Litigation and the practitioner

Bill Harvey and Dr Nizar Hirji discuss the first in our series of interactive CET exercises centred around litigation and the eye care practitioner (C56925)

This exercise centred around your discussion of the following scenario;

An optometrist in your place of practice (not part of an NHS hospital), having obtained informed consent, instils a cycloplegic instead of the consented topical anaesthetic for the purpose of performing contact tonometry on the right eye of the patient. The subsequent pupil dilation precipitates an angle closure attack resulting in the patient having to attend the local eye casualty department, and being admitted for treatment.

You are approached by the patient after being discharged from the hospital, who wants to know what legal action they can take against the optometrist, stating that they have suffered considerable distress, incurred costs and significant loss of earnings as a result of the time off work due to the optometrist’s action. In addition to this the right eye now has a best corrected acuity of 6/9 (NPH) instead of the 6/6 that the patient had before the incident as detailed in the patients’ optometric records.

You were then asked to discuss the following:

- What might the optometrist be taken to task legally for?
- What course of action can the patient take and are they likely to receive compensation?
- Would it be appropriate for the optometrist to admit that they had made a mistake on realising that they had instilled the incorrect medication in the right eye?

DISCUSSION

This example is certainly not unheard of and touches on both the legal process where a clinical mistake has resulted in harm, both physical and financial, and upon the interpretation of the GOC Standards of Practice regarding our professional duty of candour.

What might the optometrist be taken to task legally for?

A majority of respondents suggested the accusation levelled would be of negligence and a few also added or instead suggested assault. Example responses included:

“The optometrist could face civil legal proceedings for breach of duty of care and clinical negligence. They may also face disciplinary procedures from the GOC for fitness to practice, breach of professional duty of care in the standards of practice and code of conduct.”

“We felt that the optometrist could be taken to task legally for negligence and maybe fitness to practice. This issue should not occur if the optometrist was paying attention in a couple of ways. The serial number and details of the minimum should have been noted on the record card and confirmed against the details on the box. At this point before any drop was instilled the mistake should have been noticed.”

“The optometrist could possibly be taken to court by patient for negligence. While a mistake has been made, the patient would have to prove that the result of the optometrist’s actions caused them harm.”

One of you suggested the accusation should be ‘negligence of tort. Civil law covers areas such as tort (wrong-doing or harm to another resulting in injury).’

A few respondents suggested that the optometrist might be accused of a second offence along with negligence, as here; ‘the optometrist could legally be taken to task for assault, as even though patient consent was gained, the wrong drops were administered and also clinical negligence, clinical negligence being a subsection of the law of tort.’

Indeed, a very few felt the accusation was for assault alone, as here; ‘I believe the optometrist can be legally taken to criminal court for assault (and battery) as they administered the incorrect
Dr Nizar Hirji adds...

Battery – the patient could complain to the police regarding battery - a criminal offence involving physical contact. This would require the practitioner to be arrested by the police and prosecuted by the Crown Prosecution Service (CPS) should they think that there is enough evidence for a realistic prospect of conviction. However, an essential element of most crimes and this one in particular, is the presence of ‘mens rea’ (mental intent). Since this act was unintentional, it is unlikely that the police or CPS would want to proceed. That consent was obtained is also, since it was not for the cycloplegic administered.

Clinical negligence – the patient could take the practitioner to task for clinical negligence. However for an action of clinical negligence to succeed, the following legal criteria must be met:
- There must exist a duty of care owed by the practitioner to the patient.
- There must be a breach of that duty of care by the practitioner.
- There must be foreseeable harm/injury as a consequence of the breach.

All the elements must be proved by the patient for the action to succeed and for the patient to claim compensation for the resulting harm/injury.

The employer (if applicable), the NHS England (if applicable) and the General Optical Council may also want to conduct separate hearings should the matter be brought to their attention.

All GOC registered practitioners have an obligation to comply with GOC Standards of Practice and standard 19 in particular states that you have to: ‘Be open and honest with your patients when you have identified that things have gone wrong with their treatment or care which has resulted in them suffering harm or distress or where there may be implications for future patient care.’ Finally, as per the Compensation Act 2006, ‘An apology, an offer of treatment or other redress, shall not of itself amount to an admission of negligence or breach of statutory duty.’

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.

eye drop into the eye. Even with consent, the optometrist can still be taken to task. They could also have a civil case brought against them for the tort of clinical negligence especially as the administration of the incorrect drug led to the angle closure attack (which would not have happened with the anaesthetic) which in turn led to the patient’s distress, costs, loss of earnings and ultimately lower visual acuity.’

And another; ‘Following a discussion with my peer we felt that the optometrist could be legally taken to task for assault, as they had obtained consent from the patient for the anaesthetic to be administered but this is not what was used and the patient had not consented to the cycloplegic drug. Also it was administered in error causing unnecessary complications for the patient.’

What course of action can the patient take and are they likely to receive compensation?

Almost everybody suggested that compensation would be due – here are a few examples of responses:

‘I would say the patient could pursue a civil case of clinical negligence as the practitioner has an obvious duty of care to his patient. The practitioner then breached that duty of care, it would be reasonable to expect an optometrist to ensure the correct drug was being used. The resulting harm to the patient was foreseeable as angle closure and the resultant visual damage is a known side effect of cycloplegic drugs. It would say that the patient stands a good chance of compensation.’

‘The patient could certainly take a course of action to attempt to claim compensation. This could be started by formally lodging a complaint to the practitioner and also the GOC. Because actual harm has been caused, myself and my dispensing optician colleague would assume that the patient would be likely to receive some form of financial compensation. They have also suffered financial loss due to time off work, so suitable compensation should be received as a result of this.’

A small number worked in practices where they suggested their employer would take up the issue. Undoubtedly true as this is, it is still important to understand the legal process at the heart of this scenario – As both myself and the peer who I discussed this with both work for large multiple organisations, we felt that, if this was to happen in one of our practices, then this situation would be dealt with in the first instance by the practice manager, who would then pass it to the relevant department of our business. We felt that there would definitely be a compensation offer made and that it would be substantial as there is long-term damage to the patient’s vision, as well as the distress caused.’

Those suggesting assault gave less specific action predictions, such as; ‘the patient should put in a formal complaint to the optometrist’s employer and GOC. They should also seek legal advice from a lawyer as this is a clinical negligence claim, whereby they should receive compensation due to the loss of earnings and personal injury suffered.’

Would it be appropriate for the optometrist to admit that they had made a mistake on realising that they had instilled the incorrect medication in the right eye?

Regarding admission of mistake – pretty unanimous in saying the optometrist must admit their error in accordance with their duty of candour. Here is an example answer: ‘It is essential, (not just appropriate) that the optometrist admits the mistake that has been made. They have a duty of both care and candour to admit that if they have done something wrong, that they inform the patient. If the optometrist didn’t let the patient know, having accidentally instilled a drop that blurs vision, the patient could have driven home/reanted machinery with vision below standard. The consequences of this could have been disastrous.’

No comments