

Concussion: An Issue of Negligence in Sport?

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The Legal Issues Arising From the Management of Concussion in Sport

On 18 September 2015 the Rugby World Cup will kick off with England playing Fiji. During the course of the competition a number of players will, undoubtedly, be concussed. The focus on concussion in the forthcoming World Cup compared to the previous World Cup in 2011 will be marked. What has caused the spotlight to be shone so brightly on this issue over the last 4 years?


In 2001 the National Football League Player Association started to look at the consequences of the impacts sustained through playing American Football. Around the same time, in November 2001, the governing bodies for football (FIFA), the Olympics (IOC) and ice hockey (IIHF) convened the 1st International Conference on Concussion in Sport.


Whilst elite sport debated the issue, Ben Robinson, aged 14 years, was playing rugby for Carrickfergus Grammar School in Ireland on 29 January 2011. Early in the second half Ben suffered two concussive blows to the head. He can't remember the score and is unsteady on his feet but continued playing. With a minute to go Ben collapses and died on the pitch. Ben had died from second impact syndrome.

18 months later, in November 2012 at the 4th International Consensus Conference on Concussion. There was significant disagreement at that meeting as to the protocols to be implemented for concussions in sport. Dr Barry O'Driscoll, who had been a medical advisor to the IRB for 15 years, was not happy with the interpretation of the recommendations and resigned his post.

By August 2013, a \$765m (£490m) settlement was reached between the NFL and former players. The basis of the settlement being the prevalence of neuro-cognitive disorders among former players having been caused by repeated concussions.

So, will we see the concussion debate be explored through litigation in our Jurisdiction? Understanding the way in which liability will be assessed should assist in improving the way in which concussions are managed and improve player welfare.

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Concussion

A concussion is a traumatic brain injury that alters the way the brain functions. A concussion of the brain alters the state of consciousness, most commonly due to a blow to the head. Effects are usually temporary but can include lasting headaches and problems with concentration, memory, balance and coordination.

Whilst some concussions may be immediately apparent, the appearance of symptoms or cognitive deficit might be delayed several hours and thus concussion is one of the most complex injuries in sports medicine to diagnose.

Although the majority of concussive symptoms will have worn off after 7 days and most concussive injuries are mild, there are serious issues around Second Impact Syndrome and the long term cumulative effect of repeated concussive trauma such as dementia/alzheimers.


Legal Principles


At any one time, a sportsman/woman will be a player, an employee, a patient. Such status confers duties and obligations on those involved in the relationship. For there to be an act of negligence, the club/governing body/doctor must be found to owe a *duty of care* to the player; the club/governing body/doctor must have *breached that duty*; and that reasonably *foreseeable harm must have been caused* as a result of the breach of duty.


The player as an Employee - Employers Liability

If a participant in a particular sport is paid by their club to play, it is likely that the club will be considered to be the player's employer. This relationship is an obvious one in professional sports, but the principle will also extend and apply to those who receive very modest sums (perhaps expenses only) for playing in what may otherwise be considered amateur teams.

Broadly speaking an employer must ensure that an employee has a safe place to work; is properly trained; has the correct equipment in good working order; that his fellow employees are competent; and that a safe system of work is adopted. Whether or not there is a duty and a breach of duty will be a matter to be determined on the facts of each case.

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The player as a patient - Clinical Negligence

When a player is injured or consults with a club doctor, the player's status as a "patient" as well as a player conveys a duty of care onto the player/patient from the club doctor.

Upon a concussion injury occurring, the club doctor will be required to exercise his skills immediately on the field of play but also on an on-going basis as he monitors the player following the injury. Whilst the standard of care by which a club doctor will be judged are the same as a doctor of similar standing, the environment and dynamics in which a club doctor operates are very different. A failure to perform a proper medical examination and reach a clinical decision that would be supported by a reasonable, responsible body of practitioners would render the doctor negligent.

Referees and officials

The referee has a duty to the players to ensure that the rules are applied. He must also ensure that violent and/or dangerous play is sanctioned. Failing to take control and not enforcing the rules can result in the referee being liable if an injury is sustained by a player as a result of his failings.


The player's responsibility - Contributory Negligence


Contributory negligence may arise if a person was injured in part due to their own actions. Damages may be reduced to account for this.

Players undertake an assessment at the beginning of each year which provides a baseline for cognitive responses. Players who are found to have deliberately set the baseline below the genuine position will be exposed to an allegation of contributory negligence. Such an allegation may also arise where a player continues to play after suffering a concussion.

Governing Bodies

The governing body determines how a sport is governed; how the rules are applied and modified; they will invest in and promote the sport; and, in most cases, they will also act as a disciplinary body. As such governing bodies have a significant say in the commercial activities of clubs and professional participants. Commercial contracts that create a payment relationship between player and governing body will, in all likelihood, establish the appropriate legal relationship to confer a duty of care.

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The consensus statement on concussion in sport

The 1st International Consensus Conference on Concussion in Sport took place in 2001. The aims of the conference were to provide recommendations for the improvement of safety and health of athletes who suffer concussive injuries.

The 4th, and most recent, conference took place in 2012. Following the 2012 Consensus, the IRB (as “World Rugby” was known at the time) introduced the Pitchside Suspected Concussion Assessment (PSCA) whereby any player who has a “suspected” concussion must be removed from play. However, where a team doctor suspects that there is a “potential” concussion, the PSCA’s stated aim was to provide a “quiet situation” for the doctor to make their assessment. Semantics, maybe, but by opening up a distinction between “potential” and “suspected” the clubs and the doctors have been presented with a scenario which is open to abuse/misinterpretation.

When first introduced, the PSCA was so highly criticised in Australia that the Chief Medical Officer of the Australian Rugby Union, Dr Warren McDonald, wrote a memo to all Member Unions stating “Under NO circumstances in domestic rugby competitions in Australia shall a PSCA Protocol be implemented If a player is suspected of having concussion that Player must be removed from play...”


In summary, as we stand, we have a team doctor who has a duty to exercise his clinical judgment taking into account the protocols he receives from his domestic governing body as well as guidance/directives from World Rugby. In assessing the liability of those who hold responsibility for player welfare it will be the Court’s role to work through the chain of passes to determine the status of the PSCA and return to play protocols; how they should be interpreted; and the clinical judgment exercised by the medics in the application of the protocols.

Conclusion

Those responsible for player welfare owe a duty of care to those players and must, therefore, understand where they are exposed to liability for any potential claims.

Governing bodies, clubs and club doctors must be aware of the evolving understanding and research in this area. Policies and protocols established in 2012 may not establish a defensible position in litigation arising from events in 2015.

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It must be recognised that contact sports are a key part of our society. Sport is beneficial to us in many ways and the issue of concussion, if properly researched and managed, should not drastically change the way our favourite sports are played, coached or refereed.

Focussing on player welfare whilst recognising the challenges in managing concussion will do as much as is reasonable to avoid serious injury to players and reduce exposure to potential legal liabilities.

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