



National Academy of Opticianry

Continuing Education Course

Approved by the American Board of Opticianry and the National Contact Lens Examiners

Professional Liability for Opticians: A procedure to minimize the exposure to liability - Part II

National Academy of Opticianry

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National Academy of Opticianry

PREFACE:

This continuing education course was prepared under the auspices of the National Academy of Opticianry and is designed to be convenient, cost effective and practical for the Optician.

The skills and knowledge required to practice the profession of Opticianry will continue to change in the future as advances in technology are applied to the eye care specialty. Higher rates of obsolescence will result in an increased tempo of change as well as knowledge to meet these changes. The National Academy of Opticianry recognizes the need to provide a Continuing Education Program for all Opticians. This course has been developed as a part of the overall program to enable Opticians to develop and improve their technical knowledge and skills in their chosen profession.

The National Academy of Opticianry

INSTRUCTIONS:

Read and study the material. After you feel that you understand the material thoroughly take the test following the instructions given at the beginning of the test. Upon completion of the test, mail the answer sheet to the National Academy of Opticianry, 8401 Corporate Drive, Suite 605, Landover, Maryland 20785 or fax it to 301-577-3880. Be sure you complete the evaluation form on the answer sheet. Please allow two weeks for the grading and a reply.

CREDITS:

The American Board of Opticianry and the National Contact Lens Examiners have approved this course for one (1) Continuing Education Credit toward certification renewal. To earn this credit, you must achieve a grade of 80% or higher on the test. The Academy will notify all test takers of their score and mail the credit certificate to those who pass. You must mail the appropriate section of the credit certificate to the ABO and/or your state licensing board to renew your certification/licensure. One portion is to be retained for your records.

AUTHOR:

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COURSE LEVEL:

Intermediate

COURSE DESCRIPTION

The professional liability of opticians and a procedure to minimize that risk is studied in this report. There is a review of the legal basis for lawsuits and a description of the liability laws and how they relate to the practice of opticianry. The course includes a discussion of the quantity of opticianry litigation in the courts today as well as areas of potential litigation. Finally, the author makes numerous recommendations to the practicing optician in order to reduce the litigation risk of day-to-day opticianry.

INSTRUCTIONAL OBJECTIVES

Upon completion of this course you should be able to:

- Understand the significance of the opticianry liability issue in today's marketplace
- Identify the most common areas of opticianry litigation.
- Describe the variables associated with and the degrees of impact resistance in common lens materials.
- Explain the legal basis for opticianry litigation.
- State the necessity of obtaining and scrupulously following industry standards in everyday opticianry practice.
- Outline the steps that need to be taken in everyday opticianry practice to minimize your exposure to liability.

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**PROFESSIONAL LIABILITY FOR OPTICIANS:
A Procedure to Minimize the Exposure to Liability
PART II**

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INTRODUCTION

In part one of this report, we identified and defined our professional liability problem, investigated the literature related to opticianry liability, learned of the many legal aspects to professional liability and delved into lens materials. Many of the myths prevalent in the optical industry were also exposed along the way. Part two of this report will focus on interesting statistical data, draw conclusions from that data and most importantly, provide extensive guidance to the optician in the form of an approach to minimize their liability as they perform their vital role in vision care on a daily basis.

DEFINITION OF TERMS

A.N.S.I.

American National Standards Institute --A private corporation which develops and publishes standards and guidelines for many industries, including eyecare.

A.S.T.M.

American Society for Testing Materials -- A private corporation which tests the safety of eyewear and certifies it acceptable for specific sports. Their evaluation simulates the impact that one would receive if participating in a particular sport. The testing is done on an entirely voluntary basis.

Express Warranty

A statement of fact from the seller concerning the sale of goods (*Starsky, 1990*).

Fiduciary

In general, a person is a fiduciary when he/she occupies a position of trust or confidence in relation to another person or his/her property (*Corley, 1979*). Here it is used to describe the relationship between an optician and their patient.

Implied Warranty of Fitness

The consumer is entitled to believe that the goods are fit for a particular purpose, as distinguished from ordinary use. The buyer is relying on the seller's (optician's) expertise (*Starsky, 1990*).

Implied Warranty of Merchantability

The consumer is entitled to believe that the goods purchased are fit for the ordinary purposes for which the goods are intended and used (*Starsky, 1990*).

Liability

In its broadest legal sense, the word means any obligation one may be under by reason of some rule of law (*Corley, 1979*). Here it is applied to both professional and product liability.

Negligence

The failure to do that which an ordinary, reasonable, prudent person would do, or the doing of some act that an ordinary, prudent man would not do. Reference must always be made to the situation, the circumstances, and the knowledge of the parties (*Corley, 1979*). Here it means that the courts will decide if the optician behaved in a manner consistent with other, reasonable opticians.

Optician

One who is extensively trained in the interpreting of ophthalmic prescriptions and applies that knowledge to obtain the optimum visual and safety performance for the patient in a pair of spectacles or contact lenses (*Ophthalmic Dispenser*) (*Thomas, 2004*).

Polycarbonate

A thermo set plastic ophthalmic lens which is one of the lightest and is the most impact resistant lens material available. It also boasts of 99% ultra-violet radiation absorption and a scratch resistant coating as standard (*Drew, 1990; Karp, 2004*).

Product liability

An area of liability caused by products that have been placed on the market and prove defective in some manner. The causes of lawsuits are: negligence, breach of express warranty, common law deceit, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, and strict liability. The areas of defect are:

- **Manufacturing defect:** The product does not conform to its design.
- **Design defect:** The product does conform to its design, but the design is defective in some manner.
- **Defective warning:** There are no effective instructions or warnings to go with the product. The consumer should have been told what the product can and cannot do (*Starsky, 1990*).

Strict liability

The general meaning is liability without fault. If you engage in a certain kind of conduct that causes harm, liability will result irrespective of intent, negligence or innocence (*Starsky, 1990*).

STATISTICAL DATA

The researcher attempted to document an increase in opticianry litigation with sound statistical information. In addition, the researcher attempted to uncover sound statistical information on ocular injuries. Although some of the statistics were impossible to uncover, the researcher feels there is substantiation for the research hypothesis.

To begin with, examine the immense disparity between what the average optician is testing for via government mandated impact resistance tests and some examples of the decidedly stronger impacts encountered in sport activities. The dress drop-ball test evaluates .15 foot-pounds of pressure exerted on the lens while the sport impact could be as great as 52 foot-pounds of pressure exerted on the lens!

FDA DROP BALL TEST AND IMPACT EXAMPLES

COMMON SPORT IMPACT EXAMPLES

- Racquetball 85 - 110 MPH 21 - 36 foot pounds
- Squash 130 - 140 MPH 25 - 29 foot pounds
- Badminton 105 - 145 MPH 3 foot pounds
- Tennis 85 - 110 MPH 31 - 52 foot pounds
- Handball 55 - 70 MPH 14 - 23 foot pounds

FDA DROP-BALL Tests:

- 1 inch steel ball = **.62 foot pounds!**
- 5/8 inch steel bail = **.15 foot pounds!**

Using a 1/4 steel ball, the pressure required to break an ophthalmic lens on average is:

- 2mm heat treated glass - .057 foot pounds
- 2mm chemically treated glass - .41 foot pounds
- 2mm ophthalmic plastic - .59 foot pounds

By comparison, a common magazine tossed across an average living room generates 2.25 foot-pounds of pressure!!

Polycarbonate withstands impacts greater than 8.8 foot-pounds

SOURCE: John K. Davis, Gentex Optics and Sports Ophthalmology, Ch. two.

As it turns out, it appears that there are no statistics maintained on the quantity of opticianry lawsuits. Paul Houghland, Jr., past executive director of the Opticians Association of American, expressed the opinion that the vast majority of cases are settled out of court with non-disclosure clauses (see *Appendix A*). Dr. Chase also feels that this is the case. In fact, he feels that only 1% of such cases ever reach a courtroom (*Chase, 1988*). This is further substantiated by Bruneni (1997) and legal search firms.

While there does not appear to be direct substantiation for the quantity of opticianry litigation, there is anecdotal and ancillary support. Expert witnesses are not complaining about being out of work, and indeed claim that the number of suits is on the rise (*Woods, 1992; Bruneni, 1997; Nunes, 2016*).

The ancillary support stems from the injury projections compiled from the U.S. Consumer Product Safety Commission, National Electronic Injury Surveillance System (NEISS) and published by Prevent Blindness America. Prevent Blindness America says that there were 2.5 million ocular injuries in the United States during 2016. 50,000 of those injured parties have lost part or all of their vision. In the workforce alone, there are over 2,000 ocular injuries a day! That amounts to well over 700,000 occupational injuries last year. Of those 700,000, 10% to 20% will suffer some form of vision loss. Around the household alone, Prevent Blindness states there were 125,000 ocular injuries last year. While detailed statistics are not kept for all categories, Prevent Blindness America offers statistical support for sport and recreational injury increases in recent years:

SPORT AND RECREATIONAL EYE INJURIES

	1986	1991	2002	2003	2016
0-14 years old	_____	15,323	13,243	_____	14,178
Total – All ages	35,781	39,526	35,633	40,000	34,746

As the data shows, there was a slight decrease in total eye injuries in the most recent year but still almost 35,000 sport related injuries occurred! Furthermore, there was a 29% increase in childhood ocular injuries from 1978 to 2016! While some of these increases may be accounted for by population increases or an increase in participants, the numbers are still daunting. Historically, the top three causes of sport injury were baseball, basketball and racquet sports. In 2002, basketball and baseball retained their positions in the top three, but aquatic sports came in at number two. In that same year, there was an unexplained drop in racquet sports all the way to number seven. As of 2003, the top three are back in their usual position of baseball, basketball and racquet sports. However, there were significant shifts in the most recent data. The top three sport activities for ocular injuries in 2016 were 1) water and pool activities, 2) basketball and 3) projectiles (guns, darts, arrows, & slingshots). Baseball remains a significant threat coming in at number four while racquet sports dropped to number ten, most likely due to a decline in participants. It is noteworthy to mention that the top three sport injury categories usually produce at least forty percent of the total of all injuries from sports and this year account for 43.3% (*Prevent blindness*, 2017). Furthermore, Prevent Blindness America estimates that over 50,000 of all annual ocular injuries from all sources will result in either temporary or permanent loss of vision.

WHERE DO ALL THE INJURIES COME FROM?

	1986	1991	2002	2003	2016
0-14 years old	_____	15,323	13,243	_____	14,178
Total – All ages	35,781	39,526	35,633	40,000	34,746

Childhood sport ocular injuries increased 29% from 1978 to 2016!

Americans received 2.5 million ocular injuries at home, work, and play. Total sport ocular injuries have remained virtually constant with almost 35,000 injuries in 2016. About 50,000 of the total ocular injuries will result in some loss of vision!

The top three causes of sports injuries historically:

- **1. Baseball**
- **2. Basketball**
- **3. Racquet Sports**

The top three causes of sports injuries in 2016:

- **1. Water and pool activities**
- **2. Basketball**
- **3. Projectiles (guns, darts, arrows, slingshots)**

Source: U.S. Consumer Products Safety Commission, National Electronic Injury Surveillance System (NEISS) as published by Prevent Blindness America and the Prevent Blindness website accessed 8/10/17.

These statistics certainly and minimally bolster the need for specific frame and lens protection. They also bolster the optician's need to uncover these uses for eyewear when they are at the dispensing table. Erie reports that penetrating injuries to the globe are relatively uncommon in sports. However, when they do occur, they are generally the result of eyeglass breakage with parts of the lens and/or frame being driven into the globe (*Erie*, 1991, p. 112; *Gregg*, 1987, p. 117)!

While the researcher cannot directly substantiate the hypothesis, the researcher feels that these indirect sources do provide substantiation. If not in actuality, they certainly substantiate the enormous potential for opticianry litigation in the United States. It further substantiates the need for opticians to be better informed on this subject and to have a cohesive plan to minimize their exposure to liability. The literature review and injury data certainly establishes the need for a structured procedure to reduce liability exposure and that procedure will certainly include the usage of polycarbonate lenses.

V. Conclusions and Recommendations

The following recommendations, formulated directly from the findings of this investigation, suggested future courses of action be considered seriously by all dispensers of ophthalmic goods. While some of these recommendations are relatively simple to incorporate into the daily practice of opticianry, others will require some thought and consideration before implementation.

However, none of these recommendations are more important than the others. Therefore, all opticians should seriously consider the implementation of all of these recommendations. Remember, it is virtually possible for anyone to sue anyone else for just about any reason. The suit may not be successful, but it can still occur. So, while it is impossible to protect against all sources and causes of liability, following these recommendations will at least minimize the extent of the optician's exposure to liability.

1. Review professional liability coverage and get product liability coverage. Locate an insurance carrier who has supplied coverage to other opticians. Their knowledge of the profession will help to ensure proper coverage. Consider an additional umbrella policy to extend coverage inexpensively to areas of the unforeseen (*Appler, 1999, p. 43*).

2. In the event of a liability action, be sure to hire a lawyer to work with the insurance company. This lawyer can help to prevent an out-of-court settlement that may be beyond policy limits and become a personal obligation (*Appler, 1999, p. 43*).

3. Obtain, learn and utilize copies of the ANSI and ASTM standards. Keep copies readily available for personal and staff reference. Be sure to know any applicable state standards and/or tolerances. Ignorance of these standards is no defense (*Chase, 1988; Woods, 1992, p. 252*).

4. Know all ophthalmic products well and, more importantly, know and understand their limitations. Keep abreast of the industry changes with journal reading, convention attendance and discussions with colleagues. Being ignorant of a new product or procedure is no defense but it can increase liability (*Chase, 1988*). Just imagine an optician who does not know that polycarbonate is a lens choice!

5. Never mix dress lenses/frames with occupational safety lenses/frames! Regardless of the rationale, this would be virtually impossible to defend (*Chase, 1988*).

6. Always supply and explain all of the information provided by the manufacturer. Patients have the right to be informed of a product's proper use, limitations and maintenance (*Bruneni, 1997; Woods, 1992*). One popular sport frame has a caution regarding temperature and the patient needs to know this fact – it is our duty to warn. Always document that this information has been given to the patient.

7. Analyze all product literature and promotional literature for misleading comments and/or misrepresentation. A simple display card showing someone engaged in a sport while wearing dress frames could lead to an adverse decision because it sends the wrong message to the consumer (*Chase, 1988*).

8. Become aware of the language used and that of co-workers. Be sure that misleading comments are not being used. Correct patients when they use wrong or misleading information. Never hear the word "shatterproof" without immediately correcting the speaker to shatter "resistant."

9. Always do a lifestyle analysis of every patient. Find out what their occupation, hobbies, and interests are. Find out exactly how they intend to use their glasses. Document! Document!

Document! If any professional recommendations are refused, be sure the patient understands exactly what the difference is between the recommendation and the selection they have made. In addition, document the refusal in writing and have the patient sign. Preferably, supply the patient with a copy. Using a survey type instrument, as suggested by Woods, is probably the most efficient method of accomplishing this objective (*Woods, 1988, p. 252; Woods, 1992*).

10. There is a responsibility to warn patients of any potential harm products may cause. Document this also (*Karp. 2004; Laluzerne, 1988*).

11. Never dispense a drilled rimless mounting with glass lenses. When dispensing plastic lenses in a drill mounting, be sure to use plastic bushings and washers on the screws to reduce stress on the lenses. Naturally, polycarbonate would be the ideal lens in these situations. Always check lenses for stress prior to dispensing (*Chase, 1988*).

12. Chemical tempering is safer than heat-tempered glass lenses. The volatile nature of heat-tempered glass lenses may increase the ocular damage in an accident. If glass is dispensed, use chemical tempering. Even though heat tempering is an ANSI-accepted procedure, the common knowledge is that chemical tempering is safer. Damage from a heat-tempered lens would probably be very difficult to defend.

13. If heat tempering must be used, be sure that the patient is informed and document to the patient that in the event of pits, scratches or any lens damage, the lenses must be replaced because the tempering is no longer acceptable.

14. If chemical tempering is used, be absolutely sure that the bath is at 470 ° and that the process is sixteen hours long. In addition, scrupulously follow the manufacturer's advice on the frequency of changing the salts. If the temperature or time is deficient, or if the salts are contaminated, the tempering will be improper. If the tempering is improper, it can be proven via electron microscopy. Defense would be improbable. Be sure to keep a log of tests and salt changes (*Chase, 1988*).

15. Always recommend polycarbonate for children. Children cannot be expected to always behave in a prudent manner. If the recommendation is refused, be sure the guardian is aware of exactly how much less impact resistant their selection is and document (i.e., Crown glass has only 4-5% the impact resistance of polycarbonate lenses) (*Erie, 1991, p. 112*).

16. Always recommend frames and lenses as a complete package and be sure that they meet the standard that is intended for their use. If a sport frame, be sure it meets ASTM standards for that sport. If an occupational frame, be sure it meets ANSI standards. Be sure that there is documentation in writing from the manufacturer that their frame meets the applicable standards. If this documentation is not received, DON'T sell the frame. If applicable, be sure to recommend and document polycarbonate face shields in addition to the frame and polycarbonate lens selection (*Bruneni, 1997; Woods, 1988, p. 252*).

17. At a minimum, whenever protection is an issue, be sure to recommend and document polycarbonate lenses. If polycarbonate is used, utilize 3.0mm minimum thickness. This may not

be required, but it certainly shows a good faith effort to provide the ultimate in ocular protection. However, if you select 3.0mm polycarbonate, make sure you are putting the lenses into the appropriate frame.

18. Never let a patient's pressure produce an inappropriate recommendation. Lose the sale before lowering professional standards (*Chase, 1988*).

19. Whenever someone is fitted for occupational eyewear, be sure that the frame has permanent side shields. Detachable side shields are available, but they are a poor second choice when considering your liability exposure. The courts tend to insist that we take steps to protect the consumer whenever possible. If we supply permanent side shields, they cannot be removed easily by the consumer and thus, we have protected them to the best of our ability.

20. Never dispense a frame that is a safety concern with temples that open past 90°. This may seem logical, but in actuality, when the hinge expands, the frame itself can be driven into the globe (*Woods, 1992*).

21. Use the opportunity to discuss lifestyles as an entry into multiple sales. Most people do not realize how diversely and efficiently opticians can enhance their lives. Take advantage of the situation. Remember, most consumers are amazed to find out that we can make them prescription sunglasses!

22. It is true that polycarbonate tends to be a little more expensive and that some patients may object to the extra cost. But, these days the cost differential is minimal if at all. In addition, like most everything in life, the presentation makes the difference. The proper explanation of polycarbonate, including the fact that it comes automatically with ultra-violet light protection and scratch resistance, will generally dispel any hesitations (*Karp, 2003*).

23. If time delays are a concern, again, the presentation is everything. Surprisingly, when a truly professional presentation is made which puts the healthcare back into eyecare, time elements become a decidedly secondary aspect to most patients. In addition, opticians can now purchase diamond wheels for their existing lens edgers that will cut both plastic and polycarbonate. This alone will drastically reduce delivery time. Today, polycarbonate is as easy to fabricate in our offices as any other material.

24. If dispensing sport frames, be sure to follow ASTM standards. Namely, the frame should be designated as having passed ASTM standards for the *specific sport involved*. We cannot assume that a frame that is certified in racquetball is automatically approved for tennis. Each frame has to be tested and certified for each sport. The manufacturer should supply this information. In particular, a frame that has been certified will carry the designation F803-88a. Currently, frames are certified for the following sports: paddleball, squash, women's senior lacrosse, paddle tennis, badminton, racquetball, tennis, women's field hockey, handball, and basketball (*American Academy of Ophthalmology, policy statement; 2013*). Naturally, polycarbonate in 3.0 mm thickness would be the ideal lens choice. Be sure that the frame will accept 3.0 mm lenses.

25. Consider adding appropriate signage in your office. Signs that recommend polycarbonate can help influence the consumer's choice or at least initiate an inquiry.

26. Be wary of lenses that claim superior impact resistance. Polycarbonate is still the industry standard for impact resistance. You cannot offer any patient a safer lens than polycarbonate. Until there is a safer lens material you probably want to offer what is currently the safest – polycarbonate.

27. Finally, and most importantly, always recommend polycarbonate to everyone. It is not necessary that it be sold, but its availability must be discussed with the patient. At an absolute minimum, the probability is extremely high that patients drive or ride in an automobile and could become involved in an accident. Ocular damage from broken spectacles could conceivably lead to liability. ***Also, if they do not accept the recommendation, document that fact and document the explanation of how much less impact resistant their selection may be in the event of an accident.***

It is hoped that opticians can and will utilize these recommendations to minimize their exposure to potential liability. It is imperative that opticians realize that liability can and will affect them personally. Too often, the reaction is that these things happen to some other person. In addition, most opticians seem to feel that since they don't know anyone who has become embroiled in litigation, the threat is not real. It is important to understand that opticians involved in litigation do not advertise that fact. This is not an event that they wish publicized. Furthermore, the prevailing theory in the country is that most suits are settled out of court with non-disclosure clauses. This encourages secrecy and the false belief that opticians are not sued. There is no foolproof prevention of liability. However, if opticians do not rigorously and routinely follow the recommended guidelines to reduce their exposure to liability, they may someday rue that fact. It only takes one incident for opticians to find themselves seriously exposed to liability at a high personal and professional cost.

Note: This course is offered as an informative piece of research. Neither the NAO nor the author are legal experts in liability. The individual optician should consult with a lawyer to seek specific

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Appendix A

List of Optical Industry Experts Consulted

Professor Tom Woods
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International Academy of Sports
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N.J. Board of Ophthalmic Dispensers and Technicians
Linda Gorba, Administrative Assistant
P.O. Box 45011 Newark, NJ 07101

Mr. John Young
Silor Corporation
(phone conversation, 11/30/92)

Appendix A Letter

Dear :

I would like to respectfully ask your assistance on a personal project. As a Seton Hall University graduate course requirement, I am in the midst of a research project concerning professional liability for Opticians. The premise of my research is to identify whether there has been an increase in Opticianry litigation throughout the United States in recent years. I am also investigating if the use of polycarbonate lenses might have mitigated the circumstances. Finally, I am seeking to prepare a procedure for Dispensing Opticians to utilize which will minimize their exposure to litigation.

Since you are in a position to be better informed on this subject than myself, I am hoping that you might be able to assist my endeavor. Do you have any statistics that document a rise in Opticianry litigation? Are they frivolous suits or do they legitimately rest on professional or product liability? Are you aware of any available sources related to this topic? Do you have any current statistics on ocular injuries and/or statistics on ocular injuries to spectacle wearers? Since my research is dependent on valid statistics, I will be immensely grateful if you could provide any timely assistance.

Thank you for your consideration of my request. If you need to ask any questions, I can be reached at 908-526-1200, extension 8277.

Sincerely,

Brian A. Thomas, B.S., A.B.O.M.

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