Litigation and the practitioner 3

Bill Harvey and Dr Nizar Hirji discuss the third in our series of interactive CET exercises centred around litigation and the eye care practitioner (C59847)

The exercise centred around a scenario concerning attended your place of practice (not part of an NHS hospital), for an eye exam, complaining of persistent headaches having been advised by her GP that she should firstly check with an optometrist if she needs new spectacles. The case details are summarised here.

CASE FOR CONSIDERATION

History and symptoms revealed nothing significant or untoward save for the persistent headaches, and no binocular vision or any other ocular anomaly was noted during the eye examination. The spectacle prescription was duly dispensed and the optometrist requested that a visual field assessment be conducted when the spectacles were collected.

She had collected her spectacles and at that time completed the visual field assessment which was conducted by an optical assistant at the practice. However, her headaches persisted despite the use of the updated spectacles.

Subsequently, the patient had collapsed at work with blinding headaches and her GP visited her at home that evening. She was asked about her visit to have her eyes examined. Freda explained she had had an eye examination and new spectacles were prescribed. She also mentioned that she had a ‘fields test’ after the eye examination five days later when she collected her new spectacles. The GP asked if the results of this fields test were discussed with her and if they were normal. Freda confessed that she could not recall any discussion about the fields test results with anyone. The GP, following examination, referred Freda urgently to the local hospital’s neurology department.

The patient attended the neurology department of the local hospital where she was told, after the fields test was repeated and a magnetic resonance imaging scan completed, that she had a brain tumour (a meningioma) which was inoperable with conventional surgical techniques.

The patient wants to know what legal action she can take, stating that she has suffered, and continues to suffer considerable distress, incurred costs and significant loss of earnings as a result of the time off work, and has a brain tumour that is inoperable. She puts this down to the delay by the optometrist/practice in reviewing her fields test and not referring her earlier to the hospital/GP when the VFA results were available four days after the eye exam.

The points for discussion were as follows:

• What action can the patient take against the practitioner?
• What action can the patient take against the employer?

DISCUSSION

This case proved to be our most challenging yet in this series as reflected in a divergence in some of your responses. All respondents felt there was a case to be made by the patient but the nature of the complaint and the individual responsibility of the optometrist and the employer proved somewhat divisive.

With regard to the responsibility of the individual practitioner, one response was: ‘It is the optician’s duty to make sure all tests are done and that he or she is happy with the results before issuing a copy of the prescription. In this case, the spectacles were made up in practice and the fields were to be done on collection. It is still the optician’s duty to see the results of the test and discuss with the patient the results.’ Such a response lays the blame squarely at the practitioner, as stated here. ‘The patient can therefore sue the optician in question but not the employer as it is only the optician who is at fault.’

Others felt the case against the practitioner might not be so clear cut due to any difference in management that the fields test in practice may actually have made. ‘This is a case with many grey and difficult areas to discuss. The patient would need to go via the GOC if she wanted to take any action against either the individual practitioner or the employer. The grey area, in regards to taking action against the practitioner, is whether the time delay (which
The optometrist’s decision to postpone Freda’s Virtual Fields Assessment (VFA) to when the spectacles were collected may be criticised as the eye exam is not completed until all clinically necessary tests are completed, the results reviewed and acted on as appropriate, by the optometrist. The fact that the optometrist reviewed the VFA results about a month after the initial eye exam consultation, prompted by Mr Best’s call to the practice, places her in difficulty with respect to her duty of care to her patient and compliance with aspects regarding supervision and delegation. The optometrist may also be regarded as remiss for not instructing Freda to return to the practice if her headaches persisted. This may indeed have been the intention but failed to transpire because the optometrist did not speak to Freda after the VFA was completed in the practice by the optical assistant at the spectacle collection visit. Freda may invoke a claim against the optometrist and/or she may elect to claim against the practice (which is vicariously liable for the actions of all its employees including the optical assistant who filled away the VFA results without ensuring review by the examining optometrist) or both. This incident raises questions about supervision of delegated functions and procedures generally within the practice. On the basis that there has indeed been a breach of the duty of care, Freda will have to establish on the balance of probabilities that the breach of duty in this case, the failure to refer her promptly via her GP to the local hospital, resulted in her tumour becoming inoperable (the delay materially contributing to the harm) and requiring more complex ‘CyberKnife’ radiotherapy not normally available, at the time, under Freda’s local NHS Trust except possibly after specific approval.

**Negligence**

Freda’s legal counsel will need to establish that:
- There existed a duty of care owed by the practitioner/practice to the patient
- There was a breach of that duty of care by the practitioner/practice
- The delay in referring her resulted in her brain tumour becoming inoperable - foreseeable harm/injury as a consequence of the breach

All the elements must be proved by Freda’s counsel for the action to succeed and to claim compensation for the resultant harm/injury. To establish the foreseeable harm/injury, there will need to be substantial expert neuro-ophthalmological/oncological medical evidence regarding the tumour. The onus is on Freda’s legal counsel to prove causation and harm (physical, psychological or economic), on the balance of probabilities, as a result of the breach of the duty of care (causation and causal link).

**Postscript**

The moral of the case is that it is vital to ensure that additional tests or data collection delegated or otherwise, are conducted appropriately at the same visit as the scheduled eye-examination, and not deferred to another date to guard against the sort of difficulty Freda’s optometrist/practice faces. Should there however be a valid reason as to why this cannot be done (eg delaying a dilated fundal examination when the patient has no option but to drive home), then an internal referral note/letter should be created by the examining optometrist for the follow-up visit and a formal appointment scheduled as close to the original examination date and time for the completion of the additional tests/assessments either by the original or another optometrist, and if delegated, completion of the appropriate tests/assessments under the direct supervision of the original or another optometrist in the practice who would take responsibility for the care of the patient. An alternative approach that the author favours, is to have all delegated screening activities, eg visual fields assessments, digital fundus photography, non-contact tonometry, etc, conducted before the eye exam consultation so that this data is to hand for clinical decision-making at the conclusion of the examination. Should additional investigations and/or repeat measurements be indicated in the course of the consultation eg dilated fundal exam, contact tonometry, optical coherence tomography, etc, then these investigations are conducted immediately (in the absence of valid reasons of not doing so), and the data considered before final clinical decisions and recommendations are discussed with the patient and the eye exam fees charged/claimed.

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.


without doubt was unacceptable) would have made any difference to the actual outcome of an inoperable brain tumour? Having shown this case to our optometrist, their view was that it probably would not have done. However, the optometrist was the one that requested the field test to be completed on collection of the spectacles, so was aware that this test had not been completed at the end of their examination. Although this is a reasonable request to request fields within a short time frame, the optometrist should have taken responsibility for ensuring this test was carried out, and not just relying on the procedures of the practice.

Others felt there was some culpability on the part of the employer. ‘The employer may be less easily defended, as procedure was not followed and therefore the employer was at fault. There would be cause for the employer to be investigated as there is the possibility that the optical assistant had not been properly trained or a correct protocol for completed field tests were not in place. I think there would be a case for the GOC to investigate negligence from the employer, and a separate investigation of the optometrist. That said, the GOC Standards of Practice have clearly defined that the registered professional takes responsibility for the delegated tasks undertaken with regard to their patients.

A few respondents emphasised procedures were firmly in place to prevent this sort of issue arising in the first place. ‘In our practice, the optician has a book and all patients who have had a field test or photo taken are written in the book so the optician can check the results. If the field plots are not perfect, the record is also handed back to the optician as an extra safety net. It is also written on the prescription if they refuse to have any specific test done.’