

## Trend Spotlight

# CTE – what insurers need to know now



Until recently, most people had probably never heard of chronic traumatic encephalopathy (commonly referred to as CTE). But litigation filed by former players against the National Football League (NFL) and National Hockey League (NHL) and the 2015 movie *"Concussion"* have dramatically increased awareness of this disease. CTE has certainly caught the attention of insurers. *Risk and Insurance* listed sports-related head injuries as one of the most critical emerging risks, stating "class-action lawsuits stemming from traumatic brain injuries and degenerative brain disease could cause substantial losses for the insurance market and contact sports leagues at all levels."<sup>1</sup> Let's examine why.

### What is CTE?

CTE is a progressive degenerative brain disease caused by repeated concussions and sub-concussive hits, which cause a buildup of tau protein in the brain leading to memory loss, confusion, impaired judgment, impulse control problems, aggression, and progressive dementia. Symptoms may not begin until years or decades after the last brain trauma.

CTE was first noticed in boxers in the late 1920s. Dr. Bennet Omalu is credited with discovering it in football players in 2002, during an autopsy on former Pittsburgh Steeler Mike Webster. Since then, CTE has been diagnosed in more than 90 former NFL players, and in dozens of other athletes. To date, it has only been diagnosable post-mortem. However, researchers are close to identifying it in live patients, using new imaging techniques.

### Litigation

In 2011, former NFL players began filing lawsuits against the league alleging that it

knew repeated concussions could cause CTE and that it misrepresented or concealed this risk from players. Under a 2016 settlement, representatives of deceased players diagnosed with CTE prior to April 22, 2015 are now eligible to receive up to USD 4 m. Other compensable conditions include Alzheimer's disease, ALS, Parkinson's disease, and lesser neurological impairments. NFL actuaries estimate almost 30% of former players will develop moderate to severe neurocognitive problems that are covered by the settlement.<sup>2</sup>

The NHL, World Wrestling Entertainment (WWE) and Canadian Football League (CFL) are also facing similar concussion litigation, and the issue is not limited to professional athletics. A class action suit was filed against the National Collegiate Athletic Association (NCAA) by student athletes alleging the NCAA's negligence and fraudulent concealment of information exposed them to a heightened risk of neurological diseases (including CTE).

A settlement has been reached, and preliminarily approved. The NCAA is paying USD 70 m into a medical monitoring fund which provides for screening of current and former athletes for late onset diseases resulting from concussions and subconcussive hits, and it is providing USD 5 m for concussion research. The NCAA still faces dozens of suits (some naming individual colleges or universities as defendants) by student athletes who allege they suffered concussions resulting in bodily injuries, and that they have an increased risk of long-term cognitive impairment.

Pop Warner, the largest youth football program in the U.S., has faced two suits brought by family members of young men who played Pop Warner football and were diagnosed with CTE after they died. In 2016, Pop Warner settled one suit, an individual wrongful death action, for an undisclosed amount. The other suit, a class action, remains pending.<sup>3</sup>

<sup>1</sup> "Athletic Head injuries: An Increasing Liability," *Risk and Insurance*, April 2015 <http://riskandinsurance.com/athletic-head-injuries-an-increasing-liability/>

<sup>2</sup> "Brain Trauma to Affect One in Three Players, N.F.L. Agrees," *New York Times*, September 12, 2014 <https://www.nytimes.com/2014/09/13/sports/football/actuarial-reports-in-nfl-concussion-deal-are-released.html>

<sup>3</sup> Kimberly Archie et al. v. Pop Warner Little Scholars, Inc. et al., 2:16-cv-06603 U.S.D.C. Central District of California

The Pop Warner class action also names NOCSAE (National Operating Committee on Standards for Athletic Equipment), and seeks an order requiring it to provide warning labels about the risks of CTE. Helmet manufacturer Riddell is facing similar actions alleging that it: (1) knew the long-term effects of brain trauma but failed to disclose them; and (2) falsely marketed helmets as being able to reduce the risk of concussion by 31%.

### Other possible defendants

Public and private high schools are also seeing concussion-related lawsuits. These suits typically allege bodily injuries were caused by a single concussion and cite the schools' negligence. Under state law, most schools must advise student athletes of concussion symptoms, as well as their short-term risks. But there is no law imposing a duty to warn about CTE.

Nevertheless, some organizations are voluntarily providing warnings. The Florida High School Athletic Association has amended its Consent and Release from Liability Certificate for concussions to include the following language:

"Parents and students should be aware of preliminary evidence that suggests repeat concussions, and even hits that do not cause a symptomatic concussion, may lead to abnormal brain changes which can only be seen on autopsy (known as Chronic Traumatic Encephalopathy [CTE])."

Like schools, medical professionals also have no legal obligation to warn about CTE. But the American Academy of Neurology contends that physicians have an ethical obligation to provide information about the potential short and long-term risks of single and repetitive head injuries.

### Insurance issues

Not surprisingly, those named in ongoing CTE litigation have sought coverage from insurers. Insurers have asserted numerous defenses, including that the injuries were expected or intended, do not constitute an occurrence as defined in the policy, or result from fraudulent conduct, which is not covered.

Some insurers are taking steps to avoid CTE claims using specific exclusions. The National Casualty CGL policy issued to Arena Football, at issue in *Breland v.*

*Arena Football One, LLC., et al.*, No. 2:15-cv-02258, contains the following language:

"This insurance does not apply to damages for 'brain injuries' sustained by a 'player' arising out of or in any way related to participation in any sports or athletic game, contest, event, exhibition or practice.

The term 'brain injuries' includes concussions, chronic traumatic encephalopathy or any other injury to the brain and any symptoms, conditions, disorders or diseases resulting therefrom."

Other insurers are establishing sub-limits or imposing aggregate limits for neurodegenerative claims. Some are simply refusing to insure any at-risk entities.

### Workers' compensation

CTE is not only a concern for P&C insurers. Workers' compensation carriers have also begun seeing claims alleging typical CTE cognitive impairments. The NFL has fought these claims, arguing there is no definitive link between repeated head trauma and CTE, and that CTE is not diagnosable in living players. (It remains to be seen how the NFL's 2016 admission of a link between football and CTE will impact future claims.<sup>4</sup>)

Athletes seeking workers' compensation face many hurdles. Several states preclude workers' compensation coverage for professional athletes. Workers' compensation statutes generally only apply to claims stemming from accidents or injuries or from occupational diseases, and in some states, mental disabilities are excluded under the definition of occupational disease. Cumulative trauma claims are not recognized as compensable under the laws of most states. Athletes may also face difficulty in linking CTE symptoms to repetitive brain trauma suffered on the job and not to other factors. Currently, no workers' compensation laws specifically cover CTE.

In November 2016, 38 former players filed a federal action in Florida against the NFL and its 32 teams. The complaint alleged scientific verification of CTE in the living is available. It sought a declaration that the NFL acknowledge advancements in CTE diagnosis, and provide workers'

compensation benefits because CTE is a distinct occupational disease. The plaintiffs dropped their suit in December 2016, but plan to file individual suits on a state-by-state basis, according to their attorney.

### D&O

Directors and officers (D&O) liability policies don't usually provide coverage for bodily injuries, but plaintiffs may still attempt to seek coverage for CTE-related claims. In the 2016 *Breland* decision referred to previously, Lorenzo Breland, a professional arena football player, sought coverage from the league and its D&O insurer. The D&O policy contained an exclusion for bodily injury. However, Breland argued that the policy did not exclude claims for wrongful acts, such as fraudulent misrepresentation. The court held that the policy had to be read as a whole, and while it covered wrongful acts, it excluded claims for bodily injury and breach of contract. Kevin LaCroix, author of the *D&O Diary*,<sup>5</sup> questioned the court's decision in a blog post, noting there was a difference between Breland's claims for damages for bodily injuries, and his claims for damages and other relief based upon fraud and misrepresentation. The court's decision did not analyze or discuss why the bodily injury exclusion precluded coverage for the latter claims, he noted.

D&O policies may be found to cover claims that do not seek damages for bodily injuries, but only injunctive relief, such as a change in rules or in concussion-handling policies and procedures.

### What might the future hold?

Right now, it is virtually impossible to predict who may develop CTE. However, researchers have made significant progress in identifying biomarkers of concussion susceptibility and effect. Scientists also predict that within the next 5–10 years, they will be able to identify CTE while a person is alive. These developments may be game changers. If it is possible to screen people for CTE, this could create additional duties upon entities to take steps to protect and monitor athletes. The number of plaintiffs may also increase significantly.

Insurers should closely monitor the legal side of this issue, and medical and scientific developments. The ability to evaluate CTE exposures will continue to evolve at the same pace as science advances, and as insurers tailor policy language and exclusions to address this risk.

<sup>4</sup> "NFL acknowledges, for first time, link between football, brain disease," *espn.com*, March 15, 2016

<sup>5</sup> "Football Player's Concussion Claims Test D&O Policy Exclusion," *D&O Diary*, November 30, 2016, <http://www.dandodiary.com/2016/11/articles/d-o-insurance/football-players-concussion-claims-test-policy-exclusion/>