

Sports Litigation Alert

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The Gladiators Must Perform

By Bob Wallace

The other morning I tuned in to SportsCenter and noticed that there were four major stories about violence or violent acts occurring in football, hockey, basketball, and baseball. Each sport had a particular instance of behavior which could probably be classified as criminal, or at least senseless and unnecessarily violent.

In the NFL, the story focused on the New Orleans Saints “bounty-gate” scandal, combined with Commissioner Roger Goodell’s unbending attack on unnecessary violence, blows to the head, and hits to defenseless players. In the NHL, the story was about the increased intensity of the Stanley Cup Playoffs, the resulting violent cross-checks and, again, the increasing number of violent hits to player’s heads. In the NBA, the story featured the brutal elbow thrown by Los Angeles Laker World Metta Peace, aka Ron Artest, to the head of Oklahoma Thunder player James Harden, which resulted in Harden suffering a concussion. And finally, with the baseball season about a month into its marathon 162 game schedule, the discussion focused on brush-back pitches and bean-balls, the tradition whereby a pitcher “plays a little chin music” to a batter — or actually hits him — because the batter hit a homerun, “showed him up” in some perceived way, or simply acted like a hot shot rookie (e.g., Atlanta’s Bryce Harper).

Not surprisingly, the actions giving rise to these stories were not universally condemned. In some instances, those hard hits were argued to be justified and part of the fabric of the game. Goodell, since being named commissioner, has been unyielding on sanctioning player behavior involving “unnecessary” violence on the field. He has fined and/or suspended players for hits to the head and to defenseless players. His discipline of the New Orleans Saints General

Manager Mickey Loomis, Head Coach Sean Payton, Assistant Head Coach Joe Vitt, former Defensive Coordinator Greg Williams, and several Saints players, most notably linebacker Jonathan Vilma, was unprecedented and intended to send a message to organizations, executives, coaches and players that such behavior will not be tolerated.

The reaction of the fans, the media, and present and former players, has been very interesting. Not only were Goodell’s motives questioned, but the very group of people his crusade is meant to benefit criticized the rule changes as an improper attempt to change the inherent, albeit violent, nature of the game. Even some former players who played in an era with fewer rules to protect players are suing the NFL for additional benefits and concussion injuries, have said the new rules are making the game soft and unrecognizable. Meanwhile, the customers have demonstrated their fanatical attraction to football with record television ratings.

The recent uptick in NHL on-ice violence may be contributing to a similar trend in NHL ratings. As Jim Litke of the Associated Press wrote on April 18, 2012, NHL Commissioner Gary Bettman’s “vision for a bigger footprint for hockey is coming into focus” with “skyrocketing TV ratings” almost 50 percent higher than previous years.¹ Some commentators believe the NHL has turned a blind eye to the increased violence, that those “who set the agenda in the NHL don’t want things to change,”² and that NHL Vice President of Player Safety and Hockey Operations Brendan

1 Chicago Tribune Live, Comcast SportsNet Chicago, April 17, 2012, Dave Kaplan.

2 Vancouver Sun, April 19, 2012, Cam Cole, writer

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Shanahan is not doing enough to curtail the violence and change the culture. NHL television partner NBC appears to believe violent hits and on-ice fights help drive ratings. As NBC's Ed Olczk said on ESPN's Pardon the Interruption on April 17, 2012, "When you do have people watching that's a great thing...You want to see guys get hit and hit hard, you want to see the guys drop the gloves and fight."

There are, however, some strong dissenting views. As Winnipeg Sun writer Paul Friesen, recently wrote: "Whatever progress the NHL had made in protecting players from unnecessary cheap shots this season has been pulverized in the first weeks of the playoffs. TV ratings are through the roof you say? Of course they are. They'd be even higher for a public hanging. By allowing the violence to escalate, the NHL is fashioning its own noose, inserting the game's head and leading it onto the trap door, where inevitably the catch will someday fail and we'll have a real tragedy on our hands."

All of the sports leagues have reacted differently to game violence and the health risks associated with their sport, and all have been criticized. The NHL is criticized for moving too slowly and not doing enough to stop the unnecessary hits and fighting. The NFL is criticized for acting too aggressively and softening the game, arguably to shield itself from lawsuits and liability. Even baseball, a non-contact sport, receives mixed reviews for its handling of brush-back pitches and bean-balls by empowering on-the-field umpires to first warn and then remove pitchers and managers if they try to take things into their own hands. Some believe these measures have little deterrence value. In fact, when the Phillies' Cole Hamels intentionally hit Harper, critics pointed less to what he had done, and more to the fact that he wasn't afraid to publically admit it.

No matter the leagues' reactions, litigation is coming. Across the country, more than 1,500 former football players have brought suit against the NFL alleging the league and its teams didn't do enough to warn players of the potential dangers and long-term effects of concussions and head injuries. These allegations, coupled with the recent suicides of three NFL players, Dave Duerson, Ray Easterling, and Junior Seau, have turned the way we are playing, teaching and officiating games like football and hockey into contested topics.

Although recent studies are far from complete, reports are linking repeated concussions to chronic traumatic encephalopathy (CTE) which can cause depression. Because of its effects on the brain, CTE is argued to have caused the recent suicides. A number of the NFL lawsuits allege the league withheld information regarding the severity of concussions and their lingering effects they may have had on players. Given the violent nature of their sport, it's worth considering whether NHL players will be the next group of plaintiffs coming forward against their league.

As litigation looms over this on-field violence, professional sports leagues and teams should consider a plan of legal action. The concussion lawsuits are being compared to tobacco lawsuits, due to the individual plaintiffs' presumed knowledge of the risks associated with their actions in both types of cases. If you pick up a cigarette — or shoot for the big leagues — you're putting yourself at risk. Have we learned any lessons from the tobacco litigation, and how might those lessons apply to what we are seeing now in the realm of sports litigation?

I asked my partner, Michael Minton, Chair of Thompson Coburn's Complex Litigation practice group and lead counsel for Lorillard Tobacco Company in *United States v. Philip Morris, et. al.*, (D.D.C. 2004)³ how he thought the concussion lawsuits were likely to play out. He provided me with some interesting insight and instead of trying to paraphrase his response, I am going to give you his unedited answer.

Legal hurdles to litigation over sports-related CTE
Plaintiffs lawyers bringing suits on behalf of professional athletes will face a variety of major litigation challenges, some legal, some factual.

The legal hurdles will be many, including:

1. Challenges to having claims heard as personal injury lawsuits (instead of worker's compensation claims or grievances under an existing collective bargaining agreement);
2. Challenges to having claims (or at least parts of claims) heard as class actions or in some aggregated format. The individual facts of each case will be critical, thus making aggregate litigation inappropriate; and
3. *Daubert*-based challenges to scientific evidence, such as
 - (a) linking repeated concussions to CTE-and sequelae such as depression and suicidal ideations;
 - (b) attempting to "parse out" the causative role of concussions from the many other risk factors for neuropsychological and neurophysiological problems.

Regarding the *Daubert* challenges, it is worth pointing out a couple of issues. First the NFL Players Association itself asked the National Institute for Occupational Safety and Health (NIOSH) to investigate the rates and causes of death of former players, based on nearly 20 years of data. NIOSH estimated that the risk of death from all causes, and from "mental, psychoneurotic, and personality disorders"

³ *United States v. Phillip Morris USA*, 316 F. Supp 2d 13 (D.D.C. 2004)

was significantly lower for the NFL players cohort than for the general U.S. population.

Second, the neuropsychiatric and neurobehavioral manifestations of CTE are unclear, since CTE is essentially impossible to diagnose in living persons, and the specific characterizations of the pathoetiological factors (i.e. the amount and extent of head trauma required) are unknown.

Even if the plaintiffs survive these legal challenges there will be many factual issues. First and foremost is that the players choose to play what they know is a risky sport. Football and hockey are prototypical contact sports and players have been getting their “bell rung” from the day they began playing the sport. Very few amateur participants make it to the professional level, and those who do are well aware that they have chosen an occupation that is dangerous and poses risks to nearly all of their body parts, not just their brains. Hard hits are an inherent aspect of the sport, and the players get paid handsomely for their skill and willingness to play.

The next stage (assuming the *Daubert* hurdles are cleared) is that a plaintiff or group of plaintiffs must prove the alleged injury is caused by the defendants’ wrongful conduct. For a living plaintiff, proving CTE seems highly unlikely, since it is a pathological diagnosis made post-mortem. Consequently, there is no way to make a reasonably certain medical diagnosis of CTE in a living athlete or even reasonably to identify which of those post-concussive athletes are at greater risk for CTE.

A necessary part of this proof is that the particular injury was caused by the wrongful act that is being alleged, not simply that there are many collisions inherent in the sport. If one accepts the plaintiffs’ medical hypothesis, chronic traumatic encephalopathy does not arise from a single acute incident like a broken leg, but many, many occurrences over time. Yet, currently, medical science cannot tell us what “dose” of head trauma is sufficient to cause the disease. Is it 10 head injuries or 100? Are there levels of severity? How many years of exposure to head trauma are needed? Medical science just does not know the answers to these questions.

Even if we could guess at a sufficient “dose” of head trauma, no one is going to argue that all of those occurrences were the result of defendants’ “wrongful” conduct, and

many of these occurrences may not have happened at the professional level. Here’s a legitimate question: How many of the hits were at the pee-wee, high school or college level? If causation is based on a concealment theory (that the owners knew more than the players about the eventual long-term consequences of repeated head trauma), given the decidedly unsettled nature of the science regarding CTE, what is the key fact that the players will claim the owners concealed? And what would have caused a player to say, “Sorry, coach, I’m done. I won’t play”?

Proving causation also involves ruling out other possible causes of injury. Depression, suicidal ideation and suicides, memory loss, aggression, etc., are all things that affect the quality of life, but they happen to people in all walks of life, not just football players. So inevitably the question will be this: What other factors were present in a player that might have caused that outcome? Did he take drugs of abuse, anabolic steroids, or prescription pain killers? Was he a heavy drinker? Did he have other ailments to his knees, back, arms, etc., that caused him constant and aggravating pain?

Conclusion

In addition to the complicated issues and causation proof, these lawsuits are expensive and time-consuming, and this litigation will neither solve the problems facing ex-players nor make the games safer for current and future generations of players. Instead of celebrating the nasty hit or resisting changes that are meant to clean up the unnecessary violence, the games’ stewards and its participants need to come together — not in the courtroom, but in future action that will protect the competition and the competitors.

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