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Concussion in High-Risk Sports

This roundtable event took place on 22nd March and was hosted jointly by the FOIL Sports SFT and FOIL sponsor **39 Essex Chambers**. The guest speakers were **Simon Browne QC** and **Sam Burrett** from **39 Essex Chambers** and **Richard Tolley** of **Marsh**.

Simon Browne QC opened the discussion by referring to one very old and one more recent court case that served to illustrate that although high risk sports cases may seem complicated, in reality they involve basic principles of duty of care and health and safety. These involve recognising that there is a duty of care; then the assessment of risk; taking steps to address that risk; and warning the person of that risk, i.e., making they are aware of the risk inherent in the activity. The question is then simply: 'was the duty of care breached'? Duty, breach and causation.

Sight should not be lost of these basic principles among the concepts of sports law and protocols.

The speaker has an interest in the research being carried out by the University of East Anglia into concussion. Tests had been carried out on a wide range of subjects, who were regularly re-tested. An important point to have a risen was the view that it was the speed of the ball in professional football that was relevant. In the amateur game, there seemed to be no higher risk of concussion (and later dementia) whether the player heading the ball was male or female. Those interviewed said that even if they had been a known risk of playing, they would still have played in the same way.

IN BRIEF

This roundtable event looked at the issues of liability and causation in concussive head injury cases arising out of contact sports.

The part to be played by insurers was also considered, given the spread of risk between professional and grass-roots players.

Nevertheless, people should be made aware of the risk that if they are knocked-out, they will suffer a brain injury.

Sam Burrett

The speaker had been asked to consider a number of specific issues.

Whether and to what extent a sports club or organisation might avoid liability for concussion injuries by referring for advice and treatment of those injuries to an apparently competent medical professional

It was felt that was dependent on the nature of the relationship between the club and the player/athlete and the medical professional. There are three likely scenarios.

1. The club employs or effectively employs the medical professional.
   The club would be vicariously liable for any negligent acts of the medical professional.

2. The medical professional provides the service to the club on an external basis.
   Provided the club had reasonably referred the case to the professional, it ought not to be liable for any breach of duty by the medical professional.

3. The club employs the injured athlete.
   The club has a non-delegable duty to take care of the athlete's safety and would not likely avoid liability merely by referring the case to the medical professional.

The impact of concussion protocols

A distinction should be drawn between what is required at a professional level and at an amateur level. At a professional level, concussion injuries are likely to be dealt with by inhouse or contracted medical professionals. Their actions will need to accord with a reasonable body of medical opinion. With concussion, there is a broad range of medical opinion, which is rapidly evolving.

At an amateur level, there are unlikely to be the resources to provide immediate and sustained input from medical professionals. The view was that provided the club/school/coach followed any extant guidance issued by the sport's governing body, they ought to be in a good position to say they have acted with reasonable care in the circumstances . However, a failure to put in place or follow a protocol could result in exposure to liability.

The voluntary assumption of risk (*volenti non fit injuria)*

To work in practice, the injured person would have needed to consent to being injured by someone acting negligently. This is not the same as accepting the inherent risk of that activity. In rugby, a normal tackle would be a normal incident of the game and it is difficult to see how a claim could arise.

The use of concussion waivers

This seems to be an increasingly common practice in heavy contact sports. There is a difference between those that seek to exclude the right to bring proceedings against the club for death or personal injury and those which merely seek confirmation that the athlete understands the inherent risk of injury. With the first type of waiver, there are significant legal restrictions on their

effectiveness where negligence is involved. The second type has three connected benefits. First, they demonstrate that the organiser has taken a reasonable step to ensuring that the athlete will take reasonable precautions themselves, to avoid, limit or manage injury. Secondly it fixes the athlete with knowledge of the potential risk of injury. Thirdly, it assists governing bodies to preserve any desirable contact element of the sporting activity.

Richard Tolley – A broker's perspective

Broadly speaking, the risk of sports injury is insurable.

First party injury is generally insurable (including the risk of a career-ending injury). There is a price differential between contact sports and other activities. However, the cumulative effect of injuries would probably not be covered.

Third party liability (public/general) cover is dependent on which entity is asking for cover and where in the world they are. There is then a hierarchy of sports, with the international sports bodies, that set the rules and regulations at the top of the tree. Below them sit their members, the national governing bodies (NGB's). Then there are the leagues and then the individual teams.

Insurance becomes more complicated around the international bodies. They are setting the playing regulations around such issues as concussion protocols.

There are also complications where the body combines the role of responsibility for international, national and league activities (one entity), such as the Australian Football League. The US NFL is in a similar position, which is seen as the governing body, even though there is a separate International Federation for the sport.

In the UK there is a diminishing appetite among insurers to underwrite contact sports and a move away from a current "occurrence" claims basis, to a "claims made" basis. Insurers are also imposing lower financial limits on their exposure.

Cover in the USA is available but extremely difficult to obtain and more expensive than traditional coverage. Claims by professional players will be picked up by the Workers' Compensation scheme, as employees. Canada is similar. The speaker suggested that UK insurers will be interested to know if the legal profession sees these claims as EL or PL.

In New Zealand there is no issue, as the country's Compensation Act removes the right to sue for sports' injuries. An issue there, however, is directors' and officers' insurance and the possibility of claims coming back to Ds and Os.

There is no specific insurance cover available in Italy, although professional sports people can fall back on disability insurance, but only during the period of their activity.

In France, licensing is through the national federation and so everyone has cover through their membership of the sport.

South Africa has no specific cover available and policies that might respond exclude professional sports players.

Those applying for cover are now faced with increasing burdens of risk management. Underwriters are interested in what testing a club is providing, such as specific concussion tools; research carried out into the risks associated with that sport; any scientific advice taken; and action plans created.

Insurers are also interested in initiatives such as concussion substitutes; medical protocols; guidance to players provided both for when playing and in training; medical cover, again both in play and in training; the collation and sharing of relevant data; and specific guidance provided by governing bodies.

Discussion

There was further discussion about the existence of waivers in contact sports. **Sam Burnett** remained of the view that, in the light of both common law and statutory provision, they are likely to prove ineffective in a claim arising out of an act of negligence by a third party. It is probably different where the 'waiver' or 'disclaimer' is more about ensuring that the participant is aware of the immediate and long-term risks of participation, which could be of some value in a future claim.

Simon Browne added that anyone seeking to rely on such a waiver would be required to show, in great detail, what steps they had taken to address the risks, the consequences of which they were trying to avoid.

It makes no difference what level of sport is being played, as to whether or not a waiver would be effective. However, a distinction should be drawn between lower levels of sport, which the courts expect people to be allowed to enjoy and professional organisations which have resources and may attract claims.

Richard Tolley confirmed that there are major differences between the cover provided to a professional player suffering a career ending injury and that offered by a centralised policy held by a number of umbrella organisations to provide *some* cover if a non-professional suffers a similar injury. He was not aware of any specific concussion policy available in the market. If one did exist, it would cover a single, major incident and not cumulative damage leading to the end of a career.

The discussion moved to the issue of whether or not a sportsperson would know they had suffered brain injury as a result of a blow to the head, acknowledging the cumulative risk from several blows.

Simon Browne commented that when the boxer Michael Watson suffered a significant blow, his successful claim was in respect of the medical assistance that was lacking at the side of the ring. With cumulative injuries, causation is always going to be the major issue. The speaker was concerned about the quality of the research currently being carried out, both in terms of who was driving it and the levels of funding available.

The date of awareness of the problem in this country is probably 2001.

Boxing is the classic example of a sport where short of an outright ban, it will be very difficult to avoid concussive head injuries.

In response to a question, **Richard Tolley** confirmed that available cover is now at a higher cost than previously and this was sending some organisations down the self-insuring route. There is concern not just in the primary market but also with reinsurers.

The point was made that at lower levels there are simply not the resources to meet the requirements thrown-up by this discussion. **Simon Browne** felt that there has been and will continue to be a 'tapered' responses to resources and what can reasonably be expected. It was suggested that this might not be correct for boxing, where the risks of injury appeared to be similar both at professional and amateur level. **Simon Browne** felt that the starting point here must be the

existing governing bodies' protocols, which surely would make provision for medical services. It was to be hoped that governing bodies were ensuring that the necessary information filtered down to all levels. Insurers will be asking as much about knowledge of industry standards as about what an individual club is doing. The volunteers who offer their time to these sports, probably do not understand the burden that is on them.

Richard Tolley mentioned an App available in Australia, which assists in engaging grass-roots organisers in assessing and addressing risk.

It was noted that in some sports an umbrella policy applies, whereas in others each club takes out its own insurance. Similarly, some umbrella organisations, such as the RFU, involve themselves in ensuring that there is appropriate training at all levels.

The question was put as to the difference between a hard but seemingly fair tackle and one that was negligent. **Simon Browne** was of the view that this is a moving feast, with a high degree of self-regulation in both rugby and football setting benchmarks as to acceptable and dangerous play. But what happens lower down without the likes of VAR and experienced referees? This raised the question of referee liability (including those working through technology), which can be insured. Referees need to know and apply the safety rules, or may become liable. Referee training is as much about safety now as knowing the rules of the game.

While protocols are important, it must be borne in mind that once one is in place, the organisation will be measured against it.

A delegate raised the issue of the interaction between causation in the longer term and how effectively a head injury protocol might be applied in practice, i.e., the length of time over which the player should be monitored. This was seen as an even more difficult problem at lower levels where an individual might choose to play on, even though they are aware that they have sustained a concussive head injury.

In response to a question from a delegate, **Simon Browne** confirmed that claimants in head injury cases were now regularly pleading provisional damages against the risk of dementia. Dementia can arise from a single incident as well as cumulative damage. The date of knowledge is when the person knows they have suffered dementia, which creates long-tail problems for some insurers. Causation will be a major problem, particularly when knowledge may have been different (ever evolving protocols) at the time of some of the cumulative incidents.

Another delegate was concerned about who would take responsibility for the adequacy of the protocols being fed down to lower levels.

Concern was expressed by an insurance broker about the narrow market for sports insurance and the lack of competition, particularly in the higher risk sports. Without a more vibrant market, sport may struggle to exist. This problem needs to be recognised and addressed by sport, as otherwise it may be forced down the route of self-insurance (which may not be affordable). Claims are potentially very expensive. Causation is again a major problem.

The picture is complicated by situations such as schools requiring children to play sport and having policies that cover the activities.

Another concern is that current litigation is encouraging others to consider litigation. With some organisations investigating dementia in sport, are they looking to secure compensation, or improve

safety for the future? The RFU litigation could well discourage insurers from underwriting that sport.

In Europe the issue is addressed substantially by personal accident insurance but this is seen as a luxury in the UK. The premiums in Europe come through the payment made to the licensing authority. This takes out a lot of the liability issue. Concussion does not yet appear to be a major issue for insurers in Europe. This top-down approach (with one insurer) is very different from the bottom-up approach in the UK, which leads to inconsistency, including in insurance cover.

It was therefore felt that a personal accident approach, with capped premiums would create a fund that would be more attractive to an insurer and reduce the attraction of litigation.

It was also felt that players should accept the inherent risk of injury, so that the focus could be on the adequacy of measures taken on their behalf afterwards.