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HOW MUCH BRAIN DETERIORATION DO YOU NEED TO
GET INTO COURT: ANALYZING THE ISSUE OF STATUTES
OF LIMITATIONS FOR ATHLETES' CONCUSSION-RELATED
INJURY LITIGATION THROUGH THE LENS OF TOXIC TORT
LAW

*Dominic DiMattia**

“It’s very difficult . . . you’ve kind of lost that person,
but you can’t really grieve because they’re still alive[.]”¹

I. INTRODUCTION

Stephen Peat was one of the most brutal fighters in the history of hockey.² His name often appears in rankings of the game’s greatest fights.³ Before retiring in 2007, Peat found his vision blurring while sitting in the penalty box after his fights.⁴ A year or two after he hung up his skates, headaches became a daily occurrence and were relentless.⁵ Peat now struggles with depression, anxiety, and memory loss, which have hampered his ability to hold a job.⁶ Today, Peat is homeless and in and out of rehab for his drug addiction.⁷

Walter Peat, Stephen’s father, worries about the fate of his son.⁸ The National Hockey League (NHL) has offered no support aside

* J.D. Candidate, University of Baltimore School of Law, 2019. I thank Professor Closius for his guidance and assistance in writing this Comment. I dedicate this work to my mother and father.

1. Douglas Quan, *‘No One’s Cheering Me On’: Ex-NHL Enforcer is Homeless, Battling Substance Abuse and Concussion Symptoms*, NAT’L POST (Dec. 30, 2017, 12:34 PM), <http://nationalpost.com/news/canada/no-ones-cheering-me-on-ex-nhl-enforcer-is-homeless-battling-substance-abuse-and-concussion-symptoms> (quoting Brenda Johnson, mother of L.A. Kings and Minnesota Wild enforcer Matt Johnson).

2. *See id.*

3. *See, e.g.*, Kyle Nicolas, *Hockey Fight Videos: The NHL’s 20 Greatest Fights from the Last 20 Years*, BLEACHER REP. (Aug. 3, 2011), <http://bleacherreport.com/articles/789944-hockey-fight-videos-the-nhls-20-greatest-fights-from-the-last-20-years>.

4. Quan *supra*, note 1.

5. John Branch, *After a Life of Punches, Ex-N.H.L. Enforcer is a Threat to Himself*, N.Y. TIMES (June 1, 2016), <https://www.nytimes.com/2016/06/02/sports/hockey/stephen-peat-nhl-enforcer-concussions-cte-health.html>.

6. Quan, *supra* note 1.

7. *Id.*

8. *Id.*

from a substance abuse and behavioral health program.⁹ But the Peats suspect Stephen's rapid deterioration is not behaviorally related.¹⁰ Instead, they believe the culprit is likely what has led to the early deaths of several former NHL enforcers: chronic traumatic encephalopathy (CTE).¹¹

Stories like Stephen Peat's are becoming more and more commonplace.¹² The public is now recognizing the risk of long-term brain damage from playing contact sports at all ages.¹³ Enrollment in youth hockey and football leagues has decreased significantly.¹⁴

While additional steps are being taken to protect current athletes,¹⁵ retired athletes with debilitating symptoms, and families of individuals who died from CTE-related causes, are suffering and the possibility of monetary relief through the judicial system seems bleak.¹⁶ Most will not have the opportunity to join class-action lawsuits like a select few of former National Football League (NFL) players and NHL players.¹⁷ Instead, they face the obstacle of even being heard when they take their CTE claims to court.¹⁸ With the

9. *Id.*

10. Branch, *supra* note 5.

11. *Id.* (explaining that CTE is a "degenerative brain disease caused by repeated blows to the head"). NHL enforcers fill a traditional but informal protective role on their teams and are most likely to fall victim to CTE on account of their defensive acts; enforcers will typically receive the highest number of penalty minutes during a game on account of their aggressive contact with opposing team members. *See Enforcer*, SPORTS LINGO, <https://www.sportslingo.com/sports-glossary/e/enforcer/> (last visited Apr. 5, 2019).

12. *See* John Keilman, *Youth Football Participation Declines as Worries Mount About Concussions, CTE*, CHI. TRIB. (Sept. 5, 2017, 7:20 AM), <http://www.chicagotribune.com/news/local/breaking/ct-football-youth-decline-met-20170904-story.html>.

13. *See id.*

14. *See id.*

15. *See id.*

16. *See* Sarah James, *Ring the Bell for the Last Time: How the NFL's Settlement Agreement Overwhelmingly Disfavors NFL Players Living with Chronic Traumatic Encephalopathy (CTE)*, 11 J. HEALTH & BIOMEDICAL L. 391, 424–28 (2016).

17. Stephen Whyno, *NHL, Retired Players Reach \$19M Concussions Settlement*, ASSOCIATED PRESS NEWS (Nov. 12, 2018), <https://www.apnews.com/27e7392bf42a41e598054b3f0c52730>; *see* James, *supra* note 16, at 408.

18. *See* Steven M. Sellers, *Sports Concussion Cases Put Insurers on Defense*, BLOOMBERG BNA (Aug. 8, 2017), <https://www.bna.com/sports-concussion-cases-n73014462985/>.

rise of CTE claims,¹⁹ sports leagues are attempting to use statute of limitation defenses to dismiss lawsuits.²⁰

The nature of CTE claims rings similar to the rampant asbestos litigation that occurred from the 1960s to 1980s.²¹ CTE is a disease that is not diagnosable until death, meaning potential plaintiffs often live with it unknowingly for decades.²² The same occurs in individuals with asbestos-related injuries.²³ As such, courts now suggest the legal system adopt toxic tort discovery rules in CTE cases to afford plaintiffs an opportunity to recover for their injuries.²⁴

This Comment argues that eliminating the statute of limitations for CTE cases will allow CTE litigants to bring their claims while they are alive.²⁵ Part II defines CTE and how it functions and discusses the sudden discovery of its prevalence in professional sports leagues.²⁶ Part II will also look at the effect of the first major CTE case, *In re National Football League Players Concussion Injury Litigation*, on setting precedent for future lawsuits.²⁷ Part III discusses the development of toxic tort law and how it overcomes statute of limitation issues.²⁸ Finally, in Part IV, this Comment will identify the differences between toxic tort diseases and CTE that do not allow common judicial rules to function properly in the concussion litigation arena.²⁹ Instead, the optimal and efficient means to find relief for athletes suffering from CTE is to eliminate

19. *See id.*

20. Defendant's Reply Memorandum at 10–12, *Decarlo v. Nat'l Football League*, No. 161644/2015, 2016 WL 8203448 (N.Y. Sup. Ct. Jan. 27, 2017).

21. *See id.*; *see also generally A Brief History of Asbestos Litigation*, MESOTHELIOMA & ASBESTOS AWARENESS CTR. (July 27, 2016), <https://www.maacenter.org/blog/a-brief-history-of-asbestos-litigation/> (discussing the beginning of asbestos mass torts from the 1960s to 1980s).

22. *Frequently Asked Questions About CTE*, B.U. RES. CTE CTR., <https://www.bu.edu/cte/about/frequently-asked-questions/> (last visited Apr. 5, 2019); *see also* Sellers, *supra* note 18 (explaining how many people seek treatment at the age of 60 complaining about receiving hard hits to the head during their college years).

23. *See* Sellers, *supra* note 18 (taking decades for the illnesses to manifest and even diagnose).

24. Trial Order at 11–12, *DeCarlo v. Nat'l Football League*, No. 161644/2015, 2017 WL 384258 (N.Y. Sup. Ct. Jan. 26, 2017) (denying the defendant's motion to dismiss the plaintiff's Complaint as time-barred).

25. *See infra* Section IV.A.

26. *See infra* Sections II.A–B.

27. *See infra* Section II.C.

28. *See infra* Part III.

29. *See infra* Part IV.

statutes of limitation in CTE cases altogether.³⁰ While this idea seems drastic, the nature of CTE effectively bars recovery for plaintiffs and will continue to bar recovery until further developments are made in the field of medicine.³¹

II. BACKGROUND

A. *What Is Chronic Traumatic Encephalopathy (CTE)?*

CTE is a neurodegenerative disease that frequently occurs in individuals who suffer repetitive brain trauma.³² When a person continually receives trauma to the head, the protein Tau builds up in the brain and destroys brain cells.³³ Suffering a few concussions is generally not enough to lead to the disease.³⁴ Most deceased athletes diagnosed with CTE received hundreds or thousands of head impacts over the course of their career.³⁵

The age at exposure to repetitive head trauma is a substantial factor in the development of CTE.³⁶ Athletes who began playing contact sports before the age of twelve are more likely to develop CTE earlier in life and with stronger symptoms.³⁷

At the moment, CTE is only diagnosable after death through a post-mortem examination of the brain.³⁸ There are no current medical criteria for diagnosis in living persons.³⁹ However, researchers are getting closer to discovering means of detecting the disease while individuals are still alive.⁴⁰

30. *See infra* Part IV.

31. *See infra* Part IV.

32. Robert A. Stern et al., *Clinical Presentation of Chronic Traumatic Encephalopathy*, 81 AM. ACAD. NEUROLOGY 1122, 1122 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3795597/>.

33. *What is CTE?*, CONCUSSION LEGACY FOUND., <https://concussionfoundation.org/CTE-resources/what-is-CTE> (last visited Apr. 5, 2019).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *See* B.U. RES. CTE CTR., *supra* note 22.

39. Brandon E. Gavett et al., *Chronic Traumatic Encephalopathy: A Potential Late Effect of Sport-Related Concussive and Subconcussive Head Trauma*, 30 CLINICAL SPORTS MED. 179, 183 (2011), [https://www.sportsmed.theclinics.com/article/S0278-5919\(10\)0086-4/pdf](https://www.sportsmed.theclinics.com/article/S0278-5919(10)0086-4/pdf).

40. *See* Bob Hohler, *BU Might Be Closer to Diagnosing CTE During Life*, BOS. GLOBE (Sept. 26, 2017), <http://www.bostonglobe.com/sports/2017/09/26/discovery-raises-hopes-for-diagnosing-cte-during-life/wTKGvJzgR4ZqXDRtGV1Q4H/story.html>.

Another problematic issue with the disease is that symptoms generally only appear years, or even decades, after exposure to repetitive head trauma.⁴¹ Symptoms that may signal the existence of CTE are: (1) impairments of cogitation, behavior, and mood, (2) chronic headaches, and (3) motor and cerebellar dysfunction⁴² such as Parkinson's Disease.⁴³ Behavioral and mood changes tend to occur during an individual's twenties and thirties.⁴⁴ The onset of greater cognitive and motor impairment arises later in life, typically around the age of fifty.⁴⁵

B. History of Concussion Awareness in Professional Sports

The symptoms of CTE were first documented in the 1920s in boxers, receiving the nickname "punch drunk syndrome[.]"⁴⁶ Researchers believed the symptoms of confusion, slowness in movement, and speech problems that boxers often exhibited were a result of the repeated blows to the head they received participating in the sport.⁴⁷

Little movement was made on the matter, however, until the National Football League (NFL) created the Committee on Mild Traumatic Brain Injury (MTBI) in 1994 after increased public concerns over the prevalence of concussions in the sport.⁴⁸ The committee published its first six-year study in 2003 arguing that no NFL players had long-term brain damage as a result of concussions.⁴⁹ Despite opposition from independent researchers, the NFL continued for almost a decade to portray concussions as minor injuries.⁵⁰

41. See CONCUSSION LEGACY FOUND., *supra* note 33.

42. See Stern et al., *supra* note 32, at 1122.

43. See Gavett et al., *supra* note 39, at 180.

44. See Stern et al., *supra* note 32, at 1123–25.

45. See *id.*

46. Helen Ling et al., *Neurological Consequences of Traumatic Brain Injuries in Sports*, 66 MOLECULAR & CELLULAR NEUROSCIENCE 114, 118 (2015), <https://www.science-direct.com/science/article/pii/S104474311500041X>.

47. *Id.*

48. See Edwin Rios, *The NFL's Bombshell on the Scary Truth About Brain Disease*, MOTHER JONES (Mar. 16, 2016, 10:00 AM), <http://www.motherjones.com/media/2016/03/nfl-bombshell-admission-football-cte-brain-disease/>.

49. *Id.*

50. Kevin Seifert, *NFL Medical Adviser Elliot Pellman Retiring; Move Prompted by Roger Goodell*, ESPN (July 21, 2016), http://www.espn.com/nfl/story/_/id/17113610/controversial-nfl-medical-adviser-elliott-pellman-retiring/.

Then in 2005, Dr. Bennet Omalu discovered large build ups of Tau in the brain of former Pittsburgh Steelers legend Mike Webster.⁵¹ This finding was the first case of CTE linked to professional football.⁵² This spurred the creation of concussion institutions to further research the pervasiveness of CTE in retired NFL players.⁵³ The NFL responded to this discovery by attempting to dismiss the credibility of Dr. Omalu, stating his findings were misinterpreted and flawed.⁵⁴

After more studies were published showing a direct link between CTE and professional football,⁵⁵ retired athletes began to look for relief for their concussion-related ailments.⁵⁶ The professional sports leagues offered little assistance aside from behavioral and substance abuse rehabilitation programs.⁵⁷ As such, athletes and their families turned to the legal system.⁵⁸

C. *CTE Litigation: In re National Football League Players' Concussion Injury Litigation and Its Aftermath*

In 2011, hundreds of former football players joined in a class-action lawsuit against the NFL, the first major legal proceeding for concussion-related injuries against a professional sports league.⁵⁹ The plaintiffs claimed the league failed to protect its players from concussions and repetitive head trauma, thereby subjecting them to CTE.⁶⁰ They accused the NFL of knowing about the long-term risks of concussions for decades and concealing the information.⁶¹ Evidence showed the MBTI purposely and deliberately underplayed

51. See CONCUSSION LEGACY FOUND., *supra* note 33.

52. *Id.*

53. *Id.*

54. Jeanne M. Laskas, *Bennet Omalu, Concussions, and the NFL: How One Doctor Changed Football Forever*, GQ (Sept. 15, 2009), <https://www.gq.com/story/nfl-players-brain-dementia-study-memory-concussions>.

55. See Daniel Rapaport, *Timeline: Six Studies of Head Trauma in Football That Helped Establish Link to CTE*, SPORTS ILLUSTRATED (July 26, 2017), <https://www.si.com/nfl/2017/07/26/nfl-concussion-head-trauma-studies-football-timeline>.

56. See *Frequently Asked Questions: Basic Information: What Is the Settlement About?*, NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com/FAQ.aspx> (last visited Apr. 5, 2019).

57. See Branch, *supra* note 5.

58. See *id.*

59. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 420 (3d Cir. 2016) [hereinafter *In re NFL*].

60. See NFL CONCUSSION SETTLEMENT, *supra* note 56.

61. *Id.*

the seriousness of repetitive head trauma.⁶² After six years of litigation, the NFL settled the case in January 2017.⁶³

While *In re NFL* secured relief for a class of retired professional football players,⁶⁴ its outcome may not truly help athletes find relief from CTE.⁶⁵ The NFL maintained the position throughout the lawsuit that it was not liable and did not have the responsibility to provide protection against concussion-related injuries sustained by players.⁶⁶ By settling the case, the court could not rule on the validity of this argument.⁶⁷ Precedent on whether the league knew or should have known of the risks of repetitive head trauma and whether it fraudulently concealed this information could not be established for future litigation.⁶⁸

Critics of the settlement agreement further contend it unfairly left most current and future professional football players unattended.⁶⁹ The settlement class does not include current NFL players, players who retired on or after July 7, 2014, or athletes who participated in tryouts but did not make a team.⁷⁰ Consequently, there will be many retired players suffering from CTE who will need to find alternative means of recovery.⁷¹

Further, other athletes playing contact sports, including those outside of professional sports leagues,⁷² fail to benefit from the settlement agreement when using the same arguments brought by the players in *In re NFL*.⁷³ A group of former professional hockey players brought a lawsuit against the NHL similar to *In re NFL*.⁷⁴

62. See *In re NFL*, 821 F.3d at 422; Seifert, *supra* note 50.

63. *Frequently Asked Questions: Basic Information: When Was the Effective Date? What Is It?*, NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com/FAQ.aspx> (last visited Apr. 5, 2019).

64. See *In re NFL*, 821 F.3d at 447–48.

65. See James, *supra* note 16, at 424–28.

66. Cf. NFL CONCUSSION SETTLEMENT, *supra* note 56 (explaining that the NFL denied Plaintiffs' claims that they are liable for failing to warn players of the risks of repetitive traumatic brain injuries).

67. See *In re NFL*, 821 F.3d at 447–48.

68. Cf. *id.* (upholding the settlement agreement).

69. See James, *supra* note 16, at 421–22, 426–28.

70. See NFL CONCUSSION SETTLEMENT, *supra* note 56.

71. See James, *supra* note 16, at 426–27.

72. See *In re Nat'l Collegiate Athletic Assoc. Student-Athlete Concussion Injury Litig.*, 314 F.R.D. 580, 595 (2016).

73. Sean McIndoe, *How the NHL Concussion Lawsuit Could Threaten the Future of the League*, GUARDIAN (Apr. 5, 2017, 5:00 PM), <https://www.theguardian.com/sport/2017/apr/05/nhl-concussion-lawsuit-could-threaten-future-of-league>.

74. See Whyno, *supra* note 17.

The problem was that the plaintiffs in this case likely did not have the same level of evidence pointing to the NHL culpability and previous knowing of the long-term effect of concussions and CTE that was present in the NFL case.⁷⁵ Even so, the NHL settled just as the NFL did.⁷⁶ Again, no precedent was established, and current and many former hockey players failed to benefit from the settlement.⁷⁷ Individual CTE lawsuits may soon flood the legal system with the amount of athletes who cannot find relief through class-action alternatives.⁷⁸

Due to the difficulty that arises with diagnosing CTE, legal systems across the country will need to begin establishing precedent on when these cases can be brought to court.⁷⁹ Professional sports leagues are raising the defense that retired athletes should be time-barred due to the statute of limitations.⁸⁰ They argue players were put on notice upon receiving multiple concussions during their careers.⁸¹ Because CTE cannot be discovered until death, the three to six year window that is applied to most claims has almost always passed.⁸²

However, a trial court in New York decided to view the statute of limitations problem through the lens of toxic tort law for a CTE case of one former NFL player.⁸³ The cause of action for the claim, in the judge's opinion, should likely not begin running until the actual diagnosis of CTE upon death.⁸⁴ This delayed discovery rule is persuasive in many states for asbestos-related litigation.⁸⁵ The similarities that exist between CTE and asbestos-related diseases have prompted legal experts to contend that toxic tort laws may be critical in guiding the course of CTE litigation.⁸⁶

75. See *McIndoe*, *supra* note 73.

76. See *Whyno*, *supra* note 17.

77. See *id.*

78. See *Sellers*, *supra* note 18.

79. See *id.*

80. See *In re National Hockey League Players' Concussion Injury Litig.*, MDL No. 14-2551, 2015 WL 1334027, at *10 (D. Minn. Mar. 25, 2015) [hereinafter *In re NHL*]; Trial Order at 2, *DeCarlo v. Nat'l Football League*, No. 161644/2015, 2017 WL 384258 (N.Y. Sup. Ct. Jan. 26, 2017).

81. See *In re NHL* at *7; Trial Order at 2, *DeCarlo*, 2017 WL 384258 (No. 161644/2015).

82. See Trial Order at 5, *DeCarlo*, 2017 WL 384258 (No. 161644/2015).

83. See *id.*

84. See *id.* at 6.

85. See Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 976 (1988).

86. See *Sellers*, *supra* note 18.

III. TOXIC TORTS BALANCES THE INTERESTS FOR STATUTES OF LIMITATIONS

A. *The Function of Statutes of Limitations*

Statutes of limitations function as a means to limit when a plaintiff can assert a claim for relief for a violation of law by a defendant.⁸⁷ Various policies have developed over the course of legal history that explain the benefits of limiting when claims may be brought.⁸⁸ First, defendants should not be on guard forever against untimely claims.⁸⁹ They should have reasonable expectations that their actions will or will not lead to a potential claim and that they will be able to efficiently plan for the costs of litigation.⁹⁰ Second, claims should be brought when the evidence is still fresh.⁹¹ Facts may blur and distort as documents are lost and witnesses' memories fade through the course of time, disallowing the truth to come to fruition.⁹² The third justification is that statutes of limitations assist in achieving an efficient and timely judicial system.⁹³ Judiciaries will not have to delve into the expensive and time-consuming task of sorting through decades old evidence.⁹⁴ Prohibiting the bringing of stale claims reduces the overall number of claims filed in an already overburdened legal system.⁹⁵ Finally, statutes of limitations are believed to ensure plaintiffs and defendants arrive in court on equal grounds with no one party having an advantage over the other.⁹⁶ Litigation can commence to discover the truth of the matter and promote fairness and justice with ease.⁹⁷

Although statutes of limitations often are viewed as a means of protecting defendants,⁹⁸ parties can take advantage of its application

87. James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations*, 15 VA. ENVTL. L.J. 589, 590 (1996).

88. *Id.* at 590–91.

89. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purpose of Statutes of Limitation*, 28 PAC. L.J. 453, 460 (1997).

90. *See id.* at 468–69.

91. MacAyeal, *supra* note 87, at 590–91.

92. *Id.*

93. *Id.* at 591–92.

94. *See* Ochoa & Wistrich, *supra* note 89, at 471–72, 480–81.

95. *Id.* at 495.

96. *Id.* at 483–84.

97. *Cf. id.* at 471–72.

98. *See id.* at 483. *But see id.* at 484–86.

to avoid lawsuits.⁹⁹ If a defendant can conceal illegal or negligent actions through deception, plaintiffs may not become aware of their claim until after the statute of limitations has run.¹⁰⁰ The legal system has often adjusted for these circumstances by tolling the statute of limitations when evidence of fraudulent concealment by a defendant is present.¹⁰¹

B. Toxic Tort Law Overcomes the Issue of Statutes of Limitations Precluding Equitable Claims

In 1979, the term “toxic tort” was first used by a tribunal in a case involving injuries stemming from exposure to Agent Orange.¹⁰² Today, the term has expanded to include various types of claims brought by individuals who suffer from chronic and latent diseases caused by exposure to toxic substances.¹⁰³ Toxic substances are materials produced, used, or distributed which present an unreasonable risk of harm to a person’s health.¹⁰⁴ One of the most common toxic tort claims within the past few decades has been for mesothelioma,¹⁰⁵ a disease resulting from exposure to asbestos.¹⁰⁶

Asbestos is a compound that was widely used for construction purposes for over a century.¹⁰⁷ It was not until the 1960s and 1970s that mainstream society learned of the diseases linked to asbestos

99. See Amber Davis-Tanner, *Antitrust Law—Affirmative Acts and Antitrust—The Need for a Consistent Tolling Standard in Cases of Fraudulent Concealment*, 33 U. ARK. LITTLE ROCK L. REV. 331, 331 (2011).

100. See *id.* at 336.

101. See *id.*

102. BRENT A. OLSON, MINNESOTA PRACTICE SERIES: BUSINESS LAW DESKBOOK § 25:7 (2018).

103. DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 11:13 (4th ed. 2018).

104. *Id.*

105. See Note, *Causation in Environmental Law: Lessons from Toxic Torts*, 128 HARV. L. REV. 2256, 2258 (2015) (explaining that cases arising from asbestos exposure are very common).

106. Sen, D., *Working with Asbestos and the Possible Health Risks*, 65 OCCUPATIONAL MED. 6, 9–10 (2015).

107. Cf. Lisa K. Mehs, *Asbestos Litigation and Statutes of Repose: The Application of the Discovery Rule in the Eighth Circuit Allows for Plaintiffs to Breathe Easier*, 24 CREIGHTON L. REV. 965, 965 (1991) (explaining that asbestos has been known to humankind for centuries and that it has been commonly used as a flame retardant in the past).

exposure.¹⁰⁸ As a result of many people becoming ill, toxic tort claims began to flood the judicial system.¹⁰⁹

One of the major problems that arose in litigating toxic torts was applying statutes of limitations to the claims after determining that a cause of action even existed.¹¹⁰ Asbestosis, mesothelioma, cancer, and other diseases linked to asbestos have long latency periods, meaning they do not surface until anywhere from ten to forty years following exposure.¹¹¹ In addition, during the early stages of these diseases, symptoms do not appear unmistakably and can often be misdiagnosed by healthcare professionals.¹¹²

The policies behind statutes of limitations in typical torts do not consider the characteristics of diseases in toxic tort claims.¹¹³ For the standard tort, statutes of limitations allow evidence and chain of causation to remain fresh and available.¹¹⁴ If plaintiffs delay too long, these critical parts of litigation may become distorted or lost entirely.¹¹⁵ Furthermore, defendants do not have to be worried about ancient claims emerging decades after the event that caused the injury to take place, causing a heavy burden in terms of managing ones legal affairs.¹¹⁶

However, in toxic tort cases, the lengthy latency periods often deprive plaintiffs of their right to lawsuits because they are not aware of their injury until the statute of limitations has expired.¹¹⁷ The toxic tortfeasor also unduly benefits in these situations as they gain extra protection against their misdeeds.¹¹⁸ These defendants often were aware or should have been aware of the long time period it takes for injuries to surface, making future litigation no longer a surprise.¹¹⁹ Some courts found defendants intentionally and

108. See MESOTHELIOMA & ASBESTOS AWARENESS CTR., *supra* note 21.

109. *See id.*

110. *See* Mehs, *supra* note 107, at 966.

111. *See id.* at 965–66.

112. Green, *supra* note 85, at 975–76.

113. *See* Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683, 1684 (1983).

114. *See id.* at 1684–85.

115. *See id.* at 1685.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

fraudulently concealed the hazards of asbestos from plaintiffs to shield themselves from potential litigation.¹²⁰

In order to address this unbalance of interests, courts took to fashioning delayed discovery rules and allowed for the tolling of statutes of limitations where fraudulent concealment was proven.¹²¹ These discovery rules often delay the accrual of a plaintiff's claim until they discover or should have discovered their disease, therefore considering lengthy latency periods.¹²² If the defendant took steps to hide their toxic tort from victims, plaintiffs were still allowed to bring their claim to court.¹²³ However, the wide variation and lack of uniformity of these rules among jurisdictions have caused confusion and uncertainty for litigants as to when a claim may be brought and what constitutes discovery of the injury.¹²⁴

C. *Delayed Discovery Rules in Toxic Torts*

Two types of delayed discovery rules have developed in relation to toxic torts.¹²⁵ The first is a single-action rule allows the plaintiff to only make one claim for all damages resulting in specific injury.¹²⁶ This rule, however, does not truly address the latency period issue existing in diseases occurring from toxic torts.¹²⁷ Under this rule, plaintiffs often bring their claims as soon as the smallest injury surfaces.¹²⁸ This effectively minimizes recovery because the claims are only litigated in respect to their current injuries.¹²⁹ When the disease eventually worsens and the harshest symptoms appear, these victims are barred from obtaining relief from those later developments.¹³⁰ In response, some jurisdictions established a second type of delayed discovery rule, called the "separate disease

120. See *DeCosse v. Armstrong Cork Co.*, 319 N.W.2d 45, 52 (Minn. 1982); Gideon Mark, *Issues in Asbestos Litigation*, 34 *Hastings L.J.* 871, 884–85 (1983).

121. See Green, *supra* note 85, at 976.

122. *Id.*

123. See *DeCosse*, 319 N.W.2d at 52.

124. See Green, *supra* note 85, at 978–79.

125. Christopher W. Jackson, *Taking Duty Home: Why Asbestos Litigation Reform Should Give Courts the Confidence to Recognize a Duty to Second-Hand Exposure Victims*, 5 *WAKE FOREST L. REV.* 1157, 1161–62 (2010).

126. *Id.* at 1162.

127. *Id.*

128. *Cf. id.* (explaining that under the single-action rule plaintiffs must bring their claims as soon as the first sign of adverse side effects appear or potentially lose the chance to bring a suit at all).

129. See *id.*

130. See *id.*

rule,” which creates a statute of limitations date for the discovery of each successive disease or injury.¹³¹

For purposes of discovering a claim and in order to address the flood of lawsuits from plaintiffs who were bringing them prematurely, courts have ruled that mere exposure absent physical impairment is not sufficient to bring a toxic tort claim.¹³² Rules that allow for claims to be brought under increased-risk exposure are generally prohibited as well.¹³³ Courts often conclude that for a cause of action to begin to run, there must be the appearance of a sufficient symptom that would trigger the plaintiff to investigate whether or not they have been injured through previous exposure to a toxic substance.¹³⁴ For example, the U.S. 10th Circuit Court of Appeals found that a plaintiff who had undergone three operations in regards to a symptom of a toxic tort should have discovered the cause of action and was therefore barred from bringing his claim.¹³⁵

IV. CTE LITIGATION NEEDS TO DO MORE THAN FOLLOW TOXIC TORTS’ TAKE ON STATUTES OF LIMITATIONS

Diseases implicated in toxic tort law are similar to CTE yet differ critically.¹³⁶ The delayed discovery rules existing in the realm of toxic tort law cannot effectively meet the needs of CTE plaintiffs.¹³⁷ The goal should be to ensure appropriate and equitable relief for living athletes and not wait until they are deceased.¹³⁸ Therefore, rather than deal with the complications of deciding a toxic tort rule for statutes of limitations to apply in each jurisdiction for CTE

131. *Id.*

132. *Id.* at 1167.

133. James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 822 (2010).

134. *Id.* at 822–23.

135. *Sawtell v. E.I. du Pont de Nemours and Co., Inc.*, 22 F.3d 248, 251–52 (10th Cir. 1994).

136. Compare Gavett et al., *supra* note 39, at 180 (evidencing that CTE cannot be discovered until death) with Mehs, *supra* note 107, at 965–66 (showing that asbestos-related diseases, while having a long latency period, can still be diagnosed in plaintiffs).

137. See Gavett et al., *supra* note 39, at 180, 185; see also Green, *supra* note 85, at 976 (explaining that the discovery rule tolls the accrual of a claim until the plaintiff discovers or should have discovered the actionable injury).

138. See James, *supra* note 16, at 426–28.

claims,¹³⁹ the most efficient solution is to eliminate them altogether until further medical advances occur.¹⁴⁰

A. Why Courts Litigating CTE Claims Need to Remove Statutes of Limitations Altogether

Statutes of limitations need to have a cause of action that dictates when a claim may be brought.¹⁴¹ However, discovering a cause of action during an athlete's lifetime is next to impossible with CTE because it cannot be diagnosed until death.¹⁴² Athletes may develop symptoms related to CTE, but they have no way to affirmatively learn whether these symptoms are CTE-related.¹⁴³ Delayed discovery rules offer little to no improvement in resolving this issue.¹⁴⁴ The rules merely allow for families of victims to not be barred from bringing a claim after receiving a post-mortem CTE diagnosis.¹⁴⁵ This is extremely inefficient as living former athletes suffering from symptoms of CTE often need monetary relief to help manage the disease.¹⁴⁶

By removing statutes of limitations for CTE claims, athletes are more likely to be heard in court because they will not have to overcome the burden of timing.¹⁴⁷ Instead, plaintiffs can focus on gathering evidence to show their likelihood of having CTE and how sports leagues failed to protect them against unnecessary brain trauma.¹⁴⁸ More time can be spent in court arguing over the actual elements of the claim instead of when the cause of action occurred or whether the plaintiff should have brought their claim earlier.¹⁴⁹ Accuracy and legitimacy of outcomes from CTE cases would likely improve as a result.¹⁵⁰

139. See Green, *supra* note 85, at 978–79.

140. See *id.* at 969.

141. See Mehs, *supra* note 107, at 968.

142. See James, *supra* note 16, at 427.

143. See *id.* at 425, 427–28.

144. See Green, *supra* note 85, at 983.

145. See DeCarlo v. Nat'l Football League, No. 161644/2015, 2017 WL 384258, at *6 (N.Y. Sup. Ct. Jan. 27, 2017).

146. See James, *supra* note 16, at 427–28.

147. See Green, *supra* note 85, at 969, 983–84.

148. See *id.* at 999–1000.

149. Cf. *id.* at 983–84 (explaining that much time and expense goes into litigating whether and when a plaintiff knew or should have known of his or her injury).

150. See *id.* at 969.

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If legislatures and judicial systems are too wary of eliminating statutes of limitations in CTE claims, another effective argument to allow for the tolling of these statutes is the doctrine of fraudulent concealment.¹⁵¹ When a defendant commits a tort that is self-concealing like toxic torts or attempts to cover their misdeed, the doctrine of fraudulent concealment becomes applicable to the case.¹⁵² The intention of the defendant is often to prevent the victim from knowing of a cause of action.¹⁵³ In effect, the tortfeasor prays the cause of action remains unnoticed until the statute of limitations on said action has run.¹⁵⁴ The Supreme Court held as early as the nineteenth century that the use of fraud to conceal tortuous acts should allow for the tolling of statute of limitations until the plaintiff discovers or should have discovered the fraudulent concealment.¹⁵⁵

Judiciaries determine whether a defendant fraudulently concealed the cause of action using two common law standards.¹⁵⁶ The first involves parties who operate at an arm's length.¹⁵⁷ Under this standard, the defendant must affirmatively conceal the cause of action.¹⁵⁸ Plaintiffs needs to show that they exercised due diligence and, but for the concealment, they would have discovered facts supporting their claim.¹⁵⁹ However, the defendant is not required to disclose their illegal actions.¹⁶⁰ Silence does not qualify as fraudulent concealment.¹⁶¹

The other standard involves the existence of a relationship where the victim greatly relies on his trust of the tortfeasor and his actions.¹⁶² Under this standard, the defendant has a duty to disclose

151. See DeCarlo v. Nat'l Football League, No. 161644/2015, 2017 WL 384258, at *3 (N.Y. Sup. Ct. Jan. 27, 2017).

152. Saul B. Shapiro, *Citizen Trust and Government Cover-Up: Refining the Doctrine of Fraudulent Concealment*, 95 YALE L.J. 1477, 1477–78 (1986).

153. *Id.*

154. See *id.* at 1478.

155. Bailey v. Glover, 88 U.S. 342, 349–50 (1874).

156. Shapiro, *supra* note 152, at 1479.

157. *Id.*

158. TRACY BATEMAN & ROBIN C. LARNER, EFFECT OF FRAUD OR CONCEALMENT OF CAUSE OF ACTION ON LIMITATIONS PERIOD, 66 OHIO JUR. 3D *Limitations and Laches* § 93 (2018).

159. *Id.*

160. Shapiro, *supra* note 152, at 1479.

161. See *id.*

162. See *id.* at 1479–80.

facts relating to the cause of action or the wrongdoing in its entirety.¹⁶³ Although fiduciary relationships are included, courts are hesitant to create an exhausted list of “trust defendant” relationships.¹⁶⁴ Instead, they often find this kind of relationship exists when trust and confidence exist between the parties, one party holds greater power over the other, or the defendant has much easier access to the information regarding the cause of action.¹⁶⁵

A court may not find a trust defendant relationship to exist directly between professional sports leagues and their athletes.¹⁶⁶ This is because the respective individual and independently-owned team is the employer of that player, isolating the trust defendant relationship to these parties.¹⁶⁷ As such, sports leagues like the NFL would not be found to have a duty to disclose their knowledge of CTE and brain damage resulting from concussions.¹⁶⁸

Evidence has been brought forth showing the NFL, however, did more than simply remain silent about the long-term effects of head trauma.¹⁶⁹ The NFL actively attempted to misguide and delay CTE research.¹⁷⁰ A congressional report conducted by the House Committee on Energy and Commerce found the NFL improperly sought to discredit a study on brain diseases related to concussions in 2015.¹⁷¹ After the National Institute of Health (NIH) awarded a grant from the NFL to a top researcher in the field, the league threatened to back out of its capacity as a fundraiser because it claimed the NIH biasedly selected the researcher due to a prior-existing relationship between the two.¹⁷² These allegations were found to be untrue.¹⁷³

163. *Id.*

164. *See id.* at 1480.

165. *Id.* at 1481.

166. *See* Joseph M. Hanna, *Concussions May Prove to Be a Major Headache for the NFL*, 84 N.Y. ST. B. ASS’N.J. 10, 13 (2012).

167. *See id.*

168. *See id.*

169. *See* Steve Fainaru & Mark Fainaru-Wada, *Congressional Report Says NFL Waged Improper Campaign to Influence Government Study*, ESPN (May 24, 2016), http://www.espn.com/espn/otl/story/_/id/15667689/congressional-report-finds-nfl-improperly-intervened-brain-research-cost-taxpayers-16-million; *see also* U.S. HOUSE OF REPRESENTATIVES COMM. ON ENERGY AND COMMERCE, THE NATIONAL FOOTBALL LEAGUE’S ATTEMPT TO INFLUENCE FUNDING DECISIONS AT THE NATIONAL INSTITUTES OF HEALTH 3 (2016).

170. U.S. HOUSE OF REPRESENTATIVES COMM. ON ENERGY AND COMMERCE, *supra* note 169, at 3.

171. *Id.* (quoting U.S. Rep. Frank Pallone Jr., the ranking member on the Energy and Commerce Committee).

172. *See* Fainaru & Fainaru-Wada, *supra* note 169.

Instead, the congressional report highlighted the individuals actively advocating against the grant were chairmen of the NFL's committee on brain injuries.¹⁷⁴ A member of the House Committee commented: "[The NHL] wanted to look like the good guy, like they were giving money for this research But as soon as they found out that it might be somebody who they don't like who's doing the research, they were renegeing on their commitment, essentially."¹⁷⁵ The NFL has a history of donating to certain league-linked doctors for CTE research and raising awareness about the validity of these particular studies, knowing the studies often find minimal effects of head trauma.¹⁷⁶

The NFL was not merely silent but took steps to repress valid research on concussions.¹⁷⁷ Now, with the influx of CTE lawsuits, the league is arguing that the statutes of limitations have run on almost every cause of action.¹⁷⁸ A reasonable finder of fact could see how the NFL acted in an affirmative manner for the purpose of concealing the cause of action from hundreds of potential plaintiffs.¹⁷⁹

These findings, however, solely pertain to the NFL.¹⁸⁰ Athletes in other sports may struggle to find evidence showing their respective professional sports leagues concealed knowledge or should have known of brain diseases resulting from head trauma.¹⁸¹ No tribunal has yet found any professional sports league guilty of fraudulent concealment as the NFL and NHL settlement agreements denied those courts the opportunity to rule on any of those claims.¹⁸² In addition, litigating a fraudulent concealment issue is extremely time-consuming and expensive for both the legal system and plaintiffs.¹⁸³

173. *Id.*

174. *Id.*

175. *Id.*

176. Steve Fainaru & Mark Fainaru-Wada, *NFL Donations to Brain Research Benefit League-Linked Doctors, Raise Worries About Influence on Science*, ESPN (Feb. 4, 2016), http://www.espn.com/espn/otl/story/_/id/14711203/nfl-donations-brain-research-benefit-league-linked-doctors-raise-worries-influence-science-lines.

177. *See* Fainaru & Fainaru-Wada, *supra* note 169.

178. *See* Sellers, *supra* note 18.

179. *See supra* notes 59–63 and accompanying text.

180. *See* McIndoe, *supra* note 73.

181. *Id.*

182. Whyno, *supra* note 17.

183. *Id.*

The more efficient solution is to eliminate statute of limitation periods for CTE claims.¹⁸⁴

VI. CONCLUSION

Concussion-related injury lawsuits will soon be rampant among all jurisdictions across the United States and will not be limited to professional athletes.¹⁸⁵ The NFL and NHL already contend the statutes of limitations on causes of action for CTE claims begin running as soon as symptoms appear.¹⁸⁶ However, CTE can be difficult to diagnose and cannot be confirmed until death.¹⁸⁷

The complexity of concussion-related cases is overwhelming for both the judicial system and the victims, as the science behind these types of injuries is still very nascent.¹⁸⁸ In addition, claims based on evidence outside the realm of science, such as fraud, have yet to gain traction within courts.¹⁸⁹ Instead of waiting for decades for a procedural posture to develop for concussion-related injuries and to ensure those harmed by the negligence of sporting organizations have the ability to seek appropriate relief during their lifetime, courts and legislatures should seek to remove statutes of limitations entirely for CTE claims.¹⁹⁰ Athletes such as Stephen Peat may then have the opportunity to gain the financial support needed to battle their diseases while still living.¹⁹¹

184. *See supra* Section IV.A.

185. Sellers, *supra* note 18.

186. *Id.*

187. *See* James, *supra* note 16, at 424–28.

188. *See* Benedict Carey, *On C.T.E. and Athletes, Science Remains in Its Infancy*, N.Y. TIMES (Mar. 27, 2016), <https://www.nytimes.com/2016/03/28/health/cte-brain-disease-nfl-football-research.html>.

189. *See* NFL CONCUSSION SETTLEMENT, *supra* note 56; Whyno, *supra* note 17.

190. *See supra* Section IV.A.

191. *See* Quan, *supra* note 1.