufficiently won obligation of *assistance and supervision* during the ski outing organized by the school.

Exactly as the District Court had previously sentenced, the Cantonal Court also reaches the conclusion that the non observance of the safety obligation on the slope by the teacher did not *cause the accident* since, even if this obligation had been strictly complied with, the accident could have not been avoided. The Cantonal Court declares as follows:

*"The sporting ability of the injured party and/or degree of difficulty of the slope, following to what stated, did not appear as causes of the consequence, therefore of the death of the young man caused by a fall of over 100 metres beyond the limited slope, after the latter falling and not getting injured during a calm descent and, subsequently he went beyond and crossed the barred area on foot looking for his snowboard".*

? **Sentence of the 2<sup>nd</sup> penal section of the Cantonal Court of Bern Canton dated 25 November, 2003 (acquittal in the Axalp case);  
Sentence of the Federal Court dated 23 March, 2005 (1P.600/2004)  
Expert's role, "Legal opinion"**

The lawyer of the skier who after an accident occurred on 15 January, 1999 reported serious injuries and since then is partially disabled, presents a constitutional appeal on 18 October, 2004 at the Federal Court. The plaintiff brings forward the thesis according to which the legal expert that presented detailed juridical conclusions in his examination in February and June 2002, was biased and should have abandoned the case. The plaintiff sues the Federal Court for evaluating the proofs in an arbitrary manner and invalidated the hearing in court.

On 23 March, 2005, the first constitutional section of the Federal Court rejects the appeal for refund of damages and expenses equal to a total of CHF 5,500.00 (1P.600/2004). In the sentence it is declared in particular, that all the parties involved and specifically the plaintiff were aware

*"of the fact that the legal expert was not a builder or a manager of ski slopes, but a jurist. The task entrusted to the expert with the purpose to clarify whether the counter parties fulfilled their own safety obligation on ski slopes was finally concluded, without an accurate legal examination. In addition, the expert had to clarify inevitably the legal issue concerning the meaning of this obligation, and if and when the counter parts should have taken further*

*measures as set forth by competent standards and by the juridical practice, with the purpose to guarantee better the ski path on which the accident occurred.*

The charge, the sentences of the single judge and Federal Court were "advance/prejudiced" by the inadmissible "legal opinion" presented by the expert, defined by the Federal Court as "non shareable". The sentence states:

*"The office right should have used both instances and there is no credible proof on the fact that they did not fulfil the obligation and that the legal consequences of E. should have certainly brought to such sentence".*

? **Appeal sentence of the Appeal Chamber, Bern Canton, dated 12 April, 2005  
Accident on skis occurred at the end of December 2003.  
Lack of initiation of penal action for negligent physical injuries.  
Collision with warning sign 10, indication of temporary dangerous points.**

The Appeal Chamber rejects the appeal of a skier against the decision of the investigating judge and Public Prosecution for not having initiated the penal action.

At the end of December 2003, the injured party, at about 20 metres from the intermediate station of a cableway, falls and collides against a pole at the edge of the ski slope, injuring his leg and knee. Three days after the accident, the injured party, who had returned to Germany in the meantime, accuses the manager of the slopes' facilities to be responsible for the accident. The technical service of the cantonal police is entrusted the investigation of the accident.

The plaintiff claims the fact that the presence of the pole [point 53 of SKUS directives, indication of temporary dangerous points] represents an additional source of danger. The Appeal Chamber does not agree with the presented claim and expresses the following:

*"On one hand, it is not one single pole, but a row of poles that indicate the ski slope on the right. On the other hand, poles were specifically positioned to warn the presence of dangerous points in the area of the intermediate station. Poles, which are always wooden, are usually padded. In compliance with what established by the jurisdiction of the Federal Court, those obstacles that represent a source of relevant and particular danger must be padded exclusively, because the safety obligation on the slope covers this liability only as long as it is reasonable (BGE 121 II 358, E.4a, S. 361). Certainly, it is not reasonable to pad every pole with the purpose to indicate the presence of a danger since its presence already urges to a particularly careful descent and the danger inferred from the use of non padded poles for a clear warning, is classified as minimum in such conditions. Similarly, therefore, the claim according to which all edges of the obstacles present in the area adjacent to the slope must be removed, therefore in the two-metre strip that delimits the slope, is not justified. On one hand, with regards to the pole, this is not an obstacle, but it consists of a special sign positioned in a point to minimize danger. On the other hand, from the single pole of a warning row, it cannot be inferred the considerable hazard referred to it. .... "*

The Chamber concludes:

*"In brief, it is possible to establish that the accident of Z. is due to his own personal liability. He did not consider the place (cableway station) and weather conditions during the descent at a speed suitable to his skills. In addition, the collision does not represent the consequence of the presence of the pole that he had not recognized, but he collided exclusively because of the sharp turn on the left that brought him forward onto an icy surface. By adopting a more modest speed at the upper part of the mountain and more suitable to the narrowing of the slope, in*

*particular to the conditions of the place (cableway station), he could have turned to the left more carefully and recognized the icy surface immediately. In addition, the plaintiff was aware of the narrowing of the slope and should have kept in consideration "harder" ski slopes, in quality of expert skier.*

- ? **Sentence of the Vallese Cantonal Court dated 7 March, 2005 (Civil Court, C1 04 108);  
Accident on ski with serious injuries occurred on 8 January, 1999  
Objection of lawsuit  
Crossing of area on the side of the ski slope, non controlled area, FIS 2 standard, rocks**

Since the request for refund (value claimed about 3.8 million Francs) envisaged the liability of the sued company that manages the lift facilities, the civil court expressed a preliminary sentence in the interest of the proceedings' economy. Due to the lack of acceptance, there is a final sentence of the proceeding which acquired legal validity.

At the beginning of January 1999, the plaintiff descends a delimited slope in the area in which the accident took place and collides against a group of rocks, that is to say a rocky formation, and falls, getting seriously injured.

The depositions of the parties regarding the exact place of the accident, weather conditions and snow, slope's preparation and identification of the area on the side of the slope were contrasting. Following the accident, no assessments were carried out regarding the traces and proofs had not been stored.

The court assigned particular importance to the *registry of the air aid* and complementary performances of the doctor and medical staff. *Full substantiating efficacy* was granted to the registry.

With respect to weather and snow conditions, reference was made to recordings / measuring data of the near-by *meteorological station for data measuring* which sends findings directly to SLF on-line.

Regarding the identification of the slope's margin, the court concluded that the slope was last prepared with certainly a few hours prior to the accident, therefore the slope was covered by about 8 cm of fresh snow. Indeed, the slope's side margins could have been recognized, such that a skier should have noticed, once abandoned the slope, the different snow consistency on the slope and nearby.

The court concludes as follows:

*"In the present case to be evaluated, the plaintiff collided against a rock formation at five or ten metres away from the slope and fell. The place of the accident, as a consequence, is clearly beyond the slope's surface and of the area at the edge. The path's delimiting strip had not been fully run through and as a consequence, the slope was not widened by the frequent passage on its margins, so that the safety obligation was not extended. It is also true that, witness Z. declared – only him – the presence in this area (...) of marked traces on the snow, which nevertheless, did not infer the passage of an individual in the juridical sense of the word; in any case, after a while, the witness weakened his deposition by stating that probably the area was presenting traces (only) and he could not remember exactly. Therefore, since the accident occurred on an area adjacent to the slope, therefore in a non controlled area, the plaintiff is essentially responsible for the hazards linked to descending with skis. According to the above mentioned law, the defendant is responsible only exceptionally in case of accidents in this area, and in case of double and cumulative condition that the injured party, in that area, found a particular and exceptional danger and*

*that even expert skiers, due to the condition of the ground, could have involuntarily accessed this dangerous area (...).*

*In any case, rocks are part of the aspect of alpine regions, therefore they do not represent, in non controlled area, an exceptional or fall hazard, even when they are fully covered by snow (...). Consequently, there is no atypical danger, and therefore the defendant's liability for the plaintiff's accident is out of discussion. In addition, the plaintiff, during a careful descent, should have noticed that he was leaving the slope. Following assessments regarding the circumstances performed by the Cantonal Court, the slope's margin, despite the snowfall and preparation a few hours prior to the accident, was on one hand, recognizable at first sight; on the other hand, the plaintiff should have realized, based on a different sensitivity when descending beyond the slope, that he had abandoned the path prepared in the morning. As a consequence, the defendants' liability is declined.*

*In addition, a careful user should adjust his level of focus and speed to exceptional conditions (see FIS 2 standard). If, due to diffused light or snowfall, the slope's margin is slightly hidden or harder to see, the skier must adjust his/her speed so as s/he is able to recognize the point in which the margin is located. Due to reduced visibility of the slope's margin, the plaintiff should have therefore been more careful, nevertheless, upon indication of the couple and contrarily to his spouse's will, he intentionally descended it at high speed (...). In this case, the fact that he did not see the slope's margin is only to his imprudence. If had been descending at a suitable speed, he could have stopped as soon as he left the solid slope and entered in the fresh snow in the area of the edge of it. Despite this, the plaintiff continued, even if such change in snow conditions could have not been passed unnoticed. Therefore, the plaintiff did not fall close to the slope, but evidently far away from it. As a consequence, he intentionally and freely abandoned the slope to ski on fresh snow (...).*

*Nevertheless, this point is not certain. The main issue is indeed that the plaintiff crossed the visible slope's margin during a careful descent and at the end, collided against a natural and not atypical obstacle beyond the slope located in the area adjacent to it. As a consequence, any defendant's liability is declined. In the present case, what occurred was a danger relative to a descent far away from the protected slope that exclusively injured the skier. Therefore, there is no violation of the safety obligation on the ski slope by the defendant; such violation was instead proven and confirmed by the plaintiff that should have presented proofs. The claim is therefore rejected".*

- ? **Accident caused by an avalanche in a non controlled area on 21 February, 2000, three persons died;**  
**Sentence of District Court of Prättigau/Davos dated 5 February, 2004, and also of the Grigioni Cantonal Court dated 30 June, 2004 (Lack of acceptance of appeal);**  
**Sentence of guilt for culpable homicide and order for payment of a fine equal to CHF 1,000.00;**  
**Sentence of the Supreme Court of Appeal of the Federal Court dated 3 May, 2005 (6P.163/2004 e. 6S. 432/2004);**  
**Rejected, constitutional appeal and appeal for nullity.**

A constitutional appeal was brought forward regarding the arbitrary recognition of proofs.

During the proceedings, an official expert's opinion and two integrative expert's opinions were drawn up, and also a private expert's opinion.

The official expert's opinion concluded that the plaintiff, most likely caused the avalanche. On the other hand, the private expert's opinion concluded that it was not possible to exclude the possibility that another person standing on the slope could have caused the avalanche.

The Federal Court expressed the following (E. I 8):

*“The [official] expert’s opinion has differentiated, analysed and presented in a complete way, the situation at the moment of the accident, reaching the conclusion that the plaintiff most likely provoked the avalanche. The Cantonal Court critically evaluated the expert’s opinion, considering instead the various evaluations of the private expert’s opinion objectively. The plaintiff tries to presenting the existence of additional causes of the avalanche as probable. No relevant facts or proofs were presented such to reduce the persuasive power of the expert’s opinion”.*

Through the *appeal due to nullity*, the plaintiff brought forward the fact that the preliminary sentence, erroneously, admitted the violation of subjective accuracy obligation. The person in charge of the first-aid service declared before the investigating judge that he did not considered such a dimension of the avalanche. The fact that a stricter criterion should have been valid for the plaintiff is not agreeable. In addition, he was the third person arriving on the slope, so that the risk to provoke an avalanche was only of 10%.

The Federal Court deliberated the following (E. II 12):

*“The decision does not object to the Federal Law. As explained in the avalanche bulletin dated 20, February, 2000 at 5:00 p.m., issued by EISLF, a considerable risk of avalanches was present and the point of this hazard was located on steep slopes, of all exposures higher than 2000 metres. In addition, the bulletin established that the weight of only a skier could have caused the avalanche. Excursions and descents beyond protected slopes must be carried out based on the experience to evaluate avalanche hazards and moderately. From the bulletin on avalanches, it could have mainly been inferred that ample snow accumulations were present on the peaks. In compliance with the European scale that defined the avalanche hazard, to which, in April 1993, all avalanche observation bodies of alpine regions began to comply with, in case of relevant avalanche hazard, a certain experience is necessary with regards to evaluation and steep slopes falling in the indicated exposure must be avoided (...). The plaintiff and his group did not consult the bulletin, neither they had the experience to evaluate the avalanche hazard. In addition, they did not take into account the warning notices communicated by the managers of lift facilities through signs, etc. The descending path chosen by the plaintiff, starting from a central peak, had 38% inclination and in addition, was facing north-east; as a consequence, this should have been classified as particularly dangerous after a snowfall. The plaintiff, ignoring the bulletin on avalanches and warnings, went on the slope and did not consider the accuracy criteria based on news on avalanches issued in compliance to authority’s conduct standards. As deliberated by the Cantonal Court in a suitable and detailed manner, it would have been possible for the plaintiff to foreseen the possible consequence of his own action should he had used due diligence. Such behaviour of the skier must be blamed. Therefore, with a certain probability, the avalanche could have been prevented and the death of tourists could have been avoided.*

?

The plaintiff’s appeals are groundless. The argumentation, for which the same K., in view of the expert’s opinion, declared to have been surprised by a large size avalanche, does not change anything regarding the violation of safety obligation. Even if the plaintiff implicitly disputes the probability of the event, he cannot obtain anything in his favour from the above mentioned declarations. The relative interrogation was useful to clarify an eventual penal liability of K. and in addition, concerned the extraordinary size of the avalanche that buried the ski slope. Even the objection regarding the risk of provoking an avalanche by a third skier by descending a non traced path is only of 10%, does not have any particular effect on the evaluation of his behaviour. Nothing changes in regards to the lack of compliance with accuracy obligations or the fact that the cause of the avalanche seems to be so unlikely to doubt as probable. The same is valid for the consideration deriving from the sentence of the cantonal penal court concerning the archiving of penal proceedings against K., according to whom it was a chance the fact that the avalanche was actually provoked by the descent of the third member of the

group. This decision referred to the possible penal liability of K. and evaluated the matter of possibility in regards to this point of view. The Court reached the conclusion that K. did not foresee that skiers could have reached the slope from such a difficult access point. Therefore, it established that it was a case that the avalanche was actually provoked during the descent of the third skier. From this formulation, it appears that with the term "case" is meant exclusively the fact that other skiers could have also caused the avalanche. Also on this point, the appeal is rejected.

? **Sentence of the Federal Court (Supreme Court of Appeal) dated 3 July, 2005, Corviglia-Run / Platform on which the television camera for TV shooting is located; Sliding in the B mesh (6P.31/2005 e 6S.107/2005), fatal concatenation of unfortunate circumstances.**

The accident in which a fourteen year old boy lost his life occurred on 2 January, 2002, at 9:50 a.m. The youngster, member of group of nine students led by an expert ski instructor and by a J+S guide, was descending a slope in the ski area of St. Moritz-Corviglia. The group, constituted by expert skiers, was jump training.

The slope descended by the youngsters was also used for FIS world championship competitions. A platform was created, at a distance of 21 metres from two poles of the chair lift, on which a television camera was positioned for TV shootings for the women's race that had been held on 22 December, 2001. With the approval of the ski-lift's manager, the tower was kept in the same exposed position for the men's race which would have been held on 2 February, 2002. Towards the top, the tower was protected by a so called B mesh, which extended two-metres high and in a half-circle shape, at a distance of four/five metres from the obstacle. At the moment of the accident, the ski slope at this point, was 80-85 metre wide, flat, covered by solid snow, manageable and feasible, despite the small rises or depressions of the ground.

Against the instructions of the teacher, the victim continued descending towards the platform on which the television camera for TV shootings was positioned and jumped a second time on the edge, and falls, loses a ski and slides face forward towards the platform, colliding directly with the protection mesh positioned on it. The student, rotating above the mesh that had lowered in the impact, was pushed far away on the snow, still, at a distance of three or four metres below the tower for TV shootings, without having collided against the platform. The fourteen year old boy died on the spot due to a serious brain injury.

Since the teacher gave clear instructions, his liability is not questioned.

With sentence dated 15 September, 2004, *the Grigioni Cantonal Court* (Board of Complaints) reached the verdict according to which the platform on which the television camera for TV shootings was positioned and therefore was located on the slope at the moment of the accident constitutes a well visible artificial obstacle which did not have to be removed and, due to the open configuration of the area could have been seen from the slope's users from far away. In these conditions, by evaluating the issue of obstacle's conformity to the slope, it is not possible to reach the conclusion that this obstacle was used for the television broadcasting of the world championship ski competition and not for other activities on the slope other than such competition. The preliminary sentence also admits the fact that the protection of the tower for TV shootings with a B-mesh was suitable and sufficient and the accident is not due to lack of protection. The cause of the accident is due to the fact that the descending speed of the young victim at the moment of the jump and collision against the mesh was over the foreseen moderate speed.

The Supreme Court of Appeal of the Federal Court rejected the constitutional appeal and the appeal for nullity and deliberated that the tragic accident is not due to a violation of the accuracy obligation by the persons in charge to comply with the safety obligation on ski slopes, but solely to a fatal concatenation of unfortunate circumstances.

The considerations of the federal court that clearly demonstrate the *importance* of SKUS and FUS directives are the following:

**5.3.1** In compliance with the declarations brought forward in the preliminary sentence and binding for the Supreme Court of Appeal (Art. 277bis Abs. 1 BStP), Corviglia ski slope, in the area in which the platform was built onto which the television camera for TV shootings was positioned is very open, wide, and offers excellent visibility. The obstacle was located on a flat part of the slope. The slope's area below was not characterized by particularly steep inclinations or by changes of direction with scarce visibility, narrow passages or large rises or hills that would cause the reduction of visibility of the rest of the slope and area below. Corviglia slope, in this area, presents itself to skiers and much flatter, open and wide. In addition, at the moment of the accident, visibility and weather conditions were good. In virtue of the configuration of the ground of Corviglia slope, the platform on which the television camera for TV shootings is located could be seen from far away by the users of the slopes. The preliminary sentence therefore accepts the fact that the platform did not represent an atypical obstacle and a fall hazard on the ski slope and that it was not particularly hidden, unexpected and not visible and therefore in general, not compliant with the slope (see Stiffler, a.a.O., N 429). As a consequence, the managers of the ski slopes did not have to remove it. This also complied with SKUS directives for which, according to point 28, the obligation to remove all natural or artificial obstacles is present only for specific obstacles that users, careful according to the circumstances, cannot see ahead of time (see Stiffler, a.a.O., N 433; point 8 N 87 of FUS directives). The fact the ski lifts' managers and organizers of the world championship competition did not remove the platform onto which the television camera for TV shootings is located at the end of the same competition, does not represent therefore a violation of the accuracy obligation. In this situation, it is not important the fact that the platform was only used to broadcast world championship races and not for the activity on the slope after the competition.

**5.3.2** In compliance with the sentence, unavoidable hazards for the skier and that the skier must consider at any moment, include also the fact that this may fall and therefore keep sliding without being able to stop promptly or control sliding. To reduce injuries caused by such falls, fixed objects as for example cableway's poles and trees must be removed as much as possible from the slope or be protected with suitable mechanisms, where warning signs are not sufficient ([BGE 121 III 358](#) E. 4a, S. 361; [111 IV 15](#) E. 2, and relative notes. Also see point 8 N 88 of FUS directives). Such a protection was located in this case by slopes' safety managers, who placed a B mesh at a distance of 4-5 metres from the platform, supported by over 11 poles, and eliminated this way, the hazard. According to law, the preliminary sentence also admits the fact that safety measures were sufficient. This is also confirmed by the technical expert's opinion concerning site safety, according to which B-mesh, assembled in front of the tower on which the television camera was positioned, was on a slightly inclined and rather ample area, which offered enough space to users to avoid the obstacle, according to the relative safety provision. This is also valid because, in the point in object, the skier should have considered the fact to descend at relatively high speed, as in the case of which at point [BGE 121 III 368](#), in which the slope, after a narrow passage, was going uphill, so that skiers could control the counter inclination when descending at moderate speed.

- ? **Sentence by Judge of Davos District dated 11 July, 2005 (Pr. Nr. AA 05/48);  
Accident caused by an avalanche in a non controlled area, in Rinerhorn region dated  
29 December, 2003.  
Verdict of guilt of J+S 1 guide for culpable homicide.**

A J+S 1 ski guide (since 2002), within the penal proceedings pending on him, was declared guilty for culpable homicide and therefore sentenced to 2 months of imprisonment with right of parole, with a trial period of 2 years and a fine of Fr. 200. The sentence assumed legal validity. The guide was descending the slope with ten of the best skiers of a J+S camp that boasts 110 members.

The violations of the accuracy obligation by J+S 1 ski guide, on which the verdict of guilt is based on, were multiple:

*"During a skiing outing in the region of Rinerhorn, X. was responsible for ten children and youngsters assigned to him. He had noticed the warnings, located in well visible positions in various points that were urging to be careful of the considerable avalanche hazard. During his training, which ended in 2002, J+S 1 ski teacher was also trained on avalanche hazards. Based on the knowledge acquired then, he was able to evaluate the risks linked to avalanches of which he was warned, and without doubt, he essentially knew which behaviour to adopt in such situation. Notwithstanding he did not have with him the suggested equipment (LVS device, rackets, probe) and despite the regulation in effect within the camp, according to which children can exclusively ski on slopes, X., followed by his students, left a delimited and protected slope, crossing a barring. Despite he was warned by the considerable avalanche hazard, the guide reached with them a steep slope that was never descended by another skier and then gathered the students close to him to wait for the slower ones. Thanks to his not careful behaviour, not compliant to standards, the teacher violated the accuracy obligation to which, in quality of guide, he must comply, and he was responsible for the fatal burial of the victims under the snow".*

- ? **Filing of the Grigioni Public Prosecutor proceedings dated 21 October, 2005 (Pr. VV.2003.60);  
Mortal accident caused by an avalanche at Savognin/Riom-Parsonz on 29 December, 2002, two persons died in an area indicated as Free-ride-Zone;  
Guarantor role of participants' safety and liability to comply with safety obligation on ski slopes by the employees and bodies of the company that manages ski lift facilities.**

On 29 December, 2002 (a Sunday), eight youngsters of Savognin, six snowboarders and two skiers, were at the station down to the valley managed by Savognin Bergbahnen AG. The group stops on top of the Heidipiste slope and decides, after consulting with one another, to leave the delimited and pre-arranged path with the purpose of reaching Tiempiste, parallel to the Heidipiste slope. To do this, they had to cross a non pre-arranged area, crossed by a crevasse. After descending for about 200 metres on the fresh snow, the first snowboarder directly reaches the steep slope. That point having been reached, six of the eight students stop and sit down on the snow. A. is the last one of the group of five youngsters to descend the slope but, in view of the danger, decides to leave it again. Before continuing, a snow avalanche buries him together with his team companions.

Concerning the role of safety guarantor, the following is deliberated:

*"As deliberated, the youngsters met to go beyond the slope. The group spontaneously decides to cross a tract of fresh snow to go to a nearby slope. We cannot say it is a group of skiing tourists. In addition, all the components of the group were expert skiers or snowboarders. Therefore, to none of the members of the group was assigned the duty of a guide. In this way, it is not possible to define the role of safety guarantor (see BGE 100 IV 213).*

*Moreover, the guarantor's obligations can derive from the fact that several persons, spontaneously, gather together to constitute a ski group, confident that in case of danger, they will help one another (Trechsel/Noll, Swiss penal Law, AT 1, 5. A., S. 245). As declared, the group decides spontaneously to cross the fresh snow and did not come together to protect each other against the hazard. This means that a position of the guarantor cannot derive from the constitution of a group against a well-founded danger".*

Liability resulting from safety obligation on the slope:

*"The current accident occurred in a ski area managed by Savognin Bergbahnen AG, nevertheless beyond the delimited area, in a zone indicated by the same Savognin Bergbahnen AG as Free-ride-Zone. These areas are also defined as "wild slopes", variant or Free-ride Areas and are generally accessible and created spontaneously by the passage of skiers and snowboarders in non controlled areas. These are assigned to the "non controlled area" and are not marked, prepared, and controlled by the authorities responsible for safety on slopes and neither protected from alpine dangers (refer to SKUS directives 9 and 10, SKUS directives II, point 6 and Stiffler, 3. A., N 314 and following ones). In other words, therefore, the area indicated as Free-ride-Zone is not subject to the compliance of safety obligation on slopes. This situation was pointed out to skiers and snowboarders to the "Free-ride-Checkpoint" at the station down to the valley managed by Savognin Bergbahnen AG according to SKUS directive X, point 37 (see .... Photograph 12).*

*Similarly, at least at every intermediate station, it is necessary to expose in case of avalanche hazard, SKUS warning sign 8 "Avalanche hazard in the non controlled area" with the purpose to warn skiers and snowboarders that are descending the non controlled area out of delimited and protected slopes and eventually, turn on the luminous flashing sign in case of avalanches. Starts towards wild "slopes" and variants regularly descended, must be constantly signalled through warning sign 12. Starting from "marked avalanche hazard" degree, it may be necessary, at times, a local barring (SKUS directive X, point 36). Nevertheless, logic represents the limit of this obligation, since a minimum safety and delimiting standard must always be guaranteed. The Federal Court in BGE 115 IV 193 states that in case of serious avalanche hazard, wild "slopes" known to the manager of ski lift facilities that go through slopes more exposed to this hazard, must be barred through signs located at the margin of the slope, which explicitly warn about the avalanche hazard. A general warning sign in the station down to the valley and at the end of ski lifts what refers to the general avalanche situation is not sufficient. In addition, it would be more reasonable to create additional access bars. In BGE 117 IV 415, the sentence was in this sense minimized, sustaining that, in general, warning and prohibition signs are sufficient and no bars are necessary. The Court considered excessive and not reasonable, in the case under proceedings, to bar the slope along a length of 550 metres on its margin in case of serious avalanche hazard.*

*In the present case, the day in which the accident occurred, the luminous flashing signs which warn about the avalanche hazard were on at the station downstream of the valley and at that upstream of Somtgant Mountain. In addition, at the stations on top of Somtgant and Martegnas Mountains, through which the students passed by, warning sign "Snow slab/avalanche hazard" was exposed". In conclusion, at the "Free-ride Checkpoint", the updated bulletin on avalanches was also exposed. At least one member of the students' group*

*should have noticed this warning signs. Therefore, it is asked whether these warning signs were enough or if the Free-ride-Zone should have been further protected by barring or been signalled through warning signs. With regards to this, it must be considered that for this Free-ride-Zone there is no starting point or starting/access path. This area instead could be accessed only through Heidipiste slope for a length of various hundreds of metres; therefore the placing of another warning sign at the margin of the slope would have been fruitless. According to the above mentioned sentence, it would be equally excessive and not reasonable to request to bar this area along the entire Heidipiste slope.*

*In view of what mentioned above, it is deliberated that the managers of the Savognin Bergbahnen AG fulfilled the safety obligation on slopes and for this reason, no fault can be attributed to them with respect to the non compliance with the accuracy obligation”.*

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**Abbreviations:**

Abs.	Paragraph
Art.	Article
BASPO	Maggingen sports federal office
BAV	Federal office for transport
BGE	Sentences of the Swiss federal Court, stated based on volume, paragraph and page
uBGE	Non published sentences of the Federal Court
BV	Federal constitution of the Swiss Confederation (SR 101)
BVR	Statements relative to administrative laws in Bern
E.	Consideration
EISLF	Eidgenössisches Institut für Schnee- und Lawinenforschung (Swiss Institute for the Study on Snow and Avalanches) also SLF
IKSS	Inter-cantonal agreement for cableways and ski lifts
J+S	Youth and sport
OR	Swiss bond laws (SR 220)
SR	Systematic collection
StGB	Swiss penal code (SR 311.0)
suva	Swiss insurance body against accidents
SVV	Swiss insurance association
UVG	Federal law on insurances against accidents (SR 832.20)
UVV	Decree on insurances against accidents (SR 832.202)
VöV	Public transport association
Ziff.	Point
ZGB	Swiss civil code (SR 210)

20.11.2006