

# Information paper

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## **Duty of Care** 3<sup>rd</sup> Edition

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## 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. It is important that all physiotherapists understand duty of care and its implications.

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

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.

This paper is aimed at all members of the CSP – students, registered physiotherapists and support workers. It may also be useful to those working with our members such as employers and others, who may also need to understand the principles of duty of care.

### **April 2022 - Updates from the 2<sup>nd</sup> Edition**

Information for members to consider if they choose to act as a Good Samaritan in an emergency when they are not working (page 6)

This paper also clarifies the position should members give advice to colleagues outside of the member's formal employed role (page 5).

Digital services and telemedicine (page 11)

Clinical negligence claims (page 14)

All other content remains unchanged.

## 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.

"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<sup>1</sup>."

### 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.

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

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<sup>1</sup> Donoghue v Stevenson [1932] AC 562.

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. Your duty of care to your patient cannot be delegated to anyone else, others advising and/or treating a patient will have their own duty of care.

### **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 of care can be described as the standard expected of an individual according to their skills, job role and responsibilities and that would be accepted as proper by a responsible body of practitioners in that field. What would be deemed reasonable for an experienced staff member would therefore, be different to that of a less experienced practitioner.

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 constitutes "reasonable" has been further developed to require that the practise is also "responsible" and "logical" 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 orthopaedic physiotherapist working in a hospital / clinic. A colleague stops you in passing to ask you about possible treatment for a knee problem they have and whether they should have surgery they have been offered. This colleague is not your patient and offering occupational health services is not part of your role. If you offer advice to your colleague about their individual circumstances you have created a duty of care and must therefore act accordingly. As you have done this outside of the requirements of your employed role you may be individually liable for any future claim against you. We advise members to exercise extreme caution when advising colleagues, and if they do so, to

remember to treat them as they would any other patients, including the need for proper examination and record keeping.

## Good Samaritan Acts

The GMC<sup>2</sup> and NMC<sup>3</sup> place an ethical duty of their registrants to render assistance in an emergency even whilst off duty. However, the HCPC places no such obligation on its registrants in either the Standards of Conduct, Performance and Ethics or the Standards of Proficiency for Physiotherapists.

This means that as a physiotherapist you should make your own decision as to whether you wish to offer assistance in an emergency when you are not at work. You should consider the following factors -

1. Would intervening place you, or others, at risk?
2. Are you under the influence of alcohol or drugs and therefore could have impaired decision-making?
3. Are you already providing support to someone else on the basis of a triage or other assessment of priority?
4. Do you possess relevant skills to offer assistance?
5. Is other more appropriate assistance already present?

The HCPC states<sup>4</sup> *“We do not treat actions as a ‘Good Samaritan’ – someone who provides first aid or other emergency help when there is no professional obligation to do so – as professional practice for which you must have a professional indemnity arrangement”*

Good Samaritan scenario:

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 choose to stop and 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, for example starting CPR until advanced help arrives. You are insured for such activities via your CSP professional and public liability insurance which includes cover for Good Samaritan acts,

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<sup>2</sup> [GMC Good Medical Practice](#)

<sup>3</sup> [NMC Code of Conduct](#)

<sup>4</sup> [HCPC and Indemnity](#)

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:

All registered physiotherapists are required to comply with the following HCPC standards;

- [The HCPC Code of conduct, performance and ethics](#)
- [The HCPC Standards of proficiency - physiotherapists](#)

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](#)
- [CSP Quality Assurance Standards for physiotherapy service delivery](#)

### **Ensure personal practice is of a reasonable standard.**

Examples may include

- Engaging 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.

### **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. For example ensure you follow safe delegation procedures



### **Work within your contract of employment and job description:**

Be familiar with the details of your role and responsibilities in your job description, specification and contract.

### **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.

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.

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 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, or that the local NHS service has a 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.

## **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.

## **Digital services and Telemedicine**

The standard of care for digital services and telemedicine is the same as it is for in-person assessments.

This means your duty of care remains the same and part of determining a reasonable standard of care will be to identify which patients need to have an in-person review of their clinical presentation.

## **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 or 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.

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](#)
2. [The HCPC Standards of proficiency for physiotherapists](#)

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. Further information is available in the paper "[HCPC investigations: A member guide.](#)"

#### Regulation of providers:

England: [The Care Quality Commission](#) (CQC) regulates all organisational providers of health and social care services in England. 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.

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.

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.

### **The Professional Body**

CSP publishes a [Code of professional values and behaviours](#) and [Quality Assurance Standards for Physiotherapy Service Delivery](#) 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.

### **Clinical Negligence Claims**

If a patient believes they have been harmed by the acts or omissions of an individual and/or an organisation, they may choose to launch a civil clinical negligence claim for damages. This is why it is a legal requirement for registered physiotherapists to have appropriate indemnity to practice. NHS organisations are covered by government backed indemnity schemes. Private companies should have their own corporate malpractice indemnities.

Claims will first be on a basis of breach of duty of care but even if that is established the patient must prove, on the balance of probabilities, that the breach of duty caused, or contributed to, the harm they experienced.

The civil litigation process runs completely separately from any regulatory and/or criminal investigations.

## **Section 6: Raising concerns about services and duty of care**

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

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**

Where any meetings are held to discuss concerns, documenting the discussions, outcomes and responsibilities is also important.

### **Additional Guidance**

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. If members are concerned about extremely serious wrong doing in the workplace, they are advised to seek the local policy and guidance from the CSP.

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