CTE: LEGAL AND INSURANCE ISSUES

Presentation for the NCOIL 2019 Summer Meeting

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Outline of the Problem

Recently, the plaintiffs' bar has sought to bring class action litigation and other high dollar claims for head injury exposures unrelated to a defined injury event and historically not thought to be covered by commercial general liability ("CGL") policies.

- The risk exposure occurs when a group of injured athletes sues an athletic organization, such as the NFL or a youth sports league.
- The defendant organization then seeks defense coverage and indemnification from its insurer(s).
- This is not the traditional class action risk commonly experienced by insurers (e.g., class action directly against the insurer for ambiguous policy language, improper claims handling procedures, flawed rates, etc.).

Are Insurers Sitting on a "Ticking Time Bomb?"

- Comparison to asbestos

- Comparison to Tobacco

Participation in Tackle Football in the United States, Selected Statistics

High School Football – 1,000,000 participants (appx. – Forbes, April 19, 2019)

- **2009 – 2018 – 6.6% drop in participation (National Federation of State High School Association)**
- **North Carolina: 17% drop, 2009 – 2016 (McLatchy News)**
- **Illinois: 15% drop, 2007-2016 (Chicago Tribune)**

Youth Football

- **2008-2016 – 29% drop in participation (ESPN – Tom Farrey)**

Chicago Tribune

Youth football participation declines as worries mount about concussions, CTE

The New York Times

Massachusetts Bill Would Ban Tackle Football Until After Seventh Grade

by Emily S. Rueb, March 1, 2019

- **The bill, which moved to the Massachusetts legislature's Joint Committee on Public Health this week, follows unsuccessful attempts by legislators in seven other states to pass similar health measure to protect growing brains for traumatic injury. (Other states: CA, IL, MD, ME, NJ, NY)**

- **"There is significant science detailing repetitive head impacts have long-term neurological consequences, especially when they occur during brain development", one of the bill's sponsors, Representative Paul A. Schmid III, a Democrat, said in a statement.**

- **"Should we ban youth soccer too?" asked Representative David Nangle, a Democrat who opposes the bill. "Or youth hockey? When do we stop?**

- **Canada will begin enforcing a national ban on tackling under age 12, starting in 2022**

General Liability Insurers

Defendants look to general liability insurers for defense or for reimbursement of defense costs associated with such litigation and/or indemnification for the losses they incurred.

- The proliferation of these cases and increased scope of potential liability raise a multitude of liability and coverage issues for insurers who issue CGL or other policies to sports and/or education organizations.

Methods for Making Recoveries

- Class Action
  - Must share common issues
- Individual Lawsuits
  - If Class Action pending, must “opt out” of class

Problems/Benefits with Class Action

- Benefits for Both Sides
  - NFL Experience
- Reason to Fight Class Certification
  - NHL Experience
- Problems with Class Action
  - NCAA Experience

Sports Illustrated

NHL

Judge: No Class-Action Status for Ex-NHLer Concussion Case

The New York Times

NCAA'S $75M Concussion Settlement On Hold After Notice Glitches – August 2018

- **Fairness Hearing held on February 25, 2019, Federal Court, Chicago**
- **Court will rule on adequacy of settlement limited to medical monitoring.**
- **No final ruling as of July 9.**

Medical Monitoring Cases

Players are seeking on-going testing and medical monitoring for purposes of tracking potential future harm caused by either a defined injury event or general exposure to the risk of injury.

All of the cases seeking damages for cumulative trauma and medical monitoring are based on claims of failure to comply with duty to warn and/or protect players from concussions or athletic injures and have ended in settlement or are still pending. As of today, there has been no judicial determination as to the validity of these claims.

Since 1984, more than half of U.S. jurisdictions have permitted medical monitoring awards as either an independent claim or as a theory of recovery with respect other types of injuries or exposures, but only in the context of a toxic tort case, which is not present here. Even in such cases, the recent trend at the Supreme Court level and in many state courts has been a reluctance to certify medical monitoring class actions and rather to require plaintiffs to establish an actual injury to obtain recovery.

Individual Litigation

- Multiplicity of Defenses
- Allocation of Liability
- Sports played at different levels
  High School, college, professional
- High Profile Recent Cases
  - Junior Seau
  - Aaron Hernandez

The New York Times

Family of Junior Seau Settles Case Against N.F.L.

The former N.F.L. linebacker Junior Seau with his daughter Sydney in 2011. He committed suicide a year later. Denis Poroy/Associated Press

The New York Times

Aaron Hernandez's Family Drops C.T.E. Suit Against N.F.L., for Now

The former N.F.L. tight end Aaron Hernandez in March at his trial in the killings of two men in Boston.
Pool photo by Elise Amendola

Mitigating Strategies

For Insurers: the following strategies may mitigate the risks associated with concussions and other youth athletic injuries:

- adoption of policy exclusions;
- modification of coverage limits;
- ensuring that rates consistently reflect updated rate indications based on actuarially supported loss and expense experience;
- product modification to offer buy back coverage at an appropriate and additional rate; and
- aggressive and affirmative defense of claims.

The duty of any insurer to defend and/or indemnify is likely to vary based on the facts and circumstances of each case, the type of policy, and the specific terms, scope of coverage and limitations of each specific underlying policy.

Over-all Mitigation

- Technological fixes
  - Helmet design
  - Concussion protocols/testing
- Rule Changes

Helmet Design

- The 2018 Riddell System, called the Riddell Insite Training Tool (ITT), will help coaches and trainers identify and manage potential concussions on the field as soon as they occur

- Riddell's system will provide detailed head-injury analytics, such as where on the head an athlete was hit and how hard, and how that hit stacks up against the national average.

Concussions Protocols/testing

Pre/Season / In-Game Diagnosis

There are many concussion diagnosis products on the market which claim to offer a method for concussion measurement

Unfortunately, most of these are one factor determinations based on cognitive tests

In fact only 25-30 % of concussed people show abnormal cognitive scores (Walter Reed military hospital 2012)

Only 70-75% of concussed people show balance dysfunction

5% of concussed people have a positive Nystagmus test

A multi-factorial assessment combining balance and cognition would therefore offer a significantly enhanced sensitivity and specificity for determining concussion

Concussion = Moderate or mild Traumatic Brain Injury

CBS (Cognitive Balance Score)

POWERED BY ISOTECHNOLOGY

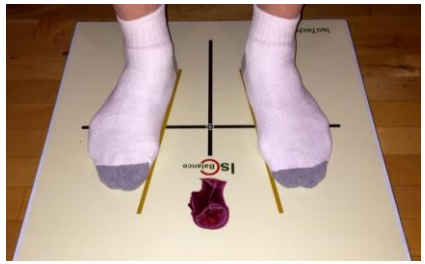
April 2019

www.isotechnology.net

CBS Overview

- Cognitive Balance Score (“CBS”) is the most efficient and easy-to-use clinical monitoring and management tool for concussive disorders, mild traumatic brain injuries (“mTBI”), frailty and risk of fall, and medication effects.

- A balance plate combined with software on a laptop provides extensive information on the neurological status of a patient with a combination of balance and cognitive assessments tests in less than five minutes.
- A standard CBS test consists of two back-to-back tests on the balance plate. In a typical test, the patient will stand still for 30 seconds with their eyes open, followed by a 30 second assessment with their eyes closed. CBS records the exact location of the patient’s Centre of Pressure on the plate. This allows a doctor, trainer or therapist to quantify the total amount of movement, the direction of the movement, and the distribution of the patient’s weight on the plate.
- CBS cognitive tests are completed either before or after the balance tests for a two factor assessment of concussion (mTBI events) and risk of fall management of the elderly.
- CBS provides an accurate and objective statistical measure of balance and cognition, allowing these values to be reliably compared both on an individual basis and against data from other patients. Baseline tests are also collected for players or patients, with a constantly updating 10-test baseline and a 3-test commencement baseline.



Early adopters of CBS

UNITED STATES MILITARY ACADEMY WEST POINT.

THE TEXAS BRAIN AND SPINE INSTITUTE

QUT Queensland University of Technology

THE UNIVERSITY OF ARIZONA

VT

BROWN

USC University of Southern California

WAKE FOREST UNIVERSITY

PHILADELPHIA COLLEGE OF OSTEOPATHIC MEDICINE 1899

UNT UNIVERSITY OF NORTH TEXAS

WALTER REED ARMY MEDICAL CENTER

UF UNIVERSITY of FLORIDA

GT

AUBURN UNIVERSITY

Rule Changes

The New York Times

Ivy League Football Saw Large Reduction in Concussions After New Kickoff Rules

Columbia University waiting to take the field against Dartmouth in a matchup in Hanover, N.H., last season. A study has found that a change in kickoff rules for the Ivy League has resulted in a reduction in concussions. John Tully for The New York Times

Summary of Big Ten - Ivy League Concussion-Related Initiatives

The Ivy League has been a leader in addressing issues regarding concussions in intercollegiate athletics, including conducting several sport-specific studies, adopting changes designed to promote student-athlete safety, and supporting ongoing and future research.

I. Ivy League Sport-Specific Concussion Studies and Actions

Between 2010 and 2012, the Ivy League conducted six separate studies regarding concussions in the following sports: football, men's and women's lacrosse, men's and women's ice hockey, and men's and women's soccer (combined study as the rules are the same for men's and women's soccer). A special concussion committee, which oversaw these studies, was chaired by two Ivy League presidents who are medical doctors and included Ivy League team physicians, athletic trainers, administrators and expert consultants.

The Ivy League Council of Presidents adopted all of the recommendations as presented, with the caveat that as information and research regarding concussion remain evolving areas, the Ivy League will continue to monitor the research, data, best practices and other information regarding concussions and cumulative head trauma to determine if any of the adopted recommendations need to be revisited in the future.

All of the studies included an enhancement of existing education of student-athletes and coaches regarding the signs and symptoms of concussions, emphasizing the potential long-term risks of repetitive brain trauma and stressing the need to report and not play with any symptoms of a concussion.

Based on the preliminary analysis of the data, beginning with the 2013-14 academic year, wrestling and rugby were also identified as sports with a high incidence of concussion. Accordingly, reviews of rugby and wrestling were conducted in 2015-16 and recommendations went into effect for the 2016-17 academic year.

II. Research Collaboration with the Big Ten Conference

In June of 2012, the Big Ten and the Ivy League, in conjunction with the Big Ten Committee on Institutional Cooperation (CIC), began a co-sponsored, cross-institutional research collaboration to study the effects of head injuries in sports. This historic collaboration between the Big Ten and the Ivy League will extend and enhance the work already undertaken by both conferences over the past several years in their prior and ongoing efforts to address issues regarding concussions in intercollegiate athletics.

Participants in the collaboration include researchers and medical professionals from all Ivy League and Big Ten schools. The world-class academic and research capabilities of the institutions will help to promote a collaborative and collegial atmosphere to address a burgeoning issue impacting the welfare of athletes at all levels of sport. Through academic research and shared resources, the collaboration will promote positive and constructive change for injury assessment and improved long-term outcomes.

In July 2013 through 2017 summits involving participants from each Ivy League and Big Ten school provided an opportunity to review the current clinical and research efforts that exist on each campus and allowed the group to identify short and long-term areas of emphasis to address as the collaboration progresses.

Q&A/Conclusion

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