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# A CHALLENGE AGAINST FORMER NFL PLAYERS' FUTURE LAWSUITS AGAINST THE NFL AND THEIR FORMER TEAMS: NEW SCIENTIFIC INFORMATION AND ASSUMPTION OF RISK

## ABSTRACT

*The National Football League (NFL) is a staple of U.S. culture. Millions of Americans plan their Sundays around watching professional football games. The NFL generates billions of dollars annually from its position as the most popular professional sports league in the United States. For years the NFL sold its fan base on massive hits between players and encouraged violent collisions on the field. As a result, player safety often took a back seat to entertainment.*

*Eventually many former NFL players began to experience major mental health problems later in life due to the massive collisions they experienced when they played in the NFL. Many former players ended up taking their own life as a result. Former players, or the families of deceased former players, finally began suing the NFL as a result of their development of mental health problems, claiming the NFL's lack of concern for player safety proximately caused their injuries. In 2016, the NFL entered into a massive settlement with a class of former players who suffered serious medical conditions associated with repeated head trauma. Other former NFL players and their families continue to bring suits against the NFL. Until recently there were not many defenses available to the NFL in defending against these suits.*

*This Note proposes the NFL should no longer be held liable for future players' mental health problems. As a result of recent medical studies concluding NFL players are nearly certain to suffer from mental health problems during their lifetime, the tort doctrine of assumption of risk should apply to negate or, alternatively, severely limit the NFL's liability in future lawsuits brought by current players after they quit playing.*

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## I. INTRODUCTION

Bennet Omalu had no idea what he was about to encounter when he walked into work one morning in 2002.<sup>1</sup> Dr. Omalu's assignment for the day was to perform an autopsy on Mike Webster, a former professional football player for the Pittsburgh Steelers.<sup>2</sup> Dr. Omalu had heard of boxers suffering brain damage as a result of repeated head trauma and wondered if the same damage could occur in a football player's brain from repeated hits to the head.<sup>3</sup> Upon initial examination of Webster's brain, Dr. Omalu did not notice anything abnormal.<sup>4</sup> After further review, Dr. Omalu discovered that

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1. Jeanne Marie Laskas, *Bennet Omalu, Concussions, and the NFL: How One Doctor Changed Football Forever*, GQ (Sept. 14, 2009), <https://www.gq.com/story/nfl-players-brain-dementia-study-memory-concussions> [hereinafter Laskas, *Bennet Omalu*].

2. *Id.*

3. Jeanne Marie Laskas, *The Brain that Sparked the NFL's Concussion Crisis*, ATLANTIC (Dec. 2, 2015), <https://www.theatlantic.com/health/archive/2015/12/the-nfl-players-brain-that-changed-the-history-of-the-concussion/417597/>.

4. Laskas, *Bennet Omalu*, *supra* note 1.

although the brain did not look battered on gross examination, upon microscopic review, large accumulations of abnormal tau proteins<sup>5</sup> were present in Mike Webster's brain.<sup>6</sup> Dr. Omalu published an article explaining his findings in a peer-reviewed journal, assuming the National Football League (NFL) doctors would be pleased.<sup>7</sup>

The backlash against Dr. Omalu from the NFL was swift and has been chronicled in the 2015 film *Concussion*.<sup>8</sup> Dr. Omalu's struggle with the NFL foreshadowed what was to come for the league—numerous legal battles over former players' head injuries.<sup>9</sup>

This Note uses two specific lawsuits—one brought by the daughter of deceased New England Patriot's tight end Aaron Hernandez and one brought by the children of deceased NFL Hall of Famer Junior Seau—as examples of former NFL players' lawsuits against the NFL. In light of these two cases, this Note argues that due to the findings of recent medical studies regarding the likelihood of NFL players developing Chronic Traumatic Encephalopathy (CTE) later in life, current NFL players should not be able to recover in future lawsuits against the NFL based on negligence claims. This Note further argues that current players have assumed the risk of head injuries and future brain-related diseases suffered from playing in the NFL. Part II of this Note gives an overview of CTE and discusses studies of NFL brains. Part III provides an overview of head-injury litigation against the NFL and provides details into the Aaron Hernandez and Junior Seau suits specifically. Part IV discusses the assumption of risk doctrine and specific negligence lawsuits involving sports injuries. Finally, Part V explains why the

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5. *Id.* Tau proteins are proteins that bind and regulate the assembly and stability of neuronal microtubules. *Tau*, MERRIAM-WEBSTER, INC., <https://www.merriam-webster.com/dictionary/tau#medicalDictionary> (last visited Jan. 15, 2018). Tau proteins can become tangled and cause neurodegenerative disorders. S. Gammon, *How Protein Tangles Accumulate in the Brain and Cause Neurological Disorders*, SANFORD BURNHAM PREBYS (Sept. 2, 2015), <https://www.sbpdiscovery.org/news/beaker-blog/how-protein-tangles-accumulate-brain-and-cause-neurological-disorders> (discussing how tau aggregates, called tangles, are toxic and progressively deteriorate the central nervous system).

6. Laskas, *Bennet Omalu*, *supra* note 1.

7. *Id.*; Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player: Part II*, 59 *NEUROSURGERY* 1086, 1086 (2006).

8. *Concussion*, IMDB, <http://www.imdb.com/title/tt3322364/> (last visited Dec. 27, 2018).

9. *Id.*; *see also* Laskas, *Bennet Omalu*, *supra* note 1.

assumption of risk doctrine should apply to future head-injury lawsuits against the NFL, precluding or severely limiting recovery.

## II. AN OVERVIEW OF CHRONIC TRAUMATIC ENCEPHALOPATHY AND STUDIES OF NFL BRAINS

For decades, it has been widely accepted that boxers who have taken countless blows to the head are likely to suffer from dementia pugilistica.<sup>10</sup> Otherwise known as “punch-drunk syndrome,” boxers who suffer from the disease commonly suffer tremors, slowed movement, speech problems, and confusion.<sup>11</sup> When he first examined Mike Webster’s brain, Dr. Omalu thought Webster was suffering from dementia pugilistica.<sup>12</sup> What he actually discovered was a completely new disease—one he termed Chronic Traumatic Encephalopathy (CTE).<sup>13</sup>

### A. *What Is Chronic Traumatic Encephalopathy?*

CTE is a progressive degenerative disease of the brain found in people with a history of repetitive brain trauma—often athletes—including symptomatic concussions as well as “asymptomatic subconcussive hits to the head that do not cause symptoms.”<sup>14</sup> As the Boston University Research CTE Center explains, “The repeated brain trauma triggers progressive degeneration of the brain tissue including the build-up of an abnormal protein called tau.”<sup>15</sup> The tau proteins arrange themselves in the brain in a unique, tangled yarnlike pattern.<sup>16</sup> The tau kills cells in multiple areas of the brain, including the amygdala, which is often seriously affected.<sup>17</sup> The amygdala “is important in emotional control, aggression, and anxiety.”<sup>18</sup>

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10. *Dementia Pugilistica*, BRAIN INJ. RES. INST., <http://www.protectthebrain.org/Brain-Injury-Research/Dementia-Pugilistica.aspx> (last visited Dec. 15, 2018).

11. *Id.*

12. Laskas, *Bennet Omalu*, *supra* note 1.

13. *Id.*

14. *Frequently Asked Questions About CTE*, B.U. RES.: CTE CTR., <https://www.bu.edu/cte/about/frequently-asked-questions/> (last visited Sept. 29, 2017).

15. *Id.*

16. BrainLine.org, *What Is Tau and Its Role in Chronic Traumatic Encephalopathy?*, YOUTUBE (Jan. 6, 2011), <https://www.youtube.com/watch?v=x5Y5LSvB3d8>.

17. Joe Ward, Josh Williams & Sam Manchester, *110 N.F.L. Brains*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/interactive/2017/07/25/sports/football/nfl-cte.html>.

18. *Id.*

Additional symptoms which accompany the brain degeneration caused by the tau proteins include “memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, suicidality, parkinsonism, and eventually progressive dementia.”<sup>19</sup>

### B. NFL Acknowledgement of CTE

In 2014, the NFL acknowledged it expected nearly one-third of retired NFL players to develop long-term cognitive problems.<sup>20</sup> The NFL based this conclusion on data they received from actuaries hired by the league.<sup>21</sup> The data concluded the prevalence rates of developing long-term cognitive problems, such as CTE, “are materially higher than those expected in the general population.”<sup>22</sup> Since acknowledging the risk of head injuries, the NFL has taken many steps to make the game safer.<sup>23</sup> For example, the NFL implemented a rule in 2013 penalizing players for striking opponents with the crown of their helmets when outside the tackle box.<sup>24</sup> Additionally, the NFL has continually taken steps to extend protection to “defenseless players” to reduce the risk of extremely dangerous hits to a player who cannot protect himself.<sup>25</sup> Such protections are now at the center of the NFL

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19. *Frequently Asked Questions About CTE*, *supra* note 14.

20. Ken Belson, *Brain Trauma to Affect One in Three Players, N.F.L. Agrees*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/sports/football/actuarial-reports-in-nfl-concussion-deal-are-released.html>.

21. *Id.*

22. *Id.* (quoting the report prepared by the Segal Group).

23. Lorenzo Reyes, *NFL Reports Reduction in Concussions, New Measures to Protect Players*, USA TODAY (Aug. 5, 2015), <https://www.usatoday.com/story/sports/nfl/2015/08/05/concussions-reduced-rule-changes-defenseless-injured-players/31189031/>.

24. *NFL Health and Safety Related Rules Changes Since 2002*, PLAY SMART PLAY SAFE (Oct. 18, 2017), <https://www.playsmartplaysafe.com/newsroom/videos/goal-changing-rule-make-game-safer-fair/>. The tackle box in football is the portion of the field marked by the offensive team’s offensive line, and tackles are individual offensive linemen who, ironically enough, are not allowed to tackle defenders. Bobby R. Goldsmith, *Football Rules for the Tacklebox Dimensions*, HOUS. CHRON., <https://livehealthy.chron.com/football-rules-tackle-box-dimensions-2944.html> (last visited Dec. 28, 2018).

25. *NFL Health and Safety Related Rules Changes Since 2002*, *supra* note 24.

game, as indicated by the sweeping rule changes to kickoffs and the use of the helmet in initiating contact beginning with the 2018 season.<sup>26</sup>

Along with implementing rule changes to protect players, the NFL has increased their player education regarding head injuries.<sup>27</sup> For example, in 2013, USA Football—with support from the NFL—began the Heads Up Football program, which was funded via a \$45 million grant from the NFL Foundation.<sup>28</sup> The outreach program strives to improve player safety for youth and high school players by training and certifying coaches to teach safety fundamentals such as proper tackling techniques.<sup>29</sup> Furthermore, the NFL Player's Association sends out information regarding concussions and emphasizes to players how important it is for them to recognize and report head injuries.<sup>30</sup>

### C. New CTE Study

In July 2017, a new study revealed troubling information regarding NFL players and their likelihood of having CTE following their playing careers.<sup>31</sup> The study, performed by neuropathologist Dr. Ann McKee, examined the brains of 202 deceased football players, of which 111 were former NFL players.<sup>32</sup> The other brains were from high school players, college players, semiprofessional players, and players from the Canadian

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26. *2018 Rules Changes and Points of Emphasis*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/the-rules/2018-rules-changes-and-points-of-emphasis/> (last visited Dec. 15, 2018) (discussing the new 2018 kickoff rules, which drastically changed the rules surrounding the kickoff). Players on the kicking team can no longer get running starts, and receiving teams can no longer form and use a “wedge block.” *Id.* Additionally, the most significant change in the NFL rules for 2018 relates to the use of the helmet. *Id.* A 15-yard penalty now applies if a player lowers his helmet to initiate contact with any other player. *Id.* As explained by the NFL Competition Committee, the main purpose of the rule change was to reduce risk and prevent injury. *Id.*

27. *New Concussion Training for NFL Players Ahead of This Week's Season Opener*, NFL PLAYERS ASS'N (Sept. 10, 2016), <https://www.nflpa.com/New-Concussion-Training-for-NFL-Players> [hereinafter *New Concussion Training*].

28. *USA Football's Heads Up Football Program*, PLAY SMART PLAY SAFE, <https://www.playsmartplaysafe.com/resource/usa-footballs-heads-football-program/> (last visited Nov. 18, 2017).

29. *Id.*

30. *New Concussion Training*, *supra* note 27.

31. Ward, Williams & Manchester, *supra* note 17.

32. *Id.*

Football League.<sup>33</sup> The brains were from players as young as 23 and as old as 89 and were made up of players who played every football position.<sup>34</sup> The results were stunning.<sup>35</sup>

Of the 111 former NFL players' brains evaluated, 110 brains, or 99 percent, were diagnosed with CTE.<sup>36</sup> Following publication of the test results, Dr. McKee proclaimed, "It is no longer debatable whether or not there is a problem in football—there is a problem."<sup>37</sup> While the results of Dr. McKee's study, as well as her comments, appear troubling on their face for the NFL in its defense of lawsuits alleging its negligence in protecting players from head trauma, the test results can actually be used to the NFL's benefit in defending against the negligence claims.<sup>38</sup>

### III. HEAD-INJURY LITIGATION AGAINST THE NFL

#### A. NFL Concussion Settlement

The list of former NFL players suffering from CTE is extensive.<sup>39</sup> Because of the list of players discovered to have CTE after their death, the NFL has faced many lawsuits.<sup>40</sup> The lawsuits claimed the NFL was negligent by not taking actions to protect players from the chronic risks of head injuries in football.<sup>41</sup> The NFL agreed to a settlement of the class action lawsuit against them, which applied to former NFL players who retired on or before July 7, 2014, and who suffered serious medical conditions associated with repeated head trauma, as well as to the family members of

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33. Jesse Mez et al., *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 JAMA 360, 363 tbl.1 (2017), <https://jamanetwork.com/journals/jama/fullarticle/2645104>.

34. Ward, Williams & Manchester, *supra* note 17.

35. See Mez et al., *supra* note 33, at 362–66.

36. Ward, Williams & Manchester, *supra* note 17.

37. *Id.*

38. See generally *id.*

39. Lisa Gutierrez, *The Grim List of Football Players with CTE Continues to Grow*, KANSAS CITY STAR (Feb. 4, 2016), <http://www.kansascity.com/sports/nfl/article/58501703.html> (noting players such as Ken Stabler, Jovan Belcher, Tyler Sash, and Frank Gifford, among others, were identified as having CTE upon posthumous examination of each brain).

40. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 421 (3d. Cir. 2016) (noting that 73 former professional football players sued the NFL in July 2011).

41. *Id.*

players who died before the set retirement date.<sup>42</sup> The settlement is worth as much as \$1 billion, covers nearly every former player for the next 65 years, and allows players and their families to recover for those players who were diagnosed with CTE or other brain injuries resulting from head injuries associated with playing football.<sup>43</sup> Some players' families, such as Junior Seau's family and Aaron Hernandez's family, decided not join the settlement and filed their own lawsuits against the NFL.<sup>44</sup>

### B. *Junior Seau Lawsuit*

On May 3, 2012, NFL Hall of Famer Junior Seau was found dead in his home at the age of 43.<sup>45</sup> Seau shot himself in the chest, which allowed his brain to be preserved for study.<sup>46</sup> A posthumous evaluation of Seau's brain found he suffered from CTE.<sup>47</sup> Seau's children brought negligence and wrongful death claims against the NFL, alleging the NFL encouraged violence among players (including Seau).<sup>48</sup> The negligence claim alleged the NFL owed a duty to Seau and other players to make them aware of the dangers of head injuries while playing in the NFL.<sup>49</sup>

The family claimed as a direct and proximate result of the NFL's negligence, Junior Seau suffered physical injury, including, but not limited to, existing and latent cognitive conditions that created diminished cognitive

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42. Steve Almasy & Jill Martin, *Judge Approves NFL Concussion Lawsuit Settlement*, CNN (Apr. 22, 2015), <http://www.cnn.com/2015/04/22/us/nfl-concussion-lawsuit-settlement/index.html>.

43. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d at 423–24; Ken Belson, *N.F.L. Concussion Settlement Payments Can Begin After Supreme Court Defers*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/sports/football/nfl-concussion-settlement-payments-supreme-court.html>.

44. See Des Bieler, *Family of Junior Seau Talks About Why It Is Pursuing a Lawsuit Against the NFL*, WASH. POST (Jan. 5, 2015), [https://www.washingtonpost.com/news/early-lead/wp/2015/01/05/family-of-junior-seau-talks-about-why-it-is-pursuing-a-lawsuit-against-the-nfl/?utm\\_term=.5efa73b91f11](https://www.washingtonpost.com/news/early-lead/wp/2015/01/05/family-of-junior-seau-talks-about-why-it-is-pursuing-a-lawsuit-against-the-nfl/?utm_term=.5efa73b91f11).

45. *Junior Seau Dies at 43*, ESPN (May 3, 2012), [http://www.espn.com/nfl/story/\\_/id/7882750/junior-seau-former-san-diego-charger-found-dead-cops-probe-suicide](http://www.espn.com/nfl/story/_/id/7882750/junior-seau-former-san-diego-charger-found-dead-cops-probe-suicide).

46. Bieler, *supra* note 44.

47. Mark Fainaru-Wada, Jim Avila & Steve Fainaru, *Doctors: Junior Seau's Brain Had CTE*, ESPN (Jan. 11, 2013), [http://www.espn.com/espn/otl/story/\\_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players](http://www.espn.com/espn/otl/story/_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players).

48. Plaintiffs' Complaint for Damages & Demand for Jury Trial ¶ 6, *Seau v. Nat'l Football League*, No. 37-2013-00031265-CU-PO-CTL (Cal. Super. Ct. Jan. 23, 2013), 2013 WL 265303.

49. *Id.* ¶ 10.

function, noneconomic losses, and economic losses.<sup>50</sup> Furthermore, the complaint alleged a wrongful death claim against the NFL.<sup>51</sup> The wrongful death allegation claimed Seau's death was a direct and proximate result of having suffered multiple past traumatic brain injuries while playing in the NFL from 1990 to 2009, which resulted in his survivors being deprived of his earnings, maintenance, guidance, support, and comfort.<sup>52</sup> On October, 5, 2018, Seau's family and the NFL announced they reached a confidential settlement.<sup>53</sup>

### C. Aaron Hernandez Lawsuit

On April 20, 2017, former New England Patriots tight end Aaron Hernandez was found dead, having committed suicide in his prison cell in Massachusetts.<sup>54</sup> A posthumous evaluation of Hernandez's brain revealed the worst CTE ever seen in a 27-year-old's brain.<sup>55</sup> Similar to Seau's family, Hernandez's family is suing the NFL and the Patriots, claiming the NFL's negligence led to the wrongful death of Hernandez.<sup>56</sup>

The complaint alleges Hernandez developed CTE as a result of playing in the NFL.<sup>57</sup> Furthermore, the complaint alleges the NFL and Patriots were fully aware of the dangers of exposing NFL players, such as Hernandez, to repeated traumatic head impacts.<sup>58</sup> Yet, the complaint alleges the NFL concealed and misrepresented the risks of repeated traumatic head impacts

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50. *Id.* ¶ 236.

51. *Id.* ¶¶ 314–320.

52. *Id.* ¶ 319.

53. Ken Belson, *Family of Junior Seau Settles Case Against N.F.L.*, N.Y. TIMES (Oct. 5, 2018), <https://www.nytimes.com/2018/10/05/sports/junior-seau-suit-nfl.html>; Shannon Van Sant, *Family of Hall of Famer Junior Seau Settles with NFL*, NPR (Oct. 5, 2018), <https://www.npr.org/2018/10/05/655024469/family-of-hall-of-famer-junior-seau-settles-with-nfl>.

54. *Aaron Hernandez Found Dead After Hanging in Prison Cell*, ESPN (Apr. 20, 2017), [http://www.espn.com/nfl/story/\\_id/19191248/former-new-england-patriots-te-aaron-hernandez-found-dead-hanging-prison-cell](http://www.espn.com/nfl/story/_id/19191248/former-new-england-patriots-te-aaron-hernandez-found-dead-hanging-prison-cell).

55. *Advanced Stages of CTE Found in Aaron Hernandez's Brain*, ESPN (Sept. 22, 2017), [http://www.espn.com/nfl/story/\\_id/20777856/lawyer-says-aaron-hernandez-had-advanced-stages-cte](http://www.espn.com/nfl/story/_id/20777856/lawyer-says-aaron-hernandez-had-advanced-stages-cte).

56. *See* Complaint & Jury Demand ¶¶ 67–83, *Hernandez v. Nat'l Football League*, No. 1:17-cv-11812 (D. Mass. Sept. 21, 2017), 2017 WL 4173469; Plaintiffs' Complaint for Damages & Demand for Jury Trial, *supra* note 48, ¶¶ 273–294, 314–320.

57. Complaint & Jury Demand, *supra* note 56, ¶¶ 61–66.

58. *Id.* ¶¶ 13–17.

to NFL players, breaching the duty of reasonable and ordinary care owed to Hernandez.<sup>59</sup> Finally, the complaint alleges the NFL's breach exposed Hernandez to repeated traumatic head impacts, causing him to develop CTE and ultimately commit suicide.<sup>60</sup>

#### D. Future of Lawsuits Against the NFL

Former and current NFL players continue to come forward, pledging their brains to CTE research once they pass away.<sup>61</sup> It appears likely that future donated brains of NFL players will show signs of CTE.<sup>62</sup> This means lawsuits similar to Junior Seau's and Aaron Hernandez's are likely to continue against the NFL.<sup>63</sup> These new lawsuits, however, could be successfully defended against by applying the defense of assumption of risk and contributory negligence.<sup>64</sup>

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59. *Id.*

60. *Id.* ¶¶ 61–67.

61. See Malika Andrews, *Matt Hasselbeck, Leonard Marshall Pledge Brains for CTE Research*, SPORTS ILLUSTRATED (May 17, 2017), <https://www.si.com/tech-media/2017/05/17/matt-hasselbeck-leonard-marshall-pledge-brains-cte-research> (noting former NFL quarterback Matt Hasselbeck and former defensive lineman Leonard Marshall have pledged their brains to CTE research once they die); *Ex-Titans Tight End Frank Wycheck Believes He Has CTE*, SPORTS ILLUSTRATED (Feb. 7, 2017), <https://www.si.com/nfl/2017/02/07/frank-wycheck-cte-symptoms> (noting former NFL tight end Frank Wycheck plans to donate his brain because he thinks he has CTE); Khadrice Rollins, *Warren Sapp to Donate Brain for Research on Concussions, Head Trauma*, SPORTS ILLUSTRATED (June 20, 2017), <https://www.si.com/nfl/2017/06/20/warren-sapp-brain-research-concussion-legacy-foundation> (noting Hall of Fame defensive tackle Warren Sapp will donate his brain to the Concussion Legacy Foundation); Sean Wagner-McGough, *Dolphins Hall of Famer Nick Buoniconti Will Donate Brain to Concussion, CTE Research*, CBS SPORTS (Nov. 3, 2017), <https://www.cbssports.com/nfl/news/dolphins-hall-of-famer-nick-buoniconti-will-donate-brain-to-concussion-cte-research/> (noting Dolphins Hall of Fame linebacker Nick Buoniconti will donate his brain because he believes he has CTE).

62. See Ward, Williams & Manchester, *supra* note 17.

63. See *id.*

64. See, e.g., *Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 913 (Iowa 2017).

IV. THE ASSUMPTION OF RISK DEFENSE AND SPORTS-RELATED NEGLIGENCE CASES

A. *The Assumption of Risk Defense*

The *Restatement (Second) of Torts* defines the doctrine of assumption of risk, stating “[a] plaintiff who voluntarily assumes a risk of harm arising from the negligence or reckless conduct of the defendant cannot recover for such harm.”<sup>65</sup> Assumption of risk is a viable doctrine in tort cases relating to negligence actions arising out of sporting contests.<sup>66</sup> The comments to section 496A give an example of a situation in which a plaintiff has entered voluntarily into some relation with the defendant that he knows involves a risk.<sup>67</sup> The example involves a spectator who enters a baseball park and is regarded as consenting to the players proceeding with the game without taking precautions to protect him from being hit by the ball.<sup>68</sup>

There are multiple categories of assumption of risk.<sup>69</sup> The first type, express assumption of risk, occurs when parties have agreed in advance to absolve the defendant of a duty of care with regard to the plaintiff.<sup>70</sup> The second type, implied assumption of risk, is broken down into primary and secondary assumption of risk.<sup>71</sup> Implied primary assumption of risk applies to coparticipants and considers the inherent risks of suffering an injury from another participant’s negligence as a result of playing a sport.<sup>72</sup> Implied secondary assumption of risk allows a defendant to claim a plaintiff should be held partly responsible for the plaintiff’s injury because the plaintiff voluntarily proceeded to face a known risk.<sup>73</sup> Comparative fault principles

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65. RESTATEMENT (SECOND) OF TORTS § 496A (AM. LAW INST. 1965). A large majority of jurisdictions have adopted the assumption of risk doctrine defined by the *Restatement (Second) of Torts*, which is why it is being utilized as the main source of law in this Note. *See id.* (listing 72 courts, encompassing both state and federal courts, that have cited § 496A).

66. Jeffrey Standen, *Assumption of Risk in NFL Concussion Litigation: The Offhand Empiricism of the Courtroom*, 8 FIU L. REV. 71, 72 (2012).

67. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c.

68. *Id.*

69. Keya Denner, Comment, *Taking One for the Team: The Role of Assumption of the Risk in Sports Torts Cases*, 14 SETON HALL J. SPORTS & ENT. L. 209, 210 (2004).

70. *Id.* at 211.

71. *Id.* at 213; *see also* Knight v. Jewett, 834 P.2d 696, 703–04 (Cal. 1992).

72. Denner, *supra* note 69, at 213–14.

73. *Id.* at 215.

will then be used to determine fault accordingly.<sup>74</sup> In order to better understand the difference between implied primary assumption of risk and implied secondary assumption of risk, an analysis of cases that have used each in regard to sports-related injuries is necessary.

### B. Negligence Cases Involving Sports Injuries

#### 1. Feld v. Borkowski

The Iowa Supreme Court case of *Feld v. Borkowski* provides an in-depth analysis regarding liability and sports-related injuries.<sup>75</sup> In *Feld*, the plaintiff, an experienced softball player, was injured when a batter's bat slipped and hit the plaintiff, causing him a severe eye injury.<sup>76</sup> The plaintiff sued the batter, seeking compensation for medical expenses and other damages.<sup>77</sup> Both the district court and the appellate court held in favor of the defendants.<sup>78</sup> Upon review, the Iowa Supreme Court noted, "While the duty to exercise reasonable care accompanies each individual in most all activities of life, some activities or circumstances have been excepted from the reasonable care duty in favor of . . . a less stringent duty of care for participants in the activity to protect others from injury."<sup>79</sup> The court explained that "known risks associated with a contact sport are assumed by participants in the sport" and "a sport involving contact between participants or contact with instruments or objects used by participants provides knowledge and understanding to the participants of the inherent risks of harm that can be created."<sup>80</sup> Therefore, sports participants cannot recover simply because they were injured as a result of playing the sport, since they had knowledge and understanding of the inherent risks of harm related to playing the sport.<sup>81</sup>

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74. *Id.* at 216.

75. *See* *Feld v. Borkowski*, 790 N.W.2d 72, 73 (Iowa 2010).

76. *Id.* at 74.

77. *Id.*

78. *Id.* at 75.

79. *Id.* at 76.

80. *Id.* at 76–77.

81. *Id.* at 77 (holding that the plaintiff would have to prove recklessness or intent in order to recover, an issue of fact that remained; thus, the case was remanded to the trial court).

## 2. Knight v. Jewett

The California case of *Knight v. Jewett* is another good example of a court wrestling with the application of implied assumption of risk to a sports-injury case.<sup>82</sup> In *Knight*, the Supreme Court of California considered the proper application of the assumption of risk doctrine.<sup>83</sup> The plaintiff suffered an ankle injury while playing in a pickup football game.<sup>84</sup> The plaintiff sued on theories of negligence and assault and battery.<sup>85</sup>

When affirming the judgment in favor of the defendant, the court noted, “[I]n the sports setting . . . conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.”<sup>86</sup> The court recognized the multiple categories of the assumption of risk doctrine.<sup>87</sup> The court reasoned in the case of secondary assumption of risk, comparative fault principles preclude automatically placing all of the loss on the plaintiff, but similarly do not place all of the loss on the defendant.<sup>88</sup> The court explained that while a defendant has no legal duty to eliminate or protect a plaintiff against risks inherent in the sport itself, the defendant does generally have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.<sup>89</sup>

The *Knight* court continued in its analysis by explaining when a risk is inherent in a sport.<sup>90</sup> The court noted that the nature of a defendant’s duty in the sports context depends heavily on the nature of the sport itself, as well as the defendant’s role in, or relationship to, the sport.<sup>91</sup> The court concluded a defendant in a sporting-injury case can be held negligent only if the conduct of the defendant was so reckless as to be totally outside the range of the ordinary activity involved in the sport.<sup>92</sup> By using such an analysis, the court was applying implied primary assumption of risk.<sup>93</sup>

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82. See *Knight v. Jewett*, 834 P.2d 696, 697 (Cal. 1992).

83. *Id.* at 697, 701.

84. *Id.* at 697–98.

85. *Id.* at 698.

86. *Id.* at 708.

87. *Id.* at 703.

88. *Id.* at 704–05.

89. *Id.* at 707–08.

90. See *id.* at 708–09.

91. *Id.* at 709.

92. *Id.* at 710.

93. See generally *id.* at 712.

### 3. Butchello v. Herberger

The New York case of *Butchello v. Herberger* stands in contrast to the *Knight* case.<sup>94</sup> In *Butchello*, the plaintiff sued to recover damages for injuries he sustained while playing in a JV college football game.<sup>95</sup> The plaintiff alleged negligence, reckless conduct, or both on the part of the college that fielded the opposing team, that team's coach, and the individual player for injuries the plaintiff sustained while involved in the game.<sup>96</sup> The defendants moved for summary judgment on the ground that the plaintiff assumed the risk of his injury.<sup>97</sup>

When overturning the trial court's denial of the defendants' motion for summary judgment, the appellate court noted, "As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation."<sup>98</sup> The court noted several factors that contribute to whether a plaintiff should be deemed to have made an informed estimate of the risks involved in an activity.<sup>99</sup> Factors the court considered included the openness and obviousness of the risk; the plaintiff's background, skill, and experience; the plaintiff's own conduct under the circumstances; and the nature of the defendant's conduct.<sup>100</sup> Furthermore, the court explained the defendant, in establishing a plaintiff's assumption of risk, must show the plaintiff was generally aware of the risk that befell him, but the defendant does not have to demonstrate the plaintiff foresaw the exact manner in which his injury occurred.<sup>101</sup>

When overturning the trial court, the appellate court agreed with the defendant that the plaintiff's action was barred by the doctrine of primary assumption of risk.<sup>102</sup> The court noted that the plaintiff was an experienced football player and that the plaintiff failed to raise a triable issue of fact concerning whether he was subjected to a concealed risk, an unseasonably

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94. *Id.* at 697–712; *Butchello v. Herberger*, 43 N.Y.S.3d 649, 650 (App. Div. 2016) (per curiam).

95. *Butchello*, 43 N.Y.S.3d at 650.

96. *Id.*

97. *Id.*

98. *Id.* (quoting *Turcotte v. Fell*, 502 N.E.2d 964, 968 (N.Y. 1986)).

99. *Id.* at 651.

100. *Id.*

101. *Id.*; see also *Maddox v. City of New York*, 487 N.E.2d 553, 556 (N.Y. 1985).

102. *Butchello*, 43 N.Y.S.3d at 651.

increased risk, or a risk that was not inherent in the sport of football.<sup>103</sup> Therefore, the court held no triable issue of material fact existed and granted the defendant's motion for summary judgment, asserting that the plaintiff assumed the risk of injury by participating in the football game.<sup>104</sup> By noting the plaintiff's knowledge as a factor in holding the plaintiff assumed the risk, the court applied the doctrine of implied secondary assumption of risk.<sup>105</sup>

### *C. Limits on the Assumption of Risk Defense*

The assumption of risk defense is not all encompassing. Limits exist for the extent of the defense.<sup>106</sup> As noted by the *Restatement (Second) of Torts*, a plaintiff does not assume a risk of harm arising from the defendant's conduct "unless [the plaintiff] then knows of the existence of the risk and appreciates its unreasonable character."<sup>107</sup> The plaintiff must subjectively be aware of the facts which create the danger and must appreciate the danger itself and the "nature, character, and extent which make it unreasonable."<sup>108</sup>

The case of *Austin v. Lincoln Equipment Associates, Inc.* is illustrative of this point.<sup>109</sup> In *Austin*, a roofer was injured when he fell off a roof while using a power roof sweeper.<sup>110</sup> The roofer was injured when he attempted to restart the power sweeper, which bucked backwards, causing the roofer to lose his balance and fall off the roof.<sup>111</sup> The jury found that the roofer had not assumed the risk of his injuries in operating the power sweeper.<sup>112</sup> The First Circuit Court of Appeals affirmed. In order to overturn the jury's verdict that the roofer did not assume the risk of falling off the roof simply by operating the power sweeper,<sup>113</sup> the court held the defendant would have needed to show the roofer appreciated the "specific danger of the power sweeper knocking him off balance, and proceeded in the face of that danger."<sup>114</sup> The court held, although the roofer had used the power sweeper

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103. *Id.*

104. *Id.*

105. *See id.*; *see also* Denner, *supra* note 69, at 216.

106. *See* RESTATEMENT (SECOND) OF TORTS § 496D (AM. LAW INST. 1965).

107. *Id.*

108. *Id.* § 496D cmt. b.

109. *Austin v. Lincoln Equip. Assocs., Inc.*, 888 F.2d 934, 935 (1st Cir. 1989).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 937.

114. *Id.*

before, there was a reasonable inference that the roofer did not appreciate the risk involved in starting the power sweeper.<sup>115</sup> The court noted the roofer did not know the power sweeper would kick back nearly a foot upon being started up, meaning he did not appreciate the risk involved in starting up the power sweeper.<sup>116</sup>

## V. APPLICATION OF ASSUMPTION OF RISK TO FUTURE NFL-CONCUSSION LITIGATION

### A. A Complete Bar to Recovery

Lawsuits similar to those brought by the families of Junior Seau and Aaron Hernandez are likely to continue to be brought by current NFL players following the conclusion of their playing career as their bodies react to the years of punishment that results from playing in the NFL.<sup>117</sup> In response, the NFL should argue the plaintiffs are barred from recovery due to their assumption of risk of head-related injuries.

Going forward, players should be unable to claim the NFL is liable for negligence in not protecting players from known health risks associated with repeated head trauma because the players themselves knew of the risks of serious head trauma from playing football and chose to play anyway.<sup>118</sup> This is not to argue that past players should be unable to recover from the NFL; it is simply arguing that going forward, the players now have the necessary, sufficient knowledge for an assumption of risk defense to be successful for the NFL.<sup>119</sup>

To avoid liability completely, the NFL can point to the *Feld* case and apply the same logic utilized by the court in *Butchello*.<sup>120</sup> The NFL can successfully argue that the players, by their participation, consented to injuries which are known, apparent, or reasonably foreseeable consequences of participation.<sup>121</sup> The scientific findings of Dr. McKee, that 99 percent of

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115. *Id.*

116. *Id.*

117. *See, e.g.*, Complaint & Jury Demand, *supra* note 56; Plaintiffs' Complaint for Damages & Demand for Jury Trial, *supra* note 48.

118. *See generally* Complaint & Jury Demand, *supra* note 56; Plaintiffs' Complaint for Damages & Demand for Jury Trial, *supra* note 48.

119. *See* RESTATEMENT (SECOND) OF TORTS §496D (AM. LAW INST. 1965).

120. *See* *Feld v. Borkowski*, 790 N.W.2d 72, 76–77 (Iowa 2010); *Butchello v. Herberger*, 43 N.Y.S.3d 649, 650–51 (App. Div. 2016) (per curiam).

121. *See Butchello*, 43 N.Y.S.3d at 650–51.

former NFL players' brains studied were found to have CTE, creates knowledge necessary for the assumption of risk doctrine to apply and for CTE to be an "apparent or reasonably foreseeable consequence of participation."<sup>122</sup> The finding that 99 percent of former NFL players whose brains were studied suffered from CTE provides the "knowledge and understanding to the participants of the inherent risks of harm that can be created" to the players, allowing them to assume the risk as well as appreciate the dangers associated with playing in the NFL.<sup>123</sup> Therefore, any claim similar to that brought by Aaron Hernandez's family would fail because the NFL cannot conceal and misrepresent the risks of repeated traumatic head impacts to NFL players; it is now a reasonable and foreseeable consequence of participation, with player's having "subjective awareness" and "knowledge and understanding" of the risk of head trauma.<sup>124</sup>

Furthermore, the NFL's policy on educating players about the importance of working with the team to report head injuries should allow the players to appreciate the dangers associated with head injuries.<sup>125</sup> Additionally, education regarding head injuries is now at the forefront of both youth and high school football.<sup>126</sup> This strengthens the argument that the players assumed the risk by supporting the "openness and obviousness of the risk" factor and the "plaintiff's background" factor set out in *Butchello*.<sup>127</sup> A future plaintiff, who currently plays in the NFL, has a far greater awareness of the obviousness of the risk of head injuries since the plaintiff was likely educated about them from an early age.<sup>128</sup> Additionally, a current player has significantly more background related to head injuries

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122. *See id.*; Ward, Williams & Manchester, *supra* note 17.

123. *See Feld*, 790 N.W.2d at 77; RESTATEMENT (SECOND) OF TORTS § 496D cmt. b; Ward, Williams & Manchester, *supra* note 17.

124. *See Feld*, 790 N.W.2d at 77; *Butchello*, 43 N.Y.S.3d at 651; Complaint & Jury Demand, *supra* note 56, ¶ 2; RESTATEMENT (SECOND) OF TORTS § 496D cmt. b.

125. *See* RESTATEMENT (SECOND) OF TORTS § 496D cmt. b; *NFL Head, Neck and Spine Committee's Concussion Diagnosis and Management Protocol*, NAT'L FOOTBALL LEAGUE (June 20, 2017), <https://www.playsmartplaysafe.com/focus-on-safety/protecting-players/nfl-head-neck-spine-committees-protocols-regarding-diagnosis-management-concussion/>.

126. *See Heads Up Football for High Schools and Middle Schools*, USA FOOTBALL, <https://usafootball.com/programs/heads-up-football/middle-high-school/> (last visited Jan. 15, 2018).

127. *See Butchello*, 43 N.Y.S.3d at 651.

128. *See Heads Up Football for High Schools and Middle Schools*, *supra* note 126.

than previous players.<sup>129</sup> Since players are taught early on in youth and high school football about the dangers of head injuries, the players now know there are major dangers associated with football. Such awareness and background regarding head injuries creates the subjective awareness required for the assumption of risk defense to apply.<sup>130</sup>

*B. Assumption of Risk and Comparative Fault as a Limit on Recovery*

One common criticism of the traditional assumption of risk defense is that it is an all-or-nothing defense, meaning the plaintiff recovers nothing if the defense applies.<sup>131</sup> This has led some courts to shy away from the traditional approach.<sup>132</sup> Even if the NFL is unable to completely bar recovery by a plaintiff, the assumption of risk doctrine can still be utilized to significantly reduce any recovery a plaintiff may win.<sup>133</sup> Factors courts typically consider to establish a party's percentage of risk include the nature of the person's risk-creating conduct (including awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct) and the strength of the causal connection between the person's risk-creating conduct and the harm.<sup>134</sup>

Use of the assumption of risk defense as it relates to comparative fault can be extremely useful in defending against a claim similar to that of Junior Seau's family.<sup>135</sup> The NFL should argue it has not breached any duty it owes to players to make them aware of the dangers of head injuries related to playing in the NFL.<sup>136</sup> The NFL should argue players are sufficiently aware of the dangers as a result of Dr. McKee's study and as a result of the

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129. *Id.*

130. *See Butchello*, 43 N.Y.S.3d at 651.

131. *See Knight v. Jewett*, 834 P.2d 696, 700 (Cal. 1992) (citing *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1230–31 (Cal. 1975)).

132. *See id.* at 702–03.

133. *See, e.g., Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 914 (Iowa 2017) (noting a plaintiff's knowledge of an open and obvious risk inherent in an activity is important in determining whether a plaintiff has any degree of comparative fault).

134. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. § 8 (AM. LAW INST. 2000).

135. *See generally* Plaintiffs' Complaint for Damages & Demand for Jury Trial, *supra* note 48.

136. *See id.*

continuing education they receive regarding head injuries.<sup>137</sup> Rather, the risk of head injuries is open and obvious and should result in the application of comparative fault principles to the plaintiff.<sup>138</sup> Furthermore, the NFL should argue head injuries are inherent in playing NFL football.<sup>139</sup> This means comparative fault should apply to reduce any liability the NFL may have.<sup>140</sup> Dr. McKee's studies, which found a high percentage of former NFL players' brains show signs of CTE, support the argument that head injuries are an inherent risk of playing football.<sup>141</sup> The NFL, relying on *Knight*, is only responsible for injuries that result from reckless conduct and is not liable for injuries that result from an inherent risk.<sup>142</sup> Therefore, because head injuries appear to be an inherent risk of playing in the NFL, the NFL's liability should be minimized, if not completely eliminated, using comparative fault principles.<sup>143</sup> Thus, the NFL has no longer breached a duty to make players aware of the dangers of head injuries.<sup>144</sup>

## VI. CONCLUSION

The NFL and former NFL players are at a turning point in the legal battle surrounding CTE litigation. It is not disputed that the results of CTE on past NFL players are traumatic and sometimes lead to tragic events.<sup>145</sup> The NFL has attempted to compensate those players and families of players affected by CTE and other brain diseases as a result of playing in the NFL.<sup>146</sup> With the results of recent medical studies, however, the NFL should not be held liable in future litigation because current NFL players now have

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137. See Jill Martin, *NFL Acknowledges CTE Link with Football. Now What?*, CNN (Mar. 16, 2016), <http://www.cnn.com/2016/03/15/health/nfl-cte-link/index.html>; *New Concussion Training*, *supra* note 27; Ward, Williams & Manchester, *supra* note 17.

138. See *Ludman*, 895 N.W.2d at 914.

139. See *Knight v. Jewett*, 834 P.2d 696, 708–09 (Cal. 1992).

140. See *id.*

141. See Ward, Williams & Manchester, *supra* note 17; Matt Wilhalme, *Brain Disease CTE Found in 87 of 91 NFL Players Tested, Researchers Say*, L.A. TIMES (Sept. 18, 2015), <http://www.latimes.com/sports/sportsnow/la-sp-sn-nfl-brain-disease-87-of-91-deceased-football-players-tested-20150918-story.html>.

142. See *Knight*, 834 P.2d at 708–09.

143. See *id.*; RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT LIAB. §§ 3 cmt. c, 8 (AM. LAW INST. 2000).

144. See Plaintiffs' Complaint for Damages & Demand for Jury Trial, *supra* note 48, ¶ 3 (alleging the NFL breached its duty to former player Junior Seau).

145. See *supra* Part II.

146. See *supra* Part III.A.

sufficient knowledge to assume the risk of developing CTE later in life.<sup>147</sup> Additionally, in jurisdictions that have moved away from the traditional assumption of risk defense acting as a complete bar to recovery, future plaintiffs' recovery should be significantly limited through comparative fault principles because plaintiffs have knowledge regarding the potential for CTE to occur and knowledge regarding the inherent risk of head injuries in professional football.<sup>148</sup>

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147. *See supra* Part V.A.

148. *See supra* Part V.B.

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