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Introduction: Football at the Crossroads

Howard M. Wasserman[†]

Football is at a crossroads. It is by far the most popular sport in the United States. It defines high school life in some states.¹ It defines college life in the southeast.² And it is the most lucrative professional sport, with the day of the Super Bowl functioning as an unofficial national holiday.

At the same time, it faces an existential challenge, if not an outright threat to its survival as a sport. As this volume goes to press in spring 2013, more than 4,000 former NFL players are involved in a pending federal class action lawsuit, alleging that the league knew about the dangers to players from concussions and head trauma and did nothing to warn them or to make the game safer.³ Former NFL star Junior Seau, a likely Hall of Famer, committed suicide in spring 2012; an autopsy showed him to have suffered from Chronic Traumatic Encephalopathy (“CTE”), a degenerative brain condition found in a number of former players and believed to be associated with repeated blows to the head.⁴ Seau filed his own lawsuit against the NFL, as well as against the manufacturers of helmets and other equipment.⁵ Many commentators openly wonder and debate whether the game can survive the next several decades.⁶ Indeed, given that the very ob-

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¹ H.G. BISSINGER, *FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM* (1990).

² WARREN ST. JOHN, *RAMMER JAMMER YELLOW HAMMER: A JOURNEY INTO THE HEART OF FAN MANIA* (2004).

³ Plaintiffs’ Amended Master Administrative Long-Form Complaint, *In re National Football League Players’ Concussion Injury Litigation*, 12-md-02323-AB (E.D. Pa. July 17, 2012).

⁴ Doug Farrar, *Report: Junior Seau suffered from CTE*, YAHOO!SPORTS, Jan. 10, 2013, <http://sports.yahoo.com/blogs/nfl-shutdown-corner/report-junior-seau-suffered-cte-syndrome-caused-repeated-134236671--nfl.html>.

⁵ Complaint, *Seau v. Nat’l Football League*, No. 37-2013-00031265-CU-PO-CTL, 2013 WL 265303 (Cal. Super. Jan. 23, 2013).

⁶ Tyler Cowen and Kevin Grier, *What Would the End of Football Look Like?*, GRANTLAND, Feb. 9, 2012, http://www.grantland.com/story/_/id/7559458/cte-concussion-crisis-economic-look-end-football; John Culhane, *Concussions and Cigarettes*, SLATE, Jul. 26, 2011, http://www.slate.com/articles/sports/sports_nut/2011/07/concussions_and_cigarettes.html. *But see* Will Oremus, *After Further Review*, SLATE, May 10, 2012, <http://www.slate.com/articles/>

ject of football is for large people to run into each other at a high rate of speed, producing repeated concussive and sub-concussive blows, it is fair to wonder whether the game can survive without significant changes to the rules and, perhaps, to the essential nature of the game. As sports commentator Bob Costas correctly argued, in “most other sports, the chance of injury is incidental; in football, the chance of injury and long-term serious effects is fundamental.”⁷

Because these events are occurring in real time, it presents an opportunity to examine some of the legal, medical, and other issues affecting the league, now and going forward. I am proud that this symposium issue of the FIU LAW REVIEW is the first scholarly collection on these issues, which are embryonic and constantly changing. The essays that follow are necessarily preliminary, but they isolate, introduce, and elaborate on those issues and concerns that will be at the heart of this conversation now and in the coming years.

John Culhane asks the question at the heart of the conversation--should football be abolished? That question requires broader consideration of the risks inherent in football and what the league and the players can do to lessen those risks, perhaps by changing how the game is played, or to establish meaningful compensation and remedial schemes without the need for litigation.

David Orentlicher and William David, who combine legal and medical training, consider the state of the medical and scientific knowledge on concussions and head trauma, showing that the problem is not only about what the NFL knew over the years, but also about what the medical profession knew over years. They argue that medical knowledge has evolved, but much remains unknown. Unfortunately, that scientific uncertainty exists at the same time that decisions about the game’s future must be made. We might add that it also exists at the same time that courts must decide about liability for past injury.

Steven Broglio and Rodney Fort approach the question from a different perspective--physiology and economics. They explore the problem of concussions and best practices in concussion management, while also identifying practical, cultural, and economic barriers to those best practices ever being adopted at any competitive level, particularly the NFL.

sports/sports_nut/2012/05/the_end_of_football_why_concussion_lawsuits_won_t_bring_down_the_game_.html.

⁷ HEAD GAMES (Gravitas Ventures 2012) (comments of Bob Costas).

We then benefit from four analyses of the various legal doctrines at issue in player lawsuits. William Gould IV traces the history of the federal labor-law preemption of state tort claims. The NFL has argued in the past, and will continue to argue in the current lawsuits, that the league's obligations to provide medical care to players constitute an issue covered by the collective bargaining agreement and thus not subject to tort litigation or liability. Gould argues, however, that the concussion litigation really is about fraud and concealment--the NFL's failure to disclose what it knew about the risks of head trauma--which has nothing to do with the CBA or with federal labor policy.

Jeffrey Standen explores the central role that the defense of assumption of risk plays in tort litigation arising from sports injuries. He argues that courts in the past have too-readily accepted in-game injury as a built-in risk of the game that the players assume simply by playing it, although with no meaningful exploration of the factual or empirical bases for that conclusion. Standen criticizes this "form of offhand empiricism" as a "poor substitute for the real thing. Yet grand empirical pronouncements based on anecdote, if based on anything at all, permeate legal decisions."⁸

Sheila Scheuerman more directly explores the pending federal class action litigation by 4,000 former players, which seeks as one remedy the establishment of a process to monitor players for future trauma-induced neurological problems, such as CTE. She examines the substantive and procedural challenges to proving medical monitoring claims and to using the class action device in bringing such claims.

Gabe Feldman then considers an alternative, quieter approach for players to recover for injuries resulting from football -- workmen's compensation systems, particularly California's uniquely flexible system. This essay explores prior use of that system by retired players, even those who never played for California-based teams, as well as efforts by the NFL and its teams to contract around that system.

The volume closes with Geoffrey Rapp's concededly "skeptical" examination of the entire conversation over concussions. He suggests that the science is too new and too changing to support the causal claims that former players are making, particularly with respect to a link between CTE and other brain trauma and suicide. At the same time, legal hurdles to recovery may be too great, science aside, to allow for recovery. And all of these problems may be too inherent to

⁸ Jeffrey Standen, *Assumption of Risk in NFL Concussion Litigation: The Offhand Empiricism of the Courtroom*, 8 FIU L. REV. 69 (2013).

the game of football itself, which simply may be too inherently violent to continue as is, but too engrained to be changed. As he concludes, there “may be no way to ever have professional football – and the *billions* of dollars it generates – in a way that is not, to a great extent, savage, barbaric, and unacceptably dangerous to its participants.”⁹

These essays are written as “thought” pieces, identifying the issues that form the heart of this controversy now and will define it in the coming years. They, and this symposium, can provide a guide for watching, understanding, and talking about much of what is to come as the future of football is decided in and out of litigation.

⁹ Geoffrey C. Rapp, *Suicide, Concussions, and the NFL*, 8 FIU L. REV. 124-25 (2013).