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Evidential Issues in Alpine Sports Injury Claims

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Introduction

Amongst those members of the industry I have spoken to there seems to be an impressive focus in assessing the value of alpine sports claims and an admirable focus on rehabilitation. It is worth the industry reviewing the evidence that Claimants have to produce if they are to prove someone is at fault in an English Court.

This article considers the evidence that a Court will expect to see focusing on three main areas that a winter sports claim will usually fall into. 1. Collisions. 2. Inadequate supervision. 3. Faulty or inappropriately installed equipment but it is first necessary to understand the differences between Jurisdiction, Choice of Law and evidencing standard of care. All will inform the necessary evidence to be obtained.

Jurisdiction

Jurisdiction means the legal area where a Court has a right to hear a case. The normal rule is that a case will be heard where an accident happened. There are special exceptions for EU countries that allow for people to be sued in another country if strict requirements are met. For example if the Defendant is domiciled in another jurisdiction or consents to be tried in another country. It is much harder to establish jurisdiction of English Courts where the accident happens outside the EU.

Duty of care

Just because the case takes place in one jurisdiction does not mean that the national laws of that jurisdiction apply. A case could be heard in Bristol County Court but the law that it applies could be Austrian or French as appropriate.

In order to sue someone there must be a breach of a rule or provision which creates duties between two people. In skiing claims in England and Wales that is likely to be the law of negligence and maybe the Occupiers Liability Act 1957 or

nuisance. In France for example there are specific provisions of like Article 1382 of the Civil code which touches on excessive speed and Article 1384 which makes the skier responsible for damage caused by objects under his control e.g. skis and poles which has often been interpreted as meaning there is no requirement to prove fault.

The main rule is that a Court will apply the law of where the injury occurred but where the accident occurs in the EU and where both skiers are English it can apply English law (EC Regulations 864/2007)

Local law is a matter of fact which is usually proved by obtaining local lawyer's reports on the law.

Standard of Care

Regardless of what Court has jurisdiction or what duty of care is to be applied the Court will always apply the standard of care of the place where an accident happens.

The simplest way to explain this is by thinking of drivers in identical situations. In the UK and Germany I have a duty to drive at a reasonable speed for the road conditions in order to avoid a collision (that is the duty of care) in order to measure whether I meet that duty (the standard of care) we might look at speed limits. If I drive down the M4 at 80mph I am speeding and acting in a way that breaches my duty to you but if driving at 80mph on the Autobahn 90 in Germany I am driving at the advised (non mandatory speed). The same is true of alpine sports from country to country and sometimes resort to resort. Claimants will ultimately have to show that the Defendant acted in a way that contravened the normal practice on that slope. This often requires costly expert evidence e.g. from local ski instructors

Collisions

Collisions are evidentially the easiest form of alpine accident to deal with. English Court use the Federation Internationale de Ski (FIS) Rules of Conduct in a similar way to how they use the Highway Code. Breach of a rule is not negligence but evidence of negligence.

Some of the most frequently cited rules in relation to collisions are:

1. Respect for others

A skier or snowboarder must behave in such a way that he does not endanger or prejudice others.

2. Control of speed and skiing or snowboarding

A skier or snowboarder must move in control. He must adapt his speed and manner of skiing or snowboarding to his personal ability and to the prevailing conditions of terrain, snow and weather as well as to the density of traffic.

4. Overtaking

A skier or snowboarder may overtake another skier or snowboarder above or below and to the right or to the left provided that he leaves enough space for the overtaken skier or snowboarder to make any voluntary or involuntary movement.

Perhaps the most useful rule for lawyers and insurers looking for evidence and most frequently ignored by skiers is:

10. Identification

Every skier or snowboarder and witness, whether a responsible party or not, must exchange names and addresses following an accident.

Where an independent witness has given your insured their name every effort should be made to contact them and take as full a note of their evidence as possible.

Inadequate Supervision

Cases where someone is injured and alleges that it is due to inadequate supervision present their own evidential difficulties. As Claimant or Defendant it is important at a very early stage to get a report from an independent ski instructor at the resort in question. This will let you know whether it is more cost effective to settle or at least make an offer.

The recent case of Gouldbourn v. Balkan Holidays Ltd & Another [2010] EWCA Civ 372 demonstrates the pitfalls in this area. The Court of Appeal recognised the rules imposed a duty on instructors to never allow pupils to take a risk beyond their capabilities but the rules did not mandate how that duty was to be met. In the absence of any evidence from a local source that it had not been, the claim failed. A report from a local instructor saying he would not have asked the Claimant to have followed him on the slope in question might have easily remedied this.

Supervision cases will more often than not involve contributory negligence where the injury is partly the fault of the supervisor and also of the skier. Insurers should grapple with this early, as a sensible Part 36 offer to settle on liability will often save costs in the long run. A good example of contributory fault Anderson v Lyotier [2008] EWHC 2790 (QB) where the Court found that an instructor should not have led a relatively inexperienced skier off piste where there was a foreseeable risk of them hitting a tree but his student to speak out if he felt he was being asked to do something beyond his ability. The Claimant was found 1/3rd responsible for not speaking out.

Defective Equipment/failure to properly install

The most common form of injury under this heading is binding not properly releasing. The biggest evidential difficulty is preserving the evidence.

If there is a defect with a product your insured owns or a defect with its installation resulting in injury, the insured should be warned to preserve the product in the condition it was in at the time of the accident. Where it is hired by the insured often the equipment will be taken back and recalibrated. Where the insured believes a defect caused an accident they are best advised to warn the hirer that the equipment is valuable evidence and should be preserved as a claim is likely. Even where this happens "errors" are often made and the equipment goes back into circulation. With or without the equipment itself expert evidence will still be necessary to describe the cause of the failure see Rochead v. Air Tour Holidays Ltd (2000) Unreported where in the absence of the equipment the Court accepted the experts analysis of the fall as described by the Claimant.

In these sale/hire of goods cases resulting in injury establishing what law is applicable and the standard of care to be evidenced is essential. There are specific exceptions to the general rule on choice of law

- Main rule: Law of country Claimant had his habitual residence if the product was marketed in that country; failing that
- The law of the country in which the product was bought if it was marketed there; failing that;
- The law of the country where injury occurred, if the product was marketed there.
- BUT if Defendant can prove that they could not foresee the marketing of the product in any of the countries above the law applicable will be that of the Defendant's habitual residence.
- Finally the law of where there is manifestly clear connections with that legal system

Conclusion

Hopefully this article is of some assistance in considering some of the evidential difficulties relating to alpine sports injury claims. It is a varied and complex area where the insurance industry is well advised to instruct lawyers early in order to assist in the process of properly analysing risks.

About the Author

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Darren Lewis is a Barrister based at St John's Chambers Bristol but with a national practice. He specialises in injuries in travel, alpine sports, foreign, aviation or maritime accidents. He is Direct Access Qualified and can act for insurers directly.



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