# Concussion Statutes and Sovereign Immunity:

## Are coaches, athletic trainers and municipalities still immune from civil liability?

**By Charles F. Gfeller and Heather L. McCoy**

Traumatic brain injuries (TBIs) among young athletes have garnered increased attention in recent years, due in large part to a growing awareness in the medical and athletic communities regarding the prevalence and potentially devastating effects of head injuries in youth sports. This increased knowledge and awareness led to the enactment of numerous concussion laws across the country. As of early 2013, more than 40 states had ratified such legislation. These concussion laws typically place educational requirements and responsive obligations on coaches, athletic trainers and other scholastic and youth sports personnel to increase concussion awareness and symptom recognition. The statutes also often mandate that schools and athletic programs implement measures designed to keep concussed athletes off the field until a physician or qualified health care professional has given the green light to return. Given the increased duties the concussion laws place on schools, coaches and other personnel involved in scholastic athletics, the question arises whether the age-old legal doctrine of sovereign immunity– the principle that shields municipalities and their employees from civil liability– will continue to protect coaches, ATs and municipalities from civil liability.

Under traditional sovereign immunity, school districts, schools, coaches, ATs and anyone else employed by a municipality were generally protected from exposure to civil liability in situations where students suffered injuries while participating in scholastic athletic events. The extent of these immunities varied by jurisdiction. Today, many states have enacted tort reform acts to allow civil actions against municipalities and their employees under certain circumstances, while also capping damages where lawsuits are permitted. Nonetheless, the doctrine of sovereign immunity still exists in some form in many states' books.

The concussion laws were, of course, implemented to protect the health of student athletes. However, plaintiffs' attorneys may attempt to use concussion laws as swords when pursuing claims on behalf of injured athletes, seeking to circumvent immunity laws that might otherwise limit exposure. Under such circumstances, plaintiffs' attorneys will take the position that if a school did not implement or enforce a sufficient educational program or protocol for dealing

with concussed athletes, in accordance with the applicable concussion law, then the school should be liable. Similarly, if a coach or AT failed to follow through with established protocols (e.g. a requirement that a player suspected of a concussion obtain a physician's note to return to play) or educational requirements, and a student athlete is harmed, then the coach or AT and their employers should be liable since there was a *per se* violation of the concussion law.

Indeed, to prevent this, many states have included provisions in their concussion laws specifically noting, for example, that "nothing in this [statute] abrogates or limits the protections applicable to public entities and public employees" (Colorado Revised Statutes § 25-43-101; see also, Nebraska Revised Statutes § 71-9106). However, for the state that did not include such language, or for the state that has exempted public schools and/or public employees from immunity (either in full, in limited circumstances or based upon a court's evaluation of certain criteria), the question looms as to whether these concussion laws broaden the duty of care owed to student athletes, thus broadening potential exposure for otherwise immune entities and employees if they are deemed to have breached the duty of care (See, e.g., Virginia Code Annotated § 22.1-271.5; Alabama Code 1975 § 22-11E-2).

One court's analysis regarding the duty of care for schools in the concussion arena is helpful in illustrating how courts may expand the applicable standard of care based on the enactment of concussion laws and the increased knowledge and awareness regarding traumatic brain injuries among student athletes. In *Cerny v. Cedar Bluffs*, the Supreme Court of Nebraska heard an appeal regarding whether the trial court properly found that a high school's conduct towards an injured football player comported with the applicable standard of care (267 Neb. 958, 2004). Brent Cerny, a high school junior in 1995, struck his head on the ground in a Friday football game and took himself out of play stating that he felt "fuzzy" or "dizzy." Cerny asked to return later in the game, and his coaches let him after observing that Cerny seemed "normal." During the following Tuesday's practice, Cerny suffered another head injury that caused second impact syndrome and resulted in permanent brain disabilities (Id. at 960-961). Cerny brought suit against his school pursuant to Nebraska's tort claims act under a theory of *respondeat superior*, alleging that the school, acting through its coaches, was negligent in failing to adequately examine Cerny following his concussion to determine the need for medical attention (Id. at 961-962).

On appeal, the court affirmed that the applicable standard of care for a reasonable coach *in 1995* included four factors: (1) the coach must be familiar with the features of a concussion; (2) the coach must evaluate the player who appears to have suffered a head injury for the symptoms of a concussion; (3) the evaluation must be repeated at intervals before the player can be permitted to re-enter a game; and, (4) the coach must make a determination based upon the evaluation as to the seriousness of the injury and determine whether it is appropriate to let the player re-enter the game or to remove the player from all contact pending a medical examination (267 Neb. at 964). However, the court's analysis hinged on the fact that the coach's actions comported with the reasonable actions a coach would have taken in 1995. The court noted that the training now required by the State of Nebraska (in 2004 when the decision was rendered) instructed coaches to not permit the athlete to return to competition until receiving clearance from a physician (Id. at 963).

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Consequently, it is likely that a Nebraska court determining the applicable standard of care in a similar case, post-2004, would hold a coach to a different standard of care than that which the *Cerny* coaches were held, one which includes the standard that a reasonable coach would not permit the athlete to return to play until he is cleared by a physician. Further, following Nebraska's enactment of the Concussion Awareness Act in July 2012, which *requires* the removal of an athlete from play with signs or symptoms of a concussion, and *requires* a health care professional's written clearance for return to play, a coach or AT would likely be held to an even higher standard of care.

As evident in the *Cerny* case, the interplay of recently enacted concussion laws with existing immunity and tort reform laws will determine whether a given jurisdiction places increased legal responsibility on coaches, ATs and other school officials to properly handle concussed athletes. This increased responsibility could, in turn, lead to increased legal exposure for entities and individuals that 25 years ago were protected by the doctrine of sovereign immunity.

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**EDITOR'S NOTE:** *Charles Gfeller spoke on this topic at the 2013 Youth Sports Safety Summit in Washington, D.C. in February 2013. He is connected to the youth sports safety topic through his nephew, Matthew Gfeller, a high school football player who died from a severe helmet-to-helmet collision during his first varsity football game in 2008. Matthew's parents created the Matthew Gfeller Foundation in his memory. Learn more about the foundation and the Matthew Gfeller Sport-Related Traumatic Brain Injury Research Center at the University of North Carolina - Chapel Hill at* **www.matthewgfellerfoundation.org.**