



Attorney Addresses Concussions in Pro, College and Youth Sports - Episode #114

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John Czuba: Welcome to the "Insurance Law podcast," the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Directory of Recommended Insurance Attorneys*.

We're pleased to have with us today attorney Al Goldberger from the [Law Offices of Al Goldberger](#) in Florham Park, New Jersey. Al focuses a great deal of his practice on sports, business, and administrative law, sports athletic risk management, and sports claims defense.

He is a nationally recognized authority on sports law and sports officiating and has served as corporate counsel to both businesses and insurance carriers.

Al has officiated college and high school sports for more than 30 years. He is the author of "Sports Officiating, a Legal Guide," which is the recognized legal authority for game officials. He is also a co-author of "Sport, Physical Activity, and the Law," which is now in its third edition.

Al has been a featured speaker at numerous national conferences on legal matters pertaining to sports law and officiating over the years.

Al, we're very pleased to have you with us again today.

Alan S. Goldberger: Thanks very much, John. Great to be with you again.

John: Today's topic is on concussions and the updated legal and insurance issues in today's sports environment and athletic communities. Al, can you tell us how concussion protocol impacted sports on the high school and college levels in recent years?

Alan: John, concussion protocol actually has come into its present vogue as a result of some significant rules changes, almost six years ago to the day announced by the national high school governing body known as the National Federation of State High School Association, and almost simultaneously announced by its next door neighbor, the National Collegiate Athletic Association and almost simultaneously announced by its next door neighbor, the National Collegiate Athletic Association, the NCAA.

Around the same time the high school federation, which we call the NFHS, reformulated their rule. It was across all sports.

The NCAA Committee on Competitive Safeguards and Medical Aspects of Sports, resolved to revise the college playing rules in virtually all sports in a similar manner. There were new rules born as a result of some data that had come to the forefront late in 2009.

In 2010, with the advent of the spring season and fall seasons, of course, not far behind, new rules were born. There was at the beginning a great deal of confusion over the mechanics of enforcing those rules.

That was also complicated by the presence of a number of state laws that were enacted involving concussion in school sports in 2010. We started out with maybe six or seven laws at various times during the years. A couple of years later there were laws in most states.

Then as the years went on, we got to a point where finally all 51 states and numerous cities and other local governments have enacted laws regarding concussion in sports. So protocols have impacted greatly, and not always in a good way, high school and college sports and youth sports as well.

There have been recent developments. College athletic trainers were complaining that football coaches sometimes and other coaches pressured athletes to return to games before they were ready to.

They complained sometimes that their jobs might be in jeopardy. There was a lot of confusion among those supervising college sports and high school sports, as well, as to who had the authority to do what.

There is some light in the college area on that front in that as recently as this January, the so called power conferences have petitioned the NCAA to go in a new direction for college sports.

Under their plan, college coaches aren't going to be the supervisors of doctors or athletic trainers anymore to the extent that they were. They won't have any type of pressure or any significant pressure that they will be able to exert.

Dr. Hanline, the NCAA medical officer, said he thinks the pending NCAA legislation that is proposed by the power conferences is the most significant rule change in NCAA history. He may be right.

For the college folks, of course, the committee involved in 2010 proposed sweeping rule changes which actually were enacted. Then somehow or other as the years passed, rather quickly, those rules that required officials and coaches to remove student athletes when they exhibited a sign, symptom, or behavior consistent with concussion were kind of done away with except for the sports of soccer and wrestling where they still are in effect today.

On the high school level, officials and coaches are still responsible for removing a student athlete who exhibits a sign, symptom, or behavior of concussion during either a practice or a game.

That rule with a lot of confusion as to mechanics, has persisted. Of course, state law impacts this as well. So as far as protocols, while they are not too clear in all cases, their presence is certainly felt, and sometimes unfortunately in the absence of the exercise of the proper protocol.

John: Are all sports being impacted or is football still by far the biggest or primary area of concern?

Alan: I don't know that football is the primary area. It's certainly the primary area in terms of publicity, and that is likely occasioned by all of the media attention to the thousands of claimants who are involved in the NFL, obviously, the pro football litigations and the NCAA athletes as well.

But the data that we have tells us that first of all, you have estimates ranging from over a million and a half people by any estimates who gets sports concussions every year, to maybe as high as four million people in college sports. Men's wrestling, very high in terms of concussion, ice hockey, men's and women's, and soccer, basketball, lacrosse, field hockey, they're all implicated.

Of course if you're the student athlete or you're the team whose athlete suffers catastrophic injury, for you it's 100 percent. I think it's fair to say that all sports are impacted. The coverage issues and the liability issues of course are cross sport. The details change a little bit, but the liability issues and the insurance issues are still there.

John: How concerned are the schools then about insurance coverage?

Alan: Probably not as concerned as they should be. Because what's going on in the insurance industry with the difficulty of dealing with these claims and the increased frequency of these claims is a world that probably only visible to the schools that are involved in litigations.

For the rest of them, they know they have insurance. They think they have insurance. They expect that there's going to be a defense, an indemnification, when a claim occurs. So it should be more of a concern than it is, but it's there.

John: Do you think it would ever get to a point where one of the major schools or colleges would ever drop a sports program?

Alan: I think not. I think that for the schools for whom sports is a significant aspect of the program, and obviously at not just the Division 1 schools, dropping the sport is not really what they see as a viable alternative, at least not in 2016.

John: From a referee's perspective, how has protocol changed for when head injuries occur now?

Alan: The protocol has changed dramatically on the high school level and on the college level, not so much, although there is evidence that things are changing at the college level. You're dealing with an adult population, so the difference now in most of the rules codes on the college level as compared to the high school level protocols demonstrates that college protocols are much different.

On the high school level, of course, you have officials working under the National Federation of High School Association rules for the most part.

Those rules are very specific along with state laws, as I said before, in all states and the District of Columbia that require removal of athletes from not only games or matches or meets but also from practices, which includes scrimmages, any time you have the team together and they're participating participated in either a practice or a game.

The protocols require, in terms of the rule, the official to recognize an injury as officials have done for decades and recognize if a student athlete is displaying any one or more sign, symptom, or behavior consistent with concussion.

This basically, although stated a little bit differently, has been true for many, many years prior to six years ago when new data came out and when all the rules changed and the landscape changed. Concussion claims started to come to the forefront.

In years past, officials were expected to, at first...Going back to the '80s or thereabouts, the deal was in the rules that if a student athlete became unconscious as a result of a collision or a fall, then that student athlete was removed and could not return to a game absent medical approval.

After that, the rule was changed a number of years ago to refer to a student who was "apparently unconscious." The reasoning was that, of course, everybody knows now, but few knew back then that the vast majority of folks at any age who sustain a concussion do not lose consciousness.

They went to apparently unconscious on the high school level. What they really meant was not apparently unconscious like if one's eyes closed and motionless, but what they meant was pretty much what the current day definition is, a sign, symptom, or behavior that would be consistent with a concussion.

The rule basically - and this is really where, to my mind, you prevent claims because you prevent injury by knowing when to take the student athlete out of the job and, as importantly, knowing when it's too soon to put the student athlete back in.

Too soon on a high school level, except for states that have a statute that says differently, is unless and until a medical professional designated by a state association as the person in authority gives the OK for the student athlete to return.

In some states, by state law or by state association adoption, it's not that day at all once the student comes out. In other states such as here in New Jersey where you can come back with a doctor's approval by statute, so that's critically important. Obviously that the athlete who comes out of a game because there's some kind of concussive type sign does not come back in unless and until medically cleared to come back in, whether it's the same day or not.

John: What are the primary concerns of insurance carriers? How can attorneys counsel them?

Alan: That certainly is a topic that has had some ups and downs. On the carrier level -- obviously a lot of concerns about the potential for all kinds of injuries and the alleged knowledge of the organizations sponsoring sports.

Again, football is very heavily involved here of course. Among the people involved it is now acknowledged that these injuries and concussive injuries occur. There have been many instances certainly over the last three years where from the NFL on down, there have been actions for declaratory judgment seeking court intervention to determine those types of coverage questions.

There are questions that the carriers are thinking about in terms of: is there an occurrence under a policy because these injuries, the concussive type injury, is really an expected part of the game. There's the question of trigger. Are there multiple injuries?

Sometimes in traumatic brain injury scenarios, particularly when the student athlete returns too soon, there are complications in later years. There are successive injuries. There may be multiple policies implicated and the duty to defend and the question of trigger and the question of multiple injuries, and coverage periods are all I think within the carriers' thinking.

In addition, new types of defenses to coverage are being wheeled out. Were injuries caused by intentional conduct? Whether governing bodies and the sponsoring organizations knew that it was a high risk of this type of injury. Were there preexisting conditions? There are proof problems of course in many of these cases in terms of athletes who may play multiple sports or may have sustained multiple injuries.

Current questions. There's question as to whether what turns out to be a catastrophic or a very serious brain injury happens as a result of one collision or one incident or whether it happens over a successive period where multiple policies may be involved.

All of these issues are obviously troubling. From an underwriting perspective, this requires more thought. As injuries happen and claims develop. There are obviously ancillary injuries which occur. It creates some very interesting coverage and defense questions for the carriers.

It remains to be seen as the case law develops how those things are going to play out. Of course, we have not only the headline making class action type, multiple tort cases where you have hundreds or thousands of plaintiffs who claim that they've sustained concussive injuries.

You have the other lawsuits which have not met with much success, the mass tort type suits that aren't seeking damages for anybody, but just want to reform the way athletics are organized and governed, and the way medical protocols are effectuated for sports. Those lawsuits have not met with success to my knowledge.

Then you have lawsuits brought by the parents or the survivors of student athletes who sustained a concussive injury. They claim that, number one in most cases, the folks who were coaching, officiating, administering the sport and the activity weren't trained to be able to identify the condition; that they didn't know when the student athlete really should be taken out of a game or they ignored the evidence that was there and permitted the student athlete to remain in the game. They didn't have adequate safety measures. They didn't have sufficient medical personnel on hand. They didn't classify the student athletes in certain sports properly so that they wouldn't be competing against people where they could be safely competing.

All of those individual claims are somewhat less problematic than the mass torts and the politically motivated public policy type claims that we have but they're obviously no less troubling or problematic for the litigants and the carriers involved.

You have all of these things. There's basically superimposed on all this is more or less the state of mass confusion on the part of everyone that's just how to deal with concussive injury in sport and the prevention of claims.

To editorialize for a moment, it's certainly clear to me, and having been an official for 37 of the last 40 years, that many people think the problem of concussion in sports can be solved by relying exclusively on coaches, volunteer and otherwise, whose training may leave something to be desired and by passing out pamphlets to a bunch of parents.

In reality, it doesn't work that way because the claim that's prevented and the injury that generates the claim is prevented by knowing when to take Junior out of the game, and knowing when it's too soon to put him or her back in the game. That's really where the rubber meets the road, John, is that you have to know when to get the child out.

You have to have the perspective to understand that what we are talking about here is not only a game, but in many cases, it's a children's game. On the youth sport level and below high school, where you have more dependency on volunteers, less access to medical care on site, and people who really are running the program who may not be aware of the import and the gravity of the exposure that the young students have, it's even worse.

It is a national, widespread, and rather discouraging problem for sport. We're trying to make inroads, but people need to understand that pamphlets won't do it and laws are not a panacea that if you have a law that all of a sudden, magically everything's OK. Somebody has to know when you have the child taken out and evaluated or the whole thing breaks down.

John: In the end, where do you see this headed, particularly at that youth level, Al, in the coming year?

Alan: We've already seen a couple of settlements in terms of youth sports with claims like this which are significant only in terms of some national organizations are involved.

The claims were resolved short of being tried, but obviously on a national level or even on a statewide level, the people who govern sport can't really be assured that the people who are actually present and coaching, officiating, or administering a particular event will know what to do unless they have developed policies and protocols and mechanics that the people who are involved will actually utilize.

We don't really need a bunch of soccer parents telling the doctors how to do their jobs. We need to get the children to the doctors so that can happen and get them off the field or court.



I see more claims coming down in the future. I see more confusion until situations shake out and people understand that you can't rely on volunteers, that you need to rely on trained functionaries to coach and especially to referee because the student athletes most often literally fall or get knocked down at the feet of the referees.

That's really where you prevent the injury and you prevent the successive injury. I hate to say the worst is yet to come, but I think we're still feeling our way.

John: Al, thanks so much for joining us today.

Alan: Thank you, John. Appreciate it.

John: That was Alan Goldberger from the [Law Offices of Alan S. Goldberger](#) in Florham Park, New Jersey. Special thanks to today's producer, John Weber.

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If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba and now this message.

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