

## How Litigation Threatens Professional Football

Steve Chapman February 4, 2013

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But football has a problem: the specter of mass brain damage among current and former players. So far, the steady trickle of disturbing revelations has had no apparent effect on ticket sales or TV ratings. What it has done, though, is more ominous: It has invited lawsuits.

If football falls into decline, it may not be the result of fans turning away, athletes avoiding it, or parents forbidding it. It may be from lawyers representing players who sustained chronic traumatic encephalopathy and expect to be compensated for the damage.

Already, more than 4,000 former players are suing the NFL, claiming it failed to warn them of the hazards. The family of San Diego Chargers great Junior Seau, whose autopsy revealed CTE after his suicide last year, has filed a wrongful death suit against the league. The Seaus are also accusing Riddell Inc. of making unsafe helmets.

Walter Olson, a Cato Institute fellow, blogger ([Overlawyered.com](http://Overlawyered.com)), and author of several books on liability, knows well how a tide of litigation can transform a landscape. And he has a bold prediction: "If we were to apply the same legal principles to football as we do to other industries, it would have to become extremely different, if not go out of business."

"Seriously?" you may ask. A guy who made a good living engaging in high-speed collisions with 300-lb. blocks of granite can say he didn't understand the risks involved? It may seem that case will be laughed out of court.

But Olson thinks not. "Courts have not been very friendly to this argument, particularly when something as grave as permanent brain damage is involved," he told me. And it's become apparent that while players were aware of the possibility of mangled knees, broken bones, and concussions, they didn't grasp that repeated blows to the head could produce debilitating and irreversible mental harms.

Exposure to asbestos was long known to be unhealthy, but that didn't stop sick workers from succeeding in court. More than 730,000 people have sued some 8,000 companies, and dozens of firms connected to asbestos in some way have been driven into bankruptcy.

The NFL has a weak hand in other ways as well. Professional football players, notes Olson, make particularly appealing litigants, since they tend to be well-known and widely liked. Their cases will get a lot of sympathetic publicity.

These athletes are handsomely paid, which means that brain trauma may deprive them of years of high earnings while requiring them to get expensive care for decades—all of which the league and other parties (stadium owners, equipments makers, and so on) may be forced to pay for.

On the other side are owners, many of whom are resented for charging high prices, fielding losing teams year after year or simply being insufferable. (Jerry Jones, I'm looking at you.)

Next in the line of fire are the soulless corporations that make or sell helmets, facemasks, and other gear that failed to prevent these injuries—and may even have contributed to them. Doctors and trainers who cleared players to return to action after a fog-inducing tackle will get close scrutiny to determine whether they put the team's needs above the patient's.

The NFL and other defendants can argue that they too were surprised to find out how much brain damage can result from the game and therefore should not be blamed for it. But as Olson notes, the game is still being played in pretty much the same way as it was before. Lawyers for the plaintiffs, he says, can ask: "How much difference would that knowledge have made if you're still letting this happen?"

It's always possible, of course, for lawmakers to pass legislation exempting organized football from the usual liability standards. But if one state or 10 states do so, attorneys can find excuses to file the lawsuits in states that don't—since the NFL is an interstate business.

A federal law might take the issue out of state courts. But how many senators will want to vote to deprive ravaged gridiron legends of their day in court?

The NFL has a lot of experience with blitzes. But it's never seen anything like the one that's coming.