

OCCUPATIONAL RISK

Documentation is key to
defending a malpractice claim



IMAGINE THIS SCENARIO: You've prescribed a series of exercises for a patient to perform in your clinic. While the patient proceeds with the exercise, you leave the treatment area momentarily and the patient injures himself while using a piece of your equipment.

Or imagine this one: You give a patient a series of exercises to perform at home. The patient falls in her living room and hurts her back while doing a specific exercise that you prescribed.

A day later—or perhaps weeks, months or even years later—one or both of these patients launch a complaint against you. In the first case, the patient claims his injury was sustained because you were not there to personally supervise that it was performed correctly. In the second case, the patient claims you did not properly demonstrate how she should perform the exercise at home.

Dealing with a patient complaint—and the potential malpractice lawsuit that can result from that complaint—is every physiotherapist's worst nightmare. Fear of litigation can have a paralyzing effect on you and your practice. But you'll have more peace of mind if you've got the right insurance protection in place.

"Physiotherapists always have to be aware of potential liability—it's a risk that comes with the job since they are physically assisting patients who have problems and there is the potential for negative things to happen," says Craig Walker, director of the Toronto-based Maltman Group International, an independent insurance adjuster retained by the CPA to investigate claims and complaints against members who have liability insurance with the association. "You need to always be aware of the risk and be certain you have coverage, preferably through your association."

While it's a rare occurrence for a lawsuit against a physiotherapist to be brought before a judge, cases have been settled out of court. Walker says the most common claims against physiotherapists involve patients who allege that they either exacerbated an existing condition or sustained a new injury as the result of treatment administered by a physiotherapist.

In addition to having insurance, the single most important thing physiotherapists can do to protect themselves from potential lawsuits is to ensure they have proper patient care documentation. "Good documentation is absolutely critical," he says. "Physiotherapists have to be vigilant in making sure their chart notes and descriptions of what they are prescribing are well documented because when adjusters get involved, it's after the fact and we have to rely on what's noted at the time the specific treatment was administered or the specific time the alleged incident occurred. The better the documentation and the more detailed the notes the physiotherapist makes at the time, the better the outcome can be."

If documentation is incomplete, the physiotherapist is at greater risk of having a judge make a decision against them, notes Walker. "If the notes are sparse and a reasoned conclusion can't be made about what might have taken place by reading the file notes, then it becomes a matter of credibility—whether the judge will believe the physiotherapist's version of events or the claimant's." Because claims can be made long after an alleged incident occurred, the physiotherapist is dependent on having detailed notes in order to recall specific facts that make their case. Walker has investigated cases where a claimant's recollection of an alleged incident differed significantly from the sequence of events that a physiotherapist carefully documented. "In these cases we were able to use that documentation to our benefit with

the claimant's lawyer, show that it didn't match what their client was saying and that they would be facing an uphill battle in pursuing the case." More than once this has resulted in the claimant dropping the case entirely.

In addition to careful documentation, Walker offers other advice for therapists: "Be conscious of best practices in every situation," he says. He also suggests therapists regularly engage in risk management assessments by taking an unbiased look at their clinic or practice and ensuring it is being run "in tune with any recommendations made by the association."

Another way to reduce your risk is to trust your gut feeling about a patient who may be potentially problematic—it could be someone who is behaving erratically or who indicates in some way that they are litigious. "If a red flag goes up about a patient, pay attention and act accordingly."

If a complaint is launched against you, contact the CPA national office immediately, advises Walker. "It's best to seek advice from CPA first, before engaging with a patient about the legal matter since that could make the situation worse."

So how can physiotherapists protect themselves in scenarios such as the two noted at the beginning of this article? In the first case, where the patient claims he was injured when the therapist left the treatment room in the clinic,

Walker says a patient would have a hard time proving an injury occurred if he did not tell the physiotherapist about it right when it happened. It's probably not wise for a physiotherapist to leave the room if the patient is performing a new exercise, but if it's a longstanding patient who has been doing the exercise for a period of time, it likely wouldn't be a problem. "But every case is different," Walker cautions. "The physiotherapist has to use their best professional judgment."

In the second scenario, where a patient falls at home performing an exercise prescribed by the physiotherapist, documentation would be key to determining the patient's validity in bringing forward a claim. "As long as the physiotherapist has the notes that show the exercise was demonstrated and that the patient knew how to do the exercise properly at home, then in my view that physiotherapist would be in a solid position."

The CPA's malpractice program is directed by the association. The policy's group retention structure allows for surplus loss reserves to be retained and used by the association for future use and investment. "All physiotherapists purchasing professional liability coverage should think about the distinct advantages of participating in the CPA program," says Brian Gomes, Chief Operating Officer at CPA. "This plan is the largest, most longstanding and most cost effective option for physiotherapy professionals in Canada."

For more information on the liability programs offered by CPA go to the association website at www.physiotherapy.ca or call 1-800-387-8679.