GETTING YOUR BELL RUNG: ANALYZING THE CONCUSSION LAWSUITS AGAINST THE NATIONAL FOOTBALL LEAGUE FROM FORMER PLAYERS

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There has been a great and divisive conflict between the National Football League and its former players about head injuries. Former players are claiming negligence by the league in the addressing the issues of head injuries. This paper investigates the argument by both sides in past, present, and possible future litigation, and further explores head injuries. This article explains that the current litigation, while useful, will not succeed because of its obscurity and the presumptions that it makes regarding concussions. This article proposes a new lawsuit that would combine aspects of the Major Tobacco Settlement Agreement of 1998 and the results of Asbestos Litigation to create a straightforward solution for both former players and the National Football League, in regards to concussions.

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I. INTRODUCTION

A PART OF THE SIDELINE CONCUSSION ASSESSMENT TEST ADOPTED BY THE NATIONAL FOOTBALL LEAGUE (NFL) ON FEBRUARY 25, 2011, READS “Signs and symptoms of concussion may be delayed, and therefore it may be prudent to remove an athlete from play, not leave them alone, and serially monitor them over a period of time. WHEN IN DOUBT, TAKE A TIME OUT.”¹ With the abundance of opinions from the major sources of media in the United States our society needs to slow down to take a time-out to look at the implications of the sport of football.²

The National Football League operates as a 501(c) 6 non-profit organization that has almost 9 billion in profits in a single year; therefore they are not taxed like a normal corporation under the law of the United States.³ Potential lawsuits that pay dividends for former players for healthcare that potentially prove negligent use of information about head injuries and the nature of the sport could cost the National Football League millions of dollars.

The next few sections of this article will introduce concussions and make the National Football League responsible for informing players about the dangers of football as well as providing healthcare for former players who were involved in these injuries without education if their collective bargaining agreements support them. These current lawsuits are a step in the right

² I did not actually add those capital letters, that’s actually how the pamphlet looks that is given to medical professionals and team trainers/doctor’s on the sidelines of actual games. I wish I would have added the capital letters though, because obviously the message is not getting through with concussed players re-entering into games every week.
³ IVN. http://ivn.us/2013/02/03/super-bowl-profits-more-than-a-game/
That is a lot of money to people that are not CEO’s of banks.
direction to solving the concussion issue, but I will outline a system comprised of parts of the tobacco and asbestos lawsuits which will hopefully provide an ultimate endpoint of these lawsuits against the NFL pertaining to concussions.

II. CONCUSSIONS

A. Concussion Overview

A concussion is defined as “a traumatic brain injury that alters the way your brain functions.” The effects are usually temporary, but can include problems with headache, concentration, memory, judgment, balance, and coordination. Every concussion injures your brain to some extent and needs time to rest and heal from the injury. Repeated concussions have the ability to be extremely dangerous to overall health and that is the problem with the NFL. Players receive a lot sometimes in the hundreds and thousands over a 10+ year career as a professional football player, which can be quite the large problem when it comes down to it. Did players realize the long-term damage when they were playing football? One would have to argue no, or they wouldn’t have rushed back onto the playing field.

B. Causes of Concussion

Why are concussions such a huge problem in the NFL? Concussions are caused by jolts, blows, or bumps to the head, or violent shakes of the upper body. Concussions are common in all levels of football, youth, high school, college, and professional due to the nature of the game of football. Because all concussions injure the brain to some extent, one of the largest problems

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5 The backlash of concussions have only occurred in the past 10 years, as technology has given us better examples of what these diseases do to us and how they are caused.
6 Something that happens quite often in such a violent sport as football, watching someone get tackled at full speed in a violent manner is quite entertaining. Especially if it’s a player you particularly don’t like.
in the National Football League is that players feel good enough to play but the brain damage has not fully healed which usually leads to a re-injury of the brain when they re-enter into play.  

C. Effects of Concussions on Health

Concussions have many symptoms that vary on type of injury. Short term effects include dizziness, headaches, loss of vision, loss of consciousness, memory loss, confusion, slurred speech, nausea, sensitivity to light and noise, disorders of taste and smell, and loss of balance. In the National Football League reports have stated that most players have suffered from them. Bill Romanowski, a former NFL linebacker (1988-2003) turned nutritionist, stated in his autobiography that he did not complete a game in which he did not suffer from a concussion.

Mr. Romanowski still suffers from concussions when he does any physical exercise and also has completely lost his sense of taste and smell. This quote embodies a very dangerous reality for the National Football League and its players. The National Football League either did not know about the effects of concussions fully, or chose to ignore the warnings of doctors and neuroscientists or the inherent risks of playing football are more hazardous than they thought out to be. Advancements in technology and neuroscience have proven that concussions need to be studied even more.

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7 This could be caused by poor physicians, poor concussion knowledge, lingering symptoms (Cases where symptoms do not occur suddenly) and players just trying to play the game of football without being injured or a cultural problem of the NFL, where concussions are signs of weakness in the machismo of the league.

8 Supra Footnote #4.


Mr. Romanowski’s quote from the autobiography reads- (Contd. On Next Page)

"I left the Raider parking lot two weeks before I retired and I could not find my home. That's what concussions did to me. I went to the doctors that the NFL sent me to and you know what they said? 'Time is your friend. We don’t know if you'll end up like Muhammad Ali and there's nothing you can do.' I remember having concussions, sticking an ice bag on my head at halftime, wobbling off the field, stick an icebag on my head, come out the second half and play. Every time. You don't know how many times that happened to me. You get concussed ever time you run into somebody with your helmet. It's just a matter of how bad the concussion is but your brain is getting concussed. It's in a helmet where you're flying around. There's never a game where I did not see stars. Ever

If a doctor told me that I might end up like Mr. Ali, I think I would either stop the activity or change doctors.

10 The National Football League doctors were obviously unaware of the long term health effects of concussions. Do you think these professionals would just say “Eh, We don’t know what concussions do to the league, let’s keep subjecting players to this kind of physicality week after week for profit” or “maybe we should look more into this.”
III. Medical Jurisprudence

A. Advancement in Technology and Neuroscience in Regards to Human Brain

There has been advancement in neuroscience because of the rapid growth of technology in the past 20 years. The brain is easier to map with computers and MRI’s than ever before with these new advances. In April 2013, President Barack Obama and The White House launched “The Brain Initiative” a program that donates millions of dollars into mapping the human brain.\(^\text{11}\) This program could lead to more understanding about Alzheimer’s disease, epilepsy, autism, schizophrenia, and the health effects of concussions.

Although this led to backlash, as usual with any million dollar proposal by the President\(^\text{12}\) the findings could have numerous possibilities for those affected by brain issues including the litigation between the National Football League and its former players.

IV. NFL and Concussions

A. NFL and Concussion History

The National Football League was founded in 1920 and concussions have always been thought to be a part of the game of football with no serious long-term implications for the players. Head Injuries were obviously becoming more and more frequent but a helmet was thought to solve the majority of these problems. The National Football League created a commission in 1994 known as the Mild Traumatic Brain Injury Committee to diagnose

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\(^{11}\) [http://www.purdueexponent.org/campus/article_d4d95701-c50c-5d51-8fd1-0e7e15cbfe2.html](http://www.purdueexponent.org/campus/article_d4d95701-c50c-5d51-8fd1-0e7e15cbfe2.html). This program was then mocked by late night television hosts and comedians everywhere, Jay Leno joked that “If anyone needs their brains mapped, it’s Congress.”

\(^{12}\) Think of U.S. Senator Tom Coburn’s (R-Oklahoma) “Wastebook.” Oddly enough, one of the top 3 things in Senator Coburn’s wastebook is the fact that the NFL is listed as a non-profit and therefore cannot be fully taxed. Roughly costing the US government, 90 million dollars of tax revenue.
concussions in the league.\textsuperscript{13} This committee has been criticized since for providing what turned out to be incorrect information leading to the large lawsuit that is the key of this article. The argument of the players in these cases are that they have been sustaining concussions playing football and the NFL should have expanded safety measures in 1994 after the committee found the initial results. The NFL is arguing that the players assume “inherent” risks of playing football.\textsuperscript{14}

The NFL recently has launched a program and website called “NFL Evolution” that marks the history of safety innovations in the game of football. It teaches the proper methods of tackling, gives safety advice to parents, players, and fans of the game, and also lists medical research information regarding issues pertinent to the NFL.\textsuperscript{15} The fact that the league is spending money on a public relations website that teaches people about the dangers and the safety advancements and calls for more is an important step in the right direction for the league. This website however has not stopped the league from implementing new rules to reduce the dangers of the game and has not stopped former players from suing the league.

\textbf{B. Current Lawsuits Against the NFL Regarding Concussions}

Recently, 4,200 of the leagues former 12,000 players have joined a lawsuit to sue the National Football League claiming that the league “glorified violence” and profited off the violent and damaging tackles that led to head injuries, and that the league withheld scientific

\textsuperscript{13} ESPN. http://espn.go.com/nfl/story/_/id/9151540/court-hears-arguments-nfl-concussions
\textsuperscript{15} http://www.nflevolution.com/home. It seems like a cover-up sham that this website was created when these lawsuits began being filed in actual courts saying that the NFL had not done enough to teach people about the risks of the game.
information and spread misinformation.\textsuperscript{16} This lawsuit is a very important upcoming tort in American culture and sports. Football is embedded in our culture and therefore it would be very damaging if a judge finds the organization of football to be at fault for the millions of injuries that occurred to players.

These former players in these lawsuits have one major argument going for them. That they did not know the inherent risk of playing football with concussion, and that the league did benefit over their promotional strategies because the NFL is the most profitable sports league in the world.\textsuperscript{17} These former players have been battling depression, mental illness, dementia, headaches, Alzheimer’s disease and blame the NFL for lying to have them put back onto the playing field after sustaining concussions. Some of the players on the lawsuit have committed suicide to deal with their mental issues and other players on the lawsuits have no current problems, however they want monitoring for fear of developing the symptoms that other players have.\textsuperscript{18} The players are also arguing that that NFL intentionally hid internal documents describing it as “fraud” and a “cover-up,” while “promoting and glorifying” the violence of the game in promotional marketing.\textsuperscript{19} These arguments will be covered in the next section of this article in more depth.

\textsuperscript{16} Supra Footnote #13. The argument for this is on very loose basis and is an essential pillar of the lawsuits, if the NFL can produce the findings of this committee and prove that they didn’t conceal anything and that the technology did not prove anything in the early 90’s, than this lawsuit by the players is trashed.

\textsuperscript{17} Supra Footnote #3.

\textsuperscript{18} Supra Footnote #8. It seems to me that during their playing years, players are in the best health from the constant training they are doing to stay in shape, but after they retire they go from age 45 to 95 overnight because all of the damage finally catches up on them.

V. Responsibility and Obligation

A. Who’s Responsible? The NFL.

No matter what the court determines in these lawsuits against the NFL, the league is responsible for the current state of the game of football. The truth of the matter is whether or not the NFL did or did not know about dangers of football, they do now and they need to take extreme safety implementations to insure no further damage. Fans must adapt to these changes in the rules and realize that it is for the betterment of society even though it may decrease entertainment value of football. The NFL would not have the money or the lawsuits if it was not for the violent nature of the game of football, which is played by some of the strongest and fastest athletes in the United States. The NFL is responsible for the safety of its players and saying that they have done enough is inappropriate and wrong.

B. Facts About the NFL and Concussions

The facts of NFL players and concussions are pretty disturbing. A study conducted by the University Of North Carolina Center Of Retired Athletes showed that the rate of concussions strongly correlates with depression. In this study, 20.2% of 532 players with three or more concussions had been diagnosed with depression. This rate of diagnosed depression is three times the rate in concussed players than in non-concussed players. The issue of depression is something that needs to be studied further as suicide in former players is becoming an issue. In December 2012, Kansas City Chiefs player Jovan Belcher committed a murder-suicide with his fiancé. This was the fourth suicide in the previous eight months with former players, and all showed signs of brain damage, more than likely caused by concussions.

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22 Supra Footnote #19.
C. New and Proposed Rule Changes in the NFL Toward Concussions

In the past several years of the National Football League several rules have been changed to enhance player safety with criticisms going toward NFL Commissioner Roger Goodell for implementing these rules. These rules include the legal ways of tackling, reducing kickoff distance, and most recently not letting ball carriers lead with the crown of their helmets while running. Not only do these rules harm the integrity of the game of football they also harm the reputability of Commissioner Goodell in controlling players and the ownership of the league. It will be interesting to see how these issues will play themselves out in the future.

D. The Problems with Collective Bargaining Toward Concussion Lawsuits

Another problem with these lawsuits is the problem of collective bargaining agreements in the league. The players signed these legally binding contracts to play the game of football. They player have to show that they were violated. These collective bargaining agreements regulate the working conditions of the employees and employers. If injuries are covered in the collective-bargaining agreements then the players more than likely are legally bound to the obligations they are upheld too. That is why in the next section I will create my own lawsuit that would be idea for former players to use if they want to have a chance to win against the league in these lawsuits.

VI. The Lawsuit That Would Win

A. Obscure Current Lawsuits

\[\supra\text{Footnote #15. We can only speculate but seemingly these injuries are all in response to head injuries as they all limit the violence of the game of football.}\]

\[\supra\text{Footnote #16. All of which were criticized by the sports media and even former football players.}\]

\[\supra\text{Footnote #17. Violations include the concealment of facts that vitally impacts player safety- aka concussions.}\]

\[\supra\text{Footnote #18. They usually are.}\]
The court will probably dismiss the most recent cases of concussion lawsuits that are outlined in this article. Why is that? The lawsuit is vague and there is no physical evidence to back up the argument of the court that has been found yet.\textsuperscript{27} The Collective Bargaining Agreements are too complicated to deal with as well. These cases go down to a basic negligence and civil liability case. Is the National Football League committing the tort? Or is the game of football committing the tort? It’s the game of football in most of these cases. Players that have shown no signs of injuries and are suing as a protection against future developments will be automatically dismissed. Those with issues of Alzheimer’s, dementia, depression, and schizophrenia will be difficult to argue for as other people develop these issues that do not play football. The causation of these issues is not fully understood and therefore the connection more than likely will be seen as too hazy. The obscurity of these issues depletes their overall argument and weakens the lawsuit.

\textit{B. Tobacco, Asbestos, and Concussions}

What would a lawsuit need to be more successful in achieving the goals of the players in these current lawsuits? An ideal lawsuit would have specific evidence that the NFL purposefully concealed information they had in regards to neuroscience on concussions therefore these lawsuits would be similar to those of the “Big Tobacco” corporations in the 1980s and 1990s.\textsuperscript{28} I think that the Master Tobacco Settlement Agreement is a more realistic plan for the court to push the National Football League in, instead of individual private liability torts with every single

\textsuperscript{27} Obviously if it is found, then that changes my opinion completely.

\textsuperscript{28} Ohio Attorney General. \url{http://www.ohioattorneygeneral.gov/Files/Publications/Publications-for-Business/Master-settlement-agreement}

It would be interesting to see the resolution to this issue, similar to the Lawsuits against the Tobacco Corporations settled in 1998 under the Tobacco Master Settlement Agreement. This settlement exempts the major tobacco corporations from private tort liability but also forced them to pay annual payments and change marketing plans. It would be interesting to see who enforces the National Football League’s following of this policy since they are set up as non-profit corporation and not as a real corporation and would have to have a different background for distributing money and advertising.
former player. These lawsuits would need to show that the collective bargaining agreements had been violated by the league because of this concealment and would have to get rid of the players that do not have developed symptoms or issues stemming from concussions yet.\footnote{I think ultimately that these lawyers need expanded research on the human brain and concussions to help courts make final decisions, research that has not fully been acquired yet.} If you were to do this settlement you could make a system for players similar to asbestos cases in the United States. Asbestos is the longest running tort litigation in the United States and in these cases once the extent of the claimed injuries are understood, the two sides, with the court, negotiate a settlement that resolves all or most claims, usually using some type of administrative scheme.\footnote{Carroll, J. Stephen, & others. Asbestos Litigation. Rand Corporation. 2005. Accessed Via: \url{http://www.rand.org/pubs/monographs/MG162.html} This manual says that: The (Asbestos) litigation arose as a result of individuals’ long-term and widespread exposure to asbestos, which can cause serious and sometimes fatal injuries, and as a result of many asbestos product manufacturers’ failure to protect workers against exposure and failure to warn their workers to take adequate precautions against exposure. This sounds strangely like the concussion problem and the NFL to me, wonder if companies argued that workers take “inherent” risk when working?} Combined with a settlement to change their marketing and add more awareness and having a fund setup for former players that can prove that concussions injured them is the way to go if the National Football League wants to survive in a changing world where technology and neuroscience might replace ignorance and the game of football.

VII. CONCLUSION

These lawsuits have the potential to be a large problem for the National Football League that could lead to its downfall. No matter what the court determines in these lawsuits against the NFL, the league is responsible for the current state of the game of football. The truth of the matter is whether or not the NFL did or did not know about dangers of football, they do now and they need to take extreme safety implementations to insure no further damage. Even though these lawsuits have some very big issues, further research and evidence could change the entire
outlook of this litigation leading to the imminent downfall of the game of football. This research should focus on an approach that is a combination of the Tobacco Master Settlement Agreement and the result of the tort litigation found in former Asbestos lawsuits around the United States. The NFL is responsible for the safety of its players and saying that they have done enough to protect the players is inappropriate and wrong.