

UTILIZING ALTERNATIVE DISPUTE RESOLUTION TO FOSTER COMPREHENSIVE TRAUMATIC BRAIN INJURY RESEARCH

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I. INTRODUCTION

There is no understating the growing need for Traumatic Brain Injury (“TBI”) research. TBI is the signature ailment of soldiers returning from combat in the Middle East, professional athletes, and even battered women and children.¹ The unfortunate truth is that the government, the leagues, the various governing bodies, and stakeholders have not adequately addressed the issue. In April of 2015 the National Football League (“NFL”) and its players agreed to a court-approved \$756 million settlement for retired players’ head injuries.² While the money might help the former players, the deal eliminates the possibility of arbitration moving

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¹ *NINDS Traumatic Brain Injury Information Page*, NINDS (Jan. 7, 2016), <https://www.ninds.nih.gov/Disorders/All-Disorders/Traumatic-Brain-Injury-Information-Page> [hereinafter NINDS].

Traumatic Brain Injury (TBI), a form of acquired brain injury, occurs when a sudden trauma causes damage to the brain. TBI can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue. Symptoms of a TBI can be mild, moderate, or severe, depending on the extent of the damage to the brain. A person with a mild TBI may remain conscious or may experience a loss of consciousness for a few seconds or minutes. Other symptoms of mild TBI include headache, confusion, lightheadedness, dizziness, blurred vision or tired eyes, ringing in the ears, bad taste in the mouth, fatigue or lethargy, a change in sleep patterns, behavioral or mood changes, and trouble with memory, concentration, attention, or thinking. A person with a moderate or severe TBI may show these same symptoms, but may also have a headache that gets worse or does not go away, repeated vomiting or nausea, convulsions or seizures, an inability to awaken from sleep, dilation of one or both pupils of the eyes, slurred speech, weakness or numbness in the extremities, loss of coordination, and increased confusion, restlessness, or agitation.

Id.

² Sophia Pearson, *NFL Concussion Deal Wins Approval, Silencing Critics for Now*, BLOOMBERG BUS. (Apr. 22, 2015), <http://www.bloomberg.com/news/articles/2015-04-22/nfl-s-765-million-ex-player-concussion-pact-wins-final-approval>.

forward.³ Additionally, the National Hockey League (“NHL”), the Fédération Internationale de Football Association (“FIFA”), and the National Collegiate Athletic Association (“NCAA”) are all involved in TBI lawsuits.⁴ It is important to note that TBI affects much more than athletes and soldiers. Battered women, children, and the elderly have all been known to suffer from TBI related ailments. The Center for Disease Control and Prevention (“CDC”) estimates that yearly TBI injuries resulted in 52,000 deaths and over 1.3 million visits to the hospital.⁵

In recognition of the harm TBI has on the United States, the Senate recently unanimously passed the TBI Reauthorization Act, which provides funding for prevention and requires the CDC to conduct research on TBI.⁶ The Traumatic Brain Injury Reauthorization Act of 2014 passed through the House and the Senate, and was signed into law on November 26, 2014.⁷ However, passage did not come swiftly or without political jockeying, thus presenting one of the issues with legislative based funding for research. During such times of budgetary constraint, it is difficult for Congress to approve funding, let alone funding for preventative medical research. Moreover, the legislation calls for the allocation of \$6,564,000 for 2015–2019.⁸ This is a drop in the bucket compared to the funds that the NFL, NHL, and FIFA would be able to provide towards research.⁹ The NFL receives \$10 billion in revenue and devotes “\$30 million to the Foundation for the National

³ *Id.*

⁴ *Id.*; for a concussion lawsuit against FIFA, see *Mehr v. Fed’n Internationale de Football Ass’n*, No. 14-CV-3879-PJH, 2015 WL 4366044 (N.D. Cal. July 16, 2015); for a concussion lawsuit against NHL, see *In re Nat. Hockey League Players’ Concussion Injury Litig.*, No. MDL 14-2551 SRN, 2015 WL 1334027 (D. Minn. Mar. 25, 2015); for a concussion lawsuit against NFL, see *In re Nat. Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351 (D.N.J. 2015); and for a concussion lawsuit against NCAA, see *Bowers v. Nat’l Collegiate Athletic Ass’n*, 9 F. Supp. 2d 460 (D.N.J. 1998).

⁵ Fred Powlage, *I Learned the Hard Way that Concussion Isn’t Just for the Young*, NPR (Apr. 15, 2015), <http://www.npr.org/sections/health-shots/2015/04/13/397044990/i-learned-the-hard-way-that-concussion-isnt-just-for-the-young>.

⁶ *Senate Passes TBI Reauthorization Act*, BIAA.COM (Sept. 17, 2014), <http://www.biausa.org/announcements/senate-passes-tbi-reauthorization-act>.

⁷ Traumatic Brain Injury Reauthorization Act of 2014, Pub. L. No. 113–196, 128 Stat. 2052 (2014).

⁸ *Id.*; see also *Key Issues*, NASHIA, <https://www.nashia.org/KeyIssues.asp>.

⁹ This is not to say that the Traumatic Brain Injury Reauthorization Act is not an extremely valuable piece of legislation. In fact, the legislation has played a major role in calling attention towards a growing problem. However, the reality is that Congress is either unable or unwilling to commit adequate funding towards TBI Research and prevention. This article calls for increased funding towards initiatives like the TBI Reauthorization Act.

Institutes of Health for basic science research, the NFL Foundation's \$25 million commitment to health and safety programs and another \$45 million provided to USA Football's Heads Up Football program to improve coaching."¹⁰ While commendable, this exemplifies the fact that the NFL and other private stakeholders are best situated to contribute to TBI research and prevention, and that much more is still needed to create positive change.¹¹ While the NFL has committed funds to "brain-injury causes and settlements to former players," it has not taken the onus in conducting research on prevention or recovery.

ADR can help move prevention and recovery research to the forefront of the issue, rather than in the background. Without mediation, NFL players and other stakeholders lose their ability to create new prevention policies and standards. If the athletes, former military personnel, and even everyday citizens were able to more successfully negotiate the prevention and recovery standards within their respective fields, it could steer society towards making TBI prevention and recovery the premier issues. While there has been a great deal of attention paid to the need for more TBI legislation, much of the success through legislation could be achieved more efficiently through arbitration or mediation with private

¹⁰ James Temple, *NFL Funds Additional Research to Prevent Traumatic Brain Injuries*, RECODE (Nov. 12, 2014), <http://recode.net/2014/11/12/nfl-funds-additional-research-to-prevent-traumatic-brain-injuries/>.

¹¹ The NFL settlement primarily awards players and their families compensation for their preexisting injuries while skirting over the main issues: prevention and research. Provided that the NFL makes over \$10 billion in revenue, it is arguably the best-situated organization to implement sweeping change with regards to TBI prevention research. The fact that NFL players are no longer afforded the right to arbitration decreases the affect they are able to have on concussion prevention moving forward. As a result of the lack of mediation, the concussion protocol has remained unchanged. The current NFL concussion protocol's stated objective is to "provide medical staffs responsible for the health care of NFL players with a process for diagnosing and managing concussion." *NFL Head, Neck, and Spine Committee's Protocols Regarding Diagnosis and Management of Concussion*, NFL PLAYERS, <http://static.nfl.com/static/content/public/photo/2013/10/01/0ap2000000254002.pdf>; see also Liz Clarke, *Explaining NFL's Concussion Protocol, the Five-step Map for RGIII's Return*, WASH. POST (Aug. 29, 2015), <https://www.washingtonpost.com/news/football-insider/wp/2015/08/29/explaining-nfl-concussion-protocol-the-five-step-map-for-rgiiis-return/>; Bill Dwyre, *Concussion Story in the NFL Seems to Have Been Lost in the Shuffle*, L.A. TIMES (Sept. 21, 2015), <http://www.latimes.com/sports/nfl/la-sp-nfl-concussions-dwyre-20150922-column.html> (explaining how one of the major successes of the new protocol is that a third party neurologist must examine the players before returning to the field. While the concussion protocol is a step in the right direction, there is still room for improvement. For example, there is no codified stipulation of NFL funds towards research. While the NFL has committed funds to "brain-injury causes and settlements to former players," it has not taken the onus in conducting research on prevention.).

stakeholders with deep-pockets.¹² Furthermore, an arbitral or mediated agreement would allow for more personalized results. For example, what might be the most effective prevention remedy for an athlete might not be optimal for a soldier or battered woman.

Many have lauded the use of mediation in the NFL negotiation settlements.¹³ While mediation was undoubtedly a “win-win” for both the NFL and the players, the agreement still falls short of achieving long-term change.¹⁴ Mediation is specifically useful in these types of cases because of the varying claims of the 4,000-plus plaintiffs.¹⁵ Given the various stakeholders involved with TBI, it seems most prudent to utilize Alternative Dispute Resolution (“ADR”) to tackle the growing need for TBI research and prevention. Through ADR, athletes, soldiers, and the general citizenry will be better positioned not only to negotiate a settlement for their prior injuries, but also to advocate for new policies and funding for prevention and research.

ADR, and more specifically mediation, could increase funding towards TBI prevention and recovery research. Section II explores the TBI Reauthorization Act in an effort to highlight its many successes and some of its shortcomings.¹⁶ Following the assessment of the national legislation, it is appropriate to examine efforts being

¹² See Elisabeth Koloup, *Get Your Head in the Game: Legislation Addressing Concussions in Youth Sports and Its Development in Maryland*, 42 U. BALT. L.F. 207 (2012); Andrew W. Breck, *Keeping Your Head on Straight: Protecting Indiana Youth Athletes from Traumatic Brain Injuries Through “Return-to-Play” Legislation*, 9 IND. HEALTH L. REV. 215 (2012); Mark Anderson, *Texas’ New Football Helmet Law*, 75 TEX. B.J. 924 (2012); Jason Navia, *Sitting on the Bench: The Failure of Youth Football Helmet Regulation and the Necessity of Government Intervention*, 64 ADMIN. L. REV. 265 (2012).

¹³ Matthew Morris & Paul W. Breaux, *Alternative Dispute Resolution*, 61 LA. B.J. 364 (2014).

¹⁴ *Id.*

¹⁵ Ken Belson, *Judge Orders N.F.L. Concussion Case to Mediation*, N.Y. TIMES (July 8, 2015), http://www.nytimes.com/2013/07/09/sports/football/judge-orders-nfl-concussion-case-to-mediation.html?_r=1&adxnnl=1&adxnnlx=1387319477-XNZ9dollarlW2kKf+LkoVw.

¹⁶ See Sandra Bond Chapman, *Bipartisan Support for the Traumatic Brain Injury Reauthorization Act*, HILL (July 30, 2014, 6:30 AM), <http://thehill.com/blogs/pundits-blog/health-care/213731-bipartisan-support-for-the-traumatic-brain-injury> (stating that “[t]he bill provides the needed framework for a national, coordinated approach to assist those with TBI and their families, to ensure that states have the capacity to deliver services to those affected by TBI, and to continue research into the causes of TBI and effective interventions.”); see also Tyler Wagner, *Susquehanna Health and U.S. Senator Robert P. Casey, Jr. Partner for TBI Bill*, PR NEWSWIRE (Sept. 12, 2014) <http://www.prweb.com/releases/2014/09/prweb12166058.htm> (quoting Senator Casey Jr., “This bill will help improve the prevention, accurate diagnosis and treatment of victims of TBI so that students can safely return to the classroom and continue to learn effectively.” The reauthorization of this legislation ensures that medical facilities have necessary resources to care for patients with TBI and focuses on research and management of brain injury specifically in children.).

made at the state-level. Next, because professional and collegiate sports leagues control a great deal of revenue, it is important to assess the initiatives set forth through their official league policies and rules, public relations efforts, and scientific contributions. This calls for an extensive examination of the NFL, NHL, NCAA, and FIFA's responses to TBI.¹⁷ Furthermore, many of the leagues have been involved in arbitrations that resulted in settlements. However, one must determine where the rewards will be allocated, who will be receiving them, and how much, if any, of the funds will be set aside for research initiatives. Section III's analysis will focus primarily on how ADR, particularly mediation, can help alleviate the many shortcomings within the responses to TBI. In addition to mediation, the analysis critiques the NFL's arbitral process in its current form. The proposal in Section IV calls for mediation between the multiple TBI stakeholders.¹⁸ More specifically, it hopes to provoke an open forum where those who control the vast majority of funds do not also control the process in which arbitral awards are garnered. Finally, the Conclusion ultimately posits that in order to facilitate true gains in TBI prevention, a true, unbiased third-party mediator or arbitrator (or both) is required.

II. BACKGROUND OF TBI AND THE VARIOUS STAKEHOLDERS

A. *Defining Traumatic Brain Injury*

Traumatic Brain Injury is difficult to define because of the various ways in which it affects different groups of people. This is due in large part to the varying severities of TBIs and the wide range of people that are at risk of receiving a brain trauma.¹⁹ For

¹⁷ A great deal of this Note is focused on TBI and the NFL. This is not to diminish the importance of veteran's or battered women's brain injuries, it is simply because there is more information available. In fact, this speaks to a major issue with TBI research and evidences that more research needs to be performed on TBI sufferers outside of sports.

¹⁸ Presently, the Commissioner of the NFL, for example, has complete control over the appointment of arbitrators. This can, and arguably has, lead to favorable results for the NFL. For this reason, the proposal calls for mediation to put the stakeholders on an equal playing field.

¹⁹ *Traumatic Brain Injury Resource for Survivors and Caregivers: Severity of TBI*, NE. U., <http://www.northeastern.edu/nutraumaticbraininjury/what-is-tbi/severity-of-tbi/>.

Traumatic brain injury severity is commonly described as mild, moderate, or severe. Injury severity is traditionally based on duration of loss of consciousness and/or coma rating scale or score, post-traumatic amnesia (PTA), and brain imaging results. Mild, moderate, and severe TBI may be characterized as follows: Mild TBI: Brief loss of consciousness, usually a few seconds or minutes, PTA for less than 1 hour of the TBI,

example, an elderly woman who slips and hits her head will have different symptoms than a twenty-five year-old professional athlete who has a high-speed collision during a football game. As a result, many health agencies have identified different levels of TBI.²⁰ In general, TBI occurs following the impact of an external force with the head, but not all contacts will result in TBI.²¹ According to the National Institute of Neurological Disorders and Stroke (“NINDS”):

Not all blows or jolts to the head result in a TBI. For the ones that do, TBIs can range from mild (a brief change in mental status or consciousness) to severe (an extended period of unconsciousness or amnesia after the injury). There are two broad types of head injuries: penetrating and non-penetrating.²²

The distinction between penetrating and non-penetrating injuries is exactly as it sounds. A penetrating brain injury is one in which the skull is pierced by an object.²³ The more common, non-penetrating brain injury is a result of an “external force that produces movement of the brain within the skull. Causes include falls, motor vehicle crashes, sports injuries, or being struck by an object. Blast injury due to explosions is a focus of intense study but how it causes brain injury is not fully known.”²⁴

Depending on the cause and extent of the force exerted upon one’s head, the resulting brain injury will vary. For example, the injury can be confined to one *focal* point of the brain or affect various areas.²⁵ The effects of a head trauma can be immediate or secondary, meaning the symptoms can either occur immediately or gradually.²⁶ Common immediate brain injuries are diffuse axonal injuries, concussions, hematomas, and contusions.²⁷ NINDS defines a concussion as:

Normal brain imaging results. Moderate TBI: Loss of consciousness for 1–24 hours, PTA for 1–24 hours of the TBI, abnormal brain imaging results. Severe TBI: Loss of consciousness or coma for more than 24 hours, PTA for more than 24 hours of the TBI, abnormal brain imaging results.

Id.

²⁰ NINDS, *supra* note 1.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ NINDS, *supra* note 1.

²⁷ *Id.* Diffuse axonal injury (“DAI”) is one of the most common types of brain injuries. DAI refers to widespread damage to the brain’s white matter. White matter is composed of bundles of axons—projections of nerve cells that carry electrical impulses. Like the wires in a

A type of mild TBI that may be considered a temporary injury to the brain but could take minutes to several months to heal. Concussion can be caused by a number of things including a bump, blow, or jolt to the head, sports injury or fall, motor vehicle accident, weapons blast, or a rapid acceleration or deceleration of the brain within the skull (such as the person having been violently shaken). The individual either suddenly loses consciousness or has sudden altered state of consciousness or awareness, and is often called “dazed” or said to have his/her “bell rung.”²⁸

Concussions, the most common form of TBI, have been the focus of most of the TBI research, as a number of former professional athletes and returning veterans have exposed the public to the difficulties faced by those who suffer from concussions.²⁹

The main cause of TBI is falling.³⁰ The second and third most common causes of brain trauma are unintentional blunt traumas and automobile accidents.³¹ Assaults account for ten percent of all TBIs and encompass shaken-baby syndrome and trauma resulting from abuse.³² Unintentional blunt trauma also includes sports related injuries.³³ Overall, football, bicycling, basketball, soccer, and playground activities account for most sports related TBI.³⁴ Roadside bombs are the most common cause of TBI in veterans.³⁵

Diagnosing TBI can often be very difficult. According to the National Institute of Health, most healthcare providers will rely on standardized tests such as the Acute Concussion Evaluation (“ACE”) and the Sport Concussion Assessment Tool 2.³⁶ Both provide a systematic way to assess a person who has suffered a mild TBI, and reviewers will often collect information about the characteristics of the injury, the presence of amnesia, as well as the

computer, axons connect various areas of the brain to one another. DAI is the result of *shearing* forces, which stretch or tear these axon bundles. This damage commonly occurs in auto accidents, falls, or sports injuries. It usually results from rotational forces (twisting) or sudden deceleration. *Hematomas* are the pooling of blood in the tissues outside of the blood vessels. There are various types of hematomas. The bruising or swelling of the brain that occurs when small blood vessels bleed into the brain are referred to as *contusions*.

²⁸ *Id.*

²⁹ *Types and Levels of Brain Injury*, BIAUSA.ORG, <http://biau.org/types-and-levels-of-brain-injury/>.

³⁰ NINDS, *supra* note 1.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ NINDS, *supra* note 1.

presence of physical, cognitive, emotional, and sleep-related symptoms.³⁷ Just as diagnosing TBI can be difficult, researching the best way to treat brain traumas has proved to be a challenge as well. Currently, the accepted method of treating a mild TBI is to employ the use of pain relievers and to rest.³⁸ Unfortunately, this has not proved to be entirely effective. A minority of individuals may develop post-concussion syndrome (“PCS”) which causes headaches, fatigue, cognitive impairment, depression, irritability, dizziness, balance trouble, and apathy.³⁹ As noted earlier, the cost of TBIs on the U.S. economy alone is staggering. More needs to be done to speed up the diagnosis and recovery process and to prevent the occurrence of PCS.

B. *TBI Reauthorization Act*

Since 1990, the National Association of State Head Injury Administrators (“NASHIA”) has been at the forefront of TBI care, research, and prevention.⁴⁰ Within six years NASHIA played a major role in the passage of the first Traumatic Brain Injury Authorization Act.⁴¹ The TBI Act of 1996 established innovative programs through the CDC and the National Institute of Health (“NIH”) as well as implemented systems through the Health Resources and Services Administration (“HRSA”) to provide for improved access to health services related to brain injuries.⁴² In addition to creating those programs, the TBI Act of 1996 also set out to define traumatic brain injuries. The Act states that TBI consists of “an acquired injury to the brain.”⁴³ The Act was then subsequently reauthorized in 2000 and 2008.⁴⁴ The 2014 TBI Reauthorization Act increased funding towards brain injury initiatives through the year 2019.⁴⁵ In 2013, \$9.76 million was allocated

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Susan L. Vaughn, *History of NASHIA*, NASHIA (Apr. 21, 2014), <https://www.nashia.org/HistoryOfNashia.asp>.

⁴¹ Susan L. Vaughn, *Traumatic Brain Injury (TBI) Reauthorization Act of 2014: Overview*, NASHIA (Dec. 2014), http://www.nashia.org/pdf/nashia_issue_brief_tbiact_2014_revised.pdf.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* While allocating more money, the TBI Reauthorization Act of 2000 also amended the definition of TBI to include injuries resulting from anoxia due to trauma. The 2000 Reauthorization also provided funding for educational and awareness programs.

⁴⁵ Traumatic Brain Injury Reauthorization Act of 2014, 128 Stat. 2052.

towards TBI programs compared to \$9.32 million in 2015.⁴⁶ It is important to note that not all of the funding is directed towards research and prevention. In fact, under section 394 (b) of the 2014 TBI Reauthorization Act, \$6.5 million per year will be allocated to “prevention and surveillance” of traumatic brain injuries.⁴⁷

It is clear that Congress has attempted to incorporate the needs of the various stakeholders within the text of the TBI Acts. However, one could view these attempts as toothless. For example, in assessing the needs of children suffering from TBI, Congress added a provision to the 2014 Act that directs the CDC to work in concert with the director of the NIH to review the scientific evidence related to brain injury management in children.⁴⁸ No explicit funding is provided to research, prevention, or management of TBI in children.⁴⁹ This is despite the fact that five high school football players died in 2014 due to head and spine related injuries and eleven high school football players died in 2015.⁵⁰ It is important to note that the TBI Reauthorization Act provides a great framework for how to approach brain injury research. However, due to budgetary constraint the legislation is unable to reach its maximum potential.

C. *State Level Sports Related TBI Laws*

According to the CDC’s Head’s Up Program, from 2009–2013, forty-seven states passed sports-related concussion laws.⁵¹ Typically, concussion in sports laws consists of three action steps: education, removal from play, and permission to return to play.⁵² While the importance of these measures cannot be understated, the state legislative measures, on the whole, neglect to fund research and, perhaps more importantly, to address preventative mea-

⁴⁶ Susan L. Vaughn, *Key Issues*, NASHIA, <https://www.nashia.org/KeyIssues.asp>.

⁴⁷ Traumatic Brain Injury Reauthorization Act of 2014, 128 Stat. 2052.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Kristen L. Kucera et al., *National Center for Catastrophic Sport Injury Research: 2014 Annual Survey of Football Injury Research*, NCCSIR (Mar. 2015), <https://nccsir.unc.edu/files/2013/10/Annual-Football-2014-Fatalities-Final.pdf>; see also Dana Ford & Ray Sanchez, *High School Football Player Andre Smith Dies in Illinois*, CNN (Oct. 26, 2015), <http://www.cnn.com/2015/10/25/us/illinois-high-school-football-player-death/>.

⁵¹ *Get a Heads Up on Concussion in Sports Policies: Information for Parents, Coaches, and School & Sports Professionals*, CDC, <http://www.cdc.gov/headsup/pdfs/policy/headsuponconcussioninportspolicies-a.pdf> (last visited Dec. 25, 2016) [hereinafter CDC].

⁵² *Id.*

tures.⁵³ There is no doubt that education will help to mitigate potential cases of TBI and perhaps even lead to more reporting and in turn more data for research.⁵⁴ Furthermore, the lack of congruency throughout the country leads to questions of efficiency. For example, there is no set standard for education with which each state is required to comply.⁵⁵ Laws in some states require a formal training sessions for coaches, while others only require that coaches be provided with informational materials.⁵⁶

D. *NFL Concussion Protocol*

In response to increased awareness and concern over TBI, a number of sports organizations amended their head injury policies. In 2009, the NFL amended their concussion protocol.⁵⁷ The new policy calls for stricter injury identification standards.⁵⁸ Additionally, the updated standards mandate a third-party review of the player and the play that caused the injury.⁵⁹ However, according to a PBS Frontline Report, “87 out of 91 former players have tested positive for brain disease.”⁶⁰ The report was based on data from deceased players so it is hard to assess the policy on the PBS’s findings.⁶¹ Prior to the rule changes, NFL players were allowed to return to the field once their symptoms subsided.⁶² Similar to state legislative efforts, the NFL has not enacted a policy requiring research funding.

⁵³ WASH. REV. CODE ANN. § 28A.600.190 (West 2009); *see also* INST. OF MED. & NAT’L RES. COUNCIL, SPORTS-RELATED CONCUSSIONS IN YOUTH: IMPROVING THE SCIENCE, CHANGING THE CULTURE 223–25 (Robert Graham et al. eds., 2013) (citing the 2013 National Conference of State Legislatures).

⁵⁴ CDC, *supra* note 51.

⁵⁵ INST. OF MED. & NAT’L RES. COUNCIL, *supra* note 53, at 223–24.

⁵⁶ *Id.*

⁵⁷ Alan Schwarz, *NFL Issues New Guidelines on Concussions*, N.Y. TIMES (Dec. 2, 2009), http://www.nytimes.com/2009/12/03/sports/football/03concussion.html?_r=0; *see also* *Concussion Checklist*, NFL, <http://static.nfl.com/static/content/public/photo/2015/10/10/0ap3000000553505.pdf>.

⁵⁸ *Concussion Checklist*, *supra* note 57 (noting that once a player exhibits symptoms of head trauma he is, without exception, to be removed from the field of play).

⁵⁹ *Id.*

⁶⁰ Jason M. Breslow, *New: 87 Deceased NFL Players Test Positive for Brain Disease*, PBS (Sept. 18, 2015), <http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/new-87-deceased-nfl-players-test-positive-for-brain-disease/>.

⁶¹ *Id.*

⁶² Schwarz, *supra* note 57.

While it would be wrong to assert that the NFL has not committed any funds to research initiatives, many of their research programs focus on concussion rehabilitation.⁶³ Over the course of five years the NFL has committed upwards of \$100 million to research and prevention initiatives.⁶⁴ Yet, as Josephine Johnston, director of research at the Hastings Center, states, “[t]he league has financial interests in this question. It has a financial interest in their players being able to play and the game being played a certain way”⁶⁵ This highlights two important considerations. First, the NFL has a great deal of control over the research that is being conducted. Second, much of the research is still focused on rehabilitation. To put it in perspective, the CDC estimates that in the year 2000, TBIs accounted for an economic loss of \$12 billion due to medical bills and loss in productivity.⁶⁶ Traumatic Brain Injury research needs to focus not only on rehabilitation but also on prevention. Additionally, rather than having a financially interested party drive the research, the stakeholders and victims should be coordinating research fund allocation.

E. *NFL Concussion Lawsuit*

In April 2015, the U.S. District Court for the Eastern District of Pennsylvania approved the settlement reached between the NFL and former NFL players.⁶⁷ The settlement provides \$75 million towards a Baseline Assessment Program that will offer all former NFL players baseline neurological examinations.⁶⁸ Additionally, the agreement calls for payments of up to \$5 million

⁶³ SI Wire, *NFL Will Help Fund New Concussion Research Studies*, SPORTS ILLUSTRATED (Oct. 24, 2015), <http://www.si.com/nfl/2015/10/24/nfl-funding-new-concussion-research-therapy>; see also Ken Belson, *N.F.L. to Help Fund Search for New Concussion Therapy*, N.Y. TIMES (Oct. 24, 2015), <http://www.nytimes.com/2015/10/25/sports/football/nfl-to-help-fund-search-for-new-concussion-therapy.html>.

⁶⁴ Amy Nordrum, *NFL Underwrites Scientific Meeting to Set National Agenda for Concussion Treatment*, INT’L BUS. TIMES (Oct. 14, 2015, 2:08 PM), <http://www.ibtimes.com/nfl-underwrites-scientific-meeting-set-national-agenda-concussion-treatment-2137145>.

⁶⁵ *Id.*

⁶⁶ CDC, *Heads Up: Facts for Physicians About Mild Traumatic Brain Injury (MTBI)*, SPORTS CONCUSSION INST., http://www.concussiontreatment.com/images/CDC_Facts_for_Physicians_booklet.pdf (citing ERIC A. FINKELSTEIN ET AL., *THE INCIDENCE AND ECONOMIC BURDEN OF INJURIES IN THE UNITED STATES* 3 (2006)).

⁶⁷ *In re Nat’l Football League Players’ Concussion Injury Litig.*, 301 F.R.D. 191 (E.D. Pa.).

⁶⁸ *Id.* at 196.

to players who suffer from a number of head injuries.⁶⁹ Lastly, the settlement included \$10 million towards education.⁷⁰ The educational programs would promote safety and injury prevention in both professional and youth football as well as programs directed towards retired NFL players.⁷¹ Critics of the settlement claim that not enough brain injuries were covered and that provisions for scientific research were severely lacking.⁷² The NFL settlement case is a prime example of a negotiation or mediation that could provide for more sweeping reform. Additionally, the NFL players have since appealed the NFL's \$1 billion plan to address TBIs.⁷³ The criticism is rooted in the fact that the negotiators for the players failed to acquire enough money for chronic traumatic encephalopathy ("CTE").⁷⁴ Currently CTE can only be diagnosed after death, and is defined as a progressive degenerative disease of the brain commonly found in individuals with a history of repetitive brain trauma.⁷⁵

The lead negotiators, in response to the criticism, said former players might otherwise have gotten nothing because the NFL had pushed for the complaints to be thrown out of court and sent to arbitration. And the science behind CTE is in its early stages; the damage cannot currently be diagnosed in the living.⁷⁶

However, more recently the growing amount of data suggesting that the violent hits that NFL players incur can lead to CTE exhibits how the settlement has fallen short in some key areas.⁷⁷ Even though the NFL did set aside some funding for research, not enough has been done. The research that they were potentially able to withhold as a result of the mediation and subsequent settle-

⁶⁹ *Id.* at 197.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Ken Belson, *Judge Approves Deal in N.F.L. Concussion Suit*, N.Y. TIMES (Apr. 22, 2015), https://www.nytimes.com/2015/04/23/sports/football/nfl-concussion-settlement-is-given-final-approval.html?_r=0.

⁷³ Maryclaire Dale, *Lawyers: NFL Concussion Deal Excludes Central Brain Injury*, BIG STORY (Nov. 19, 2015, 3:10 PM), <http://bigstory.ap.org/urn:publicid:ap.org:76aea10e50a242bbb75c9927989f3b42>.

⁷⁴ *Id.*

⁷⁵ *What is CTE?*, BU CTE CTR., <http://www.bu.edu/cte/about/what-is-cte/>; see also Elliott C. McLaughlin & Catherine E. Shoichet, *Frank Gifford Suffered from Brain Disease CTE, Family Says*, CNN (Nov. 26, 2015), <http://www.cnn.com/2015/11/25/health/frank-gifford-cte-concussion-chronic-traumatic-encephalopathy/>.

⁷⁶ *Id.*

⁷⁷ *What is CTE?*, *supra* note 75 (stating that CTE has been found posthumously in former NFL players, such as Frank Gifford, Junior Seau, Mike Webster, and Ray Easterling).

ment could have been damaging to the NFL's reputation but useful for researchers.⁷⁸

F. *NHL / FIFA Concussion Protocol*

Up until the 2015–16 season, the National Hockey League concussion protocol did not have the same stringent standards that the NFL employed.⁷⁹ The league did not require a third party to pull players out of the field of play after they exhibit concussion symptoms.⁸⁰ Furthermore, unlike the NFL, the NHL has, up to this point, refused to settle the concussion injury case against them.⁸¹ An NHL internal memorandum stated that even though other leagues—such as the NFL—had updated their concussion policies, the NHL felt it had taken the requisite measures for prevention and rehab of concussions.⁸² Additionally, NHL commissioner, Gary Bettman stated that “from a medical science standpoint, there is no evidence yet’ linking hockey with chronic traumatic encephalopathy (CTE).”⁸³ With a lack of interest to come to the negotiating table, it is clear that both the NHL and the players association would benefit from out of court negotiation or mediation.

Similar to the NHL concussion procedures, the current FIFA protocols have been scrutinized. FIFA still does not require a third party to examine players who exhibit concussion symptoms.⁸⁴ This raises serious questions pertaining to the impartiality of team doctors.⁸⁵ Soccer players recently filed a lawsuit in California against FIFA, yet the case was dismissed because the judge ruled that there

⁷⁸ Dale, *supra* note 73.

⁷⁹ Allan Muir, *NHL Needs to Adopt NFL's New Concussion Procedure*, SPORTS ILLUSTRATED (Aug. 10, 2015), <http://www.si.com/nhl/2015/08/10/nfl-new-concussion-procedure-nhl-lawsuit>.

⁸⁰ Dan Rosen, *NHL, NHLPA Bolster Concussion-Evaluation Process*, NHL.COM (Sept. 15, 2015), <http://www.nhl.com/ice/news.htm?id=779135>.

⁸¹ *In re Nat. Hockey League Players' Concussion Injury Litig.*, No. MDL 14-2551 SRN, 2015 WL 1334027, at *1 (D. Minn. Mar. 25, 2015); *see also* Adam Wells, *NHL Says It Isn't Interested in Concussion Lawsuit Settlement*, BLEACHER REP. (Oct. 1, 2015), <http://bleacherreport.com/articles/2574524-nhl-says-it-isnt-interested-in-concussion-lawsuit-settlement>.

⁸² *Id.*

⁸³ Wells, *supra* note 81.

⁸⁴ Martin Rogers, *FIFA Fails to Address Concussion Problem Head On*, USA TODAY SPORTS (June 10, 2015, 12:02 PM), <http://www.usatoday.com/story/sports/soccer/2015/06/10/fifa-concussions-evaluation-breaks-substitution/71000800/>.

⁸⁵ *Id.*

was no connection between the activity related to FIFA and the forum.⁸⁶

G. *Non-Sports Related TBI*

While sports related TBIs dominate the international focus, there are millions of people who suffer from head injuries not incurred during athletic activities. For example, in 2010, 2.5 million emergency department visits in the U.S. were related to TBI.⁸⁷ While most would guess that these visits were a result of a vicious football tackle, or perhaps a hard-hit in hockey, in reality 40.5% were due to head trauma resulting from children and elderly people falling.⁸⁸ Civilians are not the only ones at risk for TBI. The U.S. Department of Defense estimates that from 2001 to 2004, 230,000 soldiers suffered from some form of mild TBI.⁸⁹ In fact, many suggest that TBI is the signature injury of the war in the Middle East.

According to the U.S. Department of Veteran Affairs, an estimated 22% of all recent combat casualties are from TBI compared to 12% in the Vietnam War.⁹⁰ In 2008, a study was conducted to examine the effects of military blasts on the brain.⁹¹ The research focused on a group of soldiers in a training program for a position that requires the setting of explosives.⁹² Not surprisingly, the soldiers reported dull aches in their chest and back and headaches in the days following larger explosions.⁹³ Perhaps Caroline Alexander of the National Geographic sums it up best:

Despite the prevalence of the condition, the most fundamental questions about it remain unanswered. Not only is there no secure means of diagnosis, but there are also no known ways to prevent it and no cure. Above all, there is no consensus within

⁸⁶ *Mehr v. Fed'n Internationale de Football Ass'n*, No. 14-CV-3879-PJH, 2015 WL 4366044 (N.D. Cal. July 16, 2015) (appeal dismissed Sept. 22, 2015).

⁸⁷ *Traumatic Brain Injury in the United States: Fact Sheet*, CDC, http://www.cdc.gov/traumatic-braininjury/get_the_facts.html.

⁸⁸ *Id.*

⁸⁹ Caroline Alexander, *The Invisible War on the Brain*, NAT'L GEOGRAPHIC, <http://www.nationalgeographic.com/healing-soldiers/blast-force.html>.

⁹⁰ E. Lanier Summerall, *Traumatic Brain Injury and PTSD*, US DEP'T OF VETERAN AFFAIRS (Feb. 23, 2016), <http://www.ptsd.va.gov/professional/co-occurring/traumatic-brain-injury-ptsd.asp>.

⁹¹ Alexander, *supra* note 89.

⁹² *Id.*

⁹³ *Id.*

the medical community about the nature of blast-induced injury
⁹⁴

The unfortunate reality is that soldiers who return from combat abroad are not afforded adequate treatment for ailments related to brain trauma. There are countless organizations and initiatives that target the needs of returning veterans and provide the soldiers with a great deal of support. One example of this is the Wounded Warrior Project, which has pledged \$100 million to help ensure that veterans are getting the mental health care they require.⁹⁵ The program is a direct response to the growing need for care related to brain injuries.⁹⁶ While it is a step in the right direction, Steve Nardizzi, CEO of the Wounded Warrior Project, admits that it is just a start to the battle against TBI.⁹⁷ The Department of Defense asserts that from 2000–2015, 237,000 soldiers suffered from TBI and in varying degrees.⁹⁸ Just fewer than 5,000 soldiers suffer from penetrating TBI, approximately 3,400 suffer from severe TBI, about 27,700 suffer from moderate TBI, and a staggering 269,000 soldiers were diagnosed with mild TBI.⁹⁹ Additionally, five veterans have been diagnosed with CTE posthumously.¹⁰⁰ It is also recognized that veterans are at a greater risk for developing dementia later in their lives.¹⁰¹

As noted earlier, TBI also greatly affects children and the elderly. TBI is the leading cause of death and disability in children and adolescents.¹⁰² Children are especially susceptible to brain trauma because of the frequency in which they fall down and bump their heads.¹⁰³ Each year, approximately 1,300 children in the United States “experience severe or fatal brain trauma.”¹⁰⁴ However, it does not stop there. TBI is the leading cause of death

⁹⁴ *Id.*

⁹⁵ Bryant Jordan, *75% of Wounded Vets Suffer from PTSD, Brain Injury: Survey*, MILITARY.COM (Nov. 4, 2015), <http://www.military.com/daily-news/2015/11/04/75-percent-of-wounded-vets-suffer-from-ptsd-brain-injury-survey.html>.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Daniel Pearl, *Military TBI—Is it the Same as Seen in Civilian TBI?*, UNIFORMED SERV. U. OF THE HEALTH SCIENCES, <http://www.concussion2015.org/pdf/Perl%20Concussion%202015.pdf>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² NINDS, *supra* note 1.

¹⁰³ *Brain Injury in Children*, BIAA, <http://www.biausa.org/brain-injury-children.htm>.

¹⁰⁴ *Id.*

worldwide.¹⁰⁵ In the US alone there are 1.7 million civilian TBIs diagnosed annually and 5.2 million people living with long-term disabilities resulting from a head trauma.¹⁰⁶ TBI accounts for 52,000 civilian deaths, and “adolescents and adults affected by moderate or severe TBI who were discharged from rehabilitation facilities were more than twice as likely to die 3.5 years after injury compared to persons in the general population of similar age, sex, and race.”¹⁰⁷

H. *Prior Uses of ADR in Sports Cases*

The NFL has the best financial wherewithal to assist the TBI community in funding prevention and rehabilitation research. With that in mind, it is imperative that they are involved in any TBI mediation that might occur. Thus, it is useful to have an understanding of how different leagues have utilized and composed themselves in mediations. According to the American Arbitration Association, alternative dispute resolution has been used in a variety of sports-related disputes including those arising at the amateur, collegiate, Olympic, and professional level.¹⁰⁸ In response to the breaking up of the traditional collegiate athletic conferences, the Western Athletic Conference (“WAC”) and the BIG 12 conference engaged in mediation to resolve issues pertaining to the departure of member-schools.¹⁰⁹ In professional sports, arbitration clauses are often within the collective bargaining agreements (“CBA”) of the particular leagues.¹¹⁰ These clauses typically pertain to salary disputes and injury grievances, and are included in the NHL, NFL, NBA, and MLB collective bargaining agreements.¹¹¹ The NFL’s CBA with the NFLPA calls for arbitration “of what are essentially labor disputes between the team and a player. Issues can include salaries and whether an injury that precluded a player from performing was sustained as a result of play.”¹¹² How-

¹⁰⁵ Pearl, *supra* note 98.

¹⁰⁶ *Id.*

¹⁰⁷ *Report to Congress: TBI in the US: Epidemiology and Rehabilitation*, CDC, http://www.cdc.gov/traumaticbraininjury/pdf/tbi_report_to_congress_epi_and_rehab-a.pdf.

¹⁰⁸ Am. Arbitration Ass’n, *Using ADR to Resolve Collegiate, Professional, and Sports-Business Disputes*, ADR.ORG, https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_020405.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 3.

ever, even if the CBA does explicitly require arbitration to resolve a dispute, leagues have become increasingly more inclined to utilize ADR to settle their disputes because it can be more cost and time effective.¹¹³ Some examples of areas where ADR has been used outside of a CBA are: product and merchandising agreements, franchise partnerships, stadium naming rights, and independent fact-finding investigations.¹¹⁴ One potential downside of mediation in sports is that the proceedings are confidential. While confidentiality does entice the parties to settle their disputes out of court, it can also deprive the public of critical information pertaining the lawsuit.

The use of alternative dispute resolution in TBI cases has been employed before to assist in settlement. When the NFL was sued over concussions, the federal judge presiding over the case appointed a mediator to assist the parties in reaching a settlement.¹¹⁵ It is important to note the inherent differences between judge ordered mediation and elective mediation. The key factor is that in the judicially ordered mediation between the NFL and the player, both parties are restricted from discussing the details surrounding the case.¹¹⁶ Admittedly, judges and litigators should always strive for an outcome that works for both parties. However, one must question the cost.

This impacts any child that's playing any type of sport . . . the parents, the coaches, the school systems who have looked to the NFL as their model. It goes to college athletic programs, and the implications are just huge. It's like if the tobacco companies settled cases before all the (court) discovery took place, we wouldn't know what they knew, when they knew it and how they hid information.¹¹⁷

The NFL has access to data critical to TBI researchers and any concealment of the information would prove to be a setback to their efforts. Additionally, court ordered mediation does not guarantee cooperation. Having been compelled to appear before the mediator, the NFL made no guarantee to act in good faith.¹¹⁸ Per-

¹¹³ *Id.*

¹¹⁴ Am. Arbitration Ass'n, *supra* note 108, at 4.

¹¹⁵ Gary Mihoces, *Judge Orders Mediation on NFL Concussion Suits*, USA TODAY (July 11, 2013, 7:31 PM), <http://www.usatoday.com/story/sports/nfl/2013/07/11/nfl-players-concussions-law-suits/2510275/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

haps if public pressure had driven them to the negotiation table an even more generous settlement would have been produced.

III. AN ANALYSIS OF THE LACK OF ADR IN TBI DISPUTE RESOLUTION

It appears that now, perhaps more than ever, the United States government and its citizens have become aware of the issues related to Traumatic Brain Injury. In fact, Columbia Pictures produced “Concussion,” one the first major motion pictures to examine the NFL’s handling of head injuries.¹¹⁹ The NFL, unsurprisingly, viewed the movie as a threat to its image and credibility, and attempted to dispute the events that the movie portrayed.¹²⁰ With the increased attention surrounding TBI, it is no wonder that people began to question why more had not been done to alleviate head injuries. In fact, there were prior examinations of compensation and public health issues related to head injuries.¹²¹ Unfortunately, those who begin inquiries into TBI issues quickly realized that not enough is being done to prevent the injuries.¹²²

¹¹⁹ The movie “Concussion,” which is based on a true event, focuses on forensic pathologist Dr. Bennet Omalu, portrayed by Will Smith. Dr. Omalu discovers neurological deterioration in former NFL players that has similarity to Alzheimer’s disease. Omalu names the disorder CTE (chronic traumatic encephalopathy) and publishes his findings in a medical journal. The doctor attempts to raise public awareness about the dangers of football-related head trauma against the wishes and best efforts of the NFL. The movie was released in December of 2015 and while controversial, achieved critical acclaim. *CONCUSSION* (Columbia Pictures 2015).

¹²⁰ In fact, it appears that the NFL even attempted to restrict some of the contents of the film. See Ken Belson, *Sony Altered ‘Concussion’ Film to Prevent N.F.L. Protests, Emails Show*, N.Y. TIMES (Sept. 1, 2015), http://www.nytimes.com/2015/09/02/sports/football/makers-of-sonys-concussion-film-tried-to-avoid-angering-nfl-emails-show.html?_r=0.

In the end even Sony, which unlike most other major studios in Hollywood has no significant business ties to the N.F.L., found itself softening some points it might have made against the multibillion-dollar sports enterprise that controls the nation’s most-watched game. In dozens of studio emails unearthed by hackers, Sony executives; the director, Peter Landesman; and representatives of Mr. Smith discussed how to avoid antagonizing the N.F.L. by altering the script and marketing the film more as a whistle-blower story, rather than a condemnation of football or the league.

Id.

¹²¹ John G. Culhane, *Not Just the NFL: Compensation, Litigation, and Public Health in Concussion Cases*, 8 FIU L. REV. 5 (2012) (describing how compensation as a result of litigation only comes after the head injury occurs and how public health officials need to play a larger role in preventing head injuries).

¹²² *Id.* at 9.

Litigation might in the long run prove successful, but it is probably not the best approach in these cases. It would be far better for the relevant leagues to set up a compensation fund to cover the long-term, and often uncertain, physical and psychological effects of concussions and other head trauma, and to pay for the cost of medical monitoring.¹²³

Thus, while there admittedly should be some excitement surrounding the settlements that many have received as a result of their head trauma lawsuits, the settlements fall short in providing long-term relief or funding for prevention and rehabilitation.¹²⁴ In fact, many researchers posit that those who suffer from TBI should be monitored over a longer period of time, not just when they are symptomatic.¹²⁵ Not unlike how cancer patients schedule follow-ups to ensure they are still in remission, many believe that TBI survivors should be monitored even after they are asymptomatic to ensure that their conditions have not regressed.¹²⁶ All of this is further evidence that mediation would be a more appropriate means of settling TBI disputes.

The NFL is adequately situated to take the lead in TBI research, yet has neglected to fulfill the needs not only of their former and active players, but also of the greater populous.¹²⁷ For example, one shortcoming of the settlement between the NFLPA and the NFL is that CTE, the “industrial disease of football[,] goes effectively uncompensated in this entire sham of a deal.”¹²⁸ The

¹²³ *Id.* at 19.

¹²⁴ *In re Nat'l Football League Players' Concussion Injury Litig.*, 301 F.R.D. 191 (3d. Cir. 2014).

¹²⁵ Chapman, *supra* note 16.

Until recently, the conventional wisdom among scientists was that the brain had, at most, one year to recover from a traumatic injury. After that, it was thought, a person could no longer continue to make progress improving their brain function and regaining lost skills. But our research at the Center for BrainHealth shows that this idea is outdated and should be abandoned. The brain is remarkable for its plasticity, or ability to be changed, modified and repaired. The brain makes new cells, forms new connections, and strengthens old connections every day. It is important to monitor individuals who have been diagnosed with TBI longitudinally, like we monitor those diagnosed with cancer to make sure they stay in remission.

Id.

¹²⁶ *Id.*

¹²⁷ *Brain Injury Expert Critical of Deal*, ESPN (Oct. 8, 2014), http://espn.go.com/nfl/story/_/id/11665685/brain-injury-expert-critical-proposed-nfl-concussion-settlement.

¹²⁸ *Id.* However, the article also provides accounts from the NFLPA lawyers who applaud the deal. It states, “Lead players’ lawyers Christopher Seeger and Sol Weiss on Wednesday again called the deal ‘an extraordinary settlement for retired NFL players and their families—from those who suffer with neurocognitive illnesses today, to those who are currently healthy but fear they may develop symptoms decades into the future.’” *Id.*

deal could have covered more areas of concern had a mediation brought together all of the stakeholders to negotiate the terms.¹²⁹ It is for this reason that much of the analysis surrounds ADR as it relates to sports concussions. The NFL has the deepest pockets of any of the various TBI stakeholders, and therefore an analysis of how the NFL and other leagues have handled mediations in the past is particularly relevant.

In their article discussing safe drinking water in communities, Ann McNaughton and John Folk-Williams discuss how mediation can be useful in bringing together various stakeholders.¹³⁰ Additionally, they claim mediation is especially useful when the issue is complex and there are various stakeholders.¹³¹ According to McNaughton and Folk-Williams:

Conflict becomes increasingly expensive to manage as it escalates into rights-based contests such as arbitration or litigation, or power contests such as boycotts or violence. Because of its capacity to level the playing field, control costs, and achieve results, mediation has become a familiar pretrial step in state and federal litigation. ‘Stakeholder engagement’ may be understood as a form of mediation.¹³²

Through application of McNaughton’s and Folk-Williams’ stakeholder engagement theory, mediation could be used to effectuate the needs of the entire TBI community, not just those of retired players.¹³³ In their discussion of stakeholder engagement, McNaughton and Folk-Williams posit that there are two primary benefits.¹³⁴ The first purported benefit is that the mediation provided a safe venue for the stakeholders to disclose their interests without

¹²⁹ Ann L. MacNaughton & John Folk-Williams, *Engaging Stakeholders for Sustainable Water Resource Solutions*, NAT. RESOURCES & ENV’T, Fall 2003, at 36 (providing a useful definition of stakeholders).

For purposes of this article, “stakeholder” means any individual, governmental entity, or nongovernmental organization (NGO) with an interest in the situation and the power to create or frustrate possible outcomes. A key to generating sustainable solutions that can endure over time without appeal or sabotage, among diverse stakeholders with widely diverging values and perspectives, is the use of qualified neutrals to engage diverse stakeholders, develop effective information-sharing systems, bridge trust and credibility gaps, and achieve mutually agreeable results.

Id.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (explaining that stakeholder engagement has been used, as exemplified in the article, to remedy water contamination in various communities.)

¹³⁴ MacNaughton & Folk-Williams, *supra* note 129.

having to divulge information to the public.¹³⁵ This would be beneficial to the TBI community because it would allow the various stakeholders to further collaborate on research aims. In the case of water treatment, the parties were able to approach the complex issues and create the framework for future state laws.¹³⁶

However, McNaughton and Folk-Williams claim that there was a second, and more important result.¹³⁷ They argue: “The second and most important result of the 1990-1991 mediation, however, was its impact in demonstrating the value of interest-based consensus-seeking methodology, and the use of independent professional mediators, to achieve sustainable water management solutions for current and future generations.”¹³⁸ One of the major criticisms of the NFL’s current arbitration process is that their arbitrators are not completely without bias.¹³⁹ Through utilization of mediation, stakeholders will be able to feel as if they are negotiating on an even playing field, rather than sitting before an interested arbitrator.¹⁴⁰ Similar to the water treatment mediations discussed in McNaughton’s and Folk-Williams’ article, all parties would benefit from a discussion before an unbiased party. It would likely lead to more complex and all-inclusive outcomes, as was the case in the water treatment discussions.¹⁴¹ Moreover, despite the fact that water treatment and TBI are hardly relatable, mediation could still prove to be an extremely useful method to resolve TBI issues.

Mediation has rarely been used to settle sports related disputes in the past even though it has proven to be beneficial in other areas.¹⁴² In the context of sports, “[m]ediation offers a fast, cost-saving method for settling virtually any kind of conflict. Its confidential nature promotes open communication between the parties, which helps preserve, if not enhance, their working relationships.”¹⁴³ It is important to note that the purpose of any mediation

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Rachel Axon, *Deflategate Judge Will Put NFL’s Arbitration Process Into Focus*, USA TODAY SPORTS (Aug. 6, 2015, 8:42 PM), <http://www.usatoday.com/story/sports/nfl/patriots/2015/08/06/deflategate-judge-tom-brady-new-england-patriots/31256089/>.

¹⁴⁰ MacNaughton & Folk-Williams, *supra* note 129.

¹⁴¹ *Id.*

¹⁴² Mark Grabowski, *Both Sides Win: Why Using Mediation Would Improve Pro Sports*, 5 HARV. J. SPORTS & ENT. L. 189 (2014) (describing how mediation, a type of alternative dispute resolution that utilizes a neutral outsider to facilitate a resolution for a conflict between two parties, is seldom used in American professional sports disputes).

¹⁴³ *Id.*

between the NFL, and the other stakeholders—e.g., veterans and the elderly— would seek to produce an outcome in which everyone is collaborating. An issue with arbitration, litigation, or negotiation is that they are inherently adversarial.¹⁴⁴ The process of mediation helps to ensure that working relationships are maintained, privacy is protected, public relations are improved, guided negotiation is effective and efficient, and perhaps most importantly, neutrality is maintained.¹⁴⁵

The key difference between a mediator and an arbitrator or judge is that the mediator, by definition, facilitates and creates a space of neutrality while the others operate in a more adversarial space. Additionally, mediators are specifically trained to focus on interests rather than the differences and personalities of the parties.¹⁴⁶ Therefore, rather than treating the situation as if stakeholders have no shared interests, a mediator would be able to more readily identify areas where the leagues, players, veterans, and elderly all share common interests. For example, the NFL concussion litigation focused primarily on determining the settlement amount. If other stakeholders and a mediator were present, perhaps they would have focused more on safety, prevention, and research. These are areas in which, upon closer examination, all parties have an interest. The NFL, and other leagues, would want to ensure long-term health and success of their players, while everyone else would receive the benefits of medical advances and improved safety measures.

Other benefits to using mediation to settle TBI disputes are time and cost effectiveness, and the fact that it helps to protect the privacy of the parties.¹⁴⁷ Sometimes those issues are directly correlated with each other, as evidenced by the NHL.¹⁴⁸ Tangled within the complex issues surrounding the NHL's ongoing concussion lawsuit, the presiding judge has recently ordered the unsealing of damaging emails sent to and from NHL league executives.¹⁴⁹ "Disclosure of insensitive emails supports the players' argument that the league has not invested an appropriate level of care in its play-

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *Mediation Skills in Conflict Resolution*, FED. MEDIATION & CONCILIATION SERV. (Oct. 10, 2011), http://www.iafc.org/files/lmiConf11_MediationSkillsinConflictResolution.pdf.

¹⁴⁷ Grabowski, *supra* note 142.

¹⁴⁸ See Allan Muir, *NHL Dodging Another Blow to Image in Concussion Lawsuit*, SPORTS ILLUSTRATED (Jan. 22, 2016), <http://www.si.com/nhl/2016/01/22/nhl-concussion-lawsuit-embarrassing-email>.

¹⁴⁹ *Id.*

ers' neurological health[.] In the unlikely event this litigation goes to trial, jurors would see these emails and that would not help the league."¹⁵⁰ Yet, even if the emails do not end up damaging the NHL legally, it is hard to deny that the emails hurt them in the court of public opinion.¹⁵¹ In discussing how mediation can assist in sport's contract negotiations, Mark Grabowski posits:

A mediator can listen to concerns raised by one party and agree not to divulge any sensitive information until permission is received from that party. This process could be particularly useful for sensitive financial information about a team or player, health problems of a player, or potential transactions involving the player. Knowing such information, a mediator can formulate a resolution that meets the actual goals, needs, and desires of both management and player.¹⁵²

With this in mind, it seems likely that if mediation had been employed in the NHL case, the email issue would not have persisted for as long as it did. Additionally, the NHL could have potentially staved off public embarrassment had they entered into mediation.¹⁵³ The emails could have been discussed at length in private and in good faith. Unfortunately for the NHL, this was not the case and the damaging emails will be submitted to the public record.¹⁵⁴ Moreover, in general, mediation has proven to be faster and more cost effective than litigation.¹⁵⁵ This evidences that parties might be receptive to the idea of mediation in order to save time and money.

While the benefits of utilizing mediation in solving disputes are apparent, it is also important to note that there are some limitations.¹⁵⁶ In fact, mediation has been used unsuccessfully to resolve disputes in the past.¹⁵⁷ Mediation requires that both parties have a willingness to collaborate in reaching a mutually beneficial resolution.¹⁵⁸ If either of the parties are not interested in working together and cooperating, then mediation will likely prove to be

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Grabowski, *supra* note 142.

¹⁵³ *Id.*

¹⁵⁴ Muir, *supra* note 148.

¹⁵⁵ See Karin S. Hobbs, *Attention Attorneys! How to Achieve the Best Results in Mediation*, 54 *DISP. RESOL. J.* 43, 43 (1999) (stating that mediation is more cost effective and resolves disputes more quickly).

¹⁵⁶ Grabowski, *supra* note 142.

¹⁵⁷ See *id.* (describing how Beckenbaugh unsuccessfully used mediation to resolve the NHL labor dispute in 2004–2005).

¹⁵⁸ Grabowski, *supra* note 142.

ineffective.¹⁵⁹ Additionally, even though mediations will typically result in faster settlements, they still require patience from all parties.¹⁶⁰ “The federal mediator can be as skilled as possible, but no mediator can make these sides want to negotiate. Until they want to negotiate, we’ll still be sitting here with no NHL hockey and little hope of seeing any this season.”¹⁶¹ However, as noted earlier, it seems that the TBI stakeholders have a common ground are willing to collaborate. Therefore, many of the limitations of mediation would be moot.

IV. PROPOSAL

Legislation, litigation, and arbitration have led to some advances in Traumatic Brain Injury research and improved prevention and rehabilitation strategies. However, given the severity of the issue, it is clear that much more needs to be done. To that end, a comprehensive mediation summit would allow for all of the stakeholders to meet at one time to discuss how a collaborative solution can be reached. Bringing together the leagues, executives and player associations, veterans, state head injury administrators, and lawmakers would create an environment that would foster creative solutions to one of the nation’s biggest problems. Additionally, in order to ensure that the parties feel as though they are on equal footing, a third party mediation organization should facilitate the meeting. For example, the American Arbitration Association (“AAA”) or Judicial Arbitration and Mediation Services (“JAMS”) could assist the stakeholders in guiding their conversation to resolve the myriad of related issues.¹⁶² Arguably, it is most important to ensure that the leagues continue to play an integral role in the TBI discussion. This is because they are able to provide the most financial support towards research. Thus, the leagues and

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*; see also Bruce Ciskie, *NHL Lockout 2012: Mediation Means Nothing Without Effort*, SB NATION (Nov. 27, 2012, 1:16 PM), <http://www.sbnation.com/nhl/2012/11/27/3697002/nhl-lockout-2012-mediation>.

¹⁶¹ Grabowski, *supra* note 142.

¹⁶² See *The AAA and Mediation*, AAA, https://www.adr.org/aaa/faces/services/disputeresolutionservices/mediation?_afWindowId=149cicn6a7_1&_afLoop=424389663216217&_afWindowMode=0&_adf.ctrl-state=149cicn6a7_4 (describing the mediation services offered by the AAA. For over 85 years the AAA has conducted thousands of mediations annually to individuals, companies, nonprofits, and governmental agencies. Parties have the option to choose their own mediator through their comprehensive list, or have one appointed for them.).

player associations should amend their current Collective Bargaining Agreements to include a TBI mediation clause. Rather than only having an arbitration clause, the parties should include a mediation clause to require the leagues to mediate TBI related issues with not only the player associations, but also other stakeholders.

The goal of the comprehensive mediation session would be to create a complex TBI research scheme. This would augment the TBI Reauthorization Act as well as the individual efforts of the various stakeholders. Through a truly collaborative and targeted strategy, TBI research would experience higher levels of funding and increased momentum. Ideally, the mediation summit and subsequent solution would be reoccurring and subject to change as the situation surrounding the TBI community develops. If successful, the resulting agreement could alter the way the world treats traumatic brain injuries and thus provide lasting change for a community that has long suffered.

V. CONCLUSION

Traumatic Brain Injury has been the signature ailment of the ongoing Middle Eastern conflict and is now perhaps the signature ailment of an entire generation. It seems as though there has seldom been a day where TBI is not in the national spotlight. Returning veterans struggle daily from various TBI ailments. Former and current professional athletes are suffering from concussions and CTE. Even worse, there is no way to test for CTE until after death. All the while, the leagues are either denying the nexus between TBI and their activities or failing to adequately address the problem. Improvements have been achieved through creative law-making but more needs to be done. Litigation and subsequent settlement agreements have provided reparations and rule changes in the leagues, but have done little to fund and create new research opportunities. Mediation would allow for all the stakeholders to reach a comprehensive plan to fund and facilitate research. Through the use of third-party mediation, the parties would enter into discussions on even footing, and thus are more likely to reach a fair and equitable solution. The opportunity to alleviate the suffering of the TBI community is no more apparent than it is right now.

