The Future Of Footy And The Merits Of The Concussion Class Actions In The AFL

Thursday, 27 April 2023 By Jack Anderson

For fans of contact sports, the point of this article is direct, simple but stark: some of your childhood sporting heroes cannot now remember their own children's names.

The contact sport of focus in this piece is Australian rules football (AFL). A number of former AFL players now say that the reason for their current chronic neurological trauma, which is severely impacting their physical, psychological, professional and familial life – the cause – is playing football. Individually, or as part of class actions, former players are seeking compensation in negligence against treating doctors, clubs and/or the governing body or league in question – the AFL. The fundamental argument made by the players is that either the concussion protocols of the time were not followed or the protocols (or whatever form the medical guidelines of the time took) were not fit for purpose.[1]

Similar to the UK – where a class action[2] by former professional rugby players (recently and separately extended to include amateur players[3]) is ongoing; the Australian proceedings are taking place against the backdrop of a parliamentary inquiry into concussion in sport.[4]

The claims taken by the former AFL players are also similar in substance to those taken against, and often settled by, sports organisations elsewhere, most notably the NFL.[5] Unlike the US cases - where a key, initial aspect of claims against the NFL was that it knew about the risks of head trauma in American football but concealed it from the players - there is no allegation of concealment against the AFL, though, as will be shown, questions have been raised about aspects of the medical research upon which the AFL has relied in developing its concussion guidelines.[6]

This article focuses on outlining the legal aspects of the current array of actions being taken against the AFL. It assesses the substance of such claims (the purview of which is negligence) and the chances of success. Finally, this piece asks whether litigation is the optimal means of resolving the medical, regulatory, and legal concerns of not only the players involved, but with how the game is played; indeed,

the very future of contact sport itself.[7]

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Emma Grant's Claim

In the first week of March 2023 lawyers for former AFL Women's player, Emma Grant, announced the instigation of a claim against her former club, Collingwood. The claim centres around the allegation that Grant suffered a severe head injury during a pre-season practice game in 2020 when, in breach of its duty of care towards her, Collingwood negligently allowed her to resume training three weeks later. Grant missed the entire 2020 AFLW season due to the injury and then retired. The Melbourne Age has reported that Grant "*probably had eight to 10 significant concussions throughout her footballing life*", but it was the one in dispute that led her to retire.[8]

The Grant claim is of note for three reasons.

1. Much of the coverage and emphasis on this topic is on professional male players. Research on the impact that concussive injuries have on female athletes is not as readily available as for men. More study is urgently needed on the risks to women in contact sports[9]. The research that does exist, such as a 2021 study of 80,000 students in US high school football, suggests that teenage girls who play football run nearly twice the risk of concussion as teenage boys, and take longer to recover.[10]

2. It is notable that media reports of Emma Grant's claim refer to the player highlighting that as the women's game has evolved so has the intensity of tackling and other physical contests for the ball. Of more general application is that in future, part of the risk assessment undertaken by sports bodies (in, for instance, considering rule changes to decrease concussion-related dangers) should be to consider the differences between the women's and men's codes.

   Precautionary rules change in sport (and not just those relating to concussion risks) do not always nor necessarily have to be gender neutral.[11]

3. The emphasis in this topic is not only often on elite male players but on those injuries suffered by elite male players during games. Emma Grant's claim puts the focus quite rightly on injuries suffered in training or match simulations and the need for collision and combat sports to consider limiting full contact time in training. In September 2021, for example, World Rugby recommended[12] limiting full contact training to 15 minutes per week.

Liam Picken's Claim

One week after the filing of the claim by Emma Grant, a former AFL player, Liam Picken, lodged papers with the Supreme Court of Victoria alleging negligence against the league (the AFL), his club (the Western Bulldogs) and club doctors. The claim is based on the contention that the defendants in various ways negligently allowed him to be continuously and cumulatively exposed to unnecessary harm and particularly by allowing him to return prematurely to training and competitive matches where the extant medical testing of the player suggested that it was unsafe to do so.

Part of the claim alleges that Picken had several "*irregular*" baseline cognitive tests, the results of which were concealed from him, thus impacting his capacity to make an informed choice about his health (such as asking for a second opinion or referral to an expert in concussion management). Pickens retired from professional AFL in 2019, citing ongoing concussion issues, and is suing for loss of earnings and ongoing medical costs.[13]

Again, there are three points of note here. It must be remembered that in the Pickens matter (as with the Emma Grant proceedings) the defence has yet to file a response and thus what follows is of general note only and not a comment on the substance of (or defendants involved in) the matters at hand.

1. The first is a general, legal point on club doctors: are such doctors independent contractors or is the contractual relationship between them and the club or league such that the latter may be held vicariously liable?

2. As noted in a major Harvard report on NFL doctors from 2016, there can be an underlying conflict of interest in such situations i.e., club medical staff providing services to both the club and players. The Harvard proposal to *"resolve the problem of dual loyalty*" was to request that NFL teams include two sets of medical professionals: the players' medical staff, with exclusive loyalty to the player, and

the club evaluation doctor, with exclusive loyalty to the club. Without this separation, doctors (in what already can be a pressurised situation on game day or in the build up to a major game) might come under pressure from coaches to certify that a player is fit to play.[14]

In part, this is why several sports (e.g., rugby league in Australia (NRL)) have provided for independent doctors as "*concussion spotters*" for a game, permitting such doctors to authorise the removal of a player; indeed, recently the NRL mandated injury spotters at training.[15]Despite such enhanced protections in the NRL, implemented in support of club doctors and with player welfare as the paramount concern –19 players were subjected to 15-minute head injury assessments across eight games in round one of NRL 2023 - an eminent coach within that game criticized the approach as *"concussion hysteria"*[16].

3. In assessing the player on the field of play, club sports doctors are far removed from the sterile, neutral atmosphere of their consultation rooms. In the febrile atmosphere of an important game (with the player likely to want to play on and the coach, possibly, of a similar opinion) ultimately, doctors must rely on their clinical opinion, as guided by the concussion protocols applicable to the sport in question. In this, one reaction to Picken's claim is particularly noteworthy: the president of the AFL Doctors' Association stated that although it is unequivocal that doctors' prime consideration is always the health and welfare of players,

   What is also unequivocal is that we follow what the scientific recommendations are at the time and some of those can be quite nebulous and not clear-cut, so we have to rely on our clinical judgement to deal with some of those issues."

This reference to the nebulousness of current concussion protocols in the AFL must be worrying for that organisation, as would be Dr Rigby's point that pending resolution of the medical, regulatory, and legal concerns with concussion, it will have an adverse impact on '[doctors'] willingness to be involved in the sport.'[17]

Class Actions

The AFL currently faces two concussion class actions, lodged at the Supreme Court of Victoria in March.

In the first, a writ was presented to the Supreme Court of Victoria with former Geelong player, Max Rooke (41), as the lead plaintiff. He contends that in his 8-year/135 game AFL career he was concussed up to 30 times, losing consciousness at least twice. The writ alleges that Rooke (as with the other claimants) suffered "*permanent, life-altering injuries*" as a result of concussions suffered during games and training. The claimants, led by Rooke, are players who played for AFL clubs between 1985 and 14 March 2023. Also included in the action are representatives of the estates of deceased players, who played during the relevant period.

The compensation sought relates to medical care and costs but also loss of earnings, it being reported that many of the players involved have, because of their physical and neurological difficulties, had difficult in securing regular employment since retiring from the game.[18]

The second class action also includes a number of former AFL players (which may ultimately number 200) from the 1980s to more recently. Again, the players are seeking compensation for medical care and costs and loss of earnings on the grounds that the AFL (and the clubs that employed them) negligently exposed them to harm that directly caused them to suffer chronic, degenerative brain disease. Consideration is also being given as to whether family members, who have been affected secondarily by what their spouse or parent has been through, should be joined to such actions.[19]

One of the lead plaintiffs is Shaun Smith (53) who played 109 games in his AFL career between 1987 and 1998. In 2020, he secured an AUS$1.4m pay out when his insurer acknowledged that he had suffered "*total and permanent disablement*" due to the concussive blows sustained during his 11-year career. Although described as a "*landmark*" decision, given the insurer's recognition of the causal link between Smith playing football and his current neurological symptoms, it must be noted that the decision is not of generally applicability to former AFL players because the insurance policy was one that Smith had been taken out personally in the mid-1990s.

The need for players currently playing contact sport at a high level to consider personal insurance, and whether professional sports persons should be able to avail of statutory workers' compensation schemes, has been raised by Australian sports lawyers, such as Eric Windholz, for a number of years, most recently at the aforementioned Senate Inquiry.[20] This year, one AFL club, West Coast Eagles, become the first club in the AFL to recommend that their players take out personal trauma insurance[21].

The second plaintiff of interest is Katherine Tuck, the widow of former AFL player Shane Tuck. Shane Tuck died by suicide in 2020, at 38 years old. A post-mortem examination found the former Richmond Tigers midfielder (who played 173 AFL games) had been suffering from chronic traumatic encephalopathy (CTE), a severe brain disease linked to repeated knocks to the head. A coronial hearing relating to Mr Tuck's suicide in the context of a post-mortem examination began in October 2021[22] and will resume in July 2023[23].

In February 2021, a coroner's inquest took place into the suicide of former AFL player, coach and commentator, Danny Frawley (56) in a car crash in September 2019. Frawley played 240 AFL games between 1984 to 1995. During his career, he sustained approximately 20 concussions. A post-mortem analysis of Mr Frawley's brain by the Australian Sports Brain Bank found he was suffering from CTE. The

coronial inquest established that Mr Frawley had a history of mental health issues and in the period immediately preceding his death had experienced an exacerbation of the anxiety and depression he had been suffering for five years.[24]

In light of Mr Frawley's CTE and its potential relevance to his death, the coroner in Frawley's inquest sought submissions from the AFL on the current state of research in Australia regarding CTE and player safety protocols. Subsequently, questions, pursued by media outlets such asThe Guardian[25], arose about research conducted by now former medical advisor to the AFL, Dr Paul McCrory, who was material to the development of guidelines and protocol relating to concussion both in Australia and internationally. In a subsequent report, numerous recommendations were made to improve the AFL's new concussion management process and concomitant research governance structures.[26]

Without questioning those currently working in concussion safety in the AFL or elsewhere, the above McCrory report has no doubt left sports bodies in Australia and internationally vulnerable to the accusation[27] that the process which results in international or national consensus statements on concussion etc, is a little too consensual, not taking into account more precautionary or critical voices on the links between contact sport and CTE.[28]

On a personal note, as someone who has previously supported and defended the AFL's approach on concussion[29], the above questions have prompted me, and others[30], to take a much more circumspect and critical perspective on whatever policy is likely to emerge from the most recent (and sixth) International Consensus Conference on Concussion in Sport held in Amsterdam in later 2022.

Analysis

As stated, the defendants in the above claims have yet to file a response but the players involved have a difficult legal journey ahead.

Focussing on the constituent elements of the tort of negligence (as the principal cause of action), the first hurdle will be to overcome arguments relating to statute of limitations, which in the state of Victoria is generally 3 years. In a recent case, Zantuck v Richmond Football Club & Ors[31] the Supreme Court of Victoria held, in the matter of a former AFL player claiming to have accrued his injuries between 1999 and 2005, that the emerging nature of scientific research in this area and the incremental onset of chronic neurological trauma meant that the date of actual knowledge by the plaintiff of the accrual of injury could be brought forward so as to place his claim within the period of limitation.

As a side note (but on a very practical, evidentiary matter) the Zantuck proceedings also alluded to the fact that, given the passage of time, limited personal medical records relating to the then treatment of individual players may be available from either the treating doctors or clubs.[32]

Second, there is the issue as to which party owed the player a duty of care (club doctors, the club itself, the AFL or a combination of all three). Recently, it was reported that directors at AFL clubs are seeking to be indemnified[33] if former players take action against their club. In Australia, there is High Court authority Agar v Hyde[34] that a sports body does not owe a duty to take reasonable care to ensure that the playing rules of the sport did not provide for circumstances where risks of serious injury were taken unnecessarily – that case involved the then International Rugby Board (now World Rugby) and that sport's then scrum laws.

Third, even if a duty of care is found, the AFL may argue that their duty was not breached to the reasonable medical knowledge and standards of the period in which the plaintiff played. Negligence law is premised on foresight not hindsight i.e., the standard of the day, not the standards of today. It is of note here that in the aforementioned class actions, the writs specifically provide items such as a timeline of medical knowledge regarding concussions in sport and an outline of research papers done on return to play protocols by international experts dating to the 1980s (by, for example, Dr Robert Cantu in the US) which the AFL ought, it is asserted, reasonably to have known about. Indeed, as reported by the ABC, the Max Rooke writ addresses the AFL's then level of awareness in very specific terms:

At all relevant times … the defendant knew or ought to have known:

> *a) of the potential long-term consequences of concussion suffered by AFL players while training for and playing AFL football*
>
> *b) of the need to make and enforce rules reasonably designed so as to mitigate consequences of long-term injury arising from concussion*

[and the applicable standard of care required the defendant to take reasonable steps to}:

> *(a) inform itself regarding the risks of concussion to players, in line with the state of medical knowledge from time to time*
>
> *(b) make rules, policies, procedures, and protocols applicable to clubs and players reasonably designed so as to mitigate, ameliorate, and reduce the risk of long-term injury arising from repetitive minor head strikes, and concussion*
>
> *(c) ensure clubs abided by the rules, policies, and procedures in matches, in training and in directing players.*

(d) provide information regarding the risk of long-term injury arising from repetitive mild head strikes and concussion to clubs and players."[35]

The fourth and arguably most contentious argument is that of causation. Put simply, can the players show that on the balance of probabilities there is direct causal link between their past football careers and, decades later, their current suffering degenerative neurological disease? The difficulty for the ex-AFL players (causation being one of the reasons that former NFL players agreed to settle their class action with the NFL without admission of liability) is that their argument is vulnerable to the contention that the cause of their current medical difficulty may not be football but may be attributable to some other post-retirement source (lifestyle etc).

More recently, the AFL and other sports bodies have however somewhat softened their stance on causation, acknowledging that there is an association between head trauma and neurodegenerative disease such as CTE but caveating their position by saying that further research is needed into CTE through "*well-designed prospective epidemiological studies that take into account the potential confounding variables [that is the variables of medical history, lifestyle etc that may, other than football injury, have materially contributed to the players' current afflictions]*". The above acknowledgement on causation is part of the AFL's submission to the ongoing Australian Senate Inquiry into concussion in sport.[36] It was influenced by a recent statement on the link between degenerative brain health and CTE emanating from the US National Institute for Health.[37]

Finally, it could be argued that a defence available to the AFL is that of consent or in terms of the tort of negligence,volenti – simply put that the players knew the risks but played on. Volenti is an extremely difficult defence to make out in Australian law of negligence, and in common law jurisdictions more generally. In any event, it would be difficult for any sports body – and the onus would be on them to make out the defence – to sustain an argument that players in signing an AFL contract gave a truly informed decision to assume the risks of chronic degenerative brain damage in later life.

There are few workplaces in Australia if any – and for AFL professional players the field of play in their workplace – where employees would be expected to assume the risk of chronic brain damage in the course of their employment.In the most recent AFL injury surveillance report – the 30th edition[38] – concussion ranked in the top-three most common injuries resulting in missed matches in the 2021 AFL season, alongside hamstring and calf strains. Games missed due to concussions rose from 1.3 injuries a club in 2020 to 3.68 in 2021, which the AFL attributed[39] to enhanced concussion guidelines on return to play.

Returning to volenti, it is argued that the nature of any supposed implied consent given by players would surely be vitiated by the gravity of future harm.[40]

There may be an argument in contributory negligence, if for, example, players either attempted to circumvent – cheat[41] - baseline testing at the beginning of the season or deliberately did not report a concussion during the season. On the last point, a worrying, if pleasingly transparent, submission to the ongoing Senate Inquiry in Australia came from the AFL Players' Association (AFLPA) who noted that despite (a) the growing awareness[42] on the issue promoted by class actions by former players and (b) a significant increase in the number of football-ending injury applications to the AFLPA relating to concussion in recent years - in 2021, these accounted for 63% of successful football-ending injury applications to the AFLPA; pre- 2021, there had only been a total of four applications for concussion injuries; and yet, 9% of AFL players surveyed by the Players' Association failed to report a concussion they experienced in 2022, up from a 7% average over the previous five years (similarly 9%continued playing or training after experiencing a concussion without receiving medical attention). It is an extraordinary and, in some ways, mystifying increase for male AFL players - by contrast, just 2% of AFLW players did not report a concussion in 2022 which was down from 4% in previous seasons.[43]

The Future

The opening of the AFL 2023 season has been overshadowed by concussion-related matters.[44] On 26 April, a Senate inquiry into the topic held a public hearing in the AFL's heartland, Melbourne.[45] A week previously, one of the AFL's legendary past players, Gary Ablett Senior, announced that he is to sue the AFL and two clubs[46], claiming he suffered damage from concussions as a result of their negligence. Reviewing the previous months in the AFL on concussion, this author is of the view that any sport's approach to concussion must be sixfold.

Recognise

Contact sports need to recognise (and, to be fair, most have) the existential crises presented by concussion both in terms of the long term health of existing participants and the long term future of the sport in attracting new participants. Sports – and not just contact sports, see, recently in Australia with regard to surfing and netball[47] - need to recognise that concussion is an issue not confined to the elite but also impacting community and grassroots sport[48]. In North America, states in the US[49] and Canada (such as Rowan's law[50] in Ontario) have adopted statutory based guidelines with respect to the approach to concussion in school sports.

Rules

Many sports, especially contact sports, are predicated on risk-taking. Risk is part of the elemental appeal of such sports, and rightly so. Nevertheless, it is the regulatory duty of a sports body to monitor and update, by way of an evidence-based approach, the rules of its sport to avoid unnecessary risks. Even in March 2023 as the above writs were lodged, the AFL Tribunal was busy dealing with one particularly problematic but intrinsic part of the game of footy – "*the bump*".[51]

Rest

While concussion protocols – such as Head Injury Assessments – which mandate the withdrawal of a player during game time attract headlines, the return to play protocols are of critical importance. In the AFL in 2023, the minimum break under the return-to-play protocols for a concussed player remaining at 12 days[52] (in the NRL it is 11). Twelve or 11 days is not however a target, it is a guideline. If a player needs longer, they must be given it.

An interesting test of such return to play protocols would be the following scenario: a player suffers a concussion in a semi-final and has to miss the Grand Final on the following weekend because of the extant protocol. The player nevertheless obtains a second opinion that he has recovered quickly and fully and he is fit to play. Would that player have a cause of action to challenge the 12-day protocol and seek an injunction in court to participate in the Grand Final?[53]

Research

In March, the AFL released its Strategic Plan for Sport-Related Concussion in Australian Football current-2026[54], committing AUS$25million to scientific inquiry and notably the initiation and design of the longitudinal brain health study – to be known as the AFL Brain Health Initiative. As with other entities such as the NFL, the AFL works closely with its player association on concussion process and, as with bodies such as World Rugby, it seeks to support its research efforts with wider and better education of its participants. Although integrity issues such as match manipulation etc are, of course important – recently the IOC announced another US$10million in program development in the area[55]; surely, the bodily integrity of players is worth equal support from Lausanne?

Reinforce

Education is key: helping parents and volunteers at the community level to identify the acute symptoms of concussion; making coaches and administrator at all levels aware of their duties with regard to player welfare and the long-term future of the game; protecting doctors and medical personnel without whom the game cannot take place; and also informing players that they can and should self-certify. Key stakeholders in the game from parents to players' associations cannot be 'kept in the dark'[56].

Education in this area is about giving stakeholders the information and skills to mitigate the risks arising from, and to make an informed decision about, their chosen sport. Education cannot however be solely a top-down exercise i.e., for the controlling governing body to its constituent parts. There must also, be information-sharing between key stakeholders. Arising out of a recent, tragic fatality in community AFL in South Australia[57], there have been calls, supported by the Australian Medical Association, for concussion passports for contact sports[58]. Concussion passports would, as players move from club to club, or even sport to sport, allow clubs and sports (and the doctors working therein) to keep track of a player's history of head injury. Though it may have to overcome health privacy-related obstacles,giving clubs access (on a limited, privileged basis) to a central repository of players' concussion passports, may, it is advocated, become an important preventative step, especially given the damage that can arise from cumulative concussions or second impact syndrome.

Redress

Critics of the AFL continue to agitate that, given the emerging science on the nature and scope of CTE in particular, it should, in line with the precautionary principle, do more to 'test and rest'[59] players. Equally, advocates for ex-players contend that rather than fighting players in court on grounds of causation and compensation, the AFL should consider a settlement in the form of a trust fund, or levy or redress scheme. The AFL is currently working with Peter Gordon (former President of Western Bulldogs) of Gordon Legal to consider options for the introduction of an expanded financial assistance scheme for former players.[60]

For tort lawyers in Australia, the current class actions regarding concussion have similarities to how, in previous decades, long retired workers eventually secured compensation for being exposed to asbestos-related disease in the workplace. That was a tortuous or tortious process and similar to the above involved argument over the proper defendant to the cause of action, breach of duty, causation, limitation of action and the form and quantum of damages. In Australia, the first case that confirmed liability of the operators of a mine for causing asbestos-related diseases to a worker was CSR Ltd v Rabenalt[61], followed by Western Australia v Watson[62] and most notably, Heys v CSR Ltd & Anor[63]. In that line of case law, counsel for the workers were instructed by among others Peter Gordon.[64]

As with asbestos-related claims in Australia, the above sports concussion related claims may more properly be seen and resolved in terms of occupational health and safety law and necessitate some sort of redress scheme. Indeed, ultimately, the AFL and its former players may settle along lines similar to the NFL settlement[65] of nearly a decade ago.

Conclusion

Finally and on a personal note, the link between neurological trauma in later life, deriving from playing sport in earlier years, was brought to full effect with a recent interview of former Irish rugby international Fergus Slattery (74) – a childhood hero. In that interview, the impact that living with dementia has had on the former British and Irish Lion and his family is poignantly recounted. Fifty years ago, Slattery played in one of rugby union's most famous games – for the Barbarians against the All Blacks in Cardiff Arms Park on 27 January 1973[66]. Slattery (#7) is the first to congratulate "*that fellow*" Gareth Edwards after that try.[67]

Games such as rugby union have change immensely since then, the key question now is whether we will still be congratulating and enjoying the try-scoring exploits of diminutive Welsh scrum halves in 2073? The current ethical, regulatory and legal onus on sports administration in rugby, in the AFL and other contact sports is a daunting one because, in simple, stark and direct terms - sports-related dementia may be the one category of that terrible neurology disease that we can truly prevent.

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