

IS FOOTBALL BECOMING MORAL?

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On the CAS award 2015/A/3871 and 3882 Sebastián Ariosa Moreira vs Club Olimpia and vice versa.

Introduction:

For the first time, as far as I know, the Court of Arbitration for Sport has welcomed a new concept in football law: the moral suffering or moral damage of a player when it comes to a termination of contract without just cause by a club.



This could also be known, generally speaking in *legalese*, as “the law of tort”. The doctrine² said that:

“Without the need of any contract, the law of tort imposes negative obligations on certain classes of persons for the protection of other classes of persons, creating a right in the victim to damages or, sometimes, an injunction in circumstances where the victim suffers injury or damage through the wrongful act of the other person, called the tortfeasor or wrongdoer. The law of tort is not particularly concerned with sport, over and above other forms of human activity, but an explanation of how tort impacts on sporting activity is essential to a full account of the law relating to sport”.

So, tort is in sport but the moral one is not a welcomed fellow. Tort can be when assaulting or inflicting an injury, or in breaches of contract *strictu sensu* but we do not see the moral damage as a frequent insider in sport.

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² “Sports Law” by Michael Beloff QC, Tim Kerr and Maria Demetriou – Hart Publishing, first edition 1999, page 34.



There is civil and criminal liability in sport³ or tort⁴ but in the sense of personal injuries through negligence, either by players or spectators or the organisers of events but the sort of “moral” one is or unknown or not claimed.

The CAS award:

That is why the CAS award of the Uruguayan player Mr. Sergio Sebastián Ariosa Moreira against the Paraguayan club Olimpia is so crucial. A panel, on the 29th of July 2015 has decided to award the player a “moral damage” for his suffering due to the behaviour of the club.

The player claimed first before FIFA that a moral damage was to be considered but the Dispute Resolution Chamber decided that those damages were not proven: an easy way to get rid of any claim.

The player and the club appealed before CAS for different reasons, and one of those from the player’s side was the request of the moral damage valued in 250,000 USD.

On such moral damage, the player said that he claimed it because of Olimpia’s behaviour which caused him “anguish and insecurity” while the club responded that such request was indeed part of the indemnification itself and that it should not be treated apart of the compensation.

The Panel then went on explaining the requisites to be able, at least, to enter to study a possible moral damage and set three needed elements for that:

- a. The request for moral damage must be included in the applicable law.
- b. The behaviour of a person must injure an immaterial right of such “moral damage”.
- c. The injury and its circumstances must allow the Panel to have a “comfortable satisfaction” to give such damages to the victim.

On the first of the requisites, the Panel stated that:

³ “Sport: Law and Practice”, by Adam Lewis and Jonathan Taylor – Tottel Publishing, second edition, 2010, pages 711 to 775.

⁴ See Leis and Taylor page 234.



The case had several applicable laws to take into consideration, as the Swiss Law, the Paraguayan one and the international sporting regulations (FIFA Regulations for the Status and Transfer of Players mostly).

FIFA does not have the “moral damage” as part of it but the two national laws include that damage in their regulatory frame and both are applicable as per article R58 of the Code of Sports-related arbitration and mediation rules.

Article 1835 of the Paraguayan Civil Code clearly mentions it, as well as article 28 of the Swiss Civil Code and also the Swiss Code of Obligations, in its article 49 makes a clear mention. Thus, the applicable law(s) is open for the claim of such moral damage.

Then, the nature of the damage is that of immaterial rights and it is an open field that might include physical or aesthetic damage, as well as harm, feelings, reputation, etc. There are intimate rights of the victim but not all and every behaviour might start a moral damage responsibility for the victim.

The Roman principle of *naeminem laedere* or the general duty not to injure other persons needs to have negligence or an abuse of right.

Finally, the Panel must take into account that the damage is “exceptional and heavy”, so that not all the behaviours and circumstances are to be considered enough to allow such right of indemnification.

As for the case itself:

Olimpia of Asunción did not pay the salaries of the player and that behaviour has been recognized by the club, as well as the non-payment of the housing which was included in the contract, the non-giving of a car and to pay an wide insurance while the player was medically treated.

The Panel decided that Olimpia has not fulfilled its duties and was a recidivist and moreover, they never give any explanation for such behaviour but just recognizing their infringement of the contractual obligations. Thus the Panel considered that Olimpia has acted with “exceptional and heavy” behaviour.



Just to remind an issue that is important: the footballer was suffering chemotherapy, thus playing and suffering in the most important match of his career and life. The Panel was of the idea that the player was vulnerable and that he had to focus himself only in saving his life. Olimpia's behaviour was no only distracting him for the most important game of the footballer but it added a weight to his already weak body and mind.

Evidences of such impact on the player were the witnessing of his doctor, Mr. Castillo, who clearly mentioned to the Court that the footballer was strongly depressed and that the issue with his employer wasn't good either for him or for his treatment.

The Panel had "comfortable satisfaction" on the existence of the harm suffered by the player and thus that a moral damage existed and had to be indemnified.

Compensation for moral damage:

There it come a very difficult task for the Panel which is to determine how much that moral damage had to be and how much indemnification should be paid to the player.

The Panel went for an "easy" solution, which is to take the full contract which was of 911,500 USD and then to "decide" that a just amount to be paid by the club for such moral damage is 63,805 USD.

I really don't know how the Panel reach such a solution and amount because it is less than one month of emoluments (which should have been 75,958.33 USD). The calculation that can be near that was the strict "monthly salary" multiplied by four, but it is not exactly the same. The Panel says that it has used a 7% of the whole contract which is then 63,805 USD, but why 7 and not less or more is one of the mysteries of CAS.

Conclusion:

The importance of that interesting CAS award is the very well established "moral damage" issue, with all its needed steps to be accepted, the evidences and how the Panel reached a comfortable satisfaction to allow the indemnification to the player. The work of the Panel was really an insightful one and merits all our congratulations. All three are Latin Americans, and I can say that the research



made should open the eyes of us European, much less aware of what our mates on the other side of the Atlantic Ocean are doing for legal football.

Of course, this is not something that will be used in all the case but at least it opens the path for a real search of moral damage in football when it comes to breaches of contracts.

And, by the way, what about a moral damage for a club? Think about a player that abandons a club by using article 17. Could this be one of the unknown and unwritten criteria to set an indemnification?

This is a long and winding road, as in The Beatles' song... But also something to be dug into by lawyers too.

