

WAYS TO AVOID A MALPRACTICE CLAIM



Stay ahead of your game to keep your patients and your practice safe.

BY JOSHUA HANEN, JD, OD, FAAO

No medical professional wants to endure a time-consuming and stressful malpractice lawsuit. Almost 80% of malpractice claims last more than a year, and almost 40% of them last more than 3 years.^{1,2} An estimated 30% of physicians spend 40 hours just preparing for the case and 40 hours or more in court proceedings relative to a single malpractice claim.^{1,2} Optometric malpractice claims settle before a trial 98% of the time.³

DEFINING OPTOMETRIC MALPRACTICE

Optometric malpractice is the failure of an optometrist to provide medical treatment within his or her

level of professional competence, causing wrongdoing or damage to the patient. Elements of malpractice

include a professional duty owed to the patient, breach of such duty, injury caused by the breach, and resulting damages. Let us examine each of these elements in turn.

A *professional duty* owed to the patient is established when a physician affirmatively acts in a patient's care by diagnosing or treating the patient or agreeing to do so. Something as small as scheduling an appointment is considered a professional duty—even if the patient doesn't show up for the appointment. An informal consultation with a colleague could also form a professional duty, even if the doctor never meets the patient or knows the patient's name. Once treatment has begun, the doctor must continue to

AT A GLANCE

- ▶ Malpractice claims are stressful and time-consuming, with 40% of claims lasting more than 3 years.
- ▶ Most claims arise from lack of proper treatment for conditions such as glaucoma, retinal detachment, and cataract surgery postoperative care.
- ▶ As optometry care advances, optometrists will be required to adhere to higher standards of care.

BEHIND THE CLAIMS

Optometric malpractice claims commonly arise from lack of proper diagnosis or treatment for the following conditions:

- Amblyopia
- Cataract surgery
- Contact lenses
- Glaucoma
- Refractive surgery
- Retinal detachments
- Tumors

Errors commonly underlying malpractice claims include:

- Not performing a dilated examination
- Poorly explaining blurred vision
- Inadequate recall or referral
- Not prescribing impact-resistant lenses
- Not performing visual field testing
- Not obtaining informed consent
- Poorly explaining suspicious findings
- Improperly addressing adverse postoperative events

care for the patient or find a qualified colleague to take over that care.

Breach of a professional duty arises from any act or omission during treatment of a patient that deviates from the accepted norms of practice in the optometric community. What a reasonable, prudent, careful practitioner under similar circumstances would do is considered to be the proper standard of care. This can be shown through expert witness testimony, learned treatise, or practice guidelines. The standard of care evolves as the optometric industry advances.

INJURIES AND DAMAGES

Injuries caused by the breach of an optometric duty may include an infection, ocular discomfort, decreased vision, blindness, and even death. The injury must be caused

by the breach of the professional duty (ie, by the negligence of the doctor) to the patient in order to be actionable. For example, a doctor may misdiagnose a patient with retinitis pigmentosa, and that patient may lose vision. Because there is no known treatment for retinitis pigmentosa, however, and because the patient lost vision due to an underlying condition for which there is no treatment, that misdiagnosis did not cause injury to that patient.

Resulting damages often drive and shape the settlement, negotiations, and extent of malpractice claims.

Damage must occur in order for a malpractice claim to be actionable. Damages to the patient can include economic and noneconomic loss caused by the breach. Economic losses may include medical bills, lost

wages, and loss of future income. Noneconomic loss can refer to pain and suffering, disfigurement, blindness, etc.^{4,5}

Implications from past malpractice claims suggest that an optometrist must perform any and all readily available harmless testing that may be beneficial to a patient's care. Thus, the optometrist should not assume that malpractice claims can be brought only for failure to follow a practice guideline or a textbook (see *Behind the Claims*). A court can hold the optometrist liable for not using advanced diagnostic tests, not recommending the latest medical treatments, or not referring the patient for advanced surgical care.

STAY INFORMED AND EDUCATED

As optometric care advances, optometrists will be held to higher standards of care. Optometrists should consider incorporating new diagnostic instruments into their practices and be comfortable and familiar with prescribing the latest medical treatments, as well as performing or referring for surgical care. ODs should engage with their peers, regularly attend professional conferences, be aware of advances in the field, and read the professional literature. Essentially, embodying what it means to be a modern optometrist will help the practitioner avoid malpractice claims. ■

1. Chou B. Protect yourself from medicolegal risk. *Review of Optometry*. March 2017.

2. Kane L. Medscape malpractice report: Did they deserve to get sued? Medscape website. www.medscape.com/features/slideshow/malpractice-report/public#1. July 24, 2013. Accessed September 11, 2019.

3. Duszak RS, Duszak R Jr. Malpractice payments by optometrists: an analysis of the national practitioner databank over 18 years. *Optometry*. 2011;82(1):32-37.

4. Thomas AT. Restriction of tort remedies and the constraints of due process: The right to an adequate remedy. *Akron Law Review*. 2006;(39):975. <https://ideaexchange.uakron.edu/akronlawreview/vol39/iss4/5/>. Accessed September 11, 2019.

5. Ferrier C. The collateral source rule: a rule of evidence and a rule of damages. Georgia State College of Law Reading Room. May 1, 2004. https://reading-room.law.gsu.edu/cgi/viewcontent.cgi?article=1046&context=lib_student. Accessed September 11, 2019.

JOSHUA HANEN, JD, OD, FAAO

- River Lake Clinic, Minneapolis
- drjosh@riverlakeclinic.com
- Financial disclosures: None