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.

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- 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:
  - 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.
  - 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.
  - 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.

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- **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.

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.

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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

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