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Physical Therapists: Did you know that over a ten-year period, over $44 million was paid in professional liability judgements, settlements, and expenses on behalf of physical therapists? Are you at risk for a professional liability claim? To better understand your risks and examine your current practices, read the full report online at www.hpso.com/ptclaimreport2011.

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American Physical Therapy Association℠

HPSO Risk Advisor

Healthcare Providers Service Organization

Risk Advisor for Physical Therapists

How did I make that mistake?

A physical therapist (PT) grabs the wrong weight to use when conducting a functional capacity exam for a patient with an injured arm and a pre-existing neck injury. The patient suffers a cervical herniation and has to undergo spinal fusion surgery. The PT is sued.

A contributing factor to this situation may have been "inattentional blindness," which refers to the failure to see something that is unexpected. In this example, the PT was expecting a certain label on the weight and didn't notice the difference in heaviness before having the patient use it.

It's challenging to reduce the risk of inattentional blindness because it tends to be involuntary, but knowing what it is and addressing factors that contribute to it could keep you from making an error that results in your being sued, and more important, avoids patient harm.

The "invisible gorilla"

In a classic 1999 experiment, researchers asked students to watch a video of two teams passing basketballs. They had to silently count the number of passes made by members of the team dressed in white shirts and ignore the number of passes made by those in black shirts. Halfway through the video, a student wearing a gorilla suit walks into the scene, stops, faces the camera, and thumps her chest before walking off. Amazingly, about half of the students failed to see the gorilla. They were concentrating on their task and missed the unexpected appearance of a gorilla. (To see the invisible gorilla video, go to www.theinvisiblegorilla.com/videos.html.)

Think of inattentional blindness another way: We see what we expect to see. Consider gait training. A PT might be so used to putting a gait belt on a patient that he or she might actually mistake something else for a gait belt.

Awareness of what factors contribute to inattentional blindness is a first step toward reducing it. Researchers point to several factors: capacity, expectation, and mental workload.

Capacity. Drugs, alcohol, fatigue, stress, and age can affect your capacity to pay attention and notice important events. In a healthcare system where sleep deprivation is common, fatigue is a particularly important consideration.

Expectation. Confirmation bias is one aspect of expectations. We are drawn to evidence that supports a belief or expectation and tend to ignore or dismiss one that doesn't. If you have watched a patient climb stairs three times without incident, you might tend to expect the patient to do well the next time and miss a slight hesitancy that precedes the fall because you weren't expecting it.

Mental workload. You are more vulnerable to inattentional blindness if your attention is diverted to a secondary task. You may be talking to a physician on the phone and fail to notice that your patient has chosen to pick up a weight that is too heavy.

The PT profession highly values the ability to multitask. Yet studies show you are more effective if you focus on one task at a time. When you perform those passive stretching exercises, for example, focus on what you are doing and not on the list of tasks yet to be accomplished.

"Invisible gorillas" in healthcare

You can protect patients from errors and yourself from litigation by considering factors that contribute to inattentional blindness. Being aware of this risk can help minimize errors and increase patient safety.

This article has been edited for space. To read the full article with resources, visit www.hpso.com/newsletter13.

How to prepare for a deposition

Your worst nightmare has come true: You have been subpoenaed to give a deposition as part of a lawsuit. The patient is a 76-year-old man with a stroke who experienced a hip fracture after a fall during gait training. His attorney says that you failed to take appropriate safety measures to protect the patient.

You certainly aren't the first physical therapist (PT) to experience a lawsuit. According to a HPSO claim study, *2001-2010 Physical Therapy Liability,* more than $44 million was paid in professional liability judgments and settlements on behalf of PTs from 2001 to 2010.

The fact that others have been in your situation is of little comfort to you, however, as you face your first experience in giving a deposition. How can you cope with the knots in your stomach and mental anxiety?

When you know you will be working with a patient who has a comorbid condition that is unfamiliar to you, you prepare beforehand. For example, you might not have seen a patient with hemophilia in your practice before, so you research the disease to learn of any special precautions you need to take during physical therapy. Or, you might consult with a colleague who has experience in this area.

Likewise, you need to prepare for a deposition so you can feel confident in your ability to be an effective witness. If you aren't well prepared for your deposition, the plaintiff's (opposing) attorney could easily challenge the legal defense your attorney has crafted for you. In fact, a poor showing at a deposition is the most common reason for an unsuccessful defense. You can take several steps to prepare yourself, beginning with understanding the nature of a deposition.

What is a deposition?

A deposition is a legal proceeding for gathering information from someone named in a lawsuit or who is a witness in a lawsuit. Depositions occur in the discovery phase of a lawsuit—the investigative process that takes place after the complaint is filed and before the trial.

Depositions are key in a jury trial. Juries in medical malpractice trials want to hear the defendant describe what happened. Furthermore, during the trial you will be held to the facts you gave at your deposition. Any discrepancies will not reflect well on you or your defense.

During a deposition, which usually takes place in the plaintiff attorney's office, you will testify under oath. A court reporter will record your testimony verbatim, and you may be videotaped.

12 tips for giving a deposition

- Listen carefully and think before you speak. Don't be pressured into rushing a reply.
- Speak slowly, clearly, and answer courteously.
- If you need to consult the medical record, ask.
- If your attorney objects, stop speaking.
- Don't look at your attorney when a question is asked; this is your testimony.
- If you don't know the answer to a question, say so instead of guessing.
- If you don't remember something, say so.
- If you don't understand a question or word being used, don't answer; ask for clarification.
- Answer only the question asked; don't anticipate further questions.
- Understand the theme of your case. You should know every allegation being made against you.
- Be confident and self-assured. If you need a break or drink of water, ask for it.
- Tell the truth.

What to do if you are subpoenaed

Be sure to notify HPSO, your professional liability insurance provider, that you have received a subpoena to provide a deposition. You should also notify your supervisor or practice partners, depending on your clinical setting.

What is the plaintiff attorney's goal?

The plaintiff's attorney will try to restrict you to one version of the incident or facts so your trial testimony is consistent with what you said during the deposition. The plaintiff's attorney may also try to maneuver you into testifying inconsistently by rattling you or undermining your credibility, while assessing your strengths and weaknesses as a witness. For example, the attorney may point out inconsistencies in your testimony compared to the testimonies of other witnesses. It's important to not take the "bait," but rather to remain calm. You'll learn more about how to conduct yourself at the preparation meeting with your attorney assigned to you by CNA, the insurance underwriting company for the HPSO program.

What should I do before the preparation meeting?

The most important step to prepare for the deposition is to meet with your assigned attorney. Usually, the preparation meeting is held about a month ahead of the deposition and follows at least one face-to-face meeting where you learn about the details of the lawsuit, including the specific allegations being made.

Before the preparation meeting with your attorney, thoroughly review the medical record. Consider all aspects, including your notes, treatment plan, patient education, and safety measures. It may help to develop a timeline showing the chronology of what happened each time you saw the patient. Determine how what you have found compares to the allegations. To the best of your recollection, discuss with your attorney what you recall of the incident. If there are problems, you'll want to bring them to your attorney's attention.

What happens during the preparation meeting?

Your attorney will work with you to create a "theme" for your defense. For example, if you failed to document that you used a gait belt for the patient, the theme might be that even though the paperwork may have suffered, care to the patient did not. You will want to keep that theme in mind at all times during the deposition so the plaintiff's attorney doesn't pressure you into making statements that do not support your case.

This meeting is also a time when your attorney can help you prepare by discussing questions the plaintiff's attorney will likely ask and your possible responses. Finally, your attorney will review guidelines you should adhere to when you give your deposition (see *12 tips for giving a deposition*).

You will also meet with your attorney the day of the deposition to touch base and discuss any last-minute concerns. Your attorney will be with you through the entire deposition. Remember to dress professionally because first impressions count.

How to prepare for a licensing board action

Another instance where you will need to prepare with an attorney is to defend yourself when someone files a complaint against your license. License defense is needed when someone (patient, patient's family, colleague, or employer) files a complaint with a board of physical therapy against a PT's license. According to *2001-2010 Physical Therapy Liability,* the average payment for a complaint against a PT's license was more than $4,000.

An action taken against a PT's license differs from a professional liability claim in that it may or may not, as in the case of professional misconduct, involve allegations related to patient care. In addition, payments made as a result of a claim cover defense attorney costs, as opposed to being part of a settlement payment to a plaintiff. License protection ensures you have coverage for legal representation for defending yourself against allegations that could lead to revocation of your license.

You are an expert

Remember that PTs are considered experts. To give a deposition like an expert, you must prepare like an expert. It may help you avoid a trial and give you peace of mind. To help you better understand the deposition process, CNA, the insurance carrier for the HPSO program, has created a video, *Preparing for a Deposition.* Visit www.hpso.com/resources/deposition-preparation-video.jsp.

HPSO-2013-PT

Physical Therapists and Medical Malpractice

CASE STUDY WITH RISK MANAGEMENT STRATEGIES

Presented by HPSO and CNA

Medical malpractice extends to every aspect of the medical field, including physical therapy. While common perception may be that doctors bear the brunt of lawsuits, the reality is that physical therapists are increasingly finding themselves defending the very care they provide – and it can be costly. In fact, over $43 million was paid out for 1,464 malpractice claims involving physical therapists, according to a 13-year study conducted by the HPSO underwriter CNA.*

Case Study: Improper treatment resulting in burn and scarring

Settlement Payment: Low five figure settlement **Legal Expenses:** $34,037

The plaintiff was a 40-year-old female receiving physical therapy following surgery to her ankle. The defendant physical therapist applied a hot pack to the affected area for pain relief.

The defendant physical therapist's documentation in the plaintiff's record reflected appropriate temperature and duration of heat treatment. There was no documentation that the plaintiff's skin was checked during the treatment, but the plaintiff did not express any discomfort during or after the treatment. Subsequent to leaving the physical therapy center, the patient called to report a burn on her ankle at the site of the heat treatment.

Photographs revealed a dime-sized severe burn on the plaintiff's ankle. The plaintiff alleged severe pain, restriction in movement of her ankle, inability to stand, sit or walk for an extended period of time.

Further, she alleged severe scarring resulting from the burn prohibited her from maintaining her customary habit of walking 4-5 miles per day, attending a gym, and enjoying the beach.

She alleged the inability to carry out her regular activities due to pain and embarrassment from both the scarring and considerable weight gain she attributed directly to her inability to walk and exercise.

Resolution

Expert reviews were contradictory. While there was no clear departure from the standard of care, the plaintiff suffered a severe burn that resulted in scarring and some alteration in functioning. The venue was known to be plaintiff-oriented with inflated plaintiff jury awards. The case was settled for a low five figure settlement amount with an additional $34,037 paid in legal expenses.

Risk Management Comments

- There was no documentation to explain the patient's severe burn or to indicate the defendant physical therapist specifically checked the plaintiff's skin before, during and after the heat therapy.

Risk Management Recommendations

- **Review the patient's medical history prior to the application of heat therapy** to ensure there is no neurological, circulatory or other contraindication to the application of heat for pain relief.
- **Ensure the patient is able to perceive temperature and sensation** in the area to receive heat therapy prior to its application.
- **Ensure that heat therapy equipment is properly applied, padded, and timed** and the patient's skin is properly protected.
- **Inspect the patient's skin prior to, during and after heat therapy** to ensure the skin is healthy enough to withstand appropriately applied heat therapy, that the patient is not experiencing any discomfort or undue heat during therapy and there is no evidence of redness or irritation before, during and after the treatment.
- **Notify the patient's physician for any signs or symptoms of a burn** resulting from heat therapy.
- **Document objective findings and observations related to skin condition and patient expressed comfort level before,** during and after the application of heat.

Guide to Sample Risk Management Plan

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*CNA HealthPro Physical Therapy Claims Study, September 2006. To read the complete study along with risk management recommendations, visit www.hpso.com/ptclaimstudy

X-8611-0112

Physical Therapists and Medical Malpractice

CASE STUDY WITH RISK MANAGEMENT STRATEGIES

Presented by HPSO and CNA

Medical malpractice claims may be filed against any healthcare provider, including physical therapists. In fact, over $43 million was paid out for 1,464 malpractice claims involving physical therapists, according to a 13-year study conducted by the HPSO underwriter CNA.* This case involves a physical therapist working in a private practice setting.

Allegations: Ruptured disc caused by improper full spinal deep thrusts during therapy

Settlement Payment: $285,000 **Legal Expenses:** $131,443

In this case, the patient was a 5'2", 156 lb, 54-year-old woman, who underwent a hysterectomy and afterwards began to experience low back pain. Five months after surgery the patient sought treatment for her back pain with an orthopedic surgeon who believed she was suffering from degenerative problems and prescribed physical therapy at the insured physical therapy firm.

The patient was seen by the physical therapist on two occasions, two days apart. The patient alleged that the physical therapist, without adequate evaluation, performed improper physical therapy manipulations including aggressive and full spinal deep thrusts.

These treatments caused debilitating pain in her mid- and lower-back areas to the point that she became bedridden. The patient returned to her orthopedic surgeon two days post physical therapy treatment as a result of the pain.

The orthopedic surgeon confirmed degenerative disc disease, but no lumber herniations were noted. Three weeks later, the patient sought a second opinion and a neurosurgeon found two disc herniations. The patient has since undergone four surgeries and is now incapable of returning to work as an interior decorator.

The two "giant" thoracic disc herniations that were missed by the patient's first surgeon were likely already there when she visited the physical therapist. Three neurosurgeon expert witnesses for the physical therapist opined that surgery for one of the herniations would have been required regardless of the therapy the physical therapist provided. One expert stated that the surgical procedures done on the L3-4 and T6-7 were unwarranted. These levels contained pre-existing degenerative changes only and there was no evidence of nerve root compression.

The physical therapist initially shredded her contemporaneous notes. The notes in the file were unspecific regarding the mobilization exercise results. Record coding was later changed from non-specific (722.6) to Thoracic/Lumbar (722.5). The physical therapist's few remaining records indicate that she performed mobilization exercises. This treatment was not included in the plan prescribed by the patient's physician.

During the case, one of the expert witnesses for the defense noted that the physical therapist had not completed her McKenzie Course Part B (mobilization and manipulation) training until one month after she saw the patient. The expert believed the physical therapist's manual skills at the time of incident were in need of improvement.

Of the patient's expert witnesses, the physical therapy expert they retained was not a litigation expert and did not perform as an 'advocate' for the patient. He avoided conflict and ended up helping the defendant physical therapist. The patient's other expert was a chiropractor who was not a physical therapist and was unable to testify to physical therapy Standards of Care.

The patient supplemented her original suit against the physical therapist's firm with an added 'identity theft' claim based on allegations that the insured physical therapy firm negligently allowed the cleaning crew to steal the patient's medical records. Unauthorized purchases were made using the patient's personal information and her credit was allegedly damaged. The patient claimed that the physical therapy firm did not properly secure her medical records in its office. The stolen records were part of the litigation records, but were not directly related to treatment administered to the patient by the physical therapist. This charge was eventually dismissed.

The patient's attorney demanded $800,000 although damages were in excess of $1,200,000.

Resolution

Despite the documentation and incomplete training coursework deficiencies in the defendant case, defense counsel was successful in creating doubt in the mind of mediators that two negligent physical therapy sessions could not have caused the thoracic disc herniations or disc disease evidenced by the patient's records. The case was settled at mediation.

Risk Management Comments

The physical therapist appropriately shredded her personal notes regarding the plaintiff's evaluation as they contained confidential health information and were not part of the patient's health information record. However, after seeing the plaintiff twice, the documentation that was entered in the patient's record was inadequate to rebut the allegations of inadequate evaluation and improper care.

The physical therapy firm failed to have properly trained and experienced physical therapists performing patient evaluations and providing treatment. This failure alone could have resulted in a finding against the defendant physical therapy firm.

- The physical therapist failed to act within her scope of practice when providing mobilization exercises as training in mobilization and manipulation had not been completed at the time of the incident. The exercises that were performed were inadequately documented.
- The physical therapist's own expert deemed her skills to be in need of improvement at the time of the incident.

The physical therapy firm failed to protect the health information record, and portions of the plaintiff's record were stolen and/or lost and could not be provided at the time of the mediation.

- The diagnosis/treatment code on the plaintiff's health information record was visibly altered making the validity of the record itself questionable.
- Because the therapy firm failed to adequately protect her personal and medical information by allowing it to be stolen, the plaintiff alleged that she was a victim of identify theft. While this charge was eventually dismissed, the physical therapy firm failed to properly protect their patient files and records were stolen from their location.

To the defendant's benefit, there were also problems with the plaintiff's claim:

- The plaintiff's expert witness was not effective and the plaintiff's second expert was a chiropractor who could not testify to the Standard of Care for a physical therapist.
- There was evidence that the plaintiff's referring physician may have misdiagnosed her condition initially, as a subsequent physician diagnosed two "giant" thoracic disc herniations that were likely present at the time of the physical therapist's treatment.
- The plaintiff's surgeon performed four surgical procedures (some of which the defense expert indicated may have been unnecessary), and the plaintiff was permanently disabled and unable to return to work.

Despite the difficulties faced by the defense, they were able to create the doubt that just two physical therapy treatments could not have resulted in the "giant" thoracic herniations described and the case settled.

Risk Management Recommendations

- ***Understand the patient's relevant prior medical history and document the review*** before commencing diagnostic procedures and/or treatment. In cases of failed surgical intervention, severe disability, patient discomfort/distress or a history of advanced disease it may be appropriate to discuss the patient's condition with the physician prior to initiating treatment.
- ***Provide adequate licensed and experienced physical therapists*** to perform patient evaluations, develop appropriate physical therapy programs that meet the individual needs of each patient, and to provide appropriate supervision of the clinical support staff.
- ***Provide adequate supervision of licensed physical therapists*** to ensure they possess necessary skills and competencies and are treating patients within their scope of practice.
- ***Require that a qualified physical therapist perform an evaluation*** of each patient's disability/disease/ diagnoses prior to the development and initiation of the patient's treatment program.
- ***Provide physical therapy evaluations and treatment in compliance with state-defined scope of practice*** for each level of licensure, certification and training and in accordance with demonstrated skills and competencies.
- ***Cease treatment*** when a patient complains of unusual, unexpected or excessive pain.

continued…

- ***Establish 'custom and practice' for pain management*** that the physical therapist will always follow when a patient complains of unexpected, excessive and/or unusual pain during a physical therapy evaluation or treatment.
  - That custom and practice is consistently implemented each time unexpected, unusual and/or excessive pain occurs and is then fully documented in the patient's health information record.
  - By developing and following a consistent custom and practice for this type of patient event, the therapist will be able to testify with certainty to their actions even if the patient's records are lost or fail to reflect an episode of such pain.
  - When the therapist has a defined custom and practice he/she can firmly state/testify that if no episode of excessive or unusual pain is documented that he/she believes it did not occur when they were with the patient, or that the patient did not inform them of the pain.
- ***An effective 'custom and practice' related to pain management encompasses***, but is not limited to performing and documenting the following elements:
  - That the patient was questioned regarding their level of pain at the introduction of each diagnostic and/or therapeutic action/exercise, with the patient's response and the therapist's observations related to the level of pain described.
  - The patient's description of the type, severity, location and duration of the pain experienced.
  - What was occurring at the time of the onset of pain including a detailed description of the evaluation and/or treatment procedure being performed.
  - Objective clinical findings or observations by the therapist at the time the patient complained of unusual or excessive pain such as pallor, facial expression, diaphoresis, change in breathing, localized redness, heat, swelling or deformity of the body part being treated, change in sensorium or speech, gait change, fall, etc.
  - That the evaluation/treatment ceased immediately when the patient complained of unusual/excessive pain and whether ceasing the activity relieved or eliminated the pain.
  - A description of the comfort measures (rest, heat, cold, padding, reclining, etc.) offered/provided and the patient's response to such measures.
  - Notification of the patient's physician if the pain persisted after the treatment was stopped.
  - That the therapist offered to obtain emergency care and/or transport to an emergency department for medical assessment and whether this was accepted or rejected by the patient.
  - The patient's condition upon leaving the therapy location and the mode of conveyance when they departed.
- When the above elements are in place, it may be less likely that this or another physical therapist would request settlement in the presence of a desirable expert review and the fact that several other healthcare providers were involved in the plaintiff's care who were potentially liable for her very adverse outcome.

Guide to Sample Risk Management Plan

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*CNA HealthPro Physical Therapy Claims Study, September 2006. To read the complete study along with risk management recommendations, visit www.hpso.com/ptclaimstudy

X-8611-0411

Physical Therapists and Medical Malpractice

CASE STUDY WITH RISK MANAGEMENT STRATEGIES

Presented by HPSO and CNA

Medical malpractice extends to every aspect of the medical field, including physical therapy. While common perception may be that doctors bear the brunt of lawsuits, the reality is that physical therapists are increasingly finding themselves defending the very care they provide - and they can be costly. In fact, over $43 million was paid out for 1,464 malpractice claims involving physical therapists, according to a 13-year study conducted by the HPSO underwriter CNA.*

Case Study: Overly Aggressive Treatment

Settlement Payment: $400,000 **Legal Expenses:** $38,199

This case involves a 42-year old female with a long history of bilateral knee injuries and subsequent surgeries. She received her first surgery at age 14 to her right knee and then both knees at ages 16, 18, 21 and then again at 40.

The patient sought therapy after undergoing a total knee replacement. She alleged that mobilization was performed during her fifth therapy session and this treatment caused severe and permanent physical and mental injuries. The patient stated she asked the physical therapist (PT) to cease with treatment and he refused. The PT stated that this did not occur. He said he encourages his patients to treat aggressively, but no one is "forced" to do any activities.

While the patient alleged that the PT was overly aggressive in his treatment, her counsel initially had a great deal of difficulty locating any expert witnesses who would testify against the PT. The patient's attorney readily acknowledged that the PT enjoyed an excellent reputation in the local PT community and was one of if not the number one most respected physical therapist in the area.

The PT remarked that the patient had a very low tolerance for pain. She cried and was very emotional at each session. A companion attended every session for support. At times, the patient brought her mother and she would hold her hand and encourage her to continue. The PT adamantly denied he would not stop treatment. He did admit completing the treatment, but was firm that the treatment was such that it could not possibly have caused her harm. Depositions of the two aides who worked with the PT on the day of the incident, indicated that the treatment may have been more aggressive than the PT thought.

The patient claimed her subsequent ligament tear was the direct result of therapy provided by the PT. The events were in close enough proximity to show a cause for her subsequent surgeries. Her knee prosthesis had to be revised. Her situation was complicated by the severe back pain and pain in her other knee due to gait issues from overcompensating for her failed knee surgery. The pain prevented her from working at a seated position and from all physical activity.

Additionally, the patient retained a Vocational Rehab expert who stated that the patient's depression (further exacerbated by this event) was making it difficult, if not impossible, for her to retrain for another job. She would require 18 months of retraining in order to be able to qualify for work at some future date. The patient went on permanent disability. Her demand included a significant amount for the loss of future earnings.

There was a 50/50 chance of a favorable outcome for the PT. Although the PT enjoyed an outstanding reputation, the versions of treatment were decidedly different. The expert witnesses for both parties were very credible and the case went to mediation.

Resolution

Total damages and lost future wages were valued at over $1,000,000. If the case went to trial, it was suspected that an $800,000 verdict would have been likely. The claim was settled for $400,000 with an additional $38,199 paid in legal expenses.

Risk Management Comments

The physical therapist had an excellent reputation, but agreed his style was to encourage patients and to treat 'aggressively.' This aggressive therapy approach resulted in:

- Failure to stop treatment immediately and completion of the exercise even though the plaintiff complained of severe pain.

continued…

- Failure to adapt usual approach to meet the specific needs of the plaintiff, despite being aware that she was anxious, timid, had exhibited a low tolerance for pain, required support from family members even during treatment, and had shown signs of depression including crying during her therapy appointments.
- Lack of awareness of how treatment style and technique was perceived by others – the two physical therapy aides stated that the therapist's treatment with the plaintiff was overly aggressive.
- Lack of understanding that failure to adapt treatment style to each patient's individual needs may seem harsh and may frighten and alienate some patients and colleagues and leave the therapist vulnerable to increased patient dissatisfaction with a corresponding increased risk that the unhappy patient will consider litigation.

Every health care professional should undergo at least annual peer observation and evaluation to allow them the opportunity to obtain objective feedback on their performance and to continually improve in all areas of their practice.

Risk Management Recommendations

- **Consider the patient's relevant medical history** related to injuries and the severity and longevity of symptoms relative to the current reason for seeking treatment when developing and implementing their plan of treatment.
- **Observe each patient's response** to their treatment program and modify the program as needed to provide effective, individualized care for each patient.
- **Consider the patient's physical, emotional and behavioral abilities** when adopting the appropriate therapy program.
- **Adopt an appropriate tone and approach** that will meet each patient's particular needs when encouraging them to move forward in their therapy.
- **Listen to patient complaints of pain**, keeping in mind that pain is subjective, and make appropriate modifications to the treatment program as needed.
- **Stop treatment whenever** a patient complains of unusual or excessive pain.
- **Establish a pain management "custom and practice"** which the physical therapist will always follow when a patient complains of unexpected, excessive and/or unusual pain during a PT evaluation or treatment. That custom and practice is consistently implemented each time unexpected, unusual and/or excessive pain occurs and is then fully documented in the patient's health information record. By developing and following a consistent custom and practice for this type of patient event, the therapist will be able to testify with certainty to their actions even if the patient's records are lost or fail to reflect an episode of such pain. When the therapist has a defined custom and practice he/she can firmly state/testify that if no episode of excessive or unusual pain is documented that he/she believes it did not occur when they were with the patient, or that the patient did not inform them of the pain.

  An effective "custom and practice" related to pain management encompasses but is not limited to performing and documenting the following elements:
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  - Any objective clinical findings or observations by the therapist at the time the patient complained of unusual or excessive pain such as pallor, facial expression, diaphoresis, change in breathing, localized redness, heat, swelling or deformity of the body part being treated, change in sensorium or speech, gait change, fall, etc.
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  - Notification of the patient's physician if the pain persisted after the treatment was stopped.
  - That the therapist offered to obtain emergency care and/or transport to an emergency department for medical assessment and whether this was accepted or rejected by the patient.
  - The patient's condition upon leaving the therapy location and the mode of conveyance when they departed.

continued…

- **Solicit feedback from patients and other staff** regarding the effectiveness of demeanor and therapeutic approach and make adjustments as needed.
- **Perform at least annual performance assessments for every staff member** and provide feedback in order to make any needed adjustments in patient approach, therapy skills and/or treatment philosophy.

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X-8611-910

Physical Therapists and Medical Malpractice

CASE STUDY WITH RISK MANAGEMENT STRATEGIES

Presented by HPSO and CNA

Medical malpractice claims can be asserted against any healthcare provider, including physical therapists. Although there may be a perception that physicians are held responsible for the majority of lawsuits, the reality is that physical therapists are more frequently finding themselves defending the care they provide to patients. In fact, over $44 million was paid for malpractice claims involving physical therapists, according to the most recent CNA HealthPro 10-year study*

Case Study: Failure to properly Monitor or Supervise

Settlement Payment: in excess of $500,000 **Legal Expenses:** in excess of $60,000

Note: There were multiple co-defendants in this claim who are not discussed in this scenario. Monetary amounts represent only the payments made on behalf of the physical therapist. Any amounts paid on behalf of the co-defendants are not available. While there may have been errors/negligent acts on the part of other defendants, the case, comments, and recommendations are limited to the actions of the defendant; the physical therapist.

The patient / plaintiff was a 45-year-old male with a history of traumatic brain injury, limited use of his extremities and contractures of his left elbow and shoulder. He had been receiving aquatic therapy twice a week for over six months to increase his range of motion and improve his ability to perform activities of daily living. The patient was noted to have greatly improved. During his therapy the defendant physical therapist would typically work with him individually in the pool and then permit him to walk on his own along the pool wall holding the handrail.

At the time of the incident the patient was unattended and the defendant physical therapist was assisting another client. A lifeguard was on duty and the patient was wearing a life vest flotation device. A physical therapy aide noticed that the patient was fully submerged. How the patient became submerged while wearing a life vest and why he was not observed by the life guard have never been determined. The length of time he had been submerged was unclear, but the defendant physical therapist had been working with the other client for approximately five minutes. The aide pulled the patient from the water and the aide and lifeguard initiated cardiopulmonary resuscitation (CPR). The patient breathed independently after several minutes of CPR and was transported by emergency services to the hospital.

The patient remained in the hospital for approximately one month and was treated for adult respiratory distress syndrome and aspiration pneumonia. He required oxygen therapy and an extensive subsequent stay at a rehabilitation facility. He was determined to have lost 50 percent of his normal lung capacity as a result of the near drowning incident. Following rehabilitation he was transferred to an assisted living facility where he now resides.

The patient and his wife sued the defendant physical therapist and the pool owners, alleging negligence and failing to monitor and supervise a dependent adult during treatment.

Resolution

Experts deemed that the defendant physical therapist was negligent in the following areas

- Failure to directly supervise the patient's independent ambulation in the pool
- Failure to specifically assign the physical therapy aide to directly monitor the patient's independent ambulation in the pool
- Use of a life vest flotation device was not an alternative to appropriate patient supervision

Based on the findings of negligence, the decision was made to settle the claim on behalf of the defendant physical therapist.

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Risk Management Comments

- Simply having the physical therapist near the patient, having a physical therapy aide and lifeguard in the pool area and use of a patient flotation device are not adequate supervision or monitoring of a therapy patient while in the pool.

Risk Management Recommendations

- **Evaluate the patient's needs before each aquatic therapy session.**
- **Maintain visual and/or physical contact with every patient at all times during aquatic therapy.** Patients with impaired cognitive function or severe physical disability may warrant 1:1 direct physical contact during the entire aquatic therapy session.
- **Require all patients to wear properly tested and secured life vests and additional floatation devices as needed at all times when in the therapy pool.** Use of a life vest or any other flotation device does not replace the need for supervision and monitoring of every patient during aquatic therapy.
- **Educate patients of the need to remain in the area of the pool assigned by the physical therapist** even if they believe they are able to function safely in deeper water.
- **Place secured, highly visible floating pool barriers to identify the portion of the pool where therapy will take place and verify that the patient can easily touch the pool floor with their feet when standing** before initiating aquatic therapy exercises.
- **Utilize a life line between the patient and the physical therapy staff member if the patient will be further than one arm's reach away from the staff member** at any time while in the pool area.
- **Ensure adequate numbers of physical therapy staff to monitor and supervise every patient in the therapy pool and verify that every staff member is fully aware of each patient they are assigned to monitor during while they remain in the pool.** Even patients who are approved for independent exercise while in the pool must be directly monitored at all times they are in the pool and when entering and exiting the pool.
- **Clarify the specific role of the lifeguard regarding aquatic physical therapy patients with the understanding that the life guard is not responsible for individual patient supervision.**

Guide to Sample Risk Management Plan

Risk Management is an integral part of a healthcare professional's standard business practice. Risk management activities include identifying and evaluating risks, followed by implementing the most advantageous methods of reducing or eliminating these risks - A good Risk Management Plan will help you perform these steps quickly and easily!

Visit **www.hpso.com/risktemplate** to access the Risk Management plan created by HPSO and CNA. We encourage you to use this as a guide to develop your own risk management plan to meet the specific needs of your healthcare practice.

CNA

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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

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