The Head and the Heart: Juror Perceptions of Sports Concussion Litigation

By Kevin R. Bouly, Ph.D.
It is difficult to say

when the problem began. Yet, concerns over the health risks related to concussion injuries, in all levels of sports, continue to grow. Medical experts have labeled sports concussion management a public health issue and lawmakers are increasingly involved. Helmet makers, leagues, teams, and governing organizations like the National Football League (NFL) and National Collegiate Athletic Association (NCAA), are no longer on the sidelines. Lawsuits over sports concussion injuries are a reality and both popular media and academic voices are sounding off. Attorneys have described well many of the legal implications of this “wave” of litigation, but we know little about how jurors perceive the unique aspects of sports concussion lawsuits. Four findings from our annual National Juror Survey, focused on sports concussion issues, begin to fill that void and address litigation and trial strategy in concussion lawsuits.

*Severe concussion is a sleeping gun.*

Some of the damage is clear. An overwhelming majority of the jury-eligible population (84%) surveyed in late 2011 and early 2012 reported that a severe concussion is highly likely or somewhat likely to cause health problems in the future. Sports concussion plaintiffs (e.g., former NFL player Merrill Hoge) claim not only that severe concussion’s long-term consequences are necessarily unclear, but the fact that the anticipated consequences are uncertain is itself an aspect of the plaintiff’s injury. Jurors are asked to contemplate the degree of an unknowable injury that the majority believes is likely to have future consequences.

An athlete suffers a severe concussion while playing football. How likely is it that the concussion will cause health problems in the future?

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<th>Percentage</th>
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<tr>
<td>52%</td>
<td>Somewhat Likely</td>
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<td>32%</td>
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<tr>
<td>16%</td>
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“[Concussion] screws up your memory.”

“It makes Alzheimer’s.”

-Mock Juror Descriptions of Concussion Effects
Importantly, potential jurors distinguish among the level of athlete most vulnerable to future concussion-related health problems, finding younger athletes and professional athletes more vulnerable than college athletes. Yet clear risk lies with jurors who perceive the scientific evidence of future harm at the time of the concussion as ambiguous, but are predisposed to believe plaintiffs are likely to suffer injuries down the road and should be compensated both for what is expected, and more importantly, what can’t be predicted.

One explanation for the differing perceptions is that potential jurors view younger athletes as more vulnerable by virtue of continuing to develop physiologically, and suffering a concussion at a young age may halt or impact healthy development. Potential jurors may see professional athletes as more vulnerable due to violence that is unmatched at other levels. Regardless of the cause, trial counsel must address the fact that most potential jurors presume future harm related to severe concussions and view athletes as having differing levels of vulnerability to future harm.

“The fact that concussions may lead to emotional problems has been an ‘aha’ for me in just the last year or so based upon the media.”

-Male Mock Juror

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Recommendation:
Keep jurors in the here and now.
Jurors decide cases as much with their hearts, as with their minds. They are likely to view some plaintiffs (and plaintiff classes) as more vulnerable or simply more sympathetic than others – critical intelligence to inform risk in a given venue. More important for concussion defendants, however, is addressing two juror biases in concussio
Helmet makers and leagues have the greatest responsibility to protect players.

The science of sports concussion continues to evolve and play a role in concussion-related litigation. Major research programs are engaged in ongoing studies and some findings suggest that newer football helmets lower concussion risk, a finding that can represent a risk and a benefit to helmet makers and sports leagues.

“I think [helmet makers] have a big responsibility...because that is what they’re making to protect you.”

-Male Mock Juror

Perceived power to have prevented a negative outcome is a key aspect of juror decision making. Potential jurors believe helmet makers can manufacture and sell helmets safe enough for astronauts and are likely to wonder why safer sports helmets were not developed sooner by defendant companies or required/recommended by a defendant team or league (again, hindsight bias). Plaintiffs pursue evidence that helmet makers knew of dangers and chose not to make safer products, thereby failing to protect players who had a right to believe they were being protected. At the same time, evidence that newer helmets are safer may also support a juror conclusion that helmet makers have responded to knowledge of risk by improving the technology and making players safer. Potential jurors generally view leagues and helmet makers as the most powerful vehicles of player safety.

Some characteristics distinguish potential jurors’ perceptions of who should be held most responsible for athletes’ head injuries. For instance, females (30%) are more likely than males (20%) to report helmet makers are most responsible. At the same time, males (31%) are statistically more likely than females (18%) to report the athlete as most responsible. Self-described Democrats (37%) are more likely than all other political affiliations (21%) to assign the greatest responsibility to the helmet maker. These and other factors such as potential juror ethnicity, as well as key attitudes, are statistically significant predictors of jurors’ reports of the party most responsible for player head injuries.

While concussion defendants may offer “assumption of risk” defenses asking jurors to consider a player’s role in his own injuries, potential jurors have differing reactions to who is responsible for a player’s repeated exposure to risk. Juror assessments are often based upon an evaluation of the parties’ power and knowledge, and the parties’ use of power and knowledge to make choices. That assessment often results in jurors’ focus on the entities with the greatest resources: in concussion litigation that means the helmet makers, the leagues and the teams/organizations – not the players.

Recommendation:
Level the playing field.

Demonstrate how your client used its power and choices fairly and effectively – always with player safety as a primary goal. For a league like the NFL, this means demonstrating how the league took seriously its duty to protect its players and communicated consistently (or at least used responsibly) its knowledge and resources. Openly endorse the plaintiff(s) at trial. Make the strategic decision not to aggressively attack their credibility. Instead, make sure jurors see them as active consumers of medical care and medical knowledge, with the power and ability to know much more than the average juror about the health risks of their sport.
Many jurors can see themselves as plaintiffs.

Fifty-four percent of surveyed potential jurors reported they would probably or definitely pursue a lawsuit against a helmet maker if they suffered a severe head injury and the helmet maker could have offered a more protective helmet. Juror attitudes and experiences (and to some extent, demographics) are statistically significant predictors of willingness to pursue a lawsuit against a helmet maker. For instance, the perception that there are too few lawsuits filed against large corporations is predictive of a greater likelihood to report willingness to sue a helmet maker for a head injury.

Perceptions of sporting good manufacturers’ product testing is a crucial aspect of jury decision making in all sports product cases, and is a relevant predictor of potential jurors’ attitudes.

“‘I assume the federal government has certain testing requirements, but I think a good company and a sound company should proactively test their product on the basis of what they believe they need to do to make it a safe product.’

-Male Mock Juror

Specifically, 62% of potential jurors who believe sports products companies often or almost always place products on the market that are not adequately tested say they would probably or definitely pursue a lawsuit against a helmet maker. Just 48% of those who believe sports products are rarely or almost never placed on the market without adequate testing say they would do the same.

“I would want validation that it was tested by a third party.”

-Male Mock Juror

Other attitudes, including perceptions of environmental harm caused by corporations and frequency with which lawsuits against corporations have merit, are also related to increased willingness to pursue a lawsuit.

Helmet makers and leagues bear significant responsibility for concussion-related injuries.

We asked jury-eligible Americans to consider a few brief lawsuit scenarios and indicate their initial leaning in the case based on a limited description. As summarized below, based only on the information provided, potential jurors assigned the league/organizing body (NCAA or NFL) or the helmet maker with the majority of responsibility for a football player’s concussion-related injuries.
Dozens of retired professional football players experienced major health problems related to concussions suffered while playing football. Those players are now suing the National Football League, claiming League executives ignored known risks associated with concussions and chose not to protect players in order to ensure the game remained exciting for fans. What percentage of responsibility for the players’ injuries would you assign?

Obama voters are more likely to assign majority responsibility (50% or more fault) to a helmet company.

Broader anti-corporate bias is also related to greater responsibility for the helmet company, with 66% of those who believe there are too few lawsuits against corporations assigning the helmet company the majority of responsibility for players’ injuries, while just 39% of respondents who believe there are too many lawsuits report the same. Perceptions of the role of government regulation of corporations, as well as corporate harm to the environment, among other perceptions, are also predictive of potential jurors’ decision to assign majority fault to the helmet maker.

Potential jurors assigned the NFL an average of 55% of responsibility for player injuries in a scenario based on current class action litigation filed against the NFL.

Several factors in the preliminary analysis were also predictive of potential jurors’ assignment of more than 50% responsibility to the NFL in the above scenario. Perceptions of presumed fault for a sports related injury are predictive of potential jurors’ decisions to assign responsibility to retired NFL players. Fully 70% of potential jurors who report a sporting goods injury is generally, or almost always the product’s fault, assigned the NFL more than half of the responsibility. Only 41% of those who felt a sports injury is generally, or almost...
always the individual’s fault did the same. Perceptions of corporate environmental harm and lawsuits against corporations are also powerful predictors of the NFL’s responsibility for players’ injuries.

As shown in the chart above, potential juror demographics may also play a role, with a consistent pattern that males

Female potential jurors are more likely to assign less responsibility to NFL player-plaintiffs.

As in other scenarios studied, the perception that there are too few lawsuits against corporations (57% of those who believe there are too few versus just 34% of those who believe there are too many) are related to assignment of 51% or more responsibility to the NCAA. Those without supervisory experience in their work (50%) are more likely than those with supervisory experience (37%) to assign the NCAA more than 50% of responsibility.

Additional survey data supports the conclusion that jurors are likely to view the NCAA much like they would a corporate entity, and bring aspects of anti-corporate bias against the NCAA in the courtroom. Specifically, we have had discussions with mock jurors about perceptions of the NCAA and some have immediately focused on the NCAA’s profits and its responsibility to have safeguards for players in place.

“College sports makes a lot of money and they do recruit a lot of people to fill these teams and sometimes they are gone through, like I said, and probably not all the safeguards are not in place as they should be.”

-Male Mock Juror

Potential jurors’ attitudes about government regulation of corporations are also related to assignment of responsibility to the NCAA. Specifically, 51% of potential jurors who report the government should police corporations more assigned the NCAA 51% or more responsibility. Just 26% who report the government should police corporations less did the same.

Recommendation:
Test your venue early.

Every venue is different and trial risk in each venue depends on a variety of case-specific factors. The attitudes, experiences, and juror characteristics associated with leanings in concussion disputes provide a basic idea of possible risk in a given venue. Early focus groups and/or survey research in a specific venue will contextualize these findings and put a finer point on your client’s risk.

More importantly, the lessons learned in early research will allow you to make informed decisions in discovery and garner the testimony and evidence proven to be more persuasive to jurors in your case.

A college football player suffered a number of concussions while playing college football. He now suffers from significant health problems related to those concussions and is suing the National Collegiate Athletics Association (NCAA) for failing to enact policies it knew could prevent and help treat head injuries in college football players. What percentage of responsibility for the players’ injuries would you assign?

52% The NCAA
45% The Player

are more likely than females to report opinions and perceptions favorable to helmet makers, teams, and leagues. Non-white respondents (57% versus just 43% of white respondents), and those who are not employed full time (54% of respondents versus 40% of those employed full time) are more likely to assign 51% or more fault to the NFL.

In a final litigation scenario, potential jurors were asked for their impressions of a class action dispute by college football player plaintiffs against the NCAA.

"College sports makes a lot of money and they do recruit a lot of people to fill these teams and sometimes they are gone through, like I said, and probably not all the safeguards are not in place as they should be.”

-Male Mock Juror
Dr. Kevin Boully has been active in litigation consulting since 2001. His doctorate in legal communication focuses on persuasion, small group influence, and jury decision making. Dr. Boully has conducted and analyzed research and advised on a full range of plaintiff and defense cases. Dr. Boully has been Associate Editor and advisor to the American Society of Trial Consultants’ jury research and courtroom communication publication, *The Jury Expert*. Dr. Boully is also currently co-authoring a book for the American Bar Association Section of Intellectual Property, entitled *Patently Persuasive*. Outside of work, Kevin likes to fly-fish, climb mountains, and watch his three dogs hog the furniture.