

The lawyer who sacked the NFL

By Earl Ainsworth

When the bills are paid and the fortunes made, lawyers often turn to a larger question: Have I made a difference? For Alan C. Milstein, coming off a stunning victory over the National Football League, the answer is a no-brainer.

And this youngish 50-year-old is far from done, carving out an ever-expanding reputation for himself as a giant-killer, lusting for bigger prizes and meaningful inroads in the name of the little guy — and, yes, fat fees.

He's a Maryland-turned-Jersey guy who may well be better known nationally as a hot-shot lawyer than he is in the Garden State.

And in taking on a powerhouse like the NFL and beating the big boys into the ground, his name has made just about every newspaper sports section and television newscast.

Football is just his latest victory. He has been a virtual one-man gang against research firms using men and women as experimental guinea pigs. He even went one-on-one with the U.S. Army over how soldiers were administered anthrax vaccine.

Having blazed a trail to national prominence with informed-consent cases in human-subject medical research, the attorney from Sherman, Silverstein, Kohl, Rose & Podolsky in Pennsauken was a walk-on in sports law when he took the case last fall of

suspended Ohio State University running back Maurice Clarett.

It was Milstein's first-ever sports case. But as in other high-profile matters, he proved the epitome of a quick study, especially when the issue has far-reaching social impact.

Less than six months after he and Clarett became a fighting tandem, the barrier to younger players entering pro football's inner sanctum is a smoldering ruins. Clarett is in the April NFL draft, and players of modest means are thinking more seriously about going pro early, forsaking college for an immediate chance at NFL big bucks.

That Milstein was able to break the 50-year rule requiring new players be at least three years out of high school has veteran sports lawyers asking, "Who is this guy?"

It's not a new question. Indeed, no.

Medical researchers, many bearing the scars of Milstein's in-your-face offense, have been asking it for years.

Like the batch of seemingly unrelated areas of law in which he has excelled, the man is something of a paradox. As a litigator, he has a reputation as a no-holds-barred brawler with a penchant for suing everybody in sight and insulting the powerful — particularly, powerful institutions.

But spend an afternoon with him and he's the personification of the cultured kid schooled in nonviolence who, conversation-

ally speaking, is a good bet to have the quickest comeback in the room.

His talent for verbal jousting was cultivated in the Baltimore neighborhoods where he grew up — the same place that spawned movies like *Diner* and *Liberty Heights*. He says watching those flicks is like seeing reruns of his youth.

“To understand me, you have to understand a bunch of Jewish kids hanging out in a diner till 4 in the morning doing *shtick*,” he says.

Ah, but the *shtick* of the past turned into pretty meaningful *shtick* in the ensuing years.

The Clarett case is a prime illustration. Clarett is a black youth from Youngstown who, as a freshman, rushed more than 1,200 yards in 2002, leading Ohio State University to the national championship in football. But in his sophomore year he was suspended for accepting gifts in violation of National Collegiate Athletic Association rules.

Unsure he would ever play college ball again, the teen-ager wanted into the NFL. But there was a problem. Unlike baseball and basketball, pro football had a rule preventing players from joining its ranks until out of high school three years.

Easy pickings

Milstein decided it was an open-and-shut case, the football equivalent of a slam dunk.

Pro football, he reasoned, was violating the Sherman Antitrust Act — even though the league had successfully deflected that legal challenge for years by justifying its rule under its collective-bargaining agreements.

So confident was Milstein in his cause, however, he didn't bother filing an injunction, choosing to go straight at the league on the anti-trust claim.

What followed, from the league's standpoint, was nothing less than shock and awe. Last Sept. 22, Milstein and Clarett's mother visited NFL headquarters in Washington, where she explained her son's situation.

In his make-my-day style, Milstein was brief. “We want Maurice in the league.”

The lords of football, although seemingly dismissing his prospects for success, decided to buy some time, saying they would discuss it.

Oops!

Milstein's feathers were ruffled when the league said it couldn't get back to him by a date certain.

The following morning the league got a taste of what it means to tick off that what's-his-name lawyer from South Jersey. He filed Clarett's case. But that was just a tremor. The earthquake hit in Manhattan when 2nd U.S. Circuit Court of Appeals judge and avid sports fan Shira A. Scheindlin set Milstein up for a touchdown by saying, “I've been reading about this case in the papers. Is there a time element?”

Put it this way: It was like throwing Milstein an easy lateral and there wouldn't be an end run around his strategy.

Milstein noted the timeline: A crucial event where athletes work out for NFL coaches and officials prior to their draft would begin Feb. 18. Scheindlin kicked the case into high gear by saying, “If you want an opinion Feb. 1, we will have to work back from that.”

In short, Milstein and the judge were not about to let the NFL effectively eliminate Clarett simply by keeping him from showcasing himself.

The lawyer from Pennsauken still gets excited when he tells the story. “What she (the judge) gave us was a summary judgment schedule working backward! We had about 30 days to file our motion for summary judgment. The league had 30 days to respond. Then we had 10 days to reply.”

Defeat for the league was anticlimactic. There was no oral argument. On Feb. 3, Scheindlin issued a decision scarcely concealing her contempt for the league’s rationale that not letting younger players in was somehow based on the collective-bargaining rights of the players already there.

On the issue of younger players not being physically mature enough to handle the rigors of getting slammed by pro football’s army of 300-pound defensive linemen, the judge said age is a poor predictor of such things.

Before long, sports talk shows were buzzing with predictions that Clarett would be picked in the second or third round of the draft in April.

Scheindlin’s decision put the NFL between a rock and a hard place. An appeal by the league will return to the 2nd Circuit, where it will presumably encounter a chilly reception. The league could then petition to the U.S. Supreme Court. By then, chances are Clarett will have been picked by a team and his smiling face will have graced newspapers nationwide.

Human research

Sweet as the Clarett victory has been, Milstein goes out of his way to say it doesn’t compare to the impact he has had on human-subject research. Few who know the area would disagree.

The lawsuit blitz Milstein has conducted against medical research institutions using human subjects in experiments has unnerved them, caused some to shut down while they sort out new ways of controlling experiments and frightened others away from controversial trials.

The blitz began with the nationally publicized case of Jesse Gelsinger, a young volunteer in a gene therapy experiment at the University of Pennsylvania in 1999. Though Jesse’s condition could not be improved by the experimental treatment, he participated because researchers assured him he would be helping save the lives of future babies by doing so.

However, the consent papers Jesse signed did little to apprise the youngster or his parents of the true dangers involved. Soon after the genetically engineered viruses entered Gelsinger’s body, his organs shut down and he died.

At first, Jesse’s father, Paul, defended the experiments on the basis of the good they were attempting to accomplish. Over time, though, he grew suspicious of the researcher’s statements and began to comprehend the extent to which his son had been misled.

For Milstein, it was his first encounter with informed consent.

Certainly not his last.

The case settled. Though confidential, the amount reportedly was between \$5 million and \$10 million. It was a big payday

for Milstein. More important, it was good timing. Human-subject research was entering a brave new world, and so was Milstein.

The Gelsinger case and those that followed enabled him to combine his lawyerly talents, penchant for activism and a worldview shaped by a Jewish heritage that traces back to Kelm, Poland. In short, the kid from Baltimore had a cause that fit him like a glove.

He immersed himself in human-subject research, going back to the legal foundations in the Nuremberg code following the Holocaust. He studied the Tuskegee experiment, in which black people in Alabama were used in a study of syphilis.

He sued not only the researchers conducting human-subject research, but everyone on the ethics committees who had sanctioned it. He was not afraid to invoke the Nazis and racists of the 1950s when it suited his purposes — something that earned him the enmity of premiere scientists who, by Milstein's own admission, had nothing but "good hearts."

Ethical research

Why did he do it? Milstein says the money — and he has made a lot of it — is a happy by-product of calling medical research to task. Many believe him, though they may not agree with his view of what is and is not ethical in research involving humans.

"The greater-good argument isn't good enough," he says. "Just because an experiment will benefit untold numbers of others in the future, it doesn't mean we can sanction sacrificing the autonomy or well-being of the individual. It is unethical to do so."

He discusses Joseph Mengele and describes the greater good the infamous Nazi death camp doctor hoped to accomplish.

"He figured those people were going to die anyway, so he used them," Milstein says, noting it's a slippery slope once such greater good arguments are used.

"If you had a child with cerebral palsy or cystic fibrosis, you would want human-subject research to go on and you would be the first to volunteer for it. It's my view that you should not be allowed to make that choice. Informed consent does not make an unethical case ethical."

Though Milstein's view is considered radical, the research community has grudgingly given him credit for spurring positive changes in ethical safeguards. The most prominent recognition of the role he has played comes from Greg Koski, who headed the recently formed Office of Human Research Protection at the University of Nevada. When asked if he needs more resources for enforcement efforts, Koski said, "No. We have Alan Milstein."

It's tempting to ascribe some of Milstein's success to luck. There were certainly fortunate developments in the Clarett case. Another case like that might not come along for years. And, having Scheindlin on the bench was tantamount to running a pattern in heavy coverage and finding the ball slip between defenders and into your hands.

Social change

But those who have watched his moves say there's something unique about Milstein that makes him successful: He doesn't look at law as law. He looks at it as societal change. Before he was a lawyer, he was a left-leaning radical at the University

of Maryland and a graduate student in American studies at Kansas University. In fact, Milstein taught a course there on America in the 1950s. To this day, he idolizes the Beat Generation.

“I see the issues in law against the larger social context. When I prepare, I don’t just read the law in a given area, I read the literature and read about the culture.”

In fact, Milstein says, it wasn’t until he realized he couldn’t make a decent living in American studies that he went to Temple University Law School.

He credits his law-as-part-of-society approach for much of his success in human-subject research. And, it’s the backdrop against which he is pondering his next target — the National Collegiate Athletic Association (NCAA), which, he says, exploits minorities.

“They write the laws and serve as judge and jury.”

Milstein isn’t fully telegraphing his next move except to say that “a college violinist performing professionally can profit from selling memorabilia and T-shirts and college athletes cannot.”

Sounds like someone limbering up for a new attack on the *status quo*, a mouth-watering challenge at making a difference.

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