

# Virtual Mentor

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## HEALTH LAW

### Concussion-Related Litigation against the National Football League

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Over the last decade, three grisly events have caused the National Football League (NFL) to reexamine its relationship with its players and have ignited intense scrutiny from NFL athletes and the public. In 2006, Andre Waters, a retired defensive back from the Philadelphia Eagles and Arizona Cardinals, committed suicide after struggling with depression for many years [1]. Soon after his death, his family chose to have pieces of his brain analyzed to better understand just what might have triggered his depression and his suicide [1]. Five years later would come a second troubling death when Dave Duerson, a former safety for the Chicago Bears, took his own life [2]. Unlike Waters, whose self-inflicted gunshot wound was to the head, Duerson shot himself in the chest and left an eerie suicide note saying, “Please, see that my brain is given to the NFL’s brain bank” [3]. And, in 2012, perhaps the most famous incident in this string of tragedies would take place; former San Diego Chargers linebacker Junior Seau shot himself to death, again in the chest rather than in the head [4].

Postmortem examinations of the brains of these once-towering giants of the gridiron revealed disturbing evidence that these deaths, along with many other deaths and debilitating injuries of NFL players, were associated with a single condition: chronic traumatic encephalopathy (CTE), a degenerative brain disease similar to Alzheimer disease [5]. CTE is caused by a history of repeated head trauma (including known concussions and asymptomatic subconcussive injuries), and its often-devastating behavioral manifestations include “memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, and, eventually, progressive dementia” [6]. Among professional football players and many in the medical community, the occurrence of CTE is widely considered to be the result of the years of constant head injuries players experience in practice and in play, especially the repeated concussions that coaches, team doctors, and—many argue—the NFL, have shrugged off as “dings” or “bell-ringers” [7].

There are presently 242 concussion-based actions pending in federal and state courts against the NFL. They assert, among many charges, that the league was aware of the neurological effects of repeated head injuries and deliberately concealed this information to the detriment of players and players’ families [8]. This article touches upon the legal claims against the NFL in these lawsuits and just why so many former players argue that the league neglected its responsibilities to protect the health and welfare of the athletes who have made football arguably the most popular pastime in the United States. Professional athletic leagues in America are no stranger to the

courtroom, but the litigation surrounding this current controversy could help to clarify just what athletic associations and leagues owe to the safety and health of their players.

### **The NFL's Contentious Handling of Head Injuries**

The controversy surrounding the NFL and the brain injuries experienced by its players has grown out of contentious debate between the league and the medical community about the long-term repercussions of concussions and other head trauma. The NFL continues to structure its safety rules around medical determinations that many have deemed highly suspect. In 1952, the *New England Journal of Medicine* published a study on recurring sports injuries, including injuries experienced in football, which found that “patients with cerebral concussion that has recurred more than three times or with more than momentary loss of consciousness at any one time should not be exposed to further body-contact trauma” [9]. The NFL responded to this and other evidence of the potential for serious injury by gradually enacting play rules intended to create a safer on-field environment. In 1962, for instance, the NFL passed a rule prohibiting players from grabbing other players by the face mask and, in 1979, a rule forbidding players to “butt, spear or ram an opponent with the crown or top of the helmet” [10]. But it was not until 1996 that this anti-helmet-ramming rule was actually enforced, with many coaches encouraging the technically prohibited plays during the 17-year gap [10].

#### *The NFL's MTBI Committee*

As more questions and concerns about head injuries arose in professional football, a commission created by the NFL in 1994 recommended an independent scientific investigation to “foster better understanding of the causes, diagnosis, treatment and prevention of concussion” [11]. This did not happen, however. The NFL formed the Mild Traumatic Brain Injury (MTBI) Committee, made up of NFL team medical personnel and outside medical specialists in biomedical engineering, neurology, and neurosurgery and chaired by Elliot Pellman, a physician for the New York Jets who specialized in rheumatology and had little training in diagnosing and treating head injuries. During Dr. Pellman's tenure, the MTBI Committee published a 13-part study that ultimately denied the possibility of serious head injuries in NFL football [12]. The committee found that a large percentage of players appeared to the team physician to recover fully from concussion within an hour and that postconcussion signs resolve more quickly in NFL players than in nonathletes [13]. As one report noted, “NFL players are a highly conditioned, physically fit population accustomed to playing with pain and highly motivated to return to play as soon as possible” [13]. Furthermore, the MTBI Committee asserted that it found no cases of CTE in NFL players [14].

What makes these conclusions particularly surprising is that, despite the committee's avowal that professional football players were unusually sturdy athletes, the data from their research revealed that blows to the head resulted in equal if not greater brain damage for NFL players than for professional boxers, for whom the connection between head injuries and CTE was well established [12].

### *Small Changes*

In the years following the MTBI Committee's published reports, and amidst a cascade of claims by former players about poor health caused by their involvement in professional football, the NFL made some concessions. In 2006, after the wife of a former NFL player wrote to the NFL commissioner detailing her husband's mental and physical decline and the financial hardships their family had endured, the NFL responded with a plan to financially assist some former players [15]. Under the 2006 NFL Collective Bargaining Agreement, a new provision was added that would provide medical benefits under the league's retirement plan to former players suffering from dementia who had played a certain number of seasons with the league or who were permanently disabled [16]. And, in 2009, the NFL promulgated new concussion standards for when a player could return to fulltime play in an NFL game after experiencing a head injury. While the previous 2007 standards stated that a player could not return to a game following a concussion if his team's medical staff determined that he had lost consciousness, the 2009 standards stated that a player could not return to play or practice on the same day if exhibited any signs or symptoms of a concussion [17]. All the while, the NFL continued to deny any connection between football and degenerative brain diseases [12], and, in response, the players and their families have sought redress in the courts.

### **Analyzing a Claim of Negligence**

Scholars who have reviewed the more than 200 lawsuits filed against the NFL by former players or their families have identified numerous causes of action arising from the NFL's actions or lack thereof [18]. Of those, the most common claim is that of negligence on the part of the NFL towards its players. How this claim could be assessed by a court will be analyzed below using the elements of the legal definition of negligence.

One claim of negligence toward the NFL argues that the league "consistently breached its duty to protect the...well-being of its players by not enacting adequate rules, policies, and regulations that protect the players" [12]. To demonstrate that the NFL was negligent, the plaintiffs will need to demonstrate (1) the existence of a duty on the part of the defendant (the NFL), (2) that the NFL breached that duty, (3) a causal connection between the breach of the duty and the injury to the players, and (4) actual damages, meaning that the players experienced harm as a result of the NFL's action or inactions [19].

### *Duty*

Players bringing a lawsuit must first show that the NFL owed a duty or several duties to its athletes. Employers possess a duty to their employees to ensure reasonably safe working conditions, taking into account the kind of activities entailed in their jobs [20]. What is reasonable depends on the type of work being carried out, so that standards for the NFL and its players will of course be different than, for example, standards for restaurant owners and kitchen staffs.

Players will argue that the NFL had a duty to enact rules to protect players from head injuries. Players will argue that the NFL knew of the risks concussions and other head injuries posed to players that had been part of the medical literature since 1952, with research in this field growing over the last several decades [12]. In addition, the NFL's own research into head injuries, its creation of a fund to help players with dementia, and the changing of its safety and injury standards could be seen as an acknowledgement by the league that there were clear health and safety risks permeating the game [12]. Furthermore, players will claim that the NFL had a duty to warn its employees of any unsafe conditions that came to its attention and that players could not discover through their own efforts within the scope of their employment [21].

### *Breach*

Following the establishment of a duty, players must then show that the NFL breached it. A breach is defined as "failure to conform to the required standard" [19]. Players will argue that the NFL failed to ensure a safe working environment because it did not take the information about risks into consideration when formulating the rules and policies that shape the playing environment.

### *Causation*

Proving causation is likely to be the greatest hurdle for professional football players in court [18]. At first glance, it seems fairly clear that injuries sustained in football have led to NFL players developing CTE. Professional football players receive repeated head injuries during their careers, these injuries cause CTE, and CTE results in debilitating conditions that permanently incapacitate players or ultimately lead to their deaths. However, to succeed in litigation, a player will have to prove that it is more likely than not that it was the physical contact he endured during his NFL career that was the proximate cause of his CTE [18]. This is a difficult claim to assert because, while it is strongly believed that CTE is caused by repetitive brain trauma, there is still no definitive scientific conclusion that CTE is the result of these injuries [22]. Furthermore, CTE can only be diagnosed by autopsy [22], and the diagnoses that have been done up to this time have disproportionately come from the brains of NFL players who have committed suicide, bringing any number of other environmental, social, and behavioral factors into the equation, such as genetics, substance abuse, and other mental health problems [23]. While CTE and head injuries sustained during NFL play seem connected, the causal link may not be strong enough to succeed in court.

### *Damages*

Finally, if a claim for negligence survived examination of the first three elements, a player would have to demonstrate the financial damages he has accumulated as a result of the injuries and illnesses he has endured. Damages are often determined according to a person's lost wages; the costs of past, present, and future medical care; and the pain and suffering the person endures as a result of a trauma [24]. This too may be a hard to demonstrate convincingly. There is considerable uncertainty about an NFL player's income, especially future income, because it is not a

guaranteed amount [25]. Professional football players can certainly make a substantial amount of money during their careers, but the only money they are guaranteed comes in the form of signing bonuses and salaries due while on a team's roster [25]. If a player is cut from a team or can no longer meet the requirements of his employment contract, he is owed nothing more. Moreover, given the unpredictable length of players' careers and possible extra income depending on success he may or may not achieve, such as money received from lucrative endorsements, forecasting future income is almost impossible [18]. Lastly, medical costs may be a challenge to calculate as well, because it may be difficult to separate the amounts tied to a player's head injuries from other medical costs.

### **Recent Developments in NFL Litigation**

While a claim for negligence may be a difficult victory to achieve in court, that did not prevent more than 4,500 former players from filing lawsuits against the NFL since 2011. These cases were consolidated into a class action lawsuit that was filed with a federal court in Pennsylvania in 2012 [26]. However, in August 2013, before the case had been brought into court, the NFL agreed to settle with the players and their families for \$765 million [27]. Under the agreement of the settlement, the settlement would not be regarded as an admission of guilt by the NFL for the injuries and deaths attributed to the rules and policies of the league [27]. The judge presiding over the cause, Anita B. Brody, rejected this settlement in January 2014, stating that she was "primarily concerned that not all retired NFL players who ultimately receive a qualifying diagnosis or their related claimants will be paid" [28] because the NFL and the players' lawyers had not "produced enough evidence to convince her that the \$765 million would cover the potential costs for 18,000 retirees over the 65-year life of the agreement" [29]. For many players, the suggested settlement was welcome news because of their current conditions and the financial toll their injuries have taken [27]. Others, however, were pleased by the judge's decision because many players and their families felt that the amount of money offered by the NFL was insufficient to meet the needs of former and current players, and that the NFL case could potentially serve as a valuable model for other professional sports injury cases in the future [29].

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