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CHOSEN CASES IN SWISS JURISPRUDENCE RELATIVE TO SPORT ACCIDENTS ON SNOW

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1. Obligation to insure for safety of circulation on descent sports on snow - Swiss Model: No special legal base ↔ FIS rules, SKUS Directives and FUS Swiss Cableways Directives.

During the Forum held last year, in the report *Freedom of movement, personal liability of the skier and the snowboarder and obligation to insure for safety of circulation on descent sports on snow*, I have exposed the fundamental points of the Swiss Law on Snow with reference to the competent jurisdiction. Contrary to Italy, in spite of various parliamentary acts, in Switzerland there is no special legal base on the subject of safety for skiers and snowboarders. This does not mean that sports on snow in our Alps are practiced in a field without any laws. The matter applies on the Swiss model of personal liability and on the obligation to insure for safety of circulation.

A life without risk is not worth living; sport and play are life: as life, sport is above all a risk.

Precisely as in the practice of any other type of sport, the **principle of personal liability** applies also to skiers and snowboarders. Dangers inherent to the sporting practice must be kept well into consideration by whoever decides to practice it: by deciding responsibly to practice a determined sport, the sportsman/sportswoman accepts also the possible risk of placing into danger his/her own person (Selbstgefährdung) and such personal danger is not legally prosecutable.

In the evaluation of the injuries and the exposure to **third party** danger (Drittgefährdung) the Swiss jurisdiction is based on the FIS¹ Rules of conduct and on the SKUS² and FUS³ Directives for the determination of the scopes and the obligations of competent diligence. The Rules of conduct for FIS⁴ descent skiers and snowboarders (Legal and Safety Committee), modified for the last time in 2002 at Portoroz, are binding pursuant to the legal practice, while the SKUS⁵ and FUS⁶ directives, although they do not represent an objective legal *corpus*, are acknowledged by the Federal Court as safety and diligence criteria. The FIS are the expression of the diligence duties that are incumbent on the skier and the snowboarder.

The obligation of diligence falling on skiers and snowboarders results from the FIS Rules and from the SKUS integrative directives issued for the latter's benefit.

“Si scia e si va in snowboard a proprio rischio / Vous skiez et faites du snowboard à vos propres risques et périls / You ski and snowboard at your own risk / Sie fahren auf eigenes Risiko”.

This fundamental expression opens the SKUS directives for skiers and snowboarders: The responsible and wise sportsman/sportswoman must be adequately *prepared, instructed, equipped, protected and informed*. Personal responsibility is the price that he/she must pay for enjoying his/her freedom of movement.

Among the personal responsibility of the skiers and snowboarders and the obligation to insure for safety of circulation on the descent sports on snow there is a form of conflicts represented by an interaction. On every accident, the judge is held to note the **sphere of diligence** of the obligation for safety on the slope and of the damaged

¹ The FIS regulations are the result of the jurisprudence experience in the Alps countries (Austria, France, Italy and Switzerland) and of the knowledge of the FIS experts in the subject of the ski sport (1967 FIS Congress – Bayreuth); slightly modified at the 1990 FIS congresses – Montreux and 2002 – Portoroz).

² http://www.skus.ch/skus_i/frame.html - FIS regulations and SKUS directives.

³ http://www.cableways.org/dcs/users/6/Verkehrssicherungspflicht_ital.pdf.

⁴ <http://www.fis-ski.com/data/document/10-fis-rules-for-conduct.pdf>.

⁵ Directives for programming, management and maintenance of the descent sports on snow, 2006 edition and Directives for skiers and snowboarders, 2007 edition.

⁶ The obligation of insuring the safety of circulation on descent sports on snow (2006 edition); in brief: FUS directives relative to the descent sports on snow.

party and to limit him the ones from the others. Such limitation creates the basis for the determination of an adequate compensation.

2. Obligation to insure for safety of circulation on slopes: Contractual civil liability – Guarantee of trust.

The obligation incumbent on the companies that manage the transport plants on the mountain regarding safety of slopes and maintenance of rescue services constitutes an **accessory contractual obligation**. The main sentence is **DTF 113 (1987) II 246**. The regests of the sentence of 28 April 1987 state the following:

“Liability of mountain cableways in case of ski accident (art. 41, art. 97 CO).

The mountain cableway companies that provide the installation and the maintenance of ski slopes assume for the safety of the latter not only an extra-contractual liability, but also a contractual liability. The duty of guaranteeing for the safety of the slopes constitutes an accessory obligation inherent to the transport contract (comment 3-10).”

The companies that manage mountain transport plants may be summoned for judgment even for *general civil liability for illicit fact (ex delicto)* (art. 41 CO) and for *liability of the owner of a structure* (art. 58 CO). The question of whether the slopes have the characteristics of a structure is controversial.

The civil liability deriving from the transport contract is based on the **trust guarantee and on the principle of trust**. Trust represents the inalienable foundation of the juridical order. There is a relation among commercial reason, safety and liability: The commercial wish decides on safety and liability. Safety against Alpine hazards (avalanches and the hazard of falling) on demarcated descents (slopes, routes, tracks) is included in the ski pass price.

The trust guarantee is effective even where thee have been created and demarcated slopes for *cross-country skiing*, slopes and *sledge* parks, tracks for *excursions on*

snow and routes for excursions with *snow shoes*, that must be protected against *Alpine and atypical hazards*.

3. Safety device.

On 1 December 1998 the Federal Court, considering that the *managing bodies* (directors, managers, owners of slope and rescue means), with a regulation on the subject of full liability, have the obligation of installing a safety device equal for all, sentenced guilty of manslaughter and responsibility of perturbation of public circulation the director of the ascending plants, summoned for judgement. The regests of the sentence **DTF 125 (1999) IV 9**, state the following:

“Art. 117 CP and art. 237 No. 2 Penal Code; state the incumbent obligation on the mountain cableways and mechanical ascending companies to insure for safety of circulation.

Whoever is responsible of a mountain cableway or of a mechanical ascending company is liable to organise an adequate safety device susceptible of preventing that avalanches may cause accidents on the slopes.”

As characterising **element** of a **safety device** of such a nature, the Court of Appeal indicates the safety liability and the relative representation, as well as the constant record, collection, evaluation and transmission of information inherent to the evaluation of the hazard situation. In case of doubt, a slope with an avalanche hazard must remain closed.

To this effect, the Court of Appeal of the Federal Court, on 27 November 2002 (6S.379/2002), issued a sentence in conformity with what was formulated under such a principle: the director of the ascending service was sentenced for manslaughter, having omitted to demarcate and protect, or close a track in compliance with the provisions of the regulations. On this occasion, a woman skier missed the entrance of a bridge falling along a rugged slope on the left side of the bridge in question. The representative, who had amended the assignment of his director to a member of the

team, so that the snow would be removed from the bridge, did not impugn the sentence of guilt issued in first instance. The question of whether the director of the service should have assumed on himself also the additional liability for violation of his obligation of diligence that he had taken at the death of the woman skier, since he had omitted to install a single safety device in conformity with the regulations on full liability, remains still open for the Court of Appeal.

4. Extension of the obligation to insure for safety of circulation: Slope edge and section immediately adjacent to the slope.

On 23 December 2003, that is on the day preceding publication of law No. 363, *Rules on the subject of safety on the practice of descent and cross-country winter sports*, the Federal Court pronounced itself on the validity, on the occupation of the spaces for the safety obligation on the slope level, and clarified the question inherent to the adjacent surfaces. For the **DTF 130 (2004) III 193** sentence, the Court took as basis the directives issued by SKUS and FUS. From these directives the Court wandered away exclusively when, on the basis of **concrete circumstances**, and, above anything else, in consideration of the **existing situation at local level**, a higher safety standard was given.

The *adjacent areas* include the **edge of the slope** and the **section immediately adjacent to the slope**.

The **edge of the slope**, in case of obstacles and hazards of falls, must be sufficiently indicated and protected.

Should the edge of the slope not be indicated, the enlarged area around the descents is considered as slope. The obligation for safety on the slope is extended in a corresponding manner to the disordered areas.

The **section immediately adjacent to the slope** includes a **two metre strip**: this slope strip, on one hand, must allow the possibility of side-skidding for the purpose of stopping and to pause without danger in the area immediately adjacent to the slopes and, on the other hand, must supply to the users of the slope itself who, following a

fall in the vicinity of the edge, return into position and track, a zone of safe manoeuvre away from unrecognisable hazardous points and difficult to avoid even for users that descend in a considerate manner. **Real spaces for falls** must **not** be created.

Avoiding crossing the slope edges is fundamentally possible and acceptable for the user, above anything else, if the skier carries out the descent in the correct way. With the limited function for the safety of the slope's edge the measurement of the strip width located at slope's edge can be also explained and which is equal to a maximum of two meters in compliance with the SKUS directives, onto which the safety obligation is extended. The width of this strip is sufficient to guarantee, as a rule, the safety of the users who descend the slopes in a considerate manner.

The federal Court approves only, ***exceptionally and specifically***, an extension of the obligation to insure for the safety of the more limited slopes' edge areas, namely

- when there exists *a serious particular and atypical hazard* that may cause injuries to the skier, or that may jeopardise life;
and furthermore,
- if there subsists the signalled possibility of conditions of the ground that not even the careful slopes' users are able to avoid in the area of this hazardous point present beyond the slopes.

5. Compliant use of descents – Protection of atypical hazards.

On the basis of what stated in the principle of trust it results that the slopes' users must be able to trust, in compliance with the decisional framework, by the fact that they shall not be under the threat of atypical and hidden obstacles and of transit in hazardous points. Among these are included the hazards that the user, by applying the required care, is unable to recognise on time.

In the sentence of 3 July 2005 (6P.31/2005 and 6S.107/2005) the Court of Appeal, in comment 5.2, sums up such principle as stated below:

“In compliance with what is provided by jurisprudence on this subject, it is required to provide with respect to the obligation for safety on the slope by whoever is responsible of a company that manages ascending and ski lift plants, who constructs and opens ski slopes, in the slopes’ area and the slope’s edge by means of applying suitable safety measures and warnings, and that skiers, through use which is in compliance with the provisions of ski slopes, are not exposed to accidents. The users of slopes must be protected both from atypical hazards that are undoubtedly not recognisable and that therefore may cause a fall, for example hazards that cannot be avoided even by observing a careful behaviour during descent (DTF 130 III 193 comment 2.3; 126 III 113 comment 2a/aa; 122 IV 193 comment 2a; 121 III 358 comment 4 in page 360; 115 IV 189 comment 3a and 3c; 111 IV 15 comment 2, each with the relative notes; Hans-Kaspar Stiffler, Regulations for sports on snow, 3. Berne 2002, No. 294). Up to which point the safety obligation on the slope is extended, depends on each particular case, and depends from the conditions that characterise each single case. As criterion, the Federal Court each time makes reference to the SKUS directives and to the directives issued by the juridical Commission for matters linked to tracks on snow of the Swiss Cableways Association (FUS directive, ex directives SVS; DTF 130 III 193 comment 2.3; 121 III 358 comment 4 in page 361).”

The obligation to insure for safety of circulation shall avoid accidents that may occur because of lacking and insufficient safety during the use of demarcated descents.

6. Collision accidents.

The obligation to insure for safety on slopes does not absolutely serve defending from accidents *caused by the user*. In case of **collisions or near crashes**, the principle according to which whoever caused the collision or the near crash must assume liability of the damage is valid.

Contrary to law 24 December 2003, No. 363 (art. 19), the *contributory negligence* presumption (for analogy with art. 2054 al. 2 of the Italian civil Code, *Circulation of vehicles*) does not exist in Swiss law.

The collision accidents have already been object of judgement by the Federal Court

on 26 February 1954 (DTF 80 IV 49 in the Albert Bucher lawsuit) and on 7 February 1956 (DTF 82 II 25 in the Carl Bally lawsuit against Luigi Rosti) both on penal and civil level.

The regests of the collision accident judged by the Federal Court on 16 January 1996 (DTF 122 IV 17): state the following:

“Art. 125 CP: culpable injuries, adequate causality; duty of diligence of the skier.

A skier must always take into consideration, in passages without visibility, that he/she may find an obstacle, for example, by other slope users lying on the ground, and must therefore reduce his/her speed so that these may be avoided (comment 2b).

Whoever overtakes a ditch so fast that he/she cannot avoid skiers who are behind such an obstacle, risks, according with the general trend of things and experience, of causing culpably an accident (comment 2c).

The circumstance that a group of skiers may be, for any reason whatsoever, behind a ditch, does not constitute a behaviour to such an extraordinary, foolish and unforeseeable point to confine into a second plane all the other elements, in particular the unexpected arrival of a skier who by his/her speed is no longer able to stop or avoid the obstacle, that has contributed in the occurrence of the event (comment 2c).”

7. Obligation to insure for safety of circulation during competitions: participants to the competitions – slope users – spectators.

On 24 April 2007 the Federal Court met to deliberate on the **obligation to insure for safety of circulation during a competition** (6S.587/2006, 6S.8/2007, 6S.7/2007 and 6S.1/2007).

The four sentences of the Court of Appeal concerned an accident that occurred on 1 February 2003 in the Grigioni Canton on a slope used for the FIS competition by the B. Spa ascending plant, on the occasion of an Alpine giant slalom competition with 53 participants, during which an 8-year child who was at about 150 meters from the

finishing post, that is 100 metres downstream of the protection mesh, was seriously injured by the crash of one of the competitors. The competition was organised by Ski-club A.

The starting zone and the subsequent competition track were located far from the public ski slope and were delimited by the so-called “sheep fences”. In the second part, the track was protected, at the right hand side of the slope adjacent and used by the skiers by this mesh with a continuous solution: this barrier extended up to about 50 metres beyond the finishing line, near which the underlying finishing area had been left open. The finishing area width was about 50 – 60 meters. The finishing area as a whole was in a zone that did not terminate with a smooth surface, but with a steep slope.

The 16-year old competitor cut the finishing line, placed himself into an erect position, turned slightly left and subsequently initiated a wide curve towards the right crashing against the child who was arriving unexpectedly diagonally from the right towards the central station downstream.

The penal proceeding for negligence and serious personal injuries was conducted against four defendants:

the slope and rescue means director of the ascending plant,

and

three members of the jury responsible of the competition.

The *slope and rescue means director* was responsible for the safety measures and for the necessary protection.

Regarding the *members of the jury* held responsible, these were: the regional director of the Swiss Ski competition judges, and president of the judging commission, the main person responsible for the test inspection and the relative authorisation of the track competition, the competition director and president of the organisation committee, as well as the person responsible of the track.

The four defendants **(co-)responsible** of the obligation for the safety of circulation, who *had omitted to delimitate and circumscribe the finishing area*, were sentenced by

the **Grigioni Canton justice** to the payment of an extinguishable conditional fine equal to an amount variable between 1,000 and 3,000 Swiss Francs.

The Court of Appeal of the Federal Court rejected their petition.

The Court verified, in fact, the violation of the safety obligation challenged to the condemned in the preliminary instance, namely **the sphere of the obligation for safety**, from the point of view of the interests of the **competitor, the slope user and the spectators**.

The Court was making reference:

- **to the general definition of hazard**
(whoever creates a hazardous situation, is reasonably responsible of the fact that such hazard does not occur),
- **to sub-paragraph 619.1 to the 2000 Swiss Ski competition regulation**
(defines the request of a competition finishing area),

as well as

- **to sub-paragraphs 28 up to 30 of the SKUS directives regarding the plant, to the exercise and maintenance for the tracks of sports on snow that regulate the protection of natural and artificial obstacles**
(from which it results, in general, that the atypical hazards which the slope's user is definitely unable to distinguish, must be made recognisable. In the absence of such signalling system, the skier must not assume the presence of other additional hazards on a public slope, which would lead him/her to pay greater attention).

The sentence explains first of all how from the general definition of hazard itself it is deduced that **the organiser of the ski competition** was obliged to:

“mark the limits in a clear and visible manner the competition track of the general and immediately adjacent public slope “.

In addition, the fact that the delimitation of the competition slope from the public slope was accurately motivated, by means of a so-called “sheep fence” was **insufficient** for a stretch of only 50 meters from the finishing line. An open space at the finishing line **jeopardises** not only the safety of the *competitors*, but also of the adjacent public ski slope *users* and of the *spectators of the competition*.

The following criteria were applied:

- The **slope user** must not think of finding himself/herself in the middle or in the vicinity of a stretch of slope intended for a ski competition track. Slope users must clearly recognise which area still makes part of the competition track which, for safety reasons cannot be used.
- In addition of the slope users, also **spectators** must clearly be able to recognise where the competition area starts, and therefore where they cannot stop, pause or linger. Every access point of the point of finishing must be prohibited to the those who are not authorised.
- It must be clearly evident to the **competitor**, on leaving the finishing area and, therefore, the competition slope, and where the ground starts in which applies his responsibility: from that moment, in fact, he must be subject, as all the rest of skiers, to the general rules of behaviour on ski slopes.

Summarising, from the considerations of the Federal Court, it is deduced that, during a sporting event, the areas for competitors, spectators and users of public slopes must be **clearly defined** and **well delimited** each one in relation to the others.

Consequently, as explains in an adequate manner the Federal Court, little matters if it concerns a regional or international ski competition, since the different speed of the competitors did not change the *fundamental hazard undergone by third parties*. It is, in any case, necessary to assign at the finishing line an area of adequate space.

The considerations of the Federal Court are objectively based on the interpretations

adduced by the technical expert. The four sentences take due account of the legitimate expectation of the competitors, users of ski slopes and spectators.

Result: Whoever organises competitions or training for competitions (clubs, tourist offices, ski schools, companies) is held liable to supply clear delimitations and barriers and make sure that these are enforced.

Special attention must be given to the finishing area which must be fully delimited. The competitor, at times already tired, must have at his/her disposal enough space and time to break his descent and for stopping.

In addition, it must be observed that *the competition director as well as president of the organisation committee*, and member of the ski club, was informed by the Federal Court itself, for the purpose of drawing up the relative preventive measures, how it was out of doubt that he, on the basis of his own knowledge and personal abilities, was in the position of recognising the existing peril and the necessary measures suitable to make it possible of avoiding it and, certainly, already before the competition.

The Court, in sentence 6S.7/2007, comment 6.2.5, states the following:

*“In collaboration with the director of the track and in agreement with the then director of slopes (pisteur) and rescue service director, he prepared the slope on the day before the competition. Having completed this preparation he deemed, together with the other members of the jury, that the track was in order and in compliance with the safety rules. By this, it is not relevant that, for that particular competition he was a member of the jury for the first time, or that he fulfilled this assignment during his free time. If he did not believe that he was able to evaluate the risks for which he had assumed responsibility, he could have not, and **should have not** exercise the function in question. Therefore, whoever assumes an assignment, even in evident absence of the professional presuppositions for the fulfilment of such an assignment, is negligent (...).“*

Result: Honours are burdens and responsibilities! *Actio libera in causa*

8. Sledge slopes and sledge parks.

The Chamber of Appeal of the Berne Cantonal Court (AK No. 2007/206) and the Court of penal law of the Federal Court (6B_512/2007) dealt with the accident occurred with a sledge, which is described below.

On 17 February 2007, an accident occurred on the X track reserved for sledges. About midday, Céline and her 10 year-old daughter were descending on their sledge on a track reserved for sledges. While descending a long rectilinear slope, the sledge reached such a speed that Céline was unable to break on time before a narrow curve to the right and consequently she missed the turn and went off the track, succeeding, just in time, to push her daughter out of the sledge before rolling herself with the sledge along a precipice of about 18 meters. Céline was injured on her backbone and had several contusions throughout her body.

Following the investigations carried out by the police against the manager of the sledge trail, no penal action was taken against X. Spa further to the deliberation issued by the examining magistrate and the prosecutor.

The grounds were that the police investigations did not demonstrate any influence by third parties causing the incident. According to the statement of the woman, she was descending with the sledge for the second time that day and furthermore knew that on the rectilinear stretch there was a narrow curve to the right. In addition to this, from the photographic documentation it clearly results that the curve to the right was indicated by a large signal/banner, visible even from a distance, with the specific object to call the attention of the sledge track users, so that the latter may adjust in time their speed. With this signalling, the manager of the sledge track has observed sufficiently his safety obligations. Furthermore, it was not deemed necessary to position a protection mesh in the place in question in relation to the side wings. During the on-the-spot-inspection, many sledges passed on the spot of the accident and were not involved in any hazardous situations. The sledge track manager therefore did not have any fault; it results, rather, that Céline, due to an error during the descent, lost control of her sledge and, therefore, fell off into the precipice. Consequently, it con-

cerns an accident caused by the victim herself, without interference by third parties, whereby it was decided that there was no reason for proceeding to judgement.

However, Céline submitted her application for **claim**, challenging the fact that the accident was referable to her responsibility. Quite the contrary, the sledge track manager had endangered the tourists by not having protected sufficiently the said track. The sledge slope was partially hazardous and, in some points, frozen. Sometimes, it was not even clear whether a person was still on the track, since the latter, in some points, crossed the ski slope. The curve to the right was not sufficiently protected and the banner did not forewarn the curve, but seemed an advertising poster. After the accident a protection mesh was positioned during a sledge competition. The woman could not understand why for the competition a protection was placed for the purpose of safeguarding the spectators from possible hazards.

The Court of Appeal upheld the prosecutor's reasoning who had made reference, especially, to the SKUS directives with regard to the plant, activity and maintenance of the sport on snow tracks (sub-paragraph from 49 up to 52) and to the FUS directives for sport on snow tracks (NN 208 up to 211), as well as to the rules of conduct that FIS establishes for skiers and snowboarders (rules 2 and 8). The Court of Appeal deliberated that the manager, in the absence of an atypical hazardous situation, was not held liable for an additional slope safety obligation (additional signalling, protection meshes, etc.). The safety obligations of the manager are limited by the personal liability of the slope users: whoever decides to practice a sport on snow must also, fundamentally, run its correlated risks. The Court agreed that the signalling for the right turn was not affixed before, but only on the curve itself, however a careful and farseeing user would have been able to undoubtedly recognise the curve to the left with good atmospheric and snow conditions present at the moment of the accident. Finally, neither the shoes worn (of a relatively low profile), nor the sledge used for the descent were particularly suitable. The petitioner could not gain any advantage from the possible position of a protection mesh for competition purposes, since during the competition of such a nature, notoriously, competitors approach very close the edges, and adopting a similar additional measure for the competition does not mean that it is necessary to install a protection mesh also for normal users of the same slope.

The Federal Court rejected therefore in penal trial the petition submitted by the victim, since the reasoning produced could not be upheld.

The Court concluded that from the petition against the non opening of the penal proceeding it did not result:

“in what sense, in the light of the local conditions, of the shortcomings of material and of the errors of driving the means, it was not absolutely possible to attribute the accident to the personal liability of the petitioner and, therefore, renounce to a legal proceeding.”

9. Insurance against accidents: reduction of the performance in case of risk.

The juridical division of the social security of the Bern Canton (sentence of 19 February 2003, BVR 2003 500-503) judged the case of a skier who, at the end of January 2000, together with three other snowboarders, crossed a protection barrier by jumping over a barbed wire fence that was behind it. As a third component of the group in movement, the thirty-year old had then run a steep slope, covered by about 50 cm of fresh snow. The skier had therefore been dragged and buried under a bank of snow: it was only possible to recover the lifeless body of the skier buried at a depth of about 1.5 m. SUVA, the Swiss insurance against accidents, a public law body, with which the skier was obliged to draw up compulsorily a policy covering the case of accidents, had reduced by 50% the insurance premium due to the widow and to the daughter. The Court left open the question regarding the effective subsistence of an absolute risk, since by checking of the facts, from the point of view of relative risk, lead to the same result. The appeal against the decision was rejected.

Comment: according to jurisdiction, in compliance with article 39 of the Federal law on the subject of insurance against UVG accidents and with article 50 of the decree

relative to insurance against UVV accidents, an *absolute* risk subsists when an action, on the basis of a determined condition, is linked to a hazard that, independently from the subjective qualities of whoever commits the action, cannot be reduced by a considerable manner. The *relative* risk subsists when the insured is unable to reduce the particularly serious hazard by insufficiency of ability, quality and knowledge.

For completeness reasons let it be mentioned that also article 14 al. 2 of the Federal law on the insurance contract grants to the insurer the right of reducing the performance in case of damage caused in a seriously negligent manner.

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