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Civil Liability Of Sports Participants For Sports-Related Injuries In The Central Europe And In The Czech Republic

Mgr. Michal Králík, Ph. D.
Judge of the Supreme Court of the Czech Republic
Czech Republic - Europe
Email-home.alcatraz@gmail.com

I. Introduction

In general, it can be said that the information on the respective fields of the civil law in the Czech Republic and India are mutually shared only in very rare cases and the field of legal liability of sports participants for sports-related injuries is no exception. For this reason, Indian readers might find interesting or even inspiring the following comparative perspective on the issue of legal liability of sports participants for sports-related injuries in Europe, with the emphasis on the approach of the Czech legal literature and judicial practice. This paper specifically focuses on civil liability of sports participants for sports-related injuries.

II. The essence of the issue and an overview of theoretical bases substantiating the exclusion of liability of sports participants for sports-related injuries

The central question of this issue is simple and unambiguous: If a sports participant suffers an injury during the practice of a sport, may his co-participant whose conduct "contributed" to the said injury be liable and under which conditions?

As regards the definition of the subject-matter of our study, it can be said that the issue may, fundamentally, be analysed 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 special legislation, 3) from the perspective of the relevant judicial decisions. This paper will discuss the issue only from the first and from the third above described perspective.

Three different views have crystallised in the legal theory, and, in particular, in the theory of sports law. Two of them are each other's exact opposites as regards their approach to the issue of determination of legal liability of sports participants for sports-related injuries and the third one lies somewhere between these two extreme positions. There are many legal concepts dealing with the issue of legal liability of sports participants for sports-related injuries. As early as the early eighties of the last century, the relevant legal literature had already referred to more than 40 theoretical bases substantiating the exclusion or existence of legal liability for sports-related injuries.[1]

The first group of authors believes that sports participants should be liable for sports-related injuries without any limitation. Essentially, the proponents of this view do not consider sport to be such a specific field of human activity that would justify any possible application of a special legal regime to sports-related injuries. In principle, this group of authors, in general, advocates full applicability of the law to the sports-related matters. One of the proponents of this view is, for example, Edward Grayson who is acknowledged as the "founding father" of British sports law and who has strongly supported the involvement of law in the operation of sport. According to Grayson: "If a person intentionally or recklessly

[1] See also, for example: Gališin, P.: Šport a právo III. Bratislava: ŠVOČ, 1986.

causes harm to another in order to prevent them from reaching a ball (...) then these actions are in breach of the criminal law. Clearly, the administrators of sport have failed to control this evil within their own sports. The concept that sporting supervisory bodies should usurp the power of the courts and the system of British justice cannot be supported by any cogent argument."[2] Grayson's position is backed up by a number of judicial precedents according to which the sports field is not a private space which cannot be entered by the law. Such views are supported by the saying: "law of the land does not stop at the touchline".[3]

On the other hand, the second group of authors almost absolutely excludes any possible legal liability of sports participants for sports-related injuries. This is closely linked to their more loose understanding of the relationship between the law and sport. The proponents of this position come to the conclusion that the world of the sport is a sphere which the law may not enter. Such thinking is nowadays undoubtedly on the steep decline and its relevance in the real world is only marginal. One of the most prominent advocates of this approach (and probably also the best-known among scholars) was Bruno Zauli, a former Italian Olympic contestant. In his view, the territory of sports is a "magic enclosure" ruled by the laws of nature and by the "positive law of sport" which is similar to laws of nature and is based on the following principles: bona fide (i.e. good faith), equality and mutual solidarity. [4] According to Zauli, ordinary (i.e. positive) law must not penetrate the confines of this "magic enclosure" where none other than the diritto sportivo (law of sport) may exist; however, at times it is the duty of ordinary law to intrude, but only: „if the sport degenerates into episodes harmful to the material and moral well-being of citizens, that is to say if sport ceases to be such and lacks in itself, in its members, its institutions, its means, the capacity or will to recover".[5]

It is typical for the third group of authors to accept the involvement of the law in sports-related matters, but as far as the liability for sports-related injuries is concerned, it takes into account the specific nature of sports by modifying the standard concept of legal liability (whether civil or criminal). Let us now briefly review some of the most prominent concepts formulated in the course of the 20th century that have influenced the sports-related legal theory and judicial practice.[6]

1) absence of the objective elements of a crime (i.e. absence of the wrongful acts committed by the perpetrator) – under this concept, sports-related injuries are not punishable by the law on the ground that the physical integrity (health) otherwise protected by the respective legal provisions of the Criminal Code, does not fall under this category of the objects protected by the law if the said physical integrity is compromised during the course of a sports-related activity. Many authors have discussed this concept but only some of them have eventually accepted it. This concept was formulated in response to the various concepts that had once emerged, in particular, in Germany and whose objective was to substantiate the notion that damage to health caused during the performance of medical interventions is not punishable by the law due to the absence of the objective elements of a crime against health. It was pointed out that such medical interventions are performed for therapeutic purposes (surgical removal of limbs etc.) and as such do not constitute the kind of damage to health regulated in the Criminal Code. By analogy, the same kind of reasoning should be also applied to sports-related injuries. This view has been overthrown by various concepts. It was, inter alia, pointed out that this reasoning cannot be

[2] See also, for example: Grayson, E., Bond, C.: Making Foul Play a Crime, 1993, Solicitors Journal 693, 16 July.
[3] See also, for example: Gardiner, S.: Sport, Money and the Law, in: Gardiner, S. - Felix, A. - O´Leary, J. - James, M. - Welch, R.: Sports Law, Cavendish Publishing Limited, The Glass House, Wharton Street, London, 1998, p. 35.
[4] See also Zauli, B.: Essenza del diritto sportivo. Perugia, 1962.
[5] Zauli, B.: Essenza del diritto sportivo, Perugia, 1962, p. 14.
[6] Considering the length of the paper, only a very brief review with a concise description of the concepts will be given. However, some of the concepts were discussed in much detail in extensive monographs (in particular, the consent of the victim)

applied, by analogy, to a completely unrelated sphere of sports. A more detailed analysis of this issue can be found in the publications of German, French and Swiss authors.[7]

2) absence of culpability – the proponents of this concept argue that liability of sports participants for sports-related injuries is excluded as it is not possible to impute culpability (even in the form of negligence) to a sports participant who caused an injury during sport. The purported absence of culpability is supported by the argument that sports participants do not inflict sports-related injuries out of anger or hatred. However, others argue that the absence of the above mentioned "motivation" does not exclude culpability and the existence of "anger" or "hatred" does not constitute circumstances which would lead to liability for harm to health of natural persons. In this connection, a question, however, arises whether the standard criteria of culpability should be applied to sports participants as well or whether their culpability should be determined based on other criteria. This is connected with another question, i.e. whether the adherence to the rules of a sport (which should be worded in such a way so as to prevent injuries from occurring during the sporting activity thus incorporating the so-called imperative of injury prevention) indicates the absence of culpability of a sports participant or if the violation of such rules indicates the existence of his culpability and whether there is any interrelation between the fault consisting in breach of a sports rule and the fault consisting in conduct resulting in injury caused during the sport. However, it should be noted that most authors have not treated culpability (or the absence thereof) as a fundamental criterion which should be applied in order to determine the exclusion of liability of a sports-participant for a sports-related injury. In this connection, it is often pointed out that intentional infliction of injury has no place in sports and there is thus no reason to apply any privileged regime to sports-related injuries.[8]

3) application of rules on fights – among the diverse constructs formulated in the legal literature, there is also a concept that argues that possible exclusion of liability of sports-participants for sports-related injuries should be determined based on the provisions of the criminal code that lay down the criminality (i.e. punishability) of fights. However, this concept has never gained any significant acceptance both in the legal literature and judicial practice and its obsolete nature is apparent from the mere fact that the legislation of most of the countries of the world does not contain any rules on fights anymore.

4) consent of the victim – consent of the victim is one of the most discussed concepts and is based on the assumption that a sports participant, by

[7] See also, for example: Karding, E.: Straflosevorsätzliche Körperverletzungen bei Bewegungsspielen, Freiburg, 1902, pp. 1 – 24, Vollrath, A.: Sportkampfverletzungen im Strafrecht, Leipzig, 1931, pp. 7 – 15, Mletzko, K.W.: Die strafrechtliche Behandlung von Kőrperverletzungen und Tőtungen beim Sport, Erlangen, 1935, pp. 12 – 15, Mahling, G.: Die strafrechtliche Behandlung von Sportverletzungen, Borna-Leipzig, 1940, pp. 11 – 12, Garraud, M.P.: Les sports et le droit pénal, Revue international de droit pénal, 1924, Issue 1, pp. 222 – 223, 229 – 230, Roux, L. Le.: La responsabilité en matière sportive, Rennes, 1935, pp. 27 – 32, Brunner, A.: Die Sportverletzung im schweizerischen Strafrecht, Zurich, 1949, pp. 23 – 26, pp. 80 – 81. One of the most renowned experts on sports law, A. J. Szwarc, a Polish author, discussed this concept in a monograph that, in many aspects, has yet not found its equal in contemporary legal literature on sports law – Szwarc, A. J.: Wypadki sportowe w świetle prawa karnego (koncepcja wyłączenia tzw. obiektywnej istoty przestępstwa), Uniwersytet im. Adama Mickiewicza w Poznaniu, Poznań, 1972. In my opinion, A. J. Szwarc is one of the best sports law analysts. His works undoubtedly rank with the best analytical publications on sports law. Szwarc's contribution to the sports law, as a whole, may be fully appreciated only after reading his books.

[8] See also, for example: Mletzko, K. W. , c.d., p. 38, Mahling, G., c.d., p. 89, Hoffmann, G.: Zuwieweit sind beim Sport verursachte Verletzungen straffrei? Juristische Wochenschrift, 1933, Volume 7, p. 417, Roux, L. Le, c.d., pp. 41, 62 – 63, 74 – 75, Azema, I.: La résponsabilité en matière de Sports, Lyon, 1934, pp. 32, 57 – 58, Loup, J.: Les sports et le droit, Paris, Librairie Dalloz, 1930, pp. 97, 195 – 196, Kubli, F.: Haftungsverhältnisse bei Sportveranstaltungen, Zurich-Ulster, 1952, p. 65, Brunner, A, c.d., pp. 33, 45, 49, 53 – 56, 76, 90, Sośniak, M.: Prawne znaczenie naruszenia reguł sportowych, Ruch prawniczy, ekonomiczny i socjologiczny, Warsaw-Poznań, 1962, Issue 2, pp. 42 et seq.

participating in a sporting event, while knowing of the risk of injury, in fact "consents" to the risk of injury (i.e. accepts such risk) and agrees with the same. The concept of consent of the victim is typical, in particular, for the legal theory in the United Kingdom and United States of America, its proponents can be however found also in the German, Swiss, Italian, French, Belgian, Swedish, Japanese, Argentine, Chilean, Spanish or Polish legal literature.[9] However, there are also authors who do not accept this concept. [10] For the fundamental controversy is whether the consent of the victim constitutes a defence (in Czech legal terminology "circumstance excluding unlawfulness of the act"), in more general terms – whether the consent of the victim excludes legal liability also in relation to the harm to health. It is also often pointed out that the awareness of a sports participant of the possible consequences of his participation in a sport cannot be regarded as his consent to such negative consequences. In other words, the sports participant is aware of the objectively higher risk of injury during the practice of a sporting activity, such awareness, however, does not imply his consent to interferences with his physical integrity (i.e. harm to his health).[11]

5) legal custom – in connection with this concept, some say that many authors refer to the custom (tradition) as a defence leading to impunity of sports participants.[12] This is, however, incorrect since they do not refer to the custom itself as a ground for impunity for sports-related injuries, they refer to "some other" defence (circumstance excluding liability) which is based on the custom (tradition). The controversies surrounding this concept have been focused particularly on the following two questions: 1) Do the customs have any legal relevance at all? and 2) Can the customs serve as a basis for the formulation of a criterion based on which it would be possible to exclude legal liability for sports-related injuries? Some of the authors answered the above defined questions in the negative thus coming to the conclusion that customs may not constitute a defence for sports-related injuries. This concept is, in principle, based on the assumption that the negative consequences (i.e. damage) arising out of the practice of a sport is not punishable by the law simply because the law does not punish them; according to L. Le Roux, this is the exact reason why this "common error" makes law (error communis facit ius).[13]

6) sports law as a law of professionals – the legal theory sometimes ponders whether it is possible to substantiate impunity of sports participants for sports-related injuries based on the concept of law of professionals. This concept is usually discussed in connection with the deliberations on the justification of the legality of medical interventions and, according to some, should be applied by analogy to liability for sports-related injuries. Consequently, the proponents of this concept conclude that the support, authorisation or toleration of a certain

[9] There are many publications discussing this concept, for reasons of succinctness, let me refer to the book by A. J. Szwarc: Sport a prawo karne – wprowadzenie do problematyki karnoprawnej oceny tzw. naruszeń sportowych, Poznań, 1971, pp. 177 – 178, footnotes 184 – 196.

[10] See also, for example: Roux, L. Le, c.d., pp. 35 – 37, Garraud, M. P., c.d., p. 236, Charles, M.R.: Le sport et le droit pénal, Revue de Droit Penal et le Criminologie, 1952-1953, Issue 9, pp. 857 – 858.

[11] Szwarc himself also wrote an exceptionally brilliant monograph specifically dealing with this concept. See also: Szwarc, A.J.: Zgoda pokrzywdzonego jako podstawa wyłączenia odpowiedzialności karnej za wypadki sportowe, Uniwersytet im. Adama Mickiewicza w Poznaniu, Poznań, 1975. Considering the rare cases in which the earlier Czechoslovakian legal theory showed any interest in this topic, let us only mention that Peter Gališin, a Slovakian author, considers the circumstance which is discussed in connection with this concept (voluntary acceptance of the risk of injury) when analysing the material aspects of the crime, i.e. when considering its dangerousness for the society; See also: Materiálna podmienka trestnosti športových hráčov při športovom výkone. Kriminalistický sborník, 1987, Issue 12, pp. 755.

[12] See also, for example: Brunner, A., c.d., pp. 73 – 76, Karding, E., c.d., pp. 24 – 34, Asúa de L. J.: Tradado de derecho penal, Tomo IV, Buenos Aires, 1952, p. 734, Mahling, G, c.d., pp. 40 – 44, Kubli, F., c.d., p. 90, Garraud, P., c.d., pp. 212 et seq. One of the opponents of this concept was, for example, Hoffmann, C., c.d., pp. 417 et seq., who noted that it is difficult to accept legal custom as a ground for the exclusion of sports-related injuries from criminal liability.

[13] See also: Roux, L. Le, c.d., pp. 43 – 44.

activity (profession) by the State leads to the exclusion of the liability for the actions occurring during the performance of such activity. If we accept this circumstance as a ground for impunity for sports-related injuries, then the question whether it is possible to apply the concept of law of professionals as a defence for certain actions within the law in general must be answered in the affirmative. This general perspective has been found controversial as well.[14] Another controversy arose around the definition of the "activity (profession)" under this concept and whether the practice of a sport also belongs to such activities and whether, based on this fact, the concept of law of professionals may also apply to sports-related injuries.[15] The proponents of this concept concur in that respect that the concept of professional law cannot be the principal ground for the exclusion of liability for sports-related injuries. On the other hand, some of the authors believe that this concept may be applied in relation to professional athletes.

7) purpose of the sport – is one of the most accepted concepts and can be aptly described by the saying "the end justifies the means". This concept is, in principle, based on the notion that it is advisable to accept and tolerate unintended sports injuries (i.e. refrain from prosecution) because of the high moral, educational and health-promoting value of sporting activities, i.e. because of the purpose and objectives of the sport for the man and the society. In doing so, it is, however, necessary to abide by the binding rules and customs of the sport and respect the principles of fair play. If such principles are not respected, the sporting activity becomes unlawful and the sports injury becomes punishable by the rules of the applicable law. The legal theory and courts dealing with the sports-related matters sometimes consider possible application of this concept as a ground for the exclusion of liability of sports participants for sports-related injury (basically, as a defence). In this connection, it is often pointed out that the purpose of the sport follows from the very fact that the State authorises (or does not forbid) the practice of a certain kind of sport. For by respecting the sport, the State also endorses the positive objective which is followed by the sport.

Some authors even believe that the authorisation of a sport by the State constitutes an independent ground for the exclusion of liability of sports participants for sports-related injuries. These considerations are in line with the view of R. Maurach [16] who stated that the concept of purpose of the sport is, generally speaking, an attempt to find a common denominator for all the circumstances that lead to impunity. Some of the authors acknowledge that legal liability for sports-related injuries may be also excluded on this basis, .[17] One of the proponents of this concept was also R. Charles, a Belgian university professor and a public prosecutor, who published a monograph called "Le sport et le droit pénal."[18] On the other hand, other authors opposed this concept.[19] Doubts about the applicability of this concept follow, in the first place, from the fact that the legal regulation does not explicitly incorporate the purpose of the sport as a ground for impunity and its significance is based primarily on the custom. Another subject of controversy was also the definition of the term "purpose" which should lead to impunity of a certain group of actions, namely whether the definition should be based on subjective or objective criteria or on the combination of both of the above criteria. Differing opinions have been also formulated on the issue what specific purpose attainable by the practice of sport should lead to impunity for sports-related injuries and in which way such purpose should be expressed.

[14] See also, for example: Mletzko, c.d., p. 19, Brunner, A., c.d., pp. 61 – 62 etc.
[15] See also, for example: Karding, E., c.d., pp. 54 – 56, Mletzko, K. W., c.d., p. 19, de Asúa, L., J., c.d., p. 734.
[16] See also: Maurach, R.: Deutsches Strafrecht Allgemeiner Teil, 1958, p. 237.
[17] See also, for example: Karding, E., c.d., pp. 60 – 73, Becker, W.: Becker, W.: Sportverletzung und Strafrecht, Deutsche Justiz, 1938, p. 1722, de Asúa, L. J., c.d., p. 735.
[18] See also: Charles, R.: Le sport et le droit pénal. Bruxelles, 1964, the quoted excerpt translated by J. Hora in: Hora, J.: K otázce trestní odpovědnosti hráčů při sportovních úrazech, Acta Universitatis Carolinae Gymnica, Vol. 15, 1979, Issue 1, pp. 17 – 18.
[19] See also, for example: Brunner, A., c.d., p. 79, Hoffman, G., c.d., p. 417, Mletzko, K. W., c.d., p. 22, Mahling, G., c.d., pp. 37 – 39, 42, Vollrath, A., c.d., pp. 54 – 55, Roux, L. Le, c.d., pp. 7 – 17, 35.

8) concept formulated by G. del Vecchio – in the earlier Czechoslovakian legal literature, it was J. Prusák who familiarised his readers with the views of G. Del Vecchio.[20] To support his view on the impunity of sports participants for sports-related injuries, Vecchio mentions box as a typical example of the so-called contact sports. According to Vecchio, anyone participating in box foresees possible injuries and harm to health, or, in other words, such injuries are expected by him to occur as a necessary consequence of the practice of the sport. On this basis, Vecchio asks a question under which circumstances is it possible to think of the exclusion of liability in such cases where, for example, a boxer injures his opponent? Conversely, if such conduct is penalised, what are the objective and subjective aspects of the crime (i.e. actus reus and mens rea)? Vecchio comes to the curious conclusion that only accident or use of great force may constitute grounds for impunity[21]– regardless of the kind of the sport, i.e. irrespective of whether it is a contact sport or not.

While accident as a defence has been discussed in the sports law publications quite often (it is not, however, a "normal" accident but an occasional consequence of the usual practice of a sporting activity consisting in injury or harm to health where "accident" is a general term for such consequences), great force has been treated explicitly as a defence rather exceptionally. However, it is highly probable that great force, in itself, as a defence would not hold water under the Czech law. According to a number of concepts (including those that have been gaining very strong acceptance among legal experts), the circumstances of the course of the practice of the sport – and the way of use of the force may be also categorized as one of such circumstances – should be considered by the court using the criterion of the adherence to or violation of the rules of the sport with the adherence to such rules leading to possible impunity (let us now leave aside that the correctness of this view is questionable).[22] Against the possible application of a defence of use of great force, it may be also objected that, in the specific case, the court usually considers, in the first place, whether the use of great force, in itself, constitutes the circumstance under which liability of a sports participant arises (or forms a part of any of the conditions for liability) and does not consider, first and foremost, whether the use of great force constitutes a defence excluding liability for the sports-related injury.

9) authorisation by the State – this relatively popular concept, also known as the concept of general lawfulness of the sport or the concept of general lawfulness of sports-related injuries, concludes that the support, recognition, or toleration of a sport by the State leads also to the impunity of sports participants for the injuries that occur during the practice of a sport.[23] Even though this concept has many advocates, there are also those who find it incorrect.[24] The opponents of this concept present a fundamental (and correct) objection that even if it is possible to establish lawfulness of a sport or of different kinds of sport by this construct, it does not mean that everything that occurs during the practice of a sport becomes "non-punishable".[25] Another controversial issue was also the way in which the State should support, tolerate or recognise different kinds of sport, whether in the form of special legal regulation or administrative acts or even by the mere fact that the State tolerates such sports. However, it was critically pointed out that the mere tolerance based on the inactivity of the authorities that are competent to prosecute

[20] See also: Prusák, J.: Šport a právo (Úvod do dejín, teórie a praxe právnej zodpovednosti v športe), Šport, slovenské telovýchovné vydavateľstvo Bratislava, 1984, p. 190.

[21] For further details, see also: del Vecchio, G.: Il delito sportivo, Il Pensiero Giuridico Penal, Mesyna, 1929, pp. 293 – 305.

[22] Vecchio might have been influenced by the Roman law in his arguments concerning great force as acknowledged, by the way, also by Prusák. This is particularly the case of the javelin throw and injuries sustained during a ball game as described by Alfenus Varus, an ancient Roman jurist.

[23] See also, for example: Garraud, P., c.d., p. 236, Loup, J., c.d., pp. 191 – 193, Charles, M. R., c.d., pp. 858 – 861, Vollrath, A., c.d., pp. 32 – 41, de Asúa, L. J., c.d., pp. 734 – 735, Brunner, A., c.d., p. 64 etc.

[24] See also, for example: Mletzko, K. W., c.d., p. 20 or Mahling, G., c.d., p. 33.

[25] See also, for example: Roux, L. Le., c.d., pp. 23 – 24.

delictual conduct must not be confused with the recognition or support of the sport. Apart from that, any administrative acts or legal regulations not having the force of the law that evidence upport to the sport may not justify the exclusion of the legal liability for harm to health.

10) exercise of the right or performance of legal duties – this concept represents a minority trend in the theory of sports law. It is based on the assumption that if a right is properly exercised or a legal duty duly performed, the negative consequences of the practice of sport are also not subject to legal liability. The exercise of the rights and the performance of legal duties is an acknowledged defence (in Czech legal terminology, the so-called "other circumstance excluding unlawfulness of an action"), however, an unsolved question remains: How the crucial term of the "proper exercise" of a right or the "proper performance" of a legal duty should be construed from the point of view of the practice of the sport?

11) admissible risk in sport – some of the publications mention the so-called concept of admissible risk in sport as a special defence in relation to sports-related injuries. In principle, the concept argues that a higher degree of risk of harm or injury is inherent in the practice of a sport (especially in contact sports). A sports participant who is aware of the risky nature of a sporting activity and still exercises it, accepts, to a certain degree, the risk of injury. If such participant is injured by his co-participant who participates in the sport while being aware of the risky nature of the sport, then the latter is not legally liable for the consequence that occurs during the practice of this activity even if it constitutes interference with the physical integrity which is protected by the applicable law as well as by special legal regulations. The essence of the concept of admissible risk in sport is, in fact, similar to two other concepts: the concept of purpose of the sport and the concept which argues that the impunity for sports-related injuries is based on the fact that a certain sport is authorised, respected or supported by the State (concept of the authorisation of the sport by the State). The idea of possible explicit incorporation of the sports risk as a defence in legal regulations is, in the first place, opposed by the fact that this legal concept has not been sufficiently elaborated as far as its theoretical basis is concerned, in particular in the absence of any exact definition of the conditions and limits of such sports risks. One of the principal criticisms of this concept is that is it necessary to answer the complicated question to which extent a sports participant may assume the risk of damage caused to him by the injury – without any possibility to claim damage under the criminal law or under the civil law. [26] It is, however, true that the current global judicial practice puts a relatively strong emphasis on the risk in sport; firstly, in the connection with the general considerations on the nature of the sport as an activity with inherent risks where the occurrence of injuries is an undesirable, yet usual and, to a certain extent, also necessary side effect of such sporting activities, and secondly, when defining the extent to which a sports participant may validly accept the risk of injury. These legal considerations and constructs are relatively complicated and their analysis would go beyond the possibilities of this paper. Nevertheless, their common feature is that they require, apart from the requirement of the assumption of a certain degree of the sports risk by a sports participant, mandatory adherence to the rules of the sport (whose content is an expression of the imperative to prevent injuries during the practice of the sport) by the person who caused the injury.[27]

12) adherence to the rules of the sport – this concept has shown great persistence since it has survived, as one of the few concepts, all the

[26] For further details on this concept, see, for example: Gubiński, A.: Ryzyko sportowe, Nove Prawo, Issue 10, 1959, p. 1178, Sawicki, J.: Ludzie i martwe paragrafy, Warsaw, 1961, p. 367.

[27] For further details on this concept, see, for example: Sauer: Allgemeine Strafrechtslehre, Berlin, 1955, pp. 137 – 138, Nowakowski, F.: Das ősterreichische Strafrecht in seinen Grundzűgen, Vienna – Graz – Cologne, 1955, p. 62, Grinberg, M. S.: Problémy proizwodstwiennogo riska w ugolownom prawie, Moscow, 1963, pp. 25 – 26, Siewierski, M.: Kodeks karny i prawo o wykroczeniach. Commentary, Warsaw, 1965, p. 59, Lernell, L.: Wykład prawa karnego, Część ogólna, Warsaw, 1961, p. 185 etc.

phases of the development of the legal theory on this issue and has many proponents even today. This concept is based on the fundamental premise that the adherence to the rules of the sport implies impunity of a sports participant. However, it must be noted that, in the overwhelming majority of cases, the proponents of this concept do not consider the adherence to the rules of the sport to be the only and exclusive condition for the exclusion of legal liability of a sports participant, but only one of several conditions that must be mandatorily met at the same time.

In the earlier German legal theory, E. Karding argued that criminal liability of sports participants for sports-related injuries is excluded provided that the following two conditions are met. 1) In the absence of violation of such sports rules that have been adopted in order to protect health and life of the sports participants, and 2) if the participation of the victim in the sport is voluntary (including the cases where the victim was injured during a lesson of mandatory physical education at school).[28] On the other hand, another German author, A. Vollrath argues that in sports of the "Mann gegen Mann" (i.e. man against man) type, sports injuries are not punishable by the law in the absence of violation of the basic standard rules of the sport and provided that the act was committed exclusively within the limits of the practice of the sport in a manner which is not at variance with the sense of justice which is identical with the principles of fair play.[29] R. Maurach is one of the German authors who argue that, under the German law, the consent of the victim excludes liability for the injuries caused during the game provided that the following three conditions are met: 1) apart from the consent of the victim, the conduct is not against good morals (contra bonos mores), 2) the injury was not caused by any intentional violation of the rules of the sport, 3) the conduct of the participant was not savage.[30]

French authors P. Garraud and J. Loup maintain a position that the sports-related injuries are not punishable by the law provided that the following conditions are met: a) the fundamental rules of the sport were adhered to, b) the conduct of the person who caused the injury was not in any way reckless or negligent, c) the victim accepted the risk inherent in the practice of the sport. Both of the above mentioned authors emphasise that all of the above defined conditions must be met at the same time, otherwise the participant is liable both under the criminal law as well as under the civil law.[31] The current French legal theory attaches great importance to the sports rules as well. M. Gros and P. Y. Verkindt argue that the cases concerning sports-related injuries should be determined depending on whether physical contact is inherent in the practice of the sport or not. If so, a sports participant who injures his opponent cannot be, in principle, prosecuted. However, another necessary condition is that the originator of the violence resulting in damage must not violate the rules of the game. Nevertheless, the acceptance of the risk does not in any case exclude the possibility of penalising the lack of skills or foresight and all the more so the malicious intent of a sports participant to injure his opponent.[32] Even the most recent trends in the French legal theory take into account the importance of the rules of the sport. As far as box is concerned, the French legal theory, for example, acknowledges its special position since the box basically consists in inflicting blows to an opponent. However, the court would accept the defence based on the consent of the victim and would exclude the liability of the perpetrator only if his conduct was within the rules that govern the sport in question. For example, if a boxer strikes his opponent below the waist, he would not enjoy any legal protection anymore. The victim accepts the risks of receiving blows but only within the limits envisaged by the rules of the game. As regards the involvement of the law in sport, it is,

[28] See also: Karding, E.: Straflosevorsätzliche Körperverletzungen bei Bewegungsspielen, Freiburg, 1902, pp. 53, 67 – 68, 72.

[29] See also: Vollrath, A.: Sportkampfverletzungen im Strafrecht, Leipzig, 1931, pp. 47 – 49, 62 – 63.

[30] See also: Maurach, R.: Deutsches Strafrecht, Besonderer Teil, 1956, pp. 73 – 74.

[31] See also: Garraud, P.: Les sport set le droit pénal, Revue Internationale de droit Penal, 1924, p. 243, Loup, J.: Les sport et le droit, Paris, 1930, pp. 193 – 196.

[32] See also: Gros, M. - Verkindt, P. Y.: L´autonomie du droit du sport, Fiction ou réalité? L´actualité juridique, Droit administratif, 1986, p. 710.

in general, often pointed out that the rules of a game (or sport) adopted by a sport regulatory body do not bind judges but they play a very important role in judicial 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. The involvement of the 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. On the other hand, all the conduct that may not be qualified as unreasonably brutal considering the special circumstances under which sports participants act during the practice of sport (heat of the game, state of thrill, fatigue etc.) should not be subject to criminal law.[33]

P. Noll, a Swiss author, maintains a position that liability of sports participants for sports-related injuries may be excluded based on the consent of the victim provided that the rules of the sport were not violated. He backs up his position by pointing out that sports participants accept such dangers (i.e. risks) inherent in the practice of the sport that may occur even in the absence of any violation of the rules of the sport.[34] The current Swiss legal theory attaches great importance to the sports rules as well. This is, in particular, evident in the cases concerning skiing. F. Chappuis notes that, considering the increasing number of skiers and sports-related injuries, the International Ski Federation adopted rules of conduct (the so-called "FIS rules") that take into account the decisions of the civil and criminal courts of its member countries concerning injuries that occurred during the practice of skiing. However, the impact of the rules of conduct in sport on the law governing the practice of skiing and snowboarding is limited: the FIS rules basically incorporate the existing general principles of law (neminem laedere) or reiterate the express prohibitions incorporated in other legal regulations (e.g. rule no. 9 – duty to assist at accidents). The courts then apply these rules in order to determine negligence. All codified rules of skiing and snowboarding influence the law in that respect that they, to a certain degree, harmonise the relevant judicial decisions; they systematically define which basic and manifest duties are imposed on individuals on the basis of the general duty of care. Chappuis calls these rules "the rules of common sense".[35]

The impact of the sports rules on law is acknowledged also by the American and British legal theory. For example, C. S. Kenny argues that sports injuries are not punishable by the law provided that the following conditions are met: a) the victim (injured sports participant), in fact, accepted the consequences of a possible injury, b) the injury was caused during the practice of a lawful sport and c) the perpetrator adhered to the rules of the sport.[36] There has been a certain shift in the approach of the current British legal theory which does not consider the adherence to the rules of the sport as an explicit condition for impunity but as only one of the circumstances that are taken into account by the courts when determining cases concerning sports injuries. M. James argues that the law enforcement authorities will more likely proceed to a prosecution if any of the following conditions is met – the conduct resulting in the injury had nothing to do with the game, the foul was committed off the ball or after the referee had stopped the game, the wrongful act caused injury of serious nature, the perpetrator intended to cause injury to the victim, there was a possibility that the spectators would be incited by the action, the perpetrator is a professional and, therefore, a possible role model. On the other hand, the court will find the incident less serious and the incident will less likely result in criminal prosecution if it

[33] See also: Le juge, cet arbitre suprême, La gruyère, 3 April 2004.

[34] See also: Noll, P.: Űbergesetzliche Rechtfertigungsgrűnde im basendern die Einwilligung des Verletzen, Basel, 1955, pp. 97 – 100.

[35] See also: Chappuis, F.: L´influence des règles de comportement sportif sur le droit pénal: L´exemple du ski et du snowboard, in: Droit et sport, Edité par Piermarco Zen-Ruffinen, Staempfli Editions SA Berne, 1997, pp. 291 et seq.

[36] See also: Kenny, C. S.: Outlines of criminal law. Cambridge, 1952, pp. 140 – 141.

was a part of the usual course of the practice of the game and there was no intention to cause harm. For example, if it was an ill-timed tackle, only minor injuries were caused or the case had been sufficiently dealt with by the sport regulatory body. M. James has a very broad understanding of the impact of the rules of the sport on the law. He points out – based on a detailed analysis of a considerable number of court decisions – that all actions resulting in injury might be, in fact, punishable by the criminal law. Only such actions that fall under the scope of the defence of consent which, in general, covers such actions that are in accordance with the rules or playing culture of the game or sport in question, are excluded from legal liability. Furthermore, liability of a sports participant may be, however, excluded even where the rules of the sport were violated (and in this respect, this opinion is in line, in particular, with the current judicial practice of the Austrian and German courts), if the action resulting in injury constituted a legitimate means of the practice of the sport. On the other hand, James emphasises that playing by the rules of the sport, does not, in itself, constitute a defence excluding liability of a sports participant – „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 a conduct of a sports participant as nothing can make that lawful which is unlawful by the law of the land."[37]

In the Polish legal theory, which is close to the relevant Czech legal theory in many aspects, it was J. Sawicki who discussed the issue of the sports rules and believed that a sporting activity and the consequences arising out of the same are lawful provided that the following three conditions exist: a) the sport is recognised by the State (i.e. it is considered lawful), b) participation of a sports participant in the sport is voluntary, c) sports participants play by the rules and principles of the sport which are binding for them.[38]

In concluding, it is possible to add, for the sake of completeness, that the rules of the sport are discussed in this paper only as regards their role as one of the criteria applied by the courts to determine the legal liability of a sports participant for a sports-related injury. The sports rules are, naturally, analysed in legal theory from a much broader perspective; any further analysis of this issue would, however, go beyond the possibilities of this paper as this issue has been also discussed in monographs published in many countries.[39] Nevertheless, it must be also said that the concept of adherence to the rules has its opponents who refuse to determine liability of sports participant solely based on the criterion of the adherence to or violation of the sports rules.[40]

13) law of sport – this concept further develops the above outlined issue of the role and impact of the sports rules, while going even further in its conclusions. Some of the legal authors opine that the law, in general, does not bind the participants in places where the sport is practised - where the rules and standards of the law of sport apply primarily and exclusively. The so-called law of sport should thus exclude the application of the rules of the criminal law. Liability for a sports injury should, therefore, be absolutely excluded. A participant who causes an injury may be only

[37] See also: James, M.: Sports participation and the Criminal Law, in: Lewis, A. – Taylor, J.: Sport: Law and Practice, Butterworths, Lexis Nexis, 2003, pp. 1071 et seq.

[38] See also, for example: Sawicki, J.: Tajniki dyscypliny, Warsaw, 1965, p. 66.

[39] See also, for example: Szwarc, A.J.: Karnoprawne funkcje reguł sportowych, Poznań, 1977, Kummer, M.: Spielregel und Rechtsregel, Berne, 1973 or Reinhard, M.: Die strafrechtliche Bedeutung der FIS-Regeln, Zurich, 1976, Gschöpf, M.: Haftung bei Verstoß gegen Sportregeln, Dissertation, Verlag Österreich Vienna, 2000, Becker, S. D.: Sportregeln und allgemeine Rechtssätze im Normen- und Wertegefüge des Sports, Lit Verlag, Münster, 1999.

[40] See also, for example: Bojarski, M.: Wyłaczenie odpowiedzailności karnej za wypadki w sporcie, Nowe Prawo, 1970, Issue 10, p. 1443, Sośniak, M.: Prawne znaczenie naruszenia reguł sportowych, Ruch prawniczy, ekonomiczny i socjologiczny, Warsaw-Poznań, 1962, Issue 2, pp. 41 et seq., Prusák, J.: Šport a právo (Úvod do dejín, teórie a praxe právnej zodpovednosti v športe), Šport, slovenské telovýchovné vydavateľstvo Bratislava, 1984, p. 225.

penalised by the rules of the law of sport and only where the sports injury was caused in violation of the sports rules. This basic concept has been slightly modified by some authors. Under this concept, it is often argued that the application of the rules of general law to this sphere of human activity is excluded so long as the sports participants adhere to the rules of the sport. Sports injuries thus may only result in liability in sport, not in legal liability. However, this concept - in all its modifications - has been received with harsh criticism as expressed by a number of authors already many years ago. The criticism concerned, in particular, the suggestion that the sports rules should determine possible legal liability for sports-related injuries. In this connection, it was, in particular, objected that in such a case the sports rules – lacking the nature of legal rules - would be more relevant than the legal rules in determining legal liability and, therefore, the above described concept may not be accepted.[41]

At the present time, this concept has been largely rejected; its essence and basis is, from a broader perspective, intertwined with the issue of the role of the law as an instrument regulating the relationships in sport and with the issue of the so-called autonomy of the sport which have been already addressed by the Czech legal literature.[42]

The overview of the above described theoretical bases and concepts aims to demonstrate the broadness of the field in which the authors try to find the limits of the legal liability of sports participants for sports injuries. However, the list is far from complete. In actuality, it is an informative compilation which aims to help readers understand the complexity of the analysed issue as it is impossible to discuss all the concepts in any more detail and comment on their actual content given the length of the paper.

III. Civil liability of sports participants for sports-related injuries

Let us now look at the legal development in some of the European countries that have dealt with the issue of civil liability of sports participants for sports-related injuries more than the others.

Germany

The theoretical basis for further decisions of the German courts on liability of sports participants for sports-related injuries was formulated in the ruling of the German Supreme Court (Bundesgerichtshof – BGH) from 5 November 1974, file no. VI ZR 100/73 which was published with the following part of the statement of the reasons summarising its conclusions: "Anyone participating in football accepts, in principle, the risk of injuries which cannot be avoided even if the football is played by its rules. Therefore, the court must establish violation of the rules by the participant who caused the injury in order to award the damages to the injured opponent (co-participant)."[43]

The above quoted legal conclusion reflects the view of those who argue that, by his participation in a competitive sporting activity recognised by the law, a player accepts injuries that may occur during the game even if it is played by its rules (with the rules of the game governing not only the individual aspects of the game but its whole course). According to the opinion of the German Supreme Court, culpable violation of a sports rule which aims to protect the participants of the sport, gives rise, in general, to the duty to compensate damage to such injured player. The situation is different where the injuries are caused by a participant who adhered to the rules of the sport since every sports participant accepts the risk of such injuries. We can now leave aside the question whether such acceptance

[41] See also, for example: Liekendael, E.: Union belge et luxembourgeoise de droit pénal, Revue de Droit Pénal et de criminologie, 1952 – 1953, Issue 10, p. 981, Śliwiński, St.: Polskie prawo karne materialne. Cześć ogólna. Warsaw, 1946, p. 142, Michalski, W. – Zawadzki, Zb. : Prawo a sport, Prawo i Życie, 6 January 1963 etc.

[42] See also: Králík, M.: Právo ve sportu. 1. vydání. Prague: C. H. Beck, 2001, pp. 105 et seq. or Králík, M.: Právní aspekty sportovní činnosti (má právo ve sportu své místo?), Masaryk University (dissertation), 2000, in particular pp. 253-329 and the literature listed in the dissertation.

[43] BGHZ 63, 140 = NJW 75, 109.

of risk should be regarded as "acting at one's own risk" or as "socially adequate conduct" which makes it impossible, from the perspective of the legal dogmatics, to either qualify the action of the perpetrator as an action susceptible to damage compensation under a specific legal provision or to establish unlawfulness of such action even if the action of the perpetrator may be qualified as an action susceptible to damage compensation under a specific legal provision. It was pointed out that football is a game during which physical contact occurs and which, due to the elements of fight inherent in the game, often leads to unavoidable injuries when two players fight for the ball. Every player thus accepts the risk of such injuries and presumes that his opponent accepts such risk as well. This rule of the game based on the mutual assumptions of both of the participants (or of all of the participants) concerning the acceptance of the risk by the other player could not be given any legal relevance since the court must, when determining the damage award, consider the legal relationships of the football participants as to whether they are objectively typical and the individual attitude of a player is not taken into account. So the injured player must accept the exculpation of the perpetrator also where the injury caused during a game played in the accordance with the rules is of more serious nature or if the injury subsequently results in very serious harm as a consequence of unforeseeable but still adequate complications, even if eventually causing death. The acceptance of the risks that may not be avoided even if the game is played by the rules concerns also such legal cases in which the risk which was knowingly assumed by a participant results in especially serious consequences.[44]

The current German legal theory considers the above described decision as principally correct. It is specifically referred to, for example, by J. Fritzweiler[45] or M. Fuchs[46]. The limitation of legal liability based on the adherence to the sports rules is considered correct, for example, by M. Fuchs[47] or partly by D. Looschelders[48] who, however, at the same time subjected this principle and the conclusions of the above mentioned decision to some criticism regarding its general applicability. In the earlier German legal literature, this ruling of the Supreme Court was, however, also criticised. For example, Grunsky pointed out that the conclusions of the decision give the impression that in such a case a claim to damages arises but the victim forfeits such claim as a consequence of his assumption of the risk or of the application of the principle "venire contra factum proprium".

There are many decisions of the German courts concerning sports-related issues and since the cases are often very specific, it is, in fact, impossible to generalise their conclusions. In general, it is possible to observe a relatively strong trend in the decisions of the German courts which has emerged quite recently and is typical for the continental Europe. This trend has been formed based on the above mentioned decision of the German Supreme Court from 1974. Its proponents argue that liability of sports participants for sport-related injuries may be excluded not only where the conduct of such participant was in accordance with the rules of the game but also where certain violation of the rules of the sport occurred. An example of this trend in judicial practice is, for example, the decision of Higher Labour Court in Cologne (LAG Kőln) from 28 June 1984, file no. 10 Sa 59/84 which was published with the

[44] From the perspective of the application of the law by the Czech courts in relation to the substantiation of the court decisions, it is interesting that the decision refers to the Austrian theory on criminal law (F. Bydlinski), Austrian theory on civil law (Pichler) and to the French judicial practice and legal literature. In the Czech Republic, such substantiation of a decision of ordinary courts using these kinds of references is virtually unknown. However, this shows that the legal liability of sports participants for sports-related injuries is such a complex issue which has not been sufficiently elaborated in many countries of the world that it is sometimes necessary to use the experience of the courts of foreign countries in order to determine a specific case.

[45] See also: Fritzweiler, J. : Praxishandbuch Sportrecht, Munich, 1998, p. 335.

[46] See also: Fuchs, M. : Deliktsrecht, 4th edition, 2003, p. 74.

[47] See also: Fuchs, M.: Wer muss Schäden aus Sportverletzungen ausgleichen? Zeitschrift fűr Sport und Recht, 1999, Issue 4, pp. 133 et seq.

[48] See also: Looschelders, D.: Die Haftungsrechtliche Relevanz aussergesetzlicher Verhaltensregel im Sport, Juristische Rundschau, 2000, Issue 7, pp. 265 et seq.

following part of the statement of the reasons summarising its conclusions: "Not every violation of the rule of the game which aims to protect the players constitutes negligence; it must be further determined whether the conduct of the perpetrator crossed the line between the necessary toughness required by the game and foul play. The rule according to which a participant may not claim damages against the player who caused him physical injury based on the principle of good faith (bona fide) can be applied not only in cases where a perpetrator plays by the rules but also in cases where only minor violations of the rules occur that cannot be avoided during the usual course of the game provided that the court is still able to determine on sufficient grounds that similar injury resulting in damage could have been sustained as well by the participant who caused the injury. [49] The German courts subsequently extended this trend which tolerates minor violations of sports rules also to injuries sustained during the practice of American football (and other sports as well). For example, the decision of the Regional Court (LG) of Bielefeld from 8 January 2001, file no. 4O 156/00 concludes that: "the standard of due care owed by a diligent and careful player should be determined according to the nature of the sport in question. American football is a combative, contact sport in which every player accepts the risk of possible injury, so the liability claims arise only in case of a brutal act of foul play." [50] This notion was further elaborated in relation to football (i.e. soccer), for example, in the ruling of Higher Regional Court (OLG) of Düsseldorf from 2 April 2004, file no. 14U 230/03, which states that: "If culpable violation of the required standard of the duty of care occurs during a football match, it must be considered by the court within the context of the specific situation typical for the game while taking into account the specific nature of the football as a sport where two opponent parties play against each other".[51] In accordance with this philosophy, the German courts had defined, prior to this ruling, the circumstances under which a sports participant cannot be liable for a sports injury caused by him in connection with the violation of the rules of the sport (dangerous play), for example, during a football[52] or a basketball[53] game.

The above described trend in the German judicial practice is very interesting and well-founded by the legal theory even though it might seem, prima facie, that it does not provide sufficient protection to injured sports participants. The Czech judicial practice as will be shown below does not go that far in its conclusions, or, more precisely, it has not yet specifically addressed this issue since, in its view, the mere violation of the rules of a sport by a participant who injured his opponent is a sufficient ground for his legal liability, in the absence of any deeper legal analysis of this issue. We may ask whether this is only a consequence of the fact that the Supreme Court may address only the statements of the appellant included in the extraordinary appeal and no appellant has not yet argued that a minor violation of the rules may not give rise to legal liability or if it is a deliberately formulated direction of the earlier and current judicial practice in the Czech Republic according to which any violation of a sports rule leads to legal liability of a sports participant who caused injury to his co-participant.[54]

[49] For further details, see: LAG Kőln: Schadenshaftung eines Fussballspielers, NJW, 1985, volume 17, p. 991.
[50] For further details, see: LG Bielefeld: American Football, keine Haftung bei leichtem Regelverstoss, R + S, 2002, volume 5, p. 198.
[51] For further details, see: OLG Dűsseldorf, LSK, 2005, R + S, 2005, p. 435.
[52] See also, for example: BGH : Zum Verschulden eines Fussballspielers bei „gefährlichem Spiel", NJW, 1976, volume 21-22, p. 957.
[53] See also: BGH : Zur Haftung wegen eines Foulspiels beim Basketball, NJW, 1976, volume 47, p. 2161.
[54] It rather seems that the latter is true since the very sparse Czechoslovakian legal literature on sports law strongly rejected the idea that the liability of a sports participants should be determined depending on the adherence to or violation of a sports rule and came to the conclusion that liability of a sports participant for sports injury may, on the other hand, arise even if the perpetrator played by the rules. See also, for example Prusák, J.: Šport a právo (Úvod do dejín, teórie a praxe právnej zodpovednosti v športe), Šport, slovenské telovýchovné vydavateľstvo Bratislava, 1984, pp. 225 et seq.; further, see, for example: Prusák, J.: Aggressivität Problem der Vermenschlichung der

Austria

There are many decisions of the Austrian courts concerning liability of sports participants for sports-related injuries, the relevant legal theory is very elaborated and comes to the conclusions which are, to a certain extent, similar to those of the German courts. Let us now briefly look at these decisions[55]. For the purposes of integrity and coherence of this paper, only organised sports will be discussed.

The Austrian courts, similarly to the German judicial practice, also believe that the liability of sports participants for sports-related injuries should be determined while taking into account the impact and the role of the sports rules. According to my opinion, the decision which gives the truest picture of the relevant Austrian judicial practice is the ruling of the Austrian Supreme Court (OGH) from 24 September 1981, file no. 7 Ob 656/81 whose conclusions are put well in this part of the sentence: "The usual minor violations of the rules that result in physical harm during the practice of a contact sport are not usually unlawful and do not constitute violation of the law". Let me remind you of the decision of the Higher Labour Court of Cologne mentioned in the part discussing the situation in Germany, which also includes this opinion which was, however, never specifically mentioned in the pivotal German decision from 1974. This decision states that a part of the judicial practice and legal theory maintains a position that a perpetrator is excluded from liability imputed to him under Section 823 of the German Civil Code (BGB) also where he commits a minor violation of a rule which aims to protect the players provided that he does so in the heat of the game, by imprudence, by a technical failure, due to his fatigue etc.[56] In the German decision, it was further pointed out that this question was not relevant for the considerations made by the court since no violation of the rules occurred; the less there was a need to deal with the question whether the contact of the players which may be qualified as a violation of the rules which occurs frequently and therefore is expected by the players to occur during the game constitutes a failure to exercise the required duty of care which is important for the determination of possible liability for a sports-related injury since such violation of the rules may happen also to a diligent and careful player considering of how quickly he must take the relevant decision in the heat of the game. In the current German legal theory, such position is maintained, for example, by M. Fuchs[57] who, in this connection, refers to the above mentioned decision of the German Supreme Court.

The above described conclusion reflects the opinion of those who argue that a player is liable to compensate the damage caused to his opponent provided that he caused the damage by an unlawful act. However, it is necessary to take into account that the participants are normally subject to risks or possible injuries during the practice of various kinds of sport with many participants (in particular in sports such as football but also in other collective sports) where close contact of the participants or close contact of the participants with the necessary sport equipment

Sportregeln und ihre Beziehung zum Recht, Prague, ČSAV, 1985, pp. 90 et seq.; Prusák, J.: Problém surovej hry (súťaže) a prenikanie právneho princípu "non laedere" do športových pravidiel, Teorie a praxe tělesné výchovy, 33, 1985, Issue 6, pp. 374 et seq., Prusák, J.: Problémy právnej zodpovednosti pri športovej činnosti, Bulletin advokacie, 1984, III, pp. 141 et seq.; Prusák, J.: Sme len na začiatku, ba eště pred ním, Národná obroda, Issue 84, 10 April 1993, p. 11; Prusák, J.: Teoreticko-metodologické otázky skúmania vzájomných vzťahov medzi športom a právom, Teorie a praxe tělesné výchovy, 32, 1984, Issue 9, pp. 558 et seq.; Prusák, J.: Úrazy a poškodenia zdravia pri športe a problém športového a právneho deliktu, Právník, 124, 1985, Issue 9, pp. 791 et seq.; Prusák, J.: Vzťah medzi športovým pravidlom a pravidlom socialistického spolužitia a kritické stanovisko k tzv. športovému právu, Právny Obzor, 67, 1984, Issue 9, pp. 864 et seq.

[55] Where the author refers to a decision of the Austrian courts without giving any further detail, such decisions can be found on the website: *www.ris.bka.gv.at/jus/*. The author invites the reader to visit the website which is, unlike the website of the Supreme Court of the Czech Republic, very well-organised, user-friendly and easy to use.

[56] As far as the legal theory is concerned, this decision refers to the following authors: Wussow, Deutsch, Reichert and Hellgardt.

[57] See also: Fuchs, M. : Deliktsrecht, 4th edition, 2003, pp. 74.

cannot be avoided. This is typical, in particular, for sports such as football. These risks or possible injuries are taken into consideration by the participants depending on the regularity of their occurrence which follows from the nature of the sport in question. Considering the significant role of the sport in today's society, consent can be given to the risk inherent in the practice of sport – risk of physical harm of the participants. If a sports participant does not increase the degree of risk inherent in the nature of the specific sport by himself, the action or omission of such participant during the normal practice of the sport resulting in harm to health of his fellow participant may not be considered as being against the law. If a physical injury occurs, the general conditions for violation of the law must be limited accordingly.

Therefore, anyone participating in a competitive (contact) sport assumes the risks inherent to the sport that are known to him or at least recognisable by him. The defence of acting at one's own risk, i.e. where the action of the participant (victim) excludes any unlawful conduct of the perpetrator, may be accepted only if it follows from the comparison of the legal interests in question that the duty of care of the perpetrator was "cancelled" by this action of the victim. This is usually the case in the event of ordinary and minor violation of the objective duty of care on the part of the perpetrator. In such a sport, it must be presumed that inflicting injuries to an opponent is not unlawful provided that the injury is caused by typical violations of the rules which cannot be avoided in the course of the practice of the specific sport.[58]

This view has been complemented by the conclusion of the decision of the Austrian Supreme Court RS U OGH from 22 September 1994, file no. 2 Ob 571/94 according to which "an action resulting in injury during a contact sport is, on the other hand, unlawful where the action of the perpetrator goes beyond the typical violations of the rules that repeatedly occur during the fight for the ball." This conclusion was made in relation to the specific circumstances of the case (which are described in this decision in great detail) while giving an example of the so-called "high kick" as such typical violation of the rules as opposed to the violation of the rules in this case. A "high kick" as a typical violation of the rules served also as a basis for the legal arguments which appeared in the decision of the Austrian Supreme Court from 29 October 2001, file no. 7 Ob 251/01i concerning an injury sustained during the game of American Football.

By way of illustration, let us now have a look at two cases which demonstrate what violations of the football and basketball rules are considered typical by the Austrian courts and what violations are, on the other hand, considered untypical.

In the decision of the Austrian Supreme Court RS U OGH from 28 October 1994, file no. 9 Ob 1604/94 which concerned football, it was explained that "if a football player kicks his opponent with a stretched leg in order to separate him from the ball, this – regardless of any existing violation of the rules – must be regarded as something which is inherent in the nature of a contact sport. This must be determined not only based on the circumstances of the specific case and on whether there was a possibility (from the point of view of the theory of movement) to play the ball, but also on whether the perpetrator took into account the specific situation – he had only a split second to decide whether he would attack or not. The ill judgement of the situation and the consequent action based on this ill judgement thus also falls under the inherent nature of the contact sport and does not increase the risk inherent in the game. Since it was irrelevant for the degree of risk whether or not the plaintiff had any possibility to approach the ball by a kick." In this specific case, the court further explained that even the conduct which is in conflict with the rules of the sport does not give rise to the claim for damages.

[58] On the basis of this conclusion, it was determined that the "high kick" also constitutes such usual violation of the sports rules since it is a recurring and typical violation of the rules punishable by the referee, for example by ordering a free kick. It can be, however, disputable, whether the high kick is a minor violation of the football rules or not.

The decision of the Austrian Supreme Court RS U OGH from 19 September 1996, file no. 2 Ob 2255/96y concerned basketball and included a legal opinion according to which "acting excluding unlawfulness ("acting at one's own risk") will exist only in case of minor violations of the duty of care, in case of typical minor violations of the sports rules which cannot be avoided and not in case of blatantly unfair, extraordinarily dangerous conduct. The violation committed by the accused who pushed the plaintiff (who was making a jump) from behind with his both hands while having no intention to play the ball (to get hold of the ball, drive away the opponent) but intending to prevent the successful (throw-in) of the plaintiff was considered by the court of first instance without any doubts as a gross, unusual and avoidable violation of the rules of basketball – which is a non-contact sport – and thus as unlawful. This consideration of the court of first instance should not be questioned even if we take into account the fact that the accused was, at that time, a 16-years old schoolboy and the incident happened during a lesson of physical education."

England

It is typical for the British judicial practice to consider the issue of legal liability of sports participants for sport-related injuries primarily within the confines of negligent conduct. Any intentional infliction of an injury in sport automatically leads to a claim for damages.[59] Such claim is thus based on the assertion that the injury was caused by deliberate use of force to which the victim did not consent. However, it is emphasised that such type of claims is rather exceptional considering that it is necessary to prove the intention. [60] As regards negligence, the British judicial practice has based its considerations on the duty of reasonable care owed by anyone towards their neighbours under any circumstances while taking into account the specifics of the sport. In other words, negligent conduct which is, in general, sufficient to establish breach of duty to exercise reasonable care, may not suffice to establish a negligent tort in sport. The British legal doctrine distinguishes the following groups of cases concerning sports-related injuries.[61]

a) acceptance of the risks connected with the heat of the game

In this connection, it is argued that the injured sports participant is deemed to have accepted the risks of injuries caused by incidents that are usual in this sport[62]. This includes errors of judgement, especially in the sports where the decisions must be made and the sports skills must be applied under extreme physical stress. In Agar v Canning[63], a case from Canada, it was stated that: "The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse." On this basis, it was held in McComiskey v McDermont[64] that the standard of care owed by a rally driver toward his navigator should be such which is to be reasonably expected from a driver who uses his best efforts to win a motorcar rally. It should be, of course, taken into account by the court that the decisions made by the participants under such circumstances were made in the state of "thrill and excitement" of the rally.

b) Condon v Basi[65]

Condon v Basi is considered a landmark decision and is often discussed separately by the legal literature for its extraordinary significance. In Condon v Basi, a football player was found liable for breaking the leg of his opponent during

[59] See also: Lewis, A. – Taylor, J.: Sport: Law and Practice, Butterworths, LexisNexis, 2003, p. 1038.
[60] See also, for example: Lewis v Brookshow (1970), 120, NLJ 413.
[61] This classification is included in: Lewis, A. – Taylor, J.: Sport: Law and Practice, Butterworths, LexisNexis, 2003, p. 1039.
[62] See also, for example: *Clarke v Earl of Dunraven, The Satanita (1897) AC 59 or Headcorn Parachute Club Ltd v Pond, QBD Transcript, 11 January 1995 (Alliott J).*
[63] See also: (1965) 54 WWR 302 – 304, further *St. Laureat v Bartley (1998) 127 Man R (2d) 121.*
[64] See also: (1974) IR 75. Further, for example: *Stratton v Hughes, Cumberland Sporting Car Club Ltd & RAC Motor Sports Association Ltd (17 March 1998).*
[65] (1985) 1 WLR 866.

a tackle. The Court of Appeal, once again, emphasised the specific circumstances of the football match when defining the special consequences of the general duty to exercise reasonable care and made clear that, under such circumstances, it would be more advisable to determine whether the defendant exercised due care under all circumstances than to examine whether it should be presumed that the plaintiff consented (or not) to the manner in which the defendant acted in order to excuse the lack of care of the defendant. In other words, the possible consent (meaning the acceptance of certain risks, namely such risks that are inherent in the game and injuries which are usual for the game) affects the actual consequences of the duty to exercise reasonable care and does not really provide a possible defence for the alleged violation of such duty. A sports participant is liable only to such extent as to refrain from inflicting injuries to his opponent by exercising reasonable care and the standard of such reasonable care depends on all of the circumstances of the case, one of them being the fact that the participants contend with others who are, as the "reasonable sports persons", expected to asses and accept the risks of injury occurring during the normal course of the game. Therefore, if a participant exceeds the normal course of the game, the acceptance of the risk of injury by his opponents is less likely to be expected. Under such circumstances, it is more likely that the offending contestant will be found liable. This was the case of Mr. Basi who was held liable for Mr. Condon's broken leg because his sliding tackle was adjudged to constitute "serious foul play" and to have been made in a reckless and dangerous manner (albeit without malicious intent) and to have been worthy of a sending off.

c) rules of the game

The British legal theory points out[66] that it follows from Condon v Basi that, in contact sports such as football, rugby etc., liability will be almost impossible to establish unless the conduct of the defendant lies beyond the rules of the game. For example, in Leatherland v Edwards [67] , the defendant was found liable for negligence committed during a match of floorball. He was found guilty of committing a serious violation of the rules by raising his hockey stick above his waist. The Court of Appeal in Condon v Basi actually seems to argue that violation of the rules is in fact a necessary, albeit not necessarily sufficient condition of liability. Once again, this is no "speciality" of sports-related cases. In many spheres of human activity, the courts regularly decide that the rules and criteria set out by professional bodies serve as a good guideline for the determination of the reasonable conduct which is expected from those who perform their activity in the spheres of activity regulated by such rules.

At the same time, it is however, pointed out that the violation of the "laws of the game" should not necessarily suffice to establish liability in the legal sense[68]. The duty owed by a sports participant aims at avoiding those risks of injury that are not presumed to have been accepted by his co-participants by their participation in the game. The law cannot confine its own presumption that the sports participants assume certain risks only to the risks of injury caused by actions which are entirely within the rules of a game. If its position were opposite, it would have to be expected that injuries caused by foul play would result, in one way or another, in legal liability with such frequency which would be inacceptable for the nature of sport. For this reason, foul play is regarded by the British legal theory and judicial practice as an ("to a certain extent") integral part of the game or as a "playing culture" and as something which must be accepted by the participants. Nobody of sound mind believes that the duty of care owed by one participant to another should extend to the duty to never commit any foul. However, a line must be drawn beyond which the risk of injury should not be accepted. It is impossible to determine where

[66] See also: Lewis, A. – Taylor, J. : Sport : Law and Practice, Butterworths, LexisNexis, 2003, p. 1040.

[67] QBD Transcript, 28 October. 1998.

[68] This opinion is, in principle, in line with the above described views of the German and Austrian courts which, in this connection, refer to minor (negligible) violation of the rules.

exactly this line should be drawn without taking into account the specific circumstances of a case. All the circumstances of a specific case will have to be considered. However, the British judicial practice suggests that, in a game with great physical exertion (such as in football and rugby), it will be possible to establish the violation of the duty of reasonable care by a participant thus finding him liable for the injury caused to his opponent only if he commits an "especially ugly foul" consisting in manifestly condemnable behaviour.

d) unreasonable conduct

Striking a blow to an opponent is a necessary and an integral part of some sports (for example in box); some opine that, under such circumstances, no claim comes into question with regard to such injuries, at least where the injury was caused in accordance with the rules of the sport. A participant in such sport is deemed to have accepted the risks which his opponent cannot be expected to avoid. The concept of conduct which is "absolutely unreasonable considering the circumstances" is thus applied to determine the nature and extent of the liability of a sports participant to his opponents and his fellow participants. Its main purpose can be described as follow: the more a sports participant goes beyond the rules of the game, the more likely it will be held that the risk of the act committed by the sports participant cannot be deemed to have been accepted by his opponent as an integral part of the game or playing culture. And the less likely will the injury of the player be regarded to have been caused in a normal accident during the game thus constituting no breach of duty of reasonable care. As regards the competitive sports (in which incidents may occur very quickly and decisions are made in the "thrill and excitement" of the game), practical experience suggests that the courts will not determine that a sports participant is liable for an injury unless he acts in manifest breach of the rules (in a deliberate, reckless or at least too risky manner). In Caldwell v Maguire, Lord Justice Tuckey pointed out, once again, that while each participant in a lawful sporting contest owes to every other participant a duty of care, the extent of such duty can be simply characterised as "to exercise all care that is objectively reasonable in the prevailing circumstances for the avoidance of injury to such co-participants…"[69]

In this connection, it is possible to mention Elliot v Saunders.[70] In this case, Paul Elliot, then of Chelsea, was not able to establish that Dean Saunders, then of Liverpool, acted with such lack of care as to be in breach of his duty to exercise reasonable care under all relevant circumstances when his tackle severed crucial ligaments of the claimant. In this decision, Judge Drake seemed to recognise that, in order for the claimant to be successful with this claim under such circumstances, he would have to establish that the defendant was guilty of dangerous and reckless play. He further accepted the evidence of the defendant that he had raised his feet at the last moment of the tackle in an instinctive attempt to avoid probable injury to himself. According to the experienced view of the judge, such instinctive reaction was not of the kind to give rise to legal liability. However, in the more recent case Condon v Basi, Judge Drake disagreed with the judge's obiter dicta statement that a higher standard of care may be required from, say for example, a Premier League player than from a player who participates in a local football match. The required standard of care is the same in both cases, even if – as he tried to underline - the nature and level of the match in question (and also the level of skills expected from the players) would be considered by the court as a part of the actual context in which such standard should be applied.

France

At first, let us analyse in more detail one of the more recent decisions of the French courts which illustrates the development of the French judicial practice in the matters regarding civil liability of sports participants for sports-related injuries and its theoretical foundations as it encompasses virtually all the conclusions of the

[69] (2001) EWCA Civ 1045.
[70] QB Transcript, 10 June 1994.

French legal theory and judicial practice on this issue. Subsequently, the conclusions and theoretical bases following from the earlier court decisions will be discussed very briefly. The above mentioned decision is the ruling of the Civil Chamber of the Court of Cassation from 13 January 2005. In this case, M. X. was injured when participating in a friendly football match and was hit into the head by a ball which had been kicked out by M. Y., a goal-keeper of the opponent's team. The claimant argued as follows:

1) a tort exists where a goal-keeper kicks the ball with excessive force in the direction of the head of a player who is standing nearby regardless of the fact that the referee did not consider such conduct to be in violation of the rules of the game;

2) violation of the law exists where a footballer kicks out the ball with excessive force thus creating abnormal risk; in this case, M. X. pointed out in his statement to the specific nature of the tournament of the teams consisting of six players in which two teams play on one half of a football pitch, he further underlined the extraordinary force of the kick with which the goal-keeper (M. Y.) sent the ball against him regardless of the above described circumstances of this tournament. The claimant further argued that the trial judges, among other things, expressly established the roughness of the game and great force of the kick performed by M. Y.; Even in the absence of any violation of the law by M. Y. (i.e. by playing the ball with great force which is normal in football and as such does not constitute any violation of the law) as established by the court, the court should consider whether the great force of the kick of the ball sent towards M. X. on a smaller playground does not constitute violation of the law as claimed by the victim due to the extraordinary circumstances of the match played by teams consisting of six players.

This part of the complaint was not found justified, the Court of Cassation pointed out that the incident occurred when M. X. was sent by his team towards the goal of the opponent at the beginning of the match, thus compelling the goal-keeper (M. Y.) to leave his penalty area in order to get rid of the ball by kicking it off. Without M. Y. wanting to hit M. X., the ball hit him in the face. M. X. was trying in vain to cover his face, was hit in the temples and collapsed. M. X. acknowledges that M. Y. did not mean to cause him injury; that it belongs to the spirit of the game that the goal-keeper as well as any other player in different phases of the game, and in particular, a forward, such as M. X., when trying to score, uses his all strength to set the ball into the fastest motion possible; that M. Y., in his complicated position in the game, had to play the ball by kicking it off with great force before M. X. could get hold of it or prevent him from kicking the ball off. The referee of the match recorded that the accident was an "incident in the game", i. e. that the incident occurred in the absence of any violation of the rules or spirit of the game and was also not caused by any clumsiness of the player and its sole cause was misfortune. Based on these circumstances, the Court of Cassation made a conclusion that M. Y. did not commit any misconduct which is typical for the violation of the rules of the game and which could make him liable for his conduct.

Another part of the complaint was based on the following arguments:

1) in sport, acceptance of the risk by the victim constitutes a ground for the exclusion of liability only if the damage was caused during a competition (i.e. in an official match); the Court of Appeal violated the first paragraph of Article 1384 of the French Civil Code when establishing that M. X. accepted the risks inherent in the game, even if he was, after all, sure that the match was organised on a purely friendly basis, as a recreational activity;

2) acceptance of the risk by the victim does not exclude liability if such risks result in damage of such seriousness which could not have been foreseen; the Court of Appeal even demonstrated its ignorance of the first paragraph of Article 1384 of the French Civil Code when establishing that the player accepted the risks after expressly stating that the player could have not foreseen that

he would suffer paralysis of one part of his body by participating in a friendly match;

3) the concept of acceptance of risks is limited only to damage occurring during a sporting competition, it does not apply to damage occurring during a friendly match or training;

4) the concept of acceptance of risks is limited only to the risks which are normally foreseeable considering the nature of the activity in question; the risk of paralysis of one half of the body does not constitute a normal risk; in this case, it is clear that M. X., who was hit in the head by a ball which had been kicked off with excessive force by M. Y., suffered brain haemorrhage and consequent paralysis of one half of his body;

When considering the above mentioned arguments of the complainant, the Court of Cassation agreed with the arguments of the Court of Appeal which had dismissed the claim on the ground that, during a contact sport, such as football, whether played as a friendly or an official match, each of the players uses the ball but none of them controls it and navigates it as an individual. Action consisting in kicking the ball off in order to pass it to another player or towards a goal does not make the player who is in possession of the ball for a very short moment the "custodian" of the ball. A player who is in possession of the ball, is, in fact, forced either to pass the ball immediately to another player or to face attacks of his opponents who try to prevent him from controlling and navigating the ball, so he has the ball in his possession for only a very short moment in which he is able to control the ball which is otherwise permanently being played.

This decision encompasses various conclusions typical for the trends in legislation, legal theory and judicial practice concerning legal liability of sports participants for sports-related injuries, such as the concept of acceptance of risks and concept of common custody (or common control) as concepts limiting liability of sports participants for sports-related injuries.[71] However, the concept of acceptance of risks has been, in fact, received with criticism. When applying this concept, the French courts require (among other things) that the following conditions be met: 1) the danger or risk must be real, 2) the risk must be known to the sports participant in all of its aspects before he engages in this sporting activity and 3) such risk must be accepted knowingly.[72] Although it is sometimes pointed out that the concept of "acceptance of risks" has found its ideal field of application in sport despite being still very disputable,[73] the truth is that the judicial practice applies this concept selectively since it is obviously rather dangerous for the victim who runs the risk of not being able to receive compensation for the damage caused to him and also for the society because its application could lead to unpredictable decisions in favour of the originator of the damage. The courts, therefore, always consider the specific circumstances of a case and apply the concept of acceptance of risk only with great restraint.

The application of this concept is considered to be disputable for two reasons: 1) it has never been possible to reach unanimity on whether the acceptance of risk concerns only the incidents that occur during the game or sport or whether it also applies to incidents that happen outside of the game. It is possible to quote decisions of the French Courts of Appeal which favoured the first possibility but also those decisions which preferred the second one. In order to determine which position prevails, it is necessary to follow the decisions of the Court of Cassation. However, some of its decisions are contradictory, even if passed shortly after one

[71] See also: Veaux, D.: Le droit du sport, les responsabilités, Paris, 1987, Chapter: Sport et loisir, p. 7. The concept of acceptance of sports risks is an usual and established concept in theory of sports law, the concept of common custody (common control) is based on the provisions of the French Civil Code.

[72] See also: Cass. 2 civ. 21 February 1979, D. 1979, inf. rap. 346.

[73] See also: Honorat, J.: L´idée d´acceptation des risques dans la responsabilité civile, L. G. D.J., 1969.

another.[74] On the other hand, it is pointed out that the concept of acceptance of risk cannot be applied to every kind of sports. Sufficient number of cases makes it possible to compile an almost complete list of sports to which this concept may be applied. There are only a few contradictions in the published decisions, including the cases where the decision of the Court of Cassation has not established the relevant judicial practice. Although the list of the sports is rather accurate, the line between such sports in which a participant accepts risks (liability only in case of established culpability if the injury occurs as a result of mutual contact of the participants) and those not covered by the concept of acceptance of risk (full liability in case of harm caused by a thing) is very unstable.[75]

The concept of common control is based on more solid foundations than the concept of acceptance of risks. It is absolutely reasonable to presume that if a thing is, at the same time, under a common control of several persons, none of the participants may claim full legal liability of the co-controllers if he suffers harm caused by this thing. If it was the case it would be necessary to find the injured participant partly liable as well since he was also one of the co-controllers. Therefore, rather than reducing the amount of compensation proportionally to the share of the victim in the control over a commonly controlled thing (this share is actually almost impossible to determine), the judicial practice inclines to the opinion that it is impossible to determine the extent of liability for damage caused by a commonly controlled thing. The co-controllers may not claim liability against each other, they may only claim liability for established culpability of an individual.[76] The result of the consideration of the common control by the court is the same as in case where it considers the concept of acceptance of risks, however, in this case, it is not necessary to differentiate whether the harm was caused during the game or outside the game. Nevertheless, the conditions and the consequent application of this concept are not always the same as with the other concept. In sports-related cases, its application most often concerns such sports in which players fight for a certain object or they pass it from one player to another, for example, a ball.

We have already given examples of sports in which this principle clearly applies and in which the players fight for the same object or they pass it from one player to another. The court in Caen formulated very conclusive criteria in a case concerning a football match in which a goal-keeper injured another player in the face when he kicked off the ball: "a player does not exercise control over a thing held in his hand if the rules of the game allow its retention during an attack of other players or require its immediate passing to another player or in a certain direction" [77]. Common control of a ball is thus acknowledged in football [78], rugby, volleyball, basketball and tennis [79], however, common control cannot be exercised over a golf ball since it is not played away immediately and is, for a certain time, under a control of one player who strikes it.[80]

III. Judicial decisions on civil liability of sports participants in the Czech Republic

[74] In the decision from 1969, it is explicitly stated that it is not possible to invoke the concept of acceptance of risks in case where the accident occurred during the warm-up of the horses which were preparing for a harness race and not during the race itself (Ass. civ. II, 12 June 1969, Bull. civ. II. n. 210; J.C.P. 69, éd. G, IV. 201), whereas in one of the more recent decisions, it was held that the risks may have been accepted by small children injured during a sleigh ride who were only enjoying themselves and were not probably participating in any contest. This decision is very surprising since, in this case, the Court of Cassation could have dismissed the concept of acceptance of risks by reference to the young age of the "sports participants" (Cass. civ. II, 13 November 1981 : D. S. 1982, inf. rap. 360, comm. C. Larroumet).

[75] See also: Veaux, D.: Le droit du sport, les responsabilités, Paris, 1987, Chapter: Sport et loisir, p. 11.

[76] See also: Cass. civ. II, 15 June 1983 : Bull. civ., no. 127.

[77] See also: Caen 20 May 1969 : J.C.P. 69, éd. G, II, 16040, note M. A.; Gaz. Pal. 1969, 2, 171.

[78] See also: Riom 30 November 1931 : D.P. 1932, 2, 81.

[79] See also: Cass. civ. II, 20 November 1968 : Bull. civ. II, n. 277.

[80] See also: Cass. civ. II, 21 February 1979 : Bull. civ. II, n. 58.

There are only three decisions of the Czech courts from the earlier times that dealt with the issue of civil liability of sports participants. Interestingly, all of them concern injuries sustained during the practice of football:

The chronologically first decision is the ruling of the Supreme Court of the Czechoslovak Republic from 26 January 1954, file. no. Cz 486/53.[81] Even if this decision must be analysed from the perspective of the current political context and the ideological undertone (which is a product of its time) must be put aside, it still includes legal arguments which may be applied even today, particularly, the attempt to define "negligence" (meaning contributory negligence in this case) of a sports participant in relation to an injury caused to him.

The decision primarily refers to Section 1 of Act No. 187/1949 Coll., on the role of the State in physical education and sport and to Section § 1 of Act No. 71/1952 Coll., on organisation of physical education and sport, according to which physical education and sport should, in the first place, aim to maintain and improve the health of people, to enhance their physical fitness and defence capacity as well as their working efficiency and to educate the people to make them ready to defend their homeland and its socialistic regime. Section 1 of Act No. 115/2001 Coll., on support of sports, which is applicable today, defines the role of sport in the society as a community benefiting activity and lays down the duties of the departments of state and other administrative authorities and the competence of local governments concerning support of sports. It may seem that such introductory provisions are only declaratory without any actual legal relevance but this is not true. Many concepts formulated by the legal theory which try to define the limits of immunity of sports participant for sports-related injuries argue that the sport must be authorised by the State (or must not be forbidden), thus constituting an activity which is directly or indirectly (by its regulation in legislation, by financial subsidies etc.) supported by the State as an activity beneficial for the community.

The decision points out that football, by its nature, aims to enhance, in particular, dexterity and rapidity, among other physical qualities, and such qualities can be developed only if the player puts his best effort into the game; on the other hand, the moral aspect of the sport requires that he must comply with the rules of the game while doing so.[82] The decision includes an interesting choice of words pointing out that: "football would become largely pointless if the players were obliged to move carefully and slowly around the individuals of whom the referee possibly knows to be violating the rules of the game." The essence of the arguments of the decision can be found in the following conclusion: "rapid movement of the players during this game does not, in itself, constitute negligence, on the contrary, it is a requirement and a useful element of this sport. Negligence may exist only if the movement of the player is unreasonably fast in situations where he is exposed to risks which are not inherent in the nature of the game. A conduct may not be classified as negligent if the player cannot foresee that the opponent will intentionally breach the rules of the game. However, negligence would exist where the player sees an opponent holding out his leg in order to knock the running player down and the player still runs fast into it."

The above described decision does not aspire to address the issue in its complexity or to define conditions for liability of a sports participant for sports injury, it only applies a complex of opinions to this specific case, dominated by the conviction on the importance of the adherence to a sports rule when trying to define the limits of the liability of a sports participant. This trend has been gaining strong popularity in the judicial practice of the Czech courts in civil matters.

[81] Published in the Official Journal of the Supreme Court, 1954, Issue 5, pp. 86 – 87, under serial number 88.

[82] Compliance of a conduct of a sports participant with the rules of the sport is also one of the most applied conditions when considering immunity of sports participants for sports-related injuries. This issue will be addressed below in more detail.

The second relevant decision is the ruling of the Supreme Court of the Czechoslovak Republic from 29 October 1962, file no. 5 Cz 38/1962[83] – this decision deals in more detail with the definition of the conditions for and limits of the liability of a sports participant for an injury caused to his fellow participant. The decision was published with the following part of the statement of the reasons summarising its conclusions: "Liability of a player for the damage caused to the health of his opponent during a football match is deduced from the liability of a perpetrator for the damage caused to the victim by his intentional or negligent violation of his obligation or another legal duty. It is based on the established facts of the case, i.e. whether or not the injury occurred during the game and whether or not the conduct of the perpetrator was allowed or not allowed (forbidden) by the rules of the game and whether or not the intentional or negligent conduct was (un)reasonable. It is also not irrelevant whether the perpetrator is an experienced player of the game (e.g. a long-time player)."

Under the current state of law, the conclusions of this decision may be applied to other cases only partially. However, the conclusions contained in the legal summary of the decision are still valid and they are largely in line with the trend accepted by the legal theory which defines the situations in which a sports participant is not liable for injury caused by him during a sporting activity. As opposed to the more recent decision, file. no. R 16/80, which positively defines conditions under which a player is liable for the damage caused to his opponent, this decision tries to outlines the conditions under which liability of sports participants for sports-related injuries does not exist. Once again, it underlines the necessity of establishing whether the conduct of the sports participant was in compliance with the sports rules or not. However, it is also necessary to establish whether the injury occurred during the game, i.e. during the practice of the sport. In this regard, these criteria are objective. Apart from that, the decision points out that also culpable violation of a legal duty, whether intentional or negligent, must be established.

The summary of the legal conclusions of the decision also stresses the necessity of determining whether the intentional or negligent conduct was reasonable, however, in this respect, it goes somewhat beyond the content of the decision as this criterion has, in fact, not been subject to any analysis in the decision itself, although it would be indeed worthy of more extensive analysis considering its significance. As regards the requirement to adhere to the rules of the game, the decision includes an interesting reference stating that in the previous decisions of the lower courts certain sports participants were found liable (albeit for an accident) even where the existing disciplinary bodies of the sport had decided that the conduct of the sports participants was not in conflict with the sports rules. In this respect, the decision underlines that such approach does not help the practice of collective sports and ignores the role of the referees and disciplinary committees of the Czechoslovak Association of Physical Education.

The ruling of the Municipal Court in Prague from 17 May 1978, file no. 10 Co 190/76[84] may be regarded (in the absence of any Czech civil law experts dealing with this legal issue) as the fundamental decision which serves as a theoretical basis for the current decision-making of the Czech courts when determining on the liability of sports participants for injuries sustained during the practice of a sporting activity. This decision comes to the conclusion that the violation of the rules of a sporting game consisting in playing the game in a manner not allowed (forbidden) by the rules must be qualified as action which is in conflict with the duty to act so as to prevent damages to health (Section 415 of the Civil Code.). [85] Consequently, it constitutes violation of a legal duty which gives rise to

[83] Published in the Official Journal of court decisions and opinions, 1963, under serial no. 15.

[84] Published in the Official Journal of court decisions and opinions, 1980, under serial no. 16.

[85] Under Section 415 of the Civil Code, anyone must act so as to avoid damages to health, property, nature and environment.

liability for damage (Section 420 of the Civil Code)[86]

In this case, the plaintiff claimed damages for the harm to health caused to him by the defendant during a football match by an act of foul play. The above mentioned decision was analysed by J. Prusák, a Czechoslovak legal expert (now of Slovak citizenship) and we can use his analysis as a basis for further reflections. The following circumstances of the case and the reasoning of the above mentioned decision of the Court of Appeal are particularly worth mentioning: 1) the liability of a player for damage sustained by his opponent on the playground cannot be in principle excluded (Section 420 (1) of the Civil Code), 2) the rules of a sport are no legal rules, but violation of such rules by the players constitutes breach of their duty to prevent threatening damages, i.e. the general duty to act so as to avoid damages to health, property and other values as stated in Section 415 of the Civil Code, 3) the culpable unlawful action was the result of an act of foul play which was in conflict with the rules of the game; as regards the degree of culpability, it is also necessary to exclude any possible conditional intent because the injury was caused in the heat of the game, so the unlawful act was caused through negligence, 4) the causality between the culpable action and the damage objectively exists as no actual bodily harm (damage) would occur if the player did not play in a manner forbidden by the rules of the game.

Three conclusions can be drawn from the above analysis: 1) the provision of the applicable legal regulation which imposes on individuals the general duty to prevent damages performs, at the same time, the functions of special damage prevention (and vice versa), 2) the principle of alterum non laedere (Section 415 of the Civil Code) is not a provision of a non-normative nature, 3) the principle of suum cuique tribuere follows from the negation of the duty to prevent damage, from the negation of the imperative: "let anyone act so as to avoid damages to health and property", meaning "to each his own" or "to each what he deserves" since the victim deserves compensation; it follows that anyone causing damage is obliged to compensate it even if such perpetrator only violates the provision of Section 415 of the Civil Code on damage prevention which is, however, clearly a provision of a normative nature.[87]

It is possible to agree with J. Prusák also in that respect that most of the concepts of sports legal theory and judicial practice generally accepts full liability of a sports participant in case of culpable unlawful conduct. As soon as this abstract concept is applied to the actual conditions of the applicable law and to the actual situations in sport, the opinions become to differ significantly. On the one hand, there are proponents of the so-called law of sport who prefer the idea of a special legal regime applied to sports participant which is based on their legal immunity. According to such concepts, exclusion of legal liability of sports participants is based, in particular, on the following reasons: 1) violation of an interest protected by the law occurred in a sports field during the course of a sporting competition, 2) a sports participant is not liable for unlawful consequence which occurred during a sporting activity if the State authorised (or did not forbidden) the practice of the sport and 3) unlawful consequence occurred without any violation of the rules of the sport which may not be and, in fact, are not in conflict with the legal regulation.

In the 25 years following the publication of the above mentioned decision, the judicial practice did not have the opportunity to give opinion on the issue of liability in sport. The current approach of the courts is represented by the decisions of the Supreme Court of the Czech Republic which, as opposed to the earlier decisions, do not concern any collective sports

[86] Under Section 420 (1) of the Civil Code, everyone shall be liable for damage caused by violating a legal duty.

[87] Prusák, J.: Šport a právo (Úvod do dejín, teórie a praxe právnej zodpovednosti v športe), Šport, slovenské telovýchovné vydavateľstvo Bratislava, 1984, pp. 216 – 217 or Prusák, J.: Vzťah medzi športovým pravidlom a pravidlom socialistického spolužitia a kritické stanovisko k tzv. športovému právu, Právny Obzor, 67, 1984, Issue 9, p. 866.

(football) but injuries sustained during the practice of karate.

This decision is the ruling of the Supreme Court of the Czech Republic from 17 December 2003, file no. 25 Cdo 1960/2002[88], in which the Supreme Court, for the first time in the Czech history, commented on the liability of sports participants for injury caused during the practice of an individual sport. The circumstances of the case were described in the petition of the plaintiff in which he claimed compensation for pain and for reduced social opportunities pointing out to the fact that the plaintiff, during a match of the first league of the Czech Karate Association, suffered an injury with permanent consequences caused by an action of the defendant in violation of the rules of karate.

The Court of Appeal came to the conclusion that, in the present case, the defendant is liable for damage under Section 420 (1) of the Civil Code as the violation of the rules of karate must be qualified as an action which is at variance with the duty to act so as to avoid damages to health (Section 415 of the Civil Code).

In this connection, the Supreme Court of the Czech Republic pointed out that a hit violating the rules of karate is punishable not only by the rules of a karate match but it also constitutes a breach of the duty to prevent damages as set out in Section 415 of the Civil Code. Therefore, one of the conditions exists to establish the liability of the defendant (karate fighter) for the damage thus caused to the health of the plaintiff within the meaning of Section 420 (1) of the Civil Code, i. e. the violation of a legal duty. Considering the existence of all other conditions for general liability for damage on the basis of presumed culpability in this case, i.e. existence of damage and causality between the violation of a legal duty and the damage, the defendant is liable for the damage sustained by the plaintiff. In this connection, the Supreme Court referred to the decision which had been published in the Official Journal of court decisions and opinions and deals with the liability of a football player for the damage caused to another player by an action violating the established rules of the game as this decision may be similarly applied to the liability of a participant of a professional karate match for the damage caused to another fighter by an action which violates the established rules of karate (R 16/80).

The above described ruling of the Supreme Court is a decision which deals, after a very long pause, with the issue of liability of a sports participant for damage caused by a sports injury. Considering the fact that the decision was given 25 years after the publication of the previous decision on the same issue, it was, in the first place, interesting to analyse whether the new judicial decisions rendered after the overall social changes that had occurred in connection with the Velvet Revolution in 1989 depart in any way from the previous judicial decisions or if they bring any new knowledge to the theoretical base of the issue in question. However, the decision itself contains virtually no legal arguments, its significance lies in the fact that it expressly states that the conclusions of the existing judicial decisions may be also applied to the current cases while referring to the most recently published decision on the sports injury caused by a player during a sport match to another player. However, the conclusions of this decision may be, to a certain extent, generalised.

The decision states that violation of the sports rules also constitutes violation of the duty to prevent damages as set out in Section 415 of the Civil Code. However, it is necessary to make a few additional comments in order to properly explain this fundamental premise because, at first glance, it seems that if no violation of a sports rule occurs, there may also be no legal liability for any possible damage. In connection with the reflections on the extent of possible criminal and civil liability of sports participant for sports-related injuries, defences (or, under the Czech law, the so-called circumstances excluding unlawfulness of an action) are discussed very often. Moreover, adherence to a sports rule (or

[88] Published in the Collection of the decisions and opinions of the Supreme Court on civil law matters, C. H. Beck, 2004, under serial no. C 2352.

absence of violation thereof) is often included among the existing grounds excluding legal liability of sports participants referred to by the relevant theoretical concepts. Some of these theoretical bases for the exclusion of liability of sports participants use the sports rules as a criterion in determining what is lawful during the practice of a sports competition and what is unlawful within the meaning of the positive law based on the adherence to or violation of the sports rules, thus defining another circumstance excluding liability, so to speak, different from the existing circumstances. The concepts which are based on the position that legal liability may not arise in the absence of violation of the rules of a sport competition, argue, inter alia, that 1) the rules of a sport may not be in conflict with the legal rules, 2) the rules of a sport imply also the principles of the so-called general imperative of injury prevention, 3) a sports participant proceeds always in accordance with the sports rules except where the referee or another body decides otherwise.

The adherence to a sports rule may not, in itself, be the reason for the exclusion of the legal liability in sport, in particular because: 1) a sports rule, as a rule lacking any nature of a generally binding rule, is not under any immediate control exercised by the State as regards its compliance or possible variance with the applicable law or the imperative of injury prevention, 2) the rules of a sports competition are usually laid down by the sports associations having the legal form of associations of citizens incorporated under Act No. 83/1990 Coll. on association of citizens and the State, in its role in which it engages in the incorporation of an association of citizens (Section 7 - Section 8 of Act No. 83/1990 Coll.), does not review the content of such rules or their compliance with the law (and it may not, as a matter of fact), 3) according to the applicable law, formation of new kinds of sports and content of their rules is not based on any authorisation principle.

The indefensibility of the opinion stating that the adherence to a sports rule automatically leads to the exclusion of the legal liability for injury sustained in sport can be easily demonstrated on the following two examples: 1) in pankration, a sport practised in Ancient Greece, very substantial interferences with physical integrity were allowed and the consequences of such interference were not in any way punishable by the law. Similarly, if in any of the existing sports or in any of the sports to be created in the future injuries or similar harm to health were acceptable, the compliance of such a sports rule with the law and the consequent exclusion of liability for damage would be extremely difficult to substantiate, 2) the experience acquired over many years shows that sports participants master the „art“ of exercising a sporting activity in a manner which cannot be in accordance with the law and the general clause on damage prevention as set out in Section 415 of the Civil Code while adhering to the sports rules (regardless of the imperative to prevent accidents implied in such rules). For example, a sports participant may practise the sport in compliance with its rules while systematically applying his physical force to the parts of his opponent’s body of which he is aware to have been injured recently and have not been completely cured yet.

Once again, it is possible to agree with the conclusions made by Prusák stating that: 1) the courts obey the laws and other legal regulations in their decision-making, so they also determine on admissibility or inadmissibility of a conduct of a sports participant according to the applicable law when they decide on the compensation of damage to health sustained during a sports activity, 2) under the applicable law, the court is not bound by the decision of a referee or any other sport regulatory body (disciplinary committee etc.); 3) in order for the court to make the necessary conclusions on the existence or absence of the crucial circumstances of the case, the court must: a) identify the sports rule and the form of its usual application (determination of its content, defined conduct of the sports participants and the imperative to prevent accidents and exercise necessary caution), b) examine the relation of the sports rule to the applicable law as regards its accordance or conflict with a legal rule, c) clarify the question whether the harm to health occurred

while practising the game in a manner which is allowed by the rules or not.[89]

So even if the court proceeds as described above when deciding on the claim for damage compensation, it may come to the conclusion (albeit exceptionally) that the sports participant violated a legal rule and is culpable and responsible for the damage caused even if he did not violate any sports rule. Playing the game in a manner which is in compliance with its rules may not necessarily constitute a reason which excludes unlawfulness and culpability from the point of view of the rules of fair play which require from sports participants more than just the usual standard of care. In this connection, the literature describes a case of a rugby game where a disciplinary committee came to the conclusion that the tackle made by a sports participant was not forbidden by the sports rule, but the participant was held liable on the ground that he had shown "lack of sportsmanship and necessary caution which are required under such circumstances".[90]

[89] See also: Prusák, J.: Vzťah medzi športovým pravidlom a pravidlom socialistického spolužitia a kritické stanovisko k tzv. športovému právu, Právny Obzor, 67, 1984, Issue 9, pp. 870 - 875.
[90] Sawicki, J.: Ryzyko w sporcie. Warszawa, 1968, p. 32.