

# Vicarious liability in private and public dental clinics

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## SCENARIO

A 25 year-old patient attended the clinic to have four teeth extracted under conscious sedation. Following a thorough examination and medical history it was found that she had a heart murmur. The dentist prescribed an antibiotic to be taken one hour prior to the dental treatment. The patient reported that she was allergic to penicillin and this was confirmed on her medical history chart. Consequently, a prescription was given for a 3g sachet of erythromycin as an oral suspension. The following day, the patient went to the pharmacy to obtain her medication, but was informed that they only had amoxicillin available in 3g sachets. The pharmacist telephoned the dental clinic to request permission from the dentist to change the prescription to amoxicillin, and as the dentist was unavailable, a staff member gave him the permission to issue the amoxicillin. When the patient came to collect the prescription she was not informed that it had been changed and assumed that her prescription did not contain penicillin.

Subsequently, the patient attended for dental treatment carried out and informed the dental assistant that after taking her antibiotic she was feeling unwell. Treatment was to be carried out under sedation and the anaesthetist, realising that the patient was allergic to penicillin and had taken amoxicillin, administered antihistamine. No treatment was carried out at that appointment and the patient was discharged home by the anaesthetist when he felt that she was well enough and in no medical danger. However, when the patient returned home, she became unwell, suffered a fall and sustained an injury to her right hand. The dentist admitted that there had been a lack of communication between the dental surgery and the pharmacy and that as a result, amoxicillin had been prescribed despite the fact that the patient was allergic to it. Unfortunately the pharmacist was unable to identify the member of staff to whom he had spoken and who had given him permission to change the prescription.

## COMMENTARY

Legal systems around the world vary in many respects, but there is often a thread of common principles. In general, there is a separation between the relationship of an individual (or corporate organisation) to the State (often crystallised into criminal law), and that between one citizen and another (civil law). Different jurisdictions have different approaches to the law which may be codified by law, statute or case law as appropriate.<sup>1</sup> Criminal law refers to personal behaviour in relation to society, and often encompasses a wide spectrum

of offences against what society considers acceptable. These range from obvious offences such as murder to various kinds of assault, public disorder, race relations and discrimination, theft and fraud, to health & safety legislation, employment law, defamation, and law relating to land and property, transportation, goods and services etc. It is usually based on specific acts, regulations and other statutes. Civil law applies to cases which are brought by one citizen against another. Examples would be allegations of breach of contract, or negligence (including medical or dental negligence).

An act, a law, or a set of regulations acts as the statutory point of reference, made in order to give practical effect to such legislation. One can therefore refer to the text of such statutory instruments and interpret in the context of a given set of circumstances. There is, however, an inherent difficulty in that laws are made in order to achieve certain objectives, and usually with particular applications in mind. They are created at a fixed moment in time, and so at some future moment a situation can arise that had not been envisaged or anticipated when the original text of the law had been constructed.<sup>1</sup> So this means that one can refer to whatever existing laws and regulations there are to seek guidance on the issues under consideration.

Once the law is passed, all that matters is the actual words it contains i.e. the text of the legislation, even though we may be dealing with a situation that its author might never even have contemplated. However, there is usually enough detail in the text of the law to tell us how we should act – or more pertinently in many cases, how we should **not** act. Sometimes, we will need to interpret the text of the regulations and apply it in an intelligent fashion to a current scenario. Where there are acts and statutes, laws and regulations that assist us, then there is at least some certainty and direction. But there are many situations in both professional and personal lives where there is no such certainty – or at least, some room for doubt. Ethics is largely about what happens in between those areas where the law has provided us with clarity and definition – although many ethical principles are also enshrined in legislation, and in violating them we would be acting both illegally and unethically.<sup>1</sup>

Most dental practices consist of a team that comprises at a minimum of a receptionist, a dental assistant and the dentist. Usually, the receptionist and the dental assistant are employees of the dentist. There may also be a dental therapist or an oral hygienist at the practice and he or she may function for their own account or as an employee of the dentist.<sup>2</sup> In any legal claims for negligence, the dentist, as an employer, can be held responsible for any negligence on the part of the employee which had been committed while performing the duty within the scope of his or her employment. This responsibility extends not only to any treatment procedures provided, but also includes any explanations or verbal instructions given to patients by employees. This responsibility is termed “vicarious liability”. A dentist can therefore be held responsible for all acts or omissions of both his lay and

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professional staff whether or not the staff member was acting according to the instructions given. However, although the dentist has this liability for the acts of his employees every individual remains liable for his own acts, and thus a claim of negligence could be brought against the dentist or the employee or both.<sup>3</sup> Vicarious liability is an important concept in both risk management and patient management.

Professionals working for their own account and not as employees of the dentist would be held liable for their own actions if such action caused harm to a patient. It is important that these matters are clearly defined in all contracts of employment.<sup>4</sup> Communication is key to the complex relationships between members of the dental team especially from a medico-legal perspective. Clear lines of communication between all members of the dental team are required to establish individual areas of responsibility. All staff in a dental practice must receive adequate training regarding the safety of patients.

From a legal perspective, establishing responsibility for negligence is important. Vicarious liability is based in part on the legal concept of *respondeat superior*, which holds the "master" (employer) responsible for the acts or omissions of its "servant" (employee). When a person employs another for his or her own profit, fairness demands that the person also take responsibility for managing the risks and paying for the damages associated with the employee's work. In the course of employment, if an employee does not act with the required amount of skill and care, harm will be caused to others. There is always the possibility that even if the services provided by a dentist meets the standard of care, an employee may do or not do, say or not say something that may hinder or damage the perception or delivery of treatment performed and negligently cause a patient injury. This significantly expands the risk to both the patient and to the dentist. The theory behind vicarious liability is that if an employer

is always responsible for the acts or omissions of an employee, he or she will take care to delegate duties appropriately, train employees carefully and replace employees who do not follow the established protocols of the office. The law is intended to motivate employers to take sufficient care when assigning duties to employees and to specify such duties in detail.

In view of the responsibility of a dentist for the acts of his employees in the discharge of the duties of their employment, and of the liability of the individual for his own acts, there may be confusion in the mind of the reader regarding his or her own liability in various circumstances. Professionals, such as other dentists (locums), dental therapists or oral hygienists working for their own account may also be held vicariously liable for any acts and omissions of their own employees for example, the dental assistant. However, once the dentist has assumed a certain degree of authority and responsibility over staff, whether employed or contracted, he or she also shares their risk.

The law is clear that an employer is responsible for the negligent actions of his or her employees within the scope of their employment. Claims based on vicarious liability are far more likely to be brought against the dentist who does not establish practice policies and procedures to control all employees. At highest risk are dentists who cannot find the time or money to train employees, who are willing to hire unqualified staff, who fail to supervise and evaluate, who delegate authority irresponsibly, and who keep staff members employed when they do not perform in the best interest of the practice and its patients.

Public hospitals can be held vicariously liable for the negligent conduct of their employees, but employees can also be held individually liable. In terms of the Public Finance Management Act 12(2)5, a public hospital may not accept liability for the negligent actions of an employee if the employee:

- Intentionally exceeded his/her powers
- Made use of alcohol or drugs
- Did not act in the course and scope of employment
- Acted recklessly or intentionally
- Without prior consultation with the State Attorney, made an admission that was detrimental to the State or failed to comply with/ignored longstanding instructions which led to damage/reason for the claim.

Table 1 presents some ways in which dentists can reduce or minimize the risk of vicarious liability and in turn offer a higher quality of care to patients.

Vicarious liability arises from common law. The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not him/herself at fault. An employer will be held to be vicariously liable if his/her employee was acting within the course and scope of employment at the time the delict was committed. As can be seen from the above discussion, the theory of vicarious liability is simple to state but the case law demonstrates that its application to a myriad of divergent factual scenarios is more difficult.

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#### References

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**Table 1: Ways to Minimise the Risk of Vicarious Liability**

The dentist must set an example of ethos of the practice, must control and monitor work procedures and supervise all employees

Foster a positive attitude and open communication in your practice

Respect and show confidence in your employees, especially when patients are present

Check the job and employment credentials of all employees both salaried employees and independent contractors. Contact references listed on CVs

Verify current HPCSA registration of all employees whose jobs require registration

The dentist and registered employees must practice within the limitations imposed by the HPCSA taking care not to assign any duties that violate it

Clearly document, in writing for each employee, the job description including the duties and responsibilities.

Supervise each employee from the outset of employment to assure the employee has adequate knowledge and skill to perform the assigned duties

Hire staff members with good communication, interpersonal, and technical skills.

Establish written, relevant policies and protocols that give clear direction to your employees

Provide adequate training for staff members including emergency care eg., cardiopulmonary resuscitation

Encourage and financially support employees to attend CPD courses that update their knowledge and skills

Hold regular staff meetings to strengthen and re-iterate practice policies and improve communication between the dental team

Conduct performance appraisals of employees at least annually

Ensure that your professional liability insurance policy includes vicarious liability coverage