

Dental Protection Limited explains....

Public or private: Know your indemnity cover

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There appears to be still some confusion about the difference between the professional indemnity cover and subscription rates provided by Dental Protection Limited (DPL) for state employed dentists and private practitioners in South Africa.

There is also some uncertainty about exactly what members are getting for their money and what cover is provided. Private practitioners are also under a common misconception that they are somehow 'subsidising' state-employed members for most of the rates paid by state employed dentists are significantly lower than those paid by dentists working in the private sector.

Practitioners employed by dental schools which are attached to public health facilities or conduct clinics and public sector facilities (such as clinics, hospitals and other public facilities) are sometimes given incorrect, misleading or perhaps no information about the nature of indemnity cover provided by their employing institution or the State. These practitioners are encouraged or sometimes led to believe that by taking out indemnity cover with DPL they would be fully covered on the same basis as private practitioners.

As will be more fully explained below, it is important for practitioners to understand the extent of indemnity cover offered by the State and DPL and who is responsible for obtaining indemnity cover.

Private practitioners need to indemnify themselves against any claim for compensation made by a patient they treated who believes they had been harmed by negligent treatment. With the correct level of cover, DPL can manage the claim from first notification to conclusion, and can take care of all the legal costs and compensation payments.

The State institution (usually provincial health) must accept responsibility for all claims and losses arising from treatment provided in a negligent fashion by a practitioner employed by a state institution and indemnity obtained from Dental Protection by practitioners working in the state or public sector does not include cover for any claims arising from treatment carried out by the practitioner in that sector. This duty remains the responsibility of the State in terms of the National Treasury's regulations which provides that the State will bear the risks of its own damages and accidents. This explains the significant difference between the cost of indemnity for those working in the public sector and those in private practice even though they may work similar hours and provide similar care.

Normally any compensation paid by the State to the patient will not be recovered from the employee (practitioner).

However, the regulations do allow the State to recover any losses from an employee practitioner in circumstances where the damage or harm caused to a patient flows from one of the following exceptions where the practitioner:

- intentionally exceeded his or her powers.
- made use of drugs or alcohol
- did not act in the course and scope of employment.
- acted recklessly or intentionally.
- without prior consultation with the State Attorney made certain admissions detrimental to the state.
- failed to comply with or ignored a standing instruction which he or she was made aware of, leading to the loss or damage.

State cover will also be forfeited by the public practitioner if they used a state vehicle without permission, drove without licence, deviated from the route or allowed others to use the vehicle or the use of the vehicle was not in the State interests.

Practitioners employed by tertiary institutions with a high level of clinical autonomy, supervising dental students who provide clinical services to patients presenting at these clinics should seek clarity from the employing institution regarding the extent of indemnity cover to cover practitioners in respect of claims made by patients who are treated at clinics.

Practitioners who are jointly employed by the dental school at a tertiary institution and the state should similarly seek clarity on extent of indemnity cover and whether the State or the tertiary institution will provide indemnity cover.

As the state provides indemnity for its employees, cover with DPL does not extend to settling claims against the state by a patient. Any member of Dental Protection working within the public/state sector can look to Dental Protection for assistance when it might be necessary to remind the state of its obligations.

The cover provided by DPL to dentists working in the public sector also includes assistance with the following:

- **Internal disciplinary matters** – assistance with these matters.
- **HPCSA referrals** – it is quite possible that the staff or employer (state) can refer one of their practitioners to the HPCSA. Clearly the state would not pay for the defence of one of their dentists at the HPCSA – particularly if they referred the dentist in the first place.
- **Complaints** – dentists can be asked by hospital managers to respond to complaints about clinical care and, essentially, this response is on behalf of the state. DPL can assist members long before a claim or complaint arises with advice on how to best protect them and can also assist in preparing and checking reports for the State Attorney or to ensure that the blame is not shifted on to the dentist.
- **Inquests** – While the state would probably assist a dentist in the case of an inquest, it is usually only

on the 'coat tails' of its own defence. If a dentist is vulnerable to individual criticism, or there is a conflict of interest between the state and a dentist during an inquest, because of this, it may not be in a member's best interests to rely solely on the representation of a state attorney. Conversely it may not be in the member's best interests to be separated out from the rest of the staff involved; DPL can advise on the best approach in any given situation.

- **Claims** – as already discussed, DPL does not handle clinical negligence claims on behalf of state dentists – but they can assist in some areas, such as writing reports.

It is also important for those public sector dentists who are given permission to carry on private practice after their full time employment with the State for the day is over, to obtain indemnity cover to protect themselves against claims or complaints by patients treated after hours in their private practice.

Dental practitioners also often think that risks are related to them individually and to their practice. They do not consider that their employees also affect their risk profile.

The dentist as employer in the practice 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 is called 'vicarious liability' and includes acts or omissions not only by employees who provide clinical services but also by non-clinical staff in the practice. It also does not matter whether or not the employee was acting according to instructions.

It is also not limited to only clinical advice provided by the dentist but also includes any instructions or advice provided by employees. The question as where the responsibility of the employer starts and ends is not absolute but will depend on issues like control.

Private practitioners should therefore consider that it is in their own interests to ensure that any employee, locum, or independent contractor working for them and who are directly involved in delivering treatment to patients obtain indemnity in their own right, as DPL will not normally extend the benefits of membership to the assistance with any matter arising from the vicarious liability of such staff. As partners are jointly and severally liable in legal actions brought against the partnership, it is also essential that each partner and every assistant is a member of indemnity organisation like DPL.

The situation is less clear cut when one considers the position of a locum. *Locum tenens* literally means "hold a place" and that is what practitioners are doing when a dentist fills in for another dentist who is on vacation, disabled, sick or given "time out" by the regulator, or who has died. They are generally considered to operate independently and whose service provision is solely to provide cover for a limited period of time. The quality of service a locum provides is not determined by the employer; they exercise their own professional judgment in treating patients and as such are not subject to the same routine management as other employees.

In this scenario, it could therefore be assumed that should there be a claim, the employer is not liable, because they do not define the method and manner by 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. In trying to clarify the position, legal practitioners will try to confirm or discount the independent contractor status and could explore the terms of contract between employer and locum, the hours worked, whether the locum works for the one or one of many facilities and so on. Furthermore, questions could be raised as to how the role of the locum is understood within the practice by patients, who could well argue that they thought the locum was an employee of the practice.

Undoubtedly, this can be an onerous and tiresome process for both the employer and the locum and the aim is to avoid reaching that stage. It is therefore imperative that the independent contractor status of the locum and the requirement that they have their own indemnity arrangements is emphasised and that there is documentary evidence of their professional indemnity arrangements. Furthermore, patients need to be made aware of the presence of the locum in the practice – this is best done by the reception staff.

The locum should also make sure that the patient is aware of his/her role within the practice and that this is clearly documented in the medical records.

It is important for all practitioners to consider issues of risk regardless of the contractual agreement that exists between them. Policies should be in place that clearly outline how each member of the clinical team should function in providing care, whether they are independent providers or not.

It is therefore imperative that all practitioners consider the issue or risk regardless of their contractual relationship.

In conclusion, dentists working in the public sector on average pay lower fees than those working in the private sector as any claim for compensation would be against the state and be the responsibility of the state. A dentist who is a practice owner and who employs or engages self-employed contractors in his/her practice should insist that each clinician whether it is a dentist or a dental therapist/hygienist has their own indemnity or policy of insurance in place. Membership of Dental Protection is priced for one clinician's risk and does not provide cover for any employees who may be engaged by the members practice or business.

A time for Greetings and Good Wishes

This is a special time for many colleagues and the Journal extends on behalf of the Association very warm wishes to:

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