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*Supreme Court of the Czech Republic Europe*

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## **Abstract**

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## **Keywords**

criminal liability in sports, Czech Republic sports law, sports injuries, criminal liability

## **Disciplines**

Entertainment, Arts, and Sports Law

## CRIMINAL LIABILITY OF SPORTS PARTICIPANTS FOR SPORTS-RELATED INJURIES IN THE CZECH REPUBLIC

MICHAL KRÁLÍK\*

This discussion of the liability of sports participants for sports-related injuries in the Czech Republic deals with the issue of criminal liability. The author has published a matching article on civil liability.

### LEGAL LITERATURE ON THE CRIMINAL LIABILITY OF SPORTS PARTICIPANTS IN THE CZECH REPUBLIC

The first and, in fact, the only Czech author to address the issue of sports law and the criminal liability of sports participants for sports-related injuries in a more systematic way (in the late seventies and early eighties of the twentieth century) was Jiří Hora, who summarized his views in one of his papers.<sup>1</sup> J Hora introduces the following basic legal principles as the starting points for his reflections on the liability of sports participants for sports-related injuries:

- 1) An exercise of a sporting activity is based on binding and internationally – agreed rules of the sport, or, in some cases, on customs;
- 2) The essence of a sporting activity is a constant movement, frantic activity of the opponents fighting for victory;
- 3) A sporting activity aims to enhance physical fitness and health of the participants and plays an important role in the development of moral qualities of a man (the principle of fair play);
- 4) The government authorities do not intervene in sport by authorising individual sporting activities. They are, however, entitled to prohibit any kind of sports; and
- 5) Participation in a sporting activity is voluntary.

In analysing the issue of the liability of sports participants for sports-related injuries, Hora attempts to find the solution in the so-called *material aspects* of a crime, ie in the degree of danger to society of the conduct in question. Hora believes that it is possible to apply this criterion, as it allows us to consider the specific nature of the sporting activities as being different from other branches of human activity. By analysing the material aspects of a crime, it is feasible to determine whether an act of a sports participant was malicious; whether the participant only pursued sporting goals or tried to harm his opponent; and whether the perpetrator complied with the rules of the game and similar aspects relating purely to sport. This method also aims to establish the extent of the ethical and legal liability of the perpetrator based on his status (which will be different in case of an athlete representing his country and in case of a person who does not participate in sport on the top level - mass sporting activities, competitive sporting activities). In concluding, Hora expressed his conviction that the legal

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<sup>1</sup> Hora, J: K otázce trestní odpovědnosti hráčů při sportovních úrazech, Acta Universitatis Carolinae Gymnica, Vol 15, 1979, Issue 1, p 15 et seq.

regulation of the issue in question will potentially be based on the legal concept of 'legitimate risk', that is, the principle under which criminal liability does not attach to a person who acts within the boundaries of the risk that is legitimate having regard to the needs of society.

The criminal legal theory of the first half of the twentieth century does not deal with the issue of legal liability for sports-related injuries. The criminal law textbook written by Professor Albert Milota did not address any aspects of the criminal law relating to sport even in the chapter dealing with defences or in the chapter discussing the crimes against 'life and body'.<sup>2</sup> The absence of any references to sporting activities in the relevant legal literature seems to reflect that it was unnecessary to analyse the potential liability attached to sports-related injuries. This illustrates a stark contrast with the legal development in other countries where the issue of criminal liability in sport started to become a regular subject of the relevant judicial decisions and legal literature as early as the beginning of the 20th century.<sup>3</sup>

Even the publication from the early fifties commenting on the General Part of the Criminal Code was silent on the exercise of a sporting activity in its part discussing the defences in criminal law.<sup>4</sup> It was not until the late fifties that the first references to sports in criminal law and crimes in sport<sup>5</sup> started to appear in the Czech criminal legal literature. The chapter dealing with the defences not specifically mentioned in the Criminal Code included a description of the legal concept in exercising 'legitimate activity'.<sup>6</sup> Identical conclusions of the same wording can be found in a university textbook on criminal law from 1969 which also referred to sports in connection with the exercise of a legitimate activity.<sup>7</sup>

A publication by Vladimír Solnař - *Základy trestní odpovědnosti* - was a shy, yet significant step forward in the development of the study dedicated to this issue in the Czech Republic. When discussing the defences, Solnař mentions sporting activities in connection with medical interventions. He says: 'a certain analogy can be found in dealing with the issue of the exercise of a sporting activity, if such sporting activity is allowed and the action does not breach any rule of the said sport and pursues a sporting goal.' When compared to the global development of academic debates on this issue, Solnař's ideas are not in any way innovative and the conditions of impunity for sport-related injuries (lawfulness of the sport, compliance with the rules of the sport and pursuit of sporting goals when exercising the sporting activity) defined by him are well-established conditions regularly used as arguments for such impunity. In the Czech theory of criminal law, Solnař's publication is probably the most 'in-depth' in terms of the attention paid to sports-related injuries and legal liability relating to those injuries even if the author discusses this issue in only five lines of his publication.<sup>8</sup>

A criminal law textbook from the seventies picks up where its predecessors from the late fifties and sixties of the 20th century left off and, once again, discusses the issue of liability in sport in an almost identical way in connection with the exercise of a legitimate activity, while containing none of the suggestions which appeared in Solnař's publication.<sup>9</sup> It is impossible to observe any significant changes relating to sports law even during the late eighties and early

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<sup>2</sup> See also: Milota, A: Učebnice obojího práva trestního platného v Československé republice. Právo hmotné, J Gusek, nakladatelství v Kroměříži, 1926, p 30 – 34, 243 – 264.

<sup>3</sup> See also, for example: Karding, E: Strafloसेवर्सätzliche Körperverletzungen bei Bewegungsspielen, Freiburg, 1902.

<sup>4</sup> See also, for example: Filipovský, J – Tolar, J – Dolenský, A: O obecné části trestního zákona, Orbis, Prague, 1951, p 76 – 80.

<sup>5</sup> We are still speaking of the 'standard' sporting activities, ie the liability for injuries caused during the exercise of a sporting activity, without addressing any other issues concerning the criminal activities connected with sport (eg bribery, corruption etc).

<sup>6</sup> See also: Československé trestní právo, svazek I, obecná část, Orbis, Prague, 1959, p 233.

<sup>7</sup> See also: Československé trestní právo, svazek I, obecná část. Druhé, částečně přepracované vydání, Orbis, Prague, 1969, p 143.

<sup>8</sup> See also: Solnař, V: Základy trestní odpovědnosti, Academia, Prague, 1972, p 111.

<sup>9</sup> See also: Československé trestní právo, svazek I, obecná část, Orbis, Prague, 1976, p 127.

nineties. A university textbook from 1994 discusses the pending issue in an almost identical manner as the previously published textbooks, while adding no new information to the debate.<sup>10</sup> Some changes in the approach to this issue can be detected in the late nineties. A textbook published by the Faculty of Law in Brno departs from the until-then uniform approach to sporting activities which were regarded as an exercise of a legitimate activity and links sport to the concept of legitimate risk (legitimate degree of danger). However, it only speaks of the existence of a risk in sport in one sentence without any further analysis of the issue. Another author from the Faculty of Law in Brno, Josef Kuchta, mentions sport in a publication discussing the risk in sports law. This book, once again, contains little in-depth analysis of the issue. Kuchta only indicates that there are various kinds of risk that are specific to a certain extent (while mentioning, among others, also the risk in sport) while stating that the general criteria applicable to the risk must be further modified when analysing those particular risks. Kuchta does not proceed to analyse sports – related risks.<sup>11</sup>

The most recent development in the legal literature has not provided significant assistance to unify the approach to this issue.<sup>12</sup> The Czech legal community is currently rather reluctant to accept the prosecution of sports-related injuries. The conclusions of an internet discussion on the Law and Economics Blog in 2007 are also critical to the possibility of the prosecuting sports participants.<sup>13</sup> Judge J Fastner expressed a similar view on the minimum involvement of criminal law in the relation in sport.<sup>14</sup> On the other hand, T Hrnčířík believes that the criminal liability of a sports participant may arise, in particular where the injury is caused by an especially reckless action, or by a deliberate action intended to cause injury.<sup>15</sup>

## CZECH REPUBLIC DECISIONS ON CRIMINAL LIABILITY OF SPORTS PARTICIPANTS

Throughout the entire 20th century, the courts of the Czech Republic (and also of former Czechoslovakia, to be precise) had not had any opportunity to give their opinion on the issue of criminal liability of sports participants for sports-related injuries. The absence of any judicial decisions concerning this issue had already been aptly described by Jiří Hora in the late seventies of the last century. Hora said that the highest courts had not as yet taken a stance on this issue.<sup>16</sup> The situation remained unchanged until the end of the 20th century and there was virtually no available Czech legal literature specifically dealing with the issue of criminal liability of sports participants.

The limits of criminal prosecution of sports participants for sports-related injuries were outlined by the following two recent decisions of the Supreme Court.

<sup>10</sup> See also: Novotný, O – Dolenský, A – Jelínek, J – Vanduchová, M: *Trestní právo hmotné. I obecná část. 2. přepracované vydání*, Codex, Prague, 1995, p 140.

<sup>11</sup> See also: Kuchta, J: *Riziko v pojetí kriminologickém a juristickém*, Brno, Masarykova univerzita, 1997, p 85.

<sup>12</sup> See also other publications of the author on the issue in question, for example: Králík, M: *Trestněprávní odpovědnost sportovců za sportovní úrazy (teoretický a doktrinální úvod do problematiky)*, *Trestní právo*, 2006, Issue 7 - 8, p 61- 72 (Part I), Issue 10, p 20 – 24 (Part II), Issue 11, p 18 – 24 (Part III), Issue 12, p 15 – 22 (Part IV). See more recent publications, eg: Králík, M: *Právní odpovědnost sportovců za sportovní úrazy*, in: *Kolektiv autorů. Otázky sportovního práva*. Prague: Ústav státu a práva, 2008, p. 25 – 59; Králík, M: *Právní odpovědnost ve sportu*, in: Kuklík, J – Hamerník, P – Sup, M – Králík, M – Haindlová, M – Kohout, D – Kučera, V – Carpenter, K – Radostová, K – Chizzola, P: *Sportovní právo*. Auditorium, Prague, 2012, p 61 – 86;

<sup>13</sup> See also: *Sport a odpovědnost - Law&Economics Blog - Blog o právu & ekonomii*, November 2007.

<sup>14</sup> Fastner, J: *K trestněprávnímu postihu nedovolených zákroků ve fotbalu*, *Trestněprávní revue*, 2007, Issue 11, Section: *Dotazy a odpovědi*, p 330 – 331.

<sup>15</sup> See also: Hrnčířík, T: *Trestněprávní odpovědnost sportovců za zranění způsobená při výkonu sportovní činnosti – 31 August 2005* ([www. ipravnik.cz](http://www.ipravnik.cz)).

<sup>16</sup> See also: Hora, J: *K otázce trestní odpovědnosti hráčů při sportovních úrazech*, *Acta Universitatis Carolinae Gymnica*, Vol. 15, 1979, Issue 1, pp 15 et seq.

The first of these two decisions is the resolution of the Supreme Court of the Czech Republic from 21 March 2007, file no 3 Tdo 1355/2006<sup>17</sup>, published with the following summary of its conclusions:

The purpose of the rules of a sport (e.g. football) is not only to lay down equal conditions for the competing parties but also to protect the health of the players against acts that may lead to their injury, with regard, among other aspects, to the nature of the sport. However, the rules of a sport, in themselves, cannot penalize such situations where a breach of such rules by a participant of the game results in harm to health caused to another player.

Therefore, if, during the course of a game, any player culpably violates (Section 4 and Section 5 of the Criminal Code) the defined rules of the game and such violation results in harm to health caused to another person (another player), then the possible criminal liability of such injury-causing player cannot be excluded (for example criminal liability for actual bodily harm as specified in Section 224 (1) of the Criminal Code) while taking into account, in particular, the nature of the game and the seriousness of the breach of the said rules.<sup>18</sup>

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

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

### **The principle of subsidiarity of the criminal law (criminal law as the last resort (*ultima ratio*))**

This general principle is rightfully applicable in the field of sports, even though it is impossible to ignore the increasing global trend in recent years towards possible criminalisation of sports participants for sports-related injuries. However, this trend is no breakthrough in the principle of subsidiarity of the criminal law; it is only a response to the development in the world of sports, characterised by increased violence and ever-growing economic pressure on sports. This trend promoting the involvement of criminal law in sport is sometimes explained by the increasing commercialisation of sport or by the fact that the injured sports participants have become more 'courageous', in being prepared to invoke their rights.<sup>19</sup> This is further supported by the serious consequences of the practice of sport, the growing number of violent incidents on sports fields<sup>20</sup> and, in some cases, also by the mere

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<sup>17</sup> Published in *Soubor trestních rozhodnutí Nejvyššího soudu*, C H Beck, 2007, Vol. 36, under reference no T 995. Its detailed analysis is included in: Králík, M: *K trestněprávní odpovědnosti sportovců za sportovní úrazy podruhé*, *Trestněprávní revue*, 2008, Issue 2, p 33.

<sup>18</sup> This case concerned a match in an amateur football league.

<sup>19</sup> See also, for example: Bondallaz, J: *Le juge, cet arbitre suprême*, *Magazine Responsabilité pénale du sportif*, La Gruyère, 3 April 2004.

<sup>20</sup> See also, for example: Beloff, M – Kerr, T. – Demetriou, M: *Sports Law*, Hart Publishing, Oxford – Portland Oregon, 1999, pp 33 – 34.

fact that - according to some - there is no reason why the practice of sports should be exempt from the scope of criminal law.<sup>21</sup> The essence of criminal law in the sphere of sports, as far as legal liability of sports participants is concerned, was aptly outlined in the legal literature: '...the function of the criminal law in sport is to lay down distinctions between conduct which is tolerated in the context of sports involving physical contact – and would not necessarily be tolerated outside that context – and conduct sufficiently extreme as to transgress the criminal law irrespective of its sporting context and, sometimes, irrespective of the consent of the victim.'<sup>22</sup>

### Individualisation of the case

The decision correctly underlines the necessity to take into account both the type of sport and the specific circumstances of the case in relation to the conduct of the perpetrator. The general reference to the individualisation and typology of the sport reflects the views maintained in the European context. In particular this position is held by German legal theory which is characterised by a high number of relevant publications. The German legal theory distinguishes between the so-called 'combat sports' (Kampfsportarten) within which the general principles of legal liability may be modified when dealing with sports injuries; and the so-called 'parallel sports' (Parallelsportarten) within which the general principles of legal liability apply without any change.<sup>23</sup>

This view reflects the opinion that the approach to legal liability of sports participants for sports-related injuries necessarily depends on the kind of sport in question; the earlier German legal theory referred to the 'Mann neben Mann' (ie man alongside man) sports and the 'Mann gegen Mann' (man against man) sports.<sup>24</sup> J Fritzweiler, a German scholar, correctly describes the essence of the issue of legal liability of sports participants. He notes that the fundamental point of difference is the issue of permissible danger or increased risk of injury which may be caused to another person, regulation of such dangers and risks in the rules of the respective games or sports and their legal classification.

### Emphasis on the violation of the sports rule

The role of the sports rules in possible legal liability of sports participants is the golden thread of all concepts and opinions that have appeared over time. At the present, it seems that the overly rigid position that the existence or absence of any legal liability depends on the adherence to (or violation of) the rules of the sport has been abandoned for good.

<sup>21</sup> See also, from the recent publications, for example: Havranová, M: Trestná odpovědnost' v športe, Športová humanistika v systéme štúdia športových pedagógov, Zborník referátov z medzinárodnej konferencie, Bratislava, 2003, pp 60 – 62 or Sakáčová, Z: Právne aspekty zodpovednosti v športe, ACTA FACULTATIS EDUCATIONIS PHYSICAE UNIVERSITATIS COMENIANAE, Publicatio XLV, Univerzita Komenského Bratislava, 2004, pp 153-168.

<sup>22</sup> See also: Beloff, M. – Kerr, T – Demetriou, M.: Sports Law, Hart Publishing, Oxford – Portland Oregon, 1999, pp 33 – 34.

<sup>23</sup> See also, for example: Fuchs, M (Deliktsrecht, 4<sup>th</sup> edition, 2003) 72.

<sup>24</sup> The author of this classification of the 'Mann gegen Mann' sports and the 'Mann neben Mann' sports is A Vollrath, a German author, whose classification of sports used to be very popular in the sports law theory (see also, in this respect, for example: Vollrath, A: Sportkampfverletzungen im Strafrecht, Leipzig, 1931, p 47). Further, see some of the earlier publications, for example: Becker, W: Sportverletzung und Strafrecht, Deutsche Justiz, 1938, pp 1720 – 1722, Nürck, S: Sport und Recht (Die Leibesübungen in Gesetzgebung und Rechtsprechung), Reichssportverlag, Berlin SW 68, 1936, pp 276 – 278, Mletzko, KW: Die strafrechtliche Behandlung von Körperverletzungen und Tötungen beim Sport, Erlangen, 1935, pp 10 – 11, Mahling, G: Die strafrechtliche Behandlung von Sportverletzungen, Borna – Leipzig, 1940, pp 6 – 7 or Brunner, A: Die Sportverletzung im schweizerischen Strafrecht, Zurich, 1949, pp 16 - 17. However, the above mentioned classification of sports was not the only one that appeared in the legal literature. A very detailed and sophisticated analysis of different approaches to the classifications of sports appearing in the literature on sports law can be found, for example, in: Szwarc, A J: Karnoprawne funkcje reguł sportowych, Poznań, 1977, pp 20 - 46.

Nevertheless, the decision also emphasises that it is necessary to examine the degree of violation of the rules of the sport in question.<sup>25</sup> The prevailing trend in the judicial practice (or at least one of the most prominent) may be identified in the approach of the Swiss courts. Judges have tended to approach criminal cases concerning sports-related injuries with certain restraint and punished only gross violations of the rules of the game. This is because of the risk of unbearable increase in the number of this type of proceedings if the State started to punish minor offences. In this respect, the arguments presented by the Supreme Court in the above mentioned decision are limited (unfortunately) to the laconic statement that the conduct of the perpetrator must be in conflict with the rules of the sport, with a 'postscript' that the sports rules do not penalise such conduct as far as the consequent harm to health is concerned. The idea formulated in the 'postscript' is innovative in the context of the European judicial practice and is probably unprecedented.

The most recent decision on legal liability of sports participants is the resolution of the Supreme Court of the Czech Republic from 17 February 2010, file no 8 Tdo 68/2010.<sup>26</sup> As opposed to the above described decision in a case concerning football, this decision concerned an accident caused during skiing. The decision clearly follows the approach of the Czech civil courts to incidents occurring during the practice of skiing as expressed in the resolution of the Supreme Court of the Czech Republic from 23 February 2005, file no 25 Cdo 1506/2004. The Supreme Court expressly refers to this decision in its conclusions, stating that a skier must adapt his speed and manner of skiing to his personal ability and experience and to the *overall situation* of the place he is skiing in order to be able to react, in time and at sufficient distance, even to an unexpected obstacle in the way. Such factors going to *overall situation* may include: the prevailing conditions of terrain, snow, weather and visibility, number of other skiers and other persons and their movement. If a skier culpably violates these rules, it is possible to establish a violation of the so-called 'general duty to prevent damage' imposed on anybody under Section 415 of the Civil Code or a failure to meet the required standard of due care on his part. If he causes serious harm to another person's health by his negligent conduct, he may be found liable for the crime of actual bodily harm.

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

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<sup>25</sup> The so-called concept of adherence to sports rules is the alpha and omega of the reflections on legal liability of sports participants for sports-related injuries. The role and extent of this concept in the history of the legal development of this issue are so far-reaching that this legal concept could be easily examined in an extensive monograph. The author's papers concerning this concept were published in various Czech and Slovak legal magazines in 2006 and 2007; in particular, for example: Králík, M: Právní význam sportovních pravidel pro právní odpovědnost sportovců za sportovní úrazy ve světle doktrinního vývoje, Časopis pro právní vědu a praxi, 2006, II, pp 122 – 131.

<sup>26</sup> The resolution was published in the Official journal of court decisions and opinions of the Supreme Court, 2010, under serial no 55.

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

## CONCLUSION

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