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## Dealing with the NFL's Concussion Problems of Yesterday, Today, and Tomorrow

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## Dealing with the NFL's Concussion Problems of Yesterday, Today, and Tomorrow

### Cover Page Footnote

To his parents, Jack and Rhonda, and his sisters, Samara and Rachel

# Dealing with the NFL's Concussion Problems of Yesterday, Today, and Tomorrow

Bryan Lipsky\*

## INTRODUCTION

One of the hot issues the National Football League ("NFL") currently faces is teams permitting, or sometimes even forcing, players to come back too soon from concussions.<sup>1</sup> Another pressing concussion-related issue for the NFL is how to take care of former NFL players who are currently suffering, often because of concussions they sustained while playing in the NFL.<sup>2</sup> Even though the NFL is currently succeeding at heights never before seen for an American sports league,<sup>3</sup> the NFL and its current players (including the union) have not adequately dealt with the issue of the horrible health and financial situation of so many of its

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<sup>1</sup> See Patrick Hruby & Jay Lovinger, *Strange as it Sounds, Trouble in Paradise?*, ESPN.com, Feb. 13, 2007, <http://sports.espn.go.com/espn/page2/story?page=hruby/070212>.

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

<sup>3</sup> This includes an abundance of riches. *Id.*

former players who helped make the NFL as successful as it is today.<sup>4</sup>

Part I of this Note contains examples of the NFL's current and past medical issues with concussions, while briefly outlining the potential increase in number of suits and damages for future litigation concerning sports concussions. Part II discusses the legal issues for athletes concerning stating a claim of medical negligence. This Part also utilizes two cases to illustrate the NFL's reluctance to help retired players dealing with concussion-related issues. Part III discusses suggestions on improving the team-physician model, and offers a potential solution: increased pressure by insurance companies on NFL teams to give the necessary medical attention to injured players and a call for the NFL to mandate that its teams keep at least one neurologist on the field at all times. This Part also offers a solution to the problem the NFL is facing with needy former players by suggesting that the NFL continue its trend in giving out greater assistance to these retirees.

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<sup>4</sup> *See id.*

## I. CONCUSSIONS IN THE NFL

A. "It's Clear as a Bell—I Had to See if You Could Play."<sup>5</sup>

Ted Johnson's downfall since retiring in 2005, after he had helped the New England Patriots win three Super Bowls, evokes feelings of sadness.<sup>6</sup> During retirement, Johnson, like many other former NFL players, went from being a tough sports hero to a sad shadow of his former self.<sup>7</sup> Johnson now forgets names, appointments, and, most horrifyingly, sometimes locks himself alone in his apartment with the blinds drawn out of fear of the outside world.<sup>8</sup>

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<sup>5</sup> Alan Schwarz, *Dark Days Follow Hard-Hitting Career in NFL*, N.Y. TIMES, Feb. 2, 2007, at A1 [hereinafter Schwarz, *Dark Days*]. Bill Belichick, Ted Johnson's head coach as a Patriot, said this to him after making him practice soon after he suffered a concussion. *Id.* According to Johnson, Belichick later admitted his mistake, but only in private. *Id.* However, Belichick said "If Ted felt so strongly that he didn't feel he was ready to practice with us, he should have told me." Associated Press ("AP"), *Johnson says Pats Coach Ignored LB's Concussion*, ESPN.com, Feb. 2, 2007, <http://sports.espn.go.com/nfl/news/story?id=2751614>. Johnson has said that he decided to go public with his problems so that his family and friends could better grasp the horrific situation he faces, and also so that the NFL might improve the way it handles concussions. Schwarz, *Dark Days*, supra note 5. While the NFL's guidelines for dealing with concussions have recently improved, the NFL has allowed players who have sustained concussions to return to the same game. *Id.* Johnson has said that he has not considered a lawsuit against Belichick, any member of the Patriots franchise, or the NFL. *Id.*

<sup>6</sup> Schwarz, *Dark Days*, supra note 5.

<sup>7</sup> See *id.*

<sup>8</sup> *Id.* Johnson sometimes spends days at a time in this state. *Id.* Another instance of a player suffering from brain problems after he retired is former fullback Merrill Hoge, who played from 1987–94. Peter Keating, *Doctor Yes*, ESPN.com, Oct. 28, 2006, <http://sports.espn.go.com/nfl/news/story?id=2636795> [hereinafter Keating, *Doctor Yes*]. While Hoge seems to be adapting to post-NFL life relatively well as an analyst for ESPN, he did temporarily lose his vision at a wine-tasting event. *Id.* As Hoge said, "The moment the wine touched my lips, I went blind for the most terrifying 10 seconds of my life. My doctor later explained I had probably suffered trauma in the vision area of my brain." *Id.* The trauma must have resulted from the many hits he took while playing in the NFL. *Id.* Hoge sued Dr. John Munsell, then the Chicago Bears' team doctor, and initially won \$1.55 million in 2002. *Id.* This was later overturned. *Id.* Award or no award, Hoge must worry about becoming senile much quicker than the normal person, as doctors told him that he "may have sped up something that normally might happen at 75 or 80" to occur when he is possibly as young as 45 or 50. Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17, 29 (2002).

Johnson feels that his rapid decline stems from a concussion he suffered in a pre-season game against the New York Giants in August 2002.<sup>9</sup> Four days later, Bill Belichick, his coach, wanted to test him, and, against the team trainer's recommendation,<sup>10</sup> subjected Johnson to regular on-field contact in practice.<sup>11</sup> Johnson suffered another concussion.<sup>12</sup> Johnson, who already had a strained relationship with his coach due to a contract dispute, did not object because he feared he would be cut and therefore lose his \$1.1 million salary.<sup>13</sup> After the practice, Johnson sought out Jim Whalen, the Patriots head trainer,<sup>14</sup> to express his anger and inform him that he suffered another concussion.<sup>15</sup>

Johnson sat out the next couple of preseason games after he sustained two concussions in August 2002; however, when he returned he suffered more concussions over the rest of his career, which continue to plague him.<sup>16</sup> Dr. Robert Cantu, Johnson's

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<sup>9</sup> Schwarz, *Dark Days*, *supra* note 5. Johnson's only documented concussion before that came in 1993 when he played for the University of Colorado. *Id.*

<sup>10</sup> Of the Patriots' trainer, Johnson said, "It is going to be hard for me to believe that my trainer didn't know the long-term ramifications, but I am doing this to protect the players from themselves." *Id.*

<sup>11</sup> *Id.* The first play after Johnson began to practice called for him, as the middle linebacker, to collide with an onrushing blocking back. *Id.* Johnson claims that this hit had several effects on him: a warm sensation took over his body after this collision, he saw stars, and the other players seemed to be in slow motion. *Id.* While Johnson never lost consciousness, he continued to practice "in a bit of a fog," and tried to avoid contact. *Id.*

<sup>12</sup> *Id.* According to Dr. David Hovda, a professor of neurosurgery and director of the Brain Injury Research Center at U.C.L.A., "Repeated concussions—it doesn't matter the severity—have effects that are more than additive, and that last longer." *Id.*

<sup>13</sup> *Id.* NFL contracts are not guaranteed. *Id.* Players might not inform team personnel of their injuries because they may fear that the team would release them because of the injuries. See Justin P. Caldarone, *Professional Team Doctors: Money, Prestige, and Ethical Dilemmas*, 9 SPORTS LAW J. 131, 143 (2002).

<sup>14</sup> Whalen is still the Patriots head trainer. *Id.* The Patriots did not allow Whalen to comment on this story. AP, *supra* note 5.

<sup>15</sup> Schwarz, *Dark Days*, *supra* note 5.

<sup>16</sup> *Id.* According to his current neurologist, Dr. Robert Cantu, each of these concussions exacerbated the next. *Id.* Johnson claims that he learned to play with these problems, but that "from that point on, I was getting a lot of these, what I call mini-concussions." *Id.* Johnson did not report these "mini-concussions" for fear that he would be seen as weak. *Id.* Johnson claims to have suffered at least six concussions over his last three seasons, but, due to his reputation as being injury-prone, reported only one. AP, *supra* note 5.

neurologist, said Johnson's cognitive impairment and depression "are related to his previous head injuries, as they are all rather classic postconcussion symptoms. They are most likely permanent."<sup>17</sup> Furthermore, he said that "Ted already shows the mild cognitive impairment that is characteristic of early Alzheimer's disease. The majority of those symptoms relentlessly progress over time, such that by the time he's in his 50s, he could have severe Alzheimer's symptoms."<sup>18</sup> Johnson's malaise and cognitive problems kept him from being able to hold down a job as a football analyst for WBZ-TV in Boston, which in turn caused him to take large amounts of anti-depressants along with increasing amounts of Adderall.<sup>19</sup> Concussions have had an adverse and lasting effect on him.<sup>20</sup>

B. *"I Spent Some Time. . . Talking to Mike. It Took Me a While to Realize He Didn't Even Know Who I Was."*<sup>21</sup>

Unable to find comfort, Mike Webster would sometimes ask his son Garret or friend Sunny Jani to stun him into unconsciousness with a black Taser gun.<sup>22</sup> If no one was around to help him, Webster would try to stun himself.<sup>23</sup> All this, while

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<sup>17</sup> Schwarz, *Dark Days*, *supra* note 5. Dr. Cantu is the Chief of Neurosurgery and Director of Sports Medicine at Emerson Hospital in Concord, Massachusetts. *Id.*

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

<sup>19</sup> *Id.* These drugs created dangers which led him to spend two weeks at McLean Hospital, a psychiatric institution in Belmont, Massachusetts. *Id.* *But see id.* (stating that no tests have confirmed his mental condition, leading some people to believe that his problems arose due to retirement). However, Dr. Cantu said that "the vast majority of individuals with postconcussion syndrome, including depression, cognitive impairment, all the symptoms that Ted has, have normal M.R.I.'s." *Id.*

<sup>20</sup> *See id.* Ted Johnson is one of a growing number of former players and their relatives who are seeking to find out whether the former players' serious health issues stem from injuries they sustained while playing in the NFL and the treatment they received as players. *Id.*

<sup>21</sup> Greg Garber, *Wandering Through the Fog*, ESPN.com, Jan. 27, 2005, <http://sports.espn.go.com/nfl/news/story?id=197288> [hereinafter Garber, *Wandering*]. Mel Blount said this after speaking to his former teammate Mike Webster. *Id.*

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

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

often taking a smorgasbord of medications.<sup>24</sup> These were the depths to which Webster, a member of the NFL Hall of Fame, had sunk.<sup>25</sup>

A primary problem that led to Webster's tragic downfall was that he played at a time when players had little equipment for protection and when defensive lineman still used the head slap, even though it was outlawed by then.<sup>26</sup> Since Webster played center, his hands were occupied with snapping the ball, so he had less time than other offensive lineman to protect himself.<sup>27</sup> Throughout his NFL career he may have endured over 25,000 violent collisions.<sup>28</sup> Despite all of these encounters, the Pittsburgh Steelers' team doctors never once treated him for a concussion.<sup>29</sup>

After years of hardship, "Iron Mike"<sup>30</sup> suffered a fatal heart attack.<sup>31</sup> The years of suffering primarily arose from being hit too

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

<sup>25</sup> See, e.g., Garber, *Wandering*, *supra* note 21. One time Webster even tried to glue a couple of his rotting teeth back into place. *Id.* Webster was wary of his problems, as he would often write in his journal and then be unable to follow his train of thought. *Id.* Webster, a fifth round draft pick in the 1974 NFL Draft, was elected to the Hall of Fame in 1997, his second year of eligibility. Ed Bouchette, *Mike Webster, Steelers Hall of Fame Center, Dies at 50*, Pittsburgh Post-Gazette, Sept. 25, 2002, at A1 [hereinafter Bouchette, *Webster Dies*]. He went to nine pro bowls during his seventeen year career. *Id.* He was a captain on three of the four Super Bowl champion teams on which he played. Greg Garber, *Blood and Guts*, ESPN.com, Jan. 25, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972286> [hereinafter Garber, *Blood and Guts*]. In recognition of these feats, and for playing in 220 games for the Pittsburgh Steelers, more than any other player in Steelers history, he was voted to the NFL's all-time team in 2000. Bouchette, *Webster Dies*, *supra*.

<sup>26</sup> Garber, *Blood and Guts*, *supra* note 25. Even though these problems have been mostly ameliorated, concussions still loom as a primary issue in the NFL. See, e.g., Schwarz, *Dark Days*, *supra* note 5.

<sup>27</sup> See Garber, *Blood and Guts*, *supra* note 25.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* However, the Steelers' trainers noted that he never complained of concussion symptoms. *Id.*

<sup>30</sup> Bouchette, *Webster Dies*, *supra* note 25.

<sup>31</sup> *Id.* While Webster's health had deteriorated before his death, he had had no previous heart problems. *Id.* However, his family did have a history of heart disease, as well as mental illness. Garber, *Tormented Soul*, *supra* note 24.



many times in his head<sup>32</sup> from the violent collisions he endured while playing in the NFL.<sup>33</sup> He was first diagnosed with brain damage in 1999.<sup>34</sup> A man who once seemed as though he had an invincible body, no longer retained control over that body.<sup>35</sup> Days would go by where he curled himself up into a fetal position and contemplated suicide.<sup>36</sup> After his NFL days, Webster often slept in his pickup truck.<sup>37</sup> He was arrested in February 1999 for forging 19 prescriptions for Ritalin.<sup>38</sup> The player who sunk to these depths had at one time, according to Steelers owner Dan Rooney, helped quarterback Terry Bradshaw decipher defenses, illustrating the intelligence of the great offensive lineman.<sup>39</sup>

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<sup>32</sup> Only recently have scientists begun to comprehend what occurs inside the brain when a player suffers a head injury. Keating, *Doctor Yes*, *supra* note 8.

<sup>33</sup> Bouchette, *Webster Dies*, *supra* note 25. According to Webster's family's co-counsel, Webster "was hit in the head thousands of times and suffered many concussions at a time when the dangers weren't widely recognized. The evidence is clear that he was completely disabled by March of 1991." Garber, *Tormented Soul*, *supra* note 24. Webster played "a compromising position in an exceedingly violent game for an extended period of time . . . in an era when the rules governing contact were far more liberal than they are today and the development of safer equipment, particularly helmets, was embryonic." *Id.* It is also possible that he experimented with anabolic steroids, which may have led to problems he had with his liver, kidney, and heart. *Id.* While Webster denied using steroids, the NFL had not yet banned anabolic steroids. Garber, *Blood and Guts*, *supra* note 25. Webster's medical records contain steroid references. *Id.*

<sup>34</sup> Bouchette, *Webster Dies*, *supra* note 25.

<sup>35</sup> Garber, *Tormented Soul*, *supra* note 24.

<sup>36</sup> *Id.* Webster died of a heart attack on September 24, 2002, two days after he had begun sniffing ammonia due to his belief that if he fell asleep he might never wake up. Greg Garber, *Sifting Through the Ashes*, ESPN.com, Jan. 28, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972289> [hereinafter Garber, *Ashes*]. At his death, Webster also had extensive liver and kidney damage. *Id.*

<sup>37</sup> Garber, *Wandering*, *supra* note 21. From 1993–97, Webster did not have a permanent home address. Greg Garber, *Man on the Moon*, ESPN.com, Jan. 26, 2005, <http://sports.espn.go.com/nfl/news/story?id=1972287> [hereinafter Garber, *Man on the Moon*]. His former teammates often offered their help, but Webster was too proud to accept. *Id.*

<sup>38</sup> Garber, *Wandering*, *supra* note 21.

<sup>39</sup> Garber, *Tormented Soul*, *supra* note 24. Webster played center, a position that requires intelligence. Garber, *Blood and Guts*, *supra* note 25. This intelligent player rambled a bit and digressed in his Pro Football Hall of Fame acceptance speech, but he was able to get through it. Garber, *Wandering*, *supra* note 21.

Another problem Webster had was his inability to earn a living.<sup>40</sup> At the beginning of his retirement, Webster's assets exceeded \$2 million, including three annuities.<sup>41</sup> While Webster did work after playing in the NFL, none of the businesses he entered into, or jobs he held, ever succeeded.<sup>42</sup> The previous steady income soon deteriorated.<sup>43</sup> The NFL conducted a background check of Webster after he petitioned the NFL for disability benefits in 1999.<sup>44</sup> The report, completed in January 2001, illustrates the bad judgment and failed business ventures in which Webster took part.<sup>45</sup> Webster, suffering from dementia and often disoriented, took multiple medications for pain, which he paid for out of pocket since he had no health insurance after he retired.<sup>46</sup> Concussions clearly had a major negative effect on his post-NFL life.

C. "When in Doubt, Sit Them Out!"<sup>47</sup>

The NFL knows that its players are subject to hard hits<sup>48</sup> that cause concussions.<sup>49</sup> The NFL has recently admitted that in-game

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<sup>40</sup> See generally Garber, *Man on the Moon*, *supra* note 37. The problems mentioned are just a sampling of the many adversities that Webster faced in his post-NFL days. *Id.*

<sup>41</sup> *Id.* While Webster played before the recent rash of seven-figure salaries, he did earn \$400,000 in his last season while playing for the Kansas City Chiefs. *Id.*

<sup>42</sup> See *Webster v. NFL*, No. 05-2386, 2006 U.S. App. LEXIS 30594, at \*6-7 (4th Cir. Dec. 13, 2006). Webster was basically unemployed from 1995 until his death in 2002. *Id.* at \*8.

<sup>43</sup> See Garber, *Man on the Moon*, *supra* note 37. He filed his last tax return in 1991. *Id.* Prior to his neurological problems, Webster had known the tax laws of every state. *Id.*

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

<sup>45</sup> *Id.* Two such failures were being the CEO and treasurer of a Pennsylvania business known as Pro Snappers Inc., in 1990, which no longer exists, and being a strength and conditioning coach on the Chiefs in 1994. *Id.* Webster played 15 seasons with the Steelers, but held at least eight jobs over a four-year span after retiring from the NFL. *Id.*

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

<sup>47</sup> Keating, *Doctor Yes*, *supra* note 8 (quoting a statement released by the Second International Conference on Concussion in Sport that met in Prague in 2004).

<sup>48</sup> Peter Keating, *NFL Won't Bite on Dentist's Concussion Device*, ESPN.com, Feb. 1, 2006, <http://sports.espn.go.com/nfl/news/story?id=2314899> [hereinafter Keating, *Won't Bite*]. These hits average 98 times the force of gravity. *Id.*

<sup>49</sup> See *id.* Wayne Chrebet, a former wide receiver for the New York Jets, retired after he suffered his (at least) ninth concussion. *Id.* The New York Daily News reported that Jets team doctor Dr. Elliot Pellman told Chrebet, after the receiver suffered another

concussions occur about 100 times a year.<sup>50</sup> However, teams only report half of these incidents.<sup>51</sup> This probably illustrates either a lack of awareness or a lack of openness concerning concussions.<sup>52</sup>

Since 1994, the NFL has encouraged (but not required) teams to conduct neuropsychological tests on players who have sustained a brain injury.<sup>53</sup> These tests help team doctors decide when the players can return.<sup>54</sup> The NFL does not “impose guidelines or recommendations on the clubs’ medical staffs regarding concussion evaluation, testing, treatment or return-to-play criteria.”<sup>55</sup> Other professional sports<sup>56</sup> have much more cautious rules regarding concussions than does the NFL.<sup>57</sup> The International Rugby Board mandates that players sit out three weeks.<sup>58</sup> Since 1997, the National Hockey League (“NHL”) has obligated its teams to do baseline neuropsychological testing and follows an informal “seven-day rule”: players with serious

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concussion, that being able to return to the game [was] an act that “[was] very important to [his] career.” *Id.*

<sup>50</sup> *Id.* This averages to about 0.4 concussions per game. *Id.*

<sup>51</sup> *Id.* From the 2000–03 seasons, only 203 concussions were listed, according to data in the Pittsburgh Tribune Review. *Id.* Not all teams suffered equally, according to this article, as the Colts listed 20 concussions over these four seasons, while the Patriots listed zero. *Id.* This article attributes this difference to a dentist’s device, but as seen previously with Ted Johnson, the difference may actually be how the Patriots ran their team relating to concussions.

<sup>52</sup> It could also be both.

<sup>53</sup> Keating, *Won’t Bite*, *supra* note 48. For example, over a decade ago the Pittsburgh Steelers developed neurological cognitive tests to help diagnose post-concussion syndrome and to determine when, and if, an athlete would not be subjecting himself to further risk by returning to action. *Pittsburgh Steeler Concussion Evaluation Process Proposed to National Football League*, PR NEWSWIRE, Feb. 17, 1995.

<sup>54</sup> Keating, *Won’t Bite*, *supra* note 48.

<sup>55</sup> *Id.*

<sup>56</sup> On the amateur side, for the National Collegiate Athletic Association (“NCAA”), the decision to return to the same game is made on a case-by-case basis. Keating, *Doctor Yes*, *supra* note 8. NCAA guidelines state that “it is essential” that no athlete returns to action when “any symptoms, including mild headache, persist.” *Id.* The NCAA also recommends that student-athletes do not return to play the same day if they have suffered significant symptoms, long-lasting symptoms or memory problems. *Id.* The NCAA has said that neuropsychological testing has “utility” but that “further research is needed to understand [its] complete role.” *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> *Id.* However, by being cleared by doctors, some players have recently been allowed to return before this three week period culminates. *Id.*

concussions sit out at least one week and all players suspected of sustaining a concussion must undergo further tests, with teams notifying the league of every concussion.<sup>59</sup>

Part of the NFL's problem in dealing with concussions stems from the former head of the NFL's Mild Traumatic Brain Injury ("MTBI") Committee,<sup>60</sup> Dr. Elliot Pellman.<sup>61</sup> It was a little perplexing when former NFL Commissioner Paul Tagliabue named Pellman to chair this committee because Pellman is a rheumatologist, not a neurologist.<sup>62</sup> While Pellman's work has led the NFL to make significant changes in helmet design, he has also published controversial conclusions.<sup>63</sup> For instance, he reported that NFL players who returned to play in the same game in which they suffered a concussion were not at "significant risk of a second

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

<sup>60</sup> The NFL created this committee in 1994 after many of its stars, such as Steve Young and Troy Aikman, continually suffered concussions. Keating, *Doctor Yes*, *supra* note 8. These two former star quarterbacks are examples of players who have sustained multiple concussions, but who have not publicly acknowledged any problems stemming from these brain injuries. Alan Schwarz, *Expert Ties Ex-Player's Suicide To Brain Damage From Football*, N.Y. TIMES, Jan. 18, 2007, at A1 [hereinafter Schwarz, *Ex-Player's Suicide*]. In a ten game stretch during his playing career, Aikman suffered three concussions. Hecht, *supra* note 8, at 36.

<sup>61</sup> Keating, *Won't Bite*, *supra* note 48.

<sup>62</sup> *Id.* Further damage to the situation occurred when the New York Times reported that Pellman, who also serves as the team doctor for the New York Jets, had "inflated" his resume. *Id.* Pellman attended medical school in Guadalajara, rather than SUNY Stony Brook, as he once claimed. Keating, *Doctor Yes*, *supra* note 8.

<sup>63</sup> Keating, *Won't Bite*, *supra* note 48. Harsh reviews followed the committee's sixth paper, published in the academic journal *Neurosurgery*. *Id.* *Neurosurgery* prints peers' comments about studies. *Id.* One scientist said "They're basically trying to prepare a defense for when one of these players sues. They are trying to say what's done in the NFL is okay because in their studies, it doesn't look like bad things are happening from concussions. But the studies are flawed beyond belief." *Id.* However, if the NFL's research does in fact turn out to be flawed and the practices it supports in regards to concussions are in fact dangerous, the NFL could face "massive liability, financially and legally." Peter Keating, *See No Evil? The NFL Won't Face Concussion Facts*, ESPN.com, Jan. 19, 2007, <http://sports.espn.go.com/nfl/columns/story?id=2736505> [hereinafter Keating, *See No Evil*]. The NFL, known for fighting even minor disability claims, would certainly not want to be opened up to such lawsuits, so it may be hoping and praying that its research is correct. *See id.* Michael Kaplan, a New York attorney specializing in brain injuries, said: "There is the potential for bankrupting the league pension and disability plan if the NFL had to honor claims of disability brought by players who have concussions." *Id.*

injury, either in the same game or during the season.”<sup>64</sup> Playing to this tune, 15% of those who suffer concussions return to play immediately, while an additional 34% eventually return to the same game.<sup>65</sup>

Non-NFL studies, however, show that once a player gets a concussion, future concussions become more probable with a consequence of greater damage.<sup>66</sup> Dr. Kevin Guskiewicz, director of the Sports Medicine Research Laboratory at the University of North Carolina, has conducted research that disagrees with Pellman's.<sup>67</sup> Guskiewicz has shown that NFL players who have sustained three or more concussions are much more likely to suffer from depression or Alzheimer's disease<sup>68</sup> after they retire than are players who were lucky enough not to suffer any concussions.<sup>69</sup>

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<sup>64</sup> Keating, *Won't Bite*, *supra* note 48. Compare this with a 2003 NCAA study that based its research on 2,095 college football players, and found that those players who suffered concussions were more susceptible to suffer further head injuries for the next 7–10 days. Keating, *Doctor Yes*, *supra* note 8. Another of Pellman's controversial conclusions was that players who suffered three or more concussions did not perform differently from other players who took neuropsychological tests. Keating, *Won't Bite*, *supra* note 48. Pellman found the same to be true of players who missed more than a week due to a head injury. *Id.* Now compare this to a 2003 report by the Center for the Study of Retired Athletes at the University of North Carolina, which stated that a connection existed between multiple concussions and depression among former professional athletes who had suffered multiple concussions. Keating, *Doctor Yes*, *supra* note 8. A 2005 follow-up to this study found a connection between concussions and both brain impairment and Alzheimer's disease among NFL retirees. *Id.* Generally, sports doctors believe that concussions make people more vulnerable to future brain damage, especially within a short time span, because head trauma instigates a storm of chemical changes in the brain that, even if overt symptoms have subsided, may affect reflexes. *Id.* Further reasoning as to why the NFL's scientific studies have had different results than non-NFL studies is that the NFL supposedly did not include all data. *Id.* It has been alleged that they excluded 850 baseline tests in their research. *Id.*

<sup>65</sup> Keating, *Won't Bite*, *supra* note 48. This means that about ½ of NFL players who suffer concussions during a game return to that same game. According to Pellman's committee, this number is 51.7%. Keating, *Doctor Yes*, *supra* note 8.

<sup>66</sup> Keating, *Won't Bite*, *supra* note 48.

<sup>67</sup> *Id.*

<sup>68</sup> A sad example of a former NFL player who suffered from depression and possibly Alzheimer's is Andre Waters, who said that when he sustained concussions, of which he claimed to have had at least 15, he “just wouldn't say anything,” but he would “sniff some smelling salts, then go back in there.” See Schwarz, *Ex-Player's Suicide*, *supra* note 60. No obvious explanation for why Waters committed suicide in November 2006 exists. *Id.* However, Dr. Bennet Omalu of the University of Pittsburgh, a neuropathologist (and a leading expert in forensic pathology), was permitted to examine the remains of Waters'

Therefore, part of the problem is that Pellman has served as the NFL's chairman of the committee on concussions.<sup>70</sup> Pellman, who has resigned, will be replaced as chairman by two men, Dr. Ira Casson, a neurologist,<sup>71</sup> and Dr. David Viano,<sup>72</sup> a biomechanical

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brain. *Id.* Omalu, who also examined Mike Webster's brain, claims that Waters suffered brain damage while playing football. *Id.* This brain damage, according to Omalu, led to Waters' depression and death (although his claims have not been corroborated or reviewed). *Id.* Dr. Omalu found Waters' brain tissue to have degenerated to the state of an 85 year old man with traits similar to that of an early-stage Alzheimer's victim. *Id.* The NFL declined to comment, but a member of the League's MTBI Committee, Dr. Andrew Tucker, said that the league would begin studying retired players later this year to examine the general issue of football concussions and subsequent depression. *Id.* What is scary for Ted Johnson in this story is Dr. Cantu's prediction that "The type of changes that Andre Waters reportedly had most likely Ted has as well." Schwarz, *Dark Days*, *supra* note 5.

<sup>69</sup> Keating, *Won't Bite*, *supra* note 48. According to Guskiewicz, "The league hasn't even begun to study long-term effects of concussions." *Id.*

<sup>70</sup> See generally Keating, *Doctor Yes*, *supra* note 8. However, if the NFL were seeking a crutch for its problems, Pellman's resignation takes away the possibility of pinning the problems on him in the future. See ESPN.com News Services, *Pellman Steps Down as NFL's Top Concussion Expert*, Feb. 28, 2007, <http://sports.espn.go.com/nfl/news/story?id=2782445> [hereinafter *Pellman*]. Pellman's resignation probably has to do with ESPN's recent criticism of his work, and the recent events showing the horrific effects of concussions on retired players, like Ted Johnson and Andre Waters. Alan Schwarz, *Concussion Panel Has Shakeup as Data is Questioned*, N.Y. TIMES, Mar. 1, 2007, at D1 [hereinafter Schwarz, *Concussion Panel*]. However, Greg Aiello, the NFL spokesman, said that Pellman's resignation had nothing to do with the recent public questioning of his qualifications. *Id.* Dr. Guskiewicz, among others, continued his criticism of Pellman upon hearing of the resignation, saying that Pellman was "the wrong person to chair the committee from a scientific perspective and the right person from the league's perspective." Pellman, *supra*. Dr. Arthur Day, director of the Neurological Sports Injury Center at Brigham and Women's Hospital in Boston, spoke candidly about Pellman's connection to the NFL, saying "Pellman works for the NFL. Until there's definitive evidence otherwise, he's going to take the tack that managing concussions isn't a problem. Will Mercedes tell you they're not the best car?" Keating, *Won't Bite*, *supra* note 48. Pellman uses his committee's studies to defend NFL policy and team decisions concerning concussions. *Id.*

<sup>71</sup> Casson is employed by Yeshiva University's Albert Einstein School of Medicine. Schwarz, *Concussion Panel*, *supra* note 70.

<sup>72</sup> Viano has been on the committee for a long time. *Id.* Viano has already taken a step in the right direction in regards to dealing with concussions. *Id.* In contradiction with non-NFL research, in previous NFL research, specifically an article published in a 2005 article in *Neurosurgery*, he has said that like professional football players, "It might be safe for college/high school football players to be cleared to return to play on the same day as their injury." *Id.* Non-NFL research has shown that concussions sustained by adults are less dangerous than those sustained by teenagers. *Id.* Soon after he was

engineer.<sup>73</sup> However, NFL spokesman Greg Aiello told *The Baltimore Sun* that Pellman “will continue as a member of the committee and will continue to be the administrative liaison with our office.”<sup>74</sup> Therefore, at this point it is unclear how much authority and influence Pellman will retain over the committee. What is clear, though, is that new NFL commissioner Roger Goodell should make this issue a top priority for the League.<sup>75</sup>

#### D. Concussion Litigation

Injured athletes can base their suits against team physicians on several different legal theories.<sup>76</sup> The most common lawsuit

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promoted, Viano said “We’ve been cautious in our writings to say that we’re only looking at professional football players, and we don’t imply any connection of this research at the high school level or for younger people.” *Id.* Viano has also said that studying concussions and their long-term effects on retired players will be at the forefront of his committee’s work. *Id.* He expects this study to take at least three years. *Id.* However, Viano did say that he did not see the committee changing its direction. *Id.*

<sup>73</sup> Pellman, *supra* note 70.

<sup>74</sup> *Id.*

<sup>75</sup> Goodell did say, to his credit, that a player’s health should take precedence over football. Schwarz, *Dark Days*, *supra* note 5. Now, it is up to Goodell and his administration to follow through on those words with proper action. For years, the NFL has been saying that there is no scientific evidence that establishes a connection between concussions and brain damage or lasting injuries, while also claiming that the MTBI will conduct further research. Keating, *See No Evil*, *supra* note 63. Over a decade has passed since the MTBI was formed, and yet the NFL is still about to conduct research on concussions and their long-term effects, while refusing to acknowledge non-NFL research on the matter. *Id.* Speaking about Goodell’s predecessor, Paul Tagliabue, and others, a former player, Joe DeLamielleure, stated:

They’ve been in power for 20 years and haven’t done anything. Guys need help yesterday. I said to Gene [Upshaw], It’s like there’s a big pie being made here, and there’s a couple of crumbs on the floor, and they won’t even give us a crumb. This isn’t some industry that’s not making money.

Clifton Brown, *Ex-Players Say Increase in Pensions is Needed*, N.Y. TIMES, Feb. 2, 2007, at D2. DeLamielleure continued, “I’m insulted by our union.” *Id.*

<sup>76</sup> See Michael Landis, *The Team Physician: An Analysis of the Causes of Action, Conflicts, Defenses and Improvements*, 1 DEPAUL J. SPORTS L. CONTEMP. PROBS. 139, 140 (2003). In similar respects, team physicians have several different possible defenses that they can invoke in such a suit: assumption of the risk, contributory negligence, and workers’ compensation. *Id.* at 151. To make this issue even more confusing, “sports medicine” is not a typical specialty, as a doctor can achieve special qualifications in sports medicine only after completing a residency program in an area which has a specialty program. American Osteopathic The Sports Medicine FAQ, Academy of Sports

against team physicians in regards to treating an injured athlete is negligence through medical malpractice.<sup>77</sup> Concussion-related sports litigation may very well soon become more abundant,<sup>78</sup> as approximately 350,000 athletes suffer some sort of head injury in the United States each year.<sup>79</sup> What makes concussions more difficult to deal with than most other injuries is that there are many differing views and interpretations of concussions.<sup>80</sup> However, regardless of view or interpretation, brain injuries are the leading cause of athletic death.<sup>81</sup>

Despite the deadly nature of concussions, the Merrill Hoge suit<sup>82</sup> was the first case in the US based on a team physician's failure to warn an athlete about the risks and dangers in returning too soon after sustaining a concussion.<sup>83</sup> An argument has been made that similar future litigation will be conducted in front of

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Medicine, <http://www.aoasm.org/faq.cfm> (last visited Jan. 31, 2008). According to at least one court, a medical witness "qualified as an expert in orthopedics with a special interest in orthoscopic surgery and sports medicine" can be qualified as an expert, at least where he explains that there are no board certified specialties in "sports medicine." *Fleischmann v. Hanover Ins. Co.*, 470 So. 2d 216, 217 (La. 1985) (affirming the jury award to the plaintiff who suffered injuries when he was thrown from his bicycle when someone opening a car door hit him).

<sup>77</sup> Landis, *supra* note 76, at 140. Other potential claims include fraudulent misrepresentation, intentional infliction of emotional distress, battery, assault, and defamation. *Id.*

<sup>78</sup> Hecht, *supra* note 8, at 21–22. A hot topic in American society concerns the public policy debate over sports-related concussions. *Id.* at 18. The author claims that the National Hockey League ("NHL") is actually in a worse situation than the NFL, as the NHL takes an old-fashioned viewpoint of only really taking sufficient precautions when it is sure that the injury is a concussion, rather than a less severe head injury. *See id.* at 63. The author argues that at least the NFL is trying to improve in the aspect of treating head injuries. *See id.* To the NFL's credit, Gene Upshaw, executive director of the NFL Players Association, said that the NFL will be taking into consideration the issue of concussions over the 2007 offseason. Schwarz, *Dark Days*, *supra* note 5. Upshaw did state that the medical personnel and the injured player should be making the decision as to when the player should return to action, or even if to return, after a concussion. *See id.*

<sup>79</sup> Eddie Pells, *Steinberg Labels Concussions 'Ticking Time Bomb'*, redorbit.com, Apr. 20, 2007, [http://www.redorbit.com/news/health/909799/steinberg\\_labels\\_concussions\\_time\\_bomb/index.html](http://www.redorbit.com/news/health/909799/steinberg_labels_concussions_time_bomb/index.html). This extravagant number only includes those who lose consciousness. *Id.*

<sup>80</sup> *See* Hecht, *supra* note 8, at 22.

<sup>81</sup> *Id.* at 23.

<sup>82</sup> Keating, *Doctor Yes*, *supra* note 8.

<sup>83</sup> Hecht, *supra* note 8, at 30.



juries who are more aware of the severity of concussions, which surely is a pro-plaintiff stance.<sup>84</sup>

## II. THE LEGAL LANDSCAPE

### A. *Stating a Claim*

The injured athlete, the plaintiff, must establish the following elements: (1) a duty owed by the physician to the plaintiff based upon the patient-physician relationship, (2) a breach of the standard of care, (3) an injury (or the aggravation of an injury), and (4) that the breach caused the further injury.<sup>85</sup> Team physicians come into play in advising athletes about concussions when the athletes sacrifice their body, including after injuries to the brain, at the risk of further injuries.<sup>86</sup>

Like most forms of tort liability, a malpractice claim is based on a relationship existing between the tortfeasor and the injured person.<sup>87</sup> For there to be actionable negligence, there must be a patient-physician relationship.<sup>88</sup> The patient-physician relationship, typically, is based on consent, as it is formed by the patient's direct employment of the physician, and the physician's

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<sup>84</sup> *Id.* at 58. Additionally, the plaintiffs, the injured athletes, will most likely be far less tolerant now that they are becoming more knowledgeable, along with the rest of society, about concussions. *Id.*

<sup>85</sup> Twila Keim, *Physicians for Professional Sports Teams: Health Care Under the Pressure of Economic and Commercial Interests*, 9 SETON HALL J. SPORT L. 196, 199–200 (1999).

<sup>86</sup> See Landis, *supra* note 76, at 139. Physicians' decisions should be based upon the injured athlete's health. *Id.* Team physicians are responsible for medically clearing athletes. *Id.* at 142.

<sup>87</sup> See *Reynolds v. Decatur Mem'l Hosp.*, 660 N.E.2d 235, 238 (Ill. App. Ct. 1996); Lexstat 1–8 MEDICAL MALPRACTICE § 8.03(1) (Bender & Co. 2006). A physician's liability is based on the formation of a relationship with the patient. *Id.* Medical malpractice is a specific type of negligence action. *Greenberg v. Perkins*, 845 P.2d 530, 534 (Colo. 1993).

<sup>88</sup> David W. Louisell & Harold Williams, *Creation of Physician's Duty: The Physician-Patient Relationship*, 85 MEDICAL MALPRACTICE LITIGATION GUIDE § 8.03(1) (2006) (LEXIS). A physician cannot be liable for an injury that occurs after the physician has completed treating the patient. *Id.*

consent to treat the patient.<sup>89</sup> If no patient-physician relationship has been established, there is, generally, no legal duty owed by the physician to the examinee.<sup>90</sup> Therefore, since no legal duty exists, there is no basis for liability for medical malpractice.<sup>91</sup> Often, someone other than the patient engages the physician to treat the patient.<sup>92</sup> In such instances, the relationship arises because the patient accepts the services.<sup>93</sup> However, not all professional contact between a doctor and a potential patient satisfies the requisite relationship.<sup>94</sup> The general test finds the relationship is likely to arise when the services are rendered for the patient's benefit, rather than for the benefit of the person or entity employing the physician.<sup>95</sup>

Once the relationship has been formed, the law imposes a fiduciary duty of good faith and fair dealing on the physician.<sup>96</sup> Included in this duty is the physician's requirement to inform the patient of the nature of his condition, as well as receive the patient's informed consent for future treatment.<sup>97</sup> On the defense side, the patient must act reasonably and inform the physician of the patient's problems.<sup>98</sup>

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<sup>89</sup> *Id.* § (2)(a). While this relationship appears to be contractual, the law of contracts does not necessarily control such actions. *See id.* In most states where the issue has come up, courts have required the plaintiff to prove that the necessary relationship existed, while also holding that the relationship is implied if the physician affirmatively undertook to diagnose/treat the patient. *Id.*

<sup>90</sup> *Id.* § 8.03(2)(c). However, once the relationship has been created, the physician is obligated to continue treating the patient until the physician's services are no longer reasonably required by the patient. *Id.* § (3).

<sup>91</sup> *Id.* § 8.03(2)(c). Usually, there must be more than an examination to establish this relationship. *Id.*

<sup>92</sup> *Id.*

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

<sup>94</sup> *Id.* An example where the relationship would not necessarily exist is when a doctor performs a pre-employment physical examination on behalf of the employer. *Id.*

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

<sup>96</sup> *Id.* § 8.03(3).

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

<sup>98</sup> *See id.* § 8.03(4). An example is that the patient must give the physician an honest medical history. *Id.* However, an alleged failure by the patient to fulfill this duty may simply create a jury question concerning the patient's negligence. *Id.*

A recent hot issue is whether the physician owes the duty to a third party.<sup>99</sup> The necessary relationship does not exist in these circumstances.<sup>100</sup> Courts are split over whether the duty exists as a matter of law in such instances.<sup>101</sup> When a court finds that a duty exists, it usually bases its finding on some special relationship between the physician and the patient.<sup>102</sup>

This issue often comes up when a third party hires the physician, which means the traditional relationship has not been established; an employer requiring the employee to undergo a pre-employment examination is one such instance.<sup>103</sup> In cases where a third party has referred the patient to the physician for examination, and where the relationship does not exist, the substantive duty of care owed by the physician depends on general negligence principles that are applied consistently with the appropriate public policy interests.<sup>104</sup> The problem in the NFL stems from the team, the third party, hiring the physician.<sup>105</sup>

Whether a duty exists for a physician is a question of law to be decided by the court.<sup>106</sup> Additionally, there is the issue of distinguishing between misfeasance and nonfeasance. A person who realizes, or at least should realize, that to save or protect someone else he must act, is not necessarily obligated to take such action.<sup>107</sup> However, if an employee is hurt within the scope of the employment, thereby coming into the position of imminent danger,

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<sup>99</sup> *Id.* § 8.03(5). The third party is a person who is not the physician's patient. *Id.*

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

<sup>101</sup> *See id.* Texas courts, for instance, have not recognized a common law duty owed by physicians to third parties. *Id.* Statutes can also keep a physician from owing the duty to a third party. *Id.* Virginia has such a statute. *Id.*

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

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

<sup>104</sup> *Id.* An example of this can be found in New Jersey; if its Department of Labor's Division of Disability has a physician examine a social security claimant pursuant to that person's specific complaints, the physician owes a duty to examine and diagnose the complaints as he would a "traditional" patient with the same complaints, regardless of the lack of privity between the doctor and the patient. *Id.*

<sup>105</sup> *See, e.g.,* Matthew J. Mitten, *Health Law Symposium: Team Physicians as Co-Employees: A Prescription that Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 ST. LOUIS U. L.J. 211, 211-12(2005). This is where the situation arises for the NFL. *See id.*

<sup>106</sup> *Greenberg v. Perkins*, 845 P.2d 530, 537 (Colo. 1993).

<sup>107</sup> RESTATEMENT (SECOND) OF TORTS § 314 (1965).

and the employer or a person who has duties of management knows of such potential for serious harm, the employer is subject to liability if he or his management fails to take reasonable care to avert the threatened harm.<sup>108</sup>

*B. The Extension of the Patient-Physician<sup>109</sup> Relationship*

Many jurisdictions have recently extended a doctor's liability by holding doctors liable for their negligence and failures even in the absence of the traditional patient-physician relationship.<sup>110</sup> Some have even called for the replacement of the traditional requirement of a patient-physician relationship.<sup>111</sup> A potential replacement is the multi-factor balancing test, which one court held took into account six factors: (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered an injury, (3) the closeness of the connection between the defendant's

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<sup>108</sup> *Id.* § 315.

<sup>109</sup> Of course, the Hippocratic Oath states, "I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous." HIPPOCRATES, THE OATH (Francis Adams trans.) (400 B.C.E.), available at <http://classics.mit.edu/Hippocrates/hippoath.html>. While this specifically limits the relationship to patients, the issue here is whether or not a non-traditional patient-physician relationship prohibits the examinee from stating a claim.

<sup>110</sup> See, e.g., Daniel L. Kaplan, Linda D. Weaver & Taylor C. Young, *The Medical Duty of Care: Supreme Court Expands Relationship*, 41 ARIZ. ATT'Y 16, 16 (2005). The requirement of a formal relationship has never been absolute though, as the court in *Harriott v. Plimpton*, found that a physician may be held liable to the examinee if the doctor fails to properly diagnose a patient referred by another. 44 N.E. 992, 993 (Mass. 1896); *Stanley v. McCarver*, 92 P.3d 849, 851 (Ariz. 2004).

<sup>111</sup> See Patrick D. Blake, *Redefining Physicians' Duties: An Argument For Eliminating The Physician-Patient Relationship Requirement in Actions for Medical Malpractice*, 40 GA. L. REV. 573, 578 (2006) (finding two approaches for determining whether a non-traditional patient-physician relationship permits a claim: (1) if the physician is in direct contact with the examinee, the physician can be held liable for medical malpractice, and (2) courts have used a multi-factor balancing test, which holds that whether or not the traditional relationship existed is just one factor to be considered). *But see* *Reed v. Bojarski*, 764 A.2d 433, 441 (N.J. 2001) (stating that the majority rule embraces the traditional medical malpractice model, which emphasizes the patient-physician relationship as being required, except possibly in cases where the physician harms the examinee during the examination); *Greenberg*, 845 P.2d at 535 (stating that the analyses of different courts on the duty of care issues where a physician conducts an examination of a third person at the request of a third party is "remarkable").

improper conduct and the plaintiff's injury, (4) the moral blame one could claim from the defendant's conduct, (5) the prevention of future harm through a policy context, and (6) the burden this places on the defendant and the community, and the availability, cost, and prevalence of insurance for this new-found risk.<sup>112</sup>

Regardless of whether or not courts have adopted a new standard, many courts have recently broadened the relationship issue.<sup>113</sup> In *Dornak v. Lafayette General Hospital*, the court reversed the lower court's decision that the plaintiff did not state a cause of action, by holding that the hospital, a third party requiring a pre-employment examination by a physician at the hospital, had the duty to inform the plaintiff that x-rays taken at her pre-employment physical examination showed that she had a tubercular condition.<sup>114</sup> The hospital knew that she had

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<sup>112</sup> Blake, *supra* note 111, at 594 (citing *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968)). The author proposes utilizing the multi-factor balancing test where a physician has a reasonable means of informing the examinee of the results of his examination. *Id.* at 611–13. However, Blake concedes that the traditional rule is still “logical” where the physician has no reasonable means of so informing the examinee. *Id.* at 611. Another potential test would take into account several factors, which include: (1) the risk involved, (2) the foreseeability and likelihood of injury compared to the social utility gained by the actor's conduct, (3) the extent of the burden of protecting against injury or harm, and (4) the consequences of placing the burden on the actor. *Denver v. Whitlock*, 744 P.2d 54, 57 (Colo. 1987). In *Whitlock*, the court reversed the judgment against the University of Denver, where a student became a quadriplegic after a fall from a trampoline. *Id.* at 55. The plaintiff, Oscar Whitlock, was a student and a member of the fraternity Beta Theta Pi when he injured himself while jumping on a trampoline outside of the fraternity during a party in which the trampoline received inadequate lighting. *Id.* at 55–56. The court held that the University did not owe the plaintiff the duty of care to take reasonable measures to protect him against the injury that he had sustained. *Id.* at 62. The fraternity members had no basis on which to establish a special relationship between the University and the members of that fraternity that would give rise to any duty to take affirmative steps to assure that the trampoline, or other similar equipment, would only be used under safe conditions. *Id.* at 62.

<sup>113</sup> See, e.g., *Dornak v. Lafayette Gen. Hosp.*, 399 So. 2d 168 (La. 1981).

<sup>114</sup> *Id.* at 169–72. While claiming that the defendants were negligent, the plaintiff alleged that had she known of her medical condition, she would have undergone treatment immediately. *Id.* at 169. However, since no one informed her of her problem, her condition worsened, and she needed to undergo at least three years of treatment. *Id.* Informing the plaintiff here would have been simple, as it would not have needed the professional skill of a physician, nor would it have imposed an undue burden on the hospital's administration. *Id.* at 170.

tuberculosis, yet failed to inform the examinee of her condition.<sup>115</sup> Therefore, the court determined the “narrow issue” that an employer owes a duty to a prospective employee who is subsequently hired by the employer to inform her that the mandatory pre-employment examination revealed that the prospective employee had a tubercular condition.<sup>116</sup>

In *Green v. Walker*,<sup>117</sup> the Fifth Circuit reversed and remanded on a claim of negligence<sup>118</sup> in favor of holding the examining physician liable where the doctor performed the examination<sup>119</sup> at the request of a third party, at least to the extent of the tests conducted at the examination.<sup>120</sup> Dr. Leslie Walker found Sidney Green’s results to be normal, declaring him to be “employable without restriction.”<sup>121</sup> One year later, the now deceased Sidney was diagnosed with lung cancer.<sup>122</sup> The court held that the sole issue on appeal was whether or not Dr. Walker had a duty to perform the examination with due care, consistent with the medical skills he said he had, and to report his findings.<sup>123</sup>

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<sup>115</sup> *Id.* at 169. A request to further examine Dornak was made. *Id.*

<sup>116</sup> *Id.* at 169–70. However, the court also stated that, typically, an employer does not owe a duty to a prospective employee to find out whether or not the prospect is physically capable to fulfill the requirements of the employment. *Id.* at 170.

<sup>117</sup> 910 F.2d 291 (5th Cir. 1990).

<sup>118</sup> *Id.* at 292. The plaintiff claimed that the failure to disclose the beginnings of cancer at the time of the examination decreased Sydney Green’s chances for survival and his life expectancy. *Id.*

<sup>119</sup> One court even held that the physician may be found liable in a similar instance, as it reversed summary judgment dismissing the case, despite the physician never having met the patient. *See Stanley v. McCarver*, 92 P.3d 849, 850–51, 855 (Ariz. 2004) (holding that a radiologist reading a pre-employment x-ray does not absolutely free the doctor from liability simply because it was not the traditional patient-physician relationship, but rather the radiologist must take reasonable steps appropriate in a given situation).

<sup>120</sup> *Green*, 910 F.2d at 292, 296; *see also Reed v. Bojarski*, 764 A.2d 433, 433 (N.J. 2001) (holding that a physician, conducting an exam on behalf of a third party, who determines that the examinee has a potentially serious medical condition, here Hodgkin’s disease, must inform the examinee of the potential problem, and can not delegate by contract to the referring party the responsibility to notify the examinee).

<sup>121</sup> *Green*, 910 F.2d at 292. This was the best possible rating for that report. *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 293. Looking to Louisiana jurisprudence for guidance, the court extended the traditional patient-physician relationship so that it would encompass this situation. *Id.* at 295. A physician in this situation must conduct the requested tests and diagnose the results at the level of care consistent with the physician’s training and expertise, and act reasonably in making the information available to the examinee in a timely fashion if

In *Ranier v. Frieman*,<sup>124</sup> the court reversed the summary judgment dismissing the case, where a physician hired by a third party failed to diagnose that a large brain tumor in the optic chiasm caused the plaintiff's vision problems.<sup>125</sup> The court held that as a matter of fairness and policy,<sup>126</sup> the examining physician had a duty to both the examinee and to the Department of Labor, Division of Disability Determinations, to make a professionally reasonable and complete diagnosis.<sup>127</sup>

In *Greenberg v. Perkins*, the Supreme Court of Colorado affirmed the decision of the court of appeals to reverse summary judgment, holding that the lack of a patient-physician relationship did not necessarily mean that the doctor owed no duty to the examinee;<sup>128</sup> rather, a physician conducting an independent medical examination owes a duty of care to an examinee not to

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there are any findings that pose an imminent danger to the examinee's physical or mental health. *Id.* at 296.

<sup>124</sup> 294 N.J. Super. 182 (N.J. Super. Ct. App. Div. 1996).

<sup>125</sup> *Id.* at 186. Plaintiff, Penice Ranier, was unable to continue working as a PC board driller for EAI Electronic Associates at the age of 48 due to his vision difficulties. *Id.* at 184. Therefore, while he was seeking social security disability benefits, the Department of Labor, Division of Disability Determinations, sent him to Dr. Lawrence Frieman, a board certified ophthalmologist, to examine this matter. *Id.* Dr. Frieman did not diagnose the tumor, though the plaintiff did reject his advice to see his own ophthalmologist as well. *Id.* at 186. After the tumor was diagnosed, and he received radiation, the plaintiff did receive the disability benefits. *Id.*

<sup>126</sup> *Id.* at 190. Additionally, there are other relevant issues for determining the existence of a duty. *Id.*

<sup>127</sup> *Id.* Here, the plaintiff fulfilled the prima facie requirements of reasonably and foreseeably relying on the examining physician's diagnosis. *Id.* The court found that the examinee clearly relied on the examining physician in regards to his entitlement to disability benefits. *Id.* The court found no countervailing consideration to imposing the requirement on examining physicians; they have a duty to the examinee to make a professionally competent diagnosis, thereby fulfilling the public policy concern. *Id.* A different court found no public policy benefit in permitting a physician to abstain from disclosing information to an examinee when the physician has specific individualized knowledge of a serious abnormality of the examinee. *Stanley v. McCarver*, 92 P.3d 849, 853 (Ariz. 2004). Rather than acting on what he did, the court found the physician in *Stanley* liable for what he did not do: the physician did not take affirmative action to make the examinee aware of the situation. *See Kaplan, Weaver & Young, supra* note 110. It has been noted that *Stanley* confirms that there are no "bright-line" rules for physicians to follow once the requirement that there be a "traditional" doctor-patient relationship has been eliminated. *Id.* at 18.

<sup>128</sup> 845 P.2d 530, 531 (Colo. 1993).

refer the examinee for testing that may foreseeably result in injury based on information to which the physician has notice.<sup>129</sup> Here, the plaintiff sustained injuries to her cervical spine when the bus on which she was a passenger hit a stop sign.<sup>130</sup> For litigation purposes, the defendants retained Dr. David Greenberg to examine her.<sup>131</sup> Dr. Greenberg believed she was not physically injured, but rather he felt that she consciously or unconsciously exaggerated symptoms of her alleged injury.<sup>132</sup> Therefore, Dr. Greenberg referred her for further testing, which allegedly caused her pain due to previous injuries of which Dr. Greenberg had notice.<sup>133</sup>

In looking at the issue a different way,<sup>134</sup> there is the question of whether sports teams can be held liable for the negligence of team physicians.<sup>135</sup> Businesses, for instance, may be held liable through respondeat superior for the doctors they hire.<sup>136</sup> In *Knox*, the plaintiff sustained an injury to his back while working.<sup>137</sup> A

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<sup>129</sup> *Id.* at 533. Many courts have found a duty of care if the examining physician either undertakes in some way to act on behalf of the examinee or induces the examinee to reasonably rely on his diagnosis. *Id.* at 535. In a somewhat similar case, the court held a surgeon, Dr. Albert Meena, but not his nurse, to be liable to Flora Wilburn for removing staples in her leg due to negligence, despite the absence of a patient-physician relationship. *Meena v. Wilburn*, 603 So. 2d 866, 867–68, 875 (Miss. 1992). Here, a third party did not hire the doctor, but rather the doctor removed the staples from a different doctor's patient. *Id.* at 868. This caused the plaintiff's health to falter, and she had to remain in the hospital for approximately 22 days. *Id.* at 868–69. The court rephrased the issue as whether the physician owed a duty of care “despite the absence of a doctor-patient relationship.” *Id.* at 870 (citing *Beamon v. Helton*, 573 So. 2d 776, 779 (Miss. 1990) (Sullivan, J., dissenting)). *Meena* essentially overrules *Beamon*, though Justice McRae points out in his concurrence that the court should have expressly overruled it. *Id.* at 870, 875.

<sup>130</sup> *Greenberg*, 845 P.2d at 531. The plaintiff, Carolyn Perkins, was injured while riding the shuttle bus at Stapleton International Airport when the bus hit the sign causing her to fall forward and another passenger to land on top of her. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 532.

<sup>133</sup> *Id.* He wanted this additional testing to either confirm or rule out his diagnosis. *Id.* Therefore, the plaintiff based her action against Dr. Greenberg on allegations that the physician was negligent when he referred her for further evaluation. *Id.*

<sup>134</sup> Instead of debating whether team physicians should be liable.

<sup>135</sup> See generally Scott Polsky, *Winning Medicine: Professional Sports Team Doctors' Conflicts of Interest*, 14 J. CONTEMP. HEALTH L. & POL'Y 503 (1998).

<sup>136</sup> See *Knox v. Ingalls Shipbuilding, Corp.*, 158 F.2d 973, 975–76 (5th Cir. 1947).

<sup>137</sup> *Id.* at 974. The defendant corporation employed the plaintiff as a mechanic in its shipbuilding factory and yards at Pascagoula, Mississippi. *Id.*



member of the defendant's medical staff told him that the injuries were not serious, and that he should continue his work, which the court characterized as of a "heavy character."<sup>138</sup> The plaintiff's back was actually broken.<sup>139</sup> The court applied respondeat superior,<sup>140</sup> pointing to the fact that the defendant forced the injured party to go see the defendant corporation's clinic and the doctors it employed.<sup>141</sup> This transferred the relationship between the doctors and the clinic into a type of agency, and since a principal is liable for the tort of his agent as a matter of public policy, there should not have been summary judgment dismissing this case.<sup>142</sup> A team physician is essentially the agent of the team,<sup>143</sup> so if the physician can be held liable, the team probably also can be found liable.

### C. Mike Webster's Lawsuit

Despite recent positive changes by the NFL, some former players are still suffering and the NFL is combating their pleas for help.<sup>144</sup> The NFL granted the deceased Mike Webster degenerative disability benefits for suffering total and permanent disability that began four years after he retired, but denied him the

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.* After feeling continuous pain, the plaintiff saw another one of the defendant's physicians. *Id.* This physician told him to keep working, but to abstain from lifting heavy loads. *Id.* The plaintiff then went to a hospital on his own, where he was properly diagnosed with a broken back and a rupture. *Id.* at 974-75. The plaintiff then filed suit for negligence. *Id.* at 975.

<sup>140</sup> *Id.* This might not hold in our situation because a team doctor, at least superficially, keeps autonomy in the medical treatment decision-making, and therefore might be considered an independent contractor, thereby being held responsible for his own negligence. Polsky, *supra* note 135, at 510 (discussing the conflicts of interest for team physicians and possible solutions to these conflicts).

<sup>141</sup> *Knox*, 158 F.2d at 975. Therefore, the court felt it reasonable to conclude that that the clinic served the corporation's own purposes, which made the physician in charge of its agent. *Id.* Since team physicians are on the sideline during games, players injured while playing must see them. *See Keim*, *supra* note 85, at 199.

<sup>142</sup> *Knox*, 158 F.2d at 975-76. It is a question of fact as to whether the physician here acted for anyone other than himself when potentially committing the tort of negligence. *Id.* at 976.

<sup>143</sup> *See Keim*, *supra* note 85, at 198.

<sup>144</sup> *See generally Webster v. NFL*, No. 05-2386, 2006 U.S. App. LEXIS 30594 (4th Cir. Dec. 13, 2006).

more lucrative benefits for those whose disabilities occur while they are on an active roster.<sup>145</sup> Webster's estate sued under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001,<sup>146</sup> claiming that the Board abused its discretion in setting the starting date for Webster's total disability as September 1995.<sup>147</sup> The Fourth Circuit affirmed the district court's holding for Webster's estate, even though it reviewed the Board's decision under the "deferential abuse of discretion standard."<sup>148</sup> Because the Board ignored the unanimous medical evidence (which included its own expert), ignored its own appointed investigator's conclusion, and based its determination on factors disallowed by the Bert Bell/Pete Rozelle NFL Retirement Plan, it lacked substantial evidence to justify its denial.<sup>149</sup>

Two of the four types of benefits for which the NFL's retirement plans provide for those who suffer total and permanent disability from football are relevant to the Webster case.<sup>150</sup> The greater benefit, "Active Football," is for those whose disabilities arise while the subject is an active player and cause him to be totally and permanently disabled shortly after the disability

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<sup>145</sup> *Id.* at \*1–2.

<sup>146</sup> Section 1001(b) states:

It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b)(2006).

<sup>147</sup> *Webster*, 2006 U.S. App. LEXIS at \*2–3.

<sup>148</sup> *Id.* at \*22–23. The Board needed to exercise its discretion with the support of substantial evidence. *Id.* at \*23.

<sup>149</sup> *Id.* at \*3–4. Furthermore, Webster's mental incapacity should have tolled the limitations period, as his mental incapacity interfered with his filing the claim. *Id.* at \*4, 40. This retirement plan is combined with the NFL Player Supplemental Disability Plan. *Id.* at \*2.

<sup>150</sup> *Id.* at \*8–9. An applicant will be held totally and permanently disabled if the Retirement Board finds that his disability has "substantially" prevented him from engaging in, or has made him "substantially" unable to engage in, any occupation for financial gain. *Id.* at \*9.

arises.<sup>151</sup> The lesser benefit, “Football Degenerative,” is for those whose disabilities arise out of League football activities but only result in total and permanent disability before the later of (1) the player turning 45, or (2) 12 years after the end of the player’s last season.<sup>152</sup>

Webster applied for Active Football benefits foremost, and Football Degenerative benefits as a backup.<sup>153</sup> Litigation ensued after the NFL awarded him the Degenerative benefits.<sup>154</sup> In its ruling, the court found that the NFL could protect itself from false claims by sending the former player to a physician of its choosing.<sup>155</sup> The NFL did so here, but even its own doctor found Webster to have been totally and permanently disabled by 1991.<sup>156</sup> To go against its own research and the advice of those on its payroll, as it did in the Webster situation, illustrates the length to which the NFL might go to keep a retired player in need from getting money. This authority and abuse must be curbed because while Webster was in a bad position, lesser known players would not have been granted the help that the Steelers organization gave their former star.<sup>157</sup>

Even after litigation, there may be instances where players do not receive the benefits that they seek.<sup>158</sup> Brent Boyd is one example.<sup>159</sup> As a rookie in a preseason game in 1980, Boyd

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

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

<sup>153</sup> *Id.* at \*12.

<sup>154</sup> *See id.* at \*1–2.

<sup>155</sup> *See id.* at \*32.

<sup>156</sup> *Id.*

<sup>157</sup> *See generally* Ed Bouchette, *Rooneys, NFL Especially Generous to Troubled Webster*, N.Y. TIMES, Sep. 29, 2002, at C16 [Bouchette, *Rooneys Generous*]. Not only did Dan Rooney, Steelers owner, lobby the NFL Retirement Board on behalf of Webster, he often gave Webster money. *Id.* Rooney even paid \$5,000 for Webster’s funeral, which cost \$6,861.50. Garber, *Ashes*, *supra* note 36. *See also* John Barr & Arty Berko, *Fighting for Benefits*, ESPN.com, Feb. 8, 2007, <http://sports.espn.go.com/nfl/columns/story?id=2760591> (Brent Boyd, a former NFL player, stated: “I’m just a guy nobody’s heard of. But most of the guys who played in the NFL are like me, guys you’ve never heard of, and we’re hurting bad. We need help.”).

<sup>158</sup> *See generally* *Boyd v. Bert Bell/Pete Rozelle NFL Players Retirement Plan*, 410 F.3d 1173 (9th Cir. 2005).

<sup>159</sup> *See generally id.*

sustained a concussion that would affect the rest of his life.<sup>160</sup> Soon after the hit, his coaches<sup>161</sup> told him to return to the game.<sup>162</sup> Despite having momentarily lost consciousness, he followed their orders.<sup>163</sup> Boyd, a former offensive lineman who had been considered very smart,<sup>164</sup> has not only been diagnosed as clinically depressed, but has even cut himself off from his friends and former teammates because he is ashamed of his current state.<sup>165</sup>

Unfortunately, doctors did not connect Boyd's health issues and depression to the concussions he suffered as a player until 1999.<sup>166</sup> Unfortunately too, the NFL "wouldn't do a damn thing" for him, at least according to Boyd.<sup>167</sup> When he sought full disability benefits, the first two doctors<sup>168</sup> the NFL sent him to agreed with Boyd's doctors.<sup>169</sup> Then the NFL made Boyd see another neurologist,<sup>170</sup> who found that Boyd's problems "could not be an organic consequence of the head injury."<sup>171</sup> Therefore, the Retirement Board rejected Boyd's claim for full disability benefits in April 2001.<sup>172</sup> The Ninth Circuit upheld the Board's decision

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<sup>160</sup> Barr & Berko, *supra* note 157. Boyd claims that he suffered what seemed to be daily hangovers that would not disappear. *Id.* He has been unable to keep a job after football. *Id.*

<sup>161</sup> He was a member of the Minnesota Vikings. *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* Boyd recounted, "This was 1980 and I don't even know if they used the word concussion. You were just trained to stay in the game . . . . You want the job? They better carry you off in a coffin." *Id.* In addition to losing consciousness, he claims to have been temporarily blind in his right eye. *Boyd*, 410 F.3d at 1175.

<sup>164</sup> See Barr & Berko, *supra* note 157. Boyd graduated from UCLA in 1980 with honors. *Id.* Furthermore, as a rookie he mastered every position on the offensive line. *Id.*

<sup>165</sup> *Id.* There have been times where he has lived out of his car. *Id.*

<sup>166</sup> *Id.* Boyd had originally told the committee that his first and most serious injury that he suffered while as a player in the NFL was to his knee. *Boyd*, 410 F.3d at 1174. Boyd actually wrote, "I know I have the mind and spirit to succeed in an occupation, but my body refuses to cooperate." *Id.*

<sup>167</sup> *Id.* However, the NFL did provide a one-time payment, and the National Football League Players' Association ("NFLPA") provided monthly disability benefits. *Id.*

<sup>168</sup> The first was Dr. J. Sterling Ford, a neurologist in San Diego, and the second was Dr. Branko Radisavljevic, a psychiatrist in Long Beach, California. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Dr. Barry Gordon, a behavioral neurologist at Johns Hopkins University. *Id.*

<sup>171</sup> *Id.* Boyd said that much of Dr. Gordon's examination was done by an ill-prepared graduate student. *Id.* But see *id.* at 1177 (stating that Dr. Gordon, himself, conducted a 100 minute examination of Boyd).

<sup>172</sup> Barr & Berko, *supra* note 157.

because the Board did not abuse its discretion in handling the claim in concluding that Boyd's disability did not stem from his NFL activities.<sup>173</sup>

### III. OPTIONS FOR REFORM

#### A. *Altering the Team Physician Model*

Most clubs receive free or discounted medical care (for which the club pays the remainder) for its players from team physicians.<sup>174</sup> This clearly can affect the team physician's treatment of the injured athlete.<sup>175</sup> Since the athlete should not bear the risk of medical negligence,<sup>176</sup> the question becomes who should be held responsible.<sup>177</sup> A professional athlete should be able to recover in tort for the lost or reduced economic value of his career, as well as recover for other damages to compensate for pain, suffering, and other such harm.<sup>178</sup> One existing approach

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<sup>173</sup> *Boyd*, 410 F.3d at 1179. To hold that the Board abused its discretion, the court needed to find that the whole record leads to a "definite and firm conviction that a mistake has been committed" by determining that Boyd's disability does not stem from his NFL career. *Id.* (citing *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)).

<sup>174</sup> See Mitten, *supra* note 105.

<sup>175</sup> *Id.* The physician's conflict of interest occurs when trying to protect the player's health while trying to help the team, which most likely would benefit by having the injured athlete compete. *Id.* at 212–13. Even when physicians believe the players are being treated well, there still can be disastrous results: Dr. David Fischer stated that as team physician for the Minnesota Vikings he did not witness any situations where athletes were being treated poorly and was not asked to act in what he felt would be a medically unacceptable manner. Keim, *supra* note 85, at 199–200 (citing Gene Wojciechowski & Chris Dufresne, *Delicate Procedures: NFL Team Physicians Must Provide Care to Injured Players and Please Management at Same Time*, L.A. TIMES, June 26, 1988, at 12). Years later, Corey Stringer died due to the heat at Vikings training camp. *Vikings Tackle Stringer Dies From Heatstroke*, ESPN.com, <http://espn.go.com/nfl/news/2001/0731/1233494.html>.

<sup>176</sup> See Mitten, *supra* note 105, at 216–17.

<sup>177</sup> See, e.g., *id.*

<sup>178</sup> *Id.* at 219. Players must promptly report their injury to the club physician or trainer. NFL COLLECTIVE BARGAINING AGREEMENT, art. VIII, at 11 (2006). Failing to do so subjects the player to a maximum fine of \$1,500. *Id.* Furthermore, a material failure to follow the rehabilitation program set out by the team physician or trainer subjects the player to a maximum fine of \$8,000. *Id.*

recommends that the team physician be designated as an independent contractor rather than a club employee.<sup>179</sup> This approach suggests that teams should not be held liable through respondeat superior in tort for the team physician's malpractice, since they may already be held liable through workers' compensation.<sup>180</sup> The player must choose to either receive workers' compensation benefits or to sue in tort.<sup>181</sup>

Several other analyses have already been put forth.<sup>182</sup> One other analysis offers four possible solutions: (1) courts should establish a clear standard of care,<sup>183</sup> (2) there should be specific

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<sup>179</sup> Mitten, *supra* note 105, at 219. This would permit the injured athlete to receive full recovery for harm caused by the team physician's negligence. *Id.* To establish liability, the player would have the burden of proving that the team physician's medical recommendations or treatment deviated from the standard of the reasonable, customary, or accepted sports medicine care, and that this deviation proximately caused the injury to be aggravated. *Id.* In the absence of informed consent, the athlete must prove that had he known of the allegedly undisclosed risk, he would not have participated in the action. Keim, *supra* note 85, at 199–200 (citing Sigmund Solares, *Preventing Medical Malpractice of Team Physicians in Professional Sports: A Call for the Players Unions to Hire the Team Physicians in Professional Sports*, 4 SPORTS LAW. J. 235, 245 (1997) (citing PROSSER AND KEETON ON THE LAW OF TORTS 68 at 485–86 (5th ed. 1984))).

<sup>180</sup> Mitten, *supra* note 105, at 220. However, the club should be held directly liable for its own negligence if it hires or retains an inadequate physician. *Id.* The franchise should also be held liable if it tries to interfere with the physician's medical treatment, thereby causing the injury to be aggravated. *Id.*

<sup>181</sup> *Id.* at 220–21. Another approach that emphasizes workers' compensation benefits, in a refined fashion, over medical malpractice suits includes an appendix of a proposed workers' compensation statute. John Redlingshafer, *Tonight's Matchup-Workers' Compensation v. Medical Malpractice: What Should Lower-Paid, Inexperienced Athletes Receive When a Team Doctor Allegedly Aids in Ending their Careers?*, 2 DEPAUL J. SPORTS L. CONTEMP. PROBS. 100, 134 (2004). This author attacks the issue from the viewpoint of an inexperienced, not highly paid, young professional athlete. *Id.* at 101. This author also raises and dismisses several of the more commonly proposed solutions. *See id.* at 124–29.

<sup>182</sup> Compare Keim, *supra* note 85, at 219–24, with Solares, *supra* note 179, at 253.

<sup>183</sup> Without a clear standard of care, courts have a difficult time figuring out sports-related negligence and malpractice claims. Caldaroni, *supra* note 13, at 133. One suggestion focuses on creating a clear standard of care applicable to team physicians, which may thereby eliminate pressures that team doctors face, while also recognizing the problems with the current laws for sports (and entertainment); this suggestion states that amending or reapplying these laws will result in attaching liability at the proper level. Nick DiCello, *No Pain, No Gain, No Compensation: Exploiting Professional Athletes Through Substandard Medical Care Administered by Team Physicians*, 49 CLEV. ST. L. REV. 507, 537–38 (2001). If the teams and team physicians face lawsuits, they will provide better medical treatment to professional athletes, thereby decreasing the amount

agreements between the franchise and the team physicians, (3) professional athletes should be more active in their medical care, and (4) state legislation should make mandatory the disclosure of physician interests in the team.<sup>184</sup> Another analysis offers seven potential solutions: (1) establish a clear standard of care, (2) make the team physician a league employee, (3) have players take a more active role in their health care,<sup>185</sup> (4) abolish the team physician position, (5) hold the team physician's role to be strictly professional, (6) have the players hire their own doctors, and (7) have professional franchises be subject to punitive damages.<sup>186</sup> A further approach raises five potential solutions: (1) increase awareness in concussions, (2) improve athletic equipment, (3) amend sports rules, (4) change the team physician treatment model, and, more broadly, (5) professional sports leagues should take other such steps to protect their players.<sup>187</sup> A different analysis takes a novel approach to this issue: have the players' unions, rather than management, hire the team physicians.<sup>188</sup> While all of these solutions are possibilities, none of them best resolve the issue when it comes to dealing with former players, whose current state of need results from sustaining concussions while in the NFL.<sup>189</sup>

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of exploitation. *Id.* at 538. Furthermore, eliminating the control that franchises have over the physicians is probably the most effective solution. *Id.* at 535.

<sup>184</sup> Keim, *supra* note 85, at 219–24.

<sup>185</sup> Caldarone, *supra* note 13, at 148–51. Professional clubs should take responsibility not only for the immediate effects of the injury, but also for the long-term health of retired players. *See id.* at 149. Players, for their part, must take responsibility for their own health and demand all of their medical information. *Id.*

<sup>186</sup> *Id.* at 148–51.

<sup>187</sup> Hecht, *supra* note 8, at 55–64.

<sup>188</sup> Solares, *supra* note 179, at 253. This would alleviate the influence that team physicians may feel from their organization to permit the players to play. *Id.* at 237. The author of this approach states that the players and their unions are in the best position to protect their interests. *Id.* at 253.

<sup>189</sup> Otherwise, why would so many different solutions have been put forth?

## B. Possible Solutions

### 1. Dealing with the Team Physician Model

Changing the current team physician model is not the best solution.<sup>190</sup> While giving the players more power over team physicians would help the players, clubs would likely start complaining. It is possible that the physicians would then over-protect players at the expense of the franchises; since players are the drawing power, teams cannot draw without their players playing.<sup>191</sup> Therefore, this would solve one problem by creating another. Thus, there is a need for a third party to play a primary role: insurance.<sup>192</sup> This whole issue of bringing in a third party arises despite the obvious—that whether or not the athlete is actually considered a patient, physicians should assist these athletes with their participation in sports, taking into account risks of bodily injury.<sup>193</sup>

The professional responsibility of the physician who serves in a medical capacity at an athletic contest or sporting event is to protect the health and safety of the contestants. The desire of spectators, promoters of the event, or even the injured athlete that he or she not be removed from the contest should not be controlling. The physician's judgment should be governed only by medical considerations.<sup>194</sup>

Therefore, whether or not the relationship is found, the team physician must make sure to keep the athletes' health the first and foremost priority.

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<sup>190</sup> It could, however, help to ameliorate this issue. See Hecht, *supra* note 8, at 61.

<sup>191</sup> See Caldarone, *supra* note 113, at 133.

<sup>192</sup> A common third party.

<sup>193</sup> AMA CODE OF ETHICS § E-3.06 SPORTS MEDICINE, available at <http://www.ama-assn.org/ama/pub/category/8334.html>.

<sup>194</sup> *Id.* Football is one of two sports specifically mentioned in the Washington State Medical Association Principles of Medical Ethics. PRINCIPLES OF MEDICAL ETHICS AND OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL OF THE WASHINGTON STATE MEDICAL ASSOCIATION § 3.06 SPORTS MEDICINE 17 (2005), available at [http://www.wsma.org/files/Downloads/AboutUs/pdf/Jud\\_council\\_opin.pdf](http://www.wsma.org/files/Downloads/AboutUs/pdf/Jud_council_opin.pdf).



Insurance companies<sup>195</sup> should pressure NFL teams to ensure that team physicians properly care for injured players. First, team physicians should give team management the actual results of testing, not what these physicians believe management would want.<sup>196</sup> Secondly, team physicians should correctly inform the injured player on his situation.<sup>197</sup> Then, if these steps fail in keeping players from wrecking their future through concussions, the NFL programs set up to help former players must provide them with sufficient funds so they can live without fear of poverty.

While *Dornak* concerned the narrow issue of a pre-employment physical examination,<sup>198</sup> in-season examinations for the NFL should permit players to hold the team liable for failure to properly inform the player of an injury. Furthermore, since team physicians hold themselves out as being sufficiently skillful for their position<sup>199</sup> and that they will conduct a professionally reasonable and complete diagnosis,<sup>200</sup> they also should be subject to liability to the players. Physicians can also be liable for giving in to teams testing out players by sending them back into play<sup>201</sup> as Jim Whalen did for Bill Belichick with Ted Johnson.<sup>202</sup>

Physicians hoping to stay on the safe side of malpractice litigation should follow the recommendation of the medical

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<sup>195</sup> Players receive group insurance benefits that consist of life insurance, medical and dental benefits. NFL COLLECTIVE BARGAINING AGREEMENT, art. XLIX (2006). However, this also would not cover the more needy players who retired around Webster's time. *See id.*

<sup>196</sup> In some situations, the physician should disclose information to an employer about an individual who is a member of that employer's workforce. *See* 45 C.F.R. § 164.512(b)(v) (2002).

<sup>197</sup> If the team makes a disclosure for insurance purposes, the team most likely needs to then inform the individual. *See id.* § 164.512(c)(2).

<sup>198</sup> *Dornak v. Lafayette General Hospital*, 399 So. 2d 168, 169–70 (La. 1981); *see also supra* note 116 and accompanying text.

<sup>199</sup> *Green v. Walker*, 910 F.2d at 291, 293 (5th Cir. 1990); *see also supra* note 123 and accompanying text.

<sup>200</sup> *Ranier v. Freeman*, 294 N.J. Super. 182, 183 (N.J. Super. Ct. App. Div. 1996); *see also supra* note 127 and accompanying text.

<sup>201</sup> *Greenberg v. Perkins*, 845 P.2d 530, 533 (Colo. 1993); *see also supra* note 129 and accompanying text. The further testing occurred when the doctor sent the examinee for more medical tests, rather than the team physician sending the player to get tested by participation in an athletic context. *Greenberg*, 845 P.2d at 533.

<sup>202</sup> *Schwarz, Dark Days, supra* note 5; *see also supra* note 11 and accompanying text.

profession's ethical guidelines, by communicating important information about an examinee's health directly to the person being examined.<sup>203</sup> The authors of the cited article state three reasons for this approach:<sup>204</sup> (1) since the examining physician may not have the subject's consent to report incidental medical findings to the employer, informing the subject directly helps keep the doctor from being held liable for the adverse consequences of reporting information to the employer outside the scope of that examination, (2) informing the examinee directly seems more consistent with the core principles of negligence law, and (3) the burden of acting will be trivial, as the doctor, at the least, did inform the examinee.<sup>205</sup>

The NFL's Collective Bargaining Agreement (CBA), which was amended in December 2006,<sup>206</sup> is an agreement controlling interactions between the NFL and the National Football League Players Association (NFLPA).<sup>207</sup> The CBA requires each club to have a board-certified orthopedic surgeon on staff.<sup>208</sup> However, the NFL does not force teams to keep a neurologist on the field, nor does it mandate teams to use neuropsychological tests on players who have been hit in the head.<sup>209</sup> Whereas the NFL

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<sup>203</sup> Kaplan, Weaver & Young, *supra* note 110, at 20.

<sup>204</sup> *Id.* However, they also admit that there are problems with this approach, such as the individual hearing the potential bad news reacting poorly because it came from a doctor who the patient may not have even met. *Id.* This approach is not "traditional," but physicians may have to adopt non-traditional methods as the traditional legal conception of the relationship becomes easier to circumvent. *Id.*

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

<sup>206</sup> COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION (2006), available at [http://www.nflpa.org/pdfs/Agents/CBA\\_Amended\\_2006.pdf](http://www.nflpa.org/pdfs/Agents/CBA_Amended_2006.pdf) [hereinafter NFL COLLECTIVE BARGAINING AGREEMENT].

<sup>207</sup> See NFL COLLECTIVE BARGAINING AGREEMENT, art. III, at 5.

<sup>208</sup> *Id.* art. XLIV, at 132. The franchise, rather than the players, must pay the physician's charge. *Id.*

<sup>209</sup> Keating, *Won't Bite*, *supra* note 48. According to Pellman, when teams use neuropsychological tests, and a player does well, "what's the contradiction in letting him play?" *Id.* Compare this approach with that propounded by the Second International Conference on Concussion in Sport, "When a player shows ANY symptoms or signs of a concussion . . . the player should not be allowed to return to play in the current game or practice . . . when in doubt, sit them out!" Keating, *Doctor Yes*, *supra* note 8.

currently permits its teams freedom to manage concussions,<sup>210</sup> it should actually require each club to have a neurologist on the sideline.<sup>211</sup> Just as the team physician is supposed to tell the player everything he says to the franchise about that player's health,<sup>212</sup> so should the proposed team neurologist. This would ensure that, at the very least, the NFL would be stepping up its efforts in trying to deal with the team physician issue. The NFL is also trying to responsibly face the issue of needy retired players. Combining these two issues could kill two birds with one stone.

## 2. Taking Care of its Own

Mike Webster's ex-wife, Pamela Webster, spoke convincingly of the issue of former NFL players in need when she said, "The NFL needs to take care of its own. Veterans don't have insurance and they're lost after the game. They need to step up to the plate and give these guys their just deserts [sic]."<sup>213</sup> Professional sports leagues should take steps sufficient to protect their current and former players.<sup>214</sup>

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<sup>210</sup> *Id.* The team physician, sometimes with help from trainers and specialists, decides when a player may return to action. *Id.*

<sup>211</sup> See Pells, *supra* note 79. Agent Leigh Steinberg proposed this idea, as well as the idea of having more effective use of baseline tests to establish a player's capabilities before he has a head injury to compare with results when testing for concussions. *Id.*

<sup>212</sup> NFL COLLECTIVE BARGAINING AGREEMENT, XLIV, at 132. Additionally, if continuing to play will "significantly" aggravate a player's injury, the physician must advise the player of this in writing before allowing that player to resume on-field activity. *Id.* See Kaplan, Weaver & Young, *supra* note 110 (arguing that the physician should, at the least, communicate important information about the examinee's health to the examinee, who in our situation is the injured player). Also, players can, and should, request their medical or personnel records. NFL COLLECTIVE BARGAINING AGREEMENT, art. XLV, at 133. However, players are not permitted to review their medical records in the middle of the season, when a player would most likely sustain a concussion. *See id.*

<sup>213</sup> Garber, *Ashes*, *supra* note 36. One of Pamela's and Mike's sons, Colin, stated, "They have this huge pension fund and they aren't helping these people. I think, when it's all over, justice will be done." *Id.* This came before the Fourth Circuit's ruling, which seems to have upheld the justice of which Colin spoke. Their other son, Garrett, spoke of the need for the NFL to "Create a retirement exit plan, give 10-year players health care." *Id.*

<sup>214</sup> See *supra* note 187 and accompanying text. This feeling is very similar to the fifth possible solution put out by that author. *Id.*

Workers' compensation is not the best solution to this issue.<sup>215</sup> In *Lyons v. Workers' Compensation Appeal Board*, the court upheld § 308.1 of the Workers' Compensation Act of June 2, 1915, which calculates the injured player's partial disability benefit based on the average weekly wage in the state, rather than that player's actual average weekly wage.<sup>216</sup> The court upheld this Act because professional athletes are neither a suspect class nor a sensitive classification, and § 308.1 does not implicate a fundamental or an important right.<sup>217</sup> Furthermore, the right at issue is solely economic, so the standard of rational basis applies.<sup>218</sup> Therefore, workers' compensation acts do not really go the distance necessary to protect these injured-on-the-job players.

The NFL pays out \$60 million per year in pensions and post-career disability benefits to former players, but the majority of this goes to players who retired after 1977.<sup>219</sup> A group of retired players has organized the Gridiron Greats Assistance Fund to raise money for former players in need.<sup>220</sup> It should not, however, be left up to former players to raise this money; the NFL should take matters into its own hand.

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<sup>215</sup> However, the NFL's CBA does state that players injured while playing for their NFL team may be entitled to money under state workers' compensation statutes. CBA: Workers' Compensation Benefits, NFLPA.org, [http://www.nflpa.org/CBA/Workers\\_Comp.aspx](http://www.nflpa.org/CBA/Workers_Comp.aspx) (last visited Jan. 31, 2008). The benefits basically come in three different forms: (1) disability pay or wage loss benefits, (2) lump sum benefits, or (3) medical expenses. *Id.* If a state does not make workers' compensation coverage mandatory, or where an NFL franchise is excluded from a state's workers' compensation coverage, the franchise must voluntarily obtain such coverage under the compensation laws of that state or find a different means to guarantee the equivalent to its players. NFL COLLECTIVE BARGAINING AGREEMENT, art. LIV, at 153.

<sup>216</sup> 803 A.2d 857, 859, 862 (Pa. 2002). The player, Mitchell Lyons, a former Pittsburgh Steeler, became partially disabled when his knee was dislocated during a game, thereby ending his professional career. *Id.* at 858.

<sup>217</sup> *Id.* at 860.

<sup>218</sup> *Id.* The rational basis test holds for the Workers' Compensation Act, because, among other reasons, players willfully hold themselves open to a greater risk of injury for lucrative payment. *Id.* at 862.

<sup>219</sup> See Hruby & Lovinger, *supra* note 1. For a multi-billion dollar industry, this \$60 million does not appear adequate, considering these players built up the league by sacrificing their bodies, and especially when also taking into consideration how drastically medical care has recently improved. *See id.*

<sup>220</sup> Brown, *supra* note 75. Four Hall of Famers play key roles in this group: Lem Barney, Joe DeLamielleure, Mike Ditka and Jerry Kramer. *Id.*

While many former players, like Mike Ditka and Jerry Kramer, have been trying to help out these suffering players by even selling their championship rings and other memorabilia, the NFL has not been as helpful to these former employees as one would hope.<sup>221</sup> While the NFL is not the only professional sports league to have former players in need, at least one other league, the National Basketball Association (NBA), has recently stepped up to the plate for its former players.<sup>222</sup>

The NFL could be more giving with money for its retired players.<sup>223</sup> Currently, a player with three years of NFL experience is entitled to five years of medical coverage<sup>224</sup> paid by the NFL.<sup>225</sup>

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<sup>221</sup> Hruby & Lovinger, *supra* note 1. The NFL Players Union President Troy Vincent even complained that elderly former players would not stop bothering him for money. *Id.* “On the opposite sideline, I’m getting up and getting back to the huddle, and I have a coach that’s a retired player, ‘Hey, Troy, when you going to increase the benefits?’” Brown, *supra* note 75. “At practice, you’re at the airport, everywhere. Every conversation with the retired player is strictly about economics. At some point you just go, I’ve had enough, I don’t want to talk about it anymore.” *Id.* As if that was not enough, Vincent continued, “We are really making every effort to bridge the gap. Let’s develop a relationship first. You’re a Hall of Famer, tell me what I can do to improve my game, not just belittle me about what we’re not doing as an association.” *Id.*

<sup>222</sup> See Chris Sheridan, *NBA Old-Timers Get Big Pension Boost*, ESPN.com, Feb. 17, 2007, <http://sports.espn.go.com/nba/news/story?id=2769817>. “This will be like hitting the lotto, and you can’t imagine how much this means to me. I’m penniless right now, but this means a whole new life.” *Id.* John Ezersky, a member of the Boston Celtics in the late 1940s and early 1950s, said this after hearing that he was a member of a small group of former NBA players to finally receive pensions. *Id.* Previously, he and his wife had to live on the \$1,200 a month they received from Social Security. *Id.* Surely, there must be many NFL players in such predicaments.

<sup>223</sup> But see Greg Garber, *The Fringe Benefits*, ESPN.com, Jan. 28, 2005, <http://sports.espn.go.com/nfl/news/story?id=1975332> [hereinafter Garber, *Fringe Benefits*]. Garber quotes Mickey Yaris-Davis, the NFLPA’s director of benefits, saying “If the claim is that his condition was football-related, it’s an issue of workers’ compensation . . . Our medical coverage is the best in major sports—it follows a player well after his career.” *Id.* In speaking about the injured athlete, the NFLPA’s director of benefits surely would be expected to put a positive spin on the situation. This sentiment is also shared by Gene Upshaw. Upshaw said, “When everyone walks up to you and says we’re not doing anything, I know the body of work. What you don’t hear is about the guys we help.” Brown, *supra* note 75.

<sup>224</sup> Garber, *supra* note 223. With another 18 months of COBRA medical coverage available to players, the NFL may insure a player up to 6.5 years after he retires from the league. *Id.*

<sup>225</sup> *Id.* To be credited with a full year, a player must play in at least three games that season. *Id.*

While this has been a positive change since Mike Webster retired after the 1990 season, when the NFL did not provide any post-NFL medical insurance,<sup>226</sup> it is not enough.

The NFL and the NFLPA have taken some positive steps towards helping retired players.<sup>227</sup> For instance, in 1984, the NFLPA established the Retired Players Association to provide some authority within the organization to retired players.<sup>228</sup> Many current players have lobbied the NFLPA to deal with the NFL to help out retired players.<sup>229</sup> However, the steps taken thus far have not gone far enough.

The NFL's CBA includes several measures to protect players.<sup>230</sup> For example, it calls for a Line of Duty Disability.<sup>231</sup> To be eligible for Line of Duty benefits, a player must suffer a substantial injury that is a significant factor in causing his

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<sup>226</sup> *See id.*

<sup>227</sup> *See generally* NFL Players Association-Retired Players Department—FAQs, NFLPA.org, <http://www.nflpa.org/Faqs/Faqs.aspx> (last visited Jan. 31, 2008) [hereinafter FAQ].

<sup>228</sup> *Id.* Another example is the NFL's Bert Bell/Pete Rozelle NFL Player Retirement Plan. NFL COLLECTIVE BARGAINING AGREEMENT, art. XLVII (2006). Additionally, the NFL and the NFLPA are seeking to establish a Career Planning Program to smooth the transition for players into their next career. *Id.* art. LV, at 157. Another example is the NFL Players Second Career Savings Plan, which calls for NFL clubs to contribute additional monies to the future of retired players. *Id.* art. XLVIII. The NFL Player Annuity Program is another similar plan. *See id.* art. XLVIII(A). The NFL has a Tuition Assistance Plan to inspire players to continue with their education, help players find employment after they retire from the NFL, and even simply just for their own betterment. *See id.* art. XLVIII(B).

<sup>229</sup> FAQ, *supra* note 227. Kyle Brady, a tight end in the NFL, for example, petitioned the NFLPA to "use its best efforts in bargaining with the NFL to increase the benefit credit amounts for retired players." *Id.*

<sup>230</sup> *See, e.g.,* NFL COLLECTIVE BARGAINING AGREEMENT, art. X, at 16.

<sup>231</sup> CBA: Line of Duty Disability, NFLPA.org, [http://nflpa.org/cba/Line\\_Duty\\_Disability.aspx](http://nflpa.org/cba/Line_Duty_Disability.aspx) (last visited Jan. 31, 2008). Another example is the Injury Grievance provision, which concerns claims that a player's contract was terminated by an NFL franchise because an injury occurring in the performance of his contract led him to be physically unable to further perform. NFL COLLECTIVE BARGAINING AGREEMENT, art. X, at 16. An additional example is the Injury Protection provision, which would permit a player to receive the greater of either 50% of his contract for the previous season or \$275,000. *Id.* Further protecting players is the provision that they be paid even while on the Physically Unable to Perform list. *Id.* art. XXXII, at 109.

retirement from football.<sup>232</sup> This provision calls for a minimum benefit of 100% of a player's monthly pension but not less than \$1,000 month, for 7.5 years.<sup>233</sup> Why should this only last 7.5 years when the player may need to deal with this injury for the remainder of his life?<sup>234</sup>

As has been said, many former NFL players need help with their healthcare. The CBA does try to deal with this issue.<sup>235</sup> The NFL Players Health Reimbursement Account is one such method.<sup>236</sup> Another such method, the 88 Plan, is important to those former players who are suffering like Webster suffered. The 88 Plan deals with retired football players dealing with dementia.<sup>237</sup> This Plan will reimburse eligible players up to \$88,000 a year to deal with certain costs related to dementia.<sup>238</sup> This certainly is a positive step forward for the NFL on a path that the NFL should continue.

## CONCLUSION

To ensure that players today<sup>239</sup> receive proper care when suffering a head injury while participating in NFL activity, the NFL should mandate that each team keep at least one certified neurologist on the field at all times;<sup>240</sup> it is time to move past the Elliot Pellman regime.<sup>241</sup> Team physicians and the teams should be held liable to the players.<sup>242</sup> Additionally, insurance should

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<sup>232</sup> CBA: Line of Duty Disability, *supra* note 231. This does not include a retired player found to be totally and permanently disabled. *Id.*

<sup>233</sup> *Id.* The application must be submitted within four years of the player leaving the NFL and the benefit is paid in addition to any workers' compensation the retired player may receive. *Id.*

<sup>234</sup> This question assumes that the remainder of the player's life will be more than 7.5 years.

<sup>235</sup> *See, e.g.*, NFL COLLECTIVE BARGAINING AGREEMENT, art. XLVIII(C).

<sup>236</sup> *Id.* This reimburses players for medical expenses. *Id.* However, this does not take under its authority those who retired during Mike Webster's era. *See id.*

<sup>237</sup> NFL COLLECTIVE BARGAINING AGREEMENT, art. XLVIII(D).

<sup>238</sup> *Id.*

<sup>239</sup> By today, the author is referring to current and future players.

<sup>240</sup> *See supra* note 211 and accompanying text.

<sup>241</sup> *See supra* note 70 and accompanying text.

<sup>242</sup> *See supra* note 200 and accompanying text.

play a role in getting the team physicians to give the injured players all the information necessary for them to make a knowledgeable decision on when, and possibly even if, to return to the playing field.<sup>243</sup> While this should minimize the lasting effects of future concussions on current players,<sup>244</sup> Roger Goodell<sup>245</sup> and the NFL must continue to step up the efforts in assisting retired NFL players whose post-NFL lives may have been damaged or even destroyed because of concussions suffered while in the NFL.<sup>246</sup>

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<sup>243</sup> See *supra* note 195 and accompanying text.

<sup>244</sup> See *supra* note 66 and accompanying text.

<sup>245</sup> See *supra* note 75 and accompanying text.

<sup>246</sup> See *supra* note 25 and accompanying text.