

DERAILING THE T TRAIN: CURBING THE ABUSE OF TORADOL IN THE NATIONAL FOOTBALL LEAGUE

Nicoleas R. Mayne*

I. INTRODUCTION

In 2014, a group of former players filed a lawsuit against the National Football League (“NFL”) alleging that team doctors and trainers negligently supplied the nonsteroidal anti-inflammatory drug (“NSAID”) ketorolac, commonly known by the brand name Toradol, to players in order to keep them on the field, despite failing to advise players of the potential long-term effects of sustained Toradol use¹. A group that has since grown to comprise over 1,800 former players², filed an amended complaint in March 2017³, resulting in renewed discussion regarding the alleged misuse of Toradol in the NFL.

This article will explore the use of Toradol by NFL players, and argue that the league must decrease its players’ reliance on Toradol in order to protect the integrity of professional football. This article will suggest potential policy changes that could curb Toradol abuse, some of which could be achieved through the renegotiation of the Collective Bargaining Agreement (“CBA”) by the NFL and the NFL Players’ Association (“NFLPA”) when the existing CBA expires at the conclusion of the 2020 season.⁴

II. A BRIEF HISTORY OF TORADOL IN THE NFL

Toradol was originally approved by the United States Food and Drug Administration (“FDA”) in 1989.⁵ The drug is “indicated for short term (up to 5 days) management of moderate to severe pain.”⁶ Toradol is accompanied by a

*The author is a second-year law student at Harvard Law School.

¹ See Complaint, *Dent v. National Football League*, 2014 WL 2058098 (N.D.Cal. 2014).

² Jack Williams, *Ex-Players Accuse N.F.L. Teams of Violating Prescription Drug Laws, Report Says*, THE NEW YORK TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/sports/football/nfl-lawsuit-prescription-drugs-painkillers.html>.

³ See Complaint at 1, *Evans v. Arizona Cardinals, LLC, et al.*, 2017 WL 963181 (N.D.Cal. 2017).

⁴ 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT (Aug. 4, 2011) at 1, available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>.

⁵ CENTER FOR DRUG EVALUATION AND RESEARCH, 22382Orig1s000, CHEMISTRY REVIEW NDA 22-832 SPRIX™

(KETOROLAC TROMETHAMINE) NASAL SPRAY (2008) at 4, available at http://www.accessdata.fda.gov/drugsatfda_docs/nda/2010/022382Orig1s000ChemR.pdf.

⁶ *Id.* at 3.

black box warning, the highest warning level required by the FDA⁷, due to risk of potentially fatal “gastrointestinal bleeding and/or perforation of the stomach or intestines,” “increased risk of serious cardiovascular thrombotic events,” and risk to persons with impaired kidney function.⁸ Toradol is also contraindicated in patients concurrently taking other NSAIDs, such as aspirin.⁹

Toradol has been the painkiller of choice for many NFL players for at least 20 years. Use of Toradol by NFL teams was reported in 1995¹⁰, and by the 2000-2001 season, 28 of the NFL’s 30 teams reported using the drug, treating an average of 15 players, many on game day.¹¹

Toradol’s serious side effects were acknowledged in a 2012 recommendation from the NFL’s Physician Society Task Force on Toradol use, yet qualified with the observation that “NFL players are superbly fit and healthy with little risk of experiencing any of the known complications associated with the use of ketorolac.”¹² The Task Force did, however, state that the drug “should not be used in any form for more than 5 days.”¹³

Because Toradol is contraindicated for use beyond the 5 day mark, there has never been a clinical study on prolonged use¹⁴. While the 2012 recommendations clearly set a 5 day limit for use¹⁵, the Task Force did not issue a recommendation concerning repeated use of the drug for periods of less than 5 days over the course of an NFL career.

Recent player accounts suggest that Toradol use may be more widespread today than when previously studied. In a 2016 article for *The Players’ Tribune*, retired offensive tackle Eugene Monroe wrote “Every player rides the T Train at some point in his career.”¹⁶ In a survey published in 2017, 98% of players said

⁷ *A Guide to Drug Safety Terms at FDA*, FOOD AND DRUG ADMINISTRATION (Nov. 2012), <https://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM107976.pdf>.

⁸ *Ketorolac Tromethamine*, FOOD AND DRUG ADMINISTRATION (last updated Mar. 20, 2014, 1:46 PM), available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2014/074802s0381bl.pdf.

⁹ *Id.*

¹⁰ Louis Bien, *Comfortably Numb: The NFL Fell in Love with a Painkiller It Barely Knew*, SB NATION (Aug. 3, 2016), <http://www.sbnation.com/2016/8/3/12310124/comfortably-numb-the-nfl-fell-in-love-with-a-painkiller-it-barely-knew>.

¹¹ John M. Tokish et al., *Ketorolac Use in the National Football League: Prevalence, Efficacy, and Adverse Effects*, 30 *The Physician and Sportsmedicine* 19, 19 (2002).

¹² Matthew Matava et al., *Recommendations of the National Football League Physician Society Task Force on the Use of Toradol® Ketorolac in the National Football League*, 4 *Sports Health* 377, 381 (2012).

¹³ *Id.* at 377.

¹⁴ Bien, *supra* note 10.

¹⁵ Matava, *supra* note 13, at 382.

¹⁶ Eugene Monroe, *Getting off the T Train*, THE PLAYERS’ TRIBUNE (May 23, 2016), <https://www.theplayerstribune.com/2016-5-23-eugene-monroe-ravens-marijuana-opeoids-toradol-nfl/>.

their team issued Toradol.¹⁷ One player is anonymously quoted admitting “I have used it every single game for the past four or five years.”¹⁸ Nearly half of the players surveyed admitted they have been taking Toradol for years, while only 6% were one-time users.¹⁹

The 2014 *Dent* complaint details some of the injuries plaintiffs allegedly unknowingly endured while taking Toradol and other NSAIDs, opioids and local anesthetics.²⁰ Plaintiff Keith Van Horne allegedly played an entire season on a broken leg, and did not learn of the injury for five years after it occurred.²¹ Plaintiff Richard Dent allegedly played 8 weeks on a broken foot.²² Plaintiff Jim McMahon allegedly suffered a broken neck, yet didn’t discover the injury until nearly a decade later.²³ These and other stories build the suit’s narrative to its eventual allegation: the NFL violated its duty of reasonable care by providing Toradol and other medications without players’ informed consent, and without informing players of the dangers of addiction and other health risks. The complaint further alleges that the NFL recklessly endangered the health, safety and overall well-being of players, and caused injuries including drug tolerance, dependence and addiction, severe and permanent musculoskeletal injuries, and other long-term health consequences.²⁴ The *Dent* lawsuit’s viability rested largely on the theory that the NFL had voluntarily undertaken a duty of care, which it violated by providing Toradol in the manner described.

Under Section 301 of the Labor Management Relations Act, private sector collective bargaining agreements are enforceable in federal court.²⁵ If there is a arbitration remedy available under the NFL’s CBA, players lose the ability to pursue certain employment related claims in court.²⁶ Section 301 has been utilized to thwart a number of suits involving Toradol, including the 2014 lawsuit. The National Hockey League, for example, relied on Section 301 to preempt claims made by the estate of deceased enforcer Derek Boogard, including two counts

¹⁷ Tyler Dunne, *The NFL’s Drug of Choice*, BLEACHER REPORT (Jan. 11, 2017), <http://thelab.bleacherreport.com/nfl-toradol-use-players-survey/>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *See* Complaint, *Dent v. National Football League*, 2014 WL 2058098 (N.D.Cal. 2014).

²¹ *Id.* at 4.

²² *Id.* at 7.

²³ *Id.* at 52.

²⁴ *See id.* at 62-63.

²⁵ 29 U.S.C. § 185(a) (1994).

²⁶ Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 LAB. LAW. 429 (1998), available at http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1089&context=faculty_articles.

alleging the league breached its voluntarily undertaken duty to protect Boogard's health by failing to prevent team physicians from administering Toradol.²⁷

The complaint in *Evans v. Arizona Cardinals, et al.* sets its sights on the clubs comprising the league, rather than the league itself,²⁸ but this is not simply an attempt to utilize the team's status as an employer to avoid Section 301 preemption, as has been done in past lawsuits against teams.²⁹ The 2017 amended complaint does not contain a single mention of the word "duty," and instead alleges that clubs intentionally misrepresented the risks and dangers of Toradol.³⁰

The *Evans* complaint again details gruesome injuries plaintiffs allegedly played through with the assistance of Toradol and other medications, including a broken fibula³¹ and forearm³², a ruptured neck disc³³, and a break in the transverse process of one plaintiff's back³⁴. The narrative is similar, but the plaintiffs are not simply alleging that the NFL failed to live up to an assumed duty of care, but rather that clubs continuously, systematically and intentionally misrepresented and concealed critical information on Toradol and other medications in order to get uninformed players back on the field as soon as possible.³⁵

III. POTENTIAL POLICY CHANGES

The court held that the issues raised in *Dent* could be resolved through the collective bargaining process.³⁶ Following the conclusion of the 2020 NFL season, the NFL and NFLPA will have an opportunity to do that, and regardless of the outcome of *Evans*, the NFL and NFLPA should seek to implement policy changes that serve their shared interests.

The section entitled "Integrity of the Game" in the standard NFL Player Contract has each player acknowledge "his awareness that if he... uses or provides other players with stimulants or other drugs for the purpose of attempting to

²⁷ See *Boogard v. National Hockey League*, 126 F.Supp.3d 1010, 1022 (N.D. Ill. 2015).

²⁸ Complaint at 1, *Evans v. Arizona Cardinals, LLC, et al.*, 2017 WL 963181 (N.D.Cal. 2017).

²⁹ See, e.g., *Hendy v. Losse*, 925 F.2d 1470, (9th Cir. 1991) (holding section 301 did not preempt Hendy's negligent hiring and retention claim against the San Diego Chargers); *Green v. Arizona Cardinals*, 21 F.Supp.3d 1020, (E.D. Mo. 2014) (holding plaintiffs' claims against the Arizona Cardinals could be determined without interpreting the CBA).

³⁰ See Complaint at 5, *Evans v. Arizona Cardinals, LLC, et al.*, 2017 WL 963181 (N.D.Cal. 2017).

³¹ *Id.* at 27.

³² *Id.* at 104.

³³ *Id.* at 85.

³⁴ *Id.* at 99.

³⁵ See *id.* at 114.

³⁶ See *Dent v. National Football League*, No. C 14-02324 WHA, 2014 WL 7205048, at *7 (N.D. Cal. Dec. 14, 2014).

enhance on-field performance... the Commissioner will have the right... to fine Player... suspend Player... and/or terminate his contract.”³⁷ Former player Torry Holt described Toradol as “a sheet of armor”³⁸, and former Patriots team physician Bertram Zarins has stated that Toradol was administered as a prophylactic to players who anticipated, but had not yet experienced, pain.³⁹ When a player uses Toradol as a prophylactic, he arguably uses drugs for the purpose of enhancing on-field performance.

If the NFL were to define prophylactic use of Toradol as a use of drugs for the purpose of attempting to enhance on-field performance, and fine or suspend players in accordance with violations, both players and teams would have incentives to ensure Toradol is used only to treat existing pain. A similar standard could also be imposed on team physicians, with fines or suspensions imposed on physicians themselves for administering Toradol as a prophylactic.⁴⁰

Cutting out prophylactic use of Toradol is not a novel idea. One of the recommendations given by the 2012 NFL Physician Society Task Force was that “Ketorolac should not be used prophylactically as a means of reducing anticipated pain either during or after participation in NFL games or practices.”⁴¹ In fact, these recommendations, if instituted as league-wide policy, would address many of the issues raised in regards to alleged Toradol misuse. If instituted and enforced, Toradol use would be limited to players who are listed on the teams’ injury report or otherwise diagnosed with an injury by a physician, administered in the lowest effective therapeutic dose, given orally when possible, never used for more than 5 days, and never administered via IM or IV injection except when following an acute, game-related injury “where other oral or IN pain medications are inadequate or not tolerated.”⁴²

If turning these recommendations into policy is not an option, the league should at least enforce the requirement in Article 39 of the CBA stating “each Club physician’s primary duty in providing player medical care shall be not to the Club but instead to the player-patient,” and clarify that player health and safety trumps the team’s interest in a player returning to action. Some have suggested

³⁷ See 2011 NAT’L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT, *supra* note 4, at 256.

³⁸ Dan Wiederer, *NFL and pain: League zeros in on one pain medication*, STAR TRIBUNE (Aug. 22, 2012, 6:31 AM), <http://www.startribune.com/zeroing-in-toradol-the-players-drug-of-choice-carries-high-risks-but-may-soon-be-banned/166712256/>.

³⁹ Bien, *supra* note 10.

⁴⁰ See generally Pat Bradley, *NFL Reinstates Patriots Employees John Jastremski, Jim McNally From Suspension*, NEW ENGLAND SPORTS NETWORK (Sep. 16, 2015, 6:09 PM), <http://nesn.com/2015/09/nfl-reinstates-patriots-employees-john-jastremski-jim-mcnally-from-suspension/>.

⁴¹ Matava, *supra* note 13, at 377.

⁴² Matava, *supra* note 13, at 382.

the league go as far as to recommend a rule that players not be allowed back on the field within 24 hours of taking prescription pain medication⁴³, in order to set policy that constitutes a workplace safety rule rather than an infringement on team physicians' independent decision-making.

The league should also review its banned substances, and explore loosening restrictions on pain management alternatives. In a 2016 ESPN survey on medical marijuana use, 43% of players surveyed said they would rather use marijuana than Toradol if both were allowed by the NFL, and 61% believed fewer players would take painkillers if marijuana were an allowed substance.⁴⁴

It has been suggested that the NFL is too image-conscious to remove marijuana from its list of banned substances⁴⁵, however there may be alternative ways to give pain-afflicted players access to marijuana in specified situations. The NFL currently allows players to access otherwise banned substances for approved therapeutic uses via the league's Therapeutic Use Exemption ("TUE") policy.⁴⁶ The policy states "The NFL recognizes that within the list of prohibited substances there are medications that are appropriate for the treatment of specific medical conditions. For athletes who require the use of a prohibited substance to treat an appropriately diagnosed medical problem, a Therapeutic Use Exemption (TUE) may be requested."⁴⁷

The NFL has already created specialized TUE policies for certain conditions, including ADHD and hypertension⁴⁸, and could presumably craft an exemption to treat pain in cases where Toradol use has reached the recommended limit of 5 days. Currently, all TUE requests are subject to certain general requirements. First, "the medication must be necessary and indicated for treatment of the specific medical problem."⁴⁹ The definition of "necessary" is unclear here, as the ADHD policy, for example, allows various medications to be prescribed

⁴³ Gregg Easterbrook, *Painkillers, NFL's other big problem*, ESPN (May 27, 2014), http://www.espn.com/nfl/story/_/id/10975522/excerpt-painkillers-abuse-nfl-king-sports-gregg-easterbrook.

⁴⁴ *Cannabis Confidential: NFL players weigh in on medical marijuana vs. painkillers*, ESPN (Nov. 2, 2016), http://www.espn.com/nfl/story/_/id/17938762/nfl-players-weigh-medical-marijuana-vs-painkillers.

⁴⁵ Nathaniel Vinton, *Former NFL players appeal to league to embrace marijuana use*, NEW YORK DAILY NEWS (Jul. 30, 2016, 5:00 PM), <http://www.nydailynews.com/sports/i-team/nfl-players-appeal-league-embrace-marijuana-article-1.2732262>.

⁴⁶ See Appendix I, 2016 NAT'L FOOTBALL LEAGUE POLICY ON PERFORMANCE-ENHANCING SUBSTANCES (2016), *available at* https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/2016PESPolicy_v2.PDF.

⁴⁷ *Id.* at 35.

⁴⁸ *Id.*

⁴⁹ *Id.*

provided other requirements are met⁵⁰. Whether medical marijuana is specifically indicated for pain and injury management is debatable, but the league could alter the language of these general requirements or define certain terms to carve out an exception for medical marijuana. The second general requirement is that either alternative treatments are not available, or if alternatives are available, “reasons for not prescribing these alternative treatments have been presented.”⁵¹ It is plausible that reasons for not prescribing Toradol or other NSAIDs as alternatives to marijuana could be presented, for example if the patient was at risk of exceeding the recommended 5 day limit on use, or if the patient was at increased risk of gastrointestinal bleeding, renal failure, or other serious side effects stemming from prolonged Toradol use. The remaining general requirements for a TUE (completion of appropriate evaluation, submission of medical records, and that the player not begin use before a TUE is granted⁵²) could be easily met.

Allowing players to request a TUE to use medical marijuana in lieu of Toradol could be a realistic concession made by the league over the course of the collective bargaining process. Still, Toradol would likely be used by many players, and additional education should be provided to ensure that consent to drug administration is truly informed. This could be as simple as recommending that players review the potential long-term effects of their Toradol use with the NFL Personal Health Care Team already provided through NFL Player Engagement, as services include helping players “understand medications or... doctor’s orders” and “make educated decisions on... treatment options.”⁵³ The league could also include an overview of the risks of prolonged Toradol use during the rookie symposium, which already includes drug awareness as part of the program.⁵⁴

One of the reasons the league may be reluctant to provide additional education on the risks posed by Toradol is that, as previously mentioned, the use of Toradol for extended periods of time has not been studied. It is possible that prolonged Toradol use does not lead to the injuries alleged in *Dent* and *Evans*, and the NFL itself could study player use and find out. The *Evans* complaint calls for a medical monitoring system for class members, and asks the court to require a fund be set up to pay for treatment of Class Members. Players could utilize the collective bargaining process to push for a monitoring program for all players, which would over time provide additional insight into the effects of prolonged

⁵⁰ *Id.* at 37.

⁵¹ *Id.* at 35.

⁵² *Id.*

⁵³ *Programs & Resources*, NAT’L FOOTBALL LEAGUE, <http://www.nflplayerengagement.com/programs-resources/> (last visited Mar. 18, 2017).

⁵⁴ Thomas George, *History Lessons: Education of a Rookie*, NAT’L FOOTBALL LEAGUE (2008), <http://www.nfl.com/more/rookie-education>.

Toradol use by NFL players. Additionally, the players could negotiate for a fund to pay for treatment of injuries caused by Toradol misuse, similar to the Neuro-Cognitive Disability Benefit set up in Article 65 of the current CBA⁵⁵. While a fund covering treatment of a wide-ranging set of injuries may be a hard sell, the NFLPA could at least call for a fund to cover renal failure and other more serious health effects that Toradol is known to increase risk of.

IV. CONCLUSION

Ultimately, there are numerous potential policies that could decrease Toradol misuse in the NFL, and these policies can be pursued regardless of the outcome of ongoing litigation. Both the NFL and NFLPA should seek to protect player health and sustain the integrity of the game by curbing improper use of Toradol, and can work together through ongoing policy updates and the collective bargaining process to find agreeable compromises that will set an example for all of professional sport regarding athletes' use of Toradol.

⁵⁵ See 2011 NAT'L FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT, *supra* note 4, at 247.