

Rechtsanwälte



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**REPORT ON THE OCCASION OF THE EUROPEAN
JURIDICAL FORUM ON SNOW**

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**Liability in tort or objective liability in
winter sports**

I. Introduction

In order to illustrate this argument, first of all some fundamental preliminary statements are required on the subject of juridical doctrine.

II. Liability in tort

According to Austrian law, damage as such is caused to whoever suffers it physically and materially (paragraph 1311 subparagraph 1 *Allgemeines Bürgerliches Gesetzbuch* (ABGB)). Whenever the damage is inflicted to another person, who must therefore be compensated for damages, the presence of various presumptions must be established, the so-called *liability factors*.

1. Causality

Whoever is liable must somehow be in relation with the damaging event: in other words, the damage must have been *caused* by the latter or by a person or a thing for whom or which respectively he is called to answer. In this case, the principle is in force according to which behaviour (a circumstance) is cause of a determined event whenever the latter, in absence of such behaviour (circumstance), would not have occurred.

2. Illegality

The second factor to be considered within the framework of liability in tort is illegality. In accordance with paragraph 1295, behaviour (action or omission) is to be considered illicit whenever it violates the juridical order or public morality. In the contractual liability field, for example, behaviour, contrary to the contract, is to be intended as illegal. In many cases, the juridical order sanctions specific prohibitions and prescriptions for human behaviour (protective laws). For the purpose of

standardising and increasing the protection of absolute goods, the obligations for guaranteeing the safety for circulation have been introduced. On the basis of the latter, whoever authorises circulation (for example on ski slopes) is held to guarantee, within the framework or reasonableness, the protection of the users of the ski slope and the communication of possible hazards. Whoever creates a source of hazard or does not remove it from his/her area of competence, furthermore, must take steps that this does not damage anyone.

3. Fault

In addition to the presence of an illicit behaviour, a third factor to be considered is the possible fault of whoever caused the damage (cf. paragraph 1295). By fault is intended the possibility of attributing an illicit behaviour, in other words, whoever adopts a behaviour that he/she would, and also could, have avoided acts in a culpable manner.

Among the various forms of fault, *malice* and *negligence* are distinguished. Whoever is aware of the illegality of a determined action and foresees its damaging effect, and moreover notwithstanding this, allows its occurrence acts in a malicious manner.

By negligence, instead, it is intended the nonfulfillment of the due diligence. Depending on the degree, it is distinguished between serious and slight negligence. Behaviour is slightly culpable whenever it was caused by an error that, in some cases, it can pass unnoticed even by a diligent person. Instead, if the negligence is so evident that it could have not been committed in any case by a conscientious person it concerns serious fault.

According to Austrian law, as a rule it is the task of the injured party to *demonstrate* fault. In certain particular cases, however, there occurs an inversion of the task of proof (in case of violation of contractual or juridical obligations – special relations).

Whenever not only the perpetrator, but also the damaged party have created such a condition for which a damage occurred, the latter non only shall not have the right to a total compensation for damages, but must also shall bear personally part of the damages (paragraph 1304) on the basis of the relation between the fault of the perpetrator and that of the damaged party.

III. Objective liability

1. General notions

At present the liability against dangerous objects and plants is governed especially by *special laws*, in our case by the Law on civil liability against motor vehicles and railway plants (EKHG - *Eisenbahn- und Kraftfahrzeughaftpflichtgesetz*).

Concerning the liability in torts, the objective liability *does not* presuppose an *illicit and culpable human behaviour*, but instead it is based on the following fundamental concept: creation of determined sources of hazard is envisaged by law, by which the community is bound to consider the risks that may occur; whoever uses the hazardous object or exercises the dangerous activity, moreover, must be liable of the possible damages, since, by so doing, pursues his/her own interests. In this case, therefore, the factor that determines the liability of a determined subject is not the illicit and culpable behaviour, but rather the creation of a situation of hazard – in spite of the fact that it is allowed.

The question of the relation between liability in tort and objective liability is greatly controversial. According to one part of the Austrian doctrine, today it is widely acknowledged that placing into a hazardous situation represents, in relation to fault, the *weakest* cause of liability.

2. Liable subjects

In principle, is liable whoever uses a hazardous object for his/her own purposes and who has the possibility of preventing the risks. Within the framework of the EKHG (Law on civil liability against motor vehicles and railway plants), whoever uses an object for his/her own benefit is liable also of the particular risks that may occur. This person is the *holder* (paragraph 5 the EKHG) and he/she may be the owner, but also the lessee or the lease holder of the object. The determining factor is the use at one's own risk and peril. By this, it is intended that the holder, in addition of using the object for his/her own account, should also be able to use it freely.

3. Exemptions of liability

In accordance with the EKHG, whenever the accident was caused by an *inevitable fact* any liability whatsoever is excluded. The latter presupposes three conditions: 1. the event must have been caused by the prejudiced party, by a third party non involved in the use of the object or by an animal; 2. the manager or the holder and the operators assigned for the exercise of the object must have observed the necessary diligence on the basis of the circumstances of the particular case; 3. the accident must not have been caused directly by an extraordinary exercise of a risk, referable to the behaviour of an animal or of a third party non involved in the use of the object.

The liability governed by the EKHG is limited by appropriate maximums.

VI. Comparison between liability in tort and objective liability

Liability in tort	Objective liability
<ul style="list-style-type: none"> - The behaviour must be illicit and culpable (= attributable to the person) - Functions: compensation for damages, prevention and sanction - Dominating doctrine: stronger cause of liability than the objective liability - Obligation of compensation for damages: generally by the perpetrator - No maximum limit of liability 	<ul style="list-style-type: none"> - An illicit and culpable behaviour is not necessary - Instead of fault, objective dangerousness of an activity allowed as such - Whoever uses a hazardous object for his/her own purposes must compensate, by way of compensation for damages, also the damages arisen following to the occurrence of the risk - Function: only compensation for damages (controversy) - Dominating doctrine: weaker cause of liability than the liability in torts - Obligation of compensation for damages: generally by the holder - Often maximum limits of liability, for example in the EKHG

V. Draft of a new Austrian law on the subject of compensation for damages

The draft drawn up by a work group for the reform of the law on the subject of compensation for damages envisages, among the various points, a consolidation of all the main sources of the civil liability law within the Austrian Civil Code (ABGB, *Allgemeines Bürgerliches Gesetzbuch*). The draft contains two general clauses relative to the objective liability: the first regulates liability against the sources of “high risk” (paragraph 1302 E), the second the liability against the sources of “increased risk” (paragraph 1303 E).

A. Paragraph 1302 E

In accordance with paragraph 1302 E, there exists a source of **high risk** whenever an object or its usual use, namely an activity, involves – notwithstanding the use of the necessary diligence – the risk of frequent or serious damages. Among the sources of high risk can be counted nuclear stations, retaining dams, pipelines, gas pipelines and electric high tension lines, factories of ammunition and depots, long distance airplanes, railways and **cableways**, motor vehicles and boats, mining activities and explosives. In this category, however, fall also – without being expressly mentioned – the snowgrooming vehicles and the snowmobiles.

At present, it is the holder who is liable with respect to the sources of high hazard. It does not concern a pure objective liability, a principle among other things previously envisaged in today’s law in force. It is therefore possible to exclude any liability should the damage be caused by force majeure or it has occurred notwithstanding the object was in faultless conditions and possible maximum diligence was used (inevitable event). The same may be said whenever the injured party may have acknowledged the damage or may have accepted the risk. The fact that a similar objection may or may not be considered depends above all from its weight and on the degree or dangerousness, especially in the situation under consideration. In

relation to the law in force, which adopts the principle of “all or nothing”, the draft envisages that, in cases of particular dangerousness, it is possible even to reduce dangerousness.

B. Paragraph 1303 E

Concerning liability against sources of *increased risk* (paragraph 1303 E), the draft envisages an intermediate step between liability in tort and objective liability. It includes all cases in which an object or an activity results more hazardous than normally the objects or the activities, but not as hazardous to "be considered as a high hazard that would justify the attribution of the liability to the holder, regardless from the used diligence".

In other words, liability is of the objective type, but the holder of the source of hazard is bound to prove that the necessary diligence was used for the purpose of preventing the damage. According to the draft, the sources of increased risk are sources that do not reach the entity envisaged in paragraph 1302 subparagraph 2 E. There are listed, by way of example only, animals, constructions or activities such as the bicycle or **skiing** at a higher speed. By sources of increased risk are intended also motor vehicles, the maximum speed of which does not reach 10 km/h and for which, therefore, up to now an objective liability has been excluded in accordance with paragraph 2 subparagraph 2 of the EKHG. From this it follows an extension of the liability against motor vehicles.

At present, it is not yet possible to foresee whether or when the draft, among others highly criticised, will come into force.

VI. Present situation on the Austrian ski slopes

In order to understand the importance of winter sports in our Country, it is enough to consider that, every year, about 8 million skiers and snowboarders populate our slopes. The yearly number of accidents is around 70,000, of which only about 5 - 10% is caused by the fault of others; in other words, the greater part of these is referable to own fault.

For the purpose of the present discussion, the accidents by fault of others are obviously important, mainly caused by collisions between skiers, but a liability by the manager of the slope is not excluded.

Concerning collisions, the principle of liability in tort is applied with the presumption, of which under paragraph 1296 ABGB, which damage has arisen without the fault by others.

This means that, differently from Italy, the victim of a collision must demonstrate the fault of the counterpart involved in the accident.

As previously reminded, article 19 of the Italian regulation on ski slopes (Italian Republic Law No. 363 of 24 December 2003 on the subject of safety in the practice of winter sports) envisages that, in case of collision between skiers (the same is valid also for snowboarders, as provided by art. 20), it must be presumed – until proven otherwise – that everyone is liable in an equal measure of the caused damage. Concerning this, it must be observed that, although a similar presumption of fault is favourable to the injured party – but burdened to whoever has caused the damage – it would not be in any case consistent with our juridical system.

In our Country, it is sought to simplify the burden of the proof at the charge of the damaged party by considering, in certain cases, a *prima facie* proof as being sufficient. Such facilitation may be applied, for example, when someone suffers a damage caused by a skier who asserts to have fallen by the sudden detachment of the skies. In this case, it is presumed that a fastening mounted correctly does not detach without any reason, whereby it is the task of the perpetrator of the damage to prove otherwise, namely the correct mounting of the fastenings and also respect of the FIS rules before the fall.

A similar case occurs when a skier suffers damage by another user of the slope who, after the fall, slips against him/her. In this case, our Courts sentence that the latter is to be held liable only if, before the fall, he/she had violated the FIS rules. In the new jurisprudence, however, even a simple error of descent – especially a gleaning - is considered a cause for liability. Also in this case, it is up to the damaged party to demonstrate the opposite.

According to one part of our doctrine (in particular according to Dr. *Beppo Pichler* in *Zeitschrift für Verkehrsrecht* 1999, page 362), there is a similar simplification of the burden of proof - in particular by the manager of the slope – when a skier goes beyond the clearly recognisable edge of the slope and gets injured. In this case, generally is considered the hypothesis that the injured party was skiing in an uncontrolled and careless manner. Apparently the supposition of a personal fault would seem justified. It is up to the injured party therefore to illustrate the dynamics of the accident and eventually see how to invalidate such presumption.

There is a difference of opinion between jurisprudence (Supreme Court of 24 November 1998, 4 Ob 299/98) and *Marwin Gschöpf* in page 159 of his book “*Haftung bei Verstoß gegen Sportregeln*” (“Responsibility in case of violation of the sport rules”), according to which, in this case, it would not have been justified to simplify the juridical rules on the subject of the burden of proof by introducing the *prima facie* proof at the charge of the skier responsible of the fall.

There is another case of application of liability in torts – even if with inversion of the burden of proof in relation to fault – according to our legislation, on the subject of safety of circulation, whereby – in case of accident – the skier is liable to demonstrate, against the manager of the slopes (usually the manager of the plants), that the damage caused to him/her was produced by nonfulfillment, by the latter, of the obligations to guarantee the safety of circulation on the ski slope.

In Austria, doctrine and jurisprudence take as granted the presumption that the manager of the slopes is liable, as accessory performance resulting from the transport title (in some cases it is also considered also a main performance), of maintaining his/her own slopes free from atypical obstacles (those that even a responsible skier is not held to foresee or not able to avoid). Since by acquiring the ski pass a contractual relation is generated, the damaged party must demonstrate only the presence of the atypical obstacle, whereas the manager of the slopes may decline his own liability only if he is able to prove, in a plausible manner, absence of fault from his/her part.

Having illustrated the typical cases of liability in tort within the framework of accidents on ski slopes, I would now deal with the objective liability which - as previously mentioned – it does not presuppose an illicit or culpable human behaviour.

The main application field is represented by accidents on plants, all the more that – according to our EKHG - cableways, chair lifts and ski lifts are equalised to railways. This means that the skier, who suffered a damage further to one of the above mentioned transport plants, has greater probability of being compensated for damages in relation to the victim of a collision, from the moment that, in the first case, the injured party is held to demonstrate only his/her own damage, whereas the manager of the plant must prove the existence of the just examined inevitable event.

Our Courts tend to apply the objective liability in the transport framework with ascending plants, all the more that on a ski lift, for example, even the fall of a skier and his/her collision against the skier downstream involves an objective liability by the ski lift's manager.

Our Courts have assumed very severe liability criteria even on an accident on the plants that our lawyer's office brought before the Supreme Court. In that case, a skier fell, while getting onto a chair lift following the inexperience of his/her own ski companion suffering an injury. Our client was relieved from the burden of having to demonstrate the fault of the skier who got onto the plant simultaneously; all the more since our opinion was strengthened, according to which it concerned a case of objective liability, whereby the manager of the plant was liable.

Unfortunately, on our slopes there are continuous occurrences of collisions between skiers and snowgrooming vehicles or snowmobiles. Notwithstanding that our Courts very often apply the objective liability envisaged by the above cited EKHG to similar types of cases, they have not yet decided to extend it also to snowgrooming vehicles and snowmobiles, whereby - in this case - the possibility that the injured skier is compensated for damages are strongly limited. From this point of view, the intentions of the amendment to the Austrian law on the subject of compensation for damages should be supported warmly.

In any case, for the skier involved in the collision with a mechanical means a considerable contributory negligence shall be configured, since it is presumed that the skier was not skiing under good visibility conditions and that therefore he/she had violated the 2nd FIS rule.

VII. My reflexions for a European common law on snow

Considering my long experience as an attorney and ski expert within the framework of accidents on ski slopes, I deem that, for collisions but also for the consequences of the violation of the obligation to guarantee the safety of circulation on ski slopes, the principle of the **liability in torts** constitutes for the injured party a sufficient instrument for the purpose of obtaining compensation for one's own damages – notwithstanding the above mentioned difficulty to produce documentation for the necessary proofs.

The **objective liability** would be applied, also in the European framework, to cases where a skier suffers damage during ascending on the plants or further to a collision with snowgrooming vehicles and snowmobiles.