2016 CLM Annual Conference
April 6-8, 2016
Orlando, FL

Are You Ready for Football (Litigation)?

Concussion litigation is a major legal story in the news, media and featured films. A new Will Smith movie, appropriately entitled *Concussion*, premiered in December 2015. This film was critical of how the NFL dealt with concussion issues as it related to players. Recently, a large national television audience watched Cincinnati Bengals' Linebacker Vontaze Burfict inflict a violent helmet to helmet blow to Pittsburgh Steelers' Wide Receiver Antonio Brown. This improper hit caused Brown to suffer a concussion and inflamed the debate on neurological issues and contact sports.

Professional sports leagues, sports associations and schools cannot ignore the seriousness nature of the potential of concussion litigation and neurological injuries. The NFL has now entered into a $1 billion settlement with retired players to compensation them for neurological disorders suffering during their playing careers. Players in the NHL and the NCAA have also commenced lawsuits based on trauma suffered from concussions.

Concussion claims present a myriad of issues for insurers. Symptoms of a neurological impairment may not develop for an extended period of time opening up question of single, multiple or hybrid triggers of policies. Insurers also have to be mindful of state laws that can limit liability under certain circumstances.

It is also critical to understand that a concussion is a mild traumatic brain injury which can vary wildly in severity. Medical proof is critical is dispute Return to Play violations and claims of a permanent injury.

I. What is Concussion in Medical Terms?

Generally, a concussion, also known as a mild traumatic brain injury, is caused by a bump, blow or jolt to either the head or the body itself that causes the brain to move rapidly inside of the skull. A concussion can change how the brain normally functions.

The most important scientific issue is the proper prognosis for mild traumatic brain injuries. Long-lasting symptoms may be predicted by pre-existing psychopathology, rather than by any aspects of the injury.

It is important to note that scientifically validated healthcare for a mild traumatic brain injury is limited to:

- Acute/ER Services – essentially monitoring for any dangerous complications, such as internal bleeding that does not resolve on its own.

- Reassurance – educating the patient/family about the excellent prognosis, the lack of persistent problems from such an injury, etc., thereby helping them to avoid the hypochondriacal "post-concussional syndrome" that extremely small minorities of people who believe they have had a concussion fall into.

- For those patients who complain of prolonged symptoms after a mild traumatic brain injury, the only scientifically validated treatment is cognitive behavioral psychotherapy focused on teaching them to stop attributing normal shortcomings to the injury, stop engaging in catastrophic thinking, and stop all other hypochondriacal thoughts and behaviors.

Some medical professionals argue that there are no credible/reliable scientific findings which can be used to demonstrate that the return-to-play caution that has been implemented in recent years has produced any health benefit. A legal claim that a failure to follow return-to-play guidelines caused health-related damages should be defended against by a demand for credible and reliable scientific support of that claim.

The premise that a delayed presentation of neurological impairment (such as the concept of chronic traumatic encephalopathy) is caused by contact sports may lack credible/reliable scientific support. This has been the conclusion of international scientific academies which have recently published relevant scientific reviews (e.g., the World Health Organization; referencing provided in the ACOEM/Mayo material that CLM has agreed to distribute to participants), as well as this scientific review which was published even more recently: Castellani RJ et al. Chronic effects of mild neurotrauma: putting the cart before the horse? J Neuropathol Exp Neurol. 2015 Jun;74(6):493-9.

For concussions/traumatic brain injuries of moderate severity, the prognosis is (at worst) return to normal functioning within a year (although maybe not to the same exact level of functioning that the person would have had if there had been no injury or a mild injury). NOTE: These injuries are relatively rare - the overwhelming majority of traumatic brain injuries are of a mild nature.

For concussions/traumatic brain injuries of severe severity, the typical (but not certain) prognosis (for a patient who survives the injury) is return to a normal life (although maybe not to the same exact level of functioning that the person would have had if there had been no injury, a mild injury, or a moderate injury). It might take years for this prognosis to be manifested. Consequently, a prediction of a poor outcome that a doctor (or anyone else) makes in the first five years after a severe brain injury may not

reliable. NOTE: These injuries are extremely rare - the overwhelming majority of traumatic brain injuries are of a mild nature.

No matter how severe the injury was, the patient's current clinical presentation should not be accepted as a consequence of that injury unless the standard causation analysis method has been applied to the information from the case, and the results of that method have been supportive of the claimed causative relationship. The standard causation analysis method is specified in publications such as the following from the American Medical Association:

- Barth RJ. Determining Injury-Relatedness, Work-Relatedness, and Claim-Relatedness. AMA Guides Newsletter, May/June 2012. American Medical Association.

- Melhorn, JM, et al. (editors). Guides to the Evaluation of Disease and Injury Causation, Second Edition. 2014. American Medical Association.

For example, in a recently settled case, a moderate traumatic brain injury was misrepresented by plaintiff's experts as a severe injury, and the plaintiffs' experts claimed that the injury had rendered the plaintiff to be permanently unemployable, and that the injury had caused the plaintiff to be in need of constant supervision for the rest of his life. None of the plaintiff's experts had actually applied the standard causation analysis method to the case (therefore, they were behaving as amateurs, rather than as experts). When the standard causation analysis method was actually applied to the case, the method revealed that there is no scientifically credible association between this type of injury and prolonged unemployability, and there is no scientifically credible association between this type of injury and a prolonged need for supervision.

II. Trends in Concussion-Related Litigation and Claims

The potential for concussion litigation can arise from the administration of any contact sport. In the U.S., public schools offer many sports, such as football, soccer, wrestling, baseball and hockey, where students can suffer concussion-related injuries. Concussion litigation is changing the way contact sports are viewed and implemented by school across the nation.

The threat of concussion litigation to public entities and their insurers is quite real as shown by recent outcomes:

- California - $4.37 million, for a high school student who suffered brain injury;

- Washington - $14.6 million to settle a claim by student second concussion after being put back into a game;

- Pennsylvania - $7.5 million to settle a matter where college student was put back into a football game and suffered a second impact, player sustained coma and brain damage;

- Missouri - $3 million to settle concussion suit after improper return to play;

- New Jersey - $2.8 million to settle a claim for improper return to play with a second fatal impact during a football game; and

- Florida - $300,000 (statutory limits) to settle a claim for impact while not wearing a helmet during practice.

To maintain a contact sport program, public schools must be cognizant of strict record keeping and return to play protocols that the law requires to insulate these institutions from liability. Schools must be able to document when an athlete has sustained a concussion and what protocols were implemented to ensure no further injury occurs.

Most states now have enacted mandatory Return to Play Laws which require athletes to be removed from sports, following a concussion, until neurological monitoring returns to prior baseline result and medical clearance is given. There are also developing standards about the qualification of coaches who are trained to property recognize the symptoms of a potential concussion.

Finally, public entities must be mindful of attempts by claimants to establish a "state created danger" theory of liability under 42 U.S.C §1983. Under federal law, there is a special danger wherein the state's action places the plaintiff at risk and the state knew that its actions specifically endangered the plaintiff. There is no applicable state tort limitation to these claims and attorney's fees could attach if the claimant prevails.

Beyond, public schools, professional leagues such as the NFL and NHL have been involved in concussion litigation. The NFL's controversial $1 billion settlement with former players may provide a framework to compensate players. However, approximately 200 players opted-out of the settlement and could test defenses such as assumption of the risk as their cases progress.

III. Coverage Issues Facing Insurers in Concussion Claims

Concussion claims can also be extremely problematic for insurers. Since a "concussion injury" may ultimately manifest itself after several impacts or over a playing career, the question arises of when the injury when coverage in a policy of insurance is triggered by an occurrence. It is also important to be mindful that serious neurological disorders can take over a decade to present symptoms and be fully diagnosed.

The triggering of a policy concerning a concussion bodily injury depends on the jurisdiction's approach. Some states follow the single trigger (injury in-fact) approach while others allow multiple triggers of policies based on the manifestations of symptoms. The single trigger approach looks to a precise proximate cause of an injury. The multipte trigger will permit more than one alleged failure to protect an athlete such as improper

return to play and failure to follow protocols. This approach has the potential to cause more occurrences under a policy or policies.

In addition, some states are now allowing a hybrid approach to claims under a "progressive injury" theory which works in a similar fashion to toxic tort claims.

Insurers will be required to examine the potential for intentional conduct if school protocols are violated or whether intentional conduct permitted a Return to Play Law violation. Insurers also must be mindful of state law limiting a plaintiff's recovery for concussion claims will it does its due diligence on new policies or renewals.

IV. Juror Views of Concussion Litigation

Jurors enter the jury box with pre-existing attitudes, beliefs and experiences which help determine their decision. These pre-existing attitudes, beliefs and experiences create psychological constructs called "schema" through which the jurors filter the evidence they hear during the case. Evidence and information which meshes with pre-existing established schema are much more readily accepted and used in the decision making process. Evidence that does not "fit" into these pre-existing schemas will be discarded. This is not a conscious process by jurors but is instead a byproduct of the brain's need to reduce uncertainty. The brain tries to simplify decisions by only processing the information which can be easily assimilated into pre-existing knowledge structures. As a result of the ways jurors' process information, it is crucial for litigators and others involved in concussion related litigation to understand the pre-existing schema that most jurors will have before hearing anything about the case.

Because of the media coverage of concussion issues in football players, culminating in the Will Smith movie *Concussion*, jurors have developed some strong views about concussions and their long term impact on health. Unfortunately, these views are not based on scientific evidence but instead on perceptions gleaned from how information about concussions has been presented in the media. Jurors are pre-conditioned to accept plaintiff arguments that concussions have long-term health effects that cannot be measured at the time of the initial injury. This causes jurors to be pre-disposed to accept that a plaintiff should be given the "benefit of the doubt" when determining future medical costs because it is "impossible to know" the long-term effects of a concussion. Plaintiffs and their experts can safely argue that large future damage awards are needed to cover unanticipated medical effects of concussions. In addition, there is widespread knowledge that concussions can lead to mental illness and other quality of life issues that will not be apparent for decades. All of these pre-existing beliefs are highly problematic for defendants in arguing that plaintiffs with concussions have fully recovered or will need minimal future medical needs. Jurors will be very receptive to the idea that expensive "medical monitoring" programs should be put into place to continually check for long term effects of concussion related injuries. In addition, the movie *Concussion* reinforces the belief that the NFL and its affiliated doctors were willing to "cover up" the "proof" about the long term effects of concussions. This makes it difficult for defense experts to argue the "science" of

concussions because the plaintiff can easily argue that the defense experts are not believable because they are trying to “hide” the true impact of the plaintiff’s injuries. All of these factors will make it extremely difficult for defendants to “win” arguments about the actual costs associated with treating concussions.

Defendants will need to take into account the unbalanced playing field that exists in juror preconceptions in formulating arguments about concussion injuries. They will need to acknowledge the pre-existing beliefs about concussion related injuries and explain how the injuries of the plaintiff are different than these preconceptions. Defendants will need to show that the impacts of a single concussion in one traumatic event are greatly different than the long-term impact of multiple concussions or many sub-concussive events. Defense experts will need to confront the beliefs of jurors about long term effects and explain that what they have heard about football players and athletes is much different than what happened to the plaintiff in the event that caused the plaintiffs concussion. By addressing the pre-existing beliefs, experts can connect new information to pre-existing schema about concussions and explain how one-time concussions do not have the same long term impact of multiple events. Acknowledging the potential misconceptions jurors have will be crucial in obtaining acceptance of defense arguments about a plaintiff’s injuries in concussion cases.