

Ohio Ruling May Open Floodgates For Decades-Old CTE Suits

By Zachary Zagger

Law360 (November 7, 2018, 6:42 PM EST) -- Former football players suffering from long-term brain injuries discovered years after their playing days cleared a major hurdle to pursuing claims against professional leagues and universities last week when the Ohio Supreme Court allowed a CTE lawsuit from a deceased Notre Dame student to move forward.

Notre Dame and the NCAA had argued that the lawsuit, filed in 2014, came long after the two-year statute of limitations period, which they said should have begun with the player's last football game in 1978.

But the Ohio Supreme Court, the first state high court to tackle this issue, found that chronic traumatic encephalopathy, or CTE, could be treated as a latent condition that develops long after an initial injury and may not reasonably be discovered until years later.

While the case focuses just on the requirements to bring such a claim, not the substance of whether Notre Dame and the NCAA can be held responsible, attorneys say the ruling shows that such claims from players who haven't played football in decades can clear an initial statute of limitations defense.

"I think the likelihood is that we are going to see in the near term, an increase in lawsuits, especially for anyone who can find a way to bring a claim in Ohio," said Jenner & Block LLP sports and commercial litigator Michael J. Nelson, who has defended concussion lawsuits.

"The ruling carries extra weight, not just because it's from a state supreme court, but because of the claim volume it could trigger — it opens the door to a potentially large number of player-plaintiffs going back decades," he said.

The ruling allowed the wife of former Notre Dame football player Steven Schmitz, who played for the Fighting Irish from 1974 to 1978 and died in 2015, to bring negligence and fraud claims against the school and the NCAA alleging they failed to warn players of the risks of repeated head trauma in sports and continued policies and practices that downplayed such risks.

The issue for the Ohio Supreme Court centered around the "discovery rule," which says that the statute of limitations does not start until the plaintiff is either informed by a medical authority of an injury that could lead to a claim or when the plaintiff reasonably should have been aware of such an injury.

Notre Dame and the NCAA argued that Schmitz knew he had suffered from serious head trauma when he last played football. If not then, he and his wife should have been aware that any symptoms he might have experienced in 2010 were tied to football head trauma as that was the year the NCAA changed its concussion protocols in response to increasing publicity regarding the long-term dangers of concussions.

But the Ohio Supreme Court compared CTE to a case where a plaintiff developed cancer six years after being exposed to a toxic gas. Even though the plaintiff, in that case, knew he experienced problems immediately after being exposed to the gas and even had a benign papilloma removed from his nasal cavity, he was not aware he might have a claim until a doctor linked his eventual cancer diagnosis with his exposure to the gas.

Similarly, the court said, in Schmitz's case, based on the allegations he made in his complaint, though he knew he had taken some hard hits to the head playing football, he did not discover the injury giving rise to his lawsuit — CTE — until he was diagnosed by doctors at the Cleveland Clinic in 2012, according to the allegations of his complaint.

“Schmitz’s experience of disorientation as to time and place following head impacts establishes that he was, or at least should have been, aware that he had sustained head injuries,” the court said. “But head injuries, including concussions, are an inherent part of football. They do not inherently suggest the existence of actionable wrongdoing.”

Key to the court’s analysis was that the statute of limitations did not merely begin when Schmitz started having neurological issues — it started when he knew that he had a claim for his CTE. Even if he suffered some neurological impairment prior to his 2012 diagnosis, he “did not know and had no reason to know that he had suffered a latent brain injury while playing football,” the court said.

While the court did leave the door open for facts to be discovered down the road that show Schmitz should reasonably have known that his neurological problems were tied to his football playing days, that argument is now harder to make and will open the door for more cases, at least in the short term, by showing that such claims can get past an immediate dismissal bid, attorneys said.

“What this ruling allows is for someone who is beyond the statute of limitations to look into whether or not they have a case and not be shut down legally by a statute of limitations,” said Gregory G. Rizio, a personal injury litigator with Rizio Law Firm.

“So there are a lot of ex-football players, probably hundreds and hundreds of players who played at Notre Dame in the 1970s who may be suffering from CTE-like symptoms who may now look into whether ... they have the right to bring a claim,” he said.

The ruling will not only open the door for more claims to be brought in Ohio but will have an impact on other courts across the country, particularly due to the thorough discussion of the discovery rule issue.

“It is not an outlier. There are many states that would have a similar approach to it,” said mass tort litigator Timothy O'Brien of Levin Papantonio Thomas Mitchell Rafferty & Proctor PA. “I think that the important thing is that it is not only knowledge of the injury but knowledge of the tortious conduct that resulted in the injury.”

Overall, the case is one of a recent trend of concussion cases leaning in favor of plaintiffs being able to bring claims alleging that the repetitive head trauma and high incidence of concussions in sports lead to long-term neurological conditions like CTE, an issue raising broader concerns about collision sports.

But it will take more cases to actually go to trial to sort out who can be held liable and for how much for long-term brain conditions. For now, this Ohio case could show a path on how claims can proceed to that point.

“We have seen this in mass tort claims in the past, whether it is asbestos or tobacco, once one state rules a certain way, there is a ripple effect throughout the country,” Nelson said. “Not every state supreme court is going to agree with Ohio, but it is moving in that direction.”

--Editing by Pamela Wilkinson and Kelly Duncan.