Litigation and the practitioner part 3

Dr Nizar K Hirji looks at employer responsibility and also accountability for clinicians operating within NHS England. (C52609, one distance learning point for optometrists and dispensing opticians.)

Accountability is fundamental to professionalism. It is concerned with the readiness to have one’s actions, decisions, and failures to act, to be questioned; to explain why departures from reasonable expectations of peers may have occurred; and to respond responsibly with candour when errors in behaviour or judgment have been made. In this respect it is important to remember that ‘An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.’

This series concentrates on the accountability of the optometric/optical practitioner in England, however many aspects have similarities, or indeed apply in other parts of the UK, and to business registrants of the General Optical Council (GOC). It is not a substitute for formal legal counsel. This article will briefly cover two of four key areas of accountability of the practitioner, before going on to cover in later articles civil litigation – the fifth key area of accountability.

Employer

Practically all optometrists and dispensing opticians will be employed at some point in their career from pre-registration through to retirement, and for some, even beyond retirement from their principal career. Anyone employed under a ‘contract of employment’ to provide optometric/optical services, will acquire a number of statutory and explicit contractual rights and thus relevant contractual and statutory obligations for which they will become accountable to the employer. Should poor performance or conduct issues arise, the employer will hold the practitioner to account and follow procedures complying with the pertaining law from investigation through to, disciplining and dismissal if necessary, and referral to external bodies including the police, NHS England and the GOC. Should this process be flawed or unfair, then the employee has recourse to an employment tribunal.

All employees also have, along with other implied duties, an implied common-law duty of care to their employer regardless of any contractual relationship. This means that employees must exercise reasonable skill and care when working for an employer. Failure to do so could mean that they may become accountable to not only their employer but to any or all of the other key stakeholders detailed in figure 1. This is reciprocated, in that employers not only have to abide by contractual and statutory obligations, but also by their common-law duty of care towards employees, and others, and must exercise reasonable care towards their employees and others, else they too could become accountable in a similar manner.

This ‘common law duty of care’ was first recognised in the case of Donoghue v Stevenson. The case involved Mrs Donoghue who on August 26 1928, drank the contents of an opaque bottle of ginger-beer poured over a tumbler of ice-cream which a friend had bought for her at a cafe in Paisley. When the remaining ginger-beer was poured over the ice-cream it included the decomposed remains of a snail which could not have been detected until the greater part of the contents of the bottle had been consumed. As a result, Mrs Donoghue suffered from shock and severe gastro-enteritis and accordingly initiated legal proceedings against the manufacturer.

The basis of her case was that Stevenson, as the manufacturer of ginger beer, contained in an opaque bottle which prevented inspection, owed a duty to her as the consumer of the ginger-beer, to take care that there was no noxious element in it. She further contended that he neglected such duty, and that he was, consequently, liable for any damage caused by such neglect. Her claim was initially unsuccessful at trial because no contractual obligation existed between the manufacturer and Mrs Donoghue since it was her friend who had made the purchase and not Mrs Donoghue. The case later succeeded on appeal to the House of Lords where it was established that a duty of care can exist to the third party of a contract. This case established contemporary thinking regarding negligence, to be discussed in later articles, and the ‘neighbour test’ which Lord Atkin famously stated as ‘The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question ‘Who is my

FIGURE 1 Illustrates five key areas of accountability of the practitioner
neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.1

A more recent case of Janata Bank v Ahmed2 illustrates clearly that an employer is entitled to claim that there is indeed an implied duty of care in an employee’s contract of employment. The Bank’s claim against Mr Ahmed was heard in the High Court, Queen’s Bench Division and the judgement was that Mr Ahmed was liable for £36,135.10 as damages caused by his failure to exercise his implied duty of care and was thus negligent as the assistant general manager in London. The appeal against the decision of the High Court was dismissed and leave to appeal to the House of Lords was refused. It is uncommon to find such cases in courts, as most employers would normally simply resort to summarily dismissing the employee rather than suing them for damages that may arise as a result of any breaches of their duty of care.

The significance of the Donoghue case in particular, is that there need not be a contractual agreement between parties to have a common law duty of care. Therefore, as we go about our duties we must think about the wellbeing of people around us – our ‘neighbours’ (co-workers, colleagues and others), and the impact our activities (or failure to act) may have on them. As practitioners, there is further clarification regarding expected conduct, performance, and express professional duty of care in the form of Standards of Practice for Optometrists and Dispensing Opticians, Optical Students, and the Code of Conduct for all registrants of the GOC.3 It is therefore not unreasonable to expect to find that these standards and the code of conduct becoming explicit terms in employment contracts for all employees and others (eg locums) in the best interests of employers, practitioners and patients. This also raises the importance of ensuring by way of explicit contractual terms, that the standards of practice obligations are not in any way compromised should one choose to work for an employer not registered with the GOC. Finally, a number of optometrists are beginning to assume extended roles and some are completing tasks traditionally allocated to medical practitioners. These practitioners with specialist interests providing advanced ophthalmic services (eg independent prescribers) are unquestionably taking additional professional risks and further accountability for their action or inactions. Interestingly, currently, there appears to be no surcharge in the provision of their professional indemnity cover, in view of their involvement in advanced ophthalmic service activities.4 Note that I do not include, in this cluster, activities that are so called ‘enhanced services’ to the provision of NHS sight tests which are additional to the NHS sight test (under a General Ophthalmic Services (GOS) contract) obligations, but are well within the core competencies of GOC registered optometrists in the UK (eg Referral Refinement or Minor Eye Conditions Service) – a view echoed elsewhere.5

NHS ENGLAND
In April 2013, the NHS Commissioning Board adopted the name NHS England for all operational purposes, save for legal and contractual purposes where it retains its original statutory name. Any optometrist who wishes to provide NHS sight tests must be included in NHS England’s national ophthalmic performers list in accordance with the National Health Service (Performers Lists (PL)) (England) Regulations 2013.6 An optometrist (referred to as a ‘performer’) may be concurrently on the Welsh, Northern Ireland or Scottish Health Board list, but only one list entry is allowed in England.7 In practice this means almost all optometrists save those who only provide ophthalmic services in secondary care or on a private basis are ‘performers’ and have to be on the NHS Performers List to conduct NHS sight tests under a GOS contract. The performers’ lists framework provides NHS England with powers over admission, suspension and removal from its lists and responsibility for the movement of performers between area teams and the maintenance of the performers lists. The powers conferred by NHS PL (England) Regulations 2013 on NHS England enables it to ensure that performers are fit for purpose – that they are suitable to undertake NHS primary care services and to protect patients from any performers who are not suitable, or whose ability to perform those services may be impaired. This may relate to any aspect of a performer’s conduct or performance, which may, or may appear to:

- Present a risk to patient safety
- Undermine the efficiency of primary care services
- Undermine patient and public confidence in the NHS as a result of a serious allegation, eg sexual misconduct
- Represent a financial risk to the organisation or services
- Represent a significant departure from accepted guidelines and/or professional standards

NHS England has established performers lists decision panels (PLDPs) and performance advisory groups (PAGs) within area teams in order to support its responsibility in managing performance of primary care performers.

For any complaint or concern deemed serious at the outset, the medical director jointly with another director has the power to invoke an immediate suspension from the performers list.8

The normal course, however, is for the Performance Advisory Group (PAG) to consider complaints and concerns that the NHS England team and medical director (responsible officer) receive about any clinician.9

The PAG comprises a senior manager with a performance role who chairs the meeting, a senior manager with experience in primary care contracting and/or patient safety and experience, an optometrist nominated by the medical director (who may be an NHS England optometric advisor (OA), or may be recruited...
from the LOC), and a lay member. The chair may also co-opt other individuals to assist the group as necessary but they may not vote. The PAG may request further fact-finding, eg a review of records before making decisions about any further action. Based on this and any other information available to the PAG it may decide:

- That there is no patient safety or public interest concerns and that no action is required.
- To manage the concern informally.
  - eg by agreeing a local action plan with the performer, and/or by a meeting with the performer and/or a recommendation for them to discuss the issues with their employer/mentor/appraiser. (National Clinical Assessment Service cannot currently involve itself on optometric performers issues)
- That there is need for a formal investigation before decisions about any further action may be taken.
- To refer/signpost the performer to their medical practitioner/occupational health if it involves a health issue before decisions about any further action may be taken.
- To arrange mentoring.
- To arrange a period of supervision.
- To refer to the Performers Lists Decision Panel (PLDP) to formally invoke the Performers List Regulations where:
  - local resolution has failed to address the concerns, or
  - it is deemed necessary to impose conditions, or
  - there is a requirement to suspend the performer from the list, or
  - there are significant patient safety/conduct issues, or
  - there are serious performance/conduct concerns that have either
    i. resulted in serious patient harm or
    ii. may seriously undermine public confidence.

A further action that may be considered is a voluntary ‘undertaking’ which is essentially an agreement out with the performers’ lists regulations between NHS England and the performer regarding future behaviour or performance. It may be to do with, for example, supervision or further training. Failure to comply with an undertaking is regarded as a serious matter and would invariably result in referral to the PLDP for action under the NHS PL (England) Regulations 2013.

Membership of the PLDP comprises:

- A lay member who will chair the PLDP.
- An optometrist (who may be an OA or may be recruited from the LOC).
- The medical director for an area team or their nominated deputy.
- Additional non-voting members and advisors if invited by the chair from time to time.
- An LOC member may also attend at the performer’s request.

The PLDP will consider the concerns referred to them by the PAG along with the supporting information provided and based on this may decide to:

- Take no further action.
- Refer back to PAG for further investigation or monitoring.
- Consider referral to the primary care contracts team for consideration under the relevant contract regulations.
- Agree an action plan for remediation of the performer when appropriate, including a reporting process for monitoring of the implementation of the action plan.
- Refer to the GOC.
- Refer to the police.
- Refer to NHS Protect.
- Take disciplinary action which results in conditional inclusion, contingent removal, suspension, exclusion and removal.
  - The performer will have the opportunity to have an oral hearing with representation and support, legal or otherwise, at the hearing.
  - Having made a decision to invoke the PL Regulations and having given the performer notice of the proposed action, the PLDP, possibly in the form of an oral hearing panel, will then determine whether, dependent upon those grounds and evidence presented, what action, if any, should be taken.

The performer has right of appeal against a decision made by the PLDP if they:

- Refuse to include a practitioner in a performers list on the grounds referred to under regulation 7(1) (Decisions and grounds for refusal).8
- Impose, maintain or vary any conditions under regulation 10 (Conditions), 11 (Failure to comply with conditions), 12 (Suspension) or 16 (Reviews).8
- Remove a practitioner from a performers list under regulation 11(1)(c), 14(3)(Removal from a performers list) or (5), 16 or paragraph (6)(b).8
- Refuse to include a practitioner in the ophthalmic performers list under regulation 40(1) (Additional grounds for refusal).8

Appeals are considered by the First-tier Tribunal (Primary
Health Lists) who will undertake a complete re-hearing of the case. The re-hearing will involve a judge, a specialist with professional experience – e.g a GP, dentist or ophthalmologist, and a layperson with relevant health experience. The hearing will also be ‘in public’ and attended by: a clerk or usher, a lawyer acting for the NHS, and the performer’s lawyer or other representative where applicable.

The author, by way of a Freedom of Information enquiry, was able to establish that in 2014-15 there were 94 cases referred to the Professional Advisory Group and 65 cases were referred to the PLDP regarding optometrists’ performance on NHS England’s ophthalmic performers list. However, there are no cases detailed regarding PLDP. This may be partly because a proportion of these cases may most likely be new applicants who simply do not have adequate references for one reason or another, and so may have conditions applied.

Many practitioners also have a contractual relationship with NHS England (General Ophthalmic Services Contract) to provide mandatory (sight testing) and/or additional (domiciliary) services. Any breaches of this contract may result in NHS England:

- Taking no action.
- Agreeing an action with the contractor.
- Issuing a remedial notice.
- Issuing a breach notice.
- Applying a contract sanction.
- Terminating the contract.

Most contractual disputes are dealt with informally, occasionally involving an OA/LOC member to help. When unresolved, contractual disputes can be formally addressed via the courts (non-NHS contracts), or via the NHS dispute resolution process. The non-NHS body contractor reserves the right to have the matter dealt with via the NHS route if they so choose, whereas for an NHS contractor, only the formal NHS route is open in first instance.

Stage one of the formal NHS dispute resolution process may involve the contractor in a meeting where there will be an opportunity to invite a representative body (or LOC) to support at the meeting with NHS England representatives, to resolve the dispute locally. Should this fail then the matter would be escalated to stage two of the process which will involve the NHS Litigation Authority (NHS LA) – a Special Health Authority, which (among other things) adjudicates in contractual disputes between NHS England and individual primary care contractors.

In such instances both parties will be asked to prepare submissions on the dispute. Having considered the written submissions from both parties, a decision will be made by an officer of the NHS LA who fulfils the role of ‘the adjudicator’. Occasionally, however, particularly where there are material differences in the facts presented by the parties, complexities, or even insufficient information, it may be necessary to hold an oral hearing. Decisions of the NHS LA can only be set aside by the High Court.

The author, by way of a Freedom of Information enquiry, was able to establish that in 2014-15, NHS England sent GOS contractors the following:

- 12 breach notices.
- 17 remedial notices.

The most recently published dispute between a GOS contractor and NHS England that involved the NHS LA was in 2013-14. It came about because NHS England tried to recover monies from a GOS contractor because of unfearable GOS claims identified through the post payment verification process.

In that particular case, having considered written submissions from both the contractor’s representative and NHS England, NHS LA’s adjudicator found in favour of the contractor, and NHS England was not allowed to recover any monies.

Dr Nizar K Hirji is optometrist and principal consultant, Hirji Associates, Birmingham

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