The NFL's Failure to Provide a Duty of Care and Fraudulent Misrepresentation for Injured Veterans with Special Regards to Concussions

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Introduction

“These are not the types of risks these players or their families associate with the game of football.”

“Iron Mike” Webster (“Webster”) played center for the Pittsburg Steelers in the National Football League (“NFL”) from 1974-1988. During his time with the Steelers, Webster won four Super Bowls. In all, Webster started 245 games during his sixteen-year career in the NFL. Webster was selected to the NFL’s Pro Bowl nine times during his career. Webster would retire from football in 1991. His great career in the NFL eventually led to Webster being inducted into the Pro Football Hall of Fame in 1997.

In 2002, eleven years after his retirement Webster passed away. During the eleven years leading up to his death, Webster was plagued with depression and other mental problems that would later be traced back to the multiple concussions he sustained while playing in the NFL.

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3 Id.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 See Gerardi, 18 Sports Law. J. at 199.
On December 20, 2009 the NFL, for the first time, finally acknowledged that multiple concussions have long-term consequences.\textsuperscript{10} Former players and their families believe that the NFL should have warned players of the potential long-term consequences of concussions. They believe that the NFL had direct knowledge of the potential devastating effects on the brains and memories of former players. Therefore, these players are demanding that the NFL be held liable for concealing and even misrepresenting the truth about concussions. These players argue that without proper knowledge, they lacked the ability to make proper decisions of whether to return to football after a concussion or potentially suffer long-term consequences such as the increased risk of Alzheimer’s disease, dementia, or even death. Players also feel that the benefits available to them are inadequate and hard to retain because the retirement benefits require too many hurdles to be jumped through in order to receive these retirement benefits.

Because of the hardships that Webster and others continue to suffer, this paper will discuss how the NFL has failed to protect its veterans and the legal consequences that will follow. First, this paper will provide an introduction to the relationships between the NFL, its thirty-two teams, the players, and the Collective Bargaining Agreement. Second, this paper will discuss the severity of concussions that plague ex-NFL players and how concussions affect players’ lives after retirement. Third, this paper will discuss the medical compensation and retirement benefits available to former players. The hurdles that players have to go through to receive these benefits will be discussed in this section. Fourth, this paper will discuss concussion studies and when the NFL had a duty to warn. Fifth, this paper will discuss the legal consequences of the NFL’s decision to rely on flawed medical opinions when it crafted its

\textsuperscript{10} Id. at 213-214.
concussion policies and the NFL’s decision to conceal a direct link between concussions and mental decline. Sixth, this paper will discuss possible defenses available to the NFL.

**History of the NFL, Its Players, and the Collective Bargaining Agreement**

The NFL is an unincorporated association\(^{11}\) that currently consists of thirty-two independently owned\(^{12}\) professional organizations that are involved in a joint venture.\(^{13}\) The NFL is a nine billion dollar-a-year business\(^{14}\), making it the most successful sports league in the world.\(^{15}\) Each of the thirty-two teams are profitable with the average team worth approximately one billion dollars, ranging in value from $1.65 billion for the Dallas Cowboys to a mere $725 million for the Jacksonville Jaguars.\(^{16}\) The NFL and its teams are not considered a single entity for legal purposes.\(^{17}\)

Each team is allowed only fifty-three players on its roster.\(^{18}\) Both the NFL and its teams are considered the employers of the players.\(^{19}\) Each team controls the players primarily on a

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\(^{11}\) The term “unincorporated association” refers to a collection of persons who have joined together, usually under a common name, for the accomplishment of a common lawful purpose without a corporate charter.” George A. Locke, *Civil Liability of Member or Officer of Unincorporated Association* 6 Am. Jur. Proof of Facts 3d 679.


\(^{13}\) *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1251 (2nd Cir. 1982).


\(^{17}\) *N. Am. Soccer League*, 670 F.2d at 1252.


day-to-day basis.\textsuperscript{20} The NFL controls each of these players on a larger scale with policies, rules and regulations all defined under the Collective Bargaining Agreement (“CBA”).\textsuperscript{21}

Currently, NFL players have an average salary of over one million dollars.\textsuperscript{22} This average ranges anywhere from the league minimum of $235,000,\textsuperscript{23} to the $23 million yearly salary for Peyton Manning, the highest paid player in the NFL.\textsuperscript{24} However, one has to take note that such large salaries have not always been offered. It is important to appreciate what players like Webster made during the 1980’s in order to understand the financial struggle that they are currently going through regarding paying for their medical treatments. In 1980, the average player had a salary of only $78,657.\textsuperscript{25} Additionally, the salaries do not last as the average player plays only three years.\textsuperscript{26}

Every player in the NFL is a member of the National Football Leagues Player Association (“NFLPA”). The NFLPA was established in 1956.\textsuperscript{27} The NFLPA is a labor union that represents the players’ interest.\textsuperscript{28}

The CBA is the agreement between the NFL and the NFLPA that sets forth policies that affect the players in the NFL.\textsuperscript{29} Because the NFLPA is the players’ exclusive bargaining agent, labor laws prevent a player from negotiating with a team regarding the terms and conditions of

\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Huebinger, 16 Sports Law. J. at 280.
\textsuperscript{23} Id. at 281.
\textsuperscript{26} Huebinger, 16 Sports Law. J. at 281.
\textsuperscript{27} NFL Players Association, http://www.nflplayers.com/about-us/.
\textsuperscript{28} Id.
\textsuperscript{29} Vaughan, 96 Cornell L. Rev. at 609-610.
his employment.\textsuperscript{30} Therefore, players’ medical rights and retirement benefits are governed by the CBA that each player signs and the NFLPA.

The NFL and NFLPA have taken great strides in their commitment to the player’s safety and post-football welfare with the new CBA. Currently, the CBA requires that all team physicians disclose any information that can potentially affect the players’ performance or their health.\textsuperscript{31} The CBA also requires that the NFL conduct research into the prevention and treatment of injuries commonly experienced by players.\textsuperscript{32}

With the aggressive physical nature of football, injuries to players are inevitable. It is estimated that nearly seventy percent of the NFL’s players will suffer an injury that requires medical care.\textsuperscript{33} Once a player is injured, the team is not required to pay for his medical treatments past the duration of his contract.\textsuperscript{34} Therefore, when these injuries are serious enough to permanently end the players career, the CBA provides benefits such as Workers Compensation.\textsuperscript{35} If a state does not have Workers Compensation laws, then the CBA requires player benefits to equal those of states that have such laws in place.\textsuperscript{36} The CBA also includes a retirement plan for its players’ known as the Bert Bell/ Pete Rozelle NFL Player Retirement Plan (“Retirement Plan”).\textsuperscript{37}

\textsuperscript{30} Id. at 612.
\textsuperscript{32} Id. at 172.
\textsuperscript{34} Id. at 266.
\textsuperscript{35} Collective Bargaining Agreement at 176.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 221.
Since the CBA has only been in place since 1993, it does not cover players that retired prior to 1993.\textsuperscript{38} Therefore, these retired players are not subject to any CBA provision, including the Retirement Plan.\textsuperscript{39}

**Background on Problems that Concussions Cause in the Long Run and the NFL**

There is not another contact sport where its athletes suffer as many serious head injuries as in football.\textsuperscript{40} Concussions can happen in numerous ways, from a player hitting his head on the ground to helmet-to-helmet contact between players. A concussion is defined as “a mild traumatic brain injury where the brain impacts the interior of the skull due to a blow to the head, fall, or violent head movement.”\textsuperscript{41} “Concussions have the power to affect a person’s memory, speech, balance, judgment, coordination, and reflexes.”\textsuperscript{42} Symptoms of an isolated concussion can include any of the following:

“headache, nausea, amnesia, balance problems, dizziness, fatigue, irregular sleeping patterns (i.e. trouble falling asleep, sleeping more than usual, sleeping less than usual, drowsiness), irritability, sensitivity to light, sensitivity to noise, increased sadness, nervousness, feeling more emotional, numbness or tingling, feeling slowed down, sensation of being “in a fog,” difficulty with concentration, difficulty with memory, and visual problems.”\textsuperscript{43}

It is estimated that there are 1,700 concussions suffered by players in the NFL each season.\textsuperscript{44} If a player receives an isolated concussion and that concussion is treated properly then

\textsuperscript{38} Plaintiff’s Complaint, 2011 WL 2731784.
\textsuperscript{39} Id.
\textsuperscript{40} Gerardi, 18 Sports Law. J. at 193.
\textsuperscript{42} Gerardi, 18 Sports Law. J. at 184.
\textsuperscript{43} Erika A. Diehl, What’s All The Headache?: Reform Needed To Cope With The Effects Of Concussions In Football, 23 J.L. & Health 83, 89 (2010).
\textsuperscript{44} Gerardi, 18 Sports Law. J. at 191.
it is not likely to cause death. An isolated concussion is where a concussion happens and the brain has a chance to properly heal before another concussion occurs. The problem occurs when a player suffers other concussions before the brain has a chance to properly heal from the first concussion. When this occurs, it is called second-impact syndrome. Providing the player with sufficient time to recover, until he does not have any concussive symptoms, is how to properly treat a concussion. A physician should make this determination.

“Retired NFL players are more likely to develop mild cognitive impairment ("MCI"), a form of dementia that can lead to Alzheimer's disease, than similarly aged men who didn't play football.” Players that sustain just three or more concussions during their career are five times more likely to be diagnosed with MCI, than players that do not sustain multiple concussions throughout their career. MCI is defined as a brain disorder in which thinking abilities are mildly impaired. “Dementia is not a specific disease.” Dementia symptoms affect the brain by imposing a “significant loss of intellectual abilities such as memory capacity, severe enough to interfere with social or occupational functioning” on the brain. Dementia affects the brains

46 See id.
47 Id. at 704.
48 Id.
49 Id.
50 Id.
52 Kain, 40 Rutgers L.J. at 699.
function in two ways, either by memory loss or impairing judgment.\(^{56}\) “Alzheimer’s disease is
the most common cause of dementia.”\(^{57}\) Alzheimer’s disease is a “slowly progressive disease of
the brain that is characterized by impairment of memory and eventually by disturbances in
reasoning, planning, language, and perception.”\(^{58}\) Alzheimer’s disease affects memory loss
because it destroys brain cells.\(^{59}\) Chronic Traumatic Encephalopathy (‘‘CTE’’) is “a progressive
neurodegenerative disease caused by repetitive trauma to the brain which eventually progresses
to dementia.”\(^{60}\) Therefore, NFL players that suffer multiple head injuries are more likely to
suffer various brain disorders later on in life than those that do not suffer head injuries.

**What Benefits are Available for Retired Players and the Hurdles Players Must Go Through to Get Retirement Benefits**

The NFL has not entirely turned its back on former players, who have suffered multiple
concussions and are currently harmed by their effects. The NFL has attempted to help players
and their families pay for medical treatments and other costs associated with brain injuries.
However, as this section of the paper will show, these benefits are interlaced with multiple
hurdles that must be jumped over in order to receive the benefits.

**The “88 Plan”**

In 2006, the NFL and NFLPA agreed to add a section to the CBA to help compensate
NFL players and their families for dementia.\(^{61}\) This compensation plan, the “88 Plan” was
created to help former Baltimore Colts tight-end John Mackey’s wife pay for her husband’s

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56 Gerardi, 18 Sports Law. J. at 187-188.
57 Id. at 188.
59 Gerardi, 18 Sports Law. J. at 188.
medical bills due to his dementia.\textsuperscript{62} Mackey wore the jersey number 88, hence the name of the “88 Plan.”\textsuperscript{63} Mackey was diagnosed with dementia in 2000.\textsuperscript{64} In 2006\textsuperscript{65}, Mackey was forced to live in an assisted living facility due to his dementia.\textsuperscript{66} In 2011, Mackey died.\textsuperscript{67}

The “88 Plan” will reimburse or pay for certain costs associated with dementia to former players and their families that have been diagnosed by a physician with expertise in the field of dementia.\textsuperscript{68} The plan pays $88,000 per year to any player that meets the qualifications described above in order to help cover medical expenses.\textsuperscript{69} To date the “88 Plan” has paid out over seven million dollars to over 100 NFL families who have players that are currently suffering from dementia.\textsuperscript{70} Before the creation of the “88 Plan”, the NFL made only four payments for claims relating to dementia in its retired players.\textsuperscript{71}

Sadly, this plan only covers vested players that have been determined by a board to have dementia and, therefore, does not cover every retired player suffering from brain disorders caused during their playing time.\textsuperscript{72} A vested player is determined under the NFL’s pension plan as a player that has played in three or more seasons.\textsuperscript{73} Multiple concussions have the potential to

\textsuperscript{62} Gerardi, 18 Sports Law. J. at 216-217.
\textsuperscript{63} Id. at 217.
\textsuperscript{65} Id.
\textsuperscript{66} See Gerardi, 18 Sports Law. J. at 216-217.
\textsuperscript{68} Collective Bargaining Agreement at 230.
\textsuperscript{69} Gerardi, Sports Law. J. at 217.
\textsuperscript{71} Carrabis, 2 Harv. J. Sports & Ent. L. at 380-381.
\textsuperscript{72} Collective Bargaining Agreement at 230.
\textsuperscript{73} Gerardi, 18 Sports Law. J. at 217.
occur before a player becomes vested. Therefore the “88 Plan” does not cover every player that is suffering from dementia as a result of concussions suffered during their playing time in the NFL.

The NFL’s Retirement Plan and its Problems

The NFL’s retirement plan is called the Bert Bell/Pete Rozelle NFL Player Retirement Plan. The Retirement Plan compensates players monthly for disabilities and retirement pensions. The Retirement Plan groups players into one of four disability categories: Active Football, Active Non-Football, Football Degenerative, or Inactive. The “Active Football” disability category refers to an active player receiving an injury on the playing field and that injury makes that player totally and permanently disabled at the time of the injury or within six months of when his NFL career ends. The “Active Non-Football” disability category refers to an active player that receives an injury not on the playing field that renders the player totally and permanently disabled within six months after his NFL football career ends. The “Football Degenerative” disability category refers to a player that becomes totally and permanently disabled due to a football injury within fifteen years of his NFL career ending. The “Inactive” disability category is a catch all where a player becomes totally and permanently disabled and

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74 Id. 
75 Id. 
76 Huebinger, 16 Sports Law. J. at 286. 
77 Id. 
78 Id. at 287. 
80 Id. 
81 Id.
does not fit into one of the other three disability classifications.\textsuperscript{82} The category a player is placed in determines the yearly maximum that the player will receive through the Retirement Plan.\textsuperscript{83}

The Retirement Board (“Board”) determines the category in which to place a disabled player.\textsuperscript{84} This Board is comprised of six members, three from the NFL and three from the NFLPA.\textsuperscript{85} The Board Members decisions are given “full and absolute discretion” on how to interpret the Retirement Plan when deciding whether a former player can receive disability benefits or to refuse that player disability benefits.\textsuperscript{86}

Federal courts will review the Board’s decision by an abuse of discretion standard.\textsuperscript{87} Under this standard of review, the Board’s decision will be upheld as long as the decision, “is the result of a deliberate, principled reasoning process and if it is supported by substantial evidence.”\textsuperscript{88} Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”\textsuperscript{89} Because of this high standard available to the board members, it is extremely difficult to overturn a denial decision as demonstrated by the statistic that only one decision has been overturned out of twenty-five court challenges.\textsuperscript{90} That decision involved the denial of disability benefits to Webster.\textsuperscript{91}

\begin{itemize}
\item \textsuperscript{82} Id. at 1115.
\item \textsuperscript{83} Huebinger, 16 Sports Law. J. at 287.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} LoVellette, 36 Pepp. L. Rev. at 1119.
\item \textsuperscript{86} Id. at 1120.
\item \textsuperscript{87} Id. at 1122-1123.
\item \textsuperscript{88} Id. (quoting Smith v. Cont’s Cas. Co., 369 F.3d 412, 417 (4th Cir. 2004)).
\item \textsuperscript{89} LoVellette, 36 Pepp. L. Rev. at 1124 (quoting Jani v. Bell, 209 F. App’x 305, 313 (4th Cir. 2006)).
\item \textsuperscript{90} LoVellette, 36 Pepp. L. Rev. at 1125.
\item \textsuperscript{91} Id. at 1126.
\end{itemize}
In 1998 Webster was diagnosed with brain damage and in 1999 he applied for disability benefits. He was denied disability benefits under the then current NFL retirement plan because of the Board’s conclusion that Webster’s mental disability did not occur while playing in the NFL. In reviewing an application for disability benefits, an applicant “will be deemed to be totally and permanently disabled if the Retirement Board finds that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit.” To be eligible under the “Active Player” portion of the disability section, a player must show that he became disabled while he was an active player or shortly after his retirement for the NFL.

In order to show that his permanent disability was due to brain damage that occurred during his “Active” time in the NFL, Webster sought care and treatment from various physicians, between 1997 and 1999, who all concluded that Webster had become disabled to a point of not being employable and that his disability was caused primarily by brain damage suffered while playing football. The Board disregarded Webster’s doctor’s medical opinions and required that Webster undergo evaluation by one of the Boards’ “own doctors” which surprisingly would also conclude that Webster was “completely and totally disabled.” The Board completely disregarded their own “neutral” doctor’s opinion as well as Webster’s doctors’ opinions and denied his claim.

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92 Jani, 209 F. App’x at 308.
93 Id. at 311.
94 Id. at 309 (quoting The Plan § 5.2).
95 Jani, 209 F. App’x at 309.
96 See id. at 310-311.
97 Id. at 311.
98 Id.
Webster’s estate was forced to bring a lawsuit on his behalf to address the injustice caused by the denial of Webster’s retirement benefits long after his unfortunate death.99 The Board claimed its denial decision was based its belief that Webster could not have been substantially unable to engage in another employment and that Webster was determined by various doctors to be in good health.100 In finding that the Board had abused its discretion, the court looked primarily to the Board’s own medical expert who found that Webster became “completely and totally disabled” while playing in the NFL.101

Webster’s troubling path to collecting disability benefits is a prime example of why former players are having issues obtaining access to these health benefits. After a Congressional investigation in 2007, it was determined that former players consider their access to health benefits to be extremely difficult.102 One problem is the extreme difficulty of getting a Retirement Boards decision overturned.103 Federal courts defer to the Retirement Board’s decisions and a court will only overturn a decision if it is shown that the decision was an abuse of discretion on the part of the Retirement Board.104 Another problem is that the Board has too much power and has a monetary incentive to deny ex-players that have legitimate claims and need access to these important and necessary health benefits. This could be attributed to why players are questioning the speed at which these disability claims are being administered.105 Players believe that the slow administration of claims is simply a “delay tactic.”106

99 Id. at 313.
100 Id. at 315-316.
101 Id. at 316.
102 Huebinger, 16 Sports Law. J. at 290.
103 LoVellette, 36 Pepp. L. Rev. at 1140.
104 See LoVellette, 36 Pepp. L. Rev. at 1122-1126 (discussing the abuse of discretion standard used by federal courts).
105 See LoVellette, 36 Pepp. L. Rev. at 1145.
106 Id.
Astonishingly, players believe that the Retirement Board’s delay tactics are being used simply to get players to die earlier and therefore relieving the Retirement Board of the obligation to pay a higher disability claim. For these reasons, NFL players commonly refer to the NFL’s Retirement Plan as the “Delay, Deny and Hope They Die” plan. As of 2007, the NFLPA did not recognize dementia as a football related injury of which ex-players could receive health benefits. This stance by the NFLPA was one reason that Congress became involved in the NFL’s concussion policy starting in 2007.

Progression of Studies Linking Concussions to Mental Disorders

Starting in 2003, evidence tying concussions and later in life mental disorders began amounting at an alarming rate. The NFL had knowledge of this and decided not to alert its players. Even if the NFL chose not to admit that there was a link, the NFL should have alerted its players to this potential danger. The NFL would not admit the link until its commissioner finally admitted the connection in 2009 after Congress put the NFL on the hot seat. This section will look at those studies linking concussions to later in life mental disorders and also look at what studies the NFL chose to look at and which ones the NFL completely disregarded when making its concussion guidelines in 2007.

2003 and 2005 University of North Carolina Studies

In 2003, a study found that NFL players that suffered from multiple concussions were three times more likely to suffer from clinical depression later in life than the general

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107 See id. at 1145.
population. This study was advanced in 2005. In 2005, a study was conducted by mailing a survey to 3,683 retired NFL players. The average player who completed this questionnaire was fifty-four years old and played on average six and a half years in the NFL. The study asked various questions about each of the players overall health. Of the players surveyed, 1513 (60.8%) stated that they had received one concussion during their playing time and 597 (24%) stated that they had received three or more concussions during their playing time in the NFL. The data suggested that a history of recurrent concussions might lead to memory impairment, mild cognitive impairment, and an earlier expression of Alzheimer’s disease. The most significant finding was that retired NFL players were at a 37% higher risk of being diagnosed with Alzheimer’s disease than other males of the same age. The problem with this survey is that each of the 3,683 retired players self reported their answers; therefore, memory problems that the players said they had were not independently verified.

2002-2007 Dr. Bennet Omalu and Dr. Kevin Guskiewicz

Mike Webster, Terry Long, and Andre Waters each suffered multiple concussions during their playing careers in the NFL. Before their deaths, each player “presented clinical symptoms of sharply deteriorated cognitive function and psychiatric symptoms such as paranoia, panic attacks, and major depression.”

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111 Id.
112 Gerardi, 18 Sports Law. J. at 197.
114 Gerardi, 18 Sports Law. J. at 197.
115 Univ. N.C., supra note 113.
116 Id.
117 Id.
118 Id.
119 Hanna & Kain, 28 FALL Ent. & Sports Law. at 9.
120 Id.
Dr. Bennet Omalu conducted autopsies on these three deceased NFL football players’ brains. Dr. Omalu, a forensic pathologist at the University of Pittsburgh, performed these autopsies on Webster in 2002, Long in 2004, and Waters in 2007. After conducting his study, Dr. Omalu concluded that the player’s deaths were partially caused by “CTE”, which was triggered by multiple concussions. Each of their brains contained “trademark neuropathological signs of CTE.” After conducting studies of the player’s brains, it was concluded that, “mild traumatic brain injuries can have a lasting effect, especially in a cumulative manner.”

Dr. Kevin Guskiewicz also studied ex-NFL players and found that retired players that suffered three or more concussions had five times the risk of developing MCI than players that did not sustain three or more concussions while playing in the NFL. At the time of these studies, Dr. Guskiewicz was the director of the Sports Medicine Research Laboratory at the University of North Carolina. As a result of these two doctors findings, the NFL was forced to review their concussion guidelines and to address the potential long-term effects of concussions in the NFL’s 2007 Summit on Concussions.

121 Id.
122 Kain, 40 Rutgers L.J. at 698.
124 Hanna & Kain, 28 FALL Ent. & Sports Law. at 9.
125 Id.
127 Kain, 40 Rutgers L.J. at 699.
129 Kain, 40 Rutgers L.J. at 699.
The NFL’s MTBI Committee

Beginning in 1994, former NFL commissioner Paul Tagliabue (“Tagliabue”) decided that the NFL needed to study concussions and their effects on players.\textsuperscript{130} Tagliabue decided that a committee, named the Mild Traumatic Brain Injury (“MTBI Committee”), would conduct the studies.\textsuperscript{131} Dr. Elliot Pellman (“Pellman”), an expert in rheumatology, would spearhead this committee.\textsuperscript{132} A rheumatologist is a physician that diagnoses, studies, and treats arthritis.\textsuperscript{133} It is both interesting and troubling that the NFL chose to place a rheumatologist as the committee chair instead of a medical professional with expertise in concussions.

While serving as chairman of the MTBI Committee, Pellman was also the team doctor for the New York Jets.\textsuperscript{134} This fact alone should have raised questions of potential conflicts-of-interest as to whether Pellman could provide objective leadership in determining what was in the best interests for the players safety or doing what was best for the NFL teams, i.e. getting the players back on the field as quickly as possible so they can contribute to their team winning.\textsuperscript{135} This type of conflict, involving the team doctor, is best described as “mixing business with medicine.”\textsuperscript{136} These studies would be used and relied on by the current NFL commissioner, Roger Goodell (“Goodell”), in crafting the NFL’s Guidelines for Concussion Management.\textsuperscript{137}

\begin{itemize}
\item\textsuperscript{130} Heiner, 18 Seton Hall J. Sports & Ent. L. at 259-260.
\item\textsuperscript{131} Id. at 260.
\item\textsuperscript{132} Id.
\item\textsuperscript{133} http://medical-dictionary.thefreedictionary.com/rheumatologist
\item\textsuperscript{134} Heiner, 18 Seton Hall J. Sports & Ent. L. at 260.
\item\textsuperscript{135} See Kain, 40 Rutgers L.J. at 708.
\item\textsuperscript{136} Id. (quoting Peter Kendall from Alan Schwarz, \textit{For Jets, Silence on Concussions Signals Unease}, N.Y. Times, Dec. 22, 2007, at A1).
\item\textsuperscript{137} Heiner, 18 Seton Hall J. Sports & Ent. L. at 260.
\end{itemize}
The MTBI Committee concluded that there is not an increased risk for repeat concussions after a player sustains his first one.\textsuperscript{138} This conclusion was opposite of other NFL studies that suggests an increased risk for repeat concussions after a player sustains his first concussion.\textsuperscript{139} The MTBI Committee further concluded, “return to play does not involve a significant risk of a second injury either in the same game or during the season.”\textsuperscript{140} This conclusion contradicted a 2003 survey by Dr. Guskiewicz, where he found that “players who have already suffered a concussion are more susceptible to additional head trauma anywhere from seven to ten days after the initial incident and a likelihood of recurrent injury with each successive previous injury.”\textsuperscript{141}

The MTBI Committee published its studies on concussions to the NFL.\textsuperscript{142} The problem with this publication and, subsequently, its use in formatting the NFL’s concussion guidelines is that various experts in the field of neurology contradicted the MTBI Committee’s conclusions.\textsuperscript{143} In fact, it was determined that Pellman’s conclusions were “at odds with virtually all published guidelines and consensus statements on managing concussions.”\textsuperscript{144}

Clearly, there are contradicting studies on almost all of Pellman’s conclusions. Pellman should have at least acknowledged these contradicting studies in his published reports that the NFL then used to create their concussion guidelines. The NFL should have also acknowledged

\textsuperscript{138} Id. at 261.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 263 (quoting Elliott Pellman et al., \textit{Concussion in Professional Football: Players Returning to the Same Game - Part 7}, 56:1 Neurosurgery 79, 79 (2005)).
\textsuperscript{142} Heiner, 18 Seton Hall J. Sports & Ent. L. at 260.
\textsuperscript{143} Id. at 261 (quoting Christopher Nowinski, \textit{Head Games: Football’s Concussion Crisis} 8-9 (2007)).
\textsuperscript{144} Heiner, 18 Seton Hall J. Sports & Ent. L. at 261.
the adverse findings to its players. Since the NFL continued to rely on the heavily criticized findings of Pellman, the NFL has opened the door to potential tort liability.\textsuperscript{145}

\textbf{2007 Summit on Concussions}

Amidst widespread speculation and controversy regarding concussions, the NFL held a mandatory meeting in Los Angeles in 2007. This meeting was called the “Concussion Summit” and was called to further study and discusses the incidence of concussions in the NFL.\textsuperscript{146}

During the Concussion Summit, the MTBI Committee studies that the NFL relied on were attacked.\textsuperscript{147} By this time in 2007, there was much scrutiny from outside experts and researchers who believed “players who suffer multiple concussions during their NFL career experience lifetime effects such as Alzheimer’s, depression, dementia, and other serious ailments.”\textsuperscript{148} In fact, Dr. Omalu and Dr Guskiewicz, along with other experts, gave presentations to the committee regarding their finding that a direct link existed between concussions and, later in life, mental problems.\textsuperscript{149}

In response to the 2007 Concussion Summit, the NFL did for the first time outline steps for teams, players, coaches, and team doctors to follow regarding managing concussions.\textsuperscript{150} Also, following the 2007 Concussion Summit, the NFL distributed a document to all of its players, called the NFL Player Concussion Pamphlet (“Pamphlet”).\textsuperscript{151} The Pamphlet addresses various questions regarding concussions. When asked if there is an increased risk of future harm, the Pamphlet states, “current research with professional athletes has shown that you should

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\textsuperscript{145} \textit{Id.} at 264. \\
\textsuperscript{146} \textit{Id.} at 277. \\
\textsuperscript{147} \textit{Id.} at 260-261. \\
\textsuperscript{148} \textit{Id.} at 277-278 (quoting Press Release, National Football League, NFL Outlines for Players Steps Taken to Address Concussions, (Aug. 14, 2007)). \\
\textsuperscript{149} Kain, 40 Rutgers L.J. at 721. \\
\textsuperscript{150} Heiner, 18 Seton Hall J. Sports & Ent. L. at 277. \\
\textsuperscript{151} \textit{Id.} at 278. 
\end{flushright}
not be at greater risk of further injury once you receive proper medical care for a concussion and are free of symptoms.”\textsuperscript{152} This Pamphlet continues by quoting, “current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly.”\textsuperscript{153} Lastly, and most detrimental to the NFL, the Pamphlet states “we want to make sure all NFL players are fully informed and take advantage of the most up-to-date information and resources as we continue to study the long-term impacts of concussions.”\textsuperscript{154}

The NFL’s position was directly adverse to Dr. Omalu’s findings after he conducted the brain autopsies of Mike Webster, Terry Long, and Andre Waters.\textsuperscript{155} The NFL, in making these false assertions of fact, relied solely on Pellman and the MTBI’s Committee reports which drew multiple criticisms from around the medical community-at-large.\textsuperscript{156}

Even after the 2007 Summit on Concussions, the NFL continued to deny and to misrepresent that multiple concussions have long-term consequences associated with the brain. Two months following the Concussion Summit, the NFL delivered this statement, “Current research with professional athletes has not shown that having more than one or two concussions

\textsuperscript{152} Id. at 279 (quoting Press Release, National Football League, NFL Outlines for Players Steps Taken to Address Concussions, (Aug. 14, 2007)).
\textsuperscript{153} Heiner, 18 Seton Hall J. Sports & Ent. L. at 279 (quoting Press Release, National Football League, NFL Outlines for Players Steps Taken to Address Concussions, (Aug. 14, 2007)).
\textsuperscript{155} See Heiner, 18 Seton Hall J. Sports & Ent. L. at 264-266.
\textsuperscript{156} Id. at 264.
leads to permanent problems.”¹⁵⁷ It is important to understand that “there is no magic number for how many concussions is too many.”¹⁵⁸

2009 Congressional Hearings

As a result of a University of Michigan study that found NFL alumni being diagnosed with Alzheimer’s disease at an alarming rate of 19% more than non-NFL men ages thirty to forty-nine, Congress decided it had seen enough and decided to intervene.¹⁵⁹ At the hearing, Goodell still refused to admit a “direct link between playing football and brain disorders.”¹⁶⁰ This statement was directly contradicted by Dr. Cantu’s statement that “there is growing and convincing evidence that repetitive concussive and subconcussive hits to the head in NFL players leads to a degenerative brain disease.”¹⁶¹

Since the 2009 Congressional hearing, the NFL has radically changed it concussion management polices for the best interest of the players.¹⁶² As a direct result of this Congressional hearing, the NFL finally acknowledged that concussions could have lasting consequences¹⁶³ and more specifically that “concussions can lead to long-term problems.”¹⁶⁴

¹⁵⁷ Hanna & Kahn, 28 Fall Ent. & Sports Law at 10.
¹⁵⁸ Id.
¹⁵⁹ Id.
¹⁶² Gerardi, 18 Sports Law. J. at 213.
¹⁶³ Id. at 213-214.
Torts Section

The NFL’s continuing denial of a link between concussions and mental decline has been analogized to the tobacco industry’s denial of a link between smoking cigarettes and later in life health problems. Like the cigarette industry, the NFL formed a research committee for the purpose of refuting and disagreeing with a number of experts regarding concussions. The MTBI Committee disagreed with Dr. Bennet Omalu and Dr. Kevin Guskiewicz’s scientific studies, as well as other experts. The NFL should have acknowledged their expert opinions. Furthermore, the NFL should place players on notice of the potentially devastating results that concussions can have on a player’s life after retirement.

The denial of a relationship between concussions and cognitive decline can also be analogized to asbestos exposure in the workplace. Attorney Ronald G. Feenberg described concussions as a “workplace danger whose effects can take 20 to 40 years to manifest.” If this is found to be true, it is estimated that the NFL is looking at potential liability upwards of $100 million from ex-NFL players filing workers compensation claims.

So the question becomes, does Webster and other retired players have a claim against the NFL? Probably yes, and this section will discuss potential claims that retired players and their families might have against the NFL.

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166 Kain, 40 Rutgers L.J. at 717.
169 Id.
170 Id.
1. Negligence

In 1932 Enfin vint Lord Atkin stated, “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour”.\(^{171}\) A claim for negligence must be supported by four elements: 1) a duty owed by the defendant to the plaintiff; 2) a breach of that duty by defendant; 3) a casual connection between the negligent conduct and the harm caused to the plaintiff; and 4) some form of damages suffered by the plaintiff.\(^{172}\)

**Duty**

In a negligence case, a plaintiff must establish that the defendant owes a plaintiff some form of a duty,\(^ {173}\) which is defined as “a legal obligation that is owed or due to another and that needs to be satisfied.”\(^ {174}\) Duty is “essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor’s part for the benefit of the injured person.”\(^ {175}\) If the duty is found, that duty exists at all times and the defendant must exercise reasonable care for the plaintiff’s safety.\(^ {176}\) Reasonable care is defined, as “the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under similar circumstances.”\(^ {177}\)

A duty can be established in a number of ways including undertaking.\(^ {178}\) Undertaking refers to when “an actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to the other has a duty of reasonable care to the

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\(^{171}\) Tony Weir, Tort Law, Oxford University Press 2002 pg. 29.


\(^{175}\) Dykema, 492 N.W.2d at 474 (quoting Moning v. Alfono, 254 N.W.2d 759 (1977)).

\(^{176}\) Kionka, Torts in a Nutshell 5th Edition at 114.

\(^{177}\) Black’s Law Dictionary 240 (9th ed. 2009).

\(^{178}\) Kain, 40 Rutgers L.J. at 720.
other in conducting the undertaking if: (a) the failure to exercise such care would increase the risk of harm beyond that which existed without the undertaking...”

The NFL undertook a duty to provide reasonable care when it first set up the MTBI Committee to research concussions. The MTBI Committee was specifically set up to study the effects of concussions on NFL players. A duty to warn occurs when a party realizes through specific facts that an act or omission of a fact exposes another to an unreasonable risk of harm. Therefore, the NFL had a duty to warn its players of any findings that could potentially put the players in harms way. The MTBI Committee knew that there were adverse studies to its own findings.

The MTBI Committee’s findings were used to formulate preventative team guidelines that the NFL would use to increase safety concerns around the NFL. The notice that the players received was the Pamphlet that outlined guidelines for the players to take. The NFL knew or should have known that this pamphlet would be relied on by NFL players and teams in determining when a player should go back into the game and also by players assessing whether or not the risk of future cognitive injuries is worth their returning to football after suffering a concussion.

A duty can also be found based on a special relationship, including that of an employer-employee relationship. An employer is defined as “a person who controls and directs a worker under an express or implied contract of hire and who pays the worker’s salary or

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180 Heiner, 18 Seton Hall J. Sports & Ent. L. at 260.
181 Kain, 40 Rutgers L.J. at 720.
182 Id.
183 Heiner, 18 Seton Hall J. Sports & Ent. L. at 264.
184 Id. at 260.
185 Id. at 278.
186 Dykema, 492 N.W.2d at 474.
wages.” An employee is defined as “a person who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.” The NFL is the employer and the individual players are the employees.

In determining if a special relationship exists, various factors are examined including “the foreseeability of the harm, the victim’s inability to protect himself from the harm, the costs of providing protection, and whether the plaintiff has bestowed some economic benefit on the defendant.” Once this special relationship is established between the employer and the employee, the employer is under a duty to use reasonable care to protect his or her employees. The duty to protect is placed on the party that is in control, the employer, because it is in the best position of the two parties to provide a place of safety.

Clearly, this employer-employee relationship exists between the NFL and its players. The NFL controls the players through its contracts with the players. The NFL and its thirty-two teams are in the best position to provide for the safety of players who sustain concussions given their resources to establish a concussion committee, hire competent and responsible team doctors and physicians, and to put in place sufficient concussion guidelines so that a player does not reenter a game too early and suffer later in life increases in the risk of being diagnosed with

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188 Black’s Law Dictionary 602 (9th ed. 2009).
189 Heiner, 18 Seton Hall J. Sports & Ent. L. at 282.
189 Id. at 281 (quoting Dykema v. Gus Macker Enter., Inc., 492 N.W.2d 472, 474 (Mich. Ct. App. 1992)).
190 Heiner, 18 Seton Hall J. Sports & Ent. L. at 281.
191 Dykema, 492 N.W.2d at 474.
192 Id.
193 Heiner, 18 Seton Hall J. Sports & Ent. L. at 282.
194 Id.
brain and mental disorders. The NFL has a duty to act as a reasonable person would in studying and coming up with its concussion guidelines.

The fact that an employer-employee relationship is found does not automatically make the players subject to workers compensation and thus bar any form of a torts suit. An employer can still be liable in tort for negligent misrepresentation.

A reasonable person will take notice of all studies, including those adverse to their beliefs, in assessing the proper guidelines for its league to follow regarding concussions. Moreover, a reasonable person will inform at least informed its players that concussions have the potential to cause serious health problems.

**Breach of Duty**

Once a duty is established between a plaintiff and a defendant, a breach of that duty must be established. This breach happens when an employer fails to use a reasonable standard of care. “If a reasonable person would recognize an act as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the magnitude of the risk outweighs the utility of the act in question.”

Starting as early as the 1920’s, the NFL became aware of the devastating effects of concussions on the brain. In 2005, the NFL became aware of studies potentially linking multiple concussions to later in life mental disabilities. This possibility was highlighted by the brain autopsies performed by Dr. Omalu. The NFL knew of the potential catastrophic link and

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195 *Id.* at 291-292.
196 *Id.* at 292.
197 *Id.* at 284.
198 *Id.* at 285 (quoting *RESTATEMENT (SECOND) OF TORTS* § 291 (1965)).
199 Plaintiff’s Complaint, 2011 WL 2731784.
200 Hanna & Kain, 28 Fall Ent. & Sports Law at 10.
201 Gerardi, 18 Sports Law. J. at 198-199.
completely disregarded these adverse findings when it summoned the MTBI Committee to come up with NFL concussion guidelines.\textsuperscript{202} The NFL failed to disclose the potential harmful link to its players until 2009.\textsuperscript{203} If a reasonable person would disclose the link to players then the NFL had a duty to disclose prior to 2009.

**Causation**

There must be a link between the defendant’s breach of that duty and the harm that is caused to the plaintiff. That link is called proximate cause and therefore a plaintiff must prove that the defendant’s breach proximately caused the plaintiff’s injuries.\textsuperscript{204} Proximate cause is “a cause that directly produces an event and without which the event would not have occurred.”\textsuperscript{205} Proximate cause has two parts, causation-in-fact and scope of liability.\textsuperscript{206} Causation-in-fact requires that the plaintiff must show that “but for the defendant's allegedly tortious act or omission, the injury at issue would not have occurred.”\textsuperscript{207} Scope of liability requires the plaintiff to show his injury was a “natural and probable consequence of the defendant's conduct, which in light of the circumstances, should have been foreseen or anticipated.”\textsuperscript{208}

The NFL, for whatever reason, decided to completely disregard multiple studies and qualified medical opinions linking concussions to later in life mental problems.\textsuperscript{209} As a direct result of players relying on the NFL’s stance that sustaining multiple concussions does not cause later in life mental disabilities, players returned to the game too quickly and sustained other

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\item \textsuperscript{202} Heiner, 18 Seton Hall J. Sports & Ent. L. at 261.
\item \textsuperscript{203} Gerardi, 18 Sports Law. J. at 213-214.
\item \textsuperscript{205} *Black’s Law Dictionary* 250 (9th ed. 2009).
\item \textsuperscript{206} *Fratter v. Rice*, 2011 WL 4348279 (Ind. Ct. App. 2011).
\item \textsuperscript{207} *Id.*
\item \textsuperscript{208} *Id.*
\item \textsuperscript{209} See Heiner, 18 Seton Hall J. Sports & Ent. L. at 261.
\end{itemize}
\end{minipage}
concussions before their first concussion was properly healed. Because their brains had not properly healed, they are at a higher risk for developing later in life mental disorders.\textsuperscript{210} If the NFL had warned its players of what it clearly knew about the potential effects of concussions, players might have made an informed decision regarding whether they wanted to continue playing. Since the NFL failed to do so, later in life mental disorders are the natural consequence of the NFL’s own negligence in failing to warn players and letting them play again before their brain has time to properly heal.

\textbf{Damages}

Finally, some form of damage must be proven to allow a plaintiff to recover from a defendant’s negligence. It is well documented that ex-NFL players who sustain multiple concussions have are five times more likely to be diagnosed with MCI than players that do not sustain multiple concussions throughout their career.\textsuperscript{211} It is well documented that ex-NFL players that sustained multiple concussions have a higher likelihood of being diagnosed with MCI, dementia, and Alzheimer’s disease.\textsuperscript{212} Or, even worse as in the tragic stories of Mike Webster, Terry Long, and Andre Waters, suffering multiple concussions was determined to be a direct cause in their premature deaths.\textsuperscript{213}

\textbf{2. Fraudulent Misrepresentation}

An actor who makes a misrepresentation is subject to liability to another for physical harm which results from an act done by the other or a third person in reliance upon the truth of the representation, if the actor (a) intends his statement to induce or should realize that it is likely

\textsuperscript{210} Kain, 40 Rutgers L.J. at 718.
\textsuperscript{211} Kain, 40 Rutgers L.J. at 699.
\textsuperscript{213} See Hanna & Kain, 28 FALL Ent. & Sports Law. 9.
to induce action by the other, or a third person, which involves an unreasonable risk of physical harm to the other, and (b) knows (i) that the statement is false, or (ii) that he has not the knowledge which he professes.\textsuperscript{214} The basic elements of a misrepresentation claim are a 1) false representation; 2) that is material; 3) made with scienter; 4) intended to induce reliance; 5) which actually is relied on; and 6) damages that occur as a result of the misrepresentation.\textsuperscript{215}

**False Representation**

A false representation, or a misrepresentation, is “the act of making a false or misleading assertion about something with the intent to deceive.”\textsuperscript{216} A false representation can also be found when a party makes a material omission.\textsuperscript{217} The NFL’s denial of a link between sustaining multiple concussions and later in life health risks is a material omission.\textsuperscript{218} Until 2009, the NFL stood firm with its assertions regarding no link between concussions and later in life cognitive decline.\textsuperscript{219} In 2007, the NFL handed out Pamphlets to its players regarding concussions.\textsuperscript{220} That Pamphlet misrepresented to players in the NFL various points regarding concussions including when asked if there was an increased risk of future harm, “current research with professional athletes has shown that you should not be at greater risk of further injury one you receive proper medical care for a concussion and are free of symptoms.”\textsuperscript{221} The Pamphlet continued by quoting, “current research with professional athletes has not shown that having more than one or

\begin{footnotes}
\item[214] \textsc{Restatement (Second) Torts} § 310 (1965).
\item[215] Kionka, Torts in a Nutshell 5th Edition at 517; See Kain, 40 Rutgers L.J. at 722-725.
\item[216] Black’s Law Dictionary 1090 (9th ed. 2009).
\item[217] Kain, 40 Rutgers L.J. at 722.
\item[218] \textit{Id.} at 723.
\item[220] Heiner, 18 Seton Hall J. Sports & Ent. L. at 279.
\item[221] \textit{Id.} (quoting Press Release, National Football League, NFL Outlines for Players Steps Taken to Address Concussions, (Aug. 14, 2007)).
\end{footnotes}
two concussions leads to permanent problems if each injury is managed properly.” Lastly, and probably most detrimental to the NFL, the Pamphlet stated “we want to make sure all NFL players… are fully informed and take advantage of the most up-to-date information and resources as we continue to study the long-term impacts of concussions.” The NFL also omitted material information from its concussion Pamphlet and from its 2007 press release about the life-altering findings of Dr. Omalu and Dr Guskiewicz.

Material

In order to be liable in tort for a misrepresentation, the statement or concealment must be of a material nature. Material has to be “of such a nature that knowledge of the item would affect a person’s decision-making.” As current NFL running back Brian Westbrook stated, “a lot of football players didn’t know, and I include myself, that if you have two-three--four concussions you’re at a higher risk of [incurring] dementia, early-onset of Alzheimer’s, [etc.].” If players knew and were informed of the risks involved with suffering multiple concussions, especially regarding later in life mental disorders, they might be less inclined to quickly reenter a game following repeated concussions. A person must assume that a NFL player will act as a rational human being and be concerned about his personal health and safety.

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224 Kain, 40 Rutgers L.J. at 723.
226 Hanna & Kahn, 28 FALL Ent. & Sports Law at 11 (quoting Brian Westbrook on Concussions and His Future in the NFL: Deleted Scenes from His Dan Rather Reports Interview, available at http://www.youtube.com/watch?v=W3kYWD_LE1A (last visited June 20, 2010)).
Sciente

In addition to a material misrepresentation, it must be proven that the statement was made with scienter. Scienter is “a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.”\textsuperscript{227} The NFL knew that the statements contained in its concussion Pamphlet were false or misleading and continued to stand by these statements even when particular portions were attacked and shown to be incorrect.\textsuperscript{228} Furthermore, the NFL knew that there were scientific studies directly linking concussions and long-term brain disorders starting in at least 2005.\textsuperscript{229} The NFL continued its stance until it finally admitted the link in 2009.\textsuperscript{230} The NFL knew that its findings, used in the publication and distribution of the concussion Pamphlet, are at odds with and heavily criticized by concussion experts.\textsuperscript{231}

\textbf{Intended to Induce Reliance}

To inform the players, the NFL published the concussion Pamphlet. The misrepresentations by the NFL were made so that players would not think anything of sustaining multiple concussions or treat concussions with due care.\textsuperscript{232} With no knowledge of the dire consequences of multiple concussions, the players continued to play through injuries rather than retiring early.\textsuperscript{233} In not retiring early, the NFL continued to make money off of these players.

\textbf{Actually Relied On}

Roger Goodell stated, ““We want to make sure all NFL players, coaches and staff members are fully informed and take advantage of the most up-to-date information and resources

\textsuperscript{227} Black’s Law Dictionary 1463 (9th ed. 2009).
\textsuperscript{228} See Kain, 40 Rutgers L.J. at 723-724.
\textsuperscript{229} Hanna & Kain, 28 FALL Ent. & Sports Law at 9.
\textsuperscript{230} Gerardi, 18 Sports Law. J. at 213-214.
\textsuperscript{231} See Heiner, 18 Seton Hall J. Sports & Ent. L. at 261.
\textsuperscript{232} Kain, 40 Rutgers L.J. at 724.
\textsuperscript{233} Id.
as we continue to study the long-term impact of concussions.”

This information was placed in a concussion Pamphlet. Players relied on the NFL’s findings regarding concussions to be complete and accurate. Because the players did not associate multiple concussions with later in life problems, they continued to play through concussions and played after they should have retired. Because the NFL continued to misrepresent and omit material information from its players regarding multiple concussions, NFL players were deceived into believing that it was safe to return to the hard-hitting game of football prematurely after suffering a concussion.

**Damages**

Players were never told about the consequences of suffering multiple concussions and were misled to believe exactly what the NFL wanted them to believe. Sadly, the link between suffering multiple concussions and later in life cognitive decline has been shown to be devastating. It has been shown that retired players who suffer three or more concussions have five times the risk of developing MCI than players that did not sustain three or more concussions while playing in the NFL. It is well documented that ex-NFL players that sustained multiple concussions have a higher likelihood of being diagnosed with MCI, dementia, and Alzheimer’s disease. Or, even worse as in the tragic stories of Mike Webster, Terry Long, and Andre

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235 Kain, 40 Rutgers L.J. at 724.
236 Id.
237 See id. at 723.
238 Kain, 40 Rutgers L.J. at 699.
Waters, suffering multiple concussions was determined to be a direct cause in their premature deaths.\TEXT{240}

3. Malpractice Against Team Doctor

NFL team doctors and trainers are in the best position on the football field to quickly evaluate and diagnosis a potential concussion following a play. But there are times when these team doctors and trainers do not look out for what is best for the player, and instead, look to what is better for the team. Multiple issues arise because of conflicts of interest between team doctors, the players, and the team. Team doctors are motivated to get the player out on the field as soon as they can so that the team has a better chance to win. The team doctor also has a fiduciary relationship to look out for the best interest of the player, which following a concussion should be keeping him sidelined until he has made a full recovery. Liability can also be imposed on the team physician.

In order to have a claim against a team physician, a plaintiff must prove 1) that the physician owned the plaintiff a duty based upon there special relationship as patient-physician; 2) a breach of that duty; 3) some form of injury; and 4) that the physicians breach caused the plaintiff’s injury.\TEXT{241}

When a physician-patient relationship is established, the physician has a fiduciary relationship toward the patient to act in good faith and fair dealing.\TEXT{242} This requires the physician to keep the patient informed of the nature of his condition.\TEXT{243}

Merril Hoge ("Hoge") encountered this problem while playing running back for the Chicago Bears in a preseason game.\TEXT{244} During a preseason game, Hoge suffered a concussion

\TEXT{240} See Hanna & Kain, 28 FALL Ent. & Sports Law. 9.
\TEXT{241} Lipsky, 18 Fordham Intell. Prop. Media & Ent. L. J. at 973.
\TEXT{242} \textit{Id.} at 974.
\TEXT{243} \textit{Id.}
that he described as an “earthquake”.245 After receiving this “earthquake” concussion, Hoge returned too quickly to the game of football and, subsequently, he suffered multiple concussions before his brain had a chance to properly heal due to the first concussion.246

After retiring early from the NFL, due to post concussion syndrome, Hoge sued the team doctor of the Bears alleging failure to warn.247 In Hoge’s lawsuit against Dr. Munsell, Hoge alleged that Dr. Munsell did not warn him of the dangers and risks of sustaining multiple concussions and allowed Hoge to return too quickly to playing without fully checking up to ensure that he was ok after the first concussion.248 Because Dr. Munsell did not warn Hoge, Hoge claimed that Dr. Munsell did breach his duty as a physician by failing to “exercise the skill and care of a physician for a professional football team who undertakes the return-to-play decision authority for a player who has sustained a concussion.”249 The jury came back with a verdict in favor of Hoge awarding him for both compensatory damages along with pain and suffering damages.250

244 Kain, 40 Rutgers L.J. at 713.
245 Id. at 713-714.
246 Id.
247 Id. at 714.
248 Id. at 714-715.
249 Id. at 715 (quoting Plaintiff’s First Amended Complaint at 3, Hoge v. Munsell, No. 98 WL 0996 (Ill. Lake County Ct. July 5, 2000)).
250 Kain, 40 Rutgers L.J. at 717 (Hoge was awarding $1.45 million for the remaining two years on his contract and $100,000 for his pain and suffering).
Defenses of NFL

If the NFL is sued for its negligence and fraudulent misrepresentation, the NFL will have a few possible defenses. This section will outline possible defenses.

Assumption of Risk

The NFL might argue that NFL players assume the dangerous risks involved with the game of football. Assumption of the risk is where “a plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.”\textsuperscript{251} The NFL was negligent in failing to warn players of the dangers associated with multiple concussions and using grossly flawed medical studies to craft the NFL 2007 concussion guidelines. However, the NFL players knew that football was a dangerous contact sport with the likelihood of receiving various injuries while playing football.

For the assumption of the risk defense to work, a plaintiff must have actual knowledge of the risk associated with their actions.\textsuperscript{252} Actual knowledge is defined as “direct and clear… that would lead a reasonable person to inquire further.”\textsuperscript{253} This is where this defense is likely to fall apart. Until 2009, the NFL denied that concussions could have lasting consequences\textsuperscript{254} and more specifically that “concussions can lead to long-term problems.”\textsuperscript{255} Therefore, there was no way that NFL players, both current and former, could know that their continuing to play through concussions had the potential to harm them later in life until the NFL finally acknowledged the link in 2009. A court will likely use 2009 as the year when the NFL will claim, and likely

\begin{itemize}
\item \textsuperscript{251} \textit{RESTATEMENT (SECOND) TORT}$\S$ 496A (1965).
\item \textsuperscript{252} Hanna & Kain, 28 FALL Ent. & Sports Law at 11.
\item \textsuperscript{253} \textit{Black’s Law Dictionary} 950 (9th ed. 2009).
\item \textsuperscript{254} Gerardi, 18 Sports Law. J. at 213-214.
\item \textsuperscript{255} \textit{Id.} at 214.
\end{itemize}
prevail under the assumption of the risk defense because players no longer can argue that they lack actual knowledge of the dangers associated with concussions.

**Contributory Negligence**

Contributory negligence is where a plaintiff’s actions fall below the standard to which he should conform and because of his acts, he suffered injuries.\(^{256}\) A plaintiff must protect and conduct himself as a reasonable man does under similar circumstances.\(^ {257}\) There also must be a causal relationship linking the plaintiff’s negligence to the injury he sustained because of the defendant’s negligence.\(^ {258}\)

“The plaintiff's contributory negligence may be either: (a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or (b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.”\(^ {259}\)

The NFL can argue that players were negligent because they decided to return too quickly after suffering a head injury or by concealing their symptoms by not telling their team doctors.\(^ {260}\) After sustaining a head injury, a reasonable person will sit himself out and not try to “fight through” the pain. In 2007, the NFL did publish its concussion findings in the Pamphlet that they gave the players as guidelines to follow.\(^ {261}\) According to the guidelines, a player is supposed to report any concussion-like symptoms to their team doctor.\(^ {262}\) A reasonable person will take the Pamphlet’s advice and report any concussion-like symptoms to their team doctor. If

\(^{256}\) **RESTATEMENT (SECOND) TORT** § 463 (1965).
\(^{257}\) **RESTATEMENT (SECOND) TORT** § 464 (1965).
\(^{258}\) See **RESTATEMENT (SECOND) TORT** § 465 (1965).
\(^{259}\) **RESTATEMENT (SECOND) TORT** § 466 (1965).
\(^{260}\) Hanna & Kain, 28 FALL Ent. & Sports Law. at 12.
\(^{261}\) *Id.*
\(^{262}\) *Id.*
a court finds that players were contributory negligent, this defense would bar any recovery that the players have against the NFL for negligence.263

**Conclusion**

It is long overdue for the NFL to acknowledge the harm it has caused players through its own negligence and misrepresentations by making adequate changes to its current retirement plan. If the NFL does not, many players and their families’ lives will be harmed in the future. Many lives have already been affected negatively through the NFL’s actions or inactions.

This paper has shown through Webster’s story, why players are demanding that the retirement system be changed so that they can receive what they are justly entitled to. It has shown that without change, the Retirement Board continues to have an incentive to deny or delay processing claims in the hopes that a player will die and the Retirement Board will then be able to pay a lesser amount of money than it would if the player was alive.

Furthermore, this paper has walked, step by step, through the progression of medical studies linking concussions to later in life cognitive decline. This paper has shown when the NFL became aware of this devastating, potentially life ending link, and how the NFL did absolutely nothing but refute and deny these facts.

Because of the NFL’s disregard for credible research conducted by experts, the NFL must be held liable for the damage that they have caused current and former players, and their respective families. This paper has paved a road map for players’ claims against the NFL for negligence and misrepresentation and supplied the necessary facts under each element for them to likely succeed in a court of law. This paper has also supplied possible defenses that the NFL can use in their defense.

263 *Id.*
In conclusion, the NFL must be held accountable for its failure to communicate the risks of multiple concussions so that former players can get the medical help they need and deserve. Accountability is critical so that players have the best opportunity to live a full and productive life after playing football in the NFL and minimize the risks of a catastrophic mental disability.