

YOU BE THE JUDGE – OPTICIANS AND MALPRACTICE

Linda Conlin, ABOC, NCLEC

Course description

While malpractice suits against opticians are uncommon, it's important to know what malpractice is and areas in which opticians may be vulnerable to complaints. This course explores the elements of malpractice for opticians, sources of complaints and areas of vulnerability in an overview. An actual malpractice case involving contact lenses is presented. Participants are invited to consider whether the facts are in favor of the defendant or the plaintiff before seeing the actual verdict.

NOTE: Optician responsibilities and liability laws vary by state. This course is intended to present an overview for information purposes only, and does NOT offer legal advice.

Objectives

1. What constitutes malpractice
2. Sources of complaints and areas of vulnerability
3. Moot court: Do you agree with the jury?



What is malpractice?

The Hippocratic Oath begins with, "First, do no harm." From there comes the definition of medical malpractice: Medical malpractice is improper, unskilled or negligent treatment of a patient by a physician, dentist, nurse, pharmacist **or other healthcare professional**.

Malpractice or professional liability, is an error made by a professional. In legal-speak, professional liability is considered a "tort liability," a term that concerns civil wrongs (as opposed to criminal wrongs). The thinking goes that if you are a professional – someone who is skilled or who has received special training to perform a job – then your customers, clients, or patients

can expect you to possess a certain level of competency in your line of work. In other words, professionals should know better than to make certain mistakes while doing their jobs.

Malpractice cases are categorized as meritorious or non-meritorious. A meritorious case is defined as negligent conduct that causes damage. In non-meritorious cases, it is accepted that mistakes or bad outcomes can occur, but it becomes a legal matter only when there is harm.

As with most things legal, it is important to know the definitions of terms, so we will look at those. Negligence is a failure to behave with the level of care that someone of ordinary prudence would have exercised under the same circumstances. The behavior usually consists of actions, but can also consist of omissions when there is some duty to act.

The elements of negligence are:

- A legal duty to exercise reasonable care
- Failure to exercise reasonable care
- Cause in fact of physical harm by the negligent conduct
- Physical harm in the form of actual damages
- Proximate cause, a showing that the harm is within the scope of liability

Now we need to define proximate cause. It is the primary cause of an injury. It may not necessarily be the closest cause in time or space or the first in a sequence of events leading to an injury, but a cause that produces particular, foreseeable consequences. It is also known as legal cause. Foreseeable consequences are dangers that a reasonable person should anticipate as the result of their actions.

Trial by jury vs. settlement

Malpractice cases are generally decided by either jury trial or settlement. Here are some interesting statistics. Approximately 79% of jury trials are decided **in favor of the defendant**. However, of the approximately 21% of jury trials decided in favor of the plaintiff, the average jury award is about twice the amounts offered in settlement. For settlements, only about 39% of cases are settled in favor of the defendant, but about 93% of cases are settled before trial.

In a jury trial, the claimant (plaintiff) must prove by a preponderance of evidence (as opposed to beyond a reasonable doubt) that there was a breach of the standard of care, or the claimant was owed a duty of care. However, although it is technically irrelevant, the appearance of a claimant with a visible injury may subconsciously evoke sympathy from a jury.

That leads us to more definitions. Standard of care is the level and type of care that a reasonably competent and skilled health care professional with a similar background and in the same medical community would have provided under the circumstances. Errors, oversights and poor advice fall into this category. Duty of care is the legal obligation to take reasonable care to avoid causing harm.

But what if the plaintiff did something or an outside factor caused the harm, known as contributory negligence? Contributory negligence is another factor considered in a malpractice suit. It is negligence by the injured party that combines with the negligence of the injurer as a proximate and efficient cause in producing the injury. It may not cause the suit to be dismissed, but it may reduce or negate recovery for damages.

Another factor is assumption of risk, which may be proven by a clause in a contract stating the existence of the danger and the waiver of liability of the defendant for injuries caused. An example is advising the patient of the risks of contact lens wear. Assumption of risk also may be shown by other evidence, such as the injured party knowingly engaging in dangerous behavior.



Another aspect of malpractice suits is fault-based liability. This places the burden of proof on the plaintiff, who must demonstrate that the defendant healthcare provider acted unreasonably given the particular circumstances.

Informed consent, duty to warn and material risk tie into contributory negligence and assumption of risk. Informed consent means to fully inform patients about the risks involved in any proposed medical procedure or treatment. A signed form alone does not necessarily prove that the patient gave informed consent. The practitioner must actually discuss the procedure.

Duty to warn means that the patient must be informed of the dangers associated with, and the reasonable risks of any procedure or course of treatment such as contact lens wear. Duty to warn involves material risk, a risk that a reasonably prudent person would have found

significant in deciding whether or not to submit to a procedure. It refers to the patient knowing and understanding the risks rather than the decision the patient made.

Here's a sample Duty to Warn form for safety eyewear:

PATIENT ACKNOWLEDGEMENT FORM -SAFETY EYEWEAR-

My eyecare specialist and I have reviewed eyewear options. Included in the review was a discussion of the safety issues associated with using eyewear during my occupational / recreational activities.

My eyecare specialist has recommended lenses made of:

Polycarbonate

Trivex

I am instead ordering lenses made of:

CR-39

Glass

High Index Plastic

My eyecare specialist has recommended frames that are:

ANSI Rated

ASTM RATED

I understand that by not ordering safety rated eyewear, I am placing the health and safety of my eyes (or my child's eyes) at risk for serious injury, including blindness.

Patient Signature

Parent/Guardian (if appropriate)

Doctor/Optician

Date

And for contact lenses:

CONTACT LENS FOLLOW-UP AGREEMENT

With the fitting of your contact lenses, you will be given instructions on the insertion, removal and care of your lenses. You will be required to return for periodic progress evaluations in order to fully evaluate your lenses for the proper fit. Contact lens prescriptions are valid for one year. You will require a yearly contact lens evaluation, for which there is a separate fee. If multiple prescriptions are issued, additional fees may apply. We request that you return to this office for progress evaluations as listed below:

Wearing Schedule: Daily Wear Flexible Wear Extended Wear

_____ days Wear _____ hours first day

_____ month(s) Add _____ hours per day

_____ weeks(s) Maximum _____ hours / days

Care System: _____

I acknowledge that I have received and understand the above instructions for the care and handling of the contacts prescribed for me. I have been informed of the necessity for periodic evaluations to monitor my eye health and the condition of my contact lenses. I understand that improper use or inadequate care of my contact lenses can possibly cause eye irritation, infections, and corneal injury.

X _____
Patient's Signature *Technician's Signature* *Date*

IN THE BEGINNING IT IS NORMAL IF:

- 1) Your eyes itch or feel funny.
- 2) You are more aware of one lens than the other.
- 3) You have better vision with one eye than the other.

REMOVE YOUR LENSES IMMEDIATELY IF:

- 1) You develop unusual pain or tenderness
- 2) You develop unusually foggy or cloudy vision
- 3) You experience a decrease in vision that does not clear up.
- 4) You suspect something is wrong.

REMINDER TIPS:

- ALWAYS WASH HANDS BEFORE INSERTION AND REMOVAL.
- INSERT LENSES BEFORE APPLYING MAKE UP.
- REMOVE LENSES BEFORE SWIMMING OR TANNING.
- NEVER WEAR TORN LENS.
- NEVER USE TAP WATER ON SOFT CONTACTS.
- DO NOT USE ANY ARTIFICIAL TEARS OR ANY OTHER OVER THE COUNTER DROPS THAT ARE NOT FOR SOFT OR HARD CONTACT LENS USE.

I understand that should I not return for my contact lens follow-up visits I will no longer have a valid prescription. _____

1 Year Follow up _____ **Full Exam** _____

NOTE:
The solutions recommended for cleaning, disinfecting, soaking and rinsing your contact lenses and the eye drops for use while wearing the lenses have been prescribed specifically for your eyes and your lenses. Do not change your solution without first consulting with us. Use of non-recommended products may result in lens damage or irritation to your eyes.

COST OF CONTACTS:
3 mo. = _____
6 mo. = _____
1 yr. = _____
•Rebates Available

REPLACEMENT TYPE:
Brand _____
Daily 2wk Mo. other

Authorized for pick-up:

Scope of practice

Scope of practice for opticians varies by state. It is defined as what you are authorized to do under your license or certification, and what you are responsible for doing within your scope of employment. Equally as important is what you are NOT supposed to do. For example, you wouldn't advise a patient about an ear infection.

Scope of practice includes discretionary acts. That is, what you can choose to do within your scope of practice. Examples of discretionary acts we perform every day are decisions involving lens material, contact lens disinfection regimen, and referring a problem.

Complaints

Legal action comes from a complaint, usually from negligence, product liability, or breach of contract. The case may not end up in court, but dissatisfied patients may file a complaint with the state or other regulatory agency. Competitors or other professionals may file a complaint if they think you are not complying with regulations. Revenue agencies may report defaulting on

taxes or student loans to regulatory agencies. And employers may be required to report criminal behavior to regulatory agencies, even if it is not directly related to patient care.

Patient satisfaction can be different for every patient, but a poor result or a result that doesn't meet the patient's expectations may not be a breach of professional standards. However, it is best to resolve patient issues quickly and completely within the practice, follow up, and always document the issue and resolution.



You can protect yourself from complaints and litigation by being familiar with state regulations governing opticians and maintaining your credentials. Most state statutes governing opticians include phrases such as "of good character." While the language is broad, if that criterion isn't met in the opinion of the regulatory body, it may prevent licensure or provide an area of attack on the license.

Areas of vulnerability

Errors in areas commonly associated with complaints are:

- ▣ Documentation and records – interactions with patients, including by phone and email should be documented along with exam and product records
- ▣ Product liability – faulty product or one that doesn't perform as required
- ▣ Prescription release – federal regulations require that patients receive copies of eyeglass and contact lens prescriptions without having to request them
- ▣ HIPAA compliance – maintaining patient confidentiality in all aspects of the interactions with the practice
- ▣ Insurance fraud – claims must be filed accurately and timely

Let's take a closer look at each of these areas.

Documentation

A sample of documentation for eyewear would include:

- Name of prescribing doctor
- Prescription
- Date of prescription
- Date of dispense
- Measurements and frame dimensions
- Lens materials, tints, coatings
- Lens design
- Recommendations to patient for use

A sample of documentation for contact lenses would include:

- Date of visit
- Date of spectacle Rx and prescribing doctor
- Keratometry readings and date
- Contraindications
- Slit lamp evaluation, pre-fit
- Contact lens parameters
- Prescription expiration date
- Wearing schedule, care and handling instructions, and follow up schedule with date
- Acuity with contact lenses
- Slit lamp evaluation with contact lenses

Contact lens follow up visits must be documented. The documentation should include:

- Date of visit
- Wearing schedule
- Acuity with CL
- Date of next visit
- Description of observations
- Information given to patient
- Information given to prescribing doctor

Note: eyeglass and CL records should be kept for 7 years (this may vary by state, and usually includes records for deceased patients).

Product liability

Protection against product liability claims includes inspection of orders for prescription accuracy and defects, proper fit, verification that the product meets safety standards and duty to warn regarding lens materials or risks of contact lens wear. (Note: While adherence to ANSI standards is voluntary unless mandated by state law, it is considered to be the industry standard.) While a manufacturer may be at fault for a product failure, the optician may be

liable as the provider of the product. Documentation of inspection including lab forms should be part of the patient record.

Prescription release

The Fairness to Contact Lens Consumers Act and the FTC Eyeglass rule require that patients are given copies of their prescriptions whether they ask for them or not. They cannot be charged a fee or required to sign a waiver to obtain a prescription. The contact lens practitioner can make a "reasonable" judgement as to when a CL fit is complete and the prescription can be released, and there must be a documented medical reason for not releasing a contact lens prescription.

Contact lens prescriptions should include:

- ▣ Patient's name and date of birth
- ▣ Office hours, address, phone, email, and FAX
- ▣ Date of prescription and expiration date
- ▣ Date of next visit
- ▣ Quantity of lenses, wearing schedule and care regimen
- ▣ "No substitutions" noted on the prescription
- ▣ Professional signature and license number
- ▣ Disclaimer noting that the patient should immediately discontinue wear and contact an eye care professional in the event of blurred vision, redness or discomfort

HIPAA

Also called the Privacy Rule, HIPAA (Health Insurance Portability and Accountability Act) is an extensive rule that can be summarized as: The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral. The Privacy Rule calls this information "protected health information (PHI)." Personal or medical information cannot be released without the patient's consent, including in casual conversation. There are certain specific exceptions for example, patient care with another entity (ie: when another practitioner asks for a patient's prescription, you cannot require the patient to sign a release) or cooperation with law enforcement.

Insurance fraud

Insurance fraud is any act committed to defraud an insurance process. It occurs when a claimant attempts to obtain some benefit or advantage they are not entitled to, or when an insurer knowingly denies some benefit that is due. You cannot bill insurance companies for goods or services you didn't provide. Also, you cannot change a date of service as some patients want us to do when they have a "use it or lose it" vision benefit that has expired.

Moot court

The following is a summary of a contact lens malpractice case from public record. While this is only a summary of the testimony, see if you agree with the jury's verdict. **NO PEEKING!** Remember that the jury's verdict was their decision based on the evidence presented. It is neither right nor wrong.

The case

Cousineau vs. Ochsner Clinic (decided November, 1996, Louisiana)

The patient Cousineau (complainant) alleged that corneal ulcers diagnosed in September, 1988 were caused by Ochsner's (defendant) negligence in prescribing extended wear soft contact lenses in January, 1987.

Facts

- ▣ Cousineau had been wearing extended wear lenses for about 3 years, having had examinations and lenses in another state
- ▣ In January, 1987, he went to Ochsner Clinic for an eye exam and replacement lenses
- ▣ Cousineau was given an appointment for a follow up visit 2 weeks after the examination, but did not show up
- ▣ Cousineau stated that almost immediately after receiving the lenses, he experienced distorted vision, vision loss and pain
- ▣ Cousineau stated that he called the clinic "almost immediately," but the Ochsner Clinic has no record of the call, or any note in Cousineau's chart
- ▣ Cousineau stated that he was not given adequate personal or written warnings about the risks of extended wear CL
- ▣ Cousineau's next contact with Ochsner was in November, 1987 when he called and requested a pair of replacement lenses, which were mailed to him without examination
- ▣ From November, 1987 to September, 1988, Cousineau wore the lenses without incident until he went to a hospital emergency room on September 13, complaining that his eyes were burning and red
- ▣ At that time, Cousineau was diagnosed with corneal ulcers



For the jury to consider

- ▣ Was this a meritorious case?
- ▣ Which facts favor the plaintiff?
- ▣ Which facts favor the defendant?
- ▣ Was there a deviation from the standard of care?
- ▣ What about contributory negligence?

The verdict

The jury ruled in favor of the defendant, Ochsner Clinic. This appears to be a non-meritorious case because the corneal ulcers were not found to be the result of negligence. First, consider the time from when Cousineau first received the lenses from Ochsner Clinic in January, 1987 until he was diagnosed with corneal ulcers in September 1988, even though he complained of symptoms “almost immediately.” What’s more, he requested and received replacement lenses in November, 1987. It is highly unlikely that Cousineau had untreated corneal ulcers for 20 months. According to the record, there were no patently negligent acts or omissions by any of the Ochsner defendants that might have caused corneal ulcers in September, 1988, and they were not found to have deviated from a standard of care. (Note: Cousineau included the contact lens manufacturer in the suit. The manufacturer likewise was found not to be at fault.)

Professional liability insurance

Also known as Errors and Omissions Insurance, it insures a person or entity against claims of negligence by a third party in the rendering of professional services. It covers costs and settlements or judgements. However, it usually does not cover intentional wrongdoing or criminal acts. It is available through an employer, broker, or professional association.

There are two types of liability insurance. Prior Acts insurance covers claims made to incidents before the effective date of the policy. Extended Reporting insurance covers claims made after the policy ends for incidents that occurred while the policy was in effect. (Consider that in Cousineau vs. Ochsner Clinic, the corneal ulcers were diagnosed in 1988, but the case wasn’t decided until 1996. Settlements usually move faster.)

Before seeking out a personal liability policy, find out if you are covered by your employer. Depending on the complaint, the optician may still have liability as an individual, but targets are usually those with “deep pockets.” That is, directing a case toward the entity that is perceived to be able to pay a large judgement.

Other questions for the insurer are whether the policy covers proceedings by a regulatory body such as a licensing board. Look into when coverage begins. Is it with the initial complaint or at trial? Is there compensation for lost wages or income during the proceedings? Is there a deductible?

Summary

To summarize, if you think you shouldn't do something, DON'T! That can be difficult when a patient is angrily insisting that you back date an insurance claim, extend an expired contact lens prescription, etc. Ask yourself whether what the patient wants is worth your license or a law suit.

Document, document, document – everything. This includes patient complaints, your efforts to resolve them and conversations with the patient.

You are a professional. Be professional in every aspect of your work, in and out of the office.

The odds of a suit are small, but if it happens, consult an attorney.