

**Legal Preparedness for Fundamental Matters
in Health Law and Connected Rights
1 Nov 2024**

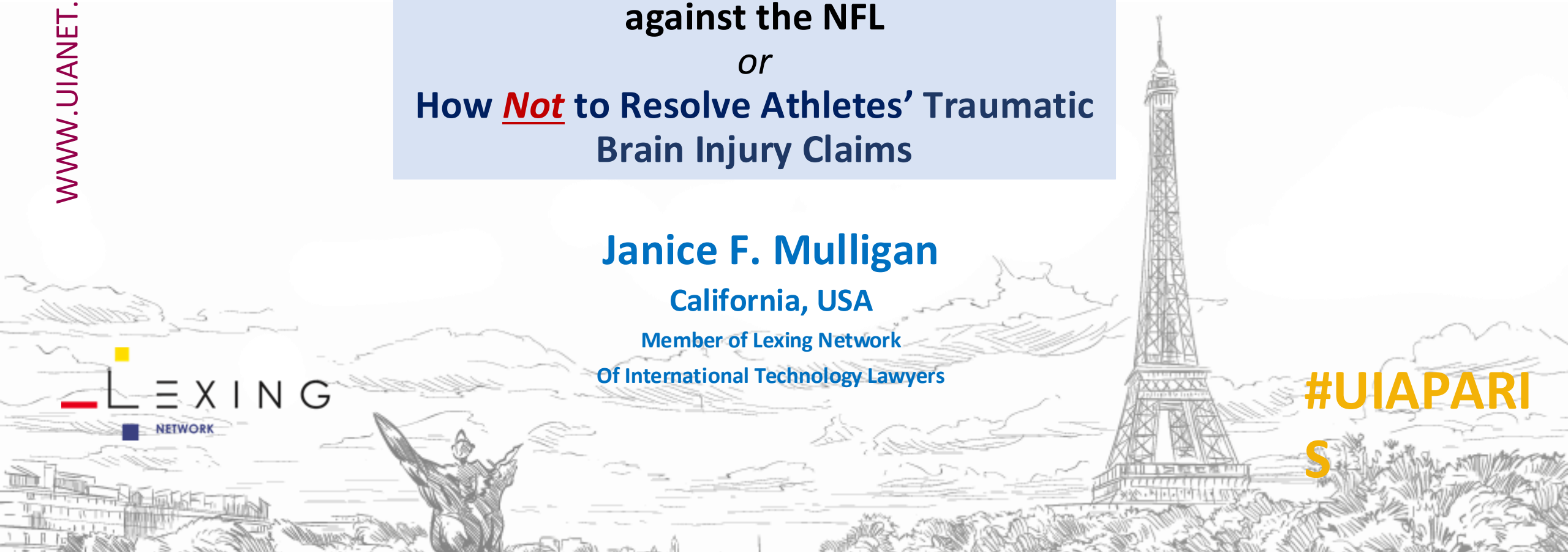
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**Case Study: Lessons Learned from US
Football Players' Litigation
against the NFL**
or
**How Not to Resolve Athletes' Traumatic
Brain Injury Claims**

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Learning Objectives:

- ✓ **Introduction: Background on TBI in Professional American Football**
- ✓ **Case Study: NFL Litigation**
- ✓ **Aftermath: Another pending class action**
- ✓ **Takeaways for Future TBI Cases**



Introduction: Background on TBI in Professional American Football

American football is the most watched sport in the US — the National Football League (NFL) is the premier professional American football league.

Beginning in 2011 and continuing to date, the US began experiencing a wave of litigation alleging *traumatic brain injuries (TBI)* in professional football players.



Potential Long-term Effects from Repetitive mTBI

Mild traumatic brain injuries (mTBIs), have high incidence rates and the potential for long-term effects.

Long-Term Effects *from repeated mTBIs can be severe and include:*

- ✓ **Chronic traumatic encephalopathy (CTE)** which is a progressive and fatal brain disease.
- ✓ **Dementia.**
- ✓ Evidence exists that repetitive mTBI can also cause **Parkinson's Disease** and **ALS**, but this is less substantiated in medical literature than CTE and Dementia.



CTE can lead to:

- ✓ **Cognitive decline.**
- ✓ **Neurobehavioral dysregulation**, manifesting as lack of self-control, violent, impulsive, or explosive behavior, inappropriate behavior, aggression, and/or rage.
- ✓ **Development of dementia.**
- ✓ **Depression.**
- ✓ **Sleep disorders**



Statistics Regarding Chronic Traumatic Encephalopathy (CTE) and Professional Football Players

✓ One study shows that of those that played contact sports, **more than 40% of athletes under 30 had signs of CTE.***

✓ **Each year of playing tackle football increases a player's risk of developing CTE by 30%.****

* Doctrow, B. (2023, September 12). *Chronic traumatic encephalopathy in young athletes*. NIH.

<https://www.nih.gov/news-events/nih-research-matters/chronic-traumatic-encephalopathy-young-athletes>.

** (2019, October 7). *CTE Risk More Than Doubles After Just Three Years of Playing Football*. Boston University.

<https://www.bumc.bu.edu/camed/2019/10/07/cte-risk-more-than-doubles-after-just-three-years-of-playing-football/>



Case Study: US Football Players' Litigation against the NFL



\$\$\$ NFL Concussion Litigation \$\$\$

To date, over 4,500 football players brought individual and class action lawsuits against the NFL.

Former players sued NFL for failure to protect against head injuries and *covering up the majority of head-trauma injuries in ex-NFL players.*



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Green, G. et al. (2024, April 23). Timing is everything in resolving mild traumatic brain injury cases (page 6). Los Angeles Daily Journal. <https://www.dailyjournal.com/articles/378163-timing-is-everything-in-resolving-mild-traumatic-brain-injury-cases#:~:text=Many%20mTBIs%20will%20recover%20within,accelerate%20cognitive%20decline%20over%20time>.



Legal Theories in NFL TBI Litigation

Negligence:

- ✓ Duty of care owed by teams to players
- ✓ Breach of duty: Failure to prevent or properly address injuries

Fraud and Misrepresentation:

- ✓ Concealment of known risks by leagues and teams causing lack of informed consent by players

Damages:

- ✓ Medical bills
- ✓ General damages for pain and suffering
- ✓ Medical monitoring and money for medical care
- ✓ Set aside for healthy players in case they later develop problems



Causation:

Difficulty in proving direct causation between symptoms and diagnosis of dementia.

Statute of Limitations:

Time-barred claims due to the delayed onset of symptoms.

Collective Bargaining Agreements (CBAs):

Impact on litigation, often limits players' rights to sue.



NFL Admits Playing American Football Can Cause CTE

After years of denying a link between football and CTE and arguing for years that players' symptoms had other causes, **in 2016, the NFL finally admitted playing American football can lead to TBIs including CTE.**



CTE can Only be Definitively Diagnosed on Autopsy

CTE has been **confirmed on autopsy in 345 of 376** deceased former NFL players.*

In comparison, a 2018 study of the **general population found one CTE case in 164 autopsies, and that one person with CTE had played college football!** This is consistent with data from Austria, Australia, and Brazil.

The number of confirmed cases is believed to be only a small fraction of NFL players with CTE:

- ✓ The vast majority of deceased former players *never* had autopsies done on their brains.
- ✓ The first such autopsy wasn't performed until 2002.



\$\$\$ NFL Concussion Litigation \$\$\$

The litigation was settled with the NFL paying out over **US \$1.2 billion on behalf of 1,600 former players** for concussion-related traumatic brain injuries (TBI).

The settlement was “**uncapped**” : Any player who developed dementia, Alzheimer’s, Parkinson’s or ALS would get paid, **no matter how much it cost.**



\$\$\$ NFL Concussion Litigation \$\$\$

Because CTE can *only* be verified on autopsy, and it often manifests as dementia, *the NFL settlement pledged to **pay players once they developed symptoms of dementia.***

*They also agreed to fund a **nationwide network of doctors to evaluate players and provide those showing **early signs of dementia with medical care.*****

Hobson, W. (2024, January 31). *The broken promises of the NFL concussion settlement.* Washington Post. <https://www.washingtonpost.com/sports/interactive/2024/nfl-concussion-settlement>

Emmady, P. et al. (2022, November 12). *Major Neurocognitive Disorder (Dementia).* NIH. <https://www.ncbi.nlm.nih.gov/books/NBK557444/>



The Diagnosis of Dementia was Key to Settlement Money

The settlement would ***not*** help players suffering from behavior and mood-related symptoms associated with CTE, but ***once players developed dementia-related symptoms of CTE, they would qualify for settlement benefits.***

Players diagnosed with “**moderate**” **impairment** qualified for the NFL-funded medical care and earned payments as high as US \$1.5 million.

Players with “**severe dementia**” were promised as much as US \$3 million.



Causation was Waived....

Under the settlement, the NFL *waived any arguments about “causation”*. Compensation was promised to those who had cognitive deficits, *without proof as to what caused it as long as there was a “verified” diagnosis of dementia.*

What was Wrong with this Billion Dollar Settlement?

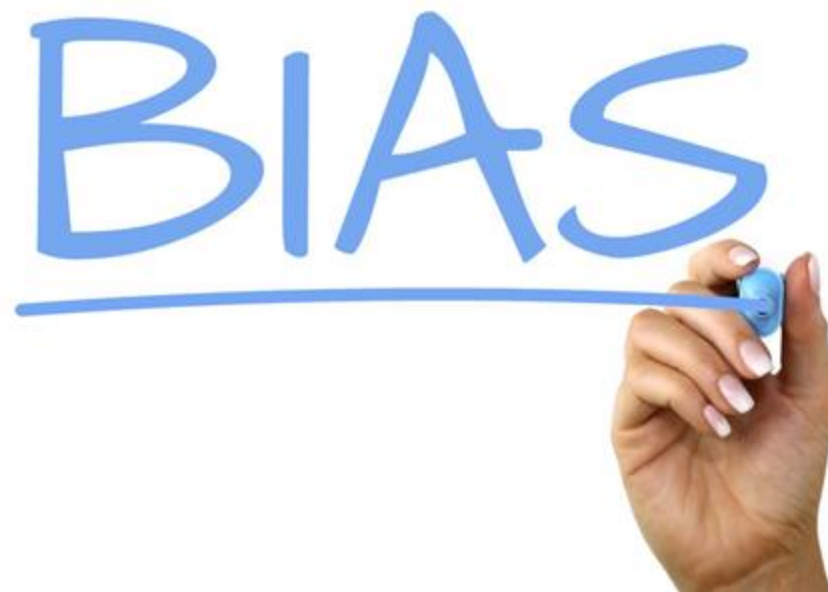
1. “Race Norming”
1. **“Disturbing failures”** in the administration of the NFL concussion settlement.



What was Wrong with this Billion Dollar Settlement?

“Race Norming”

- Race norming assumes that players of one race all *have lower cognitive levels* than players of a different race.
- ***In determining whether players qualified for help in the initial years of the settlement, “race norming” was used to assume black players began with lower cognitive levels than white players.***
- The parties to the settlement **discontinued the use of race norming in June 2021**, and allowed black players to re-submit declined claims, ***but problems with the settlement continued...***



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What was Wrong with this Billion Dollar Settlement?



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The Washington Post newspaper (Post) conducted an independent investigation. A series of Post articles published in 2024, reveal the results of the investigation and establish **“disturbing failures”** in the administration of the NFL concussion settlement:

- 1) The settlement **required greater impairment** than the standard medical definition for dementia.
- 1) The dementia diagnosis often required additional verification or review by NFL-appointed medical professionals resulting in **significant delay and erroneous denials.**
- 2) **Testing Methods were not up-to-date** and resulted in a failure to correctly diagnose many football players.



Greater Impairment than Standard Definition of Dementia

In clinical practice, doctors commonly diagnose patients with dementia ***while they are still living on their own, driving or even working.***

The settlement's **“mild dementia”** definition however required proof that the player is “unable to function independently” at social events and “needs prompting” in personal hygiene.



The NFL admits its dementia definition is “**a notch above**” that used by US treating doctors, *making it more difficult to qualify.*

Doctors evaluating for dementia have patients go through a battery of tests in several domains, including memory, language and executive function.

In everyday practice, **one or two impaired results in one domain** with other evidence are enough for a dementia diagnosis.

*But in the NFL settlement, players **must have at least four impaired tests across two domains** to receive any dementia diagnosis, including for pre-dementia.*



Clinical Dementia Rating (CDR)

The settlement's definition also requires doctors to use a **Clinical Dementia Rating (CDR scale)**. This tool was created in the 1970s by researchers and it is designed to *grade the severity of dementia not the existence of it.*

An expert board certified neurologist with an expertise in concussions quipped: *

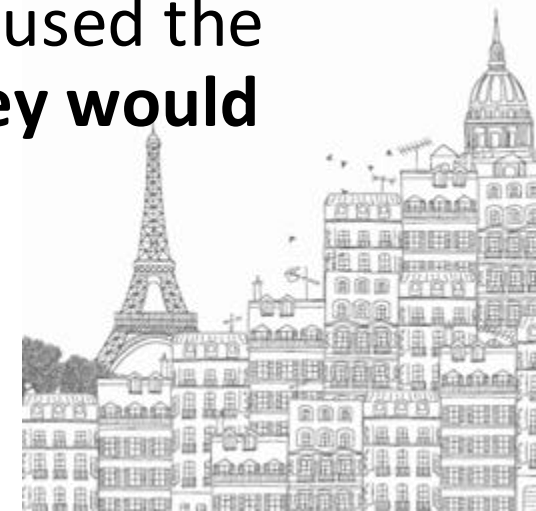
“No neurologist in America uses the CDR scale....i[t]’s junk science.”



*While dementia is incurable, **early diagnoses are important because treatment can manage the symptoms.***

By the time people meet the NFL's definition, one neurology professor observed they have **“probably been sick for many years, and it's pretty late in the game.”**

Several doctors who evaluated players admitted that **“if they used the NFL's definition in their own regular practice of medicine, they would ‘routinely fail to diagnose dementia in ailing patients.’”**



Lack of Up-To-Date Testing Methods resulted in failure to correctly diagnose many football players

Routine **MRIs can reveal evidence of *brain atrophy*** which is consistent with diseases that cause dementia.

As one neuroradiologist said, “If you’re trying to find dementia in the last 10 or 15 years and *you’re not using imaging, you’re not really trying that hard.*” *

*Although the settlement's terms require that “the latest medical tests be used to diagnose mental impairment,” it failed to describe how this would be determined and **basic MRI tests were not paid for.***

*Dr. Timothy Shepard, as quoted in Washington Post. Hobson, W. (2024, August 20). *As denials pile up, NFL settlement ignores ‘critical’ tests.* Washington Post. <https://washingtonpost.com/sports/2024/08/20/nfl-concussion-settlement-mri-alzheimer/>



Proving “Dementia is Dementia”

While causation was waived, in reviewing applications for compensation, NFL doctors often ***denied the diagnosis of dementia***, and instead blamed symptoms on other conditions such as sleep apnea, depression, or even vitamin deficiencies.



Proving “Dementia is Dementia”

While NFL’s lawyers admit the difficulty in meeting the settlement’s dementia definition, they claim this was **disclosed to the players and the players’ lawyers throughout the process.**

After reviewing the court filings, transcripts of court hearings and interviews with dozens of former players and their lawyers, the Washington Post’s investigation concluded that ***there is no evidence to support this claim.***



Proving “Dementia is Dementia”

Of the 1,241 former players who filed dementia claims based on diagnoses made by their doctors, about **85% - 1050 players were denied**, *including 300 players who were diagnosed by the settlement’s own doctors.*

The collective value of denied dementia claims is believed to exceed US \$700 million. *

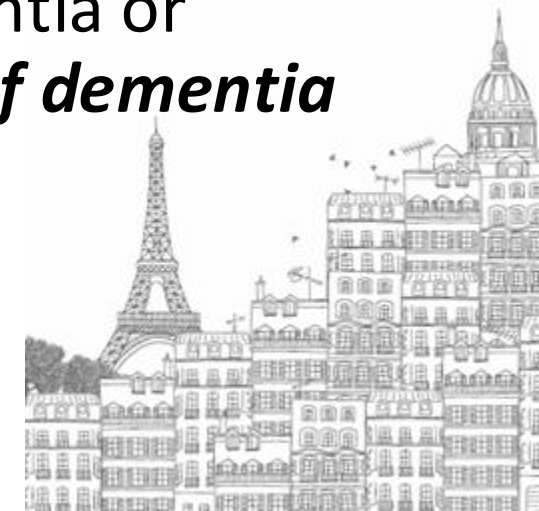
This does *not include players* diagnosed with dementia who never filed a claim because they were told they didn’t meet the settlement’s requirements.



At least 14 players failed to qualify for settlement money or get medical care for dementia ***and when they died, CTE was confirmed on autopsy.***

All 14 had complained to doctors of dementia symptoms including progressive memory loss.

The majority of them would have been diagnosed with dementia or related memory disorders ***if the typical standard definition of dementia had been used and/or if an MRI been conducted.***

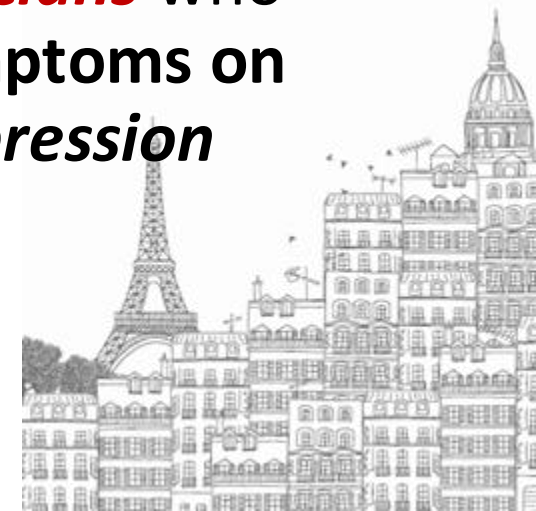


An Independent Administrative Law Firm and a retired Federal Judge Processed the Denied Claims

Of the 368 player appeals of denied claims, **71 of them (about 19%) resulted in changed decisions and a payout.**

The NFL blamed denied claims on fraud, yet the Post investigation revealed ***none of the denials even contained allegations of fraud.***

Records show settlement review doctors ***simply overruled physicians*** who had actually evaluated the players, **often blaming dementia symptoms on other health problems *also linked to concussions, including depression and sleep apnea.***



Pending Class Action against NFL settlement Administrators Filed in 2023

Players denied benefits brought a new class action against the NFL Player Disability & Survivor Benefit Plan, NFL Player Disability & Neurocognitive Benefit Plan (the “Plan”) and individual members of the Plan’s Board seeking:

- 1. Payment for the wrongful denial of benefits**
- 2. A change in how the review process for denial of benefits is conducted**

The lawsuit is still pending. The court has approved a request to replace the company responsible for managing the NFL’s network of doctors. The court dismissed individual defendant board members from the lawsuit



The Impact on the NFL



Financial Consequences: Over US \$1.2 as of April 2024 paid in settlements, *excluding* legal and expert witness fees.

Insurance: NFL's insurers **denied a duty to defend or pay** the NFL litigation claiming:

- The NFL knew and concealed the danger of repeated head injury.
- Insurers also claim the bodily injury was not caused by an “occurrence”,
- Allegedly, the players did not suffer from “injury-in-fact” during applicable policy periods.

While 25 insurers settled with the NFL, *four insurers remain in litigation*. The partial insurance settlement and some of the deposition transcripts have been sealed. Motions for summary judgment are pending.

Changes in Protocols: Increased focus on player safety, and improved concussion protocols have been instituted. The NFL has implemented rule changes to reduce collisions to the head-and has sought to improve helmet design.

Reputation: Damage to the team and league's reputation is immeasurable. As more parents decide not to let their children play football, it remains to be seen whether football will eventually face a significant decline in popularity like boxing, which fell from prominence as the brain damage suffered by ex-boxers drew more public attention.



Sports-related concussions in US: Estimated to occur between 1.6 and 3.8 million times per year, making them *the leading cause of mild traumatic brain injury (mTBI) in the US.**

Rugby: Professional leagues have concussions occur at a rate of about **0.45 per match.**

Ice Hockey: Concussion rates are estimated at around **0.41 per game.**

Soccer: Although less contact-intensive, significant concussion rates still occur, particularly in female athletes, with rates around **0.27 per game.**

* Nathanson, J. et al. (2016, January 27). *Concussion Incidence in Professional Football*. NIH. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4731682/>



UK Rugby Group Litigation

In December 2020, 9 former professional rugby union players sued the Rugby Football Union, the Welsh Rugby Union and World Rugby.

Now almost 300 players involved in the suit

Concussion Claim: “governing bodies **failed to adequately protect them from the risks associated with concussion**, which has resulted in players being diagnosed with various neurological disorders such as early-onset **dementia** and probable chronic traumatic encephalopathy (“**CTE**”) from repeated concussions.”*



1. Accept and use **established definitions and guidelines** for TBI and dementia:

- ✓ **Diagnosis:** The Diagnostic and Statistical Manual of Mental Disorders (DSM):
Widely used source for the diagnostic criteria of various mental health conditions, including dementia.
- ✓ **Testing/Treatment recommendations:**
 - American Psychiatric Association (APA) Guidelines
 - National Institute for Health and Care Excellence (NICE) based in the UK
 - World Health Organization (WHO)

2. Have settlement *documents expressly use definitions and guidelines in effect at the time of the future activity for* monitoring/future claims

3. Audit claims to ensure no bias or “Racial Norming”

4. Have agreed time limits in advance for claims’ review process and appeals because early diagnosis and treatment of dementia slow the disease’s progress



Future Considerations

This case study of the US professional football players' litigation serves to illustrate how NOT to prosecute these lawsuits. Similar injuries can be found in various professional “contact” sports.

By learning from the problems with the NFL litigation, we hope to improve the outcome for players and their teams, and for the prosecution of any lawsuit seeking recovery for TBI injuries.



Q&A

Invitation to Questions:

Open the floor to questions.

