

The Physical Therapist's Business Practice and Legal Guide

Sheila K. Nicholson, Esq, MBA, PT
Partner/Attorney
Quintairos, Prieto, Wood & Boyer, PA
Tampa, Florida



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Foreword

Generally speaking, lawsuits are usually defended through denial of liability and mitigation of damages. In order to deny liability, someone cannot have already confessed fault. While many people believe and practice admitting fault, you must understand litigation will not always treat you kindly for your acceptance of responsibility when something goes wrong.

Recognize that there is a new philosophy in health care to admit fault and take responsibility for one's mistake. Although this approach could help immediately diffuse someone's anger, it does not change the evidentiary rule that, in a court of law, admission can be used against you.

At trial, an opposing party, usually called a plaintiff, will be allowed to present to the jury your admission of fault with your apology. While I agree there would be fewer lawsuits if individuals took responsibility for their actions, I must caution against the verbalization or conduct of acceptance of fault for a bad outcome. As Joe Friday of the television show *Dragnet* would say, "anything you say can and will be used against you in a court of law."

While those words are a part of receiving your rights upon arrest, the phrase also holds true in a civil court of law. In criminal court your admission of fault (guilt) can be used against you for conviction and punishment of a crime, whereas, in civil court, the admission of fault can be used against you to substantiate liability and punishment will be given by a jury verdict of a monetary award. Thus, this is a warning that a request for forgiveness, an apology, or an acceptance of fault could be used against you in a court of law as an admission of fault. When that occurs, the case then becomes one of determining damages, not whether there is liability because the physical therapist, physical therapist assistant, or student has already confessed fault (liability) in that he or she breached some type of duty and caused some type of harm to the patient.

Preface

Seven years ago I took an incredible leap of faith and journeyed from being a clinically practicing physical therapist to a litigation attorney defending health care providers. Many have asked why and the answer is quite simple; I decided to battle for “the good guys” in a different role. At the outset I concede there are very legitimate claims against health care providers, but there are also, in my opinion, too many frivolous claims against health care providers. I would even venture to say there are some catastrophic health care injuries because of health care providers’ negligence; however, in comparison to the number of lawsuits filed, the catastrophic claims are few and far between. Nonetheless, if you or a loved one is the victim, it does not matter that the number of catastrophic claims is low.

Furthermore, if you or a loved one was the victim of a health care provider’s catastrophic mistake, you would likely want no limits to what a jury could award in compensation. In my opinion, the majority of the lawsuits seek compensation for risks (injuries) that naturally flow from the necessity of the health care providers’ services, and as such, are not caused by the health care practitioner’s negligence. These are nuisance lawsuits. So, you ask why would someone take the time to file such a lawsuit? The answer is simple, but insulting: money. Unfortunately, from a business perspective, many times it is less costly for a health care provider to settle these types of claims than it is to defend them. Like it or not, many times the physical therapist, physical therapist assistant, or student should practice so that any subsequent lawsuit has evidence for defense and mitigation of damages.

In that light, as the physical therapy profession continues to grow toward autonomous practice, I believe the profession and the physical therapist are going to face liability risks and liability exposure like never before. Further, despite having graduated from one of the finest physical therapy schools, I know firsthand that physical therapists, physical therapist assistants, and some students are ill-prepared for what

likely lies ahead. Additionally, as I review the contents of doctoral physical therapy programs and transitional doctor of physical therapy programs, I still believe physical therapists will be ill-prepared for the liability risk exposure of the future. Thus, I now embark on a quest to educate physical therapists, physical therapist assistants, and students about the law, liability, and ways to mitigate risk exposure in the practice of physical therapy.

This book covers not only the current law, which is open to daily changes, but also reviews lawsuits that health care providers have experienced so that those lessons can be incorporated into physical therapy practice. Thus, this book's purpose is to provide the educational tools for you, the physical therapist, physical therapist assistant, or student, to integrate risk management practices into your daily patient care routine as your liability exposure increases with every patient and every treatment.

Sheila Nicholson

Acknowledgments

There are so many people who helped with the idea and ultimate writing of this book that it would take too much space to thank them all. However, I must thank Jack Bruggeman because he listened to one of my lectures on malpractice involving physical therapists and suggested I write it all down. Thus, this book now exists.

I must also thank my family, especially my mother and younger brother, Glenn, who have encouraged me to follow all of my dreams and believed I could do anything I tried. However, no one has influenced this book more than my niece, Taylor; you have the most incredible heart for inspiring me to be a better person every day.

For the individuals who read, edited, and made suggestions to make this book better, a most heartfelt thank you. Lastly, I could not have finished this book without some individuals who tirelessly gave of their time, energy, and knowledge: Adam Fleischmann, Esquire; Diana Ickes, PTA; Margaret Nonnemacher, DPT; and Professor Becky Morgan, BSBA, JD—thank you.

Introduction

HOW TO USE THIS BOOK

Hopefully, this book contains information that will assist in keeping you out of liability's way. Or, if you must cross paths with a lawsuit, the knowledge and tools provided here, if followed and applied, may help mitigate your liability exposure and subsequent damages. Everyone makes mistakes, many of which are purely honest mistakes. However, we live in a world that has become very litigious and individuals seek reparation for your "honest mistakes" through our judicial system.

The judicial system is large, daunting, and complicated. However, the basic right giving an individual the right to sue was created in 1791 in Amendment VII of the Constitution of the United States, which provided, "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any [c]ourt of the United States, than according to the rules of the common law."¹ Thus, citizens of the United States have the right to seek compensation in a court of law for conduct and/or circumstances deemed wrong.

Physical therapists and physical therapist assistants have been fairly insulated from lawsuits arising out of the practice of physical therapy; however, the profession is currently evolving into autonomous practice, which, for this book, will be called entry-level practice into the health care system. Autonomous practice, part of Vision 2020, will also likely unintentionally bring with it greater exposure to liability lawsuits. Vision 2020 has begun and with it comes greater expectations, responsibilities, and rewards for physical therapists and physical therapist assistants. However, with it also comes a greater risk of liability in that physical therapists have become practitioners whom patients visit first before a physician has conducted a differential diagnosis. In that regard, the physical therapist must learn and conduct a thorough

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examination that rules in and rules out diagnoses before developing appropriate plans of treatment. Thus, the physical therapist, as an entryway into the health care system, becomes a primary care provider and concomitantly exposes him- or herself to greater risk of liability.

This book is intended to give the physical therapist, physical therapist assistant, and student an overall understanding of the changes occurring in the physical therapy profession and how these changes will undoubtedly impact their legal exposure. This book will also provide the physical therapist, physical therapist assistant, and student with a thorough review of the legal profession as well as ways to manage the risk exposure.

NOTES

¹ Constitution of the United States, Amendment VII.