1959

Optometrists' Tort Liability

Gerald F. Sweeney

Follow this and additional works at: http://engagedscholarship.csuohio.edu/clevstlrev

Part of the Medical Jurisprudence Commons, and the Torts Commons

How does access to this work benefit you? Let us know!

Recommended Citation
Gerald F. Sweeney, Optometrists' Tort Liability, 8 Clev.-Marshall L. Rev. 263 (1959)

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized administrator of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.
Optometrists’ Tort Liability

Gerald F. Sweeney*

The question “Do you need glasses?” should be answered in the affirmative by many people, nowadays. Most of us, at some time, find it necessary to visit one of the many establishments for the correction of defective vision. When the time does arrive, we are confident that our chosen “professional” will fill our needs adequately, yet, mistakes and oversights occur. What happens when a serious injury occurs as a result of this possibility? This article attempts to answer that question briefly.

A recent case, Evers v. Buxbaum,1 had as the main issue this exact point. The plaintiff had gone to an unlicensed optometrist, who, in turn, sent him to a licensed optometrist for an eye examination. A possible pathology requiring medical care was discovered by the second optometrist. He informed the first optometrist of this fact. Neither told the plaintiff of his dangerous condition. The first optometrist sold him glasses and when the plaintiff tried them on he failed to note any improvement; but “Buxbaum said for me to wear the glasses and get used to them and that my eyes would adjust to them.” The plaintiff’s eyesight became worse. Eventually blindness developed in one eye. He sued both men for failure to discover and/or timely advise him of the presence of a tumor. There was a summary judgment for the defendants in the lower court. The plaintiff appealed, and the appellate court reversed and remanded, saying:

The question is whether or not in the execution of the duty of appellees owed to Evers, under all circumstances, they reasonably were required to impart to him the existence of a recognized need that he consult a doctor who might make a correct diagnosis. We cannot know whether or not if appellant had been referred to an opthalmologist on April 28, 1956, the tumor was discoverable or if so whether or not surgery at that early date could have led to the saving of the sight of this right eye. Whether or not Evers was actually induced by fraudulent misrepresentations to purchase the glasses, however tenuous the claim on the record here, is a matter of proof. Evidence as to all such issues (including

---


causation) must be developed in a trial whereupon the appellant may prove he is entitled to go to the jury.\textsuperscript{2}

The language of the court strongly indicates that an optometrist's failure to warn his customer of an eye pathology may be actionable.

It should be noted that in eye injury malpractice cases it is difficult to distinguish between the results of the alleged malpractice and ordinary and unavoidable results of the treatment of the original injuries. Due to the delicacy of the eye structure, even a slight injury may produce very serious results. Surgery seldom is undertaken except in cases where the loss of vision is threatened as an effect of the diseased condition.\textsuperscript{3}

For intelligent insight into this matter, it is necessary to make a brief survey covering the field. The first step is to define optometry and to distinguish an optometrist from an oculist and an ophthalmologist.

Optometry is the employment of any means, other than the use of drugs, for the measurement of the power or range of human vision or the determination of the accommodative and refractive states of the human eye or the scope of its functions in general or the adaptation of lenses or frames for the aid thereof.\textsuperscript{4}

An optometrist examines eyes for refractive error, recognizes, but does not treat diseases of the eye, and fills prescriptions for eye glasses.\textsuperscript{5}

An oculist is a physician who specializes in the diagnosis and treatment of diseases of the eye. He also examines eyes for the purpose of determining whether or not glasses are needed, and prescribes lenses when necessary for the correction of vision.\textsuperscript{6}

An ophthalmologist, the technically correct name of an oculist, is a duly licensed physician who specializes in the care of the eyes. He is one who is skilled in the physiology, anatomy and diseases of the eye.\textsuperscript{7}

The basic distinction between the optometrist and the oculist, or the ophthalmologist, lies in the fact that the calling of either of the latter two has relation to the practice of medicine, whereas

\textsuperscript{2} Id. at p. 361.
\textsuperscript{3} 13 A. L. R. 2d 11, 94 (1950).
\textsuperscript{4} 41 Am. Jur. 134, Phy. & S. Sec. 2, n. 6 (1942).
\textsuperscript{6} 70 C. J. S. 809, Phy. & S., Sec. 1 (1951).
\textsuperscript{7} State v. Yegge, 19 S. D. 234, 103 N. W. 17 (1905).
the calling of the former has relation to the measurement of the powers of vision and the adaptation of lenses for the aid thereof.\(^8\)

The second step in the survey is to illustrate that optometry and related fields have been the subject of regulation by governmental bodies for a number of years. The basis for this regulation is that "the preservation and protection of the public health is one of the duties devolving on the state in the exercise of its inherent police power."\(^9\) Thus, to illustrate, the same power and the same justification for state regulation of physicians extends to the regulation of optometrists or other persons treating defective vision without the use of drugs or surgery.\(^{10}\)

In recent years many states have adopted statutes especially regulating the practice of optometry, which provide for the granting of special or limited licenses to persons practicing that system for the correction of vision without the use of drugs.\(^{11}\) Such statutes usually, if not always, define the practice of optometry, and either in express terms or by necessary implication restrict a licensee in optometry to the practice of that branch of the healing art as it is defined and limited in the statute.\(^{12}\) Whether or not the practice of optometry and other drugless methods of treating the eyes or correcting vision, solely or chiefly by mechanical means and medicine, constitutes the practice of medicine in any given case depends on the acts and conduct of the practitioner and the terms of the particular statute involved.\(^{13}\) It depends, too, on the terms of the statutory definition of the practice of medicine. Thus, in the absence of a statute specifically exempting the practice of optometry, such practice has been held to be within the meaning of a statute defining the practice of medicine in very broad and comprehensive terms,\(^{14}\) but not where optometry is the subject of a separate regulatory statute which specifically provides it shall not be construed as the practice of medicine or surgery.\(^{15}\) An optometrist's examination of the eyes for the purpose of determining whether such person's disorders of the eyes are due to a diseased condition or to some defect of

---

\(^8\) Silver v. Lansburgh, 111 F. 2d 518 (D. C. Cir. 1940).


\(^{10}\) Ibid., 139, n. 8.

\(^{11}\) McNaughton v. Johnson, 242 U. S. 344 (1917).


\(^{14}\) Ibid.

\(^{15}\) Ibid.
vision which can be corrected by lenses is regarded by some courts as a diagnosis, and hence, as the practice of medicine,\textsuperscript{16} while in other jurisdictions the contrary conclusion has been reached.\textsuperscript{17} It has been held that one advertising as an "eye expert" and offering to treat named disorders, which frequently result from defective vision, does not thereby practice medicine where he does no more than examine eyes and fit spectacles to persons of defective vision. But where the examination of the eyes and the fitting of glasses has been accompanied by the prescribing of drugs, the courts have usually held the persons doing such acts to be engaged in practicing medicine within the meaning of the statute.\textsuperscript{18}

A state may, in the exercise of its police power, regulate the practice of optometry and confine to registered optometrists who have passed the examination prescribed by statute the right to employ means other than drugs to measure the range of human vision and the accommodative and refractive states of the human eye.\textsuperscript{19} A constitutional prohibition of preference to any school of medicine does not prevent the legislature from defining the practice of medicine or from excluding from such definition the practice of optometry so as to distinguish between optometry in its strict, technical sense and acts by optometrists which only a licensed physician may legally perform.\textsuperscript{20} The question has frequently arisen whether a corporation or unlicensed persons may practice optometry through duly licensed optometrists. The answer is usually to be found in the special facts and circumstances of the particular case,\textsuperscript{21} except where the statute regulating optometry expressly limits the practice thereof to duly licensed individuals or persons.\textsuperscript{22} Under another statute which treats optometry merely as a mechanical art, it has been held that a corporation may engage therein, through licensed optometrists, on the ground that such practice involves no such personal relationship as exists between physician and patient.\textsuperscript{23} To illustrate specifically, it has been held that

\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid.
\textsuperscript{19} McNaughton v. Johnson, supra n. 11.
\textsuperscript{20} Baker v. State, supra n. 12.
\textsuperscript{21} Baker v. State, supra n. 12; 102 A. L. R. 343 (1936).
\textsuperscript{23} Silver v. Landsburg, supra, n. 9.
opticians who merely fill prescriptions of licensed optometrists who occupy adjacent office rooms under a reciprocal arrangement by which the opticians provide the offices and necessary equipment, but which includes no splitting of fees and no employer-employee arrangement, are not engaged in the unlicensed practice of optometry.\textsuperscript{24} A regulation requiring optometrists to be licensed and providing that nothing therein contained shall prohibit the operation in a department store of an optical department under supervision of a duly licensed optometrist does not prohibit such a store from merely selling optical goods without employing a licensed optometrist.\textsuperscript{25} A state may, however, provide by statute that eyeglasses, spectacles and lenses cannot be sold unless a duly licensed physician or a duly qualified optometrist is in charge of and in personal attendance at the place where such articles are sold.\textsuperscript{26} An ophthalmologist who treats eye complaints and holds himself out to the public as a doctor is usually regarded as practicing medicine.\textsuperscript{27}

Some specific examples of this regulation can be found in Ohio, California, and New York.

Ohio's Revised Code covers the subject of optometry in Sections 4725.01 to 4725.99. These sections deal with the necessity of acquiring a license before a person can hold himself out as a practitioner of optometry (§ 4725.02). They also regulate the examination given to these practitioners (§ 4725.08), as well as setting forth various acts which are prohibited in the practice of optometry (§ 4725.09).

The penal statute is § 4725.99. It states:

Whoever violates section 4725.02 of the Revised Code shall be fined not more than five hundred dollars for the first offense; for each subsequent offense such person shall be fined not less than five hundred dollars, nor more than one thousand dollars, or imprisoned not less than six months nor more than one year.

California's statutes, dealing with optometry, are Division 2, Chapter 7, Articles 1-7. They are similar to the Ohio statutes covering the same subject. However, the punishment for a violation of any of the provisions in Article 6 is broader.

\textsuperscript{24} State ex rel. Bierring v. Ritzhol, 226 Ia. 70, 283 N. W. 268 (1939).
\textsuperscript{26} Roschen v. Ward, 273 N. Y. 75, 279 U. S. 337 (1928).
Section 3120 of Article 6 provides that:

Any person who violates any of the provisions of this chapter is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not less than ten days nor more than one year, or by a fine of not less than one hundred dollars nor more than one thousand five hundred dollars, or by both such fine and imprisonment.

New York's regulation of optometrists is covered under Education Law, Sections 7101-7111. They set forth the definition of an optometrist in Section 7101, and deal with the qualifications for practice; establish a state board of examiners; require the giving of examinations, and issuing licenses and certificates, and finally provide a penalty for the violation of these statutes.28

One of the leading New York cases exemplifying this regulation of optometry is Findlay Strauss, Inc. v. University of State of New York.29

The third step attempts to show how a legal standard of care is arrived at in determining whether or not a negligent act has been performed. The whole theory of negligence presupposes some uniform standard of behavior. Yet, the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct.30

The courts have dealt with this difficult problem by creating a fictitious person, the "reasonable man of ordinary prudence." The characteristics of this imaginary person include:

(a) The physical attributes of the actor himself
(b) Normal intelligence and mental capacity
(c) Normal perception and memory, and a minimum of experience and information, common to all the community
(d) Such superior skill and knowledge as the actor has, or holds himself out as having, when he undertakes to act.31

28 N. Y. Statutes, 3 C. L. S. 579.
29 270 App. Div. 1060, 62 N. Y. S. 2d 892 (1946). The statutory power of regents to supervise the practice of optometry includes making rules pertaining to professional conduct. The Board of Regents had jurisdiction to adopt rules governing the practice of optometry relating to price advertising and unprofessional conduct which would prevent employers of optometrists from making sales of spectacles dependent on an examination by employed optometrists at prices which include such examination to be made without cost to purchaser.
30 Prosser, Torts 131 (2d ed. 1955).
31 Id., p. 124.
The jury is instructed to pose the question, "What would a reasonable man do under the same or similar circumstances?" It is then for the jury to decide whether the act of the person in the disputed case compares with the act, or behavior, of the imaginary reasonable man. If it does, then he is not guilty of negligence. If it does not, then he is guilty of a negligent act.

The characteristic that seems most important in our study of optometrists' tort liability is (d). Professional men in general, and those who undertake any work calling for special skill, are required not only to exercise reasonable care in what they do, but also to possess a degree of special knowledge and ability ordinarily found in the profession. Most of the decided cases have dealt with physicians and surgeons, but the same is undoubtedly true of many other "professions." A case in point is Kahn v. Shaw.32

In that case the plaintiff, a minor of tender years, was suing an optometrist for $5,000 damages on account of the alleged negligence of defendant, in treating the plaintiff's eyes. Plaintiff was examined by defendant and received a prescription for corrective glasses. After wearing the glasses for several weeks, plaintiff returned to the optometrist and complained of headaches and nausea. The plaintiff was assured by the defendant that this condition would subside. He continued wearing the glasses and the promised results did not materialize. Plaintiff then went to an oculist for an examination. The oculist testified the prescription given to the plaintiff by the defendant differed greatly from the one he finally gave the plaintiff. He also testified that the defendant did not dilate the eyes of the plaintiff before the initial examination, and that this was very necessary when examining minors. The jury found for the plaintiff. The defendant appealed. The higher court agreed that the evidence supported the verdict. In reference to paragraph one of the syllabus the court says:

A skillful and careful diagnosis of the trouble from which the patient is suffering is one of the fundamental duties of a physician, and if he fails in that regard as well as in the application of proper treatment and damages result therefrom, the physician must answer.33

32 65 Ga. 563, 16 S. E. 2d 99 (1941).
33 Ibid., p. 102, 16 S. E. 2d 99 (1941).
Furthermore, malpractice may consist in a lack of skill or care in diagnosis, as well as in treatment.\(^{34}\) Without deciding whether the practice of optometry is a learned profession, the defendant should certainly exercise skill and care in the examination of a patient’s eyes, and in prescribing and fitting of glasses, and whether or not the facts of this case showed negligence on the part of the defendant in his examination and treatment of the plaintiff, was for the jury. In determining what constitutes ordinary care and what constitutes negligence the jury would not be confined to the testimony of an optometrist as to what constitutes ordinary care and skill in the examination and treatment of a person’s eyes, including the fitting of glasses.\(^{35}\)

*Jensen v. Findley*\(^{36}\) is another case in which the degree of care was defined:

One who holds himself out as a specialist in the treatment of a certain organ, injury or disease, is bound to bring to the aid of one so employing him, that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury, or disease, its diagnosis, and its treatment, in the same general locality having regard to the state of scientific knowledge at the time.\(^{37}\)

Not only is there a standard of conduct required of optometrists in the examining of eyes but, there is the duty to inform the customer of the true results of the examination. The Court of Appeals in *Evers v. Buxbaum* had this to say:

Buxbaum had undertaken an affirmative line of conduct, and throughout he was under an affirmative duty to take whatever precautions were reasonably required to protect Evers from negligence stemming from that conduct. The simple subsisting fact is that when he was under a duty to speak he chose not to do so.\(^{38}\)

The fourth, and final step of this survey is a review of the leading cases covering the general field of optometry and ophthalmology.

The first case, *D. S. Kresge Company v. Ottinger, Attorney General*,\(^{39}\) dealt with a New York statute prohibiting the sale of

---

\(^{34}\) Kuechler v. Volgmann, 180 Wis. 238, 192 N. W. 1015 (1923).

\(^{35}\) Kahn v. Shaw, supra, n. 33. See also 21 R. C. L. 388 (1918).


\(^{37}\) Id., 62 P. 2d at 430.

\(^{38}\) Evers v. Buxbaum, supra n. 1 at p. 359.

\(^{39}\) 29 F. 2d 762 (1928), affd. 279 U. S. 337 (1929).
eyeglasses in any store, unless a duly licensed physician, or optometrist was in charge of and in personal attendance. The plaintiff sought to enjoin the enforcement of this statute. Kresge Company alleged that it had fifty stores in New York and that it would have been impossible to continue selling eye glasses if they were required to hire an optometrist, or a physician for each store. The court held the statute not to be void and denied the injunction.

In *Silver v. Lansburgh & Brothers*,\(^{40}\) the issue was, whether a corporation in the District of Columbia could employ a licensed practitioner of optometry to perform optometrical services for those to whom the corporation offered such services. The plaintiff based his claim upon the ground that optometry was a learned profession, and as such, prohibited the practitioner from any affiliation or connection with a corporation. The court found that optometry is a mechanical art which requires skill, but is not a learned profession and therefore ruled in favor of the defendants.

In *Williamson v. Lee Optical Company*,\(^{41}\) an Oklahoma statute dealing with the regulation of visual care was upheld. The U. S. Supreme Court ruled that no due process violation resulted from the statute's provisions which (1) prohibited an optician from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist; (2) prohibited the advertisement of spectacles, eye glasses, lenses or prisms, or eye-glass frames, mountings, or other optical appliances; and (3) barred operators of retail stores from furnishing space therein to any person purporting to do eye examination or visual care. It was held, further, that no invidious discrimination, violative of the equal protection clause of the Fourteenth Amendment, inhered in the statute's exemption from regulation of sellers or ready-to-wear glasses.\(^{42}\)

The Supreme Court of Louisiana, in *Stern v. Lanng*,\(^{43}\) was concerned with the alleged malpractice of an oculist. The action was for the alleged unskilful and negligent manner in which the defendant, as a physician, performed the duty he had assumed. The rule is well settled that the oculist who treats a patient must exercise in that regard the care and skill usually exercised by

---

\(^{40}\) Supra n. 8.

\(^{41}\) Supra n. 5.

\(^{42}\) Supra n. 5. See also "Regulation of Visual Care," 99 L. Ed. 574 (1955).

\(^{43}\) 106 La. 738, 31 So. 303 (1901).
an oculist in good standing. He may be rendered liable for his
gross mistakes. But it was not shown by a preponderance of
testimony that defendant, through want of skill or negligence,
committed a mistake for which he can be held pecuniarily liable.
Experts testified that he followed the established practice, and
it was not shown that he committed a gross error, the proximate
cause of the injury of which plaintiff complains.

In the case of *Hampton v. Brackin's Jewelry and Optical
Co.*, the plaintiff sued the defendant, under the doctrine of
*respondeat superior*, for the alleged negligence of its servant, a
licensed optometrist. The court found there was a master-servant
relationship, and then went on to answer the plaintiff's complaint.
The complaint consisted of four counts. Count 3 proceeded upon
the theory that the plaintiff was suffering from a disease of the
eye, which could not be remedied by the application of glasses,
or mechanical treatment, but which could have been remedied or
cured by medical treatment, but that nevertheless the defendant's
optometrist, after an examination of plaintiff's eyes, fitted plain-
tiff with glasses, and represented to her that the glasses would
cure the trouble. This count further alleged that by defendant's
action and representation the plaintiff was prevented from secur-
ing treatment by a doctor or specialist, and that by reason of the
delay in securing medical treatment plaintiff lost the sight of
one of her eyes, which could have been saved by a specialist and
deterioration of the sight of the other eye could have been
stopped.

The court in considering this count first referred to the
International Encyclopaedia. Under the stimulus of legislation,
optometry as a science has rapidly developed, and improved
instruments for the examination of the eye, as well as many
advances in the adaption of lenses to correct visual errors have
been introduced. Students are now thoroughly grounded in the
science of optics as a preliminary to the examination of the
eye. While no attempt is made to teach diagnosis and treatment
of eye diseases, and while dilation of the pupil with drugs is for-
bidden by law, the student is taught to distinguish between mere
refractive errors and pathological conditions of the ocular tissue.
All the processes connected with the manufacture of lenses are
also studied.\textsuperscript{45}

\textsuperscript{44} 237 Ala. 212, 186 So. 173 (1939).

The Court continues: "Clearly then the duty resting upon the optometrist was to make an examination of the plaintiff's eyes for the purpose of ascertaining any departure from normal vision. If, however, in the performance of those duties it would be apparent to a skillful optometrist that there existed in the eye under examination a disease or malformation, we would not say that it would not be his duty to so advise his patient so that proper medical or surgical treatment might be had." 46 On the undisputed evidence in this case it was apparent that the disease of plaintiff's eyes was not such as that it should have been detected by a skillful optometrist in the performance of the duties pertaining to his profession, and that he did not discover such a condition to exist. And, therefore, he did not breach a possible duty in that connection.

The case of Colin v. Smith 47 illustrates that a tort action does not act as a bar to a contract action. In the first action, plaintiff alleged defendant used insufficient anesthesia as a result of which her eye was injured during a spasm. In the second action plaintiff sued for breach of contract whereby she alleged that she hired defendant as a specialist in the field of eye surgery to remove a cataract; that he failed to remove the cataract; that he injured her eye during the operation and as a result she lost light perception and vision, and had a droopy lid. The court held that plaintiff could maintain both actions, that the first was not a bar to the second since different facts would have to be proved in each action, and the recovery had in each would compensate for different damages.

The statute of limitations, as a general rule in most jurisdictions, begins to run from the date of the wrongful act or omission (except in the case of fraudulent concealment) and not from the date of the damage. 48 However, the running of the statute of limitations is not suspended by the mere fact that treatment continues after the original act. But where the injurious consequences arise from a course of treatment, the statute does not commence to run until the course of treatment is terminated. The malpractice is regarded as a continuing wrong and the fact

46 Hampton v. Brackin's Jewelry, supra n. 44, at 179.
that a substantial portion of the injury resulted before completion of the treatment is immaterial.\textsuperscript{49}

This point is brought out in the case of \textit{Shives v. Chamberlain} \textsuperscript{50} where the loss of vision in the right eye occurred more than two years before institution of legal action, but treatment to the other eye continued within the two-year limit. The court held that the plaintiff could recover for loss of vision of the right eye as well as impairment of vision of the left. The physician's continued treatment constituted a continuing wrong causing the statute of limitations to start running when treatment ceased.

The concluding three cases will serve as illustrations that the amount of damages awarded for eye injuries varies in each case. In California, a plaintiff was awarded a $15,000 judgment for the loss of the right eye after a nasal operation for asthma.\textsuperscript{51} In \textit{Dean v. Dyer},\textsuperscript{52} $8,500 was awarded when a physician erroneously and negligently inserted a caustic solution in plaintiff's eye, causing loss of vision in that eye, despite the fact that vision would have been imperfect in any event. The case of \textit{Shives v. Chamberlain} \textsuperscript{53} resulted in an $18,000 judgment in favor of plaintiff for the loss of sight in one eye and damage of vision in the other caused by negligent and erroneous diagnosis of glaucoma.

\textsuperscript{49} Ibid.
\textsuperscript{50} 168 Or. 676, 126 P. 2d 28 (1942).
\textsuperscript{51} Langford v. Kosterlitz, 107 Cal. 175, 290 P. 2d 80 (1930).
\textsuperscript{52} 64 Cal. 646, 149 P. 2d 288 (1944).
\textsuperscript{53} Supra n. 50.