



DANGEROUS SPORTS AND INHERENT RISKS

THE SPANISH PERSPECTIVE

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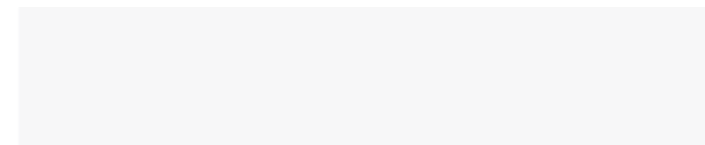
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The principles under Spanish Law

Liability based on fault: Spanish Civil Code

- ✓ Unlawful act or omission on the side of the Defendant
- ✓ A real and effective damage to the Claimant
- ✓ Fault or negligence attributable to the Defendant
- ✓ Causal link between the above



Potential actions

The action may be pursued against:

- ✓ Another participant in the sporting activity who may be responsible for the accident through fault or negligence, which resulted in injuries to the Claimant, and/or against their insurer
- ✓ The owner of the facilities or the organizer of the sporting event where the accident is due to the negligence of both/one of them, and/or their third party liability insurer
- ✓ The spectator or third party responsible for the accident through fault or negligence, which resulted in injuries to the Claimant, and/or against their insurer

Unlawful act or omission in the context of Dangerous Sports

Diligence of a Good Parent v Diligence of a Good Sportsperson

Article 1104 Civil Code

“Fault or negligence of the debtor consists in the omission of the diligence that the nature of the obligation requires and corresponds to the circumstances of people, time and place.

When the obligation does not express the diligence that must be provided in its fulfilment, the one required would be that of a good parent.”

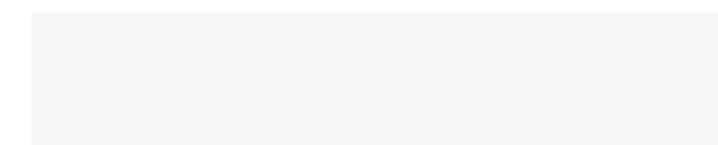
Good parent = reasonable person

Good sportsperson = average player, that judicious person who practices a certain sport

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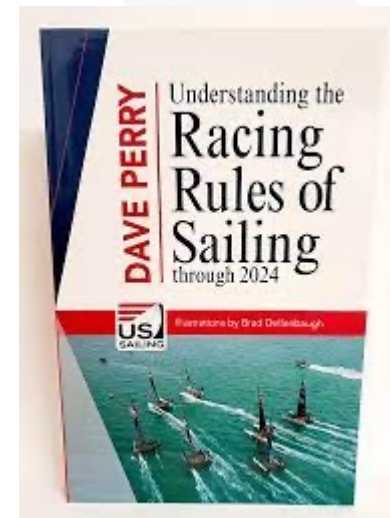
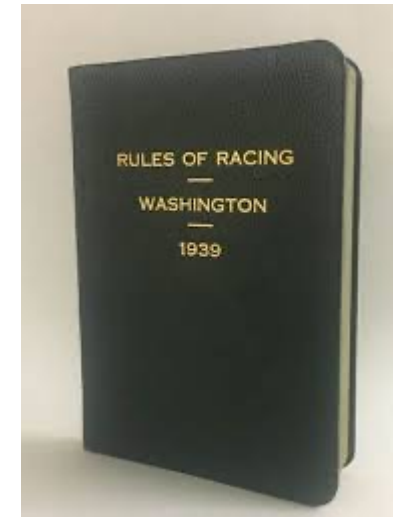
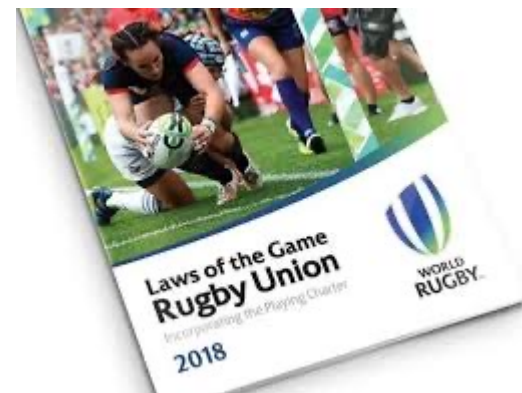
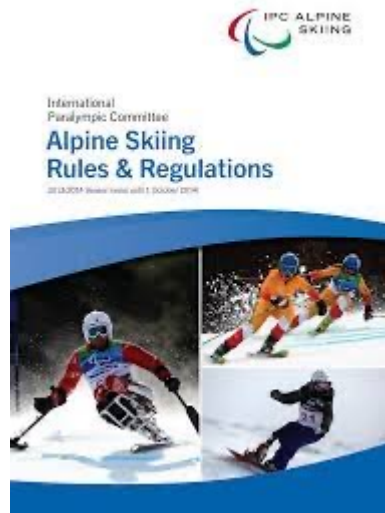
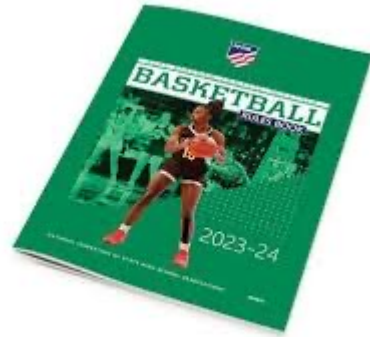
Unlawful act or omission in the context of Dangerous Sports

Private rules and social norms: Sporting behaviour

- ✓ Patterns of conduct - norms or rules - that the legislator does not create directly but must be fulfilled as a result of being agreed by a community
- ✓ Sporting behaviour is the term used to reflect sportsmanship, as it pertains to ethical behaviour, fair play, and respect for the sport, the participants, and the spectators

“Group norms are behavioral standards that become expected of group members through the reinforcement of acceptable and unacceptable behaviors” (Carron & Eys, 2012)

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Fault or negligence in the context of Dangerous Sports

Reversal of the burden of proof for the organizer of the sporting event

- ✓ The party who carries out, in their own benefit, an activity that generates danger for third parties which materializes in causing the damage, must prove that they have taken extreme diligence and precautions to avoid them
- ✓ The compensable damage must be certain and proven to have been caused by the organizer for the reversal of the burden of proof to apply
- ✓ The liability of the organiser may derive from:
 - Defects in the organization
 - Defects in the installations
 - Fault *in vigilando* or *in iligendo*

Fault or negligence in the context of Dangerous Sports

Assumption of inherent risks v. Contributory negligence

- ✓ Where there is an assumption of risk on the side of the victim it is not necessary for the victim to act in a negligent manner. It will be enough for the victim to voluntarily participate in an activity with an inherent risk which is materialised in the damage suffered. This would exonerate the responsible party for the accident only where the Defendant has acted with all diligence due in attendance to the circumstances of the accident and the relevant rules, norms and customs
- ✓ On the other hand, where the victim's fault concurs, this may be regarded to be the cause of all or part of the accident and subsequent damage: if the Claimant's negligence concurs with the negligence of the Defendant, it will be up to the court to assess the relevance of both parties' actions in the context of the risky activity in order to decide whether to moderate the liability of the Defendant to some degree and, as a consequence, reduce the level of damages to be awarded to the Claimant

Fault or negligence in the context of Dangerous Sports

Unilateral risks v. bilateral risks

✓ Unilateral risks:

sports that do not involve regular contact between participants, such as skiing, swimming, athletics, long jump... the assumption of risks does not cover the negligence of others. The chances of injury from another participant are much lower than in bilateral or contact risk sports

✓ Bilateral risks:

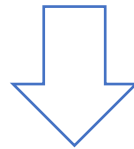
contact is an essential element, the risks and their probability of occurrence are high for each of the participants and the participant assumes the injury that is caused in an action that is permitted or habitual in sport. However, the behavior of the participant causing the damage should not be regarded as being negligent or intentional

Fault or negligence in the context of Dangerous Sports

Assumption of inherent risks

- ✓ The Defendant complied with the relevant *lex artis* and the theory of the assumption of risk applies when:

the Defendant complies with the regulations of the sport, the rules of prudence and the uses of the sport; and/or despite there being a breach of the sport's standard of diligence, this is minor



The risk and its consequent damage are regarded to be typical in the sporting activity

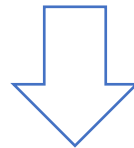
Fault or negligence in the context of Dangerous Sports

Assumption of inherent risks

✓ The assumption of risk will not exonerate a third party from being held liable when:

the activity only implies the assumption of the participant's unilateral risk; and/or

the other participant's actions are regarded to be negligent and in breach of the relevant standard of conduct



The risk and its consequent damage are regarded to be outside the scope of what has been accepted by the participant in the sporting activity

Relevant case law



Relevant case law

Reversal of the burden of proof

- ✓ **Court of Appeal of Barcelona, of 21 July 2021:** the Claimant had an accident in a ski resort when, after falling while snowboarding, he slid until he hit an artificial snow cannon installed on the side of the slope. The court concluded that once the damage and the causal link have been demonstrated, it will be up to the Defendant, with a reversal of the burden of proof to justify that they acted with the precise diligence, that is, that "required by the nature of the obligation and corresponds to the circumstances of the people, time and place" (art. 1104 of the CC). Since the reality of the accident was undisputed and the resort did not provide evidence that could lead to establish that they had acted with sufficient diligence, the liability of the Defendant was established in full and damages were awarded to the Claimant.
- ✓ **Court of Appeal of Balears, of 9 June 2020:** the Claimant brought an action for non-contractual liability against the ski resort as a result of an accident which occurred when the Claimant slid down the icy slope, violently hitting a metal bollard of the ski resort which was not properly covered by the protective mat, with several screws and nuts protruding, sustaining serious injuries. The court referred to the reversal of the burden of proof and the fact that the Defendant had increased the risk inherent to sporting activity as it was foreseeable that falls, collisions and damage, would occur and had not adopted the necessary safety measures aimed at avoiding or reducing the risk of injuries. Damages were awarded to the Claimant.

Relevant case law

Reversal of the burden of proof

- ✓ **Court of Appeal of Asturias, of 5 June 2019:** the Claimant pursued an action as a result of an accident which occurred whilst he was taking part in a karting activity. The court referred that even though the activity involved "per se" a risk and the assumption of said risk by the injured party, the general liability established with respect to the service providers in the General Law of Consumers and Users involved the reversal of the burden of proof and having assessed the evidence filed in the proceedings, it was concluded that the Defendant did not adopt the necessary measures to control the race and warn the drivers of the obstacles that existed, stopping the activity, avoiding or minimizing the consequences of the accident, hence the liability of the Defendant was established and damages were awarded to the Claimant although an element of contributory negligence was considered.
- ✓ **Court of Appeal of Madrid, of 2 June 2015:** the Claimant pursued an action as a result of injuries sustained during a football match, inflicted by hooligans. The court confirmed that although liability was originally based on the subjective element of fault, this had evolved towards a system that accepts quasi-objective solutions demanded by the increase in dangerous activities which resulted in the reversal of the burden of proof towards the party who receives the benefit of the activity in which the damage occurs. In the circumstances, the court acknowledged that on the day of the events the Defendant had not take extreme precautions, given the importance of the sporting event that was being held (Real Madrid - Atlético de Madrid match) which made it foreseeable that events such as those that resulted in injuries to the Claimant would occur. Damages were awarded to the Claimant.

Relevant case law

Unilateral risks

- ✓ **Court of Appeal of Asturias, of 23 May 2022:** the court concluded that Defendant failed to comply with the Regulations of the International Ski Federation when on 9 March 2019 he ran over the Claimant, who was descending the same slope, causing her injuries. The court acknowledge that the norm refers that "the skier or snowborder must ski in a controlled manner. He must adapt his speed and way of skiing or sliding to his personal ability and the general conditions of the terrain, snow and weather, as well as the density of traffic in the tracks." Furthermore, the third rule of the aforementioned Regulation indicates that "the skier or snowborder advancing from behind must choose his route in such a way that it does not endanger the skier or snowborder located in front." And the fourth adds that "overtaking can be done from above or below, right or left, but always in such a way as to leave enough space to prevent ordinary or extraordinary movements of the skier or snowborder ahead." Damages were awarded to the Claimant based on the full liability of the Defendant.
- ✓ **Court of Appeal of Barcelona, of 30 March 2007:** a skier speeding down a red run and entering the blue run struck and ran over a minor who was skiing with his father. The court ruled the liability of the skier and his insurer on the basis that the minor was practicing with normality on the blue slope and it was the Defendant who, coming from the red runway at excessive speed, could not perform a manoeuvre to avoid the minor, running over him. The Defendant was deemed to be negligent, since, regardless of the difficulty of the turn or finding an ice sheet —frequent while skiing – he did not have the agility, dexterity, or prudence necessary to avoid the Claimant. Damages were awarded to the Claimant based on the full liability of the Defendant.

Relevant case law

Unilateral risks

- ✓ **Court of Appeal of Asturias, of 22 November 2006:** the Claimant was skiing in the Atlas mountain (Morocco), when he was run over from behind by the Defendant, who was going down with a snowboard and slipped with a plate of ice. The court ruled that the accident was the consequence of the negligence of the Defendant, who, by descending at excessive speed, very close to the Claimant or without paying due attention to the conditions of the slope, collided with the Claimant. Damages were awarded to the Claimant based on the full liability of the Defendant.
- ✓ **Court of Appeal of Girona, of 13 January 2006:** the Claimant sustained injuries when she was practicing windsurfing on the river and was hit on the head by the mast of the Defendant's windsurf board. The court ruled that windsurfers assume the risks derived from their practice, but not those caused by the negligence of other participants. Damages were awarded to the Claimant based on the full liability of the Defendant.
- ✓ **Court of Appeal of Almería, of 2 May 2000:** the pilot of a kart was found to be liable for driving in the direction contrary to a go-kart track and cause an accident. Damages were awarded to the Claimant.

Relevant case law

Unilateral risks

- ✓ **Court of Appeal of Alicante, of 3 October 2005:** while a pilot was driving his kart, another pilot who was on the runway made a negligent manoeuvre and touched the wheel of the Claimant's kart which went off the track. The Claimant only pursued his claim against the track owners which was dismissed as the court confirmed that the accident was a consequence of the negligent manoeuvre of another driver, but not the negligence of karting, which met the necessary security measures in such facilities. The judgments of the Court of Appeal of Madrid of 17 January 2007 and Albacete of 28 September 2005 were decided in the same way.
- ✓ **Court of Appeal of Vizcaya, of 6 July 2000:** the accident occurred in a kart track as a result of one kart hitting the other from behind. The court ruled that the relevant Defendant in the case was the driver of the kart which hit the other from behind and not the owners/operators of the track. The court concluded that the cause of the accident was that the driver of the car behind that of the Claimant had caused the latter to go off track. Hence, the owners/operators of the track could not be considered as the correct Defendant in the case. The claim was dismissed on this basis.
- ✓ **Court of Appeal of Cordoba, of 28 June 2000:** the accident occurred as a result of the collision between a jet ski and a water device. Liability was apportioned between the drivers of both devices on a 50/50 basis as the court concluded that they had both contributed with their actions to the accident occurring as they both presented a similar level of risk.

Relevant case law

Bilateral risks

- ✓ **Court of Appeal of Navarra, of 11 January 2001:** during a shovel ball game, one of the players got cornered in the court and as the ball went there, his opponent tried to hit it, hitting him in the face, damaging two teeth. The Claimant sued the other player and his insurance company. The Court confirmed that in sports practice the participants assume the risk derived from the performance of the specific sport. However, there are certain behaviors outside the usual practice which constitute a negligent act for which the Defendant must respond. In this case the Defendant should have refrained from trying to hit the ball, as he was aware that his opponent was right there and that there was a probability of injuring him. Damages were awarded to the Claimant based on the full liability of the Defendant.

Relevant case law

Bilateral risks

- ✓ **Criminal Court of Palma, of 12 January 2001:** the court considered proven that during a football game the Defendant, with the intention of causing damage, without saying a word or with the ball being in dispute, hit a player of the opposing team fracturing his jaw. The court referred that in what concerned the assumption of risk in sports injuries, one must distinguish between injuries (including death) suffered during sports practice and injuries caused by the sport itself. The first group includes almost all sports, since the objective is not contact itself, and the second includes those sports that consist precisely of the direct fight between two or more competitors and/or where contact with the opponent is pursued: thus, mainly boxing, certain martial arts, or different forms of fighting. There is also unanimity in that the consent given by someone who takes part any type of sport is not a consent to be injured. For example, a footballer does not voluntarily allow his leg to be broken in a match, nor does a rugby player willingly suffer cranial injuries as a result of a tackle. What the participant consents to is the risk that the injury may occur, that is, that as a consequence of a game where there is physical contact with another competitor, he or she may suffer an injury. To assume this risk of being injured, the sportsperson demands or at least expects that whoever undermines his integrity respects the "lex artis", since not everything is legitimate nor everything goes to achieve the desired result. Damages were awarded to the Claimant.

Lambert v MIB

The issues

- ✓ What was the standard of diligence of a good sportsperson in the circumstances?
- ✓ No competition: assumption of unilateral or bilateral risks?
- ✓ Contributory negligence?

“Once I have ascertained the Spanish law (as a question of fact) in accordance with the above guidance, it remains the function of the English court (and not the expert witnesses on foreign law) to apply such law to the facts of the case before it.” Lambert v Motor Insurers’ Bureau (Rev1) [2022] EWHC 583 (QB)

Lambert v MIB

The standard of diligence of a good sportsperson

- ✓ Both Spanish Law experts agreed that the Spanish legal system did not have any specific rule or provision governing civil liability in motorcycling accidents
- ✓ The role of the motorcycling experts: this was crucial in setting the standard of a good sportsperson in the circumstances concurring to the accident
- ✓ The standard was conformed by the relevant rules, norms and customs applicable to the motorcycling activity

Lambert v MIB

Assumption of unilateral or bilateral risks

- ✓ Both Spanish Law experts agreed that the Claimant participated in an activity involving a high risk
- ✓ The experts disagreed as to whether the activity involved the assumption of unilateral or bilateral risks by the Claimant: in my opinion, there being no competitive element and no expected contact between the participants, the activity involved assuming a unilateral risk derived from the riders own driving and not that concerning other participants, i.e. the foreseeable or ordinary risks of the sport activity did not include that an impact may occur with other riders
- ✓ It was also my opinion that Spanish courts agree on establishing the liability of the Defendant when this results in an abnormal intensification of risk in the usual or regulatory conditions in which the practice takes place because of the participant's neglect of the rules of prudence that they must observe, precisely because they are aware that such transgressive behavior is capable of producing an increased risk

Lambert v MIB

Contributory negligence

- ✓ In attendance to the motorcycling experts' review of the factual evidence available, the participation of both Mr Lambert, Claimant, and Mr Prentice, Defendant, was assessed by the Court in order to conclude whose actions and to what extent had caused the accident
- ✓ Under Spanish Law, it followed that if the Court concluded that both the Claimant and the Defendant's action had contributed to causing the accident, the distribution of liability would also determine the extent of any damages to be recoverable by Mr Lambert (further expert evidence was provided to the Court by both Spanish Law experts in order to assess the damages)

THANK YOU!

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