

PERSPECTIVE

The skill mix agenda and indemnity

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Key points

- Dental therapists and hygienists should notify their indemnity provider that they are providing services under direct access.
- Governance for dental therapists and hygienists providing direct access NHS care sits with the provider rather than NHS England.
- MDDUS has a range of indemnity solutions to suit the full range of requirements for dental professional and practices.

In 2013, the GDC published its current *Scope of practice* guidance,¹ and at the same time, recognised that dental therapists and dental hygienists (DT/DH) were able to provide patient care under direct access.

In an effort to improve access to NHS dentistry, NHS England (NHSE) published guidance² in January 2023 for dental practices to allow DT/DH to provide treatment under direct access within the NHS general dental services (GDS). The latest guidance has been followed with an explanation from NHSE that the requirement to have a performer number on the claim form was only necessary because the NHS Business Services Authority (NHSBSA) required a unique identifier for the practitioner providing the care under the contract. NHSE has explained that, going forwards, NHSBSA is able to accept another unique identifier: the practitioner's GDC registration number.

These changes are designed to ease the access issues that NHSE has experienced in primary care dentistry, particularly in the post-COVID-19 pandemic and post-Brexit period, by increasing the workforce available to provide NHS care, removing the administrative barriers that previously existed.

As DT/DH cannot be performers, NHSE cannot have any direct governance over DT/DH operating under an NHS contract. NHSE must delegate the management of these practitioners to ensure patient safety to the providers of the individual NHS contracts, as already happens with medical contracts.

For the mutual protection of all parties, the governance arrangements need to be set out clearly in the contract between the provider and DT/DH, whether that was an employment contract or a contract for services with a self-employed DT/DH. Providers will need to ensure that DT/DH are fully aware of the NHS GDS contract regulations,³ the charges

regulations,⁴ and when treatment can be re-done under guarantee. The contracts with DT/DH will also need to put arrangements in place for clawback if the contract is based upon targets of units of dental activity delivery.

The contracts between the provider and DT/DH need to set out the indemnity arrangements between the two parties. Following the recent *Hughes v Rattan*⁵ and *Pawley v Whitecross*⁶ decisions in the Court of Appeal, it is clearly established law that a patient can raise a claim against the owner of a practice or the practitioner that treated the patient. The wise owner of the practice will protect their position against claims alleging breaches of their non-delegable duty of care, with a clause in their agreement making sure that the DT/DH indemnifies the practice owner against any claim arising from the errors or omissions of the DT/DH. DT/DH need to maintain their own personal indemnity arrangements to protect themselves against claims raised by patients against them, individually or via the practice, as well as to support them with regulatory cases, complaints and disciplinary action.

These changes will have an impact upon the individual indemnity risk for DH/DT providing direct access care under the NHS because previously, the indemnity risk was shared with a prescribing dentist that had carried out an examination and prescribed treatment. Indemnity providers will need to reflect upon these risks, which will now be faced by DT/DH alone. Inevitably, the cost of indemnity for this group must rise to cover that additional risk and it may take some time for claims experience to build up to allow full analysis.

Indemnity providers might reasonably anticipate an increase in requests for assistance with performance concerns raised within the practice and potentially with the GDC, because there is no direct local management via the

NHS. NHSE will of course manage any breaches of the contract directly with the provider.

Medical and Dental Defence Union of Scotland (MDDUS) offers a choice of solutions to help associate dentists, DT/DH and practice owners to ensure they have the support and protection they need. MDDUS' Dental Practice Scheme provides the principal dentists within a practice with indemnity for vicarious liability for support staff, including dental nurses and non-clinical staff.

Also, MDDUS offers Dental Corporate Clinical Indemnity (DCCI) – corporate membership open to limited companies, limited liability partnerships and individual owners or partnerships. DCCI provides comprehensive protection against vicarious liability and non-delegable duty of care claims brought against the corporate entity itself and not the individual dental professional. MDDUS' DCCI product is available on both a discretionary and insurance basis. For further information, contact the MDDUS sales team on sales@mddus.com. ■

References

1. General Dental Council. The scope of dental professionals' practice. Available at [go.nature.com/3Uy5Cmc](https://www.gdc-uk.org/3Uy5Cmc) (accessed March 2023).
2. NHS England. Building dental teams: Supporting the use of skill mix in NHS general dental practice – long guidance. Available at [go.nature.com/3KsCeZT](https://www.nature.com/3KsCeZT) (accessed March 2023).
3. UK Government. The National Health Service (General Dental Services Contracts) Regulations 2005. 2005. Available at https://www.legislation.gov.uk/ukSI/2005/3361/pdfs/ukSI_20053361_en.pdf (accessed March 2023).
4. UK Government. The National Health Service (Dental Charges) (Amendment) Regulations 2020. 2020. Available at <https://www.legislation.gov.uk/ukSI/2020/1335/made> (accessed March 2023).
5. British and Irish Legal Information Institute. *Hughes v Rattan* (Rev1) [2022] EWCA Civ 107. 2022. Available at <https://www.bailii.org/ew/cases/EWCA/Civ/2022/107.pdf> (accessed March 2023).
6. British and Irish Legal Information Institute. *Jade Pawley v (1) Whitecross Dental Care Limited* (2). 2021. Available at <https://www.bailii.org/ew/cases/EWCA/Civ/2021/1827.pdf> (accessed March 2023).