



SPORTS-RELATED CONCUSSIONS

A Q&A FOR
SCHOOLS AND OTHER
PUBLIC ENTITIES

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Are concussions making some sports too dangerous? NHL Hall of Fame goaltender Ken Dryden appears to think so:

“What once had seemed debatable, deniable, spin-able, now is not. What once had been ignored now is obvious. Not just contact or collision sports, hockey and football are dangerous sports.”¹

Too often we hear tragic stories about the disability or death of a former football player, arguably the result of a brain injury from repeated concussions.² The NFL and NCAA are facing lawsuits by thousands of former players who claim the dangers of concussions were concealed from them.³ NHL superstar Sidney Crosby missed 60 games due to the lingering effects of a concussion he sustained in 2011, and yet the concussion problem has continued unabated in the NHL.⁴

Football is America's favorite sport,⁵ and perhaps our most violent, so it's not surprising that most of the media's focus is on football concussions. The news for football is sobering. Many are questioning whether the sport must make radical changes. In a 2009 essay in *The New Yorker*, Malcolm Gladwell considered the long-term viability of football, comparing it to dogfighting.⁶ Gladwell's view is that "what makes dogfighting so repulsive is the understanding that violence and injury cannot be removed from the sport."⁷ Gladwell asked whether the same was true of professional football, and if so, whether the sport could survive. In a 2012 essay in *Grantland*, economists Tyler Cowen and Kevin Grier went further and spelled out a scenario for the slow death of football as we know it over the next 10 to 15 years.⁸ According to Cowen and Grier, "the most plausible route to the death of football starts with liability suits."⁹ In another 2012 essay in *Grantland*, Jonah Lehrer argued that the death of football will start at the high school level when parents and players, who aren't rewarded financially for playing, realize that the health risks of the sport outweigh the rewards.¹⁰ Political commentator and noted sports fan George Will

has written about the "fiction that football can be fixed and still resemble the game fans relish."¹¹

Even President Obama joined the discussion. On the eve of the 2013 Super Bowl, he had this to say in an interview in *The New Republic*:

"I'm a big football fan, but I have to tell you if I had a son, I'd have to think long and hard before I let him play football. And I think that those of us who love the sport are going to have to wrestle with the fact that it will probably change gradually to try to reduce some of the violence. In some cases, that may make it a little less exciting, but it will be a whole lot better for the players, and those of us who are fans maybe won't have to examine our consciences quite as much."¹²

Despite the media's focus, it would be a mistake to assume that the concussion problem is limited to a few contact sports. Concussions happen in virtually all sports and at all levels of play. In addition to such obvious sports as football, hockey and rugby, other sports such as soccer, basketball, baseball, lacrosse and field hockey contribute to the problem. Both male and female athletes suffer concussions. Younger athletes





and female athletes are particularly susceptible. And the concussion problem isn't even limited to traditional team sports. Cheerleading, gymnastics, biking and playground activities are all leading sources of concussions.

This installment of *Genesis Insights* employs a Q&A format to help sort through the information about concussions. We will discuss concussions and the scope of the concussion problem, current and anticipated medical developments, legislation, concussion litigation, coverage issues and other topics. We conclude with some suggestions that schools and public entities may want to consider in managing this risk.

The amount of information on sports concussions is vast and increasing every day. Medical studies, legislation, rules changes, new or improved equipment, court decisions—all of these contribute to a fast-changing environment. Schools and other public entities field sports teams. They organize leagues. They employ coaches, trainers and referees. They provide the playing fields, courts and other resources for millions of this country's young people to participate in sports and other physical activities. Sports-related concussions pose a significant and growing challenge for schools and other public entities.

Some Background and Statistics on Concussions

Question: What is a concussion?

Answer: Defining a concussion is not as simple as it might appear. After much debate, the Third International Conference on Concussion in Sport arrived at the following:

*"Concussion is defined as a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces."*¹³

The authors noted further that a concussion can be "caused either by a blow to the head, face or neck or a blow elsewhere in the body with an 'impulsive' force transmitted to the head."¹⁴ To put it in lay terms, therefore, a concussion is a brain injury, usually caused by a direct or indirect blow to the head.

Question: What is C.T.E.?

Answer: C.T.E. refers to chronic traumatic encephalopathy. C.T.E. is a degenerative brain disease caused by the development of unusual proteins in the brain, similar to the brain chemistry changes found in Alzheimer's patients.¹⁵ C.T.E. has been associated with memory loss, confusion, impaired judgment, aggression, depression and dementia. Several deceased NFL players who suffered multiple concussions during their careers have been posthumously diagnosed with C.T.E.¹⁶ Post-mortem dissection of the brain is now required to diagnose C.T.E. definitively. A recent study suggests, however, that a positron emission tomography (PET) scan may provide a means to diagnose C.T.E. in living patients.¹⁷

While promising from a diagnosis and treatment standpoint, this development potentially opens the floodgates to a large number of sports participants being able to establish that they have suffered a serious sports-related brain injury before the onset of the most significant symptoms. Many such participants could be expected to sue for damages. This is the basis for

the fear heard in some quarters that concussions could be the next asbestos.

Question: What is second impact syndrome?

Answer: Second impact syndrome is a rare and frequently fatal traumatic brain injury. It occurs when someone sustains a second brain injury before an existing brain injury has healed completely. The syndrome received publicity as a result of a series of stories about Cody Lehe, an Indiana high school football player who returned to play, apparently in disregard of his physician's advice, before recovering fully from a concussion. After participating in contact drills in practice, he suffered seizures and today remains wheelchair-bound.¹⁸

Question: Are concussion rates different for male and female athletes?

Answer: Female athletes appear to be at greater risk for concussions than their male counterparts. In its position statement on sports concussions, the American Medical Society for Sports Medicine cites several studies showing that for those sports in which the rules are similar for males and females—e.g. basketball and soccer—there is a significantly higher incidence of concussions in female athletes.¹⁹ In addition, studies suggest a greater severity and duration of concussion symptoms in female athletes.²⁰

This raises significant issues about the adequacy of the steps being taken to prevent concussions for female athletes. At the recent 2013 North American Society for Sports Management Conference, a group of researchers discussed the results of a study showing that female athletes are more likely than male athletes to return to play too soon after suffering a concussion.²¹ And it is far from clear that coaches in such female-dominated activities as cheerleading have the same concussion training and awareness as, for instance, football coaches.



Question: Is age a factor in susceptibility to and recovery from a sports concussion?

Answer: Age appears to be a factor in both susceptibility to and recovery from concussions. A study by researchers at the University of Pittsburgh found evidence that high school athletes require a longer time to recover from concussions than college athletes.²² In a recent article in *The New York Times* on the growth of concussion clinics, Dr. Cynthia Stein, a physician at such a clinic in Boston, explained that:

“A concussion might be the only injury where the younger you are, the longer it takes to get better. . . Anything else, if you cut your hand or whatever, the younger you are, the quicker you heal. But for a concussion, recent studies indicate that a 10-year-old heals slower than a 14-year-old, and a 14-year-old heals slower than a 17-year-old.”²³

Question: Can an athlete suffer a brain injury without an actual concussion?

Answer: Most of the recent press and public attention has focused on the damage to the brain caused by concussions. That appears to be looking at the problem too narrowly. Emerging scientific evidence suggests that a concussion isn't a necessary predicate for brain damage to occur. For example, a recent study by the Cleveland Clinic found evidence that college football players may suffer significant long-term brain damage from blows to the head that do not result in concussions.²⁴

Question: Are there any tools to assist teams in determining whether a player has suffered a concussion?

Answer: The diagnosis of a concussion should always be left to a trained medical professional. There are, however, several computer-based tests that purport to assist in determining whether an athlete has suffered a concussion. Perhaps the most talked-

about is the ImPACT test. This test is touted by professional athletes and has been marketed by Dick's Sporting Goods as part of a public-interest concussion awareness campaign.²⁵ ImPACT is widely used by professional sports leagues as well as universities and high schools. ImPACT testing involves generally two parts—a baseline cognitive test administered before any injury, and then a second test administered when an athlete is suspected of suffering a concussion. Detailed information on the test can be found on the website of ImPACT Applications, Inc.²⁶

The test is not without its detractors. The past president of the American College of Sports Medicine has called this type of testing “a huge scam.”²⁷ It isn't the purpose of this article to take a side in this dispute. Unless and until there is a consensus on the validity of this type of test, however, the best advice for those using or considering using one is to be aware of its potential limitations.

Question: How widespread is the problem of sports-related concussions? Is the number of sports-related concussions increasing?

Answer: There is no general agreement on the exact number of sports-related concussions occurring in the United States each year. A frequently cited estimate from the American Academy of Neurology puts the number of concussions from sports and recreation activities at 1.6 million to 3.8 million.²⁸ With respect to football in particular, a 1983 study of 103 secondary school football teams in Minnesota arrived at a rate of 19 players out of 100 with at least one possible concussion.²⁹ Concussions accounted for 24% of all football injuries in the study.³⁰ Significantly, the authors noted that by counting only one concussion per player, they ignored multiple concussion episodes and thus understated the total number of concussions in the study group.³¹

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Whatever the number, the incidence of concussions in sports and recreation activities may be increasing. In 2011, the Centers for Disease Control and Prevention (CDC) released the results of a study on non-fatal brain injuries suffered by youth in sports and other recreation activities.³² The CDC focused on emergency room admissions and concluded that from 2001 to 2009, annual emergency room visits for sports and recreation related concussions increased by 62%, from 153,375 to 248,418.³³

Looking at all the CDC data for all age groups and for males and females, bicycling, football, playground activities, basketball and soccer were the top sport and recreation activities giving rise to concussions.

By its own admission, the CDC study understates the actual number of concussions. The CDC study excluded persons who received treatment outside of an ER. In such team sports as football, however, a player may have received treatment by a trainer, team doctor or family physician. Regardless, the CDC reported a total of 2,651,581 ER visits for concussions during the study period, 351,562 or 13% of which were attributable to football.

Question: Are any significant concussion studies still underway?

Answer: Countless scientific and medical organizations are undertaking the study of concussions. Two such studies stand out for their potential to have far-reaching significance for concussion risk management.

First, on March 11, 2013, the NFL announced that it has teamed up with General Electric on a four-year, \$60 million research project to develop technologies to improve the diagnosis and treatment of concussions.³⁴ As a part of the study, GE and the NFL are soliciting proposals for “technologies and imaging biomarkers that address identification and management of subclinical and mild traumatic brain injuries.”³⁵ The offer includes possible

cash awards of up to \$10 million and potential collaboration with GE. In addition, the NFL and Under Armour will be soliciting proposals for “new materials and technologies that can protect the brain from traumatic injury and new tools for tracking head impacts in real time.”³⁶

Second, an ad hoc committee of the Institute of Medicine has received funding to conduct a comprehensive study of sports-related concussions.³⁷ The study will focus on youth in school and the military. The report, which is expected to be completed in 2014, will include specific recommendations for legislatures, school superintendents, athletic directors, and other athletic personnel, including in particular coaches and trainers.

Concussion Laws and Regulations

Question: What are some steps governments are taking to protect student athletes from concussions?

Answer: According to USA Football, as of April 23, 2013, 47 states and the District of Columbia have passed laws governing concussions and student athletes.³⁸ Most of these laws are modeled after a law passed in Washington following a traumatic brain injury suffered by Zackery Lystedt in a middle school football game. The original Lystedt Law had three key provisions:

1. training and education for coaches, athletes and parents;
2. mandating immediate removal from play of any athlete suspected of sustaining a concussion; and
3. prohibiting return to play unless and until the athlete receives clearance from a medical professional.³⁹

Not all states have adopted these exact provisions. The NFL maintains a website devoted to health and safety issues, including an interactive map with links to the laws of each state as well as pending legislation.⁴⁰

Question: What are some steps that sports leagues/associations are taking to deal with concussions?

Answer: A number of sports leagues and associations have implemented rules and procedures to prevent and identify concussions. We don't have the space to review them all, but summarize below a few such rules and procedures relating to football.

Pop Warner, which provides youth football and cheerleading programs in 42 states, has implemented a Concussion Policy and made rule changes to prevent concussions. The Concussion Policy has a number of requirements, including that the home team provide medical coverage at each game, that a participant suspected of suffering a concussion in practice or a game be removed from play and that return to play be prohibited until the participant has been cleared by a licensed medical professional trained in concussion evaluation and management.⁴¹ Rule changes implemented in 2012 limit the amount of full speed blocking and tackling in practices.⁴²

The National Federation of State High School Associations (NFHS) has published its own guidelines on concussion management.⁴³ Among other things, the NFHS recommends adoption of the “Heads Up” 4-Step Action Plan for a player suspected of a concussion: 1) remove the athlete from play; 2) have the athlete evaluated by a health care professional; 3) inform the athlete's parents about the suspected concussion; and 4) prohibit play until the athlete is cleared by a healthcare professional.

Finally, the NCAA has adopted its own rule requiring each member institution to have a concussion management plan.⁴⁴ These NCAA mandated plans must include, at the least, the following: 1) education for student athletes about the signs and symptoms of concussions; 2) a process to ensure that a student athlete exhibiting signs of a concussion



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be removed from play and evaluated by a medical professional; and 3) a policy that mandates removal from play for at least that day and that requires medical clearance for an athlete with a diagnosed concussion to return to play.

Question: Could some rule changes have unintended consequences?

Answer: We don't know for sure, but there are reasons to be cautious. In a study to be published in *The Journal of Pediatrics*, researchers at the University of Pittsburgh found a significantly higher incidence of concussions in games than in practice.⁴⁵ Commenting on the findings, one of the researchers cautioned about certain rule changes intended to protect youth football participants:

“Limiting contact practice in youth football may not only have little effect on reducing concussions, but may instead actually increase the incidence of concussions in games via reduced time learning proper tackling in practice.”⁴⁶

This doesn't mean that rule changes intended to make practice safer are a bad idea. It means rather that even the best intended rule changes could have adverse consequences that might not be immediately apparent.

Concussion Lawsuits

Question: What legal theories do plaintiffs rely on in support of concussion claims?

Answer: Negligence is the most common legal basis for liability of a public entity or its employees arising out of a sports-related concussion. Negligence theories are limited only by the creativity of the plaintiff's attorneys, but would include, at the least, the following:

- > The defendant has no concussion protocol or an inadequate protocol;
- > The defendant didn't follow its concussion protocol;
- > The defendant provided inadequate safety equipment;
- > The defendant provided inadequate training to the athletes;
- > Lack of informed consent, alleging, for example, that the risk of concussions was not adequately disclosed, or that the player, and the player's parents if the player was a minor, were not informed, for instance, that a school does not provide the best equipment to prevent concussions;
- > Failure to inform parents or other care providers of the extent of an injury and its symptoms;
- > Failure of the referees and coaches to maintain control of the game;
- > Failure to refer the injured student for medical care (ever or in a timely manner); and
- > Negligent training or supervision of coaches, trainers or referees.

Premises liability can provide another basis for liability arising from a concussion. Under this theory, liability arises not from negligence of the team or coaches, but from a dangerous condition on the property on which the sport is played. For example, in a lawsuit against the Tamalpais Union High School in California, a California court of appeal upheld a jury verdict of

\$477,000 arising out of a concussion sustained by a female athlete who had run into an unpadded basketball post.⁴⁷ The court of appeal rejected the defenses based on assumption of risk and a public policy argument that the financial burden imposed by the decision, requiring repair of dangerous sports facilities, would be too great for public entities to bear.⁴⁸ Other examples of dangerous conditions that could lead to a premises liability claim arising from a concussion could include a fence or other barrier too close to the playing field, an unpadded goalpost, an unusually hard artificial surface or uneven surface, and unprotected bleachers or other seating too close to the court or field.

A plaintiff may also try to bring an action under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983.⁴⁹ A primary advantage to proceeding under Section 1983 would be to avoid any state tort caps. In addition, a successful plaintiff in a Section 1983 action may recover reasonable attorneys' fees under 42 U.S.C. § 1988. For reasons beyond the scope of this article, it is likely to be difficult for a plaintiff in all but the most unusual circumstances to state a claim under Section 1983 arising out of a sports-related concussion.⁵⁰

Nevertheless, in a recent lawsuit in Pennsylvania, the district court adopted the Report and Recommendation of a magistrate and denied a motion to dismiss some Section 1983 claims brought by a high school player who suffered several concussions but was never evaluated or removed from play.⁵¹ **First**, the court denied the motion to dismiss a Fourteenth Amendment Substantive Due Process claim for violation of the right to human dignity. The magistrate focused on the allegation that the player was "forced" back in to the game by his coach.⁵² **Second**, the court allowed the plaintiff's state-related-danger claim to proceed, relying on the magistrate's

finding that the allegations, if proven, would show that the defendants had ample time to deliberate to prevent further injury to the plaintiff, but were deliberately indifferent to the harm that could befall him, and therefore their actions were enough to shock the conscience.⁵³ **Third**, the court denied the motion to dismiss the plaintiff's claim that the defendants' actions denied him his Due Process interest in the right to an education. Given the decline in the plaintiff's academic performance and the defendants' alleged failure to do more to assist him, the magistrate concluded that it wasn't enough to defeat this claim that the plaintiff attended school and graduated.⁵⁴ **Finally**, the court denied the motion to dismiss certain claims against the school itself, relying on the magistrate's conclusion that the plaintiff's allegations were sufficient to show a "custom or practice" to deny the plaintiff his rights.⁵⁵ This suit remains at a preliminary stage and the plaintiff ultimately may not be able to prove his allegations.

Finally, it is not uncommon for a student who has suffered a concussion to struggle academically during the period of recovery. The failure of a school to accommodate the student's educational needs could give rise to a variety of state and federal disability claims, including claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165.⁵⁶

Question: What are some of the legal defenses available to concussion claims?

Answer: Focusing on negligence claims, defenses would include those generally available in most tort claims, including assumption of the risk, contributory or comparative fault and lack of causation. Assumption of the risk and contributory or comparative fault defenses may be less successfully

mounted the younger the injured plaintiff. Causation, by comparison, is likely to be a relatively more successful defense in a circumstance where there are other explanations for the injuries, such as an earlier and unrelated blow to the head, particularly if unrelated to the defendant, or where there is a significant time lag between the alleged concussion, and the onset of symptoms. In this regard, causation is also likely to be an issue if a college defendant can show that the player suffered concussions in sports or other activities prior to playing on the college team.

In addition, state—or federal, in the case of a Section 1983 claim—immunity defenses may be available to certain public entity defendants and their employees and officials.

Certain states also have tort caps that might be available to limit the damages recoverable for certain claims against certain defendants.

Finally, there are a variety of additional defenses available to Section 1983, ADA and RA claims. Those defenses involve complex issues that are beyond the scope of this article.

Question: Have there been any significant settlements or judgments in sports-related concussion claims?

Answer: Claims arising from concussions or other catastrophic head injuries from sports and recreation activities are nothing new. Most concussion settlements are confidential and not all judgments are reported. Here are some examples of those that have been reported in one place or another:

> In 2012, San Marcos Unified School District in California agreed to pay \$4.375 million to settle a lawsuit by a former high school football player. The coaches allegedly ignored evidence that the player was suffering from severe headaches, perhaps from a prior head injury, when they allowed him to play. He



Question: Will the outcome of the lawsuits against the NFL be significant for other football programs?

Answer: The suits brought by former players against the NFL have garnered quite a bit of attention. These suits involve a host of unique issues that are not likely to be relevant to the schools and other public entities that are the intended audience for this article. To give just one example, the NFL is arguing that the claims against it are governed by the collective bargaining agreements between the players and the NFL. School athletes obviously aren't subject to collective bargaining.

This doesn't mean developments in, or more likely resulting from, concussion litigation against the NFL couldn't possibly have an impact beyond the NFL. Certainly any changes to the game adopted by the NFL to mitigate or prevent head injuries have consequences for colleges, high schools and other sponsors of football programs. For example, the NFL has considered eliminating kickoffs, which are a primary cause of concussions and other injuries.⁶¹ Similarly, some experts have suggested that widening the field would place a greater emphasis on speed and endurance instead of size and strength.⁶² The rules differ somewhat now between the NFL and other leagues so there is no reason that other leagues must follow the lead of the NFL. On the other hand, rule changes adopted in the name of safety may be difficult to resist. Any such changes could present challenges for other football programs. For instance, adjustments to the size of the field could be extremely costly, especially for colleges and high schools that might have to reconfigure their stadiums.

“Certainly any changes to the game adopted by the NFL to mitigate or prevent head injuries have consequences for colleges, high schools and other sponsors of football programs.”

suffered a severe brain injury and requires lifetime care.⁵⁷

- > In 2009, LaSalle University in Pennsylvania paid \$7.5 million to settle a claim alleging that its medical staff improperly cleared a football player who had suffered a concussion in practice to return to play. When making a tackle, he suffered a brain injury that left him significantly disabled.⁵⁸
- > In 2009, the Tahoma School District in Washington paid \$14.6 million to settle the claim by Zackery Lystedt, a middle school football player who was returned to play after a concussion and suffered a second concussion that left him permanently disabled.⁵⁹
- > In 2009, coaches and administrators from Higginsville High School, Lafayette County School District, Missouri agreed to a \$3 million settlement in a lawsuit by a freshman football player who was permitted to keep playing after suffering a concussion, resulting in permanent brain injuries.⁶⁰

Coverage Issues and Concussion Claims

Question: Are there any recurring coverage issues in concussion claims?

Answer: So far, concussion claims have not given rise to significant reported coverage decisions. The typical CGL policy covers bodily injury caused by an occurrence. Most concussion claims fall squarely within this coverage. Moreover, the typical concussion claim follows a head injury that can be tied to a specific tackle or other hit to the head. In that scenario there is little question about the cause or inception date of the bodily injury. With little question about the timing of the injury-causing event, there is usually little question about which policy is triggered; most often it is the policy in force on the date of blow to the head that resulted in a concussion.⁶³

Once a court identifies the insurance policy or policies that are triggered, the question of the number of occurrences must be addressed. This issue is significant in two respects. A finding of multiple occurrences potentially opens up multiple per occurrence limits of liability. In addition, a finding of multiple occurrences would require the insured to satisfy multiple deductibles or self-insured retentions. The single or multiple occurrence issue is much easier to resolve in the context of a claim arising from a single diagnosed concussion. A claim alleging multiple concussions or even multiple non-concussive injuries over an extended period presents a much more challenging scenario. The resolution will depend on the applicable policy language and the state law on number of occurrences.⁶⁴

In some circumstances, concussion claims can give rise to coverage defenses. The following are some examples that commentators have identified:⁶⁵

- > A suit alleging the coach knew the player would be injured if he kept

playing might give rise to a defense that the injury was expected or intended;

- > A suit alleging that that coach put a player in a situation where he was certain to suffer an injury may not be based on an occurrence, which typically is defined as an accident;
- > Either of the above two scenarios could give rise to coverage defenses based on the known loss or known risk doctrines; and
- > Depending on the circumstances, an insurer may have an argument that the bodily injury did not manifest itself during its policy period or that the injury in fact did not occur during its policy period.

Question: Might developing science lead to new types of claims with new coverage issues?

Answer: Looking ahead, the emerging science on head injuries could lead to a different type of claim that presents more challenging liability and coverage issues. As noted above, there is growing scientific evidence of brain injuries from non-concussive blows. Advances in medical science may be getting us closer to being able to diagnose C.T.E. in a live patient. It's possible to envision claims in the future for sports-related brain injuries without any single injury-causing concussion. A plaintiff might allege injuries from a series of nonspecific blows over the course of his entire football career—Pop Warner, high school and college, and perhaps even professional. Putting aside the legal viability of such a claim, including in particular significant statute of limitations and causation defenses, how might the courts evaluate such coverage issues as the trigger and allocation? Subject to individual differences in policy language and state laws, several alternatives present themselves. Our aim is not to suggest how these issues can or should be resolved. Rather, we present an overview of some issues.

First, with respect to trigger, a court could look for the first injury-causing event that led to the plaintiff's bodily injuries. It may be enough to focus on the date the plaintiff alleges he first played a contact sport that began the course of his injuries. A court sticking to a date of first injury or manifestation trigger rule might hold that the policy in place on such date is the one and only policy that is triggered. This outcome seems more likely if the injuries were caused by playing the same sport for the same team—e.g. the claim is solely against the player's high school and coaches. If the plaintiff sued several different teams over several years, and a claim survived against multiple defendants—high school and college teams, for instance—a court would seem to have to find at least two if not more triggers. A court may go further and look at this situation as being similar to exposure to a toxic substance over a period of time. That's especially true if the plaintiff alleged a series of non-specific blows to the head, as opposed to clearly identifiable blows that caused concussions. Many courts examining coverage in the toxic exposure context have found that all policies in force during the period of exposure are triggered. Again, we aren't in any way suggesting that this type of analysis would be an appropriate way to resolve the trigger question in the context of a concussion claim. We just highlight the possibility.

Second, a claim alleging that the claimant suffered multiple head injuries over a period of time can present a significant challenge in determining the number of occurrences. How the court resolves the number of occurrences question will depend on a number of factors, including the degree to which the facts establish the dates of the blows to the head or concussions and the number of different defendants.

Third, if a court were to rule that multiple policies issued to an insured school or public entity are triggered, the issue of how to allocate a loss

across those policies would arise. Broadly speaking, courts follow two approaches. Under the *pro rata* approach, the loss is allocated across all the years of exposure. In the scenario above, that would be all the years during which the plaintiff played football and suffered injury. The loss would be divided across all of those years. The insured would have to satisfy multiple deductibles or retentions and the insured would be liable for the share of the loss allocable to those periods where there was no insurance or for which the insurance had been exhausted. The other general approach to allocation is known as “all sums.” Under all sums allocation, the insured can pick a single triggered policy and exhaust vertically. The chosen insurer may seek contribution from other triggered insurers, but must bear the cost of periods of exhaustion or where no insurance was purchased.

Question: Are any insurers restricting or excluding coverage for concussion claims?

Answer: A handful of public entity insurers have begun to suggest the possibility of excluding coverage for certain types of sports-related concussion claims. One such approach is to exclude coverage if the insured did not follow a specified risk management program.

This is a new development and it remains to be seen whether it will become widespread and whether the exclusions will stand up in court. Of course, an insurer cannot retroactively exclude coverage for a concussion claim under prior policies. So the impact of such an exclusion on an insured’s ability to recover insurance proceeds for a settlement or judgment could depend on a variety of factors, including the number of policies triggered, how many of them contain an exclusion and the court’s approach to allocation. In an all sums jurisdiction, for example, the insured could simply select a policy without the exclusion from which to seek coverage.

Conclusion—Some Suggestions for Schools and Other Public Entities to Manage the Risk of Concussions and Concussion Claims

Keeping up with any fast-developing area of liability exposure can be a challenge for anyone, but especially for schools and other public entities with limited resources. The risk of concussions is but one of many new areas of liability exposure that must be managed. Whether there is a concussion crisis, as some in the media have suggested, isn’t really relevant. Concussions are potentially serious and the number of them is significant. From a liability standpoint, even if just a fraction of sports-related concussions results in a lawsuit, the numbers are large and deserve serious attention.

Appropriate risk management is especially challenging in a changing environment. That’s certainly true of the concussion risk given the continuing development of the medical science and the law. Any effective risk management program therefore has to be revised and updated in light of legal and scientific developments.

Subject to that caveat, the following are some steps that schools and other public entities should consider in order to minimize their exposure to concussion claims.

First, it is crucial to know and follow your state’s laws on concussions. We provide a link in endnote 38 to assist you in finding the applicable laws in your state. Even in those few states currently without concussion laws, schools and public entities would be well advised to conduct themselves in accordance with the best practices outlined in the laws that most other states have implemented, as it is likely lawyers will cite to these laws as evidence of the minimum standard of care.

Second, it is important to be aware of and follow the required or recommended procedures of any

league, association or governing sports body in which you participate or are a member. We highlighted a few above, but there are many others. It is crucial that you know and follow these recommendations, even if they aren’t required. Again, lawyers can be expected to use these guidelines to establish the standard of care and will cite any failure to adhere as a breach of duty.

Third, it is important that you pay as much attention to the concussion risk for female athletes as for male athletes. As discussed above, female athletes are more susceptible to concussions and can take longer to recover. In addition, there is evidence that female athletes are more likely than males to return to play before they have fully recovered.

Fourth, staff training is vital. All coaches, trainers and other medical staff and referees—not just those involved with traditional male contact sports—should take concussion awareness training courses. There are many of these available. A good place to start is the CDC’s “Head’s Up” program, which provides numerous training materials, including online courses.⁶⁶

Fifth, all participants (and their parents or guardians, in the case of minors) should read and sign liability waivers that fully disclose the risk of concussions. How much legal protection these will provide varies by state. At a minimum, however, they serve the important purpose of raising awareness of players and parents or guardians. Each school and public entity should consult with counsel versed in the law in this area to be sure they are obtaining the maximum protection.

Sixth, be sure that all equipment and facilities are maintained in order to minimize the risk of concussions. We understand that the costs of field and equipment maintenance can create a significant burden for a cash-strapped school or public entity. There is no helmet or other piece of equipment that can prevent a concussion. Still, lawyers will argue that the failure to provide

proper equipment or to make the field safe for play is a breach of duty.

Seventh, consider conducting an inventory of activities with which you have any role or responsibility that could lead to concussion claims. While team sports are obvious activities that carry with them a risk of concussions, don't ignore other activities, such as cheerleading. There are other, even less obvious activities that carry with them exposure to concussions. These include renting or making available sports fields or courts for use by community organizations, intramural or club sports, summer camps and other activities. All of these carry with them the risk of concussions and potential liability for the school or public entity. Intramural and club sports may be particularly challenging for schools. These activities tend to have lax oversight. It would be unusual for trained medical personnel to be on hand during most intramural games. The risk of liability from concussions may suggest that schools consider exerting more control over these traditionally unsupervised activities.

Finally, be sure you understand how your liability insurance coverage will respond in the event of a concussion claim. While traditional CGL coverage should respond to the typical concussion claim, subject to some of the potential coverage issues discussed above, the inventory we suggest will assist you in evaluating and as necessary adjusting your coverage. Certainly any school or public entity evaluating its insurance coverage needs should be extremely wary of accepting unusual restrictions on coverage for concussion claims. ■



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Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...
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