

2001

## No Pain, No Gain, No Compensation: Exploiting Professional Athletes through Substandard Medical Care Administered by Team Physician

Nick DiCello

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>



Part of the [Labor and Employment Law Commons](#), and the [Torts Commons](#)

[How does access to this work benefit you? Let us know!](#)

---

### Recommended Citation

Note, No Pain, No Gain, No Compensation: Exploiting Professional Athletes through Substandard Medical Care Administered by Team Physician, 49 Clev. St. L. Rev. 507 (2001)

This Note is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

NO PAIN, NO GAIN, NO COMPENSATION: EXPLOITING  
PROFESSIONAL ATHLETES THROUGH SUBSTANDARD  
MEDICAL CARE ADMINISTERED BY TEAM PHYSICIANS

I.	INTRODUCTION .....	508
II.	TEAM PHYSICIANS .....	511
	A. <i>Team Physician Defined</i> .....	511
	B. <i>Physician's Contractual Responsibilities and         Legal Duties</i> .....	511
	C. <i>Conflicts Facing Team Physicians Compromise         Independence of Medical Judgment</i> .....	513
	1. Pressures from Team Management/Employer .....	514
	2. Pressures from Coaching Staff .....	514
	3. Pressures from Professional Athletes .....	515
	4. Self-Imposed Pressures .....	516
III.	TORT CLAIMS BROUGHT AGAINST PROFESSIONAL TEAMS AND TEAM PHYSICIANS .....	517
	A. <i>Negligence Claims Against Professional Teams</i> .....	517
	B. <i>Claims Against Team Physicians</i> .....	518
	1. Medical Malpractice Claims .....	518
	2. Nondisclosure/Fraudulent Concealment/ Misrepresentation Claims .....	519
IV.	CLAIMS BROUGHT UNDER COLLECTIVE BARGAINING AGREEMENTS GOVERNING PROFESSIONAL ATHLETIC CONTRACTS .....	522
	A. <i>Standard vs Guaranteed Player Contracts</i> .....	522
	B. <i>Federal Preemption of State Law Tort Claims</i> .....	523
V.	WORKERS' COMPENSATION CLAIMS .....	526
	A. <i>Underlying Policy/Typical Statute</i> .....	526
	B. <i>Classification as Employee or Independent         Contractor</i> .....	527
	C. <i>Intentional Tort Exception</i> .....	530
	D. <i>Dual Capacity Doctrine</i> .....	532
VI.	PREVENTING ABUSE AND PROVIDING ADEQUATE COMPENSATION: PROPOSED REMEDIES .....	533
	A. <i>Create a Well-Defined Uniform Standard of         Care</i> .....	533
	B. <i>Prohibit Professional Teams from Providing         Medical Care</i> .....	534

1. Employment by Players Unions/Leagues .....	534
2. Well-Defined Employment Arrangements .....	535
3. Eliminate Incentive Pressures .....	535
C. <i>Redefine the Relationship Between Healthcare Provider and Healthcare Purchaser</i> .....	535
D. <i>Amend/Redefine Application of State Workers' Compensation Laws</i> .....	536
E. <i>Athletes and Representatives Become More Involved in Medical Treatment</i> .....	537
VII. CONCLUSION .....	537

## I. INTRODUCTION

Professional sports have become a national obsession<sup>1</sup> and the sports entertainment industry has flourished into big business in the United States.<sup>2</sup> Superstar athletes demand salaries of over \$100 million<sup>3</sup> and, as a result, have reached celebrity status.<sup>4</sup> This status brings with it the public's demand for performance at the highest level and the physical sacrifice associated with a win-at-all-costs attitude.<sup>5</sup> Sports reports and game summaries are incomplete without coverage of an injured athlete forfeiting his body for the team and his fans, or overcoming some painful injury for the love of the game.<sup>6</sup>

Injuries are a substantial part of any professional sport and require treatment from qualified personnel. Most professional sports teams are contractually bound to

---

<sup>1</sup>Joseph H. King Jr., *The Duty and Standard of Care for Team Physicians*, 18 Hous. L. REV. 657, 657 (1981) (stating that sports, athletics, and physical fitness have grown into a national obsession); see also, James H. Davis, "Fixing" the Standard of Care: Motivated Athletes and Medical Practice, 12 AM. J. TRIAL ADVOC. 215, 220 (1998) (stating that athletes are an essential part of modern social culture).

<sup>2</sup>See generally, ROBERT C. BERRY & GLENN M. WONG, 2 LAW AND BUSINESS OF THE SPORTS INDUSTRIES 14 (2d ed. 1993).

<sup>3</sup>In December 2000, free-agent shortstop, Alex Rodriguez signed a guaranteed Major League Baseball contract with the Texas Rangers for \$252 million. See Tom Verducci, *Powerball: Alex Rodriguez Hit the Jackpot When the Rangers Offered Him \$252 Million and the City of Texas*, SPORTS ILLUSTRATED, Dec. 18, 2000, at 102. Shortstop Derek Jeter recently signed a ten-year, \$189 million contract with the New York Yankees. See Anthony McCarron, *Jeter's Jillions Put Yanks on Defensive Champs but Not in Payroll*, DAILY NEWS (New York), Feb. 10, 2001, at 51. Los Angeles Lakers star, Shaquille O'neal is currently playing out a seven-year contract worth \$120 million. See Rachel Blount, *Shaquille O'neal's Impending Debut With the Los Angeles Lakers - at a Cost of \$120 Million - is Sending Shock Waves Through an NBA City Starved for a Superstar*, STAR TRIBUNE (Minneapolis), Sept. 29, 1996, at 4C.

<sup>4</sup>See Davis, *supra* note 1, at 221.

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

provide their athletes with medical care. Many teams employ the services of medical doctors in order to fulfill this requirement.<sup>7</sup> The relationship between the team physician and the professional athlete [hereinafter athlete] differs from the typical doctor-patient relationship, and can result in less than competent treatment wherein the athlete's best interests are sacrificed.<sup>8</sup>

Team management, the coaching staff, the public, and the players themselves all demand a winning team. In pursuing the ultimate goal of a championship, athletes undoubtedly compromise their health for the good of the team. Pressures on the athlete to play while injured or on a team physician to withhold medical information from an athlete are constantly present. As a result, athletes frequently play through pain and injury. All too often, athletes compete without full knowledge of the associated risks of permanent physical disability.<sup>9</sup>

Examples of athletes succumbing to the pressures exerted on them are abundant. Mike Robitaille, a professional hockey player in the National Hockey League (NHL) was sidelined with a shoulder injury and threatened with suspension if he didn't begin playing.<sup>10</sup> His coach, Phillip Maloney commented:

Of course we [Robitaille's team, the Vancouver Canucks] were short a defenceman with Robitaille out (sore shoulder). I don't know exactly how bad it is but I tell you he'd better start playing. If he doesn't, I'm going to have to consider suspending him. I'll have a talk with him about it.<sup>11</sup>

At the demand of his coach and the advice of team physicians and the team trainer, Robitaille suffered severe injuries and endured excruciating pain in order to continue to play hockey and maintain his employment.<sup>12</sup> The injuries Robitaille experienced ultimately ended his professional hockey career and left him permanently disabled.<sup>13</sup> Robitaille eventually recovered against his club through a negligence claim for failing to act reasonably to ensure his fitness, health, and safety.<sup>14</sup>

Similarly, basketball great, Bill Walton, was plagued with injuries throughout much of his career, but conceded to pressure to continue playing.<sup>15</sup> In order to play through pain, Walton reluctantly accepted injections and other pain numbing

---

<sup>7</sup>See generally, GARY A. UBERSTINE, 2 LAW OF PROFESSIONAL & AMATEUR SPORTS 14 A 24-25 (2000). See also *infra* note 41.

<sup>8</sup>See generally, *id.* at 14 A 2-3.

<sup>9</sup>See *infra*, note 12, 15, 18.

<sup>10</sup>Robitaille v. Vancouver Hockey Club Ltd., 124 D.L. R. (3d) 228, 230 (1981).

<sup>11</sup>*Id.*

<sup>12</sup>See generally *id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 233.

<sup>15</sup>Twila Keim, *Physicians for Professional Sports Teams: Health Care Under the Pressure of Economic and Commercial Interests*, 9 SETON HALL J. SPORTS L. 196, 219 (1999), citing Joseph Nocera, *Bitter Medicine*, SPORTS ILLUSTRATED, Nov. 6, 1995.

medication for several years.<sup>16</sup> Walton eventually settled a lawsuit against his former team, the Portland Trailblazers. However, he currently suffers from permanent injuries as a result of receiving numerous Novicaine and cortisone injections during his short professional career.<sup>17</sup>

Former National Football League (NFL) standouts, Charles Krueger and Dick Butkus sued their respective teams, alleging that the team and team physicians failed to disclose the nature and extent of their injuries and failed to inform them of the risks associated with painkilling treatments.<sup>18</sup> More and more professional athletes are seeking redress for alleged mistreatment by professional sports franchises, and the medical doctors they employ, through the legal system.<sup>19</sup> The major professional leagues<sup>20</sup> and professional sports teams have responded by creating a system in which both teams and team physicians escape personal liability.<sup>21</sup>

This note discusses the role of the team physician and the unique conflicts he or she faces when providing medical care to athletes. In particular, the note describes the pressure team doctors experience from team management, the coaching staff, and the players themselves.<sup>22</sup> Next, the note discusses the types of claims professional athletes have brought against their doctors and team employers and how the terms of collective bargaining agreements (CBA) and workers' compensation laws create obstacles to their recovery. The note will explore the need for a specialized legal standard within the practice of sports medicine and identify the disincentive for sports physicians to act professionally in the absence of a heightened standard of care. The final section of the note offers solutions to address the conflicts team physicians face. Recommendations include establishing a more definite and predictable legal standard of care for application to sports medicine practitioners, creating an alternative application of state workers' compensation laws to the professional sports workplace, and amending the CBAs currently governing major professional sports.

---

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*See Kruger v. San Francisco Forty Niners*, 234 Cal. Rptr. 579 (Cal. Ct. App. 1987). *See also BERRY & WONG, supra* note 2, at 510.

<sup>19</sup>*See e.g., Krueger*, 234 Cal. Rptr. 579; *Robitalle*, 124 D.L.R. (3d) at 228; *Martin v. Casagrande*, 559 N.Y.S.2d 68 (App. Div. 1990); *DePiano v. Montreal Baseball Club, Ltd.*, 663 F. Supp. 116 (W.D. Pa. 1987).

<sup>20</sup>The major professional sports leagues in America are the National Hockey League (NHL), the National Football League (NFL), the National Basketball Association (NBA), and Major League Baseball (MLB). *See generally* Kenneth Shouler, *After the Fall*, CIGAR AFICIONADO (2001).

<sup>21</sup>*See generally*, WEISTART & LOWELL, *infra* note 29.

<sup>22</sup>*See* UBERSTINE, *supra* note 7, at 14 A 3.

## II. TEAM PHYSICIANS

A. *Team Physician Defined*

Currently no uniform definition of a team physician exists because of the varied practitioners in the field, and the multitude of diverse relationships physicians may have with teams.<sup>23</sup> For the purposes of this note, however, a team physician is defined as any doctor who performs professional medical services to athletes that are either arranged for or paid for, at least in part, by an institution or entity other than the athlete or his or her insurance company.<sup>24</sup> This doctor-athlete relationship represents a departure from the typical doctor-patient relationship because the person receiving the treatment is distinct from the person or entity paying for the services.<sup>25</sup>

B. *Physician's Contractual Responsibilities and Legal Duties*

A team physician's duties are usually well defined in an employment contract with the professional franchise.<sup>26</sup> A typical professional team physician may be responsible for any or all of the following in the course of his or her employment: diagnosis and treatment of injuries, arranging for or performing surgical procedures, regulating physical fitness regimens and dietary plans, referrals to specialists, designing and overseeing rehabilitation programs, and making medical clearance decisions.<sup>27</sup>

In addition to the duties created by a physician's employment agreement, team doctors owe legal duties to the athletes they treat. The typical doctor-patient situation is a consensual relationship between physician and patient.<sup>28</sup> The doctor has fiduciary obligations toward his or her patient.<sup>29</sup> Although the doctor-athlete relationship is distinguishable, it is generally accepted that a team physician owes an athlete the same fiduciary duties,<sup>30</sup> at least in situations where the doctor is rendering

---

<sup>23</sup>See King, *supra* note 1, at 658.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.*

<sup>26</sup>See UBERSTINE, *supra* note 2, at 14 A 24. See also Daniels v. Seattle Seahawks, 968 P.2d 883 (Wash. Ct. App. 1998) (where a professional team physician signed an employment contract specifically identifying his duties and responsibilities to the team.).

<sup>27</sup>See UBERSTINE, *supra* note 7, at 14 A 3.

<sup>28</sup>See generally *id.* at ch.14 A.

<sup>29</sup>JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 988 (1979) citing Schloendorff v. Society of New York Hosp., 105 N.E. 92 (1914).

<sup>30</sup>The nature of these fiduciary duties center on the notion that the doctor is to provide treatment governed by the patient's best interests. *Id.* at 990.

therapeutic treatment directly to the athlete.<sup>31</sup> The doctor's fiduciary relationship with a patient-athlete is governed and evaluated by general tort law principles.<sup>32</sup>

A physician owes his or her patient a duty of competent treatment dictated by the patient's best interests, and a duty to not expose a patient to any unreasonable risk of harm.<sup>33</sup> The standard of care applicable to a general practitioner of medicine is measured according to the common skill and competence of a member of the medical profession in good standing.<sup>34</sup> Furthermore, when a professional holds him or herself out as a specialist, the applicable standard is the reasonable conduct of a member of that particular specialty.<sup>35</sup> Although these principles are well-defined and accepted throughout the modern legal system, their application to sports medicine practitioners has resulted in a less than clear standard.<sup>36</sup> Some courts have been reluctant to impose a higher standard to sports medicine specialists<sup>37</sup> because there are no established standards for qualification as a sports medicine practitioner.<sup>38</sup> Currently, the American Medical Association (AMA) does not recognize sports medicine as a sub-specialty.<sup>39</sup>

Many malpractice lawsuits against team physicians settle out of court before reaching final adjudication.<sup>40</sup> Thus, there are relatively few cases delineating the legal standard by which a team physician is evaluated. One court has recognized a higher duty applicable to the practice of sports medicine.<sup>41</sup> However, this case seems to be an exception. The legal system's concern with uniformity of legal standards,<sup>42</sup> and the lack of recognition of sports medicine as a specialty by the AMA has

---

<sup>31</sup>*Id.* at 991, *citing* Hoffman v. Rogers, 99 Cal. Rptr. 455 (Cal. Ct. App. 1972) (stating that a doctor-patient relationship exists between employer and doctor hired by employer giving rise to fiduciary obligations).

<sup>32</sup>*See* King, *supra* note 1, at 663-65 (stating that regardless who hires a team physician, there exists a duty to an examinee or patient athlete not to inflict injury by misfeasance and that a broad duty to act with due care exists once a doctor begins to render aid). *See generally* RESTATEMENT (SECOND) OF TORTS § 323 (1965) [Hereinafter RESTATEMENT 2d].

<sup>33</sup>*See* Matthew J. Mitten, Annotation, *Medical Malpractice Liability of Sports Medicine Care Providers for Injury to, or Death of, Athlete*, 33 A.L.R. 5th 619 (1999).

<sup>34</sup>*See* Keim, *supra* note 15, at 200. *See also* RESTATEMENT 2d, *supra* note 32, at § 282 (defining negligence as unreasonable conduct exposing others to unreasonable risk of harm).

<sup>35</sup>The requisite standard of care applicable to members of a specialty is the skill and competence of a member of that particular trade or specialty in good standing. RESTATEMENT 2d, *supra* note 30, at § 299 A.

<sup>36</sup>*Id.*

<sup>37</sup>*See* Rosensweig v. State, 158 N.E.2d 229, 237 (N.Y. 1959) (scrutinizing a ringside doctor's conduct in examining and clearing a boxer to fight pursuant to a standard of care imposed on a general medical practitioner).

<sup>38</sup>*See* UBERSTINE, *supra* note 7, at 14 A 4.

<sup>39</sup>*Id.*

<sup>40</sup>*See* BERRY & WONG, *supra* note 2, at 510 n.12-14.

<sup>41</sup>*See generally* Fleischmann v. Hanover Ins. Co., 470 So. 2d 216 (La. Ct. App. 1985).

<sup>42</sup>*See* BERRY & WONG, *supra* note 2, at 510 n.12-14.

resulted in uncertainty with respect to the standard of care applicable to physicians practicing sports medicine. It is unclear whether a team physician, providing medical care as a practitioner of sports medicine, is held to a higher standard than that of a general practitioner. This ambiguity inhibits the imposition of incentives for physicians, holding themselves out as sports medicine specialists, to administer treatment in accord with an elevated standard of care associated with professional sub-specialties.

Despite the lack of recognition by the AMA, sports medicine as a specialty is gaining acceptance throughout the medical community. For example, the American Osteopathic Association offers certification for physicians practicing or contemplating the practice of sports medicine.<sup>43</sup> Prior to 1970, there were few medical publications concerning sports medicine. Today, that number has increased dramatically.<sup>44</sup> The Professional Team Physicians Organization, of whom over eighty percent are professional team physicians, provides descriptions of injuries and their prevention online.<sup>45</sup> The study of sports medicine continues to produce data compilations as the area of practice grows.<sup>46</sup>

### *C. Conflicts Facing Team Physicians Compromise Independence of Medical Judgment*

The role of a team physician differs from ordinary physicians treating private patients. Normally, the doctor is a considered team employee and receives compensation from the team itself as opposed to receiving payment from the patient or the patient's insurance company. Numerous conflicts of interests arise from this arrangement. A team physician must constantly decide whose interests to serve: the athlete as his or her patient, or the team as his or her employer.<sup>47</sup> The team physician has two masters to serve in executing his or her professional judgment.<sup>48</sup> The

---

<sup>43</sup>*Id.* Moreover, a doctor certified by the American Board of Emergency Medicine, Internal Medicine, Family practice, or Pediatrics may earn a Certificate of Added Qualification in sports medicine by passing a written exam or by serving a one-year fellowship offered by various clinics; *see also* Charles V. Russell, *Legal and Ethical Conflicts Arising From Team Physician's Dual Obligations to the Athlete and Management*, 10 SETON HALL LEGIS. J. 299, 299 n.2 (1987) (stating that there are currently over 400 sports medicine clinics in operation in the United States); *See also* 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, 238 (1997) (stating that there are approximately 3,800 medical doctors in the American College of Sports Medicine).

<sup>44</sup>*See* Russell, *supra* note 43, at 300 (recognizing the following resources: AM. J. SP. MED., J. SP. MED & PHYSICAL FITNESS, PHYSICIAN'S SP. MED. SCIENCE & SP., and MED. SCIENCE SP. & EXERCISE).

<sup>45</sup>*See* Shouler, *supra* note 20, at 85 (stating that physicians from the Professional Team Physicians Organization made up of physicians from the NHL, NFL, NBA, MLB, and Women's National Basketball Association (WNBA) maintain a web site at <http://www.sportcare.com>).

<sup>46</sup>*See supra* text accompanying note 43, at 300.

<sup>47</sup>*See* Davis, *supra* note 1, at 223.

<sup>48</sup>*See* BERRY & WONG, *supra* note 2, at 505.



interests of the team management, the athlete, the coach, and the doctor may all conflict in ways that can physically harm athletes.

### 1. Pressures from Team Management/Employer

Team management controls the team physician's employment and exerts pressure on the doctor. This pressure may ultimately compromise his or her medical judgment and compel him or her to sacrifice the best interests of athletes.<sup>49</sup> For example, team management may pressure a physician to clear an athlete for competition before he is physically ready, conceal the true extent of an athlete's condition or injury,<sup>50</sup> or prescribe a "quick fix" in derogation of reasonable medical practices.<sup>51</sup> Obviously, these decisions may compromise the long-term health of the professional athlete.

Sports entertainment is a business like any other, and management is responsible for making its franchise profitable. Increasing ticket sales, acquiring television coverage, and selling team merchandise accomplish this goal. The most effective way to increase profitability is by winning games, and ultimately, a championship. In order to win games, a team must field its best players, and the need to maximize the immediate potential of athletes is paramount. Accordingly, team management may be willing to jeopardize the health of its players in order to realize immediate financial success.<sup>52</sup> Former Los Angeles Raider Lester Hayes said,

The team doctors are trying to tell me that all of this is in my head. That's the way they operate in the NFL when a guy gets injured. It's a powerful psychological stimuli. I've seen guys who are so hurt that they can barely move, but the team doctors try to browbeat them with good feelings. I call it Psychological B.S. 101. They tell you, "Everything's fine. You're much better. Nothing's wrong with you." They get you so psyched up that you'll play, even though you shouldn't be out there. It happens all the time.<sup>53</sup>

It is evident that some professional athletes mistrust team doctors with mistrust because they feel that the physicians are accountable to management and not the athletes. A professional team management's control over the team physician's employment subjects him or her to pressure which may operate to compromise his or her medical judgment.

### 2. Pressures from Coaching Staff

Professional coaches may influence team physicians to compromise an athlete's health in an effort to win games. A professional coach's success ultimately depends upon his or her winning percentage, or team management's assessment of his or her

---

<sup>49</sup>See King, *supra* note 1, at 698; see also Solares, *supra* note 43, at 140.

<sup>50</sup>See generally Krueger, 234 Cal. Rptr. at 579.

<sup>51</sup>See generally Davis, *supra* note 1.

<sup>52</sup>*Id.* at 230.

<sup>53</sup>Teresa Herbert, *Are Player Injuries Adequately Compensated?*, 7 SPORTS LAW. J. 243, 244-45 (2000); Jay Lawrence, "Truth Teller", *Hayes Banished*, SPORTING NEWS, Oct. 26, 1987, at 31.

potential to lead a team to success. As a result, coaches may pressure a team physician with respect to his or her autonomous decisions regarding diagnosis and appropriate medical treatment.<sup>54</sup> Firing coaches for failing to meet employer expectations is commonplace in the world of athletics. Coach's face tremendous pressure to win, even at the expense of athletes' long-term health. Phillip Maloney, the coach of the Vancouver Canucks, obviously felt pressure to win when he suspended Mike Robitaille and denied him pay for nonparticipation as a result of an injury.<sup>55</sup> Coaches need to produce the best team available from the players on his or her roster. The overbearing control a coach possesses over a professional team affords him or her the power to bench players, impose fines and suspensions, threaten termination, and influence team personnel. Ultimately, however, it is the team physician's responsibility to protect athletes from pressures to play through pain and injury.

A coach's financial and professional success ultimately depends on players' present performance. Therefore, a coach may pressure a team physician to compromise sound medical judgment or accepted practices so that an athlete will be available for competition.<sup>56</sup> As a member of the team staff, a team physician may be subject to the influences of the coach, the leader of the team under which the doctor is employed, and forsake his or her professional judgment.

### 3. Pressures from Professional Athletes

Professional athletes, unlike ordinary patients, pressure physicians to make decisions which may not be in the athletes' best long-term health interests in order to pursue their livelihood. The combined average career of athletes in the NFL, NHL, and the National Basketball Association (NBA) is a short 4.3 years,<sup>57</sup> and a thirty two year old professional baseball player is considered a seasoned veteran in the latter stages of his career.<sup>58</sup> Meanwhile, the potential for making millions is increasingly present in the professional sports industry and the competition among amateurs to reach the big leagues is fierce. The minimum salary for a NBA player is \$316,969, and jumps to a minimum of \$1,000,000 for a ten-year veteran.<sup>59</sup> The average NHL player earns \$1,365,000 per year.<sup>60</sup> Although the average and minimum salaries of professional athletes are substantial, they are miniscule in comparison to superstar athletes who command deals in the 100 million-dollar range.<sup>61</sup> Professional athletes achieve superstar status by performing at the highest levels and recording statistics that top the charts in their respective sports.

---

<sup>54</sup>See Davis, *supra* note 1, at 219.

<sup>55</sup>Robitaille, 124 D.L.R. (3d) at 232.

<sup>56</sup>See Davis, *supra* note 1, at 219.

<sup>57</sup>See Shouler, *supra* note 20, at 4-11.

<sup>58</sup>See Davis, *supra* note 1, at 217.

<sup>59</sup>See Shouler, *supra* note 20, at 82.

<sup>60</sup>*Id.* at 84.

<sup>61</sup>See *supra* note 3 and accompanying text.

Experienced professional athletes are always fighting off younger players who want to replace them.<sup>62</sup> Thus, they are not inclined to sit out a game and allow another player an opportunity. Sports trivia buffs will remember that Wally Pipp, former starter for the New York Yankees sat out one game because of a headache only to witness Lou Gherig start the next 2,130 consecutive games.<sup>63</sup> More recently, Trent Green, the former starting quarterback for the Saint Louis Rams of the NFL, was injured and sat out the rest of the season while his back-up, Kurt Warner, went on to win Superbowl XXXIV, league MVP, Superbowl MVP, a long-term contract, and ultimately Green's starting position.<sup>64</sup>

Professional athletes realize their time is limited to attain superstar status and do not want to limit their playing time, and potential chances for fame and fortune by nursing injuries on the sidelines.<sup>65</sup> As a result, professional athletes themselves pressure team physicians by attempting to convince doctors that they are physically capable to compete.

When players insist that they are able to compete and physicians know otherwise, team doctors should not certify them eligible to play. One commentator has suggested that athletes should not be permitted to decide on their own whether to participate in at least three situations:<sup>66</sup> (1) where there are significant risks of severe harm; (2) where the lucidity of the athlete is in question or his decision making ability is clouded, for example, a decision made in the heat of battle, (3) and where the decision to return the athlete to competition would be incompatible with a broadly-defined standard of professional practice.<sup>67</sup> Currently there are no uniform guidelines directing decisions regarding medical clearance to return to a particular athletic competition.<sup>68</sup>

#### 4. Self-Imposed Pressures

A less obvious conflict facing team physicians is self-imposed. A team physician's role on a professional sports team is important, and in many situations team doctors are regarded as contributing members of the team.<sup>69</sup> As members of the team, physicians are influenced by a desire to win that may interfere with their

---

<sup>62</sup>See generally Davis, *supra* note 1, at 217-20.

<sup>63</sup>*Id.* at 217-18.

<sup>64</sup>See George Vecsey, *Sports of the Times; Kurt Warner Gives Hope to Others*, N.Y. TIMES, Feb. 1, 2000, at 1D.

<sup>65</sup>See Davis, *supra* note 1, at 218.

<sup>66</sup>See generally King, *supra* note 1.

<sup>67</sup>*Id.*

<sup>68</sup>See UBERSTINE, *supra* note 7, at 14 A 12-13 (stating that although no uniform standards exist, physicians should consider the intensity and physical demands of the sport the individual athlete's unique physiology whether the athlete has previously participated in the sport with the conditions the available clinical evidence medical organization or league guidelines the probability and severity of harm and whether any medication, monitoring, or protective equipment would minimize potential health risks and enable safe participation).

<sup>69</sup>Scott Polsky, *Winning Medicine: Professional Sports Team Doctors' Conflicts of Interest*, 14 J. CONTEMP. HEALTH L. & POL'Y 503, 517-20 (1998).

medical judgment.<sup>70</sup> Athletes arguably pay the cost. This potential conflict may also arise when team physicians participate in bonus systems based on the team's record or performance, or when they receive championship rings.

The most obvious self-imposed pressure is the desire of the physician to retain his status as a professional team doctor. Many perks and benefits accompany the attendant publicity.<sup>71</sup> Many team physicians maintain local private practices that benefit from the exposure of being a professional team's physician.<sup>72</sup> In fact, recently, NFL teams have invited bids from physicians to compete for the position. The franchise will offer the position to the physician or organization who will pay the most, or who will provide the cheapest medical treatment.<sup>73</sup> This bidding to treat athletes reflects the value a physician places on being associated with a professional sports team.<sup>74</sup> Arguably, medical positions awarded to the highest bidder may compromise the interests of the athletes.<sup>75</sup>

### III. TORT CLAIMS BROUGHT AGAINST PROFESSIONAL TEAMS AND TEAM PHYSICIANS

#### A. Negligence Claims Against Professional Teams

Collective bargaining agreements governing the major professional sports leagues in the United States require teams to provide medical care to their athletes.<sup>76</sup> Most standard player contracts contain clauses reflecting this duty.<sup>77</sup> Accordingly, professional teams have a duty to exercise reasonable care to ensure the safety, fitness, and health of their players.<sup>78</sup> A team may be subject to a negligence or a breach of contract action for violating these terms.<sup>79</sup>

Mike Robitaille successfully sued the Vancouver Canucks of the NHL for breach of contract based on the team's mistreatment of his injuries.<sup>80</sup> Robitaille sustained

---

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>Being a professional team doctor makes sense economically because of the amount of visibility in the community associated with the position. Recently, some physicians have actually paid professional sports teams up to \$1 million for the rights to provide medical treatment to their athletes. *See id.* (citing Joseph Nocera, *Bitter Medicine*, SPORTS ILLUSTRATED, Nov. 6, 1995, at 82); *see also* Keim, *supra* note 15, at 215-18.

<sup>74</sup>*See* Keim, *supra* note 15, at 216.

<sup>75</sup>*Id.* Contracts awarded to the physician who will provide the cheapest medical care (pay the most for procurement of the employment agreement) do not seem to indicate a situation where the best interest of the athletes are paramount. In these scenarios, the physician's primary commitment appears to be to financial prosperity through association with the franchise, rather than to the health of his or her patient-athletes.

<sup>76</sup>UBERSTINE, *supra* note 7, at 14 A 24-28.

<sup>77</sup>*See* Herbert, *supra* note 53, at 246-47.

<sup>78</sup>*See generally*, Robitaille, 124 D.L.R. (3d) at 228.

<sup>79</sup>*Id.*

<sup>80</sup>*Id.* at 233.

injuries during an away game. He described to the team trainer that he felt “rubbery” and “shocking” sensations in his right leg.<sup>81</sup> The Canuck’s trainer told doctors from the home team that Robitaille’s problems were more mental than physical.<sup>82</sup> Soon thereafter, Robitaille was involved in a collision with another player during a game, after which his right leg jerked uncontrollably and he had to be carried off the ice.<sup>83</sup> Robitaille repeatedly asked the team trainer to see a doctor but was never given any significant medical attention.<sup>84</sup> A week later, Robitaille was body checked on the ice and injured his spinal cord.<sup>85</sup> Immediately following the injury, Canuck’s doctors told Robitaille to go home and take a couple of shots of Courvoisier cognac.<sup>86</sup> An independent doctor subsequently diagnosed Robitaille with a permanent disability.<sup>87</sup>

The court in *Robitaille* ultimately held that the Canucks had breached Robitaille’s player contract by failing to provide adequate health care, despite having actual notice of his injuries and their potential severity.<sup>88</sup>

Although Robitaille sued his team directly, most claims brought by athletes focus on the conduct of the team physician.<sup>89</sup> However, professional sports franchises may be held liable for the acts of employee doctors.<sup>90</sup> These suits are based on the theory of *respondeat superior* whereby employers are liable for the negligent acts of their employees. For example, Charles Krueger recovered against the San Francisco Forty-Niners when the team physician fraudulently withheld medical information from him.<sup>91</sup> Krueger successfully argued that the Forty-Niners maintained sufficient control over the team physician as an employee, for the team itself to be liable based on the principle of *respondeat superior*.<sup>92</sup>

## B. Claims Against Team Physicians

### 1. Medical Malpractice Claims

The majority of claims against team physicians have been brought as negligence claims alleging medical malpractice<sup>93</sup> based on a team physician’s failure to discover

---

<sup>81</sup>*Id.* at 231.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Robitaille*, 124 D.L.R. (3d) at 231-32.

<sup>85</sup>*Id.* at 232.

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* at 232.

<sup>88</sup>*Id.* at 233-34.

<sup>89</sup>See e.g., *Krueger*, 234 Cal. Rptr. at 583-84; *Hendy v. Losse*, 819 P.2d 1 (Cal. 1991); *Gambrell v. Kansas City Chiefs Football Club, Inc.*, 562 S.W.2d 163 (Mo. Appr. 1978); *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172 (N.D.N.Y. 1990).

<sup>90</sup>See RESTATEMENT (SECOND) OF AGENCY § 265 (2002).

<sup>91</sup>See *Krueger*, 234 Cal. Rptr. 579, 583-84.

<sup>92</sup>*Id.*

<sup>93</sup>See *Mitten*, *supra* note 33, at § 2(a).

an abnormality during a physical examination, improper medical clearance, improper medical care, or failure to disclose the nature and extent of an injury.<sup>94</sup> The reasonableness of the medical care provided, put at issue in these claims, is measured according to common tort law negligence principles.<sup>95</sup> Regardless of the exact standard used to evaluate a team doctor's conduct, decisions are made on a case-by-case basis—ultimately determining whether the physician deviated from reasonable conduct under the circumstances and exposed the athlete to an unreasonable risk of harm.<sup>96</sup>

## 2. Nondisclosure/Fraudulent Concealment/Misrepresentation Claims

All physicians have a duty to disclose any material information that would reasonably affect a patient's decisions regarding treatment of his or her injuries.<sup>97</sup> If a doctor fails to obtain a patient's informed consent, he or she may be subject to liability. Informed consent is based on the premise of individual autonomy. A human being of legal capacity and majority should be able to make decisions regarding his or her own body.<sup>98</sup> The recent trend however, is to require the disclosure that a reasonable patient needs to make an informed decision.<sup>99</sup>

A physician's duty of full disclosure is particularly important within the context of the professional sports industry. Most professional athletes are accustomed to playing with pain,<sup>100</sup> and generally seek out the quickest rehabilitative options.<sup>101</sup> If a team physician does not fully inform an athlete of the potential dangers associated with playing with a particular injury, or of the risks of a proposed treatment, the athlete's decision is uninformed. Under these circumstances, treatment may be considered administered without authority as a result of the physician's breach of his or her duty of disclosure.<sup>102</sup> Ultimately, the lack of informed consent, or treatment administered in the absence of consent, reduces to actionable negligence against the care provider.

When team doctors intentionally withhold material information regarding the true extent or nature of an injury, the risks associated with a particular form of treatment, or the potential hazards and long-term effects of playing with a specific ailment or

---

<sup>94</sup>*Id.* For one to recover damages in a negligence claim he or she must prove facts that give rise to a duty, a failure to conform to the requisite standard of conduct, which actually caused injury. RESTATEMENT 2d, *supra* note 32, at § 328.

<sup>95</sup>*See* Mitten, *supra* note 33, at § 2(a); *See also* King, *supra* note 1, at 685-92.

<sup>96</sup>*See* RESTATEMENT 2d, *supra* note 32, at §§ 282, 328.

<sup>97</sup>*See generally* Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

<sup>98</sup>*See id.* 780.

<sup>99</sup>*See* UBERSTINE, *supra* note 7, at 14 A 14 n.66 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, 189 (5th ed. 1984).

<sup>100</sup>*See* Davis, *supra* note 1, at 218.

<sup>101</sup>*Id.* at 216.

<sup>102</sup>*See* Canterbury, 464 F.2d at 783.

physical condition, players may also bring claims of fraudulent concealment.<sup>103</sup> To succeed on a claim of fraudulent concealment, a player must prove that the doctor acted with intent to influence a player to rely on false information in making his or her decision to continue to play or to return to competition.<sup>104</sup> At least one court has found that inducing an athlete to change his course of conduct or to alter his decision-making process satisfies the necessary intent element.<sup>105</sup> In order to recover under negligent non-disclosure or fraudulent concealment, an athlete also must prove causation, i.e. that had he been properly informed, he would not have adhered to the medical treatment or that the advice caused the harm.<sup>106</sup>

*Krueger v. San Francisco Forty Niners* is the most prominent case imposing liability on the team physician, and vicariously on the team itself, based on a claim of fraudulent concealment of medical information.<sup>107</sup> Charles Krueger was a defensive lineman for the Forty Niners for fifteen years.<sup>108</sup> Krueger missed very few games during his career and was respected around the league for playing through the pain associated with numerous injuries.<sup>109</sup> In 1963, Krueger ruptured the medial collateral ligament in his left knee and underwent surgery, after which the Forty Niners team doctor declared Krueger's knee to have undergone a "good repair."<sup>110</sup> Krueger's knee subsequently swelled and caused him severe pain during the 1964 season.<sup>111</sup> As treatment for this condition, team physician, Dr. Lloyd Taylor, administered powerful steroid injections of Novocain and cortisone.<sup>112</sup> These steroid injections were known to cause degenerative abnormalities resulting in cartilage decomposition.<sup>113</sup> Krueger testified that he had received about fifty injections during that year and then fourteen to twenty injections each year from 1964 to 1973.<sup>114</sup>

---

<sup>103</sup>See, e.g., *Krueger*, 234 Cal. Rptr. 579; *Hendy*, 819 P.2d at 1; *Gambrell*, 562 S.W.2d at 163; *Sherwin*, 752 F. Supp. at 1172.

<sup>104</sup>See *Krueger*, 234 Cal. Rptr. 579 at 582-83, citing CAL. CIV. CODE §§ 1709, 1710 ("[o]ne who willfully deceives another with the intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." The court further recognized that for the intentional concealment of a material fact to be actionable as fraud, there must exist a fiduciary relationship. According to the court, the doctor-patient relationship between Krueger and the physician satisfied this requirement.)

<sup>105</sup>*Id.*

<sup>106</sup>*Id.* at 584-85.

<sup>107</sup>See generally *id.* at 579.

<sup>108</sup>*Id.* at 580.

<sup>109</sup>*Krueger*, 234 Cal. Rptr. at 580.

<sup>110</sup>*Id.* at 580-81.

<sup>111</sup>*Id.* at 581.

<sup>112</sup>*Id.*

<sup>113</sup>*Id.*

<sup>114</sup>*Krueger*, 234 Cal. Rptr. at 581.

During the 1970 season, Krueger felt a piece of his knee break off during a game and could feel it inside his leg.<sup>115</sup> The team physician gave Krueger a pain numbing shot and advised him to return to play.<sup>116</sup> In 1971, Krueger underwent another surgery to remove loose bodies in his knee after an x-ray revealed degenerative, post-traumatic changes in his knee joint.<sup>117</sup> None of the doctors treating Krueger informed him of the medically known risks and consequences associated with injections of steroids,<sup>118</sup> nor did they notify him of the presence of loose bodies in his knee.<sup>119</sup> Krueger testified that had he known of the dangers associated with receiving the injections, or the consequences of continuing to play professional football in his condition, he would have rejected the treatment and retired.<sup>120</sup> Krueger is now permanently disabled.<sup>121</sup> He suffers from traumatic arthritis and a crippling degenerative condition in his left knee that prohibits him from standing for prolonged periods of time or walking up and down stairs without severe pain.<sup>122</sup>

The *Krueger* court found that Dr. Lloyd Taylor breached his duty when he failed to disclose information necessary for Krueger to furnish his informed consent.<sup>123</sup> Furthermore, the court concluded that the physician's actions constituted fraud.<sup>124</sup> The court found that an actual intent to deceive was not required. The intent to induce an athlete to adopt or abandon a course of action, which ultimately proved to be harmful, was sufficient for liability under a fraudulent concealment claim.<sup>125</sup> In accepting Krueger's allegations of intent, the court considered the obvious interest that the Forty Niners had in prolonging Krueger's career.<sup>126</sup> The *Krueger* litigation stunned the professional sports industry<sup>127</sup> and seemed to open the doors of recovery for the injured professional athlete. However, few athletes have found similar success with claims against team physicians and professional franchises.<sup>128</sup>

---

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

<sup>117</sup>*Id.*

<sup>118</sup>*Id.*

<sup>119</sup>*Krueger*, 234 Cal. Rptr. at 581.

<sup>120</sup>*Id.*

<sup>121</sup>*Id.* at 582.

<sup>122</sup>*Id.*

<sup>123</sup>*Id.* at 584.

<sup>124</sup>*Krueger*, 234 Cal. Rptr. at 584.

<sup>125</sup>*Id.* at 584 (citing *Peskin v. Spuires*, 319 P.2d 405 (Cal. App. Ct. 1957)).

<sup>126</sup>*Id.*

<sup>127</sup>See Jennifer Lynn Woodlief, *Fraudulent Concealment of Medical Information in Professional Football*, 9 SPG ENT & SPORTS LAW. 3, 6-7 (1991).

<sup>128</sup>See, e.g., *Martin v. Casagrande*, 559 N.Y.S.2d 68 (App. Div. 1990); *Depiano v. Montreal Baseball Club, Ltd.*, 663 F. Supp. 116 (W.D. Pa. 1987).



#### IV. CLAIMS BROUGHT UNDER COLLECTIVE BARGAINING AGREEMENTS GOVERNING PROFESSIONAL ATHLETIC CONTRACTS

In most professional sports, players' unions bargain with team owners on behalf of all of the players regarding the terms of standard player employment contracts.<sup>129</sup> The resulting agreement between the representative entity and the team owners is the Collective Bargaining Agreement (hereinafter CBA).<sup>130</sup> This Agreement dictates the terms and conditions of standard player contracts.<sup>131</sup> Although some terms are negotiable, the CBA expresses the minimum obligations and duties within professional athletic employment agreements.<sup>132</sup> CBAs also address the procedure for resolving disputes.<sup>133</sup> The typical CBA entitles the athlete to team-provided or paid-for medical care.<sup>134</sup> Thus, standard player contracts typically allow the team to appoint a physician who ultimately makes final medical decisions.<sup>135</sup>

##### A. *Standard vs. Guaranteed Player Contracts*

Professional sports employment contracts fall into two general categories. Under the standard contract, a club may terminate a player's employment if the player is unable to perform.<sup>136</sup> Under a standard contract, a player injured in the course and scope of his employment will receive full compensation during his disability until the end of the season.<sup>137</sup> The injured player is also entitled to reasonable medical costs, usually for a specified time period from the date of initial treatment.<sup>138</sup>

Under a guaranteed contract, the team usually agrees to pay the injured player a full salary despite any injuries that the athlete might incur during the scope and course of his employment for the entire agreed-upon term, as well as compensation for reasonable medical costs.<sup>139</sup> This type of agreement ensures the player's salary for the agreed-upon time period, even if the athlete fails to exhibit skills sufficient to qualify him as a member of that particular team.<sup>140</sup>

The terms of standard and guaranteed contracts provide compensation for injury without regard to the manner in which the athlete was injured.<sup>141</sup> There is no

---

<sup>129</sup>See WEISTART & LOWELL, *supra* note 29, at 778.

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>*Id.*

<sup>133</sup>See Herbert, *supra* note 53, at 246-47.

<sup>134</sup>*Id.*

<sup>135</sup>See WEISTART & LOWELL, *supra* note 29, at 829-30.

<sup>136</sup>*Id.*

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>*Id.* at 247-48.

<sup>140</sup>See Herbert, *supra* note 53, at 247.

<sup>141</sup>See WEISTART & LOWELL, *supra* note 29, at 829-30.

differentiation between accidental, negligent, or intentional injuries.<sup>142</sup> Thus, the compensation an injured athlete receives is measured the same for an athlete injured in an accidental collision in practice and an athlete injured by negligent medical treatment.<sup>143</sup> These agreements provide no compensation for any tortious acts committed against the athlete by team physicians or by team personnel. This lack of accountability and personal responsibility creates disincentives for team doctors and/or team personnel to administer prudent care founded on athletes' best interests.

*B. Federal Preemption of State Law Tort Claims*

The Supreme Court has authorized federal courts to fashion a uniform body of federal law governing CBAs.<sup>144</sup> Section 301 of the Labor Management Relations Act (hereinafter LMRA) controls procedural and substantive adjudication of litigious conflicts between employers and labor unions.<sup>145</sup> The Supreme Court has declared § 301 of the LMRA to preempt state law.<sup>146</sup> Claims substantially dependent upon the interpretation of provisions within the agreement between parties to a labor contract (CBA) are therefore governed exclusively by federal law.<sup>147</sup> Courts hold this preemptive effect to extend to all suits wherein the terms of the CBA, including those suits alleging tort claims.<sup>148</sup>

The terms in professional player contracts address injury and medical care provision. Any professional athlete's claim against his team that is substantially related to the contractual provisions of the CBA is governed by federal law. Once a court determines that a claim or dispute is governed by LMRA § 301, the court defers to any arbitration provisions contained within the labor agreement (CBA).<sup>149</sup> No court will reach the merits of any claim which, on its face, appears to be governed by an applicable arbitration provision.<sup>150</sup> Thus, athletes are often excluded from seeking redress through litigation for injuries associated with negligent medical care.

Professional sports CBAs contain arbitration clauses that establish exclusive procedures for resolving specific grievances arising out of particular contract provisions.<sup>151</sup> As a consequence, grievances arising out of contractual provisions

---

<sup>142</sup>*Id.*

<sup>143</sup>*Id.*

<sup>144</sup>*Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

<sup>145</sup>*Id.* at 220.

<sup>146</sup>*Smith v. Houston Oilers, Inc.*, 87 F.3d 717 (5th Cir. 1996).

<sup>147</sup>*Id.*

<sup>148</sup>*Allis-Chalmers Corp.*, 471 U.S. at 219-20.

<sup>149</sup>*See BERRY & WONG, supra* note 2, at 830-31. *See also Sherwin*, 752 F. Supp. at 1172; *Smith*, 87 F. 3d at 717.

<sup>150</sup>*See BERRY & WONG, supra* note 2, at 249, *citing* *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988).

<sup>151</sup>*See* *Herbert, supra* note 53, at 246-49, *citing* UNIFORM PLAYER'S CONTRACT, THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS ¶ 7(b)(1) (contract referred to here is representative of all major sports league employment agreements).

addressing medical treatment effectively become breach of contract claims. The resulting award provides a player only with contractual damages. Professional athletes cannot recover for physical and mental pain and suffering, physical disfigurement, physical impairment, or loss of earning capacity through arbitration proceedings.<sup>152</sup> Furthermore, the possibility of punitive damages to deter abusive practices and customs within professional sports are unavailable. Arbitration as an exclusive remedy for athletes who are physically injured by negligent medical treatment or fraudulent diagnosis, attaches no personal liability to professional sports teams or sports physicians. Therefore, it fails to create an incentive for doctors to employ precautionous medical treatments or to adhere to a prudent standard of care.

In *Smith v. Houston Oilers, Inc.*, two football players employed under one-year standard contracts were injured during the pre-season.<sup>153</sup> The NFL prohibits terminating a player's contract if the player is recovering from a football-related injury.<sup>154</sup> Therefore, the players were offered settlements to leave the team voluntarily.<sup>155</sup> Neither accepted the team's offers. In order to coerce them into accepting these offers and leaving the team, the Oilers allegedly forced the athletes through an abusive rehabilitation program.<sup>156</sup> This program ostensibly consisted of a reduction in actual rehabilitative treatment, the imposition of strenuous exercise far exceeding earlier demands, sleep deprivation resulting from workouts beginning at four in the morning and some ending at eleven at night, and intentional confusion of workout schedules.<sup>157</sup>

The strenuous program caused one of the players to collapse from exhaustion during a 4:00 A.M. workout session.<sup>158</sup> Together, the players sued the Houston Oilers and the team trainer for injuries sustained as a result of the rehabilitation program.<sup>159</sup> Sherman and Tracy Smith brought claims of coercion, duress, assault and battery, extortion, and intentional infliction of emotional distress.<sup>160</sup>

The Oilers maintained that the claims were preempted by federal law pursuant to LMRA § 301, and, therefore, must be resolved in compliance with the arbitration provisions of the CBA governing NFL employment contracts.<sup>161</sup> In response, the players argued that resolution of their claims did not require interpretation of the terms of the CBA, and, alternatively, that the Oilers' conduct was sufficiently outrageous to override LMRA § 301 preemption.<sup>162</sup>

---

<sup>152</sup>See Herbert, *supra* note 53, at 249, citing *Lingle*, 486 U.S. at 399.

<sup>153</sup>*Smith*, 87 F.3d at 718.

<sup>154</sup>*Id.*

<sup>155</sup>*Id.*

<sup>156</sup>*Id.* at 718-719.

<sup>157</sup>*Id.* at 718. All the while team staff threatened to blackball Sherman and Tracy from employment with other NFL teams

<sup>158</sup>*Smith*, 87 F.3d at 719.

<sup>159</sup>*Id.*

<sup>160</sup>*Id.*

<sup>161</sup>*Id.*

<sup>162</sup>*Id.*

In reaching a verdict for the Oilers, the district court determined that the claims ultimately amounted to an underlying labor dispute over the termination pay settlement offer.<sup>163</sup> According to the court, this dispute was indistinguishable and inseparable from the Oilers' conduct in forcing the players to choose between the terms of the offer and participation in the rehabilitation program.<sup>164</sup> LMRA § 301 preempted the claims because their resolution depended upon an analysis of the governing CBA, specifically, a clause authorizing NFL franchises to require participation in rehabilitation programs.<sup>165</sup> As a result, the players' only recourse was arbitration as per the CBA.<sup>166</sup>

In pursuing an appeal, the players argued that the Oilers' conduct was so outrageous that the CBA could not be interpreted to have condoned it, and therefore, no interpretation of any CBA provision was necessary to resolve the claims.<sup>167</sup> In addressing this argument, the appellate court conceded that where the actions involved consisted entirely of an employer's physical battery of an employee, there is no need for the interpretation of any labor agreement. It is generally understood that the CBA could not have condoned the intentional tort.<sup>168</sup> Therefore, adjudication of the battery claim did not depend upon the meaning of any terms included in the CBA.<sup>169</sup> However, the Court further stated that, in order for a physical battery to be independent of the CBA, there must be a direct physical act of violence committed against the claimant.<sup>170</sup> Without an allegation of a direct physical battery, the court was unwilling to apply the above-mentioned battery exclusion.<sup>171</sup> The court expressly suggested that the players themselves were responsible for the mistreatment because they "wanted to remain with a team that didn't want them" and that the two men could have chosen not to participate.<sup>172</sup> Ultimately, the court translated the player's tort claims into contractual disputes over the relative bargaining power of the team, resulting in unreasonable negotiations

---

<sup>163</sup>*Smith*, 87 F.3d at 720-21.

<sup>164</sup>*Id.* at 721 (The court stated, "Another way of stating this is that we have here a case involving contract rights, not condoned violence... Whether the Oilers had a legal right to require the players either to endure the workouts or quit is therefore a question of contract law." This type of reasoning transforms a claim scrutinizing potentially tortuous, or at least negligent conduct into one which will only measure the conformity of the conduct to a contract term.).

<sup>165</sup>*See generally id.* at 720-21.

<sup>166</sup>*Id.* at 721.

<sup>167</sup>*Id.* at 717, 719.

<sup>168</sup>*Smith*, 87 F.3d at 720.

<sup>169</sup>*Id.*

<sup>170</sup>*Id.*

<sup>171</sup>*Id.*

<sup>172</sup>*Id.*

concerning the termination offer.<sup>173</sup> Characterized in this way, the court deferred the dispute over the players' contractual rights to the prescribed arbitration methods.<sup>174</sup>

In denying Tracy and Sherman Smith an avenue for compensation for their injuries other than binding arbitration, the *Smith* court defined and characterized the players' claims as contractual in nature. The court in *Smith*, failed to separate the issues, and arguably blurred them into one. Whether the Oilers could require their players to undergo the rehabilitation program may have required interpretation of the CBA. The players, however, were suing for the injuries sustained as a result of participation in the program. They sought damages for the intentional torts the team committed against them, unrelated to their respective employment contracts.

Even though the court in *Smith* acknowledged physical battery claims as exceptions to federal preemption, it refused to apply this exception to the facts because the plaintiffs failed to allege that the team committed a direct act of physical violence against them.<sup>175</sup> However, American jurisprudence has long recognized that no direct physical act or touching is required to recover under a claim of battery.<sup>176</sup> The *Smith* court's analysis effectively shields professional sports teams from tort liability for abuse of their athletes as long as the team or team employees never directly hit or otherwise batter the athlete.

CBAs governing professional athlete employment agreements shield team franchises from personal liability or sanction for player mistreatment by limiting athletes' grievance procedures to arbitration. Consequently, professional teams are not threatened with potentially large damage awards to discourage negligent and/or reckless care of athletes. Furthermore, arbitration as an exclusive remedy denies injured athletes adequate compensation. Arbitration awards are effectively nonreviewable by courts.<sup>177</sup>

## V. WORKERS' COMPENSATION

### A. Underlying Policy/Typical Statute

Workers' compensation laws further impede athletes from obtaining adequate compensation for injuries resulting from a team physician's negligence or fraud. State workers' compensation laws provide cash-wage benefits and medical care to victims of work-related injuries.<sup>178</sup> The underlying premise of workers' compensation legislation is the social desirability of giving employees a definite and

---

<sup>173</sup>*Smith*, 87 F.3d at 720.

<sup>174</sup>*Id.* at 721.

<sup>175</sup>*Id.* at 720.

<sup>176</sup>*See* Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967) (citing Morgan v. Lyacomo, 1 So. 2d 510 (Miss. 1941) where the court declared that it is not necessary to touch a plaintiff's body or clothing or knock or snatch anything from a plaintiff's hand or touch anything connected with his or her body to constitute an assault and battery, so long as the conduct was offensive).

<sup>177</sup>*See* 9 U.S.C.A. § 10 (West 2002). The Federal Arbitration Act removes court jurisdiction over disputes wherein the parties have contractually agreed to dispute resolution via arbitration proceedings.

<sup>178</sup>*See* ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW (2000).

efficient means of compensation for injuries suffered in the course of employment, without the necessity of proving fault.<sup>179</sup> Injured employees give up the right to sue their employers for full compensation in return for definite, modest recovery without litigation, while employers protect themselves from large damage awards in exchange for liability without determination of fault.<sup>180</sup>

Workers' compensation laws only provide coverage to persons having the status of employee and expressly exclude independent contractors.<sup>181</sup> Most state statutes offer benefits to the injured employee of between one half and two thirds of the employee's average weekly wage, and impose maximum and minimum limits.<sup>182</sup> These benefit awards are limited to disabilities. Workers' compensation does not offer benefits for physical or mental pain and suffering.<sup>183</sup> Consequently, workers' compensation does not restore the claimant to the position he or she was in prior to the work-related injury. The amount of compensation awarded is generally not much higher than is necessary to prevent the worker from insolvency.<sup>184</sup>

### B. Classification as Employee or Independent Contractor

The nature of a team physician's relationship with a sports franchise determines whether an athlete's injury caused by a team doctor will be covered under workers' compensation statutes. When employee athletes are injured during the course of their employment for the team, and their claims are against team physicians considered to be employees of the team, workers' compensation may be the athletes' exclusive remedy.<sup>185</sup> This situation prohibits injured athletes from recovering damages associated with their injuries, and instead, provides them with a percentage of their wages because of their inability to work.<sup>186</sup> As a result, athletes go uncompensated for the tort committed against them and negligent and fraudulent medical care providers escape liability. The classification of doctors as independent contractors however, allows injured athletes to collect damages above and beyond the benefits available under workers' compensation statutes. When athletes are able to recover against an independent contractor team physician directly, they can pursue compensation not only for loss of wages, but also for physical and mental pain and suffering. Furthermore, the liability associated with this latter scenario attaches at the source of the culpable conduct and allows for potential punitive damage awards.

The Restatement (Second) of Agency §220 sets forth factors that courts use to distinguish employees from independent contractors. These factors include: (1) the extent of control that the master exercises over the details of the work in question;

---

<sup>179</sup>*Id.*

<sup>180</sup>*Id.*

<sup>181</sup>*Id.* § 1.01, at 1-3.

<sup>182</sup>*Id.*

<sup>183</sup>See LARSON, *supra* note 178, at § 1.03[4], 1-10.

<sup>184</sup>*Id.* at § 1.03[5], at 1-10.

<sup>185</sup>See, e.g., *Hendy v. Losse*, 819 P.2d 1 (Cal. 1991); *Martin*, 559 N.Y.S.2d 68 (both cases held that workers' compensation was the exclusive remedy for injured professional athletes).

<sup>186</sup>See LARSON, *supra* note 178, at § 1.03[4], 1-10.

(2) whether the one employed is in a distinct occupation; (3) whether the work involved is such that it normally involves supervision; (4) the skill required to perform the work; (5) who supplies the necessary instrumentalities; (6) the length and time for which the person is employed; (7) the method of payment; and (8) the intent of the parties.<sup>187</sup> In addition to the Restatement factors, courts consider an employer's tax filings as well as other documents associated with employment.<sup>188</sup> These documents can be relevant to the determination whether an employer-employee situation exists.

In *Bryant v. Fox*, former Chicago Bears players brought an action against the team's physician for medical malpractice.<sup>189</sup> In an attempt to circumvent workers' compensation laws as an exclusive remedy, the plaintiffs argued that the doctor was an independent contractor.<sup>190</sup> The *Bryant* court determined that the physician was not an employee of the Chicago Bears, and thus, the players' relief was not limited to the benefits available under the Illinois' workers' compensation statute.<sup>191</sup> In reaching this conclusion, the court relied upon evidence that the team paid the doctor on a case-by-case basis, that the team did not offer many of their employee benefits to the physician, that the team did not provide the doctor with a W-2 tax form, nor did they deduct social security from his pay, and most importantly, the team did not exercise the requisite level of control over the physician's duties.<sup>192</sup> Consequently, the players were able to bring a tort action against the physician.

Recent litigation, however, suggests that professional teams, sports physicians, and team physician insurance providers have learned from cases like *Bryant v. Fox*.<sup>193</sup> Many insurance providers now require insured team physicians to sign detailed employment contracts with professional teams.<sup>194</sup> These employment contracts expressly declare the physician an employee. The terms' structure creates an employer-employee situation. Insurers are obviously cognizant of the immunity a team doctor enjoys under state workers' compensation laws when he or she is classified as an employee, as opposed to an independent contractor. The case of *Daniels v. Seattle Seahawks* reflects this trend.<sup>195</sup>

---

<sup>187</sup> See RESTATEMENT OF AGENCY § 220 (2)(a)-(j) (1958).

<sup>188</sup> See *Bryant v. Fox*, 515 N.E.2d 775 (Ill. App. Ct. 1987) (where the court considered the filing of W-2 tax forms in determining a doctor's employment status).

<sup>189</sup> *Id.* at 775-76.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 778.

<sup>192</sup> *Id.*

<sup>193</sup> See, e.g., *Daniels v. Seattle Seahawks*, 968 P.2d 883 (Wash. App. Ct. 1998) 968 P.2d 883 (where a team physician's insurance provider required the doctor to sign an employment contract with a professional team to remain eligible for malpractice coverage. No doubt the insurance company understood the workers' compensation immunity associated with injuries resulting from the negligence of a co-employee.).

<sup>194</sup> *Id.* at 885.

<sup>195</sup> *Id.* at 883-88.

In *Daniels*, a former Seahawk player claimed that the team's physician was amenable to a medical malpractice suit because of his independent contractor status.<sup>196</sup> Daniels, a professional football player, injured himself while playing for the Seattle Seahawks.<sup>197</sup> The team doctor diagnosed his injury as a groin pull and advised him to return to play.<sup>198</sup> Daniels was unable to play and never recovered.<sup>199</sup> Daniels ultimately found out that he had, in fact, fractured his rectus femoris and that the team physician had misdiagnosed his injury.<sup>200</sup>

Although the physician originally provided medical care under a fee-for-service arrangement with the team, later, his insurance carrier required that he sign a detailed employment contract.<sup>201</sup> Pursuant to this contract, the team paid the physician an annual salary. His delineated obligations to the Seahawks consisted of about sixty percent of his medical practice.<sup>202</sup> Under the terms of the employment agreement, the team handled the doctor's relevant tax filings and paid workers' compensation benefits to the state.<sup>203</sup> However, the physician received no health insurance, sick leave, eligibility in the team's 401(K), life insurance, or vacation pay, all of which were available to Seattle Seahawk employees.<sup>204</sup>

Although the physician retained sole responsibility for medical decisions, the court determined that the employment contract clearly controlled the doctor's physical conduct in performing his contractual duties for the team.<sup>205</sup> Consequently, co-employee immunity under Washington's workers' compensation statute barred the athlete's suit against the doctor.<sup>206</sup> As a result, the court never considered the merits of Daniels' malpractice claim.<sup>207</sup> At the insistence of the doctor's personal insurance provider, the Seahawks and the physician successfully drafted an employment agreement, under which athlete employees were effectively barred from bringing lawsuits against the doctor.

Even though a few states have enacted specific legislation excluding or limiting the coverage for professional athletes,<sup>208</sup> the statutory application by the *Daniels*

---

<sup>196</sup>*Id.* at 884.

<sup>197</sup>*Id.*

<sup>198</sup>*Daniels*, 968 P.2d at 884.

<sup>199</sup>*Id.*

<sup>200</sup>*Id.*

<sup>201</sup>*Id.* at 885.

<sup>202</sup>*Id.*

<sup>203</sup>*Daniels*, 968 P.2d at 885.

<sup>204</sup>*Id.*

<sup>205</sup>*Id.* at 883, 888 n.4.

<sup>206</sup>*Id.* at 887-88.

<sup>207</sup>*Id.*

<sup>208</sup>*See, e.g.*, FLA. STAT. ANN. § 440.09 (WEST 2001), MASS. GEN. LAWS ANN. ch. 152 §1 (Law. Co-op. 1993), MO. ANN. STAT. ch. § 270 (Vernon 1991), PA. STAT. ANN. tit. 77 (2001) § 22, TEX. LAB. CODE ANN. § 406.095, (WEST 2001) and WASH. LAWS §51.08.013 all of which exclude professional athletes from workers' compensation legislation [Hereinafter Statutes].



court represents the majority view in states that have not specifically addressed professional athletes in their workers' compensation statutes.<sup>209</sup> Under most workers' compensation laws, team physicians can effectively protect themselves from players' negligence claims by crafting an employment arrangement in which the professional athlete and team physician are co-employees.

Ultimately a team physician is employed for the medical expertise he or she possesses. The typical employment agreement with a professional sports team expressly states the autonomous nature of the physician's medical decisions.<sup>210</sup> In spite of this fact, courts continue to hold that professional teams, as employers, maintain the requisite control over a team physician's duties to qualify him or her as an employee.<sup>211</sup> For example, the *Daniels* court stated that even though, "Dr. Auld [the team physician] is solely responsible for exercising his independent medical judgment. ...[w]e decline to carve out an exception of this test for physicians merely because they retain control over their professional judgment."<sup>212</sup> The immunity that team physicians can enjoy under workers' compensation systems reduces the incentive for them to treat athletes with the utmost care, and contemporaneously reduces the compensation available to injured athletes.

### C. Intentional Tort Exception

Some states exclude intentional tort claims from workers' compensation coverage.<sup>213</sup> For example, in *Kreuger*, the court, applying California State law, exempted.<sup>214</sup> *Kreuger's* action for fraud and deceit from workers' compensation coverage.<sup>215</sup> The state court held that the physician's intentional concealment of medical information amounted to fraud because of the fiduciary nature of the doctor-athlete relationship.<sup>216</sup> The *Kreuger* case applied a very specific state law<sup>217</sup> and appears to stand alone in regard to its probative outcome. In fact, subsequent athletes within the same state have attempted to apply the section relied upon by the *Kreuger* court without success.<sup>218</sup>

---

<sup>209</sup>See Statutes, *supra* note 208 (these statutes are the only state laws currently accounting for professional athletes).

<sup>210</sup>See, e.g., *Daniels*, 968 P.2d at 885. The employment contract in this case, while providing for a relationship between team and physician whereby team retained significant control over the physician's duties, expressly stated that the doctor would be solely responsible for exercising his independent medical judgment. See also Russell, *supra* note 43, at 307.

<sup>211</sup>*Id.*

<sup>212</sup>*Daniels*, 968 P.2d at 888 n.4.

<sup>213</sup>See Statutes, *supra* note 208.

<sup>214</sup>See *Kreuger*, 234 Cal. Rptr. at 579.

<sup>215</sup>*Id.*

<sup>216</sup>*Id.* at 582-83.

<sup>217</sup>CAL. CIV. CODE §§ 1709, 1710 (West 1987).

<sup>218</sup>See *Hendy*, 819 P.2d at 1.

In states that recognize an intentional tort exception to workers' compensation statutes, the exception appears to be extremely narrow.<sup>219</sup> In *DePiano v. Montreal Baseball Club, Ltd.*, a minor league baseball player sued his former team alleging intentional injury as an exception to the exclusivity of New York's workers' compensation remedies.<sup>220</sup> The player contended that the team forced him to continue to play with a known injury and, as a result, intentionally injured him.<sup>221</sup> Applying New York law, the Pennsylvania District Court commented on the difficult burden of proof associated with the exception that the plaintiff sought.<sup>222</sup>

Citing New York precedent, the *DePiano* court held that in order to qualify under the intentional injury exception to workers' compensation coverage, the defendant must have engaged in the challenged conduct with a distinct desire to bring about the specific consequences of the act.<sup>223</sup> Accordingly, mere knowledge, along with an appreciation of the risk of injury, is not equivalent to intent to cause the injury, and therefore insufficient for qualification under the exception.<sup>224</sup> The court found no evidence that the defendant intended to cause injury and further declared that no amount of negligence would suffice to meet the requisite burden.<sup>225</sup> In fact, the court relied on the fact that the team was short outfielders to prove that the team was motivated by a desire to keep their players healthy and available for competition.<sup>226</sup>

In *Gambrell v. Kansas City Chiefs Football Club, Inc.* and *Martin v. Casagrande*, professional athletes made similar claims arguing that they fell within the intentional tort exception to workers' compensation statutes.<sup>227</sup> The courts denied them relief under tort law because they had already accepted workers' compensation benefits.<sup>228</sup> In both cases, the athletes had accepted workers' compensation benefits prior to filing suit for damages.<sup>229</sup> The *Martin* court expressly stated that, where an employee has received workers' compensation benefits, his right to sue his employer no longer

---

<sup>219</sup>*See, e.g., DePiano v. Montreal Baseball Club, Ltd.*, 663 F. Supp. 116, 117 (W.D. Pa. 1987); *Martin v. Casagrande*, 559 N.Y.S.2d 68 (N.Y. App. 1990). *See also Gambrell*, 562 S.W.2d at 163 (where the court decided that the fraud and deceit alleged by a professional football player against his former team and team physician merged with the actual physical injury for which the athlete had already recovered workers compensation benefits).

<sup>220</sup>*DePiano*, 663 F. Supp. at 116.

<sup>221</sup>*Id.* at 117.

<sup>222</sup>The court stated that in order to succeed under the exception, "[T]he claimant employee must prove an intentional or deliberate act by the employer *directed at causing harm to that particular employee.*" *Id.*

<sup>223</sup>*Id.*

<sup>224</sup>*Id.* (The court goes on to say that the fact that an injury is substantially certain to occur is not enough to hold an employee liable for an injury to a co-employee in the course of employment).

<sup>225</sup>*DePiano*, 663 F. Supp. at 116, 117.

<sup>226</sup>*Id.*

<sup>227</sup>*Gambrell*, 562 S.W.2d at 163; *Martin*, 559 N.Y.S.2d at 68.

<sup>228</sup>*Id.*

<sup>229</sup>*Gambrell*, 562 S.W.2d at 164; *Martin*, 559 N.Y.S.2d at 69.

exists and thus, the merits of any subsequent claims are not considered.<sup>230</sup> Similarly, the *Gambrell* court recognized that where an injury is determined to be compensable under workers' compensation, any common law suit is subsequently barred.<sup>231</sup>

Employment agreements in the professional sports entertainment industry are contracts for future performance and differ from typical at-will employment relationships. A professional team has exclusive rights to an athlete under contract and the player is prohibited from working for other teams. Thus, the courts' narrow interpretation of the intentional injury exception has a greater impact on the professional athlete's work environment compared to the at-will employment setting. Teams have total control over the nature of medical care an athlete receives. It is usually the team physician's final decision as to the type and amount of medical treatment administered.<sup>232</sup> What's more, injuries are constantly present in the professional sports work place. Even if a team's immediate intent may be to keep a player available for competition, teams and team physicians should not escape personal liability for the injuries to athletes that are certain to result.

#### D. Dual Capacity Doctrine

The dual capacity doctrine is another exception to the exclusivity of workers' compensation statutes. In its broadest interpretation, this doctrine stands for the premise that a co-employee may assume a relationship with another co-employee distinct from the one originally established or accepted in the work place environment, and any injuries resulting from this unique relationship are not subject to coverage by workers' compensation.<sup>233</sup> Although athletes, in suits against physicians and sports teams, regularly invoke this doctrine, courts rarely recognize its applicability.<sup>234</sup>

In *Hendy v. Losse*, Hendy, a professional football player for the San Diego Chargers, sued the team physician alleging medical malpractice for the treatment of a knee injury he sustained during the 1986 and 1987 NFL seasons.<sup>235</sup> Hendy argued that the team doctor negligently caused him permanent injury by advising him to continue to play in spite of his injury.<sup>236</sup> The physician moved for dismissal of the action, arguing that Hendy's work-related injury was compensable exclusively under workers' compensation.<sup>237</sup> In rebuttal, Hendy maintained that the physician was acting in a dual capacity when he diagnosed and treated his injury.<sup>238</sup>

---

<sup>230</sup>*Martin*, 559 N.Y.S.2d at 70.

<sup>231</sup>*Gambrell*, 562 S.W.2d at 168.

<sup>232</sup>See Herbert, *supra* note 53, at 252-53.

<sup>233</sup>See *Daniels*, 968 P.2d at 888 (where the court expressed the Dual Capacity Doctrine as an exception to workers' compensation immunity where an employee acts in a capacity outside the typical employer-employee or employee-employee relationship, and this additional capacity imposes obligations separate from those imposed in the typical/original relationship).

<sup>234</sup>See, e.g., *Daniels*, 968 P.2d at 883; *Hendy*, 819 P.2d at 4.

<sup>235</sup>*Hendy*, 819 P.2d at 4.

<sup>236</sup>*Id.* at 3.

<sup>237</sup>*Id.*

<sup>238</sup>*Id.* at 4.

The court declared that the decisive issue in these types of cases is whether the physician was acting within the ordinary scope of his or her employment when he or she treated the claimant.<sup>239</sup> The court held that the doctor, in treating a player for a team that employed him, was acting within the scope of his employment. Hence, co-employee immunity barred any recovery other than workers' compensation benefits.<sup>240</sup> The court based its decision upon the following rationale,

[T]he purpose of section 3601 is to make workmen's compensation the exclusive remedy of an injured workman against his employer. That purpose would be defeated if a right of action existed against a fellow employee acting in the scope of his employment in such a way that the fellow employee's negligence could be imputed to the employer.<sup>241</sup>

#### VI. PREVENTING ABUSE AND PROVIDING ADEQUATE COMPENSATION: PROPOSED REMEDIES

The triangular relationship between a professional sports team, a team physician, and a professional athlete creates a complex dynamic exposing physicians to pressures that may impair their sound medical judgment and facilitate physical abuse of professional athletes. At the same time, the professional sports industry is organized to limit, and, in most cases, deny adequate compensation to athletes for their injuries, and to protect physicians and teams from liability. CBAs controlling employment agreements within professional sports leagues create substantial obstacles to recovery for injured athletes. Furthermore, the legal standards applicable to professional sports physicians are uncertain. Finally, workers' compensation statutes and co-employee immunity impede legal redress for injuries. This section proposes solutions that promote accountability within the industry as well as the well-being of professional athletes' physical health.

##### A. Create a Well-Defined Uniform Standard of Care

The diverse background of specialists providing medical care to professional sports teams prevents uniform definition and classification of the term *professional team physician*.<sup>242</sup> As a result, the legal standard of care to which these various practitioners are subject to, or should be subject to, is uncertain.

The need for a uniform standard governing the practice of sports medicine in order to provide an incentive to physicians to act reasonably is evident. Without a clear standard for determining the reasonableness of a sports medicine practitioner's conduct, team physicians will continue to make questionable medical decisions and recommendations. As sports popularity has risen,<sup>243</sup> so has the number of physicians practicing sports medicine.<sup>244</sup> Concurrently, the literature and resources available

---

<sup>239</sup>*Id.* at 11.

<sup>240</sup>*Hendy*, 819 P.2d at 12.

<sup>241</sup>*Id.*

<sup>242</sup>*See King, supra* note 1, at 658-63.

<sup>243</sup>*Id.* at 657.

<sup>244</sup>*See Solares, supra* note 43, at 238-40.

concerning medical care to the athlete has dramatically increased.<sup>245</sup> Experts in the field, along with the large number of responsible sports medicine practitioners must influence the American Medical Association to recognize sports medicine as an accredited subspecialty within the general practice of medicine.

This recognition will provide the court system with the requisite societal evidence necessary to create a heightened standard of care. A written exam or fellowship requirement will induce courts to recognize a more specific standard and eliminate the lengthy process of evolution through judicial scrutiny alone. More importantly, team physicians will know exactly what is expected of them, resulting in the cautious administration of medical care and ultimately, less injury as a result of exploitation of the professional athlete. The incentive to provide the prudent care associated with uniform application of a heightened standard of care is imperative.

Currently, the trend is an accepted practice standard, which requires a sports medicine practitioner to provide care in accordance with reasonable expectations of physicians in general.<sup>246</sup> Another modern standard imposed upon physicians practicing sports medicine amounts to a “what should have been done under the circumstances” test.<sup>247</sup> The evolution of a specific sports medicine standard would likely impose liability on such a specialist where none may be attached to the general practitioner.

### *B. Prohibit Professional Teams From Providing Medical Care*

As discussed above, the conflicts facing team physicians in the professional sports industry to unduly influence a doctor’s autonomous medical discretion. The end result often is inadequate or even fraudulent. Eliminating the conflicts and pressures facing team physicians would allow physicians to provide care in an environment where athletes’ best interests govern every medical decision.

#### 1. Employment by Players Unions/League

If professional sports teams did not employ team physicians, team management would have less influence over the doctors’ day-to-day decisions. Some commentators argue that league players unions should hire physicians.<sup>248</sup> Under this proposed solution, the third party paying for the medical treatment is an entity that advocates athletes’ best interests. The result would be a doctor-athlete relationship more closely related to the typical doctor-patient relationship, one in which the patient’s best interests dictate any proposed treatment. The independent nature of the physician’s employment would reduce the doctor’s susceptibility to pressures from team management.

---

<sup>245</sup>See Russell, *supra* note 43, at 300 (giving some examples of available resources such as: *Am. J. Sp. Med., J. Sp. Med. & Physical Fitness, Physician’s Sp. Med. Science & Sp. Med. Science Sp. & Exercise.*).

<sup>246</sup>See King, *supra* note 1, at 688-91.

<sup>247</sup>See Mitten, *supra* note 33, at § 2[b].

<sup>248</sup>It is argued that when league players unions pay for medical care the conflicts facing the team physician are dramatically reduced, if not eliminated, that the athletes are afforded more involvement in making decisions regarding their bodies, and most importantly, physicians are given incentive to administer health care according to the players’ best interests. See generally Solares, *supra* note 43.

Team physicians, collectively working for the league or players themselves through employment arrangements with the unions, arguably could establish a more cohesive unit whereby information could be shared and techniques developed more efficiently.

## 2. Well-Defined Employment Arrangements

A clear and express employment agreement between the professional team and physician is a less radical means of potentially eliminating conflicts facing the team physician. The medical doctor is a highly trained professional and should demand that employment contracts expressly reflect the autonomous nature of his or her position with regards to medical treatment. Although this solution may be unrealistic because professional sports teams can find physicians who are willing to agree to less stringent terms, a definite legal standard governing sports medicine, coupled with a real threat of liability, may encourage physicians to demand such terms.

## 3. Eliminate Incentive Pressures

As previously mentioned, team physicians have financial incentives that influence their treatment decisions. Leagues should not allow team physicians to participate in bonus systems conditioned upon wins or playoff qualifications. League regulations should void contracts that provide for monetary incentives and bonuses for team physicians. Furthermore, a team doctor should not receive a championship ring should his or her team attain such a goal.

Physicians must take it upon themselves to retain professional objectivity and not succumb to the surrounding pressures prevalent in professional sports. Thus, the need for professional resources through organizations and associations, as well as publications, is obvious.

### *C. Redefine the Relationship Between Healthcare Provider and Healthcare Purchaser*

Ultimately, the only way to eliminate the significant conflicts facing team physicians is to rearrange the current relationship between the health care provider and the purchaser of such care. The professional team and the athlete employee often have different interests. Eliminating the control teams have over subordinate physician employees offers the most effective solution. Realizing reform will take the initiative of players unions and ultimately, professional athletes themselves.

Prohibiting professional sports organizations from providing athlete medical care would additionally help the professional athlete to overcome the restrictions of the CBA governing his employment agreement. In the absence of a contractual term providing for team-administered care, claims arising out of negligent medical treatment would be independent from the CBA and would not require interpretation of any included provisions. This arrangement would, therefore, allow state tort claims, otherwise preempted by federal law, and provide an avenue for adequate compensation. The attendant liability would also contribute to the evolution of an accepted legal standard of conduct. The absence of a uniform body of law delineating the legal standards applicable to sports medicine practitioners inhibits incentives for team physicians to act according to athletes' best interests.

Furthermore, if treating physicians were not employees of teams, state workers' compensation statutes would not bar suits against physicians by way of co-employee immunity. The protection from liability most team physicians currently enjoy would

become unavailable. As a result, athletes would have the opportunity to pursue compensation above and beyond workers' compensation benefits, which are often times inadequate for the relatively highly paid professional player. The imposition of liability on the caregiver would encourage better care.

*D. Amend/Redefine Application of State Workers' Compensation Laws*

The underlying policy of workers' compensation has been accepted as a means of offering financial security to employees injured on the job. Within the sports entertainment industry, however, workers' compensation laws shield teams and team physicians from tort liability and encourage physical exploitation of athletes. Professional sports franchises as employers exercise a much greater level of control over athletes than do employers outside the sports entertainment industry. For example, a professional athlete may not change employers unless he is traded, and professional teams, unlike other employers, retain total control over the health of the athletes. The workers' compensation system must recognize the professional athlete's unique working environment, and alter its application accordingly in order to protect the athlete's welfare.

Professional athletes should be able to bring legal claims against team physicians for malpractice regardless of physicians' status as team employees. Application of the co-employee immunity doctrine in this instance encourages less than competent medical treatment because no real threat of liability influences the physician. An injured professional athlete patient should have the right to the same claims against a doctor, as does the injured non-athlete patient. Physicians should ultimately be held responsible when their conduct falls below the requisite expected standard.

Professional athletes should be excluded from state workers' compensation statutes, or alternatively, state statutes should be amended to allow athletes to sue team physicians. Either reform would promote more competent care. In addition, the potential threat of vicarious liability would discourage professional teams from jeopardizing the health of their players. Although this result represents a departure from the underlying policies associated with workers' compensation, it should be allowed within the professional sports industry to promote the health and safety of professional athlete employees because of the unique control sports franchises have over employee athletes.

Alternatively, physicians could be defined as independent contractors for the purposes of workers' compensation laws. Medical doctors are ultimately employed for their independent medical judgment and thus, should be treated as independent contractors. No control should ever be retained over a doctor's expert medical discretion and therefore, the title of independent contractor is appropriate. Modern case law comports with this notion and considers physicians employed by a hospital to be independent contractors<sup>249</sup>. Defined as such, the co-employee immunity doctrine is inapplicable and athletes can hold physicians accountable for negligent treatment and fraudulent medical care.

Although some states exclude professional athletes from their workers' compensation legislation,<sup>250</sup> and others, such as California allow tort actions against

---

<sup>249</sup>See *Cilicek v. Inova Health System Services*, 115 F.3d 256 (4<sup>th</sup> Cir. 1997).

<sup>250</sup>See Statutes, *supra* note 208.

co-employees who can prove fraud,<sup>251</sup> most state statutes contain no such provisions. Without an amendment or exception to state workers' compensation laws accounting for the professional athlete, players have little to no protection from a team physician's substandard medical care.

*E. Athletes and Representatives Become More Involved In Medical Treatment*

The professional athlete can insure proficient medical care despite the influences professional teams may have over team doctors. Any professional athlete's career depends upon the use of his or her body and therefore, athletes should assume a more proactive role regarding the medical treatment they receive. Accordingly, athletes should demand full disclosure and attempt to educate themselves on any injury so that they can make reasonable decisions regarding their own bodies. Furthermore, athletes should demand second opinions from independent doctors when they feel that team physicians are not administering care in accordance with their best interests or feel pressured to return to competition before they are ready.

Although most contracts hold teams responsible for administering medical care,<sup>252</sup> an athlete and his agent should negotiate the right to a second, independent opinion. Players unions should help professional athletes in establishing this type of practice. For example, had Charles Krueger gotten a second opinion earlier, he might not be permanently disabled today; and if Mike Robitaille had done the same, he might not have had to endure the pain and suffering he did. Contractual provisions guaranteeing the right to an outside physician would eliminate many of the injuries associated with fraudulent concealment situations, and reduce the long-term abuse many athletes experience.

## VII. CONCLUSION

Professional sports are a powerful attraction in the United States and the industry generates substantial amounts of money. The commodities of this industry are the professional players who compete for a living. The pressure to win leads to the compromise of the health and safety of professional athletes. Team sports' physicians face extreme pressure to clear athletes for competition and often make decisions in derogation of sound medical judgment. The non-acceptance of a uniform standard of care applicable to sports physicians exacerbates this predicament. Sports medicine is most definitely a specialty of medicine and should be recognized as such by the formation and acceptance of a uniform standard.

The money side of the sports entertainment industry has recognized that high-level competition translates into financial success. Exploitation of professional athletes through unreasonable medical treatment currently goes unchecked as a result of the governing CBAs and applicable federal law and the immunity afforded teams and physicians under state workers' compensation statutes. In order to protect professional athletes, liability must potentially attach at the level at which the care is administered. Creating a well-defined standard of care applicable to team physicians, eliminating pressures facing team doctors, and recognizing the problems

---

<sup>251</sup>See CAL. CIVIL CODE §1709 (West 2001) providing that one who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.

<sup>252</sup>See UBERSTINE, *supra* note 7, at 14 A 24 25.



associated with the current laws applicable to the sports entertainment industry and subsequently amending or reapplying them will result in attaching liability at the appropriate level. Faced with the real threat of money damages, teams and team physicians will provide more adequate medical treatment to professional athletes which will ultimately result in less exploitation.

NICK DICELLO<sup>253</sup>

---

<sup>253</sup>Nick DiCello played professional soccer in the National Professional Indoor Soccer League (N.P.S.L.) as a goalkeeper for three year while attending school at Cleveland-Marshall College of Law. Nick attended Lehigh University where he earned Academic All-American honors. Nick clerked for the Honorable Judge John M. Manos in the Northern District of Ohio District Court from 2002-2004.