CHALLENGES IN SOLICITOR PRACTICE, ESPECIALLY IN OBJECTIVE LIABILITY IN SPORT

András Nemes
Professor, University of Physical Education of Budapest, vice president of the IASL, Hungaria

Balázs Farkas
Sportsllawyer, Nemes András Lawfirm, Hungaria

I. Introduction

Starting from the intermediate lying nature of sports law I will try to analyze the Hungarian problem of the objective liability in sport from the aspects of civil law and criminal law[1].

Either the sports law studies, or the civil law studies show a kind of paradigm change in the area of liability law. It seems that this phenomena has not appeared just in the civil law and commercial law, but in the sports law as well: the global expectation regard to the objectivization of liability was found at the millennium as well, and in the past 20 years it evolved. We can not wonder that the normative solutions of the EU member states had effects on us with the join to the European Union. László Kecskés wrote down before the join to the EU that law harmonization will be inevitable in the European Union. Even then the polemy occurred that the law harmonization or the law alignment will be the technique to be followed in the European an Hungarian development of civil law. It is just 20 years that I successfully defended my PhD dissertation in connection with the athlete personality protection, which affected the problem of objective liability in many aspects. The round anniversary was a good occasion that as a university professor and as a practicing solicitor take into account those cases, which occurred in this topic in my praxis and to share my experiences with the interested parties with the intent of amelioration.

II. Discussion

Sportslaw traditionally belongs partly to public law, partly to private law. According to this dichotomy the construction of this study will be presented.

II. 1. Public law base

We extract the two most significant elements of this area, just in order to show the character of our topic. Let's see the presumption of innocence first.

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II.1.1. Presumption of innocence

We will review the constitutional law and civil law aspects among the branches of law of public law. One of the most fundamental principle of our Constitution is the presumption of innocence (or rather: non-culpability). This is a basic value in every constitutional state. Yet we have to see that it is not the legal right of top athletes in practice. What is really about? The doping control is obligatory every occasion before the promulgation of the result of an Olympic podium placement. And if it is like this, then we do not presume the innocence, but the culpability (the doping) and the athlete can get the Olympic medal just after the negative test result. During the doping processes the presumption of innocence enforce. Despite that the fact of doping offense has to be proved by the federation, we can not talk in the case of athletes who got involved to the suspicion of doping that they couold be handled as innocent until the finish of the process. Moreover, in many cases the sensationalist media handle the suspitious athletes as 'criminals'. This is an overview of the last 20 years educational and legal representative work of Prof. Nemes, let us cite first one of my talented student, Emese Simon, a former student at Pázmány Péter Catholic University wrote in one of her essay the following - maybe a little bit old, but true and characteristic case - in cycling the so called Operation Puerto scandal exploded in summer of 2006. During the investigation the name of the greatest cyclists came up, from who their licence were captured at once. This happened e.g. with Basso and Ulrich. That's why they had to miss the Tour de France and other competitions as well. Although later the investigation was closed, but the Protour teams agreed among each other that they will not… the cyclists who got involved in scandal. And the German TV declared not much later after that it will not broadcast the German tour, if on that the athletes who got involved into the Operation scandal will bee seen.

Let us to cite a relatively new – and now final - case from my own solicitor praxis. Maybe we can say the name, because this it had a quite big press echo as well, the television also dealt with it, the disciplinary case of László Tóth selected horse jumper. One of his co-athlete accused him besides with that he sedated his horse with a medicine gave into the body with injection needle and with an apple preparated with a blacklist sedative. In first instance the athlete won, with reference to formal procedural errors, then lost in second instance, finally turned to the CAS, where the excellent gremium elegantly 'separated' the criminal related circumstances from the disciplinary ones, so sponsored the presumption of culpability.

Another exciting point of the public law base, the impartial right to go to court.

II.1.2. Impartial right to go to court

Everyone has the right that any charge against him or any right and obliga-

tion in a litigation will be adjudged by an independent and impartial court established by act on an open trial, within a reasonable deadline. The line of obvious examples prove that the so called submission declaration overwrites this right of the athlete. The adjudicate bodies during the doping processes of course can not be considered as impartial, although the WADA regulation also keep the requirement of impartiality as desirable. If we consider that the athlete is a citizen hidden in a jersey, we can explain it hard that how impartial a body can be considered, which accuse a claim against the athlete, and the doping committee of the federation obliged to prove the doping offense – and in second instance the doping appellate committee of the same federation – adjudges? So we can see that while during the state criminal procedure the function of the accuser and adjudicate functions separate from each other strictly and insured by incompatibility guarantees, then in the doping procedure these two functions merger in one hand. The same organization accuse and adjudicate. In fact this solution can not be considered as impartial adjudication. Although it is possible to appellate to CAS, and CAS – at least since the foundation of ICAS - in theory is an independent Court of Arbitration, it seems that CAS mostly operates as the extended hand of the International Olympic Committee, and it is just some refreshing exemption, if it is not like this (we can take an example on the famous doping case of the Russian athletes as well).

The playing field of a solicitor in doping cases is very restricted. Let's try e.g. to cite for that the athlete consumed the medicine that contains the prohibited substance for the advice of the doctor, or for that the prohibited substance did not appear among the ingredients (it is very frequent among the defending tactics to cite for the contamination of the manufacturing technology). Those who try, will have no success, because they have to confront with the walls of the objective liability and zero tolerance every occasion. Because the athlete is liable for the choose of his doctor and for the information as well, and he has to follow more research than a normal citizen in connection with the ingredients of the consumed foods. The CAS developped a very high duty of care level in his judgments related to the nutrition of athletes that it is quasi impossible to observe. It is an often expressed principle that the athlete is liable for what he consumes. We do not have to say that this kind of duty of care level is not characteristic in the state civil law. All of these have to be applied for the injury of athletes in the spirit of deterrence, example statuation and zero tolerance. This redoubtable sentence can be found in the WADA regulation: the athlete is liable for what he consumes, and is liable for the acts of those persons, in whom he trusts as much as he allows access to his food and drink.

It belongs to the justice – ultima ratio – that the athlete can go to court as well, but rather we have to say that it does not function in practice. There was a test for this, moreover, it occurred that a club won an action against its sports federation, but the international federation expressed its disapproval and ac-

cordingly the enforcement of the judgment was not taken place as well (FTC vs MLSZ 2006 case).

II. 2. Private Law Base

The paradigm change taken place at the millennium did not characterize just the political processes, but of course the legislation as well. At the beginning of the ’90s of the twentieth century from the books of the legal regulations arranged side by side 320 cm long legal material disminued to 80 cm, by just the omission of the ’socialist’ attributives and ideologic contents.

The new Civil Code – for second try – was adopted in Hungary in 2013 and maybe the so called second try was benefitial, because it occurred in its pure form, that kind of early failure is not characteristic of our new Code, than e.g. can be found in the Roman Civil Code, namely that with the transition to the market economy the new phenomena came to the forefront gained entrance into the normative text. This kind of excessive sophistication avoided the Hungarian legislation, so the proper abstraction stayed by avoiding the casuistic listings. At the same time it is true as well, that the scissor opened more between the written law and the judicial practice. The new Civil Code expressively opens a wide space to the judicial practice, in many situations it does not give exact definition but it allows the jurisprudence to enforce it.

Of course it arised in Hungary before the change of political regime the claim for reconciliation between the two liability forms, because in the international commercial connections the criminal liability was defined other even in the Kádár-era, than e.g. in the Hungarian commerce. The Civil Code of the Peoples Republic of Hungary, the Law-Decree 8 of 1978 on the application of the foreign economy relationship restricted the liability, moreover it allowed even the exclusion of liability as well. With this in reality it turned back to the consequently enforced entire liability for damages principle, which obviously and adequately make the reparation necessary. This kind of relief process continued some decades later in the Hungarian Civil Law. In 1980 the member states of the United Nations adopted a treaty in Vienna on the international sales contracts of goods. This international treaty, which came into the common sense as the Vienna Purchase Treaty, was promulgated in Hungary by a Law-Decree as well, the Law-Decree 20 of 1987. The treaty also extenuated the culpability conception, as it narrowed the competence of chargeability, the possibility to cite for culpability, and it gave just a very small volumen justification possibility for the participants of international commerce. Finally we would refer to that this was not otherwise in the world of the so called INCOTERMS commercial standards, moreover not in the world of the so called usances as well. It is an absolutely common practice internationally that the contracted parties limit their liability. The possibilities for the exemption from liability are closed by the institutional system of lex spor-

tiva as well (the normative materials of the international sports federations, the WADA requirements, the CAS practice).

If we consider the liability as the damage sanction of the tort, then sooner or later we reach a very unjust situation, which means that be the tort chargeable, it will not be the decisive aspect in the scope of impeachment that who proceeded with what kind of act in the given situation, but just the so called 'scope of interest'. Let me to illuminate the situation with a totally obvious and known example: if the traffipax measures somebody's car with a speed of 180 km/h, the owner of the car will be penalized, apart from the fact who drove the car. This state claim is understandable that it focuses on the principle of real principium and it endeavors for safety. We can say that quasi the judicature do not want to follow the practice that the owner of the car exempted himself under the impeachment with that well-known trick that he did not drive the car, but one of his family member, but so to say nobody is obliged to testify against his family member. But as acceptable in the mentioned life situation the ground of objective impeachment, so life alien it is in sport. This kind of cynicism went so far that if an athlete a doping material that appears on a WADA prohibited list would be given by violence, he can not do anything because the material will be detectable from his blood or from his urine. The evidentiary procedure is absolutely unnecessary, because the WADA Code itself prescribes the principles of strict objectivity and zero tolerance.

The regulation system of lex sportiva, including the foundation legal status WADA doctrine, proves that the most essential difference of the anti-doping regulations from the state legal order is the principle of the strict, objective liability. This principle in sport was developped and harmonized by the CAS over the years based on the existing regulations. The judicial body presented its case related to the strict liability in its several judgments. Its fundamental issue is that while in the criminal law according to the principle of culpability there is no criminal offense without culpability (nullum crimen sine culpa), then the establishment of the doping offense in that case, when the prohibited substance was shown in the body of the athlete, does not depend on the conscious/intentional side of the athlete. What does it mean? So, it is well-known that in the criminal law the liability has two grades: willfulness and negligence. The offender commits the crime willful if he desires the consequences of his conduct, or he resigns to them. By negligence that person commits the crime, who although foresees the possible consequences of his conduct, but carelessly trusts in its backlog; as well that person, who does not foresee the possibility of the consequences, because fails to apply the due attention and care. So if someone attests the due care or attention, so in the commit of the crime he is not liable for the lowest level, with gross negligence, so the given crime is not established to his charge.

So in case of the existence of a prohibited material (substance) in the sample the doping offense will definitely be established. If the control took place on a

competition, the achieved result of the athlete on that competition will be automatically cancelled. The lack of the willfulness or negligence could be taken into consideration just during the other penalty, so called during the sentencing of the suspension. And the burden of proof is subject to the athlete. The cross-examination is very rarely successful, it is quasi impossible, the CAS developped the related principles in its huge judicial practice.

III. Case Law of the scope of objective liability

We could have chosen of course the internet connection possibilities for my case law analysis as a research method. Instead during my sports law practice – until now in this topic 18 cases occurred and we will present the conclusions, morals of my presentations in this topic on different conferences. Today the closed and final decisions can be published from the practice of the Dr. Nemes András Law Firm. We dealt with the problem of objective liability and with the case law belong to this scope 5 times in the past 20 years:

In this presentation we concentrated just for the doping relations, but there is one of a proposal at the FIFA related to Article 67 of the disciplinary code of football, moreover it was several conferences-topic too, like

1. 7 th EASM Conference 1999 Thessaloniki (Greece) Nemes, A.: Voluntary injuries in sport
2. 10 th IASL Conference Athens: Nemes, A.: Lessons of the lost Hungarian gold medalls in the Athens 2004 Oympic games
3. 19 th IASL Conference Indonesia, Isl. Bali: 2013. Nemes, A.: The Lance Amstrong case
4. 13 th IASL Conference Mexico city: 2007. nov. 13-16 Nemes, A.: Victims of the zero tolerance in the HAF procedings practice: *Case study of 3 Hungarian suspended athletes,* Gergely Horváth, Géza Pauer and Roland Varga
5. IX. International Scientific Congress „Sport, people and health; St. Petersbourg (Russia): 2019. április 16. Nemes, A.: The Hungarian antidoping regulation

We would list the cases in the alphabetic order of the related sports in the following. Our objective liability relevant cases were: american football, acrobatic gymnastics, athletics, rowing, kayak-canoe, cycling, football, equestrian, marathon running, sports shooting, triatlon and swimming.

Let us to cite one of our cases with the biggest prestige first, which is not memorable for me just because of its volumen, but because we confronted here with the reality of objective liability. In 2004 heavy athletes from Szombathely were the clients of our office, who were caught by doping offense. As it is known, on that Athens Olympics six of our athletes were caught, and although in Hun-

gary a true bestseller reported the reasons according to the history of our six caught athletes on doping offense in 2004. Prof. Nemes also used the description of their cases in the Presidency of the IASL as the material of my chair occupacy presentation as the sign of my trust from the Presidency. The Hungarian Sports Science Survey found it worthy of attention to publish my presentation – for edification. Of course Adrián Annus and Róbert Fazekas did not admit their culpability, but with this they did not go a long way. They found themselves opposite with the cord measure of objective liability, which is similar to the liability for hazardous operations in civil law, by that there is a place for exculpation in some very narrow cases, then there is no exculpation under the commitment of a doping offense. For the objectivity it has to be mentioned that the doping offense has cases, where the condition of the establishment of the offense is the willfulness or negligence, so in the case of the use, possession, submission, delivery etc. the strict objective liability can not be applied. But it has to be mentioned at least that the caught gold medal favourite athlete in Athens could produce the same, 25 ml sample, than the swimmer who got involved into the suspicion of committing a doping offense some years later, because she left the test site with the reason that she had to hurry up to a meeting with Roger Moore. Later FINA exonerated her from the suspicion of doping offense, because the MACS auditors did not provide her escort.

But there was a very important difference between the two cases: in 2004 the law of procedure of anti-doping was immature so we could have had an occasion for the argumentation, but my former decan, Mihály Nyerges did not want if our good relationship that existed with the Hungarian Olympic Committee would have been endangered by the performance of my counsel's brief, that's why he asked on a department meeting to give back my brief. Then we gave back the case to Eva Maria Barki Viennese solicitor, which was the possibly worst choice. Because she made a „Hungarian question" from it in the lack of proper sports law knowledge, by ommitting that argument file, which by all means was the part of the fact of the case, and which was transmitted with our abstract of record (in practice the CAS appliance was ready). Don't forget that the request at the wavelength of the Hungarian Radio Kossuth was still not evident, as for the athlete is asked to stay for a sample giving at the Hungarian border village during his way home to Hungary. It was not evident that this request was appropriate for an effective citation, whether the athlete is obliged to listen to autoradio while driving, moreover that time it was also not absolutely evident that the presumption of innocence is the legal right of the athlete or not (Prof. Frenkl commented the case in the television without asking the party involved). I remember well that I got involved in a debate with my colleague, György Kolláth, in connection with a sports medicine critic article about the existing or non-existing presumption of innocence. Because this colleague compounded his counter-argument with that witty question that then the killer agaric has also not legal right to the

presumption of innocence? (It was fixed because of the factuality that it was answered to him that if the killer agaric is anyway a turner or an engine driver, than the presumption of innocence is unconditionally his legal right, but if he is a top athlete, than not, because first his body fluid samples will be examined, related to the prohibited list doping materials, and just in that case will the Olympic medal be hang around his nack when it will be established that the presence of the substance cannot be detected). It is evident for every non-professional that it follows from the presumption of innocence that if the athlete served for the Olympic gold medal with his performance, than get it and could wear it until the culpability will not be proved by the competent authorities.

Róbert Fazekas got involved into a doping scandal for a second time, but that was not the case of our office, but it was instructive as well, that's why I would like to talk about it in a few words. In 2012 the athlete, who was sentenced with a six-years suspension, appealed the decision on a state court and moreover with a provisoric result: the Metropolitan Court reduced his suspension indefinitively for 3 years. The defense tactic was the usual: it is not a coincidence that the Curia pronounced that the athletes are not exempted from the liability if the prohibited doping substance gets into their body from polluted nutritional supplement. The HUNADO won a fully compliant status from the International Anti-Doping Body. According to this it presented on its website in an announcement that it appreciates that the 'objective liability' in sport and the 'zero tolerance' principle was confirmed in Hungary as well, and trust in it that these principles will finally and unquestionably be solidified with the decision of the Curia either in the practice of athletes and the sports experts who participate in their preparation, or the practice of the bench.

In the social fight for the purity of sport that standpoint is understandable and defensive, what the MACS represents: 'All of these are the indispensable elements of the fight, which is waged in order to insure the rights of the clear competitive athletes. The fair play is the only way!' – can be read in the announcement of MACS.

For those who did not have to confront with the blasphemous task of the protection of the athletes who were taken under legal procedure, would be free to publish a – today already free citable – other legal case from the world of cycling, because – despite of the expected failure – we found it a real colourful case in my praxis.

In 2012 the MACS showed the geranium-oil marker from the urine of our client, Rida Cador cyclist. Because of the objective liability our proof was absolutely teatral and evidently unnecessary at the disciplinary trial. After this made a smile for the face of the members of the disciplinary council, here we can say that without better reason we referred to the favourite food of the athlete, which was the goat milk. It avoided the attention of the athlete that the goat one time pastured the geranium. We brought a medical advisory opinion to prove that the

active ingredient really percolates into the milk. Despite of our believable story the argument (as a jurist we say: correctly) shortly closed this question, saying that it is absolutely not important how the prohibited substance got into the body of the athlete, if it is in his body, the doping offense was realized.

The interests subjected to the fairness of sport are indisputable, but let's see this question from the side of the athletes as well: With a simple phrase from the aspect of the athlete it is unjust that he has no possibility for defense. The legal representant has a difficult case related to the defense rights. It belongs to the conclusion of fact of the case that this client was a first-placed athlete as well, who got a Hungarian Championship 1st Prize at the international cycling competition managed on 26 June in 2011 in Varasdin in Croatia by the Croatian Federation. With this result he became the 5th placed of the international race as well. He also presented that he indicated those medicines on the form of HUNADO, which he could take for his asthma based on TUE permit. But he did not indicate that natural fat burning substance, which was found in his urine sample as well.

Finally let us see a frappant sportslaw case in the frame of a skating sport! First of all we have to know, that an attorney has almost no chance in a defense strategy, because a doping offense will inevitably occur if the material of the WADA blacklist is present in the urine or blood sample of athletes.

So, we present you a fairly fresh matters of fact just because this case breached a hole on objective liability: Eszter Tóth vs ISU. What's happened? Eszter Tóth, the short track speed skater of the Hungarian Club of Athletes (MTK) was just a child when she became the victim of the doping offense. She was just 14 years old when a sample was taken from her body in order to carry out the doping control. In the sample 'A' metabolits of Stanozolol was shown, which is considered as a prohibited substance. HUNADO was obliged to initiate the doping procedure because of the positive sample. After the prohibited substance was detected in the body of the young athlete, and because she had no medical exemption (TUE), the legal representative asked to examine the sample 'B' as well (this is the generally accepted procedure, just as that the result of sample 'B' had no more beneficial result for the athlete. In the doping procedure initiated on 29 March 2019 there had to take into consideration the spiritual development of the minor athlete. The minor athlete said that she did not take and did not accept any kind of unknown substance from anybody. But the doping offense was realized because of objective liability.

This was the first commitment of a doping offense, the time of suspension from competitions, participation on trainings would have been 4 years, in case the competitor can not prove that she was not subject to willfulness. The subsidiary rule taken into consideration at the sentencing is contained by Section 2 Paragraph 27 of the Hungarian Anti-Doping Decree in the following:

'If the competitor proves that she is not subject to negligence in the commitment of the doping offense, the determined suspension punishment can not be

applied. According to the speciality regarding to the minors (Point a) Section 1 Paragraph 12) in case of the commitment of a doping offense – except the doping offense committed by a competitor under 18 years of age – the additional condition of the disregard of suspension is that the competitor has to certify how the prohibited substance got into her body.'

This text between the two dashes as – except the doping offense committed by the competitor under 18 years of age - is very-very important!

The Doping Committee took into consideration that the minor athlete was just 14 years old when the prohibited substance was presented in her body, in her case willfulness was not subject to her, that's why her suspension prohibition was decreased maximally, so just 2-year suspension was sentenced as a punishment (in fact according to the strange logic of objevtive liability for nothing, because the objective liability ergo means that even the establishment of negligence is not necessary in order the athlete to be liable for committing a doping offense, to be sentenced. During the establishment of liability the question of culpability is not relevant, it can be evaluated just at the sentence of punishment). The argument of the decree evidently illuminated to the objective liability of athletes, as 'The competitor is liable for the presence of any kind of prohibited substance, compound or marker in her body, apart from that regarding to the presence at least negligence or willfulness is subject to her.'

Against the first instance decision both parties submitted an appeal. The minor athlete firstly asked for the annulment of the first instance decree and the termination of the procedure, secondly the mitigation of the suspension punishment. In front of this the International Skating Union (ISU) asked for the aggravation of the punishment.

The Doping Appellate Committee supplemented the revealed matters of fact of the first instance committee by questioning witnesses and concluded that during the preparation in the time period out of competition those conditions are not provided for the age group of the athlete, which exclude the possibility of the eventually occurred sabotage. (it revealed that the athletes have no lockers, there is no entry system at the place of preparation, and the entry is not controlled as well). It also revealed that the substance presented from the body of the minor is not applicable for doping. While according to the opinion of experts in the short-track branch competitors fight against the centrifugal force. The size of the centrifugal force firstly depend on the peripheral speed, secondly from the radius of the field track, thirdly from the weight of the body. According to the above mentioned the growth of the muscle weight of the body is not just inapplicable for doping, but in contrast, it deteriorates the aimed doping effect. After thinking over all of these the Doping Appellate Committee concluded that the minor athlete was even not subject to negligence in the fact that prohibited substance got into her body. The Doping Appellate Committee breached the objective liability and concluded that the competitor committed the doping offense contained by

Subpoint aa), Point a), Section 1 Paragraph 12 of the Anti-Doping Regulation by in her sample prohibited substance was found, so the commitment of the doping offense was established, but the calling to account was not established.

'Based on Section 1 Paragraph 27 of the Government Decree if the competitor proves during the doping procedure that even negligence is not subject to her in the commitment of the doping offense, the determined suspension punishment can not be applied against her.'

It is very important that in the case of the minor competitor, the condition of the disregard of the suspension is not that the competitor certifies that how the prohibited substance got into her body. Moreover, the Doping Appellate Committee established that the competitor is even not subject to negligence in the commitment of the doping offense.

The speciality of the decision adopted in the second instance procedure is not that sentence of a punishment was not taken place. The second instance decree is governed as final decree, ergo executable. In practice it has the positive consequence that Eszter Tóth can participate again in trainings, can get competition license for the season 2019/2020, so can compete to Hungarian and international level sports competitions as well.

Naturally against the second instance decree there is a possibility for the parties to turn to court or to the CAS within 30 days forfeit deadline from the delivery. The WADA and the ISU have also the possibility to turn to the Court of Arbitration for Sport (CAS).

V. Summary

It would be elegant to refer to the full enforcement of legal principles, but if we examine a concrete doping procedure, the WADA regulations or the legal practice of CAS (the international sports law legal literature call it lex sportiva), we can see that the athlete does not have too many possibility to prove his innocence, if a prohibited substence was found in his body. The commentar of the WADA Code also refers to it that the doping offense will be realized even if the doping substance was injected into the tied up athlete on the day before the competition. The athlete can prove just that he is not liable for willfulness or negligence in connection with the case. The doping offense can be established this case as well, at most the athlete can be exempted from the suspension. In order to establish culpability in criminal law, willfulness or negligence is needed from the offender. In this case the athlete has to prove that he is not guilty. We can form the same critic the other important rights of the athletes, including the well-known dark sides of the whereabouts information as well.

In general we can say that in the modern, technicized world the liability is based on in more and more sphere the objective result and not the consciousness and chargeability of the offender. The more and more globalized phenomena

– the objective liability – subject constitutional scruples in sport, where life, physical integrity and physical presence, condition, preparation, stamina of the athlete is the central element – even in the technical sports as well -. We argue in vain besides the general trend and with that the athlete voluntarily subjects himself to the rules of doping, control, personal data management and publicity, restricting his own fundamental rights, all of this can not take the sportsman absolutely vulnerable and outlaw. The voluntarity and validity of the restriction of rights are influenced by the proportionality and necessity, the human dignity and the right to self-determination. This middle way has to be enforced also in the regulation, by insuring the proper reasons of justification, procedural guarantees under the liability, because the law also can not restrict the essential content of a fundamental right, the self-abdication and the relinquishment of rights (in fact its pressure) is a too high price for the amusement of the society on the altar of the business profit. If this falls, then robots will do sport, and we can bet for them, but it will be another era…

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