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Kadner Graziano, Thomas

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Articles

Thomas Kadner Graziano*

The Distribution of Social Costs of Ski Accidents through Tort Law: Limits of Fault-Based Liability in Practice – and Alternative Regimes

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Abstract: In most European countries, fault-based liability is the principal pillar of extra-contractual liability, at least in theory. However, proving fault of the person alleged to be liable may be a requirement which is difficult or even impossible to fulfil, even for claimants who may in fact deserve compensation. Ski accidents illustrate these difficulties particularly well. In cases of ski collisions, fault-based liability achieves compensation often only partially, if at all, generates high transaction costs and is often inefficient, leads to results that might be perceived as unfair by victims, and achieves largely unsatisfactory results when it comes to distributing the social costs of ski accidents. The reason is that collisions often happen in a fraction of a second, that the dynamics of the accident often render the reconstruction of the accident very difficult, if not impossible, and that there is typically little or no evidence. Often witnesses are not available, or were themselves busily skiing and did not pay attention to the details of the accident, and are often, willingly or unwillingly, biased. Given these weaknesses of fault-based liability there is reason to consider alternative regimes for ski collisions. It is argued that applying a system of fault-based liability with a presumption of fault, or, alternatively and arguably even better, a strict liability system for dangerous activities to ski collisions, combined with (mandatory) liability insurance, would achieve a higher level of compensation, reduce transaction costs to a minimum, and often achieve fairer results.

*Corresponding author: **Thomas Kadner Graziano**, Professor at the University of Geneva; Director of the Department of Private International Law and of the Law Faculty's Programme on Transnational Law, E-Mail: thomas.kadner@unige.ch

I Introduction¹

Safety in ski areas largely depends on the quality of the services provided by the operators of the areas.² However, safety also depends on the behaviour of the skiers themselves. Even if the operator has done his work properly and the ski area is well maintained, skiers might, if negligent, still cause injuries to themselves or others. Damage suffered in ski accidents (including injury to health, loss of income or loss of support, further financial loss, and non-pecuniary damage) can be considerable. To give just two examples: in one case the head of government of a German *Bundesland* (state) collided on an Austrian slope with a 41-year-old woman from Slovakia. The woman was killed in the accident, leaving four children bereaved of their mother; he suffered severe head injuries. In another case, a man and a woman collided on a Swiss slope. Due to the accident, the man's left arm remained paralysed; the woman, mother of a child, suffered tetraplegia. Both skiers lost consciousness in the accident and did not remember how the accident happened.³

Whilst some damage might be covered by mandatory social insurance, other damage is not. In many jurisdictions, immaterial harm, loss of support in case of death of a parent, and long lasting loss of income are, for example, only partially covered, if at all, by mandatory first party insurance.⁴ If the victim is young and

1 This article is based on a presentation made at a conference organised by Umberto Izzo at the Università degli Studi di Trento in December 2015. The conference papers will be published in *U Izzo* (ed), *Safety and Liability Rules in European Ski Areas* (forthcoming). All translations by Christopher Booth, Hannes Meyle, and the author unless otherwise indicated.

2 For the liability of ski area operators in different European jurisdictions, see the contributions in: *Izzo* (fn 1).

3 See the cases related in the Swiss newspaper *Saldo*, 21 January 2009 No 1 p 8f (article by *M Mair-Noack/P Stöhr*). See also the recent case related in *SPIEGEL-Online* 15 January 2016: a 29-year-old Frenchman and a 30-year-old German, both wearing helmets, collided at high speed on a slope in the southern Black forest on the last descent in the afternoon; both lost their lives. The cause of the collision remains unknown, <<http://www.spiegel.de/panorama/feldberg-unglueck-skifahrer-prallten-gegen-masten-einer-schneekanone-a-1074066.html>; <http://www.swr.de/land-esschau-aktuell/bw/suedbaden/zwei-tote-skifahrer-am-feldberg-erste-obduktions-ergebnisse-liegen-vor/-/id=1552/did=16845458/nid=1552/1o9y2nr/index.html>>.

4 In Germany and Switzerland, for example, costs for treatment are covered by mandatory health insurance, whereas there is no mandatory first party insurance for immaterial harm or property damage. Of importance is the case of loss of earning capacity: in Germany, in case of injury the first six weeks are covered by the employer (if the victim is employed at the moment when the accident happens, which might not be the case for young victims, self-employed persons or persons working in their own household). If the loss of earning capacity lasts longer than 6 weeks, sickness benefits are granted by the social security system, §§ 47 and 48 of the *Sozialgesetzbuch*

disabled for life, the damage he suffered in a ski accident may amount to a few million Euros. In cases where the damage results from a collision, the victim may turn to the other skier who caused the collision in order to obtain compensation (either for the whole damage or in particular that part of the damage which is not covered by social insurance). In cases of collision between skiers resulting in personal injury, the question raised is of how well the liability regimes in force in the different jurisdictions work when considered in light of the purposes of tort and accident law.

In terms of absolute numbers, the subject is far from insignificant: approximately 38,000 to 39,000 persons from Germany are involved in ski or snowboard accidents resulting in personal injury every year. Seventeen per cent, that is about 6,700 of them, are injured in collisions, with an upward trend in recent years.⁵ In Switzerland, the number of persons injured in winter sports is as high as the number of victims of road traffic accidents.⁶ 65,000 persons insured in Switzerland suffer personal injury in ski or snowboard accidents every year, with an average cost of CHF 7,600 per ski accident and of CHF 3,900 per snowboard injury. Six per cent, corresponding to almost 4,000 of these victims, are injured in ski collisions. Whereas in Switzerland about 6,300 pedestrians are injured in road traffic accidents every year (that is, on average 1,575 every three months), in a little more than three winter months about 4,000 persons are injured in ski collisions. In Switzerland, the total costs of skiing accidents amount to more than

(Social Code, SGB) V, in the amount of 70% of lost earnings for a maximum duration of 78 weeks within three years for the same injury or illness. Beyond that period, there is no special coverage for loss of earnings. For Germany and Switzerland, see *H Meyle* in: *Izzo* (fn 1). See in general on the relationship between social security and tort law *G Wagner* in: *Münchener Kommentar zum BGB* (6th edn 2013) Vorbemerkungen zu §§ 823 ff nos 28–33; from a comparative perspective: *H Koziol*, *Ausgleich von Personenschäden – Rechtsvergleichende Anregungen für ein Zusammenspiel von Schadenersatz- und Versicherungsrecht*, *Austrian Law Journal* 2015, 186 ff, with further references.

⁵ Source: ARAG, Auswertungsstelle für Skiunfälle (ASU) in Kooperation mit der Stiftung Sicherheit im Skisport (SIS), *Unfälle und Verletzungen im alpinen Skisport, Zahlen und Trends 2014–15*, pp 2 and 9, available at <http://www.ski-online.de/files/dsv-aktiv/PDF/Projekte/ASU_Analyse_2014_2015.pdf>.

⁶ In 2012, for example, 82,360 persons were injured in Switzerland in road traffic accidents (23,660 car, 12,330 motorcycle, 30,190 bicycle, 6,360 pedestrians, and 9,820 others). 82,920 persons were injured on ski slopes (50,600 alpine skiing; 14,070 snowboarding; 6,860 sledding; 930 ski touring; 4,520 cross-country skiing; and 5,950 other). Source: *bfu* (Beratungsstelle für Unfallverhütung), *Status 2015*, available at <http://www.bfu.ch/sites/assets/Shop/bfu_2.265.01_STATUS%202015%20%E2%80%93%20Statistik%20der%20Nichtberufsun%C3%A4lle%20und%20des%20Sicherheitsniveaus%20in%20der%20Schweiz.pdf>. For more information, see *Meyle* (fn 4).

CHF 369 million per year. In other countries, the number of ski accidents is also considerable, with 35,000 injuries per year for example in Italy, 12% or about 4,200 of which are due to collisions with other skiers,⁷ and about 150,000 cases of injury in the 2014–15 season in France.⁸

II The range of liability regimes that may apply to ski collisions

From a European and comparative perspective, five different liability regimes may be potentially applicable to distribute social costs resulting from collisions between skiers, namely:

- classic fault-based liability according to which the injured has to prove that the person alleged to be liable was at fault or, in other words, acted negligently,
- strict liability for a thing a person has under control (that is liability of the ‘guardian’, as applied in certain European countries),
- strict liability for particularly dangerous activities,
- fault-based liability with a presumption that both parties were equally at fault, or
- fault-based liability with a presumption of fault.

This contribution analyses and evaluates the functionality of these liability regimes with regard to ski collision cases. When evaluating the different systems with respect to the distribution of costs of ski accidents, the following purposes of civil liability shall be taken into consideration: compensation of damage; fairness of the outcome; prevention of damage⁹ and economic efficiency when dealing with the distribution of the social costs of ski collisions.

⁷ See the report on Italy provided by Izzo (fn 1).

⁸ See the numbers provided by the organisation Médecins de Montagne, available in: <<http://www.mdem.org/france/DT1190189670/page/Les-chiffres.html>> and C Quezel-Ambunaz in: Izzo (fn 1).

⁹ There is much discussion about the question of whether tort law has preventive effects at all, in particular when considering that many damages are ultimately not carried by the tortfeasor, but may be covered by insurance. The author of this paper is, however, convinced that for as long as tortious liability is not *entirely* replaced by insurance, and as long as fairness is one of the criteria that is taken into consideration when deciding where the loss should ultimately fall, or who has to pay for insurance and at what premiums, tortious liability has at least some preventive effect. The new Tort Law Act of the People’s Republic of China for example explicitly mentions prevention as

For the purposes of this paper an economically efficient legal solution shall be defined as a solution that satisfies two conditions: (a) it is fair both for the injured person and the person alleged to be liable and (b) amongst all fair legal solutions, it has the lowest cost. In economic terms: in a set of fair legal solutions, the economically efficient solution (as understood in the present paper) minimises social costs.¹⁰

A Fault-based liability: some strengths and many weaknesses in cases of ski collisions

Liability for fault is based on the idea that the person held responsible did not observe the required standards of care and that some kind of moral reproach can be made.¹¹ If fault is established, it is regarded as fair and equitable that this person should bear the social costs resulting from his negligent action. The victim should then receive full compensation, except if he was himself contributorily negligent. On the other hand, if the required standards of care are respected, there is no liability. Fault-based liability thus creates incentives to behave as required and to prevent damage to others. As long as the costs of applying this system are reasonable, fault-based liability may also be economically efficient in that it helps achieve fair results while minimising the social costs of ski accidents and allocating costs sustained by the victim to the tortfeasor, that is, the actor who can avoid similar damage in the future.¹²

Regarding the liability of ski area operators, the classic fault-based liability should, at least in theory, work rather well. This is because it may be established without major difficulty after the accident whether the ski slope was in an unsafe

one of the aims of tort law. Art 1 of the Act provides: ‘In order to protect the legitimate rights and interests of parties in civil law relationships, clarify the tort liability, *prevent* and punish tortious conduct, and promote the social harmony and stability, this Law is formulated’ (emphasis added).

10 The evaluation of the economic efficiency of legal rules depends on the normative questions for which these rules provide answers. If the social goal is the minimisation of the sum of accident losses and the costs of accident prevention, the economically optimal rule might well be different from a rule that further takes into account the social goal of compensation of victims, see eg *S Shavell*, *Economic Analysis of Accident Law* (2007) 3.

11 See eg *J Esser/H-L Weyers*, *Schuldrecht*, Band II, Besonderer Teil, Teilband 2: Gesetzliche Schuldverhältnisse [Law of Obligations, Vol II, Special Part, 2. Legal Obligations] (8th edn 2000) § 55 III (English translation in *T Kadner Graziano*, *Comparative Tort Law*, ch 2, forthcoming).

12 For the economic reasonableness of fault-based liability in general see *Shavell* (fn 10) 5 ff.

state or not, for example by taking photos of the slope.¹³ Under such circumstances, fault-based liability might actually lead to a degree of liability that corresponds to the fault committed by the relevant actors. Consequently it could lead to a fair and economically efficient distribution of the social costs of skiing.¹⁴

In collision cases, on the other hand, a claimant in a classic fault-based liability system is often faced with serious challenges regarding the proof of fault.¹⁵ Collisions often occur in a fraction of a second. In many cases, the dynamics of the accident render its reconstruction very difficult. Skid marks or other admissible evidence hardly ever exist in the snow. Witnesses are often not available, or – if they are – they were themselves busily skiing and therefore did not pay attention to the details of the accident. Last but not least, witnesses are often friends or family members of the persons involved in the accident and their statements may, willingly or unwillingly, be biased or not entirely truthful.¹⁶

13 See however, for example, the case LG Ravensburg 22 March 2007, Az 2 O 392/06, Beck RS 2007, 08973: ‘Aus den verschiedenen vorliegenden Fotos [des Unfallortes] ergibt sich, dass die [Sicherungs-] Zäune tatsächlich häufig verstellt wurden [...]. Die Parteien und Zeugen taten sich dementsprechend mit genauen Angaben zum Unfallort außerordentlich schwer.’ (‘The various photos we have of the accident location indicate that safety fencing was frequently adjusted [...]. As a result, the parties and witnesses to the accident found it extremely difficult to provide an accurate description of the place of the accident.’) In several national liability systems, once an unsafe state of a ski slope is discovered, the fault of the ski area operator is presumed and he has to show that no fault was committed, see eg art 58 of the Swiss Code of Obligations and eg *F Werro* in: L Thévenoz/F Werro (eds), *Commentaire Romand, Code des obligations I* [Commentary on the Code of Obligations I] (2nd edn 2012) art 58, esp nos 1, 2, 8, 23 (English translation in *Kadner Graziano* (fn 11) ch 6).

14 It seems therefore logical that a recent Italian law on ski safety provides for a presumption of fault in the case of collisions of skiers, but not in the case of accidents with regards to the operators of ski areas, see art 19 on the one hand and art 4 on the other of the Italian Law of 24 December 2003 (Legge 24 dicembre 2003, no 363 ‘Norme in materia di sicurezza nella pratica degli sport invernali da discesa e da fondo’, pubblicata nella Gazzetta Ufficiale n. 3 del 5 gennaio 2004), and below, Section II D.

15 See also *V Sälzer*, *Skiunfälle im organisierten Skiraum* (2013) 206 f.

16 See eg *M Bona/A Castelnovo/PG Monateri*, *La responsabilità civile nello sport* [Civil liability in sport], 2002, no 3.4.1. See also eg the German case LG Ravensburg 22 March 2007, Az 2 O 392/06, Beck RS 2007, 08973: ‘Die Angaben der Zeugin T. sind allenfalls insoweit verwertbar, als es um die nähere Festlegung des Kollisionsortes innerhalb der Pistenbreite geht. Im Übrigen aber war ihre Vernehmung ein selten eindruckliches Beispiel dafür, wie ein rundweg redlicher Zeuge Angaben macht, die erkennbar nicht auf eigener Wahrnehmung beruhen, sondern auf unbewusstem Zusammenfügen von tatsächlich Wahrgenommenem mit später Erschlossenem bzw. gedanklich Rekonstruiertem. Bei ihrem zusammenhängenden Bericht kam die eigentliche Kollision überhaupt nicht vor, lediglich eine akustische Wahrnehmung hierzu. Dies ist umso auffal-

In the jurisdictions of Germany, Switzerland, Austria, Slovenia, Poland and Spain, for example, the liability for ski accidents is nevertheless fault-based.¹⁷ The injured skier thus carries the burden of proving the facts and the fault of the person alleged to be responsible. In order for the action to succeed, the court must be convinced of the facts and fault of the other party. If reasonable doubts remain, the action will fail.¹⁸

In published European case law, cases in which the facts are eventually fully established at reasonable cost and effort most often deal with accidents in ski groups and/or cases in which the victim was not, or was hardly, moving when the accident occurred.¹⁹

lender, als nach dem, was sie später zur Kollision angab („auf den Brustkorb drauf gefahren“), es kaum vorstellbar ist, dass ein so drastisches Geschehen – bei eigener visueller Wahrnehmung – nicht stärker in der Erinnerung verankert sein sollte. Auch die Unfähigkeit der Zeugin zu näheren Angaben über den anderen Skifahrer, der mit ihrer Freundin kollidierte, passt hierzu. Auch mit den Angaben der Zeugin J.B. ist letztlich nicht viel anzufangen. [...]’. (‘The details provided by the witness, T, may at best be helpful to more accurately determine how far across the slope the collision occurred. Beyond this, the examination of the witness proves to be a classic example of a situation in which even a bona fide witness provides statements which are evidently not based upon his or her own observations but upon observations unintentionally interfused with what he or she has subsequently deduced or mentally reconstructed. When giving her comprehensive statement on the events, the actual collision was, for all intents and purposes, not even mentioned but for her audial perception of the collision. This is all the more astonishing given that, according to her subsequent statements on the collision (“smashed into his ribcage”), it is hardly conceivable that such a drastic event – were it indeed observed by the witness – may not have been recalled more clearly. This is also reflected in the fact that the witness was unable to provide more specific details about the other skier who collided with her friend. The statements of the other witness JB do not provide any further assistance either. [...]’).

17 Based on § 823 sec 1 of the German Civil Code (Bürgerliches Gesetzbuch, BGB), art 41 of the Swiss Code of Obligations, art 1295 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB), art 1902 of the Spanish Civil Code, art 415 of the Polish Civil Code, for example. For details and references see *Sälzer* (fn 15) 124 ff, 177 ff (Germany); *A Schwaighofer* (Austria), *A Ruda* (Spain), and *D Wolski* (Poland) in: *Izzo* (fn 1).

18 See eg LG Mühlhausen 23 January 2013, Az 1 O 594/08: keine ‘vernünftigen Zweifel’, ‘eine bloß höhere Wahrscheinlichkeit der eigenen Schadensschilderung [genügt] als Grundlage des Vollbeweises nicht’. (‘A description of the facts that leaves no “reasonable doubt” or a description of the events that is more probable than not is not sufficient to form the legal basis for proof.’) For Austrian law, see eg Oberster Gerichtshof (Supreme Court of Justice, OGH) 29 January 1987, 7 Ob 721/86: ‘Der Beweis eines sehr hohen Wahrscheinlichkeitsgrades genügt’. (‘Proving the facts with a very high degree of probability is sufficient’).

19 See eg the German case Bundesgerichtshof (Federal Court of Justice, BGH) 28 April 2015, Az VI ZR 206/14, *Neue Juristische Wochenschrift*, Rechtsprechungsreport: Zivilrecht (NJW-RR) 2015, 1056; the Swiss cases BG/TF 2 August 2004, 4C.159/2004; BG/TF 29 January 2009, SB 08 23 (extremely severe injuries; criminal and civil liability; witness available; the severely injured skier

In collision cases in which both protagonists had actually been skiing when the collision occurred, the situation is usually far more complicated. Published cases illustrate the considerable difficulties typically faced by victims when it comes to proving facts and fault in cases involving such ski collisions. These cases demonstrate the considerable efforts deployed by claimants, judges and experts to establish the facts leading to the collision. In the overwhelming majority of published collision cases, the courts relied on expert advice. Sometimes the judges, accompanied by experts, visited the ski slope (or even skied on the slope themselves) in order to determine how the accident might have happened.²⁰

Sometimes evidence leads the court to conclude that one skier was, or must have been, located higher up on the slope before the accident happened. Usually in such cases the exact circumstances of the collision, however, remain unclear. Some courts have assumed in these scenarios that the skier entering the collision from above and behind was to blame for the collision (*Beweis des ersten Anscheins/res ipsa loquitur*)²¹ similar to the assumption that in rear-end car collisions the driver who came from behind is to blame and at fault.²² The skier in the downhill position may however be held to have been contributorily negligent.²³

moved at very low speed); the Austrian cases OGH 13 December 2002, 1 Ob 287/02s (an inexperienced snowboarder, member of a learning group, crashed into the member of a group of experienced snowboarders that had stopped at a place that should have been safe); OGH 15 December 2005, 6 Ob 270/05g (a skier moves slowly up at the border of the slope in order to help a friend in difficulty when another skier, skiing downhill, crashes into him); OGH 3 Ob 89/10z (a skier jumping from a ski-jump despite limited visibility crashes into a group of skiers standing at the bottom of the ski-jump); the French cases Cour de Cassation (Cass) 22 July 1986, arrêt no 613, pourvoi no 85–11.226; Cass 13 May 1969, pourvoi no 68–12.068 (both cases: liability of the member of a ski group for a damage to the instructor in a collision); Cour d’appel de Poitiers 3 December 2014, RG 14/00235 (the victim had stopped in order to collect a ski stick lost by another skier); Cour d’appel de Grenoble 26 June 2012, no 10/03646 (the victim was sitting on a ski slope).

20 See eg the case BGH 11 January 1972, NJW 1972, 627: ‘Der Trichter hat aufgrund eines Augenscheins unter sachverständiger Beratung festgestellt, dass ein in der Falllinie fahrender Skifahrer wie der Beklagte den unteren Teil des Zeller-Hangs in der ganzen Breite übersehen kann [...]. [...] [N]ach Fahrversuchen des Richters und des Sachverständigen [ist] festgestellt, dass [...]’. (‘On the basis of his investigation of the ski slope where the accident had occurred and assisted by expert advice, the judge at first instance determined that a straight-line skier such as the defendant would have had a view of the entire expanse of the lower part of the Zeller slope [...]’).

21 LG Ravensburg 22 March 2007, Az 2 O 392/06, Beck RS 2007, 08973.

22 LG Ravensburg 22 March 2007, Az 2 O 392/06, Beck RS 2007, 08973 at no 3: since further facts remain unclear, there is no basis for assuming contributory negligence and the defendant is fully liable; see also the French case Cass 8 July 2010, no 09–14557, or the Austrian case OGH 29 January 1987, 7 Ob 721/86.

23 See eg the Swiss case BG/TF 2 August 2004, 4C.159/2004 (70% / 30%).

In other cases, courts concluded from evidence that the skiers were, or in all likelihood were, travelling at the same height and at a similar speed when they collided. Here again, the additional circumstances surrounding the accident are usually unclear. Some courts then assume that both skiers could have prevented the accident and that both were negligent or contributorily negligent, depending on the circumstances. The defendant skier is then held responsible in relation to the proportion of his fault and to the contributory negligence of the injured skier.²⁴

Often the courts are however reluctant to draw such conclusions and to apply the rules on *Anscheinsbeweis/res ipsa loquitur* in collision cases.²⁵ They emphasise

24 See eg the case BGH 11 January 1972, NJW 1972, 627: contributory negligence 50%; LG Bonn 21 March 2005, 1 O 484/04, NJW 2005, 1873: '[...] [I]m Falle der Kollision zweier Pistenbenutzer, von denen keiner der wesentlich schnellere und keiner der hintere und/oder obere Fahrer ist [...] spricht zunächst in *Ermangelung weiterer Aufklärbarkeit* eine widerlegliche Vermutung dafür, dass jeder der beiden dem jeweils anderen nicht die nötige Aufmerksamkeit geschenkt und damit schuldhaft, nämlich fahrlässig gegen die FIS-Regeln 1 (allgemeine Sorgfaltspflicht) und 2 (Sichtfahrgebot bei angepasster Geschwindigkeit) verstoßen haben' (emphasis added). ('[...] Where there is a collision between two slope users, neither of whom was travelling substantially quicker than the other, nor positioned above and/or behind the other at the time of collision, [...] in the *absence of the possibility of further clarification* of fact, there is a rebuttable presumption, a priori, that each of the skiers did not pay enough attention to the other, and was therefore at fault, that is to say that the skier negligently infringed FIS rules 1 and 2 ("respect for others" and "control of speed and skiing/snowboarding" respectively)' (emphasis added). Contributory negligence: 40%; see also: OLG Stuttgart 19 June 2013, Az 3 U 1/13.

25 OLG Schleswig 28 August 2012, Az 11 U 10/12, BeckRS 2012, 25106: 'Für die Anwendbarkeit eines Anscheinsbeweises muss ein typischer Geschehensablauf feststehen, mithin ein Sachverhalt, bei dem nach der Lebenserfahrung auf das Hervorrufen einer bestimmten Folge oder die Verursachung durch ein bestimmtes Verhalten geschlossen werden kann. [...] Der behauptete Vorgang muss zu jenen gehören, die schon auf den ersten Blick nach einem durch Regelmässigkeit, Üblichkeit und Häufigkeit geprägten Muster abzulaufen pflegen. [...] Für einen derartigen Ansatz ist nach Auffassung des Senats, dessen Mitglieder zum Teil über jahrzehntelange Skierfahrung verfügen, kein Raum, da er bereits die Besonderheiten des Skifahrens nicht ausreichend berücksichtigt. Es gibt vielfältige Möglichkeiten, einen Skihang abzufahren (Abfahrtstil, Carving, Kurzschwünge). Jeder dieser Stile lässt völlig unterschiedliche Geschwindigkeiten zu. Bereits bei Skifahrern, die mit Kurzschwüngen einen Abhang ins Tal hinab fahren, können erheblich unterschiedliche Geschwindigkeiten auftreten [...]. Nach Auffassung des Senats lassen die Angaben der Parteien [...] keine Rückschlüsse auf die tatsächliche Fahrtgeschwindigkeit zur Zeit der Kollision zu. Ebenso wenig kann sicher festgestellt werden, welcher der beiden Skifahrer vorweg gefahren ist und welcher hinterher. Mithin gibt es bereits im Kernsachverhalt keine belastbaren Feststellungen'. ('In order to apply prima facie evidence, a typical sequence of events must be established, ie facts that allow the court to reasonably draw a conclusion regarding the cause of a certain result or regarding consequences stemming from a certain conduct [...]. The alleged course of events must be of such a nature that, even at first glance, it adheres to a sequence

that there are many ways in which one can ski down a slope, and that different skiing styles correspond with different speeds. In the face of uncertainty, they come to the conclusion that the reconstruction of the facts of the accident eventually fails – despite often considerable and costly efforts of claimants, courts and experts to clarify facts. The decisions are then based on the failed burden of proof, the claim is rejected, and the victim carries the costs relating to the damage entirely upon his shoulders.²⁶ Some courts have explicitly stated that any other result would require a system of strict liability.²⁷

which is regular, commonplace and occurs often. [...] In the view of the *Senat*, some of whose members have decades of skiing experience, there is no room for such an approach since it does not sufficiently consider the particular nature of skiing. There are many ways in which to ski down a hill (alpine, carving, short swings). Each of these styles comes with a wide variety of speeds. Even amongst skiers practising short swing descents, speeds may vary significantly. In the view of the *Senat*, the details provided here by the parties do not allow the court to come to any conclusion on the parties' actual speeds at the moment of collision. Nor can it be reliably determined which of the two skiers was ahead and which was behind. Consequently, no reliable conclusion may be drawn from the core body of evidence'). LG Ravensburg 22 March 2007, Az 2 O 392/06, Beck RS 2007, 08973: 'kein Anscheinsbeweis zulasten des Gegners des Geschädigten' ('no prima facie evidence to the detriment of the adversary of the injured party'). See also *Sälzer* (fn 15) 191 f, 211 ff.

26 OLG Schleswig 28 August 2012, Az 11 U 10/12, BeckRS 2012, 25106; LG Mühlhausen 23 January 2013, Az 1 O 594/08, BeckRS 2013, 03063: 'Der weitere Unfallhergang, die gefahrenen Geschwindigkeiten und die genauen Richtungen, aus denen die Parteien kamen, sind streitig. [...] [D]er Unfallhergang [bleibt] ungeklärt'. ('Further circumstances surrounding the accident, the speed at which the skiers were travelling and the exact trajectories of the parties are disputed. [...] [The] circumstances surrounding the accident [remain] unclear.') See also the Swiss decision Kantonsgericht Graubünden 9 February 2009 PKG 2000 p 138 (on criminal liability): 'Wie es jedoch zur Kollision kam, ist weitgehend unklar geblieben. Allfällige Zeugen oder weitere Hinweise, die darüber Klarheit hätten verschaffen können, konnten nicht ausfindig gemacht werden'. ('It remains largely unclear as to how the collision occurred. Neither potential witnesses nor any further evidence which may have cleared up the facts could be found'.) See also the Italian decision: Corte d'appello di Trento, sezione dictaccata di Bolzano, 20 June 2007: A child skier collided with a snowboarder. In the uncertainty surrounding the dynamics of the accident, the court of first instance, pursuant to art 2043 cc, had rejected the plaintiff's claim due to a failure to meet the burden of proof. The court of appeal thereafter rejected the application, by way of analogy to art 2054 codice civile (cc) and the presumption of equal responsibility, confirming the correct application of art 2043 cc, and thereby rejecting the appeal. Today, the presumption of a similar degree of fault of both parties, contained in art 19 sec 1 of the Italian Law 363/2003 of 24 December 2003 would apply and the claim would succeed with respect to 50% of the damage; see below, Section II E.

27 OLG Schleswig, *ibid*: unter diesen Umständen eine Haftung anzunehmen 'ginge in Richtung einer Gefährdungshaftung' (Establishing liability under these circumstances would 'be a step in the direction of strict liability'); LG Mühlhausen 23 January 2013, Az 1 O 594/08: 'Mangels einer § 7 StVG für den Strassenverkehr vergleichbaren Regelung zu einer Gefährdungshaftung ist eine

An analysis of German and Swiss case law on ski collisions thus allows the following observations to be made:

- Under a fault-based liability system, it must be established, often weeks or months after the accident, how exactly the accident happened and who was at fault. Parties, judges, and experts often spend a considerable amount of time and effort verifying the claimant's allegations in regards to the fault of the party sought to be responsible.
- In some cases, these attempts succeed, in many others they fail. Even in cases in which the defendant is ultimately held responsible, considerable doubts regarding the cause of the collision often remain.
- If the effort to establish the facts succeeds, courts still often find that the claimant was in some way not entirely free from fault, that is, that he was contributorily negligent. The costs of the accident are then eventually split between the parties.²⁸
- If the claimant fails to prove fault, he will not receive compensation from the other party, even if the latter has *in fact* negligently caused the accident.

For cases in which the victim eventually succeeds in establishing that the other party was at fault, most of the purposes of tort liability and the distribution of costs of ski accidents may be achieved and the injured party will receive compensation from the negligent tortfeasor. In many cases, however, due to his own contributory negligence, he will not receive *full compensation*. The costs of a ski accident are then split between the parties. If the facts are fully established, from a moral standpoint, the outcome will be fair and just, and be perceived as such, given that the level of compensation will correspond to the parties' respective faults. If fault-based liability is applied, a potential tortfeasor who seeks to avoid liability will have an incentive to behave according to the required standards. Fault-based liability will thus potentially contribute to safety in ski areas. However, even if the cause of the accident and the fault of the party alleged to be responsible can be established, given the often considerable time, effort, and administrative costs this entails, it might be questioned if this approach is economically efficient, in particular given that the costs of the accident may end up being shared by the parties.²⁹

Due to the aforementioned characteristics of ski accidents and the notorious difficulties in establishing fault, in a considerable number of cases the injured

Klage daher insgesamt abzuweisen'. ('In the absence of a provision establishing strict liability, such as that of § 7 StVG for road traffic accidents, the action must be dismissed in its entirety').

²⁸ See also *Sälzer* (fn 15) 191 f.

²⁹ On economic inefficiencies of fault-based liability due to high(er) administrative costs, when compared with strict liability regimes, see *Shavell* (fn 10) 262 ff.

plaintiff fails to establish with the degree of certainty required by the applicable liability regime that the defendant was at fault – even if the defendant has in reality acted negligently. The decision will then be made on the basis of the burden of proof. The following conclusions are then to be made regarding the purposes of tort law:

- *Compensation*: The victim of a ski accident will not receive compensation of the damage that he has suffered.
- *Fairness*: In cases where the defendant was in fact negligent and the decision is made on the burden of proof, the victim will not perceive the outcome as fair and equitable.
- *Incentives and economic efficiency*: Once an accident has occurred, under a fault-based liability system it is the injured party who has the incentive to gather proof and identify potential witnesses – but the injured victim is often unfortunately not in a position to set about gathering evidence. The uninjured skier, on the other hand, usually has no, or few, incentives to gather evidence and clarify the facts given that if the facts remain unclear, he will not be held liable under a fault-based system. The incentives for a potential tortfeasor to contribute to the safety of ski areas may then be relatively low, given that he may expect that the claimant's attempt at proof of fault will be unlikely to succeed. The time and money invested in gathering information to prove a claim that eventually fails further undermines the economic efficiency of fault-based liability in cases of ski collisions.
- *Insurance coverage*: Under a fault-based liability system, the injurer has an interest in being covered by liability insurance for any damage he should cause. The victim has an interest in having contracted first-party insurance to cover his own loss, should the costs of the accident be split between the parties due to the claimant's contributory negligence, or should the proof of fault fail, which may often be the case.

B Strict liability for collision cases: the French approach

French courts apply two different systems of liability for ski collisions: fault-based liability under art 1382 of the *Code civil*, and strict liability under art 1384 sec 1 of the *Code civil*.³⁰

³⁰ See, with further references, *L Clerc-Renaud*, La responsabilité civile, in: J-F Joye/G Calley/J-F Dreuille (eds), *L'accident en montagne – Étude juridique* (2015) 289 ff.

1 Liability according to art 1382 of the *Code civil*

In cases in which the facts and the defendant skier's fault can clearly be established, the French courts usually apply art 1382 and hold liable the skier who has acted negligently.³¹ If contributory negligence of the injured skier can be established, liability is reduced accordingly.³²

2 Liability under art 1384 sec 1 of the *Code civil*

If, due to the particular characteristics of a ski accident, fault cannot be established, the courts switch from fault-based liability to liability under art 1384(1) of the *Code civil*.³³ This provision, as interpreted by French courts, provides for strict liability for damage caused by a thing which is under control of a person (its 'guardian'). French courts have held in collision cases that 'the skis were a cause of the accident, taking into account the dynamic role they played as a means of locomotion, even if there had not been any direct contact between them and the victim'.³⁴ Based on such findings, the courts regularly hold one skier liable, as the 'guardian' of the skis under his control, for the damage caused to the other without requiring the proof of fault.³⁵ The skiers' liability may be reduced proportionate to contributory negligence only if contributory negligence of the injured claimant has been clearly established.³⁶ The injured skier therefore often receives full compensation from the other skier without having to prove the latter's fault. If both skiers are injured and it cannot be established if one or both were at fault, they are both liable for the full damage caused to each other.³⁷ Under the French

³¹ See eg Cass 22 July 1986, arrêt no 613, pourvoi no 85–11.226; Cass 8 July 2010, no 09–14557; Cour d'appel Chambéry 13 June 2013, no 12/01320.

³² *Clerc-Renaud* (fn 30) 291.

³³ *Clerc-Renaud* (fn 30) 295 ff.

³⁴ Cour d'appel de Colmar (Appellate Court of Colmar) 18 September 1992 (*New Hampshire Unat SA c Hugel*), *La Semaine Juridique* (JCP) 1993, IV, no 1711.

³⁵ See eg the cases Cass 19 November 1980, arrêt no 943, pourvoi no 78–16.206; Cass 25 November 1987, pourvoi no 85–15.634; for further references, see *Clerc-Renaud* (fn 30) 296 fn 162; 298 f and fn 167 f.

³⁶ See eg the case: Cass 22 July 1986, no 85–11.226; Cour d'appel de Grenoble, 26 June 2012, no 10/03646; see also *Clerc-Renaud* (fn 30) 300 f.

³⁷ *Clerc-Renaud* (fn 30) 298 f: '[E]n l'absence de témoignage, ou en présence d'aucun autre témoignage que ceux des protagonistes, ou encore lorsque ces témoignages sont contradictoires sur la position amont ou aval de chacun des protagonistes, conformément à l'article 1384, alinéa premier, du code civil chacun doit réparer le préjudice subi par l'autre lors de l'accident.' ('If there

approach, parties usually report the damage to their insurers and the matter is then directly dealt with by the respective insurers.³⁸

With respect to the purposes of tortious liability, the French approach presents the following characteristics:

- *Compensation*: An injured skier often receives full compensation of the damage suffered in a ski accident.
- *Fairness*: The French approach may be criticised for having the potential to lead to unfair results: a party who is not to blame for an accident might have to pay compensation even though it might have been the other (that is the injured) party who was negligent. However, under a fault-based system a claim may fail because the injured party cannot prove the other party's fault – although the latter may indeed have acted negligently. Both approaches may thus lead to outcomes that may be questioned. Whereas under a fault-based system, a victim that deserves compensation may end up empty-handed, under the French approach most victims of ski accidents receive compensation for the damage suffered when skiing.
- *Incentives and economic efficiency*: It may be argued that this approach provides few incentives for skiing safely, since having skied safely does not exonerate one from liability. What is more, most French citizens are insured against liability, and French liability insurers do not apply a bonus-malus system to liability following a ski collision and thus do not use this device with the aim of providing incentives to avoid damage.³⁹ This assumption of a lack of incentives might be supported by the observation that skiing may be perceived as more dangerous on French than on Swiss slopes, for example. This observation – if correct – might however also be due to cultural differences between Switzerland and France concerning behaviour on ski slopes.
- On the other hand, if in a collision case both skiers are injured and one party is clearly at fault, the party at fault will be held responsible on the basis of art 1382

are no independent witnesses to the accident, or should the witness statements received by the court contradict one another on the point of which skier was higher up on the slope when the accident occurred, each skier is obliged to compensate the harm suffered by the other, pursuant to article 1384 sec 1 of the *Code civil*.) See eg Cour d'appel de Chambéry 30 August 2012, no 11/01520. Only if it cannot even be established that the skier collided is the application of art 1384 sec 1 excluded, see eg Cass 3 April 1978, no 76–14.819: a skier claimed having been injured in a fall caused by another skier who passed her by without colliding; no liability based on art 1384 sec 1; Tribunal de Grande Instance (TGI) Albertville 24 January 2014, no 14/00030.

38 Compare *J-S Borghetti*, The Culture of Tort Law in France (2012) 3 *Journal of European Tort Law (JETL)* 158, 168–170.

39 The reason probably is that liability insurance premiums are too low to allow a malus to be used efficiently.

for the entire damage suffered by both parties. In this respect, under the French regime, skiers may still have an incentive to not behave evidently carelessly.

- In cases where the facts are difficult to establish, costly efforts to establish fault are avoided and the compensation of damage is usually dealt with directly by the parties' insurers. Since the opportunity to escape liability under this system is very slim, compensation will be quasi-automatic and transaction costs will be reduced to very low levels.
- *Insurance coverage*: Under the French approach, skiers have a considerable incentive to be covered by liability insurance.

C Strict liability for dangerous activities: applicable to skiing?

Many jurisdictions provide strict liability for damage resulting from sources of particular danger or from dangerous activities such as keeping a motor vehicle, operating a railway, manufacturing a (defective) product, or transporting goods through pipelines. In a number of jurisdictions (such as the UK, German, or Swiss) strict liability is governed by specific acts covering particular types of sources, activities, or situations.⁴⁰ Other jurisdictions (such as the Italian, Russian, Lithuanian, Estonian, or Slovenian) have introduced general clauses of strict liability in their civil codes or codes of obligations.⁴¹

In the first group of countries, none of the specific laws on strict liability explicitly cover the activity of skiing. In jurisdictions using general clauses of strict liability, skiing may however be among the activities assumed to be dangerous and may thus be covered by the general rule on strict liability. This issue has indeed been addressed by case law and discussed by academic commentary in Italy and Slovenia, for example.

The starting point in Italian law is art 2050 of the *Codice civile* (on *Responsabilità per l'esercizio di attività pericolose* (Liability for dangerous activities)). The provision (translated) states that:⁴²

⁴⁰ For numerous acts establishing strict liabilities in these countries see (with English translations) *Kadner Graziano* (fn 11) ch 6).

⁴¹ Art 2050 of the Italian Civil Code (*Codice civile italiano*); art 1079 of the Civil Code of the Russian Federation (*Гражданский кодекс Российской Федерации*); arts 6.266 and 6.270 of the Civil Code of Lithuania (*Lietuvos Respublikos Civilinis kodeksas*); arts 149, 150 of the Code of Obligations of Slovenia (*Obligacijski zakonik*); §§ 1056 and 1058 of the Code of Obligations of Estonia (*Võlaõigusseadus*).

⁴² Translation *E Bargelli*, in: K Oliphant/B Steininger (eds), *European Tort Law – Basic Texts* (2011) 135–136.

[w]hoever causes damage to another person by carrying out a dangerous activity, being such because of its nature or the nature of means adopted, must pay damages, unless he proves that he has taken all appropriate measures to avoid the damage.

According to Italian case law and academic commentary, activities are considered dangerous if they involve a significant risk of the occurrence of damage due to their very nature or due to the means employed. Hunting or the organisation of certain sports competitions, such as a motorcycle race on a circuit open to the public, are considered dangerous activities. It was further held that operating a horse riding stable was a dangerous activity and that the operator was liable for damages suffered by participants of riding lessons if they were beginners or inexperienced riders.⁴³

On the other hand, an activity that is usually safe does not become dangerous simply because it is carried out dangerously. Instead, this situation is governed by fault-based liability under art 2043 of the *Codice civile*. Regarding non-competitive skiing it was held that this sport and recreational activity does not meet the degree of dangerousness required to justify the application of art 2050.⁴⁴ In Italian academic commentary, to support this conclusion, it was argued that it would not be sensible to attribute a greater burden of proof to the defendant than that attributed to the person who suffered the damage.⁴⁵

Courts in Slovenia have reached the same conclusion and held that skiing is not to be considered a dangerous activity under the Slovenian Code of Obligations either. It thus neither triggers strict liability of the ski operators nor of the skiers themselves vis-à-vis each other. In a decision of 2013, the Slovenian Supreme Court held that:⁴⁶

[...] a ski slope is not, in itself, a dangerous thing [within the meaning of art 149⁴⁷] and skiing is a normal sporting activity that produces, like many other activities, certain dangers and risks; these are however not of such a nature that they cannot be kept under control if the activity is exercised with due care in accordance with the applicable safety regulations, a condition that would have to be fulfilled in order for this activity to be regarded as inherently

⁴³ G Cian/A Trabucchi, Commentario breve al Codice civile [Short Commentary on the Civil Code] (11th edn 2014) art 2050, Sec II.

⁴⁴ Corte di Appello di Bologna 26.2.1976 *Giurisprudenza Italiana* 73, I, 2, 964. For references to academic commentary see *Bona/Castelnuovo/Monateri* (fn 16) no 3.4.1.

⁴⁵ For references, see *Bona/Castelnuovo/Monateri* (fn 16) no 3.4.1; these authors seem, on the other hand, rather favourable to the application of art 2050 to ski collisions.

⁴⁶ Supreme Court of Slovenia, 25 April 2013, case no II Ips 787/2009 (translation based on a French translation by Jerca Kramberger Škerl).

⁴⁷ Former art 154 (2) of the Slovenian Code of Obligations.

dangerous under the Code of Obligations. If, on the contrary, an activity is not inherently dangerous, but only becomes dangerous in a certain case because due care had not been exercised and the safety regulations established by the ski operator had been violated, then the case is to be governed exclusively by fault-based liability. [...]

In an attempt to alleviate the difficulty of the injured skier in proving fault of the person alleged to be liable, some courts in Italy have applied, by way of analogy, the provision of the *Codice civile* regarding liability for damage resulting from traffic accidents (art 2054). Article 2054 (2) of the *Codice civile* establishes a presumption according to which ‘unless there is evidence to the contrary, it is presumed that each [party] has to the same extent contributed to the damage suffered [...]’

This presumption was applied, for example, by the Court of Bolzano in a case where it was impossible to ascertain the exclusive fault of one of the two skiers or the contributing fault of the other. No witnesses were available nor was it possible to ascertain in any other way what exactly had happened.⁴⁸ The court argued that skiing and driving on the road both had in common ‘the risk of traffic’, which is, according to the court, reason for presuming fault with respect to both activities. Based on this line of reasoning, the Court held the defendant skier liable for 50% of the damage considering that there was contributory negligence by the claimant to the extent of 50%. The Italian Court of Cassation did not, however, accept this analogy with road accidents and refused to apply art 2054 of the *Codice civile* to ski accidents.

48 The Court of Bolzano had to decide on a collision between skiers in a case where it was not possible to determine the course of events. The court held that ‘it was impossible to determine how the accident had happened and who was at fault; therefore, if there is no recourse to a presumption of fault, the action must fail; if, on the other hand, a presumption is applied, it cannot be overcome.’ Having excluded the possibility of using art 2050 of the Italian Civil Code (cc) (that is, the provision on strict liability for dangerous activities), the Court of Bolzano argued that there was every reason to examine the case under, and to eventually apply by way of analogy, art 2054 cc: ‘Skiing ... certainly constitutes a means of locomotion structurally designed for movement, even if it is a particular kind of movement’; ‘it is a means of locomotion, which is intended to make it more convenient and fast for people to move, and for people using them, a pair of skis is undoubtedly, so to speak, a vehicle’; ‘that it is not a road vehicle is of little importance, because we do not consider applying the rules on road traffic, but a rule that applies to circulation on land in general’; [...] ‘the fact that skis do not move on their own does not negate their property of being a vehicle; they build an entity with the skier who is carried by them which is also the case for two-wheeled vehicles which cannot keep control by themselves either, and their guidance depends significantly on the movement of the body of the person; it follows that the skis are driven by the sheer force of gravity, applied to the body of the skier, which is common, when going downhill, to all vehicles without engine’. See in detail *Bona/Castelnuovo/Monateri* (fn 16) no 3.4.1; these authors are in favour of this approach.

D Fault-based liability with a presumption that both parties have equally contributed to the accident – the new Italian approach to ski accidents

In response to the case law of the *Corte di Cassazione*, and in order to alleviate the difficulties of victims of ski collisions in proving the other party's fault, the Italian legislator introduced a special rule for ski collisions that matches the rule for traffic accidents in art 2054(2) of the Italian Civil Code. The Italian Law no 363/2003 of 24 December 2003 states:⁴⁹

Art 19. (Contributory negligence): 1. In the case of a collision between skiers, it is presumed, until evidence to the contrary is provided, that both skiers are equally responsible for any injury caused.⁵⁰

The new provision provides an explicit statutory solution to the challenge of proving facts and fault in ski collisions.⁵¹ It leads to results which seem very similar to those that are eventually reached in many German and Swiss cases, namely, that the injured party receives compensation amounting to 50% of his damage. The new provision avoids however the enormous transaction costs that are necessary under German or Swiss law to reach this same outcome.

Parties do not receive full compensation, unless they prove the other party's fault. For any remaining damage, there is thus still an incentive to bring a claim, with all the (negative) effects regarding the costs and efforts that can be observed with reference to German and Swiss case law.⁵²

Under the new Italian approach, the injurer has an interest in being covered by liability insurance for any damage he should cause. The victim has an interest

⁴⁹ Law 24 December 2003, no 363: 'Norme in materia di sicurezza nella pratica degli sport invernali da discesa e da fondo', published in Gazzetta Ufficiale no 3 of 5 January 2004, <http://img.poliziadistato.it/docs/legge_363_2003.pdf>. See on this provision eg *M Del Zotto*, Skilex 2010, Italian National Regulations Governing Safety in Skiing Sports, in: <http://www.skilex.at/ka-prun_vortrag_zotto.pdf>: 'The first national legislation governing skiing as a sport.'; for a critical appreciation see *U Izzo*, La montagna, Vol 1: La responsabilità civile e penale negli sport del turismo (2013) 21 ff; see also *Sälzer* (fn 15) 207 f with further references. In 2011, special legislation was also adopted in Poland: Act of 18 August 2011 on Safety and Rescue in Mountains and Organized Ski Areas, see *D Wolski* in: *Izzo* (fn 1).

⁵⁰ Art 19 (Concorso di colpa) 1. Nel caso di scontro tra sciatori, si presume, fino a prova contraria, che ciascuno di essi abbia concorso ugualmente a produrre gli eventuali danni.

⁵¹ On the other hand, for liability actions brought against the operators of ski areas, the traditional rules on burden of proof remain in force.

⁵² See above Section II A.

in having contracted first-party insurance to cover his own loss, should the costs of the accident be split between the parties.

E Fault-based liability with a presumption of fault – the Eastern and Central European approach

In many jurisdictions that belonged to the former socialist legal family, liability in tort was in principle fault-based, with fault being presumed; in the new codifications of many former members of this legal family this remains the case.⁵³ The burden is thus, in principle, on the defendant to prove that he was not at fault. If the person alleged to be liable cannot prove the absence of fault, this system may lead to full compensation.

This approach is based on the idea that it is often difficult for the victim to prove the defendant's fault, given that fault frequently occurs in the defendant's sphere. It is thus assumed that it is often easier for the defendant to prove the absence of fault than for the victim to prove the defendant's fault.⁵⁴ With respect to ski accidents it could be argued against this approach that if parties are participating in the activity of skiing they are both acting in a public sphere and the person alleged to be liable is not *prima facie* in a better position regarding the proof of fault, or of the absence of fault, than the victim.⁵⁵

However, with respect to providing appropriate incentives, this approach might prove to be of considerable interest: under a classic fault-based system, if fault cannot be established a liability claim will fail. Following a ski accident, a party that has *not* been injured thus has no incentive to facilitate the identification

⁵³ See eg art 1064 secs 1 and 2 of the Civil Code of the Russian Federation; § 420 secs 1 and 3 of the Civil Code of the Czech Republic; § 339 sec 1 of the Civil Code of Hungary; art 131 sec 1 of the Code of Obligation of Slovenia; art 154 sec 1 of the Law on Contracts and Torts of Serbia. See also §§ 330, 333, 334 of the Civil Code of the former German Democratic Republic. The presumption of fault was not adopted in Poland and Romania.

⁵⁴ *M Will*, *Generelle Verschuldensvermutung – das unbekannte Wesen. Osteuropäische Angebote zum gemeineuropäischen Deliktsrecht?* in: *European Tort Law – Liber amicorum for Helmut Koziol* (2000) 307 ff, esp 318f, 341f; see also *A Tunc*, *Introduction*, in: *International Encyclopedia of Comparative Law* (1983) Vol XI Torts, Part 1, I-100, p 56, see also I-17, p 13.

⁵⁵ See also *Sälzer* (fn 15) 208f: 'Bei Skiunfällen treffen die Beweislastprobleme allerdings üblicherweise alle Skifahrer gleichermaßen, insbesondere stammen die Gefahren für gewöhnlich nicht vorwiegend aus der Sphäre des einen oder des anderen Beteiligten'. ('In ski accidents, both parties generally experience the same difficulties in establishing the facts, especially since the dangers at stake do not necessarily arise exclusively from the sphere of action of one party or the other').

of potential witnesses, and the gathering of evidence: if there is no proof, there will be no liability. On the contrary, if wrongful behaviour and fault are presumed, this same party has a clear incentive to ensure that sufficient evidence is gathered to prove the absence of his fault and that potential, ideally neutral, witnesses can be identified. This in turn may help clearing up the facts. The injured victim, on the other hand, will usually not be in a position to engage in fact and evidence gathering after the accident. It could thus be argued that this approach gives exactly the right incentive to the right party.

If there are no witnesses and if no other proof is available, this approach has the potential to lead to the same results as a strict liability regime, with the same benefits and advantages. However, it is worth noting that no cases in which this rule has been applied to ski accidents have been identified.

III Evaluation of the pros and cons of the different approaches with respect to the distribution of the social costs of skiing

A Fault-based liability

Providing evidence and proving fault of the other party is notoriously difficult in cases of ski collisions. When the traditional standards of fault-based liability and rules on the burden of proof are applied, many claims in collision cases fail. In response Italian legal authors suggested easing the standards of proof and allowing judges more leeway when it comes to assessing facts and fault in ski collision cases.⁵⁶ It may well be that in practice many judges already employ flexibility and rely more on fiction than facts when determining fault and distributing the social costs of ski accidents.

⁵⁶ *Bona/Castelnuovo/Monateri* (fn 16) no 3.4.1 ('Against this backdrop of case law, the question of proof should therefore be discussed with respect to art 2043 of the Italian Civil Code at present. [...] The suggested approach to the rules of evidence is essentially based on a reasonableness test, with the evidence centred not on the exact dynamics of the accident, but rather on the judge's assessment of how *both* sides should have conducted themselves in the precise case with regard to a *common risk*. If the plaintiff fails to provide evidence on how the collision exactly happened [...] this does not necessarily imply that any liability of the defendant is excluded if a whole series of objective circumstances [...] indicate that the latter could also reasonably foresee and prevent the accident [...]').

The uninjured party under a fault-based liability regime has no incentive to contribute to clarification of the facts and the transaction costs of this liability system are often enormous when applied to ski collisions.⁵⁷ The results, as illustrated by particular cases, (often ultimately resulting in shared costs of damage or rejection of the claim) do not justify the enormous expenses associated with this approach. Further, victims who do not succeed in proving fault receive no compensation. Victims who do not have first-party insurance run the risk of having to bear their damage costs themselves, even if the accident was caused by someone else.

Given all the aforementioned weaknesses of fault-based liability there is reason to consider alternative regimes for ski collisions.

B The French approach: strict liability of the person in control of a thing

Under the French approach, the compensation of damage is usually administered directly by liability insurers.⁵⁸ Fictions in the determination of facts and fault can be avoided under this approach. The victim often receives full compensation while the transaction costs – and thus also the social costs – are reduced to a minimum.

However, under French law there are many problems surrounding the theoretical justification of the liability of the ‘guardian’ of a thing:⁵⁹ in French academic commentary it has been said that the strict liability of the individual in control of a thing cannot be seen as a liability based on risk, given that liability under this head applies to all types of things without making any differentiation between them. It cannot be based on a presumption that the person in charge of the thing must have been at fault, since the presumption under art 1384(1) is not rebuttable, and thus not a presumption at all. It cannot be based on negligent supervision either, since it applies even where the defendant skier was not negligent. The French Court of Cassation has held in some cases that the liability of the guardian of a thing was based on a presumption of liability. However, presumptions involve facts, which other facts render likely to be true whereas an obligation

⁵⁷ Exceptions are collisions in which one party was standing when the collision occurred and was member of a group of skiers, see above at Section II A and fn 19.

⁵⁸ Compare *Borghetti* (2012) 3 JETL 158, 168–170.

⁵⁹ See eg *B Starck/H Roland/L Boyer*, *Obligations*, 1. Responsabilité délictuelle [Law of Obligations, 1. Torts] (5th edn 1996) no 626–641 (English translation in *Kadner Graziano* (fn 11) ch 3) with further references also for the following arguments and opinions.

cannot be presumed. Strict liability of an individual for the damage done by a thing under his control (its ‘guardian’) as a general principle could therefore potentially be perceived as largely unviable in many other jurisdictions. All of these problems indicate that, arguably, an alternative legal basis is needed (such as the idea of liability for risk) in order for strict liability in such matters to be acceptable in other jurisdictions.

A further potential criticism is that if (mutual) compensation is almost guaranteed, independent of fault, a potential tortfeasor might then have relatively few incentives to ski safely. Given that in many ski collision cases fault cannot be proven, it might however also be questionable to what extent fault-based liability really creates incentives to ski safely.

C Strict liability for dangerous activities

Alternatively, a system of strict liability for dangerous activities could be applied to cases of collisions between skiers (reduced in the case of contributory negligence by an amount corresponding to the degree of the claimant’s contributory negligence). Applying strict liability could be based on the rationale that ski collisions happen frequently,⁶⁰ that the injuries suffered in collisions are often severe, and that there are typically considerable difficulties for the victim to provide proof of fault. It is thus only strict liability that guarantees that deserving victims receive compensation for the damage they suffered.

It is worth noting, however, that arguably no jurisdiction has considered skiing so far as an activity that is dangerous enough to justify the application of strict liability for dangerous activities. In Italy and Slovenia, both jurisdictions which apply general clauses of strict liability, this would have been possible. On the other hand it should be noted that some Italian courts have drawn an analogy between ski collisions and road traffic accidents, for which liability is strict. German courts have, in the face of uncertainty regarding facts and fault, explicitly stated that liability for ski collisions would in many cases indeed require a system of strict liability.⁶¹

⁶⁰ See the numbers above in Section I in fine.

⁶¹ OLG Schleswig 28 August 2012, Az 11 U 10/12, BeckRS 2012, 25106; LG Mühlhausen 23 January 2013, Az 1 O 594/08. For a critical view on strict liability for ski collisions, see *Sälzer* (fn 15) 209 f: ‘Insgesamt erscheint die Risikolage nicht erheblich genug, um eine Gefährdungshaftung zu legitimieren. [...] Bei den verbleibenden Fällen verwirklicht sich ein nicht vermeidbares Restrisiko.’; *S Hammerstingl*, Die Erforderlichkeit spezifischer staatlicher Regelungen im alpinen Skisport (2011) 362.

D The new Italian approach

According to the new Italian approach, liability covers, in principle, half of the damage suffered by the victim. This mirrors the result that some German and Swiss courts have reached in the face of uncertainty, though with much higher transaction costs. This result might be seen as particularly fair when considering that both parties engaged in the (dangerous) activity of skiing, and that ultimately either party could have been unlucky enough to get injured.

However, if the party suffering the injury has first-party insurance and the other party liability insurance, then in the vast majority of cases two insurers will be involved and not one, and the transaction costs will be doubled when compared with a standard case under a system of strict liability. If the injured party is not covered by first-party insurance, he will often have to bear part of the damage himself. This may in turn create incentives to costly, and often possibly fruitless, litigation regarding this part of the damage.

E Fault-based liability with a reversal of the burden of proof

Under this approach, the victim is relieved from the burden of proof. The skier who was *not* injured in the collision thus has an incentive to gather evidence immediately after the accident, and in particular to identify neutral witnesses, so that he is prepared should the victim later claim damages. The party alleged to be responsible thus carries the burden of proving the absence of fault. Given the fact that it is often difficult to prove the exact facts of the accident, this approach might often lead to results similar to those under strict liability, however, supplemented by an incentive to the party that is potentially responsible to contribute to clarifying the facts surrounding the accident. This solution thus creates an incentive to ski safely in order to be able to later excuse oneself from liability provided there is supportive evidence available.

IV Conclusions and proposal

On evaluation of the different liability systems with respect to ski accidents in the light of the purposes of tort law a number of conclusions may be drawn.

First, the traditional system of fault-based liability (applied for example in German and Swiss law) is the least appropriate of all options when it comes to distributing the social costs of ski accidents. Under a system of fault-based liability, due to typical difficulties regarding the proof of fault, in many cases even

deserving victims will receive only partial compensation or no compensation at all. A considerable number of defendants who have negligently caused injury will not be held liable due to difficulties of proving their fault. Victims will perceive this outcome as unfair. The transaction costs of using a fault-based system are considerable and often not justified by the outcome in any given case, which is frequently splitting of the costs of the accident between the parties, or no liability at all based on the burden of proof. Under this system considerable resources are applied inefficiently.

Second, the new Italian approach according to which each party is, in principle, responsible for half of the damage suffered by the other, is preferable over the German and Swiss approach, where the same result is often achieved at considerably higher costs. However, regarding the other half of the damage, the approach has all the disadvantages of the classic fault-based liability system.

Third, the French system, which often leads to strict liability, focuses on compensation and achieves this aim at the lowest possible transaction costs. Few resources are inefficiently spent for costly fact gathering, high transaction costs are avoided and the resources are efficiently spent on compensation instead. Under the French system, there is less focus on incentives to behave safely and on damage prevention, although contributory negligence is taken into account. Given that victims systematically receive compensation, the overall system will be perceived as fair, although some ‘undeserving’ victims (who have caused the accident themselves) might be able to successfully claim damages (since their fault will not be proved). The major disadvantage of the French system is that it links liability to the ‘guardianship’ of a thing (as opposed to the act of a man, where liability is fault-based) which causes unresolved (and arguably unsolvable) theoretical problems.

Fourth, applying a system of strict liability for dangerous activities to ski accidents has the same advantages as the French solution but is much easier to justify theoretically than the French system of strict liability of the ‘guardian’ of a thing. Admittedly, no jurisdiction to date rendered skiing a dangerous activity in tort law. However, given that skiing indeed causes notable personal injury in a considerable number of collision cases, and given that providing proof of fault is typically very difficult for the injured skier in such cases, skiing could – just as driving a motor vehicle – very well be classified as a particularly dangerous activity and thus be subject to strict liability, at least in jurisdictions using general clauses of strict liability. Where no such general clauses exist yet, this could be a further argument in favour of introducing them. It may be noted that the number of injuries in ski collisions is considerable in particular when compared, for example, to the number of pedestrians injured in road traffic accidents where similar evidentiary problems exist and where liability is strict.

Fifth, fault-based liability with a presumption of fault shares most of the advantages of the previous solution but places greater emphasis on providing incentives to behave safely, and possibly on a fair distribution of the loss. If the person alleged to be liable manages to prove that he was not at fault, he will avoid liability. In that case the victim will not receive compensation but will carry the damage himself. This outcome could be perceived as fair by both parties. Shifting the burden of proof to the person allegedly liable may be justified by the fact that the uninjured party might be in a better position than the victim to gather proof and identify witnesses immediately after the accident. The problem with this solution is that, again, the parties may have an incentive to proceed to costly, and probably inefficient, lawsuits surrounding the question of fault. However, in a system in which, in a situation of uncertainty, the victim receives compensation and absence of fault is only an excuse from liability, the incentive to launch a lawsuit might be perceived as less pressing than in a system where liability and compensation depend on the proof of fault.

Sixth, if liability for ski collisions is extended beyond classic fault-based liability, a further issue worth addressing is insurance coverage: both parties should have liability insurance, as is the case with road traffic accident insurance. One possibility may be the introduction of compulsory liability insurance, to be purchased together with tickets for entry into a ski area.⁶² However, as a high number of skiers may already have general liability insurance coverage,⁶³ this may be impractical. Another, less drastic solution would be an (urgent) recommendation by the operator of the ski slopes for skiers to obtain liability insurance, accompanied with an offer of the like in the vicinity of the slopes. It might further – in the interests of the injured party – be recommended to obtain first-party insurance. Mandatory first-party insurance might be regarded as overly paternalistic, although this would close gaps in the coverage of potential damage.

In conclusion, with respect to the purposes of tort law and the optimal distribution of the social costs of ski accidents, all four alternative solutions presented achieve better results than the traditional fault-based liability. Of these

⁶² In none of the countries taken into account in this paper is liability insurance mandatory in general, or for users of ski slopes in particular. In Switzerland it was estimated that a mandatory no-fault liability insurance for skiers, sold together with the daily ski pass, would possibly cost around one or two Swiss Francs (less than one or two Euros) per skier; see the article by *Mair-Noack/Stöhr*, *Saldo*, 21 January 2009 I no 1, p 8 f.

⁶³ Liability insurance is widespread in Germany, France and Switzerland, where at least 85% of the population have liability insurance, in France even more. In Italy on the other hand liability insurance is far less widespread.

alternatives, for the reasons mentioned above, ‘strict liability for dangerous activities’ is arguably the most preferable option, followed by fault-based liability with a presumption of fault.

It has been noted that any solution that provides strict liability, or comes close to it, risks awarding damages to skiers who have recklessly caused a collision and subsequently claim damages from a wholly innocent defendant in light of the lack of evidence of the claimant’s recklessness.⁶⁴ This may indeed be true in some cases. However, if the choice is to be made between not awarding damages to a few skiers who recklessly cause injury and still dare to claim damages, along with refusing compensation to many deserving victims, and awarding damages to some claimants who do not deserve it, along with many deserving victims who, due to typical evidentiary problems, do not manage to prove fault, the latter option is arguably preferable.

64 *Del Zotto* (fn 48) in fine; *W Flick*, 1st European Law Forum on Winter Sports. Law 363/2003: Reflections and Future Prospects, available at: <www.forumneve.eu/3_Report/GB/Waldemaro%20FLICK%20lawyer.pdf>; see also *Sälzer* (fn 15) 208.