

# Understanding different professional indemnity options for dentists

SADJ July 2019, Vol. 74 No. 6 p281 - p286

In recent years a number of countries have introduced a statutory requirement that dentists should hold professional indemnity or insurance arrangements to deal with any liabilities arising from their practice.

Although there is currently no such requirement in South Africa, it is absolutely crucial that all practitioners have an indemnity that can protect them against claims.

Professional indemnity should protect you not only for the claim in compensation but should also provide also for the costs and expenses associated with defending/settling such an allegation.

You need this protection at all times; whilst you practice, when you retire and even after you die, as claims can still be made against your estate for adverse incidents that occurred whilst you were practising.

Claims can come to light a number of years after professional services are rendered, which is why it is important for you (and potentially your estate) to consider your options at the time you purchase professional indemnity. Adult patients can usually bring lodge a negligence claim up to three years after they become aware, or show to have become aware, that they have suffered harm. In the case of children, the limit is usually extended to three years after the age of legal majority (i.e. 18).

There are two different products available for dental professionals and allied healthcare professionals, namely: claims-made indemnity/insurance and occurrence-based indemnity. Your clear understanding of both types of indemnity is essential to making a fully informed decision on which type of indemnity/insurance to buy. Occurrence-based indemnity is still considered the "gold standard" by indemnity providers and commercial insurers.

When a clinician is protected by occurrence-based indemnity, that clinician can be assured that if they leave clinical practice for any reason, they can still request assistance with any incidents arising out of the clinical practice during their membership period, no matter when that incident, whether it be a complaint, claim or regulatory matter, comes to light. The protection needs only to be in place on the day the treatment was provided.

Claims-made insurance provides a specified level of cover for specified circumstances and for a specified period, usually the duration of the policy. Generally,

the policy is purchased on a year-by-year basis and is designed to cover only a proportion of the claims that might arise from each year of the policy. It is for this reason that the policy can be priced lower than an occurrence-based product in the first few years. Claims-made policies are generally favoured by many commercial insurers because they are more predictable.

At the point you stop purchasing claims-made insurance, the insurer's liability stops, unlike an occurrence-based protection which offers indemnity for incidents long into the future. There is also a contractual obligation on the insured to report all adverse incidents to the insurer during the active policy.

What this means is that if you rely on claims-made insurance, you will need to purchase "tail" or "run off" cover in order to give you an extended reporting window which is included and priced in an occurrence-based policy. Insurers are not obliged to offer you run off cover when you end a policy of insurance and the run off cover must give you provide extended reporting benefits given that claims are still being reported up to 10 years or more after the treatment was provided delivered.

The permissible delay between provision of care and when a claim or complaint is reported is unique to dentistry. It is not unusual for complex implant treatment to fail slowly over many years, and it is often the case that the "post-mortem" after the failure begins to identify failings in the original patient assessment/selection and consent process that means the claim cannot be defended.

The decision to select the correct type of indemnity should not be determined by price alone. Professional Indemnity can protect you against a legal liability to compensate third parties (patients) who have sustained injury, loss, or damage due to your own professional negligence or breach of professional duty in the conduct of your profession or occupation.

The indemnity is usually priced for your own risk and does not normally provide indemnity for the acts and omissions of clinical colleagues who provide clinical services under a contract of employment.

Any dentist, oral therapist or oral hygienist must have their own indemnity whilst employed unless you purchase a group or corporate indemnity which will be priced depending upon the number of dentists, therapists and hygienists you employ.

A failure to ensure that all clinicians employed by you have in place their own indemnity arrangements in place may potentially leave you potentially exposed to a claim for vicarious liability, to which that your own indemnity may not respond to.

The table below illustrates some of the key differences one needs to consider before deciding on the type of indemnity product that suits your needs.

	Occurrence-based, discretionary indemnity	Claims-made insurance policy
Provider/s	<ul style="list-style-type: none"> <li>Dental Protection – part of The Medical Protection Society (MPS), the world's largest professional defence organisation.</li> <li>Member-owned: subscriptions paid by members create a mutual fund that is owned by members and used to provide benefits.</li> <li>Not-for-profit: Long-term commitment to support members throughout their career. No shareholders to inform their decisions.</li> </ul>	<ul style="list-style-type: none"> <li>Some short-term commercial insurers provide the product.</li> <li>Insurance companies are for-profit companies, paying dividends to shareholders.</li> <li>You have recourse to the Financial Advisory and Intermediary Services Act or the South African Ombudsman of Short-Term Insurance (OSTI).</li> </ul>
What are the key differences?	<ul style="list-style-type: none"> <li>Occurrence-based indemnity offers life-time protection for incidents that occur during the membership period.</li> <li>There is no limit on the indemnity offered or the expenses that will be paid.</li> <li>There are no additional costs or excesses to pay.</li> <li>There is no contract of insurance with terms and conditions that will apply. (there is no policy document).</li> <li>No reporting requirements. Claims or complaints should be reported in a timely manner.</li> <li>When your indemnity period has ended, there is no need to renew the policy or purchase extended reporting benefits to cover in respect of events during your indemnity period.</li> <li>Subscriptions can be suspended for periods in which the dentist is not practising. For example, if due to illness, or if you are on a maternity or paternity break, if the practitioner is taking time off or is unable to practise for other reasons.</li> </ul>	<ul style="list-style-type: none"> <li>Claims-made cover offers protection for incidents reported to the insurer whilst the policy is in force (i.e. it provides protection for incidents provided they <b>both occur and are reported</b> during the policy period).</li> <li>Some policies provide for purchase of a retroactive date which essentially backdates the cover period for which the new insurer would be responsible. The two main rules to offer retroactive cover are that: <ul style="list-style-type: none"> <li>the practitioner must have had a claim made policy in place, previously with another insurer; and</li> <li>any claims already notified or known to the practitioner prior to changing to the new insurer would not be the responsibility of the new insurer as they should have been lodged with the first insurer.</li> </ul> </li> <li>Most companies offer indemnity limits from R1m to R50m. Practitioners can choose the limit of their indemnity.</li> <li>Excess may become payable in terms of the policy for that part of the claim that remains uninsured which requires the insured to pay the first portion of the claim with the insurer settling the balance up to the limit of indemnity.</li> <li>You would require an understanding of the policy language used in the insurance contract. Expert guidance from broker may be necessary.</li> <li>Insurance policy contract will stipulate the time period within which claims are to be reported. Failure to report the claims timeously may lead to the claims being declined.</li> <li>You may be requested to sign and complete a no-claims declaration on inception of the policy or possibly during any renewal.</li> <li>Your claims today are covered by the policy you have today. This gives you the benefit of purchasing policy limits that correspond with the current economic and legal environment in which your business operates.</li> <li>Once a claim made policy is terminated, there is no further cover for new and not-previously reported claims. Once cancelled and not renewed, that is the end of that policy.</li> <li>One would have to consider whether legal costs are included within or paid in addition to the limit of indemnity available to settle a claim.</li> <li>You cannot suspend your premiums as you still need the right to report adverse incidents that you become aware of from when you were practising to maintain your protection.</li> <li>The policy may or may not include an Extended Reporting period (ERP) sometimes at a cost or at no cost up to a specific period for example, 60 months and, subject to certain conditions. It is important that you check this with the broker.</li> </ul>

<b>Indemnity provision</b>	<ul style="list-style-type: none"> <li>Indemnity is discretionary and governed by the constitution of the provider (Memorandum and Articles of Association) which regulates the relationship between the organisation and its members).</li> <li>No tightly worded contracts, exclusions or excesses.</li> <li>No caps on the indemnity provided.</li> <li>Flexibility to respond to unforeseen changes in the dentolegal environment.</li> <li>Allows greater freedom to consider unusual requests for help.</li> <li>Decisions made by informed people (including fellow clinicians) exercising good judgment and insight.</li> </ul>
<b>What is indemnified?</b>	<ul style="list-style-type: none"> <li>Assistance with all of the legal costs and compensation payments.</li> <li>Members can request assistance for any action, civil procedure, claim or demand for money arising from an incident related to their professional practice and which occurred during the period of membership.</li> </ul> <p>This can include:</p> <p><b>Clinical negligence claims</b></p> <ul style="list-style-type: none"> <li>Assistance from first notification to conclusion, including all the legal costs and compensation payments.</li> <li>Defence of a claim will depend on quality of records, treatment and consent process.</li> <li>Settlement of cases where they are not defensible only with the express consent of member.</li> </ul> <p><b>Investigations</b></p> <ul style="list-style-type: none"> <li>Advice and legal representation for HPCSA inquiries arising from health, performance, and professional conduct. Includes drafting letter and legal representation at hearing.</li> </ul> <p><b>Disciplinary procedures</b></p> <ul style="list-style-type: none"> <li>Advice and representation if practitioners face allegations arising from the provision of clinical care to patients, concerning their professional conduct, competence and performance, or in relation to health problems that are having a significant effect on their clinical performance.</li> </ul> <p><b>Preparing for inquests</b></p> <ul style="list-style-type: none"> <li>Assistance with preparation of a report for the coroner and advise practitioners on how to conduct themselves at the inquest. If necessary, legal representation can be arranged on their behalf.</li> </ul> <p><b>Criminal proceedings</b></p> <ul style="list-style-type: none"> <li>Assistance if you become the subject of criminal investigations that arise directly from provision of clinical care to patients. This includes investigation or prosecution for gross negligence manslaughter.</li> </ul> <p><b>Indemnity for Good Samaritan acts</b></p> <ul style="list-style-type: none"> <li>A Good Samaritan act is one in which dental assistance is given, free of charge, in a <i>bona fide</i> dental or medical emergency upon which practitioners may chance, in a personal as opposed to a professional capacity. In the unlikely event that legal proceedings follow, the dentist would be entitled to ask for assistance.</li> </ul> <p><b>Dentolegal advisory service</b></p> <ul style="list-style-type: none"> <li>Phone or email advice 24 hours a day, seven days a week for urgent advice.</li> <li>Incident reporting via website with established panel of local expert lawyers and experienced medicolegal advisers.</li> </ul> <p><b>Complaints</b></p> <ul style="list-style-type: none"> <li>Help formulating a response to a complaint and assisting and supporting you through to its resolution.</li> </ul>

	<p><b>Handling media attention</b></p> <ul style="list-style-type: none"> <li>Issuing press statements and acting as spokesperson with the press, to shield you as far as possible from having to deal directly with the adverse media attention.</li> </ul> <p><b>Counselling and support</b></p> <ul style="list-style-type: none"> <li>Access to 24/7 counselling service.</li> <li>Members are requested to contact Dental Protection at the earliest opportunity when a complaint or potential for a claim may arise. This allows Dental Protection to pro-actively manage the matter and in many cases avoid escalation into a more complex and challenging environment.</li> <li>Complaints investigated by the HPCSA require the practitioner to respond within a specified time.</li> </ul>	
<b>Reporting requirements</b>	<ul style="list-style-type: none"> <li>Members are requested to contact Dental Protection at the earliest opportunity when a complaint or potential for a claim may arise. This allows Dental Protection to pro-actively manage the matter and in many cases avoid escalation into a more complex and challenging environment.</li> <li>Complaints investigated by the HPCSA require the practitioner to respond within a specified time.</li> </ul>	<ul style="list-style-type: none"> <li>Claims-made insurance will contractually require a clinician to notify the insurer of all adverse incidents in accordance with the terms and conditions within a specified time frame. This is known as reporting. Failure to report an incident may invalidate the policy.</li> <li>An informal email might make certain allegations and seek redress, but if the policy definition of "claim" includes, for example, written demands, such a complaint may or may not trigger cover. Failure to appreciate this policy trigger and notify the "claim" in accordance with the policy requirements may result in loss of coverage.</li> <li>Even if the complaint does not constitute a claim, the policy and its obligations may nonetheless be triggered if the complaint can be considered a "circumstance".</li> <li>Many liability policies also contain a "deeming provision", such that an insured can (or maybe should) notify a circumstance which may give rise to a future claim. Once notified to the insurer, any subsequent "claim" that arises out of that circumstance is "deemed" to be a claim made within the earlier policy period to which the circumstance was notified.</li> </ul>
<b>Provision period / Period of Cover</b>	<ul style="list-style-type: none"> <li>Protection is offered on an occurrence basis, based on the date on which an adverse incident occurs irrespective of the date a complaint or claim is made.</li> <li>Members can ask for assistance with dentolegal consequences at any time - even if it is years later, they are no longer a member, or have ceased practising.</li> </ul> <p><i>This is important because it can often be years before the matter is brought and fully resolved.</i></p> <p><b>Example:</b></p> <p>Assume you had an Occurrence-based cover in force for the calendar year of 2019. If a claim is made in 2022 based on treatment performed on a patient in 2019, the 2019 occurrence-based protection offers assistance even if you are not a member for the period 2020 to 2022.</p>	<ul style="list-style-type: none"> <li>Claims made policies will provide protection only during the period of indemnity only. The insured practitioner must have had cover both on the date of incident and the date on which the claim or complaint is made.</li> <li>Some policies have extensions to the period of cover, either at the beginning (retroactive) or at the end "tail" or "run-off" cover.</li> <li>Claims-made policies provide cover so long as the insured dentist continues to pay premiums for the initial policy and any subsequent renewals.</li> <li>For each succeeding year the policy is renewed, the "cover period" is extended backwards.</li> <li>Once premiums stop, the cover stops.</li> <li>Claims made after the policy period ends will not be covered, even if the alleged incident occurred while the policy was in force unless extended reporting benefits have been purchased.</li> <li>Practitioners will have to consider what the additional costs of tail-off cover is likely to be and whether the insurer will still be writing insurance when you retire or stop clinical practice.</li> <li>For many practitioners on a claims-made insurance, there may be no choice other than to continue their insurance for many years into retirement to ensure that they are adequately protected against claims-made long after the work was completed.</li> <li>If you die before retirement, your estate will need to purchase run-off cover and continue to report adverse incidents to the insurer</li> </ul>

		<p><b>Example:</b></p> <p>Let's say you purchased a claims-made policy from SADA Insurance Company, with an effective date of January 1, 2019 and liability limits of R2 million. You elect to let the 1-year policy lapse at the end of 2019, and you do not purchase "tail" cover from SADA Insurance Company. You are then sued in 2020 for treatment you provided in June of 2019. Since the incident was reported after the policy period ended, and no tail cover was in place to extend your right to report claims, SADA Insurance Company will not assist with the claim.</p>
<p><b>Accessing benefits on Retirement, Death or Disability</b></p>	<ul style="list-style-type: none"> <li>You do not have to make any further arrangements during a career break, after you leave membership, cease practice (retire), or to protect your estate after your death.</li> </ul>	<p><b>Retirement / Death</b></p> <ul style="list-style-type: none"> <li>Some insurers will provide extended reporting benefits under claims-made professional liability policies. Usually there will be an additional cost and it will be at the insurers discretion as to whether you can purchase extended reporting benefits to cover your retirement and your death until your estate is wound up. Naturally, this will only be available for claim(s) resulting from an act that took place while the policy was in force.</li> <li>In some cases, retirement coverage is provided if two conditions are met. First the insured practitioner reached a specific minimum age, generally 55, but under some insurers' forms the minimum age requirement is 60. Second, the insured must have been a policyholder with this particular insurer for a specified period of uninterrupted indemnity.</li> </ul> <p><b>Permanent Disability</b></p> <ul style="list-style-type: none"> <li>It is advantageous if a policy's definition of "disability" is as liberal as possible.</li> </ul>
<p><b>Paying for your risk</b></p>	<ul style="list-style-type: none"> <li>Risk is assessed on the long-term trends in the regulatory and claims environments (i.e., the current number and size of claims being reported in a specialty, the likelihood they will arise in future years, and how much it will cost to resolve these matters at that future time).</li> <li>Occurrence-based subscriptions are priced with this element of uncapped, future risk included, so you pay more at the start.</li> <li>No need to buy any run-off cover when retiring, or to protect your estate after your death.</li> </ul>	<ul style="list-style-type: none"> <li>Risk is assessed by the indemnifier on the current claims' environment.</li> <li>Premiums are calculated on an annual basis. When the contract of insurance ends and is not renewed, whether at retirement or other career break, extended reporting benefits need to be purchased to allow claims to be reported and future protection provided into retirement.</li> <li>Practitioners may benefit from lower premiums initially, however with claims-made insurance you must continue paying into retirement or when you take a career break for the same level of protection you will have secured with occurrence-based indemnity.</li> </ul>
<p><b>Indemnity limit</b></p>	<ul style="list-style-type: none"> <li>No predefined financial limits on the indemnity offered, either for the cost of an individual claim or investigation arising from a single incident, or for the total of all the incidents in any period of membership.</li> <li>Members are required to choose the grade that most closely resembles their scope of practice and pay the membership fees for the category chosen.</li> </ul>	<p><b>Retirement / Death</b></p> <ul style="list-style-type: none"> <li>Claims-made insurance policy will have a cap specifying financial limits for each claim and will aggregate all claims arising from a single year.</li> <li>The limit of indemnity is the maximum amount an insurer will pay in respect of any one claim first made against the insured and notified to the insurer during the policy period. This amount will usually have to be selected by the practitioner.</li> <li>Terms and conditions specify the scope of assistance and this absence of discretion may prevent the insurer from assisting with a complaint where there are clear grounds for a refund, until it becomes a claim for compensation.</li> <li>When deciding on what Limit of Indemnity is best suitable for the practitioner, it is important to remember that the limits on most professional indemnity policies include defence costs (fees and all other expenses that are incurred in order to assist with the investigation or settlement of a claim) as well as representation costs in an inquest, an inquiry or any other proceedings in respect of matters which have a direct relevance to the claim.</li> </ul>

<b>Excess</b>	<ul style="list-style-type: none"> <li>No excesses are payable.</li> <li>Where a member has been found negligent or breached their duty of care, they may be asked to make a very small contribution equivalent to the profit element of the negligent treatment provided, otherwise all other costs may be paid by the indemnity.</li> <li>Members may also be requested to contribute to the costs where they act contrary to advice given by the organisation.</li> </ul>	<ul style="list-style-type: none"> <li>An excess, also known as the 'first amount payable' or deductible or uninsured amount, is a payment that has to be made by the practitioner before cover is undertaken in terms of a policy.</li> <li>The size of an excess depends on the sum insured, a person's claims record or even age. The excess amount may have a significant influence on the premium payable, the lower the excess, the higher the premium and vice versa.</li> </ul>
<b>Exclusions - What is NOT covered?</b>	<ul style="list-style-type: none"> <li>Discretionary protection provides flexibility to assist individual cases in a wide range of situations where most contractual policies would exclude cover.</li> <li>However, there may be situations where assistance may be declined or withdrawn.</li> </ul>	<ul style="list-style-type: none"> <li>Policy exclusions tend to narrow the scope of the insurance contract.</li> <li>Normally excluded from cover would be claims covered under some other forms of insurance, specified risks not covered under the policy or restriction of cover unless some extension is provided.</li> <li>Some of the more common provisions is exclusion of liability in USA and Canadian jurisdictions.</li> <li>It is crucial that practitioners read the policy document dealing with what is EXCLUDED from cover.</li> </ul>

## Do the CPD questionnaire on page 337

The Continuous Professional Development (CPD) section provides for twenty general questions and five ethics questions. The section provides members with a valuable source of CPD points whilst also achieving the objective of CPD, to assure continuing education. The importance of continuing professional development should not be underestimated, it is a career-long obligation for practicing professionals.



### Online CPD in 6 Easy Steps

- 1 Go to the SADA website [www.sada.co.za](http://www.sada.co.za).
- 2 Log into the 'member only' section with your unique SADA username and password.
- 3 Select the CPD navigation tab.
- 4 Select the questionnaire that you wish to complete.
- 5 Enter your multiple choice answers. Please note that you have two attempts to obtain at least 70%.
- 6 View and print your CPD certificate.