

Traumatic Brain Injury and the National Football League: A Growing Problem

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The National Football League (“NFL”) has a burgeoning problem on its hands with regards to traumatic brain injury (“TBI”). While NFL players have been complaining for years that the NFL does not have its retired players’ best interests in mind,¹ the growing controversy over TBI became public news upon the sad story of Mike Webster, a former center for the Pittsburgh Steelers of the 1970s and 1980s, a member of the Pro Football Hall of Fame, and a key player in each of the Steelers’ four Super Bowl wins during the 1970s.

According to Greg Garber, a reporter who authored a five-part series for ESPN.com, after seventeen seasons in the NFL, “Webster had lost any semblance of control in his once-invincible body.”² He suffered from profound dementia, the result of deterioration in his brain resulting from the thousands of hits and an unknown number of concussions that he suffered during his career.³ Though he retired with over \$2 million in assets, a series of poor business decisions and his growing dementia eventually resulted in his becoming homeless for over five years.⁴ He slept in cheap hotels, his car, or public venues (train depots, airports, bus stations, etc.).⁵ By 1997, according to Garber,

[Webster’s] days were filled with pain from his numerous football injuries. He often slept only a few hours each night, usually sitting up in a chair because the ache was too great to lie down. By that time, he was taking Vicodin regularly and, at different times, Darvocet, Ultram and Lorcet. He also had a regular prescription for Ritalin and used Paxil and Prozac to dull his demons. Sometimes, the only thing that brought him relief was a black Taser gun. He would ask Sunny or his son Garrett to stun him into unconsciousness, usually in the thigh but sometimes in the back and neck. When no one was there, which was often, he would try to do it himself.⁶

Webster died in 1992 at the age of 50.⁷ The majority of these facts came to light in context of litigation brought by Webster’s estate against the NFL, in which it sought over

¹ See Gene Wojciechowski & Chris Dufresne, *Life Expectancy Low, Some Say: Football Career is Taking Its Toll on NFL’s Players*, L.A. TIMES, June 26, 1988, Part III, at 13.

² Greg Garber, *A Tormented Soul*, ESPN.com, Jan. 24, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972285>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

\$1 million in disability payments from the NFL.⁸ Webster's estate contended that the NFL Player Retirement Plan and the NFL Player Supplemental Disability Plan had abused its discretion in denying Webster "active disability" benefits prior to September 1995.⁹ The NFL argued that there was no evidence of any disability during his playing days or at any point in time prior to September 1995, and that his poor business decisions were unrelated to any TBI he may have suffered during his playing days.¹⁰ The district court agreed with the estate and found that the plan administrator had abused his discretion in denying the benefits.¹¹ The Fourth Circuit agreed with the district court's analysis, finding that the pension board "ignored the unanimous medical evidence, including that of its own expert, disregarded the conclusion of its own appointed investigator, and relied for its determination on factors disallowed by the Plan."¹² The Court also found that Webster's mental incapacity tolled the limitations period for filing a disability claim, and affirmed the award of attorney's fees and costs to the estate.¹³

While the estate's specific disability claims are important, the forest ought not be ignored for the trees. If NFL players are at substantial risk of suffering TBI, much more is at stake than the question of disability payments. One need only look at the highly regulated sports of boxing and mixed martial arts to perceive how sports that seem to subject its participants to heightened risks of TBI are regarded.¹⁴ If it turns out that the risks of TBI that NFL players are subjected to much more closely resemble the risks boxers or other combat sports participants face, the justification for regulating the NFL differently than the various organizations that arrange boxing or mixed martial arts events face seems less compelling.

Consider, for example, the case of Joe Mesi, a rising star in the heavyweight boxing class until he fought Vassily Jirov on March 13, 2004. He complained of headaches subsequent to the fight, and was taken to a hospital where he was diagnosed with a subdural hematoma.¹⁵ Even though there was no so-called "mass effect" and neurosurgeons were convinced his brain had entirely healed, Nevada State Athletic Commission ("NSAC") rules prohibit the issuance or renewal of a boxing license for any fighter who has sustained such an injury.¹⁶ The NSAC accordingly issued a permanent medical suspension of Mesi's license.¹⁷ In addition, federal boxing law prohibits boxers suspended from fighting in one state from fighting in another.¹⁸ Accordingly, the NSAC action effectively terminated Mesi's boxing career. Mesi and his representatives initiated

⁸ *Id.* (explaining that Webster's estate sought over \$1 million in disability payments);

⁹ *See* *Jani v. The Bert Bell/Pete Rozelle NFL Player Retirement Plan*, No. 05-2386, 2006 WL 3623047, *1 (4th Cir. Dec. 13, 2006).

¹⁰ *Id.* at *7.

¹¹ *Id.* at *1.

¹² *Id.*

¹³ *Id.*

¹⁴ *See, e.g.*, Michael J. Jurek, Note, *Janitor or Savior: The Role of Congress in Professional Boxing Reform*, 67 OHIO ST. L. J. 1187, 1198, 1202 (detailing public governance on the state and federal level).

¹⁵ *See* Ira Berkow, *Mesi, Aching and Rusty, is Elated After Return*, N.Y. TIMES, Apr. 3, 2006, at D8.

¹⁶ *Id.*; *see also* NEV. ADMIN. CODE § 467.017(3) (2006).

¹⁷ Berkow, *supra* note 15, at D8.

¹⁸ *See* 15 U.S.C. § 6306(a)(2)(b) (Supp. 2006); Sen. John McCain & Ken Nahigan, *A Fighting Chance for Professional Boxing*, 15 STANFORD L. & POL'Y REV. 7, 19 (2004).

legal action against the NBC, and a Las Vegas judge ruled in late 2004 that because his Nevada license had expired, he was “eligible to fight again provided he passed the medical examinations of the boxing commissions where his bouts would be held.”¹⁹

The key point here is that the NSAC maintains a host of relatively stringent requirements a fighter must satisfy before he is granted permission to participate in an NBC-sanctioned event. Such rules are intended to minimize the risks fighters face of suffering TBI or death,²⁰ and neither Mesi nor any other fighter is eligible to fight in any NSAC-sanctioned event without due clearance from independent physicians.²¹

This situation is in stark contrast to the current rules regarding when a player is eligible to return to the football field after suffering a concussion. Simply put, there are no such rules. Each team, on the advice of its individual physicians, can theoretically clear any player to return at any time it wishes. There are no external rules set forth by the NFL establishing any kind of prerequisites that must be satisfied before a player may return to action. Of course, NFL players are investments, so there would seem to be some incentive for a team to avoid rushing an injured player back to action before the injury has completely healed, lest the player suffer a career-threatening injury.

However, given that football players, especially good ones, can significantly impact their team’s chances of winning by actually being on the field, there exists a strong incentive to return an injured player back onto the football field as soon as is possible. This is exactly what former New England Patriots linebacker Ted Johnson, an important part of New England’s three Super Bowl victories, recently alleged against the head coach, Bill Belichick. Johnson, who retired in 2005, accused Belichick of “playing God with [Johnson’s] health” by prodding Johnson to participate in a full-contact practice in August 2002 in which Johnson suffered a concussion.²² That practice took place four days after Johnson had suffered a concussion in an exhibition game.²³

After the second concussion, Johnson said that he confronted Belichick and told him that Belichick knew that Johnson should not have been cleared to play.²⁴ Johnson also stated that Belichick admitted that he had made a mistake in subjecting him to the full-contact practice.²⁵ After several weeks off, Johnson returned to action and played for three more seasons, during which he suffered several more concussions of varying degrees of

¹⁹ Berkow, *supra* note 15, at D8.

²⁰ See Jurek, *supra* note 14, at 1198 (“State commissions are charged with establishing and enforcing regulations in order to protect the health and safety of boxers”)

²¹ See NEV. ADMIN. CODE § 467.027 (2006); see also Berkow, *supra* note 15 and accompanying text.

²² Jackie MacMullan, “I Don’t Want Anyone to End Up Like Me’: Plagued by Post-Concussion Syndrome and Battling An Amphetamine Addiction, Former Patriots Linebacker Ted Johnson is a Shell of his Former Self, BOSTON GLOBE, Feb. 2, 2007, at 1E.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

severity.²⁶ His neurologist stated that Johnson, 34, shows early signs of Alzheimer's disease, and that the damage is likely permanent and progressive.²⁷

This is not the first time team physicians have been accused of having conflicts-of-interest.²⁸ Their fees are paid for by the team that retains them, and there are pressures, exerted by the players themselves, by teammates, and by coaches or owners to "play through the pain" and return to full-contact practices and live action as soon as possible.²⁹ Indeed, one current NFL head coach has admitted that he "can and will" exert as much pressure as possible on an injured player and the team doctor to get the injured player back on the field.³⁰ Testimony in a medical malpractice case alleged that the same coach "would walk past injured players in rehabilitation and say derisively, 'Oh, look at the sick, lame and lazy.'"³¹ Team physicians, as integral participants in this culture, are hardly immune from its effects, especially where their fees are paid by the very teams that have incentives to rush their players back from injury.

Thus, it seems safe to suggest that the higher the risks professional football players face of suffering TBI, the less compelling the justifications are for adopting a laissez-faire attitude towards regulation of NFL rules regarding concussions, TBI, and clearances to return to full-contact action. An analogy might be drawn to Major League Baseball's steroids controversy, in which several different legislators warned MLB that if it did not adopt more stringent internal rules, Congress was prepared to enact legislation that would regulate steroid abuse in MLB.³² And, as discussed above, boxing is heavily regulated, both via its own internal governing rules, and by state statutes and regulations.³³

Of course, to argue that because boxing is heavily regulated, football ought to be is to beg the question of whether more extensive regulation is an appropriate means of managing the risk that participants will incur TBI (which in turn augments the social costs of caring for those who suffer from TBI).³⁴ A thorough analysis of the propriety or efficacy of more extensive regulation is beyond the scope of this brief treatment. Regardless of the merits of more stringent regulation, the question of consistency and disparate treatment seems nonetheless relevant. That is, if the risks of incurring TBI in playing football are

²⁶ *Id.*

²⁷ *Id.* Johnson conceded that he was partly responsible for his return to live action, explaining that he already had a reputation as an "injury-prone player" and did not want to exacerbate that situation. *Id.*

²⁸ See, e.g., Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete-Patients*, 50 ST. LOUIS U. L.J. 185, 193 (2005); Twila Keim, *Physicians for Professional Sports Teams: Health Care Under the Pressure of Economic and Commercial Interests*, 9 SETON HALL J. SPORT L. 196, 212-15 (1999); Scott Polsky, Comment, *Winning Medicine: Professional Sports Team Doctors' Conflicts of Interest*, 14 J. CONTEMP. HEALTH L. & POL'Y 503, 504-06 (1998).

²⁹ See Calandrillo, *supra* note 28, at 187-88.

³⁰ *Id.* at 192.

³¹ *Id.*, quoting Selena Roberts, *Coughlin's Biggest Risk is Rejection*, N.Y. TIMES, May 13, 2004, at D5.

³² See Murray Chass, *Congress Can Smell Drugs in Baseball, and Fear in Selig*, N.Y. TIMES, Sept. 27, 2005, at D4.

³³ See *supra* note 21 and accompanying text.

³⁴ See generally WILLIAM J. WINSLADE, *CONFRONTING TRAUMATIC BRAIN INJURY: DEVASTATION, HOPE, AND HEALING* (1999).

more comparable to those incurred in combat sports than society had imagined, it is fair to ask why the latter should be heavily regulated while the former is not.

Part of what makes these issues so difficult is the clinical uncertainty regarding concussions and long-term brain damage.³⁵ Specifically, how many concussions are sufficient to cause TBI? One? Three? Dozens? Hundreds? Though the answer to this question is unknown,³⁶ recent studies suggest the incidence of TBI among athletes caused by concussions is significantly higher than the reported frequency.³⁷ The likelihood that a player need not suffer dozens of concussions to sustain permanent TBI complicates the problem further,³⁸ as well as raises the possibility that further regulation and/or litigation over these issues will occur.

Similarly, while the protection afforded by modern helmets and by greater knowledge of the risks of TBI is far greater than in Mike Webster's era, the basic mechanism of a concussion precludes resolution of the problem simply through more advanced equipment. This is because a concussion occurs when the brain slams against the skull due to the application of force.³⁹ No matter how extensive the protection offered by a helmet, no helmet can prevent the brain itself from striking the interior of the cranium upon the application of adequate force.

Ultimately, the issues addressed in this perspective cannot serve as more than an introduction to the complicated social, legal, and ethical issues pertaining to the risks of TBI in the NFL. It does not seem likely, however, that these issues will dissipate. Less than three months ago, Andre Waters, a former Pro Bowl safety for the Philadelphia Eagles, died of a self-inflicted gunshot wound to the head.⁴⁰ He was 44 years old.⁴¹ Chris Nowinski, a former Harvard football player and professional wrestler who has suffered several concussions of his own and has written on the issues pertaining to football and TBI,⁴² requested permission from Waters' family to test Waters' brain.⁴³ The forensic pathologist reported in January 2007 that "Mr. Waters's brain resembled that of an octogenarian Alzheimer's patient."⁴⁴ Waters is survived by his girlfriend and by three children.

³⁵ See, e.g., Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17, 22 (2002) (explaining that "[p]hysicians are unable to attribute a specific number of hits a brain may take before permanent damage ensues, and are unable to agree upon a precise timetable for the safe return to athletic competition").

³⁶ *Id.*

³⁷ See, e.g., Cecilia V. Mendez et al., *Mild Traumatic Brain Injury: Neuroimaging of Sports-Related Concussion*, 17 J. NEUROPSYCHIATRY & CLIN. NEUROSCIENCE 297, 298 (2005).

³⁸ One reason researchers suspect the number is relatively low is because those who suffer concussions are significantly more susceptible to suffering additional concussions. *Id.* at 297, 298.

³⁹ Hecht, *supra* note 35, at 23-24.

⁴⁰ Alan Schwarz, *Expert Ties Ex-Player's Suicide to Brain Damage from Football*, N.Y. TIMES, Jan. 18, 2007, at A1.

⁴¹ *Id.*

⁴² See generally CHRIS NOWINSKI, HEAD GAMES: FOOTBALL'S CONCUSSION CRISIS (2006).

⁴³ Schwarz, *supra* note 40, at A1.

⁴⁴ *Id.*

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