forum
Risk, Negligence & Malpractice Claims

Welcome to Modern Dentist's first Forum - there's nothing more stimulating than a discussion forum. Over the page you will have access to several different opinions, experiences and insights from some well-known specialists in the field. Our expert voices give their opinion to a number of questions focused on risk, clinical negligence and malpractice claims, in order to fall in line with this issue's theme: Risk Management.

While we may not always agree with what we read, if it enables a platform to discuss, explore and engage with not only colleagues but our fellow peers, then mission accomplished.

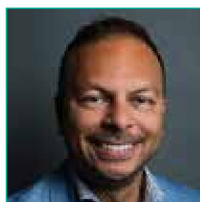
So, meet our Forum experts and join the discussion over the following pages.

Stephen Hooper is an Associate at Hempsons

Stephen joined Hempsons in January 2020 as part of the firm's merger with Eastwoods. Stephen joined Eastwoods as their first paralegal in 2004 and became their first trainee in 2006. He qualified in 2008 and was made Associate in 2015.

Stephen's practice covers a range of disciplines, with a particular focus on defending professionals involved in regulatory and disciplinary proceedings such as GDC, GMC, HCPC, NMC and NHS Trust/NHS England Investigations. He is ranked in both the Legal 500 and Chambers & Partners for Professional Discipline.

Stephen also defends clients facing criminal allegations including sexual assault, gross negligence manslaughter and fraud, and is recommended in the Legal 500 for General Crime. In addition, Stephen maintains a broad practice defending clinical negligence and personal injury claims, judicial reviews and statutory appeals, and has represented numerous clients at inquests.



Neel Jaiswal BDS (1996) MDGDP (2003) is a Director at Professional Dental Indemnity Ltd.

As a Partner in Professional Dental Indemnity Ltd I introduce dentists to a comprehensive dental malpractice insurance cover policy with a Lloyd's of London approved underwriter who have years of dental experience and a global presence.

As a fellow Dentist, it's my role in the company to make sure we are being looked after.

After graduating from Birmingham University Dental Hospital in 1996, I went on to attain a Vocational Training Certificate in Norfolk. Wanting to broaden my skills, I worked as a Junior Doctor in Oral and Maxillo-Facial Surgery at Lincoln Hospital. I then worked in Sydney, Australia gaining a wide variety of experience. Upon my return, I practiced in London and Middlesex and further trained completing my Membership exams at the Royal College of Surgeons. Neel Dentistry and Professional Dental Indemnity (PDI) gives me the perfect opportunity to demonstrate my professionalism and determination to provide the best possible care and results.

Expert bios continued over the page.

WHAT IS CONSIDERED TO BE NEGLIGENT FOR A DENTIST?

ISOBEL MICHIE

Dental cases are often settled out of court without establishing case law. However, there are a vast number of clinical negligence cases that go through courts and produce the case law which is then applied to dental negligence cases.

Bolam v Friern Hospital Management committee and Bolitho V City and Hackney Health Authority.
Breach of duty: Bolam sets out that a doctor is not negligent if they have acted in accordance with a responsible body of opinion. *Bolitho* narrowed the scope of the test, stating that the court must be satisfied that the body of opinion relied upon has a logical basis. In other words, the independent expert evidence must stand up to scrutiny. The practice adopted must be in accordance with the standards of the time.

Causation: In relation to all dental and clinical negligence claims for damages, the claimant must establish the breach of duty, but also that any such breach, on the balance of probabilities, caused the alleged damage. There is also a significant body of causation case law that Weightmans would be pleased to advise further on, particularly in relation to informed consent.

Post ***Montgomery v Lanarkshire Health Board***, in relation to informed consent, a leaflet outlining any procedure/treatment and its risks will not suffice. It is important that dentists discuss all material risks (i.e. risks that a similar person in that particular patient's position would attach significance to). The different options for treatment, as well as any costs involved must be carefully explained and the discussion must be documented. The patient must have understood and be in a position, so that they can choose between options and decide what is best for them. They should be referred to a specialist service, if this is required. When this happens, the practice must pass on all relevant medical information.

Darnley v Croydon Health Services NHS Trust establishes that if an NHS Trust chooses to delegate tasks to receptionists (non-medically-trained personnel), it will be liable for damage caused through the negligence of those staff where it results in foreseeable damage to patients even prior to admission to hospital; and this duty extends to patients who have not been treated because they have chosen to leave the hospital, where that decision results at least in part from misinformation provided by hospital staff.

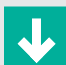
In ***Sanderson v Guy's and St Thomas' NHS Foundation Trust*** the court held that NICE guidelines are a practical tool to be used in conjunction with clinical judgement. They do not provide a substitute for logical clinical judgement which can be supported by responsible and reasonable body of dentists. We do continue to advise that any departure from evidence-based guidelines must stand up to considerable scrutiny and record keeping regarding the decision making.

> "Look for transparency; clear and fair terms with no hidden costs"
> **Len D'Cruz**

THERE CAN BE A FINE LINE BETWEEN MAINTENANCE AND NEGLIGENCE; WHAT CAN DENTAL CARE PROFESSIONALS DO TO ENHANCE THEIR TREATMENT PLANNING CAPABILITIES TO AVOID RISKS TAKING PLACE?

NEEL JAISWAL

It's important that during recall examinations on patients we know that we are treating the patient with fresh eyes and reiterate the diagnosis and possible treatment solutions, plus the risks of not having treatment. Make sure this is recorded. Clear and accurate record keeping cannot be stressed enough.



HOW CAN A PRACTICE MANAGER ENSURE THE ENTIRE DENTAL TEAM IS REMAINING COMPLIANT?

NEEL JAISWAL

Be proactive. One of the ways to ensure that your dental team is remaining compliant is to ensure that audits are being done of record keeping and clinical success outcomes. Also, ensuring that the team has done a personal development plan and are maintaining their required CPD requirements, including complaints handling ethics, medical emergencies and cross infection, among other requirements.

Len D'Cruz is a Senior Dento-legal Advisor at the British Dental Association (BDA)

Len is a general dental practitioner, foundation trainer, practice owner testing the NHS prototypes, and senior dento-legal advisor at the BDA. He has 21 years' experience supporting dentists with complaints, clinical and regulatory issues, and clinical negligence claims. He is lead lecturer at the University of Bedfordshire teaching on the MA in Dental Law and Ethics. He has authored and co-authored two books: "Understanding NHS dentistry" and "Legal aspects of general dental practice" (Churchill Livingstone), and has contributed legal and ethical content to a number of textbooks, journals and websites. He regularly shares his wisdom on NHS regulations and contract reform. He has both dental and legal qualifications.

BREAKDOWN IN COMMUNICATION IS A COMMON CAUSE FOR MANY CLAIMS FILED; WHAT ADVICE WOULD YOU GIVE TO DENTAL PROFESSIONALS TO ENSURE THEY ARE ALWAYS ON THE SAME PAGE AS THE PATIENT?

STEPHEN HOOPER

Many dentists are given this advice and simply hear the sound of an old, tired record being played to death, but it is an inescapable truth that communication is fundamentally important to safe (and hopefully complaint-free) practice. I have represented countless dentists who are clinically excellent, who have sound treatment plans in mind, but whose ultimate downfall is that they fail to explain themselves to their patients and then fall victim to complaints. Dare I say it, I used to be treated by a dentist who was guilty of that; lovely though she was, at times she failed to communicate her thought processes to me, and it was only because I probed (excuse the pun) and asked questions that I knew not only what she was proposing by way of treatment, but why that was the best treatment for me at that time (which it invariably was). Bear in mind that I have the advantage of knowing a little about dentistry because of my job – the average patient will not be as well-informed as I am, so they are more likely to simply be led by you.

In the post-*Montgomery* era, there is a greater emphasis on consent-taking being patient-focused. That means listening to the patient in front of you and catering your discussions and what information you share so it is relevant to *that* person – no two patients are the same, and you need to be sensitive to what is important to the person in the chair. Information leaflets are helpful, but it is far more important that you listen, and that you explain your findings and thought process to the patient, so they understand your proposals and are fully-aware of all the options available to them – even if some of those options (including having no treatment at all) are not what you would recommend. Ultimately, that means needing to offer your patient a commodity which is unfortunately rare for a busy dentist: time.

NEEL JAISWAL

Always try and build a good and friendly yet professional rapport with your patients. Asking the patient to present their case back to you with the pros and cons ensures they have had time to consider and reflect upon their options. Following up the patient with a member of staff and asking for feedback also may stop potential claims happening if caught early enough and managed.

ISOBEL MICHIE

The essential checklist to avoid claims: Good communication of all options and consider the individual patient's needs. Ensure records of discussion and treatment are accurate, complete and up to date for on-going patient care and handover purposes. Monitor dental health, as it could be getting worse and take steps to improve it. Give medicines safely and store them correctly. Ensure there are always enough staff on duty with the right knowledge, skills and experience to make sure the patients are safe. Ensure the premises and equipment are kept clean and hygienic to prevent any risk of infection to patients. If staff or patients have any concerns about safety, then they should be able to raise them.

Record any incidents that happen and, if you receive a complaint, ensure that the practice deals with it in the right way and in accordance with the professional duty of candour (be open and honest). Apologise and identify the learning and identify how to stop the incident happening again to other patients.

WHAT IS CONSIDERED MALPRACTICE FOR A DENTIST?

NEEL JAISWAL

The long answer is, in sums, that a dentist becomes legally obliged to pay as a result of a claim made against them arising from an injury, following from a negligent act, error or omission in the conduct of your professional business.

In short, this means claims or allegations made against you from patients for their injury or your alleged wrongdoing. Policies do, however, widen out to cover regulatory investigations, review boards, expert witness work, and even matters like defamation. More recently, cyber cover is included along with data breaches and privacy matters.

Isobel Michie is the Principal Associate at Weightmans LLP
Isobel studied medicine before converting to law. Since qualifying as a solicitor in 1994, she has specialised in both clinical and dental defendant negligence acting on behalf of defence organisations, private insurers, NHS Trusts and NHS Resolution. Isobel has extensive experience across all dental and healthcare disciplines, including cases involving the utmost severity birth and adult brain injuries. She has a particular interest in cases that relate to informed consent. She has both extensive trial and mediation experience. Her advice is pragmatic, robust and cost-effective ensuring earliest possible resolution of claims and complaints, with a focus on patient safety and lessons learnt. Legal 500 2020: Rising Star & Key Lawyer

WHY ARE DENTAL CLAIMS FOR COMPENSATION INCREASING?

ISOBEL MICHIE

Dental private treatment costs are increasing and less treatments are offered on the NHS. Patients often remain unsatisfied by a complaint response letter or how the complaint is handled, and this leads them to bring a claim for compensation. Patients continue to be better informed. Negligence continues to be increasingly in the news with public enquiries and the increasing involvement of the CQC.

In addition, there has been a significant increase in cases involving the allegation of the failure to provide informed consent, as this issue has been coming before the courts more frequently in clinical negligence cases. In addition, the increasing number of cases where we see the practice rather than the individual dentist being found to be liable as a result of vicarious liability, is also likely to be a significant factor going forwards, as patients may decide to litigate against the practice, rather than the individual dentist. Never has it been more important to check your indemnity liability insurance cover and ascertain if it is discretional or contractual and exactly what it covers.

> “Never has it been more important to check your indemnity liability insurance cover and ascertain if it is discretional or contractual and exactly what it covers”
> **Isobel Michie**

WHAT ARE THE COMMON PITFALLS THAT CAN LEAD TO CLAIMS AND REGULATORY INVESTIGATIONS?

STEPHEN HOOPER

Communication: My first answer has touched on this. Communication and lack of informed consent crop up as issues time and time again in claims and regulatory investigations, with patients complaining that they were not listened to, that had they known more they would not have agreed to the treatment undertaken or that the dentist was unsympathetic or rude.

Record keeping: I can probably count on one hand the number of GDC cases I have worked on where record keeping was *not* an issue. It is hammered home to dentists constantly these days, but it really is important - your records are your first line of defence, so make sure they contain enough detail to demonstrate that you did right by the patient.

Remembering the basics: I have worked on countless cases where dentists have been pulled up for skipping the basics, getting into bad habits and then when a complaint comes in, records are audited and all of a sudden they are accused of being systemically deficient. Carry out and record your BPEs regularly; take appropriate radiographs at appropriate intervals, grade, justify and report on them; take regular medical and dental histories and ensure the records are kept up to date. Often, these mundane details are crucially important, and it can come back to haunt you if you sidestep them.

NEEL JAISWAL

Taking different branches of dentistry, there are different risks that are prevalent to each.

For endodontics, for example, it’s important to do a risk assessment and ensure that the treatment is within a generalist capability and record that a referral is always available and can be offered.

For Dental implants; showing thorough planning and ensuring full and valid consent is important.

For periodontal disease, it’s important to ensure you’ve talked about treatment option referrals; smoking/vaping cessation and have regular periodontal charting where appropriate. Ensure the risk of losing teeth has been explained fully, including drifting, over eruption and loss of bone for future implants or denture retention.

In orthodontics and cosmetic dentistry, again, managing patient expectations and what outcomes are achievable and are being achieved; use photographs to help patients understand what their commitment is to the treatment, including information regarding cost, night guards or retention.

ISOBEL MICHIE

The commonest claims for damages that arise in dentistry are as follows:

1. Failure to provide informed consent and fully discuss the benefits, options and alternatives, particularly in relation to root canal treatment or extraction.
2. Delay in treating decay, infection and periodontal gum disease.
3. Negligent/inadequate treatment (root canal, extraction and poorly placed implants).
4. Unnecessarily prolonged treatment.
5. Failure to assess bone levels and closeness of upper teeth to sinuses causing oral antral communication.
6. Failure to assess position of nerves before extraction of wisdom teeth causing nerve damage.
7. Delay in diagnosis of mouth cancer.

We do see the same issues arising in dental claims and Weightmans would be pleased to advise further on identifying these.

> “I have represented countless dentists who are clinically excellent, who have sound treatment plans in mind, but whose ultimate downfall is that they fail to explain themselves to their patients and then fall victim to complaints”
> Stephen Hooper

DO YOU THINK THE PATIENT WILL BE MORE “COMPENSATION AWARE” GOING FORWARD?

NEEL JAISWAL

I think this has already happened with numerous legal law firms targeting dental patients through radio and print media. Where there's a blame, there's a claim culture, which is detrimental to patients in the long term as dentist can't help but act defensively.

WHAT IS APPROPRIATE INDEMNITY COVER?

NEEL JAISWAL

The market gold standard here is £5m, but some practices opt for anything up to £10M. We always recommend cover in the commercial indemnity market as this cover is contract certain and regulated by the FCA thus there is no ability for insurers to exercise discretion.

LEN D'CRUZ

Occurrence-based

The type of cover most dentists are familiar with is occurrence-based indemnity. With this, if you are paying a subscription that is appropriate to the nature and full extent of your involvement in dentistry, at the time that the incident occurs you are entitled to request assistance from your indemnity provider. This can include the granting of indemnity against some or all of any associated costs, such as any damages paid to a successful claimant together with their legal costs and any legal costs involved in representing/defending you.

Crucially, your entitlement to claim continues even when your relationship with the provider ceases or is temporarily suspended/deferred (e.g. maternity absence, career breaks): it continues in perpetuity for any clinical challenge arising from dental treatment provided during the period of cover – effectively, for ever.

Claims-made

The most common alternative to an occurrence-based indemnity arrangement is called 'claims-made'. This kind of indemnity is generally the preferred offer by insurance companies. In its simplest form you can buy claims-made indemnity for a single given year, covering only treatment provided or events taking place in that year and reported to the insurer before the end of that year. Other possible variations might allow this very limited cover to be extended forwards or backwards (or both), e.g.:

- Retroactive cover (allowing the policy to cover treatment provided during a specified period prior to the start date of the policy).
- Run-off cover (allowing the policy to cover incidents that took place when the policy was in force, but which were not reported until after the end date of the policy. This is also called an 'extended reporting period' and is usually subject to a time limit).

As if all this were not complicated enough, retroactivity and run off may attract additional premiums, or may not be offered at all. In addition, special conditions may well apply to the policy in some commonly encountered situations, creating unexpected gaps in cover.

Protection

Whether or not the cover you have is sufficient for your needs, depends on what the provider says is included and sometimes that's not clear until something has gone awry and you need support. Look for transparency; clear and fair terms with no hidden costs. If you're diversifying and providing facial aesthetics, you'll want to know that's included. If you're responsible for staff as well as patients, check that your policy includes vicarious liability. Clinical negligence claims are expected to be covered but maybe GDC hearings aren't.

Support

Check who'll be at the end of the phone to help when you need it. Ideally, it's someone who does or has done dentistry. Knowing that person speaks your language and can empathise adds an additional intangible moment of 'phew' in a moment of high stress.