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VOLUME 1, ISSUE 3

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Katherine Barnes, MS, ATC, and athletic training student Lindsy Herd assist a track athlete at the University of Kansas. Photo courtesy of Kansas Athletics

NATA Debuts Liability Toolkit

Resource designed to help ATs in all settings evaluate their risk of liability, gaps in coverage

BY BETH SITZLER

With the expansion of the athletic training skillset to include the management of concussions, emergency situations and other injuries that can have long-term consequences, athletic trainers are experiencing an increase in liability risk.

To ensure NATA members are aware of their liability risks and any gaps in their institution's insurance coverage, the NATA Liability and Risk Management Assessment Work Group was formed to develop an educational toolkit to help athletic trainers assess their liability.

"As an athletic trainer, you need to understand what risks you have and the best way to protect yourself," said Randy Cohen, ATC, DPT, chair of the NATA Liability and Risk Management Assessment Work Group. "[Athletic trainers are] specifically mentioned in state concussion laws. We're specifically mentioned in best practice documents. We are managing things that are risky. Every athletic trainer needs to know that they're protected and how they're protected when they're working in these situations."

After more than four years and thousands of work hours, the NATA Liability Toolkit was launched at the end of 2017.

"We discovered there are actually significant gaps in coverage that the athletic trainer has and that they're not even aware of it," Cohen said. "[A lot of athletic trainers were] doing things that weren't covered by their employer and they didn't realize it or their employer didn't realize that they weren't covered for all or certain aspects of their job.

"The Liability Toolkit allows the athletic trainer to fill out a form, go to their administration, their risk manager, their attorney, their insurance and say, 'This is what I do. This is how I do it. Am I covered under you by doing what I do?'"

Gretchen Schlabach, PhD, ATC, chair of the NATA Professional Responsibility in Athletic Training Committee and liability work group member, said while more focus has been placed

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on liability in recent years—as seen with the CAATE Standard requiring that all athletic training students hold or have professional liability insurance—there is still a lack of awareness that needs to be addressed.

"Professional liability coverage is incredibly important," she said. "Historically, employer liability coverage was believed to be enough. With athletic trainers being named in lawsuits today, it is important to ask ourselves if we feel comfortable with our liability insurance protection."

Using the NATA Liability Toolkit

Cohen said more than 100 experts in various settings and content areas were brought in to review and assist with the toolkit, ensuring no liability rock was left unturned.

"I think the biggest reason it took so long [to create the toolkit] is because when we started peeling open the onion, it just kept getting more and more layers and getting more and more complicated," he said. "Simple questions did not have simple answers."

> *"As an athletic trainer, you need to understand what risks you have and the best way to protect yourself,"*
>
> RANDY COHEN, ATC, DPT, CHAIR OF THE NATA LIABILITY AND RISK MANAGEMENT ASSESSMENT WORK GROUP

An example of this is sovereign immunity: Are athletic trainers who are employed by the state covered by sovereign immunity and therefore immune from civil suit or criminal prosecution? While a seemingly simple question, there are actually several facets to consider, with each state having its own say on the matter.

"Once you started asking one question, you opened up three other questions," Cohen said.

The result of those long hours and copious questions is a working document that athletic trainers in every setting can fill out online and get printable reports detailing areas of potential risk and how those risks can be mitigated.

"You start out by saying what populations you work with, and with each population you work with, you have to go through and individually put in there what you do with these populations," Cohen said of the toolkit, which offers exclusive access to NATA members. "Once you do that, you're also given the opportunity to look at your state license and state practice act to make sure what you're doing with each one of those patients, athletes, clients—whatever term you use—is appropriate and falls within your practice act."

Since the toolkit is extensive and covers a lot of ground, Cohen said athletic trainers shouldn't be surprised if it takes them more than one sitting to complete.

"The questions are not easy to answer," he said. "You're going to have a lot of 'I don't know' as the answers, and as an athletic trainer, you're going to have to do some legwork to investigate these answers."

While this may seem daunting, Cohen said it's important to put in the time and effort, adding that participants have the option to save their work and return to later if needed.

"I think the main thing is you have to just open it up and start answering the questions," he said. "What you'll end up having to do, once you get to a question you don't really know the answer to, is flag it or put unknown and try to find the answer. You can then go back and fill it out with the correct answer."

After the form is completed, the participating athletic trainer receives two reports that identify gaps in liability coverage—one that they can share with their administration and a second that can be shared with their insurance provider, written in industry-specific language.

"The next step after that is to go and have conversations with your administration and work your way up the chain to fill in those gaps to make sure you, the athletic trainer, are protected in everything you do and the institution is aware there may be gaps," Cohen said.

If there are gaps in coverage, the athletic trainer and their institution can work together to come up with a solution, be it reaching out the insurance provider or no longer performing those tasks.

"There may be situations where the institution says, 'I'm willing to accept that risk,' or you say, 'I'm willing to accept that risk for this portion of what I do.' And if you're not willing to accept that risk, then you need to realize those are things you're not doing within your job," Cohen said.

Cohen and Schlabach said ultimately the toolkit should be used to initiate a conversation about liability insurance coverage—or lack thereof with the ATs institution's administration, risk management, attorneys, etc.

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RECENT ARTICLE EXPLORES THE ROLE OF ETHICS IN STATE YOUTH CONCUSSION POLICYMAKING

BY KERRI MCGOWAN LOWREY, JD, MPH

A recent article published in the *Journal of Health Care Law & Policy* explores the role of ethics in developing effective youth sports concussion laws, arguing that the ever-evolving nature of knowledge regarding concussion pathophysiology, diagnosis, management and prevention means that concussion policy is largely based on shifting evidence. As a result, when it comes to so-called return-to-play laws, systematic review of the state of the science—and revisiting and revising the laws to reflect that knowledge—may not just be good policymaking, but may actually constitute an ethical imperative.

According to the article, "Ideally, public health laws would be developed on a robust base of scientific, epidemiologic and medical data and enacted independent of the various political forces at play. In reality, of course, this 'gold standard' is often unattainable." Rather, the success of legislation in the U.S. "depends on a combination of empirical data, anecdotal evidence, political will, political palatability, media involvement and the myriad number of issues simultaneously vying for policymakers' attention."

The complex combination of factors that drive the development and passage of public health laws—including return-to-play laws—means they are often the result of compromise; public health is just one among many important (and sometimes competing) national values, such as civil liberties, autonomy and privacy. When laws infringe upon one of these other values because lawmakers decided public health takes precedence, or when public health laws serve to create in the public a perception of safety or protection, principles of ethics demand that the law be effective or at least not harmful.

In 2009 (actually earlier if one counts a 2007 Texas law that required concussion training for coaches and medical clearance before return for athletes who lost consciousness), states began to pass legislation designed to educate student athletes, their parents and, in many cases, coaches about concussion and the risks associated with returning to physical activity before the brain has healed sufficiently. By summer

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"I think it's very educational," Schlabach said of the NATA Liability Toolkit. "It prompts athletic trainers to ask questions that they would not typically think of asking. They really need to spend some time to see where they believe they are covered, see where they believe they aren't covered and they need to sit down and have a conversation with their risk manager or whoever oversees risk management at their institution or in their work setting."

Continuing the Liability Conversation

Although the toolkit is complete, the discussion surrounding liability isn't ending. Schlabach said the NATA PRAT Committee issued a survey to members when it was first established two years ago to determine legal, ethical and regulatory needs. Liability education was at top of the list.

"Risk management is a really important area athletic trainers would like to learn more about, and that includes malpractice or liability and how to minimize the risk of that. So we, as a committee, have taken that on to provide protection-development programing as it relates to minimizing risk," she said, adding that during the 69th NATA Clinical Symposia & AT Expo this June in New Orleans, Cohen and Jeff Konin, PhD, ATC, PT, will present on minimizing legal risk. "That will be a really informative presentation. The PRAT committee is working on professional development activities to help members lessen the risk."

As for the toolkit, Cohen said the next step is for all 50 states to create their own individual liability toolkit to be used in conjunction with the NATA Liability Toolkit.

"Each state toolkit would be specific to what's legal, what's not legal in their individual state," Cohen said. "Like, what does the practice act say you can and can't do? Within that practice act, what are the standards of the state for, say, documentation, record keeping, how long you keep documentation, medical records, the confidentiality laws of that state? What does the state say about concussion laws? What does state specifically have for sovereign laws and good Samaritan laws? All of those are state-by-state regulation."

Members can access the NATA Liability Toolkit at www.nata.org/practice-patient-care/risk-liability#liability.

Third Circuit Denies Appeal of the Parents of Concussed Football Player

The 3rd U.S. Circuit Court of Appeals has denied the appeal of the parents of a high school football player who sued the school district and the coach after he suffered a traumatic brain injury during practice.

In so ruling, the panel of judges noted that at the time there was no law in place that would hold the district and coach accountable for a decision to re-insert a player in practice before he or she was medically ready.

The decision comes on the heels of a 2016 decision by a federal judge from the Middle District of Pennsylvania, who granted the motion to dismiss brought by the aforementioned school district. The district court found that the parents failed to provide sufficient evidence to support their claim that the defendants violated their son's constitutional rights as well as protections afforded by the "state-created danger" theory of liability. In addition, it found that the school employee, who was a co-defendant in the case, was entitled to qualified immunity.

The son who suffered the injury began his participation in the school's football program starting in July 2008. On Nov. 1, 2011, he was participating in football practice at the high school when he was hit by a teammate running full speed toward him. After the hit, he reported feelings of numbness and/or disorientation to the coaching staff, and his behavior became erratic. Immediately after the incident, the coaches told him to continue practicing, according to the complaint. They also allegedly failed to perform a medical evaluation or send him to the athletic trainer.

Later, during the same football practice, he was hit again, causing him to be confused, dazed and unable to continue practice. He was taken to the school's athletic trainer thereafter, but could not provide complete information to the AT regarding the two hits he sustained, according to the complaint.

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2015, return-to-play legislation had been passed in all 50 states and the District of Columbia.[1] This rapid, nationwide adoption of public health policy was almost unprecedented and likely occurred as a result of the nonpartisan support of concussion legislation, low perceived cost and the sympathetic population targeted by the laws.[2] In addition, nationwide passage of youth sports-related traumatic brain injury (TBI) legislation rode atop a wave of increased media attention on the effects of TBI in professional sports, including the tragic suicides of Dave Duerson, Derek Boogaard and Junior Seau.[3]

A criticism of the rapid adoption was that the laws themselves were rather similar. Legislatures relied largely on Washington's Lystedt Law as a model without much policy experimentation to tailor to existing state infrastructures and processes or empirical evidence on effectiveness.[4] As such, most laws contained three main provisions: concussion education for parents and athletes, immediate removal from play after suspected concussion and medical clearance before returning to play. Given what was known, championing these three key provisions and focusing on secondary and tertiary prevention were appropriate, if not inclusive of all potentially important preventive factors, like mandatory training for coaches. "But what about now? Science is ever-evolving, and with it our understanding of brain injury, prevention and protective factors are constantly changing," the article stated.

While researchers are still studying the precise pathophysiology of concussion and its effects, there has been a rapid proliferation of scientific concussion research.[5] A growing body of literature indicates that concussions are widely underreported and underdiagnosed.[6] Some research has suggested that repetitive "minor" brain injuries, including subconcussive blows, can lead to functional,[7] structural,[8] biochemical[9] and potentially chronic neurodegenerative[10] health consequences. This growing scientific evidence may have motivated legislators to add primary prevention strategies to state laws.[11] To date, 31 states have made substantive changes to their laws since original enactment; 14 states more than once. Encouragingly, these changes seem to reflect lessons learned in implementation of the law (allowing athletic trainers to make return-to-play decisions) as well as evolving knowledge (reducing allowable minutes of full-contact practices).

According to the article, "The rapid pace of concussion research is likely to yield further

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The court noted that at the time of the incident, the district was using a series of policies and procedures outlined in its 2011-12 athletic handbook to inform the coaches and parents about the district's policies, procedures, rules and regulations and general guidelines relating to its athletic program. The handbook outlines several policies requiring, among other things, the exclusion of any player from play who has suffered injury or illness until that player is pronounced physically fit by a physician. The handbook also details the duties and responsibilities of various employees in the athletic program, including the head coach, who is required to inform the athletic trainer of any injuries that occur during practices or games. Additionally, the handbook contains a separate section dedicated to the proper handling of injured players. The procedures outlined in this section prohibit injured athletes from returning to practice or competition without first being cleared by the athletic trainer. The handbook does not include any policies or guidelines that specifically address concussions or other head injuries. The district also adopted concussion policies, though deposition testimony shows it is unclear if these policies were written out at the time of the incident. It is undisputed that one year after the incident, however, the district had a written concussion policy in place.

The Claim

Specifically, the plaintiffs claimed that the football player's rights were violated as a result of the coach's "exercise of authority in telling [him] to continue participating in football practice after sustaining a hit and exhibiting signs of a concussion." They also claimed that his "rights were violated as a result of the district's practice of failing to medically clear student athletes, failing to enforce and enact proper concussion policies and failing to train the coaches on a safety protocol for head injuries." On Feb. 1, 2016, the defendants moved for summary judgment, arguing that there is insufficient evidence in the record to establish a state-created danger claim against the employee and a municipal liability claim against the district. The defendants also argued that even if there were sufficient evidence to establish a state-created danger claim, the employee would be entitled to qualified immunity.

In its analysis, the district court relied heavily on case law: "A government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Hinterberger v. Iroquois Sch. Dist., 548 F. Epp's 50, 52 (3d Cir. 2013) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011)). In determining whether a right has been clearly established, the court must define the right with the appropriate level of specificity. Sharp v. Johnson, 669 F.3d 144, 159 (3d Cir. 2012).

The viability of a state-created danger claim is well-settled. Hinterberger, 548 F. App'x at 52. However, no published opinion of the Third Circuit has found that a state-created danger arises when coaches fail to take certain precautions in athletic practice or in any analogous situation. Id. at 53. In Hinterberger v. Iroquois School District, a cheerleader suffered a severe closed head injury after attempting the "twist down cradle," a new stunt introduced by her coach at practice in a room without adequate matting. In analyzing whether the coach was entitled to qualified immunity, the Third Circuit explained that although district court opinions "may be relevant to the determination of when a right was clearly established for qualified immunity analysis," they "do not establish the law of the circuit, and are not even binding on other district courts within the district." Id.

Noting that the district court below relied on district court opinions to find that a right was clearly established, the Third Circuit reversed and concluded that those cases alone did not place the defendant coach on notice that her actions amounted to a constitutional violation. Id. at 53-54. The Third Circuit emphasized that cases from other courts of appeals also did not support the plaintiff's claim that her alleged constitutional right was clearly established, and cited to various cases that disagreed as to the applicability of the state-created danger doctrine in the context of schools. Id. at 54 (citing cases). See, e.g., Priester v. Lowndes Cty., 354 F.3d 414, 422 (5th Cir. 2004) (noting that the Fifth Circuit had not adopted a theory of state-created danger and otherwise found no liability for injury sustained to student during football practice). Fully recognizing the tragic nature of the plaintiff's injury and "the fact that more might have been done to prevent it," the Third Circuit concluded that the alleged constitutional right was not clearly established at the time of her accident. Hinterberger, 548 F. App'x at 54.

The critical portion of the Third Circuit's analysis in reversing the district court and concluding that the defendant coach was entitled to qualified immunity from suit is directly applicable here:

"The plaintiff does not cite, and we have not found, any precedential circuit court decisions finding a state-created danger in the context

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insights that will show where current concussion laws are likely to yield health gains—but also where they are likely to fall short." For example, ongoing research will hopefully shed light on when and whether an athlete can safely return to play, information that should then be incorporated into future educational and return-to-play requirements.

Legal interventions in public health can rarely rest on robust, valid and replicable evidence of "effectiveness," evidence that the law certainly will bring about a desired health outcome or prevent an undesired one. Indeed, there are valid reasons to take action before the evidence base is solid, particularly when vulnerable populations are involved. State legislatures enacted return-to-play laws to protect children despite an uncertain evidence base as to the exact nature of the problem and the most effective way to address it.[12] As evidence from the medical field and implementation emerge, states have begun to amend their laws in response—and this is evidence of healthy and ethical policymaking.

"A law that restricts freedom or creates a perception of enhanced safety or protection and does not 'work' is, we argue, an unethical one, because it either unnecessarily restricts autonomy or creates a false perception of safety," the article stated. Evaluating current legislative policy and acting upon resulting knowledge are ethical imperatives, particularly in the face of evidentiary uncertainty.

You can read the full article at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5241084/.

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of a school athletic practice. We thus conclude that the plaintiff's alleged right was not clearly established at the time of her accident." Id.

The court administering the instant opinion found the analysis in Hinterberger "instructive." Further to that point, "because [the son's] alleged right was not clearly established at the time of his injury, [the employee] is entitled to qualified immunity."

Turning to the school district, the court noted that it "cannot be held vicariously liable for the Constitutional violations committed" by its employees. Monell v. N.Y. City Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). "Rather, for liability to attach, the plaintiffs must show that the violation of their rights was caused by a policy, custom, or practice of the municipality. ... Here, the plaintiffs assert that the district is liable based both on municipal policies and customs that caused [his] injuries."

The court found no such policy or custom. "The evidence shows that shortly after [his] injuries in November 2011, the defendants began discussing how to address concussions and what protocols should be put in place."

Additionally, the court noted that the plaintiffs "have also failed to establish causation because even if the school district did have a concussion policy or protocol in place, it likely would not have had any effect on the situation because the plaintiffs have pointed to no evidence that [the employee] actually believed that [he] was suffering from concussive symptoms. Accordingly, the plaintiffs have failed to adduce sufficient evidence for their municipal liability claim."

The Appeal

On appeal, the panel of judges pointed out that there is considerable dispute about the circumstances or whether the athlete knew he was injured when he could keep practicing.

Furthermore, while conceding that "an injured student athlete participating in a contact sport has a constitutional right to be protected from further harm," the panel noted that there is a "difficult question of whether this right was clearly established in November of 2011.

"We are aware of no appellate case decided prior to November of 2011 that held that a coach violates a student's constitutional rights by requiring the student to continue to play" in circumstances comparable to the instant case.

Furthermore, it noted that there is no evidence of a "recurring pattern" of head injuries in the school district, or that the employee deliberately exposed injured players to harm.

"Given the state of the law in 2011, it cannot be said that [the employee] was 'plainly incompetent' in sending [him] in to continue to practice after he saw [him] rolling on his shoulder and being told by [him], 'I'm fine'," the panel wrote. "Nor is there any basis for concluding that he knowingly violated [his] constitutional rights." $

Second Impact Syndrome: Diagnosis Versus Myth

BY STEVEN E. PACHMAN, ESQ., MONTGOMERY MCCRACKEN WALKER & RHOADS, AND KIMBERLY L. SACHS, VILLANOVA UNIVERSITY CHARLES WIDGER SCHOOL OF LAW

On Nov. 5, 2005, La Salle University's Preston Plevretes took a massive blow to the head during a college football game against La Salle's rival, Duquesne University.[1] The play occurred in the fourth quarter, when an opposing player collided head-first with the 19-year-old Plevretes on a punt return. He lapsed into a coma almost immediately, and eventually underwent lifesaving brain surgery at a nearby hospital. Plevretes survived, but suffered lifelong catastrophic injuries as a result of the hit.

A few years after Plevretes' injury, 22-year-old fullback Derek Sheely lost consciousness and collapsed on the football field during a preseason practice at Frostburg State University.[2] Sheely was rushed to a nearby hospital and, on Aug. 28, 2011, passed away due to traumatic brain injury (TBI), by some accounts from a helmet-to-helmet hit.

Ever since sport-related concussions in football became a hot-button topic in 2007 when Alan Schwartz published his first Chronic Traumatic Encephalopathy article in the *New York Times*, followed soon after by the 2009 and 2010 Congressional hearings on legal issues relating to football head injuries, stories such as Plevretes' and Sheely's started becoming more commonly reported and litigated.

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Ryne Dougherty and Kenney Bui also were young football players who endured fatal hits to the head.[3] Nicholas Zemke, a high school football star from California, likewise suffered a debilitating head injury on the field,[4] as did Cody Lehe, Aaron Singleton and Andrew Swank.[5] The list goes on. While in recent years, there has been a greater focus on the health and safety of the athlete, one point remains clear: TBI in the contact sports world isn't going away.

What is less clear is the condition that purportedly claimed the deaths of all eight of these athletes: second impact syndrome (SIS). SIS is a controversial phenomenon that allegedly occurs when the brain sustains a second, subsequent impact before a previous injury has had adequate time to heal and recover.[6] The initial injury is said to make the brain more vulnerable, and the "second impact" purportedly sets in motion catastrophic cerebral swelling. Death can occur within two to five minutes after the second impact.[7]

Given TBI's tragic consequences, brain injury lawsuits are on the rise all across the country. In 2017 alone, at least three athletes commenced legal action seeking damages relating to traumatic injuries sustained on the field.[8] And who are the defendants in these lawsuits?

Negligence is a traditional legal claim that has four main elements: duty, breach, causation and harm.

Coaches, school officials, team doctors, athletic trainers and other health care professionals of record — all alleged to have been negligent (e.g., for prematurely returning a player to play following a prior concussion).

Negligence is a traditional legal claim that has four main elements: duty, breach, causation and harm. A plaintiff alleging negligence must prove each of these elements by a preponderance of the evidence: first, the plaintiff must show that the defendant owed the plaintiff a duty, and failed to use reasonable care in executing that duty. Then, the plaintiff must establish a causal link between the defendant's behavior and the resulting damages. In other words, even if a plaintiff successfully satisfies the first two elements, the plaintiff will not prevail unless it is shown that the defendant's conduct actually caused the resulting injuries.

This is where SIS comes into play. Since at least 2007, plaintiffs have been relying on SIS as the theory of causation in their negligence lawsuits. They claim SIS triggers rapid and severe cerebral swelling, and this swelling leads to death or permanent disability. In 2014, for example, Sheely's parents alleged that he died "due to complications from massive swelling caused by second-impact syndrome." Just last month, parents of another athlete who died following a TBI made similar allegations in a wrongful death suit against the athlete's school and coach.[9] At first blush, this seems unproblematic, but here is the catch: SIS may not actually exist.[10]

The Science—or Lack Thereof—Behind Second Impact Syndrome

The Preston Plevretes matter was a landmark TBI case involving a plaintiff's reliance on SIS as a theory of causation. In 2007, two years after Plevretes sustained a catastrophic blow to the head on the football field, he filed an action against La Salle University claiming, among other things, that the school's head athletic trainer and a nurse practitioner negligently cleared him to play despite ongoing concussion symptoms from a prior concussion he sustained several weeks earlier. He alleged that SIS caused his injuries, and retained as an expert Robert Cantu, MD, a neurosurgeon with experience in sport-related TBI, to opine on the condition.[11] In preparation for trial, Cantu penned an extensive report detailing the pathophysiology of SIS and concluded that SIS caused Plevretes' death. The case settled in 2009.

Years later, Cantu's name popped up in another catastrophic injury lawsuit. This time, he was called by lawyers for Nicholas Zemke, a high school football player who sued his coaches and school district after sustaining a debilitating head injury during a game.[12] At trial, Zemke presented Cantu's opinion regarding the cause of death, namely, that Zemke's brain trauma was the result of SIS, and SIS would not have occurred had Zemke's coaches kept him on the sidelines. However, this opinion never made it into evidence. Ultimately, the court sustained the defendants' objections to Cantu's declaration on relevance grounds.

Cantu also was retained by Ryne Dougherty of Montclair, New Jersey—a young athlete who endured a fatal hit to the head less than a month after returning to football following a concussion.[13] Dougherty's parents sued Montclair High and the township's board of education, alleging

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Q & A

ERIC FUCHS DISCUSSES HOW EDUCATORS ARE PREPARING TOMORROW'S ATHLETIC TRAINERS

The athletic training program at Eastern Kentucky University has a long and proud history since its establishment in 1971. Two athletic trainers have been influential in guiding the program—Bobby Barton, ATC, NATA Hall of Famer and former NATA president, and Eric J. Fuchs, ATC, AEMT, who took on the leadership role more than a decade ago.

Fuchs is chair of the Exercise & Sport Science Department at EKU and teaches in the athletic training program. He sat down to talk with us about being an athletic training educator and what today's athletic training students need to be aware of when it comes to liability.

Q: What interested you first, being a professor or an athletic trainer?

My interest in athletic training came first. I was an athletic training student aide in high school, which led me to attend some summer athletic training student camps. Those experiences made me want to pursue the profession of athletic training. The mentorship of my high school AT and other ATs at these workshops served as catalysts for me attending an accredited athletic training program at Ohio University. I double majored in athletic training and health education and received my teaching certification in health and biology. I knew at the time that with this combination, I could work in any setting—high school, college or clinic. Finally, I went to San Jose State University to earn my master's degree in athletic training.

Q: As an educator, what do you think are the most pressing legal or risk management issues facing ATs today?

One pressing issue is the ability for ATs to practice in various states when traveling with

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that school officials prematurely cleared Dougherty to play. SIS emerged as the theory of causation, and Cantu was prepared to testify about the condition had the case gone to trial. That never happened because, in 2013, the parties settled for $2.8 million.

These three stories, tragic as they are, illustrate that SIS surfaces in TBI lawsuits, but it has yet to be proven. Plaintiffs' lawyers advance SIS as the theory of causation, and retain medical experts to testify about the science and pathophysiology behind this so-called syndrome. These experts are finding SIS, however, even when the "second" impact occurs weeks—and multiple games—after the first impact, as in Plevretes, or where the first and second impacts are not easily identifiable, if identifiable at all, as was the case in Sheely.

Cantu has emerged as one of the go-to experts on the plaintiff's side. His name continues to appear in medical literature, news reports and legal proceedings, and his opinion generally remains the same: SIS is a valid diagnosis that can lead to death or permanent disability.

Cantu, however, represents just one side of the SIS debate. SIS has garnered much controversy in the sports-medicine community, and some experts question the existence of the condition altogether. For example, Dr. Paul McCrory, a leading neurologist and sports physician from Melbourne, Australia, has been studying SIS for almost two decades, but has yet to find verifiable scientific evidence to suggest that a repeated concussive injury is a risk factor for rapid and severe cerebral swelling.

In 1998, McCrory undertook an empirical study of SIS, seeking to gain a better understanding of the elusive condition. He and his colleague, Samuel F. Berkovic, analyzed 17 fatal cases of so-called SIS, evaluating them under four diagnostic criteria. Under this study, a case that satisfied all four categories would be classified as "Definite SIS."

Notably, not one case fulfilled the criteria for this classification. Of the 17 cases, only five actually involved a repeated blow to the head, and it was unclear whether the initial injuries played any contributory role in the ensuing deaths.[14] Twelve of the cases displayed SIS-like cerebral swelling, but one thing was missing: a second impact. The athletes in these cases simply collapsed and died without any further injury occurring. Given these results, McCrory found that SIS as a risk factor for the described cerebral swelling is not established.[15]

Almost 20 years later, McCrory appears to stand by his initial conclusion.[16] To him, SIS is still an anecdotal myth based on the interpretation of unreliable reports and eyewitness accounts.[17] As he said in the *Clinical Journal of Sports Medicine*, "Most cases of traumatic cerebral swelling, whether associated with a structural brain injury or not, have no prior evidence of head injury with ongoing symptoms that would support the concept of second impact syndrome as defined in the literature. In those cases that are presumed to represent SIS, the evidence that a prior head injury is a risk factor for this pathophysiology entity is not compelling."[18]

Experts like Cantu undoubtedly disagree with this outlook. McCrory, however, makes a good point. Researchers have been studying SIS for decades, but there is still a complete "lack of systemic evidence for its existence."[19] Belief in SIS remains largely opinion-based, and, while new studies emerge each year, none has provided concrete answers about this condition. It may take many years before a universal conclusion is reached.

The problem, of course, is that plaintiffs—and their lawyers—are not going to sit back and wait for the scientific community to reach a resolution.

The problem, of course, is that plaintiffs—and their lawyers—are not going to sit back and wait for the scientific community to reach a resolution on SIS to start using the condition in their lawsuits. So long as experts like Cantu view SIS as a valid diagnosis and are willing to liberally reach an opinion that a plaintiff sustained SIS, plaintiffs will continue to use the syndrome in attempting to establish the requisite causal link between breach and damages in negligence cases. Indeed, the SIS theory is becoming so flexible that lawyers through their experts are taking any given fact pattern and just slapping the label SIS on it, whether it's the second, 50th or 250th impact that causes the ultimate injury and regardless of the timing between the first and "second" impact or

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teams across state lines. This is being tackled through the Sports Medicine Licensure Clarity Act, a federal bill supported by NATA. It is critically important to assure ATs can provide care to their patients when traveling outside state lines, and there are many open legal questions or concerns if this legislation doesn't pass. The inconsistencies between state practice acts related to what athletic trainers can and cannot do creates challenges for accredited programs when deciding what skills or techniques to teach and what ATs and preceptors in that state are unable to perform due to practice restrictions. For example, a grade five mobilizations of joints falls within scope of practice of an AT in many states, but not all.

Another pressing issue is documentation of patient care. ATs need to keep quality records and documentation regardless of job setting. If ATs are to be recognized as health care providers, this is an area we need to improve upon. Quality medical records lead to better patient care, including coordination and communication between the various members of the sports medicine health care team.

Q: Have you noticed a change in the way students are taught about legal issues in sports medicine?

I believe this is becoming a bigger focus of athletic training programs and, more importantly, of students themselves wanting to know the liability of working with athletes since the increased focus on head injuries and the various lawsuits, many of which are pending.

Q: Do you think there needs to be a bigger emphasis on teaching legal issues in sports medicine?

I know our program and other programs do a good job teaching the basics; however, I think there needs to be a greater emphasis on the process of litigation and a lawsuit. For example, many programs talk about the processes and steps and mention depositions, but how well are we preparing our students to know and

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whether the injury-causing impact is a forceful one or one that is relatively minor. In short, lawyers and their experts are making SIS whatever they want it to be to establish their case.

How courts will grapple with SIS as a theory of causation is another issue and remains to be seen. What is certain, however, is that coaches, athletic trainers and school officials alike need to know how to best defend against these claims.

Injury Prevention and Management in the SIS World

By now, it is clear that sport-related concussion is a common injury among athletes and associated with a host of potential legal issues. TBI lawsuits are popping up all over the country, and coaches, athletic trainers and school officials are often named as defendants in these litigious situations. The risk of liability is especially high for athletic trainers. When an athlete is injured during a sporting event, athletic trainers are often the first to identify the injury, develop a treatment plan and clear the athlete to return to play. Every action athletic trainers make in this regard carries with it significant responsibility. In a world where SIS remains a debate, these decisions become even more critical.

Fortunately, there are steps athletic trainers can take to ensure they are keeping with best practices. The key is education. Athletic trainers should be intimately familiar with the most recent National Athletic Trainers' Association position statement on the management of sport concussion.[20] Irrespective of the validity of the existence of SIS, the position statement purports to describe the syndrome as malignant cerebral edema that occurs after an athlete sustains an impact while still symptomatic from a previous injury to the head or body, and recommends that athletic trainers be aware of the potential for this condition, especially in young athletes. What athletic trainers should take from the NATA position statement is that while NATA has yet to take a firm stance on the existence (or non-existence) of SIS, it nonetheless regards diffuse cerebral swelling as a potential danger for young athletes and cautions athletic trainers to understand the threat of this condition.

Next, athletic trainers must know their institution's concussion management plans and make certain that post-concussive student athletes are prohibited from returning to play until they are asymptomatic and have been evaluated and cleared by a medical doctor or doctor's designee. Whether SIS exists or not, these protocols, at the very least, are designed to protect student athletes from sustaining further injury on the field. As McCrory said, "The danger of prematurely returning to sports relates to the risk of sustaining further injury. Neuropsychologic measures of speed of information processing and reaction times are slowed in the early stages post injury. In this setting, an athlete participating in a collision sport [such as football] or high-risk sport [such as motor car racing] may not be able to respond appropriately to dangers in the sporting situation and hence sustain further injury."[21]

Athletic trainers not only need to stay abreast of advances in the field, but also need to proactively modify their concussion management protocols according to changes in local and state laws, professional organization standards and international consensus statements.

Finally, athletic trainers should keep informed of the latest changes and developments in traumatic brain injury research. If the debate over SIS tells us anything, it is that the science behind sport-related concussion is ever-evolving. Athletic trainers not only need to stay abreast of advances in the field, but also need to proactively modify their concussion management protocols according to changes in local and state laws, professional organization standards and international consensus statements. Hopefully, there will be more clarity over the existence of SIS in the near future. Until then, athletic trainers and other health care professionals should err on the side of caution and continue to treat brain injuries with a combination of good sense and clinical judgment.[22]

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understand how to prepare for that deposition and what it truly entails? A way for athletic training programs to better prepare their students, for example, would be to set up mock depositions. Utilize your campus resources—maybe have a paralegal program or law school work with faculty and students from these programs to set up a mock deposition of your athletic training students and maybe the other students also serve as council or partner with a local law firm would might be willing to help. I think students are being taught about these [topics] but do not understand the importance or how to prepare for a deposition.

Q: What is your approach to teaching your students about ethics, risk and liability?

My approach has always been to discuss these not just in an administration or legal issues class, but across the curriculum. For example, when reviewing a clinical case presented by a student in a practicum class where they returned someone to play after an injury, I may direct them to questions—was that the right medical, legal and ethical decision? Again, just because a patient can, does not mean they should. Also, I will redirect and challenge them if someone says they should not have, but the patient wanted to. I will ask, "But does a patient not have the right to refuse treatment or go AMA against medical advice if they are an adult (i.e., a college athlete) so can we not allow them to continue?" I think the key, and my approach, has always been to challenge these concepts across the various courses in the curriculum. When grading a student's patient note, I may ask, "Would you be happy with this being read aloud in a court room or do you feel this patient documentation will stand up to legal review?"

Editor's Note: *NATA recently released its Best Practices for Athletic Training Documentation to help standardize documentation practices within the profession. View the resource at www.nata.org/practice-patient-care/risk-liability.*

SYNDROME, *continued from page 10*

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+ **Rest and Return to Activity After Sport-Related Concussion: A Systematic Review of the Literature**
+ **Legal Aspects of Concussion: The Ever-Evolving Standard of Care**
+ **Concussion Care Requires Communication**

Former High School Football Player Sues School Board Over Injury

A former high school football player has sued the school board for injuries he sustained during preseason football drills in the summer of 2016. The plaintiff filed his lawsuit against the board on June 19, 2017, in West Virginia state court.

The player was a senior on the varsity football team, where he played nose tackle. In his complaint, he claimed he was taking part in a one-on-one pass rushing drill under the watch of the defensive line coach and under the approval of head coach on the second day of practice, Aug. 2.

"The offensive players were given blocking shields and instructed to protect the 'pocket' in which the quarterback would normally be located by pushing away the defensive players with the blocking shields," according to the complaint. "The defensive players, in turn, were instructed to defeat the offensive players' blocks and rush into the pocket as quickly as possible."

During the drill in question, the plaintiff, an offensive lineman, was holding one of the blocking shields when another player grabbed him and his shield, knocking him "off balance. [A]nd while plaintiff was attempting to stabilize himself, his left [foot] planted into the ground, hyper-extending his left knee."

The plaintiff claimed the assistant coach and an athletic trainer looked at his knee and told him to sit on the bench with a bag of ice on his knee. The next day, he sought medical attention. An MRI showed a torn anterior cruciate ligament in his left knee. After surgery, he missed the entire football season.

According to the complaint, the West Virginia Secondary School Activities Commission established a practice schedule for 2016 that included the first day of practice as Aug. 1, the first day of players wearing pads with no contact as Aug. 5, and the first day of live contact as Aug. 9. The schedule and rules specified that sleds, shields and blocking dummies were not allowed until the first day of pads with no live contact, which began Aug 5. The player's injury occurred on the second day of practice, Aug. 2. The plaintiff claimed the principal also was accountable to the WVSSAC and should have notified her staff of the rules.

The plaintiff claimed he suffered severe and permanent injuries, sustained medical bills and other expenses, suffered a loss of enjoyment of life and will endure future pain and suffering, physically and mentally. He is seeking compensatory damages, pre- and post-judgment interest and other relief.

RELATED RESOURCES

+ **Implementing Health and Safety Policy Changes at the High School Level From a Leadership Perspective**

COLUMN

Whistleblowing: Reporting Violations

BY JEFF KONIN, PHD, PT, ATC; TIMOTHY NEAL, MS, AT, ATC; AND GRETCHEN SCHLABACH, PHD, ATC
NATA PROFESSIONAL RESPONSIBILITY IN ATHLETIC TRAINING COMMITTEE

The social contract is not your typical contract; it is not written, but rather an understanding that professions will adhere to their professional practice standards (PPS) and thereby serve the public in a beneficial and trustworthy manner. In return, professions are awarded the privilege to develop their own specific professional knowledge, technical skills, practice standards and ethical code.

To honor the social contract, let's discuss the who, what, where, when and how of reporting violations.

Requirement to Report to a Professional Organization

To ensure quality in patient-centered care, health care professions require their members to keep a watchful eye over professional practices by requiring them to report violations of PPS. Specific to athletic training, the organizations of the Athletic Training Strategic Alliance (the Board of Certification Inc., Commission on the Accreditation of Athletic Training Education, NATA and NATA Research & Education Foundation) require members to report PPS violations. The following documents explicitly articulate the member's responsibility to report:

NATA *Code of Ethics: 2.3. Members shall refrain from, and report illegal or unethical practices related to athletic training.*

BOC *Standards of Professional Practice: 3.5 The athletic trainer or applicant reports any suspected violation of a rule, requirement, regulation, or law by him/herself and/or by another athletic trainer that is related to the practice of athletic training, public health, patient care or education.*

CAATE Ethical Standards: *If an athletic trainer or other individual serving as a representative of CAATE during a site visit or review of accreditation materials encounters obvious illegal acts, there is an obligation to report such violation. If an athletic trainer, athletic training student, college administrator or other individual is uncertain whether a particular situation or course of action violates the CAATE Code of Ethics, [there is an obligation to report].*

Requirement to Report to the State Regulatory Board

ATs may have a legal obligation to report to their state board. There are a few athletic training state regulations that require the licensed professional to report violations of the practice act, for example:

- **Arizona** 32-4153. Grounds for disciplinary action 15. *Failing to report to the board any act or omission of a licensee or applicant or any other person who violates this chapter.*
- **Idaho** 54-3911. Denial – Suspension and Revocation of License – Refusal to Renew (l). *Failing to report to the board any act or omission of a licensee, applicant or any other person, which violates any provision of this chapter.*

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Responsibility to Report to OSHA

Finally, the Occupational Safety and Health Administration encourages employees to report unsafe work conditions or work-related injury or illness. Several states have their own occupational health and safety laws and state agencies that enforce the statutes.

Whistleblowing

Despite the requirement that an athletic trainer has to report a fellow athletic trainer for a potential violation, the act of doing so is referred to as "whistleblowing" and carries a perceived negative connotation by others. Most athletic trainers who report others professionals for violating PPS believe they are doing the right thing. While whistleblowers run the risk of bringing to light adverse circumstances, they often feel that not doing so has even greater consequences. Loyalty to a colleague does not outweigh the professional responsibility to report.

Unfortunately, the harsh reality is that many whistleblowers regret reporting violations due to the potential for negative consequences. At times, poor performance evaluations, employment suspensions and job-related transfers result soon after a complaint is filed. In other cases, whistleblowers have reported losing a job and/or an inability to obtain future employment in the profession. For some, this has resulted in the loss of a home, bankruptcy and even the disruption of a family. As a result, experienced whistleblowers often advise others against doing so without carefully considering such potential consequences.

It is unfortunate that the potential consequences serve as a deterrent to reporting inappropriate actions of others. Failing to have a process for policing each other, however, can result in harm for the entire profession. In an effort to minimize negative consequences while upholding the social contract, the following tips are offered to those considering filing a report of a violation against a fellow athletic trainer:

Reporting Tips

1. Consider speaking directly with those involved. Walk through the conversation ahead of time, planning for all possible reactions and outcomes. Recognize that your conversation may be viewed as threatening.
2. Prepare to manage any of the potential consequences that can be faced as a whistleblower within an organization.
3. When talking with those involved, point out that certain behaviors or actions may be in violation of PPS and/or state and federal regulations. Express your concerns and your obligation to report if the action continues or is not corrected.
4. Suggest the alleged violator self-report.
5. If the violation was not flagrant and the person in question takes corrective action, there is no need to report for the moment. However, if the act continues to violate PPS, then a report must be made to the appropriate organizations.
6. Consult with trusted family members, friends or even an attorney to seek their advice before reporting the violation.
7. Immediately report to the appropriate organizations any potential violation where a child was involved.

How to Report

After reviewing reporting tips above, individuals may file a complaint if there is reasonable evidence that the athletic training professional and/or athletic training facility violated professional, state or federal PPS. The individual can follow the appropriate processes of each organization:

- NATA Code of Ethics complaint form
- BOC Standards of Professional Practice complaint form
- CAATE Code of Ethics complaint process (contact executive director)
- State regulatory board complaint process – (contact the regulatory board)
- OSHA complaint form

One thing that helps understand the importance of reporting a violation is by looking at it from a broader perspective. Individual members of a profession who fail to adhere to PPS and refuse to self-correct are likely to damage the reputation of the entire profession for failing to honor the social contract. This could eventually lead the profession to lose its societal status and its privilege to self-regulate, resulting in external control.

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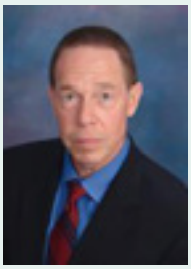

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