Management of Sport-Related Brain Injuries: Preventing Poor Outcomes and Minimizing the Risk for Legal Liabilities

We fully concur with Dr Kaminski’s call to action for athletic trainers to get involved in securing federal and state concussion legislation; however, equally important is the need to act in a prudent manner to prevent and manage sport-related concussion in their clinical settings. Athletic trainers and team physicians are under the microscope like never before, and they can become an easy target for plaintiff attorneys in the event of a catastrophic brain injury if the medical management comes into question. The best defense in these situations is to prove through sound documentation that the sports medicine team acted responsibly in meeting the standard of care for concussion management and in no way contributed to a poor outcome.

However, as the number of reported concussions continues to increase at the high school, collegiate, and professional levels, more and more lawsuits alleging failures to meet the appropriate standard of care are being filed. The increasing popularity of these legal actions is likely attributable to the increasing knowledge surrounding the frequency of concussions, the occasional catastrophic outcomes associated with concussion, and growing news of the potential long-term effects of recurrent concussion. The media is covering concussions as never before, and it is the exception for a day to pass without an article appearing in the New York Times or USA Today, or a report airing on ESPN’s Sports Center, ABC’s Nightline, CNN’s American Morning, or HBO’s Real Sports, featuring concussions or other football-related injuries. In most cases, these stories have focused on speculation about how the injury could or should have been averted. Congress has weighed in on these issues, and sport-governing bodies are under fire. Athletic trainers on the front line of managing these complex injuries must be more informed than ever before, and they must make every effort to educate their athletes about concussion.

In many cases, it is the athletic trainer who has the closest contact with a team’s players and who is responsible for protecting the players’ health and well-being. In our increasingly litigious society, whenever an unfortunate incident occurs on our playing fields, the actions or inactions of the athletic trainer and team physician are likely to be second-guessed or directly blamed. Allegations against certified athletic...
trainers in these cases include improper evaluation and testing of the athlete, improper documentation of injuries, misunderstood communication with the athlete, and a lack of education of the athlete or the athlete’s family. Even the experts have competing views on the appropriate standard of care. On the issue of pre-season (baseline) neuropsychological and balance testing, for example, the experts are divided on whether such testing is required to meet the standard of care for concussion management. The bottom line is that it’s our responsibility to be sure some form of baseline testing becomes the standard of care.

Depending on the facts of a given case, defending the athletic trainer’s conduct against a plaintiff’s allegations can be especially challenging. In some actions, the jury will have to grapple with a complicated medical or scientific theory regarding the cause of the player’s injury, such as Second Impact Syndrome; in others, the player may be so severely injured that sympathy might outweigh a more objective assessment of the facts. In such cases, jurors who are on the proverbial fence regarding whether an athletic trainer met the applicable standard of care may simply return a verdict for the plaintiff so as to avoid having to confront other, sometimes even harder, issues.

For athletic trainers to minimize the risk of becoming a defendant in a legal action following a sport-related brain injury—and to better defend themselves should a case be filed against them—they must have an understanding of “standard of care” for the management of specific injuries based on the most recent scientific literature. In addition, athletic trainers can learn from examining legal cases and the first-hand experiences of those who have defended athletic trainers during the litigation process.

The noticeable increase in the reporting of and attention given to concussions and other sport-related head injuries comes at a time of ever-increasing knowledge surrounding the nature and causes of concussions and suggested ways to avoid future head injuries, as well as the long-term effect of head injuries. In recent years, hundreds of retired National Football League (NFL) players have been studied regarding concussions sustained during their playing years and the associated long-term effects. In 2009, federal lawmakers held extensive hearings to draw attention to the issue and perhaps learn more about the damage caused by repetitive brain injuries. While we are on the topic, let’s remember that a “concussion” is a brain injury. A plaintiff’s personal injury attorney will rarely present his or her case to a jury as involving a “concussion” but will more likely focus on his client’s “traumatic brain injury.” Without sounding as if a brain injury should ever be downplayed, it is important to understand that plaintiffs’ attorneys can be masters of dramatization. Few people dispute that thousands of concussions occur on our sports fields, and especially football fields, each year. Yet despite all of the recently gained knowledge regarding concussions and prevention of catastrophic brain injuries, there still is no clear standard of care for the proper management of these injuries. In fact, there currently are more than 2 dozen competing guidelines for classifying and managing sport-related concussion, which muddy the water for how an athletic trainer should act to meet the “legal duty to provide health care services consistent with what other health care practitioners of the same training, education, and credentialing would provide under the circumstances.”

The differing views on the appropriate standard of care for the management of concussions and other potentially catastrophic brain injuries remains a controversial and somewhat confusing topic within the sports medicine community. Ironically, the ambiguity surrounding the proper standard is actually advantageous to one group, in particular: plaintiffs’ personal injury attorneys. The lack of a clear standard makes it easier for plaintiffs’ lawyers to construct theories of liability for their lawsuits against athletic trainers, alleging a breach of the standard of care by the athletic trainer following an on-field injury, as discussed below. Given the ambiguity on the proper standard of care, one thing remains clear: The best approach for athletic trainers who seek to avoid liability when treating their players may be the most conservative approach.

LESSONS LEARNED FROM PRIOR LITIGATION

The attacks on athletic trainers in these actions often involve the evaluation or testing of the athlete (or lack thereof), documentation of an injury, communications with the athlete or with a physician about an athlete, and education of the athlete. For example, in a recent case in California, an athletic trainer was found liable for failing to properly or promptly evaluate a student athlete who apparently had sustained a concussion only to later pass out, fall, and suffer a variety of physical injuries as a result of the athletic trainer’s alleged failures.7 The court ordered the defendants to pay substantial damages to the injured athlete. In another case, a University of
Tennessee football player likewise recovered hundreds of thousands of dollars: An athletic trainer allegedly failed to promptly report to a physician initial symptoms related to a concussion sustained by the player, and then allegedly failed to report the athlete's continuing headaches to the physician; the student subsequently sustained an acute subdural hematoma in connection with an injury sustained 1 month later. In another recent case, a high school football player alleged that his athletic trainer failed to properly evaluate him or take seriously his reported headaches and dizziness following a concussion and then prematurely returned him to play, which allegedly caused the athlete to suffer Second Impact Syndrome 2 weeks later from a second concussion. Although in the Melka case the jury awarded no damages to the injured player, the “cost” to the defendants nevertheless was 3 years of litigation, substantial legal fees and expenses, and a month-long, stressful, high-profile trial.

BASELINE TESTING
A common allegation against athletic trainers involves improper or inadequate testing of the athlete prior to an injury. Computerized neuropsychological testing programs designed for assessment of athletes are becoming more common within the sports medicine setting, especially for contact sports such as football. When combined with balance testing and gathering information about the athlete’s concussion history and propensity to experience concussion-like symptoms under normal conditions, these preseason (baseline) tests can provide a benchmark for evaluating the athlete following a subsequent concussion. For the past several years, all NFL teams have been required to use some form of this testing, and, most recently, the National Collegiate Athletic Association (NCAA) has strongly recommended a similar comprehensive baseline testing program for student athletes participating in contact sports as part of its best practices recommendations to its member institutions. Still, some of the most highly-regarded neuropsychologists and neuroscientists in the country who have weighed in on the issue do not believe that computerized neuropsychological testing in the management of sport-related concussion should be required to meet the standard of care (at least yet). Some neuropsychologists have taken the position that the failure of an athletic trainer to use formal baseline or post-injury neurocognitive testing in certain contexts amounted to a breach of the athletic trainer’s standard of care.

Critics of neuropsychological testing in connection with evaluating sport-related concussion point to the lack of reliability and validity of such testing. One argument is that the “impairments” detected by neuropsychological testing are mild and fleeting; no prospective controlled study, it has been argued, has been able to identify a difference between concussed players and controls after approximately 7 days post-injury. It has also been asserted that many of the commercially-distributed batteries are highly unreliable, suggesting a high rate of false-positives and false-negative findings.

Nevertheless, the consensus is that computerized neuropsychological testing, at a minimum, is another tool in the athletic trainer’s toolbox. Because of the test’s ease in administration and the ability to baseline test many athletes in a short period, as well as the test’s increasing popularity, the prudent approach is for the athletic trainer to use formal baseline and post-injury neurocognitive testing. Regardless of the true utility of the test, the risk is just too great that a jury hearing a case against a defendant-athletic trainer will find against them if such testing was not used. In short, a jury is more likely to side with an allegedly negligent defendant-athletic trainer where the jury believes that the athletic trainer performed as much pre- and post-injury testing on the athlete as was available or reasonably could have been available. Thus, when in doubt, the athletic trainer should consider the use of available testing, objective concussion assessment tools, brief screening tools for sideline use, and testing to evaluate recovery, including neuropsychological testing.

DOCUMENTING ALL PERTINENT INFORMATION
Another possible allegation in the cases against athletic trainers involves the lack of documentation in managing a sport-related concussion. For several years now, the recommended approach has been that the athletic trainer should document “all pertinent information” regarding head injuries. Indeed, the expression “if it’s not written, it didn’t happen” (or words to that effect) is a common one in the field.

The question in these cases sometimes becomes whether certain information is or is not “pertinent.” For example, at some point during a player’s non-contact period following a concussion, he or she will begin performing graduated exertional exercises. But how much detail in the athletic trainer’s documentation is required to meet the standard of care?
Many would argue—certainly, plaintiffs’ lawyers would—that it is insufficient for an athletic trainer to simply record that the injured player “performed exertional maneuvers” during the non-contact period. Questions at the trial of a defendant-athletic trainer might be raised as to the specifics of the exertional testing; for example, the dates on which the testing was performed, the witnesses to the testing, and the actual maneuvers that the athlete performed. Although the athletic trainer may have a recollection of the testing performed and all of the accompanying details and be willing to testify to the specifics under oath, the absence of such detail in the actual injury record on the player may call into question whether the specifics are being accurately recalled. Unfortunately, the trials in these cases generally occur years after the alleged improper conduct.

Because plaintiffs’ lawyers will make any and all efforts to discredit the defendant-athletic trainer’s testimony in these actions, the more detailed the medical documentation, the more likely a jury will find the defendant to be a credible witness. Thus, ideally, the documentation of all pertinent information about a concussion also should include any details, including the specific testing and maneuvers performed. For example, the athletic trainer might document that 20 minutes of treadmill running at 5 mph was performed, followed by a symptom checklist at 5 minutes and 20 minutes post exercise. The dates, times, and specific locations of testing, as well as the questions asked of the athlete during testing and the athlete’s responses, should also be documented. In other words, the more detailed the athletic trainer’s documentation, presumably the better the care delivered and the better able a defendant-athletic trainer may be to defend a lawsuit for an alleged breach of the standard of care.

**EDUCATION**

Failure to warn or educate the athlete is yet another possible allegation against athletic trainers in these cases. One simple way to educate athletes on the dangers of continuing to participate in sports while symptomatic is to have athletes read and sign a statement acknowledging that they understand the signs and symptoms of a concussion and the importance of reporting symptoms to the medical staff. In addition, those players involved in helmeted sports such as football should sign a statement acknowledging that they have read and understand the warnings that appear on their respective helmets. For example, the warning on every football helmet states, in part:

*Contact in football may result in Concussion/Brain injury which no helmet can prevent. Symptoms include: loss of consciousness or memory, dizziness, headache, nausea, or confusion. If you have symptoms, immediately stop and report them to your coach, trainer, and parents. Do not return to a game or contact until all symptoms are gone and you receive medical clearance. Ignoring this warning may lead to another and more serious or fatal brain injury. No helmet system can protect you from serious brain and/or neck injuries including paralysis or death. To avoid these risks, do not engage in the sport of football.*

In catastrophic cases where such an acknowledgement of understanding has not been secured by the athletic trainer, a “failure to warn” claim almost certainly will be made against the athletic trainer, especially where the plaintiffs are alleging that the player never recovered from an earlier injury. Thus, before each season, at a minimum, the athletic trainer should require that each player:

- Read a concussion fact sheet, similar to the 1-page document the NCAA and Centers for Disease Control and Prevention recently produced. \(^6\)
- Read the aforementioned warning on any helmets worn by the athletes.
- Sign an acknowledgment that they read and understand both.

Not only do these acknowledgments by the player serve as a possible defense to a failure to warn claim, but under certain circumstances they may also be used to establish that the player is legally responsible for the player’s own injuries (eg, if the player is reporting symptoms to teammates but withholds such information from team personnel and nevertheless continues to play). In cases where a defendant asserts and can show that the plaintiff’s injuries are a result of the plaintiff’s own negligence, the defendant may be able to prevail on a theory of “contributory negligence” or “comparative negligence,” which could bar the plaintiff from recovering any damages whatsoever.

The more education that the athletic trainer provides to the athlete about the risks of playing a contact sport and, specifically, the risks of returning to play before a complete recovery following a concussion (eg, the risk of playing while still symptomatic), the greater the likelihood of success the athletic trainer will have in defending against a “failure to warn” or “failure to educate” claim. More importantly, increased education to athletes should translate into more informed participants, which, in theory, should lead to fewer catastrophic injuries.
CONCLUSION

Due to the litigious society in which we live and work, following these recommendations does not guarantee that an athletic trainer will not be sued for an alleged breach of the standard of care. However, this commentary is intended to serve as a reminder that the more conservative approach the athletic trainer takes in managing these injuries—whether it involves the assessment of the injured athlete, documentation of the athlete’s injury, or education of the athlete—the more likely the athletic trainer may be to avoid legal liability. Faced with the inevitable sympathy that an injured athlete carries into the courtroom, the ideal course is for the athletic trainer to touch all the bases and have the documentation to prove it. This requires planning well in advance for how to manage sport concussion and to follow a standardized treatment and return-to-participation plan for these complex injuries.

REFERENCES