



risk analysis and management for therapists -- part 1 of a 2 part article

Consumers are becoming more aware of their legal rights and how to exercise them in the Courts should the need arise. The situation is being aggravated by a new breed of legal firms who advertise "no win, no fee" services, and encourage people that they might be able to collect thousands of pounds in compensation. This heightened awareness means that there has never been a greater need for you and your practice to maintain an adequate level of Professional Indemnity and Medical Malpractice Insurance protection, and to be aware of the small print in your policy.

In our unique position as the largest Insurance Brokers whose main clientele are Complementary Medical Professionals, we see many attempts by members of the General Public at claiming against practitioners. In our experience, these attempts, whether unfounded or not are definitely on the increase, as are allegations of sexual impropriety / assault. This article is designed to help you to reduce the likelihood of problems, and to recognise possible signs of a potential claim and to give you a little guidance on what to do when one arises.

Consent and Contract

A contract can be verbal or written. An exchange of goods or services (usually for money) constitutes a contract. The law of contract as well as the Tort or Negligence governs the relationship between patient and therapists. Both of these come under civil law as distinct from criminal or statutory law. What is agreed at outset or implicit forms the core of the contract.

We have noticed an increase in the number of allegations of assault or inappropriate touching by physical therapists in recent years. Whilst most of these tend to clear, they are very distressing to the therapist and can often have harmful effects on the practice, even when proved innocent.

For Doctors, it is considered good practice and is a legal requirement to obtain the consent of people you treat. The Department of Health has issued guidance on consent, which includes a code of good practice and sample forms. Whilst it is implied that if someone comes to you for a massage, they are tacitly giving you permission to

touch their body, there are issues around this which could become problematical particularly if the client alleges that they were not warned about an outcome or procedure, which if they had been, would not have agreed for you to go ahead with it. Quite clearly, if you need to contact an erogenous zone or one, which may cause embarrassment, you should always get permission and record it in your patient notes afterwards. Without detailed objective notes, you have much less chance of a successful defence in Court, should an allegation be made.

If you do not get valid consent, Criminal or Civil proceedings could result, or possible disciplinary Hearings from your Professional Body.

For consent to be valid:

1. The patient should be informed
2. The patient should be competent to understand the nature and purpose of the proposed treatment or technique (*e.g. of sound mind and able to make decisions for themselves etc*)

3. The consent must be given voluntarily
4. In respect of children below the age of 16, the situation is more complicated and you should check the position with your adviser or Association.

I often get asked if a written disclaimer is sufficient to relieve a practitioner of any possible claims against them. While these carry some weight, they are not enough on their own. More important, is a discussion or verbal communication with the client clearly recorded in the notes. Consent extends to other areas of the therapeutic relationship, the most important of these for complementary therapists would be confidentiality and disclosure for example to other therapists, doctors employers, insurance companies, but we need not go into these here.

Communication

Good communication is at the root of a healthy therapeutic alliance between therapist and client. Good listening, positive, encouraging feedback and validation are important aspects of this. Many of the incidents which we have to deal with may have not arisen or would have been defused quicker, had the relationship been stronger, communication better and the patient been given realistic expectations and clear information about how long the treatments may take, and possible problems that may arise during a course of treatment.

We learnt of one recent example, where a massage therapist without warning executed a manipulative adjustment to the neck of the patient without warning

causing that person a few years of unresolved physical and emotional difficulties. The client had gone for a massage and ended up being manipulated without permission and felt violated. We have learnt of other situations where people have gone for one type of therapy and ended up being given another in the course of the session and without adequate permission. Others, where the embarrassment of undressing was not helped by the attitude and communication style of the therapist, resulted in a complaint to the Regulatory Body.

A common problem is that other than maybe a brief medical history, not enough time is devoted to talking through the process and the likely number and type of treatments that may be required. Whilst this may be OK for the client just in need of a relaxing massage experience, it is not good practice where there may be symptoms possibly of long standing nature that may need a course of sessions to help put right.

Not making claims that your therapy can help certain conditions even if true, is a wise course to follow. You could say to your client that some people may have been helped in the past, and this therapy could help them, but you cannot predict any outcomes, as each case is different. You could prepare a leaflet which can be handed out to patients with this sort of information (you should record that you have given it to them) and spend a little time discussing this and record the conversation briefly in the notes.

On a number of occasions we have had to advise physical therapists in situations

where the patient had discontinued after one or two sessions due to discomfort or pain, or failure to produce a desired result in a short period of time. Often they asked for refunds of money, or made threats of taking the matter further. It is a matter for conjecture as to how many of these would not have happened with better management of expectations and more time devoted at outset to the management of expectations and building the relationship. My guess is that it would be quite a high proportion.

Prevention is better than cure

One of the aspects of Complementary Medicine is the taking of responsibility by the client for their own health and lifestyle, and an acknowledgement that the therapist helps the patient to heal themselves. When there is a partnership between therapist and client many good things can result. As we know, this is not always possible. It is worth pointing out to the patient that prevention is better than cure, try and educate them about posture, stress levels, lifting etc and record this in the notes. Any help and support you can offer to them in their lives to improve quality may help to reduce the likelihood of a complaint.

You are not expected to be infallible but you are expected to make reasonable judgements and manage the client relationship, including making an adequate assessment of the clients condition and referring on to Doctor or other therapist if indicated. Do not exceed the extent of what you are qualified to do. Be aware of coming to conclusions about a diagnosis of your

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protect yourself – risk management

client's condition if you do not have the necessary qualifications/experience. Certain kinds of back pain or chronic conditions may be a sign that something else is going on. If you are offering remedial treatments, it is not just what you do but you do not do which can result in action against you. The golden rule is to refer on or recommend they go for tests, or even conventional medical assessment if at all in doubt.

Precautions

- (a) Do not display your Insurance Certificate on the wall, for some people, it may be an open invitation to claim, and you could be prejudicing your Insurers. There is a common misapprehension that you should display this.
- (b) Many typical Policy conditions state you should make Patient Records & keep for 7 years. We would suggest that you keep them longer than that, particularly in respect of children patients, where the Statute of Limitation states that a claim could be brought against you for injury cases up to 3 years after reaching the age of majority. Your patient notes are a main source of defence – make sure that they are intelligible to others and always keep them in a safe place, preferably locked. Confidentiality and Data Protection Issues should always be considered.
- (c) You must notify us or your Brokers, if your insured elsewhere, within 30 days of any circumstance which may give rise to any claim and always declare previous incidents on any forms you have to complete when starting or renewing cover,

even though you think the underwriter may already know about them. Failure to do so could lead Insurers to decline a claim for indemnity arising from such circumstances.

- (d) Take care when advertising and in conversation, that no claims for cure are made. Even anecdotal conversations about your previous successes may be interpreted wrongly, so it is important to mention in these situations, that every case is different.
- (e) Refer when appropriate; particularly if a condition or situation is beyond the scope of what you have been trained to do, or where you may feel out of your depth.
- (f) Extra care needs to be taken with children patients, particularly where they may be experiencing headaches or high temperatures.
- (g) If you are a multi-therapist, and you decide to employ a different therapy from the one that your patient came for, involve the patient in that decision ensure that your patient is in agreement. Make sure that the patient notes reflect this process and can be followed.
- (h) For techniques involving contact in erogenous zones, make sure that you have explained this and obtained patients permission, preferably written and/or offer a chaperone.

Next month we will tell you how to recognise Professional Indemnity or Medical Malpractice Claims.



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