Protecting Schools From Concussion-Related Headaches

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Canadian courts recognize that there is some level of risk inherent in playing sports. However, it is incumbent upon schools and school boards to try and minimize this risk and to act appropriately if the risk materializes.

It seems nearly every week there is a new concussion-related news alert: on May 18, 2017 we learned that Tom Brady had apparently suffered numerous unreported concussions during his career; on May 8, 2017 we held our breath when Sidney Crosby went head-first into the boards yet again; and on May 11, 2017, many of us wondered if James Harden's poor and glassy-eyed performance — after returning to the court following an elbow to the head — could have been an attempt to avoid the NBA's concussion protocols.

At the same time, more and more athletes, both professional and amateur, are turning to courts of law to seek relief for their concussion-related suffering. A class action lawsuit against the National Collegiate Athletic Association ("NCAA") was recently settled for millions of dollars and included a commitment to medical screening for former NCAA athletes, as well as changes to the NCAA's concussion policies and practices; retired professional football players recently settled a class action against the NFL in exchange for establishing a screening program and monetary awards for those who are diagnosed with certain serious concussion-related ailments; and a concussion-related class action against the NHL is still unfolding in the US courts.

These class lawsuits are in addition to the numerous individual concussion-related lawsuits that are starting to develop in the US and in Canada — including a negligence action against the Canadian Freestyle Ski Association, a claim by a student football player against Bishop's University, an action against the Canadian Football League, a product liability lawsuit against helmet manufacturer Bauer, and an action against an NHL team and its doctors following two mid-game hits.

Each of these actions makes allegations against the organizations involved in facilitating the athletics activities. They allege that the organizations failed to take appropriate steps to protect athletes from suffering concussions and concussion-related injuries — whether by allowing or encouraging athletes to return to play too quickly, by providing

ineffective medical supervision, or by failing to teach players and coaches how to prevent concussions in the first place.

Ontario schools and school boards are very supportive of students' athletic endeavours. Many schools participate in interschool leagues, and students play in games both at their schools and off premises. Further, schools and school boards may find themselves in a concussion-risky situation outside of the sports context — for instance, in gym class or at a school carnival event where attendees may engage in physical activities.

So what can schools and school boards do to reduce the risk of becoming the next headline? Ensure that there is an effective concussion protocol in place for all student activities.

While the Ontario government attempted to amend the *Education Act* in 2012 by setting out required concussion policies and guidelines for all public and Catholic schools, these proposed amendments were never brought into force. The only step taken at a legislative level, to date, has been the passing of *Rowan's Law* in 2015, which establishes the Rowan's Law Advisory Committee. The Committee is tasked with reviewing the recommendations made following an inquiry into the death of 17-year-old Rowan Stringer, who passed away from a concussion-related injury on May 12, 2013.

Schools and school boards should seek guidance from other publications including the Ministry of Education's Policy/Program Memorandum No. 158 *School Board Policies on Concussion* ("PPM 158"), and the *Ontario Physical Education Safety Guidelines* published by the Ontario Physical and Health Education Association .

PPM 158 requires that all public and Catholic schools develop and maintain policies on concussions, and provides direction on the development and implementation of those policies. PPM 158 notes that the Ministry of Education considers the concussion protocol outlined in the *Ontario Physical Education Safety Guidelines* to be the minimum standard. These minimum standards require that concussion policies must contain at least the following components: development of awareness, prevention, identification, management procedures for diagnosed concussions, and training. These are also recommended best practices for independent schools.

All schools and school boards should also bear in mind the common law considerations that often govern potential actions by students: in particular, whether the school or school board fulfilled its duty of care, to the standard of a prudent or careful parent in the circumstances, by providing reasonable supervision in the circumstances to guard against foreseeable risks.

This common law duty of care is also guided by the obligations of educators set out in the *Education Act* and its regulations: principals have a duty "to give assiduous attention to the health and comfort" of the school's pupils, and to provide for the supervision of and the conducting of any school activity authorized by the board, while teachers have a duty to ensure that all reasonable safety procedures are carried out in courses and activities for which the teacher is responsible.

Accordingly, we recommend developing and implementing a concussion protocol that incorporates at least the minimum standards outlined in PPM 158 and the *Ontario Physical Education Safety Guidelines*. These include the following items:

1. **Increasing education and awareness**. This principle may require a "paradigm shift" and attitude changes. Many sports or students may feel pressure to quickly return to play, or may feel stigmatized regarding an injury. Schools and school boards should encourage students to speak up regarding any injury, especially potential concussions, and should encourage parents to share medical updates. Schools and school boards should also implement regular training for everyone involved in sports, including students and parents.
2. **Sport-specific prevention techniques**. These protocols should cover the following considerations, which should be tailored depending on the appropriate needs of each sport:
    1. Advising players how best to avoid injury and ensuring all players are aware of this standard, even if absent during orientation;
    2. Always wearing approved helmets properly, while also advising that helmets cannot prevent all injuries;
    3. Wearing mouth guards if appropriate;
    4. Advising players and all stakeholders about the importance of the above standards, and the importance of reporting injury; and
    5. Hiring qualified and well-informed coaches and team managers.
3. **Adopting adequate methods of detecting and diagnosing concussions**. Schools and school boards should ensure that all members of the school community are educated regarding concussion symptoms, and are aware of the concussion protocol. Schools and school boards should provide information to parents that set out the various steps in the concussion protocol (regarding removal from play, clearance to return, etc.).
4. **Health professionals**. If a school, such as an independent school, employs a nurse or other health professional staff person, consider having that person, or a designated individual with more in-depth concussion training, available on site during games to assist.
5. **Implementing strict return-to-play guidelines & post-concussion management programs**. Schools and school boards should implement return-to-play guidelines that include the following considerations:
    1. Requiring medical clearance following a concussion, or signs of a concussion, by a physician trained in the management of concussions;
    2. Providing for sanctions for failing to adhere to the guidelines (though bearing in mind the attitude shift discussed above, which should not encourage stigmatization of injury);
    3. Emphasizing that the decision to return to play is based solely on medical factors; and
    4. Emphasizing or mandating strict enforcement and adherence to the guidelines.
6. **Return to learn**. Schools and school boards may also consider implementing a return-to-learn element of their concussion protocols. While classroom learning is not a source of risk for aggravating a concussion or sustaining another more serious injury like a premature return to play might be, schools and school boards should ensure that injured students are supported in their academic programs.

Canadian courts recognize that there is some level of risk inherent in playing sports. However, it is incumbent upon schools and school boards to try and minimize this risk and to act appropriately if the risk materializes. Specifically, schools and school boards should be aware of the standard of care that a court will apply in negligence cases: whether or not the school or school board exercised supervision, care, and control in the manner of a prudent or careful parent in the circumstances. In most cases, this

means developing, implementing and providing training on an appropriate concussions protocol.

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