

Sports Litigation Alert

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Tackling Head Trauma The Concussion Problem In Sports

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Recent revelations about permanent brain trauma suffered by football players raise serious ethical questions and liability concerns about head trauma in sports. Public understanding about the lasting effects of serious head injuries has been growing in recent years, due in large part to high numbers of soldiers returning from Iraq and Afghanistan with traumatic brain injuries, and even higher profile survivors like journalist Bob Woodward.

Considering the extent of head trauma regularly encountered by football players and other athletes, discussion of the effects of head injuries on these athletes has kept a surprising low tone. With medical centers, public health advocates, former players and their families all becoming increasingly vocal about the real life risks of repetitive head injuries, however, and with medical science establishing ever more clearly the serious and permanent effects of the trauma, athletes, teams and leagues — and the attorneys who represent them — must confront reality: head trauma in sports is a serious problem. As with any important health issue, it is a public health concern, first and foremost, but the issue also raises serious liability concerns that must be

considered and addressed by those involved in football and other contact sports.

The Concussion Problem

The Center for Disease Control (CDC) reports that 1.8 to 3.6 million sports and recreation-related concussions occur in the United States each year. While many who suffer concussions make a full recovery, others are not so lucky. According to the CDC, concussions, also known as mild traumatic brain injuries, are caused “by a bump, blow or jolt to either the head or body that causes the brain to move rapidly inside the skull,” which “can have serious and long-term health effects.” These “include headache, nausea, fatigue, confusion or memory problems, sleep disturbances, or mood changes.” What is not widely known is that the full impact of a concussion is often impossible to assess until well after the injury. In many cases, symptoms are noticed right after the injury; in other cases, however, the CDC notes that “some [symptoms] might not be recognized until days or weeks later.”

No sport in America invites more concern about head injuries than football. Blows to the head are a regular part of the game for football players at every level, from Pee Wee leagues to the National Football League. According to the CDC, among injuries taking place during organized high school sports, football accounts for more than 60% of all concussions.

The incidence of concussions, or mild traumatic brain injuries, in the NFL has also reached a disturbing level. Injury reports publicly released by National Football League teams provide a sobering counterbalance to the excitement of the NFL schedule. Weekly injury reports during the 2008-09 regular (non-playoff) season alone revealed 76 separate player injuries classified by teams as concussion or head injuries. Most of these injured players were listed by their teams as

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“probable” or “questionable” for the game immediately following the game they were injured in, but the vast majority played without missing a single game. This despite widespread belief in the medical and rehabilitation communities that suffering multiple concussions in a short time period significantly increases the risk of serious, long-term effects of the trauma.

Counting the number of players on the NFL injury lists, one would expect a high number of current and former football players to be stricken with long term ill effects associated with mild traumatic brain injury. In fact, in recent years there has been a noticeable uptick in troubling reports and research reflecting former football players who are suffering long-term effects of repeated head trauma. Researchers at Boston University School of Medicine’s reputed Center for the Study of Traumatic Encephalopathy (the “BU Center”) published data in late January 2009 that should raise the blood pressure of the National Football League, its Players’ Association, and football players at all levels.

Brain tissue studies of former football players, obtained posthumously by the BU Center, revealed obvious signs of serious long-term brain damage, called chronic traumatic encephalopathy (“CTE”). The BU Center has studied the brains of six former professional football players, some of whom died in their 30’s and 40’s: all six brains demonstrated pronounced CTE. Another brain studied by the BU Center of an 18 year old former football player demonstrated similar signs of CTE. Researchers at the BU Center found physiological changes in these relatively young brains that they would have expected to see in the brains of 80 year olds with advanced dementia or Alzheimer’s disease.

To those who work regularly with brain injury survivors, it seems inevitable that the link between concussion in sports and long-term disabilities resulting from brain damage will eventually be irrefutable. Around a hundred former athletes, including Former

Patriots linebacker Ted Johnson, now have agreed to have their brains studied following their deaths. Many of these, a relatively young population, are already suffering classic signs of serious brain trauma, including cognitive problems, headaches, depression, sleep disorders, and anger management issues. All would agree that a life sentence of these disruptive neurological problems is a stiff price to pay for a handful of glory years on the field.

Where’s The Liability?

As the link between concussion in sport and long term health problems grows increasingly clear, the risks faced by football players and other athletes are increasingly understood. Accordingly, the exposure, both ethical and legal, of the leagues, teams, coaches and trainers who put the players on the field is becoming increasingly apparent. In other words, the increase in scientific knowledge relating to the causes and effects of concussion is also increasing the obligation of the stewards of the game to protect its athletes.

You have to wonder when a high profile football player will seek to hold a team or the NFL legally responsible for the severe, permanent consequences of his brain injury. It seems to be only a matter of time before this sort of lawsuit will be filed. Our tort system requires people to use reasonable care to avoid causing injury to another. A player suffering serious long-term neurological injuries after having multiple concussions in a short period of time has makings of a meritorious (and high value) personal injury case. All the required elements are there: (1) breach of duty of reasonable care on the part of the coach or team; (2) that causes a player’s injury; and (3) with severe, permanent damages.

Professional athletes start young, are unusually strong and healthy and can have significant earning potential, all factors that exponentially raise the potential liability exposure in such a case. When such a case is

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brought, the key to assessing such a case will be fairly straightforward. Did the team owner or its coaching staff using reasonable care when they urged (or even allowed) players with concussions to return to full contact practices or games only days after suffering a concussion?

And don't forget about the liability of a team's medical staff. A medical professional's clearance of a football player to play under circumstances that leave the player vulnerable to multiple concussions in a short time period, a factor well known to dramatically increase the potential for serious long-term effects, could easily be considered negligence, depending on the specific circumstances of the situation. The world of sports medicine is well aware of the documented link between repeated head trauma and long term disability. Recent publicity on the link between repeated head trauma and changes to athletes' brains leave these parties with no excuses, and plenty of potential liability.

Of course, the players themselves must accept responsibility for protecting their own long-term health. The person with the most interest in protecting the individual player, rather than the team, is unquestionably the player himself. But let's face it: a jury may well understand that a football player is paid to follow the instruction of the coach, and his ultimate boss, the team owner. If a coach pressures a player already vulnerable from a recently sustained concussion to get back in the game before he should, both the coach and the player

understand that the player's future success in his profession requires compliance. The player's livelihood depends on his remaining in the coach's good graces. And even without external pressure from a coach, trainer or owner, players are keenly aware that they earn their contracts on the field, not on injured reserve.

The good news is that protecting athletes from permanent harm from multiple concussions simultaneously accomplishes two important goals: it makes the game safer for those who play it; and, it protects management from exposing its players to unwarranted risks. To accomplish these goals, however, teams, coaches, trainers and players need to take seriously their obligations to learn more about the dangers of successive concussions, and to take reasonable steps to avoid them.

The information from the CDC quoted in this article is from the "Statement on Concussion and Sports," U.S. Department of Health and Human Services, Center for Disease Control, February 2009.

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