

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.

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 “inattentive 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 inattentive 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 inattentive 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 inattentive 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 inattentive 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 multi-task. 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 inattentive 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

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.

court reporter will record your testimony verbatim, and you may be videotaped.

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

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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.

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HPSO-2013-PT

Physical therapists and medical malpractice: A case study with risk management strategies

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.

In this case, the patient (plaintiff) was a 9-year-old child with cerebral palsy who had undergone extensive surgery for correction of bilateral ankle contractures. He was referred back to physical therapy following removal of the casts from both legs. In addition to his surgery, the patient had a history of balance problems, as well as pain and weakness on his right side. He was well known to the physical therapist (defendant) who had provided his strengthening and balance therapy prior to surgery....



To read the full case with risk management recommendations, go to www.hpso.com/case-studies/casestudy-article/381.jsp.