Every dental professional, however skilful, may experience an adverse incident that could result in a claim for clinical negligence.

Clinical negligence occurs when a dental professional’s clinical management or performance falls below the standard expected of a reasonably competent professional acting in a manner considered appropriate for their area of expertise and acceptable by a responsible body of dentists or relevant group of dental care professionals (DCPs).

Although clinical standards are high, patients’ expectations have increased, as has their readiness to resort to litigation.
A claim for clinical negligence often comes without warning and can be an unpleasant shock. The first notification may take different forms. It is usually by way of a letter, either from the patient or a solicitor, and it may include a request for a copy of the patient’s dental records.

Solicitors’ letters may be written in a forceful and occasionally threatening style. The claims made will be based largely on what their client has told them and may not seem fair or reasonable to you, and may even appear to change what happened. Don’t take the tone or contents of the letter personally, or reply to it directly. It is our role to act on your behalf throughout the claim process.

When you receive a claim, you need to act quickly. Strict timetables are set in law and you need to tell us immediately, so we have plenty of time to prepare your defence. It is important to keep in mind that even with the stress and upset you may feel because of one unhappy patient, many of your patients value your help and expertise and are thankful for the treatment you provide.

Key points

1. When you are aware of a claim, call and speak to one of our dento-legal advisers on 0800 374 626. Our advisory team is available between 8.30am and 6pm, Monday to Friday. Advice is available 24 hours a day, 365 days a year for dento-legal emergencies or urgent queries.

2. We will tell you how to put together the essential paperwork and documents that you need to send to us. (See section 7.2 Documentation).

3. We will then usually write to the patient (known as the claimant) or their solicitors, telling them that we have received their letter/claim form and to confirm that we will be looking after you.

4. We will ask you to give a full, typed factual account of the events in question, with reference to your clinical notes. One of our dento-legal advisers and/or any expert we instruct on your behalf (see section 7.6 Working with expert witnesses) will look at your point of view with the patient’s clinical records and use it as the starting point for your defence if the case proceeds to court.

5. You will be told of any key developments. This may include telling you that we believe there is no reasonable chance of the claim proceeding or that it has become time-barred. (See key point 1 in section 7.4 Informal Resolution: the pre-action stage of a claim). We will continue to liaise with you throughout the claim and will discuss all decisions with you that may affect your professional position, including any decision regarding a proposed settlement.

You can call us at any time to check on the progress of your claim, or ask us to contact you regularly, even if we have nothing to report.

Our advice

All documents linked to the claim should be sent to us as soon as possible, with the original envelope or packaging.

If it has been a while since the incident happened and it is difficult to remember everything that went on, you should comment on your clinical management based on what you would usually do, and from looking at your notes that you made at the time of the alleged incident.

Checklist

• Have you given a full description and timetable of events in your factual account?
• Have you included in your factual account details of any witnesses who can support your account or provide further evidence?
We need to see all the papers and records you have that relate to the claim. You need to send us everything we ask for. Do not withhold anything.

Documents must not be changed or amended in any way. If, after you have looked at the records, you think that you need to give us more information, or you want to make a correction, you need to give this to us in a separate note. We will scan the records you send us and return them to you.

Key points

1. You need to give us:
   a. a signed letter/note, from you, asking for assistance, and giving your consent for us to act on your behalf
   b. the original solicitors’ letter or request for compensation or court documents and/or standard form of request for disclosure of records, together with a note of the date on which you received it
   c. your consent for us to show the records to the patient or the patient’s representative as and when we need to and a statement confirming that you have sent all the records you have
   d. a full clinical report, in date order, of your own advice, care and treatment, together with the full name(s) and contact details of any other dental professional(s) or persons involved in the treatment
   e. your detailed comments on the allegations
   f. your preferred contact details for all future communications.

2. We need all the records you have relating to the patient which may include:
   a. the patient’s clinical notes (including a print-out of all computer-held records), preferably the originals, and these should be sent by special or recorded delivery
   b. a typed record of the relevant entries in the clinical notes
   c. a clear copy of any relevant entries in the appointment diary or message book
   d. any radiographs, clinical photographs, study models or other laboratory work/records
   e. any communications with other healthcare professionals, such as referral letters or consultant’s/specialist’s reports.

3. To protect confidentiality, we disguise the names of any other patients involved (e.g. those in an appointment diary). Please let us know the identity of anyone else named in the records so we can make sure there are no breaches of confidentiality.

Our advice

Send the original documents, together with the original envelope or packaging, to us as soon as possible. The documents must not be changed in any way. This is important, no matter how brief, scruffy, abbreviated or hurriedly written they are.

Checklist

- Have you sent the original, unaltered patient notes?
- Have you included a separate typed record of the patient’s notes?
- Is it clear on the record exactly who is responsible for each entry in the clinical notes e.g. by using the initials of the staff involved?
- Have you sent the complete original records and not just those you consider relevant to the incident?
For a claim for clinical negligence to be successful, the patient (who is referred to as the claimant) has to prove that there was some failure by the dental professional, and that failure caused the injuries of which the patient is complaining.

Key points

1. The burden of proof in claims for clinical negligence lies with the claimant. To succeed in a claim, he or she has to prove it was more likely than not that:
   a. the defendant dental professional owed them a duty of care
   b. there was a breach of that duty
   c. avoidable harm followed as a result.
2. The patient must prove breach of duty of care and causation – that is, that the breach of duty caused the injury or loss in question. Breach of duty and causation do not always go hand in hand. For example, a patient could be harmed without the dental professional having been negligent (e.g. a ‘dry socket’ following an extraction). Similarly, a dental professional can be in breach of duty without any harm to the patient (e.g. failure to diagnose very early caries which does not progress). This is often difficult for patients to grasp. They tend to think that just because something has gone wrong or does not meet their expectations, the dental professional must be negligent.
3. The patient must find a reason for claiming that a dental professional’s clinical management or performance has fallen below a reasonable standard. The clinical management of a patient will be assessed by one of our dento-legal advisers and/or an independent dental expert as appropriate (see section 7.6 Working with expert witnesses) against the Bolam standard. For dentists, the Bolam standard is that of ‘a responsible body of dentists’ practising in the same field, though this does not have to be the standard of the majority. For dental hygienists, it will be ‘a responsible body of dental hygienists’ and so on.
4. Judges may decide not to accept an expert’s evidence if it does not stand up to close inspection. It is up to a judge to decide if the standard of care is reasonable.

Our advice

Unfortunately things can and do go wrong and in practice the dividing line between negligence and adequate care can be very fine. However, that’s no consolation if you have just received a solicitor’s letter, full of allegations of negligence and the consequences for their client. Of course, the allegations may be unfounded or incorrect.

If you are accused of negligence you may feel angry and distressed, and may not know what to expect or do. Seeking our professional help is essential at the first sign of a claim.

Checklist

- Is the claimant your patient? If not, does the person making the claim have authority to do so?

Reference

1 Bolam v Friern Hospital Management Committee [1957]
1 WLR 582
After records have been shared, there may be a long time when nothing seems to happen while the claimant takes advice and decides whether to take matters further. This can take months, or even years.

If a formal claim is made against you, it is important to remember that only a small proportion of dental claims ever go to court. The majority are resolved at the pre-action stage (see opposite: Pre-action protocol). The Civil Procedure Rules in England and Wales allow for quite a lot of flexibility in the resolution process and require a fair amount of openness so both sides can help resolve the disagreement. Mediation and arbitration can also be used.

Key points

1. The Limitation Act 1980 sets time limits within which a legal claim can be made.
   a. For adults with capacity, a claim must be made within three years of the date of incident, or from the date the claimant first became aware of a possible claim (known as the ‘date of knowledge’), whichever is later.
   b. If a patient was a child (under 18) at the time of treatment they have until they are 21 to make a claim, if they are aware before that date that a cause of action exists. A claim could be made later if the patient is justifiably unaware that a cause of action exists.
   c. No time limits apply for adults without capacity.
The court has discretion to allow claims to go ahead even if they are issued outside the limitation period.

2. In England and Wales, the formal claim process begins after both parties have looked at the facts of the case and assessed the merits of the claim (see opposite: Pre-action protocol). The aim of this is to make sure that both sides have every chance to sort out a dispute informally and without going to court. At any stage, it is open to both sides to suggest a different way of sorting out the dispute. Many claims are resolved at an early stage.

3. We use the four-month period after the issue of a letter of claim to talk to you and any other dental professionals involved in the claim. During this time, we will usually:
   a. ask for disclosure of any additional clinical records
   b. seek further clinical input/opinion from one of our dento-legal advisers
   c. instruct independent experts, if appropriate (see section 7.6 Working with expert witnesses)
   d. work with you to write a detailed letter of response.

4. If, after getting advice from experts, we consider a breach of duty has caused the patient loss or damage, we will usually make an offer to settle the claim, but only with your consent, and negotiations will begin. We may also have to make a total or partial admission of liability on your behalf, with your permission.

Our advice

We appreciate that an indication of a claim is an anxious time. Don’t hesitate to call us at any time if you want to discuss your case.

Checklist

- Are we in receipt of all the documents related to the case?
- Have you checked and confirmed you are happy with our proposed response to the claimant?
5. If we do not think there has been a breach of duty of care or that there may have been a breach but it did not cause the patient any loss or damage, we will deny liability. We will set this out, giving clear and detailed reasons so that the claimant can think about their position. These arguments may make the claimant withdraw the claim.

6. Following submission of our response made on your behalf, the claimant will review their position. They may decide to:
   a. end the claim
   b. look for settlement, or
   c. start court proceedings.

Pre-action protocol
If a claimant instructs a solicitor, the claim should be carried out according to the set of rules known as the pre-action protocol. The likely order of events is as follows:

1. The claimant's solicitors issue a formal request to see the records.
2. You should notify us immediately on receipt of the request for records or initial contact.
3. We allocate the case to a specialist claims handler.
4. We give records to the claimant's solicitors.
5. The claimant's solicitors may write to an expert.
6. The claimant ends or goes ahead with the claim.
7. If the claim continues, the claimant's solicitors draw up a formal letter of claim.
8. The claimant's solicitors send a formal letter of claim to us (a letter of claim may sometimes be sent at point 1 above.)
9. Under the protocol, we, as your representative, have just four months to investigate the allegations after receiving the letter of claim. During this period, the claimant's solicitors should hold off starting legal proceedings.
10. On receipt of the letter of claim, we will seek your comments on it and ask you to attend a meeting with a dento-legal adviser/expert/solicitor, as appropriate, to discuss the case in detail and to prepare a factual statement on your behalf.
11. Within four months of receipt of the letter of claim, and with your approval, we will issue a formal letter of response.
12. The claimant's solicitors consider our response and advise the claimant.
If a claimant has not instructed a solicitor and is acting for themselves (a litigant in-person), then the claims procedure will be less predictable.
Some claims cannot be resolved at the pre-action stage and the claim will go on to formal court proceedings.

Key points

1. Formal legal proceedings will involve presenting:
   a. a claim form - which must be served (given into the hands of the defendant or their representative) within four months of its issue.
   b. particulars of claim - these must be sent with the claim form or within 14 days of the claim form being served. Both the claim form and the particulars of claim must give details of the claimant’s case and of the damages claimed. In most cases, they must be sent with a dental report confirming the personal injuries alleged in the claim.

2. The claim must be acknowledged within 14 days. Usually, the solicitor instructed by us will accept the claim form on your behalf. Sometimes the claimant’s solicitor or the court may serve the proceedings on you in person. If this happens, it is important to get these documents to us immediately, otherwise a judgment may be made against you.

3. The solicitor instructed by us will put together a defence – a formal statement in answer to the allegations set out in the particulars of claim. A full defence must be given to the court up to 28 days after the particulars of claim are served. If our solicitor thinks more time is needed, they will seek an extension from the court.

   If we believe there has been a breach of duty of care, this will have to be recognised and reflected in the defence.

4. The defence will include a statement of truth. This is a declaration, signed by you, that you believe the facts stated in the defence are true.

5. The court allocates the case to one of three tracks: small-claims track, fast track or multi-track, depending on the complexity and value of the case. The court also issues directions as to how the case will be conducted, including timetables for the exchange of witness statements and expert reports, and a provisional trial date.

6. The court may also arrange a case management conference, attended by the claimant’s solicitor and one of our appointed solicitors. This solicitor always attends this conference on your behalf. The judge will review the steps taken by both sides, ensure they have identified the issues as far as possible, and consider alternative ways of ending the dispute.

7. During the proceedings, copies of all relevant documents must be given to the claimant’s solicitors. Your solicitor will do this on your behalf, as well as issuing a disclosure statement confirming that as far as possible all documents required have been provided. You will be required to approve and sign the disclosure statement. It will also state that the ‘duty to disclose’ is understood and has been completed.

Our advice

The meeting with DDU counsel is entirely informal and is a chance for you to review the case in detail. You should use this time to tell us of any worries you may have and to be sure that all your questions have been answered.

You can amend your witness statement as many times as is necessary, before you finalise and approve it and before it is disclosed to the claimant and the court, to ensure it is an absolutely full and factual account of your involvement in the case.

Counsel is likely to ask you to see the case from the claimant’s point of view. Don’t take this personally. Everyone has your best interests at heart and it is better to identify any weaknesses or difficulties at this stage, rather than in open court.

Checklist

- If the court has served the proceedings directly on you, have you sent this document to us?
- If you are happy with the defence put forward, have you signed the statement of truth?
- Have you checked your witness statement to make sure that you are satisfied with its accuracy and detail?
8. The key to any defence in formal proceedings is the defendant’s witness statement. This is a signed factual account of events, and it will be shown to the claimant and lodged with the court. Your witness statement, put together with the help of a solicitor, is your evidence and should only contain information with which you are satisfied, as it will contain a statement of truth that must also be signed by you.

9. Exchange of evidence is an important part of the legal process:
   a. first, your witness statement, and any other factual witness statements, are exchanged at the same time with the claimant’s witness statements. This provides us with another chance to examine the case against you
   b. then expert evidence is exchanged (see section 7.6 Working with expert witnesses).

10. There may be a meeting with a barrister (usually called a ‘conference’, or ‘con’) which is chaired by the barrister (counsel) instructed by the DDU. This meeting is for you and your defence team only and is usually held in the barrister’s chambers. It is attended by you, your solicitor, the expert(s) instructed on your behalf, plus one or more members of staff at the DDU.

   The barrister(s) will have reviewed the papers beforehand, and will usually begin by talking through the events of the case, asking for clarification of the facts and expert comments. A clear plan of how to go ahead usually emerges and we will ask you to agree it.
The process of clinical negligence legal action depends mainly on opinions from independent expert witnesses. We may ask an independent expert if, in his or her opinion, there is any possible liability related to your clinical management of the claimant. Sometimes we do this early in the process, sometimes later.

**Key points**

1. **Experts** are dentists (or relevant dental care professionals) with wide experience of a particular field of dentistry and dento-legal work, either still in practice or recently retired. They may be generalists or specialists, depending on the treatment at issue.

2. Experts will comment on your clinical management and compare this with that of a **reasonable dentist (or relevant dental care professional)** with the same experience.

3. An expert may also be asked to give an opinion on **causation**, to see whether there is a direct link between the alleged negligence and the harm that the patient claims resulted. If there is no link, there is what is called a ‘causation defence’.

4. The expert’s duty is to give **objective, impartial advice** to the court.

5. Experts generally give their advice in a **written report**.

6. Both sides may put **written questions** to an expert about their report, which must be answered.

7. Before **exchange of expert evidence** the expert advising you is asked to comment on the statements prepared by the claimant. Experts meet formally after exchange of their expert reports and produce a joint statement listing areas of agreement and any outstanding differences of opinion, to help the resolve the issues.

8. Sometimes, when your case seems strong and is supported by clear expert advice, we may decide to disclose our expert evidence early in an attempt to encourage the claimant to withdraw the claim.

9. If the case goes ahead, the court may ask experts to give **verbal evidence**.

**Our advice**

We maintain a database of experts who we provide with instructions in the role of expert witnesses and to whom we offer training. We make clear in our instructions to experts that it is their duty to help the court with matters within their expertise and that this duty overrides any duty to the person from whom they have received instructions or by whom they are paid.

**Checklist**

- Do you have any questions on the expert reports that you would like put to the experts?
The decision to defend a case or settle is taken with you. It is our policy to involve members in the way their case is managed and whenever possible to take the action they want.

On rare occasions, a member may ask us to settle a claim that we feel should be defended or vice versa, but after talking it through we are usually able to agree a way forward.

Whether a claim is ended, settled before trial, settled at trial or found in favour of the member, the legal costs may be high on both sides.

Key points

1. If a case cannot be successfully defended, after talking with you we will negotiate a settlement on your behalf. This may involve making some admissions, but this will be agreed with you beforehand.

2. Before a decision is made in more difficult cases, they may be reviewed by our Dental Advisory Committee, which is made up of practising dental professionals, all experts in their chosen field.

3. Cases are also considered by the MDU’s cases committee and case management committee, which are also made up of clinicians.

4. If the claim goes to trial, the judge may decide not to accept an expert’s evidence if it does not stand up to close examination. In the end, it is up to a judge to determine if the standard of care was acceptable.

Our advice

Sometimes a case cannot be successfully defended because of non-clinical factors. The most common of which is the lack of adequate clinical notes.

Records are a key part of patient care and can provide vital evidence if your standard of care is called into question.

Checklist

- Do you agree that the claim should be settled or do you want it to be defended, if necessary, all the way to court?
Facing a claim for clinical negligence can cause a lot of stress and worry. Many members who have gone through a claim tell us that coping with personal feelings is perhaps the most difficult thing.

**Key points**

1. It is often better to let go of negative emotions than to hold them in. Of course, this may be easier said than done. It is common, and understandable, to feel:
   a. anger, which may be directed towards the patient or other colleagues involved in the case
   b. shame
   c. upset
   d. disillusionment.

2. Stress, worry and other emotions may interfere with work, sleep and home life. This is natural and you should make allowances for it.

3. Maintaining a sense of proportion and perspective can be difficult, but may help you handle the stress of a claim.

4. It may be helpful to find a trusted colleague with whom to share feelings (though you must respect patient confidentiality). Let others know what you are going through so they can offer help and emotional support.

5. It is useful if you write an account of your role as soon as possible after the incident. This account can help if a complaint or claim for clinical negligence is made at a later stage, and many members find it a reassuring process.

6. You can ask for a progress report from us whenever you want it. Keeping up to date about your claim can help you to keep things in perspective.

**Our advice**

It is quite normal to feel worried or depressed when faced with a claim. It is important that you are aware of this and you get help and support. Your doctor will be able to help you and you may wish to tell a senior colleague. You could also think about contacting:

- your professional association
- The Dentists’ Health Support Programme (t: 020 7224 4671) which can provide general information and advice to dental professionals encountering health problems.

**Checklist**

- Are you careful to protect patient confidentiality when speaking about your case?
A 24-year old man attended my foundation training practice complaining of a fractured tooth in the upper right quadrant. Pain from the tooth, which was sensitive to hot and cold fluids, was keeping him awake at night.

I examined the man and found gross caries at the upper right first permanent molar (UR6). This tooth and adjacent teeth also responded positively to ethyl chloride. A periapical radiograph showed gross caries that had resulted in destruction of more than half the crown.

I attempted to extract the tooth under local anaesthetic. However, the palatal root fractured and became displaced. I informed the patient of the complication and noted that the root had possibly been displaced into the maxillary antrum. I referred the patient to a consultant oral surgeon who attempted to remove the root under local anaesthetic and to close the oro-antral communication. While the latter was closed, the fractured root was not found.

The consultant decided to explore the right maxillary antrum under general anaesthesia via a Caldwell Luc approach. This was successful and the root was removed.

A claim was later brought against me for damages, personal injury and consequential losses due to alleged negligent treatment.

**Member story**

I’ve just qualified and my patient has accused me of negligent treatment

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**How we helped**

We sought the opinion of an independent expert who advised that there was no evidence that the standard of treatment provided fell below that normally expected from a reasonably competent trainee in a well supervised programme. He said the evidence pointed to a high standard of care throughout, both in the foundation training practice and at the hospital.

In view of this, we defended the case, which went to trial.

At trial, the judge said that the claimant had not discharged the burden of proof, and that the dentist had acted reasonably. He found in favour of the dentist.