



# Head Hunters: The Rise of Neurological Concussions in American Football and Its Legal Implications

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"Now that I'm getting older, I start thinking about it more. In 10 years, am I going to be one of those guys that's suffering?"—Denver Broncos defensive end Vonnie Holliday.

## I. BACKGROUND

According to the Center for Disease Control and Brain Injury Research Center, nearly four million sports-related concussions will occur in the United States this year.<sup>2</sup> The New York Times has reported that since 1997, over fifty football players high school age or younger nationwide have been killed, or have sustained serious brain injuries, on the football field.<sup>3</sup> In the past few years, there has been increasing awareness of the number of concussions sustained, and their long-term effects, especially in the National Football League (NFL).<sup>4</sup> Because of this high incidence rate and the recent increase in awareness, there is a real need for the NFL and institutions, such as the National Collegiate Athletic Association (NCAA), to implement stricter policies regarding violent hits in the game of football, if not for the protection of their players, then for the protection of their pocketbooks.<sup>5</sup> Organizations facilitating football games now need to consider concussion-related lawsuits in their planning efforts.<sup>6</sup> Sound

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<sup>1</sup> The Associated Press, *NFL Players' Quotes About Concussions*, INDIANAPOLIS RECORDER, Nov. 18, 2009, <http://www.indianapolisrecorder.com/articles/2009/11/30/sports/doc4b0477984c528868691612.txt>.

<sup>2</sup> Sarah Hoyer, *NJ Governor Signs Concussion Law*, Dec. 8, 2010, <http://www.cnn.com/2010/HEALTH/12/07/nj.concussion.law/index.html>.

<sup>3</sup> Alan Schwarz, *Silence on Concussions Raises Risks of Injury*, NY TIMES, Sept. 15, 2007 <http://www.nytimes.com/2007/09/15/sports/football/15concussions.html?ex=1347508800&en=18ad44b2401a598c&ei=5090> [hereinafter *Silence*].

<sup>4</sup> Knowledge @ Wharton, *Tackling the Concussion Issue: Can the NFL Protect Both Its Players and Its Product?*, Nov. 10, 2010, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=2628> [hereinafter *Wharton*].

<sup>5</sup> See generally Wharton, *supra* note 4 at 1.

<sup>6</sup> Jackson Lewis, Special Report, *Concussions in Athletes: Where We Are and What to do Now?*, Jan. 2010, <http://www.oshalawblog.com/uploads/file/Concussions%20in%20Athletes%20->

policies are needed to protect the financial interests of football organizations who face this rising number of lawsuits.

American football has always been a violent game. In modern America's litigious environment, the NFL must engage in a delicate balancing act when creating policies regarding concussions. The NFL must protect its interests in minimizing concussion-related injuries and any resulting litigation, while still giving their fan base what they want – a hard-hitting, violent game.<sup>7</sup> In sum, the NFL must find a way to protect their players without limiting the aggression inherent in the game if it wants to insulate its multi-billion dollar industry.<sup>8</sup>

## II. ORIGINS OF THE CONCUSSION

From high school leagues to the NFL, football players are becoming bigger, faster, and stronger, thereby increasing the force of collisions that occur during a game and increasing the potential for serious injuries. The brain is a soft organ, surrounded by cerebrospinal fluid and protected by the tough, bony skull.<sup>9</sup> Normally, the fluid around the brain serves as a protective cushion for the brain, isolating it from direct impact to the skull.<sup>10</sup> When the head suffers violent impact, the brain can hit the skull, causing the brain temporarily to stop working normally.<sup>11</sup> This is called a concussion.<sup>12</sup>

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%20SPECIAL%20REPORT.pdf.

<sup>7</sup> Wharton, *supra* note 4 at 1.

<sup>8</sup> Adam Fraser, *NFL Negotiating New Multi-Billion Dollar Deals*, SPORTS PRO BLOG, [http://www.sportspromedia.com/notes\\_and\\_insights/nfl\\_in\\_negotiations\\_for\\_new\\_multi-billion\\_dollar\\_deals](http://www.sportspromedia.com/notes_and_insights/nfl_in_negotiations_for_new_multi-billion_dollar_deals) (last visited Apr. 23, 2011).

<sup>9</sup> Cheryl A. Frye, *Functional Neuroanatomy*, STATE UNIVERSITY OF NEW YORK - ALBANY, <http://www.albany.edu/faculty/cafrye/apsy601/Ch.03StructureoftheNervousSystem.html> (last visited Apr. 23, 2011).

<sup>10</sup> Kenneth Saladin, *Anatomy and Physiology: The Unity of Form and Function* 520 (McGraw Hill 2007).

<sup>11</sup> *Traumatic Brain Injury: A Guide for Patients*, VA San Diego Healthcare System, Mental Health, <http://www.mentalhealth.va.gov/docs/tbi.pdf>. There are many possible side effects to a traumatic brain injury including “impaired physical, cognitive, emotional, and behavioral functioning.”

<sup>12</sup> See generally *The Human Brain*, THE FRANKLIN INSTITUTE, <http://www.fi.edu/learn/brain/head.html> [hereinafter Franklin Institute].

More serious injuries occur after the initial concussion. A concussion causes brain cells to become depolarized and allows neurotransmitters to behave in an abnormal fashion, causing such symptoms as memory loss, nausea, and confusion.<sup>13</sup> After the initial concussion, when the brain is not fully healed, it is very fragile and susceptible to minor accelerative forces. Thus, subsequent minor hits may cause traumatic and permanent brain injury.<sup>14</sup> This is the heart of the problem: players returning to the football field before allowing their initial concussion to heal fully. When the player returns to the field too early, he is at risk for what is known as Second Impact Syndrome (SIS).<sup>15</sup> SIS is the event that ensues when there is a subsequent brain impact before the initial concussion has been given time to heal.<sup>16</sup> Additionally, when concussions occur<sup>17</sup> with high frequency, a disease called Chronic Traumatic Encephalopathy (CTE) may occur in the brain.<sup>18</sup> “CTE is a progressive neurodegenerative disease caused by

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<sup>13</sup> Sam Goldsmith, *Concussions Deserve More Attention*, YALE DAILY NEWS, Oct. 7, 2010, <http://www.yaledailynews.com/news/2010/oct/07/concussions-deserve-more-attention/?print>. See generally Nigel A. Shaw, NEUROPHYSIOLOGY OF CONCUSSION: THEORETICAL PERSPECTIVES, Part I (2006), <http://www.springerlink.com/content/k7xp40310537020r/>.

<sup>14</sup> Franklin Institute, *supra* note 12. See generally Alan Schwarz, *Lawsuit Cites Mishandling of Football Concussions*, N.Y. TIMES, Mar. 18, 2010 at B12, available at <http://www.nytimes.com/2010/03/19/sports/football/19concussions.html> [hereinafter *Mishandling*].

<sup>15</sup> Terry Zeigler, *Second Impact Syndrome*, May 21, 2010, <http://www.sportsmd.com/Articles/id/38.aspx>.

<sup>16</sup> Robert L. Clayton & Bradford T. Hammock, *Concussion in Athletes: The La Salle University Settlement and Beyond*, Jan. 1, 2010, <http://www.hackneypublications.com/sla/archive/000975.php>.

<sup>17</sup> As of March 29, 2010 Major League Baseball has added a “7 Day Concussion” Disabled List category for players recovering from concussions. Alan Schwarz, *7 Day D.L. Established to Aid in Recovery From Concussion*, N.Y. TIMES, Mar. 30, 2011 at B13, available at <http://www.nytimes.com/2011/03/30/sports/baseball/30concussion.html>.

<sup>18</sup> Stephanie Smith, *Dead athletes’ brains show damage from concussions*, CNN.com (Jan. 26, 2009), [http://articles.cnn.com/2009-01-26/health/athlete.brains\\_1\\_concussions-brain-damage-traumatic-encephalopathy?\\_s=PM:HEALTH](http://articles.cnn.com/2009-01-26/health/athlete.brains_1_concussions-brain-damage-traumatic-encephalopathy?_s=PM:HEALTH) (“[T]he Center for the Study of Traumatic Encephalopathy (CSTE), at the Boston University School of Medicine, is shedding light on what concussions look like in the brain. The findings are stunning. Far from innocuous, invisible injuries, concussions confer tremendous brain damage. That damage has a name: chronic traumatic encephalopathy (CTE).”).

repetitive trauma to the brain which eventually leads to dementia.”<sup>19</sup> While CTE was originally diagnosed most commonly in boxers, it is now regularly found in football players. Of all sports related injuries, concussions are the injuries that most often go unnoticed and untreated, especially in football. The rising number of concussions in football has resulted in lawmakers trying to implement policies in their states to protect the interests of players and teams.

### III. DONATE YOUR BRAIN

In 2008, Boston University created the Boston University School of Medicine Center for the Study of Traumatic Encephalopathy (the Center) as a joint venture between the Boston University School of Medicine and the Sports Legacy Institute.<sup>20</sup> The Center currently has a brain registry where former athletes may donate their brains for research after death.<sup>21</sup> More than one hundred and fifty current athletes have signed up, including over forty retired NFL players.<sup>22</sup>

The NFL has disassociated itself from the Center since its inception in 2008. In fact, in an initial Congressional Hearing in October of 2009, one year after the Center was opened, NFL Commissioner Roger Goodell went so far as to deny any link between permanent brain injury and the sport of American football.<sup>23</sup> However, in January of 2010, Commissioner Goodell made a dramatic turnaround by stating that repeated head trauma in the sport of football may lead to permanent brain damage.<sup>24</sup> Since this

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<sup>19</sup>Bruce Klopfleisch, *Football Players and Concussions: Players Suffer Long-Term Effects from Multiple Head Injuries*, Dec. 18, 2009, <http://www.suite101.com/content/football-players-and-concussions-a181232>.

<sup>20</sup> Boston University, *Boston University Annual Report 2010: Concussion Repercussion*, <http://www.bu.edu/ar/2010/research/>.

<sup>21</sup>See Klopfleisch, *supra* note 19.

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

<sup>23</sup>*Legal Issues Relating to Football Head Injuries (Parts I & II)*, 111th Cong. 1–2 (2009, 2010) (statement of NFL Commissioner Roger Goodell), [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_house\\_hearings&docid=f:53092.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_house_hearings&docid=f:53092.pdf).

<sup>24</sup> Terry Zeigler, *Former NFL Players Call for Concussion Education*, Jan. 5, 2010, <http://www.suite101.com/content/former-nfl-players-call-for-concussion-education-a185834>.

statement, the NFL has voluntarily donated resources to the Center and has come under intense public pressure to study, and to provide education about, the neurological implications of concussions and their long-term effects after players leave the field.<sup>25</sup> It has been reported that repeated hits to the cranium might bring on dementia in retired NFL players as early as forty years of age.<sup>26</sup>

The Center is currently studying the brains of deceased NFL football players.<sup>27</sup> So far, it has examined eleven posthumous brains and found that all eleven showed signs of severe degradation.<sup>28</sup> The level of degradation found should not exist in humans naturally.<sup>29</sup> More alarmingly, the study found that former NFL players between the ages of thirty and forty-nine experienced memory loss at a rate nineteen times higher than the average population.<sup>30</sup> In direct response to these findings and statistics, in January 2010, the NFL released its first public service announcement illustrating the importance of awareness of concussions and promoting the policy that no athlete should return to play without being cleared by medical staff after suffering from a concussion.<sup>31</sup>

#### IV. CONCUSSION CARE AND NFL LAWSUIT LIABILITY

The current standard of care regarding concussion-related injuries on the football field keeps the player from returning to the game in which the injury occurred, and subsequently forbids any physical activity or contact until all symptoms of the injury subside.<sup>32</sup> This has not always been the

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

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

<sup>27</sup>*Id.* Chris Nowinski, Co-Director of Boston University Brain Center: “[h]itting your head thousands of times appears to create a disease that slowly and quietly causes your brain cells to die.”

<sup>28</sup> Zeigler, *supra* note 24.

<sup>29</sup> Klopfleisch, *supra* note 19.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup> Mishandling, *supra* note 14. See generally Daniel J. Kain, “It’s Just A Concussion:” *The National Football League’s Denial of a Causal Link Between Multiple Concussions and Later-life Cognitive Decline*, 40 Rutgers. L. J. 697 (2009).

standard. The previous rule in the NFL was to hold a player out of the game only until all concussion symptoms subsided.<sup>33</sup> However, because the full damage of a concussion could not be evaluated until forty-eight hours after the incident and initial injury, this policy was ill-advised. Physicians were unable to diagnose the real severity of concussions on the sidelines of a game.<sup>34</sup> The current standard has been implemented by the NFL amid concerns that, if a player sustains another head injury too soon after a concussion, he is much more susceptible to greater and permanent brain damage.<sup>35</sup> Playing with even a mild concussion places an athlete at a significant risk for fatal head injury and prolonged and permanent risk of brain damage, including, but not limited to, confusion, disorientation, inability to focus, and inability to maintain balance.<sup>36</sup> In light of this new standard, players cannot go back onto the field as quickly as they used to. Accordingly, with financial incentives and bonuses at stake, players may hide concussion symptoms from team personnel in order to return to the playing field. This is a dangerous incentive. Consequently, a player who returns to a game when the full extent of a concussion injury is not known could likely sue for negligent treatment by his team and staff, in addition to willful and reckless conduct.

#### A. Case Study: Merrill Hoge and the Chicago Bears

A decade before the NFL took concussions and their effects seriously, the first and only successful concussion lawsuit against the NFL was by NFL player Merrill Hoge of the Chicago Bears.<sup>37</sup> “While concussion cases [usually] exist in the contexts of product liability, insurance coverage, and traditional medical negligence,” only one case on record involves an athlete successfully suing the NFL and a team, namely the Chicago Bears.<sup>38</sup>

In a case of first impression, Hoge successfully sued former trainer Dr.

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<sup>33</sup> Klopfleisch, *supra* note 19.

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

<sup>35</sup> Mishandling, *supra* note 14.

<sup>36</sup> Dr. David S. Kushner, *Concussion in Sports: Minimizing the Risk for Complications*, AMERICAN FAMILY PHYSICIAN, Sept. 15, 2001, available at <http://www.aafp.org/afp/2001/0915/p1007.html>.

<sup>37</sup> Kain, *supra* note 32 at 713.

<sup>38</sup> *Id.*

John Munsell of the Chicago Bears.<sup>39</sup> The case involved an NFL physician's duty to warn an athlete about the risks inherent in the return to a football game too quickly after sustaining an initial concussion injury.<sup>40</sup> Hoge played in the NFL for eight seasons.<sup>41</sup> In a 1994 preseason game against the Kansas City Chiefs, Hoge suffered his first concussion, characterized as an "earthquake."<sup>42</sup> After staying on the field for two more plays, Hoge eventually took himself out of the game complaining of concussion symptoms.<sup>43</sup> Six weeks later, Hoge again suffered a concussion against the Buffalo Bills and incurred lingering post-concussion symptoms such as headaches, dizziness, and memory deficiency for ten days after the game.<sup>44</sup>

According to Hoge, the Chicago Bears stated it was just a concussion, and it warranted little treatment from the team. In Hoge's claim, he alleged the Chicago Bears and team trainer Dr. Munsell failed to warn Hoge of the risks associated with subsequent concussions.<sup>45</sup> In response to Hoge's complaint, the Chicago Bears and Dr. Munsell stated that Hoge knew of the foreseeable risks inherent in playing NFL football and Hoge explicitly assumed the risk of this type of injury – an assumption of risk defense.<sup>46</sup> However, the assumption of the risk doctrine requires knowledge or awareness of the *particular hazard* that caused the injury. Hoge argued that he lacked such particular and adequate information of the risks of playing with subsequent concussions.<sup>47</sup> He lacked this information because the Chicago Bears and Dr. Munsell failed to provide it. Hoge stated he

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

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

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

<sup>42</sup>*Id.* at 713–14.

<sup>43</sup>*Id.* at 714.

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* at 715–16. Assumption of the risk is a defense, facts offered by a party against whom proceedings have been instituted to diminish a plaintiff's cause of action or defeat recovery to an action in negligence, which entails proving that the plaintiff knew of a dangerous condition and voluntarily exposed himself or herself to it. Assumption of risk, LAWYERS.COM, <http://research.lawyers.com/glossary/assumption-of-risk.html> (last visited Apr. 6, 2011).

<sup>47</sup> Kain, *supra* note 32, at 716.

permanently suffered from post concussion symptoms and requested \$2.2 million as an estimate of his lost earnings and monies needed for future care.<sup>48</sup> Consequently, the jury found in favor of Hoge and awarded him \$1.45 million for the two remaining years on his NFL contract and additional \$100,000 for pain and suffering.<sup>49</sup> What are the implications of the verdict in *Hoge* a decade later as concussions in the NFL have become forefront in the news media? The *Hoge* verdict, coupled with the new evidentiary link of football's concussions to permanent brain damage, provides an incentive for the NFL to tackle the legal ramifications of concussions and implement new policies to protect itself from players who may sue in the future.

*B. The NFL Discourages Head-to-Head Hits and the NCAA Follows*

In an effort to protect its players and deep pockets, the NFL has taken immediate steps towards protecting current players who suffer concussions by implementing stricter guidelines for returning to play and providing teams with independent neurologists on the sidelines of all games.<sup>50</sup> Currently, a player is not permitted to return to a game in which that player leaves with a concussion related injury.<sup>51</sup> As mentioned above, the former practice allowed a player to return to the game when his concussion symptoms subsided.<sup>52</sup> The National Collegiate Athletic Association (NCAA) currently lets individual college teams make their own decisions about concussions; some conferences have uniform policies while others do

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<sup>48</sup>*Id.* at 717.

<sup>49</sup>*Id.* See generally A. Jason Heubinger, *Beyond the Injured Reserve: The Struggle Facing Former NFL Players in Obtaining Much Needed Disability Assistance*, 16 SPORTS LAW J. 279 (2009).

<sup>50</sup> Gary Mihoces, *NFL Launches New Guidelines for Assessing Concussions*, USA TODAY, Mar. 30, 2011 at 1C, available at [http://www.usatoday.com/sports/football/nfl/2011-03-29-concussions-protocol\\_N.htm](http://www.usatoday.com/sports/football/nfl/2011-03-29-concussions-protocol_N.htm)

<sup>51</sup> Ohm Youngmisuk, *Caution on Concussions*, N.Y. DAILY NEWS, Dec. 3, 2009 at 69, available at [http://www.nydailynews.com/sports/football/2009/12/03/2009-12-03\\_roger\\_goodell\\_says\\_nfl\\_players\\_who\\_show\\_concussion\\_systems\\_cannot\\_return\\_to\\_play.html](http://www.nydailynews.com/sports/football/2009/12/03/2009-12-03_roger_goodell_says_nfl_players_who_show_concussion_systems_cannot_return_to_play.html).

<sup>52</sup> Alan Schwarz, *N.F.L. Issues New Guidelines on Concussions*, N.Y. TIMES, Dec. 2, 2009, <http://www.nytimes.com/2009/12/03/sports/football/03concussion.html>.

not.<sup>53</sup> However, this will change soon. Following the NFL's lead, the NCAA is considering a similar rule that would prohibit an NCAA student athlete from returning to a game in which the player leaves with a concussion.<sup>54</sup>

### *C. The Section 88 Plan*

With the adamant denials by the NFL throughout its history that the sport and the resulting concussions cause brain degradation, it was quite a surprise in 2006 when the NFL and the National Football League Players Association (NFLPA) agreed on a Collective Bargaining Agreement (CBA) that included a provision for financial compensation for retired NFL players who suffer from brain injuries and dementia.<sup>55</sup> That portion of the CBA is called "The Section 88 Plan." Players have argued that Section 88 serves as a constructive admission by the NFL that the game is linked to brain injuries.<sup>56</sup>

Specifically, to be eligible for the Section 88 Plan, the retired NFL player must demonstrate that he suffers from dementia.<sup>57</sup> Section 88, which was named after retired football player John Mackey who wore the number 88 and who also currently suffers from dementia, allows \$88,000 per year to retired NFL players for in-house nursing home care if the care is related to dementia.<sup>58</sup> While Commissioner Roger Goodell initially denied any link between football concussions and permanent brain damage, he did not oppose the creation of The Section 88 Plan. Section 88 is jointly funded by each NFL team and is mutually administered by the NFLPA and the NFL.<sup>59</sup> Sadly, prior to 2006, the NFL had made only four payments in its entire

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<sup>53</sup> Klopfleisch, *supra* note 19.

<sup>54</sup> *Id.*

<sup>55</sup> See generally L. Elaine Halchin, *Former NFL Players: Disabilities, Benefits, and Related Issues*, Apr. 8, 2008, [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1530&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1530&context=key_workplace).

<sup>56</sup> Kain, *supra* note 32, at 726.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 726–727.

<sup>59</sup> *Id.* at 726.

history for medical claims related to dementia to its retired players.<sup>60</sup>

## V. THE LA SALLE CONCUSSION LAWSUIT AND SETTLEMENT

### A. La Salle University

The NCAA is not immune from concussion related lawsuits stemming from the football field. In October 2005 La Salle University football player Preston Plevretes sustained a concussion during a football practice.<sup>61</sup> Plevretes indicated to the coaching staff that he had been having headaches since the October 4 practice.<sup>62</sup> Plevretes went to the Student Health Center at La Salle after the game and was examined by a nurse who explained that he had, in fact, sustained a Grade 1 concussion.<sup>63</sup> After having a CT scan, Plevretes was not cleared to play again until October 16, 2005.<sup>64</sup>

On November 5, 2005, Plevretes suffered a second helmet-to-helmet collision at a game at Duquesne University.<sup>65</sup> During a play, Plevretes was momentarily knocked unconscious.<sup>66</sup> After regaining consciousness, Plevretes collapsed and then lapsed into a coma due to swelling of the brain.<sup>67</sup> Upon arrival at the hospital, Plevretes's brain was so swollen that part of his skull had to be removed.<sup>68</sup> Plevretes needs constant treatment and has difficulty walking and speaking.<sup>69</sup> He brought suit against La Salle University; the case ultimately settled for \$7.5 million.<sup>70</sup>

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<sup>60</sup>*Id.* at 728.

<sup>61</sup> Alan Schwarz, *La Salle Settles Lawsuit With Injured Player for \$7.5 Million*, N.Y. TIMES, Dec. 1, 2009, at B4 [hereinafter La Salle].

<sup>62</sup> Clayton and Hammock, *supra* note 16.

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

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

<sup>65</sup> La Salle, *supra* note 62.

<sup>66</sup>*Id.*

<sup>67</sup> Sam Wood, *La Salle to Pay Brain Injured Footballer \$7.5 Million*, Nov. 30, 2009 [http://articles.philly.com/2009-11-30/news/24988280\\_1\\_second-impact-syndrome-brain-injuries-concussion](http://articles.philly.com/2009-11-30/news/24988280_1_second-impact-syndrome-brain-injuries-concussion).

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

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

*B. The NCAA's Response*

Since the La Salle University settlement, the NCAA has taken drastic measures to adopt concussion policies for its football leagues. For the past decade, the NCAA Sports Medicine Handbook (“Handbook”) had only a few pages about concussions, which merely listed some of the most common symptoms.<sup>71</sup> The Handbook simply stated that the student athlete should not return to athletics until symptoms subside and instructed that student athletes should be “ready” to return to athletics, without defining the word “ready.”<sup>72</sup> On December 16, 2009, the NCAA Committee on Competitive Safeguard and Medical Aspects of Sports added new rules relating to concussion treatment in intercollegiate athletics.<sup>73</sup> Some of these additions include the following:

- (1) An athlete who exhibits signs, symptoms, or behaviors consistent with a concussion (such as unconsciousness, amnesia, headache, dizziness, confusion, or balance problems), either at rest or exertion, shall be immediately removed from practice or competition and shall not return to play until cleared by a physician or her/his designee.
- (2) Athletes who are rendered unconscious or have amnesia or persistent confusion shall not be permitted to continue for the remainder of the day. These athletes shall not return to any participation until cleared by a physician.
- (3) Any athlete exhibiting an injury that involves significant symptoms, long duration of symptoms or difficulties with memory function should not be allowed to return to play during the same day of competition.
- (4) It has been further demonstrated that retrograde amnesia, post-traumatic amnesia, and the duration of confusion and mental status changes are more sensitive indicators of injury severity, thus an athlete with these symptoms should not be allowed to return to play during the same day. These athletes should not return to any participation until cleared by a physician.

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<sup>71</sup> National Collegiate Athletic Association, 2009–10 Sports Medicine Handbook, 52-55(2009) [hereinafter Handbook].

<sup>72</sup> Schwarz, *supra* note 61. *See also id.*

<sup>73</sup> Handbook, *supra* note 71 at 52–55.

- (5) It is essential that no athlete be allowed to return to participation when any symptoms-persist, either at rest or exertion.<sup>74</sup>

As these new guidelines imply, the NCAA took the same path as the NFL and ordered that student athletes who sustain concussions may not return to the same game or practice in which they sustained the concussion. Perhaps more importantly, the Handbook now arguably puts student athletes on notice not only of the symptoms of concussions, but also of their potential damaging and long lasting effects when a student athlete returns to the playing field too soon. Legally, by giving student athletes notice of concussions' harmful effects through the new guidelines in the Handbook, the NCAA may have afforded itself strong assumption of risk and waiver defenses, if an injured athlete decided to file a lawsuit.

## VI. THE TRICKLE DOWN EFFECT

### A. Concussion Lawsuits on the High School Level

As the NFL and NCAA continue to deal with concussion issues, there is a discernable effect on high school football. Time Magazine has estimated that this year there will be between 43,000 and 67,000 concussions in high school football.<sup>75</sup> However, few high schools have implemented policies to deal with concussion related injuries.<sup>76</sup> Unlike the NFL and NCAA, most high schools cannot afford to hire doctors to be at practices and games. Therefore, there needs to be a uniform effort across the nation by high school football coaching staffs to recognize and treat concussion-related symptoms in a cost-effective and convenient manner.

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<sup>74</sup> Clayton and Hammock, *supra* note 16.

<sup>75</sup> Sarah Kliff, *Heading Off Sports Injuries*, Newsweek.com (Feb. 5, 2010), <http://www.newsweek.com/2010/02/04/heading-off-sports-injuries.html>.

<sup>76</sup> Sarah Hoye, *New Jersey Law Sidelines Student Athletes Who May Have A Brain Injury*, CNN HEALTH, Dec. 8, 2010 <http://www.cnn.com/2010/HEALTH/12/07/nj.concussion.law/index.html>. See also Brain and Spinal Cord, *New Jersey Imposes Concussion Rules for High School Athletes*, <http://www.brainandspinalcord.org/blog/2010/03/30/new-jersey-imposes-concussion-rules-high-school-athletes> (explaining that four states have implemented brain and concussion high school student athlete policies).

The case of Zachary Frith illustrates the consequences of not treating concussions properly at the high school level. On October 15, 2005, Frith suffered a concussion while playing in a high school football game.<sup>77</sup> Despite the injury and symptoms, the coaches permitted Frith to finish the game. The coaches did not notify Frith's parents of the injury, and Frith continued to practice the following week and also played in the next week's game.<sup>78</sup> However, Frith's parents noticed behavioral changes in their son and took him to a neurologist. The doctor diagnosed Frith with post-concussion syndrome resulting from an initial concussion and subsequent traumatic blows to his head that caused permanent brain damage.<sup>79</sup> The school's lack of a concussion guideline policy increased Frith's chances of permanent injury. Frith's parents filed suit on behalf of their son, which the school district settled for \$3 million.<sup>80</sup>

*B. State Laws Implemented to Combat Concussions and Subsequent Lawsuits*

1. Washington and New Jersey Take the Lead

There are only eleven states that have enacted concussion laws to protect their student athletes.<sup>81</sup> In response to cases like Frith's, New Jersey

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<sup>77</sup> Shamberg, Johnson & Bergman, *Football Concussion Results in \$3 Million Settlement with High School Coaches and Administrators in Brain Injury Case*, <http://www.sjblaw.com/CM/Newsletters/2009-spring.pdf> (2009).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> The lawsuit named the high school football coach and administrator as individuals. Most states provide sovereign immunity for suits against the state, and by naming the coach and administrator as defendant's Zach's parents were able to avoid the capped amount of \$300,000 under Missouri law. Mo. Stat. § 537.610. Whether or not a state university enjoys sovereign immunity for purposes of the Eleventh Amendment turns on whether the university is considered an arm of the state or whether it is an independent political subdivision. 15A Am. Jur. 2d Colleges and Universities § 46. Therefore, sovereign immunity does not apply to private universities. When a state entity has sovereign immunity, it cannot be sued for damages without its consent.

<sup>81</sup> Bryan Toporek, *NFL Encourages All States to Adopt Student-Athlete Concussion Laws*, EDUCATION WEEK, Feb. 25, 2011, [http://blogs.edweek.org/edweek/schooled\\_in\\_sports/2011/02/nfl\\_encourages\\_all\\_us\\_states\\_to\\_adopt\\_student-athlete\\_concussion\\_laws.html](http://blogs.edweek.org/edweek/schooled_in_sports/2011/02/nfl_encourages_all_us_states_to_adopt_student-athlete_concussion_laws.html).

Governor Chris Christie signed into law a new concussion bill that requires public and private school coaches to remove any athlete from play who shows signs of a concussion.<sup>82</sup> Washington enacted a similar statute entitled the Lystedt Law in May 2009.<sup>83</sup> The Lystedt Law contains three essential elements:

(1) Athletes, parents and coaches must be educated about the dangers of concussions each year; (2) If a young athlete is suspected of having a concussion, he/she must be removed from a game or practice and not be permitted to return to play; and (3) A licensed health care professional must clear the young athlete to return to play in the subsequent days or weeks.<sup>84</sup>

While the Lystedt Law is a step in the right direction, actual implementation may be complicated. Few junior varsity and varsity football teams on the high school level have physicians on standby. Furthermore, school administrators and coaches do not always enforce the law properly on the sidelines. Since these statutes were enacted, NFL Commissioner Roger Goodell sent a letter to over forty governors across the United States urging them to follow New Jersey and Washington's lead to enact legislation on appropriate concussion care and management.<sup>85</sup>

## VII. CONCLUSION

What is the next step? What can be done to safeguard NFL players' health and pee-wee players' health alike? Physiological evidence continues to accumulate, linking repeated head trauma to concussions, and

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<sup>82</sup> A.B. 2441, 214th Leg., (N.J. 2010). *See also* Associated Press, *Christie Signs Strict Concussion Law for NJ Schools* (Dec. 7, 2010), [http://abclocal.go.com/wabc/story?section=news/local/new\\_jersey&id=7829067](http://abclocal.go.com/wabc/story?section=news/local/new_jersey&id=7829067).

<sup>83</sup> H. B. 1824, 61st Leg., 2009 Regular Session (W.A. 2009). *See also* Stephania Bell, *Concussions a Public Health Issue* (Feb. 7, 2010), <http://sports.espn.go.com/espn/otl/columns/story?id=4886868>.

<sup>84</sup> Wash. Rev. Code § 28A.600.190(2009). *See also* Associated Press, *Goodell Urges Governors to Adopt Concussion Law* (May 23, 2010), <http://www.foxnews.com/sports/2010/05/23/goodell-urges-governors-adopt-concussion-law>.

<sup>85</sup> Toporek, *supra* note 81.

concussions to permanent brain injury in football. These permanent physiological changes in the brain need to be taken seriously. States should implement appropriate management guidelines to treat these injuries.

This article proposes the following. In all levels of organized football, it is important to ban high-risk practice drills, provide in-depth training to coaches and staff, and adopt a standardized return-to-play policy at all levels. It is also essential to make clear written disclosures to players and parents, alerting them to the risks associated with playing American football. By doing this, the lawsuit liability of organized football will decrease, while players and parents will have a better idea of the danger they and their children face when they play American football.

Furthermore, athletic programs and associations at all levels should implement full and aggressive concussion management programs to ensure their athletes' safety. There is a need to create protocol independent of all existing medical concussion policies. For example, key staff members need to be trained on concussion management. All football team staff members should attend mandatory concussions summits and seminars. Organized football associations, from the NFL to youth football, ought to institute mandatory brain baseline testing for all football players, comparing "normal brains" to those which have suffered concussions. Additionally, there needs to be a policy which allows a whistleblower to report anonymously when staff or doctors pressure players to play and violate policy.

As to products liability, football associations should consider switching to helmets designed to reduce the risks of concussion. However, NFL teams have not been willing to pay for these higher priced designs until there is more data that they really do reduce the number of concussions.<sup>86</sup>

The policies mentioned in this article ought to be implemented for the safety of all players and their future health – and also to protect football organizations from lawsuits. As national attention turns to how players with concussions are treated, the NFL should spearhead a national policy and take the lead role in concussion management education by enforcing their own stricter return to play standards. Change needs to start at the top.

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<sup>86</sup> Shelly Anderson, *New Helmet Designs Have Concussions in Mind*, PITTSBURGH POST-GAZETTE, July 28, 2002, at D11, available at <http://www.post-gazette.com/steelers/20020728helmets0728p4.asp>.