

THE TEAM PHYSICIAN: AN ANALYSIS OF THE CAUSES OF ACTION, CONFLICTS, DEFENSES AND IMPROVEMENTS

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“Those of us who work as team physicians enjoy the athletic milieu a great deal. But it is important to keep in mind that we are present because of a fundamental tension that exists between health and performance. Medicine concerns itself with health. Athletics concerns itself with performance. These two goals are often at odds”¹

INTRODUCTION

The links between the sports world and the legal arena are multiple and diverse. Issues become more specific when addressing the relationship of team physician to the sports world. It begins on many different levels, but becomes significant when an athlete is injured. Many do not know what exactly happens when an athlete suffers an injury. There are instances when the athlete is assisted off the field only to return a few plays later. There are those instances where the player is taken off the field with assistance from the emergency medical crews. Commentators provide spectators with some information about the athlete’s injury, but rarely divulge all of the details. The fiercest of fans glow with revenge. Fans display admiration for the player who returns to the game. Sometimes the player returns with stitches, like in ice hockey, and with the unbreakable competitive attitude for the valor of the game.

The important issue surrounding every sports injury is whether the athlete is sacrificing his or her body at the expense of more extensive injuries. That question becomes whether they know or were advised about the extent of their injuries. The “odds” expressed by Dr. Matheson above are those team physicians and staff must contend with before allowing the athlete to return to the game.² It is then for the lawyers through zealous representation of the athletes to determine any liability; the evens to those “odds” of the team physician’s decision.

The team physician struggles with numerous factors that develop from possible conflicts of interest to make his or her decision. Those conflicts of interest are the starting point for which a lawsuit may arise. The diagnosis of the injury is the decision of the physician after a compulsory analysis of the avenues of each interest. The proper decision may conflict between the player’s health and the many desires. This paper will discuss the typical claims brought against the team physician. It will then discuss the reasons that problems develop, such as conflicts of interest. The next section will discuss potential defenses to such claims brought against the team physician. Afterwards, this article will suggest several improvements to the system. Social policy issues are implied throughout, but the team physician’s goal is to be aware of the claims, the conflicts, the defenses and improvements. Their decision should ultimately be reflected by the health of the athlete as the most important concern.

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¹ Gordon O. Matheson, M.D., Ph.D, *Maintaining Professionalism in the Athletic Environment*, 29 *Physician and Sports Medicine* 2, Feb. 2001, at 1.

² *Id.*

II. TYPES OF CLAIMS BROUGHT AGAINST TEAM PHYSICIANS

Athletic competition has developed into an enormous business entity as well as a pivotal part of our society. Each competition brings thousands of people together. Out of these competitions, rivalries develop, heroes emerge, and the fans' taste for winning increases. All of this leads to greater ticket sales, but the demand for winning specifically increases the athlete's obligation to play, even when injured. As a result, litigation in the sports arena has increased. Team physicians are among the multiple parties involved.

The most common lawsuit against team physicians for their actions in treating an injured athlete is negligence dressed in a claim of medical malpractice. Fraudulent misrepresentation or concealment of medical information and intentional infliction of emotional distress are other common lawsuits. Other claims may arise such as battery, assault and defamation, but those may be outside of the physician's treatment of the athlete, criminal in nature, or coupled within a medical malpractice action.

A. Negligence - Medical Malpractice

Team physicians are usually found on the opposing side of a negligence action initiated by the athlete.³ The basis of the action is formed in a medical malpractice complaint. Medical malpractice creates a presumption that the team physician has failed to comply with the usual standards of the practice of medicine.⁴ For an athlete to achieve a successful verdict against a team physician, he must prove four elements.⁵ These four elements are the same as those needed for any successful negligence claim: duty, breach of that duty, causation, and the existence of damages.⁶

1. Duty

A duty is that "obligation to which the law will give recognition and effect to conform to a particular standard of conduct toward another."⁷ By showing that a physician-patient relationship existed, the duty can be proved.⁸ Usually that relationship is a consensual one where the patient and doctor, by their objective manifestations, enter into that relationship.⁹ Those objective manifestations include not only the patient's expressed or implied consent, but also the physician's willingness to enter into the relationship.¹⁰ But what happens when a third party relationship exists between the athlete and the team doctor? A physician's duty may arise "when the physician contracts with or is paid by a third party."¹¹ A physician who performs medical

³ Craig A. Isaacs, *Conflicts of Interests for Team Physicians: A Retrospective in Light of Gathers v. Loyola Marymount University*, 2 Alb. L. J. Sci. & Tech. 147 (1992) [hereinafter cited as "Issacs"]

⁴ David W. Louiswell & Harold Williams, *Medical Malpractice* para. 8.01 (1991) [hereinafter cited as "Louiswell & Williams"]; John C. Weisart & Cym H. Lowell, *The Law of Sports* § 8.08 (1979).

⁵ Elizabeth M. Gallup, *Law and the Team Physician* 18 (Human Kinetics 1995) [hereinafter cited as "Gallup"].

⁶ See generally Louiswell & Williams, *supra* note 4; W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30 (5th ed. 1984).

⁷ Joseph H. King, Jr., *The Duty and Standard of Care for Team Physicians*, 18 Hous. L. Rev., 657, 661 (1981) [hereinafter cited as "King"] citing Prosser and Keeton, *The Law of Torts* at 324 (4th ed. 1971).

⁸ See Gallup, *supra* note 5. This is part of the duty criteria established by the American Medical Association.

⁹ See King, *supra* note 7.

¹⁰ *Id.*

¹¹ See King, *supra* note 7, at 664.

services for a team will owe a duty of care to the athletes on that team, but only within the scope of the medical services offered.¹²

The standard of care under this duty for team physicians has been an issue of much debate.¹³ At the most basic level, this standard may be determined by a degree of care that the physician has performed before under similar circumstances.¹⁴ However, there has been an insurgence of many different types of physicians, including family physicians, orthopedists, general practitioners, osteopaths, internists, general surgeons, pediatricians, and obstetricians and gynecologist acting as a team physician.¹⁵ Because of the diverse specialties in this field, minimal and optimal standards of care have been discussed.¹⁶ Some commentators stress the need for a higher standard of care – the standard of care of a physician within a certain specialty.¹⁷ Other commentators, however, acknowledge that courts have not recognized sports medicine as a separate medical specialty and label the applicable standard of physician conduct as that of “good medical practice.”¹⁸ The result is a standard measurement of the physician’s conduct by what is commonly done by other physicians in the same specialty.¹⁹ Since courts have yet to recognize sports medicine as a separate medical specialty, it appears that a team physician’s liability for malpractice will still be decided on a case-by-case basis.²⁰ Emphasis will center upon the treatment and medical care to the injured athlete for an evaluation of the appropriate standard of care.

Several other duties exist within the treatment and care to the athlete. A physician has a duty to disclose “any material information concerning the athlete’s physical condition.”²¹ This includes providing information to the athlete of any conditions or diseases, any risks of

¹² *Id.* It is a third party relationship because the owner or team business entity is actually paying the team physician’s salary.

¹³ Twila Keim, *Physicians for Professional Sports Teams: Health Care Under the Pressure of Economic and Commercial Interest*, 9 Seton Hall J. Sport L. 196 (1999)[hereinafter cited as “Keim”].

¹⁴ See Gallup, *supra* note 5, at 18-9.

¹⁵ See Gallup, *supra* note 5, at 2. Dr. Gallup points to a survey done in 1987 by the “Physician and Sports Medicine” of 29,000 team physicians leading to a result of these categories. See also David L. Herbert, *Legal Aspects of Sports Medicine, Second Edition* 1, (PRC Publishing, Inc. 1995)(details many more providers including rehabilitative physicians, chiropractors, psychiatrists and psychologists, dentists, podiatrists, nutritionists, and many more specialties).

¹⁶ David L. Herbert, *Legal Aspects of Sports Medicine, Second Edition* 1 (PRC Publishing, Inc. 1995)[hereinafter cited as “Herbert”].

¹⁷ See Keim, *supra* note 13. See also Matthew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries*, 55 U. Pitt. L. Rev. 129 (1993)[hereinafter cited as “Mitten”].

¹⁸ See Mitten, *supra* note 17, at 144-45.

¹⁹ *Id.*

²⁰ See Keim, *supra* note 13. However, several organizations have developed a Consensus Statement detailing who the team physician is, what qualifications are recommended of a team physician, including training and clinical experience, what duties exist for the team physician, and educational opportunities that are available. Consensus Statement, The American Orthopedic Society for Sports Medicine, 2000. In fact, sports medicine is a recognized specialty of the American Board of Medical Specialties. Herbert, *supra* note 16, *citing New Specialties Created*, The Sports Medicine Standards and Malpractice Reporter 5(3):37, 1993. A certificate program has been established by the American Board of Family Practice, the American Board of Internal Medicine, the American Board of Emergency Medicine, and the American Board of Pediatrics to certify physicians in sports medicine. Gallup, *supra* note 5, at 3. But sports medicine and the team physician’s role have not been designated as a discrete specialty or subspecialty by the Council on Medical Education of the American Medical Association. *Id.* at 9.

²¹ See Keim, *supra* note 13, at 204, *citing* Walter Champion, *Fundamentals of Sports Law*, § 5.1 at 88, (1990 ed. & Supp. 1997). This duty is in compliance with the athlete’s right to determine what may be done to or with his body, but also trusting the physician’s judgment. *Id.*

continued performance, and any test results.²² It also includes instructions on treatment and if any further medical advice is necessary.²³ Coupled with this duty to disclose is the doctrine of informed consent. In order for an athlete to make an intelligent decision concerning medical information, he must know all the details relevant to the proposed treatment and problems from continued performance.²⁴

In obtaining the physician's accurate and meaningful appraisal about the injury, informed consent is one of the patient's greatest weapons.²⁵ Charlie Kruegar sued the San Francisco Forty-Niners partly based on the violation of this doctrine.²⁶ Charlie Kruegar, a professional football player, suffered an injury during a game that caused serious damage to his left knee. The team doctors failed to disclose the extent of his injury and instead supplemented treatment that compounded the injury without disclosing the effects of the treatments to his knee.²⁷ As a result, he received a large settlement against the Forty-Niners and the team physician. Other suits have also been brought by professional athletes using this doctrine and resulting in large settlements.²⁸ Informed consent can also be based on the team physician's diagnosis and treatment of a prior medical condition.²⁹ However, an athlete must prove that he would not have competed had he known of the undisclosed information in order to achieve a favorable ruling against the team physician.³⁰

Another aspect of the duty owed by the team physician is that of determining when an athlete can return to competition.³¹ This duty arises only after the injury has been properly diagnosed.³² Because team physicians have the responsibility for medically clearing athletes, they will also be liable for any harm should they fail to meet accepted practices in their specialty for determining when an athlete can return to play.³³ Athletes have filed actions against

²² *Id.*

²³ *Id.*

²⁴ *Id.* Informed consent may be implied if the athlete is unconscious at the time that care was given by the team physician. See *infra* note 30.

²⁵ See Herbert, *supra* note 16, at 174-75.

²⁶ *Id.*; See also Jennifer Lynn Woodlief, *The Trouble with Charlie*, 9-SPG Ent. & Sports Law. 3 (1991)[hereinafter cited as "Woodlief"].

²⁷ *Krueger v. San Francisco Forty Niners*, 189 Cal.App. 3d 823, 234 Cal.Rptr. 579 (1987). See also Woodlief, *supra* note 26. Krueger was not told that he was lacking his anterior cruciate ligament, rather he was given approximately fifty injections of cortisone (a steroid) and pushed by the Forty- Niners to compete. *Id.*

²⁸ See Herbert, *supra* note 16, at 175. See also Herb Appenzeller and Thomas Appenzeller, *Sports and the Courts* 240-41 (The Michie Company 1980)[hereinafter cited as "Appenzeller"]. Dick Butkis brought an action against the Chicago Bears' owners because the team physician failed to inform him of the extent of his injury and the owners forced him to play. Butkis settled out of court for \$600,000. *Id.* The family of Gerald Gemignani sued the Philadelphia Phillies on the same basis. *Id.* Bill Enyart conducted the same suit against the Oakland Raiders. *Id.* Kenneth Easley sued the Seattle Seahawks contending that the team physician did not inform him of the adverse effects of large doses of Ibuprofen that were given to him that damaged his kidneys. *Id.*

²⁹ For example, Hank Gathers had been diagnosed with a potentially life-threatening heart rhythm disorder, cardiomyopathy, and died during a college basketball game in California. His heirs sued the physicians claiming that Hank was not fully informed of the seriousness of his condition . . . and was given heart medication to enhance his performance. The lawsuit was settled. Mitten, *supra* note 17.

³⁰ Sigmund J. Solares, *Preventing Medical Malpractice of Team Physicians in Professional Sports: A Call for the Players Unions to Hire the Team Physicians in Professional Sports*, 4 Sports Law. J. 235 (1997)[hereinafter cited as "Solares"]. Terry Cummings, a former professional basketball player in the National Basketball Association, would not have had a claim because he played for years with full knowledge of his heart condition. *Id.*

³¹ See Mitten, *supra* note 17; Keim *supra* note 13.

³² *Id.*

³³ *Id.*

physicians based on an alleged negligent medical clearance recommendation.³⁴

A physician may also be sued for not clearing an athlete to play because of an athlete's prior medical condition. Anthony Penny, a college basketball player, missed opportunities to play and brought an action against a cardiologist claiming that the cardiologist acted negligently in refusing to give him medical clearance.³⁵ Some types of suits are based on the antidiscrimination laws under the Rehabilitation Act and the Americans With Disabilities Act. Each Act poses a different interpretation of major life activities, which may not include sports.³⁶ The team and team physician may not be liable for denying an athlete the right to participate in certain situations. For instance, Nicholas Knapp sued Northwestern University for disqualifying him from playing on the University's intercollegiate basketball team.³⁷ The court reasoned that the University's decision was legal under the Rehabilitation Act because the University's doctors determined that playing would be an unacceptable level of risk.³⁸ The court, however, noted that all universities need not evaluate the risk the same way, but when substantial evidence supports the "decision-maker," that decision must be respected.³⁹ The important aspect is that the school's perception of the threat of such injury cannot be based on unfounded fears or stereotypes, but rather it must be based on objective evidence.⁴⁰ In other words, objective evidence must be found before denying participation.

2. Breach

The breach of a duty is determined when the physician's conduct, by way of an act or omission, fell below the standard of care.⁴¹ As noted above, the standard of care will be determined on a case-by-case basis with emphasis on the practice used by other physicians in the same circumstances in conjunction with the standard used by other physicians within the same specialty as the team physician's. Expert testimony would be needed to establish the breach of the proper standard of care.⁴² Questions concerning proof of the breach focus on what the physician did, how dangerous it was, the physician's opportunity to discern danger, the availability of safer alternatives, and whether the physician knew about safer alternatives.⁴³

³⁴ *Id.* Professor Mitten points out several cases where the physician provided unsound advice and recommendations concerning an athlete's return to competition: the case of *Rosensweig v. State*, where a physician was found negligent for tossing out his own medical knowledge to adhere to a boxing custom; the case of *Mikkelsen v. Haslam*, where a doctor cleared an athlete to ski after a hip replacement; and the tragedies of Hank Gathers and Marc Buoniconti where physicians acted negligently in clearing them for athletic competition.

³⁵ See Mitten, *supra* note 17, citing Lawrence K. Altman, *The Doctor's World; An Athlete's Health and a Doctor's Warning*, N.Y. Times, Mar. 13, 1990.

³⁶ Paul Weiler and Gary Roberts, *Sports and the Law Text, Cases, Problems, Second Edition* 990 (West Publishing Co. 1998). Major life activities under the Rehabilitation Act are those of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. *Id.* Under the Americans With Disabilities Act, those include activities that the average person in the general population can perform with little or no difficulty. *Id.*

³⁷ *Knapp v. Northwestern University*, 101 F.3d 473 (7th Cir. 1996).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Richard Epstein, *Cases and Materials on Torts* 292 (Aspen Publishers, Inc. 1995)[hereinafter cited as "Epstein"].

⁴² *Id.*

⁴³ *Id.* citing Clarence Morris, *Proof of Negligence*, 47 Nw. U. L. Rev. 817, 834 (1953).

The “Principles of Medical Ethics” set by the American Medical Association establish multiple provisions for the physician’s standard of conduct.⁴⁴ Those principles (forming duties) include providing competent medical care and honesty in all professional interactions.⁴⁵ Nevertheless, the sports industry is replete with examples of physicians who breached the standard of care. For example, Dick Butkis sued the Chicago Bears and the team physician for negligence because of the physician’s multiple cortisone injections into his knees.⁴⁶ These injections were for the short-term needs of the team, rather than for Butkis’ long-term health.⁴⁷ Ron Morris sued the Chicago Bears and the team physician for negligence in a surgical procedure to repair knee cartilage.⁴⁸ The team physician attempted to conceal the negligence by erasing most of the videotape made during the surgery.⁴⁹ Bill Walton, a former professional basketball player, settled a lawsuit against the Portland Trailblazers for long-term damage to his feet due to injections of painkillers by the physician for the short-term needs of the team.⁵⁰ Each of these physicians breached their duty to the players to provide medical care primarily for the benefit of the patient and conducting treatment in an honorable manner.⁵¹

3. Causation

Causation is that part of a negligence claim where there must be some reasonable connection between the negligent act committed by the physician and the damages that the athlete suffered.⁵² Basically, the physician’s negligence must have caused the athlete’s harm.⁵³ Thus, in order to sustain a medical malpractice action, the athlete must prove the negligence caused his harm.⁵⁴ Dr. Elizabeth Gallup provides an excellent example of causation and damages when she describes

a football player that sustains a severe ankle sprain. The athlete then, attempting to catch a pass, runs into a goal post and suffers a concussion, a subdural hematoma, and dies. The duty to treat the sprain was clearly breached, but the damage is the athlete’s death, and the failure to properly treat the sprain did not cause the athlete to run into a goal post and die from a subdural hematoma.⁵⁵

The athlete’s estate would not succeed in a medical malpractice action against this physician.⁵⁶

⁴⁴ American Medical Association, *Principles of Medical Ethics* (June 2001) available at <http://www.ama-assn.org/ama/pub/category/2512.html>.

⁴⁵ *Id.*

⁴⁶ See Keim, *supra* note 13, at 218.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* Morris won \$5.3 million for the negligence. *Id.*

⁵⁰ *Id.*

⁵¹ See American Medical Association, *supra* note 43.

⁵² See Gallup, *supra* note 5.

⁵³ *Id.*

⁵⁴ *Id.* Harm can include a number of things like further long-term injury, loss of salary due to inability to play or present physical injury.

⁵⁵ See Gallup, *supra* note 5, at 19. It should be noted that Dr. Gallup is also a lawyer.

⁵⁶ *Id.*

Causation is evaluated on two different levels: cause in fact and proximate cause.⁵⁷ Cause in fact is where the physician actually caused the harm to the athlete. The illustrations above concerning Dick Butkis, Ron Morris, and Bill Walton are examples of cause in fact because the physicians administered the medication and performed the surgery that caused the ailments. Proximate cause considers the element of “whether the defendant’s conduct could be regarded as a substantial factor” in bringing about the harm.⁵⁸ The example by Dr. Gallup above, is illustrative of when the physician did not proximately cause the death of the athlete. One may argue, however, that since the physician did not bench the player because of the sprain, he should be liable. Although, that would be a question concerning proper treatment of the sprain. An interesting argument could be made with respect to the recent deaths of Northwestern football player, Rashidi Wheeler, and Minnesota Vikings football player, Korey Stringer, claiming that the lack of heatstroke identification and treatment by the team physicians proximately caused their deaths.

4. Damages

Damages are that element described by the actual harm an athlete suffered.⁵⁹ Awarding damages is essentially an attempt to place that injured athlete in a position he would have been in had the injury not occurred.⁶⁰ The athlete usually recovers money when he successfully proves all four elements of a negligence claim or, alternatively, a medical malpractice action. Again, expert testimony is needed to measure damages.

B. Fraudulent Misrepresentation or Concealment of Medical Information

Fraudulent misrepresentation is apparent when one fraudulently makes a misrepresentation of fact, opinion, intention or law with the purpose of inducing another to act or to refrain from action by reliance upon the misrepresentation.⁶¹ The intentional concealment of a material fact, which may be part of the misrepresentation, is also actionable fraud.⁶² The athlete must reasonably rely on the fraudulent misrepresentation to bring a lawsuit.⁶³ For example, Charlie Krueger’s comment is illustrative of the misrepresentation by the Forty-Niners’ physicians: “If I had an injury, I always went to the doctors If they said I could play, I played I relied on them to tell me not to play. I relied on the wrong people.”⁶⁴ The San Francisco Forty-Niners and their team doctors failed to make “full, meaningful disclosure” to Krueger about his injury and the treatment of the injury.⁶⁵ An award on this claim is simply one

⁵⁷ See Epstein, *supra* note 41, at 467.

⁵⁸ *Id.*

⁵⁹ See Gallup, *supra* note 5, at 20.

⁶⁰ *Id.*

⁶¹ See Epstein, *supra* note 41, at 1286 *citing* Restatement (Second) of Torts § 525.

⁶² See Woodlief, *supra* note 26; *See also* King, *supra* note 7.

⁶³ See King, *supra* note 7, at 680 *citing* Restatement (Second) of Torts § 526 (defining conditions under which a misrepresentation is fraudulent).

⁶⁴ See Woodlief, *supra* note 26, at 4 *citing* Padwe, *When Trust is Betrayed*, Sports Illustrated, June 27, 1988 at 80. Charlie Krueger was once regarded as one of the toughest defensive tacklers in professional football. *Id.* Today, Krueger suffers from “traumatic arthritis and a crippling, degenerative process that has left him unable to stand for long periods and unable to crouch, climb stairs or even walk without severe pain.” *Id. citing Krueger*, 234 Cal. Rptr. at 581.

⁶⁵ *Id.*

that an athlete was fraudulently induced into continuous play with an injury that will enhance permanent disability.⁶⁶

C. *Intentional Infliction of Emotional Distress*

Intentional infliction of emotional distress may be found where a physician makes a false statement or a statement with reckless disregard of its truth.⁶⁷ The conduct for which this action has been maintained is “where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”⁶⁸ Insults, indignities, threats, annoyances, petty oppressions, or other trivial comments are not actions usually determinative of intentional infliction of emotional distress.⁶⁹ Some courts hold physicians liable under this action for willfully or recklessly failing to perform the duty of making a good-faith attempt to provide adequate treatment or advice.⁷⁰

Don Chuy won a suit against the Philadelphia Eagles for intentional infliction of emotional distress.⁷¹ Chuy was a lineman for the Eagles when he sustained a shoulder injury in a game against the New York Giants.⁷² Chuy sought medical opinions from both the team physician and his personal physician.⁷³ Both doctors advised Chuy to retire because of “an abnormal red blood cell condition, stress polycythemia.”⁷⁴ The team physician told a reporter that Chuy was suffering from “Polycythemia Vera (a potentially fatal blood condition).”⁷⁵ When Chuy read the article, he “reportedly panicked and his mind just snapped.”⁷⁶ Chuy brought suit against the Eagles and won both compensatory and punitive damages because he became a mental wreck, lost his marriage, and suffered serious emotional stress.⁷⁷ The court stated:

If you intentionally make a statement the material and probable consequences of which it will be known to the person and cause him or her emotional distress and if the making of that statement is shocking and outrageous and exceeds the bounds of decency with respect to its natural and probable impact, then a case of intentional infliction of emotional distress is made out.⁷⁸

It is important to note that the team physician was not held liable because he was covered under the Worker’s Compensation statute, a defense that will be discussed later. However, had the

⁶⁶ *Id.*

⁶⁷ See King, *supra* note 7, at 680.

⁶⁸ See Epstein, *supra* note 41, at 85.

⁶⁹ *Id.* These may raise to the level for an action claiming assault or defamation which an athlete could certainly bring.

⁷⁰ *Rockhill v. Pollard*, 485 P.2d 28 (Ore. 1971)(doctor failing to provide treatment and care to patients in an emergency situation).

⁷¹ *Chuy v. Philadelphia Eagles Football Team and the National Football League*, 595 F.2d 1265 (3d Cir. 1979).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* See also Appenzeller, *supra* note 28, at 242-43.

⁷⁶ *Id.*

⁷⁷ *Chuy v. Philadelphia Eagles Football Team and the National Football League*, 595 F.2d 1265 (3d Cir. 1979).

⁷⁸ *Id.*

team physician been an independent contractor, the Eagles would not be vicariously liable and the team physician would likely be personally liable.⁷⁹

III. WHY DO TEAM PHYSICIANS BECOME VULNERABLE?

One of the goals of a team physician is to “develop a trusting relationship” with the athlete.⁸⁰ But that trust may be difficult to achieve in light of the circumstances surrounding the team physician’s services to the team. First, there are several reasons for a physician to accept a position with a team that surround the physician’s desires for fame and success. Secondly, once the physician accepts a position with a team, numerous conflicts of interest arise and plague the development of that trust. Each of these is discussed below.

A. *Fame and Success for the Physician*

Team physicians do not undertake positions with teams for their direct financial benefit.⁸¹ Usually, contracts are set up whereby the physician is offered a “nominal lump sum” for his services.⁸² Other relationships are established through either an employer-employee status or as a team-independent contractor relationship.⁸³ Yet other relationships are established by the physician paying the team for the privilege of being that team’s physician.⁸⁴ For example, Major League Soccer established a “bidding situation.”⁸⁵ The highest bidder becomes the team’s physician. Other teams that have set up a bidding policy include the Orlando Magic of the National Basketball Association, and the Jacksonville Jaguars and Carolina Panthers both of the National Football League.⁸⁶

Whatever the relationship may be, team physicians see this relationship as a “useful form of advertising.”⁸⁷ Football is the most prominent because of the high injury rates that receive enormous attention in local and national newspapers, radio shows, and television broadcasts.⁸⁸ Team physicians also may receive other benefits like “referrals, prestige, free tickets, opportunities to meet players, or to satisfy his or her affection for sports.”⁸⁹ Agreements are then

⁷⁹ See generally Charles Russell, *Legal and Ethical Conflicts Arising From the Team Physician’s Dual Obligations to the Athlete and Management*, 10 Seton Hall Legis. J. 299 (1987)[hereinafter cited as “Russell”].

⁸⁰ See Mitten, *supra* note 17, at 133. Professor Mitten sees this goal developed through a work ethic designed to promote safety for the athlete and to avoid unnecessary exclusion from athletic competition. *Id.*

⁸¹ See Isaacs, *supra* note 3, at 151 *citing* to an interview with Dr. Peter Bruno, an internist for the New York Knicks and the New York Rangers (Mar. 12, 1981).

⁸² *Id.*

⁸³ See Russell, *supra* note 79.

⁸⁴ Ken Fine, M.D., *Being a Team Physician: The How’s and Why’s*, 11 U. PA. Orthop. J. 40 (1998)[hereinafter cited as “Fine”].

⁸⁵ *Id.*

⁸⁶ *Id.* The Jacksonville Jaguars apparently received one million dollars from a group of physicians that became the team’s physicians and the Carolina’s Medical Center paid \$150,000 a year to the Carolina Panthers for the role of team physician. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* When considering such television programs like “ESPN” and “ESPN News” and “ESPN2,” national broadcasts not only reveal the injuries, but also often include the physician analyzing the particular injury and its detriment to the team.

⁸⁹ See Isaacs, *supra* note 3, at 151.

established where the team physician gains even more rights.⁹⁰ Given these motives, one can understand how the trust relationship becomes clouded with the physician's desire for personal fame and indirect financial success.

B. Conflicts of Interest

Before a physician makes a medical decision about the athlete's health and ability to play, several issues arise that act as weights on the physician's decision. These issues are the initial conflicts of interest that team physicians succumb to when making that final medical decision. Initially, the physician appears as a friend and adviser to athletes, and to the team.⁹¹ However, when it comes time for a medical decision, the physician must decide if athletes can participate, should participate, or can return to the game.⁹² These decisions come with intense pressure and the ramifications can be far-reaching. When the game is on the line, the pressure and ramifications can be overbearing and life-threatening.⁹³ Since the physician's decision has this magnitude, several individuals add their opinions and create conflicts.

With respect to the physician, there are at least six different relationships that create possible conflicts. There is the beginning relationship between the team and the physician. Then, the physician develops a relationship with each of the team's players. Afterwards, several third party relationships develop. These include the relationship between the physician and the athlete's family, between the physician and the media, between the physician and the athlete's agent, and the relationship between the physician and the fans. Each relationship positively and negatively impacts the physician and can result in subsequent lawsuits.

1. Team Physician and the Team

Players and their supporters question the loyalty of a team physician that is hired by the team.⁹⁴ The questions amount to a conflict of duties owed to the employer versus those owed to the athlete, or patient.⁹⁵ Teams select physicians and pay them. The team also selects athletes with one goal in mind – win games to increase profit.⁹⁶ The conflict becomes apparent: a profitable team is the one with athletes, even injured athletes, playing games.⁹⁷ The result is a physician caught in the middle of the employer and the employee-athlete.⁹⁸ And the interest of

⁹⁰ See Fine, *supra* note 84. Doctor Fine addresses some of these rights: team physician allowed to advertise on billboards around the sporting arena, team physician allowed to have their name mentioned by the announcer at the game, and team physician having name mentioned on radio and television broadcasts of the events. *Id.* Although this type of advertising may be ethically questionable, it is not unlawful. *Id.*

⁹¹ See Gallup, *supra* note 5, at 4. Dr. Gallup also discusses the physicians as role models and part of the group that selects the type of equipment to be used. *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Isaacs, *supra* note 3, at 157-58.

⁹⁵ *Id.* citing an interview with Dr. Peter Bruno, an internist for the New York Knicks and the New York Rangers (Mar. 12, 1981).

⁹⁶ See King, *supra* note 7.

⁹⁷ See Solares, *supra* note 30.

⁹⁸ See Isaacs, *supra* note 3, at 157. Remember the ramifications will include the team's view about the health of the athlete, the employee.

the team reflects the winner of this conflict in most cases.⁹⁹

Hiring a physician is not always the case. The physician may be that of an independent contractor. The physician in this capacity may be seen as a separate entity from the team. However, the physician will contend specifically with two types of conflicts. The first is the view that the physician undertook this position solely for personal financial gain.¹⁰⁰ This has a destructive effect on the trust relationship with the player-patient. The player will argue the issue of whether the physician is providing medical decisions for his own financial gain (including the success of the team) and the best medical determinations. The second view is the contention between the physician and their insurance provider. Some insurance companies mandate that team physicians undertake a form of employment to negate or minimize liability.¹⁰¹ Physicians must then decide to either withdraw from their insurance provider to maintain this relationship with the team or find a different insurance provider. Again, this may not be in their best financial interest because the physician may have to find insurance from another provider with the possibility of higher premiums.

2. Team Physician and the Player

Players want to play. They may feel invincible because of their competitive attitudes.¹⁰² They desire to play a sport for psychological or economic reasons and are willing to sacrifice their bodies to accomplish an athletic objective.¹⁰³ Physicians find themselves caught in the middle of safeguarding an athlete's health and an athlete's desire.¹⁰⁴ A good example is the recent events surrounding Matt Geiger, a thirty-one year old center for the Philadelphia Seventy-Sixers basketball team. Due to the problems with his knees, Geiger had to retire during the 2001-2002 season.¹⁰⁵ Geiger had surgery on both knees two seasons ago and arthroscopic surgery on his left knee last season.¹⁰⁶ The team physician, Dr. Jack McPhileny, stated that Geiger did all he could, including "having his knees drained weekly," to play.¹⁰⁷ This is the competitive attitude of the athletes sacrificing their bodies and conflicting with the physician's attempt to care for the athletes. Because of this, physicians are coming up with expanded treatments that hopefully "will come close to ensuring that [the athlete] will be able to resume playing professional basketball in a normal, pain-free, swelling-free environment."¹⁰⁸

⁹⁹ See Isaacs, *supra* note 3, citing Daniel Garfinkel, *The Role of the Team Physician*, Sports Medicine for the Primary Care Physician 5 (Richard B. Birrer ed., 1984).

¹⁰⁰ See Fine, *supra* note 84. This may also be seen in the employer-employee relationship, but the financial gain is an indirect result and not so clearly seen by all parties.

¹⁰¹ See generally *Daniels v. Seattle Seahawks*, 92 Wash. App. 576, 968 P.2d 883 (1998).

¹⁰² See Mitten, *supra* note 17.

¹⁰³ *Id.* at 131. Professor Mitten refers to Hank Gathers, Anthony Penny, and Marc Buoniconti's unfortunate and tragic loss when they each played with an "abnormality or injury" and either died or became paralyzed. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ FindLaw Legal News and Commentary, *Sixers Center Geiger Retires* (Nov. 23, 2001), available at <http://news.findlaw.com/sports/s/20011121/bcsportsnbageigerdc.html>. Geiger was diagnosed with degenerative arthritis in both of his knees. He was in his fourth year of professional basketball and of a six year contract worth \$48 million. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Also, consider the study cited by Professor Mitten that athletes "would rather play with physical pain than suffer the emotional pain of not playing." See Mitten, *supra* note 17, citing a study by Aynsley M. Smith.

¹⁰⁸ *Id.* Also, consider two other athletes in the National Football League. Sam Adams, a defensive tackle for the Baltimore Ravens, and Edgerin James, a running back for the Indianapolis Colts, both underwent knee surgeries this season. Regardless of the extent of each surgery, the recovery period should be the same. However, Adams is

3. Team Physician and the Player's Teammates

Pressure on athletes from other players can be overbearing. The mottos “no pain, no gain” and “winning is everything” are attitudes extending past the competition and the locker room.¹⁰⁹ Coaches add more pressure because they desire to have players on the field. Players want the team’s star players to play because of the opportunity for a championship as well as personal future financial gain. This pressure or influence upon a physician is the conflict. Some suggest it has been suppressed due to advancements within the medical field and medical ethics, but it must still be recognized.¹¹⁰

Those teammates also experience feelings of neglect and anger for the attention the injured player is receiving. Sometimes they will express their own opinions as to the extent of the injury and its effect on the team. For instance, the Philadelphia Flyers ice hockey team experienced turmoil over the past two years because of the discrepancies between management and center, Eric Lindros. At several of the games, the press would question the players about Lindros, his physical impairments, and its effect on their play. Each player seemed somber towards the injuries sustained by Lindros, but they each expressed the negative and disheartening impact the dispute had on the team. Lindros also focused his anger toward the team physicians because of his belief that they were downgrading the seriousness of his injuries and pushing him to compete. This led to other players questioning the medical treatment that they were receiving from the team physicians. The conflict here reaches many levels.

4. Team Physician and Other Third Parties

This conflict develops from several circumstances. First, consider the ramifications when the physician provides a statement to the press. The statement can have a tremendous effect on the media, fans, the agent of the athlete, and the athlete’s family.¹¹¹ This statement could create sympathy or apathy for the athlete. Fans appreciate the high salaries and condemn athletes for not playing.¹¹² Alternatively, fans may see the negligence in treatment of a beloved player and condemn management with sympathy concerns for the athlete.¹¹³ Agents and families may feel the same, and in some circumstances betrayal may result too. The physician may receive

expected to miss one game whereas James is out for the season. FindLaw Legal News and Commentary, *Ravens DT Sam Adams Has Knee Surgery* (Nov. 29, 2001) available at

<http://news.findlaw.com/sports/s/2011128/bcsportsnflravensdc.html>; FindLaw Legal News and Commentary, *Colts Running Back James Out For Season* (Nov. 23, 2001) available at

<http://news.findlaw.com/sports/s/2011121/bcsportsnfljamesdc.html>. The resulting questions remain as to how much pain will Adams be playing with or how much medication (like Charlie Krueger) will Adams be given.

¹⁰⁹ See Isaacs, *supra* note 3, at 160. These attitudes are the ones players “condone sacrifice” for the betterment of the team. *Id.*

¹¹⁰ See Gallup, *supra* note 5, at 91-2, illustrating these external pressures and its inconsistency with sound medical practices.

¹¹¹ See Appenzeller, *supra* note 28, at 244-45 addressing one of Dick Butkis’ teammates on the Chicago Bears who refused to practice and play because of a severe injury. The physician was ordered to give a statement “blasting the player and disclaiming [the player’s] injury by declaring that he just would not play.” *Id.* The physician resigned instead. *Id.*

¹¹² An example may be the star player not playing because of an injured toe.

¹¹³ An example here is the impact that fans felt when Eric Lindros, a hockey player for the Philadelphia Flyers at the time, got on a plane after a game where he suffered a lacerated lung. The physicians missed this injury and advised him to fly home after he came to them in pain. Had Lindros stayed on the plane, he might have died.

negative feedback as well.¹¹⁴ Thus, since the physician may have to disclose medical information concerning the player, a conflict with many characteristics exists between these other parties.¹¹⁵

Secondly, consider the relationship between the athlete's family and the team physician. Some families rely on the athlete's salary as their sole income. An athlete must play in order to receive such salary. However, an athlete may be placed on the injured reserve list without losing his salary, but the athlete is expected to return to the line up rather quickly. The question becomes what will happen if the athlete cannot return to play or returns to play with less stamina, or the athlete is released, waived, or traded because the team's management believes the athlete to be a health risk. The decision rests with the physician, and management will use this decision to determine the future of the athlete. A physician who knows the athlete and their family's situation will have to make a decision that could either benefit or harm the economic stability of the family. But that's not all. The health of the athlete is also a concern of the family. Family's demand the highest level of care for their loved ones. When this care is thought of as less than that, the family feels remorse and files a lawsuit.¹¹⁶

Lastly, consider the family and agent of the athlete that rely on information from a physician as to the health of the athlete for continued competition. The physician's judgment may affect the athlete's decision to continue playing. This is where the physician's judgment may be challenged for accuracy. An agent may be working on a contract or an extended contract and the family may be preparing for further involvement with the sports world. The physician's decision can hinder or inflate contract negotiations. It may leave unexpected circumstances with the family. Consequently, a physician must attempt to make a decision completely uninfluenced by all of these other parties.

IV. DEFENSES TO CLAIMS BROUGHT AGAINST TEAM PHYSICIANS

There are several defenses that physicians raise to defeat claims brought against them. These legal defenses can be exploited leaving feelings of injustice, but they are allowable and do frustrate an otherwise viable claim. These defenses are assumption of the risk, contributory negligence, and the ever-present worker's compensation statutes.

A. Assumption of the Risk

In the sporting context, an athlete may assume the risk of sustaining an injury in a sport if he or she knows or appreciates the danger of participation, and voluntarily chooses to participate.¹¹⁷ Two types of assumption of risk are recognized by the courts – implied and express assumption of risk.¹¹⁸ Courts narrowly apply the implied form by requiring knowledge and appreciation of risks and voluntary acceptance by the player.¹¹⁹ Applicability depends on the athlete's awareness to the nature and severity of the threatened harm and not necessarily the

¹¹⁴ See *supra* note 113.

¹¹⁵ Also, the physician has to maintain a confidential relationship with a patient and a disclosure to the media must be permissible under this doctrine.

¹¹⁶ Examples include the lawsuits filed by the families of Hank Gathers and Marc Buoniconti.

¹¹⁷ See Gallup, *supra* note 5, at 44.

¹¹⁸ *Id.* See also Mitten, *supra* note 17, at 163.

¹¹⁹ See Mitten, *supra* note 17, at 163.

exact foreseeability of how an injury will occur.¹²⁰ Courts will look at the athlete's maturity and experience for awareness.¹²¹ Professional athletes are held to a higher degree of awareness.¹²² The decision to play must be voluntary as well. This means that the athlete is not under compulsion, but rather freely chooses to compete.¹²³ Suppose for example that an athlete adheres to the assurance from a team physician that it is medically safe to play or that the risks are inappropriately minimized.¹²⁴ The athlete's decision in this example may be found to be a non-voluntary one.¹²⁵ However, if an obvious medical condition exists, then an athlete could not reasonably rely on the physician's assurance.¹²⁶

Express assumption of risk is found where there is a contract that waives legal responsibility.¹²⁷ Such contracts are allowed except when they violate public policy.¹²⁸ For example, a contract will be invalid if it releases the physician for negligent medical care.¹²⁹ The purpose of these contracts is to relieve the team physician, or the team and organization, from liability.¹³⁰ Most of the professional player's standard contracts do not relieve liability, but rather allow for a grievance proceeding conducted by an arbitrator.¹³¹ As long as a team's physician fully informs the athlete of the risks, the athlete will bear any harm from continued competition.¹³² This includes an incorrect judgment by a physician or any accidental harm suffered in the game.¹³³

B. Contributory Negligence

Contributory negligence is "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protections."¹³⁴ For a physician, several circumstances may bring this defense forward. If an athlete does not follow the physician's treatment requirements, then his failure can constitute further harm.¹³⁵ If an athlete does not disclose a previous or present medical condition, a court may find this non-disclosure as a contributing factor to the athlete's injury.¹³⁶ Also, assumption of risk has sometimes been merged with contributory negligence in

¹²⁰ *Id. citing Maddox v. City of N.Y.*, 487 N.E. 2d 553, 557 (N.Y. 1985).

¹²¹ *Id.*

¹²² *Id.* Professor Mitten also includes age and level of play to maturity and experience as important factors for determining "whether he or she knew and appreciated the risks of playing with a medical condition or injury." *Id.*

¹²³ *Id.*

¹²⁴ See Mitten, *supra* note 17, at 163.

¹²⁵ *Id.*

¹²⁶ *Id.* See also Solares, *supra* note 30, citing *Burke v. Davis*, 76 N.E. 1039 (Mass. 1906).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Gallup, *supra* note 5, at 45.

¹³¹ For example, see the Standard Player Contract for National Football League Player Contract, section 13, Injury Grievance.

¹³² See Mitten, *supra* note 17, at 165.

¹³³ *Id.* An incorrect judgment is still a judgment made within the required standard of care. *Id.*

¹³⁴ Prosser and Keeton on the Law of Torts § 65 (5th ed. 1984).

¹³⁵ Failing to follow prescribed treatments may constitute contributory negligence. See Mitten, *supra* note 17, at 161-62; See also Solares, *supra* note 30, at 248. Basically, just as every patient must listen and follow a doctor's instructions, so must an athlete. *Id.*

¹³⁶ Even though a physician has a duty to obtain complete an accurate medical history from an athlete, the athlete must truthfully reveal his medical history to the team physician. See Mitten, *supra* note 17, at 161-62.

circumstances where the athlete plays with a previous injury and with permission by the physician, but the athlete knows or should know that playing would cause serious danger or further injury.¹³⁷ Another possibility for contributory negligence is where an athlete is injured, but decides to continue playing with the injury without disclosing or discussing it with a team physician.¹³⁸ Different recoveries or bars to recovery may apply depending on the jurisdiction.¹³⁹

C. Worker's Compensation

Worker's Compensation statutes are designed to compensate the victim and not to punish the offender.¹⁴⁰ The employer pays for these benefits. These benefits include "medical treatment, physical and vocational rehabilitation, and earnings replacement pegged to the average wage in the state."¹⁴¹ Worker's Compensation is the exclusive remedy against an employer and co-employee for an injury that occurs without a gross violation of the law.¹⁴² The injury must have occurred "out of and in the course of employment."¹⁴³ For the team physician to be covered under the Worker's Compensation statute, he must be found to be an employee of the team.¹⁴⁴ Several factors will be analyzed to make this determination.¹⁴⁵

The right to control a physician will be one of the most determinative factors.¹⁴⁶ This leads to a finding of whether the physician is an employee or an independent contractor. If the physician is found to be an employee, then a team physician who commits a negligent act will not be liable because the Worker's Compensation statutes protect employers against these causes of action.¹⁴⁷ If the physician is determined to be an independent contractor, the physician will be liable for his own acts if sued.¹⁴⁸ A physician who maintains autonomy in his decision-making will usually be seen as an independent contractor.¹⁴⁹ On the other hand, should a physician be found an employee and performing within the scope of his employment, the physician will be

¹³⁷ See Solares, *supra* note 30, at 248 citing *Mikkelson v. Haslam*, 365 N.W. 2d 499 (N.D. 1985).

¹³⁸ See Mitten, *supra* note 17, at 162-63 addressing the decision of a Canadian court holding a professional hockey player contributorily negligent for continuing to play with an injury before a team physician could examine and diagnose the injury.

¹³⁹ As some jurisdictions would hold contributory negligence as a complete bar to recovery, other jurisdictions may apply a comparative negligence standard whereby a plaintiff can only recover if the plaintiff's fault fell below some statutory percentage. See Solares, *supra* note 30, at 249 citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 68 at 474-475 (5 ed. 1984).

¹⁴⁰ Paul C. Weiler and Gary R. Roberts, *Sports and the Law*, Second Edition 955 (West Group 1998).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* This may extend to circumstances where the player was training outside of the employers control. For instance, the Washington Redskins lost a claim raised by Doug Williams, a quarterback, for an injury suffered during the off-season on a treadmill. *Id.* at 964-65. Because the Redskins asked Williams to undertake a conditioning program, including the use of the treadmill, they were found to fall within this boundary. *Id.* at 965.

¹⁴⁴ *Id.*

¹⁴⁵ For a general list see *Lister v. Industrial Comm.*, 500 N.E. 2d 134 (Ill. 1986).

¹⁴⁶ See Gallup, *supra* note 5, at 149.

¹⁴⁷ *Bryant v. Fox*, 162 Ill. App.3d 46, 50, 515 N.E. 2d 775, 778, 113 Ill. Dec. 790, 793 (1987).

¹⁴⁸ See Gallup, *supra* note 5, at 148.

¹⁴⁹ See Russell, *supra* note 79, at 308 citing J. Weistart & C. Lowell, *The Law of Sports* 992 (1979). See also *Alexander v. Industrial Comm.*, 72 Ill. 2d 444, 381 N.E. 2d 669, 21 Ill. Dec. 342 (1978)(defining independent contractor as one who undertakes to produce a given result, without being controlled as to the method by which he attains that result).

protected.¹⁵⁰

The right to control is not the only factor. Other factors include the method of payment, the right to terminate the employment or contractual relationship, the required skill needed to perform any of the team's requests, and the source of the necessary tools, materials, and equipment.¹⁵¹ Whether the worker's occupation is similar to that of the alleged employer and whether the obligated employer deducted for the applicable tax are also evaluated.¹⁵²

Even physicians on a part-time employment basis may be covered. For instance, David Daniels' lawsuit against the Seattle Seahawks details this situation. David Daniels played professional football for the Seahawks and sustained an injury during a game in the 1992-1993 season.¹⁵³ Daniels could not finish the game because of the pain he suffered from the injury.¹⁵⁴ The next day he reported to Dr. Merut K. Auld, an orthopedic surgeon who was one of the Seahawks' team physicians.¹⁵⁵ The relationship between Dr. Auld and the Seahawks started out as an independent contractor relationship, but his insurance company requested he enter into an employment agreement with the Seahawks or terminate his insurance policy.¹⁵⁶ Dr. Auld entered into an employment agreement with the Seahawks before the injury occurred to Daniels.¹⁵⁷ The agreement required Dr. Auld to treat all Seahawks' employees, be on call at all times, attend games and training sessions, and perform surgeries.¹⁵⁸ From July to January, sixty percent of Dr. Auld's time was spent caring for the Seahawks' employees.¹⁵⁹ The rest of his time during those seven months and the other five months he performed medical tasks at his personal office engaged in his private practice.¹⁶⁰

However, the Seahawks kept accounting records, prepared tax forms and work-reimbursements, paid worker's compensation benefits, and filed all documents, taxes, and premiums for all of the work Dr. Auld did for the team.¹⁶¹ Dr. Auld maintained separate records for his private practice, and received no health insurance, sick-leave, life-insurance benefits, or vacation time from the Seahawks.¹⁶² Dr. Auld was not entitled to any retirement programs offered by the Seahawks.¹⁶³ The court labeled this relationship as a part-time employee arrangement.¹⁶⁴

Dr. Auld placed Daniels on a treatment program, but Daniels never recovered and his skills declined. Daniels subsequently found that "he had fractured his left rectus femoris."¹⁶⁵ The Seahawks eventually traded Daniels, but he was released from the other team soon after and

¹⁵⁰ *Id.* at 309.

¹⁵¹ *Bryant*, 162 Ill. App. 3d 46, 515 N.E. 2d 775, 113 Ill. Dec. 790 (1987) citing *Lister v. Industrial Comm.*, 149 Ill. App. 3d 286, 102 Ill. Dec. 512, 500 N.E. 2d 134 (1986).

¹⁵² *Lister*, 149 Ill. App. 3d 286, 500 N.E. 2d 134, 102 Ill. Dec. 512 (1986).

¹⁵³ *Daniels v. Seattle Seahawks*, 92 Wash. App. 576, 968 P.2d 883 (1998).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Daniels*, 92 Wash. App. at 968.

¹⁶⁰ *Id.* Also during that time, other physicians at Dr. Auld's private practice "filled in" for Dr. Auld. *Id.* These other physicians treated the Seahawks' employees. *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Daniels*, 92 Wash. App. at 968. Rectus Femoris is the bone in the upper leg that extends to the knee and flexes the thigh at the hip.

he does not play professional football anymore.¹⁶⁶ Daniels sued both the Seahawks and Dr. Auld claiming that Dr. Auld was negligent in finding the injury and treating it properly.¹⁶⁷ The court granted a summary judgment motion by holding that the part-time employment relationship was sufficient for immunity under Washington's Industrial Insurance Act.¹⁶⁸

This case is significant because it shows the reach of Worker's Compensation statutes. However, these statutes are not uniform amongst the States.¹⁶⁹ Some of these statutes may even cover intentional torts like the infliction of emotional distress and outrageous conduct.¹⁷⁰ Although, claims of fraudulent misrepresentation and concealment of medical information are usually free of immunity posed by the Worker's Compensation statutes.¹⁷¹

V. IMPROVEMENTS FOR THE ATHLETE

Many improvements have been suggested for the care and treatment of athletes. The standard of care has greatly improved because of "advances in communication, transportation, and the wide availability of medical literature."¹⁷² Some commentators suggest that a proper standard of care for sports medicine be established.¹⁷³ That may be difficult with many different specialists participating as a team physician, but several organizations have developed recommendations for team physicians.¹⁷⁴ In fact, other organizations have created certificate programs for sports medicine.¹⁷⁵ This type of certification enables a physician to acknowledge that he has the necessary expertise in treating sports-related injuries.¹⁷⁶ This certification also outlines the proper education and continuing education requirements of the team physician.¹⁷⁷ Continuing education, for example, is necessary for the recurring problem of heatstroke deaths. Since 1995, there have been at least twenty-five reported cases of athletes' deaths, both professional and amateur, due to heatstroke.¹⁷⁸ This total includes the recent deaths of Northwestern football player Rashidi Wheeler and the Minnesota Vikings' Corey Stringer.¹⁷⁹ Because of these heatstroke deaths, teams and schools are reevaluating their training programs

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* Washington's Industrial Insurance Act is a statute that protects employers and co-workers from a lawsuit raised by an injured worker. *Id.* It also allows protections to third persons who are in a worker's same employ. *Id.*

¹⁶⁹ See Gallup, *supra* note 5, at 149.

¹⁷⁰ *Id.* citing *Ellis v. Rocky Mountain Empire Sports, Inc.*, 602 P.2d 895 (Colo. App. 1979). In that case, a professional football player sued the Denver Broncos, the coach, and the team physician because each required him to participate in practice without fully recovering from an injury. *Id.*

¹⁷¹ See Mitten, *supra* note 17, at 160.

¹⁷² See Keim, *supra* note 13, at 201 citing Mitten, *supra* note 17, at 150.

¹⁷³ See Keim, *supra* note 13, at 220.

¹⁷⁴ See *supra* note 20.

¹⁷⁵ See *supra* note 20.

¹⁷⁶ See *supra* note 20 for a discussion within the Consensus Statement provided by the American Orthopaedic Society for Sports Medicine (2000).

¹⁷⁷ *Id.*

¹⁷⁸ CNNSportsIllustrated, *Heatstroke Deaths Since 1995* (Aug. 1, 2001), available at http://sportsillustrated.cnn.com/football/news/2001/08/01/heat_stroke_deaths.

¹⁷⁹ NSBA National Affiliate, *High Schools take Precautions Following Football Deaths* (Sept. 4, 2001) available at <http://www.nsba.org/sbn/01-sep/090401-4.htm>.

and physicians are obtaining further training on heatstroke.¹⁸⁰

These are significant improvements, but physicians must still adhere to the guidelines set by the American Medical Association that apply to physicians uniformly. These guidelines reveal that the number one concern for treating a patient is the patient's health. Applying that uniformly should reduce the amount of conflicts, if the physician maintains complete control in making his own professional, medical decisions.

Another suggestion has been made for athletes to be more active in their medical care and treatment.¹⁸¹ This may add to the conflict between the physician and athlete, however, because of the difficulties athletes confront on a personal level. Although, advocacy for the athlete's ability to receive second opinions from either his personal physician or from an unbiased physician is a beneficial improvement for the athlete.¹⁸² This must be allowed where it is evident that the athlete will receive minimal or substandard or biased care. A trust relationship already established outside the control of the team will withstand scrutiny and be looked upon as a valid second opinion.

A league wide improvement whereby physicians are hired by player's unions has also been suggested.¹⁸³ However, several problems may arise with this suggestion. Physicians should establish a trust relationship with players. The physician would be hindered by the possibility of moving to another team at the league's discretion. If a physician were negligent in providing care, then the player may have to sue the player's union and the physician. This will have a negative impact on the player and other players. The best solution is to have a steady relationship between management, the physician, and the athlete where it is understood that the physician will not be controlled or influenced by the team or the athlete in making a medical decision.¹⁸⁴ The athlete should also be reassured about the qualifications of the physician, who is hired or contracted.

Independent review commissions have also been suggested.¹⁸⁵ These would reassure the athlete that physicians are being monitored as well as ease the athlete's doubt towards treatment. These may be acknowledged within the grievance procedures set out in the standard player's contract used by the professional sports leagues. Commissions may already exist, but through medical societies that review medical judgments, review new procedures, and make suggestions for better treatment and care. If the commission has the ability to take the physician's license away, then he will be inclined to do only what is in the best interest of the athlete, rather than his own interest.¹⁸⁶ The physician would also be able to refer to these commissions if asked to do something medically unethical.

One problem not suggested as an improvement is the readjustment of the Worker's Compensation statutes. Not only are they inconsistent throughout the States, but they also

¹⁸⁰ Joshua Mason, *Schools May Reevaluate Training Regimen Due to Deaths* (Aug. 6, 2001), available at <http://www.uwire.com/content/topsports080601002.htm>; See Gallup, *supra* note 5, at 116-17 (identifying athletes for heat illnesses and conducting preparticipation examinations are preventable measures).

¹⁸¹ See Keim, *supra* note 13, at 222.

¹⁸² *Id.*

¹⁸³ *Id.* at 223, commenting on possible mandatory disclosures of physician's interest in being a team physician.

¹⁸⁴ See generally Mitten, *supra* note 17.

¹⁸⁵ See Gallup, *supra* note 5; See Herbert, *supra* note 16; See Mitten, *supra* note 17; See also Michael E. Jones, *Sports Law* (Prentice-Hall, Inc. 1999).

¹⁸⁶ Lawyers have a similar commission that reviews the character and fitness of lawyers and that has the ability to take a lawyer's license away. In Illinois, the commission is the Attorney Registration and Disciplinary Commission. Leagues could create an independent review commission similar to this, but more specialized for team physicians.

conceivably allow for too many injustices. Physicians, like Dr. Auld, should not be allowed to escape liability for blatant negligence simply because he was a part-time employee. This type of employment appears rigid, but rigid enough to fall within the Worker's Compensation statutes. Worker's Compensation statutes are valued and needed in our society. However, they should be redrawn for instances of a physician-team relationship, especially since most of the training and competitions within the many leagues do not extend for the whole year.

A team physician may make any decision, but under a Worker's Compensation statute, claims against him would be disallowed if he is found to be an employee of the team. This casts doubts on the physician's treatment. It disrupts the athlete's reassurance of a sound diagnosis. Where a physician maintains a private practice and provides medical services to a team, he or she should be viewed as an independent contractor. Even a physician-employee should be held liable for negligent care because of the unclear reasoning for the physician's decision – that of the team or that of the athlete.

Information is available. The team, leagues, and team physicians have access to many books, codes and opinions to assist them in increasing benefits and judgments in the care and treatment of the athlete. Implementing many of the strategies will benefit the athlete and minimize the liability of the team and the team physician.¹⁸⁷

Team physicians must administer care to athletes to the best of their ability. This includes compliance with uniform standards initially bestowed upon them by the American Medical Association. There should be no difference in the care and treatment of an athlete and all other patients. As Dr. Matheson commented on the rewards in medical decisions based on a "return to play" focus, he mentioned long-term health care may be the best solution for athletes.¹⁸⁸ He correctly addresses the need for physicians to be more attentive to the athlete's "well-being down the road."¹⁸⁹ This includes more credible evidence on the effects of a physical injury and the risks with continued sports participation to improve the care and treatment of athletes.¹⁹⁰

VI. CONCLUSION

The short-term care and the pressure exerted upon the physician raise questions by athletes that develop into possible lawsuits. The common lawsuits brought against team physicians can be negated by optimal performance of physicians in treating the athlete. Such lawsuits arise when there are potential conflicts of interests that surround the team physician. Those conflicts can be minimized, partly by improvements to the current system.¹⁹¹ Improvements should be made with the goal of providing the best treatment for the athlete. Improvements such as maintaining and upholding the uniform standards supplied by the American Medical Association, allowing the athlete to obtain unbiased second opinions or maintain a prior personal physician, establishing trustworthy relationships between the team, the team physician, and the athlete, and creating independent review commissions will strengthen that goal. Also, reviewing and revising the Worker's Compensations statutes and looking at

¹⁸⁷ For example, see Herbert, *supra* note 16, at 168 for a discussion on minimizing conflicts of interest.

¹⁸⁸ Gordon O. Matheson, M.D., Ph.D., *Taking a Longer-Term Perspective on Injuries*, 29 *The Physician and Sports Medicine* 5 (May 2001), available at http://www.physsportsmed.com/issues/2001/05_01/ed_notes.htm.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ For a discussion on minimizing conflicts, See Herbert, *supra* note 16, at 168.

long-term health risks will also maximize that goal. Contractual clauses are in place now for injury grievances, but clauses allowing an athlete to refrain from further injury should also be included with certain exceptions permitted by the leagues.¹⁹² The ultimate goal should be one where the athlete's health comes first, regardless of the salary and the team's immediate needs. The healthier player will inevitably be the better player.

Athletes endure many pains and a lot of publicity. Fans are completely engrossed over their team and desire nothing short of perfection. When a player is injured, many are concerned. The press uses this concern to heighten their sales and recognition. The team may use this to get the player back on the field. Concern of the other teammates and athlete's family are also elevated. Contract negotiations over the athlete's future may be frustrated. However, none of these issues should come between the physician and the athlete. Team physicians should evaluate the athlete with their primary concern on the athlete's health. Even though the athlete may want to continue playing, the physician must advise the athlete on all consequences surrounding his or her decision. Lastly, the physician must be truthful. Immediate sacrifice may lead to long-term disability.

¹⁹² With respect to Matt Geiger, the Philadelphia Seventy-Sixers obtained an injury exception to the salary cap of no more than \$4.07 million. This exception allows a team "to explore to do things" like signing or trading players. Sixers general manager said "It gives you all kind of options." FindLaw Legal News and Commentary, *76ers Get Medical Exception for C Matt Geiger*, (Nov. 29, 2001), available at <http://news.findlaw.com/sports/s/20011128/bcsportsnbageigerdc.html>. The question is whether a clause could expand past just retirement due to injury.