Tackling Concussion Liability Head-On: Stakeholders’ Standard of Care

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The catastrophic consequences associated with the mismanagement of concussions can threaten the health and well-being of student-athletes. The primary purpose of this article is to increase awareness of concussions and provide stakeholders—parents, coaches and athletic trainers—with an appropriate framework for concussion care at every level of play. The culmination of court rulings, legislature, and cautionary tales will educate stakeholders of the shared legal and ethical responsibility of creating and implementing appropriate concussion management procedures, which includes fostering a culture where student-athletes feel safe to report symptoms and remove themselves from the competition. Although a vast majority of recent literature focuses on concussion management in a football context, the practices and guidelines discussed are universally applicable across all sports.

On September 18, 2009, Drew Swank of Spokane Valley, Washington suffered a head injury during a high school football game that removed him from competition for the remainder of the contest. Three days after the injury, his
primary care physician, Dr. Timothy Burns, examined him and instructed Drew and his mother that he was not to participate for three days. Furthermore, he directed that if headaches continued after returning to football, Drew would need to sit out another week. Two days later, Drew insisted that his headaches were gone. His mom reached out to Dr. Burns to secure a medical release that would allow her son to participate in a football game scheduled for the following day. Doctor Burns complied and Drew returned to the field. However, as the game progressed, his performance quickly declined. According to those watching, Drew appeared sluggish, confused, and slow to respond. Subsequent reports confirm that his parents, teammates and coaches recognized his poor play. At one point, Coach Puryear called Drew over to the sidelines, grabbed his facemask, and berated him for his performance. Drew returned to the game, and after receiving another blow to his head staggered to the sideline and collapsed. Two days later, Drew Swanks was dead (Swank v. Valley Christian School, 2017).

The state of Washington, where Drew played football, had previously passed the nation’s first comprehensive concussion law, known as the Lystedt Law. Zackery Lystedt, a young athlete who suffered a catastrophic brain injury during a middle school football game, inspired the law (Mick-ool, 2013). Enacted in 2009, the Lystedt Law mandates that schools educate parents and players on concussion management and requires parents to sign a document acknowledging their understanding of the associated risks. The law also orders the immediate removal of an athlete from competition at the time of a suspected injury, and the player must be evaluated and receive a medical release by a licensed healthcare provider before returning to play. Since then, legislation concerning concussion management has been implemented nationwide, resulting in a significant increase in reported concussions and a decline in recurring concussions (Yang, Comstock, Yi, Harvey, & Xun, 2017). Although variations exist among state statutes, the vast majority follow the same procedures found in the Lystedt Law—procedures that clearly failed to protect Drew Swanks in the fall of 2009 and that further beg the question: With preventative measures already in place, whose duty is it to protect student-athletes from similar tragedy?

Throughout interscholastic athletics, concussions rates are most prevalent among football players, with the majority of injuries occurring during practice (Dompier et al., 2015). The adverse effects of concussions are not always immediate, and long-term effects of repeated concussions put a player at risk for cognitive problems and deficits later in life (Manley et al., 2017). Recent litigation, regulation and legislation have had a positive effect on every level of participation, from youth football to the professional ranks (Bonds, Edwards, Spradley, & Phillips, 2015). Athletes and stakeholders have seen advancements in the education, prevention and treatment of head injuries (Tjong et al., 2017). With an increased understanding of concussion management, participants make a more informed decision when assuming the risks associated with football. With this increased focus on concussion management, athletes and parents look to outside stakeholders to provide an appropriate standard of care. While preventable measures can reduce the risk, it is impossible to remove concussions entirely from any sport. The primary intent of recent concussion laws is to increase awareness among coaches, parents, athletic trainers, and officials, and prepare them to respond appropriately to injuries (Kim, Connaughton, Spengler, & Lee, 2017). With these measures already in place, why are there still concussions going unreported by high school athletes? Why are concussed players returning to play prematurely? Who is responsible for protecting student-athletes from the lasting effects of head traumas? Civil liability in concussion care introduced a definition of the legal and ethical duties of stakeholders—parents, coaches and athletic trainers—based on concussion laws and industry standards. Still, it is apparent that work needs to be done in raising awareness, changing cultural mores, educating stakeholders, defining roles, and even influencing attitudes in order to create an environment that not only allows athletes feel safe, but to be safe, which includes support and even encouragement for athletes to remove themselves from play.

### Liability in Concussion Care

Most sports concussion-related lawsuits involve the theory of negligence, as those injured look to hold the coach and school district liable for failing to identify or manage concussions appropriately (Lau, 2017). Negligence includes situations where the stakeholders’ actions fall below the accepted standard of care and fail to act when duty is owed (Karns, 1986). Every state adheres to the four elements of negligence, which include duty, breach of duty, causation, and injury to the athlete (Zipursky, 2001). In determining negligence in sports-related injury, the court must determine the legal duty of the defendant, the risks assumed by the athlete, and the current standard of liability.

In Vendrell v. School District (1962a), a freshman high school athlete participating in a varsity football game, while...
carrying the ball, lowered his head into the individual trying to tackle him. The impact to the crown of his head resulted in a fractured neck vertebra. The resulting litigation made it clear that stakeholders have a legal duty to provide reasonable care in protecting athletes from foreseeable risk. That duty involves providing appropriate instruction, supervision and medical care (Carpenter, 2008). The court ruled that the coach met the duty of care owed to the player. The coach had provided appropriate instruction during practices to minimize the possibility of injury while participating in a sport with certain risks (Vendrell v. School District, 1962b).

A severe or catastrophic injury does not mean that an actionable negligence claim exists; the plaintiff must prove that the injury resulted from an unreasonable act from the defendant (Dougherty, Goldberger, & Carpenter, 2002). With head injuries being an inherent risk in the game of football, most statutes provide immunity from liability if the coach can prove that conduct was in good faith and compliant with state concussion laws (Lau, 2017).

In Feleccia v. Lackawanna College (2017), two junior college football players filed suit after being injured while participating in tackling drills during a preseason practice. The judge ruled for summary judgment on the application of the assumption of risk doctrine (Daniel, 2016). In asserting an assumption of risk defense, the defendant must prove that the individual had an understanding of the risks associated with the game and voluntarily accepted those risks when they decided to participate (Goepner, 1989). If athletes are not appropriately informed or have prior knowledge of the dangers associated with the game, they assume nothing (Dougherty et al., 2002). In the case of these two players, the court identified that both athletes were aware of the risks, voluntarily participated in the tackling drill, and the injuries were consistent with the nature of the game. In the case of concussions and head traumas, it is essential to note that courts will consider the mental state at the time of voluntary participation. The assumed risk defense is not legally sound if a defendant knowingly returns a concussed athlete to play, even if the athlete voluntarily assumes the risk. Concussions impair an athlete's ability to assume the risks of continuing to play immediately after injury (MacGillivray, 2014).

The majority of state statutes fail to provide “strong enforcement mechanisms” or impose penalties on stakeholders who do not adhere to the mandated guidelines (Lau, 2017, p. 2893). Several states focus entirely on educational measures and do not provide removal guidelines in fear that it would negatively affect coaches or athletic trainers. In Wisconsin, concussion Act 172 states that “any athletic coach or official involved in an athletic activity, or volunteer who fails to remove a person from a youth athletic activity is immune from civil liability for any injury resulting from that omission unless it constitutes gross negligence or willful or wanton misconduct” (Wisconsin Act 172, 2012). Courts often hold coaches to a lower standard of care, fearing that a higher standard of negligence could have a “chilling effect” on the competitive nature of the sport and open the door to increased litigation (Kozlowski, 2015). Some argue that limited liability negates stakeholder accountability. However, the increase in concussion laws has proven to be effective in increasing awareness and providing athletes with a clear understanding of risks. State statutes provide a framework for concussion management plans developed by individual school districts or schools. At the heart of effective concussion management programs are stakeholders who understand and carry out their duties.

Duties of Stakeholders

An unwillingness among athletes to self-report is a considerable challenge in providing proper concussion care. At the high school level, which is the demographic highlighted in this article, identified stakeholders have proven to be the most influential persons in creating a culture conducive to self-reporting and providing appropriate care for athletes. The duty to educate is the responsibility of every stakeholder, as most state statutes require parents, coaches, and trainers to receive adequate training (Wan, 2017). The drafters of the Lystedt Law recognize the influence a parent can have, as the statute requires parents to sign an information sheet acknowledging training and asking them to report concussive behavior to coaches (Chrisman, Schiff, Chung, Herring, & Rivara, 2014). Educating parents on concussion symptoms is an integral component to actualize proper safeguards. “Parents are [a] necessary line of defense” and best equipped to notice changes in their athlete (Harvey, 2014, p. 8). Parents typically have the highest level of contact with the athlete and are well-positioned to encourage their athlete to seek medical treatment (Broglio et al., 2014).

Education about concussion safety starts in the home, as parents play an essential role in communicating with their child the importance of reporting concussion symptoms and assisting them with seeking appropriate medical care (Tinsley, 1992). Parental attitude about athletic achievement has a significant effect on both the parent and the athlete. Parents with heightened expectations for their athlete are less likely to encourage concussion reporting, and athletes who feel the heightened pressure are less likely to report signs and symptoms (Kroshus, Stelino, & Rivara, 2018). With rare exception, parents would not purposely put their child at risk, but even then researchers have seen parents with unhealthy investments or interest in their children’s athletic careers prematurely and recklessly rushing their athlete back onto the field (Armour, 2017). However, this is not the only way parents can potentially place their children in harm’s way.

Some states provide parents with a concussion information sheet that must be signed, acknowledging they have discussed the information with their child. A survey of high school football players indicates that 46% of parents signed, acknowledging they had discussed concussion awareness with their son when they had not (Cournover & Tripp, 2014). Parents must communicate the importance of reporting concussion symptoms; this has proven to have a significant influence on an athlete’s attitude about reporting (Kroshus, Kerr, DeFreese, & Parson, 2017). Parents need to
Implementing and overseeing the concussion management plan is among the duties of the head coach. The plan should include frequent training on the signs and symptoms of concussions, critical to ensure that coaches can identify signs of concussive behavior and assist athletes in receiving medical assistance (Harvey, 2014).

In 2016, during a semifinal playoff game, a high school running back experienced a hit that left the player on the ground. School officials claim he suffered a concussion, leaving him unconscious for a brief moment. Under state law, to provide adequate recovery time, the player must sit out for 7 days, which would prohibit him from participating in the state championship game. His family took the issue to court, where a temporary injunction was granted, allowing him to play (Maese, 2016). This situation exemplifies one of the overwhelming problems in the efficacy of concussion laws, as parents are unwilling to cooperate and risk returning their child to play prematurely (Hudson & Spradley, 2016). Parents must understand that their cooperation is imperative, and they play a critical role in protecting their child. Establishing comprehensive concussion management involves the coach working with school administrators and athletic trainers to establish guidelines for appropriate athlete care (Doleschal, 2006). Implementing and overseeing the concussion management plan is among the duties of the head coach. The plan should include frequent training on the signs and symptoms of concussions, critical to ensure that coaches can identify signs of concussive behavior and assist athletes in receiving medical assistance (Harvey, 2014).

In Arrington v. NCAA (2011) a former college football player filed a class-action lawsuit for the mismanagement of concussions he experienced while playing. The adverse effects of the concussions left him unable to complete his degree. In his complaint, he claimed that coaches never educated him on the dangers of concussions or safe tackling techniques. The case settled out of court. The purpose of the Lystedt Law was to mandate that coaches educate parents and players on the signs, symptoms and dangers of concussions before allowing athletes to participate in practice or competition (Zackery Lystedt Law, 2009). Informing players of the immediate and long-term risks associated with head injuries will undoubtedly impact the way athletes are affected by concussions and initiate communication between the coach and athlete (Spradley & Cromartie, 2015). The coach is responsible for distributing and gathering signed consent forms from players and parents, acknowledging that they have been informed of concussion protocols and acknowledge the risks associated with participation (Doleschal, 2006).

Dr. Robert Cantu, the cofounder of Sports Legacy Institute and one of the country’s premier concussion experts, explains the importance of taking the helmet out of tackling and blocking (Gregory, 2010). Along with formal concussion training, coaches have to research and instruct players on proper drills and tackling techniques that reinforce safety standards (Doleschal, 2006). An associate professor at Bowling Green State University and certified athletic trainer, Matthew Kutz, says that “programs are being developed to teach younger athletes a different way of tackling. These programs emphasize teaching players how to tackle using their body and not using their helmet as a weapon” (University Wire, 2016, p. 1). Along with improved techniques, coaches can significantly reduce head impact exposure by limiting contact drills in practices (Straus, 2012).

In 2015, a high school football player suffered a head injury in practice, but his coach allegedly discouraged him from seeking medical treatment. Two days later, during the homecoming game, he suffered another collision that led to a seizure on the sideline. The injury left him permanently sidelined from football, and he still suffers from cognitive deficits. In a lawsuit, he argued that his coach fostered a climate of fear and intimidation, advanced a culture that overlooks injury, and discouraged players from seeking medical attention (Baldas, 2018). The physical demands of football that result from constant and high levels of impact have created a culture that tends to downplay injury. Most athletes who fail to seek medical treatment after experiencing concussive symptoms presume the injury is not severe enough to report. Athletes put themselves at significant risk as they...
attempt to tough it out, for fear of losing playing time or letting others down (Kay, Welch, & McLeod, 2015). Signs and symptoms of concussions may not be visible or significant enough to alert an athlete to self-report, making it more challenging for coaches to protect players from further injury (Kerr et al., 2014). In a study of high school athletes, 69% of concussed athletes reported playing with symptoms, and 40% reported that the coach was unaware (Chrisman et al., 2014). If coaches are supportive of concussion-symptom reporting, athletes are more likely to report (Kay et al., 2015).

A change in culture requires coaches to honestly believe in the importance of their relationship with athletes, parents and athletic trainers and adopt a higher standard of ethical responsibility (Mirsafian, 2016). Through communication with players, coaches can create a culture that supports help-seeking and adherence to concussion protocols (Kroshus et al., 2017). Stakeholders need to frequently emphasize the signs and symptoms of concussions throughout the season and explain what symptoms mean. Overcoming the stigmas that associate injury with weakness requires a coach to use rhetoric consistent with the culture that is trying to be created (Wallace, Covassin, & Beidler, 2017).

Many coaches feel that protecting, identifying or managing concussions is solely the responsibility of athletic trainers (Spradley & Cromartie, 2015). Less than 40% of public schools have access to a full-time athletic trainer and rely on coaches to determine proper medical treatment (Pryor et al., 2015). In the absence of a trainer, the coach must provide medical care for players. Most school districts require first aid, cardiopulmonary resuscitation, and concussion training for coaches. The presence of an athletic trainer does not negate a coach’s duty; the coach must work with the trainer to provide proper medical care.

In the case of Alt v. Shirley (2012), a high school football player had experienced several hits to the head throughout the season that resulted in a temporary loss of hearing, ringing in the ears, and disoriented behavior. The injuries occurred in open view of coaches and the athletic trainer, but he was never evaluated. All of the subsequent injuries came to a head when, during a playoff game, a collision left the player “clearly disoriented and confused.” Aware of the player’s condition, the coaches forewent evaluation and kept him in the game. After witnessing two helmet-to-helmet collisions, the coaches and trainers were still unwilling to remove the injured player from the competition, which was common practice. Concerned teammates described him as being in a “drunken state,” and informed the coach and athletic trainer of his “incoherent condition.” His symptoms worsened through the remainder of the game. At its conclusion, it was clear that he needed medical attention. His mother immediately transported him to the hospital, where an examination revealed that he had sustained a substantial head injury.

The emotions of competition significantly affect a coach’s attitude toward reporting. A coach needs to be mentally prepared to remove an asymptomatic athlete from play regardless of the competitive climate (Kroshus et al., 2017). Failing to remove a player from the competition, or prematurely returning an athlete, can have detrimental consequences. Research has shown that “concussed athletes reveal an increased susceptibility to additional concussions,” and repeated concussions increase the risk of cognitive impairment later in life (Wetjen, Pichelmann, & Atkinson, 2010, p. 553). A coach must be able to recognize concussive behavior and evaluate the player if a trainer is not present. States have begun to adopt legislation requiring coaches to participate in annual concussion management certification programs to ensure that they manage head injuries appropriately. Appropriately removing an athlete from play can have a lasting impact on a player, reducing the risk of further injury and cognitive deficits later in life.

In front of the Subcommittee on Healthy Families and Communities of the U.S. House of Representatives Committee on Education and Labor, high school athletic trainer Craig LoNigro defined an athletic trainer’s duty as the first line of defense in the prevention, diagnosis and emergency treatment of concussions. The athletic trainer has a duty to warn and execute an emergency action plan (The Impact of Concussions, 2010).

Athletic trainers are held to a standard of care consistent with state concussion management legislation and are bound to follow those laws (Broglio et al., 2014). In many states, athletic trainers are legally required to actively communicate with a licensed healthcare provider and work with them to treat, manage and safely return athletes to play (Goodwin, 2017). The American Academy of Neurology strongly recommends that a certified athletic trainer is at every practice and sporting event that has a risk of concussion (Ritter, 2010). If an athletic trainer is not present, the duty to provide medical care falls on the coaches who have limited training in the evaluation, diagnosis and treatment of head injuries. Research has shown that the availability of athletic trainers influences levels of concussion reporting (Geier, 2019).

In 2011, a football player for Frostburg State University sustained a head injury that left his forehead bleeding while participating in a high impact collision drill. The senior fullback was no stranger to concussions and had suffered from one the previous season. He returned to practice, where he later collapsed and eventually passed away. His parents filed a wrongful death lawsuit against the National Collegiate Athletic Association, the coaches, and the athletic trainer. His parents claimed that the trainers missed multiple opportunities to treat their son’s head injury. The athletic trainer claimed that the player denied having a headache or other symptoms of a concussion (Caruso, 2015; Pachman & Lamba, 2017; Solomon, 2016).

Most catastrophic head traumas stem from a player not reporting an initial concussion or the mismanagement of the injury (McCrea, Hammeke, Olsen, Leo, & Guskiewicz, 2004). Athletic trainers rely on self-reporting when making decisions to return an athlete to play; this can be dangerous
When the athlete withholds symptoms (Notebaert & Guskiewicz, 2005). One study suggests that concussive symptoms go unreported among high school football players because they are unaware of the severe risks and consequences associated with continued participation (McCrea et al., 2004). Educating and encouraging athletes to self-report signs and symptoms can help reshape the culture in athletics and erase the historical stigma of injuries being a manifestation of weakness (University Wire, 2016). Athletic trainers have a responsibility to educate athletes on the signs and symptoms of concussions and the duty to warn participants of the dangers of unreported injuries. The failure to warn can be a basis for the possible allegation (Broglio et al., 2014).

Informing an athlete that he cannot return to play is one of an athletic trainer’s most challenging tasks. The athletic trainer has to make a decision about what is best for the athlete, educate the athlete and coaching staff on the severity of the issue, and prevent a second impact that could have severe or fatal repercussions (The Impact of Concussions, 2010). Trainers owe a duty of reasonable care to their athletes to accurately assess concussive symptoms, provide proper medical treatment, inform the athlete of the risks associated with injury, and provide clearance to return the athlete to participation (Osborne, 2001). As trainers frequently interact and familiarize themselves with athletes, they may be able to identify concussive symptoms manifested in changes in behavior (Lincoln et al., 2011).

The purpose of an emergency action plan is to provide immediate response in the event of head trauma or concussion. In the event of an injury, athletic trainers are only responsible for the initial evaluations and emergency care of the athlete, removing them from participation, providing standard concussion care, and referring them to a licensed healthcare provider (Goodwin, 2017). In order to provide adequate care, necessary first aid equipment must be readily accessible, and the trainer must have access to the athletes’ emergency contacts (Doleschal, 2006). In the event of severe injury to the head or neck, the trainer must be prepared to remove the athlete’s equipment (Walters, 2004).

Immediately after the trainer diagnoses a concussion, a medical treatment plan must be put in place and discussed with the athlete’s parents. Effective concussion management includes sound documentation to track the athlete’s progress and help prevent a premature return to participation. Trainers who thoroughly document concussions, including diagnosis, treatment and the steps taken to return the athlete to play, will protect themselves and coaches from legal liability in the case of further injury (Broglio et al., 2014). When a physician clears the athlete, the trainer will oversee the athlete’s return to play. The athletic trainer is legally responsible for removing and returning athletes to play (Finder, 2010).

Conclusion

Coaches and athletic trainers have a legal duty to provide reasonable care in protecting their athletes from the foreseeable risks associated with concussions. The legislature enacted throughout the nation has been effective in increasing awareness of concussions and has provided a basic framework for concussion management plans for every sport (Kim et al., 2017). Since enacting the Lystedt Law, many states require coaches to educate and communicate the inherent risks associated with concussions and provide appropriate medical care to student-athletes experiencing related signs or symptoms. Education has proven effective, as general awareness has increased among student-athletes and stakeholders, which has led to an increase in the number of reported concussions over the past decade (Halstead & Walter, 2010). However, the amount of education mandated by the state is not enough, as recent studies have shown that the majority of high school athletes are still reluctant to self-report and question the severity of their symptoms (Geier, 2019). Athletes are fearful that removing themselves from the competition will threaten their future playing time and let down their team. Although unwillingness among athletes to self-report is a considerable challenge, coaches, athletic trainers, and parents have proven to have the most significant influence on an athlete’s behavior.

Participating in athletics regardless of sport is inherently dangerous, and those who participate assume the associated risks. The courts have determined that the appropriate stan-
standard of stakeholder liability be gross negligence or recklessness, as a common standard of negligence would have a "chilling effect" on competition and overwhelmingly increase litigation (Kozlowski, 2015). Thus, a heightened standard of care will require coaches, athletic trainers, and parents to go beyond the guidelines established by state legislatures to redefine culture and create an environment that fosters open dialog between athletes and stakeholders. A change in culture begins with the creation and implementation of a concussion management plan that is specific to each sport. A change in culture requires coaches to understand the importance of their relationship with athletes and go beyond the routine procedures, and frequently reemphasize the signs, symptoms, and risks associated with head injuries and the importance of self-reporting. Overcoming the deep-rooted stigmas associated with self-reporting requires rhetoric consistent with the desired cultural change and getting parents more involved in the discussion. It is the responsibility of parents, coaches, and athletic trainers to work together in building a culture where student-athletes feels safe to report symptoms and remove themselves from the competition.

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