Litigation and the practitioner part 1

In the first of a series on the legal framework governing eye care practice Dr Nizar K Hirji discusses some recent landmark cases and reviews the sources of law (C50932, one distance learning point suitable for optometrists and dispensing opticians)

Estimates from the Labour Force Survey show that health professionals, teachers and nurses have the highest rates of stress with rates of 2500, 2100 and 3000 cases per 100,000 people employed over the periods of 2011 to 12, 2013 to 14 and 2014 to 15 respectively. Barkhuizen and Oesfeld conducted an assessment of stress in optometric practice and found from their survey that the most stressful aspect of optometry was the 'increasing potential of litigation'.

This series of articles is about the legal accountability of the optometric and optical practitioner. They will be concerned with the legal and regulatory environment. They will show how the optometric/optical practitioner may be called upon to account for their actions and the possible consequences of failing to comply with the law. It is important to emphasise that the material within this series is not a substitute for formal legal advice and counsel.

**RECENT HISTORY**

Patients are now far better informed regarding their health than ever. Almost three-quarters (73%) of adults in the UK used the internet everyday in 2013, with some 43% using it for health information. This is a double-edged sword for the practitioner. On the one hand, they may get very knowledgeable and very demanding patients with high expectations that have to be managed. On the other hand, they may come across misinformed patients who also need to be re-educated and managed.

There is also greater legal certainty as a result of revisions to the Opticians Act 1989 (amended 2005), Health Service Regulations and NICE Guidelines just to mention a few. Everywhere the mantra of evidence-based medicine can be heard – and patients too hear this. Both the College of Optometrists and the General Optical Council (GOC) are more proactive than in the past, and have produced a variety of materials including Guidance for Professional Practice, Clinical Management Guidelines, a Code of Conduct (to be superseded by Standards of Practice in April 2016) and even a booklet downloadable from the GOC website on 'How to complain about an Optician'.

Healthcare in general, and medicine in particular, has without doubt suffered significant bad press. Landmark cases and incidents prominent in this include:

- The Bristol Royal Infirmary inquiry: set up in 1998 to investigate the deaths of 29 babies undergoing heart surgery at the Bristol Royal infirmary in the late 1980s and early 1990s. Headed by Professor Sir Ian Kennedy, the inquiry effectively exposed an 'old boy's culture among doctors; patients being left in the dark about their treatment; a lax approach to clinical safety; low priority given to children's services; secrecy about doctor's performance, and a lack of external monitoring of NHS performance. It made some 198 recommendations.
- Royal Liverpool Children's Hospital (Alder Hey) inquiry: set up in 1999 to investigate the removal, retention and disposal of human organs and tissues without consent from children and babies at Alder Hey between 1988-1995. Chaired by Mr Michael Redfern QC, his recommendations led to the overhaul of the handling of human tissue, the Human Tissue Act 2004 and the formation of the Human Tissue Authority.
- Harold Frederick Shipman: convicted in January 2000 of the murder of 15 of his patients and of one count of forging a will, while he was a GP in Hyde, Tameside. He was sentenced to life imprisonment and a public inquiry was set up in 2001 headed by Dame Janet Smith, a High Court judge. Completed in 2005, the inquiry revealed that Shipman had actually killed an estimated 250 people during his career, and in one of its six reports also criticised the General Medical Council for doing too little to protect patients and for 'looking after its own'. This report has had far-reaching impact on healthcare practice and procedures in the UK as a result of its recommendations and the government's response.
- Cure the NHS?: changes at the Mid Staffordshire Hospital had been sought after 2007. However, it took a Health Commission investigation to expose the appalling conditions, inadequacies and high mortality rates at the hospital. After four private inquiries some changes were made but it was not until June 2010 that a public inquiry into avoidable deaths between 2005 and 2008 (headed by Sir Robert Francis QC) was launched. The full details of the failures and recommen-
Continuing Education

Negligence Claims
Search the internet for ‘medical negligence no win no fee’ and you will find many legal practices prepared to take up cases for a percentage of the damages awarded. Using a Freedom of Information enquiry, Matthew et al. obtained data from the National Litigation Authority showing all ophthalmic negligence claims between 1995 and 2009. Nine hundred sixty-three claims were closed over a 15-year period, of which 67% resulted in payment. The total cost of claims was £32.1 million, with a mean payment per claim of £33,300. The specialties with the highest mean payment per claim were neuro-ophthalmology and paediatric ophthalmology. Cataract subspecialty had the highest number of claims, accounting for 34% of all claims.

The GOC’s annual report of 2015 details that for the period April 1 2014 to March 31 2015 they received 287 contacts/claims about the fitness to practise of registrants, from which 279 full investigations emerged—an increase of 48% on the previous year. Putting it into perspective however, less than 1% of GOC registrants had a complaint levelled against them. Table 1 shows the outcomes of these complaints for the past three years.

Defensive Optometry
As early as 2006, the late Professor Woodward, who was well versed with litigation hearings in optometry, made a clear unequivocal comment that optometrists ‘must practice defensive optometry’ and with an increasing role for the optometrist in primary health care more optometrists are liable to find themselves as co-defendants in actions for clinical negligence.

Never were these words more appropriate than today, with the ever-increasing scope of optometric/optical practice both within the Hospital Eye Service and private practice. However, to practice defensively and avoid litigation, it is firstly necessary to better understand the legal framework that optometry has to work within in the UK.

SOURCES OF LAW

Common Law
Case law is the ‘bricks and mortar’ of common law. Individual judgements form legally binding principles which are then applied to subsequent cases if relevant to the facts. It is therefore not unusual to find old cases referred to when judgements are handed down, unless a more recent judgement is found that has overruled the decision of the previous case. This is known as ‘legal precedent’ and is intended to safeguard consistency of treatment of similar cases. There is a recognised order of precedence for courts (see Figure 1).

A decision of the Supreme Court of Justice is binding on all other courts (subject to relevant precedents of the European Court of Justice). Figure 1 illustrates the relationship of the Supreme Court relative to the lower courts which have to abide by decisions of the higher courts.

STATUTORY LAW

The statutory sources of law are to be found in Acts of Parliament and Statutory Instruments. Acts of Parliament start life as a ‘Bill’ in Parliament, either in the House of Commons or the House of Lords, and have to go through the following stages:

- 1st Reading (introduction)
- 2nd Reading (debate)
- Committee stage (line by line examination)
- Report stage (opportunity to change the bill)
- 3rd Reading (tidying up) in both Houses of Parliament
- Amendment stage (both Houses will consider the others’ amendments)

When approved in the same form by both Houses, it receives Royal Assent and becomes an Act of Parliament. These Acts are normally legislation regarding issues either not dealt with by the courts or consolidation of common law principles into a statute. Statutory Instruments are a form of legislation which allows the provisions of an Act of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act. They are also referred to as secondary, delegated or subordinate legislation. They often create power to delegate decision-making to a minister or other official(s)/body(ies) which means that

<table>
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<tr>
<th>Outcome</th>
<th>2012/13</th>
<th>%</th>
<th>2013/14</th>
<th>%</th>
<th>2014/15</th>
<th>%</th>
<th>2015/16</th>
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<td>132</td>
<td>48.0</td>
<td>78</td>
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<td>49</td>
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<td>39</td>
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<td>10.2</td>
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<td>12.7</td>
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<td>27</td>
<td>8.9</td>
<td>9</td>
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<td>14</td>
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<td>3.0</td>
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<td>2.9</td>
<td>4</td>
<td>1.8</td>
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<td>-</td>
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Total | 305 | 275 | 226

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such legislation can be actioned quickly when the need arises to change the detail but not the principle of the law. They are however subject to judicial review should there be any concerns regarding their proper use.

**European Union law and the European Convention on Human Rights**

As the UK is a member state of the European Union (EU), it means that EU law takes precedence over UK law. Thus, like other final courts, the UK Supreme Court will, in the areas of European law in which the United Kingdom has accepted the jurisdiction of the Court of Justice of the European Union (CJEU), ask the CJEU to give preliminary rulings concerning the interpretation of any Treaties, and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, where such a question is raised in proceedings before it, and it considers that a decision on the question is necessary to enable it to give judgment.

Before the Human Rights Act was passed by Parliament in 1998 it was not possible for individuals in the UK to challenge decisions of a public authority on the grounds that they violated rights under the European Convention of Human Rights (ECHR), within the courts of the UK. This had to be done by taking the case directly to the European Court of Human Rights in Strasbourg (ECHR).

Since the Human Rights Act came into force in October 2000, individuals can now claim a remedy for breaches of their Convention rights in the UK courts. Anyone who thinks their Convention rights have not been respected by a decision of a UK court may still bring a claim before the ECHR, but they must first try their appeal in the UK courts.

**Civil and Criminal Law**

Public law covers the relationship between individual citizens and the state, and private law, covers relationships between individuals and private organisations. In practice, the best known distinction is between civil law and criminal law.

Civil law covers areas such as tort (wrong doing or harm to another), contracts, negligence, false imprisonment, defamation, family matters, employment, probate and land law. In healthcare, most litigation against practitioners is for the tort of negligence, though claims of breach of contract are also possible.

Criminal law deals with the boundaries of acceptable/unacceptable conduct of citizens and is normally enforced by the police as an offence against society as a whole.

At first glance it may seem fairly easy to classify an action as a civil wrong or as a criminal offence; however, it is not always straightforward. For instance, assault and battery can be either a criminal offence or a tort of trespass to the person. Furthermore, in extremely rare cases of gross negligence, where the breach of the duty of care is so grave, it can amount to a crime against society.3

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**REFERENCES**


- Full references can be found at opticianonline.net