State of Play: Managing the Risk of Brain Injury in College Sports

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Agenda

• Definitions
• Interesting Stats
  – Frequency of TBI
  – Background
• UE Claims Experience
• Overview of Medical Science
• Risk Management Practices & Liability Defense
• Insurance Concerns
  – Market Conditions
  – Underwriting Warranties
  – Definition of Occurrence
Definitions

- **Traumatic brain injury (TBI)** is an insult to the brain, not of a degenerative or congenital nature, but caused by external physical force that may produce a diminished or altered state of consciousness, which results in an impairment of cognitive abilities or physical functioning. *Centre for Neuro Skills*

- **Chronic traumatic encephalopathy (CTE)** is a neurodegenerative disease likely marked by widespread accumulation of tau protein in the brain. CTE is thought to result from repetitive brain trauma, including repetitive concussions and even repetitive subconcussive blows to the head, the latter not causing concussion or other obvious symptoms. CTE has been observed most often in professional athletes who are involved in contact sports (e.g., boxing, American football) and who have been subjected to repetitive blows to the head. *Harvard Medical School*
Definitions

- A **Concussion** is a traumatic brain injury that affects your brain function. Effects are usually temporary but can include headaches and problems with concentration, memory, balance and coordination. Concussions are usually caused by a blow to the head. Violently shaking the head and upper body also can cause concussions. Some concussions cause you to lose consciousness, but most do not. It's possible to have a concussion and not realize it. Concussions are particularly common if you play a contact sport, such as football. Most people usually recover fully after a concussion. *(Mayo Clinic)*
## Interesting Stats

### Frequency of TBI

<table>
<thead>
<tr>
<th>NCAA Sport</th>
<th>Annual Rate of SRC/10,000 Athletes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men’s Wrestling</td>
<td>10.92</td>
</tr>
<tr>
<td>Men’s Ice Hockey</td>
<td>7.91</td>
</tr>
<tr>
<td>Women’s Ice Hockey</td>
<td>7.52</td>
</tr>
<tr>
<td>Men’s Football</td>
<td>6.71</td>
</tr>
<tr>
<td>Women’s Soccer</td>
<td>6.31</td>
</tr>
<tr>
<td>Women’s Bball</td>
<td>5.95</td>
</tr>
<tr>
<td>Women’s Lacrosse</td>
<td>5.21</td>
</tr>
<tr>
<td>Women’s Field Hockey</td>
<td>4.02</td>
</tr>
<tr>
<td>Men’s Bball</td>
<td>3.89</td>
</tr>
<tr>
<td>Women’s Volleyball</td>
<td>3.57</td>
</tr>
</tbody>
</table>

In similar sports women tend to have higher rates of SRC than men.
### Interesting Stats

**Frequency of TBI**

<table>
<thead>
<tr>
<th>NCAA Sport</th>
<th>Average # of Reported SRCs Annually</th>
</tr>
</thead>
<tbody>
<tr>
<td>Men’s Football</td>
<td>3,417</td>
</tr>
<tr>
<td>Women’s Soccer</td>
<td>1,113</td>
</tr>
<tr>
<td>Women’s Bball</td>
<td>998</td>
</tr>
<tr>
<td>Men’s Bball</td>
<td>773</td>
</tr>
<tr>
<td>Men’s Wrestling</td>
<td>617</td>
</tr>
</tbody>
</table>

Rates of reported SRCs have been increasing.

*Every year, an estimated 1.7 million Americans suffer a concussion from falls, sports activities and car accidents.*
Interesting Stats

Background

- 2002-07: Drs. Omalu & Cantu examine ex-NFL players
- 2005: UNC Study
- 2009: NY Times report on dementia risk in NFL
- 2009: WA St. passes Zackery Lystedt Law
- 2010: First documented case of CTE in NCAA football player
- 2011: Putative Class Actions filed against NCAA
- 2015: Concussion Movie
Interesting Stats

Background

• 50 states have passed concussion legislation since 2009
• NCAA concussion guidelines have been updated three times in five years
• NFL concussion lawsuit and settlement approx. 1B
• NCAA medical monitoring lawsuit and settlement $75M
• NCAA/University Putative Class Actions
• 49 new class actions were filed against NCAA this May & June, 2 suits named schools as defendants
UE Claims Experience
Number of Athletic Concussion Claims per Year

CLAIMS PER YEAR

- 2010: 12
- 2011: 5
- 2012: 6
- 2013: 9
- 2014: 17
- 2015: 15
- 2016: 18
UE Claims Experience
Top 5 Sports with Concussion Claims

TOP 5 SPORTS WITH CONCUSSION CLAIMS
- Football: 30.59%
- Soccer: 12.94%
- Basketball: 11.76%
- Rugby: 12.94%
- Baseball/Softball: 11.76%
- Other Sports: 7.06%
UE Claims Experience
Common Allegations

- RTP Too Soon
- Negligent Coaching
- Failure to Properly Clear
- Failure to Warn
- Emergency Response – 911/CPR/AED
- Not following/having CMP’s
- Failure to refer out to MD/neurologist
- Delayed removal from play
UE Claims Experience
Common Co-Defendants

- School
- AT’s
- Coaches
- MD’s
- NCAA
- Helmet Manufacturer
Overview of Medical Science

• More work needs to be done
  – No controlled data comparison studies
  – Premature conclusions
  – Too many variables
  – Conflicting views and studies

*What everyone does agree on though is the need for comprehensive risk management practices...*
"I don't think it's a concussion ... although the smoke has me a little concerned."
Risk Management

- Education & Training – signed acknowledgement
- Pre-participation assessment – medical clearance/baseline/prior history
- Medical Coverage/Emergency Response plans – Set expectations
  - AT/MD autonomy
  - EMT’s
  - Athletic Conference requirements
    - club sports & intramurals
- Medical record/waiver retention
- Return to Play/Return to Learn
  - Communication between athletics and other depts. – multi-disciplinary committee
- Helmet reconditioning program

- Documentation, documentation, documentation!!
Liability Defenses

- Waivers/Releases — *Statute of Limitations (?)*
- No negligence
- Comparative Fault/Modified/Contributory(AL, DC, MD, NC, VA)
- Assumption of the Risk
- Statute of Limitations
- Compliance w/Guidelines – State/Association/CMP’s/CDC, etc.
- AT/HCP
- Recreational and Sports Immunities (e.g., contact sports exception)
- Asymptomatic sub-concussive hits – impugning the game of football
- Causation
Litigation Strategies – Defeating Causation

- Pre-existing mental health and other over-lays – obtain all medical/psych/academic records (and post)
- IME’s
- Well - respected experts
- Snapchat/Facebook/Twitter/Surveillance
- Junk v. Medical Science/Validity/Daubert
- Other risk factors - Genetics, ETOH, steroids, drugs, medications, ADHD, anxiety disorders, other stressors, etc.
Insurance Concerns

- Insurance Terms and Conditions
  - Insuring Agreement – when does loss commence?
  - Definition of occurrence
  - Claims Reporting Requirements
  - Continuity of coverage throughout liability tower

- Standard Markets (Hanover, WRM, Travelers…)

"Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
Insurance Concerns

• Standard Markets

Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
   (1) How, when and where the "occurrence" or offense took place;
   (2) The names and addresses of any injured persons and witnesses; and
   (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:
   (1) Immediately record the specifics of the claim or "suit" and the date received; and
   (2) Notify us as soon as practicable.
   You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:
   (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
   (2) Authorize us to obtain records and other information;
   (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
   (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.
Insurance Concerns

United Educators

•   **Athletic Traumatic Brain Injury**
    The following circumstances listed below which in any way cause, result in, and/or are related or connected to **Athletic Traumatic Brain Injury**, including any related **Medical Services**, shall collectively be grouped together and deemed to constitute one single **Occurrence**, irrespective of the time period or area over which alleged or actual injuries or damages arise, the number of such alleged or actual injuries or damages sustained, the number of persons who sustain alleged or actual injuries or damage, or the number of **Claims** made against one or more **Insureds**:

1. any and all related accidents during the **Policy Period**;
2. the continuous, intermittent or repeated exposures to the same or similar conditions that commence during the **Policy Period**; or
3. formal or informal policies, practices, procedures or courses of conduct that commence during the **Policy Period**.

2. The following definitions are added to this Policy:

   - **Bodily Injury** is amended explicitly to include **Traumatic Brain Injury**.
   - **Traumatic Brain Injury** means any of the following:
     a. a concussion or sub-concussive brain injury or brain trauma;
     b. a reaction by the brain to a bump, blow or jolt to the head or body that is transmitted to the head; or
     c. any brain injury or brain trauma which results, either immediately or later in time, in changes in behavior, thinking, and/or physical or cognitive functioning.

•   **Athletic Traumatic Brain Injury**
    Means any **Traumatic Brain Injury** to an **Athletic Participant** in connection with, arising out of, relating to or attributable to any tryout, conditioning, practice, preparation, scrimmage, exhibition or game which is related to the **Included Entity's** organized athletic programs.

•   **Athletic Participant**
    Means an individual who takes part or who took part with the expressed or implied consent of an **Included Entity** in any tryout, conditioning, practice, preparation, scrimmage, exhibition or game which is related to the **Included Entity's** organized athletic programs.
Helpful Links

- http://www.bu.edu/cte/about/frequently-asked-questions/
Thank You

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