

**PRO FOOTBALL**

# Is the N.F.L.'s Concussion Settlement Broken?

Sports Business

By JOE NOCERA OCT. 7, 2016

The neuroscientist Robert Stern gave a keynote address at a scientific conference in Boston recently. He is the director of clinical research at Boston University's Chronic Traumatic Encephalopathy Center, which has been at the forefront of the research linking C.T.E. — a disease characterized by mood swings, uncontrolled anger, depression, suicidal tendencies and eventually dementia — to repeated head trauma. A focus of the center's research has been on professional football players.

So far, C.T.E. can be diagnosed only after someone has died; the brain needs to be cut open so that researchers can look for the accumulation of tau proteins, which signal the presence of the disease. According to its most recent count, Stern's group has examined 94 brains of recently deceased N.F.L. players and found 90 cases of C.T.E.

In his keynote, however, Stern unveiled some results — “very preliminary,” he cautioned when we spoke the other day — that suggested he and his collaborators were making “exciting” progress toward finding a way to diagnose C.T.E. in living patients.

“I really do foresee being able to diagnose C.T.E. pretty accurately while people are alive sometime in the next five to 10 years,” he said. “Hopefully, even earlier.”

On the same day that Stern gave his talk, Deepak Gupta, an appellate lawyer based in Washington, filed a petition asking the United States Supreme Court to hear an appeal by a handful of former N.F.L. players. They are contesting a class-action settlement designed to put an end to the litigation between retired players and the N.F.L. over whether the league hid the dangers of concussions from them.

(After years of resisting, the N.F.L. now concedes that there is a connection between head trauma and C.T.E., but it says the connection is not yet fully understood.)

The former players who object to the settlement say it does not adequately cover medical improvements that make it easier to diagnose cognitive disorders related to repeated head hits.

On one side are the hundreds of retired players currently suffering from obvious brain damage; they stand to receive as much as \$5 million each under the terms of the settlement. There are also families of deceased former players who are in line to receive compensation once the objectors stop trying to force changes to the settlement — efforts that have failed at both the district court and appeals court levels.

On the other side are former football players who do not yet evince signs of having C.T.E. — but may someday. The objectors are from this group. They feel that the settlement helps players who are currently showing symptoms at the expense of those who will show symptoms later.

Cy Smith, a lawyer whose clients originally fought the settlement, told me they had decided not to join with those appealing to the Supreme Court. “It’s caused a lot of stress and aggravation among my clients,” he said. “It was driving a wedge between people.”

He added darkly, “That is the N.F.L.’s tactic here.”

One certainly should have some sympathy for the former players and their families who are waiting for money they badly need now. It has been a year and a half since Anita B. Brody, a United States District Court judge, approved the settlement. (One should also note that the chances of the Supreme Court's taking the case are slim.)

But that doesn't mean Gupta and his band of holdouts don't have a point. The settlement is, in fact, deeply flawed. It compensates some of the families of deceased players who had C.T.E., while others get nothing. It pays out to former football players who have symptoms of Alzheimer's and Parkinson's — common brain diseases that are not necessarily related to C.T.E. And most of all, it fails to account for that possibility Stern raised in his Boston speech: that we might soon be able to diagnose C.T.E. while those with it are still alive.

In fact, even though the settlement is supposed to be about C.T.E., a C.T.E. diagnosis will not have any effect on whether a player receives money down the line. "It's like a cigarette settlement that doesn't provide for lung cancer," Smith said.

The first problematic aspect of the settlement was the way it was put together. As is often the case when litigation starts to explode, a certain genre of high-profile class-action lawyer steps in, pushes aside the lawyers who have been suing on behalf of individual clients, and takes control of the cases, hoping to create a large class that will bring huge fees. (The lawyers in the C.T.E. case are in line to get at least \$112 million from the N.F.L.)

Led by Christopher Seeger, a smooth-talking lawyer who made his bones suing the pharmaceutical industry — his highest profile case involved Vioxx — the class-action lawyers quickly began negotiations with the N.F.L. It is quite possible that the N.F.L. could have gotten the case tossed, but it wanted this class action so it could reach a "global settlement" with the plaintiffs — meaning most of the C.T.E. lawsuits would go away forever. The class-action lawyers, meanwhile, fearing the league's legal position, decided to negotiate without ever taking on the N.F.L. in a legal battle. The class was created not to litigate but to settle.

The second issue was that the science surrounding C.T.E. was still new. Though the disease had existed for decades ("punch-drunk" former boxers were almost

certainly afflicted with C.T.E.), it began to be recognized only in the mid-2000s, after the death of the former Pittsburgh Steelers great Mike Webster. Because C.T.E. couldn't be diagnosed in living people, the N.F.L. and the lawyers concluded that they would compensate injured players based solely on a series of symptoms that ranged from dementia to Alzheimer's to A.L.S.

But while the loss of memory and cognitive skills that characterizes dementia is certainly one consequence of C.T.E. — as it is for a number of other brain diseases — Alzheimer's, for instance, has never been shown to be a product of head trauma.

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Stern declined to comment on the settlement. But when I asked him about the connection between Alzheimer's and C.T.E., he said, "There is no convincing evidence that former football players who have received multiple hits to the head are at greater risk than anyone else for developing Alzheimer's disease" — which, he added, affects more than a third of the population over age 85. It's nice that former football players with Alzheimer's will get some money from the N.F.L., but it may have nothing to do with whether they developed C.T.E. during their playing days.

(An even odder consequence is that while the families of players who died with C.T.E. before April 22, 2015, when the settlement was approved, will receive \$4 million, families of players who died with C.T.E. after that date — including Ken Stabler, Fred McNeill and Adrian Robinson Jr., who committed suicide at age 25 —

get nothing. The N.F.L. claims that this is because the settlement is geared to help former players who are still alive and struggling with brain damage.)

It's easy to understand why the N.F.L. resisted agreeing to compensate for symptoms of C.T.E. like mood swings, anger and depression. Mood swings and anger are pretty nebulous conditions, hard to pin down scientifically.

But that's where Stern's research comes in. If we are, in fact, going to have the ability to diagnose the disease in living football players within the next decade, shouldn't the N.F.L. and the plaintiffs' lawyers want to use that diagnostic tool, whatever it turns out to be, to figure out who does and does not have C.T.E.? And wouldn't they want to compensate football players who could show they had the actual disease that even the league acknowledges is related to head trauma?

Yet there is nothing in the settlement that offers that possibility. Twenty years from now — assuming Stern and others have succeeded in creating an accurate C.T.E. test — players with the diagnosis who exhibit the classic C.T.E. symptoms of anger, suicidal tendencies and so on will still get nothing from the settlement because they'll have the “wrong” symptoms. Only when they get Alzheimer's, which has nothing to do with football, will they be eligible for compensation.

I've listened to Seeger and others talk about how this was the best deal the players could have gotten, given the state of the science, the possibility of having the case thrown out of court, the lines in the sand the N.F.L. drew and so on. That's all well and good.

But if you're going to settle lawsuits that are about a disease called C.T.E., wouldn't you insist that the settlement have something to do with, well, C.T.E.? This one does not.

***Correction: October 7, 2016***

An earlier version of this article incorrectly described the relationship between A.L.S. and head trauma. There have, in fact, been links shown between the disease and repeated hits to the head. And because of an editing error, the article incorrectly described the relationship between Alzheimer's disease and head trauma. The disease has never been shown to be a product of head trauma.

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