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# Journal



## Concussions May Prove to Be a Major Headache for the NFL

*Players' Class Action Suit Places a Bounty  
on the League*

*By Joseph M. Hanna*

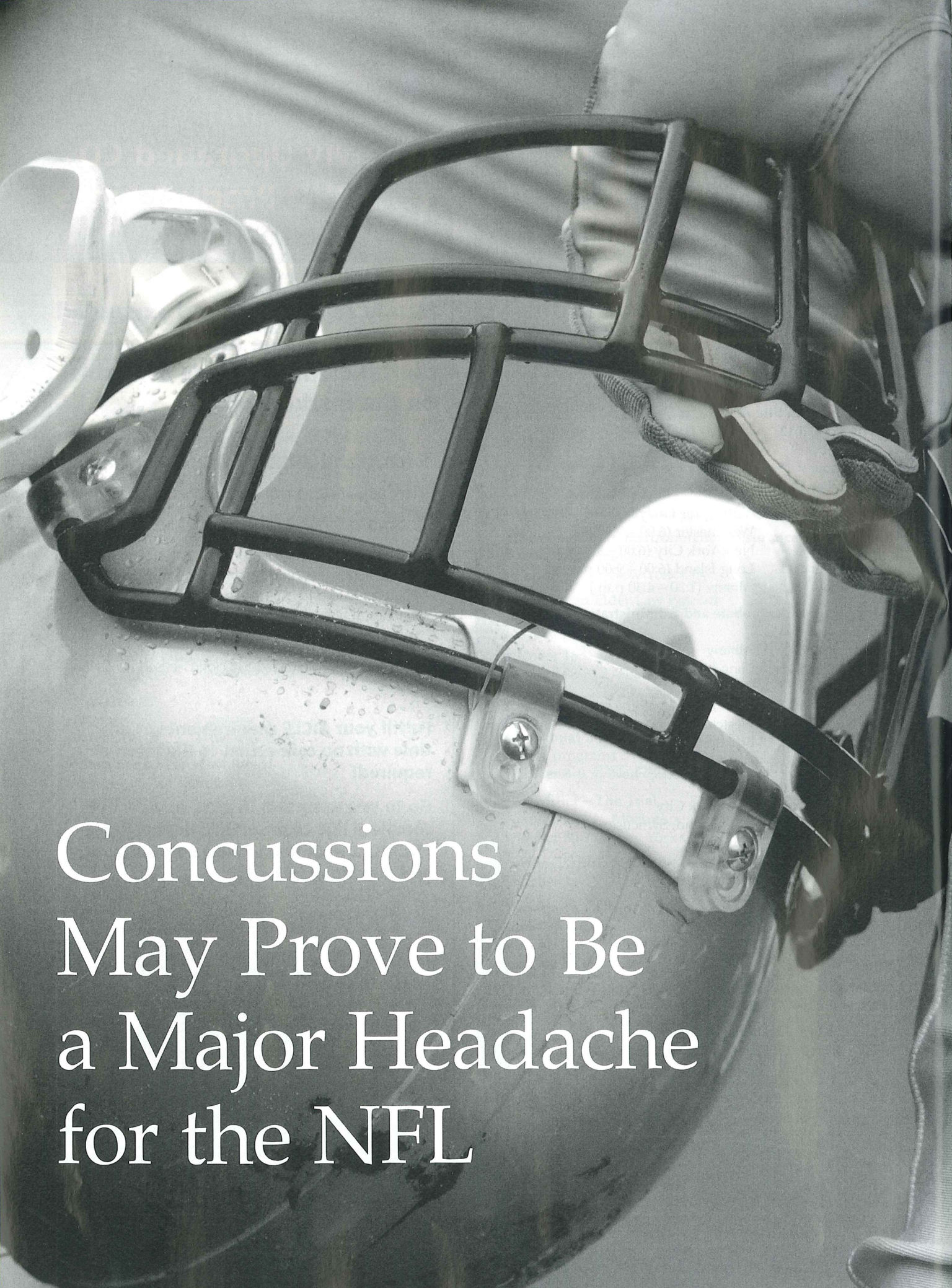
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May Prove to Be  
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for the NFL



## Players' Class Action Suit Places a Bounty on the League

By Joseph M. Hanna

### Introduction

The plight of NFL players suffering from concussion-related injuries has long been the subject of widespread media coverage, scientific debate and fan interest.<sup>1</sup> Still, recent events – such as the deaths/suicides of several NFL alumni, groundbreaking clinical studies and, most important, a giant class-action lawsuit which threatens the financial livelihood of the league itself – have once again brought the topic to the forefront of national attention. The question on everyone's mind is whether the NFL will face liability for its arguably deficient efforts to inform players of the risks associated with football-induced head trauma. While the league is not without its own defenses to liability, it will still be interesting to see how the lawsuit unfolds in the months to come.

### Game-Changing Science

In 2005, a series of clinical studies performed by independent scientists determined that multiple concussions cause problems such as depression and early-onset dementia. Dr. Bennett Omalu and Dr. Robert Cantu examined the brain tissue of three deceased NFL players (Mike Webster, Terry Long, and Andre Waters),<sup>2</sup> who had suffered multiple concussions throughout their NFL careers.<sup>3</sup> Prior to their premature deaths, all three had presented neurologic symptoms of sharply deteriorated cognitive function and psychiatric symptoms such as paranoia, panic attacks, and major depression.<sup>4</sup> The brain tissue of all three presented with neurofibrillary tangles, neurotrophil threads, and cell dropout, and Omalu concluded that chronic traumatic encephalopathy (CTE), triggered by

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multiple concussions, represented a partial cause of their deaths.<sup>5</sup>

CTE is a neurological disorder first discovered in athletes (such as boxers) who sustained multiple blows to the head. Initially, CTE presents through symptoms such as poor concentration/memory, dizziness, and headaches, but can result in increased irritability, outbursts of violent behavior, and general confusion.<sup>6</sup> Later, the disorder may progress into dementia or Parkinsonism, with symptoms such as a general slowing in muscle movement, hesitancy in speech, and hand tremors.<sup>7</sup>

In response, the NFL Concussion Committee (NFL Committee) denied a link between concussions and cognitive decline, claimed that more research was needed to reach a definitive conclusion, and asked the editor of *Neurosurgery* to retract Omalu's July 2005 article.<sup>8</sup> The NFL Committee's stance was clear: *We own this field. We*

newfound willingness on the NFL's part to revise its antiquated concussion policies.

Unfortunately, the NFL's concussion pamphlet to players, revealed in a press release issued on August 14, 2007, stated: "[T]here is no magic number for how many concussions is too many"<sup>14</sup> – suggesting that the research of independent scientists fell on unresponsive NFL ears. And, the NFL added: "[C]urrent research . . . has not shown that having more than one or two concussions leads to permanent problems."<sup>15</sup>

Later, in 2008, Dr. Ann McKee of Boston University studied the brain tissue of deceased NFL alumni John Grimsely and Tom McHale, finding that both exhibited distinct signs of CTE.<sup>16</sup> McKee believed that decreasing the number of concussions would decrease the incidence of athlete CTE, stating, "There is overwhelming evidence that [CTE] is the result of repeated sublethal

NFL alumni are diagnosed with Alzheimer's disease (or other similar memory-related disorders) vastly more often than the national population – at 19 times the normal rate for men ages 30 to 49.

are not going to bow to some no-name Nigerian with some bull-- theory.<sup>9</sup> Noting that (ironically) none of the NFL Committee members was a neuropathologist, Omalu questioned the integrity of the committee. How can doctors who are not neuropathologists interpret neuropathological findings better than neuropathologists?<sup>10</sup>

A 2005 clinical study, performed by Dr. Kevin Guskiewicz, found that retired players who sustained three or more concussions in their NFL career had a fivefold prevalence of mild cognitive impairment (MCI) diagnosis compared to NFL retirees who had no history of concussions.<sup>11</sup> To reach this finding, Dr. Guskiewicz had conducted a survey of more than 2,550 former NFL athletes.<sup>12</sup> NFL Committee member Dr. Mark Lovell attacked Guskiewicz's study, stating, "We want to apply scientific rigor to this issue to make sure that we're really getting at the underlying cause of what's happening. . . . You cannot tell that from a survey."<sup>13</sup>

Finally, in 2007, congressional scrutiny coupled with mounting media pressure (including from Alan Schwarz of the *New York Times* and Chris Nowinski of the Sports Legacy Institute) compelled the NFL to address the long-term effects of player concussions. Consequently, in June 2007 the league scheduled its first league-wide Concussion Summit. Independent scientists were invited to present their findings to team medical staffs and National Football League Players Association (NFLPA) representatives. Scientists, fans, and players were hopeful the summit indicated a

brain trauma."<sup>17</sup> Even after the results of this study were published in 2009, Dr. Ira Casson (the former NFL Committee co-chair) maintained that "there is not enough valid, reliable or objective scientific evidence at present to determine whether . . . repeat head impacts in professional football result in long-term brain damage."<sup>18</sup>

### Watershed Congressional Hearing

The debate over the long-term effects of multiple concussions reached a boiling point in September 2009, when an NFL-commissioned University of Michigan study found that NFL alumni are diagnosed with Alzheimer's disease (or other similar memory-related disorders) vastly more often than the national population – at 19 times the normal rate for men ages 30 to 49!<sup>19</sup> Several weeks after the release of this study, Congress announced that it would hold a hearing to discuss "legal issues relating to football head injuries."<sup>20</sup>

On October 28, 2009, members of the House Judiciary Committee sharply criticized the NFL's concussion policy. NFL Commissioner Roger Goodell was directly asked whether players' multiple concussions contribute to the early onset of cognitive decline, but he wisely deferred to medical judgment on the issue.<sup>21</sup> Though the NFL's leading medical voice on the subject (Casson) was not present to answer this critical query, the committee played an *HBO Real Sports* recording of Casson denying all potential links between multiple head injuries and later-life cognitive decline.<sup>22</sup>

The most poignant moment of the hearing occurred when Representative Linda Sanchez of California analogized the NFL's denial of a causal link between concussions and cognitive decline to the tobacco industry's denial of the link between cigarette consumption and ill health effects.<sup>23</sup> Extending this logic further, Rep. Sanchez encouraged Commissioner Goodell to get "ahead on this issue, if only to cover [the NFL] legally."<sup>24</sup> Sanchez seemed to suggest that the NFL might avoid tobacco industry-like liability if the NFL Committee simply issued adequate warnings to NFL players.

### Remedial Measures in NFL Concussion Policy

The NFL took several remedial measures after the 2009 hearing. First, Casson and fellow co-chair Dr. David Viano both resigned from their NFL Committee positions.<sup>25</sup> A new committee was formed and Commissioner Goodell replaced Casson and Viano with two well-credentialed neurologists – Dr. H. Hunt Batjer<sup>26</sup> and Dr. Richard G. Ellenbogen.<sup>27</sup> Second, the NFL partnered with the Center for the Study of Traumatic Encephalopathy (CSTE) by pledging to donate \$1 million to support its research.<sup>28</sup> Third, NFL spokesperson Greg Aiello made the following admission: "It's quite *obvious* from the medical research that's been done that concussions . . . lead to long-term problems."<sup>29</sup> Fourth, each team was required to make an independent doctor available to examine players and determine whether a player should return to play after sustaining a concussion.<sup>30</sup>

### Legal Implications of Prior NFL Committee Policies – Offense and Defense

Since at least 2005, the NFL Committee has been on notice of multiple medical studies linking head injuries to later-life cognitive decline. While it eventually reversed its stance on the issue, it now faces huge potential liabilities for its previous inaccurate and arguably misrepresentative statements to players. Recently, more than 2,000 NFL alumni have joined a single class-action suit, arguing that the league should be liable for its failure to provide adequate warning about the causal link between multiple concussions and later-life cognitive decline.<sup>31</sup> The NFL has several defenses at its disposal, however, so predictions regarding the disposition of this litigation are (at this time) speculative at best.

### CBA Preemption

Initially, the NFL may seek dismissal of the concussion litigation on the grounds that it is preempted by the NFL players' collective bargaining agreement and the NFL Constitution and Bylaws (the CBAs) under § 301 of the Labor Management Relations Act.<sup>32</sup> Because the plaintiffs allege that the league has breached its duty to minimize the risk of concussion-related harm to NFL players, and the CBAs outline the obligations of the NFL regarding the issuance of warnings and player safety (i.e., the

resolution of state law claims requires interpretation of a collective bargaining agreement), this is a labor dispute.<sup>33</sup> Therefore, federal labor law principles preempt the state law principles.<sup>34</sup> And, because the CBAs stipulated to arbitration proceedings in the event of a dispute (as they did here), the matter must be submitted to arbitration.<sup>35</sup> Based on prior, similar suits against the NFL, there appears to be some precedent in support of this defense.<sup>36</sup> Still, the success of this request for arbitration will depend on whether or not the court accepts the premise that the plaintiffs' claims "arise under" the CBAs.

### Failure to Warn

A duty to warn arises when one should realize either through special facts within one's knowledge or acquired through a special relationship that an act or omission exposes another to an unreasonable risk of harm through the conduct of a third party.<sup>37</sup> Because the NFL has been on constructive notice of medical studies linking multiple head injuries with later-life cognitive decline since at least 2005, by intentionally downplaying the risk posed by multiple concussions,<sup>38</sup> the league arguably encouraged players to treat their concussive conditions with less than due care, exposing NFL players to an unreasonable risk of harm. Thus, several players might have aggravated their concussive injuries by returning to play in reliance on the NFL's arguably inadequate warning.

### Duty

The NFL might argue that the NFL Committee's mere awareness of independent studies did not by itself impose a legal duty to warn players about such studies.<sup>39</sup> This argument is based on the legal distinction between action and inaction, or "misfeasance" and "non-feasance."<sup>40</sup> Absent some special relationship or special duty, the NFL might argue that it is under no affirmative duty to warn league players about the cognitive consequences of concussions such as CTE, dementia, and depression.

Further, the NFL can argue that, because NFL players are employees of their respective teams and not the league, there is no special relationship stemming from employment that would trigger an affirmative duty to warn NFL players about the long-term risks associated with concussions. Prior courts have supported this classification of the NFL-to-player relationship.<sup>41</sup>

In response, players might argue that the NFL's voluntary creation of its internal Concussion Committee created a duty on the part of the NFL to exercise reasonable care. Once an actor begins to render voluntary assistance to a third party, the actor undertakes a duty to proceed with reasonable care when such third party relies on the actor's assistance.<sup>42</sup> Players relied on the information contained in the NFL's 2007 concussion pamphlet to represent a complete and accurate synopsis of "current research" on the topic: "We want to make sure all NFL players . . . are *fully informed* and take advantage of the

most up-to-date information and resources as we continue to study the long-term impact of concussions.”<sup>43</sup> If the NFL Committee wanted players to be “fully informed,” players may argue, why did it withhold from players the findings of Doctors Guskiewicz, Cantu, and Omalu indicating a causal link between multiple concussions and later-life cognitive decline?

### Cause

An actor’s tortious conduct must be a factual cause of another’s physical harm in order for liability to be imposed.<sup>44</sup> Conduct is a factual cause of harm when such harm would not have occurred “but for” the tortious conduct.<sup>45</sup> The NFL might point to a number of causes that might have contributed to deceased NFL players’ cognitive decline. Pittsburgh Steelers’ trainer and NFL Committee member Dr. Joseph Maroon argues that steroids, drug abuse, and other substances caused the damaged brain tissue of former NFL players Webster, Long, and Waters.<sup>46</sup> Similarly, when NFL Commissioner Roger Goodell was asked about the trademark signs of CTE found in deceased NFL player Justin Strzelczyk’s brain tissue, Goodell issued the following response: “He may have had a concussion swimming. . . . A concussion happens in a variety of different activities.”<sup>47</sup>

In response, players could argue that the NFL’s failure to warn (i.e., the league’s tortious conduct) must be only one cause of their cognitive injuries.<sup>48</sup> When there are multiple causes, each of which is sufficient to cause a plaintiff harm, supplementation of the “but-for” standard is appropriate.<sup>49</sup> NFL players may concede that they sustained concussions in a variety of other contexts, but if players can prove that they aggravated their cognitive injuries as a result of the NFL’s failure to warn, supplementation of the “but-for” standard is appropriate. Again, by asserting that “there is *no magic number* for how many concussions is *too many*,”<sup>50</sup> players likely returned to play after sustaining multiple concussions. Therefore, the NFL Committee’s concussion management likely caused players to aggravate their cognitive injuries.

### Assumption of Risk

The NFL could argue that players assumed the risk of all the injuries inherent in football. Generally, athletes assume the risks of injury normally associated with the sport.<sup>51</sup> However, players must have actual knowledge – not constructive notice – of the *specific* risk at issue in order to invoke the assumption of risk doctrine.<sup>52</sup> Logically, an athlete cannot make an intelligent choice to confront a risk if he or she lacks actual knowledge of the danger.

NFL alumni concede that they had actual knowledge of traditional risks normally associated with professional football (i.e., broken bones, torn ligaments, etc.). However, players lacked actual knowledge of the long-term cognitive consequences of concussions. Former player Brian Westbrook stated: “[A] lot of football players didn’t

know, and I include myself, that if you have two, three, four concussions you’re at a higher risk of [incurring] dementia, early-onset of Alzheimer’s, [etc.]”<sup>53</sup> Again, by concealing the findings of troublesome scientific research, the NFL Committee arguably stripped players of their right to make intelligent choices about the long-term risks associated with concussive injuries.

### Contributory Negligence

Contributory negligence – i.e., the defense that there can be no recovery of damages for negligence if the injured person, by his own negligence, proximately contributed to the injury<sup>54</sup> – is the strongest argument at the NFL’s disposal. While contributory negligence is similar to the assumption of risk doctrine, it is a separate and distinct defense.<sup>55</sup> Assumption of risk involves a plaintiff’s actual knowledge of danger and intelligent acquiescence in it, whereas contributory negligence is a matter of the plaintiff’s fault or departure from the standard of reasonable conduct.<sup>56</sup>

The NFL could argue that players negligently contributed to their own injury by (1) failing to report their concussive conditions to team doctors and (2) returning to play before their concussion symptoms completely disappeared. The NFL’s 2007 informational pamphlet instructs players to self-report their concussion symptoms, indicating that concussion symptoms should be immediately reported to team medical personnel,<sup>57</sup> and that players should be asymptomatic before returning to play.<sup>58</sup>

Thirty of 160 NFL players surveyed by The Associated Press (AP) in November 2009 replied that they either failed to report or underreported concussion symptoms.<sup>59</sup> Further, some players admitted that they returned to play despite “feeling ‘dazed’ or ‘woozy’ or having blurred vision.”<sup>60</sup> The NFL could argue that players negligently contributed to their own cognitive injuries by failing to report these concussion symptoms and returning to play before becoming symptom free.<sup>61</sup>

Players will respond by arguing that the NFL’s contractual scheme incentivizes them to withhold their concussion symptoms from team management. NFL player contracts do not guarantee player payment beyond the season in which an injury occurs.<sup>62</sup> This contractual structure maximizes the risk of players incurring permanent cognitive problems because it incentivizes players to withhold their concussion symptoms and play through multiple head injuries. Dan Morgan’s concussive injuries (at least five during his tenure with the Panthers) serve as a prime example of this problem. Faced with the alternative of termination, Morgan “agreed to restructure his \$2-million roster bonus into payments of \$125,000 for each game played. . . . [This] contract gave Morgan [a] financial incentive not to reveal any concussion for treatment.”<sup>63</sup> Quarterback Derek Anderson articulates how

CONTINUED ON PAGE 16

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player contracts incentivize NFL athletes to withhold injury symptoms: “Guys play with [injuries] they’ve got no business playing with. . . . [Y]our job security is not there to sit out for a month.”<sup>64</sup>

Even if players are found contributorily negligent, they could still recover damages in jurisdictions that adhere to comparative negligence principles. While traditionally a plaintiff’s contributory negligence served as a total bar to his or her recovery, most jurisdictions adhere to a fairer comparative negligence mandate. Under a “pure comparative negligence” approach, damages are apportioned between a negligent defendant and a contributorily negligent plaintiff, regardless of the extent to which either party’s *negligence* contributed to the plaintiff’s harm. In other words, a plaintiff who is 60% to blame for an accident could recover 40% of his losses. Thus, a jury might find a player contributorily negligent for withholding symptoms and returning to play before becoming asymptomatic. However, if a jury finds the NFL is at least 1% to blame for a player’s cognitive injuries, the player can recover damages in the amount of that 1%.

### “Section 88” / Indemnification

The Section 88 amendment to the 2006 NFL CBA provides that NFL alumni may receive payment of up to \$88,000 per year for medical claims specifically “related to dementia.”<sup>65</sup> Section 88 is funded by the various NFL clubs and “jointly administer[ed]” by the NFLPA and the NFL.<sup>66</sup> Defense attorneys might argue that a player’s acceptance of Section 88 funds indemnifies the league against any future civil liability. However, this defense is not persuasive given that Section 88 contains no indemnification language.

### Statute of Limitations – “Discovery Rule”

Football-related head trauma can be likened to asbestos exposure in that damage caused by both can take up to 20 to 40 years to manifest. One study noted that while the average age of onset for CTE symptoms was 42.8,<sup>67</sup> patients as young as 25 and as old as 76 years of age presented CTE symptoms.<sup>68</sup> More important, however, this study found that the onset of CTE symptoms occurred, on average, approximately eight years after an athlete had retired.<sup>69</sup>

Initially, this indeterminate “gestation” period appears problematic. Normally, a cause of action for personal injury will accrue at the time of injury, and a plaintiff will have only two to four years to file a claim based in tort.<sup>70</sup> However, to be fair to people with latent injuries, most states have adopted what is known as the “discovery rule,” where a cause of action does not accrue until a plaintiff knows or reasonably should have known that he or she was injured as a result of the defendant’s conduct.<sup>71</sup> NFL alumni should be able to invoke the discovery rule because cognitive illnesses caused by multiple

concussions (e.g., CTE, dementia, Alzheimer’s, depression) represent exactly the type of latent injuries the rule was intended to address.

### The Bounty System

In 2010, the NFL began investigating the New Orleans Saints after receiving allegations that the team was intentionally attempting to injure other players during the 2009–2010 season.<sup>72</sup> The investigation revealed that the team’s “Pay for Performance” program would reward players through a “bounty” system. These payments, often worth thousands of dollars, went to whoever inflicted game-ending injuries on opposing players.<sup>73</sup> Though this investigation initially resulted in the suspension of several players, these suspensions were later reversed and remanded (to Commissioner Goodell) for further consideration by a three-member appeals panel.<sup>74</sup> To date, only Defensive Coordinator Gregg Williams and Head Coach Sean Payton have actually endured discipline by the league.<sup>75</sup>

Yet, it seems unlikely that the allegations of a bounty system will have a profound impact on the pending class-action lawsuit. If such programs had been prolific *and* the NFL could show that it was unaware of them, it could argue that it had no duty to warn against unknown dangers and should not be liable for any resulting injuries. Alternatively, it could attempt to shift a proportionate share of its fault to participating bounty system players under the aforementioned principles of comparative liability.

Individually injured players could also pursue claims against specific players, coaches or teams. While players won’t normally be liable for the injuries they inflict on each other during the course of playing the game, flagrantly violent conduct that shows a reckless disregard for the safety of another player could be grounds for imposing liability.<sup>76</sup>

Still, individual teams could defend against liability resulting from bounty program actions under the doctrine of respondeat superior – i.e., they will not be liable for the tortious acts of its employees who act outside the scope of their employment.<sup>77</sup> The NFL Constitution expressly prohibits the intentional targeting of individual players in connection with any sort of bounty system.<sup>78</sup> Accordingly, prohibited actions such as these could absolve individual teams from vicarious liability resulting from bounty-program-related injuries.

The problem with these theories is one of causation. In all likelihood, smoking gun evidence does not exist, and the wide breadth of possible causes for player head trauma makes linking a particular action to a particular injury speculative at best.

### Recent Developments

On December 17, 2009, Cincinnati Bengals wide receiver Chris Henry, 26, died after falling (or jumping) out of the



back of a pickup truck.<sup>79</sup> When Omalu and Dr. Julian Bailes<sup>80</sup> performed a postmortem study on Henry's brain tissue, they discovered trademark signs of CTE.<sup>81</sup> Notably, these signs were not caused by the accident, as signs of CTE develop slowly over time.<sup>82</sup> This finding was significant, as Henry, the 22nd professional football player to be diagnosed with CTE, died while *still active in the NFL*; he had developed CTE by his mid-20s.<sup>83</sup> This raises the question of how many current NFL players might have the condition without knowing it.

Shortly thereafter the NFL picked prominent neurologists Dr. Hunt Batjer and Dr. Richard Ellenbogen to co-chair a new NFL Committee: the NFL Head, Neck and Spine Medical Committee.<sup>84</sup> The selection of Batjer and Ellenbogen eliminated the potential conflicts of interest that jeopardized the integrity of the prior committee's findings, because they had no ties to any NFL teams and did not receive compensation beyond their expenses.<sup>85</sup> Both Batjer and Ellenbogen were zealously committed to distancing themselves from the old NFL Committee. At one point Batjer stated:

We all had issues with some of the methodologies . . . , the inherent conflict of interest . . . that was *not acceptable* by any modern standards or not acceptable to us . . . we don't want our professional reputations damaged by conflicts that were put upon us.<sup>86</sup>

During a May 2010 congressional hearing, then Representative Anthony Weiner of New York addressed the following comment to Batjer and Ellenbogen: "You have years of an *infected system* here, [and] your job is . . . to mop [it] up."<sup>87</sup> Undoubtedly, a critical step in the cleanup process would be the issuance of a warning to NFL players about the causal link between multiple concussions and cognitive decline.

### A Step in the Right Direction

In June 2010, the *New York Times* hinted that the NFL was working with the NFLPA and the Centers for Disease Control (CDC) on a concussion brochure worded far more strongly than the one given to players since 2007.<sup>88</sup> Later, the NFL shocked the concussion study community by conceding for the first time that multiple head injuries can cause severe cognitive health problems:<sup>89</sup>

"[T]raumatic brain injury can *cause* a wide range of short- or long-term changes affecting thinking, sen-

sation, language, or emotions." These changes may lead to problems with memory and communication, personality changes, as well as *depression* and the *early onset of dementia*. Concussions and conditions resulting from repeated brain injury can change your life and your family's life forever.<sup>90</sup>

While this warning was overdue, the NFL deserves credit for finally embracing the findings of independent scientists.<sup>91</sup>

Official changes in the concussion policy aside, the NFL has taken proactive measures with regard to the prevention of concussion-related injuries. In February 2011, the new NFL Committee announced that team medical personnel would implement a standardized sideline concussion-assessment protocol consisting of a limited neurological/cognitive examination and a balance assessment.<sup>92</sup> Following an incident in December 2011, when Cleveland Browns quarterback Colt McCoy suffered a concussion after an illegal hit but was returned to the game *after two plays*, the NFL issued a memo stating that third-party athletic trainers would be

placed in each stadium to help with the monitoring of player concussions.<sup>93</sup> During an interview with Peter King in July 2012, Commissioner Goodell hinted that the league was in the process of developing a test for a tablet or iPad which, when used on the sideline, could determine whether or not a player had suffered a concussion.<sup>94</sup>

Still, these measures were all taken *after* the class-action suits against the NFL had been filed, and not everyone is truly convinced of the league's commitment to protecting its players. Recently, Terry Bradshaw noted that "[t]hey're forced to care now because it's politically correct to care. Lawsuits make you care. I think the PR makes you care."<sup>95</sup>

### The Tragedy Continues

Sadly, Henry's death and subsequent diagnosis of CTE was no isolated incident. In February 2011, former Chicago Bears defenseman Dave Duerson shot himself fatally in the chest after experiencing deteriorating cognitive symptoms that he believed were linked to CTE.<sup>96</sup> Before his death, Duerson left specific instructions to his family: "Please, see that my brain is given to the N.F.L.'s brain bank," presumably to confirm his self-diagnosed suspicions.<sup>97</sup> In May of that year, the CSTE confirmed



that Duerson had “indisputable” evidence of CTE in his brain tissue samples, noting that there was “no evidence” of any other mental disorder.<sup>98</sup>

Later, in April 2012, NFL alumnus Ray Easterling, a former Atlanta Falcons safety, also committed suicide, dying of a self-inflicted gunshot wound at his home in Virginia.<sup>99</sup> Prior to his death, Easterling had experienced a variety of classic CTE symptoms: memory loss, hand tremors, personality changes, and, eventually, dementia.<sup>100</sup> Notably, Easterling had been the lead plaintiff in the first class-action lawsuit filed against the NFL, which alleged that the league had ignored and concealed the dangers of concussions for years.<sup>101</sup>

turn, helps to disguise the true breadth of CTE prevalence among NFL alumni.

### Scientific Research Takes Off

Fortunately, the recent media coverage has garnered significant attention for CTE throughout the scientific community. One study of over 100 active and retired NFL players strongly indicated that these athletes face a significantly higher risk of incurring permanent brain damage, including a susceptibility to dementia much higher than the national average.<sup>108</sup> Elsewhere, the CSTE has begun recruiting participants for the DETECT (Diagnosing and Evaluating Traumatic Encephalopathy Using

Football-related head trauma can be likened to asbestos exposure in that damage caused by both can take up to 20 to 40 years to manifest.

Just two weeks after Easterling’s death, in an incident frighteningly reminiscent of Duerson’s suicide, Junior Seau, a 20-year veteran of the NFL and the San Diego Chargers, also committed suicide by a self-inflicted gunshot wound to the chest.<sup>102</sup> Prior to his death, Seau had struggled with depression and other personal problems, going as far as driving his car off a cliff following an argument with his girlfriend.<sup>103</sup> His family has agreed to donate his brain to researchers to look for signs of trauma and CTE.<sup>104</sup>

More disturbing than these events, however, is the possibility that the NFL concussion problem extends much further than the current media hype. While the high-profile deaths and current litigation have brought the issue to the forefront of national attention, the progressive nature of the disease and the unstated societal stigma toward mental illness have undoubtedly resulted in under-reporting of CTE symptoms and concussion-related afflictions. One study of 34 retired NFL players (with a mean age of 62) by the Center for Brain Health at the University of Texas revealed that these individuals suffered higher instances of cognitive defects and depression compared to the control subjects.<sup>105</sup> While this hardly seems surprising in light of Dr. Omalu’s (and other, similar) findings, it is significant because many of the players were clinically depressed – i.e., exhibiting symptoms such as difficulty sleeping, weight gain/loss, and decreased energy levels – and had no idea.<sup>106</sup> More important, the study noted that depression associated with concussions doesn’t have a mood component, and that affected players wouldn’t necessarily experience the emotional volatility traditionally associated with the disorder.<sup>107</sup> In effect, many CTE sufferers could be unaware that a problem exists until the disease has progressed further into its intermediate/advanced stages. This, in

Clinical Tests) study, which will include 150 former NFL players, ages 40 to 69, and 50 same-age athlete control participants, to develop methods for diagnosing CTE during life.<sup>109</sup>

Yet another study conducted by researchers at the Albert Einstein College of Medicine of Yeshiva University reveals progress in the area of diagnosing concussions and related traumatic brain injuries.<sup>110</sup> Using a new technology known as diffuse tensor imaging (DTI), researchers were able to detect unique abnormalities in the brains of those who have had a concussion, where other methods of detection (i.e., CT scans or MRIs) have failed to do so.<sup>111</sup> This study also found that the microstructural integrity of brain tissue found in those who had suffered concussions was abnormally low in comparison to the microstructural integrity of the brain tissue in control groups (those who had not suffered concussions).<sup>112</sup> Worse still, the study revealed that these abnormal regions of brain tissue could retain this reduced level of structural integrity for up to *an entire year* following the concussive injury.<sup>113</sup>

Although this research appears to support the findings of Dr. Omalu, it does little to propose a solution so much as it defines new problems. In the coming years, the issue will be not whether concussions are linked to football-induced head trauma, but what can be done to reduce player susceptibility to CTE, and whether an adequate warning would have made a real difference. For now, it appears that little can be done for those already suffering from the disorder.

### NFL Players’ Class-Action Lawsuit

With research on CTE stalled at the diagnostic stage, former NFL alumni took legal action by filing several suits against the NFL, alleging in part that the league

“deliberately and fraudulently concealed from its players the link between football-related head impacts and long-term neurological injuries.”<sup>114</sup> The football helmet manufacturer Riddell, Inc., was also named as a defendant, undoubtedly because of advertisements stating that Riddell helmets reduced the risk of concussions.<sup>115</sup> Eventually, these suits were collapsed into one “master complaint” in the Eastern District of Pennsylvania.<sup>116</sup> As of this writing, the NFL was ordered to file a motion to dismiss by August 30, 2012,<sup>117</sup> with reply briefs due by December 17, 2012. New plaintiffs continue to file suit and will likely join the main class action in the coming months. Only one such suit has targeted individual teams for liability so far, likely because workers’ compensation exclusive remedy laws bar employees from suing employers for work-related injuries.<sup>118</sup>

Given the complexities of the case and the sheer scope of this litigation, it seems likely that the NFL and Riddell would be inclined to settle the case (if the lawsuit survives the motion to dismiss) to avoid Big Tobacco-like liabilities. Still, not everyone is convinced that drawing comparisons to the Big Tobacco cases is an accurate read of the situation. For one thing, unlike tobacco use, the effect of individual concussions on a football player remains unclear.<sup>119</sup> Further, the NFL retains trainers and medical personnel on the sideline who are employed specifically to detect and prevent player injuries, whereas smoker plaintiffs were given no such attention.<sup>120</sup> Last, because NFL players could have sustained permanent mental injuries at any point throughout their career (such as during high school, college, etc.), the causal chain – i.e., that the NFL’s failure to warn resulted in injury – is weak, and muddy at best.<sup>121</sup> While this scenario could change with discovery, it appears that, for now, the various plaintiffs’ attorneys have their work cut out for them.

## Conclusion

Undeniably, cognitive illnesses are significantly more prevalent among NFL alumni in comparison to the national population. Studies performed by the nation’s scientists confirm a causal link between multiple NFL concussions and later-life cognitive decline. Presently, researchers are actively pursuing diagnostic techniques in an attempt to prevent further injuries caused by unnoticed head injuries. Unfortunately, the NFL Committee has been aware of these causal studies since at least 2005, and despite being on notice of such studies, the NFL failed to issue adequate warnings to league players from 2005 to 2010.

The league’s current efforts to combat CTE cannot rectify the harm suffered by many of these severely injured players. As a result, NFL alumni have targeted the league with Big Tobacco-like failure-to-warn claims to recover for their cognitive injuries. Still, the NFL has a number of persuasive – and potentially exonerating – defenses at its disposal. In any event, the next few months will

determine the NFL’s ultimate liability for its actions – and could very well determine the financial survival or failure of the league. ■

1. See, e.g., Jeanne Marie Laskas, *Game Brain*, GQ (Oct. 2009), at <http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions>; Malcolm Gladwell, *Offensive Play: How Different Are Dogfighting and Football?*, New Yorker (Oct. 19, 2009) at [http://www.newyorker.com/reporting/2009/10/19/091019fa\\_fact\\_gladwell](http://www.newyorker.com/reporting/2009/10/19/091019fa_fact_gladwell); Bob Simon, *A Blow to the Brain*, 60 Minutes (Oct. 11, 2009) at <http://www.cbsnews.com/video/watch/?id=5377319n&tag=related:photovideo>.

2. See Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 *Neurosurgery* 128 (2005) (Omalu, *CTE Part I*) (examining the brain tissue of 50-year-old Mike Webster); Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player: Part II*, 59 *Neurosurgery* 1086 (2006) (Omalu, *CTE Part II*) (examining the brain tissue of 42-year-old Terry Long); Robert C. Cantu, *Chronic Traumatic Encephalopathy in the National Football League Player*, 61 *Neurosurgery* 223 (2007) (finding that Andre Waters exhibited the same type of neurological damage as Webster and Long).

3. See Cantu, *supra* note 2, at 223.

4. See *id.*

5. See *id.* These are several trademark symptoms of CTE.

6. See Michael Saulle & Brian D. Greenwald, *Chronic Traumatic Encephalopathy: A Review*, *Rehabilitation Review & Practice* 3-4 (2012), at <http://www.hindawi.com/journals/rerp/2012/816069>. These symptoms will often cause one suffering from CTE to develop mood/behavioral disorders such as depression, placing afflicted individuals at an increased risk of suicide.

7. See Cantu, *supra* note 2, at 223–24.

8. See Laskas, *supra* note 1.

9. See *id.*

10. See *id.*

11. Kevin M. Guskiewicz et al., *Association between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 *Neurosurgery* 719, 722 (2005).

12. *Id.* at 719–22.

13. Alan Schwarz, *Expert Ties Ex-Player’s Suicide to Brain Damage from Football*, N.Y. Times (Jan. 18, 2007), at A1.

14. Press Release, National Football League, NFL Outlines for Players Steps Taken to Address Concussions (Aug. 14, 2007), at <http://www.nfl.com/news/story?id=09000d5d8017cc67&template=without-video&confirm=true>.

15. See *id.* (emphasis added).

16. See Ann McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 J. Neuropathology & Experimental Neurol. 709, 732 (2009).

17. *Id.* (emphasis added).

18. *Legal Issues Relating to Football Head Injuries (Part II): Hearing Before the House Comm. on the Judiciary*, 111th Cong. 334–36 (2010) (statement of Dr. Ira R. Casson).

19. See, e.g., Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. Times (Sept. 30, 2009), at A1.

20. See, e.g., Alan Schwarz, *Congress to Hold Hearing on N.F.L. Head Injuries*, N.Y. Times (Oct. 3, 2009), at D2; see also *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 111-82 (2010).

21. See, e.g., *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the House Comm. on the Judiciary*, 111th Cong. 86 (2010) (inquiry of Rep. Conyers, Chair, House Comm. on the Judiciary).

22. See, e.g., *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the House Comm. on the Judiciary*, 111th Cong. 113 (2010) (statement of Rep. Sanchez, Member, House Comm. on the Judiciary); see also Toni Monkovic, *Concussions and Congress and the Future Game*, N.Y. Times 5th Down Blog (Nov. 1, 2009), at <http://fifthdown.blogs.nytimes.com/2009/11/01/concussions-and-congress-and-the-future-game/> (providing video footage of Rep. Sanchez).

23. *Id.*

24. *Id.*