Medicolegal Sidebar

Care of the Professional Athlete: What Standard of Care?

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Corporate Physicians

In her book *The Company Doctor*, author Elaine Draper noted that in order to contain costs related to their employees' health insurance, companies such as Dow, Chevron, IBM, and others, hire doctors who supervise the medical care they provide [2]. These company doctors are bound by two conflicting ideals: serving the medical needs of their patients, while maintaining fiduciary relationships with

their employers. Although medical journals, speeches, and medical society ethical codes proclaim the independence of corporate physicians, Draper found that company doctors anguish over the tightrope they must walk between their patients' health and the corporate oversight they face at every turn.

On the same subject, author Paul Starr, in his book *The Social Transformation of American Medicine*, detailed the historical role the

company doctor played in the history of medicine [4]. As Starr astutely noted, the basic question has always been: What is a "company doctor?" Is a company doctor a physician or surgeon who serves the needs of the company to maintain a productive work force? Is the company doctor a primary care physician for the worker to whom the sole duty owed is to the employee-patient? Is it possible that the company doctor has a dual allegiance to the employer and the employee, with unresolved conflicts creating tension between production needs and the short- and long-term health needs of the employees?

The questions raised by the above authors are relevant to team physicians who are hired or charged with providing care to professional athletes. In this article, we will examine the legal, ethical, and moral conflicts raised when team doctors provide care to highly competitive and highly-compensated professional athletes.

Team Physicians

The same definitional problems that apply to company doctors apply to

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Note from the Editor-in-Chief: We are pleased to publish the next installment of "Medicolegal Sidebar" to the readers of Clinical Orthopaedics and Related Research®. The goal of this quarterly column is to encourage thoughtful debate about how

the law and medicine interact, and how this interaction affects the practice of orthopaedic surgery. We welcome reader feedback on all of our columns and articles; please send your comments to eic@clinOrthop.org.

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team physicians in professional sports. What does it mean to be a “team physician”? Is a team physician’s principal obligation to keep the team physically intact to increase its odds of having a championship season? If so, can a team physician accomplish this objective ethically without simultaneously compromising the health status of individual professional players? And, again, if the first duty is to the team rather than the player, how does that affect a team physician’s ability to educate professional athletes about the risks and benefits of sports participation, or about the specific risks of returning to the playing field after injury?

In the law review article “Professional Team Doctors: Money, Prestige and Ethical Dilemmas,” attorney Justin P. Caldarone wrote, “Professional team doctors face the conflicting objectives of keeping their athletes on the field while still caring for their health [1]. This ‘win at all costs’ mentality can run counter to the team doctor’s Hippocratic oath to do no harm to his or her patients. Unfortunately, more often than not due to the enormous pressure to produce a championship team, team doctors, coaches, and trainers make short-sighted decisions that may jeopardize a player’s health.”

Given these conflicting obligations, why are these positions attractive to physicians?

“Team doctor positions are coveted due to the prestige attached to the title...a team doctor who fights team management’s pressure to prematurely clear a player for action will likely find himself or herself in an unemployment line,” Caldarone wrote. “However, the team doctor’s salary does not draw candidates to the position. Rather, the position’s visibility and prestige allow a team doctor to build a successful private practice. The dependence on a franchise for publicity and prestige in the club’s market place often forces team doctors to turn a blind eye to an athlete’s injury in order to appease management.”

As described by Calderone in his law review article, the prototypical example of professional team doctor misconduct occurred in the case of Bill Walton, a professional basketball player. Walton sued the team doctor of the Portland Trailblazers as a result of the team doctor injecting numbing painkillers to Walton’s feet before games. Walton filed suit alleging that the bone fracture in his foot would not have occurred had it not been for these injections. The suit was premised on the failure to warn Walton of the permanent injury that could be sustained while his feet were numbed from painkillers administered by team doctors. Walton’s case was settled 4 days before trial [1].

Most recently, a *Washington Post* article discussed quarterback Robert

Griffin III’s return in the fourth quarter of a January 2013 playoff game when it was apparent to the fans, the team, and the six medical personnel who were serving as team doctors, that he could barely run as the result of a knee ligament injury.

“There is medicine, and then there is National Football League medicine, and the practice of the two isn’t always the same,” Sally Jenkins and Rick Maese wrote in the *Post* article [3].

The Legal View

Courts have had difficulty in trying to analyze whether or not there are acceptable medical practices involving professional athletes that would otherwise be unacceptable and even reckless if the patient were not an elite professional athlete. In a recent case, *Zimbauer v Milwaukee Orthopedic Group Ltd.*, a federal district court judge attempted to establish the unique nature of treating professional athletes. Unfortunately, the court used the traditional jargon of standard of care in its analysis. It found that the Milwaukee Brewers’ team doctor was not negligent by framing the issue as one involving a standard of care for physicians and surgeons who are “sports doctors”—those who treat professional athletes. The court sidestepped the larger issue of interest—whether or

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not physicians and surgeons who treat professional athletes may be collectively negligent by establishing standards and norms designed predominantly to achieve the needs of the team owners while sacrificing the medical needs of the players [5].

In our view, it is clear that law, medicine and society are in a disturbing phase when it comes to the issue of protecting the health of professional athletes. Among the more provocative legal issues that have yet to be dealt with either as a matter of law or social policy include the following: (1) Should an orthopaedic surgeon who is a team doctor be held to the same standard of care in treating professional athletes as he or she would if treating anyone else? (2) If team doctors should be held to a different standard of care, what should that standard of care be? (3) Should team doctors be eliminated altogether, such that athletes get their medical care just as anyone else?

Ethical Questions and the Standard of Care

There has been a long-standing assumption that orthopaedic surgeons may handle medical management decisions involving professional athletes differently than medical management decisions involving their other patients.

Is this an unwarranted assumption? The assumption appears to be based on a variety of considerations, not least of which is that the athlete has an obligation to compete such that he implicitly agrees to be evaluated by different norms. In other words, the patient-athlete is different from other patients, and implicitly consents to being treated according to some altered standard of care that is best deferred to the team physician. This notion is also based on the premise that certain sacrifices must be made in order for the team to win. Among these sacrifices is an athlete's health and well-being. Potentially sacrificing a player's long-term health is justified by the competing interests of athletic glory, compensation, team victory, franchise value, and team owner financial motive.

However, stripped of all the glory of athletic competition and related interests, from a purely ethical point of view, can an orthopaedic surgeon ever compromise the health and well-being of an athlete based solely upon competitiveness or the will to win? This is a particularly difficult issue in that the decision concerning an athlete's health is often made in a moment of intense competition, much like the decision that was made to allow Robert Griffin III to reenter the game despite obvious injury. At that moment, the pressure to win a playoff game was immediate, compelling, and played out on the

national scene. However, 20 years later, after the glory of the game has faded, an athlete who was disabled by an on-field injury is likely to be forgotten and the victory may be small consolation indeed.

Conversely, if there is a different standard of care for orthopaedic surgeons treating professional athletes, what are the norms constituting this different standard? Should it include informing the athlete that the team orthopaedic surgeon has a potential conflict of interest? Medical management decisions would therefore be based on balancing the interests of the team and the athlete's health. Should it include the requirement that no medical management decision involving the athlete will in any way potentially sacrifice his immediate or future health? Will it include an abbreviated but meaningful process of informed consent where the orthopaedic surgeon advises the athlete what the risks are should the athlete return to play?

There is one critical factor that differentiates the physician-patient relationship in a professional competitive setting from that of an ordinary patient. Professional athletes, often fearing for their future employment, will insist upon continuing to play, despite it being contraindicated. In fact, it is reasonable for athletes to fear that if they are taken out of the game or

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put on the injured reserve list, an eager replacement may step into their starting role. What does the standard of care require an orthopaedic surgeon to do when confronted with an athlete who attempts to minimize his pain and injury or who insists that he is medically fit to return to play when in the orthopedic surgeon's opinion he is not?

This brings us to our third question. Should team doctors be eliminated altogether? Given the growing number of injuries in contact sports like professional football, it may be time to radically rethink the concept of a team physician. Is it malpractice or negligence per se for an orthopaedic surgeon to place himself or herself in a position where he or she has to simultaneously satisfy the medical needs of the athlete and the financial and aspirational ambitions of the team owner? Perhaps each individual player should have his or her own physician, vested with the authority to determine decisions concerning the impact of the athlete's game injury on a short- and long-term health basis, and with a professional responsibility to the athlete alone. In addition to eliminating the designated team doctor, there might be sanctions against any team who retaliated against the athlete for following the advice of his doctor, both in game day decisions and decisions concerning the athlete's readiness to play in future games.

Discussion

Elaine Draper conducted a series of interviews with company physicians, scientists, and government and labor officials, as well as historical, legal, and statistical sources and medical trade association data. Using her data, Draper dissected the complex position occupied by company doctors to explore broad themes of doctor-patient trust, employee loyalty, privacy issues, and the future direction of medicine. She addressed controversial topics, such as as drug screening and the difficult position of company doctors when employees sue companies for health hazards in the workplace [2].

Team physicians, like company doctors, are but one example of professionals who have at times ceded their autonomy to corporate management. Physicians provide the prototypical professional case for examining this phenomenon, due to their traditional independence, extensive training, and high levels of prestige. Draper's book goes beyond, by tracing parallel developments in the law, science, and technology, in order to draw insightful conclusions about changing conditions in the professional workplace, as corporate cultures across the world change to fit the new realities of the global economy.

We still live in a world where the gladiator mentality dominates

professional sports, supercharged by rapid advances in technology and communication that have intensified the athletic competition, as well as the drives for instant gratification, monetary compensation, and mass entertainment. Authors such as Draper and Starr provide a compelling examination of the corporatization of American medicine with far-reaching implications for professionals in many other fields. Highly publicized cases of athletic injury and the difficult issues related to the medical treatment that the athlete received, place orthopaedic surgeons in a visible role before the public.

The legal issues that confront the orthopaedic community acting as professional team doctors are profound, daunting, and ethically challenging. Courts and policy-makers have yet to set forth definitive rules and standards that could provide guidance and establish standards. Accordingly, the orthopaedic profession and its societies need to step into the leadership role, and identify and address the challenges and dilemmas that confront team doctors. We need to ensure that injured athletes receive proper medical care, and our profession must preserve its core principles.

References

1. Caldarone JP. Professional team doctors: money, prestige, and ethical dilemmas. *Sports Law J.* 2002;9: 131–151.

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2. Draper E. *The Company Doctor: Risk, Responsibility and Corporate Professionalism*. New York, NY: Russell Sage Foundation;2003:1–396.
3. Jenkins S, Maese R. NFL medical standards, practices are different than almost anywhere else. *The Washington Post*. Available at: http://articles.washingtonpost.com/2013-03-16/sports/37767707_1_robert-griffin-nfl-network-doctors. Accessed April 20, 2013.
4. Starr P. *The Social Transformation of American Medicine*. New York, NY: Basic Books;1983:1–528.
5. *Zimbauer v Milwaukee Orthopaedic Group, Ltd.* 920 F.Supp. 959 (ED Wis 1996).