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# The Athletic Trainer's Legal Liability for Football-Related Injuries: *Minimizing the Risk*

Text **Steven E. Pachman, Esquire, Montgomery McCracken, Walker & Rhoads, LLP Philadelphia, Pennsylvania**

**Kevin M. Guskiewicz, PhD, ATC University of North Carolina at Chapel Hill**

As the number of reported concussions and other football-related injuries continues to rise at the high school, collegiate and professional levels, more and more lawsuits are being filed, alleging that various football personnel are failing to meet the appropriate standard of care.

The increasing popularity of these legal actions likely stems from the increasing knowledge surrounding the frequency of concussions and other more serious football-related injuries, such as subdural hematomas, and the highly publicized nature of football injuries.

Last football season, the media covered sport-related concussions as never before. It appeared to be the exception for a day to pass without an article appearing in the *New York Times* or *USA Today*, or a report airing on ESPN's Sports Center, ABC's Nightline, CNN's American Morning or HBO's Real Sports featuring concussions or other football-related injuries.

In most cases, these stories have speculated about how the injury could or should have been averted. Congress is even weighing in on these issues, and sports governing bodies are under fire. Athletic trainers on the front lines of managing these very complex injuries must be more informed than ever before.



Steven E. Pachman, Esquire



Kevin M. Guskiewicz, PhD, ATC

## ATs Under Fire

Athletic trainers have become a popular target of lawsuits alleging failures to meet the standard of care following a football injury. In many cases, it's the athletic trainer who has the closest contact with a team's players and who is responsible for protecting their health and well-being. In our increasingly litigious society, whenever an unfortunate incident occurs on the football field, the actions or inactions of the athletic trainer are likely to be second-guessed or directly blamed.

Allegations against athletic trainers include improper evaluation and testing of the athlete, improper documentation of injuries, misunderstood communications with the athlete, and a lack of education of the athlete or the athlete's

family. Even the experts have competing views on the appropriate standard of care. On the issue of pre-season (baseline) neuropsychological and balance testing, for example, the experts are divided on whether such testing is required to meet the standard of care for concussion management.

Depending on the facts of a given case, defending the athletic trainer's conduct against a plaintiff's allegations can be especially challenging. In some actions, the jury will have to grapple with a complicated medical or scientific theory regarding the cause of the player's injury, such as Second Impact Syndrome; in others, the player may be so severely injured that sympathy might outweigh a more objec-

tive assessment of the facts. In cases such as these, jurors who are on the proverbial fence regarding whether an athletic trainer met the applicable standard of care may simply return a verdict for the plaintiff so as to avoid having to confront other, sometimes even harder, issues.

For athletic trainers to minimize the risk of becoming a defendant in a legal action following an injury on the football field – and to better defend themselves should a case be filed against them – they must have an understanding of “standard of care” for the management of specific injuries based on the most recent scientific literature.

Additionally, the athletic trainer can learn from examining legal cases and the first-hand experiences of those who have defended athletic trainers during the litigation process.

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On Nov. 22, the Steelers’ Ben Roethlisberger suffered the fourth concussion of his career after he, too, took a knee to the head. After sitting out one game and then being cleared following a variety of concussion tests, Roethlisberger returned to the field the following week. The same week, the Cardinals’ Kurt Warner suffered the fifth concussion of his career after slamming his head into the turf. Warner was pulled from

research also is shedding light on the long-term effect of head injuries, which was sparked by NFL Hall of Famer Mike Webster’s diagnosis of chronic traumatic encephalopathy by Bennet Omalu, MD.

In recent years, hundreds of retired NFL players have been studied concerning head injuries sustained during their playing years and the associated long-term effects. In October 2009, federal lawmakers held extensive hearings to draw attention to the issue and perhaps learn more about the damage caused by repetitive brain injuries. And yes, since we are on the topic – let’s remember a “concussion” is a brain injury. A plaintiff’s personal injury attorney will rarely present a case to a jury as involving a “concussion” but will more likely focus on his client’s “traumatic brain injury.” Without sounding as if a brain injury should ever be downplayed, it’s important to understand that plaintiffs’ attorneys often dramatize.

### Unclear Standards

Few people dispute that thousands of concussions occur on the football field each year. Yet, despite all recently gained knowledge concerning concussions and prevention of catastrophic brain injuries, there still is no clear “standard of care” for the proper management of these injuries. In fact, there are currently more than two dozen competing guidelines for classifying and managing sport-related concussion, which muddy the water for how an athletic trainer should act to meet the “legal duty to provide health care services consistent with what other health care practitioners of the same training, education, and credentialing would provide under the circumstances.” (Ray, R. *Management Strategies in Athletic Training*, 2005.)

The differing views on the appropriate standard of care for the management of concussions and other potentially catastrophic brain injuries remain a controversial and somewhat confusing topic within the sports medicine community.

Ironically, the ambiguity surrounding the proper standard is actually *welcome* to one group, in particular: plaintiffs’ personal injury attorneys. The lack of a clear standard makes it easier for plaintiffs’ lawyers to construct theories of liability for their lawsuits against athletic trainers, alleging a breach of the standard of care by the athletic trainer following an on-field injury, as illustrated in this article.

## THE RECENT INCREASE IN REPORTED FOOTBALL-RELATED INJURIES IS LEADING TO MORE LAWSUITS AGAINST ATHLETIC TRAINERS

The prevalence of reported football-related concussions and associated news media attention is increasing. This past NFL season, the media spent enormous amounts of time covering and analyzing concussions sustained by veterans Brian Westbrook, Ben Roethlisberger and Kurt Warner, including the precise causes of their injuries and the most debated issues related to the length of time for which the players should be held out of contact play, what the players should be doing (or not) in the interim, and when the players may safely return to game play.

When the medical care of high-profile athletes is played out in the media, it places all athletic trainers and team physicians under the microscope.

The first of the three highly publicized concussions occurred Oct. 26, 2009, when Philadelphia Eagles’ running back Brian Westbrook took a knee to the helmet in front of a prime-time television audience on Monday Night Football, rendering him unconscious. In the following weeks, the media spent consider-

able time discussing and debating the issue of when the Eagles could safely return Westbrook to game play without further risk of harm in light of his head injury. Following post-concussion testing, the Eagles held Westbrook out for the next two games. He ultimately returned to play three weeks after his initial injury, only to suffer another concussion that caused him to miss five more games.

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the game and missed the following week’s game with reported vision problems and neck pain. He returned to game play the following week and played the remainder of the season.

All three concussions remained the center of media focus for the rest of the year.

This past college football season, the media focused extensively on Florida Gators quarterback Tim Tebow, who suffered a concussion after hitting his head on the back of a teammate’s leg during a sack, rendering him unconscious and forcing him to spend the night in a hospital. Tebow was unable to practice the following week, but – thanks to the team’s scheduled bye week – was not required to miss any game play. His return sparked further discussion and debate on concussions and the return-to-play issue.

The noticeably increased media attention to concussions and other football-related head injuries comes at a time of ever-increasing knowledge. Experts are learning more about the nature and causes of concussions and suggested ways to avoid future head injuries;



Given the ambiguity on the proper standard of care, one thing remains clear: the best approach for athletic trainers who seek to avoid liability when treating their players may be the *most conservative* approach.

### Legal Lessons Learned

The attacks on athletic trainers in these actions often involve:

- The evaluation or testing of the athlete (or lack thereof);
- Documentation of an injury;
- Communications with the athlete or with a physician about an athlete;
- Education of the athlete.

For example, in a recent California case, an athletic trainer was found liable for failing to properly or promptly evaluate a student athlete who apparently had sustained a concussion only to later pass out, fall and suffer a variety of physical injuries as a result of the AT's alleged failures. *Gill v. Tamalpais Union High School District*, No. A112705, 2008 Cal. App. Unpub. LEXIS 3928, at \*1 (Cal. Ct. App. May 14, 2008). The court ordered the defendants to pay substantial damages to the injured athlete.

In another case, a University of Tennessee football player likewise recovered hundreds of thousands of dollars after an athletic trainer allegedly failed to promptly report to a physician initial symptoms related to a concussion sustained by the player, and then allegedly failed to report the athlete's continuing headaches to the physician, and where the student subsequently sustained an acute subdural hematoma in connection with an injury sustained one month later. *Pinson v. Tennessee*, No. 01-9409, 1995 Tenn. App. LEXIS 807, at \*1, 5 (Tenn. App. 1995).

And, in another recent case, a high school football player alleged that his athletic trainer failed to properly evaluate him or take seriously his reported headaches and dizziness following a concussion and then prematurely returned him to play, which allegedly caused the athlete to suffer Second Impact Syndrome two weeks later from a second concussion. *Melka v. Orthopaedic Assocs. of Wisc.*, No. 06-2136 (Wisc. Cir. Ct.

2008). In this case, the jury awarded no damages to the injured player, but the "cost" to the defendants was three years of litigation, substantial legal fees and expenses, and a month-long, stressful, high-profile trial.

### Baseline Testing

A common allegation against athletic trainers involves improper and/or inadequate testing of the athlete prior to an injury. Computerized neuropsychological testing programs designed for assessment of athletes are becoming more and more common within the sports medicine setting, especially for contact sports such as football.

These pre-season tests, often combined with balance testing and gathering information about the athlete's concussion history and propensity to experience concussion-like symptoms under normal conditions, can provide a benchmark for evaluating the athlete following a subsequent concussion. For the past three years all NFL teams have been required to utilize some form of this testing, and most recently the NCAA has mandated a similar comprehensive baseline testing program for student-athletes participating in contact sports at its member institutions.

Still, some of the most highly-regarded neuropsychologists and neuroscientists in the country who have weighed in on the issue do not believe computerized neuropsychological testing in the management of sport-related concussion should be *required* to meet the standard of care (at least yet). Some neuropsychologists have taken the position that the failure of an athletic trainer to employ formal baseline and/or post-injury neurocognitive testing in certain contexts amounted to a breach of the athletic trainer's standard of care.

Critics of neuropsychological testing in connection with evaluating sport-related concussion point to the lack of reliability and validity of such testing. One argument is the "impairments" detected by neuropsychological testing are mild and fleeting; no prospective controlled study, it has been argued, has been able to identify a difference between concussed players and controls after around seven days post-injury. It has also been asserted that many of the commercially distributed batteries are highly unreliable, suggesting a high rate of false positives and false negative findings. (Broglie et al., 2007).

**Nevertheless, the consensus is that computerized neuropsychological testing, at a mini-**

**mum, is another tool in the athletic trainer's toolbox.** Because of the test's ease in administration and the ability to baseline test a large number of athletes in a short period, as well as the test's gaining popularity, the prudent approach is for the athletic trainer to employ formal baseline and post-injury neurocognitive testing.

Regardless of the true utility of the test, the risk is just too great that a jury hearing a case against a defendant-athletic trainer will find against him/her if such testing was not utilized. In short, a jury is more likely to side with a defendant-athletic trainer when the jury believes the AT performed as much pre- and post-injury testing on the athlete as was available or reasonably could have been available. Thus, when in doubt, the athletic trainer should consider use of available testing, objective concussion assessment tools, brief screening tools for sideline use, and testing to evaluate recovery, including neuropsychological testing.

### Documentation

Another possible allegation in the cases against athletic trainers involves the lack of documentation in managing a football-related head injury. For several years now, the recommended approach has been that the athletic trainer should document "all pertinent information" surrounding head injuries. Indeed, the expression, "If it's not written, it didn't happen" – or words to that effect – is common in the field.

The question in these cases sometimes becomes whether certain information is or is not "pertinent." For example, at some point during a player's non-contact period following a head injury, he will begin performing graduated exertional exercises. But how much detail in the athletic trainer's documentation is required to meet the standard of care?

Many would argue – certainly, plaintiffs' lawyers would – that it is insufficient for an athletic trainer to simply record that the injured player "performed exertional maneuvers" during the non-contact period. At trial, questions might be raised as to the specifics of the exertional testing: for example, the dates on which the testing was performed, the witnesses to the testing, and the actual maneuvers the athlete performed.

Even though the athletic trainer may recall the testing and all of its accompanying details



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and may be willing to testify to the specifics under oath, the absence of such detail in the actual injury record may cast doubt on whether the specifics are being accurately recalled. Unfortunately, the trials in these cases generally occur years after the alleged improper conduct.

Because plaintiffs' lawyers will make any and all efforts to discredit the defendant-athletic trainer's testimony in these actions, the more detailed the medical documentation, the more likely a jury will find the defendant to be a credible witness. Thus, ideally, the documentation of all pertinent information surrounding a head injury also should include any details, including:

- Specific testing and maneuvers performed (for example, jumping jacks, knee bends, etc.);
- Dates, times and specific locations of testing;
- The questions asked of the athlete during testing and the athlete's responses.

In other words, the more detailed the athletic trainer's documentation, the better able s/he may be to defend a lawsuit for an alleged breach of the standard of care. Presumably, more detailed documentation by the athletic trainer, regardless of the injury, should correlate to better overall care of the injured athlete.

### Patient Education

Failure to warn or educate the athlete is yet another possible allegation against athletic trainers in these cases.

One simple way to prove you have educated football players on the dangers of football, generally, and on the dangers of continuing to play despite symptoms, is to have them read and sign acknowledgements that they understand the detailed warning that appears on every football helmet. This warning states, in part: *"Contact in football may result in concussion/brain injury, which no helmet can prevent. Symptoms include: loss of consciousness or memory, dizziness, headache, nausea or confusion. If you have symptoms, immediately stop and report them to your coach, [athletic] trainer and parents. Do not return to a game or contact until all symptoms are gone and you receive*

*medical clearance. Ignoring this warning may lead to another and more serious or fatal brain injury. NO HELMET SYSTEM CAN PROTECT YOU FROM SERIOUS BRAIN AND/OR NECK INJURIES INCLUDING PARALYSIS OR DEATH. TO AVOID THESE RISKS, DO NOT ENGAGE IN THE SPORT OF FOOTBALL."*

In catastrophic cases where such an acknowledgement of understanding has not been secured by the athletic trainer, a "failure to warn" claim almost certainly will be made against the athletic trainer, especially where the plaintiffs are alleging the player never recovered from an earlier injury.

Thus, before each season, at a minimum, the athletic trainer should require that each player:

- Read a concussion fact sheet, similar to the one-page document the NCAA and CDC recently produced;
- Read the aforementioned warning on the helmet;
- Sign an acknowledgment that they read and understand both.

Not only do these acknowledgements by the player serve as a possible defense to a failure to warn claim, but, under certain circumstances, may also be used to establish the *player* is legally responsible for his own injuries (if, for example, the player is reporting symptoms to teammates but withholds such information from team personnel and nevertheless continues to play).

In cases where a defendant asserts and can show the plaintiff's injuries are a result of the plaintiff's *own* negligence, the defendant may be able to prevail on a theory of "contributory negligence" or "comparative negligence," which could bar the plaintiff from recovering any damages whatsoever.

The bottom line is the more education the AT provides to the player concerning the risks of playing football and, specifically, the risks of returning to play before a complete recovery following a head injury (for example, the risk of playing while still symptomatic), the greater the likelihood of success the AT will have in defending against a "failure to warn" or "failure to educate" claim.

More important, increased education to

athletes should translate into more informed participants, which, in theory, should lead to fewer catastrophic injuries. These recommendations, although focused on prevention of catastrophic injuries in football, can be applied to most all contact sports.

### Conclusion

Anyone can sue anyone for nearly anything; these recommendations are not a guarantee that an athletic trainer will not be sued for an alleged breach of the standard of care.

Rather, this commentary is intended to serve as a reminder that the more conservative approach the athletic trainer takes in managing football-related injuries – whether it involves the assessment of the injured athlete, documentation of the athlete's injury or education of the athlete – the more likely the AT may be to avoid legal liability.

Faced with the inevitable sympathy an injured athlete carries into the courtroom, the ideal course is for the athletic trainer to touch all the bases and have the documentation to prove it.

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# CONCUSSION

## A FACT SHEET FOR COACHES

### THE FACTS

- A concussion is a brain injury.
- All concussions are serious.
- Concussions can occur without loss of consciousness or other obvious signs.
- Concussions can occur from blows to the body as well as to the head.
- Concussions can occur in *any* sport.
- Recognition and proper response to concussions when they first occur can help prevent further injury or even death.
- Athletes may not report their symptoms for fear of losing playing time.
- Athletes can still get a concussion even if they are wearing a helmet.
- Data from the NCAA Injury Surveillance System suggests that concussions represent 5 to 18 percent of all reported injuries, depending on the sport.

### WHAT IS A CONCUSSION?

A concussion is a brain injury that may be caused by a blow to the head, face, neck or elsewhere on the body with an “impulsive” force transmitted to the head. Concussions can also result from hitting a hard surface such as the ground, ice or floor, from players colliding with each other or being hit by a piece of equipment such as a bat, lacrosse stick or field hockey ball.

### RECOGNIZING A POSSIBLE CONCUSSION

To help recognize a concussion, watch for the following two events among your student-athletes during both games and practices:

1. A forceful blow to the head or body that results in rapid movement of the head;
- AND-
2. **Any change** in the student-athlete’s behavior, thinking or physical functioning (see signs and symptoms).

### SIGNS AND SYMPTOMS

#### Signs Observed By Coaching Staff

- Appears dazed or stunned.
- Is confused about assignment or position.
- Forgets plays.
- Is unsure of game, score or opponent.
- Moves clumsily.
- Answers questions slowly.
- Loses consciousness (even briefly).
- Shows behavior or personality changes.
- Can’t recall events before hit or fall.
- Can’t recall events after hit or fall.

#### Symptoms Reported By Student-Athlete

- Headache or “pressure” in head.
- Nausea or vomiting.
- Balance problems or dizziness.
- Double or blurry vision.
- Sensitivity to light.
- Sensitivity to noise.
- Feeling sluggish, hazy, foggy or groggy.
- Concentration or memory problems.
- Confusion.
- Does not “feel right.”



## PREVENTION AND PREPARATION

As a coach, you play a key role in preventing concussions and responding to them properly when they occur. Here are some steps you can take to ensure the best outcome for your student-athletes:

- Educate student-athletes and coaching staff about concussion. Explain your concerns about concussion and your expectations of safe play to student-athletes, athletics staff and assistant coaches. Create an environment that supports reporting, access to proper evaluation and conservative return-to-play.
  - Review and practice your emergency action plan for your facility.
  - Know when you will have sideline medical care and when you will not, both at home and away.
  - Emphasize that protective equipment should fit properly, be well maintained, and be worn consistently and correctly.
  - Review the Concussion Fact Sheet for Student-Athletes with your team to help them recognize the signs of a concussion.
  - Review with your athletics staff the NCAA Sports Medicine Handbook guideline: Concussion or Mild Traumatic Brain Injury (mTBI) in the Athlete.
- Insist that safety comes first.
  - Teach student-athletes safe-play techniques and encourage them to follow the rules of play.
  - Encourage student-athletes to practice good sportsmanship at all times.
  - Encourage student-athletes to immediately report symptoms of concussion.
- Prevent long-term problems. A repeat concussion that occurs before the brain recovers from the previous one (hours, days or weeks) can slow recovery or increase the likelihood of having long-term problems. In rare cases, repeat concussions can result in brain swelling, permanent brain damage and even death.

### IF YOU THINK YOUR STUDENT-ATHLETE HAS SUSTAINED A CONCUSSION:

Take him/her out of play immediately and allow adequate time for evaluation by a health care professional experienced in evaluating for concussion.

An athlete who exhibits signs, symptoms or behaviors consistent with a concussion, either at rest or during exertion, should be **removed immediately from practice or competition** and should not return to play until cleared by an appropriate health care professional. Sports have injury timeouts and player substitutions so that student-athletes can get checked out.



### IF A CONCUSSION IS SUSPECTED:

1. **Remove the student-athlete from play.** Look for the signs and symptoms of concussion if your student-athlete has experienced a blow to the head. Do not allow the student-athlete to just “shake it off.” Each individual athlete will respond to concussions differently.
2. **Ensure that the student-athlete is evaluated right away by an appropriate health care professional.** Do not try to judge the severity of the injury yourself. Immediately refer the student-athlete to the appropriate athletics medical staff, such as a certified athletic trainer, team physician or health care professional experienced in concussion evaluation and management.
3. **Allow the student-athlete to return to play only with permission from a health care professional with experience in evaluating for concussion.** Allow athletics medical staff to rely on their clinical skills and protocols in evaluating the athlete to establish the appropriate time to return to play. A return-to-play progression should occur in an individualized, step-wise fashion with gradual increments in physical exertion and risk of contact.
4. **Develop a game plan.** Student-athletes should not return to play until all symptoms have resolved, both at rest and during exertion. Many times, that means they will be out for the remainder of that day. In fact, as concussion management continues to evolve with new science, the care is becoming more conservative and return-to-play time frames are getting longer. Coaches should have a game plan that accounts for this change.

## IT'S BETTER THEY MISS ONE GAME THAN THE WHOLE SEASON. WHEN IN DOUBT, SIT THEM OUT.

For more information and resources, visit [www.NCAA.org/health-safety](http://www.NCAA.org/health-safety) and [www.CDC.gov/Concussion](http://www.CDC.gov/Concussion).



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