

NAVIGATING VICARIOUS LIABILITY

30 NOVEMBER 2021 | HEALTH SECTOR

As a principal dentist who owns a clinic and employs other dentists, the owner of the clinic can be held liable for the negligent acts and/or omissions of employee dentists, irrespective of whether you had any direct involvement in those acts and/or omissions. This article discusses a common clinical scenario where a clinic can be impacted by the principle of vicarious liability and provides some possible ways of mitigating against those impacts.

WHERE DO YOU STAND IN TERMS OF VICARIOUS LIABILITY?

For dentists who employ other dentists, the principle of vicarious liability is one which commonly arises and is often poorly understood. The primary source of confusion stems from who is responsible between the employer (i.e. the clinic) and employee dentist when a patient complaint or claim arises. While vicarious liability involves various complex layers and related issues, for the purpose of this article we focus on the key impact of the principle from the perspective of the employer dentist, either directly in their personal capacity or as the owner of the company which employs the dentists.

In essence, vicarious liability operates to make one party liable for the wrongful acts and/or omissions of another party. The employment context is where vicarious liability most commonly arises, whereby an employer can be vicariously liable for an employee whose wrongful acts and/or omissions occur in the course of their employment. In practical terms, this means that while an employer dentist may not have had any direct involvement in the relevant treatment of a patient, the employer may still be liable even if it has done nothing 'wrong' because vicarious liability is a form of strict liability. The following discusses a clinical scenario to illustrate the issue.

CLINICAL SCENARIO

Steven is the principal dentist and owner of Wonder Smiles Dental (Clinic) through a company and family trust. Steven employs Nina as a fulltime dentist. Nina provided Joe with four dental implants at an appointment four weeks ago during which he indicated that he felt substantial pain around in the sites of three of the four implants after placement (treatment).

Six months later the Clinic received a letter of demand from Joe's solicitors seeking damages for personal injuries allegedly sustained as a result of the treatment performed by Nina.

Initially, Steven was of the view that the claim should have been brought against Nina given she performed the treatment and Steven (and the Clinic) effectively had nothing to do with the treatment. However, he was advised that due to the principle of vicarious liability, the

Clinic is liable for the alleged negligence of Nina in performing the treatment.

To complicate matters further, while Steven holds his own insurance policy in his personal capacity as a dentist, he does not hold separate insurance for the Clinic. As a result, the Clinic is uninsured in respect of Joe's claim. It is possible that Steven may not have the financial resources to be able to pay the damages and costs which may be awarded to Joe. Being uninsured also has the effect that Steven (i.e. the Clinic) will not have the benefit of ongoing legal assistance under his insurance policy, meaning he will be required to seek legal advice at his own cost.

LEARNINGS AND SAFEGUARDS

The above scenario is one which may arise in relation to dental clinics that employ other dentists. In order to protect themselves as much as possible from the impacts of vicarious liability, it is crucial for employer dentists to be mindful of the following:

- ensure they hold separate insurance for the clinic in addition to their personal policy to safeguard against the risk of being uninsured in the event of a claim against the clinic (including by way of vicarious liability);
- familiarise themselves with the terms of both their personal and clinic's insurance policies (or alternatively, seeking clarification and information from Experien regarding the policy terms);
- consider seeking independent legal advice on contracts with employees, including on whether to employ dentists to work at the clinic or whether to engage them as independent contractors instead; and
- ensure that all employee dentists maintain their continuing professional development (CPD) obligations, undertake regular discussion and consultation with their peers to debrief cases and discuss treatment, as well as providing in-house training to staff.

As explained above, vicarious liability is a complex legal issue which is often difficult to understand. If you have any doubts about how it may affect you and/or your practice, we suggest you seek legal advice or contact Experien for further information.

GET IN TOUCH



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