

Vicarious liability – it's a risky business

SADJ April 2016, Vol 71 no 3 p135

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General dental practitioners often envisage that the risks they have are related to them personally as an individual and to their own practice and rarely consider that their employees also affect their risk profile. Most dental practices consist of a dental 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. In addition, a practice may employ a dental therapist or an oral hygienist and he or she may function to their own account or as an employee of the dentist.¹ The dentist, as an employer, can be held responsible for any negligent acts or omissions that the employee commits while performing duties 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" and it includes all acts or omissions of both lay and professional staff whether or not the staff member was acting according to the instructions given. A dentist must ensure that any employee, locum, or independent contractor working for the practice, who themselves may have a high level of clinical autonomy, has indemnity **in their own right**. In addition, partners can individually or jointly be liable in legal actions brought against the partnership, and similarly it is essential that each partner and every assistant is appropriately indemnified or insured.

From a legal perspective, establishing responsibility for negligence is important. Where does the responsibility of the employer end with respect to acts of negligence and omission on the part of the employee? Since vicarious liability refers to liability for the wrongful act of another during the course of employment, it will apply when an employee does not act with the required amount of skill and care, and harm may be caused to others. In order to decide if an employer is vicariously liable for the actions of his employee there must be an employer-employee relationship.

In a typical employer-employee relationship, the locus of control lies with the employer and the employee acts within the parameters that have been set by that employer. It is assumed that since employees have been recruited, trained and retained by the employer, the employer may be deemed liable should there be a claim lodged. Claims can include those that have arisen on account of a failure by non-clinical staff to communicate patient complaints to their employer, communicate updated patient information (like medical history) to their employer, and loss of patient records.

The situation may become complicated where the locus of control lies outside the employer, for example in the case

of the employment of a *locum tenens*. In general, a *locum tenens* operates independently and provides services for a limited period of time. They are usually not supervised and the quality of care provided is not determined by the employer and the *locum tenens* exercises his/her own professional judgment when treating a patient. It could therefore be assumed that should there be a claim the employer is not liable because they have not defined the manner in which the locum works. On the contrary, the reverse is true insofar as the employer could be deemed liable in the first instance, until the independent contractor status of the locum is clarified.²

Dental professionals working in the public sector, as an employee of a public hospital or clinic, can also be held individually liable for negligent conduct and this can be found in the terms of the Public Finance Management Act 12(2)³, that states that a public hospital does not have to 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 or ignored longstanding instructions which led to damage or reason for the claim.

CONCLUDING REMARKS

It is imperative for all practitioners to consider issues of risk regardless of the contractual agreement that exists between them and the entire dental team of employees. Policies should be in place that clearly define how each should function in providing care to patients, be they independent contractors or not. Vicarious liability claims are more likely to be brought against dentists who do not have established practice policies. There must always be clear lines of communication between all members of the dental team to avoid medico-legal complications. All employees should be adequately supervised and keep their skills up-to-date. This is especially important when delegating work, which should be done only when it is appropriate and if the employee is able to perform the task. All staff in a dental practice must receive adequate training regarding the ambit of their prescribed duties and safety of patients. This is especially important where children are concerned. Clear policies defining the working relationship and specific services that will be provided by them are essential when employing *locum tenens*. In addition, patients need to be informed if a locum is employed in the practice.

References

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