

Mediation in NFL Concussion Lawsuit

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Last winter, Rick Weiler and I posted comments on this blog on a mediation success story when the NHL Lockout dispute was successfully resolved. Reporting on the commencement of that mediation, Rick wrote: "one thing for sure, given hockey's near sacred status in Canada, all eyes will be on this mediation. It may provide a very high profile example of the value of the mediation process." The mediation was indeed successful and attracted a considerable amount of public attention and interest in ADR. The new case, while in many respects different, will invariably put the spotlight on mediation.



Last Monday, a US federal judge ordered mediation between the National Football League (NFL) and its former players. More than 4,200 players have filed a suit against the NFL alleging that their head injuries had been caused by professional football. The plaintiffs' attorneys are seeking damages for diagnosed brain injuries, and funds to create a monitoring system for retirees.

The NFL argued that the dispute should be governed by the collective bargaining agreement (CBA) in place, and hence not be heard before a federal district court. In response, the players' attorneys argued that the NFL had committed fraud, thus voiding the CBA's rules about disputes. They also focused on around 300 athletes who played before 1968 or between 1988 and 1993, when no CBA existed.

Can the parties with a mediator's help find a way to resolve this dispute? Despite many obstacles, it is certainly possible. Both sides have reasons to try to settle.

The players are older and face uncertain futures. A legal battle could take years to conclude. Players' detailed medical histories are likely to become a point of contention. Head injuries can have serious consequences, including depression and dementia, or even contribute to suicides. However, even cases of demonstrable brain damage would be subject to questions about, for instance, when exactly that damage occurred - in a professional game, or elsewhere - before (e.g. in a childhood fall from a tree) or after the player's NFL career?

The League faces an expensive and possibly embarrassing discovery process. From a PR perspective, it would prefer to avoid the prospect of continuing accusations of abusing players by concealing the dangers of concussions from them, or public discussions about the violent nature of the game. Last but not least, it is exposed to potentially enormous awards of money damages in jury trials.

Finally, the mediator, Hon. Layn R. Phillips, has a reputation of a skilled and experienced neutral, who has succeeded in settling other highly complex cases.

If this mediation succeeds, it will certainly be brought up as yet another high-profile mediation success story. The ball is still in play.