

HEALTH: A CHALLENGE FOR SPORT

Health challenges of modern sport:

Prevention, regulatory treatment, liability issues and developments

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A. REGULATIONS / LIABILITY ISSUES

1. No sports please...!(?)

We all know the answer if we could ask Winston Churchill whether top sport is healthy: "No sports, please". Other familiar sentences that you can think of in connection with sport and health would be, for example, "Sport is murder" and "Do sport or stay healthy".

2. Selected topics

Now, it is undisputed that sport is not only healthy. The specific health aspects are discussed elsewhere by proven medical experts. The subject of this brief paper is rather issues such as prevention, regulatory treatment, liability issues and new developments.

So as not to exceed the scope of this paper, I will focus on a few selected individual issues. I will first examine the issue of whether sports federations may expose themselves from a legal perspective when they neglect the issue of prevention in their rules. I will then briefly address more recent developments in connection with prevention.

In the discussion regarding a possible legal relevance of prevention, the focus is on the ratio between prevention and liability. I would now like to address the issue of liability in more detail with a specific focus on the rules of the federations. In the process, I would like to say beforehand that I use the term "federation" in simplified form and representative for all associations and federations, and therefore, for instance, sports governing bodies and national federations.

3. No liability for the stupidity of others

I would also like to make a personal statement beforehand, namely that the federations are not of course responsible for the stupidity or clumsiness of their members. Even the best regulations cannot help here. I will give you a personal example of this:

I regularly go rowing in a skiff on Lake Lucerne. You could think the lake is big enough and therefore it's really difficult to believe that I have crashed into another boat twice in the last 12 months. Each time, fortunately nothing happened, apart from slight material damage. But the health-jeopardising potential of such collisions is of course huge. Both times I could only say: "Was lucky, and take better care next time. If something had happened, it would have been difficult for me to sue someone.

4. Own responsibility

We are thus already addressing a topic that is important from a legal perspective: The self-responsibility of the athlete - whether it is now of a recreational sportsman like myself or that of a top athlete. This actually goes without saying but in my opinion can be emphasised enough.

Under legal dogma, when we talk about self-responsibility, we speak primarily about Art. 44 of the Code of Obligations (OR). Pursuant to Art. 44 of the Code of Obligations (OR), the

judge can reduce the obligation of compensation or lift it entirely if the injured party has agreed to the damaging action or if circumstances for which the injured party has to vouch for himself have had an effect on the development or aggravation of the damage. With regard to sport, this says nothing other than that you have to be careful and that you have to bear the consequences yourself if you have not been sufficiently careful or that you at least have to bear certain consequences yourself if you willingly expose yourself to certain risks in sport.

I would now like to examine the issues of consent from an injured sportsman or the athlete's own responsibility in the overall context with prevention and liability.

Let us assume an athlete is injured in a competition. Then the question immediately arises whether a possible perpetrator or co-perpetrator of the injury can be called to account under the law. As we lawyers know, the liability can be of a civil law nature, with a corresponding possible compensation. However, it can also be of a criminal law nature, in addition, with the corresponding penalties under criminal law.

What effect do the regulations of the federations have here? What importance do the regulations have in connection with liability?

5. Meaning of the regulations

The answer is: The regulations are important for two reasons. Firstly, with regard to a possible liability of the federation itself. Secondly, with regard to the responsibility of the perpetrator.

6. Examples

Let us take two examples of this:

Firstly, Let us assume an ice-hockey player is injured in the throat by an opposition player during a game in an ice-hockey tournament organised by an federation.

Such an incident actually occurred in Swiss ice hockey. You may recall the accident to Michel Zeiter who thanks to the courageous intervention by doctors and care by paramedics fortunately survived the accident well.

Let us now assume a second case study: An ice hockey player is injured by an opponent with a check from behind against the head and suffers severe concussion. Both players are sidelined for several months.

In both cases, the question arises as to whether the federation and/or the player can be made accountable. Let us now assume that in the first case the opponent player unintentionally caught the player with his blade at a sensitive point, resulting in considerable loss of blood. And let us assume in the second case that the opponent player deliberately checked the injured player from behind on the head.

7. Assumptions/Restrictions

If we now want to check in this context what role the regulations of the Federation play in the assessment of the opponent's conduct, we have to work with simplifications. Otherwise, we would exceed the scope of this brief paper.

Let us therefore assume that only non-contractual liability can be considered and let us also assume that only the rules of a single federation apply, i.e. for instance those of the international federation.

In reality, of course, it can be considerably more complicated and the question of contractual liability can also arise and/or regulations of different federations can be relevant. But we want to ignore these complicating elements; otherwise we will not reach our objective under this paper.

8. Non-contractual liability (under civil law)

As all lawyers know, non-contractual liability under civil law necessitates four different elements, namely (i) damage, (ii) the unlawful nature of the damaging conduct, (iii) the adequate causality between the damaging conduct and the damage, and (iv) culpability of the damaging party.

9. Responsibility under criminal law

A requirement of responsibility under criminal law is that the so-called objective and the so-called subjective circumstance of the corresponding crime or offence are fulfilled. In other words, for instance, damage to body or health and intention or negligence in simple bodily injury pursuant to Art. 123 or 125 of the Criminal Code (StGB). Contrary to most other criminal circumstances of the Criminal Code (StGB), negligence in bodily injury can also be punishable. This is important in sport, particularly in sports that can result obligatorily in heavy body contact.

10. Negligence

This now means that with sport injuries the question of care and/or negligence is important in both non-contractual civil law liability and in responsibility under criminal law. We now want to concentrate on this care or lack of care. Today, we will not examine an intentional injury to an opponent. It still has to be clarified in this regard: When a player deliberately checks the opponent, this does not yet mean that he has wilfully injured him pursuant to criminal law when an injury occurs. I also assume that probably no player has ever wilfully injured an opponent. We will therefore leave out the wilful offences in this analysis.

11. Unlawful nature under civil law liability

From a legal dogma perspective, care or negligence in non-contractual civil law liability is important in connection with the unlawful nature. Unlawful nature is defined as a breach against statutory standards of conduct or as a breach against general duties of care. An objective benchmark applies here. It is also called "duty of care of a reasonable man". The re-

quired care depends on the specific case. Specific own skills are regularly not decisive in liability under civil law.

12. Negligence in criminal law

Under criminal law, those who do not consider the consequence of their action arising from undue lack of care or do not take this into consideration are committing an offence. The carelessness is undue when the perpetrator does not take the care into account to which he is obligated based on the respective conditions and his personal circumstances.

This means that as a result negligence and appropriate care in civil law are comparable to that under criminal law. It is fundamentally about the same with both. The difference lies solely in the specific own skills that are also to be taken into account in the responsibility under criminal law and thus introduce an individual components, whereas an objective benchmark applies in liability under civil law.

But I take the liberty of also ignoring this difference in the present case. I think that this individual aspect is not particularly important in liability at least in professional top sport because the corresponding skills of the professional athletes are probably the same or at least comparable.

13. Specific meaning of the regulations

After these statements with regard to legal theory, the way is now clear for the inclusion of the federations' rules. The Federal Court has already explicitly stated that the rules can be important in the assessment of liability issues.

In BGE (Federal Court Decision) 134 IV 26, it stated literally:

"The valid rules are also to be incorporated into the assessment under criminal law of foul play in team sports. The more blatantly rules are breached that serve to protect the physical integrity of the players, the less the realisation of a risk typical of the game can be assumed, and the more an investigation under criminal law of the fouling player is required."

14. Application example: IIHF Medical Regulations

Let us come back to the example of the ice hockey player who was injured and lost blood. What do the regulations of the International Ice Hockey Federation (IIHF) say? The "IIHF Medical Regulations" are relevant.

The "IIHF Medical Regulations" contain, among others, the so-called "Event Medical Manual". This manual records in Clause 2.0, among others:

"It is required of the Organizing Committee that a Medical Committee be established well in advance of the event ... The Medical Committee will be responsible for ensuring the safety of all players during the period of the event. This includes protecting their health not only at the main arenas where the competition will take place, but also at any practice arenas, other training sites, hotels or residences and while being transported."

The "Event Medical Manual" then obligates the "Medical Committee", among others, to:

"Establish one or more clinic in the arenas as required, and ensure that these clinics are properly equipped [...] Create an emergency action plan which includes potential player, spectator and venue related incidents [...] Review and arrange for appropriate ambulance and/or paramedic coverage [...] Create a liaison with one or more local hospitals" [...] and [...] "establish an appropriate communication system".

Based on this, Clause 3.2 of the "Event Medical Manual" makes provision for a so-called "Event Chief Medical Officer" being determined. This must be a doctor with relevant knowledge of the characteristics of ice hockey. He must ensure, among others that

1. the necessary medical means are available in sufficient quantity, that
2. doctors with the necessary knowledge are recruited and are distributed across the individual arenas, that
3. paramedics are on hand at all times and
4. the necessary contacts and links are established to hospitals.

Pursuant to Clause 5, the "Event Medical Committee" under the leadership of the "Event Chief Medical Officer" must then also ensure that suitable treatment rooms and equipment are available in the arenas themselves.

The "IIHF Medical Regulations" are drawn up and revised by the "IIHF Medical Committee". Proven and experienced physicians belong to the "IIHF Medical Committee". The implementation of the specifications in the "IIHF Medical Regulations" also has to be done by physicians with the necessary medical knowledge that also includes knowledge about the special characteristics of ice hockey.

I think that, in light of this, it is permissible to conclude from a legal perspective that the Federation thus takes the necessary organisational measures as precautions in the event of accident situations and thus applies the necessary care. If a player should be injured and - of course - if the specifications from the "Medical Regulations" should also be actually implemented, the medical care would be guaranteed and the Federation could not be accused of anything if the player should be severely injured despite all these measures.

15. Application example: IIHF Rule Book

With regard to the second example, i.e. to the check against the opponent's head, the "Medical Regulations" would then not be relevant. Rather, the "IIHF Rule Book" applies.

The relevant prohibitions and rules are found in Rules 529 regarding the so-called head-butting and in Rule 523 regarding the so-called "Checking from behind".

Rule 529, for instance, not only penalises every low to the head but also every attempt to do so, immediately with the so-called "match penalty", i.e. with an exclusion of the player for the rest of the match.

Rule 523 also results in a "match penalty" if the opponent is injured. The "match penalty" is the heaviest penalty that can be imposed on a player during a game. The Federation thus underlines the dangerous nature of such a foul and the zero tolerance in such cases because even the attempt can result in a "match penalty". In addition, such an exclusion usually also results in disciplinary proceedings under federation law, which can also result in further penalties.

In my opinion, the Federation is setting the right signal in this regard and is thus applying the appropriate degree of care in the formulation of the rules.

16. Responsibility of the player

What is the situation like with regard to the player? What about his responsibility when he injures the opponent with such a check against the head?

The rules in this case are clear. Such foul play must result in immediate exclusion for the rest of the game (if the referee(s) has/have really seen the foul). Penalties under federation law may follow. Under certain circumstances, however, this is only one side of the coin. And the question arises as to what the situation is like under civil and criminal law.

This is now a sensitive subject and caution is required with general statements. On the one hand, it is to be acknowledged that ice hockey is a "tough sport which necessarily involves body contact and during which it is to be assumed to a certain degree that the players are willing to accept injuries. On the other hand, it is also recognised that no comprehensive consent from a player to injuries may be derived from this circumstance. From a legal perspective, consent could fundamentally result in an exclusion of the unlawful nature or a distinction between the elements of the case, but as already said, "blank approval" to any injuries cannot be generally assumed even with sports that have a pronounced fighting element.

17. Precedents

In Swiss ice hockey, there has unfortunately already also been work for the criminal courts.

On 9 January 1993, for instance, Misko Antisin from Zug injured the Ambri player Petr Malko. This foul resulted in an injury under criminal law to Misko Antisin, which the Federal Court confirmed with its judgement dated 28 April 1995 (BGE [Federal Court Decision] 121 IV 249).

On 31 October 2000, the HC Davos player at the time, Kevin Miller, fouled the ZSC player Andrew McKim with a check from behind. On appeal from Andrew McKim, the Federal Court confirmed with its judgement dated 24 October 2007 a judgement from Zurich District Court due to simple bodily injury and negligent serious bodily injury (BGE [Federal Court Decision] 134 IV 26).

In these rulings, the Federal Court discussed, among others, the contingent wilful content and negligent commitment of the offence. For our topic today, it is particularly interesting as to the manner in which the Federal Court took into account the regulations of the IIHF.

First of all, the Federal Court stated that those who do not consider the consequence of their action arising from undue carelessness act in a negligent manner. The carelessness is undue when the perpetrator does not take the care into account to which he is obligated based on the respective conditions and his personal circumstances. Where in addition particular standards require a certain conduct, the extent of the care to be taken into account here is primarily determined according to these standards.

18. Two central conclusions

On the basis of these general considerations, the Federal Court stated that in the determination of permissible conduct and the obligations of care to be taken into account in ice hockey, two points should be considered in particular. Firstly, the general principle "*neminem laedere*" (i.e. not to harm anyone). And secondly the rules of the International Ice Hockey Federation.

According to the Federal Court, these rules serve not only the orderly procedure of the game but also to prevent accidents and to ensure the safety of the players. Based on this, the Federal Court concluded the following: When a rule that aims to protect the players from injuries is wilfully or grossly breached, a tacit consent to the risk of physical injury inherent in the sporting activity may not be simply assumed. Although the Federal Court acknowledged the fundamental risk of fouls and injuries in sports that emphasise body contact, it also said that the more blatantly the rules are breached that serve to protect the players, the less there can be mention of the realisation of a risk typical of the game and the more the focus is on the player's responsibility under criminal law.

With regard to the foul of Kevin Miller, the Federal Court came to the conclusion that he breached Rule 523 (Checking from behind). With this rule, precisely what happened in the specific case was to be avoided, namely that the fouled player falls forward and hits the ice with his head.

From a subjective perspective, the Federal Court then stated that an ice hockey player must always move on the ice in a manner that enables him to react to dangerous situations and if necessary to brake or avoid danger. In the specific case, Miller did not comply with this rule. It was also without doubt for the Federal Court that as a professional ice hockey player he knew the injury risks associated with a check in the back. With that, in the opinion of the Federal Court, the subject circumstance was then fulfilled which led to the prosecution of the player under criminal law.

As becomes clear from this example, the rules of the associations play an important role in court practice in the appraisal of liability issues. The Federal Court apparently assumes that the federations have the necessary know-how to define the regulations and rules relevant for their sport. This is not explicitly stated in the two rulings quoted but results from them tacitly. Overall, this means nothing other than that the associations not only have the right within the framework of their association autonomy to regulate their internal organisation and their internal penalties largely autonomously. Rather, their regulations can also develop a normative power in that their rules are taken as a benchmark in determining the necessary care.

19. Also to be taken into account in mass sport

The statements up to now referred primarily on the top sport and professional athletes. Well, it is, however, the case that also many recreational sportsmen carry out a sporting activity in Switzerland. The rules of federations and associations can also be important in connection with issues of health in recreational sport.

Let us take the example mentioned at the beginning of the amateur rowers who wreak havoc on Swiss lakes. In this regard, every rowing association or its Board members are well advised to issue appropriate rules regarding the usage of rowing boats and to publish them.

These include, for instance, information about the rowing rules to be applied with on the lake, the wearing of life jackets, in particular in the winter months, conduct in wind and/or uncertain wind and water conditions, etc. If an association board member, for instance, permits even inexperienced young members to use narrow racing boats without supervision or instruction, they can fundamentally be made liable if such a beginner overturns and is injured. In such a case, liability under civil law would probably be based on liability from omission. It would probably be argued that the Board members had the status of guarantors and that the damage would not have occurred if the Board members had acted in a due manner.

As, however, already mentioned, I am a strong advocate of own responsibility - or put in legal terms, self-culpability - must play a pivotal role in the legal appraisal of such accidents. The association boards can do nothing about the stupidity or carelessness of their members. If a total novice ventures out alone on a lake in a skiff with a strong wind and a temperature of minus 5 degrees Celsius, in my opinion, any possible causal chain would be interrupted by the irresponsible self-culpability, and the Board should not be held accountable.

B. MORE RECENT DEVELOPMENTS

1. Study in BJSM

Irrespective of liability questions, the federations and associations have many possibilities of having a preventive effect with proactive measures with regard to the health of the sportsmen, whether in top sport or in recreational sport. A recent article of the British Journal of Sports Medicine is based on a detailed study of the role of international sports federations in protecting athletes' health. I am thus now coming to the second part of this part on the latest trends. The following statements are now no longer of a primarily legal nature.

In its introduction, the article first gives a reminder that the IOC has issued an "Olympic Movement Medical Code" (OMMC). This serves as a guideline for the medical departments of the international sport federations. The OMMC calls upon the Olympic movement to take measures that ensure that sport can be carried out without risk to the athlete's health. Those measures that are necessary to protect participants' health and minimise the risks of physical and psychological damage should be taken.

Well, it is clear that the OMMC in this breadth and generality cannot be anything other than a general guideline. As such, it is not legally enforceable. This study did not therefore deal

with legal aspects either. Rather, it addressed the issue of what measures the international top sports federations have taken with regard to health. The basis of the study was a survey among the international summer and winter sports federations. Thirty-five federations participated in the survey. Among others, the federations had to answer how they weight the importance of certain measures in conjunction with health.

2. Relevant aspects for federations

The federations weighted the following measures as most important: The battle against doping, followed by the protection of the health of top athletes and the promotion of the sport's image as a safe sport.

In contrast, measures to promote the health of recreational sportsmen, measures to increase the number of recreational sportsmen and measures to promote the health of the population in general figure at the lowest end of the scale. Interestingly, there were no differences between the replies from the summer sport federations and those of the winter sports federations.

3. Specific measures

With regard to the specific measures devoted to health, "First aid" ranked first, followed by "Control/monitoring of accidents during competitions or tournaments" and "Prevention through rules for equipment and competition venues".

"Diet", "Environment conditions" (e.g. heat), "Accident prevention through specific training methods" and "Pre-competition examination" were named as being slightly less central.

Topics such as "Mental health of the athletes", "Post-career management" and "Competition and training during pregnancy" were then found at the lowest end of the scale.

The study concludes with a tacit criticism that the questions of pregnancy and sport are not weighted more strongly after "Career management" and "Mental health". With regard to the latter, the cases of suicide among top athletes were mentioned as a problematical point in particular. Not entirely unexpectedly, this study also puts forward the idea that the sports federations should also address the issues of the health of recreational sportsmen and the general population at large more.

Whether and to what extent the international federations should indeed be more active with regard to the promotion of mass sport and the promotion of the health of the population in general is, in my opinion, ultimately a question of sport or federation policy. My personal opinion is that this does not have to be the core task of a sport federation. However, the federations can undoubtedly play an important role in prevention in general.

4. Monitoring of sport injuries in particular

Finally, I would like to take up a specific aspect of the aforementioned preventive measures. The study by the British journal emphasised, among others, the monitoring of sport injuries as an important measure in the prevention of sport injuries. In my opinion, an interesting ex-

ample of this is a study that was recently conducted in collaboration with Swiss Ice Hockey and which I am reproducing here in brief with the kind consent of Swiss Ice Hockey. During that study, type, number and time of the injuries, among others, were analysed. The results are very informative and permit clear conclusions with regard to prevention.

5. Results

It was, for instance, established that most injuries occur in the months of August and October. In August therefore because this month is still in the preparation period and the players are not yet as well trained in this period and are thus more susceptible for injuries. Another reason is the circumstance that in summer the ice is even softer due to the heat, and this also promotes the risk of accident. It is also explicable that the second highest number of accidents or injuries occurs in October. Most games regularly take place in October. Another important finding of the study is that the three body parts most affected by accidents are shoulder, head and knee. Concussions occur more frequently to defenders than forwards.

6. Conclusions

Based on the study results, initial conclusions could then already be drawn, namely that special attention is to be paid to physical aspects in the preparation period and that specific development programmes in addition to work on the ice help to prevent injuries. As it is well known that figures do not lie, I think that valuable insights can be gained from such studies in all sports and that these can help prevention. These can then be implemented with corresponding regulations from the federations so that the federations can also promote prevention in this regard.
