Presented by HPSO and CNA

Physical Therapists Medical Malpractice

Case Study with Risk Management Strategies

Medical malpractice claims may be asserted against any healthcare provider, including a physical therapist. This case study involves a physical therapist working in a physical therapy office setting.

Case Study: Failure to follow referring practitioner's orders; failure to report patient's condition to referring practitioner; improper management of a surgical patient; improper management over the course of treatment.

Indemnity Payment: Greater than $120,000
Legal Expenses: Greater than $130,000
(Monetary amounts represent only the expenses made on behalf of the physical therapist)

Summary

A 50-year-old male was involved in a motorcycle accident on April 22nd and sustained a massive rotator cuff tear. On May 3rd he underwent a right shoulder arthroscopic rotator cuff repair performed. On May 19th, the orthopedic surgeon prescribed/ordered post-operative rehabilitation, which instructed the patient to begin passive motion at three weeks, active motion at six weeks and strengthening at four months. On May 26th, the patient began rehabilitation therapy for his right shoulder with our insured PT at a PT office practice.

The patient made steady improvements over the next few months.

However, on August 26th, the PT noted that during the therapy sessions over the prior weeks, the patient had discomfort through the right shoulder and, while working with light resistance through adduction, he felt some tightness through the biceps. The PT noted that patient had a marked increase in anterior shoulder pain.

At a follow-up visit on September 1st, the orthopedic surgeon diagnosed a new injury to the shoulder and a loose suture anchor. The surgeon noted that "although [the patient's] physical therapy prescription clearly stated that he was not to begin strengthening until the 4-month mark, his therapist started him on strengthening at the 3-month mark with significant resistance including pull downs of 30 pounds." The surgeon further noted that this aggressive therapy caused a metal suture anchor in the glenohumeral joint to become dislodged.

On September 2nd, the patient underwent right shoulder rotator cuff revision surgery, which he alleges has resulted in permanent disability. After his revision surgery on September 2nd, he spent approximately four months in a recliner and wore a cast that significantly limited his range of motion causing him to have permanent partial disability of his shoulder/arm.

The patient filed a lawsuit shortly after his second surgery. The patient claimed that he re-injured his shoulder as a result of the physical therapy rendered by the PT, requiring revision surgery, additional rehabilitation, and an extensive recovery period.

Risk Management Comments

Defense of the claim was extremely difficult as in the patient's documentation the PT authored an addendum indicating that he did "light stabilization on post delt, lats, [and] scap stabilizers." This note was made in self-interest.

Our physical therapy expert testified that he did not believe that the PT deviated from the standard of care in his treatment of the patient. He opined that the prescription was vague, but that none of the exercises the patient performed under PT's direction were inappropriate.

We believed the chance of a defense verdict was 50 percent considering these favorable opinions. However, with the complex physiology involved and the orthopedic surgeon's records directly faulting the PT, it would be a difficult trial.

Resolution

Plaintiff appeared aggressive and angry during his deposition and made violent threats against defense counsel on record.

Our PT appeared well prepared, composed, and professional during his depositions.

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Medical bills were in excess of $50,000 and loss of income was over $75,000.

The defense attempted to settle this case several times, but the plaintiff attorney would not budge below their $1.2 million dollar demand.

Surveillance was initiated on the patient, revealing that the patient was able to move around without difficulty and was not nearly as compromised as he claimed. (At one point he held a large garbage can over his affected shoulder for several minutes.) The patient claimed that because of the four months he spent unable to do anything, his marriage suffered and led to his wife filing for divorce. Social media posts by the patient during this same time period showed him flirting with other women who were not his wife. Social media photos showed the patient on his motorcycle after his first and second surgery with comments posted by patient. During his deposition he claims that he did not engage in such as motorcycle trips.

A week prior to trial, the defense attorney called the plaintiff's attorney and let him know about the surveillance tapes and the social media posts that would be used at trial.
The plaintiff's attorney agreed to a settlement prior to trial.

Risk Management Recommendations

- ***Be vigilant about protecting patients from the most common types of injuries,*** such as re-injuries.
  - Adhere to organizational treatment protocols when available. If protocols are not available, refer to the applicable state practice act and professional organization guidelines.
  - Review published evidence-based best practices.
  - Determine the level of patient compliance with any prescribed exercises.
  - Establish realistic expectations in regard to the likelihood of experiencing pain during therapy, probable outcomes and duration of treatment.
  - Document all discussions with the patient in the health care record.
- ***Before establishing a treatment plan, the PT should be aware of the patient's pre- and post-surgical diagnoses, including the extent of the injury (e.g., grade and percentage of tear in the shoulder) as this can significantly affect the likelihood of a re-injury.***
- ***Accurately and contemporaneously document*** care given in the patient health record.
- ***Adhere to organizational policies and procedures,*** and document compliance.

Guide to Sample Risk Management Plan

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*CNA HealthPro Physical Therapy Liability, 2001-2010, CNA Insurance Company, December 2011. To read the complete study along with risk management recommendations, visit www.hpso.com/ptclaimreport2011.

X-13098-218

Presented by HPSO and CNA

Physical Therapists Medical Malpractice

Case Study with Risk Management Strategies

Case Study: For the Physical Therapist: Improper management over the course of treatment; improper technique; failure to obtain informed consent; failure to supervise or monitor patient; failure to supervise or monitor physical therapy assistant.
For the Physical Therapy Owner: Failure to provide appropriate education for clinical staff; failure to maintain a safe environment; failure to assure that clinical staff are qualified.

Indemnity Settlement and Legal Expense Payment:
Greater than $25,000
(Monetary amounts represent only the payments made on behalf of the physical therapist and physical therapy firm)

Medical malpractice claims may be asserted against any healthcare provider, including a physical therapist. This case study involves a physical therapist working in a physical therapy office setting.

Summary

A healthy 39-year-old patient came to our insured's physical therapy office requesting treatment for cervical/neck pain. During the initial evaluation, the physical therapist documented that the patient was a highly stressed, self-employed licensed psychologist with no known injury to her cervical neck area. The patient denied taking any medications on a regular basis and the use of alcohol or smoking and stated she had a sedimentary job where she spent many hours on a computer. The treatment plan for the patient was to undergo therapeutic stretching and flexibility activities, low weight neck traction, T.E.N.S., electrical muscle stimulation and hot packs.

After an informed consent and treatment plan were agreed upon and acknowledged, the PT spent the last few minutes of the evaluation showing the patient a home exercise program and how the exercises should be performed.

During the first treatment visit, the PT asked the patient if she would like to add cupping to her treatment plan. The patient agreed and the PT changed the plan to include cupping.

The second treatment visit, which included cupping, went well. The PT documented that the patient had the treatment done and everything was fine.

The next week when the patient came for therapy, she said that she felt okay after the cupping procedure, and agreed to have the cupping procedure again. The PT was not in the office at the time of the visit, so a PTA did the procedure. The PTA opened the office in the morning and worked alone until the insured PT came in at noon, and the PTA was also certified to perform cupping.

During the treatment, the PTA walked away for a few minutes to wash other cups. When the PTA returned and removed one of the cups, a watery area was noted on the patient's right upper trapezius, between her neck and shoulder. The PTA wiped the area and in the course of wiping, tore the skin.

The PTA contacted PT, who instructed the patient to use antibiotic cream on the site when she got home. The PTA took a photo of the blister and instructed the patient on proper wound care.

A few days later the patient called the insured PT and informed her that the blistered area was very painful and had become infected. She could not get an appointment with her primary care provider, so she was forced to seek treatment from an urgent care center and missed time from work. She told the insured that the urgent care prescribed her with oral antibiotics and referred her to a wound care facility.

A week later, the PT texted the patient, and the patient said she had a lot of pain and couldn't work. The patient was very upset and complained that PT should have supervised the PTA and they should have had a first aid kit in their office. The PT informed the patient that she would pay for her out-of-pocket expenses, including the trip to the urgent care center and her missed work.

A month later the patient texted the PT and requested her insurance information. The patient reported that the site of the wound was very painful, and she wanted to make a claim for the medical costs she incurred, lost income and pain & suffering.

Risk Management Comments

The PT and the PTA completed a three day course certifying them to perform the cupping technique about 2 weeks before this incident.

Notably, a PTA is not required to be supervised for certain therapies as long as they are working from an approved PT plan of treatment.

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During the investigation of the incident, it was discovered that the PT had only discussed the risks associated with cupping and only obtained a verbal consent for cupping, not a written informed consent, from the patient.

Resolution

The patient did not hire an attorney, but gave her father full rights to negotiate a settlement.

Settlement negotiations were difficult as the insured continued to communicate with the patient about the incident during the negotiations.

The PT did not understand why she couldn't talk to the patient and listen to her complaint about the burn and settlement negotiations, hindering negotiations.

Risk Management Recommendations with regards to treating Physical Therapists:

- ***Adopt an informed consent process that includes discussion*** and teach-back from the patient, and demonstrate that the patient understands the risks associated with the treatment.
- ***Recognize patients' medical conditions,*** co-morbidities and any additional specific risk factors that may affect therapy.
- ***Be vigilant about protecting patients from the most common types of injuries.***
- ***Evaluate and document each patient's skin integrity, neurological status, and ability to perceive pain or discomfort,*** and convey problems to staff.
- ***Closely supervise and/or monitor patients during treatment,*** including frequent skin checks.

Risk Management Recommendations with regards to treating Physical Therapy Practice Owners:

- ***Perform at least annual performance reviews for each employee, including a review of errors, "near misses", document requirements compliance, existing skills and directly observed competencies.*** Provide physical therapy staff with coaching, mentoring, and clinical and system education as needed to ensure that patient safety requirements are satisfied.
- ***Ensure that clinical practices comply with standards endorsed by physical therapy professional associations,*** state practice acts and facility protocols.
- ***Provide appropriate clinical support for staff, in compliance with supervisory or employment agreements.*** Encourage compliance with relevant legal, ethical and professional standards for clinical practice.

Guide to Sample Risk Management Plan

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Presented by HPSO and CNA

Physical Therapists Medical Malpractice

Case Study with Risk Management Strategies

Case Study: For the Physical Therapist: Improper technique; improper management of a surgical patient; failure to supervise and monitor patient; failure to supervise or monitor physical therapy assistant; failure to report patient's condition to referring practitioner

For the Physical Therapy Owner: Failure to provide appropriate education for clinical staff; failure to maintain a safe environment; failure to assure that clinical staff are qualified

Total Incurred: $100,000
(Monetary amounts represent only the indemnity settlement payment and/or legal expenses incurred on behalf of the insured physical therapy firm)

Medical malpractice claims may be asserted against any healthcare provider, including a physical therapist. This case study involves a physical therapy firm.

Summary

The patient was a 48-year-old male who severely injured his right elbow in a bike accident on March 10th. He had surgery on March 14th to have plates and screws implanted to reduce the fracture. The surgery was successful, and the patient was scheduled for physical therapy at our insured's physical therapy offices beginning April 8th.

The prescription for therapy was to evaluate and treat, noting the surgery done for the injury sustained, with a request for therapy to be conducted three times per week for six weeks, or 18 visits total.

During his initial evaluation on April 8th, the employed physical therapist reviewed the operative report from March 14th. The operative report stated that the patient's perioperative diagnosis was a severely comminuted supracondylar and intercondylar T-shaped fracture of the distal, right side and the following procedures were performed under fluoroscopy:

- An ulnar nerve transposition
- Olecranon osteotomy and subsequent approximation of the osteotomy at the end of the procedure
- Open reduction and internal fixation of bicondylar intercondylar comminuted distal humerus fraction
- Application of a long arm splint

However, the PT found no protocol issued by the surgeon for physical therapy rehabilitation. This surgeon's patients typically began physical therapy on the second week post-surgery, but this patient began on the third week post-surgery, which could explain some of the patient's complaints of stiffness. The PT documented the following in the patient's health care record:

- **Initial evaluation observations:** Patient is overweight, ambulates independently and has a stiff right elbow, complains of pain, stiffness, swelling, tenderness, muscle spasms and weakness at the right elbow and arm. Describes the pain as radiating to the right arm with tingling and numbness into the right fingers. He reports having functional limitations to activities of daily living with problems sleeping and working, which was due to his inability to use his right elbow.
- **Physical examination:** Severe tenderness and muscle spasms of the right elbow, wrist, hand, fingers at a level of 9/10. Right-hand grip was 35 pounds, left –hand grip was 70 pounds. Swelling noted to the right elbow. Passive range of motion of the right elbow flexion was -80°, extension -50°.
- **Short-term goals:** Decrease pain, tenderness, muscles spasms, swelling and stiffness of the right elbow, wrist and hand. Improve range of motion and muscle strength.
- **Long-term goals:** Eliminate pain, tenderness, muscle spasms, swelling and stiffness of the right elbow, wrist and hand. Bring patient back to prior levels of function.
- **Treatment plan:** Cold packs, T.E.N.S. unit, electrical muscle stimulation, therapeutic exercises, therapeutic activities and mobilization. Rehab potential is good.

The evaluation was signed by the patient and forwarded to the doctor.

The therapeutic exercise program initiated on the April 8th session continued unchanged through April 19th with the assistance of a PTA. The therapeutic exercise program included: wrist flexion with 3 pound weight 10 times, wrist extension 3 pound weight 10 times, Ulnar/Radial deviation 3 pound weight 10 times, Supination/pronation with 3 pound weight 10 times, Theraputty, bicep curls with 3 pound weight 10 times, tricep curls with 3 pound weight 10 times, pulleys for two minutes, use of Cybex for two minutes, elbow flexion and extension 10 times.

A PTA was utilized appropriately per APTA guidelines during the treatment plan: any joint mobilization/manipulation techniques were performed by the PT and not delegated to the PTA. A home exercise program was also initiated with documentation showing how the exercises were to be performed. These exercises were the same as performed in the clinic.

Treatment dates were April 8, 10, 12, 15, 17, and 19:

- The patient reported right elbow stiffness at the April 15th treatment, but he was still able to perform the therapeutic exercises with minimal difficulty, so the PT continued physical therapy per the treatment plan.
- On April 17th, the patient presented with increased elbow extension post treatment at -10°.
- On April 19th, the PT documented: "Patient reports he is in pain today. Patient

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states he was fine post-treatment the 17th but started having pain that evening which continued the following day. He had severe pain, so he had to call his doctor for pain medications. Patient reports pain is less today, and he has been icing elbow. Patient able to perform therapeutic exercises but with no weights on elbow, and no difficulty performing active elbow flexion and extension on the mat with ice and electrical stimulation post with elbow rested in extension."

- On April 22nd, the supervising PT received a call from the patient stating he saw his doctor and has a new fracture. The surgeon planned surgery for the following week. The patient also canceled the rest of his appointments (April 24th and 26th).

A second surgery was performed on April 25th and the orthopedic surgeon's notes stated that the physical therapy caused the secondary injury. The second surgery included removal of existing hardware and open reduction and internal fixation of the distal humerus by using Synthes posterolateral plate, posteromedial plate and application of a U splint.

The patient did not return to our insured's practice after his second surgery.

Risk Management Comments

The patient hired an attorney to file a malpractice lawsuit alleging the therapy resulted in either a re-fracture of the area of the elbow previously operated on or a loosening or fracture of the screws holding the plate in place from the first surgery. This second surgery delayed his returning to work and he accumulated excessive medical fees and loss of income. The patient claimed damages of approximately $46,000, which included additional medical costs and expenses as well as a delayed time to return to employment.

A defense expert's review found that there was no deviation in the standard of care, but it was a close call. The expert was critical of the use of 3-pound weights being used at 4 weeks post-surgery as listed in the chart. The expert's criticism focused on the 3 pounds and questioned if there was a hurry to heal to have started with 3 pounds. The expert stated if lighter weights were used, or there was an option to begin with lighter weights, that should have been charted. It appears from the chart the treatment began with 3-pound weights and that may be considered too aggressive, which contradicted the insured's testimony that the patient was treated conservatively.

Resolution

The claim was difficult to defend as the treating orthopedic surgeon's charting claimed the second surgery was due to the aggressiveness of physical therapy. However, during preparations for trial the surgeon walked back his statement, asserting that the physical therapy was probably not the cause of the secondary injury.

The patient made a demand of $50,000 to settle. The PT office owner did not believe he or his staff did anything wrong and did not want to settle, so preparations were made to go to trial.

However, during preparations for trial, there was evidence that proved the patient was working odd jobs shortly after his second surgery and did not suffer any loss of income. It also appeared that the patient had been cheating his employer in collecting disability benefits. Prior to the trial, the patient was terminated for falsifying his disability benefits from his employer, though he was able to secure employment with a competing company shortly after his termination. This made it difficult for the plaintiff's attorney to get a real loss of earnings claim amount during the trial.

The trial ended with a verdict of no liability on the part of the treating PT or the PT firm. While this represented a successful defense of the insured PT firm, legal expenses totaled more than $100,000.

Risk Management Recommendations with regards to treating Physical Therapists:

- **Ensure that clinical documentation practices comply with standards** promulgated by physical therapy professional associations, state practice acts and facility protocols.
- **Document objective facts** related to patient care and refrain from using subjective opinions or conclusions.
- **Respond immediately to any signs or symptoms of a possible fracture** by determining the need for additional medical evaluation.
- Contact the referring practitioner for any consistent patient complaints, such as pain or swelling.

Risk Management Recommendations with regards to treating Physical Therapy Practice Owners:

- **Perform at least annual performance reviews for each employee, including a review of errors, "near misses", document requirements compliance, existing skills and directly observed competencies.** Provide physical therapy staff with coaching, mentoring, and clinical and system education as needed to ensure that patient safety requirements are satisfied.
- **Ensure that clinical practices comply with standards endorsed by physical therapy professional associations**, state practice acts and facility protocols.
- **Provide appropriate clinical support for staff, in compliance with supervisory or employment agreements.** Encourage compliance with relevant legal, ethical and professional standards for clinical practice.

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Physical Therapists Medical Malpractice

Case Study with Risk Management Strategies

Medical malpractice claims may be asserted against any healthcare provider, including a physical therapist. This case study involves a physical therapist who owned a physical therapy practice.

Case Study: Failure to monitor; failure to provide clinical support and supervise staff

Total Incurred: Greater than $225,000

(Monetary amount represents only the payments made on behalf of the insured physical therapist and his role as a PT practice owner and do not include any payments that may have been made from any co-defendants.)

Summary

This case involved a 77-year-old man with a history of Parkinson's, osteoporosis and a recent cerebrovascular accident (CVA). He was receiving physical therapy (PT) at the insured physical therapist's PT practice.

The patient suffered from significant postural deficits, creating a severe forward bent posture. Also, due to right-sided weakness caused by the CVA, he was using a cane for mobility assistance. Prior to his stroke, the patient was living at home alone and required minimal assistance with activities of daily living. The patient had been seen on and off at the insured PT's office for several years, so after his CVA, he began therapy again due to his inability get out of bed and frequent falls.

The patient had a referral to attend therapy three times a week for eight weeks to provide transfer, balance and flexibility training intended to improve his range of motion. Toward the end of the eight weeks, the patient was allowed to perform his exercises under the supervision of a physical therapy assistant (PTA).

During one session, while standing using exercise bands, the patient performed scapula retraction exercises and balancing on his own. After a few minutes of performing the exercise, he lost his balance and began to fall. The PTA, who was across the gym assisting another patient, rushed over to keep the patient from falling. The patient landed on his buttocks on top of the PTA's feet, and when the PTA assisted the patient to a standing position, he immediately complained of right hip pain. The PTA encouraged the patient to be evaluated by a practitioner, so an ambulance was called to transport the patient to the local emergency department.

While in the emergency department, the patient was diagnosed with a right intertrochanteric fracture, which was surgically repaired. He was hospitalized for six weeks. After discharge, the patient was sent to a long-term care facility for rehabilitation.

The patient was eventually able to return home, but he required a full-time home health aide to assist with activities of daily living. He has been unable to walk since the accident and now requires a wheelchair or one-on-one assistance while ambulating.

The patient sued the insured physical therapist and his PT practice, alleging failure to monitor the patient and failure to supervise the PTA.

Risk Management Comments

During the initial interview with defense council, the insured PT recalled that the patient had performed scapula retraction exercises hundreds of times before the incident without hands-on assistance and knew how to properly perform them. Although the PT was not on site at the time of the patient's fall, he believed that one-on-one supervision of the patient was not necessary.

Several defense expert PTs were asked to review the claim and offer an opinion. Most were supportive of the original plan of care, but were concerned that a patient with posture and balance issues was allowed to exercise without supervision throughout the course of his physical therapy. The experts agreed that the PT did not have to be in the therapy gym to directly supervise the PTA, but he needed to be on site.

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Resolution

The possibility of a defense verdict was deemed to be less than 20 percent. Defense counsel assessed the potential exposure/claim value of the case as being up to $350,000.

The case eventually settled, and the cost of the settlement plus the costs associated with defending the claim ultimately totaled more than $225,000.

Risk Management Recommendations

For Treating Physical Therapists:

- ***Provide clinical support and supervision*** for physical therapist assistants, aides and students in compliance with standards of practice for physical therapy.
- ***Delegate patient therapy services only to the appropriate level of staff*** and provide appropriate supervision for all delegated patient services.
- ***Recognize patients' medical conditions,*** co-morbidities and any additional specific risk factors that may affect therapy.
- ***Utilize appropriate safety devices,*** such as gait belts, hands-on assistance and/or have the patient hold onto a balance beam bars when stepping on and off of steps or exercise balls.
- ***Never leave the therapy area*** when the patient is receiving services from another level of staff.
- ***Observe high-risk patients closely to prevent falls*** and/or injuries, and never leave them unattended.

For Physical Therapy Practice Owners:

- ***Know the current scope of practice parameters*** for a physical therapist, a physical therapist assistant, physical therapy aides and physical therapy students.
- ***Ensure that clinical practices comply with standards endorsed by physical therapy professional associations,*** state practice acts and facility protocols.
- ***Be knowledgeable of the levels of supervisory responsibility of a PT and know when it is acceptable for a PT*** to have general, direct or direct personal supervision of physical therapist assistants, aides and students.

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X-13575-1218 PT