A KNOCKOUT BLOW?

The current state of CTE and concussion litigation in Australia and around the world

LEGALIGN GLOBAL

MARKET UPDATE

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INTRODUCTION

In 1928, an article in the *Journal of the American Medical Association* used the phrase "punch drunk" – a reference to a medical condition experienced by professional and amateur boxers who were repeatedly sustaining blows to the head. The term described boxers who would exhibit the symptoms of excessive alcohol use after a fight, including confusion, dizziness, unsteadiness and loss of bodily functions.

Fast forward to today where developments in science, medical imagery and the study of the brain in sportspeople have since identified that the same condition was also present in people who played a variety of other contact and non-contact sports (previously thought unthinkable). Enter the term "chronic traumatic encephalopathy" or CTE.

The discovery of CTE in American National Football League (NFL) players in the early 2000s was a body blow to the professional and amateur sporting landscapes around the world. While very little is still known about the causative effects of CTE, sporting organisations, schools, community groups and their insurers have proactively responded to the emerging risk by taking actions to mitigate the potential impact of CTE on sporting participants.

This has resulted in a seismic cultural shift from sportspersons being held to an invincible gladiatorial standard, to a greater level of acknowledgement of the need to protect sportspeople both on and off the field.

This paper examines the various responses by sporting organisations, at both the professional and amateur levels, and their insurers to the emerging risk of CTE in sport. It also analyses the legal risk posed by the condition and the likely 'battleground' on which the issue of head knocks in sport will be fought in and out of courtrooms around the world.

The perspectives and insights offered in this paper reflect a collaboration between Legalign Global alliance partners, Wotton + Kearney, DAC Beachcroft and Wilson Elser.

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CONCUSSION, CTE AND THE MEDICAL SCIENCE DEBATE

What is concussion

A sport-related concussion, according to the Concussion in Sport Group international Consensus Statement , is “a traumatic brain injury induced by biomechanical forces” that “may be caused by a direct blow to the head, face, neck or with an impulsive force transmitted to the head” causing the brain to slide back and forth forcefully against the inner walls of the skull.

Concussion typically involves short-lived impairment of neurological function, however it is an evolving injury so symptoms may change over time. It does not necessarily involve a loss of consciousness and does not involve structural damage to the brain.

Typical complications of concussion include ongoing headaches, vertigo and cognitive difficulties, which, in the case of post-traumatic concussion syndrome, can last for weeks or months. In severe cases, the impact that causes concussion can lead to bleeding in or around the brain, which in some circumstances, can be fatal. There are also long-term consequences of concussion or an accumulation of sub-concussive head impacts.

The ongoing debate and challenge in the sporting context centres around the extent to which concussion, or an accumulation of sub-concussive head impacts, causes long-term cognitive deficits and, particularly, CTE.

What is CTE

CTE is a disease of the brain that leads to progressive degeneration of brain tissue (neurodegeneration) and which is thought to be clinically associated with memory loss, confusion, altered gait and speech, impaired judgment, impulse control problems, aggression, depression, parkinsonism and progressive dementia.

The disease is characterised by the build-up of an abnormal form of a protein called ‘tau’, which surrounds small blood vessels within the depths of cortical sulci of the brain. At this stage, CTE pathology can only be diagnosed in a post-mortem autopsy.

Concussion and sub-concussive impacts and CTE

In 2005, Dr Bennet Omalu published his post-mortem findings of CTE in the brain of Mike Webster, NFL offensive lineman for the Pittsburgh Steelers.

What made Dr Omalu’s discovery so significant, was that before 2005 the risks of sports-related brain injuries had only been identified in combat sport/boxing athletes. The term ‘punch-drunk syndrome’ referred to dementia pugilistica, which was discovered in boxers in the 1920s and was long used to describe the symptoms we now know are consistent with repeated head knocks including unsteadiness, tremors and mental dullness.

Since Dr Omalu’s findings, the global medical community has significantly expanded its research into the link between repeated concussions, sub-concussive blows and CTE in sportspeople through a variety of foundations and academic institutes including:

- **The Australian Sports Brain Bank** – established in 2018 in partnership with the University of Sydney and the Concussion Legacy Foundation USA. In early 2020, researchers at the Australian Sports Brain Bank diagnosed Australian Football League (AFL) Hall of Fame member Graham ‘Polly’ Farmer with CTE following his death in 2019. Since that diagnosis, other former AFL players have been diagnosed with CTE post-mortem, including Danny Frawley and Shane Tuck.
- **The Concussion Legacy Project UK** – established in 2021 by a partnership between the Concussion Legacy Foundation UK and the Jeff Astle Foundation to research CTE in the UK. Steve Thompson, English Rugby Union player became the first UK athlete to pledge his brain following his diagnosis of early onset dementia at the age of 42.

- **The Boston University CTE Centre** – perhaps the most prolific research centre currently investigating the link between concussion and CTE. The VA-BU-BLF Brain Bank was formed in 2008, and researchers from Boston University have identified CTE in former NFL players including Junior Seau and Aaron Hernandez. In July 2017, Boston University published research that 110 of 111 deceased football players (99%) had CTE.

While there is growing concern about CTE and its possible relationship with concussion, a causative link is yet to be clearly established.

The medical community continues to face difficulty researching this link and there are limitations in the available research. This includes a lack of a control group, inherent selection bias (where families of ex-players with symptoms of CTE are far more likely to donate their brain to research), and the potential contribution of confounding variables, such as alcohol abuse, drug abuse, genetic predisposition, psychiatric illness, or co-existing dementia that are not adequately accounted for in the current literature.

Central to the question of what then might represent a reasonable body of medical opinion on the assessment and treatment of traumatic brain injuries in sport is the Concussion in Sport Group (CISG). This is a group of experts organised by international sports governing bodies that meet every four years to establish a consensus on the specific understanding of concussion in sport.

On each occasion the CISG meets it produces a consensus statement. Statements have been released since 2002. The last statement followed the fifth International Conference on Concussion in Sport, held in October 2016, which identified that "a cause and effect relationship has not yet been demonstrated between CTE and sport-related concussions or exposure to contact sports. As such, the notion that repeated concussion or sub-concussive impacts cause CTE remains unknown."

COVID-19 has delayed the CISG's next statement, which is likely to follow the sixth International Conference on Concussion in Sport that will be held later this year. Given the advancement of research and studies since 2016, it's likely the CISG position will change regarding the relationship between concussion and CTE. In July this year, a study conducted by the Oxford Brookes University and 12 other academic institutions, alongside the Concussion Legacy Foundation, found "conclusive evidence" that repetitive head impacts cause CTE. This research has recently been published, but whether it is adopted as the leading medical opinion remains to be seen.

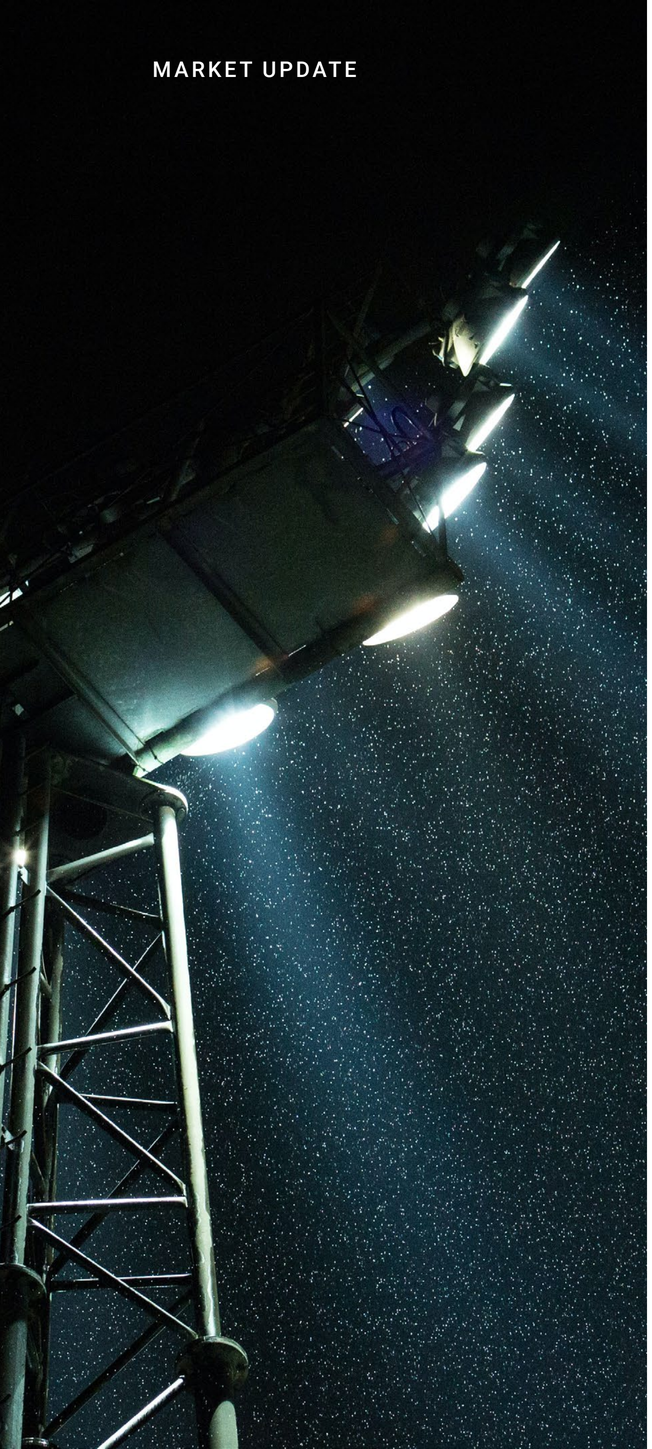
Where a definitive causal link is established between concussions in sports and the diagnosis of CTE by the medical community, it will become incumbent on sporting organisations to attempt to mitigate the risk of brain injury to its athletes. Sporting organisations have already begun to address these potential risks (e.g. through rule changes, penalties and education) and technological advancements continue to be developed to assist sportspeople on the ground level. Some examples of this include:

- In March 2021, a saliva test was recently proven by researchers at the University of Birmingham in the UK to successfully detect concussion in rugby players with 96% accuracy. The test, being developed by Marker Diagnostics, "provides an invaluable tool to help clinicians diagnose concussions more consistently and accurately" according to Antonio Belli, MD, senior author and professor of trauma neurosurgery, University of Birmingham.
- In August 2022, the International Federation of Association Football (FIFA) confirmed that NeuroFlex, a virtual reality headset that tracks eye movement, would be used on concussed players during the upcoming FIFA World Cup in Qatar. NeuroFlex has already been used in Super Rugby and the South Australian National Football League (SANFL). NeuroFlex Executive Director Grenville Thynne said: "This technology will ensure any such call made at the World Cup will be based on pure science and real time data".

Critically, as the medical science evolves and technology advances regarding the diagnosis and identification of traumatic brain injuries and CTE, the 'margin of error' for improperly diagnosing or mishandling a concussion will reduce.

99%

In July 2017, Boston University published research that **110** of **111 deceased football players** (99%) **had CTE**.



A CULTURAL SHIFT

Over the past two decades there has been a gradual shift in the way sporting organisations around the world have addressed the potential risks of traumatic brain injury to participants in a wide variety of non-combat sports, particularly physical contact sports like gridiron, Australian rules football and rugby.

In the almost 20 years since Dr Omalu's findings regarding Mike Webster's brain, there have been numerous examples of sporting organisations around the world taking action to minimise the risk of head injuries to their athletes including:

- **The modification of rules to reduce the likelihood of a dangerous collision that may cause concussion.** For example, the 2018 rule changes in the NFL had defenders line up within one yard of the restraining line on a kickoff to prevent a 'running start' for defenders when attempting to tackle the kick returner. The kickoff was called "by far the most dangerous play in the game" by the Green Bay Packers President, Mark Murphy.
- **Penalties both in game and post-game for offending players who contact the head of another player.** For example, the AFL made any contact with the head of another player a reportable offence in 2007. For the 2022 season the AFL went further and said any "careless or rough conduct" (including contact to the head) regardless of any injury would carry a minimum sanction of a one match suspension.
- **Protocols to ensure that a player who has suffered a head injury is tended to and tested before returning to the field of play.** For example, in 2017 Australian Rugby Union (ARU) trialled and subsequently implemented a 'blue card' that allows a referee to send off a player who is suspected of suffering a concussion for medical evaluation.

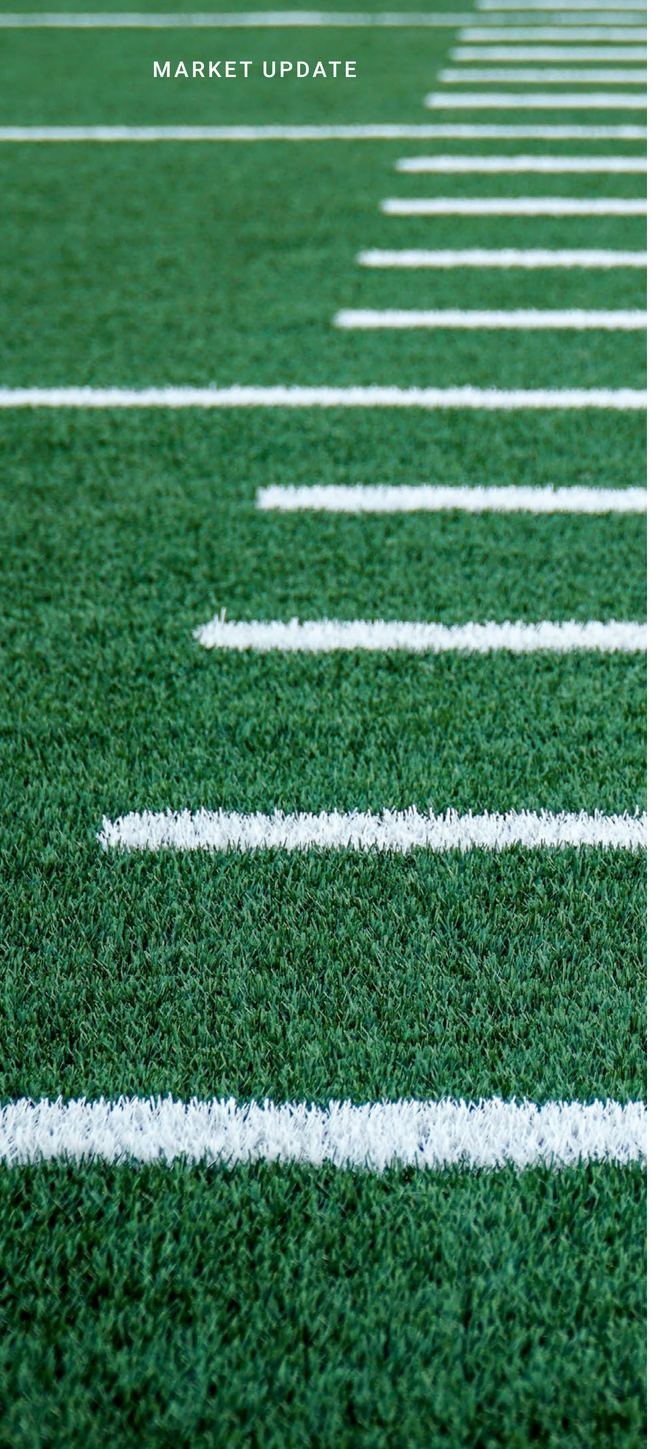
These changes to sporting codes around the world have coincided with a significant 'cultural shift' in the sporting community's attitude (both player and fan alike) towards head injuries in sport in the modern era.

In the past, contact sports like the NFL and Super League Rugby promoted their codes by showcasing hard-hitting tackles. Certain players became synonymous with a willingness to sacrifice their bodies. They were portrayed as "gladiator athletes", who played through pain and injury for their team to win.

In more recent years, this image has been replaced with athletes being celebrated for showing sportsmanship and compassion to another player who sustained injury. There are many examples of this in a variety of sporting codes. In April 2021, AFL player Dane Rampe received national praise for not playing on and waiting by the side of Kamdyn McIntosh who was knocked unconscious in an AFL match. These actions are now described as "beautiful" and "all class", where once they might have been considered "soft".

Despite these positive changes being reinforced by peak-body organisations, clubs, athletes and supporters, there remains a constant negative association with participation in these sports and the potential effects of repeated head knocks and CTE. This is amplified by the ongoing discovery and diagnosis of CTE in recently deceased athletes in these codes (for example, AFL player Murray Weidman in October 2021) and the retirement of young athletes 'in their prime' due to concerns over repeated concussions (such as NRL player Boyd Cordner, who was hailed as a "hero" for deciding to retire just days after turning 29 years old in June 2021).

This ensures the risk of concussion and CTE (and the potential for litigious action) remains front of mind for all stakeholders of sporting organisations, clubs, players and their insurers alike.



LEGAL CONSIDERATIONS

Potential parties

There are potentially two categories of claimants in a litigated concussion claim:

- **past players claimants** – claims brought by players who played in the 'past' and more specifically, before the recognition of the risks of concussion and CTE in their respective sporting codes. These claims will turn on (amongst other factors) the 'state of knowledge' and whether the respective sporting body *knew or ought to have known* of the risks associated with concussion / CTE at the material time, and
- **modern player claimants** – claims brought by players who played more recently (since the 2010s) or who currently play. These players have been active participants since the recognition of the risks of concussion and CTE in their respective sporting codes. Their claims will turn on (amongst other factors) the adherence to and compliance with protocols in place to prevent concussion / head injuries by the respective sporting organisation and its personnel.

The potential defendants to a concussion claim are varied and could include one or a combination of an allegedly injured player's team/club, coaches and assistants, team doctors, peak organisations (such as the NFL or FIFA), officiators and manufacturers of protective sporting equipment.

Potential legal hurdles and defences

A concussion claim will almost certainly present a variety of legal and factual issues that will need to be considered case by case. However, when defending these claims in Australia, the UK (as a similar common law jurisdiction) and to a lesser extent the US, the following key factors should be considered:

- **Establishing causation** – whether a link can be drawn between a claimant's alleged injury (CTE or symptoms such as amnesia, headaches, depression and lethargy) and the alleged exposure to, mistreatment or mishandling of repeated sports-related concussions during their playing career (which may span decades).
- **The 'state of knowledge'** – whether the sporting body knew, or ought to have known, of the risks associated with repeated concussions and taken reasonable steps to protect its players accordingly.
- **Compliance with concussion policies and procedures** – whether the sporting organisation had in place appropriate concussion protocols and, if it did, whether it ensured compliance with its own policies for limiting concussion and head injuries.
- **Statutory defences** – whether there are any protections available under statute for engaging in 'dangerous recreational activities' such as contact sports, and whether this will be available to a sporting organisation.

Establishing causation

It is well established in both Australian and UK case law that a sport's governing bodies owe a duty of care to ensure the safety of the participants in the sporting activity. Further, medical practitioners owe a duty to exercise reasonable care and skill in the treatment of a patient.

However, establishing causation regarding an alleged breach of this duty presents a considerable hurdle to a prospective claimant. In common law jurisdictions like the UK and Australia, a claimant must be able to establish that 'but for' the alleged incident / event (i.e. the concussions / sub-concussive blows) they would not have suffered the alleged condition (e.g. CTE). Concussion claims will be subject to two elements of causation, legal causation and medical causation.

For legal causation, where the allegation is a traumatic brain injury was due to the negligence of the sporting organisation in failing to prevent excessive concussions, the claimant must prove on the balance of probabilities that:

- the excessive concussions are as a result of the negligence of the defendant (i.e. a failure to comply with concussion protocols in allowing the claimant to return to the game)
- the defendant's negligence caused the traumatic brain injury, and there were no other causes for this – determining this over the course of many playing years would be a difficult task for a claimant, and

- their consequential losses, such as loss of earnings and any care needs, flow from the traumatic brain injury and not from a different cause – this may be difficult to distinguish where an athlete may be limited in any event due to other sports-related injuries (such as neck or shoulder injuries) entirely different to the traumatic brain injury caused by excessive concussions.

Regarding medical causation, CTE is only diagnosable through post-mortem examination. This means that a claimant who may be suffering from CTE (and exhibiting known symptoms, such as amnesia or unsteadiness) will only be able to conclusively establish this condition after their death.

Further, a medical consensus on the link between sports-related concussions and CTE remains unclear at this stage. The Australian Institute of Sport, in collaboration with the Australian Medical Association, the Australasian College of Sports and Exercise Physicians and Sports Medicine Australia, currently conclude that "**there is currently no reliable evidence which clearly links sport-related concussion with CTE**" (in line with the most recent CISG statement).

In view of this, establishing medical causation for a claimant will require detailed evidence from a range of medical experts in various disciplines including, amongst others, neurology. This evidence will then be weighed against the relevant prevailing attitudes towards this topic. Given the current uncertainty around the diagnosis and treatment of brain injuries, that evidence will undoubtedly be opposed on behalf of the defendants by other suitably qualified experts. It will be a real challenge for the courts to untangle this and be prepared to draw this causative link at trial. This issue was recently exemplified in the UK case of *Mathieu v (1) Hinds (2) Aviva Plc* [2022] EWHC 924 (QB) where the Judge (when considering the risk of dementia as a result of a traumatic brain injury) stated: "I do not consider, on the current state of the science, that the claimant can show, to the balance of probabilities standard, the existence of a more than fanciful chance that the traumatic brain injury will lead to him developing dementia".

Ultimately, until the medical science advances to a stage where there is a conclusive link between repeated concussions and CTE, which can be accurately diagnosed, establishing causation is likely to be a significant hurdle for a potential claimant (and a deterrent from pursuing a concussion claim).

The 'state of knowledge'

Even if a causal nexus between concussion and CTE can be established, establishing the 'state of knowledge' at the relevant time of the sporting organisation will be critical to establishing a breach of duty against a sporting organisation.

CTE and the risks of repeated concussions to non-combat/boxing sportspeople is in its relatively infancy in the context of Australian sports. CTE was first diagnosed in:

- Barry 'Tizza' Taylor, a rugby union player and the first Australian sportsperson diagnosed in 2013 (eight years after Mike Webster), and
- Graham 'Polly' Farmer, the first Australian rules footballer diagnosed in February 2020 (15 years after Mike Webster).

This demonstrates that a claimant would face considerable difficulty trying to prove that an Australian sporting organisation knew or ought to have known of the risk of repeated concussions, and that this could result in a long-term brain injury like CTE in participants before the 2010s (at the earliest).

The prospects of a successful concussion claim from historical 'past players' who played in the last century against an Australian sporting organisation are therefore limited (when the risks of repeated concussions and indeed, CTE was simply not known to Australian sporting organisations).

Compliance with concussion policies / protocols

With the 'state of knowledge' in mind, the greater risk arises from 'modern' players who have participated in contact sports but were not properly subjected to concussion protocols to limit or prevent the risk of repeated head knocks.

Australian sporting bodies have continued to enforce concussion protocols and looked to sanction clubs that fail to comply or attempt to flaunt these rules. By example, doctors independent of clubs were introduced by the NRL to assess concussions and prevent club-employed doctors from making the decision to take a player out of a game.

Actions like this at a professional level are positive and would assist any future defence of a claim on the basis that all reasonable steps were taken by the sporting organisation to ensure that a player was removed and/or unable to participate in a game following a concussion.

However, we anticipate the issue of compliance will be particularly relevant to the 'grass roots' / amateur level of sports when a potential claim arises. Access to the resources of the professional levels may be limited (such as trained medical staff) and organisations may be more inclined to disregard concussion procedures (where the scrutiny of television and the media is not present) at a junior level.

It is incumbent on amateur sporting organisations to make sure that all reasonable efforts are made to properly protect against and respond to concussion. As to what a court may consider 'reasonable' for an amateur organisation, most professional sporting codes have implemented community guidelines to provide education on concussion/head injuries and assist amateur organisations with limiting and treating concussions. For example, the AFL annually releases "The Management of Concussion in Australian Football with specific provisions for children aged 5-17 years", which provides amateur Australian rules football clubs (and their players) with information on concussion and the basic steps to prevent, identify and manage concussions.

Where an amateur sporting club has complied with its relevant 'peak body' protocols around the education, prevention, identification, and management of concussion, it will minimise its exposure to a potential concussion claim (as a court is likely to consider that all reasonable steps were taken to minimise the risk, and the player was made fully aware of the risk of a concussion).

In addition, noting the discrepancy in resources (i.e., financial capacity, access to medical expertise) between amateur clubs and their professional counterparts, an amateur club will also not be expected by a reasonable court to have a greater 'state of knowledge' regarding the management of concussive injuries to its players. In other words, an amateur club will not be held to a higher standard than its relevant professional/peak sporting body when it comes to attempting to minimise the risk of concussion/head injuries to players.

Accordingly, where it can be demonstrated that the amateur organisation complied with concussion protocols, it will be well-placed to defend a concussion claim and rely on statutory/common law defences available within its jurisdiction.

Statutory defences

Unique to Australia is the availability of statutory defences for defendants against claimants who have suffered an 'obvious risk' whilst engaged in 'dangerous recreational activities' under the relative Civil Liability Acts in the states where this defence is available (including New South Wales and Western Australia).

These provisions are often referred to as the 'DRA defense' and, at a high level, provide that a person is not liable for the harm suffered by another as a result of an 'obvious risk' of a 'dangerous recreational activity'. These provisions have been found to apply to both amateur 'recreational' sportspeople and professional athletes.

It is not controversial that rugby and Australian rules football are contact sports played with a level of physicality that would be considered to be a 'dangerous recreational activity', and this has been determined by Australian courts in a few notable cases involving rugby league players.

However, to attract these protections, a claimant must also be found to have been injured as a result of an obvious risk of that activity, which requires the court to find that the risk of suffering significant or serious injury was obvious to a reasonable person in their position. A claimant will argue that the risk of developing CTE or a concussion-related brain injury was not obvious at the time. The challenge for the defendant is then demonstrating that this risk was obvious to a reasonable person in the position of the player playing the relevant sport.

In the Supreme Court of Queensland decision of *Sally James v USM Events Pty Ltd* [2022] QSC 63, Justice Brown emphasised that the mere fact that a participant in a sport has chosen to accept some "inescapable risks" (in this case a triathlon) does not mean they assumed "any risk associated with competing in the event" (in this case, the risk of collision between another athlete's wheelchair and the claimant).

For past player claims, demonstrating that a claimant had constructive knowledge of the risk of concussion / CTE will be hard to prove to establish this defence before the early 2000s. Indeed, the respective Australian sporting organisations also did not know of the risks of concussion and any potential link to a long-term brain injury (like CTE) in these early years and not until the 2010s (at the earliest).

However, for modern player claims, the knowledge of concussion risks in sport (particularly contact sports) is now widespread. All sporting organisations now have established concussion protocols, including limiting its occurrence during play and educating both players and staff around how to respond should a concussion occur. Accordingly, where a claimant alleges to have suffered a brain injury/concussion as a result of playing in the 2010s and beyond, this defence may be available and should be thoroughly explored.

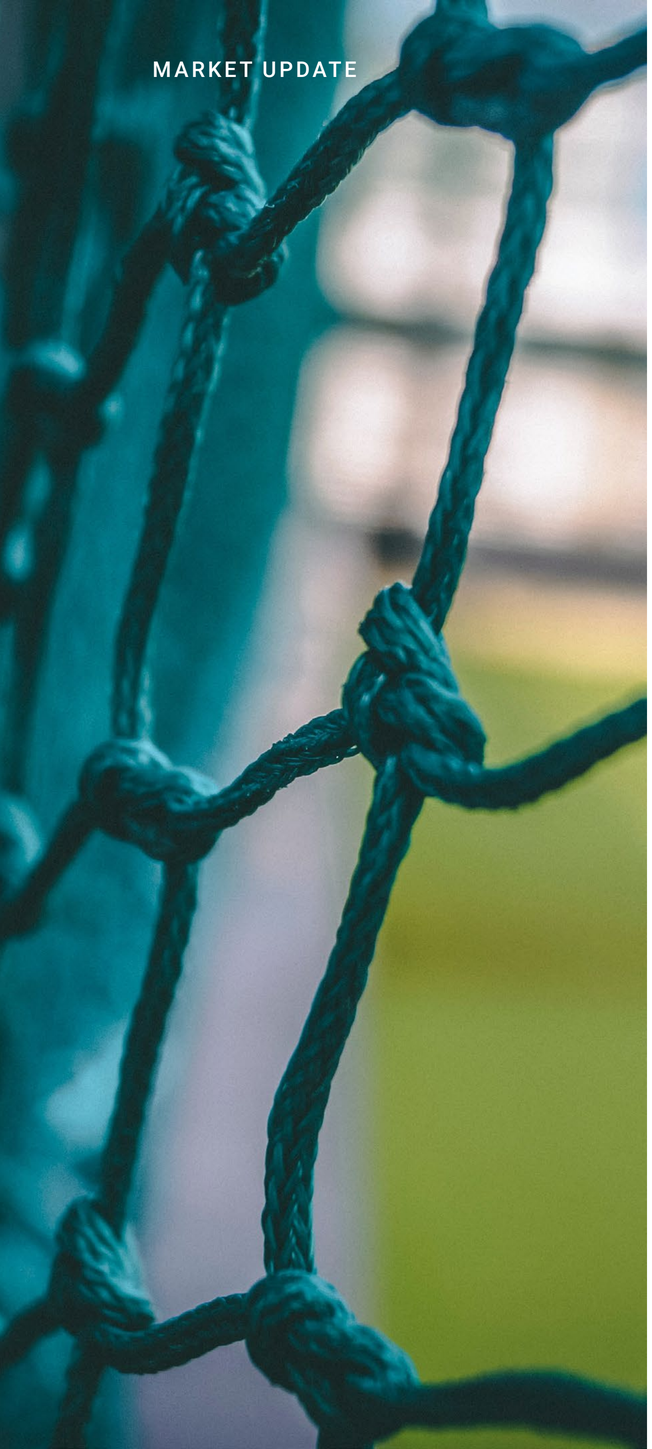
There will of course be other factors unique to each case that may sway the ability to invoke this defence in past player claims, including instances of repeated concussions and/or a player opting to play against medical advice warning of concussions. Each case should be carefully reviewed on its own facts.

The High Court of Australia decision in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2022] HCA 11 is a good reminder that while a risk might appear on its face to be 'obvious' (i.e. falling from a horse), this will turn on the circumstances of each case and the correct level of generality regarding assessing the subject 'risk' for the purposes of applying the DRA defence. This is not a simple task and will require careful analysis when considering a concussion / CTE claim.

There is also a statutory defence for an 'inherent risk', where a defendant is not liable for a risk being defined as "something occurring that cannot be avoided by the exercise of reasonable care". While concussion is likely to be inherent in contact sport, this defence is challenged by the notion that reasonable care can be taken to avoid the materialisation of CTE (assuming the medical link between multiple repeated concussions and CTE). A sporting organisations' ability to rely on the inherent risk defence will therefore turn on whether it exercised all reasonable care by implementing and ensuring compliance with various concussion protocols/procedures.

Finally, there is also the common law defence of *volenti* or voluntary assumption of risk. This defence can be relied on where the DRA defence is not available and where it can be shown that the claimant perceived the existence of danger, fully appreciated it and voluntarily accepted it. The lack of clear linkage between CTE and concussion is likely to mean that a court will unlikely uphold this defence (although as time goes on this may become a viable option in defending a claim where a sporting organisation has made all reasonable efforts to protect its players).

"For past player claims, demonstrating that a claimant had constructive knowledge of the risk of concussion/CTE will be hard to prove."



INSURANCE RESPONSE

Concussion litigation and CTE claims (at least in Australia and the UK) are continuing to develop. It will be some time until we see these claims crystalize to the same extent that we have seen in the US.

Relevantly, as sports and sporting organisations have evolved to address the risk of concussions and head injuries so has the insurance industry.

Since concussion emerged as a potential risk category, we have seen insurers take the following steps (amongst others) to ensure that sports and sporting organisations remain insurable moving forward:

- requiring sporting organisations at all levels maintain and enforce concussion protocols to ensure that concussion-related injuries are responded to appropriately and in line with best practice for the relevant code as determined by the sporting organisations peak body
- using sub-limits within a policy specifically for a brain injury or latent injury (such as CTE) to effectively cap an insurer's exposure to claims made for concussion and/or CTE, and
- establishing a 'retroactive date' in a policy that applies where the latent injury is deemed to have occurred on the day it was first diagnosed. By implementing a retroactive date, the policy effectively becomes a 'claims made' policy for a brain injury claim and this avoids a situation where there may be difficulty identifying 'lost policies' or which historical policy responds – particularly where a past player may allege his injury occurred over his playing career spanning many years with differing policies with different clubs for different years.

There also continue to be various hurdles for prospective claimants (particularly in Australia and the UK) in establishing liability against a sporting organisation or its personnel. Insurers should continue to be prepared to underwrite sporting organisations and monitor, but not be alarmed by, potential concussion claims.

We anticipate further insurance developments will continue to emerge as the medical and legal landscape evolves around concussion claims.

"There continue to be various hurdles for prospective claimants in establishing liability against a sporting organisation or its personnel."

PERSPECTIVES FROM AROUND THE WORLD

Australia

Australia lags the US and the UK in concussion litigation, with no successful actions by a claimant brought to trial to date. The few claims that have been unsuccessfully made were against the allegedly injured player's club and team doctor. For example, James McManus sued the Newcastle Knights and a team doctor for allegedly failing to manage his concussions during his playing career including 'several concussions' in 2015 (a year before he retired). In September 2021, the matter settled 'in the Knight's favour' two days before hearing in the NSW Supreme Court.

Despite the intimation of class-action claims in both the AFL and NRL which have been foreshadowed since 2019, these are yet to be formally progressed in any court in Australia. This may be due to a lack of participants willing to join such action, or due to the various legal hurdles a claimant will face when pursuing a concussion claim in the Australian jurisdiction.

UK

In the UK, no concussion claim has successfully been progressed and decided on at trial by a UK court. Like Australia, the hesitation to pursue such a claim by a potential claimant may be due to limitations associated with establishing a claim in a common law jurisdiction (which both Australia and the UK share).

More recently, former players in both rugby union and rugby league have recently issued claims against the respective governing bodies of these codes (World Rugby, Rugby Football Union and Rugby Football League respectively). However, proceedings have not advanced, and we understand that both bodies have been asked to disclose documents relating to their concussion protocols before further legal action is considered.

US

The US is by far the most progressed jurisdiction in terms of concussion litigation. Most notably in 2015, the NFL agreed to a final settlement of up to US$1 billion in response to a class action filed on behalf of more than 4,500 former players. To date, more than 20,500 retired NFL players have had claims approved totaling more than US$870 million for a range of neurological and cognitive diseases. The NFL is also one of the only major sporting codes that has publicly acknowledged that "there is a direct link between traumatic brain injury and CTE".

Similar class actions against National Collegiate Athletic Association (NCAA), the National Hockey League (NHL) and World Wrestling Entertainment (WWE) show that the US is 'leading the pack' in concussion-related litigation.

Actions have also been bought by individuals in different state jurisdictions, rather than as a part of a class action, with mixed results. In July 2021, former Oregon high school football player, Connor Martin sued his former high school over concussion-related injuries he suffered during a 2016 football game. The Hermiston School District and Mr Martin subsequently reached a $38.9 million settlement over the proceedings.

In contrast, in February 2021, two former NCAA football players, Craig Bokor and Joseph Delsardo, commenced proceedings against the NCAA and the University of Pittsburgh for negligence, fraudulent concealment, breach of contract and unjust enrichment, claiming that the school and the NCAA knew about the dangers of head injuries and did nothing. Both Bokor and Delsardo subsequently withdrew their claim stating they never intended to sue.

Despite these concussion claims in the US, we anticipate Australia and the UK will not get to a similar stage of broad litigious action from both class actions and individuals alike. This is because of the significant legal hurdles in those jurisdictions and the level of damages available, which are much lower than those awarded in the US.

WHAT'S NEXT IN AUSTRALIA?

Overall, the issue of concussion is very much at the forefront of the collective mind of sporting organisations around the world.

Ultimately, Australia and insurers of Australian sporting organisations have the benefit of observing the UK and the US experiences of how concussion and CTE claims have evolved.

Despite being 'at the back of the pack' at present, we anticipate that Australia will eventually see an influx of concussion and CTE claims given the likely developments in medical science and the legal understanding of how a concussion claim may be established.

If you have any questions about concussion claims, contact one of Legalign's experts.

Key contacts

International Consensus Conference on Concussion in Sport

Amsterdam | 27-29 October 2022

Finally, the 6th International Consensus Conference on Concussion in Sport will be taking place in Amsterdam, the Netherlands between 27-29 October 2022. At the conference, leading experts and key stakeholders in concussion will meet to develop an updated consensus on best practice guidelines for the management, treatment, return to play and prevention of concussion in sport. Legalalign Global will provide a further update following the conference, which will be of significant importance to all stakeholders with exposure to concussion risks.

TIMELINE OF KEY EVENTS

Key date	Key event
1928	Punch Drunk Syndrome discovered in boxers in the US
November 2001	First International Symposium on Concussion in Sport is held
July 2005	Bennet Omalu releases his findings of CTE in the brain of deceased NFL player, Mike Webster
16 February 2007	Making contact with the head of another player in the AFL becomes a reportable offence
14 June 2007	Concussion Legacy Foundation UK founded
2008	The Boston University CTE Centre, in collaboration with the US Department of Veteran Affairs and Concussion Legacy Foundation, form the VA-BU-CLF Brain Bank
October 2011	NCAA faces first class action head-injury lawsuit by former athletes alleging they suffer from lasting effects from concussions
June 2012	NFL faces first class action head-injury lawsuit by former players
2013	Barry Taylor, legendary rugby league player, passes away aged 77 – he becomes the first Australian sportsperson diagnosed with CTE
29 July 2014	NCAA settles class action agreeing to spend US$70m on a medical monitoring program for collegiate athletes and US$5m on concussion research
11 April 2015	Jeff Astle Foundation UK formed to raised awareness of brain injury in all forms of sport

Key date	Key event
15 April 2015	NFL agree to final settlement of up to US$1b in response to a class action filed on behalf of more than 4,500 former players
26 April 2017	Following the fifth International Conference on Concussion in Sport in Berlin, October 2016, the consensus statement is published in the *British Journal of Sports Medicine 2017* – it states the notion that repeated concussion or sub-concussive impacts cause CTE remains unknown
25 July 2017	Boston University study reveals 110 of 111 deceased American footballers tested had CTE
February 2019	Australian Medical Association publishes a position statement stating there is currently no reliable evidence that clearly links sports-related concussion with CTE
February 2020	AFL great Graham Farmer diagnosed with CTE following death in 2019
January 2021	Former AFL player, Shane Tuck diagnosed with most “severe” case of CTE according to Australian Sports Brain Bank – he was 38 years old at the time of his death
6 July 2021	Former Oregon high school football player sued former high school over concussion related injuries suffered in a 2016 football game, reaching a $38.9m settlement in the US
September 2021	James McManus withdraws his claim against the Newcastle Knights regarding the alleged mismanagement of concussions during his playing years
As of August 2022	20,500 retired NFL players have had claims approved totaling more than US$870m

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