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THIS IS FOOTBALL, YOU’RE SUPPOSED TO GET HIT: TACKLING CONCUSSIONS AND CHRONIC TRAUMATIC ENCEPHALOPATHY; HAS THE NFL BEEN WRONGFUL?

Kayleigh R. Mayer*

I. INTRODUCTION

Junior Seau excelled as an all-star linebacker in the National Football League (NFL) for twenty seasons with the San Diego Chargers, Miami Dolphins, and New England Patriots before he retired in 2010. Seau was a stand-out football player who played in two Super Bowl games, and many of his fans and peers recognized him for his volunteer work, including starting the Junior Seau Foundation and receiving the NFL's Man of the Year Award and a Volunteer Service Award from the President in 2005. In the mid-1990s, while still in the NFL, Seau’s behavior began to change and his memory started to deteriorate. Seau suffered from insomnia, forgot conversations he had with people, and became aggressive and violent towards others. Seau took his own life at the age of forty-three on May 2, 2012, just two short years after his retirement from the NFL.

Unfortunately, Junior Seau's story is just one of many stories over the past several years that involve former-NFL players whose lives ended tragically by suicide. In 2012 alone, five other NFL players committed suicide (two of them were playing in the NFL at the time they committed suicide) and at least five others committed suicide.

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2. Id. ¶ 196, 197.
3. Id. ¶ 203.
4. Id. ¶¶ 198-99, 201.
5. Id. ¶ 213.
6. Id. ¶¶ 215-17.
7. See id.
from 2005 to 2011.8 A majority of the other players died, like Seau, from self-inflicted gunshot wounds.9 Out of these eleven recent player suicides, autopsies later indicated that at least six had Chronic Traumatic Encephalopathy (CTE), a progressive disease caused by numerous hits to the head, including most recently and notably, Seau.10

This paper considers whether the NFL could be liable in a wrongful death action for a former-NFL player’s suicide. Part II explains the medical history of brain injuries and CTE, and provides an overview of what the NFL has done in response to the medical studies related to brain injuries. Part III sets forth the statutory requirements for a wrongful death action. Part IV analyzes the NFL’s potential liability in a wrongful death action, while trying to connect the claims to the recent concussion litigation11 and addresses the NFL’s potential defenses in a wrongful death action.

II. CONCUSSIONS, CTE, AND THE NFL

CTE, a disease caused by obtaining multiple hits in the head, is often “associated with memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, and . . . demen-


9. See generally Barchenger et al., supra note 8; List of Recent Untimely Deaths for NFL Players, supra note 8; Associated Press, supra note 8; Lupkin, supra note 8.

10. See Barchenger et al., supra note 8; List of Recent Untimely Deaths for NFL Players, supra note 8; Associated Press, supra note 8; Lupkin, supra note 8. See also Mary Pilon & Ken Belson, Seau Had Brain Disease Found in Other Ex-Players, N.Y. TIMES, Jan. 11, 2013, at B13.

11. In August 2013, the NFL and the plaintiffs in the concussion litigation agreed to a settlement with a court-appointed mediator, instead of inside a courtroom. See Press Release, Alt. Dispute Resolution Center (Aug. 2013) available at http://static.nfl.com/static/content/public/photo/2013/08/29/0ap2000000235504.pdf; see also Associated Press, NFL, Ex-Players Agree to $765M Settlement in Concussions Suit, NFL.COM (Aug. 29, 2013), http://www.nfl.com/news/story/0ap1000000235494/article/nfl-explayers-agree-to-765m-settlement-in-concussions-suit. Not only did the settlement end the litigation, but also it provided for medical benefits and other compensation to certain players who were injured, or their families. Press Release, supra note 11, at 1. The $76.5 million, to be paid by the NFL and NFL Properties, will cover the medical benefits and compensation, but will also help fund additional research and cover the costly litigation expenses. Id. Because the litigation settled outside of court, the NFL did not need to disclose its own files and information, and a fact finder did not determine when the NFL knew what regarding CTE and brain injuries; thus, this paper will still analyze the NFL’s potential liability in a wrongful death action.
tia." In response to the negative effects of mild traumatic brain injuries (MTBIs) “caused by the concussive and sub-concussive impacts that have afflicted former professional football players in the NFL[,]”13 thousands of the former players’ spouses and other beneficiaries have filed lawsuits. Many of the complaints were consolidated to form one Amended Master Administrative Long-Form Complaint (Amended Master Complaint), which alleged that the NFL, along with NFL Properties and helmet manufacturers such as Riddell, Inc., were liable for damages based on negligence, fraud, and wrongful death, among other things, for the players’ concussion-related injuries during their time in the NFL.14

This type of lawsuit is not new for the NFL. For example, after NFL player Dave Duerson passed away in 2011, his estate brought an action against the NFL and Riddell, Inc., the football helmet manufacture that manufactured and supplied at least seventy-five percent of the helmets used by NFL players during Duerson’s career.15 The complaint set forth several facts and stories about Duerson’s life, both while he was playing in the NFL and after he had retired from the league.16 The Chicago Bears drafted Duerson in 1983 as a safety, and he later played for the New York Giants.17 In total, Duerson played in one hundred thirty-four regular season NFL games.18 In games and practices, Duerson sustained at least three documented concussions along with several others that were not documented.19 Duerson had “no prior history of depression or psychological issues,” but in the ten years leading up to retirement,20 he had symptoms such as “intense headaches, lack of short term memory, language difficulties, vision trouble, and problems with impulse control.”21 His professional and personal life also suffered, including a divorce from his wife,22 a foreclosure on his home, personal bankruptcy, and a guilty plea on a do-

14. See generally id.
mestic battery charge. Even Duerson knew something was not right, and in the time leading up to his death, he “expressed [a] desire that his brain be studied post-mortem, as he believed that ‘there [was] something going on’ in his brain.” Duerson sent his ex-wife a text message and left a note at his condominium saying, “Please, see that my brain is given to the NFL’s brain bank” and after his death, Duerson was diagnosed with CTE.

Due to the recent concussion litigation and numerous suicides by both current and former NFL players, concussions and other head-induced trauma have become a hot topic in the media. However, a pathologist first “described the clinical aspects of a progressive neurological deterioration (‘punch drunk’) that occurred after repetitive brain trauma in boxers” back in 1928. Still, until 2010, the NFL continually denied a causal link between the concussions that players suffered while playing football and the players’ cognitive decline in the later years of their life, despite all of the studies released by scientists and other medical researchers over the years.

The early medical studies addressed concussions and the effects that they have on the brain as they relate to boxers, but as early as 1952, the medical industry recommended that if a football player sustained three concussions, he should refrain from playing the sport any longer. Concussions are difficult to define, and the definition has evolved over time. Historically, loss of consciousness was the main measure used to determine the seriousness and severity of traumatic brain injuries. However, in 2001, the first International Symposium on Concussion in Sport, a symposium held to recommend ways to improve the health and safety of concussed athletes, defined a concus-

25. Schwarz, supra note 23.
28. Id.
29. See Alan Schwarz, N.F.L. Asserts Greater Risks of Head Injury, N.Y. TIMES, July 26, 2010, at A1 (describing a poster that the NFL hung in NFL locker rooms throughout the country, which stated “[t]hese changes may lead to problems with memory and communication, personality changes, as well as depression and the early onset of dementia. Concussions and conditions resulting from repeated brain injury can change your life and your family’s life forever.”).
30. See generally Harrison S. Martland, Punch Drunk, 91 J. AM. MED. ASS’N 1103 (1928).
sion as "a complex pathophysiological process affecting the brain, induced by traumatic biomechanical forces."33

A. The History of CTE

In 2002, forensic pathologist Dr. Bennett Omalu received the daunting task to perform an autopsy and study the brain of former NFL player Mike Webster after Webster died at fifty years of age.34 Omalu’s findings indicated some sort of disease that scientists had never seen before: “Brown and red splotches. All over the place. Large accumulations of tau proteins.”35 Omalu eventually called the disease Chronic Traumatic Encephalopathy (CTE).36 Although CTE had been around for years, particularly in boxers, this was the first time a scientist actually named and called the disease CTE.37

Shortly after Omalu’s findings regarding Webster appeared in Neurosurgery, Omalu studied former-NFL player Terry Long’s brain.38 Long played for the Pittsburgh Steelers, and in 2006, at age forty-six, committed suicide by drinking antifreeze.39 Long’s life post-NFL consisted of psych wards, bankruptcy, and living alone; he even tried drinking rat poison before the antifreeze.40 Omalu noted that Long’s brain looked like that of “a [ninety]-year-old . . . with advanced Alzheimer’s” disease.41 Long was the first player who committed suicide and was then diagnosed with CTE post-mortem, but doctors and researchers still continue to diagnose CTE post-mortem in NFL players who committed suicide.

From 2006 until 2011, ten other NFL players committed suicide.42 These players’ ages ranged from Kenny McKinley who died at twenty-three43 to Mike Current who died at sixty-six.44 Most famously, players like Dave Duerson, who died at age fifty, and Ray Easterling, who

33. Id. at 6. Today, the Center for Disease Control and Prevention defines a concussion as “a type of traumatic brain injury . . . caused by a bump, blow, or jolt to the head that can change the way [the] brain normally works.” Concussion in Sports, CDC, http://www.cdc.gov/concussion/sports/ (last updated July 22, 2012).
35. Id.
36. Id.
37. Id.
38. Id.
39. Lupkin, supra note 8.
40. Laskas, supra note 34.
41. Id.
42. See generally Barchenger et al., supra note 8; List of Recent Untimely Deaths for NFL Players, supra note 8; Associated Press, supra note 8; Lupkin, supra note 8.
43. List of Recent Untimely Deaths for NFL Players, supra note 8.
44. Barchenger et al., supra note 8.
died in 2012 at age sixty-two, shot themselves in the chest, similar to Seau, and were identified post-mortem as having CTE.\textsuperscript{45}

Each of these former NFL-players who committed suicide suffered from the side effects and exhibited the symptoms of CTE, perhaps explaining the changes in their behavior and attitude. Behaviors common in those diagnosed with CTE include “irritability, impulsivity, aggression, depression, short-term memory loss[,] and heightened suicidality that usually begins [eight to ten] years after experiencing repetitive [MTBIs].”\textsuperscript{46} As the disease progresses, the changes become more severe and include “dementia, gait and speech abnormalities[,] and Parkinsonism[,]” but when CTE is in its late stages, people often “mistake [the disease] for Alzheimer’s disease or frontotemporal dementia.”\textsuperscript{47}

The Center for the Study of Traumatic Encephalopathy at Boston University recently studied the brains and spinal cords of eighty-five different donors post-mortem for CTE and other neurodegenerative diseases like Alzheimer’s and Parkinson’s disease.\textsuperscript{48} In this study, out of the thirty-four sample members who played professional football (all who played in the NFL, except one who played in the Canadian Football League), only one sample member did not have CTE.\textsuperscript{49} Forty percent of these former players with CTE were linebackers; thus, suffering “repetitive head trauma occurring on every play—not concussions associated with violent collisions—may be the biggest risk.”\textsuperscript{50} Additionally, out of the fifty-one members with CTE and CTE-MND (motor neuron disease), seven committed suicide, while six others had “suicidal ideations” at one point or another in their lives.\textsuperscript{51}

Over the past eighty-five years, the information about CTE, including its symptoms and causes, progressed continuously; however, the NFL has not always been as quick to respond as one might expect.
B. The NFL’s Responses to the Medical Findings and CTE Diagnoses

One of the first times the NFL addressed concussions and traumatic brain injuries occurred when it, through then-Commissioner Paul Tagliabue, created the Mild Traumatic Brain Injury Committee (MTBI Committee) in 1994 to help guide research on MTBIs’ affect on NFL players.52 Dr. Elliot Pellman, a rheumatologist and associate team doctor for the New York Jets, was the original chair of the committee.53 While Pellman was the chair, the MTBI Committee published a thirteen-part study, which included findings that NFL players fully recover from concussions in one hour, and that NFL players heal quicker than other non-athletes heal with respect to post-concussion symptoms.54 Moreover, the MTBI Committee did not find any cases of CTE in the NFL players that it studied and the Committee concluded that concussions in the NFL did not lead to its players having long-term permanent debilitating effects, such as CTE.55 In 2007, Pellman resigned as chair of the MTBI Committee after receiving “strong criticism of his work and indications that he had exaggerated several aspects of his medical education.”56 Following Pellman’s resignation, Dr. Ira Casson and Dr. David Viano became the co-chairmen.57

When Omalu’s findings regarding Webster’s brain appeared in Neurosurgery in 2005, three scientists on the MTBI Committee wrote letters to the journal’s editor seeking to have the article retracted as they “disagree[d]” due to “[s]erious flaws.”58 During the summer of 2007, the NFL held a concussion summit in Chicago with Commissioner Roger Goodell, team doctors and athletic trainers, and scientific researchers;59 however, Goodell did not invite Omalu.60 At the summit,
Casson stated “[t]he only scientifically valid evidence of chronic encephalopathy in athletes is in boxers and some steeplechase jockeys. It’s never been scientifically validly documented in any other athletes.”

Following the summit, the NFL outlined various steps that the league took with respect to concussion management and it issued a pamphlet for players containing concussion symptoms. The pamphlet defined concussion as “More Than a ‘Ding’... caused by a hard hit to the head.” The pamphlet also stated that “research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is managed properly. It is important, however, to understand that there is no magic number how many concussions is too many.”

In October 2009 and January 2010, members of the House of Representatives met to discuss legal issues relating to football head injuries, where they ultimately criticized the NFL’s concussion policy. Co-Chairmen Casson and Viano resigned shortly afterwards, and the MTBI Committee became the NFL Head, Neck and Spine Medical Committee (HNS Committee). The NFL and the Center formed a partnership, where the NFL donated one million dollars to support the Center’s research. However, the chair of the HNS Committee stated that there was not enough data in the Center’s studies to assess the risk of playing football, likely because the studies were only performed on players who were significantly impaired prior to their deaths—not those who had repetitive brain trauma throughout their NFL careers.

Finally, in 2010, the NFL admitted that traumatic head injuries can cause short-and long-term problems and even permanent brain damage and other cognitive problems. The NFL released a poster to replace the previous pamphlet, displayed the poster throughout NFL

61. Mihoces, supra note 59.
63. Id.
64. Id.
67. Schwarz, supra note 56.
68. Alan Schwarz, Duerson’s Brain Trauma Diagnosed, N.Y. TIMES, May 2, 2011, at B11.
69. See Fainaru & Fainaru-Wada, supra note 50.
70. See Schwarz, supra note 29.
locker rooms, and passed out the poster in brochure form. The poster “warn[ed] players that repeated concussions ‘can change your life and your family’s life forever’” and addressed that some of the long-term effects of concussions include depression and dementia. Additionally, the NFL began to implement various safety measures and concussion assessments, and made small strides in making the game of football safer for its players by adopting rule changes. One of the NFL’s new rules requires players to leave the game and bars them from returning to play on the same day in which he sustained a concussion or showed any signs of a concussion. This new rule is a significant change to the NFL’s previous position on return to play. In the past, the NFL strongly maintained that players did not put their safety at risk if they returned to the game once their symptoms subsided, even if that happened in the same game as the injury. Even though the NFL has made some progress over the years, although not as much or as quickly as the researchers in the medical field, NFL players continue to get hit in the head during games and practices, suffer from brain injuries and cognitive decline in their later years of life, and die prematurely, sometimes from suicide.

III. Wrongful Death

Following the medical field’s great and continuous progress over the years in its research regarding the long-term debilitating effects of concussions, including describing and naming CTE, and the less-than-ideal responses from the NFL, many former NFL-players’ beneficiaries, including Seau’s and Duerson’s, sued the NFL alleging a variety of claims. Most of the claims were brought against the NFL, and alleged negligence, fraudulent concealment, fraud, and negligent misrepresentation. However, some of the complaints contained one additional cause of action: wrongful death.

Wrongful death is a state law action regulated by the individual states that “allow[s] people who have suffered losses as a result of

71. Id.
72. Id.
73. See Schwarz, supra note 66.
74. Id.
75. Id.
76. See generally In re Nat’l Football League Players’ Concussion Injury Litig., No. 2:12-md-02323-AB.
77. Id. at 49–72
78. Id. at 53.
another's tortuously caused death to recover damages," usually for the "loss of financial . . . support" that the deceased would have provided to the beneficiary if he were still alive. The beneficiary or a personal representative of a decedent may bring a wrongful death claim to recover damages from the decedent's wrongful death to help benefit the decedent's beneficiaries and compensate for their loss.

The decedent's spouse, children, or parents are the beneficiaries eligible to bring suit and recover under the law. For example, the complainants in the recent concussion litigation alleged that "[a]s a direct and proximate cause of the conduct alleged [in the complaint], the NFL caused the [deceased players] to develop the debilitating brain diseases . . . set forth above . . ."; thus, the beneficiaries "have been deprived of the earnings, maintenance, [and] guidance . . . that they would have received from the rest of the [deceased players'] natural lives . . . ."

Although wrongful death is a state law claim, most states' statutes are similar. Because the Amended Master Complaint in the recent concussion litigation was filed in Pennsylvania, this paper analyzes the wrongful death claim under Pennsylvania law.

### A. Elements of Wrongful Death

The first and most obvious element that must be present for a beneficiary to recover in a wrongful death action is that a person must have died. Second, the decedent's death must have been caused "by a wrongful act, negligent or unlawful violence[,] or [the] negligence of another." Third, the decedent could not have recovered the same damages that the plaintiffs seek in the wrongful death action. Lastly,
any previous actions arising from the same injuries must be consolidated into the wrongful death action. A plaintiff can meet three of the four elements easily, and they are not at issue in this paper; thus, the plaintiff-beneficiary will have the most trouble proving that the defendant “caused [the decedent’s death] by a wrongful act or negligent or unlawful violence or negligence . . . .” This means, the decedent’s death must have been “caused by violence or negligence of the defendant.”

B. Suicides

The main, and obvious, glaring issue is whether another person’s wrongful, negligent, or violent act can actually cause a person’s death when that person committed suicide. Generally, plaintiffs cannot recover in a wrongful death case when the decedent committed suicide because the “suicide constitutes an independent intervening act so extraordinary as not to have been reasonably foreseeable by the original tortfeasor.” However, there are a few limited exceptions to this rule under Pennsylvania law. One such exception, for when the “defendant [i]s not associated with a hospital or mental health institution,” requires a “clear showing of a duty to prevent the decedent’s suicide and a direct causal connection between the alleged negligence and the suicide.” Another exception allows the beneficiary to recover for the decedent’s suicide when the beneficiary brings the lawsuit under the worker’s compensation statute. This exception requires that the suicide be “caused by pain, depression[,] or despair resulting from a work-related injury so severe as to override rational judgment.”

Pennsylvania law may “preclude[] liability, absent a special duty, for suicide caused by negligent acts” but it may allow recovery when an intentional act is what caused someone else to commit suicide. This is because liability for intentional torts extends beyond what is foreseeable to the tortfeasor, which is not necessarily true for negli-
gence. Thus, to impose liability, the plaintiff needs to show that the defendant's intentional tort was a "substantial factor" in causing the decedent to commit suicide.

C. Negligence

Negligence is the first exception that allows a plaintiff to recover in a wrongful death action when the decedent committed suicide. To prove the defendant's negligence, the plaintiff-beneficiary must prove four elements: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty by not acting as required by the duty, and (3) the defendant's action or inaction caused (4) harm.

The plaintiff first needs to demonstrate that the defendant owed the decedent a duty, which may be difficult. Without successfully proving this first element, the remainder of the plaintiff's claim could fail automatically and because this paper deals with suicide, the defendant's requisite duty is even higher: the defendant must have a duty to "prevent the decedent's suicide . . . ." Next, there must be "a direct causal connection between the alleged negligence and the suicide." "Whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk[,] and the public interest in the proposed solution." The defendant can only owe a duty when his conduct "foreseeably creates an unreasonable risk of harm to others."

D. Intentional Torts

A plaintiff may still succeed on a wrongful death claim even if he cannot prove that the defendant owed a duty to the decedent to prevent his suicide because he may be able to show that the defendant committed an intentional tort and that it was a "substantial factor" in causing the decedent to commit suicide. Common intentional torts include assault and battery, intentional infliction of emotional distress,

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98. Id.
99. Id.
101. BEST & BARNES, supra note 80, at 89. In this situation, the defendant's act or inaction would have caused harm to the decedent, not the plaintiff.
103. Id.
106. Id.
and fraud.\textsuperscript{107} To recover for one of these harms, the plaintiff must prove that "the defendant intended to affect the [decedent] in some way that the law forbids."\textsuperscript{108} With respect to the NFL and player suicides, some variation of fraud is the most likely claim.\textsuperscript{109} Under Pennsylvania law, the plaintiff must prove "(1) a material factual misrepresentation; (2) made with knowledge or belief of its falsity; (3) with the intention that the other party rely thereon; (4) resulting in justifiable reliance to that party to his detriment.'"\textsuperscript{110}

\section*{E. Worker's Compensation}

If a plaintiff cannot show that the defendant's negligence or intentional tort was the direct cause of the decedent's suicide, the plaintiff can allege that a mental injury "stem[ming] from the decedent's function as an employee, not from outside circumstances" caused the decedent to commit suicide.\textsuperscript{111} The suicide must have been "caused by pain, depression[,] or despair resulting from a work-related injury so severe as to override rational judgment."\textsuperscript{112} To recover, the plaintiff must prove: "(1) [that] there was initially a work-related injury as defined by Section 301 of the Act; (2) which injury directly caused the employee to become dominated by a disturbance of the mind of such severity as to override normal rational judgment; and (3) which disturbance resulted in the employee's suicide."\textsuperscript{113} In this case, the NFL is not the employer of the players in the league. The Pennsylvania statute specifies that "[e]very employer shall be liable . . . ,"\textsuperscript{114} which does not include the NFL, but rather, each of the teams.

\section*{F. Damages}

Under the Pennsylvania Wrongful Death Act, if the plaintiff-beneficiary succeeds in proving that the decedent's death was wrongful under the Act in one way or another, then the defendant could be

\begin{footnotesize}
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\item \textsuperscript{107} \emph{Best \& Barnes}, supra note 80, at 15.
\item \textsuperscript{108} \emph{Id}.
\item \textsuperscript{109} \textit{See In re Nat'l Football League Players' Concussion Injury Litig.}, No. 2:12-md-02323-AB, ¶¶ 276, 295 (alleging fraudulent concealment and fraud in that the NFL knowingly and fraudulently concealed the risks of head injuries and returning to play too soon after suffering head trauma).
\item \textsuperscript{110} Smith v. The Equitable, 27 F. Supp. 2d 565, 568 (E.D. Pa. 1998) (quoting Agathos v. Starlite Motel, 60 F.3d 143, 147 (3d Cir. 1995)).
\item \textsuperscript{113} \emph{Id.} at 884–85.
\item \textsuperscript{114} 477 PA. CONS. STAT. § 431 (2012).
\end{itemize}
\end{footnotesize}
liable for various damages. A court could award damages equal to "the value of the services the [decedent] would have rendered to his family if he had lived." In addition to any pecuniary damages recoverable for the plaintiff-beneficiary's loss, the plaintiff-beneficiary can recover "damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death."

Ultimately, to prove a wrongful death claim for a decedent's suicide successfully, the plaintiff must show that the defendant "caused [the decedent to commit suicide] by a wrongful act or negligent or unlawful violence or negligence of another . . . ." The plaintiff can prove this by demonstrating the defendant was negligent, committed an intentional tort that was a substantial factor in the decedent committing suicide, or possibly through a worker's compensation claim if the decedent committed suicide based on a mental injury caused from a work-related injury.

IV. THE NFL'S POTENTIAL LIABILITY

Because the NFL settled with the plaintiffs in the recent concussion litigation, a jury never had the opportunity to decide whether the NFL could be liable for wrongful death with respect to the facts alleged in the Amended Master Complaint. There was never a trial and the NFL did not need to release information as to what it knew regarding the medical studies. This paper analyzes whether the NFL could be liable for the various wrongful death claims brought against it by the former players' beneficiaries, and Dave Duerson if the parties did not settle. Because this paper focuses on Duerson and the other former NFL players who committed suicide, its analysis and conclusion regarding potential NFL liability for wrongful death may be different than potential liability for NFL players who sustained concussions, were later diagnosed with CTE, and/or died of other "natural" causes.

115. 42 PA. CONS. STAT. § 8301(b) (2012).
117. § 8301(c).
Duerson’s estate could succeed in proving that the NFL wrongfully caused his death, even though Duerson committed suicide; however, it will not be a slam-dunk case. To be successful, the estate needs to show that the NFL’s “wrongful act or negligent or unlawful violence or negligence”\(^\text{122}\) caused Duerson’s death because the NFL failed to do what it should have done: keep him safe while he played football, and provide him with medical and safety information.\(^\text{123}\) Duerson’s estate alleged that the NFL failed to educate Duerson about concussions, failed to warn him of the long-term effects of suffering from and playing through the symptoms of head trauma and concussions, and failed to implement measures and protocols to assess concussions and minimize the risks of repetitive head trauma and brain injuries.\(^\text{124}\)

Duerson’s estate attempted to demonstrate a causal link between the NFL’s actions and Duerson’s death. First, it alleged that the NFL failed to “prevent, diagnose, [and] properly treat” Duerson’s concussions and that the NFL failed to warn him that playing while having symptoms of a concussion would cause permanent brain damage when the NFL “knew, or should have known the harmful effects of poorly managed concussions” based on various medical studies and reports.\(^\text{125}\) Second, it alleged that the continual brain trauma and concussions, including playing with symptoms of concussions, caused Duerson to develop CTE.\(^\text{126}\) Third, it alleged that CTE caused, or at least contributed in some way to, Duerson’s death;\(^\text{127}\) and lastly, it alleged that if the NFL would have properly treated Duerson’s concussions and warned him of the negative and long-term effects of concussions and other brain injuries, Duerson would not have suffered the continuous and permanent brain damage that, at the very least, contributed to his death.\(^\text{128}\)

The connection seems obvious, but the fact that Duerson committed suicide and did not die from the natural side effects or causes of having CTE makes the analysis less straightforward. To prove the NFL acted wrongfully regarding Duerson’s death, his estate needs to

\(^{122}\) 42 P.A. CONS. STAT. § 8301(a) (2012).
\(^{124}\) See id.
\(^{125}\) Duerson, No. 2012L002043, at 3.
\(^{126}\) Id. at 4.
\(^{127}\) Id.
\(^{128}\) Id. at 5.
prove that an exception exists because committing suicide generally bars recovery for wrongful death.129

1. Negligence

The first exception requires Duerson’s estate to prove that the NFL negligently caused Duerson’s death, which entails first, a “clear showing of a duty to prevent [Duerson’s] suicide . . . ,” and second, a “direct causal connection between the [NFL’s] negligence and [his] suicide.”130 Duerson’s estate alleged that “[t]he NFL had a duty to Dave Duerson and all NFL players to keep them reasonably safe during their NFL careers and to provide Dave Duerson with the most up-to-date medical information on all issues, including brain trauma.”131 Assuming that the NFL had the duty alleged in the complaint to keep players “reasonably safe during their NFL careers,” that duty is not the same as a duty to prevent Duerson, or any other player, from committing suicide. Furthermore, even if the NFL had a duty to prevent its players from committing suicide, Duerson did not commit suicide during his career in the NFL, it was years later. Thus, the NFL did not owe Duerson the duty alleged in the complaint.

In the end, whether the NFL owed Duerson a duty to protect him from suicide is a question of fairness.132 A court could find that the NFL actually owes its players a duty to keep them reasonably safe during their careers, but then conclude that holding the NFL to a higher duty is unfair. However, it is also possible that the NFL’s conduct in not taking the medical studies seriously, not imposing concussion assessment protocols sooner, and not educating its players on the risks of concussions “foreseeably create[d] an unreasonable risk of harm to others,”133 which could impose a higher duty, to prevent suicide. Although researchers found signs of CTE as early as 1928 in boxers134 and recommended that football players leave the game after sustaining three concussions in 1952,135 CTE did not really come to light until Mike Webster’s death in 2002.136 Because Duerson played in the NFL from 1983 until 1993, the effects of concussions were not as well known at that time. Thus, this exception likely does not work

130. Id.
133. Campo, 655 A.2d at 24.
134. See generally McKee et al., supra note 27.
135. Thorndike, supra note 31.
136. See Laskas, supra note 34.
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for Duerson’s estate as it is not fair to the NFL to impose such a strong duty.137

2. Intentional Torts

The next exception available to Duerson’s estate is to show that the NFL’s alleged fraud, an intentional tort, caused Duerson to commit suicide. To recover using this exception, the NFL’s fraud must have been a substantial factor in Duerson’s suicide.138 Duerson’s estate alleged that the NFL, and its MTBI Committee “embarked upon a propaganda scheme designed to mislead NFL players and retirees regarding the long-term ramifications of concussions” and other brain trauma.139 The estate further suggested that the NFL “repeatedly misinformed its retirees that there exists ‘no evidence of worsening injury or chronic cumulative effects’ from multiple concussions.”140 Lastly, Duerson’s estate alleged that the NFL repeatedly denied any connection between hits to the head on the field and long-term brain damage.141

Under Pennsylvania law, Duerson’s estate must prove four elements.142 Duerson’s estate may have proven the first element, a material factual misrepresentation,143 by showing that the NFL continually denied a link between the brain trauma and hits to the head during a player’s career, and the long-term debilitating brain damage that players suffer following their time in the league.144 Second, the NFL must have made the misrepresentation knowing or believing that it was false.145 It is possible that the NFL knew the statements were false as there were numerous medical reports concluding the contrary. Moreover, the NFL likely knew that its “former NFL players exhibit[ed] mood disorder (mainly depression), memory loss, paranoia, poor insight/judgment” and other behaviors caused by hits to the head, which made those players “prone to suicide or other tragic death.”146 Duerson’s estate may have proven the second element, the NFL’s fraudulent intent, by showing that the NFL knew or should have known the statements were false.147

137. However, the chances of recovery are better for the players who played in the league from 2002 on, when researchers continued to find CTE in NFL players and the NFL was slow to implement any changes. Furthermore, the potential recovery for players in the concussion litigation who did not commit suicide is greater, as it is more likely that the NFL had a duty to keep them reasonably safe than to prevent suicide.
140. Id.
141. Id.
143. See id.
son’s estate may be able to show that the NFL made the statements hoping that players, including Duerson, would rely on the idea that returning to play the same day after receiving a concussion or that there is no magic number for how many concussions is too many. The NFL may have intended the players to rely on these types of statements so that they would return to the game sooner; after all, the NFL needs players on the field to have a football game and to make money. It is very likely that Duerson, and other players, relied on the NFL’s statements regarding concussion management because they had no reason not to believe the NFL. The players likely believed they could return to play whenever the NFL said they could, causing them to sustain unnecessary repetitive hits to the head with little recovery time, which eventually lead to brain trauma, CTE, and ultimately death in several cases, including Duerson’s.

Using fraud to prove that the NFL wrongfully caused Duerson’s death is a plausible option, especially because a court could find that the NFL’s fraudulent concealment was a substantial factor that contributed to Duerson’s suicide. Again, the problem for Duerson’s estate will be to show when the NFL made the statements and took action with respect to the time that Duerson played in the NFL.

3. Worker’s Compensation

If Duerson’s estate does not succeed in proving negligence or fraud, it can attempt to prove that Duerson had a mental injury “stemm[ing] from [his] function as an employee, not from outside circumstances[,]” which caused him to commit suicide due to “pain, depression[,] or despair resulting from a work-related injury . . . .” Pennsylvania’s worker’s compensation statute states that employers are liable in this situation, and in Duerson’s (and the other NFL players’) case, the NFL is not the employer, the individual team is. Thus, although Duerson’s estate can likely prove that Duerson’s injury was work-related (he sustained concussions and hits to the head while playing football, which lead to CTE); the injury caused him “to become dominated by a disturbance of the mind . . . as to override normal rational judgment” (he was distraught, lost control of his impulses, and was troubled by the thought that something was going on his brain); and that all of the disturbances combined caused his

149. Id. at 884–85.
suicide (the progressive CTE caused his brain to deteriorate and led to depression and a heightened suicidality, which actually led to suicide), the NFL would likely escape liability as it was not Duerson’s employer.

This claim would be more successful if Duerson’s estate were to bring it against the Chicago Bears, the team Duerson played for during one-hundred regular season games. Bears management, coaches, and trainers, were the people documenting Duerson’s hits and concussions and making the decision about when he could return to play. The problem with suing the Bears for Duerson’s wrongful death is that the Bears coaches and/or management were not the ones directly promulgating the information about concussions, the NFL did that.

Although using worker’s compensation to prove that a wrongful act caused Duerson’s suicide makes the most sense, it may be the least likely to succeed if Duerson’s estate brings the claim against the NFL. Duerson’s estate may also have a difficult time showing the NFL owed Duerson a duty to prevent him from committing suicide, but it may be able to prove the NFL’s fraud substantially contributed to Duerson’s death.

B. Possible Defenses for the NFL

If Duerson’s estate can use one of the three exceptions to prove that the NFL’s wrongful actions or inactions caused his suicide, the NFL may be able to assert one of two defenses available in wrongful death actions. The first is the statute of limitations, which generally requires a plaintiff to bring a wrongful death claim “within two years ‘from the time the cause of action accrued.’” Pennsylvania’s discovery rule “tolls the statute of limitations where a plaintiff does not ‘know that he has a cause of action, or that [the decedent] has suffered an injury due to another party’s wrongful conduct.’” Pennsylvania case law further explains that in a wrongful death action, the plaintiff must commence the lawsuit “no later than two years after the date of the death . . . .” In Duerson’s case, it is nearly impossible to pinpoint when Duerson’s injury occurred as he sustained hits to the head throughout his entire football career, likely having a cumulative

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153. Id. at 1142.
effect. Death was Duerson’s “injury” under the statute, and the statute of limitations began to run when Duerson committed suicide on February 17, 2011.\textsuperscript{154} His estate filed its complaint on February 23, 2012, which is within the statute of limitations.\textsuperscript{155} Thus, the NFL cannot use the statute of limitations as a defense.

The NFL’s second available defense is comparative negligence, which replaced contributory negligence in Pennsylvania in the 1970s.\textsuperscript{156} Comparative negligence “reduce[s] wrongful death award[s] in the event [that the plaintiff] was . . . negligent”\textsuperscript{157} and “allocate[s] the responsibility for monetary damages in accordance with the comparative degrees of [the plaintiff’s and the defendant’s] negligence . . . .”\textsuperscript{158} Thus, if a court finds that the NFL was negligent in causing Duerson’s death, the amount of damages the court awards to Duerson’s estate could decrease if the court also finds that Duerson was negligent. For example, Duerson may have been negligent in not fully explaining his symptoms to trainers or coaches after being hit on the field or if he chose to go back in the game while still having concussion-like symptoms.

Even though the statute of limitations does not bar Duerson’s estate from bringing a wrongful death action, one of the largest hurdles for the estate to get over is proving when the NFL knew information regarding concussions and CTE, what information the NFL knew, and when the NFL responded. This could prove to be a problem because the timing has to correspond with the eleven seasons that Duerson played in the NFL.

V. CONCLUSION

A wrongful death action is the best theory that the beneficiaries of deceased NFL players who committed suicide can use in an attempt to recover for the loss of their loved one. There are several ways one can prove that a defendant was wrongful and negligence is only one of them. Thus, if the plaintiff-beneficiary fails in showing that the NFL owed its players a strong, direct duty to protect them from committing suicide, there are still other avenues available for the plaintiff-beneficiary to prove that the NFL’s wrongful act caused the former player’s death.

\textsuperscript{154} See Duerson, No. 2012L002043, at 1.
\textsuperscript{155} Id.
Although it remains unclear whether a court would hold the NFL liable in a wrongful death action, the potential success of this type of lawsuit will increase if the league does not use all of the information it has now and proactively work to prevent brain trauma in its current and future players.\footnote{159} Just a short time ago, CTE could only be detected post-mortem in NFL players; however, in February 2013, the University of California, Los Angeles released results of a study indicating that researchers detected CTE in the brains of five former NFL players who are still alive.\footnote{160} Although this study is preliminary, it suggests that science and medicine continue to make strides in the detection of CTE and will continue to do so in the future. Assuming the NFL is aware of this study and the possibility of detecting CTE in its early stages, a court could consider it “wrongful” for the NFL not to test players in this way in the future. This may impose a duty on the NFL to test and keep players from participating if they show signs of CTE or other neurological disorders.

The NFL ultimately needs to find a way to protect the safety of its players better and more efficiently, or lives will continue to be lost prematurely due to health problems and suicides. As of June 1, 2013, the concussion litigation involved over 4800 different player-plaintiffs, and the number is increased if their spouses and family members are included.\footnote{161} Although not all of these plaintiffs committed suicide or brought wrongful death actions against the NFL, if the NFL has to continually settle with players to stay out of court, the large cost could have a serious impact on the league. To preserve the game of football and the league itself, the NFL may eventually need to answer to the concussion litigation. Perhaps more importantly, the NFL needs to continue working toward making the game safer to prevent the suicides of former players based on the lasting effects of concussions sustained while playing football.


