

# Concussion—Traumatic Brain Injury

By James A. Johnson

Concussions, which are traumatic brain injuries (TBIs), occur when the brain violently impacts the inside of the skull. Concussions can permanently damage a brain's function ability to think or work. These injuries lead to tort claims and product liability lawsuits against the National Football League (NFL), high schools, college teams, helmet manufacturers, and others involved in the game of football.

## Football

Are you ready for some football? This is the rhetorical question every September and at the Super Bowl. Well, YES and NO. This controlled violence is still violence, engendering results like retired players who cannot get out of bed without help, migraine headaches, and quarterbacks and linemen who cannot raise their arms or tie their shoes. Football has caused suicides, namely Aaron Hernandez, Jovan Belcher, Junior Seau, O.J. Murdock, Kurt Crain, Mike Current, Dave Duerson, and Ray East-erling. There was an avalanche of litigation against the NFL, NFL Properties, Riddell Sports Group (Riddell) and others. Approximately 2,500 former players and surviving family members sued the NFL for allegedly distorting and hiding data about concussions. On April 15, 2013, a Denver, Colorado jury found Riddell Inc. liable for failing to warn about concussion dangers. The jury awarded \$11.5 million to Rhett Ridolfi, a high school student, and found Riddell 27% at fault. Ridolfi, a former Colorado high school football player, suffered serious brain injuries and partial paralysis. The jury assessed \$3.1 million in damages against Riddell.

In 2010, the NFL gave Boston University's Center for the Study of Traumatic Encephalopathy \$1 million to study the brains of 60 deceased football players.<sup>1</sup> Although all the test results are not in, many showed signs of chronic traumatic encephalopathy (CTE). CTE is a neurodegenerative disease caused by repeated blows to the head. The symptoms of CTE are slurred speech, headaches, psychosis, and depression. On December 3, 2012, an additional study from Boston University detailed 33 causes of CTE in deceased ex-NFL players. The NFL, NFLPA, owners, coaches, general managers, and players should see this as a call to action.

## National Center for Injury Prevention

According to the National Center for Injury Prevention, it is estimated that as many as 47% of all high school football players suffer a concussion each year. Football players who suffer multiple concussions are at risk of permanent brain damage. A few years ago, not one state required that high school and middle school athletes who suffered concussion symptoms receive medical clearance

to return to play. According to USA Football, all 50 states now have some form of student-athlete concussion law in place.<sup>2</sup>

One of the purposes of this article is to inform coaches, players, parents, athletic directors, and general counsel about the seriousness of the risks of concussions to young people whose brains have not yet fully developed. Every concussion is a brain injury. The effect of this damage ranges from behavioral and emotional disorders to full body paralysis.

An excellent online resource for comprehensive facts and laws covering youth sports is The Policy Surveillance Portal, a LawAtlas project. It covers information specifying requirements of when an athlete may return to play and the distribution of some form of TBI/concussion sheet. For example, it states:

Every year as many as 300,000 young people suffer concussions or traumatic brain injuries (TBIs), from playing Sports. These injuries can have serious-and long term effects, and all states have adopted laws aimed at reducing harm for youth sports TBIs occurring at scholastic activities. This map identifies and displays key features of such laws across all 50 states and the District of Columbia and over time, from 2009 to 2017.<sup>3</sup>

## Litigation

The power and tension between intercollegiate athletics and universities has escalated. Football and basketball coaches who are successful often overshadow the institutions themselves. Money is power. These coaches are deities on their campuses and in their respective states. The revenue stream from sports often drives university decision-making and conflicts with the schools' underlying values. University administrators must strike a delicate balance and enforce educational values, while at the same time reward winning athletic programs. This balance requires a tightening of the reins on coaches and requiring in their contracts immediate reporting and action in handling allegations of wrongdoing and allegations of crimes. Cases in point are Penn State and Ohio State. However, there are likely other athletic programs with serious problems that have not yet surfaced. A reassessment is in order with new rules to keep coaches' input at a minimum in admission policies, discipline, and other areas that are purely university business. Athletic directors, university general counsel, and lawyers in general should find positive solutions and eliminate the need for

this cascade of litigation involving educational institutions and athletic programs.

## New York State

In 2011 New York passed the Concussion Management and Awareness Act (Ch. 496 of the Laws of 2011) (the Act) that became effective July 1, 2012 for all public and charter schools. The Act requires the Commissioner of Education, in conjunction with the Commissioner of Health, to promulgate rules and regulations related to students who sustained a concussion or mild traumatic brain injury. These guidelines apply to all public school students who have sustained a concussion, regardless of where the concussion occurred.<sup>4</sup>

The Act requires that school coaches, physical education teachers, nurses and certified athletic trainers complete a New York State Education Department approved course on concussions and concussion management every two years. It also requires that students who sustained, or are suspected to have sustained, a concussion during athletic activities are to be immediately removed from such activities. A student may not return to athletic activities until he or she is free of symptoms for a minimum of 24 hours and has been evaluated by and received written and signed authorization to return to activities from a licensed physician.

## Show Me the Money

For years, there has been a groundswell of talk about whether college players should be paid or able to profit from their fame before they graduate. This is not optimal, because one cannot make the amateurism argument when players are being compensated. Moreover, paying players money raises questions of maintaining the academic integrity of institutions. The National Collegiate Athletic Association (NCAA) President, Mark Emmert, has increased the value of athletic scholarships to cover the full cost of attending college.

In fact, the five wealthiest college football conferences notified the NCAA in October 2014 of their proposals to provide more benefits to athletes under the new governance model. This allows the Big 10, ACC, Big 12, Pac-12 and SEC to pass legislation without the support of the other Division I leagues. These changes would increase benefits to student-athletes, including athletic scholarships that will fully cover tuition; guaranteeing multi-year scholarships, and allow former athletes to return to school at any time and provide long-term health care and insurance to former athletes.<sup>5</sup>

Authentication needs to be returned to sport and the integrity of competition should be preserved, which in turn will foster even greater competition and help to remove the asterisk in front of new records. It appears that NFL Commissioner Roger Goodell has been paying

attention. Affirmative steps are being taken, in earnest, to address player safety, conduct, and rule changes.

U.S. District Judge Anita Brody in Philadelphia approved a \$1 billion settlement for NFL players and family members that became effective on January 7, 2017. The revised settlement approved by Judge Brody covers more than 20,000 NFL retirees and is designed to last at least 65 years. It also provides up to \$5 million to individual retirees who develop Lou Gehrig's disease and other profound problems.<sup>6</sup>

As an interesting aside, the U.S. Court of Appeals from the Seventh Circuit in Chicago held on June 26, 2018 that the NCAA transfer rules do not violate the Sherman Act. Student athletes who transfer to Division I schools are required to wait a full academic year before they can play on teams. The opinion upheld the year in residency rule of the NCAA based on the fact that college athletes are amateurs, and cited the 1984 U.S. Supreme Court opinion *NCAA v. Board of Regents of the Univ. of Oklahoma*<sup>7</sup> and the Seventh Circuit 2012 opinion in *Agnew v. NCAA*.<sup>8</sup>

## Conclusion

The purpose of this article is not to deter participation in football, but rather to educate and inform attorneys, athletic directors, coaches, parents and players of the risks and symptoms of concussion. Participation in sports by young people can engender mental and physical toughness, discipline, sportsmanship and leadership qualities. These individual attributes collectively can also provide an advantage in the game of life.

In the final analysis, to inspire true sport and protect the rights of athletes, Grantland Rice, the dean of sports journalists said it best: "When the one great scorer comes to mark against your name, he will not write if you won or lost, but how you played the game."

## Endnotes

1. [www.bu.edu/today/2010/nfl-gives-1m-to-bu-center-for-athlete-brain-study/](http://www.bu.edu/today/2010/nfl-gives-1m-to-bu-center-for-athlete-brain-study/).
2. <http://usafootball.com>.
3. [www.lawatlas.org](http://www.lawatlas.org).
4. The Concussion Management Awareness Act, available at [www.nysenate.gov](http://www.nysenate.gov).
5. DETROIT FREE PRESS, Nation & World, Oct. 2, 2014 at Sec. 9C.
6. <https://nflconcussionsettlement.com>.
7. N.C.A.A. v. Bd. of Regents Univ. Oklahoma, 468 U.S. 85 (1984).
8. *Agnew v. N.C.A.A.*, 683 F.3d 328 (7th Cir. 2012).

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