

Play the Game 2019

Team Doctors and the Duty of Care in the NFL

Professor Betsy Grey

Sandra Day O'Connor College of Law

Team Doctors: Dual Loyalties

- **To the Athlete**
- **To the Club**

- **Structural Conflict of Interest Problem**

- **“Are the physicians looking out for the health of the players or are they just trying to keep them on the field?”**

Roadmap

- 1) **Doctor's duty of due care to patient**
- 2) **Doctor's responsibilities to the club**
- 3) **Calls for independent medical care in NFL**
- 4) **Practicality of proposals**

Principles of Doctor's Duty of Care

- Special relationship between doctor and patient
- Provide medical care that is in the patient's best interest, including do no harm and not increase the risk of other, foreseeable injuries
 - Standard of care: conform to what other reasonable doctors would do given the same set of facts
 - Standard of care: higher for specialists
 - Doctor must obtain consent to treat
 - Duty to disclose medical information so patient can make an informed choice about treatment

Standard of Care

- This Duty of Care remains the same, regardless of who pays the doctor.
- Doctor also governed by ethical standards, including:
 - AMA Code of Medical Ethics (including sports-specific provision)
 - State licensing boards' Codes of Ethics
 - Specialties may have own ethical codes and guidelines, but not one for NFLPS
- Under these codes, patient's welfare takes priority

Lawsuits against team doctors

- Merrill Hoge (Illinois 1996): j/plaintiff. jury awarded \$1.5 to athlete
- Zimbauer v. Milwaukee (Wisconsin 1996): j/defendant.
- Gibson v. Digiglia (Louisiana 2008): j/defendant
- Villegas v. Feder (New York 2009): j/defendant

Team Doctor as Employee of the Club

- 2011 CBA between NFL and NFLPA requires each club to “retain”:
 - An orthopedic surgeon
 - At least one physician certified in internal, family or emergency medicine
 - NFL has huge medical staff. Includes orthopedists, internists, family medicine, emergency medicine, neurologists, neurosurgeons, cardiologists, psychologists.
 - Each club has a “head” club doctor
 - About 175 doctors in NFL
 - Over 30 team doctors on call at each game

Team Doctor's Obligations as Employee

- Advance the interests of the club
- Non-therapeutic role
- Assist in business decisions, including whether player can play at a sufficiently high level of performance
- Club has legitimate interest in monitoring player's health
- Club has legitimate interest in access to medical information

Calls for Independent Medical Care in NFL

- Outgrowth of three forces:
 - 1) visible, high profile traumatic head injuries in sport
 - 2) increased science studies on repetitive concussive injury and long term neurological problems (CTE)
 - 3) Large, class action litigation. NFL settlement 2015
- Currently, “unaffiliated” neuro-trauma specialist at each NFL game

Football Players Health Study at Harvard University

- “How can we ensure that players receive excellent health care they can trust from providers who are as free from conflicts of interest as realistically as possible?”
- Recommends strong division of responsibilities of medical staff
 - 1) **Players’ Medical Staff:** player care and treatment
 - 2) **Club Evaluation Doctor:** evaluate players for business purposes

Harvard Proposal

- Based on unaffiliated neuro-trauma model
- NFL would absorb costs
- Players' Medical Staff chosen and supervised by Committee of medical experts, jointly selected by NFL and NFLPA.
- Not complete bifurcation: medical information flow between the doctors and the clubs, including **Player Health Report**. Report provided before and after each practice and game, to both Club and Player.
- Report should take player's desires into account.
- Report recommendation controls player's level of participation.

Where do we go from here?

- NFL has not adopted Harvard Proposal
- NFL unique among US professional sports clubs
 - Wealthiest
 - Strong bargaining position with player's association
 - Cost, ability of players to seek outside doctors, need for coaches to speak directly to players about health, inherent bias