Litigation and the practitioner 3

Bill Harvey and Dr Nizar Hirji discuss the last in our series of interactive CET exercises centred around litigation and the eye care practitioner (C-61613)

The last of our exercises relating to legal issues in the modern workplace focused upon an area of some debate. Namely, does the inclusion of a minor addition in a bid to offer some support to accommodation in order to alleviate symptoms related to near work constitute a part of a prescription. And might their recommendation outside the test room mask any other causes of symptoms, such as decompensation of a near exophoria, something that an addition might in fact exacerbate.

THE CASE
An optometrist at your place of work (not part of an NHS hospital), has prescribed for Mrs Joan Fernandez a 31-year-old bursar at a local private school, who attended with asthenopic symptoms and occasional diplopia at near when tired, the following spectacle Rx for her to wear generally and particularly at work where she used computers extensively:

RE -0.75/-0.25 x180 (6/5 N5)
LE -0.75/-0.25 x180 (6/5 N5)

Mrs Fernandez confessed during the consultation that some years ago she was given some ‘pencil-to-nose’ exercises by an optometrist, but never really took them seriously and would now prefer another solution as her headaches and discomfort were really affecting her at work.

Apart from the low myopic and slightly astigmatic spectacle prescription, other relevant clinical findings were as follows:

- Orthophoric at distance with and without the new spectacle prescription
- 10Δ exophoria at 30cm (without the new spectacle prescription)
- 4Δ exophoria with the new spectacle prescription at 30cm
- A near point convergence to 6cm with and 14cm without the new spectacle prescription
- Amplitude of accommodation was found to be around +5.50D monocularly using an RAF rule
- No fixation disparity ‘slip’ (aligning prism requirement) noted both at distance and near with the new spectacle prescription
- No other significant findings and nothing untoward in her ocular or general health

Mrs Fernandez had never used spectacles before and elected to ‘shop around’. She was planning to use them all the time with her computers at work, to relieve her asthenopia as discussed with the prescribing optometrist. This practitioner had also asked her to return sooner than her scheduled 12 months review date if her symptoms persisted after she had obtained and used her new spectacles.

She visited an optical practice at a nearby town the following weekend and saw a rimless spectacle frame that she liked. She decided to discuss her spectacle lens options with one of the optical assistants at the practice. During this discussion, she explained that she was a school bursar, and that the spectacle prescription was intended to relieve her asthenopic symptoms, particularly at work and using her various computer screens and tablets.

The dispensing optician at that practice was then asked about suitable lens options, and recommended ‘digital’ lenses incorporating a +0.75D add to provide an accommodative ‘boost’. Mrs Fernandez decided to take the advice given and ordered spectacles with ‘digital’ light sensitive lenses and collected the spectacles the following week. Having used them for four weeks, Mrs Fernandez returned to the original prescribing optometrist as was suggested to her, complaining that her headaches were no better with the spectacles prescribed. She still noticed occasional horizontal diplopia while using the computer, and she was generally as uncomfortable with the spectacles as she was without them.

She also confessed that she had made errors at work while wearing these spectacles, and was due to attend an initial disciplinary meeting with the headmaster at the school which she was very upset about.

The optometrist re-examined Mrs Fernandez, and came up with findings no different to those at the initial visit. The specta-
icles that Mrs Fernandez had obtained were carefully checked and the +0.75DS addition was noted on the spectacles. It was explained to Mrs Fernandez that the prescription lenses she had been dispensed were more like bifocal lenses and not the single vision lenses that had been originally prescribed for her. With these lenses, she was told, it was not surprising that she was struggling with her work because they neutralised any benefit the prescribed correction might have had. The prescribing optometrist stated that he was concerned that the prescription was not dispensed as per the prescription. In view of this, she was recommended to return to the dispensing practice and to get the spectacles re-dispersed correctly as prescribed.

You are approached by the patient who is quite upset. She has decided to complain to the GOC, and wants to know what action she can take against the dispensing optician and the practice that recommended and supplied ‘digital’ lenses. She states that she has suffered considerable discomfort and distress, incurred costs as a result of the time she has had to take off work because of the persistent headaches and intermittent diplopia. She added that, as a result of wearing the spectacles, she had made more errors at work and now faces a disciplinary meeting with the headmaster and has an expensive pair of spectacles that do not help her with respect to her symptoms.

Your discussion with a colleague of the same registrant category (optometrist, dispensing optician, contact lens optician or therapeutic optometrist) needs to include the following:

- What action can the patient take against the practitioner/practice/employer?

**DISCUSSION**

**Optics**

Symptoms of asthenopia after prolonged near work, especially over long hours and in often not perfectly set-up environments, perhaps at times outside those established daily body clock and of small or less well contrasting targets, are often linked to a decompensation of a phoria. This patient has a near exophoria. Her spectacle correction, ostensibly a distance correction, will force her to accommodate more for near work. This extra accommodation is likely to result in some convergence which, in turn, helps to overcome the tendency for the eyes to drift out (the exophoria). Any reading addition is, in effect, pushing the spectacle correction closer to plano and reduces the influence upon the phoria.

**Your thoughts**

Here are two typical responses. ‘She is entitled to new glasses. The prescribing practice can decide whether to take additional steps to redress the customer service concern (such as issue new glasses and a refund). It is wrong of the DO to “prescribe” an addition that wasn’t on the original prescription. Though this is likely to fall short of a fitness to practice issue, she may be able to “sue” for hurt and distress.’

And another, ‘After discussion, we felt that the patient’s complaint to the GOC would firstly be assessed by a registrar where an investigation and more information would be gathered. If they felt it valid, they would pass it on to two case examiners who would decide what action to take. Either take no further action, issue a warning to the registrant, ask for further investigation or refer onwards to an independent fitness to practice board possibly...’
even urgently. Depending on the outcome of that, the dispensing optician could have their name removed from the register and be unable to practice.

If there was any issue of NHS voucher, then the patient could complain to NHS England and the NHS could choose to investigate the company. The patient could complain to the optical consumer complaints service to seek a refund for the glasses if the practice were not willing to oblige.

As the patient is clearly upset, suffered physical and economic hardship, they could start civil proceedings for negligence against the practice or dispensing optician for having supplied a product different to that of the one prescribed and been issued when the patient has been given enough information to make an informed decision on the type of lens being chosen.

The dispensing optician has established a duty of care by delegating the task to the optical assistant and, as taking payment for the glasses starts a contract, there has been a failure in the duty of care to the patient as the dispensing optician has not investigated further what is being dispensed and why. Nor have they interacted with the patient themselves and, finally, foreseeable damages have been incurred as a product no different to not wearing the glasses has been dispensed therefore not correcting the initial problem and leading to physical, emotional and economical damage.

Law
Dr Nizar Hirji offers the following thoughts:

The recommendation of 'digital' lenses may, in this case, have been well intentioned, but evidently ill-advised, and ended up negating whatever assistance the single vision spectacles could have provided the patient for her work as a barrister. Adjustment of prescriptions for a 'change in dispensed power due to a change in vertex distance [and] change of dispensed addition due to change of working distance' are currently within the scope of practice of dispensing opticians in the UK.

The inclusion of an 'addition', however small, on single vision spectacle prescriptions to provide an accommodative 'boost' is an aspect that unsurprisingly the Opticians Act (1989) is silent on, as innovations such as these lenses and other technological advances (eg sale and supply of rigid gas permeable lenses for orthokeratology; peripheral defocus soft contact lenses and peripheral defocus spectacle lenses for myopia control; or indeed 'accommodative boost' soft contact lenses) were either not around, or not considered, when the Act was enacted.

'Digital' or 'accommodative boost' lenses are normally dispensed following a determination of the near refraction, and not merely as an 'off-the-cuff' adjustment of the spectacle prescription as happened in this case, and the added complexity of convergence challenges clearly demonstrates why this should be so. The patient is not happy because she has ended up with a pair of spectacles that she derives no benefit from and as a result of the advice she received from the dispensing optician who recommended the lenses and the practice that supplied them without reference to the prescriber.

In reality, the dispensing optician and practice that recommended and supplied the spectacles will most likely be happy to apologise and offer to re-dispense the spectacles (gratis) to the original single vision prescription, and may even make a 'gesture of good will' to placate Mrs Fernandez. A prudent approach would have been for the dispensing practitioner to, at the very least, check with the prescribing optometrist regarding the suitability of digital lenses to provide an accommodative 'boost' for Mrs Fernandez before proceeding with the dispense.

On the basis that there has indeed been a breach of the duty of care, and if Mrs Fernandez wishes to pursue this further, she will have to establish, on the balance of probabilities, that the breach of duty, in this case providing advice which resulted in her buying spectacles from the practice that were unsuitable for her to work in, occurred and consequently she continued to experience discomfort, distress and difficulty at work, and possibly now faces a warning from her employer.

For negligence to be a consideration, Mrs Fernandez' 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 advice and dispensing of the accommodative 'boost' spectacles resulted in her distress and difficulty at work – foreseeable harm/injury as a consequence of the breach.

All the elements must be proved by Mrs Fernandez' counsel for the action to succeed and to claim compensation for any resulting harm/injury. To establish the foreseeable harm/injury, there will need to be expert optometric and dispensing evidence regarding the discomfort, distress and difficulty at work. The onus is on Mrs Fernandez' 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).

What are the implications for the employer and for the role of the GOC in this case? The employer/practice has vicarious responsibility for all their employee's actions for lack of, and for the systems, and support staff they have in the practice. The employer/practice is thus answerable too, and is likely to be taken to task jointly with the employed practitioner by Mrs Fernandez.

The GOC may conduct its own Fitness to Practice hearing regarding this case, should this matter be brought to their attention by way of a complaint, and will most probably consider the practitioner's and the practices' compliance or otherwise with GOC standards since the Act as it stands currently, is silent on the issue of the sale and supply of 'accommodative boost' or 'digital' spectacle lenses.

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.

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REFERENCES

1 https://www.abdo.org.uk/advice-guidelines/ Section 2
2 Opthalmic Dispensing updated July 2015 last accessed July 2018

Optician will be looking to run further legal topics for debate over the next three-year cycle. If you have any specific topic in mind you would like to raise, feel free to email your suggestion to Bill.Harvey@markallengroup.com.