2017 Eastern Athletic Trainers’ Association Annual Meeting

Concussions and CTE: Legal Implications to the Athletic Trainer

January 7, 2017
Steven E. Pachman
Georgette Castner
Experience

• Catastrophic Sports Injury Cases (2005)
  • Counsel Athletic Trainers
  • Defend Athletic Trainers
Defended

- Athletic Trainers
- NPs
- Schools
- Doctors
- Coaches
- Sports Associations
August 28, 2011
2001-2004
The New York Times

A Son of Football Calls His Mother

APRIL 26, 2015
Potential Defendants

• Coaches/Managers
• Colleges, Universities, Other Schools
• Team Physicians
• Athletic Trainers
Theory of Liability: Negligence

• Failure to conform to the required standard of conduct

• Departure from conduct expected of a reasonably prudent person under the circumstances
Class Action Settlements: No Shield

• NFL litigation (*Easterling*): Whether NFL concealed *long-term* effects of concussions

• *Arrington v. NCAA*

• “Concussion Cases” – Premature RTP
What is a Concussion?

• A brain injury caused by a blow to the head or body that can change the way the brain normally works

• Concussions cannot be seen, but symptoms include:
  – Headache
  – Nausea
  – Irritability
  – Loss of consciousness
  – Balance problems or dizziness
  – Slowed reaction time
Concussion Cases Increasing

- Death from Head Injury in Practice
- Catastrophic Injury Lawsuit
- Premature Return to Play
- Failure to Employ Baseline Testing
- Wrongful Death Lawsuit
- Brain Damage Lawsuit

Why is there an increase...?
REASONS FOR INCREASE:

1. *Heightened Awareness*

*Chronic Traumatic Encephalopathy*

2002
REASONS FOR INCREASE:

2. The Media
REASONS FOR INCREASE:
3. High Profile Head Injuries

The New York Times
Cam Newton Sustains Concussion in Panthers’ Loss to Falcons
REASONS FOR INCREASE:

4. Scholarly Publications

National Athletic Trainers' Association Position Statement: Management of Sport-Related Concussion

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REASONS FOR INCREASE:

The number of reported concussions and other football-related injuries continue to increase, and the increased recognition of the potential for long-term health effects at high levels, even on youth athletes, is driving the search for effective ways to reduce the risk of injury and to manage them when they occur. This report summarizes the National Athletic Trainers Association (NATA) position statement on the management of sport-related concussions and offers recommendations for athletes, coaches, parents, and others involved in youth, high school, college, and professional football. The statement is based on a comprehensive review of the current literature and expert opinion.

RECOMMENDATIONS

Defining and Recognizing Concussion

1. The ATC should develop a high sensitivity for the various mechanisms and presentations of traumatic brain injury.
REASONS FOR INCREASE:

5. Institutional Responses

CONCUSSION
A Must Read for NFL Players
Let’s Take Brain Injuries Out of Play

**Concussion Facts**

Concussion is a brain injury that alters the way your brain functions.
Concussion can occur from a blow to the head/body:
- following helmet to helmet contact, and / or
- contact with the ground, object or another player
Most concussions occur without being knocked unconscious.
Severity of injury depends on many factors and is not known until symptoms resolve and brain function is back to normal.

All concussions are not created equally. Each player is different, each injury is different and all injuries should be evaluated by your team medical staff.

**Concussion Symptoms**

Different symptoms can occur and may not show up for several hours. Common symptoms include:
- Confusion
- Headache
- Amnesia / Difficulty remembering
- Balance problems
- Irritability
- Dizziness
- Difficulty concentrating
- Nausea

Symptoms may worsen with physical or mental exertion (e.g. lifting, computer use, reading).

**Why Should I Report My Symptoms?**

- Practicing or playing while still experiencing symptoms can prolong the time to recover and return to play.
- Unlike other injuries, there may be significant consequences of "playing through" a concussion. Repetitive brain injury, when not treated promptly and properly may cause permanent damage to your brain.

**What Should I Do If I Think I’ve Had a Concussion?**

- Report it. Never ignore symptoms even if they appear mild. Look out for your teammates. Tell your Athletic Trainer or Team Physician if you think you or a teammate may have had a concussion.
- Get Checked Out. Your team medical staff has your health and well being as its first priority. They will manage your concussions according to NFL / NFLPA Guidelines which include being fully asymptomatic, both at rest and after exertion, having a normal neurologic examination, normal neuropsychological testing, and clearance to play by both the team medical staff and the independent neurologic consultant.

**Take Care of Your Brain.** According to the CDC, "traumatic brain injury can cause a wide range of short- or long term changes affecting thinking, sensation, language, or emotions". These changes may lead to problems with memory and communication; personality changes, as well as depression and the early onset of dementia. Concussions and conditions resulting from repeated brain injury can change your life and your family’s life forever.

Work smart. Use your head, don’t lead with it. Help make our game safer. Other athletes are watching...

For more information about traumatic brain injury and concussion, go to http://www.cdc.gov/concussion
Problem: Competing Views of Experts

Case Against University and Others

Issue: Neuropsychological Testing
Neuropsychological Testing

• Designed to examine cognitive abilities
  – Attention Span
  – Memory
  – Reaction time

• Used for managing sport-related concussions
Failure to employ neuropsychological testing:

“CRITICAL FAILURE”
“The poorly-established reliability and utility of neuropsychological testing in evaluating sport-related concussion”
Neuropsychological Testing
Other Areas of Disagreement

Standard of Care

- Documentation of Injuries
- Communication with Athletes
- RTP Protocol
Other Areas of Disagreement

Science/Causation

Second Impact Syndrome
Other Areas of Disagreement

Science/Causation

Does Second Impact Syndrome Exist?

Paul McCrory, MBBS, PhD

Centre for Sports Medicine Research & Education, and Brain Research Institute, University of Melbourne, Melbourne, Australia

Abstract: Second impact syndrome (SIS) is a widely feared complication of traumatic brain injury. Although postulated to occur after repeated concussion, the evidence for such a premise is not compelling. This paper reviews the published evidence for and against the existence of this controversial entity. Rather than SIS being a complication of recurrent concussion, it is far more likely that the clinical condition represents "diff-
matic brain injury. This condition is more common in children and adolescents, which reflects the known demographics of so-called "second impact syndrome." We propose that clini-
cians abandon the misleading term second impact syndrome and refer to the syndrome as diffuse cerebral swelling.

Key Words: Concussion—Cerebral edema—Second impact syndrome.

Does second impact syndrome EXIST?

Plaintiff’s Attorney  n.
The attorney who represents a plaintiff (the suing party) in a lawsuit.

DO YOU NEED A SPORTS INJURY LAWYER?

Concussion Injury Attorneys

If you are injured because of someone’s negligence and suffer a concussion, you may be entitled to compensation.

If you or a loved one has sustained a serious sports-related injury that may have been caused by negligence, give us a call today!
Charleston Concussion Lawyer

Concussions is yielding surprising and frightening new information about the consequences and severity of what was once considered a fairly minor injury. Concussion and other brain injuries have the capacity to reshape the entire course of one's life.

If you or a loved one has suffered a concussion as a result of another person or entity's recklessness or negligence, contact the Charleston concussion injury attorneys of the Steinberg Law Firm at 843-720-2800.
Concussion in Sports

Brain Injury Lawyers
Unfortunately, many physicians, coaches, athletes, and athletic trainers trivialize and dismiss the dangerous possibility of a traumatic brain injury and allow a hurt young person to continue to play.
THE POINT: LAW FIRMS ARE TARGETING CONCUSSION CASES...
Nature of Plevretes Action

• Negligence/Premature RTP Following Concussion 32 Days Earlier

• The Defendants
  – University
  – Coach
  – AT
  – NP
  – Physician
Allegations in Complaint

Concussion Policies

• Failure to **have** adequate policies and procedures

• Failure to **enforce** policies and procedures
Allegations in Complaint (Cont’d)

Evaluation/Testing

• Failure to properly evaluate initial injury

• Failure to monitor post-concussion
Allegations in Complaint (Cont’d)

Referral

• Failure to refer Plaintiff to doctor for post-concussion evaluation

• Failure to refer Plaintiff to doctor regarding RTP decision
Allegations in Complaint  (Cont’d)

Documentation

Failure to properly document *all pertinent information* surrounding *initial injury*, including:

• mechanism of injury;

• initial signs and symptoms; and

• prior concussion history
Failure to Warn

- Of risks of playing football while symptomatic

Education

- On signs and symptoms of concussion
Battle of Expert ATs: Proper Standard Care
Professional Opinion:

I, the undersigned, have reviewed the following documents regarding
the case provided to me by Michael Trunk, Esquire, and this report
contains my opinions regarding the medical reviewed.

- Failure to have adequate **concussion protocol**
- Failure to use recommended **concussion assessments**
- Failure to keep adequate **medical records**
Delayed return to activity, continued questioning regarding symptoms, referrals back to Student Health, and graded exertional program all are an appropriate part of a RTP protocol.

No evidence to suggest mismanagement of a suspected concussion contributed to the injury.
Key Issue: Second Impact Syndrome

Battle of Expert Neurosurgeons
stage was set and the risk increased for the devastating injury he sustained on November 5, 2005 when he was blocked and suffered devastating dysautoregulation (second impact) syndrome in addition to an acute subdural hematoma.
Report – Expert on Second Impact Syndrome for AT

NO evidence of “second impact syndrome”
LESSON:
Unclear Standard of Care
Complex Scientific Issues
Substantial Injuries
The “Sympathy” Factor
The “Sympathy” Factor
Recent Head Injury Verdicts and Settlements

- Premature RTP → Permanent Brain Damage
  $7.5 million verdict

- Injuries Sustained in Football Game
  $7.9 million settlement

- Failure to Supervise → Catastrophic Football Injury
  $8.0 million settlement

Demands $10 million+
Sheely Lawsuit

• Death of player at a college in MD

• Defendants
  – Head Coach
  – Assistant Coach
  – AT
  – NCAA

Parents Sue University Over Son's Death
Alleged Facts Leading to Death

• In days before injury, sustained multiple head injuries (never tested for a concussion)
• Day of injury, during practice, complained of headache and not “feeling right,” and was bleeding from his forehead
• Assistant Coach: “stop your . . . moaning . . . and get back out there”
• Returned to field, collapsed, never regained consciousness
NCAA faces trial after ruling in death of DIII football player

THE BALTIMORE SUN

NCAA, state reach settlement in case of Frostburg football player who died after head injury
CTE Cases

• Individual/Class Actions

Similar Theories of Liability
(e.g., failure to warn, failure to educate)

CTE

Suicide
What is CTE?

• A syndrome characterized by abnormal changes in brain cells (abnormal tau proteins)

• Symptoms that have been associated with CTE include depression, irritability, and forgetfulness, but currently CTE can only be diagnosed after death
What Causes CTE?

• Researchers do not yet know the exact causes.

• Scientists have stated that while there may be a relationship between head trauma and CTE, no clear-cut cause/effect relationship has been established.
Patrick Risha Case

• Dartmouth football player

• Committed suicide at 32; left behind 3 year-old son

• Suit against NCAA and Dartmouth (Westmoreland County)

• Negligence and wrongful death
 Plaintiff’s Emotional Appeal
The Defense

• Jurisdictional question

• Investigation
  – Any criminal history
  – Any prior drug use
  – Family history
  – Medical history
  – Any prior concussions

• Voluntary dismissal with prejudice
Beyond Concussions
The Peditto Case

• High school player attending summer camp
• Knee injury
• Defendants
  – State of New Jersey
  – Rowan
  – Football coaches
  – High school/Diocese
• Negligence claim
Challenges for the Defense

- Age
- Mandatory attendance
- High school coaches present during drill
- Severe and permanent injury
Questions for Plaintiffs

• Whose camp/drill?

• Was there a breach?

• Charitable immunity?
What to expect: if sued

• Document hold notice

• Investigation

• Witness interviews

• Retain experts
What to expect: in litigation

• Written discovery (Rogs, RFP, RFA)

• Fact depositions

• IME

• Expert depositions
What to expect: resolution

- Settlement/mediation
- Trial
- Value drivers (media, economic/non-economic losses)
Total Costs of Cases
THE POINT:

Prevent This Experience
Assumption of Risk

Previously...

- *Benitez v. New York*, **FOOTBALL**
- *Bowser v. Hershey Baseball Assn*, **BASEBALL**
- *Craig v. Amateur Softball Assn*, **SOFTBALL**
- *Mohney v. USA Hockey, Inc.*, **ICE HOCKEY**
- *Pagesh v. Ucman*, **WATER SKIING**
- *Sandler v. Half Hollows Hills West High School*, **FIELD HOCKEY**
Assumption of Risk
Two-Part Analysis

(1) Was player aware of risk?

(2) Did player face risk voluntarily?
A Few Years Ago...

PLAYER
ASSUMED
RISK
Assumption of Risk Application

(1) Player was aware of risk . . .
   • Football *inherently dangerous*
   • Risk of serious injury is *substantial*

(2) Player faced risk voluntarily . . .
   • Player not *forced* to play
Assumption of Risk Defense Often Successful

• Injuries “*inherent* in competitive team sports”

• “The risk of a *head injury* is *inherent* in the sport of football”

• “Voluntary participation in any physical activity or sport, such as softball, constitutes an assumption of risk for those injuries arising out of the *inherent* risks in a sport”
But Today...
Burden has shifted *away* from player

Today’s Focus on Cause of Injury:

- School
- Coach
- Physician
- Athletic Trainer
THE BOTTOM LINE:
Schools, Coaches, and Health Care Providers: Take Most Conservative Approach

FOLLOW YOUR POLICY:

The University of North Carolina at Chapel Hill
Sport Concussion Policy
Developed by the Matthew Gibell Sport-related Traumatic Brain Injury Research Center
and Division of Sports Medicine
Updated August 1, 2010

The University of North Carolina at Chapel Hill, and collaborators, has maintained a commitment to the evaluation and treatment of concussion for many years. Our concussion policy and the research developed by the University and its collaborators, have been followed by the latest guidelines from the American Academy of Neurology and the National Institute of Neurological Disorders and Stroke. Our concussion policy and research is an effort to stay current and to follow the latest guidelines from these organizations.

Our clinical research conducted at UNC-Chapel Hill, and corroborated by others, has shown that an athlete’s balance and/or cognitive functioning are often depressed following a concussion— even in the absence of self-reported symptoms. It has been demonstrated that it typically takes anywhere from 2 to 10 days for an athlete to return to their normal state following a concussion. However, in some cases (~10%) athletes can experience post-concussion syndrome in which the symptoms last beyond 3 weeks.

The UNC Sports Medicine staff utilizes a three-fold approach when determining an athlete’s readiness to return to play following a concussion. In the event of a suspected concussion, the concussion management protocol requires the evaluation of the athlete’s symptoms, neurocognitive function, and balance which provide the sports medicine staff with the objective information necessary to return the athlete to play safely. The findings of these post-injury assessments are then compared to pre-season baseline assessments, conducted on all student-athletes participating in contact sports during their first year. Any athlete sustaining a concussion during the previous season is also re-baseline tested at the start of the next season. Athletes from the following UNC teams are pre-season baseline tested: baseball, basketball (men and women), cheerleading, field hockey (women), football, gymnastics, lacrosse (men and women), soccer (men and women), softball, swim (platform divers only), track and field (pole vaulters only), wrestling, and any other student-athlete as deemed necessary by the team physicians (i.e., previous history of concussion).

The following concussion policy and concussion management protocol has been adopted by UNC Sports Medicine and is to be followed by all teams for managing athletes suspected of sustaining a concussion.
NCAA Concussion Policy and Legislation

- Written Concussion Management Plan on File
- Concussion Evaluations by Medical Staff Member – with Concussion Experience
- No Same-Day RTP
NCAA Concussion Policy and Legislation (Cont’d)

• Athletes Cleared by a Physician
• Concussion Education
• Signed Student-Athlete Statements Accepting Responsibility to Report Injuries
TESTING
“DOCUMENTING “ALL PERTINENT INFORMATION”

“If it’s not documented... it didn’t happen”
COMMUNICATION
ATHLETE EDUCATION

• Concussion Symptoms
• Prevention
• Reporting
• Consequences
• Statutory Requirements
STAYING EDUCATED/UP-TO-DATE

• Guidelines

• Sports Medicine Handbook

• Current Literature

WHY...?
ATHLETE SAFETY

HEALTH and SAFETY of the ATHLETE ALWAYS COMES FIRST
Pre-Injury
Post-Injury
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