

2005

## Team Physicians as Co-employees: A Prescription That Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice

Matthew J. Mitten  
*Marquette University School of Law*

Follow this and additional works at: <https://scholarship.law.slu.edu/lj>



Part of the [Law Commons](#)

---

### Recommended Citation

Matthew J. Mitten, *Team Physicians as Co-employees: A Prescription That Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 St. Louis U. L.J. (2005).

Available at: <https://scholarship.law.slu.edu/lj/vol50/iss1/11>

This Symposium is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**TEAM PHYSICIANS AS CO-EMPLOYEES: A PRESCRIPTION THAT  
DEPRIVES PROFESSIONAL ATHLETES OF AN ADEQUATE  
REMEDY FOR SPORTS MEDICINE MALPRACTICE**

MATTHEW J. MITTEN\*

Playing-field injuries and related illnesses are an inherent part of professional sports that are assumed by players. At the major league level, professional players in most team sports have unionized and have shifted the costs of medical treatment for these injuries to their respective teams. Players' unions have collectively bargained for contractual rights that require league clubs to provide and pay for medical treatment for players' injuries and illnesses suffered within the scope of their employment.<sup>1</sup>

Each club typically selects a local doctor or group of doctors, usually specialists in orthopedic or internal medicine with expertise and experience in sports medicine, to serve as its team physician(s).<sup>2</sup> Because being a team physician for a professional sports team is prestigious and often results in a corresponding increase in non-athlete patients and more overall revenue, many sports medicine physicians seek to provide medical care to professional athletes.<sup>3</sup> It is not uncommon for a club to receive free or discounted medical care for its players from its chosen team physicians.<sup>4</sup> Such symbiotic economic relationships may adversely affect the quality of sports medicine care provided to professional athletes and jeopardize their health if the team's need for an injured player's services interferes with the team physician's

---

\* Professor of Law and Director, National Sports Law Institute, Marquette University Law School. I want to express my gratitude to Professor Nicolas Terry for inviting me to participate in this symposium and to Matt Weiss, a third-year student at Marquette University Law School, for his research assistance in connection with this article.

1. *E.g.*, MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION 2003–2006 BASIC AGREEMENT 217, [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) [hereinafter MLB AGREEMENT]. The regulations that constitute a part of Major League Baseball's Uniform Player Contract provide that the club is responsible for the cost of "reasonable medical and hospital expenses incurred by reason of [a player's] injury and during the term of [his] contract or for a period of up to two years from the date of initial treatment for such injury." *Id.*

2. Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete Patients*, 50 ST. LOUIS U. L.J. 185, 190–91 (2005).

3. *Id.* at 192.

4. *Id.*

medical judgment regarding the appropriate treatment and when the player may safely return to play.

There is a unique relationship among a club, its players, and the team physician.<sup>5</sup> The club seeks to win games and maximize profits, but must comply with its contractual obligations to the team's players. The players want to maximize their on-field performance to help the team win and enhance their individual economic rewards. Injured players want to return to play quickly, but they do not want to suffer serious or permanently debilitating health effects caused by improper medical treatment or by resuming play too soon. The team physician has the potentially conflicting responsibilities of providing medical care to the players and protecting their health while also facilitating the club's ability to win games by having its best players on the field.

Both the club and its players rely on the team physician's expertise and judgment in sports medicine matters. A player generally has a contractual obligation to submit to medical care and treatment deemed necessary by the team's chosen physicians,<sup>6</sup> with the right to receive a second medical opinion from a group of designated medical specialists (the cost of which is paid by the club).<sup>7</sup> Courts recognize that the team physician serves as the "gatekeeper" to the playing-field and that his or her medical opinion deserves appropriate deference. As one court explained, "it will be the rare case regarding participation in athletics where a court may substitute its judgment for that of the . . . team physicians."<sup>8</sup>

A team physician's "judgment should be governed only by medical considerations."<sup>9</sup> Although facilitating an injured athlete's ability to return to play is one objective, the team physician's paramount duty should be to protect

---

5. See Nick DiCello, Note, *No Pain, No Gain, No Compensation: Exploiting Professional Athletes Through Substandard Medical Care Administered by Team Physicians*, 49 CLEV. ST. L. REV. 507, 536 (2001). As this commentator has observed:

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.

*Id.*

6. *E.g.*, MLB BASIC AGREEMENT, *supra* note 1, at 217. The Basic Agreement states that a player, when requested by his club, "must submit to a complete physical examination at the expense of the Club, and if necessary to treatment by a regular physician or dentist in good standing." *Id.* It also provides that "the Club shall have the right to designate the doctors and hospitals furnishing such medical and hospital services" to injured players. *Id.*

7. *E.g.*, *id.* at 45-46 ("[T]he Clubs shall provide an updated, accepted listing of medical specialists . . . to whom Players may upon their request go for diagnosis and a second medical evaluation of an employment related illness or injury being treated by the Club physician.").

8. *Knapp v. Nw. Univ.*, 101 F.3d 473, 485 (7th Cir. 1996); *see also Pahu v. Univ. of Kan.*, 897 F. Supp. 1387, 1394 (D. Kan. 1995).

9. COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS § 3.06 (2004-05).

players' health and safety by providing high-quality sports medicine care and treatment.<sup>10</sup> Nevertheless, team physicians encounter competing loyalties and inherent conflicts of interest. Extreme time-sensitive needs for an injured player's services may mean that the physician is pressured by team officials to place the team's needs ahead of medical considerations necessary to protect the player's health and safety.<sup>11</sup> In addition, injured players may be willing to sacrifice their health by pressuring the team physician to provide medical clearance for them to return to play.<sup>12</sup>

Unless statutorily excluded from coverage, a professional team's players are "employees"<sup>13</sup> who are entitled to workers' compensation benefits for injuries occurring within the scope of their employment.<sup>14</sup> In states in which professional athletes are covered by workers' compensation laws, both the player's original playing field injury and an aggravated injury caused by the team physician's improper medical treatment are compensable injuries.<sup>15</sup> A professional player's additional or enhanced injury caused by the team physician's medical malpractice is compensable because, like the original injury, it is considered to be sustained in the course of employment.<sup>16</sup>

In states where professional athletes are covered by applicable workers' compensation laws, clubs tend to designate their team physician as an "employee."<sup>17</sup> An employment relationship is established, often at the insistence of the team physician's medical malpractice insurer, primarily to provide immunity from players' tort suits.<sup>18</sup> As a co-employee, the team physician is immune from tort liability for improper medical care provided to a

---

10. Matthew J. Mitten, *Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 ST. JOHN'S L. REV. 5, 8–9 (2002); see also Calandrillo, *supra* note 2, at 188–89.

11. Calandrillo, *supra* note 2, at 192; Barry R. Furrow, *The Problem of the Sports Doctor: Serving Two (Or Is It Three or Four?) Masters*, 50 ST. LOUIS U. L.J. 165, 171 (2005).

12. See generally Matthew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries*, 55 U. PITT. L. REV. 129, 133–36 (1993).

13. *Bryant v. Fox*, 515 N.E.2d 775, 779 (Ill. App. Ct. 1987) (holding, as a matter of law, professional football players are "employees rather than independent contractors").

14. See generally 2 ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 22.04[1][b] (2005) [hereinafter LARSON & LARSON]; Benjamin T. Boscolo & Gerald Herz, *Professional Athletes and the Law of Workers' Compensation: Rights and Remedies*, in 3 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 17:3 (Gary A. Uberstine et al. eds., 2004) [hereinafter Boscolo & Herz].

15. See, e.g., *DePiano v. Montreal Baseball Club, Ltd.*, 663 F. Supp. 116, 117–18 (W.D. Pa. 1987) (recognizing that improper medical care may fit into intentional injury exception to New York's Workers' Compensation Act); *Bayless v. Phila. Nat'l League Club*, 472 F. Supp. 625, 629, 631 (E.D. Pa. 1979), *aff'd mem.*, 615 F.2d 1352 (3d Cir. 1980); *Brinkman v. Buffalo Bills Football Club*, 433 F. Supp. 699, 702 (W.D.N.Y. 1977).

16. *Bayless*, 472 F. Supp. at 629–30; *Komel v. Commonwealth Edison Co.*, 372 N.E.2d 842, 844 (Ill. App. Ct. 1977).

17. See, e.g., *Daniels v. Seattle Seahawks*, 968 P.2d 883, 885 (Wash. Ct. App. 1998).

18. E.g., *id.*

player within the physician's scope of employment with the club.<sup>19</sup> In other words, a professional athlete is precluded from bringing a malpractice claim against the team physician for negligent medical care that aggravates or exacerbates his original injury.<sup>20</sup>

The developing judicial construction of the co-employee doctrine to encompass team physicians creates a disincentive to adequately protect professional athletes' health and to serve effectively as a "gatekeeper." Although workers' compensation benefits do not provide full recovery for all harm caused by the team physician's negligent treatment of a player's injury (i.e., the full economic value of a player's lost wages and pain and suffering),<sup>21</sup> most courts hold that these benefits are the player's exclusive remedy.

In *Hendy v. Losse*,<sup>22</sup> a professional football player sued the team physician for negligently diagnosing and treating his knee injury suffered during a game and for advising him to continue playing football, allegedly causing him to aggravate the injury.<sup>23</sup> Dismissing his claims, the California Supreme Court held that the state's workers' compensation law bars tort suits between co-employees for injuries caused within the scope of employment.<sup>24</sup> The Court found that the player and team physician were both employed by the San Diego Chargers club and that the physician acted within the scope of his employment by "provid[ing] medical care for injuries that are inherent in the nature of plaintiff's employment."<sup>25</sup>

---

19. This legal doctrine, whose parameters vary by jurisdiction, generally provides that workers' compensation benefits are the exclusive remedy available to an injured employee and prohibits a tort suit against a co-employee who caused the injury (except for intentional wrongs). *Bryant v. Fox*, 515 N.E.2d 775, 778 (Ill. App. Ct. 1987) ("[T]he exclusive-remedy provision bars an employee from bringing a common-law negligence action against a co-employee."). See generally 6 LARSON & LARSON, *supra* note 14, § 112.02[1][b], at 112-7-112-10.1.

20. The workers' compensation co-employee doctrine also immunizes the club from vicarious liability in tort for its team physician's medical malpractice. *Mitten*, *supra* note 10, at 45. In the relatively few jurisdictions where professional athletes are excluded from workers' compensation coverage and are not barred from bringing tort suits against their employer or co-employees, the team physician is usually designated as an "independent contractor" in an effort to prevent the club from being vicariously liable for medical malpractice. See *DiCello*, *supra* note 5, at 536.

21. Two commentators observe that "[p]rofessional athletes, because of their high salaries, frequently are entitled to workers' compensation benefits at the maximum level. The maximum compensation rates are so low relative to athletes' salaries that they are not adequately compensated for their injuries under workers' compensation." *Boscolo & Herz*, *supra* note 14, § 17:5, at 17-12.

22. 819 P.2d 1 (Cal. 1991).

23. *Id.* at 3-4.

24. *Id.* at 12-13.

25. *Id.* at 3, 13. However, the court stated: "If a co-employee provides medical services other than those contemplated by the employee's employment and in so doing is not acting for the

The player argued that his malpractice action should be permitted because the team physician's "duties as a professional are separate from the employment relationship."<sup>26</sup> However, the Court rejected this contention by construing the statute to provide only workers' compensation benefits as the exclusive remedy against a co-employee who causes injury while acting within the scope of employment.<sup>27</sup> The Court reasoned that the objective of the workers' compensation statute is to prevent California employers from being held directly liable for workers' compensation benefits and vicariously liable for tort judgments against its employees.<sup>28</sup>

Similarly, in *Daniels v. Seattle Seahawks*,<sup>29</sup> a Washington appellate court held that the Seattle Seahawks' team physician was immune from a malpractice suit by one of the players he treated.<sup>30</sup> Before 1991, the team physician was an independent contractor who had a fee-for-service agreement with the club.<sup>31</sup> Thereafter, at the insistence of his malpractice insurance carrier, the club restructured this relationship and made him a part-time employee, although he continued to have a private orthopedic practice.<sup>32</sup> His employment relationship stated that he "will be solely responsible for exercising his independent medical judgment as to all decisions on medical care and methods of treatment of Seattle Seahawks employees," but provided the club with the right to direct and control his duties and working hours.<sup>33</sup>

Even though the team physician was engaged in the independent profession of medicine without being subject to the club's control or direction when providing medical care to its players, the court ruled that the physician was immune from tort liability as a matter of law because he was in the "same employ" as the plaintiff-player.<sup>34</sup> In other words, tort immunity existed under

---

employer, he or she no longer enjoys the 'immunity' from suit which section 3601 creates for acts which are within the scope of employment." *Id.* at 12.

26. *Id.* at 11.

27. *Hendy*, 819 P.2d at 12.

28. *Id.*

29. 968 P.2d 883 (Wash. Ct. App. 1998).

30. *Id.* at 887-88.

31. *Id.* at 885.

32. *Id.* The club paid its team physician an annual salary and provided him with the necessary office space, tools, and equipment to provide on-site medical services for its players. *Id.* It also provided accounting and tax services relating to this aspect of his medical practice, but did not provide him with health insurance, sick leave, vacation pay, life insurance, or retirement benefits. *Id.*; cf. *Bryant v. Fox*, 515 N.E.2d 775, 777-79 (Ill. App. Ct. 1987) (although team physician found not to be club employee, case is instructive regarding how to structure relationship between club and physician so it will be judicially recognized as employment).

33. *Daniels*, 968 P.2d at 885.

34. *Id.* at 887-88.

Washington's workers' compensation co-employee doctrine because both physician and player were employed by the Seahawks club.<sup>35</sup>

In my opinion, a team physician should not have immunity from malpractice merely because he or she is characterized as an "employee." Whether designated as either an "employee" or an independent contractor, the same inherent conflicts exist. Regardless of how he or she is characterized, the team physician has an ethical and legal duty to provide appropriate sports medicine care and recommendations to the club's players based solely on medical considerations. If the team physician breaches this duty, the co-employee doctrine should not provide a shield from tort liability for harm caused to professional athletes.<sup>36</sup> Rather than getting blanket immunity under state workers' compensation laws, team physicians should be accountable if their malpractice causes harm to players whose health and safety are entrusted to them.

Courts recognize that it is not necessarily unreasonable for workers' compensation laws to be applied differently to professional athletes than other employees. For example, excluding professional athletes from workers' compensation benefits, or providing them with only reduced benefits, does not deny them equal protection of the law.<sup>37</sup> As one court observed, "[P]rofessional athletes willfully hold themselves out to risk of frequent, repetitive and serious injury in exchange for lucrative compensation."<sup>38</sup> However, professional athletes suffer greater uncompensated loss than typical employees when negligent medical treatment exacerbates their playing-field injuries. Although they voluntarily assume the inherent risks of injury from playing a sport, professional athletes should not be required to involuntarily

---

35. *Id.*; see also *Lotysz v. Montgomery*, 766 N.Y.S.2d 28, 28 (N.Y. App. Div. 2003) (holding that the New York workers' compensation statute barred a player's malpractice claims against team physician when he obtained medical treatment "solely by reason of his employment with the Jets, and not as a member of the general public").

36. Other commentators advocate this position. See, e.g., Teresa Herbert, *Are Player Injuries Adequately Compensated?*, 7 *SPORTS LAW J.* 243, 276 (2000) ("A physician should not be allowed to treat a player with any less care than he treats his other patients. If he does, workers' compensation should not deny a player a right of recourse that is available to any other injured patient."); James D. Young, *Liability for Team Physician Malpractice: A New Burden Shifting Approach*, 27 *RUTGERS L. REC.* 4 (2003) ("[A]ny notion that a [team] doctor's co-employee status will shield his liability to a patient he negligently treats should similarly be removed."); DiCello, *supra* note 5, at 536 ("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.").

37. *Rudolph v. Miami Dolphins, Ltd.*, 447 So. 2d 284, 291-92 (Fla. Dist. Ct. App. 1983) (exclusion from benefits); *Lyons v. Workers' Comp. Appeal Bd.*, 803 A.2d 857, 860-62 (Pa. Commw. Ct. 2002) (reduction in benefits).

38. *Lyons*, 803 A.2d at 862.

bear the economic costs of aggravated injuries and accompanying pain and suffering caused by the team physician's malpractice.

A unique relationship exists between the team physician and a professional athlete vis-à-vis a company physician and the company's employee, which justifies non-application of the co-employee bar to tort immunity in the former situation. Unlike company physicians, team physicians may encounter pressure to recommend and/or provide medical treatment that furthers the employer's (team's) immediate need for an employee's (player's) services rather than provide treatment in the best interests of the athlete's health. Potential tort liability creates an important legal incentive for the team physician not to succumb to such pressures, which are inherent in professional sports.

The Minnesota Court of Appeals opinion in *Stringer v. Minnesota Vikings Football Club, LLC*<sup>39</sup> illustrates the appropriate limits on judicial application of the workers' compensation co-employee doctrine necessary to encourage the provision of sports medicine care that adequately protects the health and safety of professional athletes. The court appropriately recognizes that a sports medicine care provider's status as a co-employee should not ipso facto confer tort immunity.<sup>40</sup>

This case arose out of the 2001 death of Korey Stringer, a former Minnesota Vikings football player, caused by complications from heatstroke suffered during the club's preseason training camp.<sup>41</sup> In a wrongful death action, Stringer's heirs alleged that several Vikings' employees, including the assistant athletic trainer and coordinator of medical services, provided improper emergency medical care to Stringer when he suffered heatstroke.<sup>42</sup> These defendants argued that they were entitled to co-employee tort immunity under Minnesota's workers' compensation statute.<sup>43</sup>

The court held that co-employees have tort immunity only when carrying out their employer's nondelegable duty to provide a safe workplace for its employees, which is the basis for imposing strict liability for workplace injuries on employers.<sup>44</sup> However, there is no immunity if a co-employee owes a personal duty of care arising out of his provision of medical care to a fellow employee that is "not pursuant to the employer's nondelegable duty to provide a safe workplace."<sup>45</sup>

---

39. 686 N.W.2d 545 (Minn. Ct. App. 2004), *aff'd on other grounds*, 705 N.W.2d 746 (Minn. 2005).

40. *See id.* at 549–50.

41. *Id.* at 547.

42. *Id.* at 547–48.

43. *Id.* at 548.

44. *Stringer*, 686 N.W.2d at 549.

45. *Id.* at 550.



The court ruled that the emergency medical care rendered to Stringer by the club's assistant athletic trainer and its coordinator of medical services "did not involve general workplace safety or the removal of workplace hazards . . . pursuant to their employer's nondelegable duty to provide a safe workplace."<sup>46</sup> Rather, their conduct gave rise to an independent personal duty that exists regardless of their co-employee relationship with Stringer.<sup>47</sup> The court explained that "under some circumstances, personal duty may be coextensive with employment duties. But not *every* action taken by an employee is in furtherance of the employer's nondelegable duty to provide a safe workplace."<sup>48</sup>

The Minnesota Supreme Court, however, held that defendants' "obligations to Stringer directly resulted from their employment by the Vikings and the Vikings's efforts to provide a safe workplace for their players."<sup>49</sup> Thus, "any duty they had toward Stringer did not exist absent their employment status"<sup>50</sup> and the defendants are immune from tort liability.<sup>51</sup>

Two dissenting justices expressed "doubt that a scope of employment test is workable . . . where the co-employees' job is to provide [medical] care directly to employees."<sup>52</sup> In their view, sports medicine care of an injured athlete is not conduct merely "taken in the performance of the employer's nondelegable duty to provide a safe workplace."<sup>53</sup> They expressed concern that limiting co-employee liability to acts outside the course and scope of employment provides tort immunity "essentially coextensive with that of the employer,"<sup>54</sup> although the co-employee does not provide any corresponding quid pro quo injury benefits as does the employer.

The dissenters also cited the following policy arguments weighing against co-employee tort immunity: "the injured employee is entitled to be fully

---

46. *Id.* at 550–51. In contrast, the court held that another defendant, the club's head athletic trainer, was protected by co-employee immunity because his alleged tortious conduct arose out of the Vikings' nondelegable duty to ensure safe work conditions for its players. *Id.* at 551. This defendant allegedly was aware that Stringer suffered heat exhaustion on July 30 and was responsible for accurately weighing the players before and after practice to measure their fluid loss and determine whether it was safe for them to practice, but he did not ensure that these measurements were accurate and did not prevent Stringer from practicing on July 31, the day he suffered heatstroke. *Id.*

47. *Id.*

48. *Id.*

49. *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 762 (Minn. 2005).

50. *Id.*

51. The Minnesota appellate court held that the defendants are not subject to tort liability because their conduct was not grossly negligent, which is the co-employee liability standard established by the Minnesota workers' compensation statute. *Stringer*, 686 N.W.2d at 551–52.

52. *Stringer*, 705 N.W.2d at 767.

53. *Id.* at 763.

54. *Id.* at 767.

compensated for his injuries by all but the employer; the co-employee tortfeasor should not be relieved of the consequences of his wrongdoing; extending immunity to the co-employee would encourage fellow employees to neglect their duties[.]”<sup>55</sup>

To establish a uniform rule not dependent on varying judicial interpretations of state workers’ compensation laws, the players union should insist on a provision in the league collective bargaining agreement requiring that team physicians be designated as independent contractors rather than club employees. Removing the unwarranted protection conferred by co-employee tort immunity would enable a professional athlete to seek full recovery for harm caused by the team physician’s negligent care and treatment of his injuries. It would not impose strict liability on team physicians for sports medicine care that aggravates a player’s preexisting injury or necessarily mean that the team physician had committed medical malpractice in such cases. To establish liability, the player would have the burden of proving that the team physician’s medical recommendations or treatment deviated from reasonable, customary, or accepted sports medicine care and proximately caused his aggravated injury.<sup>56</sup>

It is fair to assume that, in most instances, the team physician provides appropriate sports medicine care to the club’s players despite pressure to provide treatment that enables a professional player to return to play as quickly as possible. Physicians who serve in this capacity generally are very skilled and reputable clinicians who have significant professional and economic incentives to provide high quality sports medicine care to the team’s players. Failing to do so may result in a highly publicized malpractice lawsuit by a professional athlete, which likely will adversely affect the physician’s private practice and increase the cost of malpractice insurance. Obtaining second opinions from medical specialists not directly affiliated with the club also should reduce instances of improper medical recommendations and care by the team physician.

Nevertheless, when the team physician fails to provide appropriate medical care and thus causes aggravated injury and diminished playing skills, a professional athlete should have a tort remedy to recover for the lost or reduced economic value of his career, as well as other damages to compensate for harm such as pain and suffering. Even if a professional athlete may recover workers’ compensation benefits for an aggravated injury caused by medical malpractice, these benefits do not provide full compensation for the team physician’s independent tortious conduct. To avoid double recovery for the harm caused by negligent medical treatment, it may be appropriate to reduce a professional athlete’s tort judgment against the team physician by the amount

---

55. *Id.* at 764.

56. Mitten, *supra* note 10, at 8–13.

of workers' compensation benefits received as a result of any aggravated injury caused by the team physician's medical malpractice.<sup>57</sup>

To avoid liability for the payment of both workers' compensation benefits and tort damages, the club generally should not be vicariously liable for its team physician's malpractice. Otherwise, the primary policy justification for the co-employee tort immunity doctrine—namely, employer strict liability for workplace injuries in lieu of vicarious liability for employee torts that injure fellow employees—would be undermined.<sup>58</sup> Holding the club vicariously liable, which is a form of strict tort liability, might encourage lay club officials to attempt to direct and control the treatment that the team physician provides to injured players. This undesirable consequence could inhibit the team physician from independently exercising his or her medical judgment and result in treatment that adversely affects an injured player's health.

On the other hand, to create an incentive to ensure that professional athletes will receive appropriate sports medicine care, the club should be directly liable for its own negligence in connection with the hiring or retention of its team physician.<sup>59</sup> The club should also be liable for interfering with its team physician's medical judgment or exercising substantial control over medical treatment that causes aggravated harm to an injured player.<sup>60</sup> To avoid

---

57. For a general discussion of the "collateral source rule" and its abolition or limitation in various jurisdictions, see 2 DAN B. DOBBS, *THE LAW OF TORTS* § 380, at 1058–61 (2001).

58. As one court explained, this doctrine has another policy basis: "[L]ike the employer, a co-employee is involved in a compromise of rights; among employees, the *quid pro quo* is that each employee surrenders his common law right to bring tort actions against other employees in return for immunity to their tort suits." *Deller v. Naymick*, 342 S.E.2d 73, 76 (W. Va. 1985). It is relatively infrequent that professional players tortiously injure team physicians, so this is not a major concern. However, to further the objective of maintaining reciprocal rights among employees, it would be appropriate to allow the team physician to assert tort claims against the team's players.

59. However, a professional sports team has a strong incentive to select well-qualified team physicians to provide medical care to its players to protect its substantial economic investment in them.

60. See, e.g., *Krueger v. S.F. Forty Niners*, 234 Cal. Rptr. 579, 584–85 (Cal. Ct. App. 1987) (finding NFL club and team physician liable for fraud in connection with medical treatment rendered to injured player that caused permanent knee injury); *Robitaille v. Vancouver Hockey Club Ltd.*, 124 D.L.R.3d 228, 232–33, 253 (B.C. Ct. App. 1981) (finding NHL club liable for influencing injured player's medical treatment and requiring him to continue playing, which caused disabling spinal cord injury, and finding player to be 20% contributorily negligent for continuing to play and failing to use reasonable care to protect his health). Alternatively, one commentator recommends that there be a rebuttable presumption that the club is jointly liable for damages if the team physician negligently treated an athlete. Young, *supra* note 35. He asserts that by "shifting the burden to the team to prove it was not controlling the doctor, the team's incentive to force injured players to play or to encourage physicians to be less candid regarding the extent of injuries would be minimized." *Id.* The club could escape liability by proving that its management did not exercise any control over the medical treatment rendered by its team physician. *Id.*; see *Wilson v. Vancouver Hockey Club*, 5 D.L.R.4th 282, 290 (B.C. 1983)

the prospect of double recovery for the same harm, the player must elect to receive either workers' compensation benefits or to pursue a tort claim.<sup>61</sup>

---

(finding NHL club not vicariously liable because its management did not exercise any control over team physician's negligent treatment of its player).

61. Major league professional athletes typically have contractual injury protection guarantees that require their respective clubs to pay their full salary for the season in which their injury occurs. Major League Baseball players and National Basketball Association players may have multi-year guaranteed contracts that require full payment of their salaries if they are unable to play because of an injury suffered within the scope of their employment. *E.g.*, MLB BASIC AGREEMENT, *supra* note 1, at 28. Any tort judgment against the club should be reduced by the amount of these contractual payments.

