

THE IMPACT OF CONCUSSION LAWSUITS ON THE FUTURE OF FOOTBALL

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I. INTRODUCTORY REMARKS

A. Ryan Becker

First, I would like to welcome everyone to the University of Mississippi School of Law. It is great to see so many faces from outside of the University here. Thank you to everyone in attendance.

Before we get the program started, I did want to thank a couple of people that really made this event possible. First, I'd like to thank Professor Berry. Without his guidance and leadership, this event would not be possible. I'd like to thank him for his continued commitment to the MISSISSIPPI SPORTS LAW REVIEW. Professor Berry, thank you.

I would like to thank the MISSISSIPPI SPORTS LAW REVIEW. Without your continued commitment and dedication to the REVIEW, this event would not be possible. I greatly appreciate each one of you.

Lastly, I'd like to say thank you to the inaugural Editor-in-Chief of the MISSISSIPPI SPORTS LAW REVIEW, Justin Campbell. Justin has been extremely helpful this year in helping me grow as the leader of the REVIEW. I am glad he could make it the symposium today.

With all that being said, I would now like to hand the program over to Professor William Berry III. I hope that you enjoy the Second Annual MISSISSIPPI SPORTS LAW REVIEW Fall Symposium. Again, I would like to thank everyone for joining us today.

B. Professor William W. Berry III

Thank you, all. It is wonderful to see such a great crowd. We have this beautiful new law school, and it is just fantastic to pack the place. Tomorrow at this time, there will be another gathering – a bigger group than this – congregating in the Grove, and you are going to hear people say, “Well, we may not win the game, even though we’re playing Vanderbilt, but we’re certainly going to win the party.” There is a great tradition of Southern football that we have here in Oxford, Mississippi.

But, we have some legal issues that we are going to talk about today that may in fact threaten the whole foundation of the game of football as we know it. About this time last year, retired National Football League players started to file lawsuits against the NFL, now totaling around 3,500 players. Their allegations, relate to the NFL’s failure to advise them of the risks of playing football. In particular, the players cite the permanent and sometimes life-threatening injuries that have allegedly resulted from the concussions that they suffered in the NFL.

Most notably, two star players, Dave Duerson and Junior Seau, have both committed suicide in the past year by shooting themselves in the chest so to preserve their brain for further study. Many believe these suicides resulted from the long-term consequences of the injuries they suffered while playing football.

We have a fantastic panel here today with a variety of different perspectives. We are going to have each of them present briefly and then we are going to have a panel discussion. I am going to ask them a series of different questions and give you all

an opportunity as well at the end to ask them whatever questions you have.

Without further ado, let me introduce our panelists. First, we have André Douglas Pond Cummings, who is an adjunct professor of law in West Virginia, and also now the Dean of Academic Affairs at the newly founded Indiana Tech Law School. He teaches sports law, entertainment law, civil procedure, business organizations and securities law. He received his J.D. from Howard University, and afterwards he clerked for Christine Durham on the Utah Supreme Court and Chief Judge Joseph Hatchett of the United States Court of Appeals for the Eleventh Circuit. He also practiced law in Chicago with the firm of Kirkland & Ellis before becoming a professor. Part of his practice there was representing clients in the entertainment and sports law industries, including former NFL athletes, so he has some first-hand experience with some of these issues. He is widely published in a number of areas, including investor protection, racial justice, and affirmative action.

Our next guest is Dr. Andrew Gregory. He is a physician in the Sports Medicine Department of Orthopedics at Vanderbilt University. He is also assistant professor in Orthopedics and Pediatrics at Vanderbilt. He earned his B.S. in Chemistry from Indiana University, where he played on the volleyball team. Then, he received his Medical Degree and did his Pediatric residency at the University of Alabama School of Medicine. He also had a Fellowship in Primary Care Sports Medicine at the American Sports Medicine Institute. He is the co-founder of the Vanderbilt Sports Concussion Center, so concussions are issues he faces every day. He is currently the team physician for Hillsboro High School in Nashville, Vanderbilt and Belmont Universities, the Nashville Sounds, as well as the United States Volleyball Team. He is a Fellow of the American Academy of Pediatrics and a Fellow of the American College of Sports Medicine as well.

Our next panelist is Dean Jeffrey Standen. He is the Associate Dean and the Van Winkle Melton Professor of Law at Willamette College of Law. He received his undergraduate degree in Philosophy from Georgetown, and his J.D. from Virginia. He clerked for Judge Robert Chapman on the U.S. Court of Appeals for the Fourth Circuit. He spent several years in practice with

Hunton & Williams in Richmond, and also served as the Deputy General Counsel of the United States Sentencing Commission. He teaches sports law, gaming law, evidence, and remedies. He has also written three books on sports law: *Taking Sports Seriously: Law and Sports in Contemporary American Culture*; *The Beauty of Bets: Prediction Markets and The Problems of Compensation*; and *The Law of Sports in the United States*. He has written extensively on issues regarding sports law and gaming law, and has his own blog called *The Sports Law Professor*.

Our next panelist is Philip Thomas, a graduate of this law school. He has his own law practice in Jackson, Mississippi. He does complex litigation, and specializes in nursing home and assisted living abuse. He has been listed several times in the *Best Lawyers of America*. He also has his own blog, the *Mississippi Litigation Review and Commentary*. Currently he is representing two of the classes of the plaintiffs in NFL litigation, so he also knows first-hand what is going on with these issues.

Last, but not least, we have a local celebrity of sorts, Todd Wade, a retired NFL offensive tackle. He starred, as many of you know, at Ole Miss before going on to the National Football League. He was a second-round draft pick of the Miami Dolphins, and he played for the Texans, Redskins, and Jaguars. He currently resides in Oxford, Mississippi, and has remained active in the local community. There is even a movie about him that was shown at the Oxford Film Festival a few years ago.

Without further ado, I'd like to turn the podium over to Professor Cummings.

II. PANEL PRESENTATIONS

A. Professor André Pond Douglas Cummings

I'm delighted to be here. Honestly, I'm delighted to be in SEC country. I grew up on the West Coast, so I'm kind of a Pac-10/12 person, and have lived in the Midwest and the East Coast, but it is good to be down here. I'm excited to be at Ole Miss.

I wanted to take a second to thank Ryan Becker for putting this symposium together and inviting me and these very

impressive panelists to talk about something that I view to be extraordinarily important. I'm also grateful to Professor Will Berry, and to Nick and Pavin, a couple of the sports law students that I've met since I've been here in Mississippi. I think it's exciting that the *Mississippi Sports Law Review* is here; it's on this campus, it's publishing cutting edge articles, and it's hosting this really important symposium today.

My topic is "Junior Seau Head Trauma and the NFL's Concussion Problem." Full disclosure: as Professor Berry indicated to you, I was a former NFL agent. I represented several players in the NFL in the late '90s and early part of 2000. I didn't represent Junior, although I worked closely with Junior and his representation on Junior Seau's Charity Golf Tournament. I also worked for his Junior Seau Foundation. I also should mention that through my wife, Louvenia, I'm intimately connected with the Polynesian community, particularly in southern California where I grew up and where Louvenia grew up.

Junior Seau's loss was profoundly devastating to the Polynesian community in Southern California, to the NFL community, and, of course, to his family and friends. This is a serious discussion today. It's critical, and I think that the lives and well-being of athletes and their futures are at stake in this discussion. There are esteemed panelists here that will do better than I will at describing the medical side of concussions, so I will leave most of that to the pros that are here. I did want to talk about a couple of things just to set the table.

A traumatic brain injury is defined as "an injury caused by bump, blow or jolt to the head or body that causes the head and brain to move quickly back and forth. This sudden movement can literally cause the brain to bounce around or twist in the skull, damaging brain cells and creating chemical changes in the brain." That comes from Dr. Julian Bailes, who I'm sure Dr. Gregory is familiar with, one of the primary specialists in head trauma in the United States.

Concussions are a type of traumatic brain injury, typically classified or often classified in one of three grades: Grade 1, Grade 2, or Grade 3. A Grade 1 concussion is typically where there is transient confusion, no loss of consciousness, symptoms that last less than 15 minutes, sort of the seeing stars concussion where

you don't lose consciousness. On the other hand, a Grade 3 concussion is typically involving a loss of consciousness, post-traumatic amnesia, pretty serious stuff.

Let me tell you, for those of you that don't know, I know that Junior's prime was probably when a lot of you were eight, or maybe ten. Let me tell you a little bit about Junior. Junior Seau grew up in Oceanside, California. He played football at USC, and those of you that didn't know his career, he was an absolute monster on the field. He played with reckless abandon. Junior was fearless. He was relentless; some people might say he was maniacal. He was best known as a San Diego Charger, but he also played with the Miami Dolphins. Some of you may have known him here in his picture in his later part of his career when he played with the New England Patriots. He was a leader. He was always the captain on the defense. Long-time coach Marty Schottenheimer once joked that he was the assistant coach to Junior Seau in the San Diego Chargers locker room.

Junior was not just an incredible football player; he was a force of nature off the field. Like many Polynesians that I know, Junior was kind and loving. He counted thousands of people as his friends. He had a successful foundation, the Junior Seau Foundation. His charity golf tournament was incredible—he raised a lot of money.

Yet, in Junior's later career, in his post-retirement life, Junior was deeply troubled. Why? One of his teammates, Gary Plummer, had this to say after Junior Seau pointed a handgun at his chest and killed himself last year. This is Gary Plummer, a middle linebacker who played alongside Junior in San Diego: "In the 1990's, I did a concussion seminar," Gary Plummer says. "They said a Grade 3 concussion meant you were knocked out, and a Grade 1 meant you were seeing stars after a hit, which made me burst out in laughter. As a middle linebacker in the NFL, if you don't have five of these Grade 1 effect concussions each game, you were inactive the next game. This is the thing that I think is stunning: Junior played for 20 years; that's five concussions a game, easily. How many in his career, then? That's over 1,500 concussions. I know that's startling, but I know it's true. I had over 1,000 in my 15 years. I felt the effects of it. I felt depression

going on throughout my divorce. Junior went through it with his divorce.”

Is it really true? Is it possible that Junior Seau had 1,500 Grade 1 concussions, and probably several Grade 2, and maybe Grade 3? Let’s take a look. I want you, as you watch this short clip, to watch Junior’s head as he played football for the San Diego Chargers.

[video clip of Junior Seau viciously tackling offensive players]

One of the things that was reported when Junior Seau committed suicide was – there were stories in the San Diego newspapers that said he had sort of lost connection with his friends and his family. They said that he was unconnected to his children, that he had become sort of distant from his kids. He loved his kids. They said that he had a gambling addition, had markers worth \$400,000.00 and \$500,000.00 at several casinos in Las Vegas, that he would fly into rages at girlfriends. He was divorced from his wife Gina and had a couple of domestic violence charges after he retired. That was portrayed as Junior not being able to deal with life after football very well.

Dr. Julian Bailes, in one of his studies and on his brain health sciences website, says that “symptoms of dramatic head traumas include rage, inability to connect in personal relationships, addictive behavior.” What was portrayed in Junior’s sort of after he committed suicide stories was that he had not been able to handle life after the NFL very well. I think Dr. Julian Bailes would argue that he was suffering from the ... I think he was suffering from the after-effects of 1,500 concussions that he suffered in his career.

Dr. Julian Bailes, in a book that I published last year called *Reversing Field*, had this to say about a groundbreaking study that he conducted on autopsies of former football players and Chris Benoit, the wrestler that killed his family and committed suicide. “At the request of the NFL,” Dr. Bailes says, “my team and I recently had the chance to do autopsies on four modern-day NFL players. By the families’ permission, we were also given the opportunity to do an autopsy on professional wrestler Chris Benoit. Our team found brain damage in all five professional

athletes.” I find this next part stunning. “The degree and type of damage we found is similar to changes in the brain due to Alzheimer’s Disease, and should never be exhibited in people this young.” He autopsied Mike Webster, former center for the Pittsburgh Steelers, who died at age 50. He autopsied Chris Benoit, who committed suicide in his thirties. He autopsied Terry Long, who ingested antifreeze to kill himself at 45. He autopsied Andre Waters, Philadelphia Eagles defensive back who died of a self-inflicted gunshot wound at the age of 44. Essentially what he found, and Dr. Gregory might be able to talk about this in some detail, he found that the tau proteins in the brain were reflective of Alzheimer’s victims that were 90 years old. These were what the neurons in the slides that he was showing us had turned brown, indicating that they were dead neurons in the brains of 45- and 50-year old people that indicated more as if they were Alzheimer’s patients in their nineties. As Dr. Bailes said,

These were our findings ... All of the brain tissue samples we examined initially appeared normal, no loss of structure, no growth, no appearance of stroke, no tumors, no infections. Their brains appeared completely normal, even when examined with regular stains under the microscope. When we used special stains that specifically attach to tau proteins, however, we saw evidence of old, dead neurons. This is particularly important because tau protein has been discovered by one of the abnormalities found in the brains of people with Alzheimer’s disease. When you apply abnormalities found in the brains of people with Alzheimer’s disease, when you apply tau staining to a normal brain to look for damaged neurons, the background normally turns a bluish color so that any brown you see is dead tissue: i.e., dead tau protein. Tau constitutes a major structural protein of neurons in their connections. Regarding Chris Benoit, even at the age of 40, Chris’ brain was replete with innumerable areas of abnormal tau protein staining. We believe that these represent multiple concussive injuries.

Let me conclude with a couple of quick thoughts. Again, according to Dr. Bailes, who has just conducted a rehabilitative study of former NFL players, he says,

Our work with active and former NFL players really took off when we partnered with the Los Angeles Chapter of the NFL Players Association. As part of the rehabilitation study, we scanned the brains of 116 NFL players. We found 113 suffered brain damage, and the level of brain damage was awful. People who have chronic traumatic brain injuries, which almost all football players have because they get hit in the head thousands of times in their careers, have a much higher incidence of depression and suicidal ideas and suicidal behavior. Thirty percent of the players we studied had issues with severe depression that is four times the rate of depression among the general population. Even worse, linebackers like Junior Seau, who lead with their heads on the field, suffer the most significant damage. The study showed patterns in damage to the front part of the brain and temporal lobes, under the temples and behind the eyes, which manage memory, mood stability, and impulse and temper control.”

Bailes concluded, “Dave Duerson,” who Professor Berry made a reference to earlier, “Junior Seau and Ray Easterling, who was the lead plaintiff in these lawsuits until he killed himself, did not need to take their own lives out of fear, frustration or despair. They most likely could have been saved if they had been under the care of physicians and other providers that specialize in the treatment of patients with traumatic brain injuries.”

Dr. Bailes believes, and I think it’s true, that if traumatic brain injury sufferers are under the care of physicians and they are worked with, that they can actually have repair in their brains; they can actually deal with this trauma. Junior never sought any help; his life spiraled out of control after his career was over, and he was too proud to tell anyone that he needed to see a counselor, or that he couldn’t sleep, which is another symptom of concussions. He slept maybe two or three hours a night around the time that he committed suicide.

My final point is this, and I hope we can have a robust discussion about this later. In my view, the NFL has completely failed in two ways. The NFL has completely failed in recognizing the damage that concussions do. There is evidence back to the 1950’s. Science was indicating that a concussed person should leave whatever arena they were in that was causing them

concussions after three concussions. There was evidence in the early 2000's that there was a linkage between concussions and severe brain damage in football players, and the NFL was still telling its players there is no evidence that concussions are linked to severe brain damage later in life. The NFL has failed badly, I think, on that front.

The other area that the NFL has failed badly, and I tried so desperately to do this with my players, was in post-career counseling. Nobody leaves the NFL, maybe Mr. Wade did, but nobody leaves the NFL on their own terms; everyone is told you can no longer play. Your talent is no longer good enough to maintain; everyone gets cut, and then you leave the life of a very regulated, regimented schedule. If you did well with your money, then you have money. If you didn't do well, we know of the bankruptcies that have happened for all of these star athletes. There is so little care for post-career counseling and post-career advice for what these guys that have devoted their lives to the game can actually engage in.

I believe regardless of whether this class-action lawsuit is allowed to continue or is returned to arbitration through collective bargaining, the NFL will be forced to settle, and I think it will settle with a significant amount of money with its former players. The question is, that I hope we answer today, is the League going to change? Is the League going to continue to change as necessary, or is it too little, too late? Thank you.

B. Dr. Andrew Gregory

A little bit of irony: the only medical person has laryngitis, but I'm going to do my best, keep drinking the water and see if I can make it through.

I'm going to try to sort of give you a little bit about my perspective, and I'll come back and maybe discuss a little bit about what was already brought up. I'm a pediatrician by training. My practice now is pediatric sports medicine, where I deal with injuries in children. I've been taking care of high school football for 15 years, so that's really my perspective. That's what I still take care of. In fact, I'm missing a game tonight to be here. My perspective, other than high school, comes from training. When I was a Fellow in Birmingham, we took care of the XFL team in

Birmingham. You may remember the XFL. If you want to talk about some interesting football, that was it. Only one quarterback actually made it through that season without getting injured in the XFL. I took care of Samford University in Birmingham for football, and when I first came to Vanderbilt 12 years ago I took care of football for about six years. I don't take care of football anymore, although I will be pulling for the Dores tomorrow.

My perspective on concussion goes back all the way to my training where I'd been taking care of concussion the whole time. We started our Concussion Center a little more than a year ago, and it's been very eye-opening to see the number of patients who we see we are dealing with; primarily these are younger adults or adolescents or even youth. My personal belief is that it's not because there's actually more concussions; it's simply because we are much more aware of what a concussion is. Parents, coaches, players, doctors, other medical personnel, they are actually now coming to our attention.

This really began back in 2006. There's a middle school football player named Zack Lystedt in the State of Washington who was playing in a football game, had a head injury, came out of the game very briefly and was allowed to go back in the game and had a second head injury, had a massive bleed, had both sides of his skull removed to allow the brain to swell, survived, and is significantly affected. He is able to walk now, he can talk but it's very hard to understand him, he's not able to go to college, he's not able to take care of himself.

The State of Washington enacted a law, and it's called the Zack Lystedt Law. The law has three components. One of them is athletes, parents, and coaches are required to be educated every year in concussion and what it is and what you should do about it. That to me makes a lot of sense. Number two: an athlete is not allowed to go back in a practice or game if there is suspicion of concussion. This is not a diagnosis; you don't need a doctor. A coach, a parent, another player can actually raise the suspicion. It's based on a symptom checklist which you can have on your phone, or a coach can have on a clipboard. The third part is that you have to be cleared by a licensed medical provider prior to going back to the game. They did a very smart thing. They didn't decide who is the best person; they just said you had to be trained

in the management of concussion. They didn't argue about whether it's a doctor or a neurosurgeon or a neuropsychologist or a physical therapist or an athletic trainer. They just said you need to be trained. That is the model law, which most states are following suit now.

Now, correct me if I'm wrong, but I don't think Mississippi has a law. Tennessee, where I am, does not have a law. We've been arguing about it for three years, and what we're arguing about has nothing to do with educating players. It has nothing to do with holding them out. It has nothing to do with clearance, except for nobody can agree on who is the best person to send them back, which to me is just crazy. That's what we're arguing about. That is what we're arguing about in the State of Tennessee. You can tell me if Mississippi is any different.

My personal belief is, and this is the only law I know governing a specific medical condition and its management, but it's actually a very positive thing, and you're not going to hear that from too many of us about laws telling us what to do in the medical field. This is one where I actually believe it is a positive thing because it's education. Guess what: coaches and teachers don't get educated if there's no law requiring them to do it, because they're required to get educated in so many other things. If you say, "hey listen, we want to teach you about concussions," – "oh, sorry, we don't have room, we've got to do all these other things first." There's a lot of high school athletes that the High School Athletic Association has rules about concussion, but what about all the kids who are out playing youth sports that aren't a part of high school? These rules don't apply to them, so they can still go back into the game, even if they're showing signs of concussion.

The legal side of this to me, one of the other arguments that has been brought forward as well, that there is no penalty if you don't follow the law. My personal belief is that if people know there's a law, sometimes there doesn't have to be a penalty for them to actually follow the law. You know it's a law, the schools are going to do it even though there's no penalty. Why? Because there's a law. I do think there's a positive outcome even though there's not going to be police going around saying, "did you send this person back in the game?" That is really my perspective on it.

I'm working with our state legislature to try to get a good law in Tennessee and not a law who's the best medical person to take care of it. I firmly believe that athletic trainers can take care of concussion, a pediatrician can take care of concussion, you don't need a neurologist, you don't need a neurosurgeon to manage it. The reason is most of these kids are not going to have access to a subspecialist. You want somebody there who is at least trained in it, and the training exists. You go to the CDC website right now you can get trained in the management of concussion whether you're a coach, a medical provider, a parent, or a school administrator. All this is already out there.

To make a couple brief comments about concussion, I think the definition that was given to you is sufficient. I will, however, point out that even in the medical field we really can't agree on exactly what it is, the point being now that if you are diagnosed with a concussion, all these other steps have to follow, but if you don't call it a concussion, like you call it a "closed head injury," or maybe a "transient neurologic phenomenon," then you don't have to follow all these rules. What do we do? We don't call it a concussion. "Do you think it's a concussion?" "No, I think it's a transient neurologic phenomenon." I don't even know what means. The definition is still a little vague, even in the medical literature.

Part two to that is the grading system that was outlined. Most of us who do this on a regular basis don't follow it, and the reason is it's not very good. We know that if you're diagnosed with a Grade 3 concussion your symptoms may go away in a week, and if you're diagnosed with a Grade 1 concussion your symptoms may last months. The grade really has no bearing on prognosis, and those of us who do this don't use grades. If somebody calls me on the phone and says, "hey, I've got a kid with a Grade 2 concussion," I say "well, you need to go to the CDC website and get educated on the management of concussion," because the grading system is no longer used. I think that's an important idea, that you cannot predict outcome right at the get-go. You can only predict it after you follow the concussion until it resolves.

The second thing I'll bring up is this idea of something called chronic traumatic encephalopathy, and I'm going to stay away from medical terms for the most part. Chronic implies it's gone on for a long time, traumatic implies that there was an injury, and

encephalopathy is brain damage. This is the diagnosis that the pathologist is making by looking at a brain under a microscope and saying there's a bunch of these tau proteins. The diagnosis, in my mind, should be tau protein encephalopathy. The pathologist is then making this assumption that this is all from concussion sustained. What else could have happened? You have concussion, you have this brain with tau proteins, what about everything else in the middle? What about their history of depression, with or without football? What about their drug use, talking about drugs of abuse. What about supplement use, things like testosterone? You can't tell me that professional wrestlers and the older football players did not use these things, because we know they did. What about alcohol use? What about other injuries that were not from football? And I have no association with the NFL.

I come to you merely as a medical scientist, and I want to know what are the things that led to this condition, which I will call tau protein encephalopathy because we really don't know. Did they play football and did they have this? Yes, and we're talking about a very small number of cases that have actually been proven with this. Junior Seau, you can correct me if I'm wrong, his brain did not have tau proteins. He did not have tau protein encephalopathy. Is it tragic that he killed himself? Is it tragic that he had depression and all these other things? Absolutely. There's no doubt about it; it is a tragedy. He left behind children. There's no doubt that this is a tragedy, but I think that we have to be careful and not scare ex-professional athletes into thinking everybody's got this because I worry that some of these people who are depressed are actually taking their life because they want to prove that they have this and prove to people what's going on, and Junior's an example of somebody who didn't have it. Was he depressed? Absolutely. Did he have other things going on? Yeah. Could his concussions have something to do with it? There's no doubt; I think that they could have, but I think we cannot make big assumptions and cause a mass scare, particularly in ex-athletes. We are actually studying ex-athletes as well and trying to help them manage what they're dealing with, and I think that's an important thing.

The final thing I'll leave you with is we're arguing about football today, and football is certainly a dangerous sport. It's a

contact sport. We have data on concussions in football that it's about three times the rate of soccer, so of the sports that we play, it is a relative high injury rate. Let's think about some other things. What about boxing and MMA? The whole goal of that is to knock somebody out. If you knock somebody out, they have a concussion. That's legal in the United States. Most of the early cases of this chronic traumatic encephalopathy were actually made in boxers. MMA now is becoming very popular. This is something that's going on in youth right now. They can box, and they can do MMA. We're arguing about football, but I would ask us to step back and say okay, football is obviously popular across the country, but what else should we be thinking about? In my mind, we should be thinking about other things where the whole goal of the activity is to give them a concussion. That's how you win. You can't win football without giving somebody a concussion. I just try to put it in some perspective, so with that I'll drink some more water. Thanks.

C. Professor Jeffrey Standen

Like the other panelists, I am delighted to be here in this spectacular new facility for your law school. I was here many, many years ago, and my goodness, what a change. Congratulations on that. I also want to congratulate the students who have started the *Mississippi Sports Law Review*; it's a needed book, in the field. Already the first few issues are important; I've paid close attention to them, and just wish them all the best as they continue that endeavor.

What I want to do is perhaps turn the conversation a little bit more toward the litigation that's going on right now, to highlight a few of the issues that I think are there in that litigation that will confront the plaintiffs. I'm hesitant to say much with Mr. Thomas going right behind me; he'll correct my errors, I'm sure, with his better perspective. Really, I see two primary issues with the tort litigation, both involving what I want to talk about today, which is the notion of assumption of risk, the old tort notion that's never quite clear in your tort classes, and indeed never quite clear in the tort cases either.

In the sports arena, assumption of risk raises two issues. First, the court ultimately adjudicates this litigation has to determine the game that it wants to address. In other words, will the court examine the sport of football, and NFL football in particular, as it is, or will the court create some hypothesized, platonic notion of the sport of football and speak to that? This is a very large issue. Courts and commentators have, in talking about sports and the risks that athletes assume, had to conceptualize what is the sport, what is the risk the athlete takes? Some have argued that the athlete only takes the risks of the contact or other actions that are actually permitted by the rules, a very tightly framed assumption of risk. In other words, only if the contact is one of the type that is legal under the rules of the game does the athlete take the risk, and for no other contact. For example, an athlete playing hockey would not assume the risk of a fight, even though as we know hockey and fighting go together pretty often.

Another standard that courts like to follow is that the athlete assumes the risk not just of permitted conduct, but in addition of prohibited conduct that is itself contemplated by the rules. Going back to hockey for an example, the hockey player would take the risk of body checks, but would also take the risk of fighting, because fighting, although prohibited by the rules, is nonetheless contemplated by the rules. The rules talk about fighting, prescribe penalties for fighting, so it's a broader notion of assumption of risk.

Then finally we have cases that sort of track more of the criminal law notion, with the model penal code notion, that assumption of risk is something bigger, that the athlete expects not just conduct permitted by the rules or conduct that's contemplated but prohibited by rules, but rather expects and assumes the risk of all conduct that is reasonably part of the game. Some courts even go so far as to say any conduct that happens in connection with the game is a risk the athlete assumes. Back to hockey, where we had an athlete, after the whistle had blown, who skated by another player and hit him on the back of the head, clearly beyond the rules, not even a penalty per se as a game-time penalty because the period had ended. That, nonetheless, was a conduct, the court said, that the athlete would reasonably expect in connection with the game.

Thus the first issue, in defining what's the sport, we must ask what is football? My guess would be that in the game of football, blocking and tackling that occur every day on every play constitute parts of the game. That conduct can lead, even where legal under the rules of the sport, to head injuries or concussions. It's hard for me to see, under any standard the court might adopt, the court deciding that head trauma is to some level not part of the risk the football participant assumes.

The second issue with respect to assumption of risk arises after we define the sport. Now we must apply the standard to the game we have defined. What does it mean to say that that athlete has assumed a risk, whatever the sport would be? Does a baseball player assume the risk of the bean ball, for example? A recent California case talked about this problem, and the court will likely at some point have to address this issue in the context of the NFL concussion litigation. How should the court go about deciding whether or not head blows, head traumas, or head contact is in fact something that the athlete voluntarily assumes and takes on? Did the athlete knowingly and voluntarily take on the risk of head trauma, with all its potential repercussions? Here is an issue I am sure the plaintiffs in the NFL concussion litigation will fight with a lot of fervor. What is surprising is that, typically, courts resolve this sticky factual question about whether the particular plaintiff voluntarily assumed this risk as a matter of law, and not as a question of fact. In other words, they resolve it on their own; they do not give the question to the jury. The courts will say that when a contact is of the kind that is a reasonable, everyday part of the game, then that's a question of law. It's not a jury question. The courts say the jury must be given the question only when the contact is outside the normal, everyday expectations. Only more extreme conduct would go before the jury.

It's a little surprising, perhaps, to us as lawyers to think that this question really could be resolved as a matter of law by a judge. Thinking of that bean ball case that I alluded to a moment ago that arose in California. We had a pitcher who, in a college game, threw a bean ball, a high and inside pitch at the batter. The pitcher said afterward he was angry, he was angry he had given up a home run, and he was going to throw the pitch inside on purpose. He wanted to hurt the batter. Sounds like a crime,

right? He waited, he lay in wait, he waited for the batter to step into the batter's box, waited for the umpire to signal "play ball," and then he threw the ball purposely at the batter. The pitcher hit the batter, in fact, and the batter suffered a serious brain injury. The batter sued and the court ruled that, as a matter of law, reciting anecdotal evidence and the testimony of a few witnesses, that the bean ball is the kind of risk that the batter takes, even including the intentional bean ball. If the pitcher had thrown that ball at the batter as he walked toward the plate, that would be a crime and be national news. Or if he got him in the dugout, that would be on ESPN. The pitcher waited until the batter was in a place where, in a sense, the pitcher would be exonerated. The pitcher was very frank in his testimony. He said, "Yeah, I was angry, I wanted to hit him." He was very plain about his intentions. Yet the issue about whether or not this particular plaintiff in fact assumed the risk of intentionally injurious conduct was never submitted to the jury.

In the world of sports litigation, assumption of risk has a lot of momentum. Although the doctrine is disfavored in other areas of tort litigation, it remains viable in sports cases. And it is commonly treated as a question of law.

I think the plaintiffs here in this NFL case face a pretty significant series of hurdles because a court could plausibly rule that blows to the head in contact football are in fact ubiquitous. They're everywhere, every play. Courts have always held to the notion in sports that the athlete could have just left the field. The athlete could always walk away, and if that's the starting point, that the athlete makes that choice, then I think the plaintiffs are going to have a tough time.

A few additional thoughts, if I may. I know the plaintiffs are looking for the smoking gun. I think Professor Cummings mentioned this a little bit earlier, this idea that the NFL knew something early on and failed to disclose it. It's very possible, being the world we live in, there would be some email or memos from some person to another saying something that's going to be damaging to this NFL's position, that the NFL knew something. I'd be surprised a little bit. The analogy is to the tobacco litigation.

I was very involved in the tobacco litigation, I can't remember on which side, some years ago. I am not sure the common analogy to the tobacco litigation is a good one. The tobacco companies had their own labs, their own scientists; it was a little academic enterprise, and they were generating tons and tons of paper containing all kinds of stuff, scientists just chatting back and forth about every possibility. The NFL is not set up that way. It's not tobacco, it's not big tobacco with a research institute; it's just a small League office that basically tries to organize thirty-two franchises as best it can. I don't think we'll see a repeat of the tobacco cases. Even though there will likely be some data from the 1950s and 1960s that are discovered, the bottom line is that assumption of risk is still an attractive defense. The plaintiffs can read too, you see. To the extent that data is out there on the internet or in the public arena in *Time* magazine, the courts have always held that the plaintiffs were every bit able to read and digest that information as much as the NFL could have. I'd be surprised to find out the NFL really has something, that it has information that was not available in the public arena, that the NFL procured and held onto and kept quiet all these years. The very idea seems preposterous.

Juries love smoking guns, but the question's going to be will this case ever get to a jury, or will a judge rule, as I've been thinking, as a matter of law that plaintiffs assumed the risk. No jury question at all.

The other part of the litigation, I'm just finishing up here, is the helmet side, where the plaintiffs have sued some of the helmet manufacturers, Riddell and others. Products cases in the sports arena are very hard to prove because causation is just a bear to try to establish. Our medical doctor mentioned earlier, I won't go through all of this, but there's lot of potential causes out there for malignancies or encephalopathies, and I wouldn't spend a minute on this. I know nothing more than that. Even as a more everyday thing, what causes an injury; is it the ground the head hits? Is it the opponent's blow? Did the pad in fact cover up the injured area or not when the player was hit? If a different helmet had been worn, would that have sufficed to prevent the injury? These are all causation issues that are just legion and complex whenever you're dealing with a products case in a sports arena.

I'm not saying that this can't be done; plaintiffs' lawyers are very able, but that's going to be a challenge to them.

I guess to wrap it up, definitely as I read the cases and study the cases in tort law as applied to sports, it's very clear, and the court's right about this, that they are very reluctant, the courts are, to impose tort liability into the playing arena. To say to the pitcher, "you may throw inside, but if you hit him, you're going to be liable," is very problematic. Courts fear that tort liability would alter the incentives of the players, of the athletes, and of the coaches. In sports opinions, courts state that do not want to alter this vigorous athletic game in which players are giving their best without regard to potential legal ramifications. If that's the sentiment that the courts have, if that's the sentiment the court has in this kind of litigation, I think we'll see another court that's also reluctant to intervene into sports.

Thank you.

Dr. Gregory: I was just going to make one comment about helmets, just to put it in some perspective. Helmets are designed for one purpose, and that's to prevent skull fracture. They're very good at it; they will never prevent concussion; there will never such a thing as a concussion-proof helmet. If you look at the newer helmets that you've seen people placed in after they've had a concussion, they essentially make them bigger, but I liken it to an egg shell. If you shake up the egg, you can shake up the yolk without breaking the shell; it's really no different in your brain. It doesn't matter how big or how good the helmet is, there will always be concussions, even with helmets.

D. Philip Thomas, Esq.

I'm Philip Thomas. It's good to be here, back at the law school. I was a student here 20 years ago. When I was walking in here, I saw one of my old teachers walking around, and it made me nervous all of a sudden.

I practice in Jackson. I have my own practice, but in big cases like this I work with other attorneys. There's another lawyer in Jackson named John Giddens, whom I work with on a lot of big cases; we've tried a lot of cases together; we've tried a case against each other, and we're working together on this litigation. I've tried

five cases to verdict representing folks who had suffered brain injuries; two of those folks had Alzheimer's or dementia, and that's the connection between the nursing home and assisted living litigation and this NFL litigation, because most of the folks in nursing homes, or many of the folks in nursing homes, have Alzheimer's or dementia. These guys, the former NFL players, are much much more likely to suffer those conditions later in life than the general population is.

There's a great blog, *NFL Concussion.com*, that a third-year law student in Missouri put together last year. It's got all the information on the litigation you could ever want, including pleadings and ways to get the list of all the former players who have filed lawsuits. We represent, as of today, we're filing our fourth lawsuit today in Jackson, and we represent 149 former players, some you're heard of, some you haven't, some who are in the Hall of Fame, some who will be in the Hall of Fame. They're a bunch of folks out there who have played in the NFL really, more than I ever really thought about it, but a lot.

On the litigation, I'm not really worried about the assumption of the risk, because the NFL is going to have to win that every time against every guy. They're not going to be able to win assumption of the risk against all 4,000 or evidence up to 5,000 or 8,000 players. They've got to win that every time, and they're not going to win that every time.

I'm worried about the Collective Bargaining Agreement. That's the Motion to Dismiss that's pending now, where the NFL is trying to get the case thrown out of courts and sent to arbitration under the Collective Bargaining Agreement with the players' unions. That's what I'm worried about right now because that throws out the whole litigation, all the cases.

After that, if the plaintiffs win on that, it's just game on, and the NFL will file a lot more motions, and there are other motions that could really knock out big chunks of these cases: statute of limitations and those sorts of things. I'm worried more about those global issues than I am individual stuff: whether a player could have been depressed or had inappropriate conduct or all of that stuff. Anyway, those are issues that are going to come up in the individual player's cases. The NFL is going to win some of that, and the NFL is going to lose some of that. Those are the types of

issues that we litigate all the time in brain injury cases that go to trial. There's always an element of either you would've been messed up anyway, or you're faking. They love you're faking defense, no matter how bad the conduct, no matter what the injuries look like, they say they're not going to do that because it can really blow up in their face, and often they can't help themselves and they go with the you're faking defense. It doesn't work a lot of times.

We know the NFL has engaged in sleazy conduct. We don't really have to go looking for the smoking gun. Are there smoking guns out there? I hope so. I hope there are better smoking guns than what we know now. What we know now is that the NFL lied to the players for years and years about the risk of head injury in playing football. We know the NFL told players you can go back into the game, not some other game, you can go back into this game, the game you're playing in right now, when you've had a concussion or head injury in a football game. We know that the NFL set up a study commission and published literature that went after the mainstream literature that concussions and repeated concussions are dangerous. Their story they were giving to the players was "this is not serious, you don't have to be careful, you can go back in." The problem with that is once you get one concussion, you're much more likely to get a second concussion, and then when you get a second concussion, you're much more likely to get a third concussion, and it's worse and worse. Sometimes you don't really see what happens until later in life.

The cases to me are less about money and more about medical care, and that's the solution. Okay, what's the easy solution? The easy solution is the NFL needs to own brain injuries of former players, and in doing that, they would own some brain injuries that they didn't cause and aren't their fault. They would own some brain injuries, maybe some Alzheimer's, some dementia, of former players who would have suffered that anyway. They would also be owning the brain damage, and we're talking about brain damage, they would own that brain damage that they did cause, that playing football in the National Football League did cause. I would submit that that's fair; that's what's fair, is for them to own all of it. If they would step up and do that, then this would all go away.

That's not how the NFL works; it's 32 mutli-billionaires, and they're not going to have anybody tell them what to do. They tell folks what to do, particularly players. It's going to be a big fight. There's a multi-district litigation in Philadelphia where it's being fought out. The cases we file in Mississippi get shipped off to Philadelphia. I hope I get to be intimately involved in the fight. I love fighting those big New York law firms who may not respect the lawyers down in Mississippi—I really get a charge out of that. I would be a lot of fun. We'll see. It's going to be a long fight, and it's going to be a hard fight.

E. Todd Wade

My name's Todd Wade. Let me start by saying this. I didn't get my law degree here; I don't have a law degree, I'm not a doctor, just a former NFL player, so I'm your token NFL player here to speak about my experiences while playing in the National Football League. I've had a concussion in my lifetime, I guess a Level 3 which was discussed before me; however, that was from a car wreck when I was very young. I possibly have had smaller trauma while with the NFL, but I never knew it if I did, so it's not something that I currently feel or notice. I do know it's real and a concerning issue amongst athletes and followers of the sport. I know players who certainly dealt with it as it can be a very serious issue, although there are few that have had serious problems directly related to the head trauma caused through football. I think in hindsight, looking back at things and also looking at what you hear now, and just from other players, I think a lot of people will have a case. I would imagine, just from listening to some of you about a lot of the litigation, some people might be going after it for different reasons than actually feeling justified by compensation; it could be for money? A positive in the research is that new methods may be taken from better head gear to better diagnosis through the attention this is getting.

For instance, since I've been in the NFL, if somebody has a head injury, they come out of the game, they inspect them. If they feel they've had a head injury, they do not go back in the game, if the player develops a concussion. I believe a lot has been watered down so you really just don't know valid details because the cause

is just now getting much more research, more investigation and much more money focused towards it.

At the University of Boston, they've been doing a lot of research in brain trauma in sports. I've been contacted for years to go to Boston and participate in the study. I was an offensive tackle and there is serious contact each play, particularly in the running game, but your wide receivers and skill players are much more likely to get the serious head trauma than offensive linemen.

Even though I led with my head a lot more than I should, I personally feel I didn't suffer from the play to play trauma that is being discussed and if you think I have brain damage, well, you need to keep it to yourself. Seriously, I think as of today I would give probably more of an objective view, maybe somewhere down the middle, because it can go either way. Some of it's real, such as Dave Duerson with Chicago, he absolutely suffered from it. He wrote a note before he took his life discussing it, and then shot himself in the chest for a reason. He felt that his brain, because of the head trauma, had put him in the situation he was in and he wanted out. Depression is a very serious issue and seems to be a direct cause of the disease.

However, there are a lot of variables, a lot of variables that I think really have to be examined. Looking at the NFL you have an 85% divorce rate once they leave the game, and many are financially ruined. You're talking about within two or three years, 85% of former NFL players are divorced. That's one piece of it. Y'all know a little bit about that, being law students, that's usually half your money and then some. There's a lot of things to be depressed about, as you know, but financially, that's another thing.

I've noticed a lot of guys have a very hard time leaving the game behind, and you can almost pick them out, guys that – and trust me, I loved football, really did, and while I did stop playing on my own terms, I was banged up and hurt and I just got to a point where I wasn't as hungry for the game as I used to be. For a lot of guys that put everything that they could into it, they do become lost once they leave. They cannot get their footing.

Back to the failed marriages, the retired or fired athlete is showing up at the house for the first time with no plan in place and have no idea what they want to do next, so their wife is not

used to seeing them during the season, during the off-season a little bit, but they go home and they sit there, they start gaining weight, or other things depression related. I think there's a lot of variables, and if you look into suicides in general, I believe around 90% are from depression. I think when you examine the study, you really have to go back and look and see exactly what caused the depression. There are variables to look at, and there are plenty of people in the study and guys who are in the lawsuit who probably have legitimate claims. For myself, I've been contacted before, and I honestly didn't think that I had anything wrong. I actually have been tested before, and they didn't come up with anything, and that was just for a cat scan.

When you're contacted, and I've told them that I really didn't have a concussion, and they will say "well, all you had to do was have helmet-to-helmet contact at any point." I'm thinking, gosh, well, since I've been in the fifth grade, my helmet's rubbed against somebody else's helmet, is that a legitimate claim?, and for me it wasn't. Because there's a lot of wiggle room in the entire issue, it's really tough, I think for maybe even for both sides, maybe even tougher for the plaintiffs, but you understand the case on both sides.

As I listen to everyone's view, I'll give my perspective upon entering the League, contracts, what you expect. How many guys in here play football? If any girls play football, you can raise your hand too. You knew what you were getting into, in my opinion, when you played football. What I would say is if someone that's not part of the claim is – the actual factors that actually make this thing happen, do you feel that you're owed money for a certain reason? Were you misled? Did the trainers let you back on the field before they should have? When you entered football did you not know that you were going to be hitting someone, or possibly getting knocked out? I think that's the way I looked at the suit. I'm not completely against it, because I understand the disease and know it exists.

If any of you have any questions with that, I'll be glad to answer.

Thank you.

III. PANEL DISCUSSION

Berry: We had a lot of very interesting things that have bubbled to the surface with our five different presentations, and I think for me the macro question is really the most interesting one, which is what is this going to mean for football going forward?

Standen: That's a great question about the future. We would think that it would take an act of a legislature to proscribe a contact sport or to regulate it in some way, but actually, if you look at the history of blood sports, I'm not sure football qualifies, but the history of blood sports in this country, it's actually always been the courts, believe it or not, to take the lead in the eventual banning of sports.

For example, with bare knuckle fighting, it was courts that got into the business of actually awarding tort damages from the winner to the loser, or the losers to the state sometimes. Over time it became so prohibitively expensive to engage in bare knuckle fighting that people stopped doing it, and that created momentum for state legislatures to step in, for better or worse, and to prohibit and regulate, at first regulate bare knuckle fighting, requiring gloves, requiring Marquis of Queensbury rules, and Broughton Rules, as they were called, another set of rules, then eventually banning the practice outright. That's history. That's a long way in the future, but it wouldn't be unusual for liability to be the first blow, if you will, to regulate professional football.

Thomas: I don't know. This is the question everybody wants to know, it's when my friends call me up all pissed off saying, "you're going to screw football up, man," and that's not what it's about to me. It would be great if it makes football safer. It would be great that, as a byproduct of this, more states at the high school level enacted these head injury policies and raised awareness for it. That would be fantastic. For me, give the guys medical care. Be honest about the dangers, fully educate, don't try to hide anything, don't try to sweep anything under the rug, but then take care of the guys. The NFL is such a valuable League now, just billions and billions and billions of dollars. I can understand in 1970, when the League wasn't worth that much, saying we can't afford to do that, but the League can afford to do it now. It can

take care of these guys for the rest of their lives. If you're on a roster for two years, or three years, or I don't know what the number is, but you're going to have guaranteed medical care for the rest of your life for brain injuries. That's pretty easy.

Could football be a little safer? I don't know. I'm not a ref, and I love football. I tore down goalposts in my thirties, so I'm a big football fan. I don't know. That's not my arena.

Gregory: I agree with you about the medical coverage part of that. I think that's a hard one to argue regardless of the outcome. My hope is that it happens. I will speak to the other side of it, which is the rules side. Since the 1970's, and this was actually why the NCAA was put together, was because of Experian football. Leading with your head is against the rules, and I would argue to you that that actually happens every night in high school football. It happens every Saturday in college football, and it happens every Sunday in NFL, and it very rarely gets called. It's against the rules, but the rules are not enforced. That's one of the things that I hope this brings to light. I actually think it's great that the NFL has rules, just like Todd pointed out, that they're not allowed to go back in the game, because for us, at the youth level, they see that this is what happens at the NFL. They can't argue that at the youth level. It used to be "well, the pros are allowed to go back in, and I want to go back in." That's great for the kids to see that the pros don't go back in either.

I would like to see the actual rule enforced that you cannot lead with your head because it currently isn't enforced.

Berry: There seems like there have been a lot of positive consequences with this proliferation of state laws and the NFL advancing these protocols they started in 2009, and then with Colt McCoy, you will all remember, last year they had a new protocol that said that we have to have somebody on every sideline. Colt McCoy got a concussion during a game and went back into the game. By the end of the last football season, the NFL now requires each team to have somebody on the sideline to check people out.

Are there other things that the League could be doing to really improve players' safety? It seems like you have Tom Brady's commercial where they're trying to promote this vision that they really do care about the players, but I query whether that syncs up with the reality. What do you all think about all that?

Wade: I think that this is kind of funny in a way because just watching before the last CBA came into effect, guys holding out, and Tom Brady has his own suit, and Peyton Manning and everyone, it's going back to what we originally talked about. It's a tough deal. The way I look at it, I always knew if you have a concussion, you come out and you don't go back in. I remember Chris Chambers, and a couple of guys on my team it happened to. You always had a couple of guys on a team that experienced a concussion, but maybe that one time they were allowed to go back in.

Can helmets improve or not? Possibly, for instance, Dr. Gregory made a good point. Either the helmets are going to shake no matter what, you look at the race car helmets – should it be built like a race car helmet? You know more about this than I do, I'm sure, but it's probably the exact same effect as Dr. Gregory mentioned. Your brain's going to shake, no matter what. I remember my rookie year you had the whole standard big, heavy helmet before they came out with the one that's a little bit lighter, and it wasn't the one that has the little shell on top, it's a little more traditional than that. Many of us liked the new versions and some liked the older heavier models. I don't know what else you'd do to enhance the safety of the helmet. It really comes down to educating the players and getting the trainers to have an extended certificate that teaches them more about evaluating players that have just received a major hit, but it sadly may come to a certain point when high school and college coaches talk to the team in a pregame speech warning their players of potential head trauma. That can't go in a pre-game speech. Before the season starts, what's going to happen is you're going to watch videos and show stuff just like every year in the NFL you get to the new rules changes, as the referee is showing somebody from the year before doing something out there that basically started a rule, and everybody's laughing in the thing, but they're going to need to show more details involving head trauma. They could already be showing videos like that to educate and to remind people how serious it is because you really don't know until later on in life, and that's some of the things you're seeing.

cummings: I think that a cultural shift is necessary, and I think the cultural shift has to happen at the very youngest ages. I

let my nine-year old son play tackle football last year, and I had him read the waiver that I had to sign. In the waiver it said, “concussions can cause serious brain damage and even death in some circumstances,” and my nine-year old is going, “are you going to let me play, Dad? It says you could die here.” I was oh, man.

Anyway, the cultural shift that I’m talking about is Scott Fujita released a statement when he was suspended again, re-suspended, by Roger Goodell, and Roger Goodell sent him a letter saying “I’m disappointed in you for the bounty scandals.” Fujita said, “I’m disappointed in you, Commissioner. You act like you care about players’ safety and that suddenly something that’s such an important part of what you’re doing and you’re trying to go to an 18-game season, you’re trying to play us on Thursday nights with no time to recover from Sunday games to Thursday night, and you’ve started the season with replacement officials.”

When I say a cultural change I’m talking about Kurt Warner being cleared to play and Kurt Warner saying, “I’m still dizzy, so you may have cleared me to play, but I’m not going to play,” or Dale Earnhardt saying, “I’m not going to race in the chase because I’m not seeing clearly.” I think we’re on the cusp, maybe, of seeing a cultural change, and if can start in the youth football and we can see an example of things going forward.

The other thing that I just wanted to mention is, those of you that played when you were nine, I didn’t play until I was older, but I was stunned that my nine-year old son’s coaches were screaming at these kids. They’re looking at butterflies and stuff on the field, and their coaches are screaming at them for not being intense enough and not hitting hard enough and not getting in there. I think it’s got to start from the bottom up, and it’s got to be a radical cultural change in order to really be okay with the fact.

My last thought here is that Junior Seau was a warrior. He would never come out of a game. He would drag his broken body into that because he didn’t want to show weakness, he didn’t want his own teammates to see that he wasn’t playing, and that sort of idea of being a warrior and playing through injury, I just think that’s so unhealthy and something that culturally needs to shift.

Thomas: One thing that needs to be brought out is that it’s not just concussions, per se. One of the problems is just repetitive

blows to the head, without a concussion. To address that, you need less contact. You need as little contact in practice as possible, where you can still play the game safely, and then maybe in games you can address some of the hitting that goes on away from the play, that is really some of the most severe hitting on the field. Go to the game this weekend and watch what's going on away from the play. Watch hitting that's just really not necessary for the play. Todd might disagree with me, but to me it looks pervasive; it looks like it's just part of the game, and maybe clean up some of that.

Wade: You hit on something, and I agree with you because they also do need to deal with the hypocrisy within the owners. You have some really good-hearted owners out there, so I don't look at them as the greedy guys up there. They do have a business and they have to run their business. As far as players receiving higher salaries, it's a good thing. I completely agree, and it also needs to start at a younger age, just letting people know – not scaring them to death, but teaching them safety number one. You're taught at an early age not to duck your head when you strike an opponent. This has prevented many spinal issues. We've learned from that from day one, it seems like. My teammates used to joke about the hits comparing them to a car wreck every time you really hit somebody hard. It's just boom, one after another, me hitting a defensive end, over and over again, because you're using your hands, but a lot of times it's just like a ram. It's over and over again, so that certainly causes problems down the road, but we would joke about it, saying, "well, if it's a car wreck, I guarantee I could survive a heck of a car wreck," a real one, because you're used to that type of contact. There's just something to be said for it.

I played with Junior, and he played with the Dolphins. Seeing the guy approach practice every day, seeing him be the first guy in the locker room, his whole mentality, you really hit it when you said, "warrior mentality." The Polynesian culture, I don't know if that goes back to that or what, but the guy was tough as nails, greatest guy on the earth. I'm not going to go to even guess why that happened, why he did it, was it head-related or was it depression-related from a different reason? I don't know. I do know someone like that playing that long, for 20 years, yes,

they're going to sustain some type of brain injury. They also want to play for 20 years at the same time, so when they exit the game or are forced to exit the game, being able to go and switch gears to, "what am I going to do now?"

For myself, I actually moved back here. I didn't know where I wanted to move to. When I got drafted I watched TV to find out what city I'm going to move to. I'm really watching the TV ticker, and you get a phone call, okay, you're moving to Miami. Yes. There's some other cities like Seattle or Pittsburgh – somebody else is on the clock before then that wasn't as pleasant of a place, or good weather like that. When you leave, too many aren't prepared for that, and that isn't head-trauma related, it's going on the other side, not being so shell-shocked or surprised when you do exit the game. If you don't leave on your own, if you are forced out of the League, a lot of people go back and sit on the couch, and think "what do I do now?" A lot of people don't even have a house or somewhere else to go. For instance, I had a little condo here, so I come back to Oxford and happened to be at the end of the season, so I caught an Ole Miss game and said, "this is great, I'm staying here." That's the honest truth. It just got to the point where I just didn't have the hunger for the game like I used to have.

The next two years I purposely didn't watch pro football because I still had friends out there. Even though it was after my ninth season, I didn't want to know that I made a bad decision and regret it. This is also leaving the League after 2008, and that's probably about the worst time you want to leave the NFL is after 2008, with the terrible economy. As far as the finances, I guarantee the majority of the NFL were wiped out, former players. Some people invested well or did some of the right things, but it's something that's gripped a lot of players. Going back to the variables, there is something to be said about that.

Standen: I just wanted to mention a case, actually from the same time period, from the 1970's. This is a baseball case. There was an outfielder for the New York Mets named Elliott Maddox, a good player, sort of a borderline all-star player. On the day of a game, the field at Shea Stadium where the Mets played was just very wet, a lot of rain. Maddox said, "I really don't think it's safe for me to play out there. I don't want to play." He went to his coach and the coach said, "get out there, we need you; it's a big

game.” He even went to the General Manager, or some Assistant General Manager, I believe it was, and said, “I’m not really comfortable playing the game.” The Assistant GM said, “this is part of the deal, right, that when there’s a game, you’re our right fielder. We need you out there.” So Maddox goes out and plays, slips and falls and damages his knee in all kinds of different ways, and he’s never the same again. He played a few more years here and there as a journeyman and soon he was out of the league, and he sued. Here’s my point: the court told him “you had a choice.” The court didn’t say it was up to the league to say don’t go back in the game, it wasn’t up to the coach to say it’s not safe for you. The court said no. It’s a man’s game, you’re a man, you make this decision, and Maddox, you knew it was slippery, you took the field, you could’ve said I’m out of here, you could’ve walked away, and the fact that you didn’t means you don’t recover, and he got nothing.

That’s the mentality, for better or worse, that we see in the sports litigation and tort cases. I think we have to think about that, that maybe there is a cultural change that needs to be made. Maybe it’s not necessarily to justify the players, but also by the spectators or by the lawyers or, I guess, the professors. When they’re dealing with sports, it’s a different kettle of fish, if you will, a different thing. We can’t infantilize the players. They’re grownups. It’s been mentioned what about post-career care? A lot of ex-players themselves have started their own businesses that sell, if you will, post-career services, counseling, to their fellow competitors. In other words, the players can create markets, they can take care of themselves to a certain extent, and I’m not trying to be normative, I’m not trying to say that’s how it should be, but I’m just suggesting that if courts follow the tone and tenor of what we’ve seen in the past, the answer could be to these players, as harsh as it may sound, that even though the coach was telling him to get back out there, you made that choice, and you got back out there, and you suffered the consequences from that.

Gregory: I’m just going to make a practical comment to answer your question about what else can be done, and it’s going to come back to something that Todd said, that this goes outside the NFL in my mind and really down to high school and youth football. If there’s one thing you can do, it would be a certified

athletic trainer at every high school in America, and every youth football. That's better than a coach, that's better than a parent, that's better than a referee, that's better than an EMS person. It goes back to something you said, that there's got to be somebody better. I'm going to tell a very brief story.

Now it's required on the sideline that at every NFL game there is a neurosurgeon. Neurosurgeons go through nine years of training to become a neurosurgeon. Zero of those years are spent on the sideline. They operate on a lot of bad brain injuries. They don't treat concussions. We go cover a horse race in Nashville, somebody fell off and hurt their head and had to be life-flighted. The next year we were required to have a neurosurgeon and neurologist on-site because this had happened. You can't operate on the field. You can only operate in the hospital. The next player that falls off, a neurologist calls on the radio and says he's got his chest wound, he's got a piece of wood sticking out of his chest, so we go pick up this guy, and he's talking to me, I'm like, there's no way he's got piece of wood sticking out of his chest. I take off his jacket, and he's got a Kevlar vest on, a piece of wood is sticking in his Kevlar; he takes his jacket off, and he goes and rides the next race.

These people are not used to taking care of athletes. None of their training is going to take care of athletes. Sports medicine docs, that's what we do; athletic trainers, that's what they do. You really want people that do this on a regular basis, that understand athletics. Does a neurosurgeon have more training than me? Absolutely. Do they have more training than a certified athletic trainer? Absolutely. This is what we do on a regular basis. There's not enough resources to have a neurosurgeon at every high school football game; it's not possible. You want the best person you can get for the least amount of money; that's an athletic trainer.

Berry: All right, one more question from me and then I'm going to open it up to the audience. I think the other collateral consequences of the litigation and of this increased attention to concussions is this hesitancy of parents to say, "I want my kids to play football," or even weighing the consequences. I think Dr. Gregory's point about really having to connect the dots between the concussion and the brain injury needs to be done more medically, and there's a lot of studies going on, but do you all see a

world in which this is going away, which football is going away, or is it just a situation where it's going to continue on, and maybe the answer is just to give people better medical care, and you just really assume the risk by playing, and that's the world we live in?

Wade: People, including myself at one point, and this is funny coming from an offensive player, I remember when they first started regulating helmet-to-helmet over the secondary. A wide receiver coming over the middle, and I thought sometimes it can be called a little too much, you know sometimes it's accidental. I think it's a good rule, absolutely I think it's a good rule. That's a proactive measure that they're taking. Let's go ahead and throw helmets out there; we don't know if that can really – and I believe Dr. Gregory on that – helmets are helmets. I don't believe it's so much a conspiracy that they would send a lesser helmet to you. When it's your players, you're invested in your players; they're like your cattle. They want them to be healthy. That's just the way the owners look at us, so that is part of it. I feel like they are taking the right steps now.

What has happened in the past, that's a different story. 2000, my rookie year, and from that point on I will say that I saw trainers making an effort to prevent someone back onto the field if they sustained a concussion or heavy hit. That was right around that time when that switched, so maybe the first two years they pushed somebody back out there. It's really a chain-of-command, or demand, really, because they start from the top with the owner, the coaches feel all the pressure that they're going to get fired, then the players are under them, and it trickles down that way. As a player, and my first four years I never got seriously hurt, I had a Grade 2 MML sprain, I had to miss the game, but I started the rest of all the games, and it crushed me to not play that one game. I was embarrassed, and it wasn't that my teammates were laughing or giving me grief about it. I felt guilty that I was letting the team down, and it was something that – it was the absolute worst feeling in the world. It's not like skipping school; it's fun for a second, but then you're looking around thinking "this isn't fun anymore." You feel almost a sense of depression by not being out there playing and contributing. If you're at home watching on TV yes, that's much worse; then you're like, oh gosh, has a really good game, then I might lose my job. You start getting that, too. The

team's doing bad, it starts going back up. The coaches start feeling pressure, they start treating the players very strange, and then they start selling each other out, and the whole thing – it's kind of like a business that's about to go under. It's like an Enron. Everybody's doing all this stuff, and it's like the whole ship's sinking. It all comes down to money.

There were two to three times in my career that happened to me that I felt that I would never do it again, that I was hurt, especially when it's below the waist, knees, legs, ankles or something like that, and knees, and you go back out there, you're really less of a player than the guy that would be filling your spot. You do whatever you could because you're not, through competition, but almost through pride, you don't want to let anyone else know that you cannot play the game. Through taking pain killers, and the trainers never knew about this, I go and find those on my own, it's out there. Things like that, whatever it took to mask that pain where, you know, well the next week I'll be feeling a little better because I'll be a little bit healthier – well, you go out there and you're a little numb and something happens. There's been some tragic cases, people doing things like that, but there is that guilt there. I always wanted a coach to come to me “no, we're not letting you even travel this week.” But if they'd leave it out there just a little bit for the player to decide his fate, the players are going to go for it, and want to play in that game. Things like that, and whether it's head trauma or anything else, that's something that I don't think, has really ever been concrete.

cummings: Mr. Wade's talking about the cultural shift I'm talking about. Oftentimes when we talk about concussions, we're talking about a player actually saying, “I'm seeing stars,” and very few players are likely going to self-report as they feel, as Mr. Wade did, this sort of intensity about playing.

There's two primary forensic pathologists and Dr. Julian Bailes I talked about earlier today, a neurosurgeon. There are probably, at least in all of my research, the two primary proponents of concussive injuries leading to brain damage in these football players, and they're the ones that are, in my mind, leading the charge in the research as to how dangerous it is. Neither of them are calling for an end to tackle football. They're talking about making it safer, and they're talking about being better

about it. In all of the research I've done, the strongest proponents of brain injury, and 113 out of 116 NFL players we researched had brain damage, they are not calling for the end of football. What they're calling for is better helmets, more safety, more awareness, different culture. I don't see football in our country, a multi-billion dollar industry, going away. I just don't.

What we haven't done today is talked about the positives of playing a team sport, or playing football. Those of us that have played football growing up, or any team sport, know the camaraderie, and I believe that I didn't get into drugs and all other things because I was playing team sports when I was coming up, and I wanted to – I'm sure you're looking at me, you can see what an athlete that I was – I wanted to be in tiptop physical condition, and it wasn't going to come by taking drugs and getting involved. We haven't talked about the great things about playing organized sports.

The last thing that I wanted to do is I wanted to clarify a thing Dr. Gregory and I disagreed a little bit on Junior Seau. He may know better than I, but Junior Seau's autopsy came back without any signs of brain damage, but Dr. Omalu said that that's not rare. What they need is to send his brain tissue to the National Institute of Health to see if there is any sort of tau proteins or whatever, and I don't think that report has come back.

Gregory: Yes.

cummings: I think that his initial autopsy was no brain damage, but his brain tissue is currently at the National Institute of Health, so we'll find out whether there was tau protein and brain damage and what have you when that report comes out, and it's still pending.

Gregory: I'll bring up one question which I got asked this week in clinic, which is a parent to me saying "would you let your kid play football," and I think that really comes back to what you're asking. I do believe that there a going to be less parents letting their kids play youth football unless the rule changes about when you can start hitting in youth football, and then it may not have that effect. I do believe there will be fewer kids playing because parents are more worried about them. Do I think that'll kill football? No. There's a whole lot of kids playing youth football

that never move on, but I do think there will be less kids playing youth football.

Thomas: I was just going to say football's not going away, not in the foreseeable future. It's more popular than it's ever been. A good ticket to the Superdome for a Saints' game is \$300.00, and it's sold out for the season before they kick off the first game. The first time I went to Ole Miss games they were played in Jackson, because the stadium here in Oxford held about 20,000 people. They played in Jackson because it held 40,000 or 45,000 people, and look how big the stadium is now. Football is more popular than it's ever been. If you want to see sports that are going by the wayside in popularity, look at NASCAR, look at the LGPA, the women's professional golf tour; those are sports in decline. Football is not a sport in decline.

Berry: Let's open it up to you all. We've got a fantastic panel here, and surely you must have some questions.

Speaker 1: Okay, in light of the bounty scandal, it's two weeks since they incurred the Federal Board's violent and aggressive behavior. Should coaches also share some of the responsibility and liability, and could this even assist in the cultural shift that you refer to?

cummings: I'm really anxious to see if Mr. Wade's going to have some insight into bounty stuff on teams; I'm sure he doesn't, but the one thing that I'll say is a couple of my guys played for Tony Dungy, and a couple of my guys played for Gunther Cunningham and Marty Schottenheimer, and there's just different ways to coach football. Tony Dungy was a builder of men; "let me show you an example to be a good man; this is all about doing things right." Marty Schottenheimer and Gunther Cunningham and Ray Rhodes were like, "we're going to war! They're trying to rape and pillage our families; we have to destroy the enemy!"

These are reports I've gotten from the players. There's different kinds of coaches, and I can totally imagine Gregg Williams saying, "go out and take this guy's head off. If we beat the hell out of him, we're going to win this game." I can totally imagine that being the case. I don't know if he was saying, "I'll give you a thousand dollars if you do it," but I think that it's a multi-billion dollar industry. These coaches are coaching for their jobs. Mr. Wade was just talking about how when the ship's going

down, everyone starts undermining each other and pointing fingers on the coaching staff. It's crazy; it's a crazy business. I think coaches have to take some of the responsibility for the safety of their players, and I think it's difficult to do that when you're in a \$5 million contract, your livelihood or whatever is on the line. I don't know if it's a great answer to your question, but coaches certainly bear responsibility for the safety of the players. I love coaches like Dick Vermeil and Tony Dungy and Lovie Smith. I don't have much patience for Bill Parcells and Marty Schottenheimer and those that are like, "they're going to come in and try to take your wives and your children away from you, so you have to destroy them."

Wade: My friends have asked me about the whole Bountygate scandal and all that stuff. Gregg Williams was the defensive coordinator when I was in Washington, so I know him fairly well. Not that I agree with the act of it; I think it got overblown a little bit in the media, and the biggest thing when I knew it was overblown was I was watching ESPN and it was showing it in a highlight video, and it had this ominous music playing, which was basically a defensive highlight video of the Saints. I'm like, ok, gosh, what are they doing? You see, okay, it's a sack, it was a safety in the end zone, these are good highlights! I never once saw helmet-to-helmet; I never saw those plays, but ESPN was trying to make it look that way. I'm really not defending the Saints coaches all the way because they were warned, and they did it again, which also tells me it wasn't that it was a necessity of the coaches. Number one they, I'm just guessing, that they thought that it wouldn't be exposed, but also I don't think they were trying to hide anything. I think that just seeing London Fletcher and some old teammates come out of the meetings laughing. It was always kind of humorous. I think some of the paying money for a big hit and things like that, probably, but it wasn't ill-intended to really hurt anybody. What defensive player, if he's zeroing in on the quarterback, doesn't want to kill him? You hope the pads protect the player, and you make the pads as good as possible, and as guys are getting bigger and faster and stronger, as technology advances, there are going to be head injuries out there, and it's what you can do to protect that on the front end. I'm just guessing, but from the legal standpoint, I would

think, if I was the NFL, and the contract, when you sign it, it's letting you know everything that's out there about what lies ahead.

As far as the Bountygate stuff, that is part of the culture. I don't know one coach that hasn't said, "I want you to knock his head off." Now does he want you to really rip his head off and knock it down the street— no, it's just an expression, but they really want you to take care of business, and if that calls for a hard hit to a player, so be it.... If it's over-regulated, we may get much more than we wanted. Talk about an unintended consequence. As an offensive tackle, if I'm blocking somebody, and trust me, I used to be a lot bigger so I could actually push people over, but did I pancake them too hard? If I put him on the ground, did his head hit the ground hard, or was it too hard? It can be a slippery slope there, which would be concerning to me as a player watching this. Initially we all thought "this is ridiculous, this helmet-to-helmet stuff, they're going to just kill football." It didn't and as you can see, you're starting to see more and more big hits out there. Even though that is still there, even though it's a big fine, those players know that they're going to get, I think, \$25,000.00 for a helmet-to-helmet hit, at least when I was playing, or for a fight or things like that. It's tough to regulate; I don't know how that's going to be settled, but I think from a legal standpoint, I'm just guessing, I'm not an attorney, but handling that on the front end for the current players and the new draft picks coming up next year, that's going to have to be addressed when they sign their contract.

Speaker 2: My question kind of goes to something that Mr. Thomas said about he feels the NFL should own an obligate responsibility for the head trauma. Obviously we all recognize the head trauma and especially when you talk about the profession and suicides, take the case of Mr. Duerson. But if the NFL were to own up to all head trauma issues, would they then subsequently have to own up to all severe injuries, like in what the NFL addresses this concussion issue, and if forced to, will they then be liable for all other serious injuries - knee injuries, hip injuries, football, organic, muscle-building, back mass building – where do you draw the line if you do it all?

Thomas: I don't know where the line is now. Maybe Todd can shed some light on this. If you blow a knee out playing football and it puts you out of the game, do you have health coverage provided by the NFL that covers future treatment to that knee, or not?

Wade: I've been out of the game for a few years, I have two more years left in my health care coverage. Once you're done playing, you have health care for five more years and you're done, you're on your own. I'm sure it will be fairly expensive, but I've had it for five years. You also have workmen's compensation that helps with post football surgeries and physical therapy. I don't see any type of cardiovascular issue ever coming up, or respiratory, I don't see how they're going to monitor that— that would be pretty tough to pinpoint. A player coming back and saying "my knee wasn't ready, and you pushed me in the game; you told me I was ready," because they do. I will say the younger guys, the least important guys, lower on the chain of value, they are more likely to be pushed out there much more than someone else. Number one they're not as valuable to the team in salary, but they're also viewed as just a young guy. You can see that, and that's not acceptable, but you can see how that's done, and that's almost a natural action by the coaches, and the coaches put pressure on the trainer, and the trainer ends up caving in..

cummings: I would just quickly say Roger Goodell recently argued that the NFL does a good job of taking care of its players after they're retired. There's benefits, I remember at least when I was repping players, that the teams were required to triple-match their 401K contributions. There's benefits and pensions that are available if you contributed to them over the years; they're not available until 45-50.

Wade: Forty-five at the youngest; most people take it at age fifty-five, it is two for one, but yeah, it's great. Unfortunately, It is not protected from inflation.

cummings: Getting money that you've put into your system while you were playing, so Goodell actually argues, I don't know if he believes it, but he argues that they actually do a good job, or at least a better job of taking care of retired players than they used to. Workmen's compensation is something that he brought up. I didn't know about the insurance ending at five years. I really like

what was said earlier about the NFL just taking ownership because the players made the League. I know that the Commissioner and the owners like to think they did, but the players make the League. We would not love football without these guys out there putting their all into the game, and I just don't think the League, yet, takes care of the players that make it so successful.

Berry: We've got time for one more question.

Speaker 3: All right. Dr. Gregory, you said earlier that there is a need to have certified athletic trainers at every single high school football game. What does it take to become a certified trainer, and then is it feasible to have them at every single game, and possibly even down towards middle school as well as youth football?

Gregory: To be a certified athletic trainer you need an undergraduate degree and then you actually can do a graduate degree in athletic training. The State of Texas requires an athletic trainer at every high school, so it's certainly feasible, because it's done in the State of Texas. As far as how do you make it work you can put the burden on the schools, but schools are already having a tough time. Our model, we employ 40 athletic trainers at 40 high schools through our Sports Medicine Center, so we actually pay the athletic trainers to go out there. There's many models of making it work, and I see no reason why it couldn't work. Certainly, if you look at Texas, it has worked. I don't know any real reason against it. Certainly, you put in middle schools in the mix and then youth football in the mix, that's a much bigger leap. You're talking about a lot more athletic trainers, but starting with the high schools, at least it's a place to start.

Berry: All right. Thank you all. We could have this conversation for hours, but we didn't want to hold you longer than two hours. Let's give our panel a round of applause; this was fantastic. Thank you all so much for coming, and we'll see you next year. Thanks.

