
CONCUSSIONS AND RETURN TO PLAY GUIDELINES

by: Mark MacDonald and Eric Katzman

For far too long, the “get back on the field” or “get back on the ice” mentality has dominated youth sports. Unfortunately, in Canada and the United States, popular sports like hockey, soccer, and football expose young participants to the risk of serious injuries like concussions. Between 2010 and 2011 children accounted for 38% of all Ontario residents visiting emergency rooms for concussions,¹ and hockey accounts for almost half of all traumatic brain injuries among Canadian youth who participate in team sports.² Medical investigation has determined that concussions are especially harmful in young athletes and often go undiagnosed because younger athletes may not be able to accurately describe their symptoms. This leads to scenarios where children do not receive enough time to recover and where they are pressured to return to play or to return to the classroom before their brains have recovered from injury.

Many organizations and sports associations have created “return to play” guidelines to manage recovery from concussion injuries, but there is no uniform or binding standard governing the issue. The lack of authoritative guidance makes it very difficult to determine which guidelines to follow and which guidelines will be applicable from a risk management perspective. Government intervention on the issue is long overdue, but provincial governments have thus far failed to provide clear regulatory or legislative guidance. The Ontario Government has attempted to pass new provisions under the *Education Act*,³ and is likely close to establishing a more standardized protocol for concussions, but it has been left to non-governmental organizations to provide guidance in the interim.

Legislation in Ontario

In May of 2012, the Ontario legislature introduced amendments to the *Education Act*, which included the following:

¹ Ontario Ministry of Education, “McGuinty Government Launches New Concussion Strategy” News Release (March 6, 2012) at subheading: Quick Facts < <http://news.ontario.ca/edu/en/2012/03/protecting-student-athletes.html>>.

² Hockey Linked to Nearly Half of Brain Injuries in Canada’s Kids, Teen Athletes, Sheryl Ubelacker, The Canadian Press (March 29, 2013). Online at: <<http://www.ctvnews.ca/health/health-headlines/hockey-linked-to-nearly-half-of-brain-injuries-in-canada-s-kid-teen-athletes-1.1216150>>

³ RSO 1990, c. E-2.

Concussions

Minister's policies and guidelines

321. (1) The Minister may establish and require boards to comply with policies and guidelines respecting head injuries and concussions in pupils, including policies and guidelines,

(a) respecting the distribution of information to pupils, parents, guardians, board employees and volunteers about the prevention of head injuries, the identification of symptoms of concussions and the management of concussions;

(b) respecting when a pupil who is suspected of having sustained a concussion is to be removed from or prevented from further participating in intramural or inter-school athletics or any part of the health and physical education curriculum;

(c) respecting the return of a pupil who has or may have sustained a concussion to intramural or inter-school athletics or to any part of the health and physical education curriculum, or his or her return to learning;

(d) respecting the responsibilities of board employees, classes of board employees, or other persons who are involved in intramural or inter-school athletics or any part of the health and physical education curriculum in relation to the prevention of head injuries, the identification of symptoms of concussions and the management of concussions;

(e) specifying other persons, in addition to board employees, who have responsibilities described in clause (d);

(f) respecting any other matter that a board's policies and guidelines must address;

(g) respecting any requirements that must be included in a board's policies and guidelines.⁴

Unfortunately, these amendments were never brought into force because they were tabled just before the legislature was prorogued. It remains to be seen if, at some point, the provisions will be reintroduced. However, on March 19, 2014, the Ministry of Education sent a Policy Memorandum to all school boards entitled "School Board Policies on Concussions."⁵ The memorandum mandates that school boards in the province have policies in place for dealing with

⁴ Bill 39 – *An Act to Amend the Education Act – May 2012* – the Bill passed first reading, but failed to come into force before the legislature was prorogued.

⁵ The entire memorandum is attached to the schedule to this paper. Dated March 19, 2014.

concussions by January 30, 2015, and that the policies should include “a development of an individualized and gradual return to learning and/or return to physical activity plan for every student with a diagnosed concussion.”⁶ The memorandum further explains that, “there is no pre-set formula for developing strategies to assist a student with a concussion to return to learning activities since the recovery process will vary for each student.”⁷

The Ministry has also set up a resource website for teachers, parents, coaches, students and health care providers at www.ontario.ca/concussions. The website provides links to information on the Ontario Physical Education Safety Guidelines, including “return to play” protocols.⁸ The protocol relating to “Return to learn/Return to Physical Activity Plan” is a step-by-step process outlined for students returning to school and sports.

Until these guidelines are officially adopted, the most authoritative concussion protocols appear to be those set out by the Ontario Physical and Health Education Association (OPHEA). OPHEA is a non-governmental organization that exists to support schools and communities through program supports, partnerships, and advocacy to protect the health and safety of children and youth. The organization’s website sets out concussion protocols for elementary and secondary school students who participate in intramural and interschool sports.⁹ The protocols set out the stages students must go through in order to be carefully reintroduced to both sport and classroom environments. The protocols include the facts about concussions, a teacher responsibility checklist, a checklist for concussion signs and symptoms, as well as each phase of the protocol for returning to learning and returning to physical activity. The protocols also chart the potential cognitive difficulties that children may experience as a result of concussions and the appropriate communication and teaching strategies for teachers and school staff responsible for implementing the “return to play/learn” strategy.

The above guidelines are only applicable to concussion injuries in the educational setting. Junior sports associations have their own concussion protocols and these vary depending on the prevalence of concussion injuries, budgets, and the level of guidance provided by the various governing bodies. Junior hockey is a good example of the uncertainty surrounding the issue of concussion protocols in the face of attempts to set out a standardized approach.

⁶ Ontario Ministry of Education Policy/Program Memorandum No. 158. Online at <<http://www.edu.gov.on.ca/extra/eng/ppm/158.pdf>>.

⁷ *Ibid.*

⁸ Ontario Physical Education Safety Guidelines – Return to Learn Program, see attached guidelines.

⁹ OPHEA concussion protocols can be found online at <<http://safety.ophea.net/release-of-new-and-revised-concussion-protocols>>.

Hockey Canada

Hockey Canada is the governing body for all minor hockey programs in Canada. Section 5.11.7 of Hockey Canada's Policy and Procedure Manual¹⁰ sets out its concussion policy as follows:

5.11.7.1 When an individual has suffered a suspected concussion, the following steps must be taken:

- Any minor hockey player who suffers a suspected concussion must stop participation in the hockey activity immediately. If there is doubt as to whether a concussion has occurred, it is to be assumed that it has and that the player's parent guardian be encouraged to have the injury properly diagnosed by a medical doctor as soon as possible. A hockey activity is defined as any on-ice or off-ice function involving physical activity.
- Team officials should recommend to the individual's parent or guardian that they seek medical attention immediately, especially if the concussion occurred in any form of hockey activity.
- When a player is diagnosed by a medical doctor as having a concussion, the individual must stop participation in all hockey activities immediately.
- The participant is not permitted to return to any hockey activity until written permission is given by a medical doctor. A sample of a "return to play" form can be found in the Hockey Canada Safety Program Participants Manual**.
- ** Note - Return to full participation shall follow the adopted Hockey Canada Safety Program "return to play" guidelines outlined below.
- A copy of such documentation MUST be submitted to the governing body and/or the Team Safety Person or trainer as determined in the Branch policy, prior to the participants return to any hockey activity.
- All Branches encourage the prevention of concussions with strong education programs. This includes: The reduction of violence and fighting in the game through education and rule enforcement.
- The reduction of head checking and hitting from behind through education and rule enforcement.

¹⁰ Hockey Canada Policy and Procedure Manual. Online at: < http://cdn.agilitycms.com/hockey-canada/Corporate/About/Downloads/policy_procedures_manual_july_2010_e.pdf>.

- Ensuring that strong policies and preventions are put in place with respect to coaches and volunteers participating in on ice activities including the wearing of CSA certified helmets.

5.11.7.2 Rationale and Recommendation

- To encourage greater overall awareness and responsibility regarding the importance of safety of all players, especially as it relates to head injuries.
- ***To reduce the potential for litigation resulting from a concussed player being permitted to return to participation without proper clearance by a medical doctor.***
- To place a greater degree of responsibility on the parent/guardian to ensure that the players health is of paramount importance.
- Each may determine an applicable penalty for any club/team who knowingly disregards their responsibility of requiring a medical doctor's written permission for permitting a player to return to play once it has been determined that the player has received a concussion.

5.11.7.3 Recommended Implementation

- Hockey Canada highly recommends implementation by all Branches. It would be the decision of the Branch as to enforcement and sanctioning of this policy. ***The following challenges have been identified with respect to mandatory enforcement. If a Branch moves to mandatory enforcement these challenges will need to be addressed:***
 - a) Experience with doctor's notes being submitted to the governing body has shown it difficult to educate parents and volunteers with respect to this requirement. Communication of this mandatory requirement must be made a priority if this is implemented as a mandatory requirement for return to play.***
 - b) Work with professional medical associations to educate physicians on the policy above so they are aware of the current "return to play" guidelines as well as the policy within their Branch.***

5.11.7.4 Recommended "return to play" Framework

- The return to play process is gradual, and begins after a doctor has given the player clearance to return to activity.
- Doctor's clearance must be submitted to your governing hockey body or the Team

CONCUSSIONS AND RETURN TO PLAY GUIDELINES

Trainer/Safety Person as per Branch policy.

- Step 1: No activity, only complete rest. Proceed to step 2 only when symptoms are gone.
- Step 2: Light aerobic exercise, such as walking or stationary cycling. Monitor for symptoms and signs. No resistance training or weight lifting.
- Step 3: Sport specific activities and training (e.g. skating).
- Step 4: Drills without body contact. May add light resistance training and progress to heavier weights. The time needed to progress from non-contact to contact exercise will vary with the severity of the concussion and the player. Go to step 5 after medical clearance (reassessment and note to be submitted to your team's staff or your governing body as per Branch policy).
- Step 5: Begin drills with body contact.
- Step 6: Game play.
- Each step should take at least one day
- If symptoms or signs return, the player should return to the previous step, and be re-evaluated by a physician.

Hockey Canada notes that the effect of successive concussions is cumulative and that if concussions are not properly managed, they can result in permanent impairment, the end of a player's participation in sports, and long-term cognitive deficiencies.¹¹ Hockey Canada has also launched a Concussion Awareness Application in an effort to disseminate its policy on concussions and its "return to play" guidelines. Hockey Canada's website further offers a Concussion Recognition Tool designed to help identify when someone has suffered a concussion. Minor hockey associations must be aware of these guidelines in implementing their respective policies.

Along with strict certification regiments for trainers at the minor league level, some associations are going a step further and enforcing baseline testing for youth in minor hockey. A baseline test is used to establish an athlete's physical and cognitive performance capabilities at the beginning of a season before the athlete has suffered any injuries. After a concussion injury occurs, and after severe symptoms have subsided, the athlete is then tested again to determine if her brain has fully recovered. Baseline testing is yet another tool in an effective concussion management

¹¹ Available Online at: <<http://www.hockeycanada.ca/en-ca/Hockey-Programs/Safety/Concussions.aspx>>.

program. Several associations including Minor Oaks Hockey Association in Oakville and the Belleville Minor Hockey Association have gone as far as making baseline testing mandatory for their players. Parents and coaches have praised the idea and there have been only minor complaints about the new regimen.¹²

Despite the numerous resources that Hockey Canada has made available to the public, it remains unclear whether its protocols have been properly implemented by minor hockey associations across the country. What is clear is that Hockey Canada has set a minimum standard to which hockey associations will likely be held if legal claims are initiated against them.

Case Law

In the absence of clear legislation, tort principles have established the duty of care owed by sports teams and school boards to their players. A team is under a duty to exercise reasonable care for the health and safety of its players. This duty extends to the actions of the team's employees, including coaches, physicians and trainers, for whom the team is vicariously liable. There is a dearth of cases in Canada dealing with situations where a professional player initiates an action against the team as result of concussion during play; minor league sports presents the new wave of such potential litigation. However, a case called *Robitaille v. Vancouver Hockey Club Ltd.*¹³ represents an exception. *Robitaille* is the leading Canadian case on the standard of care owed by sports teams to their players and involves a return to play situation. Cases from the United States are also discussed in this section as they may help inform a Canadian court's decision.

*Robitaille v. Vancouver Hockey Club Ltd.*¹⁴

In *Robitaille*, National Hockey League player Mike Robitaille sustained a series of injuries that eventually led to the end of his career. Despite his team's awareness of Robitaille's injuries, he continued to play through the injuries until he was ultimately disabled. As a result of his injuries, Robitaille initiated an action against his team, Vancouver Hockey Club Ltd.

The trial judge found that, had reasonable attention been paid to Robitaille's welfare, he would have undergone a full medical and neurological examination after one of his earlier injuries.¹⁵

¹² Globe and Mail, James Myrtle, Rachel Brady, "Minor Hockey Associations Mandate Baseline Concussion Testing" September 12, 2011.

¹³ 1979 CarswellBC 477, 19 BCLR 158 (BC SC) [*Robitaille BCSC*]; affirmed by *Robitaille v. Vancouver Hockey Club Ltd.*, 1981 CarswellBC 216, 30 BCLR (BC CA) [*Robitaille BCCA*].

¹⁴ *Robitaille* is analyzed by a companion paper to this one, entitled The Legal Implications of Concussions in North American Contact Sports.

¹⁵ *Robitaille BCSC supra* note 13 at para 16.

As a result, the serious nature of Robitaille's injuries would have been discovered and he would not have played in the game in which his injuries were severely aggravated.¹⁶ The trial judge held that the defendant hockey club owed a duty of care to take reasonable care to ensure that its players did not suffer undue or unnecessary risk of injury, and this duty included the obligation to provide medical care.¹⁷ The defendant breached its duty of care in failing to react reasonably to Robitaille's complaints and symptoms, in failing to provide appropriate medical care and in putting pressure on him to ignore his injuries, which resulted in the permanent damage.¹⁸ It was within the defendant's reasonable contemplation that carelessness on its part was likely to cause injury to Robitaille. Further, the doctors and coaches, who were employees of the defendant, were negligent and the defendant was vicariously liable for their actions.¹⁹

The trial judge awarded \$35,000.00 in exemplary damages, which was upheld at the Court of Appeal.²⁰ The trial judge reduced Robitaille's compensatory damages of \$400,000 by 20% because of his contributory negligence in failing to act reasonably to protect his own health and well-being, which was also upheld at the Court of Appeal.

Although *Robitaille* did not arise in the context of a concussion-based injury, the case recognizes the obligation to provide proper medical care in cases involving a professional athlete employed by a team.²¹ This is important to a player's return to play, as the medical evidence available to a sports team at the time that a player is permitted to return will determine the reasonability of that decision.

*Cerny v. Cedar Bluffs Junior/Senior Public School*²²

In *Cerny v. Cedar Bluffs Junior/Senior Public School*, a high school football player suffered a head injury after being allowed to return to play during the same game as well as a subsequent practice. As a result, he brought an action alleging negligence against the school and the school district. The court held that "the appropriate standard of care to be applied to coaching staff of the school is that of a reasonably prudent person that holds a state teaching certificate and a coaching endorsement", which requires that the coach:

¹⁶ *Ibid.*

¹⁷ *Ibid* at para 46.

¹⁸ *Ibid* at para 64.

¹⁹ *Ibid* at para 63.

²⁰ *Ibid* at para 80.

²¹ In order to claim against a team for the negligent actions of a team physician, through vicarious liability, one must establish that the physician was an employee, acting in the course of their employment with the team, and not an independent contractor.

²² (2004), 679 NW 2d 198, 200-01 (Neb Dis Ct) [*Cerny*].

- i) be familiar with the elements of a concussion,
- ii) must look for concussion symptoms if a player has suffered a head injury,
- iii) must repeat this evaluation at intervals before the player can return to play, and must evaluate the seriousness of the injury to determine whether it is appropriate that the player resume play or be prohibited from participating until cleared by a medical professional.²³

In this case, not only was the coaching staff subject to the standard of a reasonably prudent person, but in light of the training that the high school coaches had, they were required to identify and manage sports-related concussions suffered by their players. As the coaching staff were able to demonstrate that they had exercised reasonable care in following the concussion “return to play” guidelines established by the school, the court found that they were not negligent and had exercised reasonable care.²⁴

This case enunciates the same basic elements of Hockey Canada’s “return to play” guidelines, though it fails to provide the same level of specificity. However, this case is useful in showing how sports teams can meet the standard of care through the use of proper procedures and by proving that they were followed.

*Zemke v. Arreola*²⁵

This case involved a school board’s duty of care to arrange for prompt medical care for injured students prior to a return to play. In this case, a high school football player advised his coaches of a dislocated finger during a game but did not report a head injury that he also sustained. The student continued to play but suffered a subdural hematoma following another hit. The player subsequently brought a negligence claim against his coaches and the school district.²⁶ The main issue before the court was whether the aggravation of the student’s head injury was foreseeable. Since the player did not report the head injury and since there were no obvious symptoms of it, the court held that the coaches were not negligent in failing to remove the student from play.²⁷

This case is significant in that a school board successfully defended an action on the basis that it was unreasonable to expect coaches to bar a return to play based on a concussion injury that was undisclosed and undetectable in the circumstances. Such a situation is common in minor-level sports involving young plaintiffs.

²³ *Ibid* at 203.

²⁴ *Cerny supra* note 13 at 203, 206-7.

²⁵ (2006), WL 1587101 (Cal App 2 Dist).

²⁶ *Ibid*.

²⁷ *Ibid* at 5.

Guidelines and the Case Law

Even though there is no specific, legislated standard for a player's return to play in following a concussion, a court will hold a sports team or school board liable if a player is permitted to return to play in the wake of a concussion if it contravenes the *Robitaille* standard of care; specifically, a sports team or school board has a duty to take reasonable care to ensure that its players do not suffer undue or unnecessary risk of injury. *Robitaille* further establishes that this may require access to appropriate medical assessments prior to the return to play, especially if the player is a member of a professional sports team. American case law provides that school boards may be held to a higher standard of care, such that the court may hold a coach to the standard of a reasonable person holding teaching and coaching certifications. Lastly, the fact that prior injuries were unreported by a player will help a defendant prove that they acted reasonably in the circumstances based on the information that that was available. Adherence to the Hockey Canada standards, or a comparable protocol, would significantly strengthen a defendant's position in the wake of a serious injury and an ensuing lawsuit by helping to prove that the defendant's conduct was reasonable.

Adjusting to the New Reality

Unfortunately concussions are a risk that cannot be eliminated from contact sports. They occur at all levels of competition and with players of any age. Concussion awareness has increased drastically in recent years and regulators are scrambling to keep step with demands for change. Effective "return to play" guidelines are essential for young athletes because of their physical vulnerability and inability to properly communicate symptoms to coaches and trainers. For this reason, sports organizations and schools must develop effective concussion management protocols or risk liability for civil claims; to lag behind the trend of increasing concussion awareness is a recipe for liability. If implemented correctly, these strategies will help in the defence of civil claims that target the deeper pockets of sports associations. The legal landscape is quickly changing, and with high profile cases ever present in the media, the pressure is on sports organizations and school boards to properly implement thoughtful and effective "return to play" guidelines.