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Concussion controversy may play out in the legal system

The volume of NFL-related litigation stemming from the concussion controversy is growing. Lawsuits brought by former players against the NFL currently are pending in several states. In Louisiana, a class-action suit was recently filed in federal court alleging that the former players developed mental and physical problems relating to their time playing in the NFL.

In Philadelphia, several concussion-related suits have been consolidated against the league. In a New Jersey class action, 12 former players challenge the league's administration of the anti-inflammatory ketorolac tromethamine (marketing under the trademark Toradol). Those players also allege that Toradol alleviates the pain players feel to such a degree that concussion symptoms are not properly identified. (See "Rules of the Game" column in the March 2012 Chicago Lawyer magazine for an in-depth discussion).

Collectively, these lawsuits generally contend that NFL teams knew, or should have known — in some cases as far back as the 1920s — that concussions have long-term consequences.

On Feb. 23, this wave of litigation took a local turn when the son of retired Chicago Bear Dave Duerson filed a wrongful death lawsuit in the Cook County Circuit Court Law Division under the caption *Duerson v. National Football League, et. al.* 2012-L-002043. Named as defendants are the NFL and Riddell Sports Group, the manufacturer of the helmet that Duerson wore while he played professional football.

Duerson was the starting safety on the 1985 Chicago Bears team that won Super Bowl XX. He played in four straight Pro Bowls and was named Walter Payton NFL Man of the Year in 1987. Last year, Chicago football fans were shocked and saddened to hear that Duerson had died of a self-inflicted gunshot wound in Sunny Isles Beach, Fla. Duerson shot himself in the chest so that his

brain could be donated for research and testing. One of Duerson's last text messages stated, "Please, see that my brain is given to the NFL's brain bank." Per his final request, Duerson's brain was donated to the Boston University School of Medicine's Center for the Study of Traumatic Encephalopathy. The center currently is studying the brains of 100 retired professional athletes. Part of its focus is on defensive football players between the ages of 40 to 69. The NFL is providing some funding for the research.

At age 50, Duerson was relatively young but apparently suffered from at least three documented concussions and possibly more during his 10-year playing career. As many suspected, postmortem testing concluded that Duerson developed the brain disease chronic traumatic encephalopathy (CTE). The claims made by former players identify CTE as a progressive degenerative disease found in individuals who have suffered repeated brain trauma and one that may lead to depression, chronic headaches and cognitive disfunction. The symptoms also may include lack of impulse control. CTE has been associated with former boxers who had taken too many punches to the head. Former players argue that CTE's causes also include repeated brain trauma or concussions that are common in football.

Many commentators have noted that Duerson at one time sat on the panel that determined former NFL players' claims for disability, including claims alleging cognitive damage resulting from the time they played professional football. Few of those claims ever were approved. In 2007, Duerson testified before Congress and questioned the link between football and long-term brain damage. Family and friends of Duerson, however, state that his views

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changed over the last few years before his death.

Like the Toradol lawsuit, the younger Duerson's suit focuses on the NFL's Mild Traumatic Brain Injury (MTI) Committee and alleges that it not only failed to inform players, but that it concealed the long-term effects of concussions and the linkage between NFL head trauma and permanent brain injury.

Specifically, the lawsuit alleges that "The NFL embarked upon a propaganda scheme designed to mislead NFL players and retirees regarding the long-term ramifications of concussions, subconcussive brain trauma and repetitive

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brain trauma." Allegations include claims that the league failed to warn players of the effects of continuing to play after head trauma and specifically failed to diagnose Duerson's injuries. It cites several neurological studies and sharply attacks the committee's work. Finally, it claims that the league failed to implement policies to prevent players from returning to the game after injury.

Observers note that Duerson's lawsuit differs from the other recent suits against the league in one significant respect, namely that because of postmortem testing, Duerson now is documented to have had CTE. Because CTE is diagnosed after death, living players who have filed lawsuits against the league will have to prove through other means that they suffer from it. One similar component that likely will arise in Duerson's lawsuit is what degree, if any, the football that Duerson played in high school and at the University of Notre Dame contributed to his condition.

In statements following the filing of the lawsuit, Duerson's family and attorneys asked players, coaches and family members to take heed. Duerson's attorneys also challenged the mindset of some current NFL players, like Chicago Bear Brian Urlacher, who recently suggested that he would hide concussion symptoms from his team.

For its part, the NFL said in a statement that while it had not seen the lawsuit, "Dave Duerson was an outstanding football player and citizen who made so many positive contributions, but unfortunately encountered serious personal challenges later in his life. We sympathize with the Duerson family and continue to be saddened by this tragedy." The league consistently has contended that it followed appropriate medical protocol available at the time.

Before Duerson's lawsuit, some concluded that the NFL lawsuits were based, in part, on this issue of NFL health insurance and disputes over whether collision related injuries are entitled to league benefits and coverage. With the filing of Duerson's lawsuit, though, a wrongful death element has been brought to issue. The controversy over concussions is sure to be played out as this, and the other lawsuits, unfold.