

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 lumbar 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

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

This publication is for educational purposes. It is not legal, professional or medical advice. CNA makes no representations as to its correctness or completeness and accepts no liability for any injury or damage that may arise from its use. Specific legal or medical questions should be referred to a competent attorney or medical professional before applying this material in any particular factual situations. This material may address and discuss matters for which your policy does not provide coverage, and the material does not create or imply the existence of coverage. Please consult your insurance policy for the specific terms, coverages, amounts, conditions and exclusions of coverage. All products and services may not be available in all states and may not be available in all states and may be subject to change without notice. CNA policies are underwritten by the property/casualty companies of CNA, Chicago, IL. CNA is a registered trademark of CNA Financial Corporation. © 2011 Continental Casualty Company. All rights reserved.

This publication is intended to inform Affinity Insurance Services, Inc., customers of potential liability in their practice. It reflects general principles only. It is not intended to offer legal advice or to establish appropriate or acceptable standards of professional conduct. Readers should consult with a lawyer if they have specific concerns. Neither Affinity Insurance Services, Inc., HPSO, nor CNA assumes any liability for how this information is applied in practice or for the accuracy of this information. This publication is published by Affinity Insurance Services, Inc., with headquarters at 159 East County Line Road, Hatboro, PA 19040-1218. Phone: (215) 773-4600. All world rights reserved. Reproduction without permission is prohibited.

Healthcare Providers Service Organization is a division of Affinity Insurance Services, Inc.; in CA (License #0795465), MN and OK, AIS Affinity Insurance Agency, Inc.; and in NY, AIS Affinity Insurance Agency. © 2011 Affinity Insurance Services, Inc. X-8611-0411

