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## Concussions and Collegiate Sports: Can the NCAA Be Held Accountable?

Isabella M. Smith

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## **Concussions and Collegiate Sports: Can the NCAA be held accountable?**

### **I. INTRODUCTION**

Concussions are an epidemic in collegiate sports. Playing a sport, especially a contact sport, increases the probability of suffering a concussion.<sup>1</sup> Concussions are serious brain injuries that can alter the brains of young athletes and cause lifelong effects.<sup>2</sup> They are a significant public health concern and have not been taken seriously until recent years as evidence has shown that concussions and repetitive brain trauma can lead to the development of neurodegenerative disease as people age.<sup>3</sup>

#### *a. The NCAA and its Role in College Athletics*

The National Collegiate Athletic Association (“NCAA”) is a nonprofit organization that acts as the governing body in collegiate sports.<sup>4</sup> Founded in 1906, the NCAA was created with the sole goal of keeping college athletes safe.<sup>5</sup> At the beginning of the 20<sup>th</sup> century, football at the college level was much more dangerous than it is today. In 1904, there were 18 deaths and 159 serious injuries in that one season alone, and the public outcry following called for the sport to be abolished or reformed, which led to the ultimate creation of the NCAA.<sup>6</sup> At present, the NCAA is dedicated to the “well-being and lifelong success” of college athletes and accounts through its three-division structure for about 1,100 member institutions across the nation with over 500,000 college athletes.<sup>7</sup>

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<sup>1</sup> Ianof, Jéssica, et al., *Sport-Related Concussions*, 8 DEMENTIA & NEUROPSYCHOLOGIA 1, 14-19 (2014).

<sup>2</sup> *How long does concussion last: long-term effects*, UNIV. OF QUEENSL. AUSTL. QUEENSL. BRAIN INSTITUTE, <https://qbi.uq.edu.au/concussion/how-long-does-concussion-last-long-term-effects> (last visited May 3, 2023).

<sup>3</sup> *Head Injury 25 Years Later – Penn Study Finds Increased Risk of Dementia*, PENN MEDICINE NEWS, (Mar. 9, 2021), <https://www.pennmedicine.org/news/news-releases/2021/march/head-injury-25-years-later-penn-study-finds-increased-risk-of-dementia>.

<sup>4</sup> *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> (last visited April 17, 2023).

<sup>5</sup> *Mission and Priorities*, NCAA, <https://www.ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> (last visited April 17, 2023).

<sup>6</sup> *History*, NCAA, <https://www.ncaa.org/sports/2021/5/4/history.aspx> (last visited April 17, 2023).

<sup>7</sup> *Overview*, NCAA, <https://www.ncaa.org/sports/2021/2/16/overview.aspx> (last visited April 17, 2023).

Today, the NCAA operates as a nonprofit organization that generates over \$1 billion annually and in 2022 generated \$1.14 billion.<sup>8</sup> The NCAA governs three divisions of collegiate sports on broad overarching issues that affect collegiate athletics as a whole, but each division is authorized to set its own rules and operating guidelines for its day to day functions.<sup>9</sup> Divisions I, II, and III are comprised of various member schools that operate within the NCAA’s policies.<sup>10</sup> The NCAA is comprised of the NCAA Board of Governors, who represent interests from all three divisions, and various committees that set forth and legislate the policies that allow the NCAA and college athletics to function.<sup>11</sup> The NCAA does have a national office headquartered in Indianapolis, Indiana and maintains leadership under the executive team who are granted authority through the NCAA Board of Governors.<sup>12</sup> Despite being dedicated to the “well-being and lifelong success” of college athletes, it took until 2013 to expand the executive team and create the position of Chief Medical Officer. In 2013, Dr. Brian Hainline was named the first Chief Medical Officer of the NCAA and added to the executive team.<sup>13</sup> Dr. Hainline still holds this position today and has been compensated \$647,513 annually for this position.<sup>14</sup>

*b. The Changing Stigma Around Sports Induced Head Injuries*

Collegiate sports and head injuries have gone hand in hand throughout history, but the lasting effects of these injuries were not readily apparent. The history of boxing elucidates how the

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<sup>8</sup> Matt Johnson, *NCAA revenue topped \$1.1 billion in 2022*, SPORTSNAUT, (JAN 29, 2023), <HTTPS://SPORTSNAUT.COM/NCAA-REVENUE-2022/>.

<sup>9</sup> *How the NCAA Works*, NCAA, <https://www.ncaa.org/sports/2015/10/28/how-the-ncaa-works.aspx> (last visited May 10, 2023).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *National Office Leadership Team*, NCAA, <https://www.ncaa.org/sports/2016/1/15/national-office-leadership-team.aspx> (last visited May 10, 2023).

<sup>13</sup> *NCAA Names First Chief Medical Officer*, NCAA, Oct. 8, 2012, <https://www.ncaa.org/news/2012/10/8/ncaa-names-first-chief-medical-officer.aspx>.

<sup>14</sup> *NATIONAL COLLEGIATE ATHLETIC ASSOCIATION*, NON PROFIT LIGHT, <https://nonprofitlight.com/in/indianapolis/national-collegiate-athletic-association> (last visited May 10, 2023).

negative stigma has developed around repetitive sports related head injuries and their lasting effects.<sup>15</sup> Despite not knowing exactly what was happening, the incidence of neurodegenerative disease, such as Chronic Traumatic Encephalopathy (“CTE”), and repetitive head trauma from college sports is not new.<sup>16</sup>

Boxing was extremely popular, but despite its popularity was also very controversial because of what was happening to career boxers. Boxers after a career of hits used to be known as “punch drunk” which then created a negative stigma around brain injuries and their effects.<sup>17</sup> The indication of being “punch drunk” was after repeated blows over the course of years with significant mental disturbances, and the scientific community had seen this reported before as “dementia pugilistica or traumatic encephalopathy.”<sup>18</sup> The public denounced the sport and boxing fans in turn blamed the victims for their participation as being “punch drunk” was not something anyone wanted to be associated with.<sup>19</sup>

In 1960, the high-profile death of Charles Mohr is cited as the end of boxing in the collegiate space as the NCAA dropped the sport the next year, but death is not seen the contributing factor to the decision to stop the sport.<sup>20</sup> There were at least fifty four college athlete football deaths between 1931 and 1965 so death was not the deciding factor, but the stigma around what was happening to boxers and the undesirable idea of being “punch drunk.”<sup>21</sup>

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<sup>15</sup> Stephen T. Casper, *From ‘Punch Drunk’ to CTE: How the Sports World Learned to Ignore Brain Trauma*, GLOBAL SPORT MATTERS, (February 10, 2022), <https://globalsportmatters.com/health/2022/02/10/punch-drunk-cte-sports-world-ignore-brain-trauma/>; Stephen T. Casper has been retained in the United States and the United Kingdom by plaintiffs in concussion litigation.

<sup>16</sup> See CTE discussion *infra* Part II Section a.

<sup>17</sup> See *supra* note 15.

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

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

The recent conversations around sports and neurodegenerative disease began after Bennet Omalu published a report in 2005 that Chronic Traumatic Encephalopathy (“CTE”) had been found in a former National Football League (“NFL”) player.<sup>22</sup> Bennet Omalu was the individual who named this disease and in an interview noted this name was given as it was descriptive and easily made an acronym.<sup>23</sup> This report even inspired a movie to be created about Omalu’s discovery and educate the world on the dangers of repetitive hits from football.<sup>24</sup> Since then, the world has opened its eyes to the lasting effects of brain injuries and how collegiate sports play a factor in developing a neurodegenerative disease and led to some collectives forming such as the CTE Center at Boston University.<sup>25</sup>

Despite extensive research findings, the NCAA has seemingly avoided liability for concussions and their effects in collegiate sports. The next section, Part II, will next address the incidence of concussions in collegiate sports and the potential lasting effects and consequences of concussions and repetitive head injury. This section will investigate the various studies conducted by the NCAA and others to see just how prevalent brain injuries are in the collegiate athletic world. Part III will then discuss the state of liability with the NCAA and explore how the NCAA can be held accountable or avoid accountability by exploring recent cases and settlement agreements. That section details pertinent litigation in this space and will analyze which claims may have a

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<sup>22</sup> Omalu, Bennet I et al., *Chronic Traumatic Encephalopathy in a National Football League Player* 57 NEUROSURGERY 128, 128-34 (2005).

<sup>23</sup> “‘Chronic’ means long-term, ‘traumatic’ means it’s associated with trauma, ‘encephalopathy’ means a bad brain.” *CTE: Discovery of a New Disease*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/oral-history/league-of-denial/cte-discovery-of-a-new-disease/> (last visited May 10, 2023).

<sup>24</sup> CONCUSSION (Columbia Pictures 2015).

<sup>25</sup> The CTE Center at Boston University (“BU”) conducts innovative, high-impact research on CTE and other long-term consequences of repetitive brain trauma of athletes, first responders, and military personnel. They work in collaboration with the VA Boston Healthcare System and the Concussion Legacy Foundation. *About the Center*, BU RESEARCH CTE CENTER, <https://www.bu.edu/cte/about/> (Last visited May 11, 2023); See discussion on collaboration with BU CTE Center *infra* Part IV.

likelihood of success. The final part will investigate remediation efforts in the industry and what there is to do going forward.

## II. INCIDENCE OF CONCUSSIONS IN COLLEGIATE SPORTS

### *a. Concussions and Potential Lasting Effects*

A concussion by definition is an injury to the brain causing the temporary loss of normal brain function that can be caused by direct trauma to the head or by a rapid acceleration-deceleration of the head.<sup>26</sup> A person does not need to lose consciousness for a concussion to occur and many report that they cannot remember what happened right before or after the injury.<sup>27</sup> Concussions affect memory, judgment, reflexes, balance, muscle coordination, and speech, with common symptoms including: confusion, headache, dizziness, memory loss, blurry or double vision, ringing ears, nausea/vomiting, difficulty concentrating, sensitivity to light, trouble falling asleep, and loss of taste or smell.<sup>28</sup> Diagnosis of a concussion stems from describing of symptoms following an accident, not through diagnostic scans because MRI and CT scans will only show evidence of structural defects in the brain, and a concussion may present normally through these neuroimaging tests as a concussive injury is metabolic and microscopic in nature.<sup>29</sup> Some individuals experience prolonged symptoms such as memory and concentration problems, mood swings, headaches, fatigue, personality changes, dizziness, excessive drowsiness, and insomnia; when this occurs it is known as post-concussive syndrome.<sup>30</sup>

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<sup>26</sup> *Concussion*, AMERICAN ASSOCIATION OF NEUROLOGICAL SURGEONS, <https://www.aans.org/en/Patients/Neurosurgical-Conditions-and-Treatments/Concussion#:~:text=A%20concussion%20can%20affect%20memory,before%20or%20after%20the%20i njury> (last visited April 17, 2023).

<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.*

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

A large part of the concussion liability dialogue is what is known as a subconcussive impact. A subconcussive impact is a hit to the brain that is below the concussion threshold in which the brain is shaken, but the damage is not enough for symptoms to present.<sup>31</sup> It is essentially an impact to the brain that does not cause immediate outward symptoms.<sup>32</sup> This could happen through falls, car crashes, assaults, being hit on the head by a falling object, and participation in contact sports.<sup>33</sup> The brain is still affected, but the lasting effects are not as readily apparent. Research has found that subconcussive hits hurt memory and attention, damage connections in our brain, suppress brain function, and may contribute later in life to mood and behavior problems.<sup>34</sup> Research has now found that repeated subconcussive hits can damage brain cells and lead to negative effects on cognition.<sup>35</sup>

Additionally, after suffering a concussion playing a sport, there is the risk of second impact syndrome (“SIS”). Second impact syndrome occurs after an initial concussion when a second concussion is sustained before being able to fully heal from the first; this second concussion could happen hours, days, and even weeks later.<sup>36</sup> SIS is the acute and frequently fatal brain swelling that may be impossible to control as the impact causes vascular congestion and increased intracranial pressure.<sup>37</sup> The risk of SIS is higher in contact sports and areas where a second or even initial hit is not apparent.

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<sup>31</sup> *Resource Center: Subconcussive Impacts*, CONCUSSION LEGACY FOUNDATION, <https://concussionfoundation.org/cte-resources/subconcussive-impacts> (last visited April 17, 2023).

<sup>32</sup> Mathieu Rees (Medically Reviewed by Hedi Moawad, M.D.), *What is Subconcussion and is it Dangerous?*, MEDICAL NEWS TODAY, (Dec 6, 2022), <https://www.medicalnewstoday.com/articles/subconcussive-head-impacts>.

<sup>33</sup> *Id.*

<sup>34</sup> *Resource Center: Subconcussive Impacts supra* note 30.

<sup>35</sup> *Mathieu Rees supra* note 31 (citing Michail Ntikas et al., *Repeated Sub-Concussive Impacts and the Negative Effects of Contact Sports on Cognition and Brain Integrity*, 19 INT’L J. OF ENV’T RSCH AND PUB. HEALTH 7098 (2022)).

<sup>36</sup> *Concussion supra* note 9.

<sup>37</sup> *Id.*



Following repeated head trauma, neurodegenerative diseases are a concern. The biggest one in this field, that research has been rapidly increasing, is for CTE. CTE is brain degeneration likely caused by repeated head trauma.<sup>38</sup> This condition is not yet well understood and is thought to have a complex relationship with post-concussive syndrome and SIS.<sup>39</sup> CTE develops later in life and diagnosis is only made during an autopsy, except for rare cases of individuals with high-risk exposure. Symptoms of CTE include difficulty thinking, memory loss, problems with executive function, behavioral and mood changes such as impulse behavior, aggression, depression, emotional instability, substance misuse, suicidal thoughts or behavior, and motor changes like Parkinsonism<sup>40</sup> and motor neuron disease<sup>41</sup>.<sup>42</sup> Experts now believe that CTE may show up in two forms, one in earlier life in an individual's 20s or 30s and the other that causes symptoms later in life, around age 60.<sup>43</sup> Currently there is no cure for CTE, and research is being conducted to understand more about the causes and frequency of the disease.<sup>44</sup>

*b. Concussion Studies and Their Findings*

In 2014, the NCAA and the U.S. Department of Defense (“DoD”) launched as a part of the broader NCAA-DoD Grand Alliance, the Concussion Assessment, Research and Education

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<sup>38</sup> *Chronic traumatic encephalopathy*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/chronic-traumatic-encephalopathy/symptoms-causes/syc-20370921> (last visited April 17, 2023).

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

<sup>40</sup> This is an umbrella term that refers to several brain conditions, including Parkinson's disease, that cause slowed movements, tremors, and rigidity or stiffness. *Parkinsonism*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/22815-parkinsonism#symptoms-and-causes> (last visited May 10, 2023).

<sup>41</sup> Motor Neuron Disease (“MND”) is a type of disease that affects the brain and nerves, and the most common form of MND is amyotrophic lateral sclerosis also known as ALS. These progressive diseases destroy motor neurons which are the cells responsible for skeletal muscle activity like walking, talking, breathing, and swallowing. *Motor Neuron Diseases*, NAT'L INST. OF NEUROLOGICAL DISORDERS AND STROKE, <https://www.ninds.nih.gov/health-information/disorders/motor-neuron-diseases> (last visited May 10, 2023).

<sup>42</sup> *Id.*

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

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

(“CARE”) Consortium.<sup>45</sup> The CARE<sup>46</sup> Consortium is comprised of two major parts, a clinical study core and an advanced research core.<sup>47</sup> The clinical study part aims to define the “natural history” of a concussion which is the way symptoms and physical signs present and change over time, and the research core aims to see how the brain itself is affected through neurobiology of concussion and repetitive head impact exposure.<sup>48</sup> The first phase of CARE in the initial six months, focused on the natural history and neurobiology of head impact exposure and acute concussions; the second phase, CARE 2.0, focused on the intermediate effects like changes in brain health over an athletes time in college and persistent effects soon after graduation; and the third phase will look to the long term effects of head impact exposure/concussions and the nature and causes thereof.<sup>49</sup>

The CARE Consortium, with over 50,000 student-athletes and service academy cadets enrolled and over 5,000 concussed participants examined, was given \$57 million out of the \$105 million allocated to the greater NCAA-DoD Grand Alliance.<sup>50</sup> The NCAA, in analyzing data from 2009 to 2019, found that on average there were 11,500 concussions reports per year and of those reports approximately 3,750 were among football players.<sup>51</sup> The hardest hits occurred in wrestling with 7.8 concussions per 10,000 athlete exposures followed by 7.6 in Men’s Ice Hockey, 7.2 in Women’s Ice Hockey, 6.9 Women’s Soccer, and 6.8 in Football, respectively.<sup>52</sup>

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<sup>45</sup> *NCAA-DOD Care Consortium*, NCAA, <https://www.ncaa.org/sports/2018/3/7/ncaa-dod-care-consortium.aspx> (last visited April 17, 2023).

<sup>46</sup> This concussion and repetitive head impact study is the largest ever conducted with the most participants. *Id.*

<sup>47</sup> *Id.*

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

<sup>49</sup> *Id.*

<sup>50</sup> *NCAA-DoD Grand Alliance*, NCAA, [https://ncaaorg.s3.amazonaws.com/ssi/concussion/SSI\\_NCAADoDInfographic.pdf](https://ncaaorg.s3.amazonaws.com/ssi/concussion/SSI_NCAADoDInfographic.pdf) (last visited April 17, 2023).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

The NCAA chose to highlight five findings from the first five years of the study.<sup>53</sup> They highlighted that, “Those who played football before age 12 do not demonstrate any neurocognitive deficits in college,” but once the link is clicked with further information from this study that statement becomes misleading.<sup>54</sup> The NCAA reports that in examining early life exposure to contact in football, they found that the age at which athletes were exposed to contact did not have an effect on their neurocognitive performance in college compared to other college athletes who were in noncontact sports, and that those who did play football before age twelve did not show neurocognitive defects in college.<sup>55</sup> This is different than the NFL study that suggested that playing football before age twelve was associated with abnormal changes in neuroimaging, symptoms of depression and apathy, and poor cognitive function later in life.<sup>56</sup> The NCAA says that this demonstrates that playing football before age twelve suggests negative consequences later in life but no cognitive problems in college.<sup>57</sup>

The NCAA also found that the exposure to impacts have a higher association with a concussion rather than just the force of an impact, suggesting that a high number of low force hits can amount to a priming effect for a concussion.<sup>58</sup> For athletes who have suffered more than one concussion, anxiety and depression are more prevalent and this is more so seen in athletes with at least four concussions.<sup>59</sup> The study also found the days between suffering a concussion and returning to play has increased over the past 15 years from 6.7 days to 16.1 days. Following a

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<sup>53</sup> *NCAA chief medical officer reflects on progress of concussion research*, NCAA, <https://www.ncaa.org/sports/2019/7/11/ncaa-chief-medical-officer-reflects-on-progress-of-concussion-research.aspx> (last visited April 17, 2023).

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

<sup>55</sup> *CARE Consortium: Estimated age at first exposure to football and neurocognitive performance*, NCAA, <https://www.ncaa.org/sports/2019/4/24/care-consortium-estimated-age-at-first-exposure-to-football-and-neurocognitive-performance.aspx> (last visited April 17, 2023).

<sup>56</sup> *Id.*

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

<sup>58</sup> *NCAA chief medical officer reflects on progress of concussion research supra* note 52.

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

concussion there is a vital 10-day acute recovery period where experts note that the brain is particularly vulnerable to effects of repetitive trauma.<sup>60</sup>

It is also noted in an older NCAA concussion study that 91.7% of all repeat concussions happened within ten days of the first and that now of the 701 concussed CARE athletes there was only one repeat concussion.<sup>61</sup> Additionally, they found that individuals who suffered a concussion during childhood were more than double the risk to suffer another concussion later in life compared to those who suffered one in adolescence.<sup>62</sup> This study found out that 10% who had a concussion in childhood suffered three or more by age eighteen.<sup>63</sup> This also indicates that a prior concussion is its own independent risk factor in a subsequent concussion.<sup>64</sup>

A separate study over a five-year period investigated the number of concussions across all twenty three men and women's NCAA varsity sports using the exposure data from the NCAA Injury Surveillance Program.<sup>65</sup> It also looked at how the concussions were happening whether it was through player contact, contact with the playing surface, or contact with a piece of equipment.<sup>66</sup> The results of the study found that the rate of concussions in competition was higher than it was in practice; the highest concussion rate was in men's ice hockey and women's soccer; concussion rates increased in women's soccer and volleyball throughout the study; and most men's concussions resulted from player contact whereas women's resulted from equipment/apparatus

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<sup>60</sup> CARE Consortium: *Return to play and risk of repeat concussion in football*, NCAA, <https://www.ncaa.org/sports/2019/5/15/care-consortium-return-to-play-and-risk-of-repeat-concussion-in-football.aspx> (last visited April 17, 2023).

<sup>61</sup> *Id.*

<sup>62</sup> NCAA chief medical officer reflects on progress of concussion research *supra* note 33.

<sup>63</sup> CARE Consortium: *Influence of age at first concussion*, NCAA, <https://www.ncaa.org/sports/2018/5/29/care-consortium-influence-of-age-at-first-concussion.aspx> (last visited April 17, 2023).

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

<sup>65</sup> Chandran, Avinash, et al., *Epidemiology of Concussions in National Collegiate Athletic Association (NCAA) Sports: 2014/15-2018/19*, 50 THE AMERICAN JOURNAL OF SPORTS MEDICINE 2 (2021).

<sup>66</sup> Andrew Moser, *Study looks at the number of concussions in NCAA sports over five-year period*, CONCUSSION CENTER UNIV. OF MICH., (Feb. 14, 2022) <https://concussion.umich.edu/news/archive/study-looks-at-the-number-of-concussions-in-ncaa-sports-over-five-year-period/>.

contact.<sup>67</sup> This study found that women’s basketball, soccer, and softball had higher incidences of concussions compared to their male counterparts, and that men and women’s ice hockey had similar instances of concussions even though women’s ice hockey does not permit body checking.<sup>68</sup> One of the authors of the study, Andrew Boltz, noted that, “We looked through the literature to provide further support for our observations and we found there are some sex differences related to head-and-neck muscle mass. We also think anticipatory collision versus unexpected collisions may play a factor.”<sup>69</sup>

### III. THE STATE OF LIABILITY FOR THE NCAA

Much of the current litigation surrounding the NCAA and brain injuries has not yet made it past the pleading stage or to the crux of liability. Much of the concussion litigation comes down to does the NCAA have a duty of care to protect college athletes from concussion related risks and was that duty breached. This section explores the consolidated settlement litigation of the NCAA, a separate class action against the NCAA, and the success of individual claims against the NCAA.

#### a. *In re NCAA*

Many former college athletes brought punitive class actions against the NCAA for negligence, breach of contract, fraudulent concealment, unjust enrichment, and medical monitoring, and all these actions were consolidated by the Multidistrict Litigation Panel with the final and most recent ruling in 2019.<sup>70</sup> This ruling sought a final approval of the Second Amended Class Action which was granted.<sup>71</sup> The instigating plaintiff was Adrian Arrington, a former football player for East Illinois University, who brought the punitive class action against the NCAA for the above claims

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<sup>67</sup> Chandran *supra* note 40.

<sup>68</sup> Andrew Moser *supra* note 41.

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

<sup>70</sup> *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig.*, 332 F.R.D. 202 (N.D. Ill. 2019).

<sup>71</sup> *Id.* at 207.

and thereafter settlement discussions started.<sup>72</sup> At this time, numerous others brought similar punitive class actions against the NCAA which led to the consolidation of actions for pretrial proceedings and the appointment of an Executive Committee, Co-Lead Counsel, Special Class Counsel for Medical Monitoring Relief, Liaison Counsel for Plaintiffs, and Lead and Liaison Counsel for the NCAA.<sup>73</sup>

There were extensive arm's length negotiations that lead to a settlement agreement in 2014, but one of the named Plaintiffs, Anthony Nichols, who played football for San Diego State University opposed the settlement.<sup>74</sup> The initial settlement was not approved and Plaintiffs negotiated with the NCAA to expanded the class to include student athletes that played non-contact sports at NCAA schools.<sup>75</sup> After the initial settlement was not approved, Nicols was appointed as Lead Objector and the Court allowed him to file objections to the amended settlement agreement.<sup>76</sup> His main objection to the settlement agreement was that it required members to release their right to pursue, on a class wide basis, any personal injury claim as well that it did not provide monetary compensation for injuries.<sup>77</sup> Following these objections the Court preliminarily certified the settlement class with several conditions: the Court required that class members be provided with direct notice and the option to opt out of the settlement, the release of personal injury claims was limited to those where a class was composed of college athletes from more than one NCAA-affiliated school or sanctioned sport, as well as the way settlement monies were to be spent.<sup>78</sup>

The settlement named specific class representatives from the Contact Sport Settlement Subclass and the Non-Contact Sport Subclass; each representative has played an NCAA sport at

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<sup>72</sup> *Id.* at 208.

<sup>73</sup> *Id.*

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 209.

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

the time the NCAA concussion management and return-to-play guidelines were alleged to not meet best practice standards, and each representative is considered at risk for developing symptoms in the future from concussion and/or subconcussive hits.<sup>79</sup> As part of the settlement, the NCAA will pay \$70 million into a fund for the Medical Monitoring Program, lasting for fifty years, which will cover Medical Evaluations, Notice and Administrative Costs, Screening Questionnaire Costs, Class Representative's Service Awards, and approved Attorney's Fees and Costs.<sup>80</sup> During this fifty year span, the statute of limitations will be tolled to allow the Settlement Class Members to pursue individual and class action claims if the funding runs out before the fifty year period ends.<sup>81</sup> Additionally the terms of the settlement provide that in the first ten years the NCAA must commit \$5 million for concussion related research.<sup>82</sup>

The Medical Monitoring Program requires an initial screening assessment phase where the class member fills out a Screening Questionnaire with their symptoms every five years until they turn fifty, and thereafter no more than every two years to see if they qualify for a Medical Evaluation.<sup>83</sup> The Medical Committee, comprised of Dr. Brian Hainline, Dr. Robert Cantu, Dr. Ruben Echemendia, and Dr. Robert Stern – all experts in the field of sports related concussions and mid- to late-life neurodegenerative disease, determines if the individual qualifies for a Medical Evaluation that is then performed at one of thirty-three sites across the country.<sup>84</sup> The responsibilities of the Committee include: overseeing the performance of the Program Locations, recommending how research funds be spent, reviewing and amending annually the Screening Questionnaire and the Medical Evaluations to reflect the most current standard of care.<sup>85</sup> The

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<sup>79</sup> *Id.* at 210-11.

<sup>80</sup> *Id.* at 211.

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

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 212.

evaluation is designed to assess post-concussion syndrome symptoms as well as cognitive, motor, mood, and behavioral symptoms linked to diseases such as CTE.<sup>86</sup> Members of the class may qualify for two Medical Evaluations and can request a third through the Committee.<sup>87</sup> Following the Medical Evaluation, within sixty days a diagnosis is provided to the class member's personal physician and these examinations are not subject to health insurance constraints to receive benefits.<sup>88</sup> To keep class members aware during the fifty year period of the Program, every ten years a public relations publication campaign will run and notice will be sent to members.<sup>89</sup>

The NCAA has also agreed to changing its policies to better reflect best practices in concussion management and "return to play" policies.<sup>90</sup> Following the settlement, five new NCAA policies were enacted and each member institution must certify in writing that it has implemented a compliant concussion management plan consistent with these new policies within six months of the settlement to enforce the release of claims.<sup>91</sup> The policy changes include: (1) a requirement that all student athletes undergo baseline testing before the first practice or competition during pre-season, (2) amended "return to play" guidelines that provide that any student athlete that has been diagnosed with a concussion cannot return to play on the same day the concussion was sustained and must be cleared by a physician before being permitted to participate, (3) for all Contact Sports at Division I, II, and III schools, medical personnel trained in the diagnosis, treatment, and management of concussions will be present at all games and available during practices, (4) before each season, member institutions will provide NCAA approved education and training to all coaches, athletic trainers, and student athletes, and (5) member institutions will annually provide

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<sup>86</sup> *Id.* at 212.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 212-13.



educational materials to all academic faculty about academic accommodations for the student athletes who suffered concussions.<sup>92</sup> To ensure compliance, the NCAA will create a standardized process to track the incidence of concussions and their resolutions, and additionally will also create a third party reporting mechanism to report management concerns directly to the NCAA.<sup>93</sup>

To take part in the settlement, class members must agree to release certain claims. They must release any and all claims:

[S]eeking damages for medical monitoring, or other legal or equitable relief for medical monitoring, related to concussions or sub-concussive hits or contact ... with respect to any conduct, acts, omissions, facts, matters, transactions or oral or written statements or occurrences on or prior to the Preliminary Approval Date arising from or relating to concussions or sub-concussive hits or contact sustained during participation in NCAA-sanctioned sports as an NCAA student-athlete, ... claims brought or pursued on a class-wide basis (other than claims pursued on behalf of a class of persons who allege personal injuries or bodily injuries resulting from their participation in a single NCAA-sanctioned sport at a single-NCAA member school, and relating to concussions or sub-concussive hits or contact), including but not limited to tort claims, claims for breach of contract, breach of statutory duties, actual or constructive fraud, negligence, conspiracy, misrepresentation, fraudulent inducement, fraudulent concealment, breach of fiduciary duty, compensatory and punitive damages, injunctive or declaratory relief.<sup>94</sup>

These releases were designed to benefit the NCAA and its affiliates and the statute of limitations for personal injury claims is tolled from the initial filing of the *Arrington* case (September 12, 2011) to the date of final settlement approval.<sup>95</sup> Class members retain some rights and are entitled to bring claims for individual personal or bodily injuries, “personal or bodily injury class claims brought on behalf of a class of persons who allege injury resulting from their participation in a single NCAA-sanctioned sport at a single-NCAA member school,” and “class claims that do not relate in any way to medical monitoring or medical treatment of concussions or sub-concussive hits or contact.”<sup>96</sup>

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<sup>92</sup> *Id.* at 212.

<sup>93</sup> *Id.* at 213.

<sup>94</sup> *Id.*

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

<sup>96</sup> *Id.*

The Court notes there were four million class members that received either direct or indirect notice and only twenty-two members filed objections, three of which lacked standing to object, leaving 16 viable filed objections.<sup>97</sup> Sixteen objectors argue the settlement provides insufficient relief, eleven complain because the settlement does not monetarily compensate for injuries and medical costs, and others call for injunctive relief such as helmets for female lacrosse players and scholarships that are not conditional based on injury status.<sup>98</sup> The Court responds by pointing out that the Settlement Agreement allows class members to bring personal injury lawsuits on an “individual or single-sport, single-school class basis to seek compensatory or additional types of injunctive relief.”<sup>99</sup> One objector brought attention that the class members release the medical monitoring claim against NCAA Member institutions, and the Court noted that the release does not preclude members from “seeking damages, including damages based on past medical care, from an NCAA member institution by way of an individual or single-school/single-sport class claim, so long as the claim is unrelated to medical monitoring.”<sup>100</sup> There were four class members who submitted letters in support of the settlement and the Court pointed out that Lead Objector Nichols now supports the settlement.<sup>101</sup>

*b. Richardson v. Southeastern Conference*

Jamie Richardson and a punitive class of similarly situated University of Florida (“UF”) college athletes filed an action against the NCAA and the Southeastern Conference (“SEC”) for six claims of negligence, fraudulent concealment, breach of express and implied contract, breach of express contract as a third-party beneficiary, and unjust enrichment because Defendants did not

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<sup>97</sup> *Id.* at 219.

<sup>98</sup> *Id.* at 219-20.

<sup>99</sup> *Id.* at 220.

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

<sup>101</sup> *Id.* at 220-21.

adopt or implement satisfactory concussion treatment, safety protocols, and guidelines for return to play.<sup>102</sup> The complaint cites numerous reports and studies that over decades analyze the risks associated with brain trauma and the harmful effects of subconcussive impacts.<sup>103</sup> Richardson alleges that over himself and other players the NCAA and SEC were in a superior position to know about these studies, that for decades they have known of the damaging effects of concussions, and that despite this the NCAA has actively concealed these findings from the public and college athletes. Plaintiff further alleges that the NCAA 2010 concussion management plan that was adopted has been and is still deficient.<sup>104</sup> The SEC moved to dismiss the complaint for lack of personal jurisdiction and the Court held that Richardson failed to establish general or specific jurisdiction over the SEC.<sup>105</sup> The NCAA moved to dismiss all but the negligence claim for failure to state a claim.

Under the theory of fraudulent concealment, Plaintiff Richardson alleged that the NCAA shielded the short- and long-term risks of concussive and subconcussive hits and had he been privy to this information he would have terminated playing football for UF.<sup>106</sup> The Court held that under Florida's twelve-year statute of repose law, Plaintiff put forth sufficient allegations to bring forth a fraudulent concealment claim.<sup>107</sup> Plaintiff alleged from 1920 to 2010 the NCAA knew of and appreciated the importance of the publications detailing the effects of repetitive brain injuries and therefore had a duty to issue guidelines and rules to protect the athletes who suffered concussions.<sup>108</sup> The allegations include: that until 2010, the NCAA knowingly failed to enforce and promote safety guidelines for concussions; it concealed the dangers of concussions in its

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<sup>102</sup> *Richardson v. Se. Conf.*, 612 F. Supp. 3d 753, 759 (N.D. Ill. 2020).

<sup>103</sup> *Id.* at 761.

<sup>104</sup> *Id.* at 763.

<sup>105</sup> *Id.* at 766.

<sup>106</sup> *Id.* at 767.

<sup>107</sup> *Id.* at 769.

<sup>108</sup> *Id.*

publication of the Sports Medicine Handbook and when the dangers were finally acknowledged in the 1994 publication, the NCAA did not recommend the internationally accepted concussion guidelines and left it to the discretion of individual teams; in the 1998 publication the NCAA noted that concussions and second-impact syndrome can be life threatening but did not endorse return to play criteria or a concussion grading scale; and that after leaving college the NCAA failed to inform Richardson that he had been subject to an increased risk of long term brain damage and therefore concealed the risks of returning to play after a concussion.<sup>109</sup> Additionally, Plaintiff showed that the medical literature that touched on these matters were only accessible to the NCAA.<sup>110</sup>

Richardson also alleges that the NCAA breached an express or implied contract. Under Florida law the plaintiff must demonstrate (1) a valid contract, (2) a material breach, and (3) damages.<sup>111</sup> There is no requirement that the contract be written, just that a party allege facts that a contract existed through an offer, acceptance of that offer, and consideration.<sup>112</sup> The NCAA tried to argue that Richardson only offered vague factual allegations and baseless legal conclusions but Richardson alleged in the Complaint that he was required to enter into a written agreement with the NCAA that he would comply with their Constitution, bylaws, and regulations to play football at UF.<sup>113</sup> Richardson says in exchange the NCAA would conduct football in a safe way and require UF to protect the safety and health of its players. Additionally, Richardson says even absent an express contract, the NCAA's conduct and statements in its governing documents evidences the NCAA's assent to enter into an implied agreement with Richardson to protect his health and that the NCAA breached this promise.<sup>114</sup> In light of this, the court found that there was sufficient

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<sup>109</sup> *Id.* at 769-70.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 770 (citing *Jovine v. Abbott Labs., Inc.*, 795 F. Supp. 2d 1331, 1341 (S.D. Fla. 2011)).

<sup>112</sup> *Id.* (citing *C.I. Spataro Napoli, S.A. v. Fashion Concepts, Inc.*, No. 12-80885-CV, 2012 WL 12862817, at \*1 (S.D. Fla. Dec. 20, 2012)).

<sup>113</sup> *Id.* at 770.

<sup>114</sup> *Id.*

evidence to plead a breach of contract and quasi-contract to effectively defeat the NCAA's motion to dismiss.<sup>115</sup>

Richardson additionally asserted that he was a third party beneficiary to the contract between the NCAA and UF and because of the NCAA breach, he was damaged.<sup>116</sup> In Florida to succeed as a third party beneficiary in this context, the plaintiff must prove (1) existence of a contract, (2) the clear or manifest intent of the contracting parties that the contract primarily and directly benefit the third party, (3) breach of the contract by a contracting party, and (4) damages to the third party resulting from the breach.<sup>117</sup> The NCAA attempted to argue that Richardson has not shown the existence of a contract that would recognize him as a third party beneficiary but the court points out that the contractual obligations alleged in this instance are specific and targeted towards safety of the student athletes.<sup>118</sup> The agreement provided that “[m]ember institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the [NCAA] shall be applied to an institution when it fails to fulfill this obligation” and that “[e]ach institution shall comply with all applicable rules and regulations of the [NCAA] in the conduct of its intercollegiate athletics programs.”<sup>119</sup> The court found that these statements were not merely aspirational but were specific commitments by the NCAA to regulate UF's football program so that the players mental and physical well-being would be protected.<sup>120</sup> The terms further show that the NCAA and UF intended to oversee football in a way that would directly benefit the players and the NCAA was unable to dismiss this third party beneficiary contract claim.<sup>121</sup>

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<sup>115</sup> *Id.* at 771.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (citing *Gables Ins. Recovery, Inc. v. Blue Cross & Blue Shield of Fla., Inc.*, 813 F.3d 1333, 1338 (11th Cir. 2015)).

<sup>118</sup> *Id.* at 772.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

Richardson, in the alternative of his breach of contract claims, alleged unjust enrichment against the NCAA. To succeed on an unjust enrichment claim under Florida law (1) the plaintiff must directly confer a benefit upon the defendant, who has knowledge of the benefit; (2) the defendant then accepts and retains the conferred benefit; and (3) under the circumstances it would be inequitable for the defendant to retain the benefit without paying for it.<sup>122</sup> The NCAA argues that the first element is not properly plead and the court agreed. Richardson claimed that by playing football for UF he conferred a benefit on the NCAA through the revenues generated by UF for broadcasting, merchandise, and ticket sales which in turn provided revenues for the NCAA for its own broadcasting and merchandising contracts for UF football games.<sup>123</sup> The benefit Richardson claimed to confer on the NCAA is too attenuated from his own actions to state this claim and the NCAA motion to dismiss for unjust enrichment was granted.<sup>124</sup>

*c. Greiber v. NCAA*

In New York, the Nassau County Supreme Court was considering motions from Hofstra University and the NCAA to dismiss a plaintiff's complaint and for summary judgment in the NCAA's favor, respectively.<sup>125</sup> Plaintiff, Samantha Greiber, sued the NCAA, Hofstra University and Shannon Smith, the head coach of the women's lacrosse team, after suffering two concussions on the team during practice.<sup>126</sup> Following her first concussion, Greiber after two months was cleared to return to play and sustained her second concussion within a year of her first.<sup>127</sup> Against Hofstra and the coach, Plaintiff Greiber alleged that they failed to adequately supervise, regulate

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<sup>122</sup> *Id.* (citing *Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla., N.A.*, 667 So. 2d 876, 879 (Fla. Dist. Ct. App. 1996)).

<sup>123</sup> *Id.* at 772-773.

<sup>124</sup> *Id.* at 773.

<sup>125</sup> *Greiber v. Nat'l Collegiate Ath. Ass'n*, No. 600400/17, 2021 NY Slip Op 33311(U) (Sup. Ct., Nassau County Nov. 29, 2021).

<sup>126</sup> *Greiber* at ¶ 2.

<sup>127</sup> *Id.*

and minimize the risk of injury to her; that they failed to warn her of the risks of concussions; that there was issues with the coach's experience and the safety of her drills; and that the concussion protocols were inadequate.<sup>128</sup> Plaintiff against the NCAA claimed that the NCAA breached a duty of care because it prohibited protective headgear that could have prevented her injuries and did not provide proper information about the risks of concussions.<sup>129</sup>

The doctrine of primary assumption of risk is relevant and provides that if the risks are known or obvious to a voluntary participant then the participant has consented to these risks and the defendant has released its duty of care by making the conditions as safe as they appear however participants are not to have assumed risks that are concealed or unreasonably increased over the usual inherent dangers of the sport.<sup>130</sup> The court found that Defendants, Hofstra and Coach Smith, demonstrated a *prima facie* right to judgment as a matter of law with their submissions and met the burden through expert opinions establishing that (1) Hofstra provided adequate information on the risks of concussions, (2) Greiber was injured in adequately supervised conditions typical to women's lacrosse players in practice drills, (3) Hofstra implemented an adequate concussion protocol, (4) Hofstra personnel acted properly in caring for Greiber, and (5) by voluntarily participating on the team Greiber assumed the risk of injury.<sup>131</sup> Greiber was unable to rebut the experts conclusions that the defendants were not negligent in regard to the safety of practice drills, supervision of practice, the adequacy of the concussion protocols, the educational material provided to warn about concussions, or the coach's actions in managing Greiber's injuries.<sup>132</sup> The

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<sup>128</sup> *Id.* at ¶¶ 2-3.

<sup>129</sup> *Id.* at ¶ 3.

<sup>130</sup> *Id.* (citing *Calderone v Molloy College*, 177 AD3d 692, 112 N.Y.S.3d 191 [2d Dept 2019] and *Cruz v. City of New York*, 197 A.D.3d 555, 152 N.Y.S.3d 708, 2021 NY Slip Op 04658 [2d Dept. 2021]).

<sup>131</sup> *Id.* at ¶ 6.

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

court granted the motion for summary judgment for Hofstra University and Shannon Smith and dismissed the claims against them.<sup>133</sup>

To support its motion, the NCAA argued that it did not owe any duty to warn individual players of the risks of concussions and even if there was such a duty it was satisfied by providing Hofstra, a member institution, with the most current information about the risks of concussions in its sports medicine handbook.<sup>134</sup> The NCAA argues that student athletes assume the risks when playing and that there was no certified standard for women's lacrosse headgear, that at the time no manufacturer made this headgear, and pointed to studies that showed helmets could increase risk to women's lacrosse players.<sup>135</sup>

Among the alleged duties breached included failing to use reasonable care in implementing adequate concussion protocols and instituting safe practices, failing to supervise plaintiff, and prohibiting helmets – all which impacted her recovery and caused permanent post-concussion issues.<sup>136</sup> Greiber provided expert testimony from Dr. Robert Cantu<sup>137</sup> who opined that her injuries were permanent and would have been prevented had she been allowed to wear a helmet, her concussion symptoms caused her test scores to decline and prevented her from being accepted to graduate school, and that the NCAA left her vulnerable to concussions by not requiring helmets.<sup>138</sup> The Court found that the NCAA exercised significant control over the rules of play and equipment for women's lacrosse and imposed requirements on its member institutions and therefore carried out these functions with reasonable care.<sup>139</sup> Dr. Cantu's opinion, in addition to studies submitted,

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<sup>133</sup> *Id.* at ¶ 7.

<sup>134</sup> *Id.* at ¶ 5.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at ¶ 6.

<sup>137</sup> Dr. Cantu was one of the experts named in *In Re NCAA* to the Medical Committee as a part of the Medical Monitoring Program.

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

<sup>139</sup> *Id.* at ¶ 7.



created sufficient issues of fact as to whether the NCAA disposed of its duty to shield the plaintiff to risks that were unreasonably increased and NCAA's motion for summary judgment was denied.<sup>140</sup>

*d. Gee v. NCAA*

A recent verdict does not bode well for future plaintiffs against the NCAA as a jury recently ruled against a plaintiff and in favor of the NCAA. In 2020, widow Alana Gee, acting on behalf of the Estate of Matthew Gee, filed suit against the NCAA for negligence and wrongful death.<sup>141</sup> The NCAA attacked the Plaintiff's argument because of the legal issue of whether it owes any legal duty to protect players from the effects of playing football, and the evidentiary issue as to whether plaintiff has any evidence that her husband's condition was caused by playing football.<sup>142</sup> Matthew Gee was a football player for the University of Southern California ("USC") where he played from 1988 till 1992 as a linebacker; after college he played for the then Los Angeles Raiders and he died at age 49.<sup>143</sup>

The lawsuit sought \$55 million alleging that Matthew Gee had approximately 6,000 hits in his college career and these hits caused permanent brain damage which led to cocaine and alcohol use which then killed him.<sup>144</sup> The cause of death was a sudden cardiac arrest brought on by acute cocaine toxicity and untreated hypertension.<sup>145</sup> Plaintiffs' lawyers argued that the NCAA knew about the effects of head trauma since the 1930s but did not ban head first contact, implement baseline testing, or educate players of these risks.<sup>146</sup> Additionally, the NCAA pointed out that Gee

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<sup>140</sup> *Id.*

<sup>141</sup> *Gee v. NCAA*, No. 20 STCV, 2022 Cal. Super. LEXIS 60731\* (Cal. Super. Aug. 24, 2022).

<sup>142</sup> *Gee* at \*2.

<sup>143</sup> *Id.* at \*3.

<sup>144</sup> *Jury finds NCAA not responsible for ex-USC LB Matthew Gee's death*, ESPN (Nov. 22, 2022)

[https://www.espn.com/college-football/story/\\_/id/35087574/jury-finds-ncaa-not-responsible-ex-usc-lb-matthew-gee-death](https://www.espn.com/college-football/story/_/id/35087574/jury-finds-ncaa-not-responsible-ex-usc-lb-matthew-gee-death)

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

had other problems that would have eventually killed him not related to football like liver cirrhosis.<sup>147</sup> Gee was one of five linebackers who played for USC in 1989 who died before turning 50, and all of them displayed cognitive defects associated with brain trauma.<sup>148</sup> The jury was not allowed to hear testimony about Gee's teammates' deaths.<sup>149</sup>

Gee's brain was examined at Boston University's Chronic Traumatic Encephalopathy Center and was found to have CTE.<sup>150</sup> NCAA attorney, Will Stute, said in his closing argument, "You can't hold the NCAA responsible for something 40 years later that nobody ever reported. The plaintiffs want you in a time travel machine. We don't have one at the NCAA. It's not fair."<sup>151</sup>

*e. A Comment on NFL Litigation*

The National Football League ("NFL") has taken some responsibility in the litigating regarding brain injuries and sports when it settled the National Football League Players' Concussion Injury Litigation.<sup>152</sup> Plaintiffs alleged that the NFL hid evidence that showed the risks of repetitive brain trauma, but the NFL's Mild Traumatic Brain Injury Committee did not have to disclose what it knew, as part of the settlement there was no admission of liability.<sup>153</sup> The \$765 million settlement provides \$675 million for former players suffering from cognitive injuries, \$75 million for baseline medical exams, and \$10 million for research and education on the safety and prevention of brain injury.<sup>154</sup> Players had initially hoped for \$2 billion from the NFL which averages nearly \$10 billion

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Jury finds NCAA not responsible for ex-USC LB Matthew Gee's death supra* note 142.

<sup>152</sup> Jed Hughes, *NFL Concussion Settlement Enables the League to Move Forward*, BLEACHER REPORT, (Sept. 16, 2013), <https://bleacherreport.com/articles/1775731-nfl-concussion-settlement-enables-the-league-to-move-forward>

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

in revenue annually, but this was at least some consolation for the members and families affected by the effects of repetitive brain trauma.<sup>155</sup>

#### IV. REMEDIATION EFFORTS

Across the nation various organizations are researching how concussions affect the brain and how sports can be made safer. Some have identified concrete steps to take to reduce the incidence of concussions and impacts on the brain. Some suggestions are to reduce subconcussive hits, sports should delay the introduction of contact until age appropriate, eliminate contact where unnecessary, and modify contact where appropriate.<sup>156</sup>

The Concussion Legacy Foundation is a non-profit organization founded by Dr. Robert Cantu<sup>157</sup> and Chris Nowinski, Ph.D. that was founded to “support athletes, veterans and all affected by concussions and CTE, to promote smarter sports and safer athletes through education and innovation, and End CTE through prevention and research”<sup>158</sup> They support and collaborate with the Boston University CTE Center and other programs worldwide. Before 2005, there were only 45 cases of CTE ever diagnosed, and after CTE was found in two NFL players, Nowinski saw the need for and importance of building the world’s first CTE focused brain bank.<sup>159</sup>

Upon hearing about the suicide of former NFL player, Andre Waters, in 2006 Nowinski suspected that Waters had CTE and was able to obtain Waters’ brain from his family and confirm the presence of CTE. Once he saw this connection, he launched an outreach program to find families of recently deceased athletes and others to study their brains. The results found were

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<sup>155</sup> *Id.*

<sup>156</sup> *Resource Center: Subconcussive Impacts*, CONCUSSION LEGACY FOUNDATION, <https://concussionfoundation.org/cte-resources/subconcussive-impacts> (last visited April 17, 2023).

<sup>157</sup> Dr. Cantu was one of the experts named in *In Re NCAA* to the Medical Committee as a part of the Medical Monitoring Program.

<sup>158</sup> *Mission & History*, CONCUSSION LEGACY FOUNDATION, <https://concussionfoundation.org/about/mission-history> (last visited April 18, 2023).

<sup>159</sup> *Id.*

astounding – of the first 111 NFL players studied 110 had CTE, and of the first 53 college football players studied 48 had the disease.<sup>160</sup> In 2008, in collaboration with the Boston University CTE Center and the U.S. Department of Veterans Affairs the VA-BU-CLF Brain Bank was founded and is now the largest CTE repository in the world.<sup>161</sup>

## V. CONCLUSION

More research needs to be conducted in the field of concussions and their effects. As technology has progressed the world is learning more about brain injuries, but much of this research has not been proactive and leads to issues in litigation. The research being conducted is a reaction to the public finding out more about the damaging effects of concussions but does not provide much relief for college athletes. The incidence of concussions in collegiate sports needs to be monitored further in the future because athletes with brain injuries will age into our society and we need to be ready to support them.

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<sup>160</sup> Chris Nowinski, *Can I have your brain? The quest for truth on concussions and CTE*, TED (Mar. 19, 2018) [https://www.ted.com/talks/chris\\_nowinski\\_can\\_i\\_have\\_your\\_brain\\_the\\_quest\\_for\\_truth\\_on\\_concussions\\_and\\_cte?language=en](https://www.ted.com/talks/chris_nowinski_can_i_have_your_brain_the_quest_for_truth_on_concussions_and_cte?language=en)

<sup>161</sup> *Id.*