

Around the World

Switzerland

SWITZERLAND: CRIMINAL LIABILITY OF RIVER RAFTING GUIDES AND TOUR OPERATORS

Discussion of Decision 6B_165/2013 dated January 17, 2014 by the Swiss Federal Supreme Court and of Decision SK 14 233 dated February 19, 2015 by the Berne High Court

☞ Criminal liability; Criminal negligence; Death; Hazardous pursuits; Switzerland; Tour operators

Facts

In 2007, a class of 15-year-old students and their teacher went on a rafting excursion on the river Saane in the Canton of Berne. The 21 persons were placed on three boats on each of which there also was a rafting guide who was responsible for steering the boat.

In a gorge, an accident took place. The group in the first boat deviated from the planned course into a slower current, crashed into a rock and partially bounced back into the faster current, blocking the course. The second boat collided with the first boat on this planned course and flipped over. All the persons in the second boat were thrown overboard. The life vest of one of the students got caught under water, and the student was pulled under water by the current. It took two to eight minutes until the student could be rescued by the rafting guides who had to cut the life vest to do so. Two of the guides immediately started reanimation while the third guide climbed out of the gorge and ran to the nearest phone (the only emergency mobile had been inaccessible after the boat on which it had been had flipped over), and it took 17 minutes for a doctor to arrive at the site after he called the emergency medical assistance by air, approximately 23 minutes after the accident.

The student was taken to the hospital where she died three days after the accident based on the consequences of irreversible brain damage due to the lack of oxygen.

Held:

(i) Introduction

This tragic case led to several court cases regarding liability based on criminal and public law. This contribution will limit the discussion to the two final court decisions on the issue whether the river rafting guides and the operator of the river rafting tour were to be held criminally liable for homicide through negligence.

The prosecutor's office made investigations regarding the criminal liability of the three river rafting guides, the operator of the river rafting tour and the teacher. It came to the conclusion that the investigation had to be closed without any consequences for the suspects, except for the rafting guide in the second boat whose boat had flipped over, who was charged for homicide through negligence.

(ii) Decision 6B_165/2013 dated January 17, 2014 by the Swiss Federal Supreme Court

The order for withdrawal of prosecution against the third guide who had been able to stop his boat before reaching the place of accident was not appealed and entered into force. However, the order for withdrawal of

prosecution against the first guide whose boat had collided with the rock, the operator and the teacher was appealed through all instances. The Federal Supreme Court (FSC) rejected the final appeal against this order.

As to the teacher, the claim was not heard for formal reasons.

As to the operator of the tour, the FSC had to analyse whether he breached his duties of diligence: (a) by not making sure that every one of the guides/boats was equipped with an emergency mobile; and (b) by allowing a class of 15-year-olds without any river rafting experience onto the planned excursion.

The FSC referred to the previous instance's findings pursuant to which the irreversible brain damage was confirmed as the cause of death by medical experts and that earlier professional reanimation or treatment by a doctor could not have changed this. For this reason, the time elapsed between the accident and the call to the emergency medical assistance did not cause the tragic consequence of the accident. Even if a doctor had been at the site of the accident immediately after the rescue of the student, she would have suffered the irreversible brain damage which ultimately led to her death. For this reason, the FSC left the question unanswered whether the operator of the tour had breached his duties of diligence to equip every guide/boat with an emergency mobile.

Further, the FSC referred to an expert opinion by the Federal Office for Sports which had analysed the grade of difficulty with regard to the several sections of the planned rafting excursion. This expert opinion had come to the conclusion that the sections which were actually passed by the boats before and during the accident were to be rated with the difficulty grades II to III pursuant to the criteria applied by the International Canoe Federation and that one section which was not passed because of the accident which took place before said section was reached was to be rated with the higher difficulty grade IV. Additionally, the expert opinion had stated that all sections which the boats had passed, including the gorge in which the accident had happened, i.e. sections of a difficulty grade of II and III, were suitable for a river rafting excursion with a class of 15-year-olds who did not have any river rafting experience.

The FSC rejected the argument that this expert opinion was formally and substantively insufficient for the court to rely on. It also refused to analyse whether the section of the planned excursion which was rated IV but which was not passed by the boats would have been too difficult for a class of 15-year-olds who did not have any river rafting experience. As to the latter, it stated that, while it was true that the excursion should not have taken place if this were the case, this issue was not relevant because the difficulty of said section had not caused the accident. It clearly held that the accident would have had to constitute the realisation of the risk which was assumed in breach of duty in order to lead to a criminal liability of the operator. However, as the risk to pass a section of the difficulty grade IV did not materialise in the accident, it did not matter whether the plan to pass such a section at a later point in time constituted a breach of duty.

Based on this rationale, the FSC dismissed the appeal against the order for withdrawal of prosecution regarding the tour operator.

As to the guide whose boat collided with the rock, the FSC had to analyse whether the guide had committed a guiding/steering mistake by getting off-course. The aforementioned expert opinion had come to the conclusion that the guide had reacted reasonably after having strayed off the planned course, which was qualified as normal in this sport which took place in a very dynamic environment. There were no indications that the guide could have acted wrongfully, e.g. that he had not been attentive, that his orders to the students were not correct or belated or that he did not do everything to keep the unavoidable collision with the rock as unimpactful as possible. Relying on this, the previous instance had come to the conclusion that the guide had not breached his duties of diligence and care.

Based on this rationale which it fully adopted and confirmed, the FSC dismissed the appeal against the order for withdrawal of prosecution regarding the guide.

(iii) Decision SK 14 233 dated February 19, 2015 by the Berne High Court

The rafting guide whose boat had flipped over was charged for homicide through negligence. He was criticised for not having left enough distance between his boat and the boat in front of him and therefore not being able to stop his boat in time when the boat in front of him blocked his course. The court of first instance had acquitted the guide by confirming that the distance between the two boats had been sufficient and that the guide had anticipated the situation reasonably when he noticed that the boat in front of him would collide with the rock, namely that he could not have expected that this boat would block a part of the course he wanted to take. This decision was appealed to the Berne High Court (BHC).

The BHC thoroughly analysed the large number of witness statements and several expert opinions and statements from the investigation and the proceedings before the court of first instance. It came to the conclusion that the combination of all witness and expert statements reflected a realistic and coherent behaviour by the guide who did all he could, taking into account the dynamics of the situation and the little time he had available to make a decision on how to react. Namely, it stated that it made sense that the guide expected that the first boat could flip and therefore decided that he could be of better help to the students on that boat if he passed the first boat and would help from below instead of trying to stop his boat before the rock which would have been possible but a risky manoeuvre. This explained why the guide reduced the distance to the boat in front of him which he was allowed to do taking into account all advantages and disadvantages of this decision. Generally speaking, the BHC held that it was necessary to evaluate the situation from an *ex ante* perspective, i.e. to analyse whether the actions of the guide seemed reasonable before the collision took place, and not to look at the situation *ex post*, i.e. in full knowledge of what exactly happened even after the guide had to react to the foreseeable collision of the boat in front of him with the rock.

Based on this rationale, the BHC dismissed the appeal against the acquittal of the guide by the court of first instance.

(This decision remained unappealed even though an appeal to the FSC would have been possible.)

Discussion

As usual in Swiss proceedings, questions which prove to be irrelevant for the outcome of proceedings are not decided by the FSC. It is rather rare that obiter dicta are being included in a decision. Therefore, it is not surprising that the FSC did not analyse the question whether the operator would have been obliged to make sure that more emergency mobiles would have been available, and whether an excursion through a section of the difficulty grade IV would have been suitable for a class of 15-year-olds without any rafting experience. Even though these would have been interesting decisions for all river rafting operators, it is understandable with regard to the workload of the FSC and taking into account the principle of separation of powers that the FSC did not take on the analysis of these issues which proved to be irrelevant in the case at hand.

The parents and sister of the deceased student also initiated liability proceedings against the school which (through the teacher who was responsible for the class) had organised the excursion. As opposed to the criminal proceedings which were held in the Canton of Berne which is where

the accident took place, this case was litigated before the courts in the Canton of Zurich (as this was the domicile of the school). It went up to the FSC twice which finally dismissed the claim on August 27, 2015. This case involved mainly different and many more questions than the criminal proceedings as described above, amongst other the admissibility of rafting excursions for school classes and the duty of teachers to reconnoitre excursions on site and to inform the parents in detail about planned activities. A discussion of this case would push the boundaries of this contribution. However, the final decision may be found online on the FSC's website by searching with the case number 2C_1035/2014.

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