

Concussion in sport: INSURERS, BE ALERT, NOT ALARMED

Claims arising from sports-related concussion are regarded globally as an emerging risk across the medical, legal and insurance sectors. Class actions against sports governing bodies and clubs in American football¹, ice hockey², and association football³ have attracted worldwide media attention resulting in ongoing controversy and confusion.

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Central to this controversy is the medical condition Chronic Traumatic Encephalopathy (CTE), a degenerative neurological disease thought to be linked to repeated head trauma, including concussion, and usually acquired in sport-related activity.

Recent developments in both North America and Australia highlight the potential claims trend in this area.

Meanwhile, the 5th International Conference on Concussion in Sport held in Berlin last October led to the Concussion in Sport Group (CISG) producing an updated consensus statement in April 2017 on sport-related concussion⁴, intended to assist health professionals caring for injured athletes at recreational, elite or professional levels. Importantly, insurers should continue to monitor developments in this area, but should not assume the North American experience will translate to Australia.

THE WORLD'S HOT SPOT – NORTH AMERICA

In April 2015, a US\$1 billion settlement was reached between the National

Football League (NFL) and a class of former players who had suffered various traumatic brain injuries (TBI) as a result of playing American football.

The class included the families of players who were diagnosed as suffering CTE after death. The settlement received worldwide attention and was highly controversial, as while it allowed players suffering a variety of TBIs to claim, it limited the claims relating to CTE to only those players who had died prior to the settlement date. This led to appeals by a group of players dissatisfied with the settlement.

While those appeals were ongoing, in March 2016 the NFL publically admitted for the first time a link between American football-related concussions and long-term brain injuries, including CTE, relying on research by the CTE Center at Boston University (BU)⁵.

The settlement was approved by an Appeal Court in April 2016⁶, and in December the United States Supreme Court refused to hear a further appeal, allowing the settlement to finally proceed. It also allowed the NFL's coverage claim against its insurers to resume⁷.

With the stakes for the NFL so high, many believe it settled to avoid exposing its knowledge of a link between head trauma and long-term neurological damage⁸. Now the NFL must disclose such knowledge to its insurers as part of discovery in the coverage litigation. To date, no information has become public, but may over the coming months.

Conversely, the National Hockey League (NHL) is robustly defending a class action by former ice hockey players⁹. The NHL denies a link between concussion and long-term brain injuries, challenging the research of BU. The NHL issued subpoenas for BU's records to discredit the research. The subpoenas were largely quashed, but it is clear the NHL is not going to accept causation without a fight.

Finally, individual athletes have made discrete claims against clubs, colleges, governing bodies and medical and coaching staff relating to the mismanagement of single concussion injuries that have led to neurodegeneration¹⁰. Claims against some governing bodies were dismissed

Mark O'Connor of the Geelong Cats is tackled during the round 16 VFL match between the Box Hill Hawks and Geelong Cats at Box Hill City Oval on August 5, 2017 in Melbourne, Australia.





Daniel Nielson of the Kangaroos was tackled in a contest and was taken off on a stretcher on 20 August 2017 in Melbourne.

RISKY BUSINESS – WHERE TO FROM HERE?

The NFL settlement and subsequent media attention around concussion provide an alert for insurers of the potential sports-related concussion risks in Australia and New Zealand. Australia's litigious society has historically taken its lead from claims trends in North America. However, it is important that insurers are not alarmed by the extraordinary NFL settlement as the characteristics and risks confronting players using helmets as defensive weapons is unique and will not necessarily affect sporting codes in the region.

The outcome of concussion claims will largely be driven by two important considerations: firstly, the sporting body's/club's knowledge of the impact of head injuries on neurodegeneration, and, if so, at what point in time; and secondly, the question of causation, which remains a lively debate amongst medical experts. The NHL's class action is being battled on the medical causation basis and the progress of that claim needs to be closely monitored, as it will likely provide guidance on how Australian courts may interpret the medical science and treat claims.

Future concussive incidents are manageable. Insurers need to ensure their policyholders have up-to-date concussion management protocols and participants' return to play following a concussive incident is managed by medical professions. While insurers should remain alert to best practice and continue to take steps to reduce exposure to future concussion injury risks, it is not yet necessary to be alarmed. The medical science is still playing out.

on jurisdictional grounds. However, claims remain on foot against the parties with direct control of the athletes' injury management. Causation will be an issue in these cases.

THE RIPPLE EFFECT – AUSTRALIA

The emerging risk of concussion claims is now being seen closer to home.

At the National Rugby League (NRL) level, former professional rugby league players James McManus and Brett Horsnell have made claims against their clubs^{11,12}. Both cases are ongoing.

In the Australian Football League (AFL), player agent Peter Jess is attempting to recruit professional sportspeople who have suffered concussion playing sport, with a view to bringing a class action against relevant leagues¹³. As yet, no steps have been taken to bring such a proceeding.

In 2017, the AFL and NRL continue to enforce rules around head contact and concussion protocols designed to deter players from making avoidable head contact and officials from ignoring protocols. In March, the NRL issued fines to three clubs that failed to follow its protocols and remove concussed players from the field. In June, the AFL successfully appealed its own Tribunal's inadequate penalty against a player who pleaded guilty to striking an opponent to the face (and concussing the opponent). This reflected a positive step for the AFL in seeking to mitigate the risk, as it was the first time the AFL had ever appealed a Tribunal finding.

OTHER DEVELOPMENTS

Finally, the CISG's updated consensus statement accepts a potential link between repeated sport-related head trauma and long-term brain injuries, but it does not go so far as to say that it is causative of long-term brain injury, let alone CTE. Causation will then be fertile grounds for debate when the proceedings advance.

Current research, including the BU research, is limited to specific groups of athletes, rather than the broader community. Further, while repeated concussions may cause neurodegeneration, research suggests that other factors may also contribute, including poor diet, lack of exercise, sleep deprivation and alcohol and drug use/abuse.

While the CISG says that further research will be needed before it will accept a causal link, it still continues to provide guidelines within the consensus statement for sports-related concussion management.



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