



liability awareness

by Sheila K. Nicholson, PT, JD, MBA

Guidance in the Courtroom

Use of the Guide to Physical Therapist Practice as a tool in litigation.

In medical malpractice cases, a patient or client sues one or more health care providers, claiming some form of negligence regarding care and/or treatment he or she received or failed to receive. In these cases, the plaintiff must prove elements of the cause of action. In medical malpractice and/or negligence cases, these elements, generally speaking, are that:

- ❖ The plaintiff (the patient or client) was owed a duty from the health care practitioner,
- ❖ The health care practitioner breached the applicable standard of care,
- ❖ This breach caused some harm to the patient or client, and
- ❖ There was actual harm, or “damages,” to the patient or client.

The plaintiff must allege and prove each of these elements at trial in order to prevail on liability for a particular negative outcome.

An important tool that expert witnesses testifying against physical therapists (PTs) and physical therapist assistants (PTAs) use to form opinions about the duty and applicable standard of care owed a patient or client is the *Guide to Physical Therapist Practice*.¹ It is vitally important from a legal standpoint, therefore (not to mention the standpoints of best practice and professionalism), that every PT and PTA be familiar with the Guide and the ways in which it can be used from a legal perspective.

Watch Your Back: An Example

The legal concept of duty is complex. Duty varies depending on the circumstances surrounding each particular cause of action. It is defined in *Black's Law*

*Dictionary*² as “[a] legal obligation that is owed or due to another, and that needs to be satisfied, [or] an obligation for which somebody else has a corresponding right.” Standard of care, meanwhile, is defined in *Black's* as “[in] the law of negligence, the degree of care that a reasonable person should exercise.”

Although the standard of care in ordinary negligence cases depends on what a “reasonable person” should do, in cases of alleged professional negligence (malpractice), the standard of care depends on how professionals practice in a relevant geographic community. A typical formulation of the standard of care appears in Louisiana Rev Statutes § 40:1299.41(A)(7), quoted here in a malpractice case that was brought against a PT:³

The standard of care required of every health care provider ... in rendering professional services or health care to a patient shall be to exercise that degree of skill ordinarily employed, under similar circumstances, by the members of his profession in good standing in the same community or locality, and to use reasonable care and diligence, along with his best judgment, in the application of his skill.

It is important to note that the duty a PT owes his or her patient or client during evaluation and treatment is different from the duty a physical therapy clinic owner owes his or her clientele regarding maintenance of the premises. Also, it should be understood that attorneys and others often use the terms “duty” and “standard of care” interchangeably in medical malpractice cases. Hence, the plaintiff in a medical malpractice (professional negligence) case against a PT or PTA must establish the degree of care that the PT or PTA was “legally obligated” to

provide to the patient. This is where the Guide comes in.

At the outset, it should be stated that the Guide never was meant to establish the standard of care that a PT or PTA must satisfy with respect to any patient or client. Indeed, the document specifically states, “The Guide is not intended to set forth the standard of care for which a physical therapist may be legally responsible in any specific case.” It further emphasizes, “The Guide does not provide specific protocols for treatments, nor are the practice patterns contained in the Guide intended to serve as clinical guidelines.”

But those disclaimers have not, do not, and will not prevent attorneys and expert witnesses from using the Guide to support claims that PTs and PTAs have failed to meet a given community’s standard of care. Indeed, even if the Guide itself were ruled inadmissible as evidence of the community’s standard of care, an expert witness probably would be able to refer to the Guide in testifying about the standard of care.

Consider this example. A physical therapy patient receives treatment in a physical therapy clinic for low back pain. Two years later, he returns to physical therapy for what he states is an exacerbation of the previous injury. The PT treats the patient, but 3 months later the man is diagnosed with lung cancer and metastasis to the lumbar vertebra. A malpractice lawsuit is brought naming the PT as defendant for failure to recognize and refer the patient to another health care practitioner.

The Guide defines pain as “a disturbed sensation that causes suffering or distress” and states that PTs use tests and measures “to determine a cause or a mechanism for the pain, and to assess the intensity, quality,

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and temporal and physical characteristics of any pain that is important to the patient and that may result in impairments, functional limitations, or disabilities.” It further states, “Results of tests and measures of pain are integrated with the process to establish the diagnosis, the prognosis, and the plan of care, which includes the selection of interventions.” Clinical indications for use of tests and measures are predicated, the Guide says, on clinical judgment that incorporates the patient’s history and systems review findings.

Clinical indications for use of tests and measures that are listed in the Guide include pathology/pathophysiology in the cardiac, endocrine/metabolic, integumentary, musculoskeletal, neuromuscular, and pulmonary systems; impairments in the categories of circulation, integumentary,

joint integrity, muscle performance, pain, posture, and ventilation; and functional limitations in the ability to perform actions, tasks, or activities related to self-care, home management, work, and community/leisure activities.

A plaintiff’s expert may take the view that the Guide’s language establishes that, in every back pain case, the PT must consider all possible causes of pain, irrespective of its location. For that reason, if the PT has not *documented* in his or her written evaluation that he or she has done this, the charge may be made that the PT breached the prevailing standard of care.

Thus, in the back-pain scenario, the PT must be able to document that he or she completed a comprehensive evaluation, conducted all necessary tests and measures as identified in the Guide and thus considered all possible causes of the patient’s back pain, and determined that it was caused by something other than bone metastasis to the lumbar vertebra. Otherwise, the plaintiff’s expert can opine that the PT did not go through all tests and measures necessary. Had the PT conducted a comprehensive evaluation as outlined in the Guide, the expert might argue, he or she would have identified a problem with the patient’s lungs and referred him to a pulmonologist before going forward with physical therapy. Consequently, that expert would conclude, the PT did not meet the applicable standard of care.

A further challenge for the PT in this case—and indeed all malpractice cases—is the extent to which the plaintiff is sympathetic. PTs should realize that the younger the patient or client who is claiming injury due to malpractice, the more sympathetic a jury may be when it comes time to calculate damages.

Looking Ahead

PTs and PTAs should recognize that the preceding example is not uncommon—and that it will become even more

common as PTs progress toward becoming entry-level practitioners of choice pursuant to Vision 2020.⁴

This should come as no surprise. Academic preparation for the doctor of physical therapy degree includes training in the skills of differential diagnosis, and, as an entry-level practitioner of choice, a PT may be the initial health care provider to evaluate a patient presenting with new or recurrent onset of signs and symptoms. Thus, in many cases there no longer will be the “safety net” of a physician having evaluated the patient and having ruled out certain diagnoses in the process of determining whether the patient would benefit from physical therapy.

Increased responsibility will be accompanied by heightened accountability. The need for PTs and PTAs to be schooled in the contents and use of the Guide, so very important now, will only become more critical in securing a bright future for physical therapy. **PT**

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