FORUM OF INSURANCE LAWYERS

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# FOIL UPDATE 15th October 2022

# Insurability of High Risks Sports and Concussion

This event was held virtually on 11th October 2022 and was hosted by the FOIL Sports SFT.

The speakers were **Simon Browne KC**, **Samuel Burrett** of **39 Essex Chambers** and **Richard Tolley** *of* **Marsh**. This summary of the presentations incorporates extracts from notes kindly provided by the Simon Browne and Samuel Burrett. The notes are also available separately, including full references to the various sources cited.

**IN BRIEF**

Three expert speakers looked at issues relating to concussive head injury in contact sports, including the latest developments in medical opinion; group litigation; responsibility/liability; the relevance of waivers; and the availability of insurance.

**Simon Browne KC (SBKC)**

There have been significant developments in this fast-moving area over the last six months (since the last roundtable on this topic).

The Concussion in Sport Group (CISG) has produced a number of papers, Paul McCrory who was the chair of the CISG and lead author of four out of the five Consensus Statements on Concussion in Sport stood down from the role in March following numerous allegations of plagiarism in his work. This has added to the various criticisms already levelled at the work of the CISG, which is central to shaping concussion protocols in a myriad of international ports, including rugby and football. The 6th Concussion in Sport Conference was due to take place between 27th-29th October 2022 in Amsterdam.

With any research, it is always interesting to see who is funding it and we all need to be circumspect in accepting the validity of views and take note of the peer reviews of published papers.

Another development has been the issue in July, by Rylands Law, of a claim on behalf of some 185 (and apparently rising) professional and semi-professional rugby players against World Rugby, the Rugby Football Union (RFU) and the Welsh Rugby Union (WRU) arguing that they failed to take reasonable action to protect players from known risks of concussion and repeated concussion causing them to suffer chronic traumatic encephalopathy CTE) and/or early onset dementia (EOD). Proceedings have yet to be served but the speaker understood that a meeting has been arranged between the parties.

This runs alongside the continuing media debate, particularly podcasts, including one from the BBC Sports Desk titled "Rugby's concussion crisis – do the sports risks outweigh its rewards" and a BBC Sport broadcast "Steve Thompson: Rugby World Cup winner describes impact of dementia", in which the former international player looked at the problems of living with dementia.

In addition, a new study was published in July, in Frontiers in Neurology, which found that by using the Bradford Hill Criteria there is "convincing evidence" that repetitive head impacts (RHI) cause CTE, although the researchers acknowledged that the link between RHI and CTE is imperfect. It is repetitive impacts that are the problem: sending a player back on the field after a head injury, without following the head injury protocol and having two weeks off playing.

A further development is that the WRU has introduced a requirement for each player wishing to register with it and their chosen club to sign a waiver (or more accurately tick a box on its online registration form). This is dealt with in more detail by the next speaker.

"I have familiarised myself with and accept any risks of injury that may be associated with playing a contact sport such as Rugby Union". It then includes hyperlinks to the Welsh Rugby Player Welfare Policies and its advice on concussion in rugby. The speaker noted the feedback from former players, now in middle-age, who confirmed that had they been made aware at the time they began to play, of the risks associated with the sport, they would still have played.

Finally, as far as recent developments are concerned, the National Football League (NFL) and NFL Players Association (NFLPA) issued a joint statement on the Saturday before the roundtable following their investigation into the handling of concussion protocols in the recent case of Tua Tagovailoa, the Miami Dolphins quarterback. He appeared to have suffered a concussion during a game against the Buffalo Bills, in which he was tackled, hit his head on the ground, got up, took a few steps but then stumbled and fell. However, he later returned to the field, having been cleared to play by a Dolphins' physician and an unaffiliated neurotrauma consultant, who determined that his instability was caused by an earlier-reported back injury, although they did not examine that injury. He was hospitalised a few days later following a concussion sustained in a game against the Cincinnati Bengals. The neurotrauma consultant's contract was terminated by the NFLPA. It is evident that there was (and is) some disagreement between the NFL and NFLPA about whether the concussion protocol was meaningfully applied. They ultimately concluded following their investigation that the letter of the protocol was followed. However, the outcome was not what was intended when the protocol was drafted.

Accordingly, they modified the protocol to include "ataxia", which is defined as "abnormality of balance/stability, motor co-ordination or dysfunctional speech caused by a neurological issue", as a diagnosis which will prevent a player returning to the game and being subjected to follow-up care

in compliance with the protocol. The incident has raised some serious questions about compliance and enforcement of concussion protocols in professional sport.

The speaker questioned the conflict this perhaps illustrates between steps taken in relation to player safety, in a very well-funded sport and the risk that clubs will still do everything possible to return an injured player to the field of play.

**Issuing claims with multiple individual claimants**

Claims are likely to be pursued by way of group action, in which the speaker has considerable experience. Master Davison has expressed clear views on how such litigation should be managed.

It has been possible for a single solicitor to issue a single claim form, for a fee of £10,000, on behalf of multiple claimants, with the same claim (CPR Part 19). However, it is common for more than one firm of solicitors to have multiple claims (e.g., the diesel claims). In this situation, individual claims should be issued. But this raises the issue of whether the solicitors can afford all the issue fees; and will the defendant wish to pay so many fees, if liability is established?

The best approach may be illustrated by reference to the original phone-hacking litigation, where a scheme was devised under the supervision of Vos J (as he then was), where a small number of firms were pursuing the same remedy for different clients. Notable features were:

a. The firms on the record were specialist media firms and any new claimants should subscribe to one of those firms where efficiency arises through experience in the scheme. There should be a discrete protocol to deal particularly with disclosure.

b. In the event of litigation, there should be the appointment of a Lead Solicitor whose role is to be the contact point for the court and the other parties. The relationship between the lead solicitor and other claimant firms must be carefully set out in writing, so the court only rarely needs to become involved in issues between them.

c. The claimants represented by the lead solicitor must instruct the same counsel team in relation to the GLO issues, which (by definition) are all common or related issues of fact and/or law, so there is no need for separate representation. Once those issues have been resolved, the court will then direct how any individual issues (such as the quantum of individual claims) are to be resolved.

However, these principles were tested in the matter of *David Abbott & 3,449 Others v Ministry of Defence [2022] EWHC 1807 (QB)* (Master Davison). The claim was issued in the name of a single claimant but with a schedule of 3,449 other claimants. The Master had no hesitation in concluding that the issue of a single bulk claim form was not permitted in the prevailing circumstances, emphasising that each set of claims must have a common purpose and period.

The Master went back to basic principles. He referred to CPR 19.1 and CPR 7.3 which allow a solicitor to use a single claim form to start all claims which can be conveniently disposed of in the same proceedings. In this case it was held that the 3,500 individual claims plainly could not be conveniently disposed of in the same proceedings. The claims had a common defendant and a number common themes, but that was all. They were, “far, far too disparate in terms of the periods and circumstances in which each claimant sustained his or her Noise-Induced Hearing Loss. In short, they presented, “a huge variety of unitary claims”.

Although there was a proposal to select 16 'lead cases' for trial, the outcomes of those cases would not fully resolve the entire cohort. Moreover, the proposal to place 3,500 separate claims on a single claim form – with a single claim number – would place "an impossible strain" on the court's computerised case management system.

The speaker suggested that a more practical approach during the pre-action protocol phase might have been to try to group claims with common factors, so that there might have been five or six groups of several hundred each, rather than one action with 3,500.

This is going to be a challenge in these head injury claims. Neither side will probably want to risk incurring unnecessary issue fees. The parties will need to look at sub-categorising the claims.

**Samuel Burrett (SB)**

**<u>The Welsh Rugby Union (WRU) 'waiver'</u>**

This is not a waiver in the strict legal sense in that it does not ask a player to waive their right to bring a claim in the event of injury caused by negligence. In completing the online registration form "to register as a player for the WRU and (a) chosen club", players are now required to tick a box acknowledging:

**"**I have familiarised myself with and accept any risks of injury that may be associated with playing a contact sport such as Rugby Union''.

A hyperlink takes the player to, amongst other resources, a webpage entitled 'Concussion Guidelines for the Domestic Game' and a document entitled 'WRU Concussion Guidance'. The WRU Concussion Guidance is dated 2016. It states it has been developed utilising guidelines published in the 2012 Consensus Statement on Concussion in Sport, as adapted for rugby by World Rugby. The Guidance has not apparently been reviewed and updated to take in the 2017 Consensus Statement on Concussion in Sport.

This can only relate to injuries sustained non-negligently. It seems to have been introduced just before the start of the present season. It is cast very wide, but clearly encompasses concussive head injury.

As to the legal context, waivers such as this are often used in an attempt to prospectively offer a defence against potential claims for injury caused by negligence on the basis that the claimants voluntarily assumed the risk of the injury, that is the legal maxim volenti non fit injuria or the volenti defence. However, their operation is heavily restricted in two fairly critical respects.

The first is the precise nature of the agreement and consent which must flow from the claimant. A defence to a sport concussion claim brought in negligence on the basis that the claimant voluntary assumed the risk of injury will only apply if the claimant agreed to the defendant acting negligently and to waive his or her right to legal action, not just to the inherent risk of playing the sport.

*In Nettleship v Weston [1971] 2 QB 701 at [701]*, Lord Denning expressed the doctrine of volenti as operating as follows (emphasis added):

"Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of volenti non fit injuria has been closely considered and in consequence, it has been severely limited. ***Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The [claimant] must agree, expressly or impliedly to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant."***

Diplock LJ explained in *Wooldridge v Summer [1963] 2 QB 43 at [69]*, a case in which a spectator was injured when a horse crashed through a barrier:

"the maxim in the absence of expressed contract has no application to negligence simpliciter where the duty of care is based solely upon proximity or 'neighbourship' in the Atkinian sense. The maxim in English law presupposes a tortious act by the defendant. ***The consent that is relevant is not consent to the risk of injury but consent or the lack of reasonable care that may produce that risk*** … and requires on the part of the plaintiff at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran."

In a rugby context (a colt player suing the referee), Bingham LCJ held in *Smoldon v Whitworth and Nolan [1997] ELR 249 at [146]:*

"***The [claimant] had of course consented to the ordinary incidents of a game of rugby football of the kind in which he was taking part. Given, however, that the rules were framed for the protection of him and other players in the same position, he cannot possibly be said to have consented to a breach of duty on the part of the official whose duty it was to apply the rules and ensure as far as possible that they were observed***. If the [claimant] were identified as a prime culprit in causing the collapse of the scrums, then [volenti and contributory negligence] might call for consideration."

While the terms of the WRU waiver are cast wide to include acceptance "of any risks of injury that may be associated with playing a contact sport such as Rugby Union", the waiver does no more, in the speaker's view, than invite the player to accept the inherent risk of playing the game (which must now include the risks of concussions and sub-concussions caused non-negligently). It does not, for example, include terms to the effect that the player accepts the risks of injuries "even if arising from negligence" such that a player could be said to have expressly consented to those risks. In that way, it does not purport to invite a player to agree to waive their right of action in the event of a potential defendant (whether the WRU, a club, coach, referee or another player) causing injury as result of their negligence. It would not, therefore, in our view likely sustain a defence of *volenti* to a negligence claim.

The second critical restriction is S2(1) of the Unfair Contract Terms Act 1977 (UCTA), which serves to prevent a defendant from excluding or restricting their liability for death or personal injury resulting from negligence by means of a contract term or a notice given to persons generally or particularly.

In *Harrison v Intuitive Business Consultants Limited (t/a Bear Grylls Survival Race) & Others [2021] EWHC 2396 (QB),* Ms Harrison signed a waiver form in the following terms prior to taking on an obstacle course (from which she fell):

"A risk of injury and/or death from the activities involved in the Bear Grylls Survival Race … is significant including, but not limited to the following: … strains … fractures … While particular rules, equipment, and personal discipline may reduce this risk, the risk of serious injury does exist … I knowingly and freely assume all such risks, both known and unknown, ***even if arising from the negligence of the Releases or others*** and assume full responsibility for my participation …" (emphasis added)

This may be contrasted with the WRU waiver, which did not explicitly invite acceptance by the participant of any risks arising from negligence. However, as HHJ Freedman (sitting as a High Court Judge) correctly identified in that case, it is trite law under S2(1) UCTA that liability for death or personal injury resulting from negligence cannot be excluded by a contract term or notice. He, therefore, gave the waiver no further consideration. Although not referred to be the judge, S2(3) of UCTA would also have been relevant.

There is, however, a slight chink in a claimant's reliance on UCTA in that it only applies if the defendant is acting in the course of a business pursuant to S1(3). 'Business' is not comprehensively defined in the Act. S14 provides that it "includes a profession and the activities of any government department or local or public authority". In Clerk & Lindsell on Torts 23rd Edition at [3-136], it offers the following view as to how that definition should be interpreted:

"Arguably any activity that is not within the remit of private domestic life should be covered. The issue is not whether the activity is "commercial" in the sense of being designed to make a profit, but whether it takes place in the public sphere. Thus, charitable bodies, educational institutions and even religious institutions ought to fall within the Act."

If that is right, the speaker felt that it would probably capture most sports institutions or organisations. Certainly, UCTA would apply where there was an agreement including a waiver between a professional sports person and their club.

This does not mean that waivers have no benefit. The speaker felt that there are three connected benefits to the use of a waiver such as this:

a. It ensures participants are fully informed of the risk of concussions and other TBIs inherent in heavy contact sports, such as rugby, and the potential long-term effects. In that way, the potential defendant – whether a sports governing body (as in the case of WRU), club, school or coach – can say that they have taken a reasonable step to ensure the participant will take appropriate precautions for their safety, whether by adjusting or limiting their participation in the sport or by the way they themselves deal with a head injury. It is, in some respects, akin to occupiers providing a warning to visitors of dangers on their premises in order to discharge the common duty of care to keep them reasonably safe.

b. It fixes sports participants with knowledge of the risk from, at least, the point at which they sign the waiver. The concussion litigation which has been brought in relation to historic repeated concussions by sports participants – for example, the NFL and NHL litigation – allege that the players were not informed and were ignorant of the risk of long-term brain injuries. As the medical

and scientific research continues to improve everyone's understanding of the risks of concussion, it will likely become more difficult for participants in heavy contact sports to make that assertion. However, the medico-scientific picture is still a grey area, so it will be helpful, so far as possible, to fix sports participants with knowledge of the potential risks by waivers or notices in black and white terms to limit ongoing liability.

c. It is a means of allowing sport governing bodies to preserve heavy contact aspects of their sport, which may be a unique and desirable aspect of the sport, by imposing a degree of responsibility on the participants for their own actions. If all the players say 'we want to play' and 'we want to play in this way', that should enable a sporting body to preserve some of the riskier aspects of an activity. As was held by Foskett J at [142] in *Anderson v Lyotier [2008] EWHC 2790*, the decision to run a risk is a collaborative one that is taken by the athlete and, depending on the specific circumstances, their coach, the match-official and the rule-making body. Potential liability for rule-making bodies for maintaining heavy contact aspects of sports, despite known risks, will be mitigated if participants willingly accept those risks.

**Causation in concussion claims relating to long-term brain damage or disease**

**SB** emphasised that that within their notes, he and SBKC had set out preliminary considerations which were not intended to anticipate what may arise from other discussions to be held on this subject later this year and in early 2023. There is a great deal of controversy and developments are fast moving.

**Richard Tolley (RT)**

**The insurance market and how it views this risk**

From about 2000 to 2019, the insurance market in this field was 'soft' and the premiums were very low, for wide coverage. Around 2019, the general insurance market began to harden, with higher premiums for narrower coverage. Sport is a very small part of the insurance market, with only a handful of providers.

This limited number of insurers and rising premiums put the issue of head injury under the microscope. Although the market is softening, going forward into 2023, the speaker saw this type of cover being a challenge. It will be available on a limited basis and only to organisations whose policies, procedures, etc are seen to provide best practice in managing this risk. Insurers are going to pick-up on the issue of waivers in the context of best practice.

Only six or seven insurers will now offer any form of cover in the UK, in relation to concussive injuries. These are at the primary level of £1M – 5M. A handful will sit above the primary level. The picture is similar in Australia. In the USA there are only three or four insurers; Canada appears to have one; and South Africa none.

Insurers have responded in a number of ways: increased premiums significantly (50%-100%); increased deductibles/excesses (effectively no cover below £250,000-£500,000); the introduction of sub-limits for injuries such as concussion, so that cover is far below what it would be for other types of claims; triggers changing from losses occurring to claims made; a combination of these; or excluding cover.

Who can obtain cover? It is a challenge for international governing bodies, which set the rules and protocols. It is slightly easier for national bodies, as they are not setting the rules and regulations. It is a challenge for the professional sports club, as it has to enforce the rules and protocols on a daily basis. It also depends on where in the world the body is located because of the absence of cover in some countries. The final issue is 'what is the sport'? Where concussive head injury rarely occurs, it may be easier to obtain cover.

**Q&A**

**Q:** Where does a waiver sit with (currently) unknown risks?

**SB:** The Bear Grylls's waiver sought to exclude 'unknown' risks. SB did not think that a person could possibly sign-away their rights in respect of a risk about which neither party had any information. They could not be said to have consented. Governing bodies/sports clubs are unlikely not to pass on information known to them about the risks of engaging in an activity. Otherwise, there would probably be a breach of duty and any suggestion of *volenti* would be negated. This was an issue in the NFL claim.

**SBKC** raised the issue of what risks are supposedly protected by the laws of the game? It can be seen how, over the last few seasons, rugby has changed to reduce the risk of contact with the head. Can there be a waiver in respect of a contact which is deemed to warrant a yellow or red card for the opposing player? All the clubs can do is be seen to be doing their best to apply the laws of the game, protocols, etc.

**Q:** Steve Thompson (see above) suggested that since the game turned professional in 1995, the intensity of training had increased and many of his head contacts had been sustained in training, rather than in matches. What should be the rules/protocols for training?

**SBKC:** With cases like Steve Thompson the issues include 'what was known, when'? Since the nineties, things have changed. There is an awareness now that some activities should be restricted in training, such as children heading a football. There is increasing awareness that training can be as bad as playing. However, training at the professional level has to be for the game that is to be played. This may lead to a two-tier system but there needs to be a balance. Professional training will be as intense as it needs to be unless protocols are imposed.

**SB:** referred to some of the guidance World Rugby and other governing bodies have provided. It does not appear to distinguish between concussion sustained in a match and concussion sustained in training. It ought to be treated the same. Inevitably, what happens in a match is likely to be seen by outsiders, unlike what may happen in training. The point may be how it can be ensured that protocols are observed as much in training as on match days.

**Q:** The Thompson issue seems to be less about a major impact but many, repetitive impacts over years of training. Is the only way to deal with this to have a no-contact sport?

**SBKC:** A lot of this is going to come down to the medical evidence and causation. The medical profession is divided. Some are dismissive of the suggestion that relatively minor but multiple contacts raise the risks above those of the population at large.

**Q:** Do governing bodies need to get a grip on the risk that at lower levels, organisations may not be enforcing protocols fully?

**SB:** In short, 'yes' but there will be tensions at all levels between a player experiencing a head injury and a desire on his/her part or that of others to return them to the field of play, as quickly as possible. Governing bodies may need to weigh-in to police what is going on. The RFU protocol is embedded in its regulations, so that a breach of the protocol could amount to a breach of the regulations and lead to disciplinary measures. However, SB was not aware of any pro-active steps to check that the protocols are being adhered to at lower levels.

The questioner thought that the protocols probably were being adhered to for matches, at most levels of the game, but the problem was in training: a matter for the clubs.

**SB:** The waivers at least go to education, ensuring an awareness, which hopefully works from the bottom up and will provide impetus to adhering to protocols.

**SBKC:** This raises the interesting question of enforceability. Who is ensuring that the rules intended to protect players at grass-roots level are being enforced? Is it the referee? At best s/he can suggest to someone else that a player appears to be groggy. Is that person then competent to assess the situation? This is a major problem at lower levels of the game. Guidance needs to be provided on responsibility. The referee is there to enforce the laws of the game: is s/he there also to enforce protocols? Probably not.

A delegate observed that the onus will probably increase on governing bodies to do more than just make information available but also to take steps to ensure that protocols are followed at all levels.

**RT** responded that in rugby there is a definite move to improve education on a trickle-down basis. A lot of responsibility must lie at club level. It would be interesting to see what other sports are doing, where the risk of concussion is lower.

**SBKC** drew a parallel with safeguarding, where responsibility lies at club level. However, there must be concern for how much responsibility is placed on individuals who are often volunteers, giving freely of their time. The courts *should* recognise this balance.

Another delegate confirmed that whereas club officers need to be cleared for safeguarding purposes, there is currently no similar requirement that they should be aware of concussion protocols or even basic first aid. A starting point would be to set a base-line. He also queried the place of player responsibility. What have these players done to help themselves, with some recorded as having received warnings to stop playing rugby, but they continued to do so? Also, a player in training who takes a blow must surely have responsibility to leave the session. Who else can stand on the side of the pitch to make a record of possible incidents? The delegate believed that 2022 should be taken as the date by which all players were fixed with knowledge of the risk of concussive injury in rugby.

**Q:** Could waivers become a condition precedent for insurance?

**RT:** This is seen in the USA, where it is suspected they carry more legal weight. They often apply where spectators are likely to participate. First party insurance may also be required for participants, although that might meet only part of a catastrophic claim because of policy limits.

Nevertheless, there is evidence that first party insurance can result in there being no third party claim. It may depend on where the athlete is.

**Q:** Can players still obtain insurance against not being able to play again, following injury?

**RT:** It is still available but the premiums have risen and it is now more often the player who buys the cover, rather than the club. Where the club is involved, it is now just for a few, key players and not the entire squad. The policy may benefit the player, or the club