THE DECISIONS OF SPORTS PHYSICIANS FROM A LEGAL PERSPECTIVE

Klaus Vieweg
*Professor Dr., University of Erlangen, Germany**

Abstract: *Sports physicians operate within a network of relationships that includes inter alia associations and federations, clubs and insurance providers, as well as athletes and their advisors. These networks can vary depending on the professional or voluntary function performed by the physicians. Due to the existence of conflicting objectives (e.g. between the short- or long-term use of a medical measure), and the necessity of providing a prognosis in particular, sports physicians may often encounter problems in arriving at a decision. The legal requirements placed on the conduct of sports physicians and the decisions they make can be distinguished from one another depending on the type of contractual relationship in question and whether the physician is acting in a voluntary capacity. In addition, depending on the type of sport concerned, there will be special, specific factors and conditions involved. These can, for their part, play a considerable role with regard to the type and extent of any possible liability to be imposed on the sports physician.*

Keywords: Sports physician, informed consent of athletes, medical malpractice, liability

Introduction

The developments that have taken place in the field of sport over the past few decades have not gone unnoticed by those working in the branch of sports medicine. Professionalisation, commercialisation, and an increased media presence have all pushed the decisions of sports physicians – and their evaluation from a legal perspective – into the spotlight. Two cases may serve as examples:

- The Dutch footballer *Arjen Robben*[1] has played for Bayern Munich Football Club since 2010. During the South Africa World Cup in 2010, he played for the Dutch national team in spite of a muscle tear in his left thigh. After the World Cup, he was not able to play for two months, meaning that he missed the first games of the 2010/2011 Bundesliga and the opening of the Champions League. According to FC Bayern Munich, they could not allow Robben to play, as he might have aggravated his original injury. The Dutch football federation KNVB objected to the claim for compensation filed by FC Bayern Munich, asserting

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[1]Cf. Frankfurter Allgemeine Zeitung (FAZ), 5.8.2010, p. 26 and 9.8.2010, p. 17.

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that Robben had undergone a thorough check-up and had been given the go-ahead to play as normal in spite of his injury.

- Reports of sudden cardiac death (SCD) frequently appear in the media.[2] The case of *Dale Oen*, a 26-year-old Norwegian swimming world champion, attracted a considerable amount of attention. The doctors treating him had not diagnosed the life-threatening condition, which was only established during an autopsy of the swimmer. Oen's coronary arteries were occluded by atherosclerotic plaque. Based on changes that were apparent in Oen's heart muscle, the doctors determined that he had suffered a heart attack caused by a blood clot one to two months before his death. A medical expert stated that an ECG was probably all that would have been needed in order to arrive at the correct diagnosis.[3]

The normal working day of the average sports physician is generally less spectacular than the cases discussed above. In spite of this, however, it still provides fodder for a multitude of questions. Three categories of questions should be mentioned:

- the network of relationships in which sports physicians may find themselves and which provides a first impression of the – sometimes diverging – interests involved;
- conflicting objectives and the resulting problems for sports physicians as regards reaching decisions;
- the legal requirements in respect of the decisions of sports physicians (these may also have to be considered in connection with the legal requirements in respect of the decisions of other key players).

I. Networks of Relationships involving Sports Physicians

It cannot be said that only one type of sports physician with one distinct role exists; rather, there exist a multitude of different types of sport physician, whose roles depend in particular upon the extent of commercialisation and professionalisation in the field in which they are involved.

The usual type of network is either a relationship between two entities (sports physician and athlete), or one between three entities (athlete, club/association and club/association physician). Each of these three participants is linked with the other entities – individuals and organisations – which can also potentially have a considerable interest in the decisions of the sports physician. Athletes are connected to their families and friends (parents are, of course, of considerable

[2]FIFA is the only global federation to maintain a register of deaths caused by SCD. In this register, it is recorded that 84 deaths have taken place due to SCD over the past five years, Frankfurter Allgemeine Zeitung, 25.5.2012, p. 30.

[3]Der Spiegel, No. 25 of 18.6.2012, p. 135.

importance when it comes to minors), to advisors, sponsors and insurance providers. Clubs and associations are incorporated into the hierarchical 'association pyramids' and must endeavour to keep their sources of finance (the media and interested members of the general public, including fans) interested by achieving sporting success. Sports physicians themselves are connected not only to athletes, clubs and associations, but also to their professional associations and, possibly, employers, the media and insurance providers. These relationships generally have a legal basis, which – for reasons of brevity – will not be discussed in greater detail in this paper.
(See diagram at the end of this paper)

II. Conflicting Goals and the Consequent Problems in reaching a Decision

On the main, in all levels of sport, one can distinguish between the following activities engaged in by sports physicians:

- examination of athletes in order to determine whether they are fit either to participate in sports in general, or to participate in specific types of sporting activities (e.g. fit to dive);
- treatment of sick or injured athletes and reaching of decisions as to whether they are fit to participate in sports competitions;
- conducting medical measures that are non-indicated in order to improve athletes' sporting performance.

It is clear that each type of decision listed above could be complicated by conflicting goals and – in certain circumstances – serious conflicts of interests. This becomes particularly clear when one considers any decisions to be made in respect of a professional footballer's fitness to play – a decision which will be decisive for the finalizing of a million-euro transfer. Depending on the extent of commercialisation and professionalisation in the particular case, the sports physician may come under an immense amount of pressure, particularly in cases where there are sizeable amounts of money at stake. The short-term interest of being able to play in a game or a particular competition and the long-term risk of causing damage to a player's health by administering medical measures as a 'quick fix' is a further example of a case where conflicting goals come into play.

1. Examination in respect of Fitness to Play

The examination of an athlete in order to determine whether he or she is fit to play serves various different purposes. In professional sports, the result of any such examination will serve as a basis for the decision as to whether a player should be transferred – the sums of money involved are often several million euro. Both the old and new clubs, as well as the athlete and other entities close to

him or her (in particular his or her agent or advisor) will have a considerable interest in the result of the examination, which will be the foundation upon which the transfer contract is concluded, as well as a basis for any possible sources of commission. Furthermore, if the result of the examination is positive, it can serve as a safeguard – particularly for the sports association; here, the selection of an athlete for the national squad (Kaderathlet) and participation in competitions are of particular relevance. Based on the information available, it seems that there is quite a lot of confusion in this particular area. There are no consistent guidelines. The only definite obligation is that a resting ECG must be carried out. This is in spite of the fact that congenital muscle disorders may be diagnosed using a stress ECG, thus reducing significantly the risk of death. The cause of this problem is, most likely, a lack of awareness on the part of associations, and, on the other hand, the exasperating fact that clubs and associations are often unable to bear the costs of these tests.

Chapter II Fig. 9 IOC Olympic Movement Medical Code[4] sets out a detailed account of the procedure to be followed in respect of medical support in its regulations, but – unfortunately – one that is rather removed from the requirements of actual practice. The wording of the Code is as follows:

"*9. Medical Support*

9.1. In each sports discipline, appropriate guidelines should be established regarding the necessary medical support, depending on the nature of the sports activities and the level of competition.

These guidelines should address, but not be limited to, the following points:

- medical coverage of training and competition venues and how this is organised;
- necessary resources (supplies, premises, vehicles, etc.);
- procedures in case of emergencies;
- system of communication between the medical support services, the organisers and the competent health authorities.

9.2. In case of a serious incident occurring during training or competition, there should be procedures to provide the necessary support to those injured, by evacuating them to the competent medical services when needed. The athletes, coaches and persons associated with the sports activity should be informed of those procedures and receive the necessary training for their implementation.

9.3. To reinforce safety in the practice of sports, a mechanism should be established to allow for data collection with regard to injuries sustained during training or competition. When identifiable, such data should be collected with the consent of those concerned, and be treated confidentially in accordance with the recognised ethical principles of research."

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[4]Accessible at http://www.olympic.org/PageFiles/61597/Olympic_Movement_Medical_Code_eng.pdf. (27.2.2015).

2. Rehabilitation and Maintenance of Health as the Primary Aim of Medical Treatment

The primary task of physicians is to heal their patients. Restoration and maintenance of health is one of the leading principles of medical treatment by which doctors should abide. They should act in a manner which ensures that their behavior is in line with this maxim and should, indeed, make it their ultimate goal. The Hippocratic Oath, one of the oldest sources of medical professional ethics, declares: "I will prescribe regimens for the good of my patients according to my ability and my judgment and never do harm to anyone."[5] In the tradition of the Hippocratic oath, the Declaration of Geneva (Physician's Oath), which was adopted by the World Medical Association in 1948, and has since been revised several times, states that "the health of the patient will be my first consideration".[6]

The (Model) Professional Code for Physicians in Germany[7] takes its lead from these ethical behavioural rules. In accordance with § 1 of the rules, doctors should ensure that his actions serve to maintain the health of individuals and the population at large. Doctors are duty-bound to keep patients alive, protect their health and to rehabilitate them, as well as to reduce their suffering. In the IOC Olympic Movement Medical Code, Chapter I fig. 1.2, it is stated that "the health and the welfare of athletes prevail over the sole interest of competition and other economic, legal or political considerations."In this particular configuration, the interests of all involved parties are generally equal, and there are thus no particular legal problems in this area.

In all of the relevant sources, therefore, the rehabilitation of patients and maintenance of their health are central leading principles in accordance with physicians should always act.[8]

3. Athletes' Ability to Play and Enhancement of Athletes' Performance

As health is the primary goal of medical treatment, it can also come into conflict with athletes' ability to perform and the enhancement of athletes' performance. Athletes – and their trainers, advisors and sponsors, as well as their clubs and associations – are often not only concerned with rehabilitation and maintenance of their health. Rather, they endeavour to attain the best possible per-

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[5]Accessible at Oath of Hippocrates, Miller-Keane Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health, 7th edn. (2003). Accessible at http://medical-dictionary.thefreedictionary.com/Oath+of+Hippocrates. (27.2.2015).

[6]Accessible at http://www.cirp.org/library/ethics/geneva/ (27.2.2015).

[7]Accessible at http://www.bundesaerztekammer.de/downloads/MBOen2012.pdf (27.2.2015).

[8]Sigrid Lorz (2007), Arzthaftung bei Schönheitsoperationen, Berlin, p. 172, with further references.

formance from their bodies, and to achieve peak sporting performances (short-term perspective). These performance maxims can accommodate athletes' health (if one proceeds from the assumption that peak sporting performances can be achieved only by a healthy body), but this is not always the case. For instance, athletes may be required to play in a competition and, in doing so, risk damaging their health further because of a previous injury, as happened in the aforementioned case of Arjen Robbens.

In such cases, physicians are caught between the conflicting objectives of maintaining athletes' health and rehabilitating them, and, on the other hand, supporting the sporting and economic interests of athletes and clubs – or, as the case may be, associations – as well as those of trainers, advisors and sponsors. Often, the short-term sporting benefit and the long-term health benefit are in direct conflict with each other – a conflict that is very difficult to resolve. This is, for example, the case where a sports physician has to reach a decision as to an athlete's ability to participate in a competition and, although participating in the said competition will not lead to any acute health problems, it cannot be ruled out – or may even be inevitable – that the athlete's health will be damaged in the long term. Some relevant examples in this respect include game day injections, the 'Voltarol' problem, and the administration of cortisone. In such situations, doctors must arrive at a prognosis and ensure that it is a defensible one. When considering each case, they must balance the short-term sporting and economic benefits against the long-term health risks.

The opinion at which the doctor arrives must then be communicated to the athlete as well as to the club, the association, the trainer, etc. (after the athlete has waived the doctor's requirement to maintain confidentiality) as a recommendation. The extent to which this process should include dialogue among the main parties involved – which appears particularly sensible in cases involving a sporting activity with which the sports physician is not overly familiar – should be decided on a case-by-case basis.

One possible consequent issue might be that, in cases involving football clubs that are constituted as incorporated companies, it would appear necessary to inform the public of any essential information.[9]

4. Implementation of Non-Indicated Measures in order to Improve Sporting Performance

Particular problems arise in cases where athletes – or rather, the clubs behind the athletes – demand that sports physicians implement medical measures that enhance athletes' performance. This can involve anything from administering painkillers to carrying out elective operations, or even distributing of doping substances. Examples

[9]See § 15 German Securities Trading Act (Wertpapierhandelsgesetz).

of non-indicated measures that may be undertaken in order to improve athletic performance include breast reduction for female high jumpers, the cutting and sewing of the Achilles tendon at an opportune time in order to ensure that the tendon does not tear during competition, and the strengthening of tendons and ligaments by means of the surgical insertion of tissues.[10] All of these pose ethical problems.

III. Legal Requirements on the Decisions reached by Sports Physicians under German Law

How can sports physicians bring these conflicting objectives into harmony with one another, and how should they act in specific situations? Does it depend on whether the physician has signed a written contract? The law sets out distinct behavioural requirements for sports physicians, which generally apply to all three types of activity. In addition to specific contractual obligations, the observance of medical standards is a material requirement.

1. Contractual Obligations on Sports Physicians

First, sports physicians are required to abide by any treatment and medical care contracts concluded with athletes and/or clubs or associations.[11] Here, the duties and behavioural requirements set out in the contract are decisive – e.g. in relation to examinations in respect of fitness to play. In my view, however, the doctor should, if necessary, advert to the fact that the examinations carried out were insufficient (e.g. no stress ECG). If no contractual agreement to the contrary has been reached in accordance with § 630a (1) German Civil Code (Bürgerliches Gesetzbuch – BGB), then the doctor is only obliged to take reasonable care in carrying out the treatment, but is not required to ensure that any particular level of sporting success or standard of health is achieved.

The contractual obligation to notify the other party to the contract of any possible adverse effects or risks to the athlete's health is one which often applies to sports physicians. One condition of notifying the athlete's club or association is, however, that the athlete has already consented to the doctor's doing so. If the doctor is employed by a club or association by virtue of a contract of employment, his or her first concern must be the instructions of the club or association: he or she must, in general, follow the instructions of the club or association. This requires the athlete's consent under § 630d (1) German Civil Code.

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[10] As to performance enhancement surgery, see Peter Brüggemann (2015), Möglichkeiten und Perspektiven der Leistungssteigerung aus biomechanischer und orthopädischer Sicht in Klaus Vieweg (ed.), „Techno-Doping“, p. 9 (24 et seq.).

[11] Here, the Latin principle of pacta sunt servanda applies – in English: contracts must be observed.

2. Treatment in accordance with the Medical Standard of Care

Insofar as nothing to the contrary has been agreed upon, sports physicians are obliged to ensure that the treatment they provide is in line with the medical standard of care in accordance with § 630 a (2) German Civil Code. The definition of the medical standard of care is comprised of three components; scientific knowledge, practical experience and acceptance within the medical profession. Treatment by a doctor will be acknowledged to have reached the medical standard of care in cases where the treatment concerned is accepted within the medical profession in terms of scientific knowledge and medical experience.[12]There is no officially recognised designation for sports physicians.[13] An extra qualification in the field of sports medicine after further interdisciplinary training is possible, but the requisite level of care is ascertained in accordance with objective generalised criteria.

Doctors are obliged to act in accordance with the objective standards of skill and knowledge that are usual among conscientious and attentive specialists in the area concerned, and not solely in line with their own subjective standards and abilities, which may be below the required standard.[14] If a sports physician reaches the limits of his or her own abilities in terms of knowledge and performance, he or she must consult with a specialist in the relevant field – for example, specialists in internal medicine should consult with orthopaedic specialists and vice versa. In certain cases, sports physicians may be obliged to ensure that athletes are brought to hospital. [15] If a doctor does not meet the required medical standard of care, he or she will generally be found to have committed medical malpractice.

This standard of liability applies not only to sports physicians who receive remuneration, but also to sports physicians who are employed on a purely voluntary basis. Although these doctors work in a voluntary capacity, and have not entered into any written contract, they are subject to the same standard of liability as their remunerated colleagues. The only exception to this rule occurs in cases where a doctor – who is not obliged to act by virtue of a contract – happens to be present at the scene of an emergency. In such cases, the doctor would be liable under § 680 German Civil Code only in cases of intent and gross negligence –

[12]Sigrid Lorz (2007), Arzthaftung bei Schönheitsoperationen, p. 162.

[13]This was otherwise in the former German Democratic Republic, where it was possible to become a "state approved sports physician" (after completing corresponding courses of instruction) and "specialist in sports medicine" (after four years of further training and an exam), see Federal Constitutional Court (Bundesverfassungsgericht) decision of 9th March 2000 - 1 BvR 1662/97, margin no. 4.

[14]Sigrid Lorz (2007), Arzthaftung bei Schönheitsoperationen, p. 163.

[15]G.H. Schlund, Deutsche Zeitschrift für Sportmedizin 52 (2001), p. 258 (259).

i.e. behaviour clearly opposed to the requisite standard of care which goes far beyond the limits of defensible and tenable behaviour by a doctor.

3. Non-Indicated Medical Procedures

But what is to be done in cases where the athlete or his or her club demands the provision of treatment that does not meet the requisite medical standard of care – i.e. when medical treatment that (in the short term) is of benefit to the athlete's ability to perform, but (in the long term) poses risks or even damage to his or her health? Here, a parallel can be drawn to cosmetic surgery in general.[16] As has already been demonstrated, the restoration and maintenance of health are the primary goals of medical treatment. However, the doctor's mandate to heal, as the primary principle in accordance with which physicians should act, does not imply that this must be the only legitimating factor involved in treating a patient, or that any treatment of a patient with alternative aims is considered negligent a priori.[17]

Here, the constitutionally guaranteed right of the individual – and therefore athlete – to self-determination under Art. 2(1) in conjunction with Art. 1 (1) German Basic Law (Grundgesetz) must be borne in mind. Only the athlete in question has the right to reach a self-determined decision in respect of his or her own body.[18] It follows that, irrespective of any possible contrary obligations placed upon athletes or the sports physicians by virtue of their contracts with clubs or associations or instructions delivered by clubs or associations, sports physicians are not obliged – and indeed are not even entitled – to carry out medical procedures on athletes without their consent – specifically, against their will (key word: informed consent). If a doctor performs a medical procedure without an athlete's consent, or against his or her will, the doctor will be found to have committed a battery (a tort of negligence) and will be held liable to the athlete – and in certain circumstances the club or association – for any resulting damage. However, the sports physician may carry out non-indicated medical procedures if an athlete wishes him or her to do so (parallel cosmetic surgery, e.g. breast reduction for a female high jumper).

In respect of all medical procedures, therefore, it is required that athletes have consented to the treatment. In order for consent to be found valid, it must be determined that the doctor provided sufficient information to the athlete as to the type, significance and any possible risks of the treatment in accordance with

[16]See in detail the following comprehensive study of the private law problems that arise in such cases: Sigrid Lorz (2007), Arzthaftung bei Schönheitsoperationen, passim.

[17]Ibid., p. 172.

[18]Ibid., p. 91.

§ 630 c (2) and § 630 e German Civil Code. Even in cases where the treatment is in line with the requisite standard of care, and thus corresponds to the medical standard of care, the athlete's consent may be found to be invalid – and the treatment unlawful – if information provided by the doctor is insufficient, or if no information is provided.[19]

Medical treatment may be unlawful if it is found to be contrary to the principles of good faith – specifically, if the athlete's consent is contrary to the principles of good faith. If a medical procedure aimed at enhancing performance is contrary to the standards of all decent and just persons, the athlete's consent will be found to be invalid, and the procedure will not be permitted. This should be decided on a case-by-case basis.

IV. Legal Consequences for Sports Physicians

If sports physicians do not comply with the aforementioned behavioural requirements placed upon them, they may incur civil liability in respect of athletes, clubs or associations. It is also possible that they may be prosecuted under criminal law.

1. Civil Liability

If a sports physician commits medical malpractice by failing to reach the required medical standard of care in accordance with § 630 a (2) German Civil Code, or if he or she is found to have committed a battery on the athlete because the athlete's consent was insufficient, he or she will be liable to pay damages to the athlete under the law of contracts (§§ 280 (1), (3), (281) German Civil Code) or under the law of torts (§ 823 (1) German Civil Code) for any damage caused.

Liability to pay damages to the athlete may arise by virtue of contract in cases where a treatment contract has been entered into with the club or association only, and the athlete simply benefits from the contract. The athlete will be protected by the contract in cases where the sports physician performs a physical on the athlete on behalf of the club and, in doing so, incorrectly certifies that the athlete is fit to play, leading to the athlete suffering damage to his health. If the sports physician is found to be liable on the merits, he or she will be ordered to bear the costs of any necessary subsequent treatment (in accordance with § 249 (1) German Civil Code), any loss of earnings (in accordance with § 252 German Civil Code), and an appropriate amount of damages for pain and suffering (in accordance with § 253 (2) German Civil Code).

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[19] Ibid., p. 91.

The sports physician may also be held liable to pay damages to the club or association in accordance with §§ 280 et seqq. German Civil Code in cases where he or she acts in breach of his contractual obligations – in particular, the obligation to ensure that his or her treatment of the athlete is in line with the requisite standard of care. In such cases, the physician will have to bear the cost of any reduction in the club's profits caused by the player's absence and consequent inability to take part in competition (in accordance with § 252 German Civil Code). In such cases, it is obviously advisable that the sports physician have adequate cover from insurance in order to avoid becoming insolvent.

If the doctor fails to comply with his contractual obligations to the club or association purely in order to accommodate the athlete's right to self-determination, he or she will not incur civil liability. If the doctor is unable to fulfil his or her contractual obligations to the club or association, while at the same time fulfilling his or her duty not to undertake any treatment of the athlete without his or her consent, for the reason that these two duties come into inextricable conflict with one another, then the patient's right to self-determination will – as demonstrated above – take precedence. Here, the Latin principle of impossibilium nulla obligatio applies (there is no obligation in respect of impossible things).

2. Criminal Liability

Physicians may also be held criminally liable if they are found to have caused bodily harm either negligently (§ 229 German Criminal Code) or intentionally (§ 223 German Criminal Code). The basis for criminal liability is broadly similar to that for civil liability: A doctor will be found to have caused bodily harm to a patient if, on the one hand it is found that he or she failed to reach the required medical standard of care and acted carelessly and, on the other, if a medical procedure was carried out without the athlete's consent. Here, omission is also relevant – in particular, a failure to inform the patient.

If the sports physician has concluded a contract with the club or association to treat spectators in cases of emergency, and if he or she deliberately does not discharge this duty, he or she can be found to have caused bodily harm to a spectator by virtue of omission. However, the doctor will not generally be held criminally liable in respect of the club or association. If no such contractual obligation exists, and a doctor who happens to be present at the scene of an emergency fails to help, even though help was necessary and it would have been reasonable to expect him or her to provide such help, he or she will be held criminally liable for failing to have assisted under § 323c German Criminal Code.

Conclusion

1. Sports physicians are involved in networks of relationships, which – depending on the level of the sporting activity – can involve athletes, clubs and associations, trainers, advisors, sponsors and, furthermore, spectators.

2. Conflicting objectives exist between the primary purpose of medical treatment – the restoration and maintenance of an athlete's health – and sporting and economic interests.

3. In principle, one may distinguish between three basic configurations of medical activity: examinations in order to ascertain whether athletes are fit to play, treatment when an athlete is injured or ill, and the undertaking of measures that are not medically indicated, but are desired by the athlete.

4. In resolving these conflicts of interests, the sports physician must have regard to his or her contractual obligations towards the athlete, club or association. He or she must also ensure that the treatment he or she provides reaches the requisite medical standard, and act in accordance with the athlete's right to self-determination. He or she should point out any shortcomings in specific examination procedures and should make him- or herself familiar with the specifications of the sporting activity in question, both in relation to training and to competition. It is recommended that the physician discuss any treatment with coaches, and that he or she also observe the situation closely. In this way, the risk of incurring civil – or even criminal – liability will be reduced to the minimum.

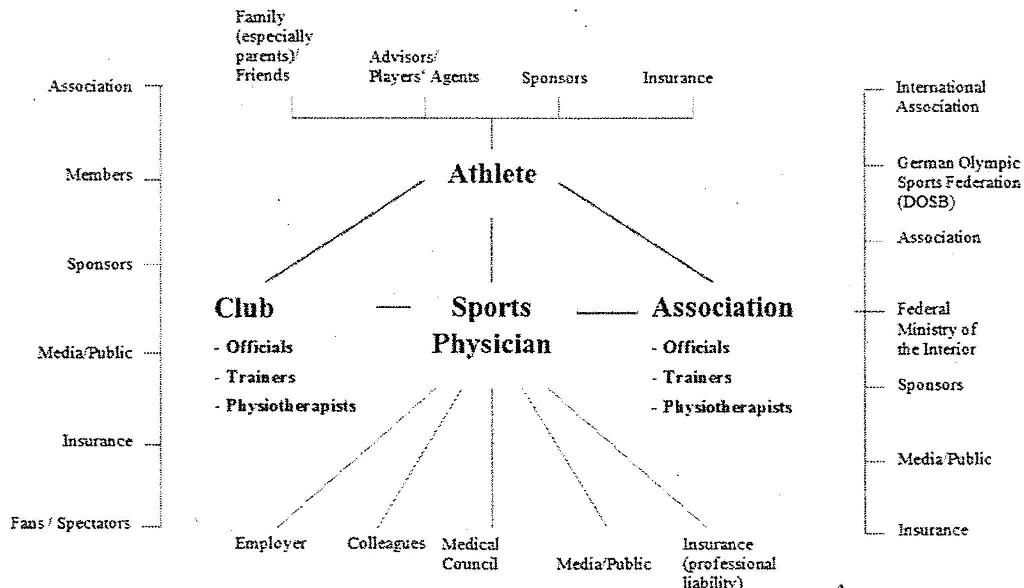

Diagram: Network of Relationships between Sports Physician and Others