

2013

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When in Doubt, Sit Them Out: Why the National Football League’s Historically Flawed
Concussion Policy May Cost Them More Than Bad Publicity

Nick Tamburri¹

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*"I don't give a damn, he'd do the same thing to me. It's war! They don't give a freakin' you know what about you, they will kill you. They're out there to kill you, so I'm out there to kill them. If I didn't hurt him, he'd hurt me. They were gunnin' for my legs, I'ma come right back at them...I'm a *^#@#* soldier!"* – Kellen Winslow, Jr., November 8, 2003²

*"A concussion is as common in professional football as paper cuts are to a clerical staff."*³

I. Preface

With the Colts desperately trying to chip away at the Eagles lead just before halftime, Austin Collie darted down the seam to catch a Peyton Manning pass before two defenders converged upon on him as if they were heat-seeking missiles. What happened next has become a familiar scene in the National Football League (NFL) on Sundays. Quintin Mikell and Kurt Coleman simultaneously hit Collie, and he lay motionless on the ground.⁴ Collie remained on the ground for several minutes before being taken off the field on a stretcher.⁵ The image of Collie on the ground was so dire, CBS commentator Jim Nantz lamented, "Go play football, but let somebody have a life though okay?"⁶ The diagnosis that Collie had suffered a concussion was good news, considering the possible alternatives that seemed likely from the vicious tackle. Despite the consequences of the play, the NFL did not issue any fines to the players involved⁷ and some of Collie's teammates publicly stated that they thought the hit was legal.⁸ A month prior, Colts President and competition committee member Bill Polian went so far as to dismiss the uproar over the big hits in the NFL and defend the tackling technique of defensive players.⁹ It was clear that not only was there was no unanimity on the issue, but there was a stark contrast in the opinion over whether or not fierce hits and resulting concussions were an issue in the NFL.

Austin Collie, drafted 127th overall in the 2009 NFL draft,¹⁰ had become one of Peyton Manning's favorite targets and an integral member of the Colts in his second year. He tried to return just two weeks after the concussion he suffered against the Eagles, but he was forced to leave that game in the first quarter with concussion-like symptoms.¹¹ By season's end the Colts

were 7-6 and fighting for their playoff lives. Collie returned for the divisional rivalry game against the Jaguars in week fifteen, with first place on the line. He had one of the best starts to a game by a wide receiver in the NFL all year long, with eight catches for eighty-seven yards and two touchdowns before halftime.¹² Tragically, his eighth catch that day would be the last one he made all season. Just before the half, Collie attempted to catch a ball between two defenders and was hit with a forearm to the head by linebacker Daryl Smith.¹³ For the second time in a few weeks, Collie lay motionless on the field for several minutes. It was his second concussion and the third time he left the game because of a head injury in just seven weeks.¹⁴ Austin Collie's season was over.¹⁵

It is now well recognized that the NFL has a serious problem with protecting its players from concussions. It has been reported that the average concussion in professional football involves a greater impact and a more forceful head velocity change than the average automotive accident.¹⁶ Many former players have been forced to retire due to recurring concussions.¹⁷ Many retired players have gone public, explaining how the repeated concussions they suffered during their playing careers had impacted their lives years later.¹⁸ In 2010, the league's best comeback story and perhaps its most exciting player only got a chance to play because his teammate suffered a concussion.¹⁹ Ironically, respected commentators have gone so far as to compare the violence and injury inherent in the game of football to the repulsiveness of dogfighting.²⁰

This paper will examine the concussion problem throughout the landscape of professional sports with a focus on the NFL. It will explore the NFL's position on head injuries along with its position on how those injuries relate to cognitive decline later in life. It will review past NFL litigation and explore the potential causal link between head trauma and future health issues

being the impetus for future litigation, concluding that the NFL's concussion policy from 2005-2009 may subject the league to liability from lawsuits by its former players. This paper will suggest ways for the NFL to avoid future litigation and more importantly, explain how the NFL can save itself by implementing procedures that will limit the impact of concussions on a player's future health and well-being.

II. Introduction

Scientists and the medical community have not agreed on a conclusive definition for a "concussion."²¹ It has quite simply been defined as "a physical injury to the head resulting in altered mental function, with expectation of recovery in 2-3 weeks."²² Additionally, several terms are used interchangeably to describe what is commonly known as a concussion.²³ In 2001, the Concussion in Sport Group decided on the following definition: "A concussion is defined as a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces."²⁴ Several common features that may be used to define a concussive head injury include that: (1) it may be caused by a direct blow to the head, face, neck, or elsewhere on the body with an "impulsive" force transmitted to the head; (2) it typically results in the rapid onset of short lived impairment of neurological function that resolves spontaneously; (3) it may result in neuropathological changes but the acute clinical symptoms largely reflect a functional disturbance rather than structural injury; (4) it results in a graded set of clinical syndromes that may or may not involve loss of consciousness. Resolution of the clinical and cognitive symptoms typically follows a sequential course; and (5) it is typically associated with grossly normal structural neuroimaging studies.²⁵

Concussions can differ significantly in severity, thus making it problematic to classify all of them with a single term.²⁶ There are at least forty-one different guidelines for grading a head

injury.²⁷ Furthermore, there is no universal agreement on the grading of a concussion, making the evaluation of epidemiological data very difficult.²⁸ Nevertheless, it is recognized that a patient who has suffered a concussion may exhibit varying symptoms which may include: a feeling of being stunned or seeing bright lights, brief loss of consciousness, lightheadedness, vertigo, loss of balance, headaches, cognitive and memory dysfunction, tinnitus, blurred vision, difficulty concentrating, lethargy, fatigue, personality changes, inability to perform daily activities, sleep disturbances, and motor or sensory symptoms.²⁹ Moreover, chronic traumatic encephalopathy (“CTE”) is a fairly recently recognized condition believed to be caused by major collisions or the accumulation of subconcussions that are not as noticeable as the common concussion.³⁰ In football, the development of CTE can result from the accumulation of collisions over the course of a player’s career.

Further complicating matters is that concussions and CTE often go undiagnosed because the symptoms of each are not always recognizable.³¹ An anonymous retrospective survey conducted in 2005 revealed that many patients were not aware of whether or not they had suffered a concussion.³² Ninety-three of the 105 patients who had suffered a concussion had no idea they had been concussed.³³ Additionally, an athlete may even ignore concussion-like symptoms in order to stay in the game, thus making them hard to monitor.³⁴ Peyton Manning admitted that he would purposely do poorly on an initial memory test to allow him to stay in a game when the test would be administered on him after he took a hit.³⁵ In the NFL, critics cite the strong competitive nature and pressure to perform as potential reasons that players ignore concussion-like symptoms or play before they are healthy.³⁶ Hall of fame linebacker Harry Carson blames the glorification of the “big hit” on television networks and periodicals that only

fan the flames and encourage younger players to strive to make the hits that will be featured on "SportsCenter."³⁷

The Center for Disease Control and Prevention has estimated that as many as 3.8 million sports and recreation-related concussions occur in the United States each year.³⁸ Other estimates specific to sports and treatment have estimated that over 300,000 sports-related concussions occur annually in the U.S.³⁹ A recent study found that high school athletes were about four times more likely to suffer a concussion today than they were just a decade ago, with football being cited as the most dangerous sport.⁴⁰ The American Academy of Pediatrics has released studies that suggest concussions suffered by children in sports are on the rise, as the amount of concussions has doubled from 1997-2007.⁴¹ Sadly, serious concussions have even caused more than a few fatalities among high school football players over the years.⁴² The bottom line is that concussions are extremely prevalent in sports.

What is most troubling about this issue are the long-term health effects that are linked to concussions.⁴³ Studies have found a strong correlation between the rate of diagnosed clinical depression among retired NFL players and the number of concussions they had sustained during their career.⁴⁴ Some people have even speculated that concussions can lead to suicide.⁴⁵ Additionally, research has indicated that a history of previous concussions puts a player at a greater risk for future concussions, as well as the acute outcomes after a subsequent concussion.⁴⁶ Suffering multiple concussions has also been associated with an increased risk of developing Alzheimer's disease and memory loss.⁴⁷ A 2009 study by the University of Michigan's Institute for Social Research found that former NFL players are nineteen times more likely to develop Alzheimer's disease or other memory-loss diseases than other men between the ages of thirty and fifty.⁴⁸ Recent studies also suggest that NFL players are eight to ten times

more likely than the average citizen of being diagnosed with amyotrophic lateral sclerosis (ALS), the incurable neuromuscular disorder more commonly known as Lou Gehrig's disease.⁴⁹ In the NFL, there were a reported 154 concussions through week eight of the 2010 season, an increase of twenty-one percent over the prior year.⁵⁰ These statistics manifest how the long-term effects of concussions can be deadly serious for many athletes.⁵¹

III. Concussion Issues Permeate the Professional Sports Landscape

Boxing is the sport in which the participants' exposure to the risk of head trauma and concussions seems the most logical and easily recognizable. It is intuitive that in a sport where the objective is to knock out the opponent, its athletes risk injury to the brain. Commentators have credited the death of Duk Koo Kim in 1982 for bringing the most extreme dangers of boxing to the public consciousness.⁵² Kim's death prompted regulatory and legislative bodies around the nation to investigate boxing.⁵³ The investigation examined the long-term effects of boxing in addition to the short-term effects manifested by through the fate of Kim. The long-term effects of boxing include memory loss, speech impairment, depression, and chronic encephalopathy, better known as "punch-drunk syndrome."⁵⁴

Football and hockey, however, are the two sports with the highest incidents of head trauma and concussions.⁵⁵ A study on head trauma in junior hockey found that the incidence of game-related concussions was seven times the rate found in 2005, with many concussions left unreported.⁵⁶ The concussion issue in hockey is also prevalent in the National Hockey League (NHL). NHL-star Eric Lindros was forced to retire prematurely in 2007 because he sustained at least seven concussions over the course of his career.⁵⁷ Lindros believed his history of concussions made him a marked man. "You basically have an X on your back," explained Lindros. "Players who before would never come at you, once they know about your

concussions, they will come at you, and with high elbows.”⁵⁸ Multiple concussions also cut short the NHL career of his brother Brett. In retrospect, Brett Lindros believes he did not have sufficient information about the dangers imposed by concussions and as a result, he did not take enough time off after suffering a concussion.⁵⁹ One NHL “enforcer” acknowledged that there were times that he got hit in the head during a fight and the next day he would just fall down during practice. His explanation was that, “I wasn’t able to turn left.”⁶⁰

The concussion issue in the NHL was made more public with the recent news that the brain of the late Bob Probert who died at the age of forty-five showed evidence of CTE, the degenerative disease caused by repeated concussions.⁶¹ This information caused some to debate whether the concussion problem can be addressed by banning fighting from hockey.⁶² Sports medicine physician Paul Echlin believes that there is enough evidence that indicates a correlation between fighting and concussions, thus leading him to conclude that a ban on fighting is a way to address the numerous concussions in the NHL.⁶³ Former player Marty McSorley disagrees with this theory. McSorley suffered numerous concussions as a player and he presently deals with memory loss and other symptoms resulting from brain injury.⁶⁴ Nevertheless, McSorley believes his cognitive issues are more likely attributable to the concussions he suffered while playing, since he only suffered one or two concussions from fighting.⁶⁵

The NHL’s biggest superstar and Olympic gold medalist Sidney Crosby has missed over half of the 2010-2011 season due to a concussion, with no timetable for his return.⁶⁶ In an ironically unfortunate coincidence, his sister Taylor has recently suffered a similar fate while playing goalie for her hockey team.⁶⁷ To its credit, the NHL seems to be taking the concussion issue seriously, as evidenced by comments from Commissioner Gary Bettman as well as the cautious approach the Penguins have taken with Sidney Crosby.⁶⁸ Additionally, one former

player who suffered many concussions in his career recently agreed to posthumously donate his brain to BU medical school for research to help determine the long-term effects of his concussions.⁶⁹

Concussion issues are not limited to the more physical, “contact” sports. Former Major League Baseball (MLB) MVP Justin Morneau sustained a season-ending concussion trying to break up a double play. Eight months later, he still has lingering symptoms and has yet to play in a game.⁷⁰ The Mets’ Jason Bay suffered a concussion in July of 2010 when he collided with a padded bar in the outfield, going full speed, attempting to catch a fly ball.⁷¹ Bay played in the next two games before missing the remainder of the season with post-concussion symptoms.⁷² It is no surprise that the Mets used caution with Bay, since they were heavily criticized just a few years earlier for the manner in which the organization handled the concussion of Ryan Church.⁷³ Baseball equipment manufacturers have attempted to reduce the number of concussions to players through product innovation. Rawlings released its newest batting helmet, the S-100, in August of 2009.⁷⁴ The helmet has a bulkier, more protective design than past models and is built to withstand the impact of a 100-mph fastball.⁷⁵

Other major sports in which the players wear minimal equipment and no head gear have similarly not been able to escape the issues that result from concussions. Concussions in soccer can occur when a player “heads” the ball, but they occur more often when two players’ heads collide as they battle for a ball in the air.⁷⁶ A study presented at the American College of Sports Medicine Meeting revealed that athletes with a history of multiple concussions are much more likely to suffer from impaired balance after repeated purposeful heading of a soccer ball.⁷⁷ The NBA, a league in which its players wear no equipment, recently lost all-star point guard Chris Paul to a concussion when he collided with an opponent’s shoulder.⁷⁸ Paul left the court on a

stretcher.⁷⁹ It has since been reported that the NBA has been consulting with an independent neurologist and may establish a new league-wide policy for handling concussions by next season.⁸⁰ Beyond the traditional sports, experts have speculated that although staged, head injuries have serious and perhaps fatal repercussions in professional wrestling as well.⁸¹

Although each sport has been affected by head injuries, football has the longest and most problematic history with respect to concussions.⁸² Concussions are currently one of the most hotly-debated issues in football. The game of football is tied to violence, as evidenced by a former player's suggestion that trying to remove the violence from football is like trying to remove the trees from a forest.⁸³ The remainder of this paper will examine the potential liability of various entities as a result of the concussions suffered by NFL players. With the NFL being the first major sport forced to confront the concussion issue, the other sports have the benefit to learn from the NFL's mistakes.

IV. Civil Liability in Tort and the Standard of Care - Legal Issues Related to Concussions

A. The NFL

Sports injuries that occur as a result of competition are not typically tortious in nature. Injuries are viewed as part of the inherent risks of playing the game. Yet, the tortious behavior of various actors or entities involved in sports can cause athletic injuries.⁸⁴ An injured athlete can base a cause of action on one of three theories: (1) an intentional tort such as battery or assault, (2) recklessness, or (3) negligence.⁸⁵ In the common negligence lawsuit, a plaintiff must prove duty, breach, causation, and damages.⁸⁶ The focus of this paper will be the potential tortious liability based only upon negligence as it applies to the NFL and its teams, team physicians, and helmet manufacturers.

An employer is defined as “a person who controls and directs a worker under an express or implied contract of hire and who pays the worker’s salary or wages.”⁸⁷ An employee is “a person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”⁸⁸ The NFL and its teams are the employers of the individual players, who are considered the labor. A duty of reasonable care is necessary to establish liability if a “special relationship” is found to exist between a plaintiff and a defendant.⁸⁹ “Some generally recognized special relationships include common carrier-passenger, innkeeper-guest, employer-employee, landlord-tenant, and invitor-invitee.”⁹⁰ Thus, the employer-employee relationship is viewed as a “special relationship” upon which the duty of reasonable care can be based.⁹¹

When a principal has a special relationship with an agent, the principal owes the agent a duty of reasonable care with regards to the risks arising out of that relationship.⁹² In a special relationship, the employee entrusts himself to the control and protection of his employer, thus the duty to protect is imposed upon the employer because he is in the best position to provide a safe workplace for the employee.⁹³ To determine whether a duty is imposed on an employer by a “special relationship,” it must be determined if the plaintiff-employee entrusted himself to the defendant, without the opportunity of control to protect himself.⁹⁴ To determine that, “it is necessary to balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of the occurrence, and the relationship between the parties.”⁹⁵ Other factors include, “the defendant’s ability to comply with the proposed duty, the victim’s inability to protect himself from the harm, the costs of providing protection, and whether the plaintiff has bestowed some economic benefit on the defendant.”⁹⁶

B. Team Physicians

Team physicians can potentially be liable to players under the tort of negligence, which can result from medical malpractice. To bring a successful lawsuit against a team physician for a concussion-related negligence action, the NFL player would have to establish the following elements: 1) a duty owed to the plaintiff based upon doctor-patient relationship; 2) a breach of the standard of care; 3) an injury; and 4) a causal connection between the breach and the injury.⁹⁷

Typically, all professional and collegiate teams employ a team physician to provide medical care to its athletes. The primary concern of the team physician must be to provide the best medical care to the athletes.⁹⁸ The duties of a team physician include, but are not limited to the following: 1) coordinate pre-participation screening; 2) manage injuries on the field; 3) provide for medical management of injury and illness; 4) provide for appropriate education and counseling regarding nutrition, strength and conditioning, ergogenic aids, substance abuse, and other medical problems that could affect the athlete; and 5) coordinate rehabilitation and return to participation.⁹⁹

The physician-patient relationship between the physician and player requires the physician to provide medical treatment and advice consistent with an athlete's best health interests.¹⁰⁰ Regardless of any pressure team physicians may feel from management, coaches, fans, or athletes, their decisions should be governed solely by medical considerations.¹⁰¹ The physician and player also share a fiduciary relationship in addition to the physician-patient relationship.¹⁰² The fiduciary relationship makes the physician responsible for fully disclosing the extent of all injuries to the player. Any concealment or misrepresentation can subject the physician to liability for fraud.¹⁰³ In *Cobbs*, the California Supreme Court recognized the patient's right to disclosure of information necessary to give consent to medical treatment.¹⁰⁴ Pertinent information includes the risk of bodily harm, problems of recuperation, and an

explanation of complications that may occur from surgery.¹⁰⁵ This undoubtedly applies to information relating to head injuries sustained during a football game. In malpractice suits involving a physician, the trend is to apply the national standard of care; the applicable legal standard of conduct is “good medical practice” within the physician’s area of expertise.¹⁰⁶

C. Equipment Manufacturers

Negligence-based lawsuits in sports can also involve equipment manufacturers. The most prevalent litigation involving football equipment involves helmet manufacturers.¹⁰⁷ Litigation is so common that the high cost of liability insurance has significantly decreased the amount of companies that manufacture football helmets.¹⁰⁸ The business had become so unprofitable that by 1987 only two companies were manufacturing football helmets for professional, collegiate, and high school players.¹⁰⁹ Today, the exclusive provider of football helmets for the NFL is Riddell.¹¹⁰

Theories of liability against equipment manufacturers can be based on negligence or strict liability. Allegations of negligence typically focus on negligent design, manufacture or a failure to warn.¹¹¹ In this context, a duty means the duty of a manufacturer to warn the player or to refrain from producing or selling a defective helmet.¹¹² The focus on a failure to warn case is often causation; for instance, whether an adequate warning on the helmet would have prevented an injury. A negligent suit based on a design defect may be a more difficult standard for the plaintiff since design defect cases involve proof of helmet testing and expert battles.¹¹³

Section 402A of the Restatement of Torts explains strict liability: (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer is subject to liability for physical harm thereby caused to the user or consumer if (a) the seller is engaged in

the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.¹¹⁴ A plaintiff must prove that the helmet manufacturer (1) is a supplier of the product; (2) the product was defective in design or condition and thus unreasonably dangerous; (3) the defect existed when the product left the defendant's control; and (4) the condition was the proximate cause of the plaintiff's physical injury.¹¹⁵ "Unreasonably dangerous" is explained in comment i as meaning that the product must be dangerous to an extent beyond which an ordinary consumer would contemplate.¹¹⁶ Comment j reveals that a supplier may be required to give a warning to prevent its product from being considered "unreasonably dangerous."¹¹⁷

V. A Brief Overview of Lawsuits Brought Against the NFL

A. Merrill Hoge

Former NFL running back and current ESPN TV analyst Merrill Hoge has stated that he literally died from a concussion before the Bears' doctors were able to resuscitate him.¹¹⁸ He explained:

When I came to the sideline, I was never unconscious. My facemask had been bent. They were switching my facemask and realized cognitively I was not responding properly. They take me to the training room where I died -- I flat-lined. My heart stopped. In the process of trying to resuscitate me, I started to breathe again. Now, they rushed me to the emergency room. I was in ICU for two days, but it was after that I was basically trapped in my home for six weeks. You could not take me around the block, and I would not be able to find my way home because I did not have the cognitive skills. I had to learn how to read again. In fact, months later if you would sit me down and take the inventory of the day I would not be able to recite that to you. So, there is a lot of cognitive issues that I dealt with, and it took almost two years to overcome those particular issues.¹¹⁹

Ten days after suffering his second concussion of 1994, Hoge continued to suffer from post-concussion symptoms, such as dizziness, lethargy, sleepiness, memory loss, and headaches.¹²⁰

Hoge was forced to prematurely retire in 1994 after just eight seasons because of the concussions he had suffered that same year.¹²¹

The team's treatment of his concussions led to the lawsuit Hoge filed in 1996 against the physician employed by the Chicago Bears. Hoge alleged that the medical trainer negligently allowed him to return to the field with post-concussion symptoms and failed to warn him of the increased risk of suffering a second concussion that he became susceptible to by re-entering the game. Furthermore, Hoge alleged that he was allowed to go back into the game without a follow-up examination.¹²² He also argued that he would not have returned to play until he completely recovered from the first concussion if he had been aware of his post-concussion condition, and thus would have remained a salary-earning player.¹²³ Incredibly, Hoge's lawsuit is the only one on record that involves a plaintiff-athlete suing an NFL affiliated party.¹²⁴ He received a successful verdict against the medical trainer and was awarded approximately \$1.5 million.¹²⁵

B. Mike Webster

The NFL has also been subject to several lawsuits arising from its Retirement Board's denial of disability benefits to its former players.¹²⁶ In such cases, federal courts use an abuse of discretion standard to determine if benefits were improperly denied.¹²⁷ To overcome this substantial burden, the retired player would have to prove that the Retirement Board's finding was "arbitrary and capricious, unsupported by substantial evidence, instituted in bad faith, or erroneous on a question of law."¹²⁸ Making matters harder for the plaintiff, the Retirement Plan administrators have given significant freedom in interpreting the evidence and their decision is accorded substantial deference.¹²⁹

Mike “Iron Mike” Webster was a late-round pick of the Pittsburgh Steelers who became one of the best centers in NFL history.¹³⁰ He played on four Super Bowl winning teams and made the Pro Bowl nine times.¹³¹ Webster played in 150 consecutive games and had a six-year stretch where he did unbelievably did not miss a single down.¹³² He retired in 1991 and was elected to the Hall of Fame in 1997. Webster died in 2002 at 50 years old.¹³³

Over the course of his career, Webster took many shots to the head and sustained multiple concussions.¹³⁴ Although his death was linked to heart disease, much of the attention after his death was focused on his mental state, which one doctor described as that of a “punch-drunk boxer.”¹³⁵ A “punch-drunk boxer” is a common description for someone who suffers from chronic traumatic encephalopathy (CTE). In 2002, Mike Webster was the first person ever to be diagnosed with CTE.¹³⁶ Dr. Bennet Omalu, a forensic pathologist and neuropathologist who examined Webster’s brain, believes he has proven that repeated concussions in football lead to early-onset dementia, as evidence by what happened to Webster.¹³⁷ Ira Casson, a neurologist and former co-chairman of the NFL concussion committee has dismissed Omalu’s conclusions as inconclusive and erroneous in regard to Webster and other former players.¹³⁸

Webster struggled to hold a job after his career and eventually applied for disability benefits under the NFL Retirement Plans, applying for active football benefits and, in the alternative, football degenerative benefits.¹³⁹ The crux of the issue was figuring out exactly when Webster became totally disabled.¹⁴⁰ The case included a complex amount of facts and dates in addition to conflicting expert testimony between Webster and the NFL.¹⁴¹ Webster submitted comprehensive evidence which suggested that his disabilities began while he was still actively playing football, and thus he should have been entitled to disability benefits.¹⁴² The

defendant argued that since no doctor had evaluated Webster until 1997, the exams were not timely and thus speculative and conclusory.¹⁴³

The court found that the Retirement Board had ignored the findings of every medical expert who examined Webster and had disregarded the findings of its own investigator in reaching the decision to deny him benefits.¹⁴⁴ Both the factual circumstances of Mike Webster's life along with the medical testimony presented by his estate proved to be decisive in rendering his estate the winning verdict.¹⁴⁵ Mike Webster's estate became the first applicant to win a reversal of a benefits decision in federal court.¹⁴⁶ The significance of this case should not be minimized since the NFLPA's own director had been publicly unsympathetic to the plight of former players.¹⁴⁷ The important question now is whether this decision will change the way that courts evaluate disability plan cases and as a result whether the NFL will be susceptible to increased causes of action brought by its retired players.¹⁴⁸

VI. The Potential Liability of the NFL and its franchises

A. Recent Tragedy & Independent Studies: Waters, Johnson, and Duerson

Fifty years from now, it is likely that football historians will mark 2005 as the year things began to change for the NFL. In 2005, independent scientists performed various neuropathological and clinical studies that demonstrated multiple NFL concussions cause cognitive problems such as depression and dementia.¹⁴⁹ Since then, several researchers have become pioneers on the issue, studying the brains of various former professional athletes.¹⁵⁰ Their findings were the driving force behind the change in the NFL concussion policy that was instituted just last year.¹⁵¹ In 2005, the NFL had many policies and rules in place to protect its

players but none that dealt specifically with head trauma. The NFL left those decisions to each of its individual teams.¹⁵²

Since 2005, the concussion issue has received increased public attention and scrutiny. The increased public attention can be attributed to three main factors. The first is the seemingly increased violent nature of the game.¹⁵³ Second, current players began to publicly speak out on the issue more than they had in the past.¹⁵⁴ Third and perhaps most importantly, the studies of former athletes' brains has revealed a significant correlation between head trauma and health problems.¹⁵⁵ By 2009, researchers at the Center for the Study of Traumatic Encephalopathy (CSTE) confirmed that a sixth former player was found to have CTE, a type of brain damage that is incredibly rare among the general population.¹⁵⁶ These players include Mike Webster, Andre Waters, Terry Long, John Grimsley, Justin Strzelczyk, and Tom McHale.¹⁵⁷ The CSTE announced that McHale was suffering from CTE when he died and that he had a brain condition similar to Alzheimer's disease.¹⁵⁸ McHale's cause of death was an apparent drug overdose, while Grimsley died of an accidental gunshot wound to the chest. Webster, Long, and Strzelczyk died after long fights with depression.¹⁵⁹ Andre Waters committed suicide in 2006 at the age of forty-four.¹⁶⁰

Waters' suicide led to a watershed, front page news article in the New York Times that exposed the issue to the world.¹⁶¹ Nicknamed Andre "Dirty" Waters by Dan Dierdorf, he joined the Philadelphia Eagles in 1984 as an undrafted free agent.¹⁶² Waters was a violent and reckless player who quickly gained the reputation as a ferocious hitter, incurring many league fines throughout his career.¹⁶³ Not surprisingly, he also suffered numerous concussions during his career.¹⁶⁴ Waters played in an era when NFL doctors minimized the significance of head injuries.¹⁶⁵ When the co-founder of the Sports Legacy Institute Chris Nowinski¹⁶⁶ learned of

Waters' suicide, he requested Waters' brain for research but the coroner refused.¹⁶⁷ However, Waters' niece Kwana Pittman was influential in persuading reluctant members of his family to let the researchers analyze his brain and they were able to salvage small chunks of Waters' brain to study.¹⁶⁸ Dr. Bennet Omalu found the same red streaks in Waters' brain as he had found in the brains of former players Webster and Long.¹⁶⁹ Omalu's research also found that Waters' brain had significantly deteriorated and that the damage was either caused or accelerated by successive concussions.¹⁷⁰ He concluded that Waters' brain damage resulted from his career as an NFL player, which led to his depression and suicide.¹⁷¹ Quite significantly, this expert blamed the suicide directly on the concussions he sustained while playing football.

In addition to the significant research that has been conducted over the past six years, former players are now more willing to publicly discuss the significance of concussions. Former New England Patriot linebacker Ted Johnson believes concussions have led to his severe depression and addiction to amphetamines.¹⁷² Johnson points to 2002, when he suffered back-to-back concussions, as the origin of his problems which have also resulted in sleeping disorders and mental fatigue.¹⁷³ He alleges that his coach Bill Belichick went against the recommendation of the team trainer and exposed him to on-field contact during a practice just four days after he suffered a concussion in a preseason game.¹⁷⁴ Belichick placed the blame on Johnson for not communicating that there was a problem.¹⁷⁵ However, since NFL contracts are not guaranteed, players often feel pressured to play at any cost. Interestingly, the Patriots would not allow trainer Jim Whalen to comment on the story.¹⁷⁶ Quite prophetically, Johnson expressed his fear of somebody being the "next Andre Waters."¹⁷⁷

Former four-time NFL Pro Bowler Dave Duerson was fifty years old when he shot himself in the heart on February 17, 2011, sending shockwaves throughout the league.¹⁷⁸ It was

no ordinary suicide, if there is such a thing. After deciding to commit suicide, he shot himself in the chest, seemingly to preserve his brain for research.¹⁷⁹ His intent was strongly implied by text messages he sent to his family¹⁸⁰ and the note he left prior to his suicide. The note implored the first person who found it to, “Please, see that my brain is given to the NFL’s brain bank.”¹⁸¹ Although the news of his suicide itself did not come as a shock to many,¹⁸² the outrage and horror from the public and former players has been directed at the manner in which Duerson committed suicide.¹⁸³ Commentators have called Duerson an apparent martyr for a cause, with the possibility that his death could be a turning point for NFL.¹⁸⁴ The NFL has undoubtedly taken a different approach to concussions over the last year, as evidenced by its \$1 million donation to the CSTE, the group that will now examine Duerson’s brain for the effects of CTE.¹⁸⁵ Many retired players in addition to Duerson have pledged to donate their brains for research.¹⁸⁶

B. The NFL’s 2005-2009 Position on Concussions and Their Effect on Future Health

It is uncertain whether this different approach can save the NFL from potential liability for its past treatment of its concussion problem. The NFL has commissioned various studies over the years that have resulted in significant and disputed findings. One such study placed a majority of the blame for concussions on helmet-to-helmet hits, attributing 61 percent of all NFL concussions to those types of hits.¹⁸⁷ As a result, the NFL implemented rules and policies to police helmet-to-helmet hits. The most controversial and debated of the studies was a thirteen-part study commissioned by the NFL’s Mild Traumatic Brain Injury (MTBI) Committee which was published in *Neurosurgery Journal* and relied upon heavily by Commissioner Roger Goodell to create the NFL’s new Guidelines for Concussion Management in August of 2007.¹⁸⁸

The most controversial and relevant of the studies focused on repeated head trauma injuries, neuropsychological testing of players, and when a player should return to the same game.¹⁸⁹ The MTBI committee concluded that both “single and repeated concussions can be managed conservatively with rest, and most players can return quickly to play.”¹⁹⁰ Commentators stated that the NFL should take notice of the widespread criticism over the studies, as its research may be flawed and incomplete.¹⁹¹ This criticism is especially plausible since the NFL’s lead researcher was a rheumatologist, not a neurologist, who admitted he was not an expert on concussions.¹⁹² Making matters worse for the NFL has been its outright reluctance to accept or consider the findings of independent researchers.¹⁹³

The NFL continued to raise ambiguity about the long-term effects of concussions prior to 2009, refusing to accept the majority academic opinion which implicated a causal link between concussions and cognitive decline.¹⁹⁴ In a statement released in August 2007 after its first “Concussion Summit,” the NFL advised its players that they will not suffer long-term medical effects if they manage concussions properly, thus denying a causal link existed between concussions and CTE.¹⁹⁵ Dr. Kevin Guskiewicz’s findings concluded that players who suffered at least three concussions had a five times greater chance to have Mild Cognitive Impairment.¹⁹⁶ Nevertheless, the NFL also took the position that a player is not at greater risk for a further injury once he receives medical care for the concussion.¹⁹⁷ This stance may expose the NFL to potential future litigation and liability.

The combination of unflattering studies and media pressure culminated in a climactic turning point for the NFL in 2009. The House Judiciary Committee decided to hold a Congressional hearing in October of 2009 to discuss “the impact of head injuries and what can be done to limit them and compensate the players and their families.”¹⁹⁸ The Committee

questioned Commissioner Goodell extensively, making him read from the pamphlet the NFL gave to its players, “Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly. It is important to understand that there is no magic number for how many concussions is too many.”¹⁹⁹ In what amounted to significant admonishment of its study, the Committee compared the league’s approach to science with the tobacco industry’s approach to the public’s health concerns with smoking.²⁰⁰ Ira Casson, the co-chair of the NFL’s Committee on Mild Traumatic Brain Injury, was inexplicably unavailable to testify in person. The Committee did, however, play a recording of Dr. Casson from *HBO Real Sports* in which he denied any links between head injuries and later cognitive decline.²⁰¹ Dr. Casson resigned his position with the NFL just a few months after the Congressional hearing.²⁰²

C. The 2009 Congressional Hearing Leads to a Change in NFL Policy

The Congressional Hearing seemed to cause an overhaul of the NFL concussion policy, as wholesale changes followed in the wake of the hearing. For the first time ever, a league official had publicly acknowledged the long-term health effects of concussions.²⁰³ It was at that point that the NFL decided to pledge \$1 million to the CSTE.²⁰⁴ Effective December 2009, the NFL officially instituted a new concussion policy. The policy expanded the list of symptoms that, if recognized, would preclude a player from returning to the game.²⁰⁵

A player who suffers a concussion should not return to play or practice on the same day if any of the following symptoms or signs is identified based on the initial medical evaluation of the player: Loss of consciousness; Confusion as evidenced by disorientation to person, time or place; Inability to respond appropriately to questions; or Inability to remember assignments or plays; Amnesia as evidenced by a gap in memory for events occurring just prior to the injury; Inability to learn and retain new information; or a gap in memory for events that occurred after the injury; Abnormal neurological examination, such as abnormal pupillary response, persistent dizziness or vertigo, or abnormal balance

on sideline testing; or A new and persistent headache, particularly if accompanied by photosensitivity, nausea, vomiting or dizziness; Any other persistent signs or symptoms of concussion.”²⁰⁶

After the policy was implemented, both Vikings center Matt Birk and Saints tight end Ernie Conwell each said that they had demanded to go back into a game after a head injury, only to have trainers hide their helmets to keep them on the sideline.²⁰⁷ In a 2010 game, Dallas Cowboy tight end Jason Witten was visibly upset with trainers for not allowing him to re-enter the game after suffering a big hit.²⁰⁸ In advance of the 2011 NFL season, the league produced a poster that warned its players of the long-term effects of concussions, using terms such as depression and dementia.²⁰⁹ The NFL mandated that the poster be hung in every locker room across the league. The NFL also increased punishment for helmet-to-helmet hits, saying it would consider suspending and fining its players. Three players alone were fined \$175,000 in one weekend.²¹⁰ The NFL’s next move was to implement standardized sideline testing to diagnose concussions for the 2011 season, which will require all thirty-two teams to implement the same baseline testing for concussions on the sideline.²¹¹

Despite its efforts, the NFL has still been heavily criticized for the way it has handled its concussion problem since 2009. In June of 2010, the NFL had another hearing before the House Judiciary Committee in which the House Panel criticized its two new co-chairmen on the Committee on Head Injuries.²¹² They were accused of sounding like the “same old NFL.” Congressman Anthony Weiner was particularly critical, explaining that he was troubled that the new doctors were so unprepared that they could not even answer basic questions that dealt with helmets.²¹³ The NFL has not handled its concussion problem in the best manner possible, but can it be held liable by former players?

D. Potential Liability for the NFL

The NFL has been on notice of the potential causal links between concussions and cognitive impairment since the findings of independent medical studies were released in 2005. Despite the published studies, the NFL continued to deny that a causal link existed until 2009.²¹⁴ The NFL may be subject to tort liability based on negligence for its concussion policy from 2005 to 2009, specifically for its reliance on its own flawed study. As previously discussed, since it is established that a court would likely find that a special relationship exists between the NFL and its players,²¹⁵ it is prudent to start the analysis with an examination of the duty owed by the NFL to its players.

A duty to warn exists through a special relationship when one should realize that an act or omission exposed another to unreasonable risk of harm.²¹⁶ Comment (c) to §302 states that an actor may be negligent in failing to prevent harm to another resulting from his failure to control a force already in action. Thus, an NFL player can argue that the NFL failed to warn him that he was at risk for serious cognitive disability. The player can argue that he was exposed to an unreasonable risk of harm by relying on the NFL's study conducted by the MTBI Committee. The NFL relied on its study to make recommendations for the treatment of head injuries to its players.²¹⁷ If a reasonable person would recognize an act as involving risk of harm to another, that risk is unreasonable if its magnitude outweighs the utility of the act.²¹⁸ Here, the potential for harm is extraordinary, such that the magnitude of risk to the player is extremely high.

Although the league can take the position that it did not know of the risks at the time, it can be argued that a reasonable person should have known of the risks of permanent cognitive damage from concussions. This can be inferred from the differences in the two documents

distributed to the players in 2007 and 2009.²¹⁹ The 2007 release stated, “Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly. It is important to understand that there is no magic number for how many concussions is too many.”²²⁰ League spokesman Greg Aiello contradicted this position just two years later, “It’s quite obvious from the medical research that’s been done that concussions can lead to long-term problems.”²²¹ This had amounted to a tacit acknowledgment that the NFL was no longer able to defend a position that conflicted with nearly all scientific understanding of head trauma. If a player suffered numerous concussions prior to 2009 which end up causing health issues in the future, the NFL can potentially be liable for its failure to warn the player of the health risks arising from multiple concussions. This is especially true if the player asserts that he relied on the NFL’s position and returned to the game earlier than he should have. Therefore, a player will likely be able to establish the duty element of negligence.

The experiences of Ted Johnson and Wayne Chrebet illustrate a breach of this duty. Ted Johnson was practically forced to return to practice against his will, not having full knowledge of the increased health risk to which he was exposing himself. He potentially made himself susceptible to a lifetime of health issues by getting back on the field. Similarly, Wayne Chrebet lost consciousness for a few minutes after he suffered a concussion in a game in November of 2003.²²² Irresponsibly, he was cleared to re-enter the game based solely on his declaration that he was fine.²²³ It follows that either player has a cause of action of negligence against the NFL for its policy that placed them at risk.

The NFL would likely be precluded from avoiding the duty element by arguing that players are employees of the teams and not the NFL according to §42 of the Restatement. §42 of

the Restatement explains that once an actor begins to render voluntary service to a third party, the actor undertakes a duty to proceed with reasonable care if relied upon by the third party.²²⁴

The creation of the MTBI Committee and subsequent concussion study by the committee can be understood as a voluntary service provided by the NFL to its players. The NFL caused players to rely on the information distributed to them in which the NFL acknowledged that it wanted to make sure its players were fully informed about the potential impact of concussions.²²⁵

Consequently, an NFL player can argue the NFL breached its duty of care when it failed to warn him about the long-term risks of concussions.

To state a cause of action against the league, an NFL player would also have to establish causation. The player would have to prove that the NFL's conduct was the cause of his health problems.²²⁶ The conduct by the NFL only has to be one of the causes of the player's health issues.²²⁷ Therefore, the plaintiff would not have to prove that the NFL's conduct was the only cause of the harm, but just that it was one of the causes. A player would have to prove that his health issues were caused by repeated blows to the head during his career. As previously mentioned, the player can argue that the NFL's failure to warn of the causal link between head trauma and later cognitive decline caused him to rely on that information, thus leading to his subsequent health issues. For example, if a player sustained a head injury between the years 2005-2009²²⁸ and he relied on information provided by the NFL to return to play before he should have, he likely can prove a cause of action against the NFL based on negligence. As discussed briefly in Section IV, commentators have acknowledged the similarities in the positions taken by the NFL and the tobacco industry in downplaying potential health problems in their respective industries.²²⁹ Both formed research committees to refute evidence that would

pose a monetary risk to its success. Like the tobacco industry, the NFL had denied the existence of a causal link by attempting to discredit independent studies.²³⁰

The NFL will put forth an assumption of risk defense. It will argue that a player assumed the risk of injury by playing football. In *Vendrell v. School District No. 26C*, the court denied the plaintiff recovery by finding that the plaintiff assumed the inherent and obvious risk of injury in being tackled.²³¹ Legendary coach Bill Parcells has stated publicly that players are well aware that football is hazardous to their health.²³² After all, everyone involved with football understands that serious injury is a possibility. However, even if a player understood the risks of suffering concussions by playing football, it does not mean he had the same knowledge that the NFL had. Thus, the player was not fully aware that he was making himself susceptible to long-term health consequences when he re-entered the game. Had he known, he would have chosen to sit out. The NFL continued to inform its players that there was no evidence to suggest concussions caused cognitive decline until 2009, thus increasing the danger to its players by failure to disclose and address the issue. Given its historical denial of a causal link between head trauma and cognitive decline along with its reliance on a flawed study, it is plausible that a player can prove duty, breach, causation, and damages in a lawsuit against the NFL despite any defenses offered by the league.

It is likely the NFL would also argue contributory negligence by the player in that he had negligently contributed to his own injury. Although it shares similarities to the assumption of risk doctrine, contributory negligence is a separate defense.²³³ Assumption of risk questions a plaintiff's actual knowledge of danger, while contributory negligence focuses on the fault of a plaintiff and whether his or her conduct was reasonable.²³⁴ Contributory negligence is defined as when a plaintiff's own negligence played a part in causing the injury and that the role is found to

be significant enough to bar a plaintiff from recovering damages.²³⁵ If the jurisdiction does not recognize contributory negligence, the NFL would derivatively adopt comparative negligence as its defense, which reduces a plaintiff's damages by the percentage the plaintiff is deemed responsible for the injury.²³⁶

The NFL can argue that a player was complicit in contributing to his injury by returning to play too early or hiding his concussion by failing to report his symptoms. Almost 20 percent of players polled in November 2009 admitted that they had underreported concussion symptoms.²³⁷ Players admitted they returned to play "feeling 'dazed' or 'woozy' or having blurred vision."²³⁸ For example, fullback Kevin Turner admitted he once got hit so hard that he did not know what city he was in, yet he still went back into the game.²³⁹ In response, a player would try to justify his actions as necessary based on the NFL's contract policy which does not guarantee contracts. This defense has potential success for the NFL provided that it can show the player acted independently in concealing his injury in an attempt to return to the game. However, it will have the same issue previously discussed if the player claims he concealed his injury in reliance on the study that suggested he was not put at further risk of health injury by sustaining another concussion.

Alternatively and more aggressively, an athlete can allege fraudulent concealment by the NFL. This can be argued through a misrepresentation claim. To prove a cause of action based on misrepresentation, a plaintiff must prove: 1) misrepresentation or general omission of a fact; 2) the fact asserted was known by the defendant to be false; 3) the defendant made the assertion with the intent the plaintiff would rely on the assertion; 4) the plaintiff justifiably relied; and 5) was injured as a result.²⁴⁰ The player can argue fraudulent misrepresentation regarding the press

release on August 14, 2007.²⁴¹ If the NFL chooses to disclose anything at all, it likely had a duty to disclose complete and accurate information.

The NFL was aware of the independent studies which suggested there was a link between concussions and long-term health issues, since it had publicly refuted the studies on numerous occasions.²⁴² Thus, the league did not disclose complete and accurate information. A plaintiff can attempt to prove that the NFL purposely concealed the findings of the independent studies which took a different position than the one asserted by the NFL. Had the player been aware of the health risks, perhaps he would have considered retirement before returning to play. This type of fraudulent claim would be disastrous for the NFL, as substantive punitive damages would be likely if a player won this type of suit.²⁴³ The biggest hurdle a player would face is proving that the NFL made the assertion with the intent that a player would rely on the information. A fraud case can only succeed if the plaintiff establishes that a reasonable person would have believed and acted on the NFL's misrepresentations.²⁴⁴ The NFL will argue that the players had enough anecdotal evidence and recent studies to be well informed. Despite its potential arguments, it is clear that the NFL did not do enough to warn players of the neurological problems that can result from repeated blows to the head. It also warrants mentioning that in either action, the NFL may also be susceptible to a loss of consortium claim brought by a player's wife.²⁴⁵

Regardless of the potential future claims that may be filed against the NFL, the league did correctly change its position, even if it was too late. By publicly accepting the scientific opinion that a causal link exists between concussions and later cognitive disability, the NFL has undeniably put itself in a better legal position to dispute negligence claims. As of 2009, a player will not be able to claim that the NFL failed to warn him of the potential future risks that repeated concussions can lead to cognitive decline. Merrill Hoge, who has publicly criticized the

NFL for its concussion policy and was successful in his lawsuit, acknowledged the significant changes made by the league.²⁴⁶ He commented that what happened to him would not happen in the NFL today.²⁴⁷ Although it can be faulted for its concussion policy in the past, the NFL has come a long way since it implemented baseline testing for concussions in 1995.²⁴⁸

VII. The Potential Liability of NFL Team Physicians

The NFL is not the only defendant who may be liable to a player for health injuries sustained from concussions. Typically, if a physician-patient relationship exists and the diagnosis or treatment is inconsistent with the accepted standard of care, a physician is subject to liability through medical malpractice.²⁴⁹ To bring a successful lawsuit against a team physician for a concussion-related negligence, the player has to establish the following elements: 1) a duty owed to the plaintiff based upon doctor-patient relationship; 2) a breach of the standard of care; 3) an injury; and 4) a causal connection between the breach and injury.²⁵⁰

The team physician's number one priority is to care for the player's health above all else.²⁵¹ However, a team physician faces many issues in treating a player that arise from a conflict of interest. Offensive lineman Pete Kendall summed up this conflict of interest, "I see guys playing in games that I don't think a personal advocate would allow them to do...the doctor who is supposed to be looking out for you is also the same guy who may put you into a game that the team has to win. You're mixing business with medicine."²⁵² There is no denying that a team is more financially successful if it wins games and thus it has a monetary interest in keeping its players on the field.

A physician can be conflicted when the interests of management²⁵³ and the player do not coincide. Situations can arise in which a physician feels his or her job security may be

threatened by placing the health interests of a player above management's desires. For example, if a team was to pressure a physician to make a decision that was not consistent with sound medical practice, a moral dilemma would arise over whether to serve the team or the player.²⁵⁴ The doctor must both properly diagnose the injury and treat it so that the player can return to the field and perform for the physician's employer.²⁵⁵ On at least one occasion, a physician has resigned because of this conflict. In his resignation statement, Cincinnati Reds team doctor Michael Lawhon complained of dishonesty from the front office and misleading reports on injuries.²⁵⁶ The conflict of interest scenario has even been portrayed in football movies such as *Any Given Sunday* and *Varsity Blues*. In fact, it played out in real life as well when former NFL player Charlie Krueger won his lawsuit which alleged that the team physician fraudulently concealed information about his knee injury.²⁵⁷ This realization may cause an athlete to think twice about the medical diagnosis given by his team's physician.

Physicians may also face pressure from the NFL player himself who knows that his livelihood is dependent on his being healthy enough to play. A player does not always have his own best health interests in mind. Often times, he is more worried about losing his job than his own well-being.²⁵⁸ NFL QB Matt Cassel confirmed this when he said, "Someone once told me, which I agree, you never want to see someone else doing your job and the mentality, as always, is to get back as soon as I can."²⁵⁹ It has gotten to the point that team physicians have to practice "detective medicine" because players will deny having any medical ailments in order to be part of a professional team.²⁶⁰

Despite any culpability that may arise from a conflict of interest, the co-employee doctrine of workers' compensation law will shield a team physician liability since it is likely the physician is a direct employee of the team. Since 1991, the common practice is for teams to

designate the team physician as an employee which then subjects him or her to the co-employee doctrine.²⁶¹ Workers' compensation laws insure that, "injured workers no longer have to establish negligence attributable to their employer in order to obtain legal redress. They merely have to demonstrate that their conditions arose out of and during the course of their employment."²⁶² Due to this heightened protection, most states have eliminated a private cause of action for injuries that are covered by workers compensation.²⁶³ From this immunity arises the "co-employee" doctrine which acts as a means to allow injured workers to exercise a private cause of action against an employer.²⁶⁴ This means the cause of action would be directed against the team, not the team doctor.

The doctrine states, "An employer may become a third person, vulnerable to tort suit by an employee, if - and only if - it possesses a second persona so completely independent from and unrelated to its status as employer that by established standards the law recognizes that persona as a separate legal person."²⁶⁵ Therefore, a team physician is not a separate legal person and thus immune from suit under the workers compensation laws of most states.²⁶⁶ Since the NFL's Collective Bargaining Agreement ("CBA") mandates workers' compensation benefits to its players, the players can be left without a civil remedy if injured.²⁶⁷ Perhaps a ray of hope was provided for NFL players in the dissenting opinion in *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 763 (Minn. 2005), which expressed policy concerns with laws that provide blanket immunity to physicians since it can lead to their use of a lower standard of care.²⁶⁸ Nevertheless, if a player wants to sue a team physician for malpractice, he will have to sue the team under agency law to recover. Thus, it is likely a physician would not have to resort to defenses such as contributory negligence or assumption of risk by the player to avoid liability for his injuries.

VIII. The Potential Liability of Helmet Manufacturers

This section will explore whether an NFL player who suffers a head injury may also be able to recovery from Riddell, the exclusive helmet manufacturer and provider for the NFL. Numerous suits against helmet manufacturers have been brought both on the theory of negligence and strict liability which shed light on whether Riddell may be subject to liability. The holdings suggest Riddell will not be liable as long as it does not ignore its duty to warn the user of its product or manufacture a negligently designed product.

The plaintiff in *Rawlings Sporting Goods Co. v. Daniels* was a high school quarterback who suffered an injury from a head-to-head collision that resulted in permanent brain damage.²⁶⁹ What was unique about this case was that the collision caused an indentation in the plaintiff's helmet. The plaintiff claimed Rawlings was negligent in failing to warn him that its helmet would not protect him from a subdural hematoma.²⁷⁰ The court held that, "every manufacturer had a duty to warn of dangers in the use of its product of which it knows or should know."²⁷¹ Therefore, provided that Riddell warns the NFL and its players that its helmets will not prevent all injuries, it can avoid liability resulting from head trauma.

In another case involving a high-school quarterback, the plaintiff successfully sued Riddell for negligent design and misrepresentation.²⁷² The plaintiff alleged that the lining in the helmet was insufficient and put forth evidence of helmet testing standards. The plaintiff presented evidence of Riddell's in-house records of testing, which showed that it inadequately and minimally investigated the relationship between the helmet design and neck injury.²⁷³ Thus, to avoid liability in a lawsuit brought by a player, Riddell must do all the necessary testing relating to injuries and head trauma. Given the current scrutiny and attention being given to

concussions, it is likely Riddell has committed the necessary resources to testing its professional football helmets.

Several cases have also been brought under the strict liability theory. For strict liability, courts have held that the risks of playing football are so obvious that a warning would only inform the wearer of what he already knows.²⁷⁴ Thus, for a plaintiff to be successful in a strict liability lawsuit against a manufacturer, the plaintiff must prove there was an existing defect in the design of the helmet. *Byrns v. Riddell* was another high school football case in which the plaintiff suffered a head injury during a game while wearing a Riddell helmet.²⁷⁵ The plaintiff produced a witness to attempt to show that Riddell helmets had a design defect that was inherently dangerous since it transmitted shock to the head. The appellate court held that the evidence revealed further testing could have found a defect in the design and thus it precluded a directed verdict issued by the trial court.²⁷⁶

In *Durkee v. Cooper of Canada, Ltd.*, the Court held that the proper test for manufacturer liability was whether it had failed to protect against a risk that was unreasonable and foreseeable by the manufacturer.²⁷⁷ Accordingly, to avoid liability, Riddell must be sure its testing procedures meet the appropriate standards of design and give the NFL adequate warning to prevent negligence suits, since the risks of head trauma and concussions are widely recognized and foreseeable. It seems an NFL player's best chance to successfully sue Riddell for head injury would be to put forth expert testimony relating to defect in the helmet design or inadequate testing procedures. Of the three potential defendants discussed, this course of action is the least likely to result in a successful verdict for an NFL player.

The NFL should be aware that it is likely going to have to defend “concussion lawsuits” in the future. In fact, New Mexico Senator Tom Udall recently sent a letter to the Federal Trade Commission requesting an investigation and accusing Riddell for “misleading marketing claims” relating to the safety of its helmets.²⁷⁸ Riddell’s website promoted that, “research shows a 31 percent reduction in the risk of concussions in players wearing a Riddell Revolution football helmet when compared with traditional helmets.”²⁷⁹ Udall took issue with the claim, alleging that the statistics were unsubstantiated.²⁸⁰ A significant result of the concussion issue becoming highly publicized is that juries are likely to be informed and thus possibly be sympathetic to the plaintiff. The NFL must continue to take this issue seriously, as if its future was hanging in the balance. Some have started to speculate that if it does not, there may not be a league a few decades from now.²⁸¹

IX. Potential Solutions: An Upcoming Opportunity for the NFL

The NFL is at a crossroads in its history, despite surpassing baseball long ago as the most popular sport in the United States.²⁸² The league has made positive changes to address its issue with concussions in the last few years, starting with its public acknowledgement that concussions can cause future health issues.²⁸³ The NFL has also recently announced that it will implement standardized concussion-evaluation procedures that will help determine whether a player is healthy enough to return to the game.²⁸⁴ The mandatory guidelines will incorporate a neurological, cognitive, and balance test.²⁸⁵ The NFL is doing a much better job of educating its players and making them more aware of the severity of concussions. In recent years, the NFL has increased awareness, changed rules and policies, and has tried to improve its helmets. It has also implemented mandatory procedures for its teams to follow before allowing a player to return to play, thus not allowing the teams to have total control over monitoring player concussions, as

they have in the past. Furthermore, the NFL has fined its players enormous amounts of money for hits to the head and should continue to do so. Despite these positive changes, more can be done to insure the future of the league. The NFL must utilize the current negotiations with the NFLPA to make additional changes to its concussion policy and incorporate new rules that will protect the safety of its players.

A. Leather Helmets

Many have argued that the NFL must improve its helmets. One suggestion has been to add an inflatable inner sack to absorb a blow to the head and reduce shock to the brain.²⁸⁶ Another suggestion has been to add a polyurethane secondary helmet, a “Pro Cap,” that attaches to the primary helmet to help reduce shock to the brain.²⁸⁷ Most proposed solutions suggest improving the current helmet in some form. The NFL should ignore those suggestions and take the exact opposite approach in its attempt to reduce its players’ head injuries.

The first thing the NFL should do to alleviate head injuries is to implement a leather helmet similar to the one invented by Paul Brown²⁸⁸ that was used until the mid 1950s. The NFL should outlaw the use of any polymers or non-leather material in the manufacturing of its helmets. At first thought, this may seem radical and unnecessary. Nevertheless, some of the most respected NFL players and coaches have suggested this change would limit the violence and head injuries in the NFL.²⁸⁹ A state-of-the-art helmet makes a defender less fearful of using his body as a projectile. The late, legendary coach Bill Walsh argued that the extra protection of a helmet allows a player “to play with more abandon and that means increasingly harder hits.”²⁹⁰ Hall of Fame safety Ronnie Lott was one of the fiercest hitters to ever play football. Yet, he agrees with Bill Walsh and admits that a change in equipment would have changed the way he

played. "If they took away half my padding, they'd take away half my power."²⁹¹ Ironically, the improvements made to helmets seem to have made the game less safe. Hall of Fame quarterback and FOX analyst Troy Aikman also advocates the idea of the NFL returning to the use of leather helmets.²⁹² He has gone so far as to say that if he was to ever have a son, he would not allow him to play football because of how dangerous the sport has become.²⁹³

Contrarians argue that football is an inherently violent game and no amount of fines, suspensions, or equipment improvements will change the game.²⁹⁴ That logic is misguided. Football is a dangerous game, just as war is dangerous. However, the current helmets make it a more dangerous game, just as nuclear weapons make war a more dangerous endeavor. Changing the helmets does not turn football into a non-violent game. Nor should it change the way it has always been played. It would merely prevent defenders from playing recklessly with no regard for their health. Unless the NFL changes the fundamental rules of the game, it will not alter the game that has become so popular simply by changing its helmets.

B. The Collective Bargaining Agreement ("CBA")

The CBA is the governing document that regulates what rights the teams and its players have. It also controls the interactions between the NFL and the NFLPA. Arbitration is used to settle disputes that arise from the terms of the CBA.²⁹⁵ The NFL can use the upcoming negotiations of the new CBA to implement new rules and policies that will help reduce exposing its players to CTE in the future. As discussed, the current contracting policy incentivizes players to hide their concussions.²⁹⁶ As much as the owners will fight it, the league must force its teams to guarantee player contracts in some form. Even if it just means enforcing a minimum amount of years that must be guaranteed, something must be done. We should look no further than the

situations of Ted Johnson and Wayne Chrebet to understand why this is necessary.²⁹⁷ By doing this, the NFL would also rebut a player's argument that he felt pressure to play through a concussion. Under the current system, the team is given most of the power when negotiating a contract with a player. If the NFL wants to remain in business, it must give some power back to its players by guaranteeing contracts, as is done in the other three major professional sports. A player will be less inclined to risk further head trauma by prematurely re-entering a game if his contract was guaranteed and his job was secure.

The NFL can also use the upcoming CBA to change the liability immunity that is currently given to its physicians. The NFLPA should fight to gain greater protection against malpractice by team physicians.²⁹⁸ The team physician will often be exempt from liability if the player can collect workers' compensation for his injuries.²⁹⁹ This policy should be changed in the upcoming CBA. The NFL should make its team physicians subject to tort liability for medical malpractice. If this policy were adopted, it is anticipated that the physician will be more likely to put the player's health interests above the interests of management or the team. One suggestion offered is to make the physicians league employees, rather than team employees.³⁰⁰ Perhaps this would make them more independent and less beholden to a specific team. For example, the Packers trainer received both a Super Bowl ring and Super Bowl bonus this past year.³⁰¹ Clearly, this conflict of interest may cause a trainer to put the team's interests first. One thing is obvious, the NFL should not allow its team physicians to continue to practice free from the threat of liability.

Another issue that will be discussed in the upcoming labor negotiations is the length of the NFL season. The NFL should not extend its schedule by two games per season. If it tries, the players should vehemently oppose this proposal. An eighteen game season is an unnecessary

change that is being driven by the greed of a few owners. The league cannot justify extending the season to include more games, considering the knowledge it now has regarding the risks posed by concussions. The NFLPA has stated publicly that an eighteen game season is not in the best interest of player safety, so it is not even on the negotiating table from their point of view.³⁰² They should not allow an increase in money to persuade them to soften this stance. NFL players already incur too many hits to the head during a sixteen game season. The NFLPA should bargain to get the NFL to keep track of hits to the head. The NFL can simply designate a person to each team for the entire season to accomplish this. If baseball teams keep pitch counts to protect the arm of a pitcher, there is no reason that the NFL cannot track hits to the head or at least force its teams to do so.

The NFL should also continue to educate its players on the long-term health risks of playing football as it has done over the past few years, so that players' participation amounts to informed consent. If a player is fully aware of the health risks he assumes by playing football, it may make him more conscious of his safety. The NFL should also limit the amount of contact allowed by its teams in practice. Research has concluded that a person develops CTE from repeated trauma to the head, not just one concussion.³⁰³ Therefore, repeated hitting in practice exacerbates the problem. This has been demonstrated in the cases of several former players, including Merrill Hoge and Ted Johnson. Lastly, the NFL has been more receptive to working with the CSTE and the SLI to try to provide them with the brains of former players for research.³⁰⁴ The league should take it a step further and openly embrace that relationship, making each entity a business partner. Independent research can only help the NFL learn more about the effects that concussions have on its players.

C. Congressional Oversight

The NFL should attempt to get Congress more involved in the regulation and the oversight of the concussion problem in the NFL. Congress has already held several hearings thus far, as the NFL has been questioned as to what it is doing to protect its players' safety. Continued Congressional oversight will incentivize the league to continue to monitor and research concussions in a way that the threat of litigation may not. This health issue presents a much more serious problem than past sports issues that Congress has spent its resources investigating.³⁰⁵ Furthermore, if concussions continue to plague the NFL ten years from now, it is likely Congress would then take even more drastic measures and possibly exert some control over the league. If the concussion problem continues to worsen, perhaps Congress can implement a law that would limit tackling in youth leagues until adolescence. The root of the problem starts with childhood, from which time most professionals have been playing football. Limiting tackling in children's leagues is perhaps another means to fight the concussion problem. However, we have not yet come to that point. For the time being, Congressional oversight should suffice to ensure the NFL continues to treat its concussion problem seriously.

X. Conclusion

Former running back Eric Shelton recently filed a lawsuit claiming that the league's disability plan withheld benefits for an injury caused by a helmet-to-helmet hit.³⁰⁶ Shelton alleges the league incorrectly awarded him benefits for "degenerative" impairments as opposed to the maximum benefit for an injury that causes immediate, permanent harm.³⁰⁷ The NFL is likely to encounter similar lawsuits after publicly acknowledging that concussions can lead to future cognitive impairment. This admission has opened the door for liability to those who played during the era when the NFL denied there were any cognitive risks taken by playing professional football. The Shelton lawsuit should serve as a predictor for what is to come.

It is rumored that there are two class-action suits against the NFL which are expected to be filed by the summer of 2011.³⁰⁸ The lawsuits will be filed by former players and will focus on what knowledge the league had in regards to the long-term effects of concussions before 2009. The NFL may be liable to players who sustained head injuries during the time when the NFL publicly denied there were any long-term effects to concussions. Nevertheless, the league has done a much better job publicly acknowledging the issue and putting procedures in place to protect the health of its players the last few years.

Despite the legal ramifications involved, recurring head injuries also present sociological and cultural concerns that may affect the NFL in the future. Lawsuits will not bankrupt the NFL. However, the sheer brutality of the sport potentially may have dire consequences. Some have speculated that football will become a sport played only by the lower-class.³⁰⁹ Comparatively, the brutality of boxing has prompted the World Medical Association and the British Medical Association to suggest all forms of the sport should be banned.³¹⁰ The NFL hopes that its sport does not turn into a culture of regret. Only time will reveal what the future holds for the NFL. One thing is certain: the health risks have caused us to consider something we could not have fathomed just ten years ago. Are we sure the NFL will exist a few decades from now?

¹ Seton Hall Law, J.D. Candidate 2013.

² <http://sports.espn.go.com/nfl/news/story?id=1657901>. See also <http://www.youtube.com/watch?v=I82BPA5QAaQ> (last visited March 1, 2011).

³ Ira Berkow, *Sports of the Times; The Joys of Inflicting a Sore Head*, N.Y. TIMES, Dec. 12, 1989 at B15.

⁴ Sean Leahy, *Colts Austin Collie alert after concussion in scary hit vs. Eagles*, USA Today, Nov. 7, 2010.

⁵ *Id.*

⁶ <http://www.youtube.com/watch?v=oZVQFAGsqu0> (last visited March 3, 2011).

⁷ http://www.philadelphiaeagles.com/news/Story.asp?story_id=22469 (last visited March 3, 2011).

⁸ Paul Kuharsky, *Collie hit was clean, say two Colts' DBs*, ESPN.com, Nov. 7, 2010, http://espn.go.com/blog/afcsouth/post/_/id/17557/collie-hit-was-clean-say-two-colts-dbs (last visited March 1, 2011).

⁹ Judy Battista, *Banned Hits Return, Along with Confusion*, N.Y. TIMES, Nov. 9, 2010, at B15.

¹⁰ <http://www.nfl.com/draft/history/fulldraft?season=2009&round=round1#round1> (last visited March 3, 2011).

¹¹ http://www.huffingtonpost.com/2010/12/20/austin-collie-injury-colts-jaguars_n_798869.html (last visited March 3, 2011). Concussion-like symptoms may include headaches, confusion, nausea, vomiting, blurred vision, and loss of memory.

¹² *Id.*

¹³ *Id.*

¹⁴ Battista, *supra* note 9.

¹⁵ And so was the season for many fantasy football owners with hopes of winning their league championship. Week 15 was the week of the semifinals in the Bloomfield Fantasy Football League. By halftime, Austin Collie had scored 26.7 points for Team Marino. Team Marino lost that week by 3 points.

¹⁶ Elliot Pellman et al., *Concussion in Professional Football: Summary of the Research Conducted by the National Football League's Committee on Mild Traumatic Brain Injury*, 21:4 *Neurosurg. Focus* 850, 855 (2006).

¹⁷ Greg Bishop, *Jets Confirm Another Concussion for Coles*, N.Y. TIMES, Oct. 24, 2008, at B14. Both Al Toon and Wayne Chrebet were forced to cut their careers short because of concussions.

¹⁸ Associated Press, *Bradshaw: Concussions have caught up*, Foxsports.com, Apr. 12, 2011, <http://msn.foxsports.com/nfl/story/Hall-of-Fame-quarterback-Terry-Bradshaw-says-he-is-feeling-the-effects-of-numerous-concussions-041211?GT1=39002> (last visited April 16, 2011).

¹⁹ <http://sports.espn.go.com/nfl/news/story?id=5565099> (last visited March 1, 2011). Michael Vick got his chance to play for the Eagles in week 1 when Kevin Kolb left the game after suffering a concussion.

²⁰ Malcolm Gladwell, *Offensive Play: How different are dogfighting and football?* The New Yorker, Oct. 19, 2009.

²¹ James P. Kelly & Jay H. Rosenberg, *Diagnosis and Management of Concussion in Sports*, 48 *NEUROLOGY* 575, 575 (1997)

²² Tim Anderson, et al., *Concussion and Mild Head Injury*, 6 *Prac. Neurology* 342, 342 (2006).

²³ *Id.* at 342. Concussion, mild head injury, mild traumatic brain injury (TBI), cerebral concussion, and post concussion syndrome have all been used to describe what is understood as a concussion.

²⁴ M. Aubry, et al., *Summary and Agreement Statement of the First International Conference on Concussion in Sport*, Vienna 2001, 36 *Br. J. Sports Med.* 6, 6 (2002).

²⁵ *Id.* at 6.

²⁶ Robert C. Cantu, *Posttraumatic Retrograde and Anterograde Amnesia: Pathophysiology and Implications in Grading and Safe Return to Play*, 36 *J. Athletic Training* 244, 244 (2001).

²⁷ Anderson et al., *supra* note 22 at 343.

²⁸ Cantu, *supra* note 26 at 244.

²⁹ *Id.*

³⁰ Ben McGrath, *Does Football Have a Future?* The New Yorker, Jan. 31, 2011. A sub-concussion is caused by a blow to the head which may not manifest with immediately incapacitating symptoms and signs. These can also result in brain damage later in life.

³¹ J. Scott Delaney et al., *Recognition and Characteristics of concussions in the emergency department population*, 29 *J. Emer. Med.* 189, 189 (2005).

³² *Id.*

³³ *Id.*

³⁴ Alan Schwarz, *High School Players Shrug off Concussions, Raising Risks*, N.Y. TIMES, Sept. 15, 2007, at A1. Jasmon, with his battering-ram, freshly buzz-cut head and eyes that danced with impending glory, immediately answered: "No chance. It's not dangerous to play with a concussion. You've got to sacrifice for the sake of the team. The only way I come out is on a stretcher." Jasmon, a senior with three concussions on his resume, looked at two teammates for support and unity. They said the same thing with the same certainty: They did not quite know what a concussion was, and would never tell their coaches if they believed they had sustained one. Matt Selvaggio, who plays with Jasmon on both lines, said: "Our coaches would take us out in a second. So why would we tell them?" *See also* Jeff Klein, *Study Finds Concussions in Hockey Underreported*, N.Y. TIMES, Nov. 2, 2011, at B9.

³⁵ Damon Hack, *Inside Pro Football; Clearing the Fog That Surrounds Concussions*, N.Y. TIMES, Oct. 17, 2003, at D7.

³⁶ http://espn.go.com/nfl/topics/_/page/concussions (last visited March 1, 2011).

³⁷ Letter from Harry Carson, *Concussions: The Hidden Injury*, N.Y. TIMES, Apr. 19, 1998, at B11.

³⁸ <http://www.cdc.gov/Partners/Archive/HeadsUp/> (last visited March 4, 2011). *See also* Kevin Guskiewicz et al., *Epidemiology of concussion in collegiate and high school football players*, 28 *Am. J. Sports Med.* 643, 643 (2000).

³⁹ University of Pittsburgh Department of Neurological Surgery, <http://www.neurosurgery.pitt.edu/trauma/concussion.html> (last visited on March 3, 2011).

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- ⁴⁰ Leigh Boerner, *Concussions may be on the rise in high schoolers: study*, REUTERS, Feb. 27, 2011.
- ⁴¹ http://www.digtriad.com/news/most_popular/article.aspx?storyid=147260&provider=top (last visited March 3, 2011).
- ⁴² Michael Schmidt and David Caldwell, *Brain Injury Puts Player in Critical Condition*, N.Y. TIMES, Oct. 15, 2008 at B20. A football player for Montclair High School in New Jersey died after sustaining a brain hemorrhage during a football game in 2008. The player collapsed after making a tackle and had suffered a concussion earlier in the year. In a span of three months in 2008, two teenagers died in New Jersey during football activities. A 17-year-old died in August because of bleeding in the brain after he was tackled during a practice. The other, a 13-year-old, died that month because of an undetected heart condition. In 2007, three high school players in the United States died as a result of head injuries sustained while playing football, according to the National Center for Catastrophic Sports Injury at the University of North Carolina.
- ⁴³ See generally Erika Diehl, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & Health 83, 83-124 (2010).
- ⁴⁴ Alan Schwarz, *Study of ex-N.F.L. Players Ties Concussion to Depression Risk*, N.Y. TIMES, May 31, 2007, at A1. See also Kevin Guskiewicz et al., *Recurrent Concussion and Risk of Depression in Retired Professional Football Players*, 39 Medicine and Science in Sports and Exercise 903, 903 (2007).
- ⁴⁵ <http://www.suicide.org/concussions-can-lead-to-suicide.html> (last visited March 5, 2011).
- ⁴⁶ Guskiewicz et al., *supra* note 38 at 643.
- ⁴⁷ Robert Cantu, *Chronic Traumatic Encephalopathy in the National Football League*, 61 Neurosurgery 223, 223 (2007).
- ⁴⁸ Allen Barra, *The NFL's standardized concussion tests*, Wall St. J., March 9, 2011, http://online.wsj.com/article/SB10001424052748704758904576188404205150580.html?mod=googlenews_wsj (last visited March 12, 2011).
- ⁴⁹ Tim Graham, *Kevin Turner's Rugged Road*, ESPN.com, Mar. 16, 2011, http://espn.go.com/blog/afceast/post/_id/26976/kevin-turners-road (last visited April 16, 2011).
- ⁵⁰ Associated Press, *Concussions reported in NFL up 21 percent from last season*, NFL.com, Dec. 13, 2010, <http://www.nfl.com/news/story/09000d5d81cdf2d6/article/concussions-reported-in-nfl-up-21-percent-from-last-season> (last visited March 10, 2011).
- ⁵¹ See *infra* Section IV and V. See also Christopher Nowinski, *Head Games: Football's Concussion Crisis* (2007), stating that concussions and repeated head trauma can lead to many ailments such as Alzheimer's disease, dementia, depression, and memory loss.
- ⁵² David Noonan, *Boxing and the Brain*, N.Y. TIMES, June 12, 1983, at section 6.
- ⁵³ *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ Jeff Klein, *Study Finds Concussions in Hockey Underreported*, N.Y. TIMES, Nov. 2, 2010, at B9.
- ⁵⁶ *Id.*
- ⁵⁷ Jeff Klein, *Many in N.H.L. View Fighting as Necessary*, N.Y. TIMES, Mar. 3, 2011, at B18.
- ⁵⁸ *Id.*
- ⁵⁹ <http://www.sbnation.com/nhl/2011/2/8/1981568/concussions-nhl-sidney-crosby-marc-savard-eric-lindros> (last visited March 7, 2011).
- ⁶⁰ Klein, *supra* note 55.
- ⁶¹ Jeff Klein, *Disempower Play*, N.Y. TIMES, Mar. 6, 2011, at B10.
- ⁶² Harvey Fialkov, *In light of Probert news, should NHL ban fighting?* The Balt. Sun, Mar. 4, 2011.
- ⁶³ Klein, *supra* note 55.
- ⁶⁴ Jeff Klein, *Ex-Enforcer Says Fights Aren't Real Problem*, N.Y. TIMES, Mar. 4, 2011, at B10.
- ⁶⁵ *Id.*
- ⁶⁶ <http://sports.espn.go.com/nhl/news/story?id=6098742> (last visited Mar. 7, 2011).
- ⁶⁷ <http://www.ctv.ca/CTVNews/Health/20110308/crosby-sister-concussion-110308/> (last visited March 7, 2011).
- ⁶⁸ Klein, *supra* note 42. By season's end, Crosby had still not played in a game and was only starting to skate on the ice during practice.
- ⁶⁹ Mike Sielski, *A Headache that won't go away*, Sept. 14, 2010, <http://online.wsj.com/article/SB10001424052748703466704575489813509916080.html> (last visited March 7, 2011).
- ⁷⁰ Pat Borzi, *Diverging Recoveries Highlight Danger of Concussions*, N.Y. TIMES, Mar. 8, 2011, at B11.
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⁷² *Id.*

⁷³ Alan Schwarz, *Concussion Protocols Fail Vonn*, N.Y. TIMES, Feb. 14, 2011, at D1.

⁷⁴ David Waldstein, *Safer Batting Helmet Draws Resistance from Some Players*, N.Y. TIMES, Aug. 12, 2009, at B11.

⁷⁵ *Id.*

⁷⁶ Jordana Foster, *ACSM 2009: Multiple Concussions Linked to Postheading Deficits in Soccer Players*, June 3, 2009, <http://www.medscape.com/viewarticle/703796> (last viewed March 7, 2011).

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⁷⁸ Associated Press, *NBA Results*, L.A. TIMES, Mar. 7, 2011, at C8.

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- ¹²⁴ Hecht, *supra* note 120 at 20.
- ¹²⁵ *Id.*
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- ¹⁵⁶ *Id.*
- ¹⁵⁷ *Id.*
- ¹⁵⁸ <http://sports.espn.go.com/nfl/news/story?id=3864644> (last visited March 10, 2011).
- ¹⁵⁹ Smith, *supra* note 150.
- ¹⁶⁰ <http://sports.espn.go.com/nfl/news/story?id=2669517> (last visited March 10, 2011).
- ¹⁶¹ Alan Schwarz, *Expert Ties Ex-Player's Suicide to Brain Damage from Football*, N.Y. TIMES, Jan. 18, 2007, at A1.
- ¹⁶² http://en.wikipedia.org/wiki/Andre_Waters (last visited March 8, 2011).
- ¹⁶³ *Id.*
- ¹⁶⁴ Schwarz, *supra* note 155. Waters once told a reporter in response to a concussion question, "I think I lost count at 15." He later added: "I just wouldn't say anything. I'd sniff some smelling salts, then go back in there."
- ¹⁶⁵ McGrath, *supra* note 30. "You got your bell rung," they used to say. You're "just a little dinged up." This was not merely macho sideline-speak; it was, as recently as a decade and a half ago, the language of the NFL's leading doctors. Elliot Pellman, who served until 2007 as the Jets team physician, once told a reporter that veteran players are able to "unscramble their brains a little faster" than rookies are, "maybe because they're not afraid after being dinged."
- ¹⁶⁶ http://en.wikipedia.org/wiki/Christopher_Nowinski (last visited March 10, 2011). Chris Nowinski is widely credited for putting the concussion issue on our social and cultural conscious radar. He co-founded the Sports Legacy Institute in 2007 along with neuropathologist Dr. Robert Cantu.
- ¹⁶⁷ Carpenter, *supra* note 137.
- ¹⁶⁸ Alan Schwarz, *In NFL Fight, Women Lead the Way*, N.Y. Times, Apr. 11, 2010, at SP. See also Carpenter, *supra* note 137.
- ¹⁶⁹ Carpenter, *supra* note 137.
- ¹⁷⁰ Schwarz, *supra* note 155.
- ¹⁷¹ *Id.*
- ¹⁷² John Branch et al., *NFL Culture Makes Issue of Head Injuries Even Murkier*, N.Y. TIMES, Feb. 3, 2007, at D1.
- ¹⁷³ Smith, *supra* note 150.
- ¹⁷⁴ Alan Schwarz, *Dark Days Follow Hard-Hitting Career in NFL*, N.Y. Times, Feb. 2, 2007, at A1.
- ¹⁷⁵ Associated Press, *Johnson says Pats coach ignored LB's concussion*, ESPN.com, Feb. 2, 2007, <http://sports.espn.go.com/nfl/news/story?id=2751614> (last viewed March 10, 2011).
- ¹⁷⁶ *Id.*
- ¹⁷⁷ Schwarz, *supra* note 162. Chris Nowinski told Bill Simmons on his *B.S. Report* podcast that Johnson wrote the introduction for his book, *Head Games: Football's Concussion Crisis*. However, due to his family's concern of stigmatization in regards to employment, they decided to pull the introduction from the book. <http://espn.go.com/espnradio/show?showId=bsreport>.
- ¹⁷⁸ Analyst and former player Randy Cross said, "It ought to terrify anyone that's played the game."
- ¹⁷⁹ Bill Dwyre, *Dave Duerson's suicide could be a turning point for the NFL*, L.A. TIMES, Feb. 21, 2011, <http://articles.latimes.com/2011/feb/21/sports/la-sp-dwyre-20110222> (last visited March 10, 2011).
- ¹⁸⁰ Alan Schwarz, *NFL Players Shaken by Duerson's Suicide Message*, N.Y. TIMES, Feb. 21, 2011, at D1.

¹⁸¹ According to a photo published by the New York Times, the note read, "Please, see that my brain is given to the NFL's brain bank." <http://www.chicagonow.com/blogs/chicago-bears-huddle/2011/02/new-york-times-releases-photo-of-duersons-suicide-note.html> (last visited March 10, 2011).

¹⁸² Roy S. Johnson, *Dave Duerson's death a warning*, Feb. 25, 2011, ESPN.com, <http://sports.espn.go.com/espn/commentary/news/story?id=6150767> (last visited March 10, 2011). Johnson opined that the NFL had taken over possession of the head-injury stigma, which once belonged to boxing.

¹⁸³ Bill Dwyre, *Will Dave Duerson's tragic shot hit home?*, L.A. TIMES, Feb. 25, 2011, <http://articles.latimes.com/2011/feb/25/sports/la-sp-dwyre-dave-duerson-20110226> (last visited March 10, 2011).

¹⁸⁴ Dwyre, *supra* note 179.

¹⁸⁵ Schwarz, *supra* note 174.

¹⁸⁶ Graham, *supra* note 49.

¹⁸⁷ Dan Vergano, *Concussions seen in new light*, USA Today, Oct. 26, 2003,

http://www.usatoday.com/sports/football/nfl/2003-10-26-concussions-study_x.htm.

¹⁸⁸ Heiner, *supra* note 152 (citing Len Pasquarelli, *Goodell tackling concussion issue head on*, ESPN.com, June 18, 2007).

¹⁸⁹ *Id.* at 260-261.

¹⁹⁰ *Id.* at 261 (quoting Elliott Pellman et al., *Concussion in Professional Football: Repeat Injuries - Part 4*, 55:4 *Neurosurgery* 860, 860 (2004)).

¹⁹¹ Heiner, *supra* note 152 at 287. Dr. Robert Cantu noted the significance that the league's internal study only included active players.

¹⁹² *Id.*

¹⁹³ Mihoces, *supra* note 138. "A doctor in Pittsburgh (Omalu) said he has linked the death of four former NFL players to brain damage from football. Researchers without NFL ties say surveys of retired players show those who had multiple concussions are more likely to report being diagnosed with depression. The NFL disputes the findings but is launching, under first-year Commissioner Roger Goodell, a study of retired players to examine the possible long-term effects from careers of collisions." *See also* Carpenter *supra* note 130. "Ira Casson, the then co-chair of the NFL's Committee on Mild Traumatic Brain Injury and a neurologist at Long Island Jewish Hospital, said neuropathologist Omalu has not provided complete medical histories on Webster and Long, relying instead on anecdotal evidence from the families rather than actual records. He also questions whether a real diagnosis can be made on Waters from such small fragments. Casson also said there were "glaring deficiencies" in an article Omalu published on Webster, claiming that Omalu made Webster's brain trauma seem worse after being questioned on his initial findings. He said Omalu needs to have a wider sampling than just football players to prove his thesis." *See also* 2007 NFL Press Release *infra* note 187.

¹⁹⁴ Daniel Kain, "It's Just a Concussion." *The National Football League's Denial of a Causal Link Between Multiple Concussions and Later-Life Cognitive Decline*, 40 *Rutgers L.J.* 697, 700 (2009).

¹⁹⁵ National Football League, *NFL outlines for players steps taken to address concussion issues*, NFL.com, Aug. 14, 2007, <http://www.nfl.com/news/story?id=09000d5d8017cc67&template=without-video&confirm=true> (last visited March 10, 2011).

¹⁹⁶ Kevin Guskiewicz et al., *Association between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 *Neurosurgery* 722 (2005).

¹⁹⁷ National Football League, *supra* note 195.

¹⁹⁸ Alan Schwarz, *Congress announced hearings on injuries*, N.Y. TIMES, Oct. 3, 2009, at D2.

¹⁹⁹ *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2010), http://judiciary.house.gov/hearings/printers/111th/111-82_53092.PDF, at 116.

²⁰⁰ *Id.* Congresswoman Linda Sanchez compared the NFL's denial of the severity of brain injuries to the tobacco industry's claims that smoking was not carcinogenic, "And it sort of reminds me of the tobacco companies pre-1990's when they kept saying no, there is no link between smoking and damage to your health or ill health effects. And they were forced to admit that that was incorrect through a spate of litigation in the 1990's." *See also* Alan Schwarz, *NFL Acknowledges Long-Term Concussion Effects*, N.Y. TIMES, Dec. 20, 2009, at D1.

²⁰¹ http://judiciary.house.gov/hearings/printers/111th/111-82_53092.PDF, *Id.* at 113.

²⁰² Alan Schwarz, *NFL Head Injury Study Leaders Quit*, N.Y. TIMES, Nov. 24, 2009,

<http://www.nytimes.com/2009/11/25/sports/football/25concussion.html> (last visited March 10, 2011).

²⁰³ Schwarz, *supra* note 198. League spokesman Greg Aiello said in an interview, "It's quite obvious from the medical research that's been done that concussions can lead to long-term problems." This had amounted to a tacit

acknowledgment that it was no longer able to defend a position that conflicted with nearly all scientific understanding of head trauma.

²⁰⁴ *Id.*

²⁰⁵ Press Release, National Football League, *NFL Adopts Stricter Statement on Return-to-Play Following Concussions*, Dec. 2, 2009.

²⁰⁶ *Id.* See also Todd Neale, *NFL Institutes New Concussion Policy*, abcnews.com, Dec. 5, 2009, <http://abcnews.go.com/Health/MindMoodNews/nfl-institutes-concussion-policy/story?id=9251126> (last visited March 10, 2011).

²⁰⁷ Branch, *supra* note 172.

²⁰⁸ Todd Archer, *Jason Witten diagnosed with a concussion*, Dallas Morning News, Sept. 19, 2010, http://cowboysblog.dallasnews.com/archives/2010/09/jason-witten-diagnosed-with-a.html?utm_source=twitterfeed&utm_medium=twitter (last visited March 5, 2011).

²⁰⁹ Alan Schwarz, *NFL Asserts Greater Risks of Head Injury*, N.Y. TIMES, July 26, 2010, at http://topics.nytimes.com/top/reference/timestopics/subjects/f/football/head_injuries/index.html.

²¹⁰ Judy Battista, *NFL Fines Players for Hits to Head*, N.Y. Times, Oct. 19, 2010, at <http://www.nytimes.com/2010/10/20/sports/football/20hits.html>.

²¹¹ Associated Press, *Standardized Concussion Tests for NFL*, ESPN.com, Feb. 24, 2011, <http://sports.espn.go.com/nfl/news/story?id=6156002> (last visited March 10, 2011).

²¹² Alan Schwarz, *House Panel Criticizes New NFL Doctors*, N.Y. Times, May 24, 2010, at <http://www.nytimes.com/2010/05/25/sports/football/25concussion.html>.

²¹³ *Id.*

²¹⁴ Schwarz, *supra* note 198.

²¹⁵ See *supra* Section IV.

²¹⁶ Restatement (Second) of Torts §302 (1965).

²¹⁷ National Football League, *supra* note 195.

²¹⁸ Heiner, *supra* note 152, (citing Restatement (Second) of Torts §281 (1965)).

²¹⁹ McGrath, *supra* note 30.

²²⁰ National Football League, *supra* note 195.

²²¹ Schwarz, *supra* note 198.

²²² Heiner, *supra* note 152 (citing Chris Nowinski, *Head Games: Football's Concussion Crisis*, (2007)).

²²³ *Id.*

²²⁴ Restatement (Third) of Torts §42 (2005).

²²⁵ National Football League, *supra* note 195.

²²⁶ Restatement (Third) of Torts §26 (2002).

²²⁷ *Petersen v. Gray*, 628 A.2d 244, 246 (N.H. 1993). “Although the court also used the words ‘a proximate result’ and ‘a substantial factor,’ the court never explained the basic principle that a plaintiff does not have to show that a defendant’s negligence was the sole cause of his or her injuries.”

²²⁸ It was not until 2009 that the NFL publicly acknowledged that concussions can lead to long-term health issues.

See also Schwarz *supra* note 198.

²²⁹ Kain, *supra* note 194 at 717.

²³⁰ *Id.* at 718. See also *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1490-91 (1988) (explaining that several large scale cigarette manufacturers formed the Tobacco Industry Research Committee (“TIRC”) in January 1954 to carry out their conspiracy “to refute, undermine, and neutralize information coming from the unbiased-scientific and medical communities”).

²³¹ *Vendrell v. School District No.26C, Malheur County*, 233 Or. 1, 376 P.2d 406, xxx (1962).

²³² Graham, *supra* note 49.

²³³ 82 A.L.R.2d 1218 (1962).

²³⁴ *Id.*

²³⁵ BLACK’S LAW DICTIONARY (9th ed. 2009).

²³⁶ *Id.*

²³⁷ Hanna and Kain, *supra* note 149, (citing Howard Fendrich, *AP Impact: NFL Players Hide, Fear Concussions*, ABC News, <http://abcnews.go.com/Sports/wireStory?id=9123270> (last visited June 20, 2010)).

²³⁸ *Id.*

²³⁹ Graham, *supra* note 49.

²⁴⁰ Restatement (Second) of Torts §525 (1977).

- ²⁴¹ The 2007 Press Release stated, “Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly. It is important to understand that there is no magic number for how many concussions is too many.”
- ²⁴² Mihoces, *supra* note 138.
- ²⁴³ John Culhane, *The NFL's next big headache*, Slate.com, Feb. 2, 2011, <http://www.slate.com/toolbar.aspx?action=print&id=2283618> (last visited March 11, 2011).
- ²⁴⁴ *Id.*
- ²⁴⁵ *Id.*
- ²⁴⁶ http://judiciary.house.gov/hearings/printers/111th/111-82_53092.PDF, at 82.
- ²⁴⁷ *Id.*
- ²⁴⁸ Hecht, *supra* note 120 at 50.
- ²⁴⁹ Matthew Mitten, *Medical Malpractice Liability of Sports Medicine Care Providers for Injury to, or Death of, Athlete*, 33 A.L.R.5th 619, 628 (1995).
- ²⁵⁰ Mitten, *supra* note 100.
- ²⁵¹ See *supra* Section IV.
- ²⁵² Alan Schwarz, *For Jets, Silence on Concussions Signals Unease*, N.Y. TIMES, Dec. 22, 2007, at A1.
- ²⁵³ By management, I mean those involved with the teams that are not the player, such as owner, coach, etc.
- ²⁵⁴ Keim, *supra* note 97 citing Russell.
- ²⁵⁵ Gene Wojciechowski and Chris Dufresne, *Delicate Procedures: NFL Team Physicians Must Provide Proper Care to Injured Players and Please Management at the Same Time*, L.A. TIMES, June 26, 1988, http://articles.latimes.com/1988-06-26/sports/sp-8413_1_team-physician.
- ²⁵⁶ Associated Press, *Doctor for Reds Quits*, N.Y. TIMES, Dec. 4, 1991 at B19.
- ²⁵⁷ Wojciechowski and Dufresne, *supra* note 255.
- ²⁵⁸ Joel Thorman, *Chiefs players getting the message on playing hurt*, arrowheadpride.com, Dec. 16, 2010, <http://www.arrowheadpride.com/2010/12/16/1879607/chiefs-players-getting-the-message-on-playing-hurt> (last visited March 11, 2011).
- ²⁵⁹ *Id.*
- ²⁶⁰ Keim, *supra* note 86 citing Roderick West, *In Whose Interest? The Return of the Injured Athlete to Competition*, 25 SPG BRIEF 8, 77 (1996).
- ²⁶¹ Mitten, *supra* note 249 at 215.
- ²⁶² Andrew Hohenstein, *Team Physicians: Adhering to the Hippocratic Oath or Just Plain Hypocrites?* 19 Marq. Sports L. Rev. 579, 587 (2009), (quoting Mark A. Rothstein et al., *Employment Law* 406 (1994)).
- ²⁶³ *Id.* Hohenstein at 587 citing Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law* § 113.01 (2007).
- ²⁶⁴ *Id.*
- ²⁶⁵ *Id.*
- ²⁶⁶ *Id.*
- ²⁶⁷ Hohenstein, *supra* note 262 citing *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 763 (Minn. 2005).
- ²⁶⁸ *Id.*
- ²⁶⁹ *Rawlings Sporting Goods Co. v. Daniels*, 619 S.W. 2d 435, 437 (Tex. Civ. App. 1981).
- ²⁷⁰ *Id.*
- ²⁷¹ *Id.* at 439.
- ²⁷² *Peisino v. Riddell, Inc.*, No. 83-C-SE-129 (Del. Super. Ct. July 7, 1989).
- ²⁷³ Sullivan, *supra* note 112, citing Centerpiece, *Plaintiff's creative product testing proved that a football helmet had failed to prevent a student's spinal cord injury*, 32 Atl. L. Rep. 356 (Oct. 1989).
- ²⁷⁴ *Lister v. Bill Kelley Athletic, Inc.*, 485 N.E.2d 483 (Ill. App. 2d. 1985).
- ²⁷⁵ *Byrns v. Riddell, Inc.*, 550 P.2d 1065 (Ariz. 1976).
- ²⁷⁶ 27 A.L.R. 805 (1930).
- ²⁷⁷ *Durkee v. Cooper of Canada, Ltd.*, 298 N.W.2d 620 (Mich. App. Ct. 1980).
- ²⁷⁸ Kurt Niland, *FTC investigates football helmet company for false safety and marketing claims*, Southerninjurylawyer.com, Jan. 22, 2011, <http://www.southerninjurylawyer.com/news/2011/01/22/ftc-investigates-football-helmet-company-for-false-safety-and-marketing-claims/> (last visited April 16, 2011).
- ²⁷⁹ *Id.*
- ²⁸⁰ *Id.*

²⁸¹ McGrath, *supra* note 30.
²⁸² *Id.*
²⁸³ Schwarz, *supra* note 198.
²⁸⁴ Barra, *supra* note 48.
²⁸⁵ *Id.*
²⁸⁶ Hecht, *supra* note 120 at 59.
²⁸⁷ *Id.*
²⁸⁸ http://en.wikipedia.org/wiki/Football_helmet.
²⁸⁹ Barra, *supra* note 48.
²⁹⁰ *Id.*
²⁹¹ *Id.*
²⁹² Jeff Pearlman, *Five ways to end football head injuries*, CNN.com, Mar. 4, 2011, <http://www.cnn.com/2011/OPINION/03/03/pearlman.football.head.injury/?hpt=T2> (last visited March 12, 2011).
²⁹³ Graham, *supra* note 49.
²⁹⁴ David Zinn, *In the NFL, the violence comes to a head*, Edgeofsports.com, Oct. 20, 2010, <http://www.edgeofsports.com/2010-10-20-579/index.html> (last visited March 12, 2011).
²⁹⁵ Mitten, *supra* note 100.
²⁹⁶ *See infra* Section VI
²⁹⁷ *Id.*
²⁹⁸ Hohenstein, *supra* note 262 at 606.
²⁹⁹ *See infra* Section VII.
³⁰⁰ Bryan Lipsky, *Dealing with the NFL's Concussion Problems of Yesterday, Today, and Tomorrow*, 18 Fordham Intell. Prop. Media & Ent. L.J. 959, 987 (2008).
³⁰¹ Pearlman, *supra* at 292.
³⁰² Jim Trotter, *NFLPA leader: 18 game schedule off the table in CBA negotiations*, SI.com, Mar. 9, 2011, <http://sportsillustrated.cnn.com/2011/football/nfl/03/09/nfl.labor.18.game.schedule/index.html?eref=sihp> (last visited March 12, 2011).
³⁰³ *See infra* Section II.
³⁰⁴ Chris Nowinski, co-founder of the Sports Legacy Institute, told Bill Simmons on his *B.S. Report* podcast that the NFL has helped with their research by getting them brains to study. <http://espn.go.com/espnradio/show?showId=bsreport>.
³⁰⁵ The MLB steroid problem, for example.
³⁰⁶ Alan Schwarz, *Ex-Player is Suing Over Pay for Injury*, N.Y. TIMES, Nov. 30, 2010, at B13.
³⁰⁷ *Id.*
³⁰⁸ McGrath, *supra* note 30.
³⁰⁹ Chris Nowinski, co-founder of the Sports Legacy Institute, had this discussion with Bill Simmons on his *B.S. Report* podcast. <http://espn.go.com/espnradio/show?showId=bsreport>.
³¹⁰ <http://www.medicalnewstoday.com/articles/160847.php> (last visited March 12, 2011).