

# NEWS SECTION

## Switzerland

### ICE HOCKEY/CRIMINAL LAW

#### Federal Supreme Court

Decision 6B\_298/2007 dated October 24, 2007

 Assault; Sportspersons; Switzerland

**Facts:** In a professional ice hockey game of the Swiss National League A played in the year 2000, Kevin Miller of the Hockey Club Davos fouled Andrew McKim of the Zurich Lions Skating Club. Andrew McKim was in possession of the puck, and Kevin Miller approached him at high speed. He checked Andrew McKim hard from behind 0.38 seconds after the latter had shot the puck towards the goal. This check made Andrew McKim fall over and hit the ice hard with his forehead. He remained unconscious for a moment and suffered a severe concussion. This concussion forced him to immediately retire from professional ice hockey. Until now, he has not pursued a full-time occupation of any kind.

Kevin Miller was sent off the field for the remainder of the game. He was later suspended for eight further games and fined CHF 3,000 by the judicial bodies within the Swiss Ice Hockey Association.

Furthermore, the Zurich district court found Kevin Miller guilty of wilful assault and negligent aggravated assault and sentenced him to a three-month prison term (two years' probation). He appealed this decision and was found not guilty by the Zurich cantonal court of appeals. The decision of the court of appeals was then brought to the Federal Supreme Court (FSC) by Andrew McKim.

**Held:** Initially, Andrew McKim's standing for this appeal was confirmed. A victim may appeal against a criminal decision concerning his assailant if the decision appealed may have an influence on the appreciation of the civil claims of the victim.

The FSC then set out to discuss general questions on the application of criminal law. It pointed out the difference between a wilful and a negligent assault. According to Swiss criminal law, an assault is committed wilfully if the delinquent is aware of the potential consequences of his actions and decides to act irrespective of such knowledge thereby risking the consequences. A negligent assault, on the contrary, is committed if the delinquent does not use the necessary precautions when acting in a way that could be harmful to others. While he may be aware of the fact he might endanger others, he does not wilfully decide to take a chance but is—owing to a lack of common sense—confident the negative consequences of his actions will not be realised.

Some authors have argued that any ice hockey player would agree to potentially being assaulted by opponents simply by taking part in an ice hockey game. In rendering its judgment, the FSC made use of the opportunity to state that this was not generally the case. Such an implicit agreement is, according to the FSC, not given for deliberate or grave violations of sports rules which have been created specifically for the protection of the players. Kevin Miller had clearly gravely violated at least r.522 (charging) and r.523 (checking from behind) of the International Ice Hockey Federation (IIHF). These rules indeed had been created for the protection of the players' health. The FSC therefore ruled out the assumption of Andrew McKim having agreed to being assaulted. Such an assumption would have made finding Kevin Miller guilty impossible.

Having discussed these preliminaries, the FSC continued to review the decision of the court. It agreed that the consequences of the actions of Kevin Miller fulfilled the objective elements not only of an assault but also of an aggravated assault. The subjective element, the distinction between wilful, negligent or unintentional fulfilment of the objective elements, gave more scope for discussion.

First, it found the decision of the second instance, finding Kevin Miller not guilty of wilful (simple) assault, to be contrary to the law. It reasoned that, regardless if a check is intentional or not, an ice hockey player should control his movements on the ice so that he is always able to avoid hitting his opponent or getting into other kinds of potentially dangerous situations. If, however, he gets himself wilfully into a situation in which it only depends on coincidence if a body check is done according to the rules or not, the wilfulness of his assault (risking the consequences) is given. The decision of the court of appeals was set aside as regards this issue.

The FSC then also set aside the decision of the second instance with regard to the negligent aggravated assault. It reasoned that Kevin Miller (being a professional ice hockey player) had been in a position to foresee that a body check from behind could result in severe and permanent physical harm of the victim (aggravated assault). Had he acted more diligently, these injuries might have been avoided. Therefore the negligence was considered to be a given and the decision of the court of appeals to be contrary to the law.

As the decision of the second instance had definitely set aside the decision of the first instance, the FSC could not simply confirm the decision of the first instance. A decision in the matter itself could not be rendered by the FSC either as not all the details for the assessment of the punishment were known to it. Furthermore the Swiss Penal Code had changed while the case had been in appeal, and the FSC would have had to decide whether the old regime or the new regime was more favourable for Kevin Miller and would thus be applicable. It was not possible to decide this without further investigating the personal situation of Kevin Miller. The case was therefore sent back to the first instance, and the district court was requested to make a new decision. The court of first instance will now have to decide whether to apply the old law (i.e. punishing Kevin Miller with a short prison sentence on probation) or the new law (i.e. fining Kevin Miller).

**Comment:** This is only the second time the FSC had to decide on the criminal qualification of a professional ice hockey player's foul (the first decision being No.121 IV 249). These two decisions are in line with each other and coherent. The FSC has, in detail, outlined the conditions under which a violation of a sports rule may also be punished under criminal law. Usually, sports professionals and associations do not appreciate it if a state court makes a decision on the consequences of violations of sports rules once the judicial bodies of the respective sports associations have already ruled on a case. As its main focus is directed towards the health of the players, however, the FSC has shown a certain responsibility towards the players' integrity which should protect them from unnecessary assaults but still leave them enough freedom to play their sports with a reasonable amount of physical exertion.

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