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## NFL Brain Damage Epidemic Continues

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Over 300 lawsuits, incorporating nearly 5,000 former players as plaintiffs, have been filed against the NFL. Most cases allege negligence, fraudulent concealment and fraudulent misrepresentation regarding the NFL's failures to protect its players from later-in-life cognitive and mental health issues and its concealment of those risks. The Judicial Panel on Multi-District Litigation has consolidated these cases, pursuant to 28 U.S.C. § 1407, in the Eastern District of Pennsylvania before the Honorable Anita B. Brody.

Brain damage in former NFL players is an epidemic that constitutes a national health crisis. Evidence of progressive, advanced brain damage, commonly referred to as Chronic Traumatic Encephalopathy ("CTE"), has been found in the neuropathological postmortem analysis of numerous former NFL football players. CTE is associated with symptoms of irritability, short-term memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, heightened suicidality and progressive dementia.

While former NFL players knew that playing professional football could precipitate bum knees, aching backs, and mangled fingers, none imagined that their chosen careers would ultimately alter their essence, change their personality, or riddle their brain with forgetfulness, confusion and irritability. To ask "What's for dinner?" two hours after eating; to have a towel wrapped around the waist, but not remember whether you are going into, or coming out of, the shower; to tell friends, children, wives the same story once, twice, or three times in the same conversation; to have relationships fall apart; to contemplate suicide...these are all unfortunately typical experiences for the proud men that strapped on their shoulder pads and helmets and went to war during practice and on Sunday afternoons for our entertainment.

These authors are acutely aware of the devastation CTE can inflict upon former players through our representation of many former players or their

families, including the family of former Chicago Bears safety Dave Duerson. In Duerson's case, post-mortem neuropathological review demonstrated CTE, resulting in significant deterioration in his brain's frontal cortex, which controls the ability to recognize future consequences, to choose between good and bad activities; the temporal cortex—areas of the brain that control judgment, inhibition and impulse control; in the amygdala, an area of the brain that monitors impulse control, mood and behavior; and in the hippocampus, an area of the brain responsible for memory.

While the specific incidence and prevalence of CTE in former NFL players is unknown, a recent medical journal reports that 33 of 34 (i.e., 97 percent) of professional American football player's brains, analyzed post-mortem, demonstrated CTE.<sup>1</sup>

CTE is not a new phenomenon. CTE was first reported in 1928 by a New Jersey pathologist and originally termed "punch drunk" aka "dementia pugilistica." Yet, in a professional sport where the head is consistently and continually struck, the NFL sat on the sideline for years, purposefully ignoring the issue.

Then, in 1994, the NFL Committee on Mild Traumatic Brain Injury embarked upon a propaganda scheme designed to mislead NFL players and retirees regarding the long-term ramifications of concussions, sub-concussive brain trauma and repetitive brain trauma. From its bully pulpit, the NFL emphatically and repeatedly professed that brain damage in former NFL football players was not a result of brain trauma sustained during the players' NFL careers.

In 2004, the NFL wrote that there exists "no evidence of worsening injury or chronic cumulative effects"<sup>2</sup> from multiple concussions and that "there is no evidence...of widespread permanent or cumulative effects of single or multiple mild traumatic brain injuries in professional football players."<sup>3</sup> As recently as 2006, the NFL "concluded that mild TBIs in professional football are not serious injuries."<sup>4</sup>

Such pronouncements were diametrically opposed to the lion's share



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of research in the neurological community. These statements were also in direct contradiction to the realities facing NFL retirees. In 2002, Mike Webster, a four-time Super Bowl Champion with the Pittsburgh Steelers, died at age 50 after a 16-year NFL career. During his retirement, Webster suffered from amnesia, dementia, depression and acute bone and muscle pain. Although the NFL awarded Webster benefits for "brain damage due to football," when post-mortem analysis of Webster's brain revealed that Mike Webster's brain was deteriorating due to CTE, the NFL unsuccessfully demanded that the peer-reviewed medical journal, *Neurosurgery*, retract the paper detailing Webster's CTE, as it contradicted the NFL's propaganda scheme. Subsequent suicides of Justin Strzelczyk, Terry Long, Andre Waters, Dave Duerson and Junior Seau served as constant reminders of the catastrophic impact of CTE.

Would the NFL's acknowledgment of the risk of lifelong brain damage have resulted in players choosing not to participate in a sport that could earn them substantial paychecks? Maybe, maybe not. But, if the NFL would have taken the necessary steps to oversee and protect its players by warning them of the dangers of head traumas and properly educated and trained all persons involved with NFL teams in the recognition, prevention and treatment of concussive brain injuries, then con-

cussive and sub-concussive head trauma would have been significantly reduced, and concussed players' brains would have been given adequate time to recover prior to being subjected to further trauma, thus greatly reducing the risk of permanent damage to the brain.

The NFL has moved to dismiss the players' claims based upon a pre-emption argument (i.e., that the collective bargaining agreements between the NFL Players Association and the NFL players govern players' grievances). Before ruling on the NFL's motion to dismiss the cases, Judge Brody ordered the parties to mediation with retired U.S. District Judge Layn Phillips.

On August 29, 2013, just days before the start of a 2013 season that generated over \$10 billion for the NFL, it was announced that the League would pay \$765 million to settle the "Concussion Litigation." Additionally, without having conducted any discovery, the Proposed Class Counsel is also seeking, and the NFL does not object to paying, \$112.5 million in attorneys' fees! Many of the plaintiffs' attorneys, including these authors, believe that most of those additional funds should be earmarked for the former players and their families, rather than a few lawyers.

Contrary to certain media reports, these cases have not been certified as a class action. Nevertheless, the proposed settlement is structured in



the form of a class action settlement. As such, if approved, former players will have to decide whether to partake in the settlement “as is,” opt out of the settlement or object to the settlement at a Fairness Hearing.

The current proposal targets \$75 million to fund a Baseline Assessment Program (“BAP”) that will offer eligible retired NFL football players baseline neuropsychological and neurological evaluations to determine the existence and extent of any current cognitive deficits. A total of \$675 million (plus, in the event of a funding shortfall, a contribution by the NFL of an additional \$37.5 million) would go toward a Monetary Award Fund that will provide compensation

to retired NFL football players who currently carry a “Qualifying Diagnosis” or receive one in the future.

The qualifying diagnoses consist of Alzheimers, dementia, ALS and/or Parkinsonism in living plaintiffs. While death with CTE is compensable, CTE in living plaintiffs is not. Notably, a retiree’s age at the time of Qualifying Diagnosis and number of years in the NFL will arbitrarily dictate the level of compensation. The proposed settlement excludes current players from any compensation and excludes the families of those who died prior to 2006. Additionally, the agreement requires players to dismiss and abandon any claims they may have against the NCAA or other football

related organizations. The pending cases against Riddell—the helmet maker—will be allowed to proceed.

By structuring the settlement as a class action settlement, the proposal affects not just the 5,000 pending plaintiffs, but the entire community of nearly 20,000 living retired NFL players. Judge Brody’s initial review of the proposed settlement terms revealed a concern that “in various hypothetical scenarios, the Monetary Award Fund may lack the necessary funds to pay Monetary Awards for Qualifying Diagnoses.” Despite Proposed Class Counsel’s assurances that “economists conducted analyses to ensure that there would be sufficient funding to provide benefits to all eligible Class Members,” given the size of the Settlement Class and projected incidence rates, Judge Brody was not convinced. It was ordered that the economic and actuarial data supporting this proposition be shared with the court-appointed Special Master, Perry Golkin, to assist the court in analyzing the financial aspects of the settlement. That analysis is currently taking place.

Judge Brody’s concerns about the fairness, reasonableness and adequacy of the proposed settlement are sensible. The men suffering from these horrific injuries (and/or their families), and those players who will inevitably suffer later in life, deserve just compensation. Given the enormity of the problem, its solution cannot be trivial.

In the eight months that have passed since the proposed settlement was announced with great fanfare, very little has been accomplished.

Will Judge Brody approve this proposed settlement? Will further negotiations be required? Will a Settlement

Class be certified? Will the sought-after attorneys’ fees be approved? Will many plaintiffs opt-out of the proposed settlement? Will a global settlement of these cases even be realistic?

Stay tuned...

1. A.C. McKee, et al., “The Spectrum of Disease in Chronic Traumatic Encephalopathy,” *Brain*, 2012
2. MTBI Committee Report (2004)
3. Elliot J. Pellman, et al., “Concussion in Professional Football: Neuropsychological
4. Testing — Part 6,” *Neurosurgery*, vol. 55, no. 6, Dec. 2004, p. 1299
5. Pellman, E & Viano, D, Concussion in Professional Football: Injury Collection & Data Analysis, American Association of Neurological Surgeons, *Neurosurgery Focus*, 21(4) (2006)

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