Sports Litigation Alert

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Minimizing Risk of Legal Liability for Sport-Related Injuries: A Concussion Defense Lawyer's Take

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As the number of reported concussions and other sport-related injuries continue to increase at the high school, collegiate, and professional levels, more and more lawsuits alleging the failure of schools, health care providers, and athletic associations to meet the appropriate standard of care are being filed. The popularity of these actions is attributable not only to the increasing knowledge surrounding concussions and chronic traumatic encephalopathy (as well as the now-highly-publicized nature of sport-related injuries), but also because plaintiffs' attorneys who brought asbestos cases in the 1970s and 1980s, and tobacco cases in the 1990s, are now targeting "concussion cases."

The most recent addition is a class action filed on November 29, 2014 against the Illinois High School Association that alleges multiple failures in the area of concussion management, such as testing, education, and protocols. This suit is just the latest concussion action in what is becoming a terrifying trend for athletic associations, schools, coaches, and any health care provider who treats an athlete.

Today's reality is that following a catastrophic head injury in the sports' context, the first question becomes is who – ***other*** than the injured athlete – is responsible for that catastrophic outcome. That question quickly becomes who must ultimately pay the injured athlete, or the surviving parents in a death case, to compensate the victim or victim's family for that injury.

Once litigation commences, many other questions arise:

- Was the athlete properly educated about the signs and symptoms of concussions?
- Should the athletic trainer have conducted additional testing on an injured athlete prior to returning the athlete to game play?
- Was the athletic trainer working under the supervision of a physician?
- Was the school's concussion policy adequate?
- Should pre-season neuropsychological baseline testing have been implemented as part of the policy?
- Did the coach unduly influence the athletic trainer's best judgment?

For nearly 10 years now, I have been retained by individuals, schools, and other entities all across the country to tackle these tough questions. The litigation that follows can be contentious, high-profile, and drawn-out.

My first concussion representation – one of the very first of its kind – began in 2005. I represented a Philadelphia-based university, an athletic trainer, and a nurse practitioner. Since then, I have advised school personnel at all levels, including athletic directors, risk managers, head coaches, physicians, athletic trainers, and other health care providers, on how to minimize the risk of a lawsuit against them in the first place or best defend a lawsuit in the event one is filed.

Complicating matters is the undefined moving target that is the standard of care concerning the management of sport-related concussions. Even the "experts" have

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competing views on the appropriate standard, muddying the waters further. On the issue of pre-season baseline testing, for example, experts are divided on whether such testing is required to meet the standard of care, with some even arguing that the use of such testing may actually result in exposing the athlete to *greater* risk of injury. With this backdrop of confusion, and thus no well-defined standard to hold defendants to, plaintiffs' lawyers are free to feast in this new area of law.

Popular targets in these lawsuits are athletic trainers, team physicians, and coaches, since they are in closest contact with a team's players and are charged with (or hold themselves out as) protecting player health and well-being. Schools and athletic associations of course are being targeted too. Athletic directors could be targeted next.

Depending on the facts, defending the conduct at issue 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 juror sympathy might outweigh a more objective assessment of the facts. In such cases, jurors who are on the proverbial fence regarding whether the defendant met the applicable standard of care may simply return a verdict for the plaintiff so as to avoid having to confront other, likely harder, issues.

Although in this single short piece it is impossible to provide a foolproof method of avoiding a concussion lawsuit (and it is always impossible to guarantee victory in the event of litigation), I offer the following tips to potential concussion case defendants at the collegiate level:

Follow Guideline 2i of the NCAA Sports Medicine Handbook ("Sports-Related Concussion")

Although the updated Handbook does not include many *mandates* with respect to concussion management, institutions and health care providers that fail to follow them can expect a major uphill battle in the event of a lawsuit. Under the heading "NCAA adopted concussion management plan legislation," the NCAA requires that institutions have a "concussion management plan for its student-athletes," which must include:

- an annual process that ensures student-athletes are educated about the signs and symptoms of concussions, where athletes must acknowledge that they have received information about the signs and symptoms of concussions and that they have a responsibility to report concussion-related injuries and illnesses to a medical staff member;
- a process that ensures an athlete who exhibits signs, symptoms or behaviors consistent with a concussion shall be removed from athletic activities and evaluated by a medical staff member with experience in the evaluation and management of concussions;
- a policy that precludes an athlete diagnosed with a concussion from returning to athletic activity for at least the remainder of that day; and
- a policy that requires medical clearance for an athlete diagnosed with a concussion to return to athletics activity as determined by a physician.

Follow the recent guidelines resulting from the 2014 Safety in College Football Summit

Last January, I presented at a two-day working meeting, co-sponsored by the NCAA, which addressed, among other key safety concerns, the issue of *independent* medical care. The guidelines resulting from the conference on this issue were that:

- an institutional medical line of authority should be established independently of a coach, and in the sole interest of student-athlete health and welfare;
- the medical line of authority should be transparent and evident in athletics departments, and the organizational structure should establish collaborative interactions with the medical director and primary athletics health care providers;
- institutions should designate a licensed physician to serve as medical director, and that medical director should oversee the medical tasks of health care providers;

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- all athletic trainers should be directed and supervised for medical tasks by a physician; and
- the medical director and health care providers should be empowered with unchallengeable autonomous authority to determine medical management and return-to-play decisions.

Document, Document, Document

On a more practical issue, a common allegation against health care providers in concussion cases is "failure to properly document" since, for years now, the recommended approach has been that "all pertinent information" surrounding head injuries be documented. Indeed, the expression "if it's not written, it didn't happen" is a common one that can be dangerous in a lawsuit.

The question thus sometimes becomes whether certain information is "pertinent." For example, during a player's "no-contact" period following a head injury, the injured player generally performs graduated exertional exercises in an athletic trainer's presence. 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 record simply that the injured player "performed exertional maneuvers." Questions at the trial of an athletic trainer 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 performed. Even though the athletic trainer may have a recollection of the testing performed and the accompanying details, and be willing to testify to the specifics, the absence of such detail in an actual injury record may call into question whether the athletic trainer is recalling the specifics accurately. Indeed, trials generally occur years after the alleged conduct.

Because plaintiffs' lawyers will make all efforts to discredit the defendant's testimony, the more detailed the 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 the specific testing and maneuvers performed (jumping jacks, knee bends, etc.), dates, times, and specific locations of testing, and the questions asked of the athlete during testing and the athlete's responses. In other words, the more detailed the documentation, the better able a defendant may be to defend a lawsuit for an alleged breach of the standard of care.

As concussion lawsuits become even more common, it is crucial for potential defendants to protect themselves as discussed above, for the good of their institutions and the safety and health of the athletes themselves.