

CTE Claims – Are You Ready To Tackle Them Head-On Or Will You Be Blindsided?

By: Tom Glassman

Imagine a tsunami of claims alleging serious, objective, and life threatening medical conditions, all stemming from events occurring many years earlier. None identify a specific causal event, and they cast a wide net, targeting multiple defendants over a period of many years. Is this a new John Grisham novel? Is it a resurgence of asbestos litigation? Actually, it is neither. Over the next decade we may well see a wave of chronic traumatic encephalopathy (CTE) claims brought by current and former athletes.

The visceral reaction is to dismiss CTE claims as the NFL's problem, and not look any further. While there is a potential settlement pending in the litigation brought by former NFL players, that is not the end to this story. It is only the first chapter of what may turn out to be a lengthy book. If you stop reading now you will not be ready for the all-out blitz which may be coming.

The next wave of plaintiffs will not be professional athletes. They are ordinary people who competed in sports at the youth, recreational, scholastic, or collegiate levels. Claims will not be limited to football players, and will include hockey, soccer, baseball players, and even cheerleaders. While CTE is usually discussed in conjunction with football, its link to other sports has only been fairly recently asserted. As medical research develops and the plaintiffs' bar becomes bolder, it is inevitable links to more sports will be alleged.

Consider these statistics on annual sports participation:

Football:

- In any given season, fewer than 3,000 players actually play in a NFL game.
- Over 3.4 million youths (ages 6 to 18) participate in tackle football on some level.
- Of this group, slightly more than 1 million youth played high school football.
- Approximately 130,000 football-related concussions were reported at the high school level in 2015.
- Nearly 73,000 students play college football at the NCAA level.

Soccer:

- Nearly 8 million youths (ages 6 to 18) participate in soccer on some level.
- Of this group, over 800,000 play at the high school level.

- Nearly 100,000 concussions were reported at the high school level in 2015.
- Over 50,000 students play at the NCAA level.

Hockey:

- Over 740,000 youths play ice hockey. This is just in America and does not include Canada.
- More than 6,000 students play at the NCAA level.

At the peak of asbestos litigation, plaintiffs' attorneys cast a wide net, and the same will be true for CTE litigation. Targets in CTE litigation will likely include:

- Schools;
- Communities with recreational leagues;
- Sport complexes with their own private leagues;
- Coaches, whether paid or volunteers;
- Equipment manufacturers and retailers; and
- League and team sponsors.

The challenges presented to insurers are immense. Can participation in a particular sport even be documented? If someone claims they played in a football league ten years ago, do records even exist? Even if their participation is proven, records likely do not exist regarding possible concussions or head trauma, as there were likely no concussion protocols in place. No incident report was likely prepared, and even if one was, it probably was not preserved. If records even still exist, how accurate and detailed are they?

Proximate cause will be a critical issue, as many plaintiffs will have competed for a number of teams, in a number of sports, for a number of years. What if a plaintiff not only played football from age five all the way through high school, but also played hockey and wrestled? Can anyone pinpoint with any reasonable medical certainty at what point, if any, in this continuum they sustained any sort of head trauma? Perhaps they did, perhaps they did not - but who ultimately bears this burden of proof? Not too long ago if someone "had their bell rung" it was laughed off, and no medical attention was sought.

Over the years clever plaintiffs' attorneys used class actions to sidestep proving proximate cause. Class actions are often used to "hide" claims with questionable causation, in the hope the dubious claims are overlooked and simply paid as part of an overall settlement. Class actions might be brought on a variety of levels. A major target are equipment manufacturers. If you are an insurer of a manufacturer of football helmets, what do you do with a plaintiff claiming they wore their helmet in a youth football league ten years ago? Class actions may also be brought against national or regional governing bodies for sports, alleging inadequate safety measures were in place.

This also raises questions of apportionment and comparative fault, which greatly vary greatly between jurisdictions. What do you do with a plaintiff who lived in several states growing up, and played different sports at different stages of their childhood? Now they are suing every coach, school, and league they ever played for – in three different states. How is fault allocated? Which states' laws apply? Since laws on these issues vary greatly from state to state, expect creative forum shopping by plaintiffs' attorneys who seek not only the most favorable venue, but also the most favorable state law to apply.

Product liability laws vary more from state to state than almost any other type of tort law. The following scenario is not too farfetched. Gizmo, Inc. manufactured football helmets and went out of business in 2008, after filing for bankruptcy. Their helmets remained in use. Happy High School bought Gizmo helmets from Bill's Sporting Goods. Bill's sold the helmets without making any changes or alterations, and without making any representations about their safety. In 2014, Bill retired and sold the company to Joe's Sporting Goods. In 2016, Billy filed a CTE suit, alleging he has CTE due to a defective Gizmo helmet. In some states, Billy can sue Joe's, even though Joe's obviously had no involvement whatsoever in the design, manufacture, or sale of the helmet. Some states allow suits against innocent sellers (and their successors) when the manufacturer is insolvent.

An important, although possibly uncomfortable question, is what level of fault should be allocated to parents for their own comparative fault? For example, what about the parent who does not disclose prior injuries or head trauma to a coach, or fails to seek proper medical attention for their child?

Claims against coaches for teaching improper techniques or ignoring head injuries present special challenges. If an individual is sued because of their actions as a volunteer youth football coach, are they covered by their homeowner's insurance? Are they covered by the school's or league's insurance? Are there governmental immunity issues? Is there even documentation they coached?

Admittedly this article raises some questions ~~that which~~ cannot yet be answered, but there are things to do now, so you are not blindsided later.

1. Contact insureds who organize, sponsor, or coach youth sports to determine what documents and information they ordinarily retain for player participation,

coaches, and player injuries. Obvious choices also are insureds who are schools, churches, municipalities, or sports clubs. Admittedly this is easier to do in some instances than others, but this where a local agent or broker can be a great asset due to their knowledge of their community. Work with your insureds so sound practices are adopted enabling accurate records are kept and retained going forward.

2. Engage coverage counsel to analyze your policies proactively for the coverage questions you already know are likely to present themselves.
3. Add questions to homeowner and umbrella applications about an insured's involvement in coaching sports. Consider whether endorsements should be added to these policies, addressing coaching liability.
4. The plaintiffs' bar has a head-start on engaging top medical experts, but there is still time to catch up. Work with your panel counsel to identify leading experts in this evolving field. Set up databases and other resources so information on recurring on top-tier experts, as well as plaintiffs' experts, are accessible to your claims teams and defense counsel. CTE claims are a magnet for experts using "junk science," so this type of collaboration helps you not only line up the right experts, but also to work with your counsel on *Daubert* challenges on opposing experts.
5. Consider a small core group of claims professionals to form a dedicated team to handle these claims when they arise. Their expertise with the applicable medicine and science will provide better results in evaluating both causation and damages.

Participation in the NFL is finite and readily definable. In contrast, given the fact millions of people are involved in sports ~~which~~ that could conceivably expose them to head trauma, and the medical aspect is still evolving, there are many more chapters left to be written before we will know how this story ends.

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