

TUESDAY, APRIL 23, 2024

PERSPECTIVE

## Timing is everything in resolving mild traumatic brain injury cases

By Geri L. Green  
and Premkiran Reddy

A recent Washington Post investigation revealed disturbing failures in the administration of the 2015 NFL concussion settlement despite the fact that the NFL has, to date, paid out over a billion dollars for concussion-related mild traumatic brain injuries (mTBI). The reported revelations provide useful insight into settling future mTBI claims.

Research into mTBI has advanced considerably since 2015. Recent studies have found that there is a high incidence of mTBIs in motor vehicle collision cases and only about half were diagnosed by initial treating providers. As a result, the research is quickly evolving to provide more tools and resources to clinicians as well as lawyers involved in mTBI cases.

mTBI is any injury to the brain which can be caused by sources, such as external physical forces, causing trauma to the head or body resulting in rapid acceleration/deceleration of the brain, penetrating skull injuries, exposure to intense sound, or prolonged oxygen deprivation. It can impact various regions of the brain, giving rise to diverse physical and cognitive symptoms, with severity and manifestation varying in each case. Some symptoms may include headaches, confusion, just not feeling right, loss of consciousness, balance problems, sensitivity to light and sound, tinnitus, fatigue, sleep disturbances, seizures, trouble concentrating, memory impairment, emotional lability, and suicidal thoughts. The severity and duration of symptoms depend upon



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various factors including the nature and force of the impact to the brain, the specific regions affected, the individual's overall health and effectiveness of the brain's repair mechanisms. *See*, "A Multi-dimensional Approach to Post-concussion Symptoms in Mild Traumatic Brain Injury," *Frontiers in Neurology*, December 2018.

The Post's investigation revealed that the NFL settlement imposed a stringent standard for a dementia diagnosis in excess of the prevailing medical standard as reflected in the *Diagnostic and Statistical Manual of Mental Disorders V* and often required additional verification or review by NFL-appointed medical professionals, resulting in

significant unnecessary delay and erroneous denials.

### Methods of Detection

While conventional brain imaging may be enough to identify a mTBI, it can often yield erroneous negative results. And detection is often complicated by the brain injury itself, which can cause denial of

symptomology, and impair motivation and decision-making, hindering a willingness to attend and prioritize medical appointments or accurately communicate symptoms.

Since the NFL settlement, mTBI research has significantly evolved in areas of detection and diagnosis, prognosis and treatment. Newer detection techniques can aid in identifying the different symptomology present immediately after the injury and the symptomology over time. There are other promising tools for diagnosis, such as videonystagmography to assess eye movement abnormalities; advanced MRI techniques; hormonal tests; and biomarker tests that measure markers of neurodegeneration. But, at this time, there is no diagnostic test that can definitively rule out mTBI.

The most reliable approach for diagnosis, in many cases, remains conducting multiple comprehensive clinical evaluations and gathering evidence of the individual's observed behaviors over time (before and after the incident) from the affected individual as well as collateral sources, such as educational and employment records, objective associates, and family members. There are various diagnostic checklists readily available, such as the Rivermead Post-Concussion Symptoms Questionnaire and the CDC's Acute Concussion Evaluation tools, to assist lawyers,

physicians, and family members in detecting brain injury and charting progress or decline.

### **The Sticky Question of Causation**

Affixing causation to the symptoms is similarly troublesome. The NFL Settlement required an additional verification that the dementia or impairments were caused by the NFL concussions and not some other life event. As a result, numerous players diagnosed with dementia by board-certified doctors were then wrongfully denied benefits by the NFL's settlement review doctors, who blamed the impairments on depression and sleep apnea.

Using evaluative tools and checklists to document a comprehensive chronology of symptoms can assist in determining causation. A history of prior brain injury can be differentiated from the current mTBI by identifying prior and current symptoms and establishing a pre-injury functioning reference point. Only the newly occurring symptoms can be attributed to the current mTBI. For example, individuals with high pre-injury functioning may exhibit less noticeable deficits resulting from mTBI and pass many mTBI tests, but they may still suffer significant reductions in speed and accuracy compared to their pre-injury status.

### **The Art and Science of Good Timing**

For cases involving mTBI, the timing of settlement discussions is complicated by the delay in the ability to establish a prognosis due to lengthy and uncertain recovery times. Many mTBIs will recover within the first three to six months. However, if symptoms persist after two years, significant recovery is unlikely due to the neuronal damage and impaired repair processes that may further accelerate cognitive decline over time. While early settlements can have cost savings, they may result in unfortunate re-

sults. The NFL settlement pre-dated much of the player's onset of long-term symptoms resulting in many players dying without receiving settlement benefits, only to be confirmed to have severe Chronic Traumatic Encephalopathy (CTE), a brain disease attributed directly to football, on autopsy. What is clear at this time is that our understanding of mTBI and how to treat it is developing. It is a moving target that requires lawyers, as well as treating physicians, neurologists, and experts to be well-versed in medical advancements in mTBI detection, evaluation, and treatments.

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*After a long career as a trial lawyer, **Geri L. Green** is a mediator, arbitrator, and special master/referee with ADR Services, Inc., and **Premkiran Reddy** is a California lawyer and M.D. specializing in TBI cases. Reddy also works in mediation and arbitrations.*

