

Civil liability (obligation of guaranteeing safety of circulation on ski slopes) of the managers of ascending plants in Switzerland
Hans-Kaspar Stiffler, Erlenbach/Switzerland

Obligation of guaranteeing safety of circulation on ski slopes

The Swiss Federal Court usually reassumes the civil liability of managers cableway plants, the so-called **obligation of guaranteeing safety of circulation on ski slopes**, in the following manner: the managers of ascending plants, who prepare the ski slopes and open them for the purpose of practicing sports on the snow, are bound to adopt the necessary precautionary and safety measures in order to avoid risks. What this means concretely is illustrated below.

Juridical foundations

Since 24 December 2003 Italy has a law on the subject of safety on snow slopes (law No. 363), with relative Ministerial Decree dated 20 December 2005 on the signalling system. **Switzerland has no special law of such nature**, notwithstanding that certain members of Parliament have tried – the first dates since now far away 1969 – to promote the creation of a special law that would regulate, on one hand, the reciprocal responsibilities of whoever practices sports on snow and, on the other hand, the tasks and the obligations of the managers of ascending plants. This attempt, however, has always been rejected by Parliament, which referred to the FIS conduct regulations for skiers and snowboarders and to the SKUS directives for programming, planning, management and maintenance of sport descents on snow, both introduced voluntarily.

Obviously also in Switzerland the **juridical regulations** constitute the bases of reference when it concerns establishing the liability of the managers of ascending plants. This is valid, first of all, in terms of **penal law**, if I may stop a moment on this argument: the slope operators and managers can be condemned if they commit in the case envisaged by the penal Code, for example a manslaughter (art. 117 PC) or a culpable injury (art. 125 PC), without having fulfilled one's own task of guaranteeing the safety of the slopes, and due to this a skier is subjected to an injury.

From the point of view of the **civil law**, on order to justify possible claims for compensation of damages against the managers of the plants, articles 41 and 97

of the Swiss Code of Obligations are referred particularly. Art. 41 of the C. of O. regulates those rights not laid down in the contract, while art. 97 of the C. of O., regulates those contractual.

In **Art. 41 of the Code of Obligations** it is written that:

Anyone is liable to repair the damage caused unlawfully to a third party whether intentionally or heedlessly.

By following this law regulation, the Federal Court has developed, in its now secular constant routine procedure, the so-called **rule of risk**, according to which whoever creates such a condition that it may cause damage to another person is liable, according to the juridical doctrine acknowledged universally, to adopt all the necessary precautionary measures for the purpose of avoiding the damage.

The principle that subtends the rule of risk is certainly clear. However, it places the judge in front of a double task: to verify, on one hand, which precautionary measures should have been adopted, and on the other hand, whether their omission may be considered fruit of negligence. In accordance with art. 41 of the C. of O., in fact, the judge may grant compensation of damages only when whoever is liable for damages has acted with negligence. Even today, therefore, it is regularly the duty of the injured party to demonstrate a fault by the manager of the plants or his personnel, usually the ski slope manager (*pisteur*) or the operator. Needless to say how difficult this is.

A remedy, however, is granted by the **contractual responsibility in accordance with art. 97 of the C. of O.** The latter establishes the following:

The debtor, who does not fulfil the obligation or does not fulfil it in the due manner, is bound to compensation of the damage derived thereby, unless he proves that no fault can be attributed to him.

In an important sentence of **1987** (DTF 113 II 246), the Federal Court has acknowledged for the first time that, in the case of accidents on ski slopes, the liability of the managers of the plants is of a contractual nature and has established the following: regardless of whether of contractual nature or not laid down by the contract of the cause of responsibility, the obligation of guaranteeing the circulation on ski slopes does not change in the contents, but the juridical position of the injured party results better, in the first case, in relation to the burden of the proof for fault (art. 97 of the C. of O. with respect to art. 41 of the C. of O.) and to the end for becoming statute barred (10 years instead of 1 year). The Federal Court has motivated its decision by asserting that the obligation of general protection of whoever creates a situation of risk becomes an **accessory contractual obligation** in case that the creation of a

hazard is connected to the carrying out of the contract, as it clearly happens in the skiing areas. In this case, there is a close correlation between transport upstream by cableway and descent by skis. In fact, according to the **principle of relying**, the user of an ascending plant can rely on the fact that it does not only carry out its main function, namely the transport, but that it also guarantees, as accessory performance, the safety of the ski slopes and the rescue service.

Therefore, at this point it must be established which precautionary and safety measures must be adopted by the managers of the plants. Today this question is regulated by planning, management and maintenance of the sport descents on snow passed by the SKUS, the Swiss Commission for prevention of accidents in sport descents on snow.

The SKUS directives on planning, management and maintenance of the sport descents on snow

Concerning this, I would like to make a brief historical *excursus*. Since the start, in Switzerland the cableway managers were not in charge only of simply transporting upstream passengers for then leaving them to their fate, but rather have always supplied also services for the descent downstream. On September 1936 – as many as 71 years ago! – in fact, in the Davos Parsenn skiing area, the so-called “Parsenndienst” was established, which would fulfil the following tasks:

- demarcation of the ski slopes with simple wooden poles (not coloured)
- warning in case of avalanche hazard
- rescue

In 1966 and in 1968 the managers of ascending plants drew up two expert’s reports for clarifying which measures they should adopt on the slopes for the protection of their clients, and in 1970 supplied a decisive contribution in the strengthening of **SKUS**, the **Swiss Commission for the prevention of accidents on sport descents on snow**, established in 1960, and in the drafting of today’s **SKUS directives**. But what is SKUS? Since 1989 it is a foundation, joined by all associations, organisations and independent institutes interested on snow sports, namely - in representation of the **managers of ski slopes** - the Swiss Cableways FUS and the Union of public transports UTP and - in representation of the **users** of ski slopes - the Swiss Ski Federation Swiss-Ski, SWISS SNOW SPORTS and the Swiss Snowboard Association. These are supported by **special bodies**, such as the Swiss Office for the prevention of accidents UPI, the Federal Office Macolin UFSPo for sport, the Federal Office for transport UFT, the Federal Institute for the study of snow and avalanches SNV and, finally, the Swiss National Institute of insurance against accidents Suva. In other words, SKUS holds within it all the necessary technical

knowledge for planning, management, maintenance and the protection against hazards, something for which it owes the great esteem that it enjoys, inasmuch that today, according to the Federal Court jurisprudence, the directives issued by the SKUS are considered a **reference criterion for the definition of the necessary diligence in the phase of planning, management and maintenance**. The directives are binding for the managements of the plants, and hence for the persons responsible for the ski slopes, and they establish the standard conditions that the skiers have the right to expect.

In addition, in the two-year period 1975/76, the managers of plants established a work **group**, joined moreover by two of our reporters – attorney-at-law Heinz W. Mathys and the undersigned - who, in a detailed report, illustrated thoroughly the juridical situation valid on the snow ski slopes, by recapitulating it in the so-called **FUS directives for the managers of the cableway plants**. These rules, obviously, are on line with the SKUS directives, but contain operative instructions much more detailed for the persons responsible of the ski slopes and contain also explanations.

The SKUS directives in detail

In the report prepared by the undersigned in 2005 during the first Forum, I have presented one by one the SKUS directives, grouped together as a whole in 16 paragraphs, therefore today I will limit myself in recalling briefly the contents, pausing on the following points:

- Purpose of the directives and personal responsibility of the descent sport on snow user.
- Subdivision of the descent sport on snow: ski slopes - itineraries – cross-country.
- Planning, opening and demarcation of descents.
- Protection measures against artificial or natural obstacles
- Measures in case of avalanche hazards – Freeride Checkpoints.
- Protection measures against fall hazards.
- Demarcation and signalling system therein included the orientation tables for users of ski slopes (coloured).

The directives are available in paper format at the SKUS, in German and French languages. On internet there is also a version in the Italian language (http://shop.bfu.ch/pdf/779_42.pdf).

Legal doctrine and evaluation criteria

In 1968 the Courts – firstly the Cantonal Courts and the Supreme Courts – started taking interest on the rights of skiers having been injured on ski slopes. In 1975, in the framework of a **penal proceeding**, the **Federal Court** was able for the first time of judging a very serious ski accident occurred on a ski slope. Even in the following years, the Federal Court was called to judge continuous penal proceedings, verifying constantly a violation by the managers of plants. The personal fault of skiers and snowboarders has never been judged, since the penal law does not acknowledge the principle of compensation of fault.

The situation changed since the moment when the Federal Court was called to judge also the **civil proceedings** under the form of compensation for damage actions. The Federal Court in this manner was able to establish certain **important evaluation criteria** in the light of the obligation of both parties, the manager of the plants and the ski slope user. These criteria are:

- **Principle of relying:** the users of snow ski slopes may rely on the fact that the ski slopes made available to them are demarked and safe.
- **Obligation of guaranteeing safety of circulation on ski slopes:** the managers of ascending plants are bound to adopt the necessary precautionary and safety measures for the purpose of avoiding risks on the ski slopes.
- The **contents** and the **entity** of the previously mentioned obligation are determined on the basis of the SKUS directives.
- **Protection must be guaranteed,**
 - > on one hand, from hazards clearly recognisable and therefore representing a hidden peril;
 - > on the other hand, from hazards that cannot be avoided even by adopting a cautious behaviour.
- **Reasonableness:** it is possible to require safety measures only within the limit of what has been deemed necessary and possible by the commercial procedure.

- **Personal responsibility of users:**
 - > whoever practices a snow sport assumes the risks involved in such a sport;
 - > a wrong behaviour by whoever is skiing by underestimating his own abilities and the notified meteorological and ski slopes conditions or does not respect the signalling system, is to be attributed to personal liability.

Conclusions

As an accessory contractual duty included in the transport title, the obligation of guaranteeing the safety of circulation on ski slopes, implies a strong responsibility bound upon managers of the plants. The contents and the entity of such obligation are determined on the basis of the SKUS directives. The presence of reasonable evaluation criteria makes it so that there must not be arranged anything impossible. The principle of personal responsibility of the users of the ski slope is valid, according to which the latter are liable in case of wrong behaviour and are bound to respect the signalling system and the demarcations.

According to the Swiss legislation, however, the responsibility deriving from the obligation of guaranteeing safety of the circulation on ski slopes is today **computable** and the risk of being called to respond legally of such obligation may be covered by insurance, something essential for the managers of ascending plants.