

“Who really brings the game into disrepute?”

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In Brief

A public spat. A drunken fall. A scathing comment. Professional athletes, like many of us, occasionally do careless and reckless things.

Unlike many of us, however, professional athletes are often fined exceedingly large amounts of money, suspended or terminated from their employment for doing these things. And you can almost be certain that somewhere within the governing body’s charge sheet relating to the conduct, there will be an allegation that the athlete has brought either him or herself or the game into disrepute.

But what does this charge mean? And *who* really brings the game into disrepute?

More often than not, when an athlete is charged by a governing sporting body, one of the allegations will be that the athlete brought the game into disrepute. Although less common, athletes can also be charged with bringing themselves into disrepute.

Both the athlete’s contract and the particular code of conduct or by-laws of the sport will usually contain clauses which state, in effect, that the athlete must refrain from doing anything which adversely affects or discredits the game of that particular sport or team or which brings the athlete or the athlete’s sport into disrepute.

If an athlete misbehaves in any way, and in so doing falls foul of other specific clauses of his or her playing contract or the code of conduct, it is likely that they will also be charged with either bringing themselves or the game into disrepute too. The charge is almost always levelled at an athlete who steps out of line.

However, both athletes and governing bodies need to be aware that in order to establish a breach of these common provisions, the governing body must establish that public opinion of the sport has been diminished as a result of the *conduct in question*, and not as a result of some peripheral sideshow (i.e. speculative media articles) which may have since overtaken the conduct in question. Anything less may not suffice and a tribunal may not be prepared to make a finding that the athlete is the cause of bringing themselves or the game into disrepute.

Conduct that brings an athlete into disrepute

In the case of *D’Arcy v AOC* [2008] CAS 2008/A/1539, which concerned the Australian swimmer Nicholas D’Arcy’s altercation with fellow swimmer Simon Cowley, the Court of

Arbitration for Sport considered a clause of Mr D’Arcy’s “membership agreement” of the Olympic swimming team which stated that Mr D’Arcy could not engage in conduct which, if publicly known, would be likely to bring him into disrepute.

The Court held that “*bringing a person into disrepute is to lower the reputation of a person in the eyes of ordinary members of the public to a significant extent*”. The same description is generally applicable to bringing a game into disrepute.

The Court determined that Mr D’Arcy’s conduct, in that he has been “*out at a public bar in the early hours of the morning, intoxicated and had become involved in a fracas with another former athlete, which led to that person being very seriously injured and taken to hospital*” was sufficient to bring Mr D’Arcy personally into disrepute.

On appeal, Mr D’Arcy’s legal team submitted that the fact the panel at first instance had not found that the sport of swimming (or the Olympic Team or AOC for that matter) had been brought into disrepute was a significant factor that should have been taken into account. However, the Court found that the fact that Mr D’Arcy’s conduct had brought him into disrepute was sufficient for the AOC to terminate Mr D’Arcy’s agreement.

This case shows that there is certainly a lower threshold to establish that an athlete has brought him or herself into disrepute.

Conduct that brings a sport into disrepute

Patrick George in his paper ‘Sport in Disrepute’ *Australian and New Zealand Sports Law Journal* (2009) 4(1) 24, discusses the case of *Zubkov v FINA* [2007] CAS 2007/A/1291, where a Ukrainian swimming coach, Mykhaylo Zubkov, was charged by FINA (the international governing body of swimming) with bringing the sport of swimming into disrepute after footage was broadcast of Mr Zubkov having a physical altercation with his daughter during a swimming meet in Melbourne in March 2007. Mr Zubkov was originally expelled from his position as coach and barred from reapplying for admission for six years.

On appeal, however, the Court of Arbitration for Sport found that while Mr Zubkov’s conduct had been aggressive and violent, there was no evidence to prove that his actions brought the sport of swimming into disrepute. For the sport to be brought into disrepute, the conduct needed to adversely affect the promotion and encouragement of the development of swimming. As a result, Mr Zubkov’s ban was reduced to an eight month suspension.

Interestingly, it was argued that the broadcaster and FINA contributed to any offence of bringing the sport into disrepute by showing the footage of the altercation on international television.

Our recent experience

Swaab Attorneys recently acted for an Australian professional athlete in a code of conduct tribunal hearing. The governing body of that sport sought that the athlete's contract be terminated on various grounds. One of the charges was that the athlete had brought the game into disrepute. Crucially, the charges were brought against the athlete many months after the conduct occurred. During these months, the athlete had continued to represent the sport, had performed well both on and off the field and had upheld all of the athlete's obligations under the playing contract and code of conduct.

At the hearing it was submitted by the governing body that the athlete's conduct and the publicity as a result of that conduct, reflected adversely on the game.

We submitted, on behalf of the athlete, that the conduct reflected only on the athlete and others directly involved in the incident and that any subsequent poor reflection of the game was brought about not by the athlete's actual conduct, but the ensuing media attention (citing *Zubkov v FINA*), much of which contained speculation, as well as the governing body's general handling of the matter.

We also submitted that there was an issue with the timing of the conduct and the charge from the governing body, given it could not be alleged that the game had been brought into disrepute at the time of the player's conduct but only after the governing body itself went public with the charges. A number of media articles were tendered at the hearing evidencing the healthy and positive state of the sport between the time of the conduct and time at which the charges were brought.

The athlete admitted that the conduct was a minor contravention of a different clause of the code of conduct by-laws.

Therefore, the tribunal found that it was unnecessary to determine whether the athlete was in breach of any other provisions, including that the athlete brought the game into disrepute.

However, in saying that, the tribunal noted that there were difficulties in characterising the athlete's conduct as having brought the game into disrepute. The tribunal noted that this was because the conduct itself only became publicly known, and therefore capable of adversely reflecting on or discrediting the game, as a result of the tribunal process itself. Prior to that, the athlete had continued to play and represent the sport and the sport was in good health.

Lessons for athletes

Firstly, it is clearly much easier for a sporting body to establish that an athlete has brought his or herself, rather than the sport, into disrepute. Therefore, it is important that athletes and their management consider whether there are any provisions in their

contracts that preclude them from bringing themselves into disrepute. These clauses are naturally more prevalent in individual sports, such as swimming and athletics. If an athlete is subject to this type of clause, then, in the event of being charged with some form of misconduct, the governing body will likely rely more heavily on a breach of this clause than other more specific clauses.

Secondly, for athletes charged with bringing their respective sport into disrepute, their governing body must establish that the athlete's conduct, and not some peripheral or consequential effect (including the body's subsequent management of the matter), is *the act* which brings the sport into disrepute. In those circumstances, it is important that athletes clearly identify that there is a difference between their conduct and other factors, such as media attention, which are simply not within the athlete's control.