



**F**ODO's inaugural legal events at Optrafair were staged in a remarkably relaxed atmosphere given the importance of matters discussed.

During two open and lively sessions, practitioners posed questions about patient records, NHS changes and fitness to practise investigations to FODO's legal experts.

In the first session **Judith Chrystie** and **Tom Rider**, partners of law firm Field Fisher Waterhouse, explained how the introduction of duty of candour as part of the Health and Social Care Act may affect practitioners.

This was followed by a discussion on liability and defence of eye care professionals on the second day of Optrafair, when representatives from law firm Berrymans Lace Mawer took questions from the floor.

### Regulations and contracts

This session commenced with a discussion on the likely reaction of regulators in the aftermath of the Mid Staffordshire NHS foundation trust scandal. Duty of candour had in any event become a consideration for optical practices providing NHS services, however this would be in sharper focus following the shocking events in Staffs. A duty of candour means the staff involved being obliged to report adverse incidents, in restricted circumstances, to their patients and their families.

With this closer focus on patient safety, increased reporting of complaints into the General Optical Council was also likely and needed to be planned for, however the Optical Confederation would be calling for a proportionate response.

'Optics doesn't kill people,' said Chrystie. 'It is a low-risk profession, however a similar level of regulation to a doctor or nurse is going to apply.'

Next the panel tackled the issue of patient confidentiality, given the requirement for compulsory peer review in the new CET cycle, with practitioners advised to consider data protection very carefully when discussing patient records as part of their peer review.

A domiciliary provider asked about handing patient information over in a care home setting, which also required due process and patient consent was recommended. Providers were told they could rightly assume in these circumstances that the care home manager has a right to hold

# Defence first

During Optrafair the Federation of Ophthalmic and Dispensing Opticians, as part of the Optical Confederation, attempted to sooth the legal headaches surrounding the changes to the NHS and GOC regulations. **Joe Ayling** reports from the 'FODO Fringe'



information about residents in the care home when they are clearly acting on the patient's behalf.

Discussing heavy-handed PPV activity by some PCTs including removing records and not returning them for long periods, Chrystie said: 'CCGs have the power to access information or have information produced to it, but that is different from taking the actual patient records. Other than on termination of a contract, there is not an express entitlement to have patient records delivered up.'

'Optical practices need to be quite robust, therefore, and insist that the actual records remain in the practice.'

FODO chief executive David Hewlett said: 'The problem is we are far too nice in optics and that's always been the problem. We've been a little remiss in this sector in resisting unreasonable demands. Our GP colleagues just would not stand for such bullying and we need to learn

### FODO's team answer members' questions at Optrafair

from their example.'

With PCTs abolished last month in line with the NHS reforms, new GOS contracts will be drawn up with NHS England via the 27 Area Teams to incorporate this handover. Meanwhile, eye care commissioning as a whole has entered a new era, with general practitioners leading the new groups, which provided new opportunities for enhanced services.

Chrystie said: 'Those of you who have been in optics for some time will know GPs often don't quite understand how the optometrist works so there is a challenge to convince them that we can deliver more care in the community.'

The introduction of Universal Credit, a benefits scheme currently being rolled out in the North West, could also present an administrative challenge when it came to patients from the North West having NHS eye tests elsewhere in the country, however it was clear under GOS rules



that individuals could access GOS anywhere, which would be clarified through Optical Confederation guidance.

### Liability and defence

The second day of FODO Fringe moved from regulations and contracts to liability and defence. Legal experts **Gary Allison** and **Laura Smith** of Berrymans Lace Mawer and FODO professional adviser **Professor Steve Taylor** discussed new and recurring fitness to practise issues facing optical professionals. Changes to GOC fitness to practise rules, including the appointment of case examiners, were expected to tighten up the complaints system.

Allison began by providing some figures on the average level of damages provided to patients who complain about lost vision.

'There is often talk of a compensation culture, but I don't think this exists,' he said. 'It's fascinating when you ask members of the public how much they think they ought to be awarded for the loss of sight.' Estimates vary widely but a person who has lost their sight in one eye could be entitled to around £36,000 compensation from the courts for their pain and suffering, Allison reported. 'To me, this doesn't suggest overcompensation,' he added. 'Claims and settlements have remained at about this level across the sector for several years suggesting to me that patients are seeking appropriate



Jayne Rawlinson, Tom Rider and Judith Chrystie

levels of compensation and not bounty hunting.'

However, this settlement did not account for loss of earnings, care needs and other factors such as enhanced holiday transport costs which could add up to much more depending on individual circumstances. Talking about compensation trends, Allison said a few decades ago there were fears incidents such as failure to detect retinal detachment and glaucoma could have caused a rise in claims, which never materialised.

'There was real potential for a spike in those trends but it hasn't happened. I think it is because of the hard work that has been done across the industry on clinical protocols. In our department, it is quite marked how much effort goes into clinical protocols, uniformity and consistency across the

sector,' he said. 'So the claims incidence that we saw never really ran away and spiked as it could have done as we have responded to maximise patient safety across optics.'

Allison added recent changes in claim legislation from April 1 could shake up the system. 'We might see a spike in claims over the next six months or so as we understand that many claimants signed up to Conditional Fee Agreements in February and March, as the Jackson costs reforms which prohibit recovery of success fees and insurance premiums from defendants were implemented on April 1,' he said.

Hewlett added that the spike should even out in the long-run as the underlying rates per 100,000 sight tests were stable and low against the 21 million sight tests carried out each year. Inevitably though, numbers of claims would increase proportionately as the number of sight tests rises.

The vast majority of patient complaints being made were over prescription spectacles and passed through the GOC, Hewlett added. Under the Opticians Act, the GOC does not have the power to screen out any complaints before they reach the Investigation Committee and a letter is sent out to the individual or business registrant. The Council's proposed appointment of case examiners was expected to help deal with this.

Smith said: 'A lot of the time patients go straight to the GOC and we can't

### WHAT THE GOC SAYS...

*Optician* took some of the queries raised at the FODO Fringe to the General Optical Council stand at Optrafair.

**Optician:** How will the introduction of duty of candour impact the way practitioners deal with patients and complaints?

**GOC:** The GOC and the other healthcare regulators are all carefully considering the Francis Inquiry and the Government's initial response to it. Although GOC registrants were not directly implicated in the Mid-Staffs scandal, there are still lessons for all healthcare regulators to learn.

With regard to the duty of candour and raising concerns, we will consider whether we need to strengthen our existing rules and guidance as part of our standards review later this year.

We will issue further detail later this year about how we plan to respond to the Inquiry. Any changes we may make to regulations will be proportionate and based on evidence of having a public protection benefit.

**Optician:** What is the guidance for patient confidentiality when peer review sessions take place under the new CET scheme?

**GOC:** When discussing real cases, registrants should not disclose confidential information such as names, addresses and dates of birth.

**Optician:** When do the GOC case examiners start their roles and will they reduce the average time for a FTP case to be resolved?

**GOC:** We expect the introduction of case examiners to speed up our fitness to practise process. We will make our guidance for case examiners publically available on our website, including our expected time limits for case outcomes. The implementation requires legislative change; we are currently working with the Department of Health to achieve this and do not yet have a timetable for case examiners to start.

**Optician:** Some practitioners are unhappy they are sent letters when a complaint is lodged that do not lay out the exact allegations. Is there a reason for this and is it something the GOC is looking to change?

**GOC:** When we receive a complaint, we share all relevant information that we have with the registrant but do not always have full details of the allegation. Sometimes, on investigation of an initial complaint, there can be a change in the scope of the allegations as more information comes to light. Our current process is in line with our legislative powers and we are not currently seeking to change it.

**Optician:** What is the average turnaround for fitness to practise cases and what is the GOC's internal target?

**GOC:** The median time from opening an investigation to a first FTP hearing is 91 weeks. We are working hard to reduce this through the introduction of case examiners, holding hearings more frequently and bringing in a new electronic case management system. We have already dramatically reduced the median time taken to make an interim order decision, where urgent action is needed to deal with the most serious allegations, from 37 weeks to 12 weeks.





**Jayne Rawlinson, Laura Smith, Gary Allison and Professor Steve Taylor discuss liability and defence. Allison dismissed talk of a compensation culture**

stop them. But it is disappointing when there is a complaint to the company that hasn't been handled properly.'

The GOC was also questioned for not framing any allegations in its letters that go out to registrants following a complaint.

Smith said: 'We understand that this can be a frustrating issue. The GOC send out a standard letter with a copy of the patient's complaint. The patient's

complaint might be three pages long with varying quality and it is for the registrant to ascertain which parts of the complaint amount to an allegation. Practitioners will want to ensure a thorough response to the GOC.'

Practitioners are given 28 days to respond to the GOC's Investigating Committee. If the case is referred on for a hearing then the GOC aims to conclude the process within six

months, which Smith acknowledged can be 'very stressful' both for the individual and business registrants.

Finally, the panel was next asked by chair **Jayne Rawlinson** what practical steps practitioners can take to deal with complaint issues.

Allison said the quality of the communications was all important. 'It is important to focus on the speed and quality of the response and to be honest and open to the complainant,' he said.

Managing the performance of individual practitioners was also deemed vital.

'Performance management is not about beating people with a stick, it is actually about thinking, learning, recognising where improved practice could benefit and approaching it with a much more supportive view,' added Rawlinson. ●

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