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In flag fracas, Hernandez falls out of focus

On Friday at a political rally in Huntsville, Ala., President Donald Trump called on NFL owners to get rid of “son of a b——” players who choose to demonstrate during the national anthem.

This divisive statement, followed up by tweets from the president decrying NFL players, was met with public outcry from the public, certain NFL owners and all NFL players. On Sunday, NFL players responded. Television coverage around the country was fixated on which NFL teams participated in the singing of our national anthem and whether NFL players were standing, sitting or kneeling during “The Star-Spangled Banner.” Monday’s headlines, almost universally, centered on the topic.

The president reignited the controversy over the proper forms of civil discourse and stirred racial tensions. His comments sparked arguments about the legitimacy of the protests started by Colin Kaepernick, a former NFL quarterback that is now unemployed after kneeling during the playing of the national anthem during last year’s NFL season.

Whether or not by design, President Trump’s statements overwhelmingly overshadowed the news that broke only a day before he went on his tirade — that convicted murderer and former NFL superstar Aaron Hernandez’s brain demonstrated stage III chronic traumatic encephalopathy, or CTE, following his suicide in a Lancaster, Mass., prison cell. Hernandez was only 27 years old.

Hernandez’s neuropathology results demonstrated tau protein depositions in the frontal lobe of his brain, brain atrophy and large perforations in the septum pellucidum, a central membrane, all demonstrative of advanced CTE according to Boston University’s Dr. Ann McKee.

CTE is associated with mood and behavioral changes, memory loss, cognitive deficiency and, sometimes, suicidality. CTE is a neurodegenerative disease that

progresses through four worsening stages. The stage III findings in Hernandez’s 27-year-old brain were similar to the findings in Junior Seau’s 43-year-old brain and former Chicago Bear Dave Duerson’s 50-year-old brain.

The Hernandez revelation came at a particularly troubling time for the NFL. In July, Boston University’s School of Medicine published its most detailed report on its CTE findings. Jesse Mez, et al., “Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football,” 318 JAMA 313, 313-400 (2017).

The university revealed that 110 of 111 former NFL players’ brains it analyzed demonstrated CTE.

Then, on Sept. 19, a study published in the journal *Translational Psychiatry* found that playing tackle football under the age of 12 exposes children to repetitive head impacts that may double their risk of developing behavioral problems and triple their chances of suffering depression later in life. M L Alosco, et al., “Age of First Exposure to American Football and Long-Term Neuropsychiatric and Cognitive Outcomes, *Translational Psychiatry*.”

The NFL relies upon America’s youth replenishing the talent pool in the professional ranks. With youth football participation in serious decline, the NFL was on its heels.

Until Mr. Trump unknowingly came to their rescue. Without Donald Trump’s statements and the resulting backlash, the dialogue surrounding this weekend’s NFL games would have focused on Aaron Hernandez’s CTE diagnosis and the compiling medical literature surrounding the risks of football. Instead, the weekend had a much different focus.

Indeed, the Hernandez estate’s case against the NFL and the New England Patriots LLC will be a fascinating one to follow in the months ahead. The federal lawsuit, filed in the U.S. District Court of Massachusetts, highlights the NFL’s historical deception of the link between repetitive head trauma and long-term brain damage, such as CTE.

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BY WILLIAM
T. GIBBS



William T. Gibbs is a trial attorney at Corboy & Demetrio P.C., representing victims of negligence. He currently represents several former NFL and NHL athletes and their families. He can be reached at WTG@corboydemetrio.com.

It alleges that these defendants’ “negligent conduct ... deprived [Aaron’s daughter, Avielle] of the companionship and society of her father.”

These same types of allegations were made in more than 200 lawsuits that were consolidated before U.S. District Judge Anita Brody in the Eastern District of Pennsylvania and resulted in a class-action settlement estimated to compensate former NFL players approximately \$1 billion over the next 65 years. *In re: NFL Players’ Concussion Litigation*, E.D. Pa., 12-md-2323.

But, Hernandez’s case does not fit within the class-action case. By its plain terms, the settlement only covers players who were retired by July 7, 2014. The class action settlement does not bar Hernandez’s heirs’ claims because he was not a retiree as of the deadline. Because Hernandez was not retired as of that time, the class-action settlement’s release of “any and all past, present and future claims ... arising out of, or relating to, CTE” does not apply to his case.

What will come of players’ claims if those players were still active in the NFL as of the summer of 2014?

The defendants will provide a multipronged defense. The league’s spokesman told reporters that “We intend to contest the claim vigorously ... Any attempt here to paint Aaron Hernandez as

a victim, we believe is misguided. His personal story is complex and doesn’t lend itself to simple answers.”

In addition to contesting the case on its merits, the defendants will seek procedural dismissal. The Patriots will file motions to dismiss based upon the exclusive remedy provision of the Massachusetts workers’ compensation scheme. Mass. Gen. Laws Ann. ch. 152, Sections 1-86 (2017).

The NFL will move to dismiss based upon perceived preemption pursuant to Section 301 of the Labor Management Relations Act, arguing that any duty owed to its players is the subject of collective bargaining. 29 U.S.C.A. Section 185 (West).

Causation will be hotly contested. Undoubtedly, the number of head traumas sustained by Aaron Hernandez while at the University of Florida, Bristol High School and in Pop Warner football will be highlighted by the league in which he only played for three seasons.

Certainly, the NFL will argue Hernandez’s tragic transgressions were not in any way related to his degenerating brain and that CTE played no role in his premature death.

But, if Hernandez’s case survives those potential pitfalls, discovery will be extremely problematic for the league. Settlement of the class-action case at an early stage meant that NFL documents were not produced in discovery. Here, the smoking guns may be many. Additionally, it is reasonable to assume that the depositions of Robert Kraft, Bill Belichick, Paul Tagliabue and Roger Goodell will proceed.

But until then, the NFL gets its wish — no one is talking about CTE or Aaron Hernandez. Certain NFL owners publicly railed against the president for reigniting the racially fueled national anthem protests but, privately, these owners are relieved that their president unwittingly deflected attention away from the only issue that can threaten the very existence of their \$13 billion a year enterprise — CTE.