

European Legal Doctrine Concerning Criminal Liability of Sports Participants for Sports-Related Injuries and Its Reflection in the Czech Republic

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Abstract

This paper aims to provide a brief summarization of the most important trends that have crystallised during the twentieth century in the European legal theory and judicial practice concerning criminal liability of sports participants for injuries occurring during the practice of a sport. Based on the description of this general background, the paper further explains how this development in Europe has influenced the decision-making practice of the courts of the Czech Republic.

Keywords: Czech Republic, comparison, criminal liability, sports-related injuries

1. Introduction

This paper deals with the European legal doctrine concerning criminal liability of sports participants for sports-related injuries and its reflection in the Czech Republic. The information presented in this paper may be used for the purposes of comparison or as an inspiration on how to approach this issue in those countries that have no experience with criminal liability of sports participants for sports-related injuries.

2. Theoretical Basis of the Issue

The criminal law approaches the issue of legal liability of sports participants for sports-related injuries in very diverse ways. Over the years, two principal positions have emerged: 1) One numerous group of authors believes that injuries sustained in sport are equally unlawful (i.e. criminal) as any other acts affecting life, health or physical integrity of a man and those who committed such acts are subject to unlimited criminal liability under the applicable criminal code. In certain periods of time, sports participants in some countries were “systematically” prosecuted by law enforcement authorities for the negative consequences that occurred during the course of a sporting encounter and there have also been attempts to address the issue of liability for sports-related injuries by legislation, whether by way of legislative initiatives or drafts or parliament’s proposals and parliament debates. It is argued that sports participants should be fully criminally liable for sports injuries since there is no defence excluding their liability. The proponents of unlimited criminal prosecution of sports participants often emphasise that criminal codes do not contain any provisions excluding criminal liability of sports participants (Vassali, 1958). As regards the existing legal defences, it is often pointed out that they may not be automatically applied to the sphere of sports as they do not solve the issue of impunity of sports participants in its entirety (Geraci, 1962; Konstant, 1956; Brunner, 1949). However, it must be noted that this view is quite isolated and has not gained any significant acceptance. The legal theory, for the most part, disagrees with this view and it is also not a prevailing position of the law enforcement authorities. In the Polish literature on criminal law, this position was criticised, for example, by A. Gubiński who argued that, in certain cases, it would lead to consequences that would not be acceptable in practice (Gubiński, 1961). 2) The second group of authors, by contrast, base their view on the assumption that, under certain strictly defined conditions, criminal liability of a sports participant for death, harm to health or interference with physical integrity of his opponent is excluded provided that such negative consequences occurred during the practice of a sport. It is inferred that injuries sustained during the practice of a sport are, under certain circumstances, non-punishable. This principal idea is shared by all the proponents of this view, however, the opinions significantly differ on the extent of such impunity and on the conditions under which criminal liability of sports participants is excluded and on the legal

classification of the grounds which exempt the conduct of sports participants from being subject to prosecution. The differences are owing to the fact that criminal codes do not contain any special provisions specifying under which conditions criminal liability of sports participants exists or is excluded. Provided that this conclusion can be made based on the available literature. However, this conclusion cannot be made with absolute certainty. Some publications on sports law state that such special provisions were included in the Criminal Code of Ecuador and in the Cuban Code of Social Defence and possibly also in the Criminal Code of Paraguay in the first half of the twentieth century; at the same time, the authors of these publications, however, observe that such legal regulations had not become very common.

The need for some rules defined by the criminal law theory that would govern the legal classification of sports-related injuries gets more urgent, in particular, with the increasing number of injuries sustained during the practice of a sport and with the changes in the nature of sport. Little is known today that in the 1960's, box was temporarily prohibited in former Czechoslovakia (with the exception of the international boxing matches that had been already agreed upon) as a consequence of two fatal injuries occurring in a boxing ring shortly after one another (Sawicki, 1966; Sawicki, 1968; Jedruch, 1969). The ban was only temporary since it was decided that the box would be prohibited until the adoption of such rules which would guarantee better safety of the boxers during the match (The theory of sports law is aware of this need. As early as forty-five years ago, J. Constant, a Belgian author, wrote: *"It is most certain that, nowadays as well as throughout the entire history of mankind, sports encounters have been an important element of social life. However, in the past, such encounters used to be primarily characterised by individual and selfless activity which did not embrace the idea of a direct fight against the opponent and did not yet suffer from the tyrannical stimulation exerted by the press and commercialisation which, in these days, forces the contestants to display excessive passion for the sport and to make all possible efforts to satisfy their extreme hunger for victory."* (Constant, 1967; Charles, 1952-1953). In the eighties of the last century, it was, for example, U. Scherrer who pointed out to the criminal aspects of the practice of sports in connection with the increasing number of sports-related injuries, especially in contact sports (Scherrer, 1988). In the nineties, J. P. Rochat aptly described the existing situation in the following words: *"The world of sports, in general, and the competitive sport, in particular, has undergone a deep change and experienced a significant transition in the recent years. The practice of sports which used to be marginal until recently has become, within a couple of years, a real social phenomenon which is susceptible to political and socioeconomic interests that multiply the number of possible conflicts. Sport has become a social phenomenon, it is far from playing a marginal role in our society and for this reason, it is unthinkable not to apply the rules and general principles of the positive law to sport as to any other sphere of human activity. For a long time, sport could be the synonym for fair play and chivalry. Naturally, there are still some athletes and officials who try to promote these virtues, but the world of sports is no better or worse than the society within which it functions and within this reflection of the society conflicts regularly arise. The expansion of the practice of sport and its ever-increasing commercialisation constitute, at the same time, a source of conflicts, thus providing reasons for the involvement of the courts which is more and more frequent."* (Rochat, 1997).

The absence of any relevant legal theory in the past led to differences in approach to this issue among law enforcement authorities and to discrepancies in the decision-making of the courts in relation to such cases. The impact of this situation on sports participants is completely negative since they cannot, in fact, rely on any strictly defined rules governing the practice of their sport.

The issue of legal liability of sports participants for sports-related injuries may be examined, in particular, from three different perspectives: 1) from the perspective of the relevant legal theory and theory of sports law, 2) from the perspective of the relevant legislation, 3) from the perspective of the relevant judicial decisions. Given the limited length of the paper which makes it impossible to analyse the issue from all three perspectives, only the approach of the legal theory and judicial practice to this issue will be discussed.

3. Criminal Liability of Sports Participants for Sports-Related Injuries in European Countries – a Brief Overview

3.1 England

At first, let us stay in the field of the common law and let us look at some of the cases that appeared before the criminal courts. The first cases concerning criminal liability of sports participants for sports-related injuries in the English judicial practice date back to 19th century, namely *Bradshaw* ((1878) 14 Cox CC 83) and *Moore* (1898) 15 TLR 229). In *R v Bradshaw*, the accused charged the victim who was dribbling the ball by jumping at him. The force of the charge caused rupture of the intestines of the victim who died the next day. In *R v Moore*, the victim kicked off the ball and both the victim and the accused started to chase it. A goalkeeper was the first to

get hold of the ball and kicked it out from the reach of both players. At that moment, the defendant jumped with his knees against the back of the victim, causing him to be thrown violently against a knee of the goalkeeper, resulting in an internal rupture and his untimely death, a few days afterward. Both Bradshaw and Moore were accused of manslaughter. However, despite the similarity of these two cases, the respective juries came to different conclusions. Bradshaw was acquitted since his action was an integral part of playing a physical sport such as football. The challenge was of such nature that it could be expected to be made by the participants in a game such as football as played at that time. Although the judge did not use these exact words, he, in fact, held that if the act is an integral part of the game, then the consent of the victim will be presumed and no criminal liability will be attached to this act. On the other hand, Moore was convicted. His assault was held to be beyond what is necessary to play football successfully. Therefore, the victim could not consent to the act as it was not an integral part of playing football. Lord Justice Bramwell and Lord Justice Hawkins, respectively, decided that it is irrelevant whether the accused violated the rules or not; according to Lord Justice Bramwell, the accused is guilty if he intends to cause serious injury by his action or if he is aware that his action is likely to cause such injury, according to Lord Justice Hawkins, the accused is guilty if the force applied by him is likely to cause injury. However, Lord Justice Bramwell told the jury that: *"if a man is playing according to the rules (...) it may be reasonable to infer (...) that he is not acting in a manner which he knows will be likely to be productive of injury"*. The judges noted that football, although lawful, was a "savage" game at that time. The accordance of the conduct of the accused with the rules known by the plaintiff seems to be clear evidence that the plaintiff consented to such conduct and, in the light of the more meticulously articulated rules of the sports that are recognised today, it provides at least some evidence that it is reasonable conduct to which a valid consent could be given. In this connection, the British legal literature points out that the absence of any definition of what is "an integral part of the game" and what is not is one of the reasons of the existing problems in criminal prosecution of sports participants for sport-related injuries (James, 2003).

Let us now look at some other decisions of the English courts as classified by the English legal theory (James, 2003).

According to Section 47 of Offences against the Person Act 1861, whoever commits any "assault occasioning actual bodily harm" is criminally liable. For example, *R v Davies* ((1991) Crim Lr 70) is one of the cases that may be included in this classification group. In *R v Davies*, the accused punched the victim in the face during a football match because the victim had committed a foul against him before. The victim suffered a fracture of a cheekbone. The accused was charged with assault occasioning actual bodily harm and sentenced to six months in prison. It was emphasised that if an assault occasioning injury occurs during a game, the consent of the victim may be a defence provided that the injury-causing act was a legitimate means of playing such sport. Punching an opponent, such as in *R v Davies*, does not constitute any legitimate means of playing football. All acts resulting in injury are thus, in fact, potentially criminal. Only such acts that fall under the scope of the defence of consent which, in general, covers such acts that are in accordance with the rules of the game or playing culture of the sport are excluded from liability (James, 2003).

However, it is also necessary to take into account the consequences which occur in the specific case. For example, in *R v Billinghamurst* ((1978) Crim LR 553), during a rugby match, the accused punched the victim in the face in an off-the-ball incident, after a throw-in, fracturing the jaw of the victim in two places. The punch was an intentional contact and although the accused did not have to foresee the actual degree of injury, he must have known that his action would result in some kind of injury since some kind of injury is inevitable if someone punches another person. The injury was serious enough to qualify as grievous bodily harm. In connection with this case, it was, once again, pointed out, that the law, in general, does not acknowledge the consent of the victim to be a legal defence for inflicting grievous bodily harm. However, if the assault occurs during the practice of a sport, consent may be a defence to charge under Section 20 OAPA 1861 provided that the act resulting in injury was a legitimate means of the practice of such sport. Since punching does not constitute any legitimate means of playing rugby, consent of the victim may not be used as a defence in *R v Billinghamurst*. In this connection, the legal theory pointed out that, although almost all of the described cases concerning grievous bodily harm which occurred during the practice of a sport on a sports ground involve off-the-balls incidents, nothing can prevent the law from being applied to actions relating to the fight for the ball, not even to such that are in accordance with the rules of the game). The rules of the game do not determine the criminality of the conduct of the accused as "nothing can make that lawful which is unlawful by the law of the land" (decision Moore ((1898) 15 TLR 229)).

However, the defence of consent may not be applied to actions that have little in common with playing the game. We can give an example of criminal prosecution of an on-the-ball incident which resulted in acquittal of the accused. However, its value as a precedent is disputable. In *R v Blisset* (*R v Blissett* (1992) Independent, 4

December), the elbow of the accused came into contact with the face of the victim when both of them were jumping for the ball during a professional football match. The victim suffered a fracture of his cheekbone and eye socket and was unable to play professional football again. At the trial, the accused was acquitted based on the argument that such type of challenge happens on this level of football so often that it is an integral part of the game and, therefore, it should be deemed to have been consented to by the victim. Since it was held that the act was not criminal because it had been consented to, the accused could not be found guilty of any unlawful conduct. The application of the concept of “integral part of the game” in *Blisset*, however, raises significant doubt considering the risks associated with the use of an elbow during the game.

3.2 Scotland

In Scotland, the law operates, to a large extent, in a similar way as in England (Stewart, 2000). In 1996, Lord Advocate issued Instructions to the Scottish Chief Constables in which he set out the circumstances under which incidents of participator violence should be brought before the criminal courts. The principal concern of Lord Advocate was to keep the police - as the primary source of control of the attending spectators - focused on its principal task. The police should investigate only such incidents of violence of sports participants that are “well beyond” what is considered “normal play” (Miller, 1996). These instructions, for example, provide that the police should investigate incidents “where the violence used by a participant goes well beyond that which would be expected to occur during the normal run of play and that which the rules of the sport concerned are designed to regulate. In deciding which incidents to investigate the police should pay particular regard to incidents where the violence or disorderly behaviour has occurred after the whistle has been blown and whilst the ball is dead and to incidents where the violence or disorderly behaviour has occurred in circumstances designed or liable to provoke a disorderly or violent response from spectators.” This move was a response to a series of criminal prosecutions in Scotland with a clear position on the violence on sports fields. One of them was the conviction of Duncan Ferguson, then of Glasgow Rangers FC, for head butting opposing full-back John McStay of Raith Rovers. Duncan Ferguson was sentenced to three months in prison and the Scottish Football Association imposed a 12 match ban on him (Beloff, Kerr, Demetriou, 1999).

Although there is neither any definition of “normal play” nor any definition of what is “well beyond” such normal play, the general opinion clearly reflects the position of the courts. According to this position, the consent of the victim may be used as a defence in most cases involving participatory violence and only the most serious assaults or such assaults which have little or nothing in common with playing the game should result in indictment and consequent conviction. However, the Crown Prosecution Service has not issued any similar instructions in relation to cases that occur in England and Wales.

3.3 Switzerland

In 1983, the Federal Supreme Court held (BGE 109 IV 102) that participation in a sports event or a game does not justify physical injuries connected with such participation. Gross negligence or intentional misconduct is not covered by the implied consent of the participants with the risk. The Federal Supreme Court thus specified the defence of “consent of the injured (i.e. victim)” – which is so often invoked by all sports participants – and limited it to cases of ordinary negligence (*culpa levis*). On this occasion, the court also inferred that it is irrelevant for the criminal prosecution if the referee punished the challenge resulting in injury as a violation of the rules of the game. Referees are responsible for the conduct of the game and criminal judges should protect the public order independently of the role of the referees. However, the Swiss judicial practice, in general, acknowledges that criminal prosecution may be initiated even where the conduct was not judged by the referee to be in conflict with the rules of the sport.

The Swiss judicial practice is closely linked to the Swiss legal theory. Urs Scherrer observes that offences occurring on sports fields may be subject to criminal prosecution while emphasising that this trend has not been prevailing in the Swiss legal circles until recently (Scherrer, 1985). As regards the above mentioned decision, Scherrer notes that the decision takes reasonably into account the occurrences that may happen during the practice of a sport since it would be unacceptable and it would preclude any further development of sport if a sports participant had to fear criminal sanctions at every slight error committed by him during the game (Scherrer, 1988).

In relation to criminal liability of sports participants for sports-related injuries, Jacques Bondallaz, a prominent Swiss expert on sports law, observed: “Until a certain point in time, sport could have been perceived by some as a sphere which eludes the operation of the law. However, we have slowly come to realize that it is, in fact, a social activity just like any other and there is, indeed, no reason why it should be exempt from the regulation by the State which, in the form of the criminal law, aims to protect the public order. In Switzerland, this realization

has been developing since the conviction of the culprits of the infamous assaults against Lucien Favre in football and Piotr Malkov in ice-hockey. Even if it is appropriate now not to mention the names of these culprits in order to respect their right of oblivion (i.e. the right to be forgotten), the public is surely far from forgetting them. After all, since the famous Bosman ruling by the European Court of Justice in 1995, it seems that the sport officials have finally realised that all the branches of the law may intervene in the practice of sports.“

J. Bondallaz provides an interesting characteristic of the Swiss judicial practice as regards this type of incidents. He notes that the judges tend to approach criminal cases concerning sports injuries with a certain restraint and impose sanctions only in the event of gross violation of the rules of the game. For if the State started to punish offences of lesser importance, there is a risk of unacceptable increase in number of such cases and subsequent overload of the Swiss courts. The principles for determining criminal liability of sports participants for sports-related injuries are characterised by Bondallaz as follows: 1) from the point of view of the criminal law, the conduct of the perpetrator may be either classified as intentional bodily harm (either grievous or actual bodily harm) or as bodily harm caused by negligence or as assault and battery. According to the type of offence, the punishment ranges from fines to imprisonment of up to ten years. 2) It is, in particular, medical opinions that help judges to determine whether the conduct constitutes grievous bodily harm (which is prosecuted *ex offio*) or actual bodily harm (which is, under the Swiss law, prosecuted only based on the action of the victim). 3) The rules of the game adopted by sports organisations do not bind criminal judges but they, in fact, play a very important role in practice. There is actually no court decision establishing liability of a sports participant who adhered to the rules of the game and the violation of such rules would seem to be, in fact, a necessary condition for the involvement of the courts. 4) The involvement of the criminal courts is thus limited only to such cases where it is possible to prove the violation of the rules of the game by the perpetrator and such violation of the rules is especially reprehensible considering the usual practice of the sport. 5) On the other hand, all conduct that may not be classified as unreasonably brutal considering the special circumstances under which sports participants act during the practice of the sport (heat of the game, state of thrill, fatigue etc.) should not be subject to criminal law (Bondallaz, 2004).

3.4 Germany

The development of the German case law is very interesting. There is a significant number of judicial decisions concerning compensation of the damage caused by one sports participant to another under the civil law. However, the criminal law holds back in this sphere of human activity and prefers to deal with other problems than with the criminal liability of sports participants for sports-related injuries. From the most recent court decisions, see, for example, the decision concerning liability of the operators of a ski slope (piste) which was published with the following summary of its legal conclusions: “Those who are obliged to secure the piste, cannot presume that a skier, under normal visibility and snow conditions, after a fall on a hard, recently groomed surface of the ski slope, will slide down for another 150 m, then get out of the piste, failing to stop for another 111 m on the adjacent firm slope, subsequently falling over a perpendicular cliff and eventually dying.” - AG Kempten, decision from 19 July 2004 - 222 Js 7926/04.

The approach of the German courts and law enforcement authorities is aptly described by M. Reinhart who wrote: “*The fact that the competent authorities do not really deem necessary to intervene in incidents concerning injuries or harm caused in connection with the practice of a sport, has probably something to do – apart from the fact that they do not want to deal with additional workload – with the specific understanding of public interest. I’m tempted to conclude that the law enforcement authorities consider their own reluctance to prosecute such incidents as an uncomplicated way of how to preserve the presumed or actual nature of the sport as something which is beyond the reach of the criminal law and which is governed by its own rules, without having to venture on the thin ice of the legal concepts of Sozialadäquanz (social adequacy), consent, voluntary assumption of risks and unconscionability (i.e. determining whether the conduct is against good morals). It has been hardly examined from the scientific point of view whether the mere sporting context may actually justify their failure to pursue the special public interest in prosecuting such offences. In view of the foregoing and considering the intrinsic vagueness of the notion of “public interest”, it seems useful to develop rationally reviewable criteria based on which the public prosecutors would decide which sports-related incidents or injuries should be investigated and which not. However, in order to do this, it is, at first, necessary to define which of the existing offences come into consideration and the specific circumstances of the case must be taken into account. Within the entire sports-related sphere of live, the reluctance of the law enforcement authorities to pursue the public interest by prosecuting incidents occurring in sport may be accepted only if the injury, whether intentional or negligent, was caused by one sports participant to another.*”

No simple and all-embracing answer can be given to the question whether accidents and injuries occurring in

sport should not be punished simply because - in the absence of any criminal complaint lodged by the victim - there is no public interest in criminal prosecution of the incident. It is possible to think of a special regime which would apply to sports incidents on the ground that sport is ruled by its autonomous laws but only where the incident involves an injury caused by one sports participant to another during the practice of a sport. In all other cases, the sporting context is not strong enough to have any impact on the criminal investigation by the law enforcement authorities. However, it is necessary to differentiate between these sports injuries "in the proper meaning of the word" as follows. Firstly, the line between the punishability and non-punishability of the sports-related incidents should be, in principle, drawn between the recreational sport (mass sport) and top level/competitive sport. The former (i.e. the recreational sport) still occupies a space which is hardly ever intruded by the (criminal) law, whereas the latter (i.e. the top level sport) - because of its important role in the society and due to the fact that it is being progressively approached and examined by the civil law - has also become the subject of interest of the criminal law. And, secondly, it is necessary to distinguish between usual and gross violations of the rules of the game: Usual violations of the rules are inherent in the nature of the sport and should not "provoke" any criminal investigation. There is usually - primarily due to the general duty to prevent damage - a special public interest in prosecuting gross violations of the rules of the game. However, this, by no means, means that, in such cases, the accused must be eventually convicted. In this phase, the investigation is only initiated and the outcome of the proceedings is still open. Equally open is the question whether and how these specifics of the sports affect the material aspects of a crime (i.e. its degree of danger to society)." (Reinhart, 1997)

3.5 Poland

We must not forget to mention the development in Poland as the decisions of the Polish courts on liability of sports participants are quite significant and the literature on sports law in Poland is one of the most important in the area of Central and Eastern Europe. To a certain degree, it presents principles that may be also applicable under the Czech law.

The Polish Supreme Court gave its opinion on the issue of liability of sports participants for sports-related injuries in its decision from 27 April 1938 (file no. 2K 2010/37) stating that: *"Having regard to the fact that the sports games are a phenomenon of everyday life, that they enjoy great popularity in the society and are supported by the legislation and government officials and considering that the conduct of such games is regulated by the rules that are thought-out and elaborated into great detail and provide both for the sport objective of such games and for the safety of the participants, it must be deemed that a participant acts lawfully if he abides by the applicable rules of the game, does not violate the principles inherent in the game and follows exclusively the sports objective in his efforts."* (Sawicki, 1970). As regards the Czech legal literature, this decision is referred to probably only by J. Hora who pointed out (without giving his opinion on the decision) that the Polish Supreme Court, by this decision, established, as a condition for impunity in cases concerning sports-related injuries, that the sports participant must play by the rules of the game while pursuing the objective of the sport; violation of such principles results in criminal sanctions under the law depending on the degree of culpability and on the extent of the damage (Hora, 1979).

However, it must be noted that, even in Poland, this decision has not been received entirely positively. For example, St. Śliwiński (Králík, 2006b), when critically analysing this decision, pointed out that the sports rules, in fact, "acquire" the nature of legal rules where the criminal liability of sports participants is determined based on the adherence to or violation of such rules. Furthermore, it is necessary to keep in mind that - apart from the authors who try to define the criteria and limits within which the conduct of sports participants is considered lawful even if it results in negative consequences - there is also a significant number of proponents of the view that there is no reason to apply any "privileged" criteria to determine legal liability of sports participants for sports-related injuries. This group of authors is convinced that no legal provision explicitly excludes legal liability of sports participants. The proponents of unlimited punishment of sports participants often refer to the fact that criminal codes do not contain any special provisions excluding legal liability of sports participants (Vassali, 1958). This is also in line with the view that defences set out in criminal codes cannot be automatically applied to the sphere of sport. It is argued that such defences do not always solve the issue of impunity of sports participants in its entirety (as they do not take into account the specifics of the practice of sports) (Brunner, 1949). However, this position is not prevailing and has not gained general acceptance. For example, A. Gubiński criticised this position by pointing out that, in many cases, it would lead to consequences that would be unacceptable in practice (Gubiński, 1961).

3.6 France

The relevant decisions of the French courts are relatively numerous and even though they try to define meticulously what the conditions of legal liability of sports participants for sports-related injuries are, it is also possible to find cases in which severe legal sanctions were imposed. For example, a rugby player was sentenced to pay 583,000 francs to his victim since he punched him in the eye. The victim eventually lost his eye (T.G.I. Arbes, 13 May 1993). In another case, a football player was accused of breaking his opponent's tibia and fibula in a challenge and was ordered to pay damages in the amount of 112,726 francs (T.G.I. Bourg en Bresse, 19 September 1989). At the same time, it is, however, emphasised that a player accepts the risk of being punched and it cannot be, therefore, deemed that all punches that may potentially cause injury during the course of the match lead to legal liability.

The courts thus had to adapt the criteria which are usually applied in order to establish a criminal offence to the specifics of the practice of sports. All practice of sport entails, in fact, a certain degree of risk. This degree depends on the specific sport. The French legal theory acknowledges that, outside the sporting context, the usual rules of legal liability apply regardless of the acceptance of the risks of the game by the victim – *"If someone kicks his opponent in the dressing room during the break between the first and the second half of a football match, this constitutes an act of deliberate violence, on the other hand, the players accept the risk of being kicked during the match since football is played by feet."* This conduct is permitted by the custom and is not punishable provided that the game is played by the rules since not every charge (or punch) is allowed. However, this custom-based permission cannot extend to savage attacks. Therefore, it is necessary to draw a more precise distinction between the punishable challenges that lead to legal liability of the perpetrators and the challenges that are not punishable by law and are not subject to any civil or criminal sanctions.

As far as the practice of sports is concerned, the French case law distinguishes several types of conduct. According to the basic classification, it is possible to distinguish between unlawful and lawful conduct. For the purposes of this paper, let us deal only with the former which can be further divided into: a) intentional violation of the law and b) unintentional violation of the law.

3.6.1 Intentional Violation of the Law

In this connection, it is often pointed, that a simple misconduct in a game is a necessary, albeit insufficient requirement for the existence of legal liability of a sports participant. According to the French courts, the act of the perpetrator must be intentional and in conflict with the rules of the game. A criminal offence occurring in sport necessarily entails a violation of the rules of the game. This was observed by the Court of Cassation when reviewing a decision which had established the civil liability of a participant of a volleyball match (Cass. civ., 15 May 1972). There are many decisions that place explicit emphasis on the violation of the rules of the game in their statements of reasons. In cases concerning rugby, it was held that such violation was, for example, a headbutt (Rennes, 30 May 1989), a tackle (Toulouse, 20 February 1977), a kick in the head of an opponent who was lying on the ground (Riom, 10 January 1979) and a fist punch in the face resulting in the loss of the eye of the victim (Tarbes, 13 May 1993). As regards football, it is possible to mention a challenge violating the rules of the game (Lyon, 21 April 1989 and Toulouse, 22 October 1983), a fist punch in the face (Douai, 18 March 1992 and Rennes 30 January 1979) or an assault from behind (T.G.I. Grasse, 21 July 1993).

A judge is not legally bound by a decision of a referee which has the same probative value as evidence produced by other witnesses, such as sports officials, spectators or players. However, he may hardly dismiss the violation of the rules of the game which was determined and punished by the referee since the referee is a "privileged witness". On the contrary, the judge will rather use it as evidence of the act giving rise to liability. For example, one of the court decisions thus emphasises, in its statement of reasons, that a penalty kick was ordered after a headbutt and another one refers to a penalty kick penalising a tackle in rugby (Rennes, 30 May 1979). Another ruling points out to a referee's decision to send off a player who attacked his opponent in an off-the-ball incident (T.G.I. Annecy, 9 October 1991). Instead, the judge reserves the right to discover a violation of the rules which the referee failed to notice but which was observed by other witnesses. This is, for example, the case where the referee was not standing near the place of the incident, hence in the position which makes him a "first class witness" (Rennes, 26 June 1990) or where he was not paying sufficient attention. For example, he failed to see a "kick" noticed by the linesman (assistant referee) and other players (Riom, 10 January 1979). However, the violation of the rules of the game does not necessarily constitute a tort or a criminal offence. A goalkeeper who, in an attempt to get hold of the ball, raises his knee in order to protect himself, eventually injuring a forward from the opponent's team, commits a foul. However, such conduct is not considered to give rise to liability since it does not constitute any intentional brutal act (Kas. Civ. 21 June 1979). Evidence of any intentional violation of

the rules of the game thus seems to be a precondition of any conviction.

A deliberate act of foul play is committed where the perpetrator intends to commit the offence, i.e. where there is “deliberate foresight of damage infliction to another person”. Nevertheless, involuntary action may be penalised as well as a violation of the rules of the game. Therefore, the judge requires another condition to be met to establish the intention of the perpetrator to commit the offence. He also examines whether the action of the perpetrator constitutes an “intentional brutal act”, “unfair punch” or even “punch inflicted under circumstances which constitute abnormal risk”. However, it is often emphasised that it is not always possible to tell intentional conduct from unintended actions in the heat of the game and in the state of thrill arising out of the practice of the sport. The courts also tend to classify as savage or unfair all conduct which has nothing to do with the game. Punching a player who is not in possession of the ball (Tarbes, 7 April 1994) or who has just passed the ball to another player is an example of such conduct. Let us mention a case of a player who was injured by a challenge from behind when he was running alone towards the goal of the opponent and the ball was not at the distance to be played anymore (T.G.I. Annecy, 9 October 1991) or a case of a footballer who kicked his opponent in the leg after making him immobile by holding him with his both hands, so it was impossible to play the ball (Rennes, 26 June 1990).

The courts acknowledge that aggressive play may be necessary, for example in football and rugby. However, it becomes inexcusable when the player does not intend to play the ball anymore but instead intends to “knock down” his opponent at all costs. For example, in such situations where a player is attacked from behind even if he did not obstruct the game (T.G.I. Grasse, 21 July 1993). The courts also deem that any other action than the one which is usual during the practice of the sport, such as punching an opponent with a fist, constitutes conduct which is in conflict with the rules. A decision to send the player off which is normally made by the referee under such circumstances will help bring the opinion of the judge on the action of the perpetrator into harmony with the view of the referee and will constitute additional evidence of intentional conduct by the player.

3.6.2 Unintentional Violation of the Law

Any unintentional violation of the law by the player has at least two common features with intentional violations of the law. Firstly, there must be a breach of sporting rules and, secondly, the violence must go beyond the risks of the game assumed (accepted) by the participants. However, as opposed to intentional violations of the law, there is no “malice aforethought”. However, it is not always easy to prove intent given the chaos of the game. A player may make an unfortunate move in the heat of the game without being necessarily aware that he may cause serious injury to his opponent. It is thus impossible to establish any intentional violation of the law on his part since his conduct is related to the game and excludes any malicious intent. On the other hand, his conduct may be, nevertheless, considered unlawful if it goes beyond the risks accepted by the participants. The courts observe that “*if a rugby or football player voluntarily accepts the risk of being injured by his opponents, this is under the condition that such injuries occur as a result of the practice of this virile and violent sport in accordance with the rules of the game.*”

Unintentional violation of the law thus exists if the conduct of the player is in conflict with the rules of the game and/or where the injury caused by the player goes well beyond the usual risks accepted by the victim. It is, therefore, pointed out that “no player entering a sports field consents to the risks of being seriously injured, or, *a fortiori*, of losing his life on the field!” Hence, a rugby player was convicted for involuntary manslaughter since he killed his opponent during a tackle by jabbing his head into the belly of the victim instead of diverting it as required by the relevant rules of the sport (Trib. correct Bourg en Bresse, 6 April 1938). A player who had made a brutal tackle resulting in fracture of four ribs of his opponent was also found guilty of occasioning actual bodily harm unintentionally (Toulouse, 20 January 1977).

The seriousness of the damage will be most often the decisive factor for establishing unintentional violation of the law where there is evidence of violation of the rules. It was thus held that a foul (which was made by a foot kicked up from the ground) resulting in fracture of both hips of the victim constituted actual bodily harm inflicted unintentionally (Toulouse 22 November 1983). A player who had been prosecuted for causing injury to his opponent resulting in rupture of his left testicle and later acquitted by the Magistrates’ Court of the charge of intentional actual bodily harm was, on appeal, convicted of bodily harm inflicted unintentionally. In this case, the Court of Appeal which, equally as the judges of the Court of First Instance, did not establish any malicious intent, nevertheless stated that the accused “did nothing to prevent the collision and such conduct – surprising for an athlete who controls his body – constitutes violation of the law.” (Dijon, 21 March 1991).

3.7 Other European Countries – a Brief Overview

It must be, however, noted that the approach of the courts of other European countries to incidents and injuries in

sport is not as benevolent as that of the courts of the Czech Republic.

In this connection, we may, for example, mention a case in which the Regional Court of Cordoba sentenced one José David Larga, a Spanish football player, then of FC Seneca, a team from the third division of the Spanish football league, to one year in prison and ordered him to pay a fine of 390,000 marks for a savage foul. On 21 September 1997, in a match with Atlético Guadal, the non-professional football player committed an intentional foul against his opponent in such a brutal way that the victim had to end his career due to serious knee injury.

In 2005, a criminal procedure was started against Rachid Bouaouzan, then of Sparta Rotterdam, who committed a foul against Niels Kokmeijer of the opposing team, breaking his leg in two places. Under the Dutch law, a player (who had been penalised in accordance with the rules of football - by a 12-game ban) may be sentenced for actual bodily harm to imprisonment of up to eight years.

Let us mention an interesting case from Aosta, a city in northern Italy. A hockey player was accused of causing death to his opponent by hitting the victim with a hockey stick. During the match, the players got into a scuffle and were "fencing" with their hockey sticks. J. Boni hit his opponent violently to the sternum with the blade of his hockey stick and caused him injuries that proved to be fatal after the transfer of the victim to the hospital (cardiac standstill). Boni was accused of involuntary manslaughter. He was later charged with more serious offence and there was a danger that Boni would be sentenced to imprisonment of ten to eighteen years. In their final considerations, both the court and the public prosecutor accepted the argument of the defence that the accused had not intended to injure his opponent by the act of foul play, he was only trying to prevent him from playing the game and this challenge was made in the heat of the game which formed an integral part of the game (Sakáčová, 2004).

4. Decisions of the Courts of the Czech Republic on Criminal Liability of Sports Participants

Throughout the entire twentieth century, the courts of the Czech Republic (and also of former Czechoslovakia, to be precise) had not had any opportunity to give their opinion on the issue of criminal liability of sports participants for sports-related injuries. The absence of any judicial decisions concerning criminal liability of sports participants for sports-related injuries was aptly described by Jiří Hora already in the late seventies of the last century. Hora said that the highest courts had not as yet had the opportunity to take a stand to this issue (Hora, 1979). The situation remained unchanged until the end of the twentieth century and there was also virtually no available Czech legal literature specifically dealing with the issue of criminal liability of sports participants.

The first and, in fact, the only Czech author to address the issue of sports law and criminal liability of sports participants for sports-related injuries in a more systematic way (in the late seventies and early eighties of the twentieth century), from the point of view of legal theory, was Jiří Hora who summarized his views on the issue of criminal liability of sports participants for sports-related injuries in one of his papers (Hora, 1979). J. Hora defines the general theoretical basis of legal liability of sports participants for sports-related injuries based on the following fundamental principles: 1) the practice of a sport is based on the binding and internationally agreed rules of the sport, or, in some cases, on customs, 2) the essence of a practice of a sport is a constant movement, frantic activity of the opponents fighting for victory, 3) the practice of a sport aims to enhance physical fitness and health of the participants and plays an important role in the development of moral qualities of a man (the principle of fair play), 4) the government authorities do not intervene in sport by authorising individual sports, they are, however, entitled to prohibit any sport, 5) participation in sports is voluntary.

In examining the issue of liability of sports participants for sports-related injuries, Hora tries to find the solution in the so-called "material" aspects of a crime, i.e. in the degree of danger that the conduct represents for the society. Hora believes that it is possible to apply this approach as it allows to take into account the specifics of sport which differs significantly from other branches of human activity – in other words, by analysing the material aspects of a crime, it is possible to determine whether the sports participant acted with malice aforethought, whether he only pursued the objective of the sport or also intended to harm his opponent, and, further, to establish the extent of the ethical and legal liability of the perpetrator based on his status (which will be different in case of an athlete representing his country and in case of a person who does not participate in sport on the top level – (recreational sport v. competitive sport)), and finally, to determine whether the perpetrator complied with the rules of the game and to examine similar aspects relating purely to sport. In concluding, Hora expressed his conviction that the possible legal regulation of the issue in question will probably tend to be based on the legal concept of "permissible risk" which reflects the principle under which criminal liability does not attach to a person who acted within the boundaries of the risk which is permissible with regard to the needs of the society and purposes of the science and technology.

The limits of the criminal prosecution of sports participants for sports-related injuries have been in practice outlined by the following two decisions of the Supreme Court from the recent past.

The first of these two decisions is the resolution of the Supreme Court of the Czech Republic from 21 March 2007, file no. 3 Tdo 1355/2006 (published in *Soubor trestních rozhodnutí Nejvyššího soudu*, C. H. Beck, 2007, Vol. 36) which was published with the following summary of its conclusions: *“The purpose of the rules of a sport (e.g. football) is not only to lay down equal conditions for the competing parties but also to protect the health of the players against acts that may lead to their injury, with regard, among other aspects, to the nature of the sport. However, the rules of a sport, in themselves, cannot penalize such situations where a breach of such rules by a participant of the game results in harm to health caused to another player.”*

Therefore, if, during the course of a game, any player culpably violates (Section 4 and Section 5 of the Criminal Code) the defined rules of the game and such violation results in harm to health caused to another person (another player), then the possible criminal liability of such injury-causing player cannot be excluded (for example criminal liability for actual bodily harm as specified in Section 224 (1) of the Criminal Code) while taking into account, in particular, the nature of the game and the seriousness of the breach of the said rules.”

The above mentioned decision was challenged by a constitutional complaint which was dismissed as manifestly unfounded by the resolution of the Constitutional Court of the Czech Republic from 28 February 2008, file no. I. ÚS 1939/07. However, in this respect, the Constitutional Court unambiguously stated that the fundamental constitutional rights of the claimant had not been violated by the decision of the Supreme Court. Moreover, the Constitutional Court expressly pointed out that it did not feel to be competent to comment on whether, and how, it is relevant for the existence of the criminal liability of the player whether or not there was a breach of the rules of the game during which the injury occurred, as this is a typical task of the Supreme Court. Furthermore, it stated that it was also not for the Constitutional Court to determine whether the risk inherent in sport constitutes a valid defence or to choose from other legal concepts relating to legal liability of sports participants for sports-related injuries that have been developed in other countries of the world. However, from the positive point of view, the Constitutional Court emphasised that the consent of the victim with the participation in the game may not extend to the action of the player who caused the injury.

The decision of the Supreme Court underlined some of the rules that are decisive for the judicial practice:

4.1 The Principle of Subsidiarity of the Criminal Law (Criminal Law as the Last Resort (Ultima Ratio))

This general principle is rightfully applicable also in the field of sports even though it is impossible to ignore the increasing global trend of the recent years towards possible criminalisation of sports participants for sports-related injuries. However, this trend is no breakthrough in the principle of subsidiarity of the criminal law, it is only a response to the developments in the world of sports which is characterised by increased violence and ever-growing economic pressure on sports. This trend promoting the involvement of the criminal law in sport is sometimes explained by the increasing commercialisation of sport or by the fact that the injured sports participants have become more “courageous” to invoke their rights (Bondallaz, 2004) and, further, by the serious consequences of the practice of sport and by the increasing number of violent incidents on sports fields (Beloff et al., 1999), and, in some cases, also by the mere fact that, according to some, there is no reason why the practice of sports should be exempt from the scope of the criminal law (Havranová, 2003). The essence of the involvement of the criminal law in the sphere of sport, as far as legal liability of sports participants for sports-related injuries is concerned, was aptly outlined in the legal literature: *“...the function of the criminal law in sport is to lay down distinctions between conduct which is tolerated in the context of sports involving physical contact – and would not necessarily be tolerated outside that context – and conduct sufficiently extreme as to transgress the criminal law irrespective of its sporting context and, sometimes, irrespective of the consent of the victim.”* (Beloff et al., 1999).

4.2 Individualisation of the Case

The decision correctly underlines the necessity to take into account both the type of the sport and the specific circumstances of the case in relation to the conduct of the perpetrator. The general reference, in the decision, to the individualisation with the general reference to the typology of the sports reflects the views maintained, in the European context, in particular, by the German legal theory which is characterised by a very high number of relevant publications. The German legal theory distinguishes between the so-called “combat sports” (Kampfsportarten) within which the general principles of legal liability may be modified when dealing with sports injuries and the so-called parallel sports (Parallelsportarten) within which, in principle, the general principles of legal liability apply without any change (Fuchs, 2003). This view reflects the opinion that the approach to legal liability of sports participants for sports-related injuries necessarily depends on the kind of the

sport in question; the earlier German legal theory referred to the “Mann neben Mann” (i.e. man alongside man) sports and the “Mann gegen Mann” (man against man) sports (Vollrath, 1938). J. Fritzweiler, a German scholar, correctly describes the essence of the issue of legal liability of sports participants for sports-related injuries. He notes that the fundamental point of difference concerning legal liability of sports participants for sports-related injuries is the issue of permissible danger or increased risk of injury which may be caused to another person, regulation of such dangers and risks in the rules of the respective games or sports and their legal classification.

4.3 Emphasis on the Violation of the Sports Rules

The role of the sports rules in possible legal liability of sports participants is the golden thread of all the concepts and opinions that have appeared throughout the time. At the present time, it seems that the overly rigid position that the existence or absence of any legal liability depends on the adherence to (or violation of) the rules of the sport has been abandoned for good. Nevertheless, the decision also emphasises that it is necessary to examine the degree of violation of the rules of the sport in question. The so-called concept of adherence to sports rules is the alpha and omega of the reflections on legal liability of sports participants for sports-related injuries. The role and extent of this concept in the history of the legal development of this issue are so far-reaching that this legal concept could be easily examined in an extensive monograph; let me only refer to my papers concerning this concept which were published in various Czech and Slovak legal magazines in 2006 a 2007 (for example Králík, 2006a). The currently prevailing trend in the judicial practice (or at least one of the most prominent) may be identified in the approach of the Swiss courts according to which judges tend to approach criminal cases concerning sports-related injuries with certain restraint and punish only gross violations of the rules of the game since there is a risk of unbearable increase in number of this type of proceedings if the State started to punish minor offences. In this respect, the arguments presented by the Supreme Court in the above mentioned decision are limited (unfortunately) to the laconic statement that the conduct of the perpetrator must be in conflict with the rules of the sport, with a “postscript” that the sports rules do not penalise such conduct as far as the consequent harm to health is concerned. The idea formulated in the “postscript” is innovative in the context of the European judicial practice and is probably unprecedented.

The most recent decision on legal liability of sports participants is the resolution of the Supreme Court of the Czech Republic from 17 February 2010, file no. 8 Tdo 68/2010 (the resolution was published in the Official journal of court decisions and opinions of the Supreme Court, 2010, under serial no. 55). As opposed to the above described decision in a case concerning football, this decision concerned an accident caused during skiing. The decision clearly follows the approach of the Czech civil courts to incidents occurring during the practice of skiing as expressed in the resolution of the Supreme Court of the Czech Republic from 23 February 2005, file no. 25 Cdo 1506/2004. After all, the Supreme Court expressly refers to this decision in its conclusions by stating that a skier must adapt his speed and manner of skiing to his personal ability and experience and to the overall situation in the place he is skiing (in particular, to the prevailing conditions of terrain, snow, weather and visibility, number of other skiers and other persons and their movement etc.) in order to be able to react, in time and at sufficient distance, even to an unexpected obstacle in the way. If a skier culpably violates these rules, it is possible to establish a violation of the so-called “general duty to prevent damage” imposed on anybody under Section 415 of the Civil Code or a failure to meet the required standard of due care on his part. If he causes serious harm to health to another person by his negligent conduct, he may be found liable for the crime of actual bodily harm.

The rules of conduct for the skiers published by the International Ski Federation (FIS) do not constitute any generally binding legal regulation but they are binding for the skiers on the piste and any culpable violation of the above mentioned rules constitutes violation of the legal duty to prevent damage within the meaning of Section 415 of the Civil Code. In this respect, the Supreme Court emphasised its acknowledgement of the role of the rules issued by the International Ski Federation (the so-called FIS rules) as the sole regulatory instrument in skiing - which is, to a certain extent, a risky recreational activity - since the role of the above mentioned rules may not be trivialized in the absence of any other rules regulating the practice of skiing and the need for such rules is evident. In general, it may be inferred from these rules of conduct that a skier must adapt his speed and manner of skiing to his personal ability and experience and further to the conditions of terrain, snow, weather and visibility and to the overall traffic on the piste, in other words, to the overall situation on the piste or on a track for cross-country skiing in order to be able to react even to an unexpected obstacle in time and at sufficient distance. This, at the same time, means that he cannot go where he cannot see. If a skier fails to respect these rules, he cannot be deemed to have acted in accordance with the requirements of Section 415 of the Civil Code, i.e. in compliance with the so-called general duty to prevent damage or to have met the required standard of due care which could be expected from him both objectively and subjectively.

This decision is applicable in its entirety also to cases which will be determined under the newly-revised Criminal Code, and, in particular, to such crimes as negligent homicide as defined in Section 143 and grievous bodily harm caused by negligence under Section 147 of the Criminal Code. The decision was published in the Official Journal of court decisions and opinions, thus providing guidance for the courts that will be dealing with similar cases in the future.

5. Conclusion

Although the case law of the Czech courts concerning legal liability of sports participants for sports-related injuries has only started to develop in the recent years, it is evident that it has taken the route of acknowledging the possible existence of both civil and criminal liability of sports participants for sports-related injuries while putting emphasis on the role of the sporting rules (or on the adherence to or violation of such rules) for the determination of any possible liability. Despite the relatively small number of decisions concerning this issue (and in the absence of any relevant legal literature), it is apparent, even at this point, what the courts of the Czech Republic consider to be the essential elements of legal liability of sports participants for sports-related injuries. Although this issue may undergo further development in the future, it seems today that the limits of legal liability have been set out firmly and it is most probable that, in the immediate future, no substantial deviation from the existing development can be expected, both as regards the civil and criminal liability.

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