



The Widening Risk Concerns Surrounding High School Athletics - Episode #132

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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 Recommended Insurance Attorneys*.

We're pleased to have with us again today attorney Al Goldberger from the [Law Offices of Alan S. Goldberger](#) in Florham Park, New Jersey. Al is a nationally recognized authority on sports law and sports officiating and a former NCAA basketball official, baseball umpire, and high school football official.

He is also the author of *Sports Officiating, A Legal Guide*, and counsels clients nationwide in sports and athletic risk management and liability defense. A frequent speaker on sports law, Al was named the keynote speaker this summer at the Louisiana High School Officials Association's Sports Officiating Summit and also addressed more than 600 Kentucky officials at that state's Officiate Kentucky Day.

Here in New Jersey, Al has been named to the Rutgers Youth Sports Research Council Advisory Board, and he is also admitted to practice in New Jersey, New York, and Maryland.

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

Al Goldberger: Thanks. Good to be with you again, John.

John: Today we'll be discussing with Al the most recent developments in high school sports athletic risk management. Al, what do you see as active areas of risk in interscholastic sports in today's climate?

Al: John, we've had three state Supreme Court decisions in 2017 alone involving high school athletics and sport. But I think this year as in every year, there's a handful of concern areas that float to the top.

The first I call children and others in harm's way. It just strikes me that bad things can and often do happen in a game where players and other people are somewhere other than where they should be on the court or field. There are collisions between people and between people and objects can obviously cause injury.

Contact sports, the danger is magnified, sports with multiple participants on opposing sides. Sometimes they're traveling at high speed. More often than not game management in this area leaves something to be desired from a risk management perspective.

The next area, equipment and facilities. In some cases we see, it's a case of bad equipment. In others, it's the case of not using equipment that could prevent injuries or mitigate injuries at all. Then we have makeshift equipment or items used in contexts other than sports.

We had an incident a few weeks ago that I'm sure a lot of people saw on the news here in the metropolitan area where a high school football player doing a conditioning drill was unfortunately killed by a large log that he and several of his teammates were carrying in a drill. That is used apparently in the military, and the log fell on the boy's head and resulted in his death.

We see all kinds of things going on with equipment, facilities. Sometimes these things are preventable. The consequences can be very high when people don't take into account the age and skill level and the appropriateness of the equipment or the facility for that level of play. Over the years, some parties' defendant have been able to walk away, and some were not so fortunate when equipment is involved.

Third area: injury response. Not only first aid but also the risk associated with moving an athlete prematurely after an injury or not having a healthcare professional within easy reach or failure to even summon medical assistance in a timely fashion. These things all contribute to the claims experience, and all of this is magnified when we talk about concussion or what I like to call concussion confusion.

Now we have a seven year history of playing rule support, state statutes everywhere, and we still have inappropriate responses in many cases to the potentially concussed athlete.

Next, failure to teach fundamentals and, its nasty twin, letting aggressive play morph into taunting and baiting situations and even fighting. All unsportsmanlike conduct of this nature provides a fertile climate for serious injury situations.

Finally, perennial high risk areas of unchecked violent behavior on the part of not only student athletes but others in the venue. Immunity protection in this area only goes so far in the presence of an arguably reckless and aggressive coach who might not hesitate to incite a crowd as well as his or her athletes in terms of behaving badly. These are all factors that make managing risk in this area very challenging.

John: Al, have the playing rules evolved in response to recent claims experiences at all?

Al: I think they have, and I think they continue to evolve as coaches and athletes devise more ways to try to beat the rules and so doing sometimes find themselves in injury situations. We've had playing rules modifications over the years and refinements in fighting penalties resulting in suspension not only on the high school level but at the youth level in some cases internally at the NCAA level.

Taunting and baiting rules have been refined and various interpretations have come up regarding trash talking and untoward remarks directed by an athlete or a coach -- usually at an opponent.

Excessive physical conduct and contact has been the subject of a great number of rules modifications including the targeting rules, notably in football, using a helmet as a battering ram, chop blocking, horse collar tackling, spearing, and so forth.

Rules regarding leaving the bench area during a fight also are in response to claims experiences that have actually happened in high school sports and unfortunately below. Rules regarding clearances from sidelines and where people are allowed to be and where they are not allowed to be, rules regarding unauthorized persons on the field, spectator interfering with games.

Of course rules about equipment, which we talked about a little bit before, that may not be suitable or that is dangerous in some way, hard surfaces, jewelry, headwear, sometimes medical devices, sometimes casts and braces.

Also if equipment is lying around the playing area, all of these things represent a potential for injury and are essential to managing risk in terms of the rules modifications and paying attention to the rules modifications.

John: Al, how are carriers responding to claims involving injuries resulting from assaults and other intentional acts?

Al: We've had a couple of fairly recent cases, one very recent, where carriers have gone in on declaratory judgment actions or otherwise moved to basically abrogate whatever coverage may have otherwise existed.

We had a case where a baseball coach was actually convicted of unintentional homicide where he was conducting a team meeting after a game and went into a fight situation involved a concessionaire, believe it or not. It ended up that there was a fatality. Coach wanted coverage, and coverage was actually in the final analysis afforded to him.

There was another case in Hawaii where a youth football coach who was reportedly known to have some violent tendencies charged onto the field and assaulted a player and evidently threw him into the air with such force that his head hit the ground.

That situation in that case ended up in coverage being denied and that ruling upheld on appeal by the court. There are responses to these types of claims that we see increasing because of intentional conduct such as assault and other intentional torts on the playing field.

John: Since the influx of legislation in claims involving concussion in sports, you mentioned concussions earlier, have the high schools devised effective risk management strategies regarding concussion?

Al: I think that, John, is a work in progress. There are risk management strategies that one would think would be dictated not only by the playing rules that have been in effect in their present format for most high school sports since March of 2010.

In 2010 of course, we had only a handful or so in terms of state legislation regarding concussion for example. In 2014, by then we had 50 or 51 state legislatures including DC enact legislation involving concussion in sport applicable to high school sports. Those items have been around for a while in terms of both the rules and state law but of course not always followed by appropriate risk management practices.

With that, it's a continuing work in progress. There's still a lot of confusion, and there are a lot of misgivings about how to handle these situations on the field.

There was the Washington case involving an athlete named Andrew Swank was recently heard by the Washington Supreme Court, and decision came down remanding the case back in terms of the coach's liability for that particular injury and whether or not his conduct was grossly negligent. Still an open issue, John.

John: How about from a referee perspective, Al? Have the protocols change for a head injury since the 2010 playing rules revisions and the influx of more state legislation?

Al: The protocols have evolved in a certain way. It has taken a few years, but those associated with high school sports have come to realize that it's actually the referees and the umpires and the other game officials at whose feet a concussed athlete will often fall.

These folks really are in the best position most of the time to determine whether or not a student is exhibiting a sign, symptom, or behavior that's consistent with concussion.

Under the law in most states, that standard or a similar standard where there is a reasonable suspicion that there may be a concussive injury that occurred is left to either the official or a coach or another medical professional. But the important thing of course is if there is a symptom or sign or behavior of concussion, to get the student athlete out of the game so he or she can be evaluated.

The process is evolving. Referees are trained and instructed that if they notice any one sign, symptom, or behavior of concussion present after a fall or contact, an athlete has to come out. Regardless of whether anybody else wants to discuss it or not, the athlete has to come out at least at that point in the game. So that's pretty much where the protocol is.

John: Al, how have recent statutory immunity decisions impacted the stakeholders in the administration and conduct of interscholastic sports programs?

Al: The statutory immunity has been upheld by the Supreme Court of Illinois this year, also by an appellate court in Connecticut this year again, and by the Swank case that we talked about a couple of minutes ago, the concussion case in the state of Washington, also by the Supreme Court of Washington.

You had rather a generous ruling in terms of the defendant in the Illinois case, which involved actually a physical education setting where you had a floor hockey game. The issue was, among other things, whether there was supervisory immunity because the physical education instructor who was supervising a floor hockey game made the safety goggles that were available optional for the students.

The students declined or most of the students -- including the injured plaintiffs certainly declined to wear the goggles. Of course that particular student sustained a serious eye injury, being struck with a ball in the floor hockey game.

This became a case that was litigated all the way up to the state Supreme Court, and the immunity was upheld despite the fact that the teacher felt that the modified floor hockey equipment that she was using that provided for the students did not present the risk of serious injury. So that's a case that certainly could have gone the other way, but that's the way it ended up.

John: Al, have the efforts of state legislators made a difference in how sports manage risk?

Al: It's clear that those efforts have. There's an increased consciousness, John, on the part of how sports programs are constructed and how at least nominally the regulations have come down.

State legislatures in some case have specific penalties, although in most cases, they don't, but they certainly have specific directions requiring the adults responsible usually, and most often the coach, sometimes the official mentioned as well, but the deal is that the adults in charge of the game need to get the student athlete who has a symptom, sign, or behavior consistent with concussion out of the game.

That in turn along with an increased emphasis on trash talking and intimidation and race baiting and so forth have generally anecdotally at least made the people in charge of administering high school sports more sensitive to the fact that bad consequences can ensue when the rules and regulations not only the legislature sets by statute but by administrative regulation and by playing rules and playing rules modifications in some cases.

If these aren't adhered to, then in some cases, like in the Swank concussion case, there is at least an implied cause of action that flows from failure to obey the statute. Of course, gross negligence and reckless misconduct is very rarely if at all a defense to a claim so that if there would be otherwise immunity for ordinary negligence, you don't have it for gross negligence or recklessness.

Generally, the consciousness is being raised. But again, as my friend, Professor Abrams, so aptly wrote when talking about concussion law and regulations and enforcement, he quoted Tip O'Neill who said, "All politics is local." Doug Abrams' point was all rules enforcement is local as well.



We really solve the problems of rough play and concussion in sport and dangerous tactics and illegal equipment and lack of crowd control and all the other evidence of bad administration locally at the venue because the people in charge obviously have to act and have to be proactive to prevent any injury that might occur.

Not that you're required to absolutely prevent an injury as we know but you need to make an effort. You need to do what's reasonable and appropriate.

We think that the legislatures acting certainly have raised the consciousness, but it's always a struggle to translate that into what your people do down on the field or in the gymnasium.

John: Al, thank you so much for joining us again today.

Al: Thank you, John. Great being with you.

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

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