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Chosen cases from civil jurisprudence on sport accidents on snow in Japan

Preamble

I History of skiing in Japan

1. Birth of skiing in Japan

Skiing in Japan was born on 12 January 1911 at Takada (Niigata prefecture).

On that day, Major Theodor von Lerch who arrived in Japan from the Austro-Hungarian Monarchy to oversee the Japanese army, taught for the first time the officers of the Nipponese army to ski. Lerch skied only with a small stick without a wheel. He taught skiing also at Sapporo (Hokkaido).

Since then, skiing progressively spread throughout Japan, so that in 1923 the first national championship competition was held in Otaru (Hokkaido).

2. Adoption of the European skiing technique

In 1929, Japan invited Oraf Herset from Norway for a consultancy in relation to the construction of a ski jump for jumping with skis. In 1930 it was Hannes Schneider's turn from St. Anton in Arlberg, Austria, who was assigned to teach the skiing technique.

3. Opening of the ski slopes

The birth of the first countryside ski clubs dates back before the Second World War. These ski clubs, established mainly by village farmers, managed some ski slopes without ascending plants. Alpine skiing and skiing proper, at that time, were not two distinct disciplines. These ski slopes often were the destination of University students' Alpine clubs and, after all these years are still operating. In any case, at that time skiing in Japan represented a sport discipline favoured by a very narrow circle of persons.

4. The skiing areas of the endogenous type since the Fifties

Soon after the Second World War, the farmers of the most hit areas were heavily impoverished. In winter they were obliged to go to the nearest town to look for work. At the same time, they tried to manage the activity of room-letting and of the ski slope for the purpose that also in winter they could stay in the village. This was the start of today's skiing activity in Japan. The so-called endogenous type skiing areas have some common features. For the village, skiing represented only an accessory activity, complementary to agriculture and silviculture, the two main occupations. The farmers managed the activity of room-letting, general store shop and restaurant for skiers. The skiing area, in the second place, was particularly suitable for skiing, for which it was not necessary to modify artificially the natural morphological conformation of the area. This endogenous form developed especially along the railway, since Japan, in the Fifties, did not still have motor vehicles.

5. The skiing areas of the exogenous type since the Sixties

The high manner of skiing areas emerged around the Sixties. The main tourist operators of cities, such as Tokyo, started investing in the mountain regions for increasing the skiing areas. With the growth of the economy, the number of skiers also increased considerably. This is how the natural conformation of the territory was modified by the hand of man, access roads to the ski slopes and luxury hotels with annexed discotheques were constructed and substituted a little at a time the rooms let by the farmers. Skiing, as a winter *play* becomes ever more popular.

6. The skiing industry during the speculation bubble

Japan lives from exports. Its main commercial partner is the United States with whom, since the Eighties, a commercial friction has arisen following the excess of exports by Japan. One of the reasons is the scarce internal demand of the nation. In order to increase it, since the middle of the Eighties the Japanese Government offered incentives to investments also in the tourist field.

In the so-called *bubble economy*, not only tourism, but also other sectors such as the iron and steel, the building, etc., industries have invested large amounts of money in the accomplishment of skiing areas and golf fields. The consistent offer and the favourable trend gave rise to the demand. For the young generations skiing is becoming a fashion. "Why skiing? Because this is what everyone does". It was the ski bubble.

II The skiing areas today in Japan and the relative challenges

1. The skiing areas today, in a climate of economic difficulty

The ski fashion did not last long. Since the middle Nineties, in fact, the number of skiers is in constant decrease. After the burst of the speculation bubble, today all the skiing areas are in economic difficulties.

At present the slopes in Japan are 568, of which 125 are of the exogenous type areas. The latter are in a more critical situation compared to the endogenous type areas, due to the excessive debt and the excessive investments of the past. In 125, in fact, only about thirty are still operative while the remaining is object of property sale. The property investment fund is showing a great interest for these. Even M&A are taking roots in the skiing industry.

The 443 endogenous type areas have not been hit as heavily as those of the other type since - even during the speculation bubble – they have contained to a greater extent their investments. For this reason, however, the plants are obsolete and not very attractive, especially to the younger generations.

2. Perspectives

It would be very difficult, for the exogenous type areas, to gain much money from the ski slopes, since the days when these are working – within the skiing framework – do not exceed 120 days per year.

I believe that, basically, the exogenous type areas contrast the endogenous development of the mountain regions and are deleterious for the protection and the upkeep of the landscape and nature.

For us, it would be a great challenge to succeed in realising also in Japan the successful combination between the upkeep of agriculture and silviculture, from one hand, and “soft” winter tourism, on the other hand.

III The skiing accidents in Japan

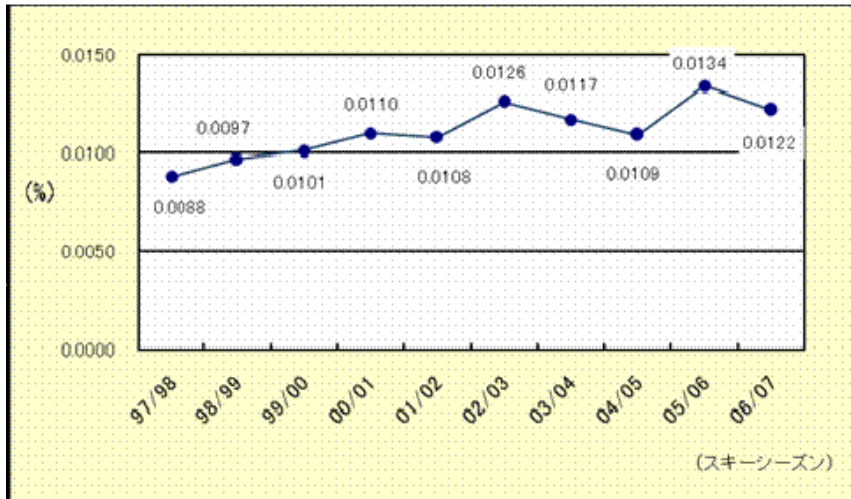
In Japan an association has been established for safety in skiing, consisting by all the organisations and the operating bodies in the ski world, such as SAJ (Japanese Skiing Federation), SIA (Japanese Professional Skiing Instructors Federation), JSBA (Japanese Snowboard Federation), JFTA (Japanese Transport Federation), etc. Its activity consists in adopting safety measures, such as standardisation of the signalling system on ski slopes, the creation of a skiing regulation, the execution of statistics on accidents in the practice of sports on snow, the promotion of information campaigns,

etc.

The following information relative to skiing accidents is the result of the research activity promoted by the association.

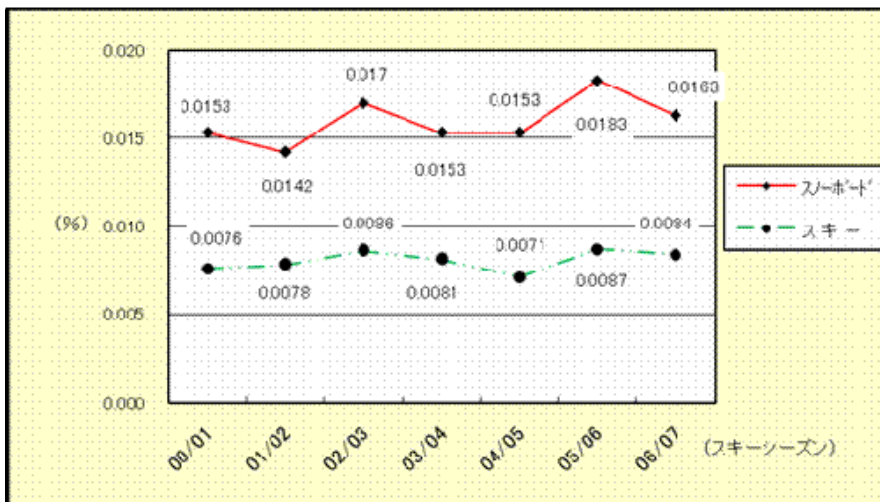
Tab.1 Trend of the percentage of accidents

Percentage of accidents = number of accidents ÷ number of skiers transported on the plants



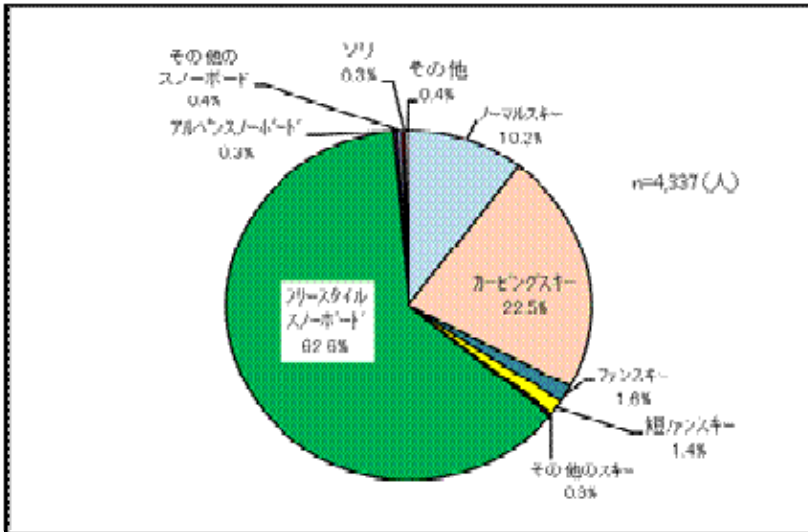
In these ten years, the percentage of accidents has increased.

Tab.2 Trend of the percentage of accidents (comparison between snowboard and ski)



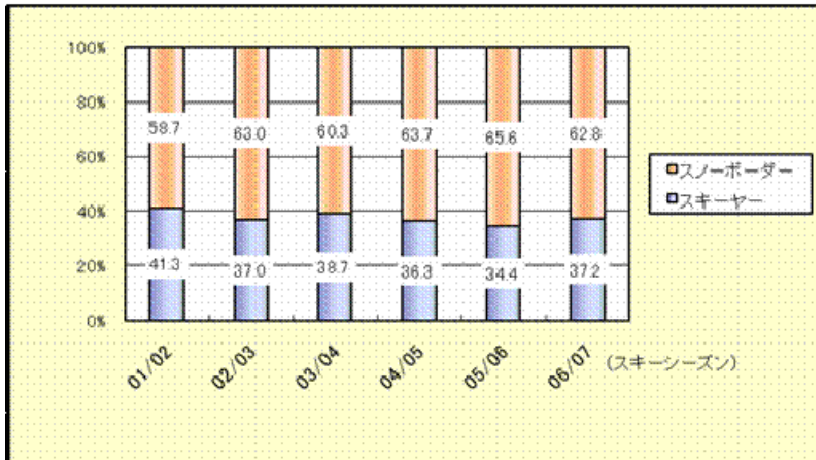
In the case of snowboard, the percentage is twice as great compared to ski

Tab.3 Percentage of accidents depending on type of ski/snowboard used



10.2%= normal ski, 22.5%=ski carving, 62.6%=snowboard freestyle
Season 06/07

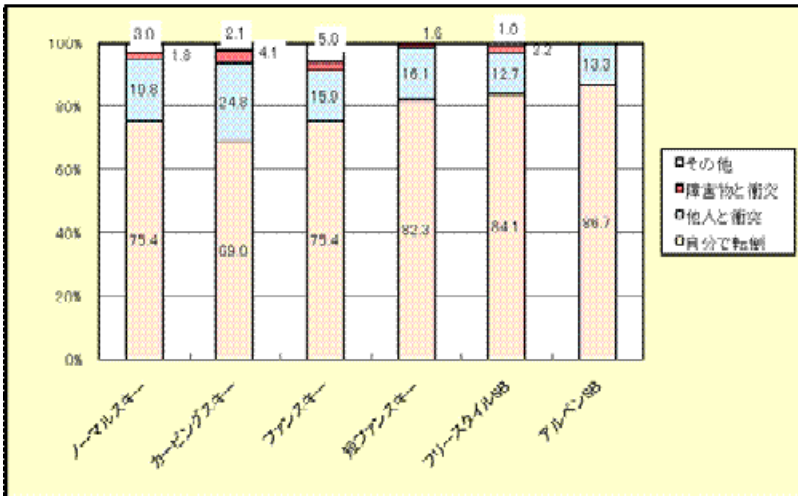
Tab.4 Comparison between snowboarders and skiers



In the upper part snowboarders, in the lower part skiers

Tab. 5 Causes of the accident

Season 06/07



From upper part to lower part: falls, collisions with other skiers, collisions with an obstacle and other reasons

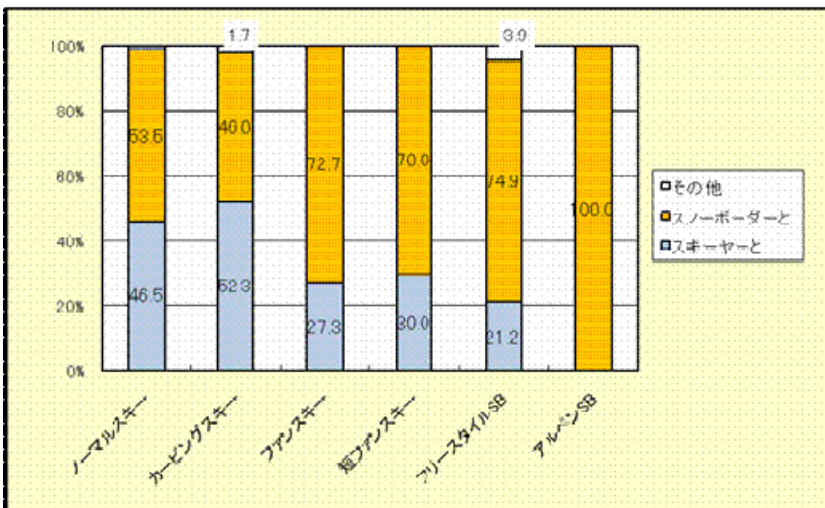
From left to right: normal ski, ski carving, FunSki, short FunSki, snowboard freestyle and Alpine snowboard

The percentage of collisions with other skiers is higher in the case of sky carving.

The obstacles were: tree (46), protection nets (13), pylon (11), boulder (4), signal (4) and snowboard (4)

Tab. 6 With whom do collisions occur?

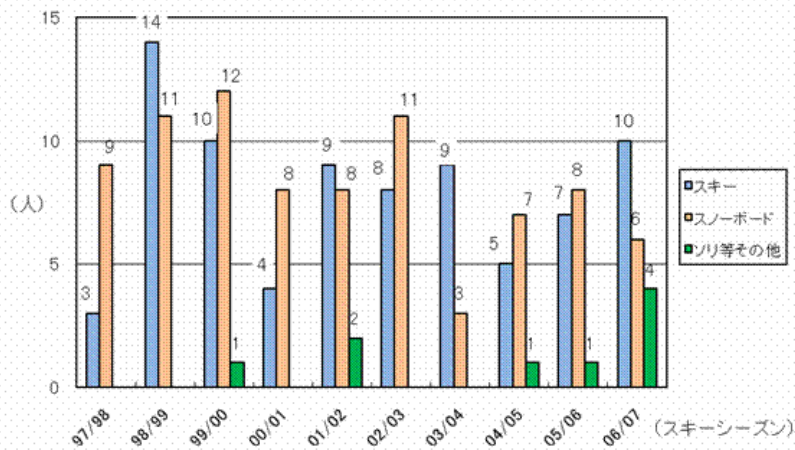
Season 06/07



From upper part to lower part: with skiers, with snowboarders and with other objects

From left to right: normal ski, ski carving, FunSki, short FunSki, snowboard freestyle and Alpine snowboard

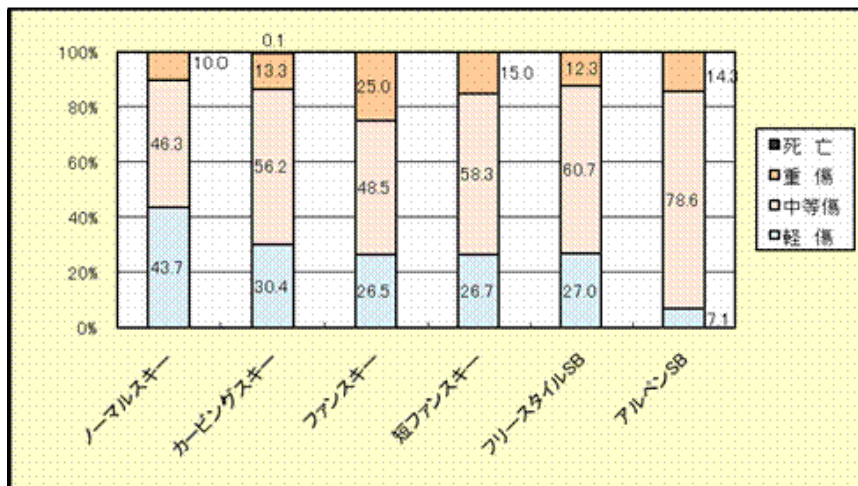
Tab. 7 Deaths in sports on snow in 10 years.



At left: ski, at centre: snowboard, at right: sleighs

Tab.8 Degree of accident

Season 06/07

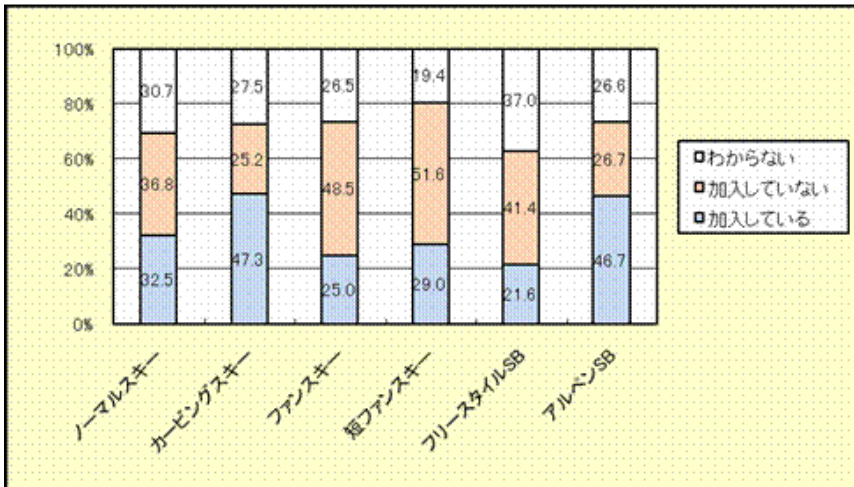


In lower part: slight accident, in centre: accident, in upper part: serious accident and death

From left to right: normal ski, ski carving, FunSki, short FunSki, snowboard freestyle and Alpine snowboard

Tab.9 Disability insurance

Season 06/07

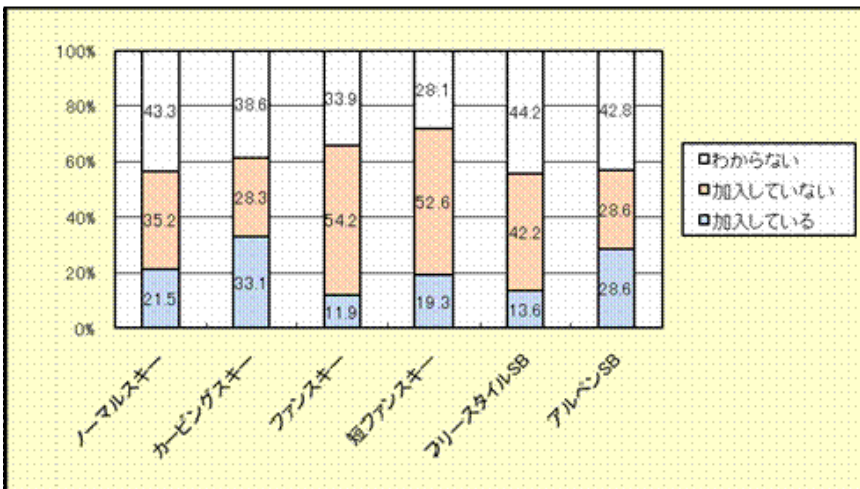


From lower part: insured, not insured, I do not know

From left to right: normal ski, ski carving, FunSki, short FunSki, snowboard freestyle and Alpine snowboard

Tab.10 Insurance against compensation for damages

Season 06/07



From lower part: insured, not insured, I do not know

From left to right: normal ski, ski carving, FunSki, short FunSki, snowboard freestyle and Alpine snowboard

IV Chosen cases from civil jurisprudence on sport accidents on snow in Japan

In Japan there are no special laws for skiing and winter sports. The main juridical reference for causes of civil compensations for physical and moral damages is the Civil

Procedure Code.

1. Liability in case of collision between skiers

Paragraph 709 of the Civil Code establishes the obligation of compensation for damages in case of illicit actions.

Paragraph 709: Whoever, by malice or negligence, violates the rights or the interests of another person under the protection of the law is liable to compensate for damages caused to the benefit of the latter.

In the jurisprudence regarding collisions on ski slopes, a general concept is ratified, according to which – in the sport discipline – the damaging illegality of the event is excluded. The perpetrator of the damage, therefore, may be relieved of the obligation of compensation for damages only if he has acted according to the sport regulations or the manners universally acknowledged, since it may be presumed that those practising a determined sport discipline accept to assume the risks usually linked to such a sport. Almost in all cases, however, the judges have ascertained if the perpetrator of the damage had acted with negligence and, in the affirmative, they have imposed – subject to previous evaluation of negligence on both sides – the obligation of compensation for damages. This means that the Courts acknowledge the principle of acceptance of the risk and evaluate whether the accident occurred notwithstanding respect of the manners universally acknowledged, but – finally – the decisive criterion is whether negligence was present. Practically there is not any sentence that acknowledges the negligence of the culprit and simultaneously excludes the illegality of the fact on the basis of the principle of acceptance of the risk.

Case 1: Court of Tokyo, 21 December 1964

An employee of the manager, assigned at the ski slope and rescue service, jumped from the ski jump. His left ski hit the face of a young woman who was standing at the base of the ski jump. The woman was seriously injured, losing the sight of the right eye. Together with her parents she sued the ski slope's employee and the manager. The Court acknowledged the serious negligence of the defendant and ordered both to compensate for damages with the following motivation: sport fundamentally is for the well-being and the culture of a population and, as such, it must be treated with incentives. Since whoever practices a sport accepts the risks generally linked to such a discipline, in case of an accident the liability in accordance with paragraph 709 of the

Civil Code does not subsist whenever the damaging event occurred in respect of the sport rules and of the manners universally acknowledged. This is valid also for the ski accidents. In this case, however, the jump carried out by the employee assigned to the slope could not be considered absolutely an allowed event.

The sentence did not acknowledge any negligence from the injured party.

Case 2: Court of Tokyo, 27 September 1990

A lady beginner fell by sliding on a slope reserved for expert skiers, and hit another skier, who was seriously injured. The latter sued her and claimed compensation for damages. The Court acknowledged the defendant's negligence. In case of a sport accident, the illegality of an event that is allowed by the rules of sport or by the manners universally acknowledged is excluded. Once considered the conditions of the ground, of the snow layer and of the weather, the woman should have actually skied carefully, or even think of descending the slope on foot – guaranteeing the safety of the slope – in order to avoid the accident; even this behaviour, in fact, falls within the rules of skiing or in the manners universally acknowledged. The fact of skiing in an inconsiderate manner, thus causing the accident, exceeds the limits of an action generally allowed.

Case 3: Court of Sapporo, 23 February 1993, Court of Appeal of Sapporo, 28 October 1993, Supreme Court, 10 March 1995

In this case, the sentences of the Juvenile Courts and that of the Supreme Court were contrasting.

A young skier, in spite of having seen in front of him a lady skier who was proceeding slower than him by performing wide bends, descended rapidly with a winding line crashing into the lady skier downstream. Both were expert skiers. The injured woman sued the young skier. As mentioned previously, the sentences of the Juvenile Courts and that of the Supreme Court were contrasting.

The Juvenile Courts excluded the illegality of the event performed by the defendant with the following motivation: when skiing on a slope, it is not possible to exclude the presence of a risk. Every skier, therefore, has the obligation to avoid such a risk. On the other hand, skiing does not only represent a hobby and an amusement for free time, but also a sport. This applies especially for the more expert skiers, who practice skiing by assuming a risk. It follows that illegality of the event cannot be mentioned, since, notwithstanding that he had injured the other skier, the defendant did not violate the regulation or the manners universally acknowledged on the slope. The Supreme Court (10 March 1995) rejected the preceding sentences with the following motivation: on the

ski slope, skiers have the obligation to observe carefully the movements of the skier who is downstream, by adapting their speed for the purpose of avoiding a collision. Since, in this case, the defendant had seen the lady skier at a downstream position with sufficient anticipation and could have avoided the crash, it is not possible to exclude the above mentioned obligation. The plaintiff has therefore the right to compensation for damages.

Concerning liability in case of collisions between skiers, it is possible to recapitulate the tendency of the sentences by stating that, from time to time, the latter examine and evaluate carefully the negligence of both parties, after which they establish – to their discretion – the amount of the due compensation, notwithstanding that they acknowledge generally the principle of the assumption of the risk.

2 Liability of the slope's manager

2-1 Liability of the slope's private manager

In case of liability of the slope's private manager, the prescriptions of which under paragraph 709 or paragraph 717 of the Civil Code are in force.

Paragraph 717 (1) Should a person be subjected to a damage further to a defect of a structure linked to a determined area, the manager of the area is liable to compensate the victim for the incurred damages. Should a manager have taken all measures for the necessary diligence for the purpose of avoiding the risk, it shall be the owner of the area to compensate for damages.

2-1-1 Is the ski slope a structure in accordance with paragraph 717 of the Civil Code?

Case 4 Court of Nagano, 24 March 1970

On 6 February 1966 a novice skier died following a crash with a log which was left in the middle of a slope for beginners. His relatives suited the manager of the ascending plant in accordance with paragraph 717 of the Civil Code.

The defendant asserted that he was the manager of the ascending plant, but not of the slope, which resulted completely natural (the end product of snow falls), and not snowgroomed by himself. The slope as such, therefore, did not represent a structure in accordance with paragraph 717 of the Civil Code.

The Court of Nagano acknowledged the liability of the manager in accordance with paragraph 717 of the Civil Code with the following motivation: the ascending plant as

such, has no value at all, since it can carry out its real function only in combination with the slope. Both represent one as a whole, by which the slope constitutes a structure in accordance with paragraph 717 of the Civil Code. The log is a defect of the structure that subjects the manager into obligation of compensation for damages.

This was the first sentence that considered the slope as a structure in accordance with paragraph 717 of the Civil Code.

2-1-2 Consideration of negligence of the manager and the prejudiced party

Some sentences have acknowledged only the negligence of the skier.

Case 5 Court of Yokohama, 18 December 1985

Being unable to adapt speed to his own skills, a young skier ended up out of control directly on the slope edge, at the point where the latter crosses the link with the neighbouring slope, which at that moment was closed. There he crashed with another skier, arriving from this link, undergoing mortal injuries. His parents sued the manager asserting that the latter was under the obligation to mark the crossing of the slopes with a "Stop!" signal. By not fulfilling such an obligation, the manager was guilty of negligence.

The Court rejected the plaintiff's claim. At that point, the signals would not be necessary for common skiers, since the link is at the extreme edges of the slope and the presence of an arrow would signal the previously closing of such a link. Since it was the first time that the skier was travelling along that slope he should have proceeded cautiously by controlling his own speed. Therefore, the accident is not attributable to the manager's negligence, but instead to that of the skier.

Case 6 Court of Toyama, 31 January 1990

A woman bought a non professional sled equipped with breaks and reached the slope with the chair lift. During the descent with the sled, she activated the break for stopping, but the latter did not work. The woman crashed against the pylon of the chair lift thus causing serious injuries to herself. She sued both the manager and the Company that sold her the sled asserting that the manager was under obligation of adopting appropriate measures for the purpose of avoiding a collision against the steel pylon, for example by surrounding the latter with a mattress. The company, on the other hand, was under obligation to explain the limits of operation of the break and inform the consumer that in case of an emergency, it was necessary to break by using the feet. On

the contrary, the Company advertised in an exaggerated manner the safety of the product, causing the accident. The two defendants therefore did not respect their obligations.

The Court rejected this claim, asserting that, when skiing or descending with a sled, it involves proceeding on a natural ground, for which risks must always be taken into consideration. The user of the slope must choose a path on the basis of his/her own skills and to the efficiency of the skis or of the sled that may allow him of avoiding the risks. The manager of the slope can carry out the necessary installations on the slope only by assuming that skiers behave in such a manner as to avoid the dangers. In this case, between the steel pylon and the snowgroomed slope there was a strip of fresh snow (of 6 metres of width) that had not been snowgroomed, which differentiated from the slope in which skiers normally do not access. Within this strip the skier could have avoided the risk of crashing against the pylon. Absence of protections should not be deemed as a defect of the structure.

Non professional sleds, in fact, would be suitable for soft, not steep inclinations. Therefore, just by the external appearance, it could have been easily ascertained the reliability of the break, by understanding at once that, in case of emergency, in order to avoid the danger, it would have been necessary to break by using the feet. The Company therefore has no obligation whatsoever of explaining the control limits of the breaks.

Case 7 Court of Asahikawa, 16 June 1987

The chair lift in question is in the middle of a slope. From the arrival station of the plant skiers reach the slope by descending along a relatively narrow corridor which, even if steep, it is located in the immediate vicinity of the chair lift pylon. Along this corridor, an eleven-year boy lost his balance, crashed against the pylon and died. The pylon was protected by a mattress, but at a height of 70 cm with respect to the snow layer, thereby the youngster hit the pylon in the unprotect part. His parents sued the manager in accordance with paragraph 717 of the Civil Code.

The Court acknowledged the liability of the manager in accordance with paragraph 717 of the Civil Code. Since many skiers proceed along the corridor in proximity of the pylon, the latter should have been appropriately protected with mattresses. Moreover, the manager should have adapted the position of the mattresses at the height of the snow layer. Since the nonfulfillment of adapting the position is intended as a defect of the structure in accordance with paragraph 717 of the Civil Code, the manager is liable to compensation for damages.

At the same time, however, the Court acknowledged also the negligence of the prejudiced party. The accident occurred at the end of March. Every skier should know that in this period of the year the quantity of snow and the slope conditions deteriorate, thereby greater caution should be taken by proceeding carefully when using the slope, something that was not observed by the prejudiced party. The Court established the latter's negligence in the measure of 75% and reduced proportionally the amount of compensation, in accordance with paragraph 722, subparagraph 2 of the Civil Code.

Paragraph 722 Compensation for negligence

The Court establishes the amount of compensation depending on the degree of negligence of the injured party.

Case 8 Court of Tokyo, 26 March 1990

A 22-year old skier fell from the slope on a parking lot, losing his life. There was a jump of about 1.5 - 2 metres between the slope and the parking lot.

His parents sued the manager by virtue of paragraph 709 and paragraph 717 of the Civil Code.

The Court acknowledged the defect of the structure in accordance with paragraph 717. The manager had created an embankment onto which were planted some trees; however, some stretches of this embankment were without any trees, and the snow fallen on the parking lot was heaped in these empty spaces. Since it was difficult for skiers arriving from upstream to recognise the boundary between the slope and the snow heap, the manager should have arranged a protection net or a large signalling board in order to avoid falls into the parking lot. The omission of such measures is intended as a defect of the structure in accordance with paragraph 717 of the Civil Code.

On the other hand, the Court acknowledged also the negligence of the prejudiced party, who should have previously known of the existence of such a step between the slope and the parking lot.

The Court established his negligence in the measure of 80% and reduced proportionally the amount of compensation, in accordance with paragraph 722, second subparagraph of the Civil Code.

2-2 Liability of the public manager of the slope

By liability of the public manager of the slope is intended the liability governed by paragraph 2 of the law of compensation for damages by the State.

Paragraph 2 Obligation of compensation for damages by the State.

In case of damage due by a defect during the phase of construction or management of public works such as roads, rivers, etc., the State is liable of compensation for damages.

Case 9 Court of Tokyo, 25 February 1998, Court of Appeal of Tokyo, 25 November 1998

The Commune of Nozawaonsen manages a slope on which there is an artificial bridge that connects two ridges and at the same time constitutes a narrow slope for expert skiers. A 22-year old skier lost his balance in the middle of the bridge, crashed against the guardrail and the protection net and, gliding into the cleft between the two, jumped 11 metres from the bridge losing his life. His parents summoned to court the Commune claiming compensation for damages in accordance with paragraph 2 of the law on compensation for damages by the State.

The Court acknowledged the defect in the phase of the construction and management of the bridge, asserting that the protection net was insufficiently strong for avoiding falling off the bridge. Although the manager had affixed a signalling board before the bridge, it cannot be considered as a substitute of a safety protection net.

On the other hand, the Court acknowledged also the negligence of the skier. It established his negligence in the measure of 20% and reduced proportionally the amount of compensation in accordance with paragraph 722, second subparagraph of the Civil Code., ordering the Commune to pay 69 million yen.

The Court of Appeal, however, judged the negligence of the prejudiced party more severely with respect to that of the Court of preliminary instance, namely equal to 60%.

In the allotment of liability between the prejudiced party and the manager, almost all sentences presume the obligation, by the skier, to adapt speed, descent and the path to his/her own skills, to the conditions of the ground, of the snow layer and the weather, and traffic on the ski slope. The manager has the obligation to adopt safety measures only in the measure whereby the skiers, by reaching an agreement pertaining into the above mentioned obligation, are able to avoid personally the risks. It follows that the manager must take measures only for the dangers that, notwithstanding the fact of respecting such an obligation, is not possible to be avoided.

On the basis of this principle the Court evaluates from time to time the degree of the defect of the structure, on one hand, and the fulfilment of the obligation by the skier, on the other hand, by establishing the percentage of compensation of fault.

In particular, it would be difficult to establish the percentage of compensation of fault to be attributed to the manager during the phase of the construction or management of the structure, from the moment that it can be foreseen that the damage, caused by the accident as a consequence of the nonfulfillment of respecting the obligation by the skier, is of considerable proportions, as in case 9.

Conclusions