Football and cigarettes: A legal perspective on the NFL's concussion crisis

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Available at: https://works.bepress.com/annette_greenhow/9/
Participating in sport is a human right and many Australians exercise that right on a regular basis by engaging in a diverse range of sporting pursuits. On any given weekend, the majority of young Australians are playing sport, with many enjoying a game of football, or watching their favourite professional players take to the field. The undisputed health and social benefits of sport participation are hallmarks that define the truly unique nature of sport, in contrast to other forms of associations. But what sometimes gets overlooked is the recognition and management of the risks associated with such participation, and the need to elevate the welfare and interests of the participant above all else. A recent illustration comes from the United States where the ‘Big Tobacco’ litigation, representing over 3 000 retired players as plaintiffs, threatens to rock the foundations of the billion-dollar industry, the National Football League (NFL). This ‘concussion crisis’ has not, as yet, infiltrated the Australian football scene, but does raise questions about the legal responsibilities of a governing body to protect the health and welfare of the assets central to its success—the players.

The NFL litigation, albeit in the early stages and far from resolution, can provide a useful insight into the way a governing body responds to the challenges of meeting the demands of a range of stakeholders, with competing interests underpinned by a network of complex economic and personal relationships. It also demonstrates some negative externalities that come from an entrenched self-regulatory model and provides the necessary ingredients to trigger state intervention and regulatory reconfiguration in the form of prescriptive youth concussion laws for school-aged football participants, now adopted in 38 states and the District of Columbia.

This chapter of the story begins in 2002 when a forensic pathologist in Pittsburgh conducted an autopsy on deceased NFL footballer, Mike Webster. The autopsy report identified the brain disease Chronic Traumatic Encephalopathy (CTE), also known as ‘Punch Drunk Syndrome’, as a significant contributing factor leading to the death of Webster caused by repeated head trauma sustained while playing football. The NFL immediately denied the link and, some suggest, embarked upon a campaign to minimise the issue, by discrediting the quality of the independent research. This criticism is now reflected in the NFL litigation and forms the basis of allegations of negligence and fraudulent concealment against the NFL.

The NFL litigation has a long road to travel before the outcome will be known, and it will be interesting to see how it unfolds. Regardless of the outcome, the very public nature of these proceedings has focussed attention on issues of regulation and governance in professional football and the legal complexities involved in the business world of sport.