TRAUMATIC BRAIN INJURY LIABILITY: WHAT EDUCATIONAL INSTITUTIONS NEED TO KNOW

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Traumatic brain injury (TBI) related lawsuits are an emerging risk that could have significant liability consequences for educational institutions. Take Zachary Frith, for example, a 14-year-old freshman football player who received a $3 million settlement for a permanent brain injury he sustained while playing high school football.

Zach suffered a concussion while playing wide receiver during a game. Although coaches and administrators documented the injury, they never notified his parents and allowed him to continue playing without being evaluated by medical personnel.

After participating in subsequent practices and games, Zach’s parents noticed changes in his behavior and took him to a physician. The physician diagnosed him with a concussion and ordered him to stop playing football. Despite these orders, Zach’s coaches allowed him to continue to play. Zach developed post-concussion syndrome and severe permanent cognitive deficits as a result of the repeated head trauma he sustained after the initial concussion.1

In recent years, awareness of the effects of TBIs has grown at the high school and collegiate levels. In response to this increased awareness, all 50 states developed concussion laws to better protect young athletes, and the Centers for Disease Control (CDC) launched an educational initiative around preventing, recognizing, and responding to concussions.

While concussion management recommendations such as these can help to reduce the potential for tragedies such as Zach’s, there will always be risks. As a result, many law firms now have practice areas specializing in TBI, and some even focus specifically on sports injuries. For this reason, it is important for educational institutions to stay on top of this emerging issue. If they have not already, it is increasingly likely that they will find themselves in the cross-hairs of TBI-related litigation in the not-too-distant future.
Unlike professional sports leagues, which have an abundance of financial resources for defense and indemnity payments for TBI-related lawsuits, educational institutions often have no financial margin for error. This could be a frightening state of affairs if huge TBI settlements at the professional level spark more lawsuits at the collegiate and lower levels. “TBIs are receiving increased attention and more awareness thanks in large part to high profile litigation in the NFL and NHL,” according to Bryan Elie, vice president of underwriting at United Educators Insurance. “It is an emerging risk that all institutions with athletics should be aware is looming on the horizon.”

This is already a reality for some institutions. There are numerous examples of high schools being sued. For example, a suburban Philadelphia school was sued by a former football player for assault and battery after the student claimed to have suffered mental deficiencies from two concussions in a game where he received no care. In another case, a San Diego area school district paid a $4.4 million settlement to a student who sustained a head injury playing football and now must communicate via a computer and keyboard.

At the college level, the National Collegiate Athletic Association (NCAA) has been the target of TBI-related class action lawsuits alleging the league failed to educate players on the long-term effects of concussions. Individual institutions have also been the subject of TBI-related suits. For example, several Frostburg State University officials were named in a lawsuit claiming that their “reckless disregard for player health and safety” led to the death of 22-year-old Derek Sheely, who sustained multiple head injuries during football practice.

Cases such as these illustrate why being prepared is of the utmost importance. “While educational institutions may not perceive TBI as a huge issue yet, it is our goal to increase awareness and encourage our members to change their behaviors,” said Robb Jones, senior vice president and general counsel for claims management at United Educators Insurance. “The steps taken today can significantly reduce the exposure to this emerging risk in the future.”

According to both Jones and Elie, educational institutions should have an integrated multipart approach to TBI that focuses on how to prepare, identify, and respond to traumatic brain injuries. They should also ensure that their insurance program is appropriate for sports-related injury exposures.
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Sports-Related TBI and U.S. Collegiate and High School Athletes

Sports are inherently risky, and traumatic brain injuries have been and always will be a risk of participation. In recent years, however, the topic has garnered increased attention among the media, sports, and medical communities. This has left some to ask, why now?

Dr. Gerard Gioia, division chief of Pediatric Neuropsychology and director of the Safe Concussion Outcome, Recovery & Education (SCORE) program at the Children’s National Health System, traces increased interest in the topic back to a hit sustained by former University of Florida quarterback Tim Tebow in 2009. “When Tebow took that hit they showed it 50,000 times on every television network,” Dr. Gioia explained. “Florida had a bye week, so this went on for two weeks. Everybody and their grandmother had an opinion as to whether he should be playing that next Saturday. It was that hit, together with the increasing attention in professional football, that propelled the whole issue forward.”

While awareness of TBI has grown quickly, “the science behind being able to predict, prevent and diagnose TBIs is still evolving,” according to Elie. This point is highlighted in a study released by the Institute of Medicine (IOM). According to the study, “much remains unknown about the extent of concussions in youth; how to diagnose, manage, and prevent concussions and the short- and long-term consequences of concussions as well as repetitive head impacts that do not result in concussion symptoms.”

To fully grasp the issues it is important to be clear on a couple of basic questions: What exactly is a traumatic brain injury? And who is most at risk?

TBIs can range from a subconcussive blow to the head to a potentially life-threatening fractured skull or intracranial hematoma. According to the Mayo Clinic, a TBI occurs when an external mechanical force causes brain dysfunction, usually from a violent blow or jolt to the head or body. A concussion, the most common type of TBI, occurs when the head and brain move quickly back and forth causing it to bounce or twist within the skull.

The IOM study identified football, ice hockey, lacrosse, wrestling, and soccer as the sports with the highest rates of concussions among male high school and college athletes, and soccer, lacrosse, basketball, and ice hockey among female athletes. According to the research -- and perhaps unsurprisingly -- football is responsible for the highest percentage of
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head trauma cases in high school and college athletes. What is perhaps more surprising is the rate of concussions in other sports such as soccer, particularly women’s collegiate soccer. In that sport, women are almost twice as likely as men to sustain a concussion.

Knowledge about the impact of head injuries to athletes is growing at different rates depending on whether you are talking about high school, college or professionals, according to Dr. Gioia. “Data for youth before high school is minimal,” he noted. “There is better information for high school – but for the most part only for boys playing football. There is not as much for girls’ sports or for youth soccer, hockey or lacrosse. It largely becomes a matter of informed opinion.”

With regards to football, the IOM study estimates that high school football players are nearly twice as likely to sustain a concussion as their college-aged counterparts. The question is, why?

• Are younger players more susceptible to concussions or are older players less willing to report symptoms?
• How much do muscles and conditioning increase the ability to absorb a blow?
• Are the most susceptible athletes less likely to play at a higher level?
• Does the type of equipment matter?
• Are concussion risks and prevention more adequately communicated at the collegiate level?

These questions have yet to be fully answered. Researchers are also grappling with critically important questions such as whether repetitive brain trauma in young athletes directly correlates with long-term brain diseases such as depression, chronic traumatic encephalopathy (CTE) and Alzheimer’s disease. For the time being, many important decisions must be made based on informed opinions and common sense.

TBI Identification and Response

Students experience many benefits from participating in sports. In addition to physical activity, they learn teamwork, sportsmanship, leadership, and responsibility – among other valuable lessons. According to Dr. Gioia, “there are many things a sports league, its coaches, and officials can be doing to maximize the benefits of the experience while minimizing the risk.” Experts agree that implementing a concussion management program that focuses on prevention, identification, and response is in the best interest of the athletes, their coaches, and their schools.

The good news about concussions is that most athletes (80 to 90 percent) fully recover within two weeks of the injury. However, the people responsible for their safety must have the proper knowledge in order to facilitate this recovery. If trained medical personnel are
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According to the IOM study, “A potentially concussive injury requires removing the athlete from play, caring for the injury appropriately in both the acute stage and during the recovery process, and returning to play only when he or she has recovered demonstrably and is no longer having any symptoms.” Athletes who return to play before being fully recovered risk a prolonged recovery and a more serious injury. To assist with this, CDC developed the Heads Up: Concussion in Youth Sports initiative to provide coaches, parents, and athletes with information on preventing, recognizing, and responding to a concussion. “We highly encourage educational institutions to develop and implement a return-to-play program,” says Jones. “These programs reduce the potential for liability and are often required by law.”

When developing concussion management guidelines, educational institutions should also consider how to manage the student’s return to cognitive activities. Much of the conversation surrounding youth athletes focuses on when it is safe to return to physical activity. The impact that a concussion can have on a student’s cognitive/learning ability is frequently overlooked. The symptoms of a concussion, including headache, blurry vision, sensitivity to light and noise, and fatigue, all can significantly hinder a student’s ability to perform in the classroom. In fact, research suggests that cognitive overexertion can worsen concussion symptoms and possibly prolong recovery. However, Dr. Gioia warns against extreme activity limitation which can cause student-athletes to develop other issues. A balanced approach must take into account the individual’s circumstances including their normal physical, social, and academic activities.

**Government Regulation**

The good news for athletes is that some of these steps towards preventing and managing head injuries are no longer simply recommendations, but instead are legal requirements.

In 2013, the topic of concussions made its way to Washington, D.C., where two pieces of concussion-related legislation were introduced, one in the Senate and one in the House of Representatives. Like similar bills introduced in the past few years, neither bill received much consideration. At the state level, concussion legislation has had much more success. In early 2014, the last five holdouts (Georgia, Oregon, Tennessee, Wisconsin, and Mississippi) passed concussion-related legislation designed to better protect young athletes.
None of the laws are identical, but most mandate that student athletes who experience a concussion be removed from play and obtain a health care provider’s permission before returning. For example, New York’s state law that went into effect in 2011 requires:

- Removal from play
- Medical clearance prior to resuming play
- Training for coaches
- Distribution of information to coaches, students, and parents
- Students and parents to sign forms confirming receipt of concussion information

Most of the other laws have similar requirements. These laws are an indication that although the early focus on the long-term effects of traumatic brain injuries may have centered on professional athletes, the conversation has quickly turned toward the nation’s youth. Many health professionals welcome this attention at the legislative level.

**Culture of Resistance in Athletics**

The culture of resistance in sports is one of the biggest impediments to properly identifying and responding to concussions. It is a culture that has developed over the course of centuries, and it is highly resistant to change. The IOM study likens the culture of resistance in sports to the military where devotion to duty and service comes before self. This viewpoint is shared by many involved in athletics at all levels, including the athletes themselves, and changing a behavior that is as old as competition itself will take time.

One way around resistance to self-reporting is by taking the responsibility out of the athlete’s hands. In football, for example, research is ongoing on ways to design helmets that can reduce head injuries and minimize their potential long-term consequences. At the forefront of this research is Dr. Stefan Duma, head of Virginia Tech/Wake Forest University School of Biomedical Engineering and Sciences. Dr. Duma’s research involves installing helmets with sensors called accelerometers that record the angle and gravitational pull (g-force) of a hit. After recording hundreds of thousands of hits, Dr. Duma and his team have been able to identify when a hit is most likely to cause a concussion. When a player sustains a hit, the data is sent to a laptop on the sideline for athletic trainers and other personnel to review. If the data signals a high probability of concussion, medical personnel can proactively examine the athlete and therefore eliminate his or her innate resistance to self-report.

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**Concussion Risk Reduction**

In a perfect world there would be a way to prevent TBIs entirely. Unfortunately this is not possible, according to Jones. “Contact sports that are inherently violent are always going to have risk,” he explains. “You are never going to make them totally risk free. The question is how you reduce the risks.”

Ways that this can be accomplished include minimizing an athlete’s exposure to high impact situations and designing better protective gear. For example, a primary goal of Dr. Duma’s ongoing research is to design helmets that can reduce the occurrence of sports-related concussions. Other suggestions include making changes to the game and game preparation. The IOM study, for example, recommended that “National governing bodies for youth sports and youth sport organizations undertake a rigorous scientific evaluation of the effectiveness of age appropriate techniques, rules, and playing and practice standards in reducing sports-related concussions and resulting conditions.”

Part of the NFL’s response to a recent $765 million settlement with retired players is to promote new ways in which kids are taught to tackle. In partnership with USA Football, the NFL is promoting “Heads Up Football” by teaching kids what they believe to be a safer way to tackle. The idea is that by providing education at the youth level, the game will be played differently and reduce the risk of concussions as athletes reach the higher levels.

**Risk Management**

From an insurance claims perspective, TBIs are an emerging issue. As the science continues to evolve, and as the understanding about the long-term effects on student athletes increases, educational institutions could find themselves targeted for TBI-related litigation unless they stay current with best practices in concussion management. “The TBI environment is evolving, as we continue to learn more, institutions’ prevention and response programs may change,” according to Elie. “They need to keep this as an active area for change as medical awareness increases.”

Many institutions already take proactive steps to mitigate these future risks. “It is important to increase awareness on the issue and encourage educational institutions to change their behaviors,” Jones explains. “At the very least, educational institutions should implement a
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concussion management program that explains how to respond to a suspected concussion.” This is a recommendation that appears to be gaining traction. “The numbers of reported head injuries are increasing because of more awareness. There has been a huge uptick in concussion reporting,” according to Jones. “Many schools are choosing to report even though they are not claims.”

Taking these proactive measures are key to preventing, or at least minimizing, future liabilities. Some institutions, such as Southern Methodist University, have taken it a step further.

Risk Management Case Study

Head injuries have emerged as a topic of discussion at many colleges and universities and are increasingly a focus of university enterprise risk management programs. An example of this is the work being done at Southern Methodist University (SMU) in Dallas where a joint committee was created to focus on concussions and concussion management. The Concussions Committee was the brainchild of David Liner, director of risk management at SMU. Liner explained that the idea came as a result of a risk assessment that identified that head injuries were a common concern across various departments. The purpose of the committee is to engage departments that may not typically communicate with each other so that they can share different perspectives on a common issue.

The committee includes representatives from research, engineering, athletics, recreational/intramural athletics, health care, legal, and risk management. By creating synergy across departments and gaining a different perspective on a common issue, they are better able to make recommendations and shape institutional policies. For example, this created an opportunity for physiology researchers who were conducting head injury studies to communicate and ultimately partner with the School of Engineering, which was attempting to design a helmet that can better manage wave impact. The committee’s goal is twofold, to combine the research and athletic arms of the university, and to manage the risk of head injuries to protect student athletes and address future liability issues.
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Conclusion

Although there is much we still do not know about the long-term effects of TBI, what we do know is that there are millions of student athletes eager to play the sports they love and to represent their schools and communities on the court, field, or ice. We know that there is an expectation that educational institutions will meet the highest safety standards for all athletes. We know that as awareness of TBIs in athletics grows, educational institutions will continue to receive more scrutiny. And finally, we know that although behaviors are often slow to change on the field, they must not be slow to change off the field. It is not only the school’s ethical responsibility to do their utmost to prevent and respond to traumatic brain injuries, it is increasingly becoming their legal responsibility.

Educational institutions can be prepared to respond to this emerging risk by implementing a comprehensive concussion management program. They also should work with a broker experienced with educational institutions to assure that the proper insurance coverages are in place to address this increasingly significant exposure.


