# Around the World

## Switzerland

### SWITZERLAND: CIVIL LIABILITY OF THE OPERATOR OF A SKI SLOPE

*Discussion of Decisions 4A _206/2014 and 4A_236 /2014 dated September 18, 2014 by the Swiss Federal Supreme Court*

Contributory negligence; Damages; Personal injury; Skiing; Sports and leisure facilities; Switzerland

#### Facts

In 1996, an 11-year-old girl was skiing with her parents on a slope of the difficulty grade "medium" (red) which she knew well. She was wearing skiing glasses but not a helmet. In a slight bend of the slope (which was 29 metres wide at said location), she did not follow the bend but skied straight ahead, off the slope and into the fresh snow where she hit a slope marking post made out of iron. This accident caused serious injuries including almost total loss of eyesight, loss of scenting and tasting abilities.

The girl sued the operator of the ski slope for compensation for pain and suffering, requesting the payment of CHF 194,000 plus interest, alleging that the operator had breached its legal duty to implement safety precautions.

The case was argued extensively over the years, before several instances up to the Swiss Federal Supreme Court (FSC), from where it was sent back to lower instances again for reconsideration. Both parties appealed the decision by the last of the previous instances to the FSC. The court had ordered the operator to pay the girl CHF 112,000 plus interest of five per cent as of the day of the accident.

#### Held

The FSC confirmed that cable car and ski lift operators providing ski slopes are under a legal obligation to implement reasonable safety precautions in order to avoid that risks would materialise. This duty is, on the one hand, of a contractual nature (vis-à-vis the customers of the cable car and ski lift operators), and its fulfilment is compensated by the fee the customers pay for the transport ticket for the lifts. On the other hand, this duty is based on tort law (vis-à-vis all users of the slopes, including the ones who have not bought a lift ticket, e.g. users who have climbed the mountain on their own and are using the slopes to ski down) and goes back to the general legal principle pursuant to which whoever creates a risky situation has to make sure that such risks do not materialise. Possibly, a third legal basis for such duty might also be the liability which real property owners have for defects of their property; however, the FSC left open whether this indeed was the case here.

Said legal duty to implement any reasonable safety precautions requires, pursuant to the FSC, that slope users be protected from atypical risks which are not easily recognisable and which prove to be traps. Further, the operators are obliged to protect slope users from risks which cannot be avoided even by skiing/snowboarding carefully. However, there are two limits to the described duty. First, an operator is requested only to implement precaution measures which are reasonable, usual, necessary and possible; however, a minimal standard is to be complied with in any case. Secondly, the slope user acts on his or her own responsibility to a certain extent; any risks which are inherent to the skiing/snowboarding sport shall be borne by the slope user.

There are several detailed guidelines by private and public bodies on which the FSC relies in order to specify this rather generally worded duty to implement safety precautions. These guidelines cannot be qualified as law as such, but they help to concretise the duty in regular situations. In extraordinary situations, however, the court instances may define a specific operator's duty more extensively than these guidelines do. They have to take into account the efficiency of the discussed safety precaution, its costs, its disadvantages, the probability that the risk might materialise and the extent of the damage to be expected if the risk indeed materialised. Any risks which can easily be avoided by the user may be disregarded by the operator.

In the case at hand, the accident took place approximately 1 to 2 metres away from the edge of the slope in the fresh snow. The FSC confirmed that this was an area which was still covered by the operator's duty to implement safety precautions. It held that the operator was under an obligation to make sure that any natural or artificial obstacles were removed, padded or signalled with hazard warning signs. Pure hazard warning signalling would not be sufficient in cases of significant risks.

In the proceedings before the previous instances, the operator had argued that it was not reasonable to request that the slope marking post be padded as at least 500 slope marking posts were just as exposed to potential accidents as the one which the girl had hit. Also, it had argued that slope marking posts were essential at the respective section of the slope in order to protect the skiers and snowboarders from crevasses in the nearby glacier, and that plastic marking posts were not suitable to provide such protection because they were not as stable and could not be anchored into the ground as firmly as iron posts and therefore could be blown away or broken by strong winds.

However, the FSC confirmed that the previous instance's findings regarding these arguments were not arbitrary. The previous instance had held that, even at the time, plastic marking posts which were suitable even for weather-exposed locations on glaciers did indeed exist. It had also held that the location on the slope where the accident happened was to be qualified as a rather risky section of the slope even though the probability of accidents was not to be considered very high, and it had found that a collision with an iron post bears a risk of serious injury. Based on this analysis, the FSC stated that it would not have been expecting too much from the operator to install less dangerous plastic marking posts instead of the iron marking posts even though this would have caused more costs and labour. Therefore, the FSC came to the conclusion that the operator had indeed breached its duty to maintain safety precautions on the slopes.

The girl had not appealed the previous instance's decision to determine the full compensation for pain and suffering at CHF 140,000 but had criticised the previous instance's finding pursuant to which she was to be compensated at a rate of 80 per cent only based on her own partial fault. The previous instance had analysed the girl's behaviour. It had held that the girl had not adapted her way of skiing to her abilities and the current weather and slope conditions. The fact that she was not wearing a helmet was not qualified as acting on her own responsibility as, at the time, and contrary to today, not many persons were wearing helmets. However, the fact that the parents let the girl ski ahead was qualified as acting on one's own responsibility which was to be attributed to the girl. Taking all of this into account, the previous instance found the girl responsible for her accident at a rate of 20 per cent and therefore only awarded 80 per cent of the compensation set at CHF 140,000, i.e. CHF 112,000. The FSC confirmed that the girl was to be attributed some fault as she was not acting as responsibly as it could be expected from her but denied that the parents' fault would also reduce the compensation owed. It sent the case back to the previous instance (again), requesting that said court determine the rate by which the full compensation

of CHF 140,000 was to be reduced by the girl's careless way of skiing. Considering the rationale, it is to be expected that the cutback will be reduced; however, the FSC did not order this explicitly.

## Discussion

As Switzerland is a country of skiers and snowboarders, there are court cases on the liability of ski slope operators on a regular basis. Over the past decades, the FSC has developed an established law practice on which safety precautions may be requested from the operators and to which extent skiers and snowboarders are responsible for their own actions. The case described above is illustrative both as to the facts contained therein as well as to the standard legal deliberations on the liability of sports operators by the FSC. The one thing it is not illustrative of is the duration of the proceedings.

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