

Time to Call an Audible: The Need for a Change in Concussion Rules on the Legal Playing Field.

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In recent years one of the biggest issues in athletics is that of concussions. Recent studies by both Government agencies and private organizations have brought to light the long term dangers of concussions suffered by athletes at all levels of sport. While a majority of the research and spending in the field of concussions, or more generally Traumatic Brain Injury, is focused on professional athletes and leagues there is a growing movement to use more resources on treatment and prevention of concussions for both youth leagues and high school athletics. This shift in focus comes as the result of growing library of research that underlines the fact that often times once players reach the professional level permanent damage has already been done in lower levels of competition. As a result, sports leagues across the country have begun changing their rules to accommodate the particular dangers that concussions represent. However, the tort law has continued to lag behind in its recognition of the unique nature of head injuries. At this point case law continues to address athletic injuries of all types under a single blanket of rules, rules that are poorly suited for the risks and consequences that traumatic head injuries present. As a result

legislatures have begun addressing the issue on a state by state basis, but this process must be sped up.

Medical Definitions of Concussion

Traumatic Brain Injury (TBI) is the catchall term for any injury caused by direct contact between the brain and any object. The most severe examples of this come from injuries where an object penetrates the skull and connects with the brain; however, in the context of high school athletics the most common instance of TBI is a concussion. A concussion occurs when a person's head receives a jolt strong enough to cause the brain, which rests suspended in a pool of cerebrospinal fluid, to move far enough to impact the inside of the skull.¹ Depending on the force of the impact with the skull, the brain can experience anything from temporary dysfunction of brain cells to bruising and bleeding of the brain itself. In most cases the damage caused by a mild or moderate concussion will heal over time, provided that the brain is given sufficient time to recover after the injury. However, if left untreated these injuries can result in life-long effects and in severe cases even death.²

Short-term symptoms of concussions include loss of consciousness, headache, nausea, sensory issues, slurred speech, pupil dilation, and loss of

¹ "Concussion - CNN.com." *CNN.com - Breaking News, U.S., World, Weather, Entertainment & Video News*. N.p., 17 Feb. 2005. Web. 8 May 2011. <<http://www-cgi.cnn.com/HEALTH/library/DS/00>

² Mayo Clinic Staff. "Traumatic brain injury - MayoClinic.com." *Mayo Clinic*. N.p., 16 Sept. 2010. Web. 8 May 2011. <<http://www.mayoclinic.com/health/traumatic-brain-injury/DS00552/METHOD=print>>.

coordination.³ These symptoms tend to be fairly mild in all but the most severe concussions. This causes a distinct problem for those attempting to diagnosis a concussion without the aid of a CAT scan or other imaging device. Due to this difficulty in diagnosing a concussion without medical training doctors recommend that anytime there is a blow to the head that results in any symptoms of a concussion the patient should be immediately brought to a hospital for further evaluation because failure to quickly diagnose a concussion can increase the potential for permanent mental impairment.⁴

One of the risks that is particular to athletes who have received concussions but continue playing is repetitive head injury syndrome. Repetitive head injury syndrome points to a growing belief within medical circles that if a patient suffers a second concussion in the days or weeks following their initial concussion the effects, both short and long-term, are multiplied greatly.⁵ The science behind this belief is persuasive but at this point is still limited mainly to antidotal evidence and trends that have yet to be conclusively proven to be directly connected to secondary concussions. However, studies suggest that athletes who have suffered three or more concussions are three times more likely to suffer from depression later in life in addition to reduced cognitive performance.⁶ Perhaps the most likely source

³ Id.

⁴ Id.

⁵ Cifu, David. "Repetitive Head Injury Syndrome." *Medscape: Medscape Access*. N.p., 16 Nov. 2010. Web. 8 May 2011. <<http://emedicine.medscape.com/article/92189-overview>>.

⁶ Id.

of conclusive information regarding the risks of multiple concussions is the research currently being done in a joint venture by Boston University's Center for the Study of Traumatic Encephalopathy and the National Football League. As a part of this venture many current and former NFL players as well as athletes from other sports and skill levels have pledged their brains to be donated to BU upon their deaths for study.⁷ As a part of this study, those who have pledged their brains will answer regular surveys regarding their mental state in order to ensure that each autopsy is accompanied with relevant information regarding the individual's perception of their brain function.⁸ As of May 7, 2011 the center has tested 15 brains of former NFL players, 14 of which showed signs of permanent brain trauma.⁹ However, the admitted problem with these results is that the players who have pledged their brains to the program are the same ones who have been suffering the most noticeable symptoms of brain damage, thus preventing the researchers from creating a "control" group with which they can compare the data.¹⁰

Concussions in High School Athletics

⁷ "CSTE Brain Bank » Center for the Study of Traumatic Encephalopathy » Boston University." *Boston University*. N.p., n.d. Web. 8 May 2011. <<http://www.bu.edu/cste/our-research/brain-bank/>>.

⁸ Id.

⁹ Smith, Michael David. "After finding trauma in NFL players, researchers seek more brains | ProFootballTalk." *ProFootballTalk*. N.p., 7 May 2011. Web. 8 May 2011. <<http://profootballtalk.nbcsports.com/2011/05/07/after-finding-trauma-in-nfl-players-researchers-seek-more-brains/>>.

¹⁰ Id.

While much of the research regarding traumatic brain injury has been focused on the injuries sustained by professional athletes, concussions are of particular danger to high school athletes. This danger comes from the lack of development of teenager's brains as well as the nature of the high school experience itself. According to a 1999 study of high school sports injuries, 5.5% of injuries in high school athletics are mild traumatic brain injuries.¹¹ As a result of this conclusion, rate groups who are advocating for additional protections for high school athletes estimate that over 60,000 concussions are suffered in high school sports alone.¹² As a result of these concussions the dangers of chronic traumatic encephalopathy are quickly becoming a factor for younger and younger athletes, with a case recently being discovered in the autopsy of an 18-year-old football player.¹³ According to researchers, the student's brain exhibited the same abnormalities that are the focus of the extensive research that has created such worry regarding risks for professional athletes.

¹¹ Powell, John W., and Kim D. Barber-Foss. "Traumatic Brain Injury in High School Athletics." *JAMA*. N.p., 8 Sept. 1999. Web. 8 May 2011. <jama.ama-assn.org/content/282/10/958.full.pdf>.

¹² Hamilton, Jon. "Doctors Throw Flags On High School Concussions : NPR." *NPR : National Public Radio : News & Analysis, World, US, Music & Arts : NPR*. N.p., 2 Feb. 2011. Web. 12 May 2011. <<http://www.npr.org/2011/02/02/133437361/doctors-throw-flags-on-high-school-concussions>>.

¹³ Wolters Kluwer Health. "Multiple Concussions Linked to Lasting Symptoms in High School Athletes." *Newswise: news for journalists, press release distribution for public relations*. N.p., 25 Jan. 2011. Web. 12 May 2011. <<http://www.newswise.com/articles/multiple-concussions-linked-to-lasting-symptoms-in-high-school-athletes-subtle-effects-may-be-precursors-to-future-concussion-related-problems-reports-neurosurgery-journal>>.

The nature of high school and adolescence creates a distinct problem for determining the actual effects of concussions on high students. In 2010 a study was done by Dr. Phillip Shatz that compared a group of 260 students who had had one concussion at least four months previous to a group of 105 students who had had at least 2 concussions at least four months previous and a group of 251 students who had never had a concussion.¹⁴ According to this study students who had suffered from multiple concussions were more likely to suffer cognitive issues, physical symptoms, and sleep issues.¹⁵ However, outside of a statistical study it is unlikely that coaches and teachers would readily pick up these changes due to the fact that many of the symptoms involved would be more quickly attributed to general adolescent changes and often the perception of the “dumb jock” instead of an underlying symptom of a concussion. Also, the social pressure placed on student athletes creates a distinct difference from more obvious physical injury. While a player is generally willing to come off the playing field due to a knee injury generally the “cobwebs” from a concussion are just “shaken off” so that the player can return to the field. This is partially because of the perception that continuing play after a concussion is just a toughness issue and that if a quarterback returns to school on Monday with a sling after a shoulder injury they will gain sympathy from classmates but if they return without any

¹⁴ Id.

¹⁵ Id.

external symptoms after a potentially more dangerous concussion they may lose social standing.

The final key issue in dealing with high school concussions comes from the classroom itself. Just as a knee or shoulder need to be restricted from use after a major injury, after a concussion the brain must also be allowed time to repair itself without use.¹⁶ As a result doctors recommend that just removing an injured athlete from the playing field after a concussion is not sufficient, instead schools should allowed concussed athletes time away from the classroom after an injury in order to prevent further damage from overuse, computer screens, and sensory overstimulation.¹⁷

Coach and School Liability

While it seems clear that the medical community has determined that concussions represent a risk that exceeds that of nearly any other athletic injury, the legal community has been unwilling to follow suit. Time and time again courts around the country have been unwilling to apply any additional scrutiny to the coaches and schools that allow players to continue to compete and practice after sustaining a concussion. One of the most recent examples of this comes from the Supreme Court of Nebraska in Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.,¹⁸ In this case a high school football player sustained a concussion after missing a tackle in the second quarter of a game,

¹⁶ Hamilton, Jon. "Doctors Throw Flags On High School Concussions : NPR."

¹⁷ Id.

¹⁸ 267 Neb. 958, 679 N.W.2d 198 (2004)

a few plays later he removed himself from the game with complaints of dizziness.¹⁹ The coaching staff had the injured player sit on the bench until after halftime, at which point the coach determined, without the input of any medical professionals, that the player's dizziness was just a result of hyperventilation and had him reenter the game.²⁰ While the player did not suffer any further head injuries during the remainder of the game he had a persistent headache through the weekend and into the team practice on the following Tuesday.²¹ At this practice, the player was allowed to participate in contact drills with the team and sustained a secondary concussion as a result.²² This secondary concussion was the principal cause of permanent brain injury that was sustained by the player according to a specialist who testified for the player.²³

The player filed a personal injury suit against the school district alleging that the coaches were negligent for a variety of reasons that included allowing him to continue playing without any sort of medical supervision following his concussion.²⁴ Both the district court and Nebraska Supreme Court held that the proper level of care that needed to be applied was that of

¹⁹ Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 267 Neb. 958, 960, 679 N.W.2d 198, 200-01 (2004)

²⁰ Id.

²¹ Id.

²² Id.

²³ Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 267 Neb. 958, 961, 679 N.W.2d 198, 201-02 (2004)

²⁴ Id.

“a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement.”²⁵ Under this level of care all that was necessary was that the coaches be “(1) to be familiar with the features of a concussion; (2) to evaluate the player who appeared to have suffered a head injury for the symptoms of a concussion; (3) to repeat the evaluation at intervals before the player would be permitted to reenter the game; and (4) to determine, based upon the evaluation, the seriousness of the injury and whether it was appropriate to let the player reenter the game or to remove the player from all contact pending a medical examination.”²⁶ The Court further ruled that under this standard there was no need for any medical professionals to evaluate the injured player and that instead the coach’s lay judgment was sufficient to avoid liability.²⁷

Rulings such as Cerny point to the need for tort reform in state legislatures in order to protect student athletes due to the difficulties in diagnosing concussions and the danger of long-term damage that they represent. One of the best examples of the type of law that needs to be passed comes from Washington State in its 2009 passage of the Zackery

²⁵ Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 267 Neb. 958, 967, 679 N.W.2d 198, 205 (2004)

²⁶ Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 267 Neb. 958, 968, 679 N.W.2d 198, 206 (2004)

²⁷ See: Id.

Lystedt Law.²⁸ This law adjusts the liability requirements for coaches whose players have sustained concussions by removing the decision from the coaches and placing it in the hands of licensed medical professionals. Under the terms of the law players who are believed to have sustained a concussion must be removed from the field of play and cannot be returned until they have received clearance from a medical professional who has received specific training in the evaluation and care of concussions.²⁹ The bill also provides an added level of protection from suit for the medical professionals who make the determination in order to ensure that they can staff as many sporting events as possible with volunteer medical staff.³⁰ This bill was also passed in Oregon, and various versions of it are being investigated by legislatures across the country.³¹ However, until these bills are passed nationwide players are still being placed at risk every day.

While there is clearly a movement to address the dangers of concussions in student athletes the movement is a long way from achieving its goals. In order to provide the proper protection to students there needs to be both a change in the laws regarding school and coach liability in every

²⁸ Schwarz, Alan. "States Taking the Lead Addressing Concussions in Youth Sports - NYTimes.com." *The New York Times - Breaking News, World News & Multimedia*. N.p., 30 Jan. 2010. Web. 18 May 2011. <<http://www.nytimes.com/2010>

²⁹ Wash. Rev. Code Ann. § 28A.600.190 (West)

³⁰ Id.

³¹ "Concussions in football get attention of state governments - ESPN." *ESPN: The Worldwide Leader In Sports*. N.p., 28 Jan. 2010. Web. 18 May 2011. <<http://sports.espn.go.com/espn/news/story?id=4865622>>.

state as well as a concerted effort to make students aware of the risks that they are taking when continuing activity after suffering a concussion in order to make them realize that this is a potentially more devastating injury than nearly anything else that they can suffer on the playing field. While these goals seem to be in reach, lawmakers must hurry, because time is of the essence.