Litigation and the practitioner

Bill Harvey and Dr Nizar Hirji discuss the second in our series of interactive CET exercises dedicated to litigation and the eye care practitioner (C58763)

This exercise centred around a scenario concerning an employed registered dispensing optician with contact lens qualifications who fitted and supplied Mr Zeta, a male, 17-year-old, non-smoking, mathematics undergraduate in community practice (not part of an NHS hospital), with a daily disposable silicone hydrogel contact lens for his right eye only. He was anisometropic and amblyopic in his left eye. He suffered microbial keratitis in his better sighted eye and now wants to know what action he can take against the contact lens fitter, stating that he has suffered considerable distress, incurred costs, and now has permanently reduced corrected vision in his right eye instead of the 6/5 that he had before the incident as detailed in the clinical records. (The full scenario is available with the online version of this article.)

- What action can the patient take against the practitioner/practice/employer?
- The leaflet regarding contact lenses issued to the patient prior to the supply of the lens was not one that the practitioner had written but one supplied by another organisation. Does that have any impact?

Discussion

As with all good discussions, there was a divergence of views and respondents were pretty evenly split between those that felt there was no case to answer here and those that felt the patient had justification to take legal action. Typical of responses representing the former was: ‘We do not believe the patient would be successful with any action taken as we do not think there was much more that could have been done, it isn’t even certain that the contact lens was the cause of the keratitis. There is nothing stopping him from taking action though. We would expect that the leaflet provided by a contact lens company would probably have been looked at by a lawyer who would have passed it as being sufficient advice.’

Another was: ‘It seems that the contact lens fitter had done everything correctly in relation to fitting the patient with contact lenses within the guidelines of the GOC and AOP and also in advising him of the potential risks. The leaflet given would have been one that was endorsed by the GOC and or the AOP and therefore would be fit for purpose in relation to supplying the patient with all the necessary details for contact lens hygiene and care. It would be impossible for the contact lens fitter to give the patient an actual level of risk as there would be too many variables. The patient should be advised of this but also told that he could if he wished make a complaint to the GOC or AOP.’

Of the answers suggesting legal action was likely was this comprehensive response: ‘We thought it most likely that the patient would try to bring a negligence claim against the contact lens practitioner. We read the three aspects that need to be proven →

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The decision of the UK Supreme Court in Montgomery (Appellant) v Lanarkshire Health Board (Respondent) (Scotland) established that the duty of care for practitioners includes providing patients with comprehensive information about all aspects that may have an impact on the patient's decision, including treatment options, advantages, disadvantages, risks, and answers to all the patient's questions. Practitioners may argue that disclosing and discussing very small but more serious risks of potential consequences of diagnostic and treatment options might unduly alarm patients and may put them off; but the Montgomery judgement means that it is no longer up to the practitioner to decide if a risk or question is relevant (ie 'material') - it is the patient's prerogative. It may be that serious risks are very rare and may never come to pass in the patient's or the practitioner's lifetime, but nevertheless the Montgomery judgement means that they have to be raised. Thus all discussions with patients including details in patient information leaflets (PILs) and brochures (where appropriate), have to be up-to-date and contain key facts together with known risks, particularly if grave, even if very rare, of any diagnostic techniques to be conducted, or treatments that practitioners provide and alternatives. Accordingly, during discussions (and in PILs) regarding contact lens options, there needs to be an explicit caution about the potential risk of sight threatening microbial keratitis with different types of contact lenses and modalities of wear. Although rare, this grave complication of contact lens wear is known to have an annualised incidence of 4.2 per 10,000 (0.042%) and varies with type of lens and modality of wear, e.g. the annualised incidence of sight-threatening microbial keratitis in daily soft contact lens wear is 1.9 per 10,000 (0.019%)7 and in overnight soft contact lens wear, 19.5 per 10,000 (0.195%).7 It is for the patient to decide if this small risk of sight threatening microbial keratitis is 'material' to them or otherwise - in the case of Mr Zeta, effectively a monocurcular patient, who stated that he had this information at the outset, he would not have consented to contact lens wear for his only good eye. Any practitioner exercising reasonable care would need to be explicit about risks of contact lens wear at the outset, and would undoubtedly question the advisability of contact lens wear as a treatment option for any monocular patient, in view of the potential of the low but serious risk of sight threatening microbial keratitis. It should be noted that although the Bolam test still applies to procedures regarding clinical negligence, it is not apposite for legal actions regarding consent and/or disclosure where the Montgomery judgement supersedes.

Negligence: If the patient suffers damage, as a result of an undisclosed risk, which would have been disclosed by a [practitioner] exercising reasonable care to respect the patient’s right to decide whether to incur the risk, and the patient would have avoided the injury if the risk had been disclosed, then the patient will in principle have a cause of action based on negligence.6

Patient Information Brochure/Leaflet – the judgement by the Court of Appeal in Webster & Ors v Mark Liddington & Ors established that clinicians adopt ‘the contents of the brochure[s]’ when handed to the patients who are offered treatment, and the fact that they did not write the content of the leaflet does not absolve them from their responsibility for statements therein. Some readers who responded to this exercise did pick up on the fact that perhaps the contact lens PIL given to Mr Zeta may not have been up-to-date/appropriate. As it is the practitioner who ultimately takes the responsibility for the content of the PILs handed out to patients, it behooves practitioners to be satisfied that the information contained in these PILs provided, regardless of their source, detail accurately, known risks of diagnostic and treatment procedures, even if they are rare, and particularly if they are grave.

Employer, NHS England and the GOC – the employer has vicarious responsibility for all their employee’s actions if lack of, and for the systems and support materials (including PILs) and staff they have in the practice. Thus the employer too is answerable and may well be taken to task jointly with the employed practitioner by the patient. NHS England (if appropriate) and the General Optical Council will most likely conduct their own Fitness to Practice hearings.

REFERENCES
1 Montgomery v Lanarkshire Health Board [2015] UKSC 11
3 Bolam v Friern Hospital Management Committee [1957] 1 WLR 582
4 Webster & Ors v Mark Liddington & Ors [2014] EWHC Civ 560 (07 May 2014)
5 It is essential to remember that every case turns on its own merits and that any views expressed here are not a substitute for formal legal counsel.
FEEDBACK

and felt they would have no issue proving that a duty of care was owed to the patient by the practitioner as this is implicit whenever we agree to fit a patient with contact lenses. The contact lens fitter does seem to have been meticulous about giving written information before the fitting, we felt it would also be sensible to get Mr Zeta to sign to say he had read and understood this (this is what we do in practice). The practitioner has also checked compliance and ensured follow up checks are completed, fulfilling these aspects of duty of care.

'The patient would now have to prove a breach of the duty of care. We wondered if his notes showed that there had been a full and frank discussion about the extra potential risks of an ambyloptic patient, when a patient has only one eye with good vision both of us would always emphasise the importance of using protective eyewear and would be very cautious about fitting contact lenses. We also wondered if the information leaflet was up to date and if it gave easily understandable stars for the risk of microbial keratitis as the articles provided indicated these were both necessary aspects of a duty of care. If either of these things were not able to be proven then we thought a negligence claim could be successful.

'Finally, we looked at the foreseeable harm or injury as a consequence of the breach. If the patient did not fully understand the risks involved in contact lens wear with a highly ambyloptic eye then we felt that would be a strong likelihood of loss or damage to vision.'

A more succinct response was: 'If the information leaflet was provided by another organisation then we felt it was the practitioner's responsibility to check that it contained up to date information and, as far as they could, to check it complied with the Montgomery judgement. However, we also felt it was reasonable to expect that if a leaflet was provided by a professional body for instance then the leaflet should fulfil these requirements. If it did not, we thought the practitioner/employer/practice being accused of negligence could take legal action against the professional body.

'In this example the patient could take the practitioner to court under a civil case – the argument being that he may have been negligent due to not providing the patient with all the risks involved when wearing contact lenses. As the patient stated if he had known the possible risks to his sight from microbial keratitis he would never had agreed to the wearing of contact lenses. You could argue he was unable to give informed consent due to lack of vital information. There is an argument that the practitioner and the practice should have checked the information leaflet to make sure it included all the relevant information and warnings – if found to be lacking the required information to amend the leaflet or produce their own to include all relevant warnings (especially for anisometropic and ambylopic patients). Despite over two years there showed to be excellent compliance and hygiene it does not state that there was ever a redress of warnings of risk of infection and/or signs/symptoms for the patient to be aware of. This could have been discussed again after a year of wear to check the patient remembered what to watch out for and then the missing information would have been picked up. It was very unfortunate this has happened and the practitioner/practice should apologise to the patient – remembering that an apology is not an admission of guilt but can help to placate a patient who feels upset and that they have been wronged.'

A final example suggesting culpability was: 'Sadly, we felt, on balance, that there was a degree of negligence in this case, even though the practitioner had warned the patient of the risks involved in CL wear at the start and seen him for regular aftercare appointments. It is well known that patients do not retain all of the information they are given at appointments and the aftercare appointments should have been used to reiterate the risks involved at more regular intervals. This should have been done even though the patient was compliant and meticulous about his hygiene. As the contact lens leaflet was not produced by the practice, the CL fitter should have taken more care to read through the information himself and add extra points as necessary, instead of abdicating this responsibility to a third party (ie the publisher of the leaflet).

'We all agreed that this would have been particularly important as the patient is both ambyloptic and anisometropic. The patient would be able to prosecute the contact lens fitter through the civil courts for tort; although he gave consent, he would be able to argue that he had not been able to make an informed choice due to the limited "risk information" given to him at the start. As he stated himself, he would not have proceeded with the fit if he had been given all of the information. While we understand the need to be candid and honest when things go wrong, we felt that it would be more appropriate for the practice just to apologise and refer the patient to the relevant governing bodies to obtain redress, rather than discussing the case in great detail with him.'