



Peter Brownson is a Consultant Orthopaedic surgeon based in Liverpool. He specialises in shoulder and elbow surgery and he is a past President of BESS. Over the last 25 years, he has treated elite athletes from a wide range of sports and he was the upper limb surgeon for Liverpool Football Club from 2000 to 2017. He serves as an Expert Witness for McCollum Consultants.



David Spencer is a partner in Clyde & Co LLP. With over 20 years of experience in litigation, specialising in a wide range of catastrophic and fatal injury claims, David also heads our sports practice group. He is responsible for coordinating our sports law offerings across insurance, claims and risk, and regulatory. David is also the appointed panel solicitor for liability claims involving the UK Governing Bodies of two and four-wheeled motorsport. He is a member of the Forum of Insurance Lawyers (FOIL) Sports Law Sector Focus Team.

Professional insurance when treating elite and professional athletes

Peter Brownson, David Spencer, Andrew Wallace and Nigel Jones

The terms 'elite' and 'professional' are commonly used to refer to individuals with the potential to earn money from sport, media or endorsements.

The treatment of such elite and professional sports people is recognised as an area of particular risk when it comes to clinical negligence claims. There are several reasons for this.

Firstly, athletes may have a higher earning capacity when compared to the average patient. Secondly, the impact of a minor injury may be disproportionately significant. Thirdly, third parties such as professional clubs or sponsors may have a stake in the sportsperson's wellbeing.

With regard to professional indemnity insurance for doctors involved in the treatment of professional athletes, the first point of reference may be the GMC professional guidance of indemnity which states: *"The GMC requirement is to hold adequate and appropriate insurance or indemnity arrangements in place covering the full scope of your medical practice... for liabilities that arise from your practice as a doctor whenever a claim is brought."*

In terms of what constitutes adequate and appropriate to the GMC, they state that *"the law says appropriate cover is cover against liabilities that may be incurred in practising as a doctor having regard to the nature and extent of the risks of practising as such."*

Whilst this GMC wording is a good start it does not necessarily help us to the extent necessary when considering the level of cover required when treating an elite athlete. Perhaps more pertinent guidance can be found within the Faculty of Sport and Exercise Medicine's professional code Section 1.71: *"You must ensure that you have adequate indemnity protection against damages, claimants' costs and defence costs relating to a claim brought by a patient's employer, club, agent, sponsor or event organiser in relation to alleged negligent treatment of a patient."*

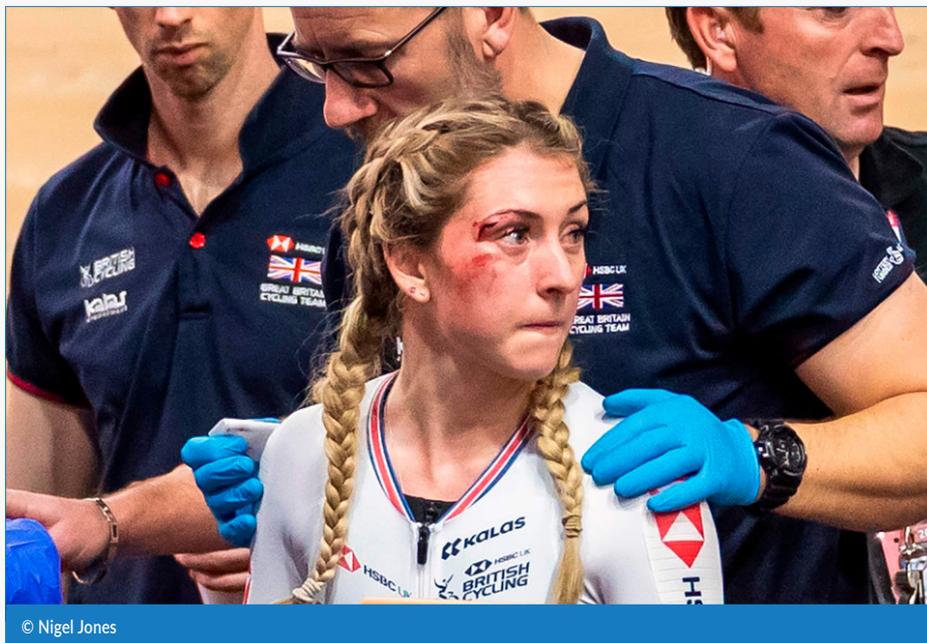
This statement highlights two important points: firstly, it is essential for doctors treating elite and professional athletes to recognise that not only may claims from professional or elite athletes be of a higher value than those from the average lay person, and secondly that there is every possibility that the doctor will not only receive a claim from the patient but also from the club whose asset has been damaged, players agent, sponsors etc. This is referred to as third party cover. In other



Andrew Wallace has worked exclusively in shoulder surgery for over 25 years and has been at the forefront of the development of arthroscopic techniques for the management of shoulder instability, cuff tears and arthritis with a particular interest in elite athletes. Following training in Australia, Scotland and Canada and academic posts at Imperial College and in the NHS, he was a founding member of the Fortius Clinic in London. He has extensive experience in dealing with athletes from international and premiership rugby and football, as well as cricket, martial arts, equestrian and other disciplines within sport.



Dr Nigel Jones is a Consultant in Sport and Exercise Medicine and works at Spire Liverpool Hospital and Rehab 4 Performance. He is the current Chief Medical Officer for British Cycling and Prior to this he was Doctor to the England Men's Senior Rugby Union Team. He has also worked at Liverpool Football Club, the English Institute of Sport, and the British Boxing Board of Control. Nigel is a former Chair of Education for the Faculty of Sport and Exercise Medicine (FSEM), and the British Association of Sport and Exercise Medicine (BASEM). Nigel has many years' experience as an Expert Witness in Sport and Musculoskeletal Medicine.



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words, medical malpractice insurance as opposed to professional indemnity insurance is additionally required to respond to a claim from a third party such as a football club.

Historically, such third-party cover has not been provided by providers of medical indemnity. To quote from the Medical Protection Society website, *'our advice to specialists/consultants treating sports people for injuries incurred during the course of their employment is to ensure that they conduct themselves in such a way that the duty of care is limited to the patient and not to the patient's employer. In order to minimise the liability, we strongly advise members who treat elite or professional athletes that they should:*

- *Not enter into a written or oral contract with a third party (i.e. someone who is not their patient) to treat the professional or elite sportsperson for reward.*
- *Only accept referrals from other independent healthcare professionals, and not from clubs directly or from healthcare professionals working for them.*
- *Address any professional fee notes to the patient and not a third party. If fees are to be settled by a third party, the patient should be asked to forward them on. Alternatively, written confirmation may be obtained from the patient that all fee notes should be sent to the club, employer or their medical insurers.*

It is important to note that what constitutes a written or oral contract with a third party is not defined but factors that might be considered relevant would include hospitality, free match tickets etc. This issue was

highlighted in the case of *West Bromwich Albion Football Club v El-Safty [2005] EWHC 2866 (QB)*. The claim related to negligent advice and subsequent unsuccessful knee surgery performed by the defendant Consultant Surgeon on a West Bromwich Albion (WBA) player. WBA claimed 'millions of pounds' in damages from the Defendant for the losses which it alleged it had suffered in consequence of his negligence; the loss of value of the contract, the cost of replacing him and lost wages. The action was brought both in contract and in tort. The Defendant denied there was a contract with WBA and denied he owed any duty to WBA in tort. The existence of any duty in contract or tort was tried as a preliminary issue. The Court at first instance found that there was no contract between WBA and the Defendant as WBA's physiotherapist had referred the player to the Defendant as a health professional, as opposed to instructing the Defendant for reward. The claim for a liability in tort also failed. WBA unsuccessfully appealed to the Court of Appeal (see [2006] EWCA Civ 1299).

As an aside, the player concerned issued his own separate claim for damages of c. £7 million against the same defendant (*Appleton v El Safty [2007] EWHC 631 (QB)*). The negligent advice was admitted and the Court awarded damages of £1.5 million on consideration of expert quantum evidence.

The area of third-party cover came under further scrutiny and entered the public domain in 2019 when Sunderland Football Club attempted to sue their club team doctor for £13 million. In response, the doctor pursued a counter-claim for an indemnity / contribution against the club's former physiotherapist >>



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and doctor. The claim related to an alleged failure by the club doctor to raise concerns about a player's chronic knee issue at a signing on medical. Although subsequently the claim and counter claims were abandoned, it highlighted the potential issues facing doctors treating professional athletes.

Whilst the vast majority of orthopaedic surgeons will not be employees of a particular elite sport organisation e.g. a football club, some 'Club Doctors' will be. It is imperative that these doctors establish what vicarious liability cover is provided by their employer, and what is not. Those on a service level agreement will have no vicarious liability cover.

Arranging appropriate cover may be relatively straightforward, however, what of adequacy?

As the previous summary identifies, multi-million-pound claims for damages from 'average' athletes (Mr Appleton was described in his litigation as a footballer with a 'low profile') are not uncommon.

Damages for the injury itself (general damages for pain, suffering and loss of amenity) may be the least expensive part of the claim, however the claim can (and will) be developed to include loss of income, loss of potential income, loss of bonus (personal and club), loss of sponsorship, loss of benefit of sell on clauses, lost opportunity in management and even punditry.

In addition, claims inflation is an ongoing concern in the insurance industry, where all

claims are more expensive, year on year. The concern might not necessarily be when the next Mr Appleton makes a claim, but when the claimant was going to be the next Ronaldo, McIlroy, or Hamilton.

And damages are only one element; "... You must ensure that you have adequate indemnity protection against damages, claimants' costs and defence costs."

In complex claims, as professional athlete claims can often be, the claimant's litigation costs might reasonably exceed £1 million, and the costs of defending a claim to trial is unlikely to be too far behind.

So, how much indemnity is enough?

Dedicated medical insurance schemes have been developed that provide additional levels of protection in terms of level of medical indemnity (up to £20 million rather than the more usual £10 million) and third-party liability. Probably the most well-known of these is provided by SEMPRIS but other schemes do exist.

However, when taking out professional indemnity through such schemes, it is important to note that the increased level of protection comes at a price. Firstly, the costs of such indemnity are increased. Secondly, professionals undertaking the treatment of professional athletes may subsequently find that they are effectively locked-in to the same insurance provider, even if they

cease treating professional athletes, as new insurance providers may be unwilling to provide retrospective cover for athletes treated previously or at the very least will require details of all professional athletes treated previously together with a log of previous claims.

In summary, it is essential that surgeons check with their insurance providers that they have both appropriate and adequate cover before commencing treatment.

The treatment of elite athletes is extremely challenging for many reasons:

- The increased risk and size of potential negligence claims
- Exposure to third party claims
- Increased reputational risk for the surgeon
- Increased complexity of diagnosis and surgical treatment
- Increased urgency of diagnosis and treatment

Consequently, ideally, what are often highly complex or controversial decisions should be made in collaboration with colleagues, with the consent of both the player and the club/agent.

Finally, it is important to state that the increased risks and costs of indemnity cover should be reflected in the fees levied on the player/club for their treatment. ■