

## Boogaard Ruling Blurs NHL Liability In Head-Injury Suits

By **Zachary Zagger**

*Law360, New York (June 6, 2017, 10:22 PM EDT)* -- An Illinois federal district judge on Monday tossed a wrongful death suit brought by the parents of former National Hockey League enforcer Derek Boogaard, a ruling that highlights some of the hurdles facing individual players or families who go after the NHL with concussion and head injury claims, yet whose procedural nature may limit its influence.

U.S. District Judge Gary Feinerman dismissed the lawsuit by Len and Joanne Boogaard over the 2011 death of their 28-year-old son from a drug overdose while dealing with the effects of a concussion. A post-mortem analysis of his brain later found he was suffering from the highly publicized degenerative brain condition chronic traumatic encephalopathy, or CTE.

While the decision turned on the fact that the Boogaards were not named as trustees for a wrongful death action under state law requirements, Judge Feinerman went on to say the substantive pleadings of the plaintiffs failed. The court agreed with the NHL that the plaintiffs had not pled the league had a legal duty not to promote violence, nor had they shown the league was negligent by not properly disclosing the risks of head injuries.

Yet because the ruling was ultimately decided on procedural grounds, it makes the broader impact of the suit — which is separate from ongoing multidistrict litigation against the NHL over concussions in Minnesota — unclear moving forward.

Gary Wolensky, a product liability litigator with Buchalter PC, said the court's opinion could have ended at the finding the Boogaards needed to petition to be trustees, without addressing the pleadings.

"It really is puzzling, because it is a mandatory statutory requirement for a wrongful death claim under Minnesota law. The judge could have ended his opinion right there," Wolensky said. "It is interesting why he didn't. Maybe it was more of a guide for future litigants in this jurisdiction. But he really did put a stake in the heart of the plaintiffs' claims."

Others suggested the ruling may give the NHL an additional boost, as it does not bode well for other individual players or players' families who try to pursue claims on their own.

"It is a big momentum win for the NHL," said Michael J. Nelson of Latham & Watkins LLP, who has represented defendants in sports concussion litigation. "While the Boogaard decision may not — particularly given its procedural nature — have a direct substantive impact on the NHL MDL in

Minnesota, it may embolden the NHL's aggressive approach to concussion litigation generally."

"There is an emerging dynamic here with some plaintiffs filing individual actions instead of class actions and bypassing the complex and time-consuming MDL process," Nelson added. "But based on Judge Feinerman's decision, this Boogaard case was not a good showing for the concussion plaintiffs' bar on the single-plaintiff front."

Boogaard was known as an "enforcer" or "fighter," a player tasked with taking revenge for brutal hits on his teammates. During his six-year tenure with the Minnesota Wild and New York Rangers, he participated in at least 66 fights, his parents' suit alleged.

The suit dates back to 2013 with claims against the NHL and Commissioner Gary Bettman, alleging Boogaard developed an addiction to painkillers and permanent brain damage from injuries sustained on the ice that led to his death. He died just after he left a rehab facility where the NHL had sent him.

The lawsuit got bogged down in procedural issues and questions over whether the claims were preempted by the NHL's collective bargaining agreement. In September, Judge Feinerman allowed Boogaard's family to file a second amended complaint.

The suit then centered on allegations the NHL had fostered a culture of violence that caused Boogaard to get into several fights, which in turn caused him to develop CTE and an opioid addiction, and allegations that the league implicitly communicated that head trauma is not dangerous.

However, Elizabeth A. Kaveny, a Chicago-based litigator with Burke Wise Morrissey Kaveny LLC, said this made the suit distinguishable from many other brain injury lawsuits and presented further challenges beyond the technical and pleading issues.

"It is not that he died from the brain injuries. It was from an accidental drug overdose," Kaveny said. "His case really turned on the NHL doctors prescribing Derek painkillers, and an overwhelming amount of painkillers, versus a concussion brain injury, brain trauma case against the league itself."

Ultimately, Judge Feinerman said the Boogaards could not bring their wrongful death claims since they were not named as their son's trustees within the proper period of time. Although the case was in Illinois federal court, the judge, following Illinois choice of law rules, found that Minnesota law should apply since that is the state where Boogaard died and where he played the bulk of his NHL career.

But Judge Feinerman went on to call out the Boogaards' pleadings for failing to address the NHL's arguments that they did not allege it had a legal duty not to promote violence, how the league's conduct violated that duty, or how the NHL was otherwise negligent in not properly disclosing or communicating the long-term effects of concussions.

"Those arguments were eminently reasonable, yet Boogaard utterly and inexplicably failed to address them, thereby forfeiting both sets of claims," the judge said.

Still, he said the "opinion should not be read to commend how the NHL handled Boogaard's particular circumstances — or the circumstances of other NHL players who over the years have suffered injuries from on-ice play."

"I think the judge made comments that went both ways," Kaveny said. "The judge was quick to say that

he was not making any rulings that in any way encouraged or gave protection to a league that promoted violent conduct or fighting, and that he was not endorsing the league. His finding was that there were problems with the elements of proof, which is a very fact-specific thing, so I think the role it will have in other individual cases is minimal.”

There could be other issues emanating from Boogaard’s death. Already, Len Boogaard has filed a complaint with California medical authorities over the NHL’s and National Hockey League Players’ Association joint substance abuse program, according to an April report from TSN.

But it appears for this suit, in particular, it may be the end of the line, as attorneys said appealing the issue of not petitioning to be trustees could be difficult.

“My view is that this opinion was correct and rested pretty much completely on the failure to comply with the statutory provision under Minnesota law, which precludes anyone from bringing survival or wrongful death actions without first petitioning to become a trustee for such actions,” Wolensky said.

The case is Boogaard et al. v. National Hockey League, case number 1:13-cv-04846, in the U.S. District Court for the Northern District of Illinois.

--Editing by Philip Shea and Jill Coffey.