THE LEGAL ENVIRONMENT

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THIS CHAPTER WILL INCLUDE A REVIEW OF:

- Overview of legal principles
- Legal forms of business organization

INTRODUCTION

The establishment of an optometry practice requires meticulous preparation. Regardless of the country or jurisdiction, there will be a long list of legal requirements that must be met and administrative protocols which must be established. Chapter 1 of this subject examines the legal environment and how it affects the operation of an optometry practice.

Most optometry practices are small businesses and in most cases they are managed by the optometrist/owner of the business. While business skills and a working knowledge of accounting and law will not impact on an optometrist's ability to perform a comprehensive eye test, they are an essential part of the practice of optometry and the success of the practice.

OVERVIEW OF LEGAL PRINCIPLES

This subject introduces some of the concepts of law as it applies to optometric practice. It will serve as a general introduction, however more detailed knowledge is required since it is expected that all citizens are aware of their legal obligations. While there are some common principles across jurisdictions there are also some significant differences.

It is essential that optometrists make themselves familiar with the legal requirements in their own jurisdictions. It is also recommended that formal legal advice be obtained, particularly for substantial contracts such as leases. The purpose of this subject is to give optometrists sufficient knowledge of the law to understand the advice given by a lawyer and to be able to ask perceptive questions.

OVERVIEW OF LEGAL PRINCIPLES(CONT.)

Jurisprudence is the science and philosophy of law. A practising optometrist should have a working knowledge of this important field. It is not possible to cover all of the variations in jurisprudence across the world; that is, differences in legal systems in different countries, or variations within each system in one subject. Nor is it possible to cover one country in depth. However, while an optometrist could not be expected to become an expert in the law, some knowledge is useful if not essential and therefore this subject aims to give an overview and introduces some common legal principles and, to some extent, the philosophy underlying the legal principles.

In some countries all laws are created by the government. This process is referred to as legislation. Under the British system there is a second category of law referred to as common law or judge made law. These laws are evolved from judgements made by judges in particular court cases. Both common law and legislative law are discussed below.

The following legal principles will be discussed:

- Doctrine of the Separation of Powers
- Criminal and Civil Law
- Burden of Proof
- Common Law
- Tort
- Legislation
- Contracts
- Optometric Legislation
- Consumer Law

DOCTRINE OF THE SEPARATION OF POWERS

Some countries have adopted an overriding principle known as the doctrine of the separation of powers. The doctrine, developed in ancient Greece and used in the British Westminster System, is followed by many countries, including India, the United States and Australia. The doctrine requires that the powers of the legislature, the judiciary and the executive arm be separate and independent. Thus, undesirable pressure cannot be brought to bear on one arm by another. For example, the executive arm of government should not be able to influence the law courts.

The separation of powers is often blurred in some countries. For example, in Australia and the United Kingdom all members of the executive arm are also members of the legislature, and by being members of the controlling political party have effective control of both the executive and legislative arms of government, despite the fact that the head of the executive in both countries does not technically head the legislature.

Moreover, in both countries, and others such as the United States, the judges of the highest court are nominated by the government when a vacancy exists. So, while the government does not have direct control over the judiciary, its members can appoint judges who they believe will have similar political views.

CRIMINAL AND CIVIL LAW

Criminal law deals with offences deemed to be crimes (also known as felonies) or misdemeanours (lesser crimes) while civil law covers such areas as contract law and tort (discussed below). There are many variations of legal systems but the two major systems are adversarial (used by the British and others) and inquisitorial (favoured by European countries).

The European criminal law system is based on an inquisitorial system, where judges who are specifically trained in questioning ask questions to the accused and other witnesses. This system is also used in some lower courts in the British system, notably in consumer tribunals, discussed later in Part 1.

By contrast, the British system, also used by many former British colonies including Australia, the United States, India and several African countries, is based on an adversarial system where both sides are represented by lawyers who ask questions to the other side. The judge adopts a role of referee or arbiter. The result of the case is determined by the judge/s or in some cases a jury. The jury is normally selected from members of the general public and, as a result, they have no legal training.

OVERVIEW OF LEGAL PRINCIPLES(CONT.)

BURDEN OF PROOF

The burden of proof will vary between countries. It also varies depending on whether the case is a criminal or a civil case. In the British legal system, the burden of proof in criminal cases is “beyond a reasonable doubt”. In some cases this means a unanimous decision by a jury, though some jurisdictions allow a prescribed majority. There is also an onus (burden) on the prosecutor to prove the case with the defendant considered innocent until proven guilty.

Civil cases have a lesser burden of proof, “on the balance of probabilities”. That is, the judge (or possibly the jury) simply determines which party they think is more likely to be correct. The lesser level of proof is a reflection of the less significant consequences. That is, a loss in a criminal case may mean the loss of personal liberty and in some countries possibly the loss of life whereas a loss in a civil case results in a loss of money.

STRICT LIABILITY

In most criminal and some civil cases the prosecution must prove that there was intent to commit the particular act. This is referred to as ‘mens rea’, Latin for ‘guilty mind’. They must also prove that the act was committed by the person charged. This is referred to as the ‘actus reus’, Latin for ‘guilty act’. Some criminal and civil acts, however, are considered by the law to be strict liability. This means that only the actus reus must be proved. The intent need not be proved. An example of strict liability is traffic offences. The police need only prove that a person was speeding; they do not have to prove that the person intended to speed. A case of civil law negligence is an example of strict liability. In the case discussed below, Donoghue versus Stevenson, there was no need to prove that Stevenson intended to harm Mrs Donoghue.

COMMON LAW

Common law is law created by the decisions of judges. If no law exists concerning a particular case, or if the legislation is confusing, judges will decide the case on the legal principles as they see them. This creates what is referred to as legal precedent. In the case of common law the higher the court within the judicial system the stronger the precedent. The logic underlying this system is that judges, as legal experts, are best placed to act as arbiters of what is reasonable in the absence of legal structures. Moreover, judges in higher courts are deemed to be more senior and more experienced, so their judgements carry more weight.

Case Example: Donoghue V Stevenson 1932

A seminal case in the British legal system is Donoghue versus Stevenson, heard by Britain’s Privy Council (the United Kingdom’s highest court) in 1932. It was responsible for establishing the legal concept of tort, a civil wrong; in the case of Donoghue versus Stevenson the civil wrong of negligence. The judge delivering the judgement of the Privy Council, Lord Atkin, also established what became known as the neighbour principle, where "A man has a Duty of Care to conduct himself in such a way as to avoid harm to others, where a reasonable man would have seen that such harm could occur".

The plaintiff (the person suing the defendant) in the law suit, Mrs Donoghue, visited a restaurant in Paisley, a suburb of Glasgow Scotland, with a friend. Mrs Donohue’s friend bought her a bottle of ginger beer in an opaque bottle and she proceeded to drink the ginger beer from a glass into which the ginger beer had been poured by the waiter. After finishing the glass she poured the remaining drink from the bottle into the glass and found the remains of a partly decomposed snail. As a result of this visit to the cafe Mrs Donohue contracted gastroenteritis and decided to take legal action for payment of her medical bills and to compensate her for the shock.

Mrs Donoghue could not sue the shop owner for breach of contract because she had not bought the ginger beer and therefore had no contract, written or verbal, with the shop; it was her friend who had the contract with the restaurant, however her friend had not been directly disadvantaged. Mrs Donoghue’s lawyer decided to sue the manufacturer of the ginger beer, Stevenson, for negligence in the manufacture of the ginger beer. At that time no law on negligence existed and the case was brought, on appeal by Stevenson’s lawyers, to the Privy Council in London.

The five justices of the Privy Council found in favour of Mrs Donoghue by a majority of three to two. This judgment effectively created a new law, the law of negligence, and the legal principle of ‘duty of care’. This judgement then acted as precedent in similar cases following the judgement. It carried the weight of law in all courts at the same level or below. Since the Privy Council is the highest court in the United Kingdom its effect was total. Common law can be amended or changed by judges in a higher court (except in this example where no higher court exists) or by legislation.

OVERVIEW OF LEGAL PRINCIPLES(CONT.)

TORT

Tort is a branch of common law dealing with civil wrongs. Evolving from the case discussed above, it covers areas such as negligence, defamation and nuisance, where a person will take action against another who they believe has wrongfully caused them harm. The term is derived from the Latin word tortus, meaning twisted.

Negligence

Negligence is where a person (or company) has not taken appropriate care, resulting in some damage, financially or physically to another person or company. Donoghue versus Stevenson, where Stevenson was considered negligent by not taking sufficient care in the manufacture of the ginger beer, is an example of the application of the principle of negligence.

Defamation

Defamation is where a person (or company) has harmed the reputation of another person or company through wrongful public comment. That is, making comments that cannot be supported with evidence. Defamation takes two forms, written, known as libel, and spoken, known as slander. For defamation to have occurred there must be an audience. The larger the audience the greater the damage to the victim's reputation and the greater compensation they are likely to claim

Nuisance

Nuisance is where a person (or company) has caused some damage, financially or physically to another person or company through their actions. This might be through such things as creating toxic fumes or excessive noise or polluting a stream.

In a common law system, a person will sue the offending person for damages incurred. If, however, they have been harmed by someone under someone else's control, such as an employee or agent, they may choose to sue the controlling party under the principle of 'vicarious liability'. Vicarious liability is where a person takes responsibility for actions of their agents or employees. The decision to sue the controlling party rather than the person directly responsible for the act is often made on economic grounds. That is, the controlling party is likely to have a greater capacity to pay damages than an employee.

There are several ways in which a defendant may defend a law suit, even when the act is proven. These include:

CONSENT

That is, the person agreed to participate in the act causing the damage. This is the defence used by medical practitioners when operations do not go as planned. Medical practitioners and businesses operating risky adventures (such as skydiving) will usually ask patients or participants to sign a form acknowledging and accepting the risk. This will not necessarily protect the business or practitioner from a lawsuit, however, if negligence can be shown to have occurred.

ILLEGALITY

This defence would be used if the harm were caused because the plaintiff was breaking the law. For example a person speeding in a hire car, causing a crash and resulting injuries.

CONTRIBUTORY NEGLIGENCE

In the case of contributory negligence the defendant would argue that the plaintiff also had some share in the negligent behaviour. An optometrist being sued for an eye injury caused by contact lenses for example, may claim contributory negligence if the patient had not followed the cleaning advice.

OVERVIEW OF LEGAL PRINCIPLES(CONT.)

LEGISLATION

Legislation, also referred to as statute law, is law that is created by parliament (the legislature). These laws are called Acts of Parliament. Legislation supersedes judge-made law and can be changed only by new legislation. However, under the doctrine of the separation of powers, judges are often required to interpret the law in cases of ambiguity. Legislators are often not available to be asked what was meant by their legislation, particularly if there is a significant time period between the enacting of the legislation and the need to test its meaning. For this reason, judges are required to carry out this task. In a case where the legislature is unhappy with the interpretation of a particular act its only recourse is to introduce new legislation or regulations to clear up the interpretation.

Although systems vary from country to country, legislation usually starts out as a 'bill' introduced into the parliament, normally by the relevant government minister. The minister for health, for example, would introduce a 'bill' relating to health. The bill would be discussed in parliament before being voted on. In some countries the bill must receive the assent of the head of state before becoming law. In a country with a constitutional monarchy (such as the United Kingdom, Australia, New Zealand and Japan), this is normally a formality. The head of state in such cases has little if any power to refuse assent. This is also true of republics where the head of state (normally a president) is separate from the head of government. In republics where the head of state is also the head of government (such as the United States and South Africa) the assent of the head of state is not merely a formality.

Once the bills become acts of parliament they normally reside in the statute books, which are bound volumes available to anyone who wishes to access them.

CONTRACTS

Contracts are used in all areas of business. They are used for employment of staff, selling of goods, provision of services and leasing of premises. A contract binds both parties to the contract and requires them to fulfil their part of the agreement. They are often written but in most jurisdictions a verbal agreement also constitutes a contract. Written contracts have the benefit of proof of what was agreed and obviate the need for memory or witnesses. They also help to prevent disputes and claims of contacts not being honoured. For this reason contracts involving significant value, such as the purchase of houses and cars, are invariably written.

The characteristics of contracts

There are five basis elements common to all contracts regardless of whether it is a formal written contract or a verbal contract.

The five elements of contracts are:

- Offer and acceptance
- Intention to create legal relations
- Consideration
- Capacity
- Consent

Offer and acceptance

A contract cannot come into effect until one party has made an offer and the other party has accepted. Courts are often required to determine whether an offer was actually made.

Determining what is an offer is not always straightforward. For example, the law does not necessarily consider the displaying of frames on a rack to be an 'offer to sell'. Precedent in the British system suggests that it is not an offer but what is referred to as 'an invitation to treat'. In other words, it merely invites a patient to make an offer to purchase the frame. Hence patient would make an 'offer to buy' and the optometrist would then 'accept' hence creating the requirement of offer and acceptance.

The distinction between an invitation to treat and an offer to sell is not always clear and in some cases a court may be required to determine whether an offer was made. The case of Carlill versus the Carbolic Smoke Ball Company, discussed below, is such an example.

OVERVIEW OF LEGAL PRINCIPLES(CONT.)

Intention to create legal relations

This element is meant to rule out casual arrangements such as, for example, an offer to drive someone home. A contract must have a business-like intent and not be a casual arrangement. To continue the analogy, a lack of intention to create a legal relationship would prevent a person offering to drive someone home of demanding a fee on arrival.

Consideration

Contracts must be of benefit to both parties. The benefit each party obtains is referred to as consideration. In most cases 'consideration' will be money, goods or services but this need not necessarily be the case.

Another area in which courts may be called on to decide is whether consideration existed. For example it is not clear whether a person who made an appointment with an optometrist for an eye test has actually offered payment in return for the test at this point. That is, have they made an offer which has been accepted and has the optometrist already provided some consideration by setting aside (valuable) time in the diary? If so, the optometrist may consider that the contract was breached if the person did not turn up. It is for this reason that some practitioners have a sign in the practice indicating that a fee will be applied if a patient does not turn up and has not notified the practice in sufficient time. Whether this is consideration, and whether such a sign is legally effective, would be for a judge to decide, should it ever get to court.

Capacity

Both parties must be capable of entering into a contract. It is for this reason that children are usually not allowed to enter into contracts, nor are people who are insane or were drunk when the contract was formed. There are, of course, certain contracts that minors can enter into. It would be absurd, for example, to prevent minors from purchasing an ice cream. However, in most jurisdictions, a child could not enter into a contract with an optometrist for a $1000 pair of spectacles.

In many countries it will be for a judge to decide up to what value a minor may enter into a contract. When making such a decision they would consider what the average person would consider reasonable. In English law there is a term used for deciding what is reasonable "what would the man on the Clapham omnibus think?" This essentially means 'what would the person in the street think?' the Clapham omnibus being a commuter in an average London suburb. Omnibus is the formal term for what is often referred to simply as a bus.

Consent

The last element of a contract is consent by both parties. Coercion is not allowed in the creation of a contract. This is why some countries have introduced legislation that requires a cooling-off period for some contracts, allowing a purchaser to change his/her mind within a specified period after signing. And, again, the courts may be called on to determine if someone was coerced into signing a contract (or entering into a verbal contract).

Case example: Carlill vs the Carbolic Smoke Ball Company 1892

Just as Donoghue versus Stevenson was a landmark case in common law, Carlill versus the Carbolic Smoke Ball Company is an important case in contract law. The case was heard by the British Court of Appeal in 1892. The Carbolic Smoke Ball Company produced a device consisting of a rubber ball with a tube extending from it. The ball was filled with carbolic acid and users were encouraged to insert the tube in their nose and squeeze the ball. The purpose was to prevent the user from contracting influenza which was endemic in Britain in the 1890s. The company advertised that they would give £100 to anyone who caught the flu while using the ball as directed. The plaintiff in the case, Mrs Carlill, subsequently caught the flu and demanded her £100 from the company. The company refused and Mrs Carlill decided to take action.

One question to be answered by the court was whether the £100 offer was meant to be taken seriously or whether it was merely 'puffery', such as the claims of washing powders that they wash 'whiter than white'. They decided that it was a serious offer since there was also a comment claiming that they had deposited £1000 in a local bank to show that they were serious.

The second question regarded offer and acceptance. The court decided that the £100 represented part of the offer by the company and that purchase and prescribed use by Mrs Carlill represented acceptance. The defence was that the advertisement was merely an invitation to treat (as most advertisements would be); however the specific nature of the advertisement was considered by the court to be an offer. Furthermore, the purchase represented the consideration on Mrs Carlill's part. Carlill versus the Carbolic Smoke Ball Company is a good example of how courts may be called on to interpret the elements of a contract.

OVERVIEW OF LEGAL PRINCIPLES(CONT.)

OPTOMETRIC LEGISLATION

Many countries have legislation covering the registration and practice of optometrists. Most, if not all, countries will also have legislation covering the registration and practice of ophthalmologists. Optometric legislation will normally define the scope of practice and will also list tasks which optometrists are prevented from carrying out, such as eye surgery, and in some countries, the use of therapeutic pharmaceuticals.

There will, or may, be a government board responsible for registration of optometrists and the monitoring of their practice. The membership of such boards is usually prescribed in the legislation. They will often have one or more members nominated by the optometrists' association and may include representatives from the educational institutions (the relevant universities) and the appropriate government department. The brief of most professional boards is the protection of public welfare. That is, while nominated by an organisation, they are not meant to be advocates for their nominating body and are not supposed to act on their behalf. In some countries the continued registration of optometrists is dependent on achieving a set amount of continuing education points. This is intended to ensure that skills are maintained.

Compliance with local ophthalmic legislation is essential and all optometrists should make themselves aware of all the appropriate rules and regulations applying to their location.

CONSUMER LAW

Optometrists must be familiar with consumer legislation in their jurisdiction. Optometrists provide both services (eye tests) and goods (spectacles and contact lenses). The aim of this section is to provide an understanding of the basic principles of consumer law and how it might apply to optometrists.

Although the details may vary across jurisdictions, the principles are (or should be) generally universal and are largely based on common sense. They are also based on fundamental ethical principles.

Specific consumer law

Some countries will have general legislation covering goods and services. These laws will usually outline the rights and obligations of both traders and consumers. While optometrists would consider themselves as 'professionals', rather than 'traders' and their clients as 'patients' or 'clients' rather than 'consumers' or 'customers', the law will usually treat them as trader and consumer.

Consumer rights

Although consumer legislation varies across countries there are generally common principles that apply to most consumer protection laws. Consumers are generally provided with five basic (and inalienable) rights when dealing with traders (including optometrists). Even if not covered by legislation, the first four should be considered as a part of the moral and professional obligations of an optometrist.

The five basic consumer rights are:

1. To be able to do business without being defrauded

All transactions with patients should be fair and legal. There should not, for example, be any hidden clauses in contracts.

2. To be able to make an informed choice about the transaction

No important information should be concealed from the patient. The patient must be provided with all the information relevant to any decision.

3. To have equality in dealings with the trader (optometrist)

No unfair advantage should be exerted by the optometrist.

4. To expect that all products are safe

Dangerous goods should not be sold. For example, goods should be withdrawn from sale if they are dangerous.

5. To have access to a system of redress if their rights are breached

There should be an independent authority the patient can turn to in order to have a complaint heard. This is discussed below.

All consumers have (or should have) these rights and, if enshrined in law, no optometrist can legally circumvent them. If the promises are not supported by law there is still an ethical obligation for optometrists to recognise the above rights (at least the first four).

OVERVIEW OF LEGAL PRINCIPLES(CONT.)

Implied promises

In addition to the above basic rights, most consumer legislation assumes implied promises by traders in any transaction or contract with consumers. These are promises which traders (optometrists in this case) are deemed, ethically and/or legally, to have made even if they may not make them explicitly.

Once again, where no legal requirement to make these promises exists there will still be a moral and professional requirement for optometrists to implicitly make such promises.

The five implied promises and their implications for optometrists are:

1. The goods must be of 'merchantable quality'

That is, they must be fit to be sold. In the case of spectacles, it could be argued that a pair of spectacles that do not meet the requirements the international standard on finished spectacles (ISO21987) or local country standards would not be of merchantable quality. Equally, spectacles with damaged frames or scratched lenses would not be of merchantable quality.

2. The goods match the description

The goods purchased must match their description. That is, they must look like how they were described and they must do what they the optometrist said they would.

3. The goods are fit for the purpose

If the trader was made aware of the purpose for which the goods were required, then the goods must be fit for the purpose. It is assumed that the optometrist would give expert and accurate advice.

As an example, if the patient indicated that he or she played a sport such as squash or tennis then the optometrist should recommend impact resistant lenses.

4. The goods correspond with the sample

If a consumer was shown a sample, then the goods they finally purchase should correspond with this sample. For example a frame should look the same and be the same colour as the one chosen by the patient.

5. Any service is carried out with due skill and care

If an optometrist performs a service for a patient, such as an eye test, then this service must be carried out with due skill and care.

Most legislation requires traders to give a refund when any of the promises are not fulfilled. However, optometrists are not usually required to offer a refund if the consumer merely changed his or her mind.

The implied promises above are treated as if they were a part of the contract and so failure to comply is effectively treated as a breach of contract. Consumer legislation is normally intended to provide an easier solution to the consumer than suing for breach of contract. This simplified approach is discussed below.

Consumer Redress

One of the rights a consumer has is the right of redress, that is, an opportunity to have their complaint heard and resolved. Most governments, in setting up their consumer legislation, have also set up government departments and courts similar to the following in order to deal with consumer issues.

Optometric legislation may also provide an avenue for redress through a complaint to the board if the patient is complaining of a breach of professional ethics.

Consumer Affairs Bureaux

Consumer Affairs Bureaux are government departments that handle complaints from consumers and will try to mediate between the consumer and the optometrist. Bureaux employees attempt to settle all disputes in a manner acceptable to both parties. They will hear complaints from a consumer and then put the complaint to the trader to get their side of the case. Once both cases are stated they attempt to facilitate conciliation between the two parties by suggesting a compromise or pointing out where the law would consider the fault to lie.

If a resolution cannot be reached the next step is a formal tribunal.

OVERVIEW OF LEGAL PRINCIPLES(CONT.)

Consumer Claims Tribunals

Consumer Claims Tribunals sometimes called small claims tribunals are panels where claims up to a certain value can be heard. The normal legal system usually involves expensive lawyers and court costs and is not really suited to claims involving costs significantly less than the cost of the court case. Most Consumer ClaimsTribunals require only a small fee to have the case heard.

The case is heard by a 'referee' who acts as the judge. The aim of such tribunals and the use of a referee rather than a judge are to make the process less imposing. The process is more like a meeting than a court case. No lawyers are generally permitted to attend and the referee will probably not wear judges' robes. In the absence of lawyers both the optometrist and the patient would simply state their cases.

While consumer tribunals do not usually have the power to fine or impose other penalties tribunals, they do normally have the power to instruct the optometrist to refund the money or make good repairs. Failure to comply with these instructions would then be a breach of the law, often referred to as contempt of court.

LEGAL FORMS OF BUSINESS ORGANISATION

There are several forms of business organisation. The forms most likely to be used in the formation of an optometry practice are sole trader, partnership and company. Other, less common forms of business, such as trusts and cooperatives may also be an option in some jurisdictions. Once again, legal or accounting advice should be sought to guide the decision of which structure to use. Taxation and reporting requirements will vary across countries.

SOLE TRADER

Sole tradership is the most basic business structure. In many jurisdictions it may require very little if any legal formalities. Essentially it means operating the business as a person with no formal business structure. It may be possible to use a business name; however this would usually be treated differently to a company. The business name would be regarded merely as an alternative name for the sole trader. In most jurisdictions business names have to be registered in order to protect them from use by others.

There are generally few government regulations controlling sole traders. There is also the benefit of receiving all of the profits of the business. Among the disadvantages, however, is the lack of partnerswho can share the debts, share the workload or provide new ideas.

The main disadvantage of being a sole trader is that the optometrist accepts all responsibility for debts, including potential losses in law suits. Therefore, not only are the business funds and assets at risk, but also the owner's private wealth.

PARTNERSHIP

A partnership is usually treated as the same as a sole tradership, in terms of obligations. A partnership is relatively easy to establish and involves little in the way of government control. Like a sole tradership, each partner has unlimited liability. That is, if a partnership closes with substantial debts then each partner may be required to pay all of the debts, not just their share. Hence, if one partner is unable to meet the debt the remaining partner or partners must bear the entire cost.

Some jurisdictions may require a written partnership agreement. Even where not required, a partnership agreement is advisable, regardless of how close the personal relationship between the partners.

A written partnership agreement is a contract between the partners outlining each partner's rights and responsibilities. It helps to prevent disputes between the partners, where they have differing recollections of what was verbally agreed to, and is particularly important if several partners are involved.

As with sole traderships, partnerships are often allowed to use a business name. It is not uncommon for optometry partnerships to use an optical business name such as *XYZ Optical* rather than the names of all of the partners.

Partnerships have the benefit of bringing in more funds, new ideas and more people to share the load. However, partnerships do dilute the ownership and freedom of action.

LEGAL FORMS OF BUSINESS ORGANISATION(CONT.)

COMPANY

In the British corporate system there are two basic types of company; private and public. In other jurisdictions there may only be one type of company. Private companies have limited ownership and ownership is not offered universally in the market. Most small companies are private companies and many will have evolved from sole traderships or partnerships. Ownership of shares in public companies is open to all members of the public. Public companies often evolve from smaller private companies.

Optometry practices would normally be set up as private companies. All companies have shareholders; in private companies this may be as few as 2 and is rarely over 50. There may be legal limits to the number of shareholders.

Public companies are listed on the stock exchange of the home country and, in some large corporations, may be listed on international stock exchanges and their shares are traded publicly. Stock exchanges effectively trade in second-hand shares: they provide a venue for shareholders to sell their shares and others to buy shares.

Private companies

Private companies present an alternative to sole traderships and partnerships and provide the owners with more protection. However they also have more onerous legal responsibilities, particularly with regard to regular reporting.

In some jurisdictions it may be possible to buy an existing 'shelf' company. Shelf companies have been set up by brokers, often financial organisations or accountants, with the purpose of selling them to people wanting to establish a company. Shelf companies normally come with the following essential features:

- **Existing shareholders:** There will normally be a minimum of two who will have already paid up their shares of a nominal $1 each. These existing shareholders will transfer their ownership to the people buying the shelf company
- **A board of directors:** These are normally the same two peoplewho had also held the initial shares. Again, the original directors will resign and the new shareholders will elect their own board of directors. In a small company the directors will usually be the shareholders
- **A memorandum of association:** These are the objectives of the company and will be stated in broad terms for a shelf company. The new directors may choose to amend or add to the memorandum of association
- **Articles of association:** These are the rules of the company – again these will be basic and those that would be common to all small companies, such as rules about when meetings must be held
- **The certificate of incorporation:** The certificate of incorporation is the company's registration with the appropriate government department
- The company seal and a name

There is no obligation for the purchasers to maintain the same number of shareholders or directors. They can add new shareholders and directors as they see fit. These decisions would be recorded in the minutes of the company.

The type of company is normally indicated by letters after the name. As examples:

- In the British system the term limited (Ltd) is normally added to the name of a company. Limited refers to the liability of the shareholders. That is, their liability is limited only to the unpaid amounts on their shares
- In Australia the term limited is normally added to the name of a company, and if it is a private company with a restricted number of owners, as in the shelf company above, the term proprietary limited or Pty Ltd is used
- In Germany the term Gesellschaft mit beschränkter Haftung[1] (GmbH) is used for private companies

A company is treated by the law in most jurisdictions as if it were a person. This is referred to as a 'legal entity'. It can sue and be sued, owe money and have money owed to it. Therefore, if a company is sued, any penalty must come from the assets of the company and not the owners.

[1]Literally « company with limited liability »

LEGAL FORMS OF BUSINESS ORGANISATION(CONT.)

Public company

Public companies are usually quite large and after the original share offer, called a float, any change of ownership is handled by the home country's stock exchange which links potential buyers with sellers. In most companies you must buy a minimum parcel of shares of usually around 500 or 1000. Public companies often grow from private companies that have reached their full potential with their current funding levels. Floating a company is seen as a means of growing the company rapidly with an influx of new funds from the new shareholders. That is, the company can grow at a much faster rate than it would with its current ownership and capital base. However it significantly dilutes ownership. Stock exchanges provide a venue for trading shares after the original float.

- In the United Kingdom the term PLC used for public companies
- In Australia public companies merely have the word limited (Ltd) after their name
- In Germany the term Aktiengesellschaft[2] (AG) is used for 'stock companies', that is, public companies

The day to day price of the shares of public companies will depend on the company's performance and also on external influences such as unemployment rates, the inflation rate, interest rates and the state of the world economy.

Public companies are controlled by a board of directors elected at the annual general meeting by the shareholders at the time of the meeting. Most companies have a few large shareholders and they generally decide who is on the board.

The board then appoints senior managers, some of whom may sit on the board, who are then responsible for the day-to-day running of the company. As with private companies, public companies also have limited liability.

Legal entity

Companies have a life of their own and continue independently of its owners. That is, companies are 'legal entities' or legal beings. The law considers them as if they were humans. They can sue and be sued and can own and sell property. If sued, a company is liable to the extent of its own assets. Its owners are only liable for any unpaid amount still owing on their shares. This is why the liability of the owners is referred to as 'limited liability'. However, in some jurisdictions, directors may be held personally responsible for their actions if they are deemed to be negligent.

While optometrists may be inclined to set up private companies to gain the protection of limited liability they may not be able to achieve this total protection. Banks and other suppliers of finance are aware of limited liability and are often reluctant to lend money to a new company unless its directors offer personal guarantees such as a mortgage on their home to cover the loan. This defeats the purpose of limited liability, at least with respect to the loan repayments. Limited liability would still apply in cases of law suits. However, optometrists, as medical practitioners, may be fully liable for their professional practice and so would be wise to take out professional indemnity insurance (discussed in Part 2).

SUMMARY

While an optometrist cannot be expected to be an expert in law and administration, he or she must have a high level of awareness of the major principles, know where to seek advice and, having sought the advice, understand the advice. Ignorance is not an acceptable excuse in the eyes of the law. Many of the skills and business knowledge required to manage a practice will be gradually developed as the practice grows but some prior study and preparation is also required.

[2]From « Aktien » : shares and « Gesellschaff » : society

SELF ASSESSMENT 1

1. **How does statute law differ from common law?**

2. **What are the implied promises made by traders to their clients?**

3. **What are the essential characteristics of a contract?**

4. **What is the main disadvantage of being a sole trader?**

ANSWERS – SELF ASSESSMENT 1

1. **How does statute law differ from common law?**
   Statute law is created by the legislature of a country. It supersedes any existing common law. Common law is created by judges when hearing cases.

2. **What are the implied promises made by traders to their clients?**
   - The goods must be of merchantable quality
   - The goods must match the description
   - The goods must be fit for the purpose
   - The goods must correspond with the example
   - Services must be carried out with due skill and care

3. **What are the essential characteristics of a contract?**
   - Offer and acceptance
   - Intention to create legal relations
   - Consideration
   - Capacity
   - Consent

4. **What is the main disadvantage of being a sole trader?**
   Unlimited liability