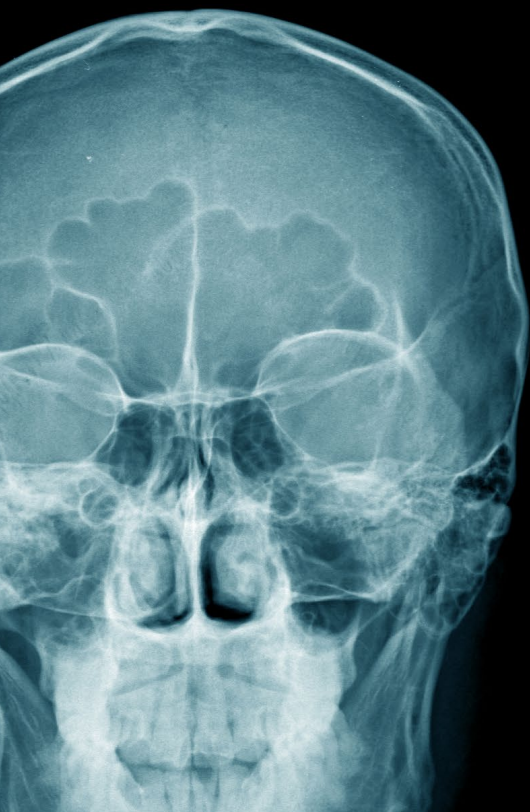


SPORTS LIABILITY AND CONCUSSION

CLICK ON THE SECTIONS BELOW FOR MORE



SPORTS LIABILITY & CONCUSSION

Sports concussion claims are rightly sitting high on the agenda of insurers likely to be impacted by them. This global issue is gaining increasing exposure in the international media.

Historically the USA has been ahead of the curve in this area. However, since settling the NFL litigation it is now seeing potential claims across a range of other sports.

In the UK, with Rylands Law bringing the Rugby Union Group litigation action as a test case later this year, we seem to be entering the eye of the storm.

On the 9 March 2021, the UK Government launched a select committee to examine the scientific evidence and links between head injury and dementia across all sports where there is a risk.

In Australia, a watchful eye is being kept on what has, and is, developing ahead of them in other jurisdictions.

This document draws together insight and opinion shared by DAC Beachcroft (DACB), leading Counsel and experts from the USA and Australia in our recent Sports Liability and Concussion webinar.

Our dedicated sports law team stands ready to advise and support you and your customers in relation to any sports liability claims.



To watch a summary of each topic and read the key takeaways, click the link below:

KEY TAKEAWAYS

Click on the sections below for more



HEAD INJURIES IN SPORTS - SETTING THE SCENE



Bilal Mirza
Consultant/Head of
Sports Insurance
DAC Beachcroft - a
founding member of
Legalign Global

In 2021, sports injury headlines are likely to be dominated by stories about concussion injuries and protocols. In order to understand how we have got to where we are today, Bilal Mirza helps us to look back at the evolving nature of concussion within sport and what some of the key issues to consider may be going forward.

KEY TAKEAWAYS

Historically, making a connection between head injury and concussion and their long term effects has been slow to evolve. The science and medicine linking these effects, which include the onset of dementia, motor neuron disease and chronic traumatic encephalopathy (CTE), is still developing.

Initially only linked to boxers and the sport of boxing, the number of sports has now widened to include not only contact sports such as American football, football and rugby, but non-contact sports across a range of levels, from amateur through to elite.

Key considerations will be the range of policies and coverage that may respond and the interplay between insurance liability and the evolving nature of the rules, regulations and laws of a sport. Look carefully at milestones. A claim for compensation and damages will not automatically succeed simply because of medical evidence. There is a high threshold to cross and you would do well to consider the following points:

1. Which policy applies and does policy coverage apply?
2. Does the governing body and regulatory body owe a duty of care? Has that duty been breached?
3. Consider the difference between the club and amateur participant, as well the professional and employed participants.
4. Has a causal link been established, and has the injury and/or damage been caused by that breach?
5. What about other stakeholders? Consider all clubs/ teams for who the participant has played.
6. The Leagues: domestic, international and foreign.
7. Medical staff - is there an issue of medical malpractice?
8. The coaching and training staff - in addition, consider the management and ethos of the club, team or association - was there a win at all costs mentality?

PANEL Q&A

Roll your mouse over each of the questions below to view the answer.



DUTY OF CARE OF SPORTS GOVERNING BODIES TO PARTICIPANTS



Richard Rowe
Associate
DAC Beachcroft - a
founding member of
Legalign Global

Richard Rowe looks at the duty owed by sports governing bodies and that owed by sports clubs. Drawing on case law in England and Wales, Richard puts the duties of care into the context of the Rugby Union concussion litigation.

KEY TAKEAWAYS

- Sports governing bodies owe a duty of care to participants in their sports to take reasonable care for their safety.
- *Watson v British Boxing Board of Control (BBBC)* - the Court of Appeal held that in holding a contest under its rules and in providing specific guidelines on the medical provision required at the ringside boxing's governing body owed and accepted a duty of care to the boxers. The BBBC breached that duty in failing to have appropriate medical equipment available.
- *Wattleworth v Goodwood & Others* - it was held that despite the fact the national governing body did not licence the event taking place on a motor racing circuit at the time of an accident, it did owe a duty of care to participants where it advised on and licensed other events on the circuit and the circuit owner relied on that advice for the event in question. In that case, the international governing body did not owe a duty where its advice to the circuit owner was limited to one race meeting per year.
- At both amateur and professional level, sports clubs owe a duty of care to participants to take reasonable care for their safety. In professional sport those duties will extend to obligations under employment legislation. In a sporting scenario, it should be borne in mind that the Compensation Act [2006] provides that when determining the steps required to meet a standard of care, the Court must have regard to whether a requirement to meet the steps required may prevent a desirable activity from taking place, or discourage people from undertaking functions in connection with the desirable activity.
- Whilst media reports suggest the Claimants in the Rugby Union concussion litigation are currently only pursuing the sports' governing bodies for failing to frame and enforce their concussion protocols, it would be open for those Claimants to pursue their employing clubs where they could prove the clubs failed to use or enforce the concussion protocols provided by the governing bodies.

PANEL Q&A

Roll your mouse over each of the questions below to view the answer.



PROVING A CAUSATIVE LINK BETWEEN SPORT AND BRAIN INJURY



Richard Booth QC
Head of Chambers
1 Crown Office Row

Head injuries in sports are gaining growing attention from the media around concussion. Richard Booth discusses how the focus on causation is key in concussion and head injury claims.

KEY TAKEAWAYS

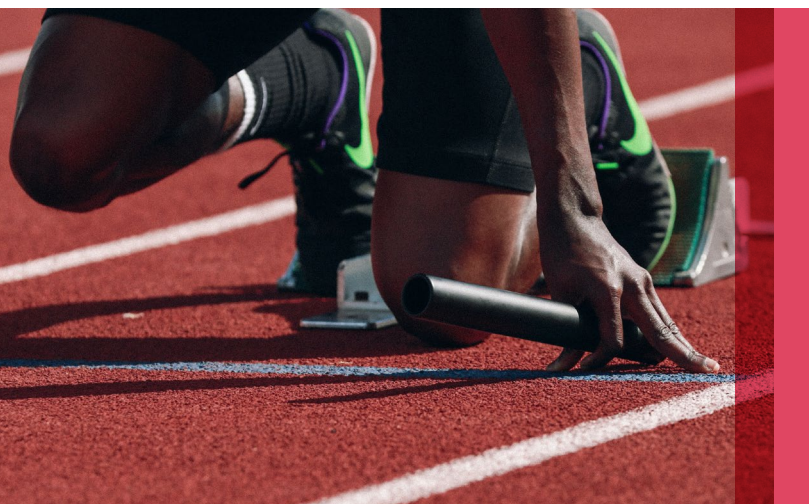
Legal Causation

- The Claimant has burden of proof and must prove on balance of probabilities that the negligence caused or materially contributed to their injury.
- The Claimant must prove that their consequential losses (especially loss of earnings and any care needs) flow from their injury and not from a different cause unrelated to the negligence.
- It is insufficient for a Claimant to establish that the negligence materially increased the risk of their developing symptoms consequent upon a concussion, unless the negligence materially increased their particular risk from a less than 50% chance of developing symptoms to a greater than 50% chance of developing symptoms.

Medical Causation

- CTE is only diagnosable upon examination of the brain in post-mortem after death.
- So in these head injury claims, parties will typically need expert neurologists, neuropsychologists and, often, neuropsychiatrists.
- It is generally agreed that concussion represents a transient disturbance of brain function, with a variable duration of symptoms.
- There is no consensus on whether concussion, being a form of temporary brain injury (TBI) which results in a temporary metabolic disturbance:
 - a) generally results in complete physical recovery; or
 - b) generally does not cause ongoing structural neurological injury.
- There is no evidence to support the fact that total rest is helpful after concussive injury, and no evidence to suggest that light exercise which does not exacerbate symptoms is harmful to the process of recovery.
- There is evidence that light to moderate exercise in the presence of minor symptoms is helpful:

Leddy et al. Exercise is Medicine for Concussion. American Journal of Sports Medicine. 2018;17:262-270
- However, no consensus as to long-term effects of strenuous physical exercise after concussive injury.
- It is generally agreed that a person who is suffering from a transient disturbance of brain function will be both more likely to suffer a second injury (due to their dulled responses), and will be more susceptible to the effects of such an injury (because they have received a second injury before recovering from the first).
- Although there are now prescribed periods away from rugby following concussive head injury, the evidence in support of those particular periods is patchy at best.



LEADING THE CHARGE: THE US EXPERIENCE



Stuart Miller
Partner
Wilson Elser - a
founding member of
Legalign Global

Following the 2016 litigation against the NFL, the US is seeing an increasing number of sports injury related legal actions across a widening range of sports. Stuart Miller assesses the experience and impact of concussions and head injury claims in the USA.

KEY TAKEAWAYS

- In 2016, 70 former players sued the NFL alleging a failure to take reasonable actions to protect them from health risks associated from injuries, including CTE. The settlement created a monetary award to compensate retired players with certain diagnoses and will remain in place for 65 years.
- Riddell, which is one of the biggest NFL helmet manufacturers, continues to face legal action based upon allegations surrounding the lack of protection from concussions.
- Head injury and concussion law suits have now been brought in sports including hockey, water polo, WWE to soccer and football.
- Dr Bennet Omalu, a Forensic Pathologist, was the first to claim to have found a link between repetitive head trauma and concussions in football and gave CTE its name.
- CTE was not technically recognised as a condition under the settlement agreement with the NFL. It has been argued that the omission of CTE from the settlement agreement undermines the core purpose of the settlement: to adequately fund treatment for health problems suffered by players. The Supreme Court of the United States denied the petitions to challenge this omission.
- California leads the way in reform to manage CTE risk in children's leagues with its "Return to Play" law. The purpose of this is twofold:
 - to increase education by imposing educational, training and notification requirements for coaches and parents; and
 - for greater caution requiring athletes suspected of suffering a concussion to sit out for the rest of the game, requiring medical clearance to return to the sport dependent upon if they were removed from the game due to head trauma.
- During NFL games, each team now has two designated individuals to a) monitor crash data from helmets and b) pull a player out of the game if they believe the player suffered a strike to the head which could lead them to suffer a concussion.



CONCUSSION & CTE: THE AUSTRALIAN EXPERIENCE



Charles Simon
Partner
Wotton + Kearney - a
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Legalign Global

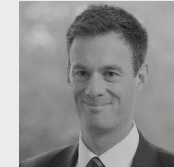
Concussion litigation is a growing risk in Australia and continues to gain momentum. Charles Simon looks at the impact of concussion in professional and amateur sports, and the implications for sporting clubs, schools, governments and associations.

KEY TAKEAWAYS

- No current Australian sporting governing body has yet publicly recognised a causative link between concussion and CTE based on the current state of medical science. The Australian Medical Association's position is that *"there is currently no reliable evidence which clearly links sport-related concussion with CTE"*. The medical causation issue therefore remains the biggest obstacle to plaintiff lawyers commencing widespread litigation in Australia.
- As a result, unlike the litigation landscape in the United States, Australia has not yet experienced the widespread litigation associated with concussion claims in its sporting codes.
- However, there are ongoing rumblings of potential class actions being advanced as well as isolated claims commenced by individual players against their clubs alleging *"CTE-like"* symptoms arising from the mismanagement of their concussive incidents leading to early retirement.
- Aside from questions of legal duty, which would not be dissimilar to the UK position given our common law system, an important liability consideration is the application of various statutory defences in certain Australian jurisdictions. These have the potential to provide a complete defence where the risk that materialised was inherent in the participation of the chosen sport. It is a powerful defence and one that has been upheld regularly by Australian Courts in other sporting contexts (i.e. jockey's being injured whilst racing, go-karting, skateboarding). However, the responsive argument from plaintiff lawyers will likely be that, that whilst a football player may have assumed the risk of a broken arm whilst playing AFL or rugby league, they were not aware of the risk of brain trauma or CTE from concussive blows during their playing days. The prospects of reliance on any such defence will only increase if the medical causation position crystallises.
- While it is widely perceived that the issue of concussion is mainly relevant to professional sport, it is amateur sport at the grass roots level that potentially presents the bigger challenge. As a sporting nation, Australia encourages its children to take up sport from a young age where concussion monitoring or protocols (as they apply to children/amateur levels) are not implemented or adhered to with the same rigour. Should a scientific pre-mortem method of detecting CTE be established, it is likely to have far-reaching impacts across many different insurance segments.
- Aware of the implications, sporting clubs, schools, governments and associations are investigating, and should continue to investigate, ways to mitigate these risks. These bodies are assessing what more can be done to protect participants by addressing both the early identification of concussion and its management. As concussion in contact sport is inevitable, the management of any concussive incident becomes paramount. For insurers operating in this space in Australia now, it is a case of remaining alert but not alarmed.



LIMITATION IN CONCUSSION CLAIMS



Simon Perkins
Partner
DAC Beachcroft - a
founding member of
Legalign Global

The effects of concussion injuries may be hidden for many years, or even decades, after a player has finished their career. Simon Perkins discusses the important topic of limitation law, including date of knowledge, in relation to concussion claims.

KEY TAKEAWAYS

- Concussion claims can involve significantly long-tail liabilities, and therefore limitation is an important aspect of the claim to investigate. In particular, consider the date and what medical advice the Claimant sought, and whether advice should have been sought earlier.
- The burden of proof will rest with the Defendant to assert that a Claimant had an earlier date of knowledge. Even if this can be proved, the Court will still have a discretion to allow the claim to proceed - making it generally difficult for limitation defences to succeed without a very clear set of facts.

PANEL Q&A

Roll your mouse over each of the questions below to view the answer.



AI & DATA IN SPORTS



Tal Brown
CEO & Co-founder
Zone7

Zone7, a start-up based in Silicon Valley and Tel Aviv, has built a machine learning platform able to evaluate and understand when individuals are at risk of injury. Tal Brown shares how Zone7 uses the latest in cutting edge sports injury A.I and data harvesting to understand injury risks for individual players and the factors influencing these risks.

KEY TAKEAWAYS

- Injuries in sports not only pose a huge risk to the individuals involved, both physically and in relation to wellbeing, but also to the operational efficiency and performance of the organisation they are representing. Risks can relate not only to the medical cost of injury, but also to the efficiency of the individual who is not in the state for optimal performance. Today in sports, the risks presented for individuals and for businesses are not managed in the same way that we manage areas such as financial risk.
- An injury or incident in sport is a random event. But Zone7's algorithms can analyse data from different organisations and sports, including football, rugby and NFL, and are able to accurately place athletes in the risk zone several days ahead of an incident.
- Data is drawn from sources including wearables that track movement in the field, medical tests, playing history amongst others. By analysing this data, patterns that precede incidents of injury can then be identified and presented to an organisation to understand the risk level for individual players, and factors influencing this.
- While this technology has been developed primarily for soft tissue injuries, Zone7 are now beginning to do some work around head impact with some early partners in rugby, which will look at quantifying the volume of impact in these injuries.



MEET THE SPEAKERS

Click on the speaker details below to find out more.





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