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Suicide, Concussions, and the NFL

Geoffrey Christopher Rapp*

The issue of concussions¹ in football has risen to prominence in recent years, thanks in no small part to the efforts of intrepid investigative journalists at the *New York Times*.² As media attention brought new interest to this topic, a variety of research institutions launched or accelerated efforts to understand the scientific aspects of brain injury.³

Concern about the long-term consequences of concussions has prompted notable rule changes and modifications, including greater “emphasis” on certain existing rules in college and professional football.⁴ Even at a lower level of competition, the link between concussions and football has prompted schools and leagues to change their

* Harold A. Anderson Professor of Law and Values, University of Toledo College of Law. Dr. John McSweeney, Professor of Psychiatry and Neurology at the University of Toledo, provided great insight into the science of brain injury. The author also thanks Toledo law students Rockwell Gust and Martha Schultes, both of whom conducted excellent research on this topic.

¹ For simplicity’s sake, I am not precise about the terminology of the injuries discussed in this piece. “Brain injury” can include a variety of different sorts of damage—contusion, brain laceration, anemia, etc. Richard Bryant, *Post-Traumatic Stress Disorder vs. Traumatic Brain Injury*, 13 *DIALOGUES IN CLINICAL NEUROSCIENCE* 251 (2011), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3182010/>; see also MICHAEL A. MCCREA, *MILD TRAUMATIC BRAIN INJURY AND POSTCONCUSSION SYNDROME: THE NEW EVIDENCE BASE FOR DIAGNOSIS AND TREATMENT* ix (2008) (discussing definitional and terminology problems). Similarly, I refer to “concussions” even though many of the brain injuries linked to long-term effects can include more mild “sub-concussive” injuries. Inga K. Koerte et al., *A Prospective Study of Physician-Observed Concussion During a Varsity University Hockey Season: White Matter Integrity in Ice Hockey Players*, 33 *NEUROSURGICAL FOCUS* E3 (2012), available at <http://thejns.org/doi/full/10.3171/2012.10.FOCUS12303>.

² See, e.g., Alan Schwarz, *Expert Ties Ex-Player’s Suicide To Brain Damage From Football*, *N.Y. TIMES*, Jan. 18, 2007, at A1, available at <http://www.nytimes.com/2007/01/18/sports/football/18waters.html?pagewanted=all&r=0>; Alan Schwarz, *Former Bengal Henry Found to Have Had Brain Damage*, *N.Y. TIMES* (June 28, 2010), http://www.nytimes.com/2010/06/29/sports/football/29henry.html?_r=0.

³ This increased institutional attention has led to an odd competition between researchers for access to the brains of deceased athletes. See Karen Given, *Researchers Compete for Athletes’ Brains*, *ONLY A GAME* (May 12, 2012), <http://onlyagame.wbur.org/2012/05/12/brain-research>.

⁴ See, e.g., Everett Lehman, *Study May Link Pro Football, Brain Decline*, *NPR TALK OF THE NATION* (Sept. 7, 2012), <http://www.npr.org/2012/09/07/160752621/study-may-link-pro-football-brain-decline> (“The NFL has made several rules changes because of concerns about concussion[s].”).

approaches.⁵ The benefits of this new interest in brain injury are not limited to the world of football—indeed, one of the primary beneficiaries of heightened public attention to brain injuries will likely prove to be America’s wounded soldiers, sailors, and Marines, returning from battlefields in Iraq and Afghanistan only to find that traumatic brain injury could pose long-term health risks.⁶

I have, from the start, been a bit of a skeptic when it has to do with concussions,⁷ but, to be clear, my skepticism is narrowly focused. First, I am skeptical, to a degree, about the maturity of the underlying science of brain injury—and whether that science, still developing and facing certain fundamental obstacles, is sufficient to support the claims that some have made surrounding this issue. The primary form of brain injury identified as associated with NFL players is known as

⁵ For instance, the Alabama High School Athletic Association introduced a more prominent “Concussion Law” that a player suspected of having a concussion could not return to play until cleared by a physician. W. Brian Hale, *Holladay Talk New Rule Changes, 2012 Vikings at Rotary Club*, DAILY MOUNTAIN EAGLE (Aug. 20, 2012), http://www.mountaineagle.com/view/full_story/19860338/article-Holladay-talk-new-rule-changes—2012-Vikings-at-Rotary-Club; see also Ryan McLaughlin, *Warning! Children’s Brains in Danger: Legislative Approaches to Creating Uniform Return-to-Play Standards for Concussions in Youth Athletics*, 22 IND. INT’L & COMP. L. REV. 131, 145-46 (2012).

⁶ See James Dao, *Athletes’ Brain Disease Is Found in Veterans*, N.Y. TIMES, May 17, 2012, at A14; Nicholas D. Kristof, Op-Ed., *Veterans and Brain Disease*, N.Y. TIMES, Apr. 26, 2012, at A23, available at <http://www.nytimes.com/2012/04/26/opinion/kristof-veterans-and-brain-disease.html>; Bennet Omalu et al., *Chronic Traumatic Encephalopathy in an Iraqi War Veteran With Posttraumatic Stress Disorder Who Committed Suicide*, 31 NEUROSURGICAL FOCUS 5, E3 (2011), available at <http://thejns.org/doi/full/10.3171/2011.9.FOCUS11178>.

⁷ See Geoffrey Rapp, *Andre Waters and Concussion Liability for NFL Teams*, SPORTS LAW BLOG (Jan. 22, 2007, 10:13 AM), <http://sports-law.blogspot.com/2007/01/andre-waters-and-concussion-liability.html>. The subject of that post, a *New York Times* article on concussions, which drew a sharp rebuke from the story’s author, had to do with the story’s characterization of the medical doctor responsible for examining Waters’s brain. The short-hand description of Dr. Bennet Omalu might have, I worried, been misinterpreted to indicate that he was primarily a research scientist as opposed to a practicing pathologist. In other later publications, Dr. Omalu has been subsequently identified, with reference to the *Times*, as “a forensic pathologist at the University of Pittsburgh” and one of “the nation’s foremost experts” in legal scholarship. Daniel J. Kain, Note, *“It’s Just a Concussion:” The National Football League’s Denial of a Causal Link Between Multiple Concussions and Later-Life Cognitive Decline*, 40 RUTGERS L.J. 697, 698 (2009) (discussing tobacco litigation as a template for the NFL concussion lawsuit). In later coverage, the *Times* has referred to Dr. Omalu as a “neuropathologist.” See Kristof, *supra* note 7; see also Irvin Muchnick, *Nearly Two Years Later, the Name ‘Dr. Bennet Omalu’ is Once Again Fit to Print!*, CONCUSSION INC. (Apr. 26, 2012), <http://concussioninc.net/?p=5547>.

Dr. Omalu has now taken up a position as the Chief Medical Examiner for San Joaquin County, California, and serves as an Adjunct Associate Professor of Pathology at the University of California, Davis. He was a founder of the Brain Injury Research Institute. See Brain Injury Research Institute, <http://www.braininjuryresearchinstitute.org/wp-content/uploads/Bennet-Omalu.pdf>. Dr. Omalu was profiled in a story in the *Washington Post* in April, 2007. See Les Carpenter, *“Brain Chaser” Tackles Effects of NFL Hits*, WASH. POST, April 25, 2007, at E01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/24/AR2007042402480.html>.

Chronic Traumatic Encephalopathy (CTE).⁸ CTE has only been diagnosed post-mortem, through analysis of the brains of the now-deceased.⁹ It remains a relatively new diagnosis, and researchers remain uncomfortable with their “lack of knowledge and the complexity” of the issue—exactly how many concussions might cause CTE and what other factors (environmental, genetic, etc.) might enhance the likelihood of CTE onset, for instance—and this lack of comfort promotes reductionism and the adoption of positions that are “simple extremes.”¹⁰

The fact is, studies of brain injury will never be conducted in a truly experimental setting.¹¹ That is to say, we will never construct an experiment in which a “subject” will be treated with a head-jarring tackle, and then compare that subject’s brain to a “control.” Instead, much of what science learns about the impact of professional football on the brain and the impact of brain injury on behavior and other aspects of life has come from non-experimental study of the brain, typically taking the form of post-mortem dissection.¹² While the link between concussions and degenerative brain conditions has logical appeal, and the link between brain conditions and behavior is supported by the same kind of intuition, the science linking brain injury to behavior *in any particular case* has a ways to go. This is not to say that recent and ongoing scientific inquiry has not made great strides and contributed much; only that the scientific support necessary to justify certain legal linkages is yet to be tested fully in the courts.

The second source of my skepticism has to do with the legal hurdles any claim regarding concussions and traumatic brain injury (TBI)

⁸ See, e.g., Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy (CTE) in a National Football League Player: Case Report and Emerging Medicolegal Practice Questions*, 6 J. FORENSIC NURSING 40, 41 (2010) (reporting a case study that “identifies emerging common denominators and characteristics of CTE in NFL players.”).

⁹ Christine M. Baugh et al., *Chronic Traumatic Encephalopathy: Neurodegeneration Following Repetitive Concussive and Subconcussive Brain Trauma*, 6 BRAIN IMAGING & BEHAVIOR 244 (2012), available at http://www.bu.edu/cste/files/2012/05/Baugh_Chronic-Traumatic-Encephalopathy_2012.pdf, at 9.

¹⁰ Jeffrey T. Barth, *Neurocognitive Assessment of Sports Concussion and CTE: From Dings to Dementia*, ALZFORUM, <http://www.alzforum.org/new/pdf/Barth.pdf> (last visited Nov. 3, 2012).

¹¹ This is the case, to be precise, with regard to *human* brain injury. Much of the science on brain injury is based on experimental studies of animal subjects. See, e.g., Sandy R. Shultz et al., *Sub-Concussive Brain Injury in the Long-Evans Rat Induces Acute Neuroinflammation in the Absence of Behavioral Impairments*, 229 BEHAVIORAL BRAIN RESEARCH 145, 145 (2012), available at <http://www.sciencedirect.com/science/article/pii/S0166432811008746#>.

¹² Baugh et al., *supra* note 10, at 9. Only recently has it become possible to execute *prospective* studies of acute traumatic brain injury. MCCREA, *supra* note 2, at 29. Such studies, which have been available for some time in the context of mild brain injury, *id.*, would involve careful neurophysiological and neuropsychological study of traumatic brain injuries through repeated standardized assessments and statistical review.

against the NFL (or other defendants) would face. Here the problem is not, for most plaintiffs,¹³ the science. Instead, they may simply face too many legal hurdles to get paid. The plaintiffs in ongoing litigation against the NFL, for instance, have to chart a delicate path between Scylla and Charybdis. On the one hand, they face state statutory schemes for workplace injuries that set out a Workers' Compensation insurance claim as the exclusive avenue for recourse, absent some exception like intentional misconduct or fraud.¹⁴ On the other hand, plaintiffs face common law tort defenses like primary assumption of risk, secondary implied assumption of risk, and perhaps comparative negligence.¹⁵ These defenses either foreclose or limit a plaintiff's ability to recover for injuries that were the subject of a policy-based "no duty" rule,¹⁶ a known risk,¹⁷ or that arose in part as a result of the plaintiff's own careless or wrongful conduct.¹⁸

To get around the Worker's Compensation exclusion, plaintiffs in current cases will argue that the leagues engaged in fraud.¹⁹ That argument will require the plaintiffs to show that the leagues had knowledge of the danger concussions posed. Unless the plaintiffs find a "smoking gun" document, part of the argument that the league knew but did not say becomes the obviousness (to the league) of the link

¹³ The "science" of brain injury will be a problem in linking certain plaintiff outcomes, like suicide, the subject of this paper, to concussions suffered on the field.

¹⁴ Modeled on the successful strategy in the tobacco litigation—where it was hard to deny that smokers thought cigarettes were safe but victories were based on manufacturers' fraud—the NFL plaintiffs will likely focus on the fraud claim. See Kain, *supra* note 8, at 717-28 (discussing tobacco litigation as a template for the NFL concussion lawsuit).

¹⁵ Erika A. Diehl, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & HEALTH 83, 96 (2010).

¹⁶ See *Knight v. Jewett*, 834 P.2d 696, 703 (Cal.1992).

¹⁷ See *Bush v. Parents Without Partners*, 21 Cal. Rptr. 2d 178, 181-82 (Ct. App.3d 1993).

¹⁸ See *Van Buren v. Worry Borowick Groner, LLP*, 779 N.Y.S.2d 484, 485 (App. Div. 2004) (finding that comparative fault applies to sports injuries arising from risks not inherent in the sport).

For instance, a player who took performance-enhancing substances that enhanced recovery but masked injury, such as, perhaps, Human Growth Hormone, might have his recovery reduced for the causal role that "unreasonable" conduct played in producing his injury. See Amy Shipley, *Doctor Charged With Administering HGH Was Headed for Appointment With Washington Redskins Player*, WASH. POST (May 19, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/18/AR2010051805244.html> (HGH believed to improve strength and recovery from injury).

Similarly, a player that denied he was experiencing concussions symptoms in order to stay on the field and rack up "stats" might be found to have engaged in negligent conduct. Daniel Malloy, *Romanowski Marketing Healing Supplements*, BOSTON GLOBE (June 26, 2007), http://www.boston.com/sports/articles/2007/06/26/romanowski_marketing_healing_supplements/?page=full (stating that former NFL player did not speak up about concussions during his player career to get back on the field).

¹⁹ See Rockwell Thomas Gust IV, Comment, *The California Workers' Compensation Act: The Death Knell of NFL Players' "Concussion" Case?*, 44 U.TOL. L. REV. 245 (2012).

between football and concussions, and concussions and brain injury. The danger, however, is that the more obvious that link is, the more primary²⁰ and secondary implied assumption of risk would step in to limit the plaintiffs' ability to recover at all. If the league's knowledge is supported by the obviousness of danger, it will be hard for player-plaintiffs to claim they did not have the same kind of knowledge.

In the face of recent rule changes surrounding concussions, like the college football rule implemented this year requiring a player to leave the field if his helmet is knocked off his head,²¹ my skepticism has developed a third feature. Simply put, it is that there may be no way to ever solve the problem of concussions and TBI in football without putting the sport to death. Men this large, this strong, and this fast, simply cannot hit one another at these speeds without exposing both themselves and their opponents to a shocking level of danger and risks of all sorts.²²

The recent rule changes are not supported by science. Instead, they were adopted as part of a logical, knee-jerk reaction to the media limelight.²³ There is a logical link, of course, between an impact to the head and a concussion, but in the absence of the possibility of experimental studies of concussions, we do not and will probably never know whether it is equally dangerous to have one's body's forward momentum abruptly arrested by a plain-old and still-legal tackle. The brain, after all, could suffer an injury not from contact to the head of a player, but from the brain itself contacting the player's head/skull. To make football a truly brain-safe activity, the only real solution might be to slow the game down to the point that it hardly resembles the sport that has come to dominate America's popular entertainment landscape.

²⁰ See Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 123-24 (2008).

²¹ See Graham Watson, *Missouri Is The Latest Team To Be Irked by NCAA's Helmet Rule*, YAHOO SPORTS (Sept. 12, 2012, 1:29 PM), <http://sports.yahoo.com/blogs/ncaaf-dr-saturday/missouri-latest-team-irked-ncaa-helmet-rule-172946949--ncaaf.html> (describing new rule).

²² George F. Will, *Football Can't Be Fixed: It Can't Be Made Safe While Remaining The Game Fans Love*, PITTSBURGH POST-GAZETTE (Aug. 7, 2012), <http://www.post-gazette.com/stories/opinion/perspectives/george-f-will-football-cant-be-fixed-647866/> (“[F]ootball is a mistake because the body is not built to absorb, and cannot be adequately modified by training or protected by equipment to absorb, the game's kinetic energies.”).

²³ Dave Richard, *Chris Harris: 'NFL Has Made A Knee-Jerk Reaction'*, CBSSPORTS.COM (Oct. 19, 2010, 3:45 PM), <http://www.cbssports.com/mcc/blogs/entry/22475988/25344934> (showing that players describe NFL rule changes as knee-jerk reactions).

The ongoing NFL concussion litigation poses numerous fascinating legal questions,²⁴ but this paper will focus on a narrow aspect of the claims that are being or may soon be asserted. Tragically, the past few years have witnessed the suicide of several former NFL players.²⁵ The media has been quick to speculate about potential linkages between brain injury and suicide.²⁶

Ex-Chicago Bears safety, Dave Duerson, who had memory loss, took his own life in February 2011, and asked in a note that researchers study his brain after his death.²⁷ In May 2012, Junior Seau, a perennial All-Star,²⁸ committed suicide in his home in San Diego, California.²⁹ An autopsy on his body was conducted by Dr. Bennet Omalu.³⁰ Seau, who spent “20 years in the league as one of its toughest defensive players,” may have suffered as many as 1,500 undiagnosed concussions, and his suicide “is focusing even more attention on the football concussion issue.”³¹ Other former NFL players who committed

²⁴ Two such issues—whether plaintiffs can get around the workers’ compensation exclusion, and around the defenses of secondary implied assumption of risk and primary assumption of risk, were mentioned above. In addition, the claims raise labor law issues—specifically, whether the injury provisions in the Collective Bargaining Agreement (CBA) render the tort claims invalid. See *Memorandum of Law of Defendants National Football League and NFL Properties LLC in Support of Motion to Dismiss the Amended Master Administrative Long-Form Complaint on Preemption Grounds, In Re: National Football League Players Concussion Injury Litigation*, 2012 WL 3890252 (E.D.Pa. Aug. 30, 2012) (No. 2:12-md-02323-AB), available at http://newsandinsight.thomsonreuters.com/uploadedFiles/Reuters_Content/2012/09_-_September/nflconcussion-nflMTD.pdf. Another issue that may arise is the appropriateness of class action litigation—whether common questions are predominant and whether the class action approach offers a superior method for resolving the underlying dispute. See Paul D. Anderson Law, LLC, *Concussion Litigation Against the NCAA is Gathering Momentum, NFL CONCUSSION LITIGATION* (Sept. 19, 2012), <http://nflconcussionlitigation.com/?p=1137> (discussing difficulty of certifying class actions in personal injury cases); J. Russell Jackson, *A Players’ Class Action Against the NFL for Concussions?*, CONSUMER CLASS ACTIONS & MASS TORTS (Feb. 3, 2011), <http://www.consumerclassactionsmasstorts.com/2011/02/articles/new-suits/a-players-class-action-against-the-nfl-for-concussions/#pings> (predicting that an NFL class action could not be certified “since individual issues of causation and liability obviously would flunk the predominance requirement of FRCP 23”).

²⁵ *Junior Seau - Latest In String of NFL Suicides..Concussions Blamed*, TMZ.COM (May 2, 2012, 11:43 AM), <http://www.tMZ.com/2012/05/02/junior-seau-nfl-suicide/>.

²⁶ *Id.*

²⁷ John Mangels, *NFL Could Face Thousands of Lawsuits From Ex-Players Over Brain Damage From Concussions*, THE PLAIN DEALER (May 27, 2012), http://www.cleveland.com/science/index.ssf/2012/05/thousands_of_ex-player_lawsuit.html.

²⁸ Seau was a 12-time selection to the Pro Bowl. *Football Star Junior Seau Found Dead in Apparent Suicide*, LA TIMES (May 2, 2012), <http://latimesblogs.latimes.com/lanow/2012/05/football-star-junior-seau-found-dead-in-bedroom.html>.

²⁹ *Id.*

³⁰ See Paul Krueger & Chris Chan, *Junior Seau’s Body Returned to Family: Dr. Bennet Omalu, Co-Founder of The Brain Injury Research Institute, Was in San Diego to Assist Medical Examiner*, NBC SAN DIEGO (May 7, 2012), <http://www.nbcsandiego.com/news/local/Junior-Seaus-Body-Returned-to-Family-150521855.html>.

³¹ Mangels, *supra* note 28.

suicide include: ex-Steeler Terry Long³² in 2006, ex-Eagle Andre Waters in 2007,³³ and ex-Falcon Ray Easterling in 2012.³⁴

Suicide has long been a problem for plaintiffs in tort claims.³⁵ The historical approach was to treat a suicide as a superseding intervention, which severed the chain of causation between a defendant's wrongful act and the death of the plaintiff's decedent.³⁶ Over the past two decades, courts have begun to take a more flexible approach, allowing claims to reach a jury even where a decedent committed suicide (or made a suicide attempt).³⁷ That approach, however, has mainly been employed in a narrow range of cases involving special relationships, in particular, those relating to mental illness or vulnerable plaintiffs.³⁸ Thus, courts have allowed cases to go forward where a psychologist, psychiatrist, or other therapist is the defendant³⁹, or where a company producing anti-depressant or other "brain-altering" drugs was involved.⁴⁰

This paper will explore the possibility that—assuming they could get around the many other legal and factual obstacles they face—a plaintiff in a concussion lawsuit would be able to recover damages in the event of a player who has committed or attempted suicide.

I. THE EVIDENCE ON BRAIN INJURY AND SUICIDE

Like concussions themselves, the link between suicide and concussions is not one that is susceptible to experimental analysis.⁴¹ Fur-

³² *Id.*

³³ *Id.*

³⁴ Paul Woody, *Concussions Led to Long, Difficult Journey for Easterlings*, RICHMOND TIMES-DISPATCH (Sept. 23, 2012), <http://www2.timesdispatch.com/sports/local-news/2012/sep/23/tmain01-concussions-led-to-long-difficult-journey-ar-2226761/>.

³⁵ *Logarta v. Gustafson*, 998 F. Supp. 998, 1001-03 (E.D. Wis. 1998).

³⁶ *Delaney v. Reynolds*, 825 N.E.2d 554, 556-558 (Mass. App. 2005) (discussing historical approach).

³⁷ As early as 1971, Professor Victor E. Schwartz observed "a growing number of courts permitting recovery" in spite of a tort victim's suicide. Victor E. Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 VAND. L. REV. 217, 217 (1971).

³⁸ *McMahon v. St. Croix Falls Sch. Dist.*, 596 N.W.2d 875, 880-881 (Wis. Ct. App. 1998); *Doe Parents No. 1 v. State Dep't. of Educ.*, 58 P.3d 545 (Haw. 2002).

³⁹ *See, e.g., Kockelman v. Segal*, 71 Cal. Rptr. 552, 561 (Ct. App. 1998) (stating that outpatient therapist may owe duty of care in connection with patient suicide).

⁴⁰ *See, e.g., Smith v. Pfizer Inc.*, 688 F.Supp.2d 735, 748 (D.Tenn. 2010) (indicating that suicide does not protect drug company that fails to warn doctors that a particular drug increases the risk of suicide).

⁴¹ Cheryl J. Cherpitel, *Acute Alcohol Use and Suicidal Behavior: A Review of Literature*, 28 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 18S, 21S (2004), available at <http://www.crisis.org.cn/UploadFile/ReadParty/23-Acute%20alcohol%20use%20and%20suicidal%20behavior.pdf> (stating that suicide studies cannot include control groups and are typically retrospective in design); *see also* Elie Dolgin, *The*

thermore, the relatively small number of suicide cases involving TBI limits the ability of researchers to explore the connections.⁴²

Although current research has been unable to answer the question of what role brain injury plays in increasing the rate of suicide conclusively, there is data suggesting “an overrepresentation of suicides and drug-related accidental deaths in our CTE cohort.”⁴³

In addition, data supports the following linkage, which is entirely logical: brain injury increases the likelihood of depression, depression leads to higher “suicidal ideation” (thoughts about suicide), and higher suicidal ideation rates increase the likelihood of suicide attempts and suicides. Those with TBI have been found to exhibit twice the rate of depressive disorders found in the general population.⁴⁴ However, other studies have found higher suicide rates among those who had just one concussion, suggesting that there may be some confounding variable at work—that some socioeconomic, cultural, or lifestyle factor may be linked to both the propensity towards brain injury and towards suicide.⁴⁵

The scientific inquiry into the connections between football and concussions, concussions and brain injury, and brain injury and suicide is formulated along a fundamentally different line than the legal inquiry into factual causation. Scientists “concern themselves with identifying statistical correlations between . . . circumstances and incidence of suicides,” but do not “attempt to explain whether, absent a particular risk factor . . ., the suicide would not have taken place.”⁴⁶ The point here is that even as the science matures and improves, it may never provide answers formulated in a fashion that allows for easy conclusions about the viability of legal claims.

Factually, it would be difficult for courts to isolate the effect of a former player’s concussions or brain injury from other factors that may have contributed to a suicide attempt. Celebrity itself is linked to rates of suicide three times the normal level.⁴⁷ And since fame can be addictive,⁴⁸ for many football players the move from the ranks of the

Ultimate Endpoint, 18 NATURE MEDICINE 190, 190 (2012) (discussing ethical and institutional concerns that prevent experimental research on suicide).

⁴² T.W. Teasdale & A.W. Engberg, *Suicide After Traumatic Brain Injury: A Population Study*, 71 J. NEUROLOGY NEUROSURGERY & PSYCHIATRY 436, 436 (2001).

⁴³ Omalu, *supra* note 7, at 8.

⁴⁴ See Roger LL Wood et al., *Role of Alexithymia in Suicide Ideation After Traumatic Brain Injury*, 16 J. INT’L NEUROPSYCHOLOGICAL SOC’Y 1108, 1108 (2010).

⁴⁵ Teasdale & Engberg, *supra* note 43, at 439.

⁴⁶ Adam J. MacLeod, *A Gift Worth Dying For?: Debating the Volitional Nature of Suicide in the Law of Personal Property*, 45 IDAHO L. REV. 93, 127-28 (2008).

⁴⁷ TYLER COWEN, WHAT PRICE FAME? 151 (2000).

⁴⁸ *Id.* at 157.

pros to a “civilian” career can itself involve a sort of massive, cold-turkey withdrawal. A player goes from being cheered on by tens of thousands to the quiet of failed investments and an aching body. That could understandably be depressing and might be a factor that increases the risk of suicide that courts would have trouble disentangling from the possible consequences of brain injury.

II. LEGAL TREATMENT OF SUICIDE IN TORT AND WORKERS’ COMPENSATION CLAIMS

The historical approach to suicide by a tort victim was inspired by “church doctrine” that “suicide was both immoral and culpable,” and courts thus rejected the possibility that a tort defendant could be blamed for another person’s suicide.⁴⁹ Even though the law has shifted in modern times, suicide remains a difficult issue and one that will typically undercut a plaintiff’s ability to recover.

A. Suicide and Proximate Cause in Tort

The first way in which suicide alters a defendant’s potential tort liability is through proximate cause and foreseeability.⁵⁰ The United States Supreme Court’s decision in the 1881 *Scheffer v. Railroad Company* case opined that “‘suicide was not a ‘foreseeable’ result of even severe physical and mental injuries.’”⁵¹

Early holes in this seemingly hard rule, that suicide severs the chain of proximate causation between a defendant’s wrongful act and a victim’s demise, centered on arguments that a tort victim, rendered delirious as a result of defendant’s wrongful act, could not understand the nature of the act of self-destruction, or that the tort victim oper-

⁴⁹ Schwartz, *supra* note 38, at 219.

⁵⁰ Plaintiffs must also, of course, establish that suicide is a “cause in fact” or a “factual cause” of the suicide—that is, that the victim would not have taken their own life had there not been negligence or other wrongdoing on the part of the defendant. Here, the plaintiffs will invoke the science linking concussions to brain injuries and brain injuries to suicides. But there they would potentially face very significant obstacles detangling the impact of brain injuries on the one hand, and the many other changes that confront a former professional football player after he leaves the sport.

Suicide may result from a change in one’s situation relative to one’s former position—where individuals “become miserable after their situation deteriorates sufficiently quickly and by a large enough amount, even if the absolute level of their position is rather good. . . . A decline relative to what people are accustomed to can make them quite unhappy.” Gary S. Becker & Richard A. Posner, *Suicide: An Economic Approach*, GLOBAL CITIZEN, 28 (2004), <http://www.globalcitizen.net/data/topic/knowledge/uploads/2009051911410705.pdf>. “A star athlete may be unable to cope well with the end of his career because he no longer gets the acclaim he had grown dependent on.” *Id.* at 27-28.

⁵¹ Schwartz, *supra* note 38, at 226 (discussing *Scheffer v. R.R. Co.*, 105 U.S. 249 (1881)).

ated “under an ‘irresistible’ or ‘uncontrollable’ impulse.”⁵² These early cases required characterizing a victim’s suicide as beyond their control to get past the proximate cause issues.⁵³

Another line of early cases involving victim suicide dealt with special categories of wrongdoers thought to have a duty to prevent suicide—sellers of liquor, pharmacists, and psychiatrists and psychiatric hospitals.⁵⁴ Professor Schwartz predicted in 1971 that this “special relationship” argument would be the most likely way to produce an expansion of liability in cases of victim suicide.⁵⁵ He argued that in any situation where the law imposes upon one class of actor responsibility for another actor’s safety, that first class could be liable for failure to act reasonably to observe a victim and prevent suicide.⁵⁶ The more control a wrongdoer had over a victim, and the greater the manifestation of symptoms of potential suicide, the more likely a court would be to impose liability.⁵⁷

It is hard to say whether the law has expanded as rapidly as Professor Schwartz might have predicted. Certainly, there have been many more cases brought in the years since 1971 in which the victim committed or attempted to commit suicide.⁵⁸ Many of the cases in which the defendants have been held liable in spite of a plaintiff’s decedent’s suicide do in fact fall into the “special relationship” categories described in Schwartz’s article: schools and students,⁵⁹ colleges and students,⁶⁰ and the like.

However, the general rule appears to be the same—suicide “is said to be a supervening cause of the victim’s loss of his life, breaking the chain of responsibility that would otherwise link the loss to the negligent act.”⁶¹ An alternative formulation of essentially the same notion is that the suicide is the “sole proximate cause” of the victim’s

⁵² *Id.* at 227.

⁵³ *Id.* at 227, 231.

⁵⁴ *Id.* at 237-51. More recent cases involving psychiatrists and mental hospitals have distinguished between “custodial” and “non-custodial” suicide cases—the former, in which the victim is under the defendant’s supervision, are typically easier to win than the latter, in which the claim is that the defendant released the plaintiff too soon or without adequate monitoring. *See, e.g.,* Mulhern v. Catholic Health Initiatives, 799 N.W.2d 104, 116 (Iowa 2011) (discussing differences between custodial and non-custodial suicide cases).

⁵⁵ *Schwartz, supra* note 38, at 251.

⁵⁶ *Id.* at 254.

⁵⁷ *Id.*

⁵⁸ A Westlaw search of the “ALLCASES” database for suicide w/s plaintiff produced 8,894 hits.

⁵⁹ *See, e.g.,* Eisel v. Bd. of Educ. of Montgomery Cnty., 597 A.2d 447 (Md. 1991), *cited in* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 reporters’ note, cmt. 1 (2012).

⁶⁰ *See, e.g.,* Schieszler v. Ferrum Coll., 236 F. Supp. 2d 602, 602 (W.D. Va. 2002).

⁶¹ *Jutzi-Johnson v. United States*, 263 F.3d 753, 755 (7th Cir. 2001) (citing cases).

death, and no other actors are to blame.⁶² Only a small minority of jurisdictions appear to treat suicide as just another risk that can be created—and foreseen—as a result of negligent conduct.⁶³

Any NFL plaintiffs seeking to recover in cases of suicide would have two approaches—to argue this is a special relationship, or to argue that the intentionally tortious nature of the NFL’s conduct reduces the degree to which the court should focus on “foreseeability.” The plaintiff’s best hope may be that the defendant’s “fraud” amounts to an intentional tort, as to which an expanded “scope of liability” principle applies.⁶⁴

B. Suicide and Plaintiffs’ Fault in Tort

A second way in which suicide can affect recovery in tort is by attributing fault to the plaintiff. Both under a traditional contributory negligence approach, and under a modern comparative fault analysis, the fact that a plaintiff’s decedent committed suicide can be used to either bar or reduce a plaintiff’s recovery.⁶⁵

Under the modern comparative fault approach, suicide will often be the basis for attributing *most* of the fault to the plaintiff, which can eliminate the possibility of recovery under “modified” comparative fault. For instance, in one of the cases relied upon by the authors of the *Restatement (Third) of Torts: Apportionment of Liability*,⁶⁶ the Iowa Supreme Court affirmed a jury award attributing ninety percent of the fault to the plaintiff’s wife who committed suicide after being released from a psychiatric facility.⁶⁷

In the typical case, a court would have to examine the state’s comparative fault statute to determine whether suicide amounted to fault attributable to a decedent—but as did the Iowa Supreme Court, it is easy to imagine courts concluding that a “reasonably careful person would not hang herself.”⁶⁸ Some courts have even gone so far as

⁶² Sarah G. Johnston, Comment, *The Mental Health Security for America’s Families in Education Act: Helping Colleges and Universities Balance Students’ Privacy and Personal Safety*, 46 DUQ. L. REV. 211, 213 n.12 (2008).

⁶³ Andrea MacIver, *Suicide Causation Experts in Teen Wrongful Death Claims: Will They Assist the Trier of Fact?*, 45 J. MARSHALL L. REV. 51, 56-57 (2011).

⁶⁴ See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 33 cmt. e, illus. 2 (2010) (intentional tortfeasor may be found liable after victim of bombing commits suicide).

⁶⁵ See, e.g., *Hobart v. Shin*, 705 N.E.2d 907 (Ill. 1998), cited by RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 reporters’ note, cmt. h (2010).

⁶⁶ See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 2 (2000).

⁶⁷ See *Mulhern v. Catholic Health Initiatives*, 799 N.W.2d 104, 107-08, 123 (Iowa 2011).

⁶⁸ *Id.* at 114.

to characterize suicide as an abnormally dangerous activity, to which strict liability applies.⁶⁹

C. Suicide in Workers' Compensation

Concussion lawsuits against the NFL currently seek, and will continue to seek, to avoid the “exclusive remedy” provisions of applicable workers' compensation statutes.⁷⁰ The monetary awards available in a workers' compensation claim would generally be lower and exclude pain and suffering damages.⁷¹ In addition, in a worker's compensation claim, punitive damages may not be available.⁷² If, however, the plaintiffs in any suicide-related cases are unable to avoid the workers' compensation statute, and are otherwise eligible under an applicable statute's filing deadlines and procedural contours, some of those plaintiffs might seek to recover for the damages associated with a suicide via the workers' compensation system.⁷³

Worker's compensation doctrine evolved somewhat more rapidly than tort law to allow recovery even in the face of an injured worker's suicide. Claimants could recover not simply when they acted under an “uncontrollable impulse” but also when they had suffered from a “disturbance of mind.”⁷⁴

It is possible, therefore, that for suicide cases in particular, failure to avoid the workers' compensation exclusion might actually enhance the damages awarded to plaintiffs' families.

III. CONCLUSION

The legal obstacles facing plaintiffs in the concussion lawsuits are significant, and perhaps especially so in connection with potential wrongful death claims involving former NFL players who ended their own lives. 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

⁶⁹ See, e.g., *Lattera v. Treaster*, 844 P.2d 724 (Kan. Ct. App. 1992), cited in RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 20 reporters' note, cmt. k (2010).

⁷⁰ See Gust, *supra* note 20.

⁷¹ Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 145 (2005) (“Worker's compensation . . . typically provides . . . virtually nothing for pain and suffering or other noneconomic losses.”).

⁷² Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 283 n. 59 (1994).

⁷³ See, e.g., *Va. Used Auto Parts, Inc. v. Robertson*, 181 S.E.2d 612 (Va. 1971) (finding that the employee's unsuccessful tort claim does not bar subsequent recovery under Workmen's Compensation Act).

⁷⁴ Schwartz, *supra* note 38, at 230.

extent, savage, barbaric, and unacceptably dangerous to its participants.

Given the choice between potential life-altering injury and the millions of dollars that might come from a professional career, however, one wonders which option a college standout athlete would prefer.

Perhaps the most sensible solution to the NFL's brain injury dilemma would be to segment a notable portion of the NFL's revenue to provide compensation to former players—and their families—who suffer serious brain injury. Develop a kind of "9/11 Fund" for former gridiron stars. Such an approach could serve the interests of justice in a way that the current litigation may be unable to do.