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| **Cover Story**  **Playing It Safe: Are Concussions Ruining Sports?**  By Anna Stolley Persky  Seattle Seahawks injured tight end John Carlson. Photo by Getty Images.Charlie Granger, a former offensive lineman for the Dallas Cowboys and the St. Louis Cardinals, says that football was a “brutal, brutal” game when he played back in the 1960s.  “The defensive end turned into an animal, a vicious animal, because that was the only way to play pro football in those days,” says the 74–year–old Granger. “We were told to hurt them, hit them with our helmet. Everything was legal then.”  Granger, who lives in Port Allen, Louisiana, with his wife, believes he is suffering from forgetfulness, moodiness, and occasional confusion because of too many brain injuries from playing football. Granger also admits he is “aggressive” and has slow reflexes.  “My wife drives us around. I stopped driving because I don’t make good decisions,” Granger says. “I don’t like stopping at red lights, and I am so very aggressive. I do weird things.”  Granger is far from alone in claiming declining mental and physical health after playing pro football. Indeed, in recent years, hundreds of retired players are blaming their medical issues, such as debilitating dementia, depression, and insomnia, on head injuries suffered while on the field.  Granger and thousands of other former pro football players are suing the National Football League (NFL) in a class action lawsuit. The master complaint alleges that the NFL deliberately deceived players about the long–term health risks of concussions. In addition, the players have sued helmet maker Riddell Inc. for allegedly manufacturing defective helmets.  The high–profile, high–stakes litigation exposes the league and its players to potentially enormous liability. The litigation also highlights a growing tension between our increasing understanding of the risks involved in head injuries and our country’s love for fierce, even violent, competition. Even President Obama has stepped into the controversy, voicing concern for the safety of the game, especially for young players.  “The litigation brings up the role of sports in American society,” says W. Burlette Carter, a professor who teaches sports law and evidence at The George Washington (GW) University Law School. “It brings up questions about our attraction to violence and balancing that with the concern we should have for the people who are playing the game and have to live lives after they leave the sport.”  Numerous studies have found a link between repetitive head injuries and subsequent health issues. The NFL says it is working to further ensure player safety.  The NFL has moved up the kickoff spot five yards—from the 30–yard line to the 35–yard line—as one step to reducing the incidence of concussions. Helmet–to–helmet collisions and head–to–head blows are often classified as unnecessary roughness, with a 15–yard penalty.  In addition, the NFL says is it is getting tougher on ensuring that a player with a suspected concussion does not return to the game. In February NFL officials said they are considering widening the playing field as another way to help protect players.  But sports law experts agree that these rule changes are likely just the beginning. Football fans from around the country question how much the game can be changed and stay football.  “Without question, there’s going to have to be some more changes in the way the NFL operates,” says Howard Shatsky, a Rockville, Maryland–based lawyer and president of Professional Football Management. “But the thing is, it’s football, so can you really eliminate collisions? By nature, it’s a violent game.”  But Dionne L. Koller, the director of the Center for Sport and the Law at the University of Baltimore School of Law and an associate law professor, believes that football can change its rules and still survive.  “The NFL …  can change the expectations of the fans by evolving the game and emphasizing passing, catching, running, kicking, and strategy,” Koller says. “There’s a lot that goes on in that sport. It doesn’t have to be marginalized because it loses some of the violence. Look at [Olympic] hockey—people start appreciating the strategy and the team aspects when you take out the fights.”  **‘Standard of Care’** The NFL class action litigation raises important legal issues such as the scope of liability for the league and its insurers. The former players argue that the NFL had a duty to care for them, but instead pushed the players into violent collisions.  “One question in these cases is, ‘What is the standard of care owed to an NFL player, someone who has agreed to an above average amount of exposure to injury?” Carter says. “The standard is contextual, and it will be different than what would be applied to the average person.”  Sports law experts say that a ruling on the scope of liability in football will eventually affect other sports such as hockey, soccer, and lacrosse at every level of competition.  “What the litigation will bring is a new consciousness across the spectrum of the sport, all the way down to the children playing,” says Ira Sherman, managing partner at Chaikin, Sherman, Cammarata & Siegel, P.C. in Washington, D.C. “Depending on the outcome of the case, there may be an even greater duty imposed on the individuals operating the activity that requires them to be cognizant of reasonable protection for the participants.”  The next court hearing in the case is scheduled, as of press time, for early April before Judge Anita B. Brody of the United States District Court for the Eastern District of Pennsylvania. The question before the judge at that time will be whether some or all of the players’ claims are preempted by the collective bargaining agreements between the players’ union and the league.  The litigation already has attracted the curiosity and, more importantly, concern of football fans throughout the country.  Carter thinks part of the attraction of the case is “the notion of challenging the NFL—the Big Kahuna.”  She adds, “And then there are people who always felt that there was a concern about injuries to players and that something was not quite right and that an injustice was being done.”  **Science Says?** A concussion isn’t a bruise to the brain, as many people believe. A player doesn’t have to be hauled off the field on a stretcher or lying on the sidelines, unable to stand up straight.  Medical experts describe a concussion as a traumatic brain injury. A concussion can be obtained either by a blow to the head or a blow to the body that jars the head. The brain, made of soft tissue, is cushioned by spinal fluid and blood. A concussion occurs when the brain shifts and hits the bone surface of the skull.  In the United States, more than 300,000 sports–related concussions occur every year, according to the University of Pittsburgh’s Brain Trauma Research Center. The likelihood of suffering a concussion while playing a contact sport could be as high as 19 percent annually.  There’s a growing body of evidence linking head trauma to degenerative brain disease, called chronic traumatic encephalopathy (CTE). Individuals with CTE often suffer from forgetfulness, depression, dementia, insomnia, impulsivity, and suicidal tendencies.  According to findings published in the scientific journal *Brain*in December 2012, athletes, military veterans, and others who suffer repeated mild traumatic brain injury are more likely to have CTE.  The study includes posthumous brain samples taken from 85 individuals, including football stars Dave Duerson, Cookie Gilchrist, and John Mackey.  Of the group, the overwhelming majority, 80 percent, showed evidence of CTE. More recently, brain specialists from the National Institutes of Health determined that former linebacker Junior Seau, who committed suicide last May, also suffered from CTE.  Head injury experts express a growing concern that even the mildest impact to the head, especially if repeated, could result in serious long–term damage. In one study of 30 children, results suggest that concussions can cause structural changes in their brain for months, long after the children displayed symptoms of their concussions.  But not everybody is convinced by the scientific data. In February former NFL player–turned–NFL Network analyst Deion Sanders said simply: “I don’t buy all these guys coming back with concussions. I’m not buying all that.”  And, as scientists and lawyers who specialize in head injuries admit, there is still much to learn about the risks associated with any head trauma, from the mild to the severe.  “It’s still a mystery—the human brain,” says Paul Zukerberg, who focuses on brain injury cases at the Zukerberg Law Center, PLLC in Washington, D.C. “We don’t have effective diagnoses, and we don’t have effective treatment. There’s still a lot of work to be done.”  **‘Flat-Out Lying’** There is no question that individuals who played sports knew even decades ago that a serious blow to the head wasn’t a good thing. But, in the NFL concussion litigation, former players accuse the NFL of knowing the more serious long–term effects, but withholding, even concealing, that information from the players.  In a statement, Sol Weiss and Chris Seeger, co–lead counsel for the former players, said that the case “is about providing security and care to former NFL players who have been subjected to repeated head impacts, which has been directly linked to an array of devastating neurological diseases and disorders.”  “This means providing comprehensive medical care and financial support to those who have had their lives destroyed by the NFL’s conduct. And it means offering independent medical monitoring and evaluation for those who have not yet developed serious symptoms.”  In the master complaint, former players allege that the NFL took on a duty to provide players with rules and information protecting them as much as possible from health risks. The NFL was negligent and failed to carry out this duty, the complaint further states.  “Further, the NFL actively suppressed and kept secret information … it knew would change the economics of the game and the health of the players …,” the former players argue in the complaint.  The former players accuse the NFL of negligence, negligent misrepresentation, fraud, and fraudulent concealment, among other claims.  According to the complaint, thousands of former NFL players are suffering or are at risk of suffering from brain injuries that could have been avoided had the league not hidden information about the link between head trauma and long-term brain injury.  Some of the plaintiffs are famous, such as former running backs Kevin Turner and Tony Dorsett. Other plaintiffs played a few years and perhaps never reached the point of household–name recognition.  Their injuries are also varied, according to the lawyers. Some former players are suffering from intense dementia and are on ventilators, unable to care for themselves. Other plaintiffs are just beginning to worry about what will become of them if their mental facilities begin to fail.  The litigation also includes wrongful death complaints filed on behalf of former players who have passed away.  In a recent interview, former quarterback Jim McMahon, also a plaintiff in the lawsuit, described NFL officials as “flat–out lying.”  McMahon has said that his brain isn’t functioning well.  “Short–term memory is not good,” McMahon told ESPN. “I won’t remember a hell of a lot about this interview in 10 minutes.”  **On the ‘Cutting Edge’** The NFL says emphatically that player safety has always been and remains a priority. Further, the NFL states that it has long been on the “cutting edge” of investigating the long-term effects of brain injuries.  Recently, NFL Commissioner Roger Goodell announced that the league is donating $30 million to the National Institutes of Health’s Neurology Institute to study brain injuries among football players and members of the military.  Further, in 2007 the league began a program granting former players with brain disease up to $88,000 a year if they need to be institutionalized.  “The NFL believes that the litigation is without merit and that the players’ claims are demonstrably inconsistent with the league’s actions over the years,” says Brad S. Karp, chair of Paul, Weiss, Rifkind, Wharton & Garrison LLP and lead outside counsel for the NFL.  “Whether it has been the adoption of new rules, the sponsorship and funding of cutting–edge medical and scientific research, or the implementation of neuropsychological testing, the league has long acted to protect NFL players from head injuries and to advance the emerging science and medical understanding of the management and treatment of concussions,” Karp says.  The NFL’s motion to dismiss argues that the players’ claims must be resolved through arbitration, in accordance with the players’ collective bargaining agreements. The National Football League Players Association (NFLPA), the labor union representing NFL players, negotiates the terms of collective bargaining agreements between the players and the NFL. Officials from the NFLPA did not return repeated requests for interviews.  In its motion to dismiss, the NFL cites section 301 of the Labor Management Relations Act, which governs collective bargaining agreements affecting interstate commerce. The NFL argues that section 301 preempts state law claims, including tort claims, when the resolution is dependent upon or “inextricably intertwined” with the terms of a collective bargaining agreement.  The NFL also cites recent cases in which courts have determined that player tort claims against the NFL or its clubs, including concussion-related claims, are preempted and must go to arbitration.**[[1]](http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/april_2013/playing_safe.cfm" \l "n1)**  As of press time, a hearing on the motion to dismiss has been scheduled for April 9 in Philadelphia.  **Playing Hurt** Sports law experts, players, and fans alike are asking the question—has the NFL put the business of the sport ahead of player safety?  There’s no question about it—football is big business. The NFL, which acts as a trade association for its 32 independently operated teams, generates more than $9 billion in gross income every year. In 2009 the average game attendance was 67,509 people.  “When sports became big business, teams had other things to consider, not just players’ health, but the bottom line,” says GW’s Carter. “That always has been a difficult balance to strike and still is.”  But NFL spokesperson Greg Aiello states, “[w]e consistently say that player health and safety is our top priority. The health of our players is our top priority … Decisions made by medical professionals are given priority over any competitive considerations. That’s a core tenant.”  Certainly, football has been considered a violent sport from the beginning. The game became somewhat popular first with exclusive East Coast colleges, such as Harvard and Dartmouth. Football eventually spread to other universities.  In 1905 President Theodore Roosevelt got involved by holding a meeting with football representatives from several colleges. Some reports say that Roosevelt, despite not having the authority to do so, threatened to ban the game if the violence wasn’t checked. At any rate, later that year, participating universities met to discuss rule changes to make the game safer.  The NFL was formed in 1920 as the American Professional Football Conference (it later became the American Professional Football Association). But, for decades, pro football wasn’t nearly as popular as collegiate football.  Then came televised games. The 1958 NFL Championship Game between the Baltimore Colts and the New York Giants drew record television viewership. Since then, pro football has gradually eclipsed collegiate football. Indeed, while some baseball fans might disagree, football has grown to become America’s most popular sport.  **Mounting Evidence** According to sports journalists, the players in the early days of pro football were often low–income, not particularly well-paid, and yet bent on keeping their jobs.  “The game grew with this culture of its own,” says Robert Lipsyte, a veteran sportswriter who spent the bulk of his career at *The New York Times*. “It had a wonderful combination of unalloyed violence and a technical expertise. It was tough and gritty.”  Lipsyte also believes that as women entered the workforce, football became symbolic as the “last place where ‘real men’ could get together, that was purely ‘male.’”  NFL players were expected to shrug off the blows and continue doing what they were paid to do—to play hurt.  “Here are these guys—they have the same sense as firemen. They are big, brave, and brothers. They are ‘manly,’ all the things that ‘traditional men’ were supposed to be—stoic, brave, able to submit to a higher authority, loyal to the team,” Lipsyte says. “They didn’t want to be seen as ‘sissies,’ and if their coach wanted them to go back in the game, they did. And they got tremendous reinforcement from the larger culture.”  The culture of football to play hurt directly conflicted with mounting medical evidence of a link between brain trauma and subsequent brain disease.  In their master complaint, former players accuse the NFL of glorifying the game’s violence through its films, and promoting a “product of brutality and ferocity.”  At the same time, for decades the league maintained that it was safe to allow players who sustained concussions to return to the field as soon as their symptoms had subsided.  However, a 2009 study commissioned by the NFL found that former pro football players were being diagnosed with memory–related diseases much more often than the national population. Congress began to intervene by holding hearings on the question of player safety.  During a U.S. House Judiciary Committee hearing in late 2009, U.S. Rep. Linda T. Sanchez, a Democrat from California, told Commissioner Goodell that the NFL’s “blanket denial or minimizing of the fact that there may be this link” reminded her of the tobacco companies when they used to say that there was no link between smoking and damage to one’s health.  A few months later, the NFL changed its rules regarding concussions. Under the change, players who exhibit signs of a concussion are to be removed from a game or practice and barred from returning that same day.  **Small Changes** The NFL, Karp says, promotes a culture “where the health and safety of players at all times trump competitive interests, and that culture is communicated to players through ongoing education, dialogue, monitoring, constant assessment, and reinforcement of policies.”  Karp states that the league “has taken a number of steps to encourage players to come forward and timely report all injuries, especially head injuries, so that they can receive proper medical treatment.”  For example, a 2011 rule change moving the restraining line for the kicking team from the 30–yard line to the 35 has, according to the NFL, contributed to a 40 percent reduction in the number of concussions during kickoffs compared to the previous season.  But some sports observers claim that team medical personnel are still sending players with apparent head injuries back into games.  Aeillo, however, said that all NFL medical personnel “are required to follow a standardized concussion assessment tool to evaluate players for concussion symptoms.”  “We are giving physicians the tools they need to be able to better spot signs of concussions; we’ve employed a dedicated athletic trainers ‘spotter’ program to identify players who may have been exposed to a head injury, and starting with the 2013 season, we plan to have unaffiliated experts in the area of traumatic brain injury to assist and work with team medical staff,” Aiello said in a statement.  Karp emphasized that the NFL has been sponsoring and continues to sponsor “cutting–edge medical and scientific research” to better understand the causes and impact of brain injuries.  “The risk of brain injury for athletes of all kinds and ages who participate in contact sports, including professional football, is a vexing issue that scientists and physicians worldwide are working hard to understand and address,” Karp says.  **Collective Bargaining** The hearing before Judge Brody in April will likely have a profound impact on how the case progresses in the years to follow. Brody is expected to decide whether some or all of the litigation must go to arbitration, as specified in the collective bargaining agreements.  Carter’s concern is that the NFLPA’s power was much weaker decades ago, when they were originally negotiating with the league over the collective bargaining agreements.  “As the popularity of the sport began to grow, it became dominated by players from poor and minority backgrounds,” Carter says. “It’s pretty clear that the earlier players lacked the ability to advocate on their behalf as compared to players today.”  Carter and lawyers involved in the litigation point out that the players from the 1960s and ’70s, for example, didn’t earn huge sums of money and played under more difficult conditions than those individuals who played in later years. In addition, Carter says, many of these now–retired players “came from backgrounds where they didn’t have easy access to medical advice, so they relied perhaps more heavily upon the NFL for medical information than the later generations of players.”  “There are questions as to whether retired players, who had less power in collective bargaining agreements when their unionizing wasn’t as strong, were properly represented in the negotiations,” Carter says.  “And are they being represented now? It’s true that a union can negotiate benefits with respect to retirees, but there must be continuity in interest between newer players and the [earlier] players.”  Carter predicts that the cases may have to be subdivided according to the time frame a player engaged in the sport.  As for whether the case will go to arbitration or litigation, Weiss and Seeger stated that they expect “this effort by the NFL to deny former players their day in court to be roundly rejected.”  **Assumption of Risk** Even if the case goes through the court system instead of arbitration, the plaintiffs face some hurdles to winning their case.  First off, the question of protecting players against concussion inevitably leads to a crucial point about the nature of contact sports: People get hurt. Sports experts say one of the NFL’s strongest arguments is that when a football player decides to join the league, he knows that he risks getting injured.  But, Weiss and Seeger countered, the players “understood that football was a contact sport and as such recognize that certain injuries may occur. They did not know, however, that playing in the NFL could lead to permanent irreversible brain damage because the NFL deliberately concealed this fact from its players.”  Additionally, the players will have to address what appears to be a common problem: Players apparently often fail to report their injuries.  The NFL could argue that it should not be held responsible when players fail to reveal their concussion symptoms.  Sherman, who handles brain injury cases but is not involved in the NFL concussion litigation, emphasizes the “gladiator attitude” of the players. But he also believes the team’s doctors who have a duty to ensure the safety of their patients.  “Players want to go to work,” says the Chaikin Sherman managing partner. “The gladiator in them needs to be managed and modulated by those who have the ability to exercise good judgment. The doctor is not a flowerpot. He should stand up and provide a clear opinion if there is any concern that the player shouldn’t perform.”  In addition, the former players could face some difficulties in establishing causation.  As Karp states, “as extensively detailed in the evolving medical and scientific literature, the causes of cognitive impairment and other brain–related issues are not known.”  “Cognitive impairment may result from a wide range of potential causes—ranging from injuries to the developing brain sustained in childhood or adolescence, to genetics, to drug or substance abuse, to aging, to high blood pressure, or to myriad other factors.”  But Weiss and Seeger said they are confident they will be able to prove causation at trial.  Carter points out that it may be difficult to trace player suicides to CTE. She states that there may be other reasons that football players take their own lives more often than the average American.  “The problem is that when people play pro football, they live in this unreal world with lots of glory, and then when they leave the game, the glory ends,” Carter says. “It will be argued that’s a big fall for people, and that causes the depression, and that causes the suicides.”  If the class action litigation ends up in the court system, the NFL faces the potential of billions of dollars in exposure, legal experts say.  Carter says she expects the litigation will be settled, although “it won’t be soon” because the NFL will want to make sure that any settlement binds all the potential claimants.  “The NFL wins no friends by appearing as though they are trying to deny players proper medical care. So it’s in their best interest, if they can, to settle this with an agreement that they can say is consistent with their existing policies,” Carter says.  **Game Change** Certainly, not everyone is thrilled to see football changing its rules in an effort to ensure player safety.  “The NFL is just the latest place where the wussification train has stopped in America,” wrote Eric Thomas in an editorial on CBS Detroit’s Web site.  But other fans see the need for safety measures, and don’t think they will ruin the game.  Attorney and football fan Brandon Schneider, a Northern Virginia resident licensed to practice in Washington, D.C., says that new safety rules are necessary and “will not take away the many great attributes that football offers to the sports fan.”  And to some observers, the glacial legal battle against the NFL offers a unique opportunity to reevaluate the role of sports in our society and “how much we should push our athletes to plow into each other as part of a game or match,” he says.  “We love the gladiator aspect of sports,” Carter says. “But these lawsuits raise the ‘blood sport’ question: Do we in our society celebrate the gladiator too much and fail to take seriously enough the impact of on–field violence? Have fans, the NFL, and even young players themselves ignored the fact that that blood–letting sometimes denies a player a decent quality of life after the football career is over?”  Koller of the Center for Sport and the Law says that the game of football may not be saved in its present form, but asks what stops us from allowing it to morph into something different.  “People take so many things as a given, that it has to be a certain way,” Koller says. “But really, sports are games that we make up. I have an optimistic view of our ability to make up games that don’t hurt people, but that we can enjoy. The size of the ball, the length of the field, we made it all up. So why don’t we make up something that is safer for the players?”  And perhaps the best indicator of a change in the culture of football to play hurt comes from the players themselves. After four concussions in 2012, Jacksonville Jaguars receiver Laurent Robinson told the NFL Network that he was still experiencing symptoms, such as throbbing headaches and sensitivity to light.  Robinson said in the interview that players know that they’re susceptible to injuries when they decide to play pro football. But, Robinson admitted, “I don’t know if it’s worth it or not. I’ve been playing for six years and I want to continue to play, but I still want to live until I’m 80, 90 years old.”  **Lystedt Law** The question of the long–term effects of concussions has reached far beyond the NFL and even football. Most states have gotten involved in regulating how concussions are handled in sports.  In 2009 Washington state passed the first concussion protection statute in the country, called the Lystedt Law. The law was named after Zackery Lystedt, who suffered a debilitating brain injury from repeated head trauma during a middle school football game. In the aftermath of their son’s injuries, Zackery’s parents pushed for increased concussion awareness and protection for children playing sports.  Since then, more than 40 states and the District of Columbia have enacted youth sports concussion safety laws modeled after Washington state’s statute. Maryland and Virginia both have their versions of the law requiring concussion education and guidelines for youth athletic activities.  Generally, these laws require the removal of athletes from games if they are suspected of having suffered concussions. In addition, athletes are often required to obtain written authorizations from doctors before they can participate again.  Many states also require some type of education for coaches, parents, or even the athletes themselves on concussions and how to protect against them.  Joseph M. Hanna, chair of Goldberg Segalla’s sports and entertainment law practice group, says he’s noticed a seismic shift in how sports are played on every level, from little league to the pros.  “Obviously there is a focus on concussions and the effects that they have on athletes. This is a major wake–up call,” Hanna says.  **Note**  **[[1]](http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/april_2013/playing_safe.cfm" \l "note1)** *Duerson v. National Football League*, No. 12 C 2513, 2012 WL 1658353 (N.D. Ill. May 11, 2012); *Stringer v. NationalFootball League*, 474 F. Supp. 2d 894 (S.D. Ohio 2007).  *Freelance writer Anna Stolley Persky is a regular contributor to Washington Lawyer.* |