Information paper

Duty of Care

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The content of this paper contains physiotherapy professional practice advice which makes reference to specific legal sources of information. The contents of this paper do not represent legal advice and should not be taken as such. If after reading this paper you remain unsure of the legal implications of any subsequent action or omission you may choose to make, you should consult a regulated legal adviser.
Duty of Care

Introduction

Duty of care is defined as a legal duty to provide a reasonable standard of care to patients and to act in ways to protect their safety. The current financial pressures in health and social care are very challenging. The ways in which an individual or a whole service works may change, levels of demand and therefore workloads may increase and resources or personnel to deliver the care may be reduced. These changing practice contexts and pressures on physiotherapy services and staff are highlighting the importance of supporting members to understand duty of care.

Purpose

The purpose of this paper is to assist all CSP members to:

- understand the principles of duty of care
- understand how to meet their own duty of care obligations
- understand the role of organisations, regulators and others in duty of care
- recognise where there may be risks to duty of care
- appropriately raise concerns relating to duty of care.

The content is relevant to the breadth of CSP membership, whether working in clinical practice and/or in management, in education or research. In the same way as the HCPC and CSP code and standards are applicable in all settings, so too are the principles of duty of care. Demonstration of compliance may vary depending on the role of the individual, the work being undertaken and the context.

Additional note

The CSP acknowledges that the forthcoming Francis report and increased focus on professionalism, the NHS Constitution consultation, and other reviews may necessitate the provision of additional guidance for members. The CSP will communicate the addition of supplements to this paper via the CSP website.
Section 1: Principles of Duty of Care

What is duty of care?
A duty of care is a legal duty to provide a reasonable standard of care to your patients and to act in ways that protect their safety.

A duty of care exists when it could reasonably be expected that a person’s actions, or failure to act, might cause injury to another person.

A duty of care is owed by all healthcare professionals, which includes full and part-time workers, permanent or temporary roles, agency workers, those who run their own businesses, support workers, students and volunteers.

Duty of care and the law
Duty of care is governed by ‘common law’ which means, the law is based on the outcome of cases that have previously come before the courts.
It is a complex area of law and the ‘rules’ that govern if a duty of care exists or not can vary according to the context and circumstances. There are settings where a duty of care clearly exists such as between;

- Parent and child
- Solicitor/ barrister and client
- Doctor and patient

This paper will only consider the duty of care between a doctor, now accepted to mean any registered health and social care professional, and their patient.

The legal concept of the ‘duty’ between the doctor and patient was set by Pippin v Sheppard (1822)(1) where it was established that a doctor owes a ‘duty’ to anyone he accepts as a patient. The duty to ‘take care’ when treating patients was developed in the criminal case of R v Bateman (1925)(2) to include the requirement to exercise a degree of skill when treating patients.

The modern definition of ‘duty of care’ is defined in the case of Donoghue v Stephenson (1932)(3)
“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure…persons who are so closely and directly affected by your act that you ought to have them in your contemplation …when you are directing your mind to the acts or omissions which are called in to question.”

**Why is duty of care important?**
Duty of care is a legal obligation placed on individuals and organisations and will be deemed to have been breached (by action or omission) if the reasonable standard of care has not been met.

Duty of care is the first of four steps that needs to be established in seeking to prove alleged clinical negligence. If clinical negligence is legally proven, this may have fitness to practise consequences for the individual and this matter would be for the Health and Care Professions Council (HCPC) to investigate.

Every registrant must reach HCPC defined standards of proficiency and conduct, performance and ethics to remain registered and therefore entitled to practice. Qualified, autonomous practitioners are accountable and responsible for individual actions and decisions on delegation. Students and support workers are accountable and responsible for their own actions undertaken through delegation and/or supervision.

**When is the duty of care created?**
In the context of physiotherapy, a duty of care is created as soon as a referral is deemed suitable and is accepted for advice and/or treatment. This may be when a referral is individually triaged before placing on a waiting list, when an appointment is created or a patient and therapist commence one-to-one contact, either in person or indirectly. Further detail on ‘Waiting lists and accepting referrals’ is provided within section 3.

**Is duty of care optional?**
Duty of care is a legal obligation and is not optional. The obligation requires the use of reasonable skill in providing treatment to patients and it is not acceptable to use any form of disclaimer, or any other method, to deflect this responsibility. Patients cannot be asked to participate in treatment programmes ‘at their own risk’; the duty of care requires patients to be assessed and advised accordingly.
What is ‘a reasonable standard of care’?
The law does not expect ‘the best’ care to be provided, nor does it permit ‘the worst’ care. A reasonable standard can be described as the standard expected of an individual according to their skills, job role and responsibilities. What would be deemed reasonable for an experienced staff member would therefore, be different to that of a less experienced practitioner.

The standard of care expected was set by ‘The Bolam Test’(4):
“The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill... it is sufficient if he exercises the skill of an ordinary competent man exercising that particular art.”

The test involves comparison with peers of the same profession, and not with the skills expected from a different profession.(5)

A minimum standard of care(6) and competence is expected of a person performing a given activity. The requirements of registration with the HCPC, including the standards of proficiency, act as the marker for possessing a level of skill required to practise under the protected title of ‘physiotherapist’.

What is deemed ‘reasonable’ has a higher threshold for those practising in senior and/or advanced practice posts where the patient has the expectation that the clinician is more skilled than a less experienced colleague.(7)

What constitutes ‘reasonable’ has been further developed to require that the practise is also ‘responsible’ and ‘logical’(8) and stands up to scrutiny. This does not mean that there is only one way to practise a technique and that colleagues cannot disagree about approaches, but each method must withstand proper scrutiny and testing.

Your duty of care as a physiotherapist
Patients have a right to expect to be treated with a reasonable standard of care by health professionals with the appropriate skills. In the course of providing physiotherapy to an individual patient or known group or patients (including information, advice, examination, assessment and treatment), the physiotherapist has a duty of care to their patient(s).
Communicating with relatives or carers regarding the ongoing care of the patient does not necessarily create a “doctor-patient” relationship. The physiotherapist does have a duty of care to a relative or carer, when the relative or carer is asked to become actively involved in the delivery of physiotherapy care to the patient at home. This duty is to ensure that the relative is educated, trained and competent to undertake and perform the tasks such as standing transfers, safe handling of a limb. The physiotherapist should not engage the relative if the physiotherapist judges that the relative cannot perform the tasks safely in accordance with directions.

Physiotherapists must be aware that they owe a duty to ensure the safety of relatives and other visitors to the physiotherapist’s or employer’s premises. This may include providing appropriate seating in a waiting area for example, or advising a relative of universal precautions if a patient is in isolation.

**Your duty of care and changes according to setting**
The duty of care which would be expected to be shown may change according to the setting and circumstances. It is important to note that the examples below are hypothetical as it would be for the Fitness to Practise Panel of the Health and Care Professions Council (HCPC) or a judge to determine whether an individual has failed in their duty of care.

**Example 1:**
You are a physiotherapist working out of hours. You are walking along a hospital corridor and you find a woman completely alone in advanced labour. In this situation it is not reasonable to expect you to care for the woman as a midwife would, but it is reasonable to expect you to call a midwife or doctor and stay with the women until appropriate help arrives.

**Example 2:**
You are an off-duty physiotherapist walking along the street and you come across a person collapsed in the street. In this situation you do not have a legal or professional duty to stop and render assistance. If you start to render assistance, you take on a legal and professional duty to care for the person appropriately. It would be reasonable to expect you to offer care to the best of your abilities, using your physiotherapy knowledge and skills. You are insured
for such activities* via your CSP professional and public liability insurance which includes cover for Good Samaritan acts.

* Providing you are a CSP member in a membership category that offers PLI subject to the terms of the policy.
Section 2: Meeting your Duty of Care as a physiotherapist

There are a number of ways in which individual physiotherapy staff fulfil their duty of care and the information below provides an overview of the core actions:

- **Comply with regulator and professional standards:** All registered physiotherapists are required to comply with the following HCPC standards;
  - The HCPC Code of conduct, performance and ethics\(^{(10)}\)
  - The HCPC Standards of proficiency - physiotherapists\(^{(11)}\)
This includes those working in management roles, engaged in education provision or research.
If your HCPC registration is annotated, (meaning that you are a prescriber), you must adhere to the additional HCPC prescribing standards of proficiency.
The CSP expects members to follow the;
  - CSP Code of professional values and behaviours\(^{(12)}\)
  - CSP Quality Assurance Standards for physiotherapy service delivery\(^{(13)}\)

- **Ensure personal practice is of a reasonable standard:**
  - Keep accurate and timely patient records
  - Engage in CPD to ensure you keep your knowledge and skills up to date and record all CPD activity.
  - Deliver a service to the standard that would be expected of someone with your job role, skills and responsibilities.
  - Use national and local best practice guidance and standards to inform your practice
  - Be familiar with and understand what must be done to ensure the service is provided safely

- **Communicate promptly any issues limiting duty of care:**
  As duty of care is a legal obligation, you must record what work or elements of care cannot be done and why, and communicate this promptly to your manager.
• **Work safely and effectively with others:**
  o Think critically about the work and tasks that you delegate to others.
  o Individuals should not be asked to undertake tasks which are outside of their competence or training.

• **Work within your contract of employment:**
  o Be familiar with the details of your role and responsibilities in your job description, specification and contract.
  o Do not accept delegated work which is outside of your personal scope of practice, that is, work that you are not educated, trained and competent to deliver safely.

• **Work within employer requirements:** Ensure familiarity and compliance with workplace standards, policies and procedures to support your safety, the safety of your colleagues and your patients e.g.
  o Local service standards and clinical protocols
  o Relevant policies such as Infection control and Health and Safety
  o Manufacturer and employer guidelines relating to equipment use. Employer processes and alert systems e.g. Medicines and Healthcare products Regulatory Agency (MHRA) for reporting and addressing equipment issues.
  o Work based procedures such as patient booking systems.
  o Mandatory training requirements.

• **Maintain confidentiality** at all times unless your duty of care requires and permits you by law to disclose the information to another professional.

**Important note:**
Although there is the expectation that an individual will work within accepted boundaries of reasonable practice, departing from accepted practice does not automatically mean a duty of care has been breached or a practitioner is negligent. What is important is that the practitioner must be prepared to justify why they departed from accepted practice.\(^ {14} \)
Similarly, being unable to treat all the referred patients or provide every element of care to patients does not automatically mean that a practitioner has breached their duty of care. The law does acknowledge that NHS resources are not limitless. It is important to have clear processes to record how decisions are made including what cannot be done and to escalate concerns to the manager.
Section 3: Duty of Care in the context of physiotherapy services

Challenges related to duty of care may arise in an organisational context, particularly where services are rationed or other resources are scarce. This section explores a number of physiotherapy service-specific issues.

Waiting lists and accepting referrals
The law does not specify how quickly a patient must be seen and it also acknowledges that services need to be provided within the limits of available resources. Excessively long patient waits for treatment may constitute a breach of the organisation’s duty of care, especially if the delay causes an exacerbation or deterioration in the patient’s condition. Robust referral pathways should be in place to assure the screening, triage, prioritisation and management of referrals.

On receipt of a referral, whether self referral, from another clinician, or via ward based blanket referral system, a physiotherapist has a duty of care to assess the priority and suitability of the referral. If the referral is deemed appropriate, then the duty to provide a reasonable standard of care commences, including not waiting an excessively long period for assessment and treatment.

If the received referral has insufficient information to allow waiting list and prioritisation decisions to be made, the physiotherapist is responsible for seeking additional information. If a triage system is not in operation and a referral is accepted and placed directly onto a waiting list, the organisation holds a duty of care for the patient until individual physiotherapy care is commenced.

Where a referral is not appropriate and the referrer is notified that the referral is not accepted, the referrer has a duty to transfer the patient to another alternative provider. It is not uncommon for out of area referrals to be transferred directly to the appropriate and often neighbouring service. In this situation, the service transferring the referral should clearly record that the referral is declined and ensure that the decision and action to transfer is
clearly reported to the referrer. The referrer remains responsible for the patient until the transferred service reviews the referral and it is accepted to their service or service waiting list.

If a triage physiotherapist contacts a patient to ask further information about the patient’s condition and as part of this process provides specific advice relating to activity and pain relief, a duty of care is created between the patient and the physiotherapist. If the patient exacerbates their condition by following the advice, the physiotherapist may be liable for their actions. The duty would be maintained by the triage physiotherapist until the patient is transferred to another physiotherapist for assessment and further care.

Accepting referrals and private practice
Private physiotherapy practitioners can choose whether they accept a referral to their clinic or not. If they choose to decline to accept a referral they may also choose whether to give a reason or not. It would be good practice to suggest an alternative provider if physiotherapy is indicated, or suggest that the patient returns to their GP for further advice. If the patient is referred to an NHS physiotherapy department, they are obliged to accept the referral, according to the patient’s condition.

Example: Skills and competence available
A female patient contacts a local small private practice asking for treatment for stress urinary incontinence. The clinic has no staff skilled in that speciality nor an available chaperone. The practice advises the patient they are unable to accept referral and advises there is a private clinic in the next town with a specialist women’s health physiotherapist.

Delivering treatment within available resources
Physiotherapy is an evidence-informed profession focused on providing quality services to improve patient and population outcomes. As autonomous practitioners, members are accountable for the decisions they make. However, in some circumstances, other factors determine the overall physiotherapy care a patient receives. Operational systems or decisions can both enable or put at risk an individual or a service’s ability to deliver a reasonable standard of care to patients and maintain their safety. All elements of treatment delivery have links to duty of care such as the;
access and availability of services
triage, prioritisation methods and referral waiting times,
number, duration and intensity of treatment sessions
choice of treatment available to patients
location and environment where treatment is delivered
the number of personnel and the ranges and levels of professional skills available
equipment and facilities.

Your duty of care requires you to raise any concerns you have regarding the quality of service patients are receiving and any potential harm that you feel patients may be exposed to. This includes the requirement to communicate concerns regarding observed poor practice and care delivered by other care providers or practitioners. Any service rationing, restrictions, redesign or excessive workloads which may risk the safety of patients, employees or the public requires immediate attention.

The law recognises that infinite resources are not available but both practitioners and ultimately organisations are responsible for ensuring that the care that is delivered is safe, timely and of a reasonable standard.

Re-distribution of resources and patient equality
An increasing number of performance targets and prioritisation methods are being implemented in healthcare. Where any resources are re-distributed from one area to another including to facilitate the achievement of targets, members must be aware that the duty of care applies to patients in both areas equally. All patients have the right to expect a reasonable standard of care regardless of where they are treated.

Decision-making processes for resource allocation must be made on the basis of patient need and not the preferences of individual practitioners or any potential benefit to the care provider.

Members need to consider that the redistribution of resources may have long-term effects on standards of care. Where recurrent redistribution is taking place and practitioners are concerned about this, it may be advisable to implement a monitoring or impact assessment process. This enables
objective evidence to be gathered so that appropriate concerns may be raised, resources reinstated or more detailed review of services undertaken.

**Websites and information leaflets**

The use of websites and information leaflets can have implications for duty of care.

**General patient information**

Where information is provided to a patient and it is not added to in any way as a result of an individual assessment, then a duty of care is not likely to have been established. The advice must be reviewed regularly to ensure that it is accurate and up to date and a statement advising that there is no intention for this general advice to be a substitute for additional professional advice given as part of individualised and tailored care.

**Tailored information**

As soon as information is personalised and tailored to the individual’s needs it becomes part of the overall package of care delivered to the patient and therefore creates a duty of care. The standard of information provided must meet the standard of reasonable care.

**Ending treatment**

Decisions to end treatment are made collaboratively by the physiotherapist in partnership with the patient and may be influenced by a number of factors. In some settings, a physiotherapist and patient may decide to stop regular treatment sessions, but allow the patient to contact the service if particular problems arise during a defined period of time. During this period, the physiotherapist still retains a duty of care to the patient.

It may be unwise to keep a patient’s case open for longer than is clinically indicated. Once an active problem has been managed according to the initial plan, the patient should be discharged and communication provided to the referrer according to local procedures.
Section 4: Organisational Duty of Care

All organisations have a duty of care to those for whom services are provided and to the staff employed to deliver services.

Organisational duty of care to the public

NHS Organisations: The NHS is required to offer a ‘comprehensive’ range of services however, there is no requirement for every NHS organisation to provide every possible service. The law accepts that ‘reasonable provision’ may be made according to the availability of resources. For example, this may mean that not every hospital will have a fully dedicated 24 hour A&E department.

If an NHS organisation offers to provide a specific service, that service must be of a reasonable standard.

For example: If an acute hospital offers a 24 hour A&E service, the hospital owes a duty to any person who comes into that A&E department seeking treatment, whatever the time of day of night. The A&E department must have appropriate numbers of staff on duty 24 hours a day with an appropriate skill mix to ensure that patients are prioritised and treated safely.

For example: If a Trust offers a children’s learning disability physiotherapy service, it should ensure sufficient and appropriately skilled staff to deliver the service. If the service cannot be delivered safely, or the reasonable needs of its identified patients cannot be met, a redesign and/or transfer of care to other providers may be necessary.

Organisational duty of care to staff

Employers have a duty of care to employees. This means that they are required to take reasonable action to assure the health, safety and wellbeing of staff. They are responsible for enabling staff to work safely and effectively in the delivery of services to the public.

There are a number of legal frameworks such as Health and Safety regulations and employment law which guide an organisations requirement to
fulfil a duty of care to its employees. Detailed exploration of each of these requirements is outside the scope of this paper.

The following are examples of an employer demonstrating their duty of care to staff:

- **Roles and responsibilities**: These primarily involve ensuring clearly defined roles and lines of accountability for individuals and services.
- **Structures, policies and procedures**: Clear organisational structures must be available, transparent and underpinned by operational policy documents; e.g. lone working, equality and diversity and bullying and harassment, to support and protect staff from harm and discrimination.
- **Support**: Availability of occupational health services, areas for rest and relaxation and commitment to workforce health promotion are examples of approaches to support employees.
- **Communication**: Clear and two-way communication with staff is necessary to support overall service operation. A channel to enable staff to raise concerns is also key.
- **Environment and risk management**: A safe and adequately risk assessed work environment is necessary.
- **Training and development**: A process must be in place to ensure that staff have the skills to enable them to do their job and deliver a reasonable standard of care to patients. This process may include supervision arrangements, appraisals and access to CPD.
- **Monitoring, management and escalation**: Monitoring the quality of services, clear management plans and escalation processes to deal with critical issues in a timely and effective manner must be in place.
- **Employment**: Employers must comply with the law; e.g. working time directives

Employers and managers have a duty to act on concerns being reported by staff who feel that duty of care is at risk. They are responsible for creating a culture to enable concerns to be voiced, and for listening and taking action in response.

The employer may also make decisions on new ways of working or elements of care to be suspended until they can be provided safely and to the required standard.
Section 5: The role of others in Duty of Care

Regulators

Regulation of practitioners: The HCPC has a statutory duty to protect the public by regulating the practice of those who are listed on its registers. To assist in fulfilling the role of protecting the public, the HCPC produces standards which every registrant must fulfil to remain registered and lawful to practice. The standards are;

1. The HCPC Code of conduct, performance and ethics\(^{(10)}\) and
2. The HCPC Standards of proficiency for physiotherapists\(^{(11)}\)
   (Standard 1a.5 further reinforces the expectations of physiotherapists to ‘be able to exercise a professional duty of care.’)

If a complaint is made to the HCPC about a physiotherapist’s care, including whether a duty of care may have been breached, this will be considered as part of the HCPC fitness to practise procedures. Whilst it is understood that individuals work within organisational frameworks, the HCPC can only regulate individual practitioners. Should the complaint relate to clinical negligence, civil proceedings may also be launched. Further information is available in the paper “HCPC investigations: A member guide”\(^{(16)}\).

Regulation of providers:

England: The Care Quality Commission (CQC) regulates all organisational providers of health and social care services in England.\(^{(17)}\) Organisational failings can be detected by the CQC inspection schedule and may in serious cases be investigated by Public Inquiry. In some cases, proceedings can be brought by the Crown Prosecution Service against individuals and/or organisations where it is alleged that there has been a criminal breach of corporate duty of care or other criminal offence.

Scotland: Healthcare Improvement Scotland undertakes announced and unannounced inspections of health services and the Social Care. Social Work Improvement Scotland scrutinises social care, social work and child protection services.\(^{(18)}\)
Wales: In Wales, both NHS and independent health organisations are monitored by the Healthcare Inspectorate. The Care and Social Services Inspectorate Wales, regulates social care, local authority support services and children's services.\(^{(18)}\)

Northern Ireland: The Regulation and Quality Improvement Authority (RQIA) is responsible for monitoring and inspecting health and social care services in Northern Ireland. The RQIA are also responsible for independent services, day care services and other community care.\(^{(19)}\)

**The professional body**
CSP publishes a Code of professional values and behaviours\(^{(12)}\) and Quality Assurance Standards for Physiotherapy Service Delivery\(^{(13)}\) and expects members to follow these in their practice. These documents, together with the HCPC standards, form the basis of what is accepted as a reasonable standard of practice within the profession.

**Promoting a just culture**
The CSP and HCPC have signed up to support the NHS Employers “Speaking Up Charter”.\(^{(20)}\) This is a commitment to aim to work to ensure a culture of transparency and openness to support individuals to raise concerns and report safety issues. Further information on accessing the charter is provided in the references list.\(^{(21)}\)
Duty of care is a legal responsibility to provide care to a reasonable standard and keep patients safe. All staff should expect to work within organisations which enable individuals to deliver safe and appropriate care in accordance with regulatory and professional standards.

If you are worried that the situation in your workplace risks duty of care to patients, it is important to know how to raise concerns in an appropriate way.

The following points and common principles for consideration may be helpful:

- **Ensure you understand your obligations** as set out in section 1.

- **Clarify the concern in relation to your duty of care:** Specify the exact nature of your concern and start to set this down, identifying the risks to the individual (you or another practitioner,) the patient, and / or the organisation.
  - Section 2 of this paper may be helpful in identifying the core of your concerns.
  - Section 3 of this paper may provide further detail and context.
  - Consider liaising with your local CSP steward at an early stage for additional advice.

- **Raise concerns first with your line manager:** Escalating your concerns within existing lines of accountability is very important.

  If your concerns relate to your immediate line manager, you should seek advice and support from HR or your local CSP steward.

- **Use evidence to support your concerns:** Prepare any evidence you have to substantiate the concerns you are raising. This may be, for example, incident report forms, a patient complaint or pathway overviews.
• **Use resources to support your concerns:** Referencing other sources may include:
  - regulatory and professional standards
  - job descriptions
  - organisational policies and procedures
  - care pathways and clinical standards
  - the NHS Constitution

  Guidance within section 2 and section 4 may also support members to identify the best references. Larger employers will have a raising concerns policy within their governance framework. This should be referred to if available.

• **Put your concerns in writing:** Documenting your position, the concerns raised and maintaining a chronological record of issues is strongly recommended.

• **Ask for written feedback** and when you will receive a response to the concerns raised. Where any meetings are held to discuss concerns, documenting the discussions, outcomes and responsibilities is also important.

**Additional Guidance**

Managerial instruction and a perceived conflict with regulator requirements. Should a situation arise where an employee is instructed to act in a way that may breach the regulatory and professional code, it would be reasonable for the employee to challenge this situation. Regulatory requirements may take precedence over terms of employment. As this is a potentially difficult situation, a member may wish to contact the CSP Professional Advice Service or local steward for advice.

**Serious concerns in the workplace.**
This paper has dealt with raising concerns within existing lines of accountability. Raising a concern locally is different to whistleblowing.

Whistleblowing is the **public** disclosure of mismanagement and is a serious action that should not be considered lightly. It covers corruption, illegality, or some other form of wrong doing in the workplace. The detailed consideration necessary to address this topic is outside of the scope of this document.
Where any CSP member is concerned about extremely serious wrong doing in the workplace, they are advised to seek the local policy and guidance from the CSP.
References

1. Pippin v Sheppard 147 ER 512 (1822)
2. R V Bateman (1925) 19 Cr App R 8 CA
3. Donoghue v Stevenson [1932] AC 562 (HL)
4. Bolam v Friern Hospital Management Committee [1957] 1 WLR 582
5. CC v Blackpool, Fylde and Wyre Hospitals NHS Trust [2009] EWHC 1791 (QB)
   URL: http://www.hpc-uk.org/publications/standards/index.asp?id=38
   URL: http://www.hpc-uk.org/publications/standards/index.asp?id=49
   (Accessed: 14 December 2012)

14. NICE v Esai


Additional Reading