

While Plaintiff in *Gee v. NCAA* Faces Uphill Battle, A Win Could Equal Hundreds of Millions for Collegiate CTE Victims



Photo Source: D. Myles Cullen , *President Trump Welcomes the Clemson Tigers to the White House*, FLICKR (Jan. 14, 2019).

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### **Historical Criticism of NCAA's Concussion Protocol**

While CTE has been a highly publicized problem within the NFL for years, many are now finding the injuries can start as early as college.<sup>1</sup> With a rise in collegiate CTE diagnoses and pre-mature athlete deaths, the NCAA has faced increased criticism for their role in the athlete's

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<sup>1</sup> See Andy Patton, *Family suspects CTE in 26-year-old Max Tuerk's untimely death*, TROJANS WIRE (June 25, 2020 2:45 PM) <https://trojanswire.usatoday.com/2020/06/25/family-suspects-cte-usc-trojans-max-tuerks-untimely-death-nfl/> (linking research on NFL player's CTE rates to recent college athletes premature death).

long-term injuries and have also been pressured to improve their concussion protocols in order to protect players.<sup>2</sup> The NCAA, however, has never faced a jury to decide whether they are liable for the negligent concussion protocol, as the many previous suits were either dismissed or settled pre-trial.<sup>3</sup> This is all changing, as the NCAA is set to begin trial in the Los Angeles County Superior Court against the family of former linebacker, Matthew Gee, who died prematurely due to extensive brain injuries suffered while playing football at the University of Southern California (USC).<sup>4</sup>

### **Matthew Gee's CTE Suit Following Arlington Settlement**

Matthew Gee was an inside linebacker at USC, where he led the team in tackles, brought the team to two Rose Bowls, and served as team captain in 1991.<sup>5</sup> Gee never played professionally and seemed to live a normal life after graduation, until 2013 when he began experiencing memory loss, depression, confusion, and rage.<sup>6</sup> In 2018, Matthew Gee died in his sleep at the age of forty-nine and his wife, Alana, later donated his brain to researchers, who diagnosed Gee with stage ii-iii CTE.<sup>7</sup> Gee was not the only USC player to die prematurely, as five of the twelve

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<sup>2</sup> See Chris Nowinski, *We Don't Have to Get Rid of College Football to Make it Brain-Safe(r)*, GLOBAL SPORT MATTERS (Mar. 9, 2022) <https://globalsportmatters.com/health/2022/03/09/how-ncaa-college-football-limit-concussions-cte/> (discussing the effects of heightened CTE rates in collegiate athletes and suggesting possible improvements to NCAA regulations, such as reducing hitting in practice, changing kick-off rules, getting rid of the three-point stance, and encouraging more targeting penalties).

<sup>3</sup> See Amanda Christovich, *The NCAA Is Going To Trial Over Traumatic Brain Injuries*, FRONT OFFICE SPORTS (Oct. 8, 2022 7:55 AM) <https://frontofficesports.com/gee-ncaa-lawsuit/> (stating that while the NCAA has faced “a handful of lawsuits in the past decade from athletes who endured long-term injuries stemming from concussion”, almost all suit were settled or dismissed and the only case that made it to trial was settled within three days).

<sup>4</sup> See *Id.* (discussing key details of Gee v. NCAA case).

<sup>5</sup> See USC Athletics Staff, *In memoriam: Matt Gee, 49, former USC linebacker and tackle leader*, USC NEWS (Jan. 4, 2019) <https://news.usc.edu/153428/in-memoriam-matt-gee-former-usc-linebacker-and-tackle-leader/> (discussing Gee's various athletics accomplishments while at USC).

<sup>6</sup> See Raymond Lucas, *Widow of ex-USC LB Matthew Gee taking NCAA to trial over wrongful death and negligence*, 247 SPORTS (Oct. 8, 2022 1:43 PM) <https://247sports.com/Article/Widow-of-ex-USC-LB-Matthew-Gee-taking-NCAA-to-trial-over-wrongful-death-and-negligence-194970459/#:~:text=Matthew%20Gee%20played%20at%20USC,original%20complaint%20filed%20in%202020>. (referencing statements made in lawsuit claim, the Matthew Gee had started experiencing major behavioral problems following his time at USC).

<sup>7</sup> See Brandon Boyd, *Matt Gee*, CONCUSSION LEGACY FOUNDATION <https://concussionfoundation.org/personal-stories/legacy-stories/matt-gee#:~:text=His%20wife%20Alana%20donated%20his,Matt%20Gee%20won>. (last visited Oct. 12, 2022) (discussing behavioral changes leading up to Gee's death, as well as the extent of brain injury found after his death).

linebackers on the 1989 USC roster have since died, all before the age of fifty.<sup>8</sup> Prior to their death, each of these players also struggled with erratic behavior, memory loss, and substance abuse.<sup>9</sup> Alana Gee eventually filed suit against the NCAA claiming wrongful death and negligence.<sup>10</sup>

Alana Gee filed suit just after approval of the settlement agreement in the *Arrington v. NCAA* case.<sup>11</sup> There, Adrian Arrington, former safety for Eastern Illinois University, filed a lawsuit, claiming the NCAA were negligent in their inefficient protocol for treating concussions and that they also fraudulently concealed the long-term side effects of concussions.<sup>12</sup> The class action suit included “all persons who played an NCAA-sanctioned sport at an NCAA member school on or prior to July 15, 2016” and was ultimately settled, with the NCAA being required to fund a \$70 million Medical Monitoring Fund, fund a \$5 million concussion research program, and institute heightened educational and reporting protocols.<sup>13</sup> While Gee’s case stands on different grounds than Arrington, the same overarching issue will persist; the NCAA failed to protect players from the risks and dangers of long-term brain damage.<sup>14</sup>

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<sup>8</sup> See Michael Rosenberg, *In 1989, USC Had a Depth Chart of a Dozen Linebackers. Five Have Died, Each Before Age 50*, SPORTS ILLUSTRATED (Oct. 7, 2020) <https://www.si.com/college/2020/10/07/usc-and-its-dying-linebackers> (discussing the deaths and injuries sustained by multiple USC players, leading up to their untimely deaths).

<sup>9</sup> See Marcio Jose Sanchez, *NCAA Faces Lawsuit Over Concussions in Football*, USA ONLINE NEWS <https://usa-online-news.com/sports/ncaa-faces-lawsuit-over-concussions-in-football/> (last visited Oct. 12, 2022) (detailing similarities in symptoms displayed in deceased USC players).

<sup>10</sup> See Kyle Golik, *Sunday Feature: The Tua Effect*, YARDBARKER (Oct. 9, 2022) [https://www.yardbarker.com/nfl/articles/amp/sunday\\_feature\\_the\\_tua\\_effect/s1\\_17106\\_3797418\\_4](https://www.yardbarker.com/nfl/articles/amp/sunday_feature_the_tua_effect/s1_17106_3797418_4) (discussing the lawsuit filed by Alana Gee, in anticipation of the pre-trial proceedings set to begin).

<sup>11</sup> See *Arrington Class Settlement Information*, NCAA <https://www.ncaa.org/sports/2019/11/22/arrington-class-settlement-information.aspx> (last visited Oct. 12, 2022) (discussing final approved settlement agreement and requirements of NCAA following).

<sup>12</sup> See Dylan Henry & Kacie Kergides & Kimberley L. Sachs, *The Arrington Settlement and Its Implications: What It Says and What It Doesn't*, SPORTS LITIGATION ALERT (June 5, 2020) <https://sportslitigationalert.com/the-arrington-settlement-and-its-implications-what-it-says-and-what-it-doesnt/> (discussing details of Arrington class action lawsuit including expansion of class parties from former and current football players to all those who played sanction sports).

<sup>13</sup> See Media Center, *Final settlement approved for the Arrington concussion lawsuit*, NCAA (Aug. 13, 2019 3:00 PM) <https://www.ncaa.org/news/2019/8/13/final-settlement-approved-for-the-arrington-concussion-lawsuit.aspx> (detailing NCAA requirements following settlement, including baseline concussion testing, return to play clearance testing, availability of medical professionals at games, and heightened concussion reporting structures).

<sup>14</sup> See *College Football Concussion Litigation*, EDELSON <https://edelson.com/investigations/ncaa/> (last visited Oct. 13, 2022) (discussing differences between Arrington and Gee case, primarily on the fact that the Arrington case was based more on medical monitoring claims, rather than personal injury claims).

## **Plaintiff's Difficulty in Proving Causation Element of Negligence**

In order to prove the wrongful death by negligence claim, the Gee family will need to argue that the brain injury suffered while at USC led to Gee's premature death and also that the NCAA knowingly withheld vital safety information.<sup>15</sup> Specifically, there are three major requirements to prove wrongful death by negligence; first that the defendant owed the plaintiff a duty of care, second that the defendant breached this duty, and third that the defendant's action is what caused the wrongful death.<sup>16</sup> The Plaintiffs are going to be fighting an uphill battle during this trial to prove each of these three points.<sup>17</sup>

The NCAA has claimed that they owe no duty of care to the players and that the institutions are the ones who should be on the hook for those injuries.<sup>18</sup> This will negate the first two prongs of the negligence test.<sup>19</sup> While, the Plaintiff may be able to refute this argument, proof of causation may be the ultimate downfall of Gee's claim.<sup>20</sup> In order to prove a negligence claim of wrongful death caused by CTE, Plaintiff needs to show that the injuries Gee sustained while playing at USC are what caused the CTE, with no intervening circumstances to break the chain of causation.<sup>21</sup> In the case where multiple negligent acts occur that possibly affect the deceased's death, the defendant can avoid liability if they can prove that the superseding incidents made the

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<sup>15</sup> See Kelsey Dallas, *A former USC linebacker died after facing memory loss and depression. His widow is suing the NCAA*, DESERET NEWS (Oct. 10, 2022 3:18 PM) <https://www.deseret.com/2022/10/10/23397126/ncaa-football-concussion-lawsuit> (discussing Alana's use of post-death brain research done on Matthew to prove her argument of brain injury sustained while at USC).

<sup>16</sup> See David Landers, *Proving Wrongful Death in a Civil Case*, NOLO <https://www.nolo.com/legal-encyclopedia/proving-wrongful-death-civil-case.html> (last visited Oct. 12, 2022) (discussing the requirements for all three aspect of prima facie case for wrongful death due to negligence).

<sup>17</sup> See *Could CTE wrongful death case for an ex-USC player vs. the NCAA spawn more?*, ABBEY FEALE <https://abbeyfealegolfclub.com/could-cte-wrongful-death-case-for-an-ex-usc-player-vs-the-ncaa-spawn-more/> (last visited Oct. 12, 2022) (discussing various difficulties in Gee's case, including difficulties with collective bargaining agreements or proof of causation).

<sup>18</sup> See Evan Weiner, *The Alana Gee v. NCAA Concussion Case is Going to Trial*, SPORTS TALK FLORIDA (Oct. 10, 2022) <https://sportstalkflorida.com/college/the-alana-gee-v-ncaa-concussion-case-is-going-to-trial/> (detailing NCAA's argument that the schools should be the one's taking care of the players, even though they are responsible for looking after every aspect of collegiate sports).

<sup>19</sup> See Landers, *supra* note 15 (detailing correlation between duty owed and breach of duty prongs).

<sup>20</sup> See *Could CTE wrongful death case for an ex-USC player vs. the NCAA spawn more?*, *supra* note 16 (stating the difficulties with proving athlete's illness is caused while at playing a contact sport at a specific period of time).

<sup>21</sup> See Tyler S. Woods, *The NCAA's Legal Fight Against CTE*, SPORTS LITIGATION ALERT (Mar. 27, 2020) <https://sportslitigationalert.com/the-ncaas-legal-fight-against-cte/> (detailing difficulty with meeting burden of proof required to show injury occurred at a specific period of time).

result not reasonably foreseeable to the defendant.<sup>22</sup> While Gee never went on to a professional career, the Plaintiff will have to show that nothing else, before or after USC, caused his CTE and ultimate death.<sup>23</sup> Gee had been an athlete his entire life, becoming an All-American linebacker and fullback in high school.<sup>24</sup> It will be difficult for Plaintiff to show that this had no effect on brain injury, such that USC was the only major cause of brain injury.<sup>25</sup>

Additionally, the NCAA is rebutting the argument by claiming the affirmative defense of assumption of the risk, i.e. that Gee knew what he was getting himself into and assumed the risk of all injury when he voluntarily decided to play high-level football.<sup>26</sup> To prove an implied assumption, as would be argued here, the defendant needs to show that the injured party had knowledge and appreciation that they were at risk and that the harm caused was inherent to the activity.<sup>27</sup> Clearly, tackle football is a high contact sport with many inherent injuries, and while many modern day tort cases have disfavored the idea of assumption of the risk, it has remained a prominent defense for negligence actions arising from sporting contests.<sup>28</sup>

### **Impact of a Potential NCAA Loss**

The effects of this lawsuit will be astronomical no matter which way the jury decides.<sup>29</sup> Should the court find for Gee, the NCAA will be facing hundreds of millions of dollars in damages as

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<sup>22</sup> See Rae-Anna Sollestre, *Wrongful Death: Does the NCAA Have an Affirmative Duty to Protect its Student-Athletes?*, 30 MARQUETTE SPORTS L.REV., 394, 398 (2020) (detailing factors which could break the chain of causation, thus limiting liability of defendant).

<sup>23</sup> See *Could CTE wrongful death case for an ex-USC player vs. the NCAA spawn more?*, *supra* note 16 (stating difficulties with causation argument of collegiate athletes).

<sup>24</sup> See USC Athletics Staff, *supra* note 5 (highlighting Matthew Gee's athletic accomplishments in high school).

<sup>25</sup> See *Could CTE wrongful death case for an ex-USC player vs. the NCAA spawn more?*, *supra* note 16 (stating difficulties of pinpointing brain injuries to one specific playing period).

<sup>26</sup> See Weiner, *supra* note 17 (stating the NCAA's primary arguments of assumption of the risk, as well as collegiate football not being a substantial cause of Matthew Gee's death).

<sup>27</sup> See *assumption of risk*, CORNELL LAW SCHOOL

[https://www.law.cornell.edu/wex/assumption\\_of\\_risk#:~:text=Assumption%20of%20risk%20is%20a,the%20risk%20of%20those%20actions](https://www.law.cornell.edu/wex/assumption_of_risk#:~:text=Assumption%20of%20risk%20is%20a,the%20risk%20of%20those%20actions). (last visited Oct. 12, 2022) (distinguishing express assumption of the risk from implied assumption of the risk, and further detailing requirements of proof for both).

<sup>28</sup> See Jeffrey Standen, *Assumption of Risk in NFL Concussion Litigation: The Offhand Empiricism of the Courtroom*, 8, FIU L.REV., 71, 72 (2012) (discussing cases which create historical difficulty of arguing against assumption of the risk cases for sporting based negligence).

<sup>29</sup> See LaDarius Brown, *Ex-USC linebacker's CTE lawsuit could force NCAA to cough up "hundreds of millions" in damages*, SPORTS KEEDA (Oct. 9, 2022)

<https://www.sportskeeda.com/college-football/news-former-ncaa-lb-cte-lawsuit-cost-millions> (depicting possible outcomes of Gee v. NCAA decision).

well as opening the door for countless future lawsuits by similarly injured players.<sup>30</sup> A large sum of these damages will stem from the fact that Gee’s attorneys are asking for disgorgement, which would force the NCAA to give back all funds it received as a result of its negligence.<sup>31</sup> Conversely, it is not a slam-dunk case for the plaintiffs and if it is determined that the NCAA is not at fault, relief for thousands of players and family members will be halted.<sup>32</sup> This case is just the first of thousands of CTE cases pending review.<sup>33</sup> The highly-publicized case is being closely monitored across the country, as the delivered verdict will be the basis for any and all future CTE litigation.<sup>34</sup>

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<sup>30</sup> *See Id.* (discussing the two major lawsuit consequences that could force the NCAA to pay millions; “substantial financial liability and a wave of future lawsuits”).

<sup>31</sup> *See Id.* (depicting effects of disgorgement which includes hundreds of millions in legal responsibility and legal costs).

<sup>32</sup> *See Id.* (discussing the difficulties with proving Plaintiff’s case as well as potential effects of a loss).

<sup>33</sup> *See David Siegel, NCAA Faces Trial Over Deceased USC Linebacker’s Head Injuries, Watch Gavel-to-Gavel via CVN, COURTROOM VIEW NETWORK (Oct. 7, 2022 11:36 AM) <https://blog.cvn.com/ncaa-faces-trial-over-deceased-usc-linebackers-head-injuries-watch-gavel-to-gavel-via-cvn>* (discussing the importance of the Gee holding and the effects it will have on future nation-wide litigation).

<sup>34</sup> *See Id.* (discussing effects of Gee decision on impending litigation).