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Three and Out: The NFL's Concussion Liability and How Players Can Tackle the Problem

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Three and Out: The NFL's Concussion Liability and How Players Can Tackle the Problem

ABSTRACT

In 1952, the New England Journal of Medicine published a study stating that a player should not continue playing professional football after suffering three concussions. As players continue to get bigger, faster, and stronger, the number of concussions has increased. In response to this problem, the National Football League (NFL) commissioned a study run by scientists and NFL team doctors to determine the long-term effects of concussions. That committee determined that no long-term repercussions exist after experiencing a concussion while playing NFL football. Despite the scientific community's critiques of the study, the NFL used the committee's findings to create the league's return-to-play guidelines, as well as other player safety rules. Further cementing skepticism of the committee's findings, in 2005, Neurosurgery published an article linking concussions suffered during an NFL player's career to cognitive deterioration based on autopsy results of a former player.

The NFL vigorously denied the Neurosurgery article's conclusions and attempted to discredit the writers. The NFL continued to use its flawed committee studies to craft league rules, despite the growing chorus in the medical community citing its flaws. Because the NFL used these findings to craft its safety rules, it exposed the players to unnecessary risk. This Note will show that the NFL acted both negligently and fraudulently towards its players, and the players should file a lawsuit in order to recover compensation for the harm that the league caused them. The players should file this suit in the district of Minnesota in order to capitalize on the district's previous favorable rulings for the players in the 2011 lockout dispute with the league's owners. This Note concludes that the players should succeed and win damages first for their pain and suffering, and second, to punish the NFL for its wrongful behavior.

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Week six of the 2010 National Football League (NFL) season played host to several highly anticipated matchups.¹ One of the marquee games that week matched the 4-1 Atlanta Falcons and the 3-2 Philadelphia Eagles.² While only the most diehard Eagles and Falcons fans can remember the final score, no one around the league has forgotten the devastating collision between Eagles receiver DeSean Jackson and Falcons cornerback Dunta Robinson.³ In the second quarter, Jackson ran a short crossing pattern and attempted to catch a pass;⁴ Robinson stopped Jackson's attempt through a violent collision where Robinson led with his shoulder and hit the defenseless Jackson in both the shoulder and the helmet.⁵ After the hit, both players remained down on the field for several minutes while team medical personnel tended to them.⁶ Training staff had to help them off the field; neither player returned to the game.⁷ Later, doctors diagnosed both players with concussions,⁸ which are dangerous injuries partially because they can lead to cognitive impairment over time.⁹

1. *2010 NFL Power Rankings: Week 6*, ESPN, http://espn.go.com/nfl/powerrankings/_/year/2010/week/6 (last updated Oct. 12, 2010) (providing weekly rankings of all thirty-two NFL teams from ESPN's NFL reporters and noting several games during week six between highly ranked teams).

2. Ryan Frye, *NFL Week 6: Atlanta Falcons at Philadelphia Eagles Breakdown*, BLEACHER REP. (Oct. 14, 2010), <http://bleacherreport.com/articles/491643-nfl-week-6-atlanta-falcons-at-philadelphia-eagles-breakdown> (detailing quarterback Michael Vick's game against his old team and outlining the keys to victory for each side). The story also noted how DeSean Jackson would have a big impact on the game. *Id.*

3. *Matt Ryan's Career-high 4 TDs Rally Falcons Over Hurt Michael Vick, Eagles*, ESPN (Sept. 18, 2011, 8:20 PM), <http://scores.espn.go.com/nfl/recap?gameId=310918001> (recapping the 2011 Eagles-Falcons game that involved another devastating hit from Atlanta's Dunta Robinson). The hit's similarity to the one that Robinson made on DeSean Jackson in last year's game is the only mention of the teams' most recent previous matchup. *Id.*

4. *DeSean Jackson, Dunta Robinson Injured* (NFL Video Oct. 17, 2010), available at <http://www.nfl.com/videos/nfl-game-highlights/09000d5d81b62126/DeSean-Jackson-Dunta-Robinson-injured>.

5. *Id.*; *DeSean Jackson Exits After Hard Hit*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=5696367> (last updated Oct. 18, 2010).

6. *DeSean Jackson, Dunta Robinson Injured*, *supra* note 4; *DeSean Jackson Exits After Hard Hit*, *supra* note 5.

7. Adam Caplan, *NFL Levies Huge Fines for Hits to Head*, FOXSPORTS, <http://msn.foxsports.com/nfl/story/helmet-fines-James-Harrison-Dunta-Robinson-Brandon-Meriweather-101910> (last updated Oct. 20, 2010).

8. *Dunta Robinson has Concussion*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=5700217> (last updated Oct. 19, 2010); Gregg Rosenthal, *DeSean Jackson Suffers Second Concussion in Less Than a Year*, PROFOOTBALLTALK (Oct. 17, 2010, 4:41 PM), <http://profootballtalk.nbcsports.com/2010/10/17/desean-jackson-suffers-second-concussion-in-less-than-a-year>.

9. *See infra* Part I.C.2.

This was Jackson's second concussion in a year.¹⁰ After his first concussion, Jackson's coach hassled him about not coming back to play the following week.¹¹ Robinson, meanwhile, suffered blame for a fifteen-yard penalty¹² and a \$50,000 fine from the NFL,¹³ but received his head coach's support.¹⁴

This severe collision was only one of three illegal hits that week resulting in a substantial fine from the NFL.¹⁵ Those hits by Robinson, James Harrison, and Brandon Meriweather received much media attention,¹⁶ prompting the NFL to release a new video to players and teams on illegal hits and player safety.¹⁷ These hits quickly became symbols of the need for increased attention to player safety, both within the league itself and in the popular media.¹⁸

10. Rosenthal, *supra* note 8. Jackson suffered a concussion during the 2009 season and the injury forced him to miss playing time. *Id.*

11. *Id.* "In the offseason, Jackson said that offensive coordinator Marty Mornhinweg gave the timeout a hard time for missing the game. 'Our offensive coordinator, Marty Mornhinweg, said some things, trying to question my toughness,' Jackson told *Sporting News*. 'I was like "Coach, I just got a concussion. This [is] my brain. If it's anything else, my shoulder, whatever, I'm going to play.'" *Id.* (alternation in original).

12. *Dunta Robinson has Concussion*, *supra* note 8.

13. Caplan, *supra* note 7; Mike Florio, *NFL Fines James Harrison \$75,000; Dunta Robinson \$50,000*, PROFOOTBALLTALK (Oct. 19, 2010, 4:29 PM), <http://profootballtalk.nbcsports.com/2010/10/19/nfl-fines-james-harrison-75000-dunta-robinson-50000>.

14. Caplan, *supra* note 7 (claiming that it did not look to Coach Smith as if there had been any "helmet to helmet" contact).

15. *Id.*; Florio, *supra* note 13. In a game between the New England Patriots and the Baltimore Ravens, New England safety Brandon Meriweather was fined \$50,000 for an illegal hit on Ravens tight end Todd Heap. *Meriweather Flagged for Hit on Heap* (NFL Video May 9, 2011), available at <http://www.nfl.com/videos/new-england-patriots/09000d5d81fc0c5f/Meriweather-flagged-for-hit-on-Heap>. Pittsburgh Steelers linebacker James Harrison was fined \$75,000 for his illegal hit on Cleveland Browns receiver Mohamed Massaquoi the same day. *Massaquoi Injury* (NFL Video Oct. 17, 2010), available at <http://www.nfl.com/videos/nfl-game-highlights/09000d5d81b62fdd/Massaquoi-injury>. Harrison reportedly received a larger fine from the league because he was a repeat offender. *Id.*

16. Gregg Rosenthal, *Setting Mark Schlereth Straight on a Few Points Regarding "Big Hits"*, PROFOOTBALLTALK (Oct. 20, 2010, 7:21 PM), <http://profootballtalk.nbcsports.com/2010/10/20/setting-mark-schlereth-straight-on-a-few-points-regarding-big-hits> (citing ESPN's coverage from Monday night until Tuesday morning on *NFL Live* and *SportsCenter* about "big hits" in the NFL).

17. NBC Sports, *NFL Releases Video on Player Safety*, PROFOOTBALLTALK (Oct. 21, 2010, 6:58 PM), <http://profootballtalk.nbcsports.com/2010/10/21/nfl-releases-video-on-player-safety>; *Player Safety* (NFL Video Oct. 21, 2010), available at <http://www.nfl.com/videos/nfl-videos/09000d5d81b80962/Player-safety>. Dunta Robinson's hit on DeSean Jackson is featured prominently by Ray Anderson, the NFL's Executive Vice President of Football Operations, in the player safety video. *Player Safety*, *supra*.

18. See, e.g., James Harrison, SI VAULT, <http://sportsillustrated.cnn.com/vault/cover/featured/11474/index.htm> (last visited Feb. 2, 2012) (showing a *Sports Illustrated* cover picturing James Harrison's hit on Mohamed Massaquoi); *NFL Regrets Photo 'Mistake'*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=5706132> (last updated Oct. 25, 2010) (explaining the NFL made a mistake by selling photos of James Harrison's illegal hit on Mohamed Massaquoi on its website); Gregg Rosenthal, *League is Selling Photo of James Harrison's Illegal Hit*,

Despite the wide attention they garnered,¹⁹ illegal hits continue throughout the league.²⁰ The hits by Robinson, Meriweather, and Harrison caused incalculable neurological damage to themselves and, more importantly, to their victims.

This Note analyzes different aspects of the NFL's problem with cognitive deterioration in former players, and what the league should do to remedy the situation. Part I provides an overview of brain health and concussions. It also addresses the NFL's history as a business and as an athletic organization, considering what the league has done to cause brain injuries in its players and its insufficient previous attempts to address those problems. Part II explores the hurdles that players face in bringing a brain-health suit against the NFL and on behalf of former and current players who may suffer from cognitive degeneration because of concussions. Finally, Part III provides a solution: a litigation strategy for players to pursue claims against the NFL for its inadequate and ineffectual handling of player brain health issues. This strategy involves different causes of action and a recommendation to file a suit in the district of Minnesota, because of the players' successful litigation history in the 2011 lockout dispute with the league's owners.

I. SCOUTING THE OPPONENT: THE HISTORY OF CONCUSSIONS AND THE NFL

It is important to analyze the NFL and concussions among its players as interrelated issues rather than looking at individual aspects in a vacuum. After exploring the physical repercussions of traumatic brain injuries and the history of concussions in football, this Part will look at the NFL and how the organization has attempted to

PROFOOTBALLTALK (Oct. 19, 2010, 11:12 PM), <http://profootballtalk.nbcsports.com/2010/10/19/league-is-selling-photo-of-james-harrisons-illegal-hit> (noting that despite fining Pittsburgh's James Harrison \$75,000 for his hit on Cleveland receiver Mohamed Massaquoi, the NFL was selling photos of the hit on its website for prices varying between \$15.95 to \$249.95); *see also Player Safety*, *supra* note 17. After the NFL's "mistake," the league also noted, "[it] will ensure that no photos of illegal plays will be available again. An outside vendor uses an automated process to post photos for sale to fans. [It] will fix the process immediately." *NFL Regrets Photo 'Mistake'*, *supra* (internal quotation marks omitted). All three of the hits by Robinson, Harrison, and Meriweather were featured in the player safety video shown around the league following week six of the 2010 NFL season. *Player Safety*, *supra* note 17. The hits were used as specific examples of illegal hits that the league will punish through either fines or suspensions. *Id.*

19. *See supra* notes 16-18 and accompanying text.

20. *See, e.g.,* Bill Williamson, *Richard Seymour Fined for Schaub Hit*, ESPN, http://espn.go.com/nfl/story/_id/7102400/oakland-raiders-richard-seymour-fined-15k-again-illegal-hit (last updated Oct. 14, 2011) (citing Oakland Raiders defensive tackle Richard Seymour's \$15,000 fine for an illegal hit, his second in two weeks, and Baltimore Ravens running back Ray Rice's \$7,500 fine for grabbing the facemask of Bradley Fletcher of the St. Louis Rams).

address concussions over time. The 2002 death of Hall of Fame Center Mike Webster was particularly noteworthy in this regard, as it spurred debate on the issue that continues today. Meanwhile, the NFL's role as a business organization has also played a significant role in limiting its ability to address the concussion problem and other brain injuries that result from playing professional football.

A. *The Medical History of Concussions*

In November 2001, the inaugural International Conference on Concussion in Sport defined a concussion as a "complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces."²¹ Doctors and medical staff diagnose a brain injury based on whether the victim loses consciousness, though loss of consciousness is not necessarily indicative of the severity of the injury.²² While medical professionals are still struggling to fully understand concussions and brain injuries in order to improve athlete safety,²³ it is clear that physical contact in sports can result in such injuries.²⁴ In fact, a study first reported brain changes in professional

21. Mark Aubry et al., *Summary and Agreement Statement of the First International Conference on Concussion in Sport, Vienna 2001*, 36 BRIT. J. SPORTS MED. 6, 6 (2002) (internal quotation marks omitted), available at <http://bjsm.bmj.com/content/36/1/6.full>. The summary determined:

[A c]oncussion is defined as a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces. Several common features that incorporate clinical, pathological, and biomechanical injury constructs that may be used in defining the nature of a concussive head injury include:

- [1] Concussion 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] Concussion typically results in the rapid onset of short lived impairment of neurological function that resolves spontaneously.
- [3] Concussion may result in neuropathological changes but the acute clinical symptoms largely reflect a functional disturbance rather than structural injury.
- [4] Concussion 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.
- [5] Concussion is typically associated with grossly normal structural neuroimaging studies.

Id. (internal quotation marks omitted).

22. *Id.* at 7. "The traditional approach to severe traumatic brain injury using loss of consciousness as the primary measure of injury severity has acknowledged limitations in assessing the severity of concussive injury. Findings in this field describe association of loss of consciousness with specific early deficits but does not necessarily imply severity." *Id.*

23. *Id.* at 6. "The aim of the symposium [in 2001] was to provide recommendations for the improvement of safety and health of athletes who suffer concussive injuries . . ." *Id.*

24. Harrison S. Martland, *Punch Drunk*, 91 J. AM. MED. ASS'N 1103, 1103 (1928). The article reported:

For some time fight fans and promoters have recognized a peculiar condition occurring among prize fighters which, in ring parlance, they speak of as 'punch

boxers in 1952.²⁵ Even that study, conducted more than a half century ago, noted that injuries less severe than concussions (which medical professionals call “sub-concussions”) had the potential to lead to brain damage.²⁶ In 1952, the *New England Journal of Medicine* published another medical study addressing injuries in football and other sports.²⁷ This study noted that football players should no longer play after suffering more than three concussions.²⁸

“Chronic Traumatic Encephalopathy,” a 2005 medical study that would bring about much debate on the issue of football player brain health was published in *Neurosurgery*, and it stated that concussions professional football players suffer are “related to translational acceleration-deceleration, with considerable head impact velocity and velocity changes.”²⁹ In other words, concussions occur when there is a transfer of kinetic force that causes increased strain in brain tissue and pressure waves within the skull.³⁰ Unfortunately, helmets do not solve that problem, because they do a much better job of protecting players’ skulls, rather than their brains.³¹ Nationally recognized neurosurgeon Dr. Julian Bailes explains how helmet technology has continued to improve:

drunk.’ Fighters in whom the early symptoms are well recognized are said by the fans to be ‘cuckoo,’ ‘goofy,’ ‘cutting paper dolls,’ or ‘slug nutty.’

Punch drunk most often affects fighters of the slugging type, who are usually poor boxers and who take considerable head punishment, seeking only to land a knockout blow. It is also common in second rate fighters used for training purposes, who may be knocked down several times a day.

Id. These same symptoms could also be ascribed to many NFL players after being the victim of both legal and illegal hits that occur each Sunday. See *McCoy Takes Helmet-to-Helmet Hit* (NFL Video Dec. 8, 2011), available at <http://www.nfl.com/videos/cleveland-browns/09000d5d824dfff1/McCoy-takes-helmet-to-helmet-hit>.

25. Ewald W. Busse & Albert J. Silverman, *Electroencephalographic Changes in Professional Boxers*, 149 J. AM. MED. ASS’N 1522, 1522 (1952). “[T]he mild psychic changes observed in a high percentage of boxers . . . are due to brain damage, which is also responsible for the less frequently seen, so-called ‘punch-drunk’ person, who is in fact in a state of traumatic dementia and reveals severe psychic and neurological abnormalities.” *Id.*

26. *Id.* “If the trauma is severe or is mild but repeated at intervals that do not permit the brain to return to normal functioning, permanent damage may result.” *Id.*

27. Augustus Thorndike, *Serious Recurrent Injuries of Athletes—Contraindications to Further Competitive Participation*, 247 NEW ENG. J. MED. 554, 555 (1952).

28. *Id.* at 555-56. “Patients with cerebral concussion that has recurred more than three times or with more than momentary loss of consciousness at any one time should not be exposed to further body-contact trauma.” *Id.*

29. Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128, 131 (2005).

30. Richard M. Greenwald et al., *Head Impact Severity Measures for Evaluating Mild Traumatic Brain Injury Risk Exposure*, 62 NEUROSURGERY 789, 789-90 (2008).

31. Jeanne Marie Laskas, *Game Brain*, GQ, Oct. 2009, <http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions>. Forensic pathologist Dr. Bennet Omalu noted that he had done many autopsies of people in motorcycle accidents where the helmet protected the skull and it was not damaged, but the brain was “mush.” *Id.*

In the old days of football, you had this leather cap to protect your ears. That was it. You'd never put your head in the game. You'd be knocked out after the first play! Even in the '60s, the helmet was a light shell. The modern helmet is like a weapon.³²

But these technological advancements have improved only skull protection, not protection of the brain underneath.³³ Today, helmets have become more of a sword than a shield because they provide more protection, and the players wearing helmets feel invincible.³⁴

B. The NFL's Many Rule Changes Shows the League's Flaws

The NFL has slowly enacted some moderate rule changes to make professional football somewhat safer; together these rule changes represent a tacit admission that the league has not taken head injuries seriously enough.³⁵ One of the first rules passed addressing head safety, enacted in 1962, included a prohibition against grabbing another player's facemask.³⁶ But a rule change will not affect the game unless in-game sanctions are attached to it;³⁷ and until 1976, the NFL did not include an in-game penalty for violating the rule.³⁸ The penalty for incidentally touching an opponent's facemask was five yards, while the penalty for pulling or twisting the facemask was fifteen yards.³⁹ If a referee judged the foul to be vicious or flagrant, then the player could be ejected.⁴⁰ In 1977, the NFL outlawed the head slap by passing the "Deacon Jones Rule."⁴¹ The rule is named after Hall of Fame defensive lineman Deacon Jones who frequently slapped the offensive lineman's head to get around him during a play.⁴²

32. *Id.*

33. *But see* Omalu, *supra* note 29. "The injury potential of these transferring inertial forces is ameliorated by the use of protective helmets." *Id.*

34. Complaint ¶ 7, *Easterling v. NFL*, 2011 WL 3627055 (E.D. Pa. 2011) (No. 11CV05209) [hereinafter *Easterling* Complaint].

35. *See* Complaint ¶ 118, *Maxwell v. NFL*, No. BC465842 (Cal. Super. Ct. July 19, 2011) [hereinafter *Maxwell* Complaint].

36. *Id.* ¶ 118(b).

37. *See generally id.* ¶ 118 (providing a non-exhaustive list of both in-game and out-of-game sanctions imposed by the NFL); *supra* notes 35-37 and accompanying text.

38. *See Maxwell* Complaint, *supra* note 35, ¶ 118(c) (describing the NFL's enactment a rule in 1976 that imposed an in-game penalty for grabbing another player's facemask).

39. *Id.*

40. *Id.*

41. Complaint ¶ 61(d), *Barnes v. NFL*, 2011 WL 3791910 (Cal. Super. Ct. Aug. 26, 2011) (No. BC468483) [hereinafter *Barnes* Complaint] (naming the rule after defensive end Deacon Jones who used the technique, which "prohibited players from slapping the head of another . . . during the play").

42. *Id.* Deacon Jones is a Hall of Fame defensive end who played for the Los Angeles Rams, San Diego Chargers, and Washington Redskins. *Deacon of Defense*, PRO FOOTBALL HALL OF FAME, http://www.profootballhof.com/hof/release.aspx?RELEASE_ID=774 (last visited Mar. 3,

Before the 1979 season, the NFL finally passed a rule prohibiting players from using their helmets to “butt, spear or ram an opponent with the crown or top of the helmet.”⁴³ Despite the rule change, “[d]uring the 1970s, 1980s and 1990s, players in the NFL were being coached, trained and motivated to use all portions of their helmets to block, tackle, butt, spear, ram and/or injure opposing players” by striking the opposing players with their helmeted heads.⁴⁴ Finally, in 1996, referees began calling in-game personal fouls for helmet-to-helmet hits.⁴⁵ Prior to this rule change, the NFL turned a blind eye to the fact that players were using their helmets to bring down their opponents, and their coaches were encouraging such activity.⁴⁶

The delay in rule change is unfortunate, because eliminating the head as a tool in tackling and blocking is necessary to reduce the cognitive decline in NFL players.⁴⁷ Prior to the 2011 season, the NFL changed the rules for kickoffs, moving the ball from the thirty-yard line to the thirty-five-yard line in order to increase the number of touchbacks and the safety of the returners.⁴⁸ This rule change came even though the NFL’s own research committee classified kickoff

2012). He was known for slapping the head of an opposing offensive lineman in order to get around that lineman and to the quarterback. *Id.* He once said he used the head slap in order “[t]o give [him] an initial headstart on the pass rush, in other words an extra step. Because anytime you go upside a man’s head, or woman, they may have tendency to blink they eyes or close they eyes. And that’s all I needed.” *Deacon Jones*, WIKIPEDIA, http://en.wikipedia.org/wiki/Deacon_Jones (last visited Oct. 17, 2011) (internal quotation marks omitted).

43. *Easterling* Complaint, *supra* note 34, ¶ 5.

44. *Id.* ¶ 6.

45. *Id.* ¶ 7.

46. *Id.* The fact that it took seventeen seasons for “spearing” to become a personal foul shows the lack of seriousness with which the NFL viewed the problem. *See id.* If the NFL had thought it an issue of greater importance, a game penalty would have accompanied a rule change much sooner. *See id.*

47. Robert C. Cantu & Frederick O. Mueller, *Catastrophic Football Injuries: 1977-1998*, 47 NEUROSURGERY 673, 674 (2000). The article reported:

[E]liminat[ing] the head as a primary and initial contact area for blocking and tackling, [is] of utmost importance. Coaches should drill the players in proper execution of football fundamentals, particularly blocking and tackling: shoulder block and tackle with the head up—keep the head out of football. . . .

. . . .

Coaches and officials should discourage the players from using their heads as battering rams when blocking, tackling, and ball carrying. The rules prohibiting spearing should be enforced in practice and in games. Players should be taught to respect the helmet as a protective device and that the helmet should not be used as a weapon.

Id. The NFL failed to properly police the use of the helmet for seventeen seasons after initially promulgating the rule. *See supra* note 44 and accompanying text.

48. Jarrett Bell, *New NFL Kickoff Rule Could be Game-Changer*, USA TODAY, Sept. 11, 2011, http://www.usatoday.com/sports/football/nfl/2011-09-08-new-nfl-rule-could-change-kickoff-return-strategy_n.htm.

returners and return units as “low risk” for brain injury.⁴⁹ If the committee’s findings are correct, it leads one to question why the NFL would alter the rule in a way that many coaches, players, and former players dislike.⁵⁰ These rule changes represent an implied admission by the NFL that injuries occur as a direct result of impact to the head, and the NFL’s reluctance to institute penalties during the game reflects that it did not take these injuries seriously for many years, and still fails to do so.

C. The NFL Attempts to Tackle the Concussion Problem by Committee

In 1994, then-NFL Commissioner Paul Tagliabue concluded there were unanswered questions about concussions in football and convened a commission on mild traumatic brain injury to address those questions.⁵¹ The panel consisted of NFL team medical personnel as well as outside professionals including a biomedical engineer, and doctors with specialties in neurology, neurosurgery, neuropsychology, and epidemiology.⁵² The committee recommended independent scientific research rather than having NFL team medical practitioners involved, “to foster better understanding of the causes, diagnosis, treatment and prevention of concussions.”⁵³ The NFL ignored the recommendation for independent research and instead used the existing commission as the starting point of its committee dedicated to studying concussions.⁵⁴

49. Elliot J. Pellman et al., *Concussion in Professional Football: Epidemiological Features of Game Injuries and Review of Literature—Part 3*, 54 NEUROSURGERY 81, 85 (2004). “The positions at low risk [for concussions] were punter, return unit, kicker, and holder.” *Id.*

50. Bell, *supra* note 48 (featuring several quotes from coaches, players, and former players expressing displeasure with the rule change).

51. Paul Tagliabue, Editorial, *Tackling Concussions in Sports*, 53 NEUROSURGERY 796, 796 (2003) (“[A]s [the NFL] looked more deeply into the specific area of concussions, [the NFL] realized that there were many more questions than answers.”).

52. *Id.*

53. *Id.* Supporting independent research warrants asking how independent the research can be if the doctors and scientists conducting the research are directly funded by the group that has a large stake in the findings of the research coming out a certain way.

54. *Id.* In 1994, the Commissioner appointed, “an NFL committee on mild traumatic brain injury with experts from inside and outside [the NFL],” which recommended independent research. *Id.* Commissioner Tagliabue wrote the letter in *Neurosurgery* as an introduction to the first installment of the NFL’s Mild Traumatic Brain Injury Committee findings. *See id.* That same committee that recommended independent research became the committee that published the research, and was saluted by Commissioner Tagliabue as “our Mild Traumatic Brain Injury Committee.” *Id.*; see also Elliot J. Pellman, Editorial, *Background on the National Football League’s Research on Concussion in Professional Football*, 53 NEUROSURGERY 797, 797 (2003).

The NFL invited rheumatologist Dr. Elliot Pellman to chair the new Mild Traumatic Brain Injury (MTBI) Committee⁵⁵ because of his position as the New York Jets' associate team physician.⁵⁶ Dr. Pellman served as the committee's spokesperson⁵⁷ and lead author of nine of the committee's thirteen reports published in the medical journal *Neurosurgery*.⁵⁸ However, as a rheumatologist, concussions and cognitive injuries are not Dr. Pellman's medical specialty.⁵⁹ Dr. Pellman's experience in the NFL may have been useful to the committee, but his lack of expertise in brain injuries made him a questionable choice to head the committee.⁶⁰ Dr. Pellman was still serving on the Jets' medical staff while publishing the MTBI Committee's findings in 2003.⁶¹ During that season, Dr. Pellman treated Jets receiver Wayne Chrebet, who suffered a concussion

55. *Maxwell Complaint*, *supra* note 35, ¶ 120. A rheumatologist is, “[a] specialist in the non-surgical treatment of rheumatic illnesses, especially arthritis. Rheumatologists have special interests in unexplained rash, fever, arthritis, anemia, weakness, weight loss, fatigue, joint or muscle pain, autoimmune disease, and anorexia.” *Definition of Rheumatologist*, MEDICINENET.COM (Apr. 27, 2011, 5:27 PM), <http://www.medterms.com/script/main/art.asp?articlekey=11968>.

56. Pellman, *supra* note 54. Dr. Pellman's work with the Jets was of interest because Jets receiver Al Toon suffered from what later would be known as post-concussion syndrome and was “the first documented NFL player that [Dr. Pellman knew] of to retire as a result of this problem.” *Id.*

57. *Id.*

58. See generally Pellman et al., *supra* note 49; Elliot J. Pellman et al., *Concussion in Professional Football: Helmet Testing to Assess Impact Performance—Part 11*, 58 NEUROSURGERY 78 (2006); Elliot J. Pellman et al., *Concussion in Professional Football: Injuries Involving 7 or More Days Out—Part 5*, 55 NEUROSURGERY 1110 (2004) [hereinafter Pellman et al., *Part 5*]; Elliot J. Pellman et al., *Concussion in Professional Football: Location and Direction of Helmet Impact—Part 2*, 53 NEUROSURGERY 1328 (2003) [hereinafter Pellman et al., *Part 2*]; Elliot J. Pellman et al., *Concussion in Professional Football: Neuropsychological Testing—Part 6*, 55 NEUROSURGERY 1290 (2004); Elliot J. Pellman et al., *Concussion in Professional Football: Players Returning to the Same Game—Part 7*, 56 NEUROSURGERY 79 (2005) [hereinafter Pellman et al., *Part 7*]; Elliot J. Pellman et al., *Concussion in Professional Football: Reconstruction of Game Impacts and Injuries*, 53 NEUROSURGERY 799 (2003) [hereinafter Pellman et al., *Part 1*]; Elliot J. Pellman et al., *Concussion in Professional Football: Recovery of NFL and High School Athletes Assessed by Computerized Neuropsychological Testing—Part 12*, 58 NEUROSURGERY 263 (2006); Elliot J. Pellman et al., *Concussion in Professional Football: Repeat Injuries—Part 4*, 55 NEUROSURGERY 860 (2004) [hereinafter Pellman et al., *Part 4*].

59. *Maxwell Complaint*, *supra* note 35, ¶ 120.

60. Laskas, *supra* note 31. The article recounted:

[Dr. Bennet] Omalu began to question the integrity of the [NFL's Mild Traumatic Brain Injury] committee. It was one thing to not even put a neuropathologist on the committee, quite another to have the committee headed by. . . a rheumatologist, as was the case with Pellman. *A rheumatologist? You picked a joint guy to lead your brain study?*

Id.

61. See *supra* note 58.

during a November game.⁶² Even though Chrebet lost consciousness from the hit, Pellman cleared Chrebet to re-enter the game.⁶³ Placing Chrebet back in the game shows that Dr. Pellman did not understand the severity of concussions and their effects. Despite this, Pellman was appointed to chair the MTBI Committee, which ultimately found such a practice proper and within appropriate medical standards.

Under Dr. Pellman's leadership, the MTBI Committee published a thirteen-part study over the course of three years.⁶⁴ The committee dedicated its first several meetings to crafting a proper definition for concussion.⁶⁵ That process led to the rebranding of concussion to "the more academically appropriate term, *mild traumatic brain injury*," commonly abbreviated as MTBI.⁶⁶

1. The MTBI Committee Publishes its Findings

The MTBI Committee wrote about a variety of scientific claims associated with different aspects of the NFL and its intersection with concussions and concussion science.⁶⁷ Its first two published studies used game film to reconstruct in-game hits⁶⁸ and concluded that

62. Jennifer Ann Heiner, Comment, *Concussions in the National Football League: Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan and a Legal Analysis of the NFL's 2007 Concussion Management Guidelines*, 18 SETON HALL J. SPORTS & ENT. L. 255, 287 (2008).

63. *Id.*

64. See generally David C. Viano et al., *Concussion in Professional Football: Brain Responses by Finite Element Analysis: Part 9*, 57 NEUROSURGERY 891 (2005); David C. Viano et al., *Concussion in Professional Football: Comparison with Boxing Head Impacts—Part 10*, 57 NEUROSURGERY 1154 (2005) [hereinafter Viano et al., *Part 10*]; David C. Viano & Elliot J. Pellman, *Concussion in Professional Football: Biomechanics of the Striking Player—Part 8*, 56 NEUROSURGERY 266 (2005); David C. Viano et al., *Concussion in Professional Football: Performance of Newer Helmets in Reconstructed Game Impacts—Part 13*, 59 NEUROSURGERY 591 (2006); *supra* text accompanying note 55-58.

65. See Pellman, *supra* note 54.

66. *Id.* The report stated:

A reportable MTBI was defined as a traumatically induced alteration in brain function that is manifested by 1) alteration of awareness or consciousness, including but not limited to loss of consciousness, "ding," sensation of being dazed or stunned, sensation of "wooziness" or "fogginess," seizure, or amnesic period; and 2) signs and symptoms commonly associated with postconcussion syndrome, including persistent headaches, vertigo, light-headedness, loss of balance, unsteadiness, syncope, near-syncope, cognitive dysfunction, memory disturbance, hearing loss, tinnitus, blurred vision, diplopia, visual loss, personality change, drowsiness, lethargy, fatigue, and inability to perform usual daily activities.

Id. at 797-98. Wayne Chrebet suffered from many of these symptoms when Dr. Pellman cleared him to reenter the game in November 2003. Peter Keating, *Doctor Yes*, ESPN MAG. (Nov. 6, 2006), <http://sports.espn.go.com/espnmag/story?id=3644940>.

67. See *infra* notes 68-100 and accompanying text.

68. Pellman et al., *Part 1*, *supra* note 58, at 800; Pellman et al., *Part 2*, *supra* note 58.

facemask attacks increased the head's lateral acceleration.⁶⁹ The second study questioned whether correct tackling techniques, rather than spearing (using the crown of the helmet), might lower the number of MTBIs.⁷⁰ Though the NFL banned spearing in 1979⁷¹ and made it a personal foul penalty in 1996,⁷² spearing—or something close to it—made up 94 out of 107 helmet impacts in one portion of the study.⁷³

The MTBI Committee found that reported concussions occurred at a rate of 0.41 concussions per game between the 1996 and 2001 seasons.⁷⁴ Over 51 percent of the players who suffered a reported concussion either continued playing after little to no rest or returned to play in the same game after briefly resting on the bench.⁷⁵ Team medical staff generally examined players after a hit and allowed those whose symptoms had apparently resolved to return to the game immediately.⁷⁶ This puts players at serious risk of suffering second impact syndrome (SIS)⁷⁷ along with the possibility of receiving chronic

69. Pellman et al., *Part 2, supra* note 58, at 1335 (“Impacts to the facemask generally twist the head while accelerating it. This increases the lateral component of acceleration. The combination of kinematics and shifting vector of acceleration may be a factor influencing concussion tolerance.”). Any increase in acceleration will lead to the brain hitting the skull harder once the player's head is no longer accelerating, because the brain is sitting in spinal fluid in the skull. *See supra* note 31 and accompanying text.

70. Pellman et al., *Part 2, supra* note 58, at 1336-37.

71. *Easterling Complaint, supra* note 34.

72. *Id.*

73. Pellman et al., *Part 2, supra* note 58, at 1331 (analyzing numbers displayed in *Table 3*). Those numbers came from video of NFL games that took place between 1996 and 2001. *Id.* at 1329. Spearing was a personal foul penalty during all of the games that the MTBI committee used in the study. *See Easterling Complaint, supra* note 34.

74. Pellman et al., *supra* note 49, at 84 (“During the 1996 to 2001 NFL seasons, there were 787 reported cases of MTBI in 3826 team-games (1913 games). This total included all preseason, regular-season, and playoff game-related concussions. Concussions occurred with an average incidence of 131.2 ± 26.8 concussions/yr and a rate of 0.41 concussion/game.”).

75. *See id.* at 86. The study reported:

16.1% of the players returned immediately to the game, including players who were evaluated on the field and returned to play and players who withdrew from the game for a few plays and then returned to play. The rest of the players rested for an extended period of time and returned in the same game (35.6%) or were removed from play and did not return to the game

Id.

76. Pellman et al., *Part 7, supra* note 58, at 86 (stating that generally after the collision, team medical personnel examined the player and he exhibited no outward concussion symptoms, resulting in the player being able to return the next time he was supposed to go back into the game).

77. *See Robert C. Cantu, Second Impact Syndrome, 17 CLINICS SPORTS MED. 37, 38 (1998)* (“The syndrome occurs when an athlete who sustains a head injury—often a concussion or worse injury, such as a cerebral contusion—sustains a second head injury before symptoms associated with the first have cleared.”).

brain damage.⁷⁸ The committee also criticized “currently promulgated guidelines for the management of sports-related concussion[s]” that protect against injuries such as SIS and post-concussion syndrome as “too conservative for professional football.”⁷⁹

Post-concussion syndrome is the group of symptoms that follow a MTBI, which includes frequent headaches, light-headedness, memory problems, and vertigo.⁸⁰ The MTBI Committee found that a large percentage of NFL players allegedly recover fully from concussions within one hour, while post-concussion signs and symptoms resolve more quickly in NFL players than they do in non-athletes.⁸¹ Many of these symptoms are subjective because tests rely on players reporting how they feel;⁸² and because NFL player contracts are not guaranteed beyond the current season, players have an incentive to report full recovery immediately to get back on the field and keep their jobs.⁸³

The committee assumed that the injuries players did not report were mild and associated with fast recovery.⁸⁴ According to the committee, “NFL players are a highly conditioned, physically fit population accustomed to playing with pain and highly motivated to return to play as soon as possible.”⁸⁵ The committee noted that these characteristics of NFL players might make them “less susceptible to MTBI and prolonged post-concussion syndrome than the general population,”⁸⁶ but the committee did not mention that a player’s brain is put at greater risk of permanent damage if a concussed player returns to the game prior to full recovery.⁸⁷

Despite the MTBI Committee using what it curiously defined as a “very broad and inclusive definition of MTBI to capture as many cases as possible,” the committee still deemed players safe to return to

78. See Daniel J. Kain, Note, “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, 704 (2009) (stating athletes not recovered from a previous concussion are susceptible to serious consequences upon a second concussive incident).

79. Pellman et al., *Part 4, supra* note 58, at 870 (criticizing the exclusion periods that prevent second impact syndrome).

80. Pellman, *supra* note 54, at 797-98.

81. Pellman et al., *Part 5, supra* note 58, at 1119.

82. See Kain, *supra* note 78, at 705 (“[T]reatment of concussions are almost entirely based on the nature of the incident and the player’s communication of his symptoms to a treating clinician.”).

83. See *infra* notes 146-47 and accompanying text.

84. Pellman et al., *Part 4, supra* note 58, at 868.

85. Pellman et al., *Part 5, supra* note 58, at 1110.

86. *Id.*

87. See Kain, *supra* note 78.

play in the same game after suffering from an MTBI.⁸⁸ Of course, that is only after getting permission from the “knowledgeable team doctors” who do not have expertise in diagnosing and treating concussions⁸⁹—including Dr. Pellman, the committee chairman who had published the NFL’s study.⁹⁰

As if reading tea leaves,⁹¹ the MTBI Committee did not discover any cases of chronic traumatic encephalopathy (CTE) in NFL players.⁹² CTE is a degenerative disease that is progressive and commonly found in athletes with histories of repeated brain injuries.⁹³ According to the committee, CTE had been “reported only in boxers and a few steeplechase jockeys.”⁹⁴ The committee ignored a possible connection even after the tenth installment of its study focused on the similarities between boxing and football.⁹⁵ That study revealed a concussion-inducing NFL hit caused the brain to strike the skull at a greater velocity and with greater force than any Olympic boxer’s punch.⁹⁶

After examining both human and animal studies, the committee concluded that the pattern of brain damage that results in CTE comes from a large number of sub-concussive blows to the head that occur over a long period of time.⁹⁷ It posited that sub-concussive blows in the NFL result in greater brain acceleration, and thus greater brain damage, than any of a boxer’s punches except for a

88. Pellman et al., *Part 7, supra* note 58, at 84, 89.

89. *Id.* at 89.

90. *See supra* notes 64-66 and accompanying text.

91. *See infra* note 110. This is the same disease that Dr. Omalu discovered in Mike Webster’s brain. *See infra* notes 120-24 and accompanying text. Dr. Omalu subsequently published his findings in *Neurosurgery*, the same medical journal in which the NFL’s Mild Traumatic Brain Injury Committee published its findings. *See infra* notes 120-24 and accompanying text. The troubling part is not the committee failing to discover chronic traumatic encephalopathy in an NFL player, it is their reaction to Dr. Omalu when he does. *See infra* notes 120-24 and accompanying text.

92. Pellman et al., *Part 4, supra* note 58, at 870.

93. Press Release, Ctr. for the Study of Traumatic Encephalopathy, New Pathology Findings Show Significant Brain Degeneration in Professional Athletes with History of Repetitive Concussions (Sept. 25, 2008), available at <http://www.bu.edu/cste/news/press-releases/september-25-2008> (“CTE is a progressive degenerative disease of the brain found in retired athletes with a history of repetitive concussions. It is clinically associated with the development of memory loss, confusion, impaired judgment, paranoid and aggressive behavior, depression, dementia and Parkinsonism [sic]”).

94. Pellman et al., *Part 4, supra* note 58, at 870.

95. Viano et al., *Part 10, supra* note 64.

96. *Id.* at 1159 (explaining figure 2).

97. Pellman et al., *Part 4, supra* note 58, at 861. Also, repeated sub-concussive blows to the head would seem to describe what every offensive and defensive lineman experiences on almost every play. Brandon E. Gavett et al., *Chronic Traumatic Encephalopathy: A Potential Late Effect of Sport-Related Concussive and Subconcussive Head Trauma*, 30 *CLINICS SPORTS MED.* 179, 184 (2011).

cross.⁹⁸ In other words, the sub-concussive blows NFL players suffer are as powerful as those that lead to CTE in boxers.⁹⁹ The committee stated that CTE occurs in boxers as a function of the length of their career and number of professional fights they are in, not the number of concussions they receive.¹⁰⁰ This evidence is even more troubling for NFL players because the committee found that NFL players' brains experienced greater impact than that experienced in boxers' brains.¹⁰¹ Despite the results of its own study, the committee still denied the potential for such serious injury in professional football.¹⁰² The NFL's official stance denied any increased risk of suffering a second injury after a concussion.¹⁰³ Ultimately, the league concluded that concussions among its players did not lead to permanent effects, such as CTE.¹⁰⁴

2. The Player Who Changed the Game

Hall of Fame center "Iron" Mike Webster died on September 24, 2002.¹⁰⁵ Webster had anchored the offensive line for a Pittsburgh Steelers team that won four Super Bowls in six seasons in the 1970s.¹⁰⁶ Prior to his death, he had suffered from such severe pain the only way he could sleep was to zap himself with a Taser gun.¹⁰⁷ The local coroner, Dr. Bennet Omalu, conducted an autopsy that revealed τ -proteins (tau proteins) in Webster's brain—an indication he had been suffering from CTE at the time of his death.¹⁰⁸ This discovery

98. Viano et al., *Part 10, supra* note 64, at 1159 fig.2.

99. *Id.*

100. Pellman et al., *Part 4, supra* note 58, at 870.

101. See Viano et al., *Part 10, supra* note 64, at 1159 fig.2.

102. See Pellman et al., *Part 4, supra* note 58, at 870.

103. See *NFL Outlines for Players Steps Taken to Address Concussions*, NFL, <http://www.nfl.com/news/story?id=09000d5d8017cc67&template=without-video&confirm=true> (last visited Nov. 21, 2011).

104. See *id.*

105. Greg Garber, *A Tormented Soul*, ESPN (Jan. 24, 2005), <http://sports.espn.go.com/nfl/news/story?id=1972285>.

106. *Id.*

107. *Id.* ("Desperate for a few moments of peace from the acute pain, repeatedly stunning himself, sometimes a dozen times, into unconsciousness with a black Taser gun."); Laskas, *supra* note 31. The article stated:

[He was] squirting Super Glue on his rotting teeth[.] Mike Webster bought himself a Taser gun, used that on himself to treat his back pain, would zap himself into unconsciousness just to get some sleep. . . . Soon Mike Webster was homeless, living in a truck, one of its windows replaced with a garbage bag and tape.

Id.

108. Omalu et al., *supra* note 29, at 129-30; see Laskas, *supra* note 31 ("Brown and red splotches. All over the place. Large accumulations of tau proteins. Tau was kind of like sludge,

prompted Dr. Omalu to team with other University of Pittsburgh doctors to write *Chronic Traumatic Encephalopathy in a National Football League Player*, an article published in the July 2005 issue of *Neurosurgery*.¹⁰⁹

Dr. Omalu's article reported the first documented case of long-term cognitive decline in a former NFL player similar to the CTE reported in other former athletes.¹¹⁰ Webster's brain appeared outwardly normal, despite "repeated mild concussive brain injury," because researchers can only see the symptoms of CTE at the neuronal level with special microscope slides of the brain.¹¹¹ His brain did have cortical amyloid plaques and neurofibrillary tangles (NFTs), two standard indicators for Alzheimer's disease—another condition that may result from the kinds of head injuries Webster suffered during his career.¹¹² Because his brain did not have any of the other necessary criteria for a diagnosis of Alzheimer's, it led the research team to the CTE diagnosis.¹¹³ Doctors thought the cause of the τ -protein buildup was "biochemical cascades that are induced by cumulative effects of repeated low-grade concussive brain injury."¹¹⁴

Based on that finding, the doctors concluded that during his NFL career, "[Webster] sustained numerous episodes of mild traumatic and/or concussive brain injury."¹¹⁵ Interviews with family members helped corroborate this finding, confirming that Webster had suffered from many common symptoms of CTE.¹¹⁶ Even though he

clogging up the works, killing cells in regions responsible for mood, emotions, and executive functioning.").

109. Omalu et al., *supra* note 29; see Laskas, *supra* note 31.

110. Omalu et al., *supra* note 29, at 129 ("[T]he first documented case of long-term neurodegenerative changes in a retired professional NFL player consistent with chronic traumatic encephalopathy (CTE).").

111. *Id.* at 129-30 ("The dura matter and dural sinuses appeared unremarkable. . . . The leptomeninges were unremarkable. There was no cerebral atrophy. There were no cortical contusions, infarcts, or hemorrhages. There was moderate cerebral edema but no evidence of uncocal or cerebellar tonsillar herniation. . . . The cranial nerves were normal.").

112. *Id.* at 130.

113. *Id.* at 130-31 ("The [neurofibrillary tangles] distribution is notably different from that observed in normal aging and [Alzheimer's disease], in which there is early involvement of the entorhinal cortex and hippocampus with later involvement of the neocortex in advanced stages.").

114. *Id.* at 131.

115. *Id.* The report stated:

In a 17-year career as an offensive lineman, he sustained numerous episodes of mild traumatic and/or concussive brain injury, which is supported by the histological evidence of remote hemorrhages into the Virchow-Robin spaces of penetrating parenchymal vessels, with multiple perivascular hemosiderin-laden macrophages. These histological findings indicate microvascular injury that may be sustained from repetitive concussive brain injury.

Id.

116. *Id.* at 132.

had neither a noted history of head trauma outside of football nor a familial history of Alzheimer's disease, his family confirmed he experienced wild mood swings, signs of cognitive impairment, and symptoms indicative of Parkinson's disease.¹¹⁷

The postmortem CTE diagnosis directly contradicted Webster's NFL injury records, which did not mention treatment for any concussions.¹¹⁸ Thus, the article concluded that while "[Webster's brain] by itself cannot confirm a causal link between professional football and CTE," it was still useful to help raise awareness that other NFL players may suffer from this condition.¹¹⁹

Doctors who reviewed the article in *Neurosurgery* found the CTE theory plausible and worth further investigation.¹²⁰ Nationally recognized neurosurgeon Dr. Julian Bailes confirmed its findings: Webster's brain was inconsistent with those of Alzheimer's patients, but consistent with those of many boxers.¹²¹ Dr. Bailes posited that the league's subdued attempts at rule and equipment changes did not address that "the regular occurrence of rapid acceleration-deceleration mechanisms of brain injury" still exist in football.¹²² Another doctor, publishing his review of the study in *Neurosurgery*, defended the conclusion in Dr. Omalu's article because of CTE's relationship to boxing and the similarities between the two sports.¹²³

3. Watch Out for the Blitz: MTBI Committee Requests Retraction

Meanwhile, the NFL's MTBI committee called for a retraction because the conclusion in Dr. Omalu's article ran counter to all of the findings in the committee's articles.¹²⁴ It claimed Dr. Omalu's article and its conclusions misinterpreted the applicable medical literature on

117. *Id.* at 128. The Center for the Study of Retired Athletes conducted a study that found similar symptoms of mood disorder in retired athletes, which leads it to the belief there is a connection between concussions suffered when playing professionally and an eventual diagnosis of clinical depression. Kevin M. Guskiewicz, Commentary, *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 134 (2005).

118. Greg Garber, *Blood and Guts*, ESPN (Jan. 25, 2005), <http://sports.espn.go.com/nfl/news/story?id=1972286> ("Webster was never treated by team doctors for a concussion, according to medical records The Steelers' trainers, too, note he never complained of concussion symptoms.").

119. Omalu et al., *supra* note 29, at 132.

120. See *infra* text accompanying notes 121-23.

121. Julian E. Bailes, Commentary, *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 134 (2005).

122. *Id.*

123. Joseph Bleiberg, Commentary, *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 134 (2005).

124. Ira R. Casson et al., Letter to the Editor, *Chronic Traumatic Encephalopathy in a National Football League Player*, 58 NEUROSURGERY E1003 (2006).

CTE, along with a total misunderstanding of CTE reported in boxers.¹²⁵ Because of these apparent flaws, the MTBI Committee deemed the description of CTE in Mike Webster incorrect.¹²⁶ To support its stance, the MTBI committee relied upon Webster's history in the league, noting he did not miss game time due to head injuries.¹²⁷ Therefore, the committee concluded, head trauma could not be the "primary cause" of Webster's malfunctioning brain and the term "chronic traumatic encephalopathy" could not be applied to the case.¹²⁸ The committee called for a retraction or revision of the article.

Omalu never retracted the article.¹²⁹ In response to the MTBI Committee's demand for retraction, Omalu and his fellow authors questioned the committee's position that NFL offensive linemen do not suffer the necessary repeated episodes of head trauma to induce CTE.¹³⁰ They stood by their findings in Webster's brain as sufficiently similar to those found in boxers' brains, a condition they felt would lead "most neuropathologists to question whether this patient had a history of boxing and lead them to examine the clinical history for episodes of repetitive head trauma."¹³¹ Their observations of Webster's brain led them to conclude that the distinct neuropathological findings are of the unique pattern reported in early stages of chronic repetitive head trauma.¹³² Omalu and his team recommended that the MTBI Committee investigate the consequences of finding a confirmed case of CTE in a former NFL player, as they seriously doubted the committee's assertion that linemen do not suffer head injuries.¹³³ Additionally, uninvolved members of the medical community publicly supported Omalu's refusal to retract his article.¹³⁴

125. *Id.*

126. *Id.*

127. *Id.* The retraction request stated:

To state that a condition is 'traumatic' in origin, one needs to present a history of significant injury (in this case, head injury) Omalu et al. indicate that their subject had a long career in professional football as an offensive lineman. They correctly point out that offensive linemen have a low incidence of mild traumatic brain injury (MTBI) compared with other position players. In the premortem history of this case, Omalu et al. do not mention any history of cerebral concussion, MTBI, or removal from play after a blow to the head.

Id. (footnote omitted).

128. *Id.* ("We, therefore, urge the authors to retract their paper or sufficiently revise it and its title after more detailed investigation of this case.").

129. Bennet I. Omalu et al., Letter to the Editor, *Chronic Traumatic Encephalopathy in a National Football League Player*, 58 NEUROSURGERY E1003 (2006) ("[Drs. Casson, Pellman and Viano] call for the withdrawal of the article, which we [Omalu et al.] would not consider . . .").

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* Omalu wrote on behalf of his team stating:

Despite the research team's response, the MTBI Committee continued its call for retraction.¹³⁵ The committee partially based its retraction request on the conclusion that a comparison of boxers and football players does not prove that CTE occurs among football players.¹³⁶ In response, Omalu and his team published a second article, *Chronic Traumatic Encephalopathy in a National Football League Player: Part II* in *Neurosurgery* a year later, expanding on and confirming the findings they published in their first article.¹³⁷ Terry Long, another former Pittsburgh Steelers offensive lineman, died at forty-five after committing suicide by drinking antifreeze.¹³⁸ Long's autopsy confirmed the second case of CTE in a retired NFL player, but the neuropathological findings in his brain were slightly different from those in Webster's brain.¹³⁹ Long's CTE symptoms included mood swings and paranoia; "[h]e manifested unpredictable fluctuations in mood and personality."¹⁴⁰

Other than swelling caused by the antifreeze, Long's brain resembled Webster's in that it appeared superficially normal.¹⁴¹ Also

We doubt Casson et al. really feel that NFL offensive linemen do not experience repeated episodes of head trauma. It is far more likely that the majority of the head trauma in the NFL, as well as in American football in general, is under-reported by the players and the team staff, who accept the occasionally 'dazed' recovery during the game and postgame headaches simply as part of the sport

Id.

134. *E.g.*, Donald W. Marion, Letter to the Editor, *Chronic Traumatic Encephalopathy in a National Football League Player*, 58 *NEUROSURGERY* E1003 (2006). The letter stated:

The letter from Casson et al. is extraordinary in the degree to which it claims definitive answers to difficult questions about the neuropathological sequelae of playing football. . . . [The NFL MTBI committee] should welcome the contribution from Omalu et al. and consider the findings of that report highly relevant to their own research, rather than recommending retraction of the article.

Id.

135. Ira R. Casson et al., Letter to the Editor, *Chronic Traumatic Encephalopathy in a National Football League Player*, 59 *NEUROSURGERY* E1152 (2006).

136. Casson et al., *supra* note 135 ("[T]he end result of the difference we measured in head impacts sustained in the two sports [boxing and professional football] could be that there is no chronic encephalopathy in football players." (footnote omitted)). *But see supra* text accompanying notes 94-98.

137. *See generally* Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player: Part II*, 59 *NEUROSURGERY* 1086 (2006).

138. *Ex-Steeler Long Drank Antifreeze to Commit Suicide*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=2307003> (last updated Jan. 26, 2006); Laskas, *supra* note 31.

139. Omalu et al., *supra* note 137, at 1086.

140. *Id.* at 1087. The article stated:

On some occasions, he would sweat profusely in public settings and become agitated when approached by other people. At other times, he was noted to exhibit a reassured, confident, and approachable demeanor. . . . [He often locked] himself in the house for 1 to 2 days. He would later seek companionship from family and friends as if nothing had happened.

Id.

141. *Id.* at 1088. Their finding from the autopsy revealed:

like Webster's brain, Long's brain had τ -proteins and NFTs that accompany those who have suffered mild chronic head injuries.¹⁴² The coroner did not find amyloid plaques, the second Alzheimer's indicator Dr. Omalu had found in Webster's brain.¹⁴³ However, this strengthened the case for a CTE diagnosis in Long, because it is consistent to find NFTs present without amyloid plaques in the brains of victims of mild chronic head injuries.¹⁴⁴ The study concluded that despite some differences, there were many similarities between the CTE present in Long's brain and that present in Webster's brain.¹⁴⁵ But the paper noted that a "long-term, longitudinal, multi-institutional, and multidisciplinary [study]" would be necessary to fully understand the disease.¹⁴⁶

D. The Front Office: The NFL as a Business

The NFL began in Canton, Ohio, as the "American Professional Football Association" but changed to its current name in 1922.¹⁴⁷ The organization has not always been as successful as it is now; in the first forty-one years of the league's history, an average of one franchise per year folded.¹⁴⁸ The NFL now is an unincorporated association that includes thirty-two separately owned football teams, each with its own name, logo, colors, and mascot.¹⁴⁹ Because it is an unincorporated association, Congress granted the NFL an exemption from income tax under section 501(c)(6) of the Internal Revenue Code in 1966.¹⁵⁰ The NFL's projected revenue from ticket sales and sponsorship deals for

The dura mater revealed no hemorrhages, xanthochromia, or subdural membranes. . . . The cerebral and cerebellar hemispheres appeared symmetrical and revealed no anomalous gyral-sulcal convolutions, atrophy, contusions, infarcts, or hemorrhages. There was global edema and congestive swelling. The leptomeninges appeared normal, as did the vessels of the circle of Willis and the basilar and vertebral arteries. The cranial nerves were normal.

Id.

142. *Id.* at 1089 (" τ -positive band- and flame-shaped small and large globose perikaryal NFT [neurofibrillary tangles] were topographically observed in several regions. The NFTs were also accompanied by τ -positive [neuropil threads].").

143. *Id.* at 1087.

144. *Id.* at 1090.

145. *Id.* at 1091.

146. *Id.*

147. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2207 n.1 (2010).

148. *Id.*

149. *Id.* at 2207.

150. Act of Nov. 8, 1966, Pub. L. No. 89-800, § 6(a), 80 Stat. 1508 (codified as amended at 26 U.S.C. § 501(c)(6) (2006)) ("§ 501(c)(6) of the Internal Revenue Code of 1954 (relating to exemption of business leagues, boards of trade, etc.) is amended by striking out 'or boards of trade' and inserting in lieu thereof 'boards of trade, or professional football leagues (whether or not administering a pension fund for football players)').").

the 2011 season is \$9.5 billion.¹⁵¹ That number pales in comparison to the NFL's stated goal of \$25 billion in revenue within the next twenty-five years, an achievable goal.¹⁵² The NFL has tripled its revenue over the past seventeen years,¹⁵³ and revenue growth will continue as new technology platforms vie for the ability to disseminate NFL content and the league works to open a new franchise in Los Angeles.¹⁵⁴

Ultimately, it is the exploits of the players on the field that allow the league to confidently make such bold revenue predictions. In the NFL, salaries for injured players are not guaranteed beyond the season in which the injury is sustained.¹⁵⁵ "The pressure is intense; there's always someone on the bench waiting to take your place," says Dr. Kenneth Podell, director of the Sports Concussion Safety Program at the Henry Ford Health System.¹⁵⁶ This pressure intensifies when coaches continue to push injured players back on the field, like New England Patriot coach, Bill Belichick, did in 2002 when he continued to send linebacker Ted Johnson into full-contact practices after Johnson suffered a concussion.¹⁵⁷ Any objection would have put Johnson's job in jeopardy.¹⁵⁸ He is now addicted to the pills he takes to alleviate his post-concussion symptoms, which include mental lapses, headaches, and depression.¹⁵⁹ Belichick's only response was: "If [Johnson] felt so strongly that he didn't feel he was ready to

151. Matthew Futterman, *NFL Back on Field, and Deals Pile Up*, WALL ST. J., Sept. 6, 2011, <http://online.wsj.com/article/SB10001424053111904900904576552773485086198.html> (stating that the \$9.5 billion in revenue would be a new record, \$100 million more than previous projections for the 2011 season). The league also forecasted an increase in attendance over 2010 numbers, helping to add to and validate the increased revenue projection. *Id.*

152. Matt Cutler, *NFL Revenue Goal of \$25 Billion by 2027*, SPORT BUS. (June 4, 2010, 7:17 AM), <http://www.sportbusiness.com/news/174569/nfl-revenue-goal-of-25-billion-by-2027> (outlining the NFL's plan that includes stadium expansions, technology investments, and annual revenue increases of \$1 billion to reach the Commissioner's revenue goal of \$25 billion by 2027).

153. Daniel Kaplan, *Goodell Sets Revenue Goal of \$25B by 2027 for NFL*, SPORTSBUSINESS J. (Apr. 5, 2010), [http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100405/This-Weeks-News/Goodell-Sets-Revenue-Goal-Of-\\$25B-By-2027-For-NFL.aspx](http://www.sportsbusinessdaily.com/Journal/Issues/2010/04/20100405/This-Weeks-News/Goodell-Sets-Revenue-Goal-Of-$25B-By-2027-For-NFL.aspx).

154. Jack Behta, *The Revenue Tidal Wave is on its Way*, NAT'L FOOTBALL POST (June 11, 2011, 4:30 PM), <http://www.nationalfootballpost.com/The-revenue-tidal-wave-is-on-its-way.html>.

155. NFL & NFL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT 260 app. A, § 9 (2011), available at <http://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>. This gives injured players a financial incentive to hide concussive symptoms from team medical personnel for fear that they might lose their place in the starting lineup or get cut. *See, e.g., supra* note 118 and accompanying text.

156. E.M. Swift, *One Big Headache*, SI VAULT, Feb. 12, 2007, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1107019/index.htm>.

157. *Id.*

158. *See supra* note 155 and accompanying text.

159. Swift, *supra* note 156.

practice with us, he should have told me.”¹⁶⁰ This creates an unenviable decision for an NFL player: either re-enter play and potentially sustain further damage to his brain, or tell the coach he cannot play, opening the door to unemployment in professional football.¹⁶¹

1. The NFL’s Policy for Players Suffering from Dementia

In the 2006 NFL Collective Bargaining Agreement, the players and owners negotiation included a new provision they called the “88 Plan,”¹⁶² after Baltimore Colts tight end John Mackey who wore the number 88 throughout his NFL career.¹⁶³ Mackey’s wife received attention for her husband’s cause after writing a letter to then-NFL commissioner Paul Tagliabue, detailing Mackey’s health decline and the financial hardship it placed on her.¹⁶⁴ The league answered her request by creating the plan, which provides medical benefits to former players who have dementia and have either accumulated enough seasons as an NFL player or are permanently disabled under the Bert Bell/Pete Rozelle NFL Player Retirement Plan.¹⁶⁵ Families of former players may receive up to \$88,000 per year if the player suffers from different forms of dementia and must live in an out-of-home facility, or up to \$50,000 per year if they care for the player at home.¹⁶⁶

When the league added this provision to the collective bargaining agreement, it denied any connection between playing football and later cognitive failure.¹⁶⁷ The NFL’s most recent collective bargaining agreement, which runs from 2011 to 2020, includes this plan.¹⁶⁸ In its new iteration, the benefit covers ALS,

160. *Id.* (alteration in original).

161. *See supra* notes 150-57 and accompanying text.

162. NFL & NFL PLAYERS ASS’N, NFL COLLECTIVE BARGAINING AGREEMENT 2006-2012 215 art. XLVIII-D, § 1 (2006), available at <http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf>.

163. Frank Deford, *Sweetness and Light: The Cautionary Tale of John Mackey*, *NFL Star*, NPR (Dec. 24, 2008), <http://www.npr.org/templates/story/story.php?storyId=98668764>.

164. Alan Schwarz, *Wives United by Husbands’ Post-N.F.L. Trauma*, *N.Y. TIMES*, Mar. 14, 2007, <http://www.nytimes.com/2007/03/14/sports/football/14wives.html> (“She wrote that dementia ‘is a slow, deteriorating, ugly, caregiver-killing, degenerative, brain-destroying tragic horror,’ and appealed to Mr. Tagliabue to help.”).

165. *Id.*

166. *Id.*

167. *See id.* NFL spokesman Greg Aiello said dementia is a condition affecting many elderly people, denying any connection between the condition and playing NFL football. *See id.*

168. NFL & NFL PLAYERS ASS’N, *supra* note 155, at 230 art. 58, § 1. After the expiration of the 2011-2020 CBA, benefits will continue to be paid, “but only to a former player who qualified during the term of [the 2011-20] Agreement and who remains qualified.” *Id.* § 4.

Parkinson's disease, and dementia.¹⁶⁹ The payments from the plan will never exceed \$100,000 per year, an amount that escalates to \$130,000 per year beginning in the league year 2016,¹⁷⁰ which runs from March to March.¹⁷¹ However, the amount of disability benefit the player receives from the NFL Player Disability Plan reduces the maximum 88 Plan benefit a player receives.¹⁷²

2. The NFL Meets to Promulgate New Concussion Standards

In June 2007, responding to the attention received by the concussions in football, the NFL held a league-wide concussion summit in Chicago.¹⁷³ Organization officials required all thirty-two teams send their doctors and medical personnel to the meeting.¹⁷⁴ In addition to team representatives, organizers invited independent medical professionals to discuss the concussion issue with the NFL.¹⁷⁵ But the NFL did not invite Dr. Omalu to speak at the NFL's summit, despite being the lead author of *Chronic Traumatic Encephalopathy in a National Football League Player*,¹⁷⁶ whose findings had furthered debate on this issue.¹⁷⁷

The NFL disseminated new concussion guidelines following the meeting on August 14, 2007.¹⁷⁸ The substance of many of them came directly from the summit, even though Dr. Omalu, one of the staunchest advocates for increased safety precautions, was not present.¹⁷⁹ The organization also distributed an informational pamphlet on concussions to its players,¹⁸⁰ telling them: "It is important to understand that there is no magic number for how many concussions is too many."¹⁸¹ The league's outside legal counsel later withdrew the pamphlet, as well as the NFL's August 14, 2007 press

169. *Id.* § 2(a).

170. *Id.*

171. *Id.* at 1 art. 1.

172. *Id.* at 230 art. 58, § 2(b).

173. Dave Goldberg, *Goodell Pushes for NFL Concussion Summit*, WASH. POST, May 3, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/03/AR20070503000031.html>.

174. *Id.*

175. Laskas, *supra* note 31.

176. Omalu et al., *supra* note 29.

177. Laskas, *supra* note 31.

178. *Maxwell Complaint*, *supra* note 35, ¶ 135.

179. *Id.*

180. *NFL Outlines for Players Steps Taken to Address Concussions*, NFL, <http://www.nfl.com/news/story?id=09000d5d8017cc67&template=without-video&confirm=true> (last visited Nov. 21, 2011).

181. *Id.* "Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems . . ." *Id.*

release that denied permanent problems result from experiencing more than one or two concussions.¹⁸²

The NFL finally admitted that its 2007 concussion guidelines were inadequate, and enacted stricter regulations to handle concussions starting in the 2009 season.¹⁸³ The 2009 guidelines are an addition to the league's 2007 return-to-play standards, which encouraged team medical personnel to continue treating concussions conservatively.¹⁸⁴ To develop the stricter and more specific 2009 return-to-play standards, the NFL's medical committee worked with team doctors, independent medical professionals, and the NFL Players Association.¹⁸⁵

The NFL enacted the 2009 concussion guideline supplement after an "embarrassing" hearing before the House Judiciary Committee on the issue of player safety the month before.¹⁸⁶ During the hearing, NFL Commissioner Roger Goodell refused to say whether he thought the cognitive decline observed in retired players was linked with their time in the NFL.¹⁸⁷ Also, committee members, former players, and even a former team executive criticized the commissioner for the league's neglect in handling brain injuries in active and former players.¹⁸⁸

Prior to promulgating the accompanying concussion guidelines, the NFL had commissioned a study of memory-related diseases in former NFL players.¹⁸⁹ The study concluded that former NFL players suffer from Alzheimer's disease or other memory-related diseases at a rate nineteen times higher than the normal rate for men between the ages of thirty and forty-nine.¹⁹⁰ The study's results came even as the

182. *Barnes Complaint*, *supra* note 41, ¶ 81; *Maxwell Complaint*, *supra* note 35, ¶ 138.

183. *Barnes Complaint*, *supra* note 41, ¶ 87.

184. *League Announces Stricter Concussion Guidelines*, NFL (Dec. 2, 2009), <http://blogs.nfl.com/2009/12/02/league-announces-stricter-concussion-guidelines> [hereinafter *Stricter Concussion Guidelines*].

185. *Id.*

186. Alan Schwarz, *N.F.L. to Shift in Its Handling of Concussions*, N.Y. TIMES, Nov. 22, 2009, <http://www.nytimes.com/2009/11/23/sports/football/23concussion.html>.

187. Alan Schwarz, *N.F.L. Scolded Over Injuries to Its Players*, N.Y. TIMES, Oct. 28, 2009, <http://nytimes.com/2009/10/29/sports/football/29hearing.html>.

188. *Id.* The findings of the NFL's MTBI Committee were also called into question. *Id.* Dr. Casson was not present to testify on behalf of the MTBI Committee, despite the committee's request that he be present to testify. *Id.*

189. Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. TIMES, Sept. 29, 2009, <http://www.nytimes.com/2009/09/30/sports/football/30dementia.html>.

190. *Id.* Over 1,000 retired players participated in the study. *Id.* In order to qualify for the study the player was required to have played at least four NFL seasons. *Id.*

A normal rate of cognitive disease among N.F.L. retirees age 50 and above (of whom there are about 4,000) would result in 48 of them having the [dementia-related] condition; the rate in the Michigan study would lead to 244. . . . So the Michigan

NFL steadfastly denied a link between cognitive decline in players and brain injuries, a claim directly refuted by the findings in the study.¹⁹¹ Dr. Casson, co-chairman of the MTBI Committee, said that the findings indicate the players in the study believe that they suffer from memory-related diseases, while the next step for the NFL is to investigate whether that diagnosis is true and to see if new studies show similar results.¹⁹²

3. The NFL Kicks Off Another Study

Both the NFL Players Association and members of Congress attacked Dr. Casson “for criticizing independent and league-sponsored studies linking NFL careers with heightened risk for dementia and cognitive decline.”¹⁹³ Amid this criticism in 2009, the NFL discontinued its long-range study on the effects of concussions.¹⁹⁴ Subsequently, MTBI Committee co-chairmen Dr. Ira Casson and Dr. David Viano resigned.¹⁹⁵ Following their resignation, the NFL renamed the MTBI Committee the NFL Head, Neck and Spine Committee in an effort to distance the newly formed group from its controversial history.¹⁹⁶ In October 2011, the NFL announced that the Head, Neck and Spine Committee is undertaking a broader concussion research project.¹⁹⁷ According to Dr. Mitchel S. Berger, the chairman of the University of California San Francisco’s neurological surgery department and the leader of the study, this new project would be considerably different from Dr. Casson’s study, which he argues was devoid of science.¹⁹⁸

findings suggest that although 50 N.F.L. retirees would be expected to have dementia or memory-related disease, the actual number could be more like 300.

Id.

191. *Id.*

192. *Id.* “The N.F.L. is conducting its own rigorous study of 120 retired players, with results expected within a few years. All neurological examinations are being conducted by Dr. Casson.” *Id.*

193. Howard Fendrich, *Ira Casson, David Viano Resign: NFL Concussion Experts Were Under Attack*, HUFFINGTON POST (Nov. 24, 2009, 10:00 PM), http://www.huffingtonpost.com/2009/11/24/ira-casson-david-viano-re_n_369856.html.

194. Sam Borden, *N.F.L. Plans Broader Concussion Research*, N.Y. TIMES, Oct. 3, 2011, <http://www.nytimes.com/2011/10/04/sports/football/nfl-plans-more-scientific-study-of-concussions.html>.

195. Fendrich, *supra* note 193.

196. Alan Schwarz, *House Panel Criticizes New N.F.L. Doctors*, N.Y. TIMES, May 24, 2010, <http://www.nytimes.com/2010/05/25/sports/football/25concussion.html>.

197. *See* Borden, *supra* note 194.

198. *Id.* (“‘There was no science in that,’ Berger said in reference to the study coordinated by Dr. Ira Casson, who was also the league’s primary voice in discrediting outside research on concussions. Asked if he might use any of the data from Casson’s work, Berger shook his head.”).

E. The Only Player to Beat the NFL in Court

Merril Hoge played eight seasons of NFL football with the Pittsburgh Steelers and the Chicago Bears¹⁹⁹ before repeated head injuries forced him to retire at the age of twenty-nine.²⁰⁰ After signing as a free agent with the Chicago Bears prior to the 1994 season, Hoge suffered a concussion in a preseason game against the Kansas City Chiefs.²⁰¹ He played the next week after a team doctor cleared him to do so,²⁰² even though he had trouble recalling the plays he was supposed to run.²⁰³ Six weeks after his first concussion, Hoge suffered a second blow to the head, leading him to retire from professional football.²⁰⁴

Following his retirement, Hoge sued Bears team physician Dr. John Munsell.²⁰⁵ The suit alleged that Munsell allowed Hoge to retake the field without warning him of the dangers faced by returning to play too soon and the risk he could sustain more severe concussions.²⁰⁶ Hoge ultimately recovered \$1.55 million,²⁰⁷ making his case the only successful lawsuit by a former NFL player against the league for its handling of concussions.²⁰⁸ Of Hoge's total recovery, \$1.45 million was awarded for the two years of his contract that he was not paid because he could not fulfill it as a result of the concussions.²⁰⁹ The remaining \$100,000 was awarded for Hoge's pain and suffering.²¹⁰

199. *Merril Hoge*, PRO-FOOTBALL-REFERENCE, <http://www.pro-football-reference.com/players/H/HogeMe00.htm> (last visited Nov. 21, 2011).

200. Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17, 26-27 (2002).

201. *Id.* at 26.

202. *Id.*

203. *Id.*

204. *Id.* at 26-27.

205. *Id.* at 27.

206. *Id.*

207. Rummana Hussain, *Hoge Wins Lawsuit Against Doctor*, CHI. TRIB., July 22, 2000, http://articles.chicagotribune.com/2000-07-22/sports/0007220191_1_hoge-concussions-brain-damage.

208. Andrew B. Carrabis, *Head Hunters: The Rise of Neurological Concussions in American Football and Its Legal Implications*, 2 HARV. J. SPORTS & ENT. L. 371, 377 (2011).

209. *Id.*

210. *Id.*

II. COMING TO THE LINE OF SCRIMMAGE: SURVEYING THE FIELD, THE OPPONENT, AND THE PLAYER'S OPTIONS

The Hoge decision demonstrates that a player can successfully sue the NFL for mishandling concussions.²¹¹ However, the decision does not address how an entire group of former NFL players could successfully sue in order to protect their rights from being systematically undermined by the NFL's stance towards concussions. In order to potentially succeed in court, players should file a class action suit alleging negligence and fraud. A jury would likely find the league liable for negligence based on its substandard handling of players' cognitive well-being by consistently failing to adopt the necessary rules, practices, and procedures to protect its players. The fraud claim could also succeed based on the league's promulgation of misinformation on which players detrimentally relied in the scope of their employment. Finally, the players should file this class action suit in the district of Minnesota because of the players' successful litigation history in that district during the 2011 lockout dispute with team owners.

A. The Players' Ability to Huddle Up and Call a Class Action Play

The first step in analyzing how players should successfully proceed in a suit against the NFL is to look at the group's viability at achieving class status. According to Rule 23(a) of the Federal Rules of Civil Procedure, a group of potential plaintiffs must meet four requirements in order for a court to certify the group for class action litigation:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.²¹²

A court should grant the players class status because they successfully meet the necessary prerequisites.²¹³ The twelve thousand retired and current players make maintaining individual suits

211. See *supra* text accompanying notes 201-07.

212. FED. R. CIV. P. 23(a).

213. See *id.*; discussion *supra* Part II.A.

untenable for both the players and for the league.²¹⁴ Joinder of twelve thousand players would be too complex, forcing certain players to represent themselves rather than benefit from work already done for a very large class of similarly situated plaintiffs.²¹⁵ The most efficient and certain way to include all NFL players with cognitive deterioration would require asking a court to certify the group with class status, which would represent all players against the league at once. The league would also benefit from the players suing in one large class. Defending one lawsuit with one set of evidence and discovery would be cheaper and more efficient for the league than defending numerous individual player lawsuits. Combining both current and former players of different eras into the same class would be proper because the NFL's series of inadequate medical policies affected all of them. Any reward recovered would be in current dollars, because the harm caused by the league should not be monetarily related to the salary earned by the specific player, because the NFL's substandard policies governed all players of varying salary levels over many years. Finally, courts should not use salaries to measure the award because the older players who made less money suffered harm while the league grew into the most profitable US professional sports league.²¹⁶

After establishing the numerosity requirement, the players must show that questions of law and fact are common to the class.²¹⁷ Each of the potential plaintiffs played NFL football, all under the league's substandard regime of handling concussive brain injuries.²¹⁸ Even though the players come from various teams that competed in different eras, "there are questions of law and fact common to the class."²¹⁹ The players, as well as the league, would benefit because the legal and factual questions are common to all class members, and those questions predominate over any questions that affect only

214. *Legal Issues Relating to Football Head Injuries (Part I & II): Hearings Before the H. Comm. on the Judiciary*, 111th Cong. 1 (2010) [hereinafter *Legal Issues Relating to Football Head Injuries*] (statement of Rep. John Conyers, Chairman, H. Comm. on the Judiciary).

215. That number is sufficient to make joinder impracticable. See FED. R. CIV. P. 23(a)(1). Plaintiffs may join in one action if "(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action." *Id.* 20(a).

216. *In a League of Its Own: America's National Football League Offers a Business Lesson to Other Sports*, *ECONOMIST*, Apr. 27, 2006, <http://www.economist.com/node/6859210> [hereinafter *In a League of Its Own*].

217. See FED. R. CIV. P. 23(a)(2).

218. *Easterling Complaint*, *supra* note 34, ¶ 37(b).

219. See *id.* ¶ 36(b).

individual members of the class.²²⁰ Even though a court may call into question the different ways that individual teams handled concussions, the league's ineffectual handling of concussions and its failure to promulgate sufficient league-wide standards for player protection will outweigh these concerns.²²¹

The third requirement for class certification is that the claims of the class representatives must be typical of each class member's claims and those claims must predominate over any questions that only affect individual members of the class.²²² Because it is the NFL's league-wide policies and practices that cause these common issues, the claims of the class representatives are typical of each class member's claims and those claims predominate over any questions that only affect individual members of the class.²²³ The claims of the class are representative and typical of claims of each class member, as all of them will have been players in the NFL.²²⁴ The league's inadequate concussion policies and regulations affect each player because its rules apply to all players from every team.²²⁵ Also, the league's denial of a link between concussions and subsequent cognitive impairment applies to players uniformly, thus supporting the notion that this class satisfies the typicality and predominance requirements. The final class certification requirement is that the players representing the class are a proper representation of the class.²²⁶ Regardless of the era or team for which the player competed, he suffered from the NFL's long-running historical choice to ignore the perils to player safety, and because of that the class of NFL players will fairly and adequately represent all members that compose the class.²²⁷

While factual distinctions will inevitably exist among the plaintiff class, each distinction or concussion is further evidence of the league-wide substandard handling of concussions and players' cognitive health. Finally, the proposed class of players meets the 23(a) requirements to serve as plaintiffs because of its numerosity, the common questions of law and fact that pertain to all potential plaintiffs, the NFL's common defenses against the claims, and because

220. FED. R. CIV. P. 23(b)(3).

221. See *supra* Part I.B.

222. FED. R. CIV. P. 23(a).

223. *Easterling* Complaint, *supra* note 34, ¶ 37(c).

224. *Id.*

225. See NFL, *Preface* to OFFICIAL PLAYING RULES AND CASEBOOK OF THE NATIONAL FOOTBALL LEAGUE (2011), available at http://static.nfl.com/static/content/public/image/rulebook/pdfs/1_Preface.pdf ("[A]ll rules contained in this book apply uniformly to both the American and National Football Conferences.")

226. *Easterling* Complaint, *supra* note 34, ¶ 37(d).

227. See *supra* Part I.B.

the class will adequately represent the interest of all players affected by the league's actions.

Once a class is properly certified under Rule 23(a), it must satisfy Rule 23(b) in order to maintain class certification.²²⁸ This potential class meets this requirement by satisfying Rule 23(b)(3), because the players would stipulate a common question of law or fact that would apply to the entire class.²²⁹ The players satisfy this requirement because their class meets certain pertinent factors, such as the desirability of concentrating litigation in the forum under Rule 23(b)(3)(C)²³⁰ as well as there being only minor difficulties that both the plaintiffs and the defendants will face in the class action under Rule 23(b)(3)(D).²³¹ Facing a class action suit would be simpler for the NFL because it would concentrate all plaintiffs' claims in one forum and suit, instead of having different players bringing cases across the country. Additionally, one set of discovery requests would be preferable to many discovery requests in different suits, which is what would happen if the players were not granted class status. Because of this, there are few difficulties the NFL would face in managing the class action that it would not confront in individual suits players would bring based on the NFL's substandard handling of concussions.

Additionally, Federal Rules of Civil Procedure Rule 23.2 governs class action suits that involve unincorporated associations, such as the NFL.²³² Despite the NFL's income tax status as an unincorporated association, Rule 23.2 should not apply because the suit would be against the NFL as a whole, rather than the individual teams.²³³ This rule is not implicated because it questions whether an unincorporated association will adequately protect its interests and those of its constituent members.²³⁴ The NFL will protect its interests in this situation because this case would involve its concussion policies. Because the league and the teams that comprise it were creating and implementing the unsatisfactory concussion policies at issue, the NFL, as an unincorporated association, will serve as a proper defendant and will adequately defend the claims against it.

228. FED. R. CIV. P. 23(b).

229. *Id.* 23(b)(3).

230. *Id.* 23(b)(3)(C).

231. *Id.* 23(b)(3)(D).

232. *Id.* 23.2.

233. *Id.* ("This rule applies to an action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties."). The NFL is an unincorporated association, but this lawsuit would proceed against the NFL as a whole, not against the individual teams that are members of the unincorporated association. See *supra* note 149 and accompanying text.

234. See NFL, *supra* note 225.

*B. The Players Get to the Line of Scrimmage:
Calling a Play for Negligence*

Negligence will be the players' most successful claim because the NFL has consistently breached its duty to protect the neurological well-being of its players by not enacting adequate rules, policies, and regulations that protect the players.²³⁵ The NFL possesses a general duty to exercise reasonable care because its conduct as the governing body of a violent game creates a risk of physical harm.²³⁶ The district of Minnesota provided a favorable ruling for the players in the suit filed during the 2011 lockout between the players and the NFL owners, thus the players should file their suit in the same district.²³⁷ The players' suit should include both their negligence and fraud claims.

The *Restatement (Second) of Agency* states that an employer bears the duty to provide reasonably safe working conditions for its employees, taking into account the kind of activity in which the employees are engaged.²³⁸ In addition, the employer must warn its employees of the risk of unsafe conditions that the employer realizes the employees may not discover through their exercise of due care.²³⁹ The league breached the duty to warn the players that professional football can cause long-term mental health risks, which the players might not discover through the exercise of their duty of care.²⁴⁰

There is no immunity from tort liability for an employer when its employee is acting within the scope of employment.²⁴¹ The players are acting within the scope of their employment each time they play football, and every time they play it is the league's responsibility to provide safe working conditions.²⁴² Because the NFL did not provide adequate rules and failed to alert the players of the dangers concussions pose,²⁴³ the NFL failed to provide a safe working environment for the players.

The NFL also breached its duty to warn, because the league had reason to know the problems that concussions can cause in

235. *Barnes Complaint*, *supra* note 41, ¶ 182.

236. RESTATEMENT (THIRD) OF TORTS § 7 (2010) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.").

237. *See generally* Brady v. NFL, 779 F. Supp. 2d 992 (D. Minn. 2011).

238. RESTATEMENT (SECOND) OF AGENCY § 492 (1958) (amended 2005).

239. *Id.* An employee's duty of care to its employer involves acting with the standard skill required for the kind of work the employee performs. *Id.* § 379.

240. *See id.* § 492.

241. *Id.* § 470 cmt. c ("A master has no immunity from liability for negligence to a servant while the servant is acting within the scope of employment.").

242. *Id.* § 470.

243. *See supra* Part I.B-C.

players, while the players did not know of the risk that concussions cause to mental, physical, and emotional health.²⁴⁴ Popular medical literature, dating as far back as 1952, noted brain changes in contact-sport athletes,²⁴⁵ and more refined medical research was emerging yearly to help inform the NFL's concussion standards.²⁴⁶ Also, the NFL commissioned its own thirteen-part study that provided substantial information linking concussions and subsequent mental decline.²⁴⁷

The NFL acknowledged it had a duty to warn the players when it changed its official concussion policies in 2009, making it the second time in two years that the league changed its rules.²⁴⁸ Another tacit admission by the league that concussions cause dementia and other cognitive problems is the inclusion of 88 Plan in the league's Collective Bargaining Agreement since 2006.²⁴⁹ The fact that other diseases that affect grown men, whether or not the men have played professional football, do not result in specific disability payments under the NFL's collective bargaining agreement undercuts the league's position that memory disorders affect many people who never play football.²⁵⁰ The league's change in position on the issue, despite similar evidence that had already existed years prior, is evidence of the NFL's negligent conduct.

A warning from the league would have been effective in reducing the players' risk of harm because it would have allowed each player to make individualized and informed decisions regarding his own cognitive health and how to proceed in his career.²⁵¹ The failure to warn qualifies as a form of basic negligence because the range of the defendant's conduct that gives rise to the duty is sufficiently broad.²⁵² Even if a defendant adequately warns of the risks it created,

244. RESTATEMENT (THIRD) OF TORTS § 18(a) (2010).

A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if:

- (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and
- (2) a warning might be effective in reducing the risk of harm.

Id.

245. *Supra* text accompanying notes 25-28.

246. See *supra* Part I.A.

247. See *supra* Part I.C.

248. *Stricter Concussion Guidelines*, *supra* note 184.

249. See *supra* Part I.D.3.

250. Schwarz, *supra* note 189.

251. See RESTATEMENT (THIRD) OF TORTS § 18(a)(2) (2010).

252. *Id.* § 18 cmt. a ("A warning can often be a useful device for reducing the risk of harm occasioned by the defendant's conduct. The range of defendant conduct that can give rise to the obligation to warn is so broad as to make clear that the failure to warn is a basic form of negligence.").

the defendant can still fail to exercise its duty of care if it does not adopt additional safety measures to protect against the foreseeable risk that remains.²⁵³ The NFL failed to adopt adequate standards to protect players' cognitive health after suffering from concussions, despite knowing the steps it needed to take.²⁵⁴ Ultimately, the league knew of the risk and knew the players would be unaware of it. A warning would have reduced the risk of harm to the players.²⁵⁵ Even when the NFL finally did promulgate standards, they were based on flawed science, and the NFL knew it was shutting out rivaling interpretations of the same data.²⁵⁶

C. The Players' Case for Fraud Against the NFL

The players could also argue that the NFL committed fraud against them.²⁵⁷ Even though fraud is a Minnesota state law claim, the plaintiffs would be able to bring this claim, in addition to their other claims, in a Minnesota federal court because the amount in controversy will be greater than \$75,000 and there will be diversity of citizenship.²⁵⁸ Venue is proper in Minnesota because the NFL has maintained a presence and continuous business with the Minnesota Vikings in the state, thus events giving rise to claims occurred in the state.²⁵⁹

The players who would sue over brain injuries were employees of the NFL.²⁶⁰ An employee has a cause of action for fraud against his employer when he adversely relies on misinformation provided by the employer.²⁶¹ The facts that give rise to negligence liability also could contribute to a fraud claim: the players relied on the NFL's claim that

253. *Id.* § 18(b).

254. *Barnes* Complaint, *supra* note 41, ¶ 186 (“Despite the fact that other sporting associations exist, such as the National Hockey League and the World Boxing Association, which have decades ago established standardized association-wide concussion management rules, until August 14, 2007, the NFL failed to establish any guidelines or policies to protect the mental health and safety of its players.”).

255. RESTATEMENT (THIRD) OF TORTS § 18.

256. *See supra* Part I.C.2.

257. BLACK'S LAW DICTIONARY 300 (9th ed. 2009).

[Fraud is a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment[;] . . . [a] misrepresentation made recklessly without belief in its truth to induce another person to act[; and] . . . [a] tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment.

Id.

258. 28 U.S.C. § 1332(a) (2006).

259. 28 U.S.C. § 1391(b)(2).

260. NFL & NFL PLAYERS ASS'N, *supra* note 155, at 260 app. A.

261. 37 AM. JUR. 2D *Fraud and Deceit* § 144 (2012).

denied that permanent problems result from more than one or two concussions;²⁶² and the MTBI Committee promulgated misleading information that led to the league policy that denied any link between concussions, CTE, and later life cognitive deterioration.²⁶³ Furthermore, the league's conclusions, based on findings from its MTBI Committee, stood at odds with generally accepted research in the field of cognitive science.²⁶⁴

The NFL also actively tried to conceal and discredit information contrary to its stated position that concussions do not lead to CTE.²⁶⁵ Silence does not constitute fraud unless there is a duty to speak, which exists in this case because of the employer-employee relationship.²⁶⁶ In order to find fraud for active concealment of information, there must be more than just silence; there must be a purpose behind the concealment of the information.²⁶⁷ Here, the league promulgated information the medical community generally viewed as insufficient while simultaneously attacking the credibility of medical researchers that presented information contradicting the NFL's stance on concussions.²⁶⁸ Also, the NFL used the MTBI Committee to conceal unfavorable information, despite the league's duty to speak on the matter in order to protect its employees' health.²⁶⁹

It was not until late 2009 that the league finally acknowledged the connection between concussions that players suffer and their long-term health effects.²⁷⁰ The NFL's decision to replace those in charge of its concussion studies and alterations to the league's return-to-play standards amount to "tacit acknowledgments that it was no

262. *Barnes* Complaint, *supra* note 41, ¶ 76.

263. *Id.* ¶ 211.

264. *See supra* Part I.C.1-2.

265. *Supra* text accompanying notes 125-29.

266. 37 AM. JUR. 2D *Fraud and Deceit* § 203.

267. *Id.*

268. *See supra* Part I.C.

269. 37 AM. JUR. 2D *Fraud and Deceit* § 203 (2012) ("Concealment . . . may consist of withholding information asked for, or of making use of some device to mislead, thus involving act and intention, or of concealing special knowledge where there is a duty to speak." (footnote omitted)).

270. Alan Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, N.Y. TIMES, Dec. 20, 2009, <http://www.nytimes.com/2009/12/21/sports/football/21concussions.html?pagewanted=all>.

"It's quite obvious from the medical research that's been done that concussions can lead to long-term problems" the [NFL] spokesman Greg Aiello said . . .

Told that his statement was the first time any league official had publicly acknowledged any long-term effects of concussions, and that it contradicted past statements made by the league, its doctors and literature currently given to players, Aiello said: "We all share the same interest. That's as much as I'm going to say."

Id.

longer able to defend a position that conflicted with nearly all scientific understanding of head trauma."²⁷¹ Prior to this announcement, NFL players had relied on their employer's steadfast stance against any link between brain injuries and CTE.²⁷² The NFL fraudulently misrepresented the facts and refuted commonly accepted science through the MTBI Committee, using that information to craft its return-to-play standards.²⁷³ These fraudulent acts harmed the players and put their safety in jeopardy.

*D. The League Calls its Defense:
The NFL's Possible Responses to the Players' Claims*

The NFL could mount two different defenses to the potential claims available to the players in their suit over cognitive deterioration, even though neither is likely to prevail. The NFL can argue that the players assumed the risk of injury from playing NFL football, and the other defense that the NFL may propose is the lack of incentive to provide misinformation. The latter defense may fare better, but will probably not prove successful because the league's desire for growth would be impeded if the extent of the players' risks for injuries were widely known.

1. The Assumption of the Risk Defense

When a plaintiff voluntarily assumes a risk of harm that naturally arises from a defendant's negligent or reckless conduct, the plaintiff is barred from recovering for that resulting harm.²⁷⁴ This assumption of risk does not need to be express; the league can argue it may be implied through an NFL player's decision to play football.²⁷⁵ This defense, as proposed by the NFL, would posit that the players knew of the dangers inherent in playing football and they undertook that danger willingly by becoming NFL players.

The players would respond that they did not know about the dangerous conditions when they became NFL players. A football player fully understands the possibility of a broken arm or torn anterior cruciate ligament (ACL) and has thus either contractually or

271. *Id.*

272. *Maxwell* Complaint, *supra* note 35, ¶ 559 ("The [players], among others, justifiably relied on these misrepresentations to their detriment in getting care for their injuries.").

273. *See supra* Part I.C.2.

274. RESTATEMENT (SECOND) OF TORTS § 496A (1965).

275. *See id.* § 496C cmt. b ("[T]he basis of the rule is the policy of the law which refuses to permit one who manifests willingness that another shall continue in a course of conduct to complain of it later if he is hurt as a result of it.").

implicitly assumed that risk; but he did not assume the risk he would develop dementia at a rate nineteen times the normal rate for men between the ages of thirty and forty-nine.²⁷⁶ He could not have assumed this risk, because the NFL did not promulgate this information to the players and discredited any research that ran counter to the information the NFL wanted to provide the players.²⁷⁷

A plaintiff does not assume a risk of harm resulting from a defendant's conduct unless the plaintiff's assumption is a knowing one, with an understanding and appreciation of the unreasonableness of the risk.²⁷⁸ Because of this requirement, the absence of an express agreement prevents a plaintiff from assuming any risk because he is unaware of the risk itself, much less the risk's unreasonableness.²⁷⁹ While the risk must be neither known nor apparent, a plaintiff's failure to discover or appreciate the risk does not affect the assumption of the risk, only the defense of contributory negligence.²⁸⁰

The players did not know of the risk of cognitive decline because they did not regulate the game's safety, have access to the league's safety information, or have access to its means of collecting the information.²⁸¹ NFL players assume certain risks when they take the field, but the risk of eventual cognitive impairment is not one of them.

2. The NFL's Incentives to Keep this Information from Players

The NFL would argue that it has little incentive to provide misinformation regarding player health as the league strives to reach its goal of \$25 billion in revenue.²⁸² As the players are the league's most visible assets, from playing in the games to spurring jersey sales, the league would argue that the potential backlash of harming its most valuable assets would be tremendous.²⁸³ Even though players come and go, the sport's credibility would be irreparably damaged if

276. Schwarz, *supra* note 189.

277. See *supra* Part I.C.

278. RESTATEMENT (SECOND) OF TORTS § 496D.

279. *Id.* § 496D cmt. b.

280. *Id.*

281. See Pellman et al., *Part 1*, *supra* note 58 (discussing the NFL MTBI Committee conducting studies and using that information to promulgate the league's return to play standards).

282. Cutler, *supra* note 152.

283. See Polamalu, *Packers Top NFL Jersey, Merchandise Sales Lists*, NFL (Apr. 14, 2011, 5:02 PM), <http://www.nfl.com/news/story/09000d5d81f410f2/article/polamalu-packers-top-nfl-jersey-merchandise-sales-lists> [hereinafter *Jersey Sales*].

fans knew that players were unknowingly risking their mental and physical well-being each time they took the field.²⁸⁴

But current players benefit the league much more than retired players, who neither sell jerseys at the rate current players do, nor sell out stadiums on game day.²⁸⁵ Because the NFL's current model has made it the most successful professional sports league in the United States, there is little incentive to change the winning recipe as long as people still fill stadiums and watch games on television.²⁸⁶ As a result, the league could argue it would have little reason to jeopardize the health and safety of its players. Despite that claim, the league's behavior shows otherwise: it has frequently been reluctant to change its rules and health standards, and when it has done so the league used its MTBI Committee's questionable findings as the basis.²⁸⁷

III. HOW THE PLAYERS CAN CALL THE WINNING PLAY: A PLAN FOR SUCCESSFUL CONCUSSION LITIGATION AGAINST THE NFL

The preceding discussion outlines the NFL's negligent and fraudulent behavior toward its players, who as a result have suffered cognitive impairment. In order to protect their rights, the players should file a class action complaint alleging both negligence and fraud under the state law of Minnesota, and file the complaint in federal district court in Minnesota. They should win compensatory damages for the injury the NFL's substandard concussion policy has caused. The suit should also lead to an alteration in the current rules to avoid putting players' cognitive health in jeopardy.

284. See Schwarz, *supra* note 186.

"I don't want to call [the shift in the handling of concussions] forced, but it's been strongly urged because of the awareness of the issue these days," Chester Pitts, a lineman and union representative for the Houston Texans, said in a telephone interview. "When you have Congress talking about the antitrust exemption and them calling them the tobacco industry, that's pretty big."

Id.

285. See *Jersey Sales*, *supra* note 283. The list of jersey sales is made from April 1, 2010 to March 31, 2011, and on that list only players active during the 2010 season were represented.

Id.

286. *In a League of Its Own*, *supra* note 216. The story reported:

As a business, American football has been beating its rivals handily for years. It has the highest total revenues of the four It remains the most popular of the four big American sports on almost every measure, from opinion polls to television ratings. And it has translated all of this into rising profits. The average football team has a market value of around 3.9 to 4.4 times revenues, compared with ratios of 2.2 to 3.0 for the other leagues.

Id.

287. See *supra* Part I.D.2-3; see also *supra* Part I.B.

A. To the Victor Go the Spoils: The Players' Damages Award

The NFL would have to pay damages for pain and suffering as a result of the players' successful negligence claim, in addition to punitive damages that result from successfully proving the player's allegation of fraud.²⁸⁸ The pain and suffering damages are the same category of damages that Hoge received in his lawsuit.²⁸⁹ In Minnesota, the court may award punitive damages upon clear and convincing evidence that the defendant disregarded other individuals' safety.²⁹⁰ Minnesota's history of jurisprudence shows that it is averse to intentional violations of the rights of others.²⁹¹ The NFL violated the players' rights to safety and complete information.

In the only successful concussion suit by a player, Merrill Hoge recovered \$1.55 million in the year 2000, \$100,000 of which was for pain and suffering.²⁹² This amount would be insufficient for the plaintiffs today, because most of the retired players within the class never made the NFL's current average salary of \$1.9 million.²⁹³ The average salary in the NFL has increased 450 percent since 1991, when the average was \$422,149.²⁹⁴ Only three years later Merrill Hoge signed his free-agent contract with the Chicago Bears, worth \$2.4 million—far more than the league average.²⁹⁵

Because salaries keep increasing, the ratio of pain and suffering benefits would continue to shrink as compared to what Hoge was able to recover.²⁹⁶ Hoge's award of \$50,000 per season for pain and suffering in his suit represented 6.9 percent of the salary he would have received if he had been able to play.²⁹⁷ Because salaries

288. The recovery does not include the cost of medical bills because Plan 88 covers those bills. NFL & NFL PLAYERS ASS'N, *supra* note 155, at 230 art. 58, § 2. This recovery is an addition to any medical coverage already offered by the NFL to its current and former players. *See supra* text accompanying notes 165-66.

289. Hussain, *supra* note 207.

290. MINN. STAT. ANN. § 549.20 (West 2011).

291. 20A2 BRENT A. OLSON, MINNESOTA BUSINESS LAW DESKBOOK § 34:77 (2011-2012 ed. 2011).

292. Hussain, *supra* note 207.

293. *The Average NFL Player*, BUSINESSWEEK (Jan. 27, 2011, 5:00 PM), http://www.businessweek.com/magazine/content/11_06/b4214058615722.htm.

294. *Average NFL Salary Up 18.5 Percent, to \$422,149*, BALTIMORE SUN, Dec. 27, 1991, http://articles.baltimoresun.com/1991-12-27/sports/1991361086_1_dan-marino-nfl-players-quarterbacks (noting that the league's 1991 average salary was "18.5 percent higher than the 1990 average salary of \$356,382 and 41 percent higher than the 1989 average of \$299,616").

295. Hecht, *supra* note 200, at 26, 29.

296. The \$100,000 (or \$50,000 per season remaining) was 6.9 percent of Hoge's remaining \$1.45 million on his contract. Hussain, *supra* note 207. The \$50,000 per season awarded by the Hoge jury is only 2.6 percent of the 2011 average NFL salary of \$1.9 million. *See The Average NFL Player*, *supra* note 293.

297. Hussain, *supra* note 207.

for NFL players are dramatically higher than they were in 1994 (when Hoge signed the contract his recovery is based on), the \$50,000 he received would represent a much smaller percentage of a player's salary today than it did for Hoge.²⁹⁸ Additionally, any amount of damages a player receives will not affect any amount of Plan 88 benefits because that payment is for medical care and this payment is for the NFL committing tort negligence.²⁹⁹

Doubling the Hoge recovery would still not be sufficient to meet the award's ratio to current player salary, but it serves as an adequate starting point.³⁰⁰ There are 12,000 active and retired NFL players who could potentially recover from the proposed lawsuit.³⁰¹ More than 6 percent of those players suffer from various brain injuries, whereas only 1.2 percent of comparably aged men in the general US population suffer from similar afflictions.³⁰² Multiplying the NFL player's 4.9 percent increase in odds of suffering from a brain-related condition with the \$200,000 recovery and 12,000 current and former players, the class of players should recover a total of \$117.6 million for pain and suffering. That number represents only 1.2 percent of the NFL's projected 2011 revenue, which will continue to grow.³⁰³

The NFL should also have to pay punitive damages for fraudulently misleading its players through the MTBI Committee.³⁰⁴ The NFL has financially benefitted far more than the cost it will incur by paying compensatory awards, and the punitive recovery should force the league to bear the cost of the players' losses.³⁰⁵

In *Pacific Mutual Insurance Company v. Halsip*, the US Supreme Court endorsed a set of constraints for punitive damage awards that consist of seven factors, the most applicable being "the degree of reprehensibility of the defendant's conduct," as well as how long the conduct lasted.³⁰⁶ In this instance, the harm from the NFL

298. See *The Average NFL Player*, *supra* note 293 (providing the average and median salaries of NFL players).

299. NFL & NFL PLAYERS ASS'N, *supra* note 155, at 230 art. 58, § 2.

300. See *supra* notes 293-96 and accompanying text.

301. *Legal Issues Relating to Football Head Injuries*, *supra* note 214.

302. *Easterling Complaint*, *supra* note 34, ¶ 11.

303. See Futterman, *supra* note 151.

304. See *supra* Part II.C.

305. Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 423 (1998).

306. *Pac. Mut. Life Ins. Co. v. Halsip*, 499 U.S. 1, 21-22 (1991). The seven factors are:

(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the

has already occurred and probably falls under *Haslip's* subjective definition of "reprehensibility."³⁰⁷ In the course of promulgating this misinformation, the NFL has become the highest grossing domestic sports league.³⁰⁸

The penalty should be an amount that forces the league to internalize the loss that its conduct generated.³⁰⁹ The NFL should bear \$470.4 million in punitive damages—four times the compensatory damages it should have to pay.³¹⁰ This will make the NFL liable for a total of \$588 million to past players for its conduct regarding the league's concussion stance. The 2010 season saw the NFL revenue grow to \$9.3 billion, with growth anticipated in each ensuing season.³¹¹ Even though this only constitutes 6.3 percent of the league's revenue based on the 2010 season, the NFL will also have to address the public relations implications of this suit, including upset fans who realize the league deprived their favorite players of vital safety information.

B. Changing the Rules of the Game at Halftime

Finally, the court should force the league to adopt rule changes in order to prevent the further growth of this problem. The court should order the NFL to work with the NFL Players Association to craft rule changes that satisfy both parties while achieving maximum safety standards. The most obvious change would be to ban the three-point stance, which linemen use as their starting position on almost every play before launching themselves headfirst into the attacking defenders.³¹² The Commissioner has already entertained this idea,³¹³ and it is a very palatable change to the game that would increase safety without compromising competition or fan enjoyment.³¹⁴ The NFL has already introduced a new rule prior to the 2011 season that has teams kick off to a shorter field, dramatically reducing the

defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Id.

307. *Id.* The NFL chose profits in promulgating misinformation over accepted science that would have advocated player safety. *See supra* Part II.E.2.

308. *In a League of Its Own*, *supra* note 216.

309. Hylton, *supra* note 305, at 439.

310. *See supra* notes 300-03 and accompanying text.

311. Judy Battista, *Details Emerge on Battle Over Projected Revenue*, N.Y. TIMES, Mar. 18, 2011, <http://www.nytimes.com/2011/03/19/sports/football/19players.html>.

312. Borden, *supra* note 194.

313. *Id.*

314. *See supra* Part I.B.

number of kick returns in games.³¹⁵ Though the league had little incentive to change its rules in the past, it can now alter its rules with input from the players to achieve a balance among safety, competitiveness, and maintaining the game.³¹⁶

Additionally, the NFL should institute game suspensions for players who recklessly lead with their helmets, causing helmet-to-helmet contact (spearing). The league currently fines players for those penalties, but suspensions would force players to respect the safety of the game as well as the safety of their fellow players.³¹⁷ These are relatively simple ways to protect player safety without drastically changing the makeup of NFL football.

IV. THE STATE OF THE GAME MOVING FORWARD

Current and former players should band together to bring a class action lawsuit against the NFL for its negligent and fraudulent acts regarding its concussion policies and safety rules. The players should succeed on these claims and should be entitled to the compensation that this Note discusses based on the only successful recovery in a concussion lawsuit against the NFL. That recovery is modified to reflect the escalating current salaries and how the players are the most vital asset to the league's continued success. Instituting this suit in the district of Minnesota will capitalize on the players' history of litigation success in that jurisdiction.

The NFL has to answer for its negligent and fraudulent conduct toward past and current players. It also has to make the game safer. This will help protect the league's most valuable commodity—its players. While the NFL has taken steps in the right direction, it still has a long way to go. In a 2011 game, James Harrison once again committed an illegal helmet-to-helmet hit, this time on Cleveland Browns quarterback Colt McCoy.³¹⁸ This was Harrison's fifth illegal tackle on quarterbacks in three seasons.³¹⁹ Meanwhile, McCoy was allowed to re-enter the game two plays later without receiving a concussion test on the sideline, even though he

315. *New Kickoff Rules Are Winning Few Fans Among Players, Coaches*, NFL, <http://www.nfl.com/news/story/09000d5d821785ce/article/new-kickoff-rules-are-winning-few-fans-among-players-coaches> (last updated Aug. 15, 2011) (noting that touchbacks rose from 16 percent during the 2010 season to 33 percent during the 2011 preseason).

316. *See generally supra* text accompanying note 303.

317. NFL & NFL PLAYERS ASS'N, *supra* note 155, at 204 art. 46, § 1.

318. *Colt McCoy Not Checked on Sideline*, ESPN, http://espn.go.com/nfl/story/_id/7352348/cleveland-browns-colt-mccoy-given-concussion-test-sideline (last updated Dec. 14, 2011).

319. *Id.*

was later diagnosed with one as a result of that play.³²⁰ The NFL has work to do in order to protect its players' cognitive well-being. Punishing the New Orleans Saints and its coaching staff for the endangerment of other players resulting from the team's bounty program does not remedy the league's past failings in protecting player health.³²¹ The severe punishment levied on the Saints should not divert attention from the NFL's past failings; rather, it should draw even more attention to them.³²²

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320. *Browns Say Colt McCoy Seemed OK*, ESPN, http://espn.go.com/nfl/story/_id/7336211/colt-mccoy-cleveland-browns-diagnosed-concussion (last updated Dec. 10, 2011).

321. *Goodell: Saints Violated NFL's 'Bounty Rule'*, SPORTS ILLUSTRATED, <http://sportsillustrated.cnn.com/2012/football/nfl/03/02/saints.bounties.ap/index.html> (last updated Mar. 2, 2012, 8:18 PM).

322. *NFL Hammers Saints for Bounties*, ESPN, http://espn.go.com/nfl/story/_id/7718136/sean-payton-new-orleans-saints-banned-one-year-bounties (last updated Mar. 22, 2012, 11:09 AM).

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