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# From Youth Sports to Collegiate Athletics to Professional Leagues: Is There Really 'Informed Consent' by Athletes regarding Sports-Related Concussions?

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# FROM YOUTH SPORTS TO COLLEGIATE ATHLETICS TO PROFESSIONAL LEAGUES: IS THERE REALLY “INFORMED CONSENT” BY ATHLETES REGARDING SPORTS-RELATED CONCUSSIONS?

Dr. Tracey B. Carter\*

*Traumatic brain injury (TBI) is a major public health issue in the United States. A sports-related concussion is a form of TBI that can occur from participation in both contact and non-contact sports and recreational activities. The Centers for Disease Control and Prevention estimates that 1.6 to 3.8 million sports- and recreation-related concussions occur in the United States every year. This article emphasizes the serious impact of TBI on youth, collegiate, and professional athletes, explores whether athletes are really “informed” regarding sports-related concussions, and provides recommendations to better protect athletes and to decrease the number of sports-related concussions.*

## I. INTRODUCTION

Participating as an athlete in sports or simply observing a sporting event is a common part of American life.<sup>1</sup> Some youth begin participating in organized, competitive sports as early as elementary school, if not before, and are “encouraged to embrace [sports] as an analog to life and as a means of developing important life skills such as teamwork and discipline.”<sup>2</sup> Moreover, collegiate sports, “recreational sports and professional sports are a dominant part of [our] mainstream American culture, providing much of the commonality that ties together our disparate and geographically diverse country.”<sup>3</sup>

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<sup>1</sup> See Lura Hess, *Sports and the Assumption of Risk Doctrine in New York*, 76 ST. JOHN’S L. REV. 457, 457 (2002); see also Kenneth J. Macri, *Not Just a Game: Sport and Society in the United States*, STUDENT PULSE (2012), <http://www.studentpulse.com/articles/676/not-just-a-game-sport-and-society-in-the-united-states> (“[s]ports are an essential and important aspect of American society; they are indispensable [sic] when it comes to their impact on a plethora of public arenas, including economics and the mass media.”).

<sup>2</sup> Hess, *supra* note 1, at 457; see also *Nabozny v. Barnhill*, 334 N.E.2d 258, 260 (Ill. App. Ct. 1975) (wherein it is stated that “[o]ne of the educational benefits of organized athletic competition to our youth is the development of discipline and self control.”).

<sup>3</sup> Hess, *supra* note 1, at 457.

Injuries to youth, collegiate, and professional athletes are another common aspect athletes share based upon their participation in sports.<sup>4</sup> Specifically, traumatic brain injury is a major health issue in the United States.<sup>5</sup> Recent research reveals the frequency of traumatic brain injuries in sports and the long-term health consequences that result from sports-related concussions.<sup>6</sup> Lawsuits, including those filed by former National Football League (NFL) players, have propelled the discussion of sports-related brain injuries into the legal arena.<sup>7</sup>

Some argue that athletes knowingly engage in contact sports such as football. However, this article emphasizes the serious problem of sports-related concussions and addresses whether youth, collegiate, and professional athletes are really “informed” regarding sports-related concussions. This article also highlights who should be held responsible for informing and protecting athletes from such sports-related brain injuries. Part II discusses traumatic brain injuries and sports-related concussions and provides statistics related to the frequency of traumatic brain injuries in sports, including football. Part III focuses on the serious impact of traumatic brain injuries on youth, collegiate, and professional athletes, including the long-term health effects of repeated head trauma and sports-related concussions. Part III also examines the economic impact of sports-related brain injuries. Part IV discusses assumption of risk and informed consent

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<sup>4</sup> See *id.* at 457-58 (stating that “sports can be risky, and injuries are an inherent part of athletic participation for students, amateurs, recreational, and professional athletes alike.”) (footnotes omitted).

<sup>5</sup> See *Basic Information about Traumatic Brain Injury and Concussion*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/traumaticbraininjury/basics.html> (last visited Sept. 20, 2015); see also *Get the Stats on Traumatic Brain Injury in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 31, 2010), [http://www.cdc.gov/traumaticbraininjury/pdf/BlueBook\\_fact\\_sheet-a.pdf](http://www.cdc.gov/traumaticbraininjury/pdf/BlueBook_fact_sheet-a.pdf) (stating that “[e]ach year, traumatic brain injuries (TBI) contribute to a substantial number of deaths and cases of permanent disability” and that “[d]ata are critical to understanding the impact of this important public health problem.”).

<sup>6</sup> See Heather MacGillivray, *Where is the Awareness in Concussion Awareness: Can Concussed Players Really Assume the Risk in a Concussed State?*, 21 JEFFREY S. MOORAD SPORTS L.J. 529, 529 (2014) (noting that “[i]n recent years, knowledge and awareness surrounding the long-term impacts and dangers of sports-related concussions have grown immensely.”); see also *id.* at 529 n.4 (citing Andrew Brandt, *The NFL's Concussion Conundrum*, ESPN (Oct. 7, 2012), [http://espn.go.com/nfl/story/\\_/id/8513300/the-issue-concussions-nfl-not-goingaway](http://espn.go.com/nfl/story/_/id/8513300/the-issue-concussions-nfl-not-goingaway) (“describing how concussion awareness has changed culture of NFL”) and Anna Stolley Persky, *Playing It Safe: Are Concussions Ruining Sports?*, WASH. LAW. (Apr. 2013), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/april-2013-playing-safe.cfm> (“noting the growing field of concussion research and describing changes implemented in NFL as result of increased knowledge of concussion risks.”)).

<sup>7</sup> See MacGillivray, *supra* note 6, at 529 (stating that increased awareness regarding the “long-term impacts and dangers of sports-related concussions” is largely because of “two civil suits filed against the National Football League (NFL) and the National Collegiate Athletic Association (NCAA) by former players suffering from debilitating cognitive deficits as a result of receiving multiple concussive impacts during their time on the field.”); see also *id.* at 529-30 n.5.

and explores whether athletes are really "informed" regarding sports-related concussions. Part V summarizes and provides a comprehensive analysis of various lawsuits filed in recent years across the country regarding sports-related concussions, especially football. Part V also emphasizes the pros and cons of the April 22, 2015 NFL players' concussion lawsuit settlement, including a discussion of why approximately 200 NFL retirees and/or their families rejected the settlement and why they plan to sue the NFL individually. Part VI concludes with recommendations regarding potential best practices to better protect athletes and to decrease the number of sports-related concussions in order to ensure the best outcome for athletes, families, youth sports, collegiate teams, professional leagues, and society in general.

## II. OVERVIEW OF TRAUMATIC BRAIN INJURIES, CONCUSSIONS, AND SPORTS-RELATED CONCUSSIONS

### A. Traumatic Brain Injuries (TBI)

#### 1. Definitions of Traumatic Brain Injury

There are various definitions of TBI.<sup>8</sup> In fact, the definition of TBI has been inconsistent, "tends to vary according to specialties and circumstances," and "has been problematic with variations in inclusion criteria."<sup>9</sup> TBI has been defined as "a nondegenerative, noncongenital insult to the brain from an external mechanical force, possibly leading to permanent or temporary impairment of cognitive, physical, and psychosocial functions, with an associated diminished or altered state of consciousness."<sup>10</sup> Frequently, "the term brain injury is used synonymously with head injury, which may not be associated with neurologic deficits."<sup>11</sup>

Moreover, the Head Injury Interdisciplinary Special Interest Group of the American Congress of Rehabilitation Medicine has also provided a definition of TBI.<sup>12</sup> This group defines TBI as:

[A] traumatically induced physiologic disruption of brain function, as manifested by one of the following:

- Any period of loss of consciousness (LOC),

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<sup>8</sup> See Segun Toyin Dawodu, *Traumatic Brain Injury (TBI)-Definition, Epidemiology, Pathophysiology*, MEDSCAPE REFERENCE, <http://emedicine.medscape.com/article/326510-overview> (last updated Sept. 22, 2015).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See *id.*

- Any loss of memory for events immediately before or after the accident,
- Any alteration in mental state at the time of the accident,
- Focal neurologic deficits, which may or may not be transient.<sup>13</sup>

The Centers for Disease Control and Prevention (CDC) defines TBI as an injury that “is caused by a bump, blow or jolt to the head or a penetrating head injury that disrupts the normal function of the brain.”<sup>14</sup> However, the CDC notes that “[n]ot all blows or jolts to the head result in a TBI. The severity of a TBI may range from ‘mild,’ i.e., a brief change in mental status or consciousness to ‘severe,’ i.e., an extended period of unconsciousness or amnesia after the injury.”<sup>15</sup>

Moreover, the National Institute of Neurological Disorders and Stroke states that TBI is “a form of acquired brain injury, occurs when a sudden trauma causes damage to the brain. TBI can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue.”<sup>16</sup>

## 2. Traumatic Brain Injury Statistics

TBI is a serious cause for disabilities and deaths, and TBI accounts for approximately 30% of all deaths in the United States resulting from some form of injury.<sup>17</sup> The Centers for Disease Control and Prevention (CDC) states that “[e]very day, 138 people in the United States die from injuries that include TBI.”<sup>18</sup> From 2001 to 2010, the frequency of TBI-related emergency room visits increased by 70%.<sup>19</sup> However, during this period, TBI-related “hospitalization rates only increased by 11% and death rates decreased by 7%.”<sup>20</sup> In fact, CDC’s statistics revealed the following:

- In 2010, about 2.5 million emergency department (ED) visits, hospitalizations, or deaths were associated with TBI—either

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<sup>13</sup> *Id.*

<sup>14</sup> *Basic Information about Traumatic Brain Injury and Concussion*, *supra* note 5.

<sup>15</sup> *Id.*

<sup>16</sup> *NINDS Traumatic Brain Injury Information Page*, NAT’L INST. NEUROLOGICAL DISORDERS & STROKE, <http://www.ninds.nih.gov/disorders/tbi/tbi.htm> (last updated Sept. 18, 2015).

<sup>17</sup> *Traumatic Brain Injury in the United States: Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/traumaticbraininjury/get\\_the\\_facts.html](http://www.cdc.gov/traumaticbraininjury/get_the_facts.html) (last updated Jan. 12, 2015) (citing Mark Faul et al., *Traumatic Brain Injury in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 2010), [http://www.cdc.gov/traumaticbraininjury/pdf/blue\\_book.pdf](http://www.cdc.gov/traumaticbraininjury/pdf/blue_book.pdf)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

alone or in combination with other injuries—in the United States.

- TBI contributed to the deaths of more than 50,000 people.
- TBI was a diagnosis in more than 280,000 hospitalizations and 2.2 million ED visits. These consisted of TBI alone or TBI in combination with other injuries.<sup>21</sup>

### 3. Four Leading Known Causes of Traumatic Brain Injuries

The Centers for Disease Control and Prevention found that from 2006 to 2010, the four leading known causes of TBIs in the United States were (1) falls, (2) blunt trauma, (3) motor vehicle accidents, and (4) assaults.<sup>22</sup> Falls were the leading cause of all TBIs and contributed to 40.5% of TBIs in the United States resulting in emergency room visits, hospitalization, or death.<sup>23</sup> Blunt trauma, such as unintentionally being struck by an object, was the second leading contributor of all TBIs, causing 15.5% of TBIs in the United States.<sup>24</sup> Motor vehicle accidents were the third leading cause of all TBIs and contributed to 14.3% of TBIs in the United States.<sup>25</sup> Assaults were the fourth leading contributor of all TBIs, causing 10.7% of TBIs in the United States.<sup>26</sup>

## B. Concussions

### 1. Definitions of Concussions

Similar to traumatic brain injury, there are various definitions of concussions. However, the majority of incidences of traumatic brain injury on a yearly basis are considered mild, and most mild traumatic brain injuries are referred to as concussions.<sup>27</sup> Medical News Today also provides the following definitions of a concussion:

- Concussion is also known as mild brain injury, mild traumatic brain injury (MTBI), mild head injury and minor head trauma. Some experts define concussion as a head injury with

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (citing Julie Louise Berberding & Sue Binder, *Report to Congress on Mind Traumatic Brain Injury in the United States* (Sept. 2003), <http://www.cdc.gov/traumaticbraininjury/pdf/mtbireport-a.pdf>); see also *Head injury—first aid*, U. OF MD. MED. CTR., <http://umm.edu/health/medical/ency/articles/head-injury-first-aid> (last updated Jan. 13, 2014) (stating that “[c]oncussion, in which the brain is shaken, is the most common type of traumatic brain injury. . . . Concussion is a mild traumatic brain injury.”).

temporary loss of brain function, which can cause cognitive, physical and emotional symptoms. Concussion may also be defined as an injury to the brain generally caused by a jolt or blow to the head—in the majority of cases the individual does not lose consciousness.

- According to Medilexicon’s medical dictionary, concussion is “[a]n injury of a soft structure, as the brain, resulting from a blow or violent shaking.”
- In sports medicine, the term concussion is commonly used, while in general medicine, MTBI (mild traumatic brain injury) may be used as well. Lay people are more familiar with the term concussion.<sup>28</sup>

The Centers for Disease Control and Prevention defines a concussion as follows:

[A] type of traumatic brain injury (TBI) caused by a bump, blow, or jolt to the head. Concussions can also occur from a fall or a blow to the body that causes the head and brain to move quickly back and forth. Doctors may describe a concussion as a “mild” brain injury because concussions are usually not life-threatening.<sup>29</sup>

Similarly, the Mayo Clinic defines a concussion as follows:

[A] traumatic brain injury that alters the way your brain functions . . . Although concussions usually are caused by a blow to the head, they can also occur when the head and upper body are violently shaken. These injuries can cause a loss of consciousness, but most concussions do not. Because of this, some people have concussions and don’t realize it.<sup>30</sup>

Moreover, the American Association of Neurological Surgeons states the following regarding concussions:

A concussion is an injury to the brain that results in temporary loss of normal brain function. It usually is caused by a blow to the head. In many cases, there are no external signs of head trauma. Many people assume that concussions involve a loss

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<sup>28</sup> Christian Nordqvist, *What is Concussion? What is Mild Traumatic Brain Injury (MTBI)?*, MED. NEWS TODAY, <http://www.medicalnewstoday.com/articles/158876> (last updated Jan. 9, 2015).

<sup>29</sup> *Facts about Concussion and Brain Injury*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 2, 2010), [www.cdc.gov/concussion/pdf/Facts\\_about\\_Concussion\\_TBI-a.pdf](http://www.cdc.gov/concussion/pdf/Facts_about_Concussion_TBI-a.pdf).

<sup>30</sup> *Diseases and Conditions: Concussion*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/concussion/basics/definition/con-20019272> (last visited Sept. 20, 2015).

of consciousness, but that is not true. In many cases, a person with a concussion never loses consciousness.

The formal medical definition of concussion is a clinical syndrome characterized by immediate and transient alteration in brain function, including alteration of mental status and level of consciousness, resulting from mechanical force or trauma.<sup>31</sup>

## 2. Causes and Incidences of Concussions

The causes of concussions are very similar to the leading causes of traumatic brain injury in the United States.<sup>32</sup> The various causes of concussions include the following: (1) automobile accidents, (2) sports injuries, (3) falls, (4) horseback riding accidents, (5) playground accidents, (6) cycling accidents, and (7) assaults.<sup>33</sup> Regarding automobile accidents, concussions often occur "when a vehicle suddenly loses speed or stops dead, causing the brain to jar (bash, bump hard) against the skull."<sup>34</sup> Both contact and non-contact sports injuries can cause concussions.<sup>35</sup> Contact sports have been defined as activities in which "physical contact is inevitable and inherent in the activity and the parties involved voluntarily assent to the contact by participating."<sup>36</sup> "[C]ontact sports, such as martial arts, boxing, rugby, American football, and hokey" [sic] and "[n]on-contact sports such as snowboarding and skiing" can all cause concussions.<sup>37</sup> "[A]ny fall that results in a blow to the head or a severe jolt" can result in a concussion.<sup>38</sup> In fact, most "concussion cases in very young children and elderly individuals in the USA and UK occur as a result of a fall in the home."<sup>39</sup>

Moreover, accidents from horseback riding, on playgrounds, and from cycling can result in concussions.<sup>40</sup> The U.S. Consumer Product Safety Commission found that there were 11,749 head injury cases caused by horseback riding accidents in 2008 in the United States.<sup>41</sup> In addition, playground accidents

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<sup>31</sup> *Concussion*, AM. ASS'N OF NEUROLOGICAL SURGEONS, <http://www.aans.org/patient%20information/conditions%20and%20treatments/concussion.aspx> (last visited Sept. 20, 2015).

<sup>32</sup> See *Traumatic Brain Injury in the United States: Fact Sheet*, *supra* note 17; see also Nordqvist, *supra* note 28 (noting that "concussions commonly occur from severe jolts to the head," including from automobile accidents).

<sup>33</sup> Nordqvist, *supra* note 28.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Azzano ex rel. Azzano v. Catholic Bishop of Chi.*, 710 N.E. 2d 117, 119 (Ill. App. Ct. 1999).

<sup>37</sup> Nordqvist, *supra* note 28; see also 34 C.F.R. § 106.41(b) (2015) (stating "contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.").

<sup>38</sup> Nordqvist, *supra* note 28.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*



that result in concussions mainly occur on “playgrounds that do not have proper soft underlays.”<sup>42</sup> The U.S. Consumer Product Safety Commission also reported 70,802 head injury cases caused by cycling accidents.<sup>43</sup> In addition, as previously cited, approximately “11% of traumatic brain injuries in the USA are caused by assaults (people being attacked), according to the CDC (Centers for Disease Control and Prevention).”<sup>44</sup>

### 3. Classification of Concussions

Generally, concussions are “classified into 3 different grades.”<sup>45</sup> The three most widely used methods to classify concussions are (1) the Cantu Guidelines, (2) the Colorado Medical Society Guidelines, and (3) the American Academy of Neurology Guidelines.<sup>46</sup> Below is a brief summary of each set of guidelines:

#### a. Cantu Guidelines

(Devised by Dr. Robert Cantu, medical director of the National Center for Catastrophic Sports Injury Research)

Grade 1 - Some amnesia lasting no longer than 30 minutes, no loss of consciousness.

Grade 2 - Loss of consciousness lasting no longer than 5 minutes. Amnesia lasting from 30 minutes to 24 hours.

Grade 3 - Loss of consciousness lasting more than 5 minutes. Amnesia lasting more than 24 hours.

#### b. Colorado Medical Society Guidelines

Grade 1 - Confusion. No loss of consciousness.

Grade 2 - Confusion. Amnesia. No loss of consciousness.

Grade 3 - Any loss of consciousness.

#### c. American Academy of Neurology Guidelines

Grade 1 - Confusion that lasts less than 15 minutes. No loss of consciousness.

Grade 2 - Confusion last lasts for more than 15 minutes. No loss of consciousness.

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*; see *Traumatic Brain Injury in the United States: Fact Sheet*, *supra* note 17.

<sup>45</sup> Nordqvist, *supra* note 28.

<sup>46</sup> *Id.*

Grade 3 - Loss of consciousness (IIIa coma lasts seconds, IIIb coma lasts for minutes).<sup>47</sup>

### C. Sports-Related Concussions

#### 1. Definitions of Sports-Related Concussions

A sports-related concussion is a form of traumatic brain injury that can occur from participation in both contact and non-contact sports and recreational activities.<sup>48</sup> Such “injury results from the rapid translational (linear front-to-back, side-to-side) or rotational (angular) movement of the multi-lobular brain within the skull.”<sup>49</sup> This “rapid movement can result in damage or disruption of the brain cell structure and metabolism.”<sup>50</sup>

Additionally, a sports-related concussion has been defined as a type of concussion that “occurs when an athlete’s skull contacts another object (i.e., an opponent, the ball, or the ground,) or comes to an abrupt halt (as in whiplash), causing the brain to rebound off of, or twist up against, the inside of the skull.”<sup>51</sup> Consequently, “[t]hese shearing forces can damage blood vessels that cause swelling and bleeding in the brain. Neurons can also be damaged, which impairs the brain’s ability to transmit important information from one area of the brain to another.”<sup>52</sup>

#### 2. Common Signs and Symptoms of Sports-Related Concussions

There are some common signals that indicate that an athlete may have experienced a sports-related concussion. Concussed athletes commonly display the following signs:

<sup>47</sup> *Id.*

<sup>48</sup> See *Definition of a Concussion*, SPORTS CONCUSSION LIBRARY, <http://www.sportconcussionlibrary.com/content/definition-concussion> (last visited Sept. 20, 2015); see Robert L. Conder & Alanna A. Conder, *Sports-Related Concussions*, 76 N.C. MED. J. 89, 89 (2015), available at <http://www.ncmedicaljournal.com/content/76/2/89.full.pdf> (noting that “[s]ports-related concussions have been classified as a subtype of mild TBI.”); see generally *Nonfatal Traumatic Brain Injuries Related to Sports and Recreation Activities Among Persons Aged ≤19 Years—United States, 2001—2009*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 7, 2011), available at [http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6039a1.htm?s\\_cid%20=mm6039a1\\_w](http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6039a1.htm?s_cid%20=mm6039a1_w) (discussing emergency room visits for concussions and other nonfatal traumatic brain injuries due to participation in organized and unorganized sports and recreational activities by children and adolescents 19 years of age or younger).

<sup>49</sup> See *Definition of a Concussion*, *supra* note 48.

<sup>50</sup> *Id.*

<sup>51</sup> Tracey Covassin & Robert Elbin, *Sport-Related Concussions*, AM. COLL. OF SPORTS MED. (Jan. 13, 2012), <https://www.acsm.org/access-public-information/articles/2012/01/13/sport-related-concussions>.

<sup>52</sup> *Id.*

- “Appears to be dazed or stunned
- Is confused about assignment
- Forgets plays
- Is unsure of game, score, or opponent
- Moves clumsily
- Answers questions slowly
- Loses consciousness (even temporarily)
- Shows behavior or personality change
- Forgets events prior to hit (retrograde amnesia)
- Forgets events after hit (anterograde amnesia).”<sup>53</sup>

In addition, athletes who have sports-related concussions have reported experiencing the following physical signs and symptoms, cognitive issues, and sleep problems:

- “Headache
- Nausea
- Balance problems or dizziness
- Double or fuzzy vision
- Sensitivity to light or noise
- Feeling sluggish
- Feeling “foggy”
- Change in sleep pattern
- Concentration or memory problems.”<sup>54</sup>

Moreover, athletes can also experience the following emotional signs and symptoms of a concussion:

- “Irritability
- Sadness
- More emotional
- Nervousness
- Lability.”<sup>55</sup>

The above noted signs and symptoms of sports-related concussions “may occur immediately after the injury, or onset may be delayed.”<sup>56</sup>

<sup>53</sup> *Concussions*, U. OF PITTSBURGH MED. CTR.: NEUROLOGICAL SURGERY, <http://www.neurosurgery.pitt.edu/centers-excellence/brain-and-spine-injury/concussions> (last visited Sept. 20, 2015) [hereinafter Concussions Article by University of Pittsburgh].

<sup>54</sup> *Id.*; see also Conder & Conder, *supra* note 48 (displaying a table that lists the following physical, cognitive, and sleep signs and symptoms of a concussion: (1) Physical: “[h]eadache, balance problems, dizziness, visual problems, fatigue, sensitivity to light and noise.”; (2) Cognitive: “[d]ifficulty concentrating, difficulty remembering, feeling mentally ‘foggy,’ feeling slowed down, answers questions slowly” . . . (4) Sleep: “[d]rowsiness, sleeping more than usual, sleeping less than usual, difficulty falling asleep, difficulty staying asleep”). *Id.* at 89.

<sup>55</sup> Conder & Conder, *supra* note 48, at 89; see *Definition of a Concussion*, *supra* note 48 (noting depression is also an emotional change concussed athletes may suffer from).

It is also important to recognize that concussions do not always result in an athlete experiencing a loss of consciousness.<sup>57</sup> In fact, "[a] common misconception regarding concussive injury is that an athlete must experience loss of consciousness in order for a concussion to be diagnosed."<sup>58</sup> Nevertheless, some studies "suggest that fewer than 10 percent of athletes who sustain a concussion actually experience loss of consciousness, whereas headache, dizziness, confusion, and disorientation are reported more often by concussed athletes."<sup>59</sup> For example, a University of Pittsburgh Medical Center study of high school and college athletes suffering from a concussion found that "on-the-field amnesia, not loss of consciousness, as long thought, was predictive of post-injury symptom severity and neurocognitive deficits."<sup>60</sup>

### 3. Sports-Related Concussions Statistics

Sports-related concussions occur frequently in the United States. However, statistics related to the prevalence and incidences of sports-related concussions vary. Specifically, "[a]ccording to the University of Pittsburgh's Brain Trauma Research Center, more than 300,000 sports-related concussions occur annually in the U.S., and the likelihood of suffering a concussion while playing a contact sport is estimated to be as high as 19 percent per year of play."<sup>61</sup> In addition, research shows that "[m]ore than 62,000 concussions are sustained each year in high school contact sports, and among college football players, 34 percent have had one concussion, and 20 percent have endured multiple concussions."<sup>62</sup> Moreover, in regards to football players, "[e]stimates show that between four and 20 percent of college and high school football players will sustain a brain injury over the course of one season."<sup>63</sup> Furthermore, "[t]he risk of concussion in football is three to six times higher in players who have had a previous concussion."<sup>64</sup>

Conversely, other research indicates that there are approximately 1.6 to 3 million sports-related concussions annually in the United States.<sup>65</sup> Moreover,

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<sup>56</sup> *Definition of a Concussion*, *supra* note 48.

<sup>57</sup> *Id.* (stating that a "majority of concussions do not result in a loss of consciousness."); Covassin & Elbin, *supra* note 51.

<sup>58</sup> Covassin & Elbin, *supra* note 51.

<sup>59</sup> *Id.*

<sup>60</sup> Concussions Article by University of Pittsburgh, *supra* note 53.

<sup>61</sup> *Concussion*, *supra* note 31; *see also id.* (quoting that "[i]n the United States, the annual incidence of sports-related concussion is estimated at 300,000. Estimates regarding the likelihood of an athlete in a contact sport experiencing a concussion may be as high as 19% per season.").

<sup>62</sup> *Concussion*, *supra* note 31.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Covassin & Elbin, *supra* note 51; *Sports Injuries*, BRAINLINE.ORG, [http://www.brainline.org/landing\\_pages/categories/sportsinjuries\\_results.php?types=article](http://www.brainline.org/landing_pages/categories/sportsinjuries_results.php?types=article) (last visited Sept. 20, 2015) (stating that "the Centers for Disease Control and Prevention estimated that

“[r]ecent studies have shown increases in the prevalence and incidence of concussion in both high school and college athletes. Approximately 8.9 percent of all high school athletic injuries are concussions, while incidence rates for college athletes range from 5 to 7.9 percent.”<sup>66</sup>

Additionally, other research cites the following statistics as it relates to sports-related concussions:

- 3,800,000 concussions reported in 2012, double what was reported in 2002
- 33% of all sports concussions happen at practice
- 39% -- the amount by which cumulative concussions are shown to increase catastrophic head injury leading to permanent neurologic disability
- 47% of all reported sports concussions occur during high school football
- 1 in 5 high school athletes will sustain a sports concussion during the season
- 33% of high school athletes who have a sports concussion report two or more in the same year
- 4 to 5 million concussions occur annually, with rising numbers among middle school athletes
- 90% of most diagnosed concussions do not involve a loss of consciousness
- An estimated 5.3 million Americans live with a traumatic brain injury-related disability (CDC).<sup>67</sup>

Also, “[t]he American Academy of Pediatrics has reported that emergency room visits for concussions in kids ages 8 to 13 years old has doubled, and concussions have risen 200 percent among teens ages 14 to 19 in the last decade.”<sup>68</sup> In sum, there are varying statistics related to sports-related concussions. However, the statistics reveal that the prevalence and incidence of sports-related concussions is an epidemic that must be dealt with properly.

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1.6-3.8 million sports- and recreation-related concussions occur in the United States each year.”).  
*Id.* at 1.

<sup>66</sup> Covassin & Elbin, *supra* note 51, at 1.

<sup>67</sup> *Sports Concussion Statistics, HEAD CASE*, [http://www.headcasecompany.com/concussion\\_info/stats\\_on\\_concussions\\_sports](http://www.headcasecompany.com/concussion_info/stats_on_concussions_sports) (last visited Sept. 23, 2015).

<sup>68</sup> *Id.*

### III. SERIOUS IMPACT OF TRAUMATIC BRAIN INJURIES ON YOUTH, COLLEGIATE, AND PROFESSIONAL ATHLETES

#### A. Long-Term Health Effects of Repeated Head Trauma and Sports-Related Concussions

A majority of athletes who suffer from a concussion “are likely to recover.”<sup>69</sup> However, sports-related concussions and repeated head trauma can have a serious long-term health impact upon youth, collegiate, and professional athletes. In fact, “[w]hen left undetected, concussions can result in long-term brain damage and may even prove fatal.”<sup>70</sup> Additionally, research reveals that “[o]ut of 50,000 deaths per year nationwide from TBI of any etiology, an estimated 900 deaths per year result from sports and recreational activities.”<sup>71</sup> For example, “[i]n 2013, there were 8 sports-related concussion fatalities from football nationally, all at the high school level.”<sup>72</sup> These “statistics raise acute concern about the health and safety of elementary school, high school, and collegiate athletes who receive a sports-related concussion, as such injuries can impair academic and cognitive development.”<sup>73</sup>

Additionally, concussed athletes can suffer from a condition known as “Post-Concussion Syndrome.”<sup>74</sup> This condition results when concussed athletes “experience chronic cognitive and neurobehavioral difficulties related to recurrent injury.”<sup>75</sup> The combined symptoms of Post-Concussion Syndrome are as follows:

- “Chronic headaches
- Fatigue
- Sleep difficulties
- Personality changes (e.g. increased irritability, emotionality)
- Sensitivity to light or noise
- Dizziness when standing quickly
- Deficits in short-term memory, problem solving and general academic functioning.”<sup>76</sup>

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<sup>69</sup> Concussions Article by University of Pittsburgh, *supra* note 53.

<sup>70</sup> *Sports Concussion Statistics*, *supra* note 67.

<sup>71</sup> Conder & Conder, *supra* note 48, at 89 (footnote omitted).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Concussions Article by University of Pittsburgh, *supra* note 53.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*; see also *From Economic Impact and Ticket Scams to Health and Psychology, IU Experts Share Insights About the Super Bowl*, IND. U. NEWS ROOM (Feb. 2, 2012), <http://newscenter.iupui.edu/index.php?id=5487> (noting that Kevin Gebke, “chair of family medicine at the Indiana University School of Medicine and director of the IU Center for Sports Medicine, says [sports-related] concussions can have negative effects for a long period of time. ‘Some symptoms are obvious—headaches, nausea, vision issues—but more long-term symptoms can include sleep disturbance, depression and diminished balance.’”).

The above “constellation of symptoms is referred to ‘Post-Concussion Syndrome’ and can be quite disabling for an athlete. In some cases, such difficulties can be permanent and disabling.”<sup>77</sup> Besides Post-Concussion Syndrome, an athlete “suffering a second blow to the head while recovering from an initial concussion can have catastrophic consequences as in the case of ‘Second Impact Syndrome,’ which has led to approximately 30-40 deaths over the past decade.”<sup>78</sup> “Second-impact syndrome has a mortality rate of nearly 50% and a morbidity rate (disabling impairments) of nearly 100%.”<sup>79</sup> Moreover, as it relates to sports-related head injuries, “[w]hile the first hit can prove problematic, the second or third head impact can cause permanent long-term brain damage.”<sup>80</sup> In fact, “[c]umulative sports concussions are shown to increase the likelihood of catastrophic head injury leading to permanent neurologic disability by 39 percent.”<sup>81</sup>

Furthermore, “the epidemic of concussions and traumatic brain injury, as well as post-concussion syndrome, . . . has been linked to various illnesses, including chronic traumatic encephalopathy, Alzheimer’s, Parkinson’s, learning and memory deficiencies, and suicides.”<sup>82</sup> Chronic Traumatic Encephalopathy

<sup>77</sup> Concussions Article by University of Pittsburgh, *supra* note 53.

<sup>78</sup> *Id.*; See also Marie-France Wilson, *Young Athletes At Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and the Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241, 244 (2010) (stating that “[s]econd-impact syndrome is one type of catastrophic injury that can result from a concussion and can be fatal. This condition is thought to occur when a second concussion is sustained before the symptoms of the last have cleared.”) (footnotes omitted).

<sup>79</sup> Wilson, *supra* note 78, at 244 (referencing GARY S. SOLOMON ET AL., *THE HEADS-UP ON SPORTS CONCUSSION* 16 (2006)) (footnote omitted).

<sup>80</sup> *Sports Concussion Statistics*, *supra* note 67.

<sup>81</sup> *Id.*

<sup>82</sup> *TJSL Professors Present at Concussion Litigation Seminar*, THOMAS JEFFERSON SCH. OF LAW (May 21, 2013), <http://www.tjssl.edu/news-media/2013/9554>; See Wilson, *supra* note 78, at 245 (stating that “[c]hronic Traumatic Encephalopathy (CTE) is one such long-term effect” of athletes who have sustained multiple concussions) (footnotes omitted); see also Roy MacGregor, *Researchers Use Dollar Signs to Show NHL the Cost of Brain Injuries*, THE GLOBE & MALL (Jan. 16, 2015), <http://www.theglobeandmail.com/sports/hockey/researchers-hope-dollar-signs-on-brain-injuries-will-save-hlplayers/article22498629/> (discussing some NHL hockey players in a study who lost their hockey careers to Post-Concussion Syndrome (PCS). The author noted that “[i]t could, however, still get worse for some of them, as there is now ample scientific evidence that multiple concussions can lead to chronic traumatic encephalopathy (CTE). CTE is a progressive condition that can lead to brain degeneration and manifest itself as dementia and other mental and neurological disorders such as depression, anger and violence. Former football and hockey players who committed suicide in recent years have been found to have evidence of CTE when their brains have been examined.”). See also J. Patrick Dobel, *The Failure of Informed Consent and the Football Brain Trauma Debate*, POINT OF THE GAME (Aug. 14, 2012), <http://pointofthegame.blogspot.com/2012/08/soul-death-in-football-informed-consent.html> (who states, “[f]ootball can kill the soul of players. Junior Seau, a NFL icon, shot himself in the chest in May [2012]. He joins three former professional football players who committed suicide in the last two years. Several were diagnosed after the fact with mental illness caused by brain damage

(CTE) "is described as a progressive degenerative disease of the brain, common in athletes and others who have suffered multiple concussions."<sup>83</sup>

Additionally, "the link between boxing and CTE has long been established."<sup>84</sup> However, a research study was also conducted at the Center for the Study of Traumatic Encephalopathy at Boston University to determine "whether other athletes—for example, football players—may be at risk of developing CTE."<sup>85</sup> The study found that "[o]f the fifty-one confirmed cases from their most recent study, 90% of CTE occurred in athletes who began their careers between the ages of eleven and nineteen, with the first symptoms of CTE observed anywhere from ages twenty-five to seventy-six."<sup>86</sup> The symptoms could begin "with concentration and memory problems, followed by progressive deterioration leading to dementia, including Alzheimer's Disease or Parkinsonism."<sup>87</sup> This study also revealed "that the severity of the ensuing disorder seems to be related to the length of time that a sport was played and to the number of head injuries sustained."<sup>88</sup> Moreover, statistics show that "30 percent of all football players will suffer from CTE, Alzheimer's or Dementia due to the head trauma associated with football."<sup>89</sup>

Consequently, "the field of sports medicine has changed its stance in the past decade over the serious, sustained effects of concussions. 'We didn't realize how many people suffer the effects of the injury long after we thought the symptoms of concussion had cleared,'" according to Kevin Gebke, Chair of Family Medicine at the Indiana University School of Medicine and Director of the Indiana University Center for Sports Medicine.<sup>90</sup>

## B. Economic Impact of Brain Injuries and Sports-Related Concussions

A "report published 20 years ago indicated that 57 million Americans would incur a brain injury at a total cost of more than \$157 billion dollars or a

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related from repetitive head trauma. Seau's brain has also been diagnosed as suffering from CSE a progressive disease resulting from repeated head trauma. It contributed to his erratic behavior and suicide.").

<sup>83</sup> Wilson, *supra* note 78, at 245 (referencing Ann C. McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 J. NEUROPATHOLOGY & EXPERIMENTAL NEUROLOGY 709, 709-10 (2009)); see MacGregor, *supra* note 82.

<sup>84</sup> Wilson, *supra* note 78, at 245.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Jack Brewer, *Concussion Talk No Longer Taboo in the NFL*, CNBC (Mar. 18, 2015), <http://www.cnbc.com/2015/03/18/concussion-talk-no-longer-taboo-in-the-nfl-commentary.html>.

<sup>90</sup> *From Economic Impact and Ticket Scams to Health and Psychology, IU Experts Share Insights About the Super Bowl*, *supra* note 76.



per-injured-person cost of \$2772.”<sup>91</sup> However, a 2013 literature review revealed that “[v]ery little research has been published on the economic burden that mild and moderate traumatic brain injury patients pose to their families, careers, and society as a whole.”<sup>92</sup> Therefore, “[f]urther research is needed to estimate the economic burden of these patients on healthcare providers and social services and how this can impact current health policies and practices.”<sup>93</sup>

Despite the dearth of research on the subject, it is becoming more common knowledge that “[a] severe TBI not only impacts the life of an individual and their family, but it also has a large societal and economic toll.”<sup>94</sup> In fact, “[t]he estimated economic cost of TBI in 2010, including direct and indirect medical costs, [was] estimated to be approximately \$76.5 billion.”<sup>95</sup>

Moreover, others have also found that “Post-Concussion [S]yndrome and chronic brain damage are serious problems with major economic impact.”<sup>96</sup> Specifically, “[e]stimates show that concussions can cost as much as \$25,000 for acute care, but treating chronic effects of brain injury can cost up to \$400,000 over a lifetime for serious cases.”<sup>97</sup>

Additional research reveals the following:

- The CDC estimates that in 2000 the medical costs and indirect costs (lost productivity) of TBI in United States totaled \$60 billion. The medical costs to the individual can be overwhelming.
- An average hospital stay for a moderate TBI is over 9 days. TBI patients may need a lengthy stay in a rehabilitation center; some patients stay for three months. When the injury is severe, the intensive rehabilitation needed may average over \$1,000 a day.
- Expenses for a TBI include: initial hospitalization, rehabilitation and possible continuing need for medical care and a caregiver. When medical and non-medical costs are combined, the Brain Association of Missouri reports that the cost of care for the average TBI patient is around \$151,000 in the first year after the injury. The medical costs of people who

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<sup>91</sup> Kathryn K. Edwards, *The Cost of Concussion in Children*, ADVANCE HEALTHCARE NETWORK FOR SPEECH & HEARING (Jan. 28, 2010), <http://speech-language-pathology-audiology.advanceweb.com/Features/Article-2/The-Cost-of-Concussion-in-Children.aspx>.

<sup>92</sup> Ioan Humphreys et al., *The Costs of Traumatic Brain Injury: A Literature Review*, 5 CLINICOECONOMICS & OUTCOMES RES. 281, 281 (2013).

<sup>93</sup> *Id.*

<sup>94</sup> *Severe Traumatic Brain Injury*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/TraumaticBrainInjury/severe.html> (last updated Mar. 4, 2014).

<sup>95</sup> *Id.*

<sup>96</sup> Brian Tiu, *The Structural Consequences of Concussion*, ELITE CHIROPRACTIC (Apr. 24, 2015), <http://www.elitechironw.com/the-structural-consequences-of-concussion/>.

<sup>97</sup> *Id.*

do not survive the injury are typically higher than those who do survive, since in cases of severe TBI, ventilators and other expensive treatments are used in an attempt to give the brain a chance to heal; these costs may then fall on the family of the deceased.<sup>98</sup>

Other researchers have noted that “little emphasis has been placed on [children] who require extended hospital stays and the financial burden associated with concussion[s].”<sup>99</sup> However, research has revealed that “[i]n 2006 approximately 8,000 children were admitted [to a hospital] with a principal diagnosis of concussion . . . [and] a substantial number require[d] at least overnight hospitalization at a significant cost. As a result, many children and their families face financial burdens associated with concussions.”<sup>100</sup> For example, “[i]n 2006 the average hospital charges exceeded \$18,000 for children ages 15-17. The average charges were slightly higher for females. Charges for girls with concussion averaged \$15,488, compared to \$15,031 for males.”<sup>101</sup> In addition, “[c]harges also differed by region: \$24,495 in the South, \$13,222 in the Midwest, \$11,868 in the West, and \$11,449 in the Northeast.”<sup>102</sup> Furthermore, “[t]he mean length of stay for children hospitalized for concussion in 2006 was 1.5 days, with average charges surpassing \$15,000. Regionally, 28.4 percent of the admissions were in the South, followed by the Northeast (26.4 percent), West (25.9 percent), and Midwest (19.4 percent).”<sup>103</sup> A majority of the children “were routinely discharged after their hospital stay, while some were discharged to another institution such as a nursing home or rehab facility (1.13 percent), another short-term hospital (1 percent), or home health care (less than .5 percent).”<sup>104</sup>

Another potential financial impact of a traumatic brain injury relates to higher education.<sup>105</sup> Both “[h]ospitalization and rehabilitation expenses can ravage a family budget, making the associated costs of higher education—such as tuition, books, and room and board—unaffordable.”<sup>106</sup> Moreover, in many cases, “families of people with brain injuries often are new to the world of disability

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<sup>98</sup> *Medical Expenses for a Traumatic Brain Injury*, BRAINANDSPINALCORD.ORG, <http://www.brainandspinalcord.org/legal/brain-injury-medical-expenses> (last visited Sept. 20, 2015).

<sup>99</sup> Edwards, *supra* note 91 (noting that the reason for this deficiency is “[b]ecause most children seen in hospitals for concussion are discharged immediately.”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See Janis Ruoff, *The Student with a Brain Injury: Achieving Goals for Higher Education*, BRAINLINE.ORG (2001), [http://www.brainline.org/content/2008/10/student-brain-injury-achieving-goals-highereducation\\_pageall.html](http://www.brainline.org/content/2008/10/student-brain-injury-achieving-goals-highereducation_pageall.html).

<sup>106</sup> *Id.*

and, therefore, unfamiliar with available resources and financial aid or with the various government agencies that serve people with disabilities.”<sup>107</sup> Consequently, “[r]equirements for scholarship money, such as a high grade-point average, inadvertently may exclude students with brain injuries.”<sup>108</sup> Additionally, “[f]ederal financial aid programs that require students to maintain full courseloads may extend beyond the reach of even high-achieving students with brain injuries, as fatigue or other impairments prevent them from carrying the required number of credit hours.”<sup>109</sup> Likewise, “[c]omplex paperwork and myriad deadlines also are common obstacles to the student with a brain injury who has financial need; such students will require one-on-one guidance and assistance with the financial aid application process.”<sup>110</sup>

There is also a scarcity of research specifically focusing on the economic impact of repeated head trauma causing brain injuries in sports, especially sports-related concussions. However, a recent study was conducted to determine the economic impact of lost salary costs because of time missed due to injuries to National Hockey League (NHL) players.<sup>111</sup> The study found that “[c]oncussions alone amounted to a salary loss of US\$42.8 million a year.”<sup>112</sup> Moreover, another recent study looked at NHL players who suffered career-ending concussions while playing in the NHL from 1995 to 2014.<sup>113</sup> Upon evaluating thirty-five former NHL players, the researchers revealed an overall cost of \$117,191,045, which accounted for the overall lost salary costs for these players who experienced sports-related concussions that forced them to end their professional hockey careers.<sup>114</sup>

Although “[p]rogress is being made at a rapid pace” in studying and diagnosing concussions, it has been noted that “we still have a long road ahead of us. It is still yet to be seen what economic impact concussions will ultimately have on the NFL” and other sports.<sup>115</sup> Likewise, “[b]ecause of the substantial increases in health care costs and the limited number of individuals admitted to U.S. hospitals with concussion, more current and detailed cost information is needed.”<sup>116</sup>

In sum, besides “the cognitive, physical and emotional issues of concussion, financial consequences emerge for those who are admitted to the

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Laura Donaldson et al., *Economic Burden of Time Lost Due to Injury in NHL Hockey Players*, 20 *INJURY PREVENTION* 347, 347 (2014), available at [http://www.researchgate.net/publication/259826481\\_Economic\\_burden\\_of\\_time\\_lost\\_due\\_to\\_injury\\_in\\_NHL\\_hockey\\_players](http://www.researchgate.net/publication/259826481_Economic_burden_of_time_lost_due_to_injury_in_NHL_hockey_players).

<sup>112</sup> *Id.*

<sup>113</sup> MacGregor, *supra* note 82.

<sup>114</sup> *Id.*

<sup>115</sup> Brewer, *supra* note 89.

<sup>116</sup> Edwards, *supra* note 91.

hospital" based upon a review of national hospital discharge data from the Agency for Healthcare Quality and Research.<sup>117</sup> As previously noted, "[w]hile previous studies have highlighted the physical and emotional burdens of concussion, few have considered the associated costs."<sup>118</sup> As it relates to a child who has experienced a concussion, "recovery can take a substantial amount of time, [and] additional costs can be accrued that increase the short- and long-term financial burden on parents."<sup>119</sup> Therefore, further research is also "needed to clarify why some children require extended hospital admissions and the costs associated with those stays."<sup>120</sup>

#### IV. ASSUMPTION OF RISK, INFORMED CONSENT, AND THE QUESTIONING OF "INFORMED CONSENT" REGARDING SPORTS-RELATED CONCUSSIONS

##### A. Assumption of Risk Defined

Assumption of risk was "formally characterized by Judge Cardozo's maxim that the 'timorous may stay at home.'"<sup>121</sup> Black's Law Dictionary refers to "assumption of the risk" as a tort and defines the term as "[t]he act or an instance of a prospective plaintiff's taking on the risk of loss, injury, or damage."<sup>122</sup> Generally, "assumption of risk means that a plaintiff, in advance, has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone."<sup>123</sup> Moreover, Black's Law Dictionary further defines the term "assumption of the risk" as "[t]he principle that one who takes on the risk of loss, injury, or damage cannot maintain an action against a party that causes the loss, injury, or damage."<sup>124</sup> However, it notes that "[a]ssumption of the risk was originally an affirmative defense, but in most jurisdictions it has now been wholly or largely subsumed by the doctrines of contributory or comparative negligence. The risk assumed by the persons was often termed an *incurred risk*."<sup>125</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 8:1 (last updated Dec. 2014).

<sup>122</sup> *Assumption of the Risk*, BLACK'S LAW DICTIONARY 143 (9th ed. 2009) (noting the term "assumption of the risk" is also sometimes referred to as "*assumption of risk*" (emphasis in the original)).

<sup>123</sup> *Id.* (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (emphasis in the original).

Most athletes willingly and knowingly engage in contact sports such as football. It is assumed in sports, especially contact sports, that due to the physical demands of the game, “players’ body parts will be bruised, broken, or cut during the game.”<sup>126</sup> In fact, when playing sports, “[t]he risk of injury, even the risk of concussion, is known and generally appreciated.”<sup>127</sup> Thus, concussions have been referred to as “the reality of contact sports.”<sup>128</sup>

Consequently, it has been noted “that the recent and intense increase in awareness surrounding the danger of continued, post-concussive play will protect the NFL and the NCAA from liability in the future by providing an affirmative defense that today’s players assumed the risk of continued play.”<sup>129</sup> In fact, it has been argued that NFL players now “have access to [a] body of knowledge and research regarding concussions and, as a matter of law, it would be difficult to prove they played [the] game without awareness of [the] sport’s inherent risk.”<sup>130</sup> Moreover, as it relates to sports-related lawsuits and the numerous “tort defenses available to the school district, team owner, or stadium operator, the most potent by far is assumption of risk.”<sup>131</sup>

### B. Consent and Informed Consent Defined

Black’s Law Dictionary defines “consent” as “[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person.”<sup>132</sup> In addition, “informed consent” is defined as “[a] person’s agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives.”<sup>133</sup>

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<sup>126</sup> Ladan Shelechi, “Say Uncle”: *New York’s Chokehold Over Live Performance of Mixed Martial Arts: Whether Combat Sports are Protectable Speech and How Much Regulation is Appropriate for Inherently Dangerous Sports*, 33 LOY. L.A. ENT. L. REV. 205, 206 (2013).

<sup>127</sup> MacGillivray, *supra* note 6, at 529; see Rebecca Williams & Christopher M. Cross, *Athletes’ Knowledge and Attitudes Toward Concussions*, CEDARVILLE U. 46, 46 (2014) (stating “[a] concussion is a common sports-related injury, particularly in the sport of football” (citing Gessel et al., *Concussions Amongst United States High School and Collegiate Athletes*, J. ATHLETIC TRAINING (2007))).

<sup>128</sup> MacGillivray, *supra* note 6, at 529 n.2 (citing Cailyn M. Reilly, *Where is Concussion Litigation Headed? The Impact of Riddell, Inc. v. Schutt Sports, Inc., On Brain Injury Law*, 20 JEFFREY S. MOORAD SPORTS L.J. 517, 517 (2013)).

<sup>129</sup> *Id.* at 530; see Jeffrey Standen, *Assumption of Risk in NFL Concussion Litigation: The Offhand Empiricism of the Courtroom*, 8 FLA. INT’L L. REV. 71, 78-80 (2012).

<sup>130</sup> MacGillivray, *supra* note 6, at 530 n.10; see also Standen, *supra* note 129, at 78-80.

<sup>131</sup> CHAMPION, *supra* note 121. The author also commented that assumption of risk “is often used by defense attorneys as a smoke screen to obscure the difference between injuries inherent in the sport and preventable injuries attributable to negligence.” *Id.*

<sup>132</sup> BLACK’S LAW DICTIONARY, *supra* note 122, at 346 (defining informed consent).

<sup>133</sup> *Id.*

### C. Examples of Prior Cases Discussing Informed Consent and Assumption of Risk When Playing Formal Sports

Consent is a defense to intentional torts, such as battery, when participating in formal sporting activities (e.g., football or hockey).<sup>134</sup> In fact, "[i]n most sports it is generally held that plaintiffs consent to the injury from blows administered in accordance with the rules of the game, but not when the blows are deliberately illegal."<sup>135</sup> This applies whether an athlete is participating in high school, collegiate, or professional sports.

#### 1. Professional Sports

*Hackbart v. Cincinnati Bengals, Inc.*<sup>136</sup> is the seminal torts case that addressed this issue early on, and the case is often cited in leading torts textbooks when discussing consent and athletic injuries in formal professional settings.<sup>137</sup> In *Hackbart*, the main issue was "whether in a regular season professional football game an injury which is inflicted by one professional player on an opposing player can give rise to liability in tort where the injury was inflicted by the intentional striking of a blow during the game."<sup>138</sup>

In that case, the Denver Broncos and Cincinnati Bengals were playing an NFL game in Denver, Colorado in 1973.<sup>139</sup> The Bengals' offensive back Charles "Booby" Clark inflicted a blow, which injured Broncos' defensive back Dale Hackbart.<sup>140</sup> The trial court found that "Charles Clark, 'acting out of anger and frustration, but without a specific intent to injure \* \* \* stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck with sufficient force to cause both players to fall forward to the ground."<sup>141</sup> However, "[b]oth players, without complaining to the officials or to one another, returned to their respective sidelines since the ball had changed hands and the offensive and defensive teams of each had been substituted."<sup>142</sup>

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<sup>134</sup> See *id.* at 346 (stating that "[c]onsent is an affirmative defense to assault, battery, and related torts"); see RICHARD EPSTEIN & CATHERINE SHARKEY, *CASES AND MATERIALS ON TORTS* 3 (10th ed. 2012); see also VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE AND SCHWARTZ'S TORTS: CASES AND MATERIALS* 93-95 (12th ed. 2010).

<sup>135</sup> EPSTEIN & SHARKEY, *supra* note 134, at 25; see CHAMPION, *supra* note 121 (stating that "participation in games involving bodily contact does not constitute consent to contacts that are prohibited by the rules or usages of the sport, if such rules are designed for the protection of the participant and not merely to control the mode of play of the game.").

<sup>136</sup> See generally 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).

<sup>137</sup> See EPSTEIN & SHARKEY, *supra* note 134, at 25; see also SCHWARTZ ET AL., *supra* note 134, at 93-95.

<sup>138</sup> *Hackbart*, 601 F.2d at 518.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 519.

<sup>142</sup> *Id.*

Hackbart “suffered no immediate ill effects from the blow, [but] he shortly thereafter experienced severe pains that, after two more brief game appearances forced him to retire, ending a successful 13-year career.”<sup>143</sup> Hackbart later sued Clark, who admitted at trial that his blow was “intentionally administered;” however, “the trial court ruled as a matter of law that the game of professional football is basically a business which is violent in nature, and that the available sanctions are imposition of penalties and expulsion from the game.”<sup>144</sup> Moreover, “[n]otice was taken of the fact that many fouls are overlooked; that the game is played in an emotional and noisy environment; and that incidents such as that here complained of are not unusual.”<sup>145</sup> In addition, the trial judge discussed “the unreasonableness of applying the laws and rules which are a part of injury law to the game of professional football, noting the unreasonableness of holding that one player has a duty of care for the safety of others.”<sup>146</sup> Furthermore, the trial judge discussed “the concept of assumption of risk and contributory fault as applying and concluded that Hackbart had to recognize that he accepted the risk that he would be injured by such an act.”<sup>147</sup> In sum, the trial judge dismissed Hackbart’s lawsuit, but the United States Court of Appeals for the Tenth Circuit reversed and remanded the case for a new trial.<sup>148</sup>

The Tenth Circuit determined that the evidence in the case revealed “that there are rules of the game which prohibit the intentional striking of blows. Thus, Article 1, Item 1, Subsection C, provides that: ‘All players are prohibited from striking on the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands.’”<sup>149</sup> In fact, the Tenth Circuit noted that “the very conduct which was present here is expressly prohibited by the rule which is quoted above.”<sup>150</sup> The Tenth Circuit ultimately held that “the trial court did not limit the case to a trial of the evidence bearing on defendant’s liability but rather determined that as a matter of social policy the game was so violent and unlawful that valid lines could not be drawn.”<sup>151</sup> Therefore, the appellate court took “the view that this was not a proper issue for determination and that plaintiff was entitled to have the case tried on an assessment of his rights and whether

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<sup>143</sup> EPSTEIN & SHARKEY, *supra* note 134, at 25.

<sup>144</sup> *Hackbart*, 601 F.2d at 519.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 519, 527; *see* EPSTEIN & SHARKEY, *supra* note 134, at 25; *see also* SCHWARTZ ET AL., *supra* note 134, at 95.

<sup>149</sup> *Hackbart*, 601 F.2d at 521.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 526.

they had been violated."<sup>152</sup> Consequently, the Tenth Circuit remanded the case for retrial.<sup>153</sup>

Additionally, in *Turcotte v. Fell*,<sup>154</sup> the court denied a negligence lawsuit filed by a professional jockey who argued that he was injured in a race, not by the defendant intentionally or recklessly bumping him, but that because of the defendant's carelessness, the defendant "failed to control his mount as the horses raced for the lead and a preferred position on the track."<sup>155</sup> Distinguishing the case from *Hackbart v. Cincinnati Bengals, Inc.*<sup>156</sup> and *Nabozny v. Barnhill*,<sup>157</sup> the court in *Turcotte* noted that "[a]s the [foul riding] rule recognizes, bumping and jostling are normal incidents of the sport. They were not, as were the blows in *Nabozny* and *Hackbart*, flagrant infractions unrelated to the normal method of playing the game and done without any competitive purpose."<sup>158</sup> Consequently, in the *Turcotte* case, the judge held that "[w]hile a participant's 'consent' to join in a sporting activity is not a waiver of all rules infractions, nonetheless, a professional clearly understands the usual incidents of competition resulting from carelessness, particularly those which result from the customarily accepted method of playing the sport, and accepts them."<sup>159</sup>

## 2. High School and Collegiate Sports

"Courts have applied similar [consent and assumption of risk] principles to high school and college athletic contests" as have been applied to professional sports.<sup>160</sup> For example, in *Nabozny*,<sup>161</sup> the court was "concerned about the negative impact of tort liability on legitimate athletic activities."<sup>162</sup> However, the court "held that 'a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful [sic] or with a reckless disregard for the safety of

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 519, 527; see EPSTEIN & SHARKEY, *supra* note 134, at 25; see also SCHWARTZ ET AL., *supra* note 134, at 95.

<sup>154</sup> 502 N.E.2d 964 (N.Y. 1986).

<sup>155</sup> EPSTEIN & SHARKEY, *supra* note 134, at 27 (quoting *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986)); see CHAMPION, *supra* note 121 (stating that "[a] cause of action for personal injury that occurs during athletic competition must be predicated upon recklessness or intentional conduct and not mere negligence.").

<sup>156</sup> See generally *supra* notes 136-53.

<sup>157</sup> 334 N.E.2d 258 (Ill. App. Ct. 1975).

<sup>158</sup> EPSTEIN & SHARKEY, *supra* note 134, at 27 (quoting *Turcotte*, 502 N.E.2d at 964).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 25.

<sup>161</sup> 334 N.E.2d 258 (Ill. App. Ct. 1975).

<sup>162</sup> EPSTEIN & SHARKEY, *supra* note 134, at 25-26 (citing *Nabozny*, 334 N.E.2d at 261). In the *Nabozny* case, during a soccer game, a goalie "sustained severe and permanent injuries when kicked in the head inside the penalty area even though the defendant could have easily avoided any contact." *Id.*



the other player so as to cause injury to that player, the same being a question of fact to be decided by a jury.”<sup>163</sup>

In *Gauvin v. Clark*,<sup>164</sup> “the jury found [a] college hockey player did not act willfully in striking another player in [the] abdomen.”<sup>165</sup> Specifically, despite hockey player Clark’s deliberate blow, “the court denied recovery [to plaintiff Gauvin] after the jury found, in a special verdict, that [defendant] Clark had not acted ‘willfully, wantonly or recklessly.’”<sup>166</sup> The court further stated that “[p]recluding the imposition of liability in cases of negligence without reckless misconduct furthers the policy that ‘[v]igorous and active participation in sporting events should not be chilled by the threat of litigation.’”<sup>167</sup>

Moreover, a judge ruled in *Avila v. Citrus Community College District*<sup>168</sup> that a community college “had a duty ‘to, at a minimum, not increase the risks inherent in the sport’” of varsity baseball.<sup>169</sup> However, the judge held that “the home team was not liable because intentional beanballs were an ‘inherent risk of the sport.’”<sup>170</sup>

#### D. The Questioning of “Informed Consent” Regarding Sports-Related Concussions

Although some argue that athletes knowingly engage in contact sports and therefore, they assume the risk of injury,<sup>171</sup> based upon recent research, players and some researchers are questioning whether athletes are really “informed” regarding sports-related concussions.<sup>172</sup> For example, it is asserted that “a concussion is an evolving injury, and symptoms may or may not be immediately present or recognized following an injurious impact or collision.”<sup>173</sup>

<sup>163</sup> *Id.*; *Nabozny*, 334 N.E.2d at 261.

<sup>164</sup> *See generally* 537 N.E.2d 94 (Mass. 1989).

<sup>165</sup> SCHWARTZ ET AL., *supra* note 134, at 95; *see* EPSTEIN & SHARKEY, *supra* note 134, at 26 (citing *Gauvin*, 537 N.E.2d at 96-97 and noting that in *Gauvin*, a “defendant ‘butt-ended’ plaintiff (that is, hit him with the nonblade end of the hockey stick) in his mid-section causing serious internal injuries. This deliberate blow resulted in a major penalty and expulsion from the game under a rule enacted for the protection of the players.”).

<sup>166</sup> EPSTEIN & SHARKEY, *supra* note 134, at 26 (quoting *Gauvin*, 537 N.E.2d at 96-97).

<sup>167</sup> *Id.*

<sup>168</sup> 131 P.3d 383 (Cal. 2006).

<sup>169</sup> EPSTEIN & SHARKEY, *supra* note 134, at 26 (quoting *Avila*, 131 P.3d at 392-93). In *Avila*, “the defendant’s pitcher hit the plaintiff, a varsity baseball player, in the head with a pitch, cracking his helmet and causing serious unspecified injuries. The plaintiff alleged that ‘the pitch was an intentional ‘beanball’ thrown in retaliation for [a] previous hit batter or, at a minimum, was thrown negligently.’” *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See* MacGillivray, *supra* note 6, at 529; *see also* Williams & Cross, *supra* note 127, at 46; *see also* Standen, *supra* note 129, at 78-80.

<sup>172</sup> *See* MacGillivray, *supra* note 6, at 532; *see also* Dobel, *supra* note 82.

<sup>173</sup> MacGillivray, *supra* note 6, at 530-31 (citing Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 4<sup>th</sup> International Conference on Concussion in Sport Held in Zurich*,

Therefore, “[a]s a result of medical clearance, players may continue to play immediately following a concussion, even if they feel ‘off’ or ‘dazed.’”<sup>174</sup> However, this is problematic since there is scientific evidence that shows “playing during the most acute phase of a concussion increases the risk of subsequent and more serious concussions.”<sup>175</sup> Consequently, it has been argued that “[d]uring the period of time immediately following a concussion, a player’s decision-making ability is impaired, his cognitive functioning compromised, and his ability to assume the risk by consenting to play is not entirely informed or valid.”<sup>176</sup>

Likewise, it has been asserted that “[i]t is neither responsible, nor legally sound, to assert that players who have already sustained a concussion and are allowed to return to play immediately thereafter have actually assumed the risk of future cognitive decline attributable to subsequent and multiple concussions.”<sup>177</sup> In fact, “a growing body of scientific research and anecdotal evidence suggests . . . a shocking number of concussed athletes do not realize that they have suffered a concussion.”<sup>178</sup> Specifically, some research indicates that “up to 90% of sports related concussions may go undetected or unreported.”<sup>179</sup> In sum, it is easy to see

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*November 2012*, 47 BRITISH J. SPORTS MED. 250, 250 (2013) (“concussion is an evolving injury in the acute phase with rapidly changing clinical signs and symptoms, which may reflect the underlying physiological injury in the brain.”); Thomas M. Talvage et al., *Functionally-Detected Cognitive Impairment in High School Football Players without Clinically-Diagnosed Concussion*, 31 J. NEUROTRAUMA 327, 328 (2014) (“symptoms often do not become manifest until several hours after trauma”).

<sup>174</sup> MacGillivray, *supra* note 6, at 530-31 (noting that “[e]ven when symptoms are immediately present, concussed players are sometimes able to successfully complete a cursory sideline assessment and are subsequently deemed clear to play.”).

<sup>175</sup> *Id.* (citing Kimberly Harmon et al., *American Medical Society for Sports Medicine Position Statement: Concussion in Sport*, 23 CLINICAL J. SPORT MED. 1, 3 (2013) (“[s]tudies support the concept of increased postconcussive vulnerability, showing that a second injury before the brain has recovered results in . . . more significant cognitive deficits”).

<sup>176</sup> *Id.* at 532 (citing George Vecsey, *College Athletes Move Concussions Into the Courtroom*, N.Y. TIMES (Nov. 29, 2011), [http://www.nytimes.com/2011/11/30/sports/ncaafootball/college-players-move-concussions-issue-into-the-courtroom.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/11/30/sports/ncaafootball/college-players-move-concussions-issue-into-the-courtroom.html?pagewanted=all&_r=0), who was “relaying [a] conversation with [an] attorney and former college soccer player who says it is ‘unrealistic’ to place burden of monitoring injuries, specifically concussions, on injured college athletes themselves). ‘If you break an arm, you break an arm.’ But with a concussion, ‘a lot of these times, it comes and goes and you don’t really know you’ve hurt yourself.’ *Id.* (quoting attorney Steve W. Berman, who has represented college athletes in lawsuits against NCAA”).

<sup>177</sup> *Id.* (“noting [the] difference between breaking [an] arm and suffering [a] concussion and explaining athletes do not consider future costs, implications of injury . . . the science of a concussion prevents an already-concussed athlete from validly assuming the risks associated with continued play.”).

<sup>178</sup> *Id.* at 557 (emphasis removed). It is idealistic to think that “every player who suffered a concussion would be immediately and properly diagnosed and removed from play until symptoms have resolved completely, cognitive functioning has returned to pre-concussive, baseline levels, and the neurologic injury has healed.” *Id.* at 556-57.

<sup>179</sup> *Id.* (referencing Alex Taylor, *Neuropsychological Evaluation and Management of Sport-Related Concussion*, 24 NEUROLOGY 717, 717 (2012)); *see also* Dobel, *supra* note 82 (noting that “[t]he

how it is argued that there is a lack of “informed consent” regarding sports-related concussions since a concussed athlete is not agreeing “to allow something to happen, *made with full knowledge of the risks involved* and the alternatives.”<sup>180</sup>

## V. RECENT SPORTS-RELATED CONCUSSION LAWSUITS AND THE 2015 NFL PLAYERS’ CONCUSSION LAWSUIT SETTLEMENT

### A. Recent Sports-Related Concussion Lawsuits

There are various sports where lawsuits have been filed in recent years because of sports-related concussions, most notably against the National Football League.<sup>181</sup> Below is a summary and comprehensive analysis of the various lawsuits that have been filed in recent years across the country related to sports-related concussions, especially football.<sup>182</sup>

#### 1. National Football League (NFL) Concussion Lawsuits

Only a few months after Roger Goodell became the National Football League (NFL) Commissioner in 2006, he was confronted with the problem of the NFL’s handling of concussions after the suicide of retired player Andre Waters, who was subsequently found to have brain damage previously thought to be suffered only by boxers.<sup>183</sup> At that time, Commissioner Goodell “repeatedly asserted that his committee of experts had found no long-term effects of concussions among N.F.L. players and that the league’s policies—specifically

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more we know the more we understand the issues [related to brain trauma and neural damage from playing football] may be underreported.”)

<sup>180</sup> See BLACK’S LAW DICTIONARY, *supra* note 122, at 346 (emphasis added) (defining informed consent); see also Dobel, *supra* note 82 (calling the “informed” choice a new football draftee is supposed to make, after being provided with information regarding the risks of playing football, as a “negotiation leading to the brain trauma deal”). The author further remarks that “[t]he stealthy soul death brought on the brain trauma induced by impacts condemn players to a living death, far beyond their imagination. Expecting [the] informed individual choice option to address the brain damage threat is an illusion.” *Id.*

<sup>181</sup> See generally *Concussions in the News*, NFL CONCUSSION LITIG., [http://nflconcussionlitigation.com/?page\\_id=976](http://nflconcussionlitigation.com/?page_id=976) (last visited Sept. 20, 2015). The website provides invaluable information and links to various news articles, court documents, exhibits, scholarly articles, as well as other helpful resources that discuss sport-related brain injuries, especially information related to the NFL concussion litigation.

<sup>182</sup> See generally *Court Documents*, NFL CONCUSSION LITIG., [http://nflconcussionlitigation.com/?page\\_id=18](http://nflconcussionlitigation.com/?page_id=18) (last visited Sept. 20, 2015) (providing a comprehensive listing and some links to the 242 lawsuits filed against the NFL over the last several years, beginning in 2011).

<sup>183</sup> See Alan Schwarz, *Handling of Ray Rice Case Puts Roger Goodell Under Heightened Level of Scrutiny*, N.Y. TIMES (Sept. 14, 2014), <http://www.nytimes.com/2014/09/15/sports/football/handling-of-ray-rice-case-puts-roger-goodell-under-heightened-level-of-scrutiny.html>.

the practice of allowing players to return to games in which they were concussed—were sound.”<sup>184</sup> However, despite mounting evidence for three years that football was “damaging brains,” Commissioner Goodell “pleaded ignorance” at a hearing in front of the United States House Judiciary Committee in October 2009 when he was questioned about whether there “was a link between football head trauma and cognitive decline.”<sup>185</sup> He responded to the committee’s question by deferring to “the medical experts,” while also emphasizing his commitment to ensuring that football was as safe as possible for the players.<sup>186</sup> Shortly after the 2009 hearing, the NFL “adopted far stricter rules for teams’ handling of brain injuries.”<sup>187</sup> In December 2009, the NFL provided guidelines advising teams not to return players to games or practices on the same day that they sustained a concussion.<sup>188</sup> In the 2009 guideline, the league further advised teams that “players should not return to play or practice on a later date until cleared by the team physician and an independent neurologist.”<sup>189</sup>

Moreover, some researchers have remarked that although the NFL may have been slow to respond to the concussion issue, the degree “to which its response was unreasonable is unclear.”<sup>190</sup> It has been argued that “[i]f many medical experts did not worry about concussions, it is difficult to fault the NFL for not worrying either . . . Moreover, the NFL did not ignore concerns about head injuries. It imposed helmet requirements and banned types of blocking and tackling that were particularly dangerous.”<sup>191</sup> Additionally, the NFL also had an

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<sup>184</sup> *Id.*; see David Orentlicher & William S. David, *Concussion and Football: Failures to Respond by the NFL and the Medical Profession*, 8 FLA. INT’L U. L.R. 23, 23 (2012) (commenting that “the NFL was not alone in viewing concussion as a relatively mild problem; physicians also did not worry very much about the medical consequences of concussions. For some time, neurologic experts disagreed as to whether concussions could cause permanent injury, with many attributing patient symptoms to psychological issues or to the incentives created by compensation programs for people with disabling conditions. Team owners and league officials could have found articles or books that would have put them on notice about the effects of concussion, but they also could have found articles or books that would have given them a false sense of security.”).

<sup>185</sup> Schwarz, *supra* note 183.

<sup>186</sup> *Id.* Goodell stated that “[t]he medical experts should be the ones to continue that debate.” When asked again by Committee Chairman, John Conyers Jr., (D-MI), to simply the answer the question, Goodell again responded that “[t]he answer is the medical experts would know better than I would with respect to that. But we are not treating that in any way in delaying anything that we do.” *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Orentlicher & David, *supra* note 184, at 23 (footnote omitted). Conversely, in its 2007 guideline, “the NFL advised teams that players should not return to play or practice the same day as a concussion when the concussion was accompanied by a loss of consciousness.” *Id.* (footnote omitted).

<sup>189</sup> *Id.* at 25 (footnote omitted).

<sup>190</sup> *Id.* (footnote omitted).

<sup>191</sup> *Id.* (referencing Richard S. Polin & Nidhi Gupta, *Athletic Head Injury*, in *NEUROLOGY & TRAUMA* 506, 513 (2nd ed. 2006)) (footnote omitted).

expert committee examine the concussion issue.<sup>192</sup> However, some question the NFL's failure to impose concussion guidelines in the late 1990s when such guidelines were already published by medical experts.<sup>193</sup>

#### a. First Lawsuit against the NFL

On July 19, 2011, *Maxwell v. National Football League*<sup>194</sup> became known as the first concussion lawsuit filed in the United States against the NFL.<sup>195</sup> The lawsuit was filed at the state level in the Superior Court of California in the County of Los Angeles by over 70 NFL retirees.<sup>196</sup> However, it was not filed as a class action lawsuit.<sup>197</sup> The former NFL players' complaint alleged negligence, fraud, strict liability based upon design defect, strict liability based upon manufacturing defect, failure to warn, and loss of consortium.<sup>198</sup>

Specifically, the lawsuit argued that the NFL took responsibility for studying concussion research in 1994 by funding a committee referred to as the "NFL Committee on Mild Traumatic Brain Injury."<sup>199</sup> Ten years later, in 2004, the committee published their findings of "'no evidence of worsening injury or chronic cumulative effects' from multiple concussions."<sup>200</sup> In another, yet related study, this same committee found that many NFL players could safely return to play on the same day they sustained a concussion if they had no symptoms and were "cleared by a physician."<sup>201</sup> The lawsuit also alleged that the NFL did not acknowledge and failed to publish warnings to all players and teams until June of 2010 that concussions could cause dementia, memory loss, CTE as well as related symptoms.<sup>202</sup>

Another key allegation in the lawsuit stated the following:

The NFL possesses monopoly power over American Football. As such, it also possesses monopoly power over the research and education of football injuries to physicians, trainers, coaches and individuals with brain damage such as Plaintiffs who played in the NFL, as well as the

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<sup>192</sup> *Id.* (referencing Ira A. Casson et al., *Concussion in the Nat'l Football League: An Overview for Neurologists*, 26 NEUROLOGIC CLINICS 217, 217-18 (2008)).

<sup>193</sup> *Id.*

<sup>194</sup> Complaint for Damages, *Maxwell v. Nat'l Football League*, No. BC465842 (Cal. Super. Ct. July 19, 2011) [hereinafter *Maxwell Complaint*].

<sup>195</sup> *Court Documents*, *supra* note 182; see Sheila B. Scheuerman, *The NFL Concussion Litigation: A Critical Assessment of Class Certification*, 8 FLA. INT'L U. L. REV. 81, 84 (2012).

<sup>196</sup> *Maxwell Complaint*, *supra* note 194, at 1; see *Court Documents*, *supra* note 182 (noting there were 75 players involved in the lawsuit); see also Scheuerman, *supra* note 195, at 84.

<sup>197</sup> Scheuerman, *supra* note 195, at 84.

<sup>198</sup> *Maxwell Complaint*, *supra* note 194, at 1.

<sup>199</sup> *Id.* at 12.

<sup>200</sup> *Id.*; see Schwarz, *supra* note 184.

<sup>201</sup> *Maxwell Complaint*, *supra* note 194, at 12; see Schwarz, *supra* note 184.

<sup>202</sup> *Maxwell Complaint*, *supra* note 194, at 12.

public at large. As a result, it owed a duty to everyone including individuals such as Plaintiffs in the following respects:

- (a) It owed a duty to protect Plaintiffs on the playing field;
- (b) It owed a duty to Plaintiffs to educate them and other players in the NFL about CTE and/or concussion injury;
- (c) It owed a duty to Plaintiffs to educate trainers, physicians, and coaches about CTE and/or concussion injury;
- (d) It owed a duty to Plaintiffs to have in place strict return-to-play guidelines to prevent CTE and/or concussion injury;
- (e) It owed a duty to Plaintiffs to promote a “whistleblower” system where teammates would bring to the attention of a trainer, physician or coach that another player had sustained concussion injury;
- (f) It owed a duty to Plaintiffs to design rules and penalties for players who use their head or upper body to hit or tackle;
- (g) It owed a duty to Plaintiffs to design rules to eliminate the risk of concussion during games and/or practices;
- (h) It owed a duty to Plaintiffs to promote research into and cure for CTE and the effects of concussion injury over a period of time; and
- (i) It owed a duty to State governments, local sports organizations, all American Rules leagues and players, and the public at large to protect them against the long-term effects of CTE and/or concussion injury.<sup>203</sup>

The NFL was also accused of knowing since the early 1920s about the dangerous impact of concussions on players’ brains but that it concealed this information from coaches, trainers, players, and the public until June of 2010.<sup>204</sup> Consequently, players have argued that they were not aware of the long-term impact of concussions and justifiably relied upon the NFL as well as helmet manufacturer Riddell to protect them.<sup>205</sup>

### **b. First Class Action Lawsuit against the NFL**

On August 17, 2011, *Easterling v. National Football League*<sup>206</sup> became the first federal lawsuit and class action lawsuit filed against the NFL in the United States.<sup>207</sup> The lawsuit was filed in the Eastern District of Pennsylvania by

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<sup>203</sup> *Id.* at 12-13.

<sup>204</sup> *Id.* at 13.

<sup>205</sup> *Id.*

<sup>206</sup> Class Action Complaint, *Easterling v. Nat’l Football League*, No. 2:11-CV-05209-AB (E.D. Pa. Aug. 17, 2011), ECF No. 1 [hereinafter *Easterling* Complaint].

<sup>207</sup> *Court Documents*, *supra* note 182; Scheuerman, *supra* note 195, at 81.

seven NFL players.<sup>208</sup> The lawsuit alleged “that the NFL concealed the long-term effects of on-field head injury and failed to warn players of the risks of harm from repeated concussions.”<sup>209</sup> The lead Plaintiff Charles “Ray” Easterling played as a starting safety for the Atlanta Falcons in the 1970s, but he “would forget the way home when jogging through his neighborhood.”<sup>210</sup> Easterling would enter a room and then later failed to remember why he was there.<sup>211</sup> He also experienced “severe mood swings and depression.”<sup>212</sup> On April 19, 2012, Easterling committed suicide.<sup>213</sup> It was later determined based upon an autopsy of his brain that “he suffered from moderately severe chronic traumatic encephalopathy [CTE].”<sup>214</sup>

### c. *In re* National Football League Players’ Concussion Injury Litigation

After the *Easterling v. National Football League* lawsuit was filed,<sup>215</sup> players filed numerous other lawsuits.<sup>216</sup> As of October 2, 2012, approximately 155 lawsuits, including 12 class action lawsuits, were filed in various courts throughout the United States.<sup>217</sup> Specifically, more than 4,500 former NFL players subsequently filed substantially similar lawsuits against the NFL after suffering from repeated concussions throughout their football careers.<sup>218</sup>

However, despite all of the class action lawsuits seeking “to represent the same putative class of former players, the class complaints varied in significant respects . . . Some class complaints asserted claims for negligence and fraud, while others brought only medical monitoring claims.”<sup>219</sup> Moreover, the class action lawsuits varied depending upon whether class certification was being “sought under Federal Rule of Civil Procedure 23(b)(2) or 23(b)(3).”<sup>220</sup> Eventually, the number of lawsuits became so voluminous that the cases were

<sup>208</sup> *Easterling* Complaint, *supra* note 206, at 1; *see also* Court Documents, *supra* note 182 (noting there were seven players involved in the lawsuit).

<sup>209</sup> Scheuerman, *supra* note 195, at 81; *see Easterling* Complaint, *supra* note 206.

<sup>210</sup> Scheuerman, *supra* note 195, at 81 (referencing Mary Ann Easterling, *NFL’s Head Injury Denial Failed My Husband*, USA TODAY, Aug. 15, 2012, at 7A) (footnote omitted).

<sup>211</sup> *Id.* (referencing Joseph A. Slobodzian, *Concussion Suits Have NFL, Ex-Players On Collision Course*, PHILA. INQUIRER, May 29, 2012, at A1) (footnote omitted).

<sup>212</sup> *Id.* (referencing Mike Tierney, *Football Player Who Killed Himself Had Brain Disease*, N.Y. TIMES, July 26, 2012, at B16) (footnote omitted).

<sup>213</sup> *Id.* at 81 n.4.

<sup>214</sup> *Id.*

<sup>215</sup> *See generally Easterling* Complaint, *supra* note 206.

<sup>216</sup> Scheuerman, *supra* note 195, at 84; *see In re Nat’l Football League Players’ Concussion Injury Litig.*, 961 F. Supp. 2d 708, 710 (E.D. Pa. Oct. 6, 2014) [hereinafter *2014 NFL Concussion Litigation* case].

<sup>217</sup> *See* Scheuerman, *supra* note 195, at 81, 84, 85-89 (containing a detailed discussion about the numerous complaints that were filed against the NFL).

<sup>218</sup> *2014 NFL Concussion Litigation* case, 961 F. Supp. 2d at 710.

<sup>219</sup> Scheuerman, *supra* note 195, at 84-85 (footnotes omitted).

<sup>220</sup> *Id.* at 85.

consolidated as a multidistrict litigation (MDL) and on June 7, 2012, the players filed a Master Administrative Long-Form Complaint in a federal district court in Pennsylvania.<sup>221</sup> The master class action lawsuit is titled *In Re National Football League Players’ Concussion Injury Litigation*.<sup>222</sup> The main issue before the court in the class action lawsuit was whether the NFL should be held liable for concussions the players suffered while playing in the NFL.<sup>223</sup> Among other things, the complaint alleged that the NFL (1) “was aware of the evidence and the risks associated with repetitive traumatic brain injuries virtually at the inception, but deliberately ignored and actively concealed the information from the Plaintiffs and all others who participated in organized football at all levels,”<sup>224</sup> and (2) knew or should have known based upon past neuropathology studies, brain imaging tests, and neuropsychological tests that football players who endure repetitive head injuries are more susceptible to suffering from conditions such as “early-onset of Alzheimer’s Disease, dementia, depression, deficits in cognitive functioning, reduced processing speed, attention, and reasoning, loss of memory, sleeplessness, moods swings, personality changes, and the debilitating and latent disease known as Chronic traumatic encephalopathy (‘CTE’).”<sup>225</sup>

The various counts in the complaint specifically against the NFL included (1) an action for declaratory relief–liability, (2) medical monitoring, (3) wrongful death and survival actions, (4) fraudulent concealment, (5) fraud, (6) negligent misrepresentation, (7) negligence, (8) loss of consortium, (9) negligent hiring, and (10) negligent retention.<sup>226</sup> The various counts in the complaint against helmet manufacturer Riddell included (1) loss of consortium, (2) strict liability for design defect, (3) strict liability for manufacturing defect, (4) failure to warn, and (5) negligence.<sup>227</sup> The complaint also alleged civil conspiracy/fraudulent concealment against all of the defendants.<sup>228</sup> The players and their spouses demanded a jury trial and sought in their complaint (1) declaratory relief against the NFL, (2) an injunction and/or other equitable relief against the NFL including the plaintiffs’ request for medical monitoring, (3) an award of compensatory and punitive damages against the NFL, (4) an award of compensatory and punitive damages against the Riddell defendants, (5) an award of any other relief that was deemed appropriate, and (6) an award of prejudgment interest, costs, and attorney’s fees.<sup>229</sup>

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<sup>221</sup> See *id.* at 81-82, 85; *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB, MDL No. 2323 (E.D. Pa. June 7, 2012) [hereinafter *2012 NFL Concussion Litigation Master Complaint*].

<sup>222</sup> See generally *2012 NFL Concussion Litigation Master Complaint*, *supra* note 221.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 4.

<sup>225</sup> *Id.* at 18-19.

<sup>226</sup> *Id.* at 2-3, 53-76.

<sup>227</sup> *Id.* at 3, 76-84.

<sup>228</sup> *Id.* at 3, 84-85.

<sup>229</sup> *Id.* at 85-86.



In response to the complaint, on August 30, 2012, the NFL and another defendant NFL Properties LLC filed a Motion to Dismiss on preemption grounds.<sup>230</sup> The Defendants asserted that the terms and conditions of NFL employment were determined by collective bargaining agreements and the NFL Constitution and Bylaws, and aggrieved parties must resolve any employment-related disputes under the dispute resolution process stated in their collective bargaining agreements, not by filing lawsuits in court.<sup>231</sup> This case was later settled.<sup>232</sup>

## 2. National Hockey League (NHL) Concussion Lawsuits

Besides the National Football League, sports-related concussion lawsuits have also been filed against the National Hockey League (NHL).<sup>233</sup> The NHL concussion lawsuit involves over 200 former hockey players who are suing the league.<sup>234</sup> Similar to the NFL concussion litigation, former NHL players have alleged that “the NHL concealed what it knew about the long-term effects of repeated head trauma, and are asking for compensation and medical treatment.”<sup>235</sup>

On November 25, 2013, the first class action concussion lawsuit was filed in the United States District Court for the District of Columbia by a class of former NHL players against the NHL for traumatic brain injuries.<sup>236</sup> The first case filed was *Leeman v. National Hockey League*.<sup>237</sup> In this lawsuit, “[t]he plaintiffs generally allege that the NHL failed to warn its players of the short and

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<sup>230</sup> *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, MDL No. 2323 (E.D. Pa. Aug. 30, 2012) [hereinafter *Memorandum of Law in Support of Motion to Dismiss*].

<sup>231</sup> *Id.* at 2.

<sup>232</sup> See *infra* Part V(B).

<sup>233</sup> See Kevin McGran, *NFL Concussion Settlement Could be Good News for Former NHL Players*, TORONTO STAR NEWSPAPERS LTD. (Apr. 29, 2015), <http://www.thestar.com/sports/hockey/2015/04/29/nfl-concussion-settlement-could-be-good-news-for-former-nhl-players.html>; see John J. Miller & John T. Wendt, *The Concussion Crisis in the National Hockey League*, 9 J. CONTEMP. ATHLETICS 1 (2015) (discussing a NHL lawsuit brought by parents of former NHL player Derek Boogaard who is deceased, the need for a paradigm shift to make the game of hockey safer, the need to apply risk management to reduce violent behavior in hockey, as well as problems involved with monitoring youth hockey players for concussions); see also Melanie Romero, *Check to the Head: The Tragic Death of NHL Enforcer Derek Boogaard and the NHL's Negligence—How Enforcers Are Treated as Second-Class Employees*, 22 JEFFREY S. MOORAD SPORTS L.J. 271, 274 (2015) (discussing how the NHL failed Boogaard and noting “that the NHL and NHLPA should include safeguards in the CBA [collective bargaining agreement] to protect the health of NHL players”). *Id.* at 276.

<sup>234</sup> McGran, *supra* note 233.

<sup>235</sup> *Id.*

<sup>236</sup> John DeWispelaere, *NHL Concussion Litigation—The Backstory and Potentially the Players' First Victory*, SPORT IN LAW (Mar. 11, 2015), <http://sportinlaw.com/2015/03/11/nhl-concussion-litigation-the-backstory-and-potentially-the-players-first-victory/>.

<sup>237</sup> *Id.*; *Leeman et al. v. NHL et al.*, No. 1:13-cv-01856-KBJ (D.D.C. Nov. 25, 2013).

long-term effects of repeated concussions and head trauma, failed to adequately care for its players after they received such injuries, and promoted and glorified unreasonable and unnecessary violence leading to head trauma."<sup>238</sup> Consequently, the former NHL players alleged that the "actions and inactions by the NHL resulted in players suffering from, or increased the risk of contracting, serious brain diseases such as Alzheimer's, dementia, and Parkinson's, and accelerated the speed and severity of players' post-retirement mental decline."<sup>239</sup> On April 11, 2014, a second class action concussion lawsuit was filed against the NHL in the case of *LaCouture v. National Hockey League*.<sup>240</sup>

On August 19, 2014, the Judicial Panel on Multidistrict Litigation determined that centralizing the NHL cases within the District of Minnesota "was appropriate."<sup>241</sup> Therefore, "[a]ll similar cases by former NHL players against the NHL were transferred to the District of Minnesota and assigned to the Honorable Susan Richard Nelson for coordinated or consolidated pretrial proceedings."<sup>242</sup> Similar to the NFL concussion litigation, the NHL class action lawsuits have been consolidated into the case of *In re National Hockey League Players' Concussion Injury Litigation*.<sup>243</sup> On October 20, 2014, a Master Administrative Long-Form and Class Action Complaint was filed against the NHL in the District Court of Minnesota.<sup>244</sup> Between November 2013 and March 2015, a total of nine "different classes of former players have sued the NHL over concussion related injuries."<sup>245</sup> The last lawsuit filed during this time frame was *Adams v. National Hockey League*,<sup>246</sup> which was filed on February 19, 2015.<sup>247</sup> On March 25, 2015, Judge Nelson "denied the NHL's motion to dismiss the Master Complaint based on the sufficiency of the allegations."<sup>248</sup> NHL Commissioner Gary Bettman was deposed on July 31, 2015 by the players' lawyers who asked "him all about what he and the league [knew] or [believed] about repeated head trauma, and what he

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<sup>238</sup> See generally *Case Information*, NHL CONCUSSION LITIG., <http://www.nhlconcussionlitigation.com/information.html> (last visited Sept. 20, 2015).

<sup>239</sup> *Id.*

<sup>240</sup> DeWispelaere, *supra* note 236; see generally *LaCouture et al. v. NHL*, No. 1:14-cv-02531-SAS (S.D.N.Y. Apr. 11, 2014).

<sup>241</sup> *Case Information*, *supra* note 238.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*; see generally *In re Nat'l Hockey League Players' Concussion Injury Litig.*, No. 0:14-md-02551-SRN-JSM, MDL No. 14-2551 (D. Minn. Oct. 20, 2014) [hereinafter *2014 NHL Concussion Litigation Master Complaint*].

<sup>244</sup> *2014 NHL Concussion Litigation Master Complaint*, *supra* note 243.

<sup>245</sup> DeWispelaere, *supra* note 236. The names of the nine lawsuits and the dates they were filed are listed in the article.

<sup>246</sup> *Id.*; see generally *Adams v. NHL*, No. 0:15-cv-00472 (D. Minn. Feb. 19, 2015).

<sup>247</sup> See generally *Adams*, No. 0:15-cv-00472.

<sup>248</sup> *Case Information*, *supra* note 238.

did or didn't do to protect those players."<sup>249</sup> His deposition is believed "to be the most significant development so far in the concussion lawsuit that is plodding its way through the U.S. legal system."<sup>250</sup> Currently, "Bettman's testimony about what he knew and what the league knew about the effect of repeated head trauma on players will be sealed, hidden from public scrutiny."<sup>251</sup> However, Judge Susan Nelson "will rule—perhaps before NHL training camps begin in September—whether to unseal the depositions to allow the public to know fully what both sides have been arguing."<sup>252</sup> It is believed that this lawsuit will take some time and that the earliest this case "could go to trial is the summer of 2016."<sup>253</sup>

### 3. National Collegiate Athletic Association (NCAA) Concussion Lawsuits

In addition to the NFL and NHL concussion lawsuits, athletes have filed lawsuits against the National Collegiate Athletic Association (NCAA) as well. Former Eastern Illinois football player Adrian Arrington filed the first class action lawsuit against the NCAA on September 12, 2011.<sup>254</sup> A second lawsuit was filed approximately two weeks later on September 28, 2011.<sup>255</sup> On October 5, 2011, the court consolidated both cases.<sup>256</sup> The complaint generally asserted that "the NCAA was negligent in safeguarding student-athletes from the risks of concussions."<sup>257</sup> The complaint specifically asserted four counts: (1) negligence, (2) fraudulent concealment, (3) unjust enrichment, and (4) medical monitoring.<sup>258</sup> Specifically, the plaintiffs alleged in their complaint the NCAA failed to do the following:

- (1) educate coaches about proper tackling techniques;
- (2) educate coaches, trainers and student athletes as to concussion-like symptoms;
- (3) implement system-wide return to play guidelines;
- (4) implement guidelines for screening and detecting head injuries;

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<sup>249</sup> Kevin McGran, *Bettman to be Deposed Friday for Concussion Lawsuit*, TORONTO STAR NEWSPAPERS LTD. (July 30, 2015), <http://www.thestar.com/sports/hockey/2015/07/30/bettman-to-be-deposed-friday-for-concussion-lawsuit.html>.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Paul D. Anderson, *Concussion Litigation Against the NCAA is Gathering Momentum*, NHL CONCUSSION LITIG. (Sept. 19, 2012), <http://nflconcussionlitigation.com/?p=1137>; *see also* Arrington v. NCAA, 988 F. Supp. 2d 1373 (N.D. Ill. 2011).

<sup>255</sup> *See generally* Owens et al. v. NCAA, No. 1:11-cv-06816 (N.D. Ill. Sept. 28, 2011).

<sup>256</sup> *See In re Nat'l Collegiate Athletic Ass'n Student Athlete Concussion Injury Litig.*, No. 1:13-cv-09116, 2014 U.S. Dist. LEXIS 174334, at \*1 (N.D. Ill. July 28, 2014) [hereinafter *Class Action Settlement Agreement and Release*].

<sup>257</sup> Anderson, *supra* note 254. The class was not just football players, but included all student-athletes. In fact, Angela Palacios, one of the plaintiffs in the case, is a former women's soccer player who played at Ouachita Baptist University.

<sup>258</sup> *Id.*

(5) implement legislation addressing the treatment and eligibility for athletes that have sustained multiple concussions; and (6) implement a support system for athletes who are "unable to either play or even lead a normal life."<sup>259</sup>

The NCAA responded to the complaint by basically denying all of the allegations of any wrongdoing on its part and by asserting various affirmative defenses.<sup>260</sup> While settlement discussions were taking place in the *Arrington* consolidated case, over 10 other lawsuits were filed nationwide against the NCAA.<sup>261</sup> Consequently, *Arrington* and all of these related cases were consolidated and the multidistrict litigation became *In re National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*.<sup>262</sup> A settlement was reached by the parties and filed with the court on July 28, 2014.<sup>263</sup> However, the settlement is still pending the judge's approval and lead plaintiff Adrian Arrington recently released a statement in June 2015 stating that he opposes the proposed settlement.<sup>264</sup> Arrington states that "the agreement is unacceptable and that he never approved the settlement proposal being considered by U.S. District Judge John Lee in Chicago . . . the first time he learned about the deal was through the media."<sup>265</sup> He ultimately fired his attorney and plans to obtain new legal counsel.<sup>266</sup>

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Class Action Settlement Agreement and Release*, 2014 U.S. Dist. LEXIS 174334 1, 9 n.1 (The various lawsuits that were filed included the following: (1) Walker et al. v. NCAA, No. 1:13-cv-00293 (E.D. Tenn., filed Sept. 3, 2013); (2) DuRocher et al. v. NCAA, No. 1:13-cv-01570 (S.D. Ind., filed Oct. 1, 2013); (3) Caldwell et al. v. NCAA, No. 1:13-cv-03820 (N.D. Ga., filed Oct. 18, 2013); (4) Doughty v. NCAA, No. 3:13-cv-02894 (D.S.C., filed Oct. 22, 2013); (5) Powell et al. v. NCAA, No. 4:13-cv-01106 (W.D. Mo., filed Nov. 11, 2013); (6) Morgan et al. v. NCAA, No. 0:13-cv-03174 (D. Minn., filed Nov. 19, 2013); (7) Walton et al. v. NCAA, No. 2:13-cv-02904 (W.D. Tenn., filed Nov. 20, 2013); (8) Washington et al. v. NCAA, No. 4:13-cv-02434 (E.D. Mo., filed Dec. 3, 2013); (9) Hudson v. NCAA, No. 5:13-cv-00398 (N.D. Fla., filed Dec. 3, 2013); (10) Nichols v. NCAA, No. 1:14-cv-00962 (N.D. Ill., filed Feb. 11, 2014); and (11) Wolf v. NCAA, No. 1:13-cv-09116 (N.D. Ill., filed Feb. 20, 2014) (collectively, the "Related Actions").

<sup>262</sup> *Class Action Settlement Agreement and Release*, No. 1:13-cv-09116.

<sup>263</sup> *Id.*

<sup>264</sup> Associated Press, *Plaintiff Opposes Potential Settlement with NCAA in Concussion Lawsuit*, ESPN (June 9, 2015), [http://espn.go.com/college-football/story/\\_/id/13048342/adrian-arrington-lead-plaintiff-con](http://espn.go.com/college-football/story/_/id/13048342/adrian-arrington-lead-plaintiff-con).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* Arrington stated, "I feel that I have been misinformed and the preliminary settlement doesn't address the reasons I filed the lawsuit in the first place . . . I would like the judge to reject the preliminary settlement. I plan to secure new legal representation to continue this fight to protect future players in NCAA sports." *Id.*

#### 4. Examples of Other Sports-Related Concussion Lawsuits and Laws

Lawsuits have been filed against other sports leagues and associations in addition to the NFL, NHL, and the NCAA related to concussions. For example, a lawsuit was filed in 2014 against the Illinois High School Association (IHSA), a governing body that writes the rules for high school sports.<sup>267</sup> The lawsuit is the first of its kind in the country against such a high school governing body.<sup>268</sup> The plaintiff (1) wants the IHSA to mandate that schools have medical professionals with concussion expertise at all football games as well as have someone available on call for all football practices, (2) wants “new guidelines to screen players for brain injuries, as well as a program to educate teachers about identifying concussions,” and (3) desires “the establishment of a ‘medical monitoring’ program that would allow all ex-high school football players from 2002 forward to be tested for problems that might be related to a concussion.”<sup>269</sup>

In addition, “[a]s of April 2014, every state and the District of Columbia, has enacted a law that addresses youth sports concussion.”<sup>270</sup> The leader in the legislative movement was the State of Washington, which enacted the “Zackery Lystedt Law to address concussion management in youth athletics. The Washington law was the first state law to require a ‘removal and clearance for Return to Play’ among youth athletes. Now all 50 states have a Return to Play law.”<sup>271</sup>

### B. 2015 NFL Players’ Concussion Lawsuit Settlement

#### 1. Overview of the Settlement

On July 8, 2013, United States District Judge Anita Brody ordered the parties involved in the *In Re National Football League Players’ Concussion Injury Litigation* to mediation before retired U.S. District Judge Layn Phillips.<sup>272</sup> The initial settlement “included \$675 million for compensatory claims for players with neurological symptoms, \$75 million for baseline testing and \$10 million for

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<sup>267</sup> John Keilman, *Ex-High School Football Player Suing IHSA Over Concussions Wants Safer Game*, CHI. TRIBUNE (Apr. 22, 2015, 7:56 PM), <http://www.chicagotribune.com/suburbs/elgin-courier-news/sports/ct-ihsa-concussion-lawsuit-plaintiff-met-20150422-story.html>.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> Kerri McGowan Lowrey, *State Laws Addressing Youth Sports-Related Traumatic Brain Injury and the Future of Concussion Law and Policy*, 10 J. BUS. & TECH. L. 61, 63 (2015); see *Sports Concussion Policies and Laws*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/headsup/policy/index.html> (last updated Feb. 16, 2015).

<sup>271</sup> See Lowrey, *supra* note 270, at 63 (noting that the law was “named for Zachary Lystedt, a middle school football player who suffered a severe brain injury after returning to a game in which he had sustained an earlier concussion.”) (footnotes omitted); see also *Sports Concussion Policies and Laws*, *supra* note 270.

<sup>272</sup> 2014 NFL Concussion Litigation case, 961 F. Supp. 2d at 710.

medical research and education. The NFL would also pay an additional \$112 million to the players' lawyers, for a total payout of more than \$870 million."<sup>273</sup> Under the proposed settlement, the diagnosis and the maximum monetary awards (i.e., caps) were as follows: Level 1.5 Neurocognitive Impairment such as mild dementia (\$1.5 million); Level 2 Neurocognitive Impairment such as moderate dementia (\$3 million); Alzheimer's Disease (\$3.5 million); Parkinson's Disease (\$3.5 million); Amyotrophic Lateral Sclerosis/Lou Gehrig's Disease (\$5 million); and death with Chronic Traumatic Encephalopathy (\$4 million).<sup>274</sup> However, these monetary awards could be decreased depending upon the player's age at the time of a qualifying diagnosis, the number of NFL seasons that were played, and other applicable offsets delineated in the Settlement Agreement.<sup>275</sup> In January 2014, Judge Brody denied preliminary approval of the proposed class action settlement based upon concerns of fairness, reasonableness, and the adequacy of the settlement amount to cover a 65-year lifespan for potentially 20,000 people.<sup>276</sup>

However, the parties made modifications to the Proposed Settlement Agreement, and on July 7, 2014, Judge Brody granted preliminary approval for the settlement "that would compensate thousands of former NFL players for concussion-related claims. The ruling . . . came about two weeks after the NFL agreed to remove a \$675 million cap on damages."<sup>277</sup> Therefore, the revised settlement no longer contains a monetary cap on damages, but it keeps "a payout formula for individual retirees that considers their age and illness."<sup>278</sup> Ultimately, on April 22, 2015, the NFL players settled their class action concussion lawsuit after receiving final approval from Judge Brody of the settlement.<sup>279</sup>

## 2. Pros and Cons of the Settlement

Various comments have been made regarding the advantages and disadvantages of the recent 2015 NFL concussion litigation settlement. Proponents of the settlement assert the following: (1) it provides for monetary awards up to \$5 million per claimant who suffers from serious conditions

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<sup>273</sup> Associated Press, *Federal Judge Approves NFL Concussion Settlement*, NFL (July 7, 2014, 5:29 PM), <http://www.nfl.com/news/story/0ap2000000363672/article/federal-judge-approves>; see also *id.* at 711-12.

<sup>274</sup> *2014 NFL Concussion Litigation* case, 961 F. Supp. 2d at 712.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 716.

<sup>277</sup> *Federal Judge Approves NFL Concussion Settlement*, *supra* note 273.

<sup>278</sup> *Id.*

<sup>279</sup> Steve Almasy & Jill Martin, *Judge Approves NFL Concussion Lawsuit Settlement*, CNN (Apr. 22, 2015, 8:36 PM), <http://www.cnn.com/2015/04/22/us/nfl-concussion-lawsuit-settlement/index.html>; see also Associated Press, *'Concern' About Appeals of NFL Concussion Case Settlement*, N.Y. TIMES (Apr. 23, 2015), <http://www.nytimes.com/aponline/2015/04/23/sports/football/ap-fbn-nfl-concussion-settlement.html>.

connected to repeated head trauma;<sup>280</sup> (2) since the NFL expects approximately 6,000 of nearly 20,000 retired players to suffer from Alzheimer's Disease or moderate dementia during their life, the settlement allows payment of approximately \$190,000 per player on average;<sup>281</sup> (3) "the NFL may never have to disclose what it knew when about the risks and treatment of concussions . . . [and] '[f]rom a business point of view, (the NFL has) . . . avoided what may have been the biggest risk to their continued prosperity;'"<sup>282</sup> (4) it allows families to obtain needed financial compensation and/or medical testing much quicker than if the case went to trial; and (5) retirees and their families are entitled to "prompt and substantial benefits and will avoid years of costly litigation that—as Judge Brody's comprehensive opinion makes clear—would have an uncertain prospect of success."<sup>283</sup>

Conversely, critics of the recent settlement argue the following: (1) since the NFL has annual revenues of approximately \$10 billion, and its total anticipated payouts over 65 years including interest and payment of attorney's fees is approximately \$1 billion, "the NFL is getting off lightly;"<sup>284</sup> (2) the settlement fails to "cover future deaths from chronic traumatic encephalopathy, a degenerative brain disease that can only be diagnosed after death, or contemplate the day when it might be diagnosed in the living;"<sup>285</sup> (3) "the number and variety of diseases covered by the deal [are] too small . . . [and] the settlement need[s] to acknowledge more classes of plaintiffs, not only those with diagnosable diseases and those without them;"<sup>286</sup> (4) the settlement unfairly provides for monetary reductions for older players as well as younger players who played in the league for less than five years;<sup>287</sup> and (5) while the settlement provides some financial assistance, some players argue that "the case is about more than money . . . the suit [is] a way to reveal the NFL's action, hold the league accountable for any

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<sup>280</sup> Associated Press, *NFL Players Win \$1bn Concussion Lawsuit that Could See Former Stars Win \$190,000 Each in Damages*, DAILYMAIL.COM (Apr. 22, 2015, 19:39 EST), <http://www.dailymail.co.uk/news/article-3051085/Judge-OKs-65-year-deal-NFL-concussions-cost-1B.html>.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*; see Katherine Campbell, *The NFL Concussion Deal's Surprise Winner*, BLOOMBERG BUSINESSWEEK (Sept. 9, 2013), <http://resourcecenter.businessweek.com/reviews/the-nfl-concussion-deals-surprise-winner> (stating that "[t]he settlement has a variety of pros and cons for the NFL, players, and youth sports participants. While the settlement has economic implications for the NFL, protection of the league's reputation may be the settlement's biggest virtue. The settlement takes concussion issues out of the limelight and allows the league to avoid admitting culpability. It further protects the NFL's reputation by allowing the league to avoid depositions and discovery that could reveal embarrassing evidence.").

<sup>283</sup> Associated Press, *supra* note 280.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Ken Belson, *Judge Approves Deal in N.F.L. Concussion Lawsuit*, N.Y. TIMES (Apr. 22, 2015), <http://www.nytimes.com/2015/04/23/sports/football/nfl-concussion-settlement-is-given-final-approval.html> [hereinafter *Judge Approves Deal in N.F.L. Concussion Lawsuit*].

<sup>287</sup> Associated Press, *supra* note 280.

wrongdoing, enhance player safety in the future, and offer injured players justice."<sup>288</sup>

### 3. Rejection of the Settlement by Some NFL Retirees and/or Their Families

Approximately 200 NFL retirees and/or their families rejected the NFL players' class action concussion settlement, and they voiced their plans to sue the NFL individually.<sup>289</sup> The family of Junior Seau, a popular Pro Bowler who committed suicide at his home in San Diego in 2012 after exhibiting "increasingly erratic behavior" for several years, has rejected the settlement.<sup>290</sup> His autopsy revealed that he suffered from chronic traumatic encephalopathy (CTE).<sup>291</sup> Therefore, his family "rejected the settlement because they want the truth to come out about the N.F.L.'s decades-long deception to hide the dangers of concussive brain injuries from the players."<sup>292</sup> However, less than one percent of former NFL players opted out of the settlement.<sup>293</sup> It is questionable how successful "such a small group will have compared with the 5,000 former players who filed the lawsuits that led to the current settlement."<sup>294</sup> These players will have to settle their differences with the NFL individually.<sup>295</sup> Conversely, with over a 99% participation rate, plaintiff's counsel argued, "it is clear the retired player community resoundingly supports this settlement."<sup>296</sup> However, "[n]o payments will be made to players until all appeals are exhausted. That could create tension between the players who are eager for some restitution and others who continue to push for a better deal."<sup>297</sup>

## VI. CONCLUSION

Athletes in youth sports, collegiate athletics, as well as professional sports must be fully informed and adequately protected from sports-related brain injuries, especially concussions. Specifically, athletes must be better protected in

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<sup>288</sup> Campbell, *supra* note 282.

<sup>289</sup> Associated Press, *supra* note 280.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Judge Approves Deal in N.F.L. Concussion Lawsuit*, *supra* note 286.

<sup>293</sup> Ken Belson, *Few Retired N.F.L. Players Opt Out of Proposed Concussion Settlement*, N.Y. TIMES (Nov. 3, 2014), <http://www.nytimes.com/2014/11/04/sports/football/few-retired-nfl-players-opt-out-of-proposed-concussion-settlement.html> (citing former NFL players Tony Dorsett, Roman Gabriel, and Bernie Kosar, who opted out of the settlement and have "preserved the right to continue suing the league for injuries related to their concussions and head hits") [hereinafter *Few Retired N.F.L. Players Opt Out of Proposed Concussion Settlement*].

<sup>294</sup> *Id.*

<sup>295</sup> *Judge Approves Deal in N.F.L. Concussion Lawsuit*, *supra* note 286.

<sup>296</sup> *Few Retired N.F.L. Players Opt Out of Proposed Concussion Settlement*, *supra* note 293 (quoting Christopher Seeger and Sol Weiss, lead lawyers for the plaintiffs).

<sup>297</sup> *Judge Approves Deal in N.F.L. Concussion Lawsuit*, *supra* note 286.



order to decrease the number of sports-related concussions. Moreover, some researchers have emphasized who should be held responsible for informing and protecting athletes from such injuries. Some best practices to better inform and protect athletes at all levels of sports include the recommendations below.

First, concussion education continues to be essential.<sup>298</sup> With increased awareness regarding the risks and significant short and long-term consequences of sports-related concussions, more research is focused on educating coaches, athletes, and clinicians including athletic trainers about concussions.<sup>299</sup> However, “[d]espite more current research regarding the dangers of sustaining a concussion, most athletes remain unaware of the consequences that can result from a blow” such as a concussion.<sup>300</sup> In fact, research indicates “that education has been minimal for athletes, resulting in poor return to play decisions and even failure to report a suspected concussion.”<sup>301</sup> Therefore, some athletic trainers have determined that “[a]s clinicians, [their] responsibility to [their] athletes is to inform them of the potential dangers associated with concussions.”<sup>302</sup> A recent study was conducted by athletic trainers at Cedarville University of 55 male football athletes from NCAA Division II institutions to assess the athletes’ knowledge and attitudes toward concussions, in order to help athletic trainers “determine what education is necessary to better inform [athletes], in order to be able to conduct a more efficient evaluation.”<sup>303</sup> The trainers noted that “[b]y determining what our athletes do know, we can better assess their future needs in regards to concussion education.”<sup>304</sup> Furthermore, “[a] proper evaluation can only be done if the athlete is both competent and cooperative—this includes their ability to recognize symptoms, their understanding of management and return to play policies, and their understanding of the significance and risks involved with these injuries.”<sup>305</sup> Therefore, “[b]y gaining insight into how much [their] athletes really know about concussions, [they] can determine what education is necessary to better inform them, so [athletic trainers] are able to conduct a more efficient evaluation.”<sup>306</sup> Consequently, “[b]ecause of the serious immediate and long-term effects one can suffer from a concussion, education plays a vital role in the prevention, recognition, and management” of sports-related concussions.<sup>307</sup>

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<sup>298</sup> See Williams & Cross, *supra* note 127, at 46.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* (citing Sye et al., *High School Rugby Players’ Understanding of Concussion and Return to Play Guidelines*, 40 BRITISH J. SPORTS MED. 1003 (2006)).

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* (acknowledging that an athlete’s “lack of knowledge not only endangers the athlete, but it affects the clinicians as well. An athlete’s knowledge and ability to recognize an injury enables us as clinicians to perform a proper evaluation of their condition; so when an athlete is ill-informed, it makes performing an evaluation extremely difficult. This is why education is so essential.”).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

Second, more effective ways must be determined to foster a change in athletes' attitudes regarding how they perceive concussions, instead of simply increasing their education and knowledge regarding concussions.<sup>308</sup> In fact, the recent Cedarville University study cited above was "comparable . . . to similar studies in that athletes' attitudes appear to be the main cause of underreporting, rather than a lack of education."<sup>309</sup> Likewise, another recent study on the effectiveness of concussion education revealed "that the education athletes were receiving, minimal or not, did nothing to change their reporting-related cognition."<sup>310</sup> Consequently, "[t]his means that despite what athletes know, their attitude towards [concussion] injuries do not change."<sup>311</sup> Therefore, it is recommended that future efforts be focused on "evaluating the effectiveness of concussion education for specific changes in overall perception, causing athletes to report concussions on a more consistent basis, regardless of the severity of the symptoms or the situation in which the concussion is sustained."<sup>312</sup>

Third, despite current research in this area, future research must be done on a continuous basis regarding the risks and impact of sustaining sports-related concussions. Besides just medical professionals, sports leagues and unions "need to continue aggressive and continued research and interventions to minimize the long-term damage" of traumatic brain injuries, including sports-related concussions and provide this significant information to their players.<sup>313</sup>

Fourth, athletes must be better protected in order to decrease the number of sports-related concussions in youth sports, collegiate athletics, and professional sports. This can range from limiting serious contact during practice to better equipment being developed by equipment manufacturers.

Fifth, there should be "joint contributions to a fund to support [current and] later life victims of the brain damage and soul loss that no one should have to bargain away."<sup>314</sup>

In sum, since it does not appear that contact sports are going anywhere any time soon,<sup>315</sup> the above recommendations should be considered and

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<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> Dobel, *supra* note 82.

<sup>314</sup> *Id.* (stating that regrettably, "[t]he odds are that individual players will not build up a fund. Mary Ann Easterling, whose husband committed suicide, summed it up, 'I'd also like to see the NFL take care of the players that do have symptoms or could possibly have symptoms.'"); *see id.* (suggesting recommendations #3 and #5 and commenting "[t]he league and union need to do this." It was also asserted that "[i]t is the least they can do for the sentence that some players will consign themselves to.").

<sup>315</sup> *But see A Plausible End of Contact Sports, CONCUSSIONS* (May 16, 2012), <http://sportconcussions.blogspot.com/2012/05/plausible-end-of-contact-sports.html> (stating that "[a]lthough the NFL is highly popular and profitable, the concussion crisis could critically maim, if not end the sport. If these scenarios can be applied to the most popular sport in America, then why

implemented (1) to ensure that athletes in youth sports, collegiate athletics, as well as professional sports are fully informed and adequately protected in order to decrease the number of sports-related brain injuries, especially concussions, and (2) to ensure the best outcome for athletes, families, youth sports, collegiate teams, and professional leagues. The reality is that the responsibility for reducing and preventing the number of sports-related concussions lies with athletes, parents, medical professionals, coaches, leagues, and unions. Moreover, sports-related brain injuries, including concussions, are a major health issue in the United States. Therefore, this is also a societal issue that must be addressed because sports-related concussions can and will have a future economic impact on all of us, not just the athlete and his or her family. As noted in the *Maxwell* case, athletes can suffer serious damages because of sports-related concussions, including later life cognitive brain injuries, and such injuries often result in “increased home care, loss of consortium, loss of employment, medical costs and pain and suffering.”<sup>316</sup> These results will ultimately trickle down to all of us, including potentially higher health care costs. As one athlete who currently has a pending lawsuit stated “I just want to make (football) safer . . . I don’t want to get rid of it.”<sup>317</sup> In sum, “[w]hat is promising . . . is that the recent awareness of the dangers of concussions is causing major sports organizations, both youth and professional, to evaluate their current head injury protocols—which will hopefully result in increased protection for players.”<sup>318</sup> However, the sports industry, including the NFL and other professional athletes and teams, can have a serious influence upon children and youth athletics.<sup>319</sup> In fact, “[t]he NFL’s values may shape the culture of sports in a way that trickles down to legions of young players.”<sup>320</sup> Therefore, the recent NFL “settlement and the responsibility the NFL assumes for player safety may have consequences for society that extend beyond the immediate parties to the suit.”<sup>321</sup>

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would other contact sports be safe? If further research establishes a causative link between CTE, concussion, and contact sports, are we morally obliged to end those sports in the best interest of the athletes? These questions will need to be answered in the coming years. As more scientific research is conducted, we may see the American sports landscape change forever.”). *Id.*

<sup>316</sup> *Maxwell* Complaint, *supra* note 194, at 75.

<sup>317</sup> Keilman, *supra* note 267.

<sup>318</sup> Elizabeth Eckhart, *Looking at the Risk of Concussion in Sports Head On*, BRAINLINE.ORG, <http://www.brainline.org/content/2014/07/looking-at-the-risk-of-concussion-in-sports-head-on.html> (last visited Sept. 20, 2015).

<sup>319</sup> Campbell, *supra* note 282.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*