

Dental Practitioners and Vicarious Liability



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This year Guild Insurance changed its pricing approach to practitioners who employ AHPRA registered dental practitioners including dental hygienist and oral health therapists. This document addresses the reasons for the changes, the exposures practitioners face when they employ staff and explains what this means for owner practitioners.

What is the risk?

Owner practitioners that engage AHPRA registered dental practitioner(s) should ensure they have vicarious liability cover to protect them from claims that originate from treatment provided by their employee AHPRA registered dental practitioners. Some professional indemnity policies are silent or specifically do not provide this cover.

This can leave the owner practitioner uninsured and needing to seek their own legal representation and covering any of their own financial loss as a result. The ADA Dentists Liabilities policy underwritten by Guild Insurance is designed to provide a sleep easy, no gaps cover for these practitioners.

What is Vicarious liability?

Vicarious liability refers to a situation where someone is held responsible for the actions or omissions of another person. In a workplace context, an employer can be liable for the acts or omissions of its employees, provided it can be shown that they took place during their employment.

For further information, please read Appendix 1 – Understanding vicarious liability.

What does this mean for you? – the Plaintiff’s choice of action

Historically the litigious environment in dentistry (and other health professions) has operated differently to the common law position, with each practitioner protecting themselves via their own insurance policy and plaintiff/complainant lawyers typically directing claims towards the individual treating dentist rather than the entity.

The reality is that the defendant cannot dictate who the claim is brought against. While it is common for claims against the treating practitioner directly, it is by no means certain that a Plaintiff won’t bring their claim against both the treating practitioner and the employer. Each party noted in the claim will need to provide defence to prove there was no negligence from their end. Therefore, employer practitioners need to ensure their cover appropriately protects themselves as well as their practice, so it responds to these claims.

What you can do to ensure you are adequately covered?

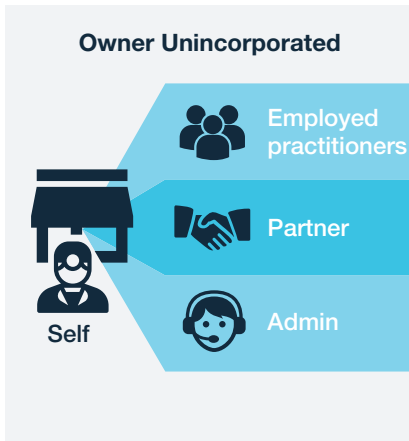


Figure 1

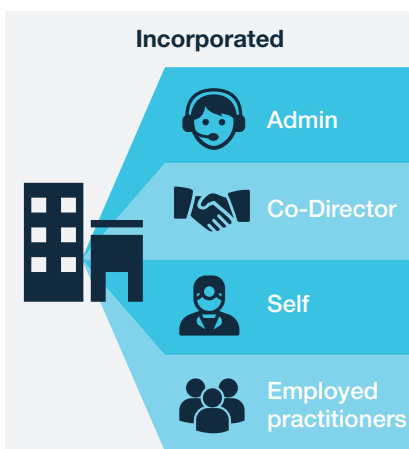


Figure 2



Figure 3



Figure 4

We have summarised below the impact of vicarious liability on employer dentists under some simple business/ownership structures.

1. Practitioners that own or are partners of a non-incorporated entity (has an ABN but is not a Pty Ltd. Examples include unincorporated sole trading entities, partnerships and service (unit) trusts with an unincorporated trustee). Practitioners with this type of business structure requires cover to be extended for their vicarious liability exposure because in an unincorporated structure the hiring of personnel (employee and/or contractor) is directly between the owner and the employee and in this there is no separation of liability between the owner practitioner and the business. See figure 1.

2. Practitioners that own all or part of an incorporated entity (ie a Pty Ltd including a services (unit) trust with an incorporated trustee) require cover for their own direct liability as a practitioner in addition to cover for their vicarious liability as owner of the incorporated entity. The incorporated entity usually hires the personnel to perform their services for the business. The law recognises that incorporated entities are a separate legal entity to the shareholder (owner) and there is limited liability between them but the entity including its directors and shareholders are vicariously liable for its personnel. See figure 2.

3. The Associate model, these are a unique business structure predominately for health practitioners, where they allow practitioners to carry on separate practices while splitting the business expenses which may include staff. Essentially the owner practitioners work independently under one umbrella or business name. Each owner practitioner operates under a separate legal entity for tax and legal purposes, these can be either incorporated or unincorporated entities. With associateships, when there are employees employed under the umbrella company the associates and/or principals of the company can be deemed vicariously liable for the professional services provided by the employees. See figure 3.

4. Associate model version 2; In some instances, the associates themselves hire employees directly through their own practice entity as well as having shared employees through the associateship. For these owner practitioners, they will have a vicarious liability exposure through their direct employees under scenarios 1 or 2 as well as vicarious liability for the associateship's employees. See figure 4.

You can see from these scenarios that it is important to understand both your business structure type and how you hire personnel into your practice as it directly effects the actions of others that you will be held liable for at law. It is not the intention of this document to explore the vicarious liability implications of all possible business structures. There are many other business structures in addition to the above scenarios that practitioners can utilise when conducting a business and our intention is to ensure that the owner practitioners can recognise if they have a vicarious liability exposure and consider the cover they need for their business entity.

Owner practitioners should seek professional advice from either their lawyer or accountant to understand their own individual circumstances and get clarity on their legal obligations.

ADA Dentists Combined Liabilities policy underwritten by Guild Insurance

Practitioners that are currently insured with Guild Insurance should have provided information to us about their professional services at the start of their insurance, during previous renewals and through various surveys. This is the information used to prepare your insurance policy.

Owner practitioners should review their policy schedule and addendum to confirm the cover that is in place for them is correct or notify us if it needs amending.

Key questions to consider include:

- > How many AHPRA registered practitioners do you directly employ in an unincorporated capacity?
- > How many AHPRA registered practitioners do you employee through an incorporated entity of which you are a director?
- > Efficacy and robustness of any contracts for service you have put in place with contractors and how these contracts effect your vicarious liability arising from actions or omissions by AHPRA registered practitioners.

Appendix 1 – Understanding vicarious liability

For practitioners that have advised they have an ownership interest in an unincorporated practice entity, Guild Insurance will automatically extend cover for owner practitioners that hire employees and will charge additional premium when there are two or more AHPRA registered dental practitioner employees.

For incorporated entities, the owner practitioner has the option to include cover for the Pty Ltd including the vicarious liability exposure for AHPRA registered dental practitioner employees with a premium charge. When there are mixed or more complex business structures a combination of both approaches may apply.

Some owner practitioners have queried engagement of independent contractors and whether these practitioners should be included. The answer depends on the nature and robustness of the contracts of service the owner practitioner has in place with their respective contractors. Some such contracts effectively remove a principal's vicarious liability exposure, and some do not. In these instances, the principal practitioner needs to make a call on whether they wish to have cover in place for contracted staff based on the nature of contract in place. If the owner practitioners do not wish to be covered for vicarious liability arising from contracted staff, then they can advise Guild Insurance and adjust the number of AHPRA registered dental practitioners they have at their practice for which they wish to be covered. For further information before making this decision please refer Appendix 1 – Understanding vicarious liability.

It is a complex area that you need to carefully consider.

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Vicarious liability is a common law principle that recognises if an employer benefits from the employment of a person, they must also take responsibility for the person's actions during the period of employment. Essentially, the employer must take the good with the bad.

The necessary elements of a common law vicarious liability are that:

1. The relationship is that of an employer/employee, and
2. The employee is acting within the scope of their employment, and
3. The employee commits or is alleged to have committed an act or omission that would attract a liability; then
4. The employer would be held liable as though it were their own act or omission.

As mentioned in the article, historically the litigious environment in dentistry (and other health professions) has operated differently to the common law position, with each practitioner protecting themselves via their own insurance policy and plaintiff/complainant lawyers typically directing claims towards the individual treating dentist rather than the entity.

The reality is that the defendant cannot dictate who the claim is brought against. While it is common for claims against the treating practitioner directly, it is by no means certain that a Plaintiff won't bring their claim against both the treating practitioner and the employer. Each party noted in the claim will need to provide defence to prove there was no negligence from their end. Therefore, employer practitioners need to ensure their cover appropriately protects themselves as well as their practice, so it responds to these claims.

Many insureds believe they have avoided all responsibilities of being an employer (from payroll tax, to Workers Comp and Superannuation, right through to vicarious liability) by setting up people that perform work for them as "contractors".

The common misconception with vicarious liability is that it won't apply if the individual is a contractor and the entity is a "Principal". The reality is that the law will look at the nature of the relationship rather than how the employer/principal (employer) defines or structures it, with a focus on the extent to which the employer controls the employee/contractor (employee). Some of the main matters that will be considered in reaching a view on this are:

- > Whether the employee performs work for anyone else,
- > The extent to which the employer controls the method of work,
- > Whether the employer provides a uniform or the tools of trade.

Applying this to the dental profession, a Principal dentist may enter into a contract with a dentist. That dentist works exclusively for the Principal, uses the principal's chair and equipment, works with dental assistants either employed by or contracted to the Principal and bills through the practice.

Even though the Principal views the relationship as that of Principal and Contractor, from a vicarious liability standpoint this could still be considered an employer and employee situation and the principal would be held vicariously liable for the acts and omissions of the contractor.

It is therefore likely that the dental practice owner's vicarious liability is likely to extend to include professional services provided by contractors.

Better through experience.

