



**BDA advice**

# **Professional indemnity**

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# Professional indemnity

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## Overview

In July 2005, the Dentists Act 1984 (Amendment order) 2005 introduced the need for all registrants to have adequate and appropriate professional indemnity. This became a legal requirement with the [2015 Rules](#), reducing the likelihood of a dentist being uninsured and unable to pay compensation. It also gave the GDC clear powers to treat any lack of indemnity as misconduct.

Choosing your professional indemnity arrangement is one of the most important decisions that you will make in your professional life; apart from the obvious financial consequences, it can make the difference between being able to continue practising or not. This is a personal choice, with personal consequences; it is not a purchase that should be determined by price alone. No two indemnity products will be the same, so any price comparisons will not be on a like-for-like basis.

## Key learning points

This advice intends to help you understand the key differences between the various indemnity products and make a properly informed and considered decision for yourself. It explains:

- Contract insurance and discretionary cover
- Occurrence-based and claims-made cover and the limitations of each
- The need for appropriate advice and support
- Financial security and oversight of insurance and discretionary providers
- The different approaches of profit and non-profit making organisations.

## Indemnity

Indemnity means that one party takes on an obligation to pay for the loss or damage that might be incurred by another party.

So, for example, if you are sued by a patient, you may need to meet the cost of:

- Financial compensation to the patient
- Engaging a solicitor to defend your actions
- Expert opinion to support your case.

When an organisation agrees to provide indemnity for you, it agrees to pay these costs on your behalf, subject to whatever terms and conditions you have both agreed. This is important as the cost of legal representation, investigation and negligence claims can be expensive.

Since 1995, indemnity has been a legal requirement for all registered dentists. The [2015 Rules](#) change made it a legal requirement for all dentists and DCPs to have indemnity that will provide appropriate cover for their patients. All registrants must declare annually that they meet this requirement, giving the GDC clear powers to treat a lack of indemnity as professional misconduct (see the GDC's [Guidance on indemnity](#)).

When considering your dental professional indemnity, you should know

- The types of indemnity provider available and the pros and cons of each
- If the product is a contractual insurance policy or discretionary
- If the cover provided is occurrence-based or claims-made
- What level of advice and support you can expect to receive if you receive a claim from a current or past patient.

## Indemnity providers

There are two main types of provider: the mutual indemnifiers (defence unions or protection societies) and commercial insurance indemnifiers.

### Mutual indemnifiers

'Mutual' means that the company and all its assets are collectively owned by the current members and must be used to meet past, current and future liabilities incurred by or on behalf of current or former members. Historically, most dentists and doctors in the UK arranged their professional indemnity through membership of a mutual defence union or protection society. The most widely used mutual indemnifiers are:

- [Dental Defence Union](#) (DDU) – dental division of the Medical Defence Union
- [Dental Protection](#) – dental division of the Medical Protection Society
- [Medical and Dental Defence Union of Scotland](#) (MDDUS).

Although indemnity may be provided via the dental division, you become a full member of the parent organisation. The assets and liabilities of member dentists are included in the collective mutual fund and are not ring-fenced.

Most mutuals do not aim to make a profit and operate on a non-profit basis. Any shares in the company are generally held by its board (or officers of its board), which has a duty to act in the best interests of the overall membership. This can mean balancing the wider interests of the membership against the interests of a member seeking assistance.

### Insurance indemnifiers

Commercial insurance indemnifiers have provided medical and dental indemnity (in the UK and internationally) for many years. Most are profit-making companies with shareholders. Their presence in the UK is growing.

Some dentists who present higher-than-average risks may need to consider a 'Lloyds syndicate', formed by one or more Lloyds members (individuals or companies) joining together to provide the capital and accept the insurance risks. The syndicate hope to make a profit commensurate with the level of risk but must be prepared to share both profits and losses, which is why this option tends to be more expensive.

## Contractual insurance vs discretionary cover

### Contractual insurance

A claim made under an insurance policy will be met if it falls within the terms and conditions of the contract. The wording of the policy is important as it defines what is covered and not covered, and under what circumstances. It will also specify financial limits for each and every claim and, possibly, the aggregate of all claims arising from a single year. The insurer has a legal obligation to accept qualifying claims and make resulting payments; the policyholder must be honest and truthful in all their dealings with, and statements made to, the insurer (a requirement of 'utmost good faith'). The Financial Ombudsman Service is the final arbiter if a claim is declined.

### Discretionary cover

Discretionary cover is often provided by the mutual indemnifiers. Members have a right to seek assistance with a claim but, being discretionary, the organisation is not obliged to provide it. Directors have absolute discretion in deciding whether to assist members and grant indemnity and to what extent. However, this discretion must be exercised responsibly and in accordance with aims of the organisation, as defined by its Memorandum and Articles of Association.

Discretionary cover allows the organisation to adopt a flexible and constructive approach to individual cases and (in theory) can assist members (and compensate patients) in situations that might be excluded from contractual insurance policies. However, the nature of discretionary indemnity means that there can be no absolute certainty that cover will be provided – the member simply has a right to request assistance and the organisation exercises its discretion to assist (or not).

Discretionary indemnity has served the medical and dental professions well for over 100 years in both the UK and elsewhere, but concerns have been raised by patient associations and law firms that specialise in bringing claims on behalf of patients as the Financial Service Ombudsman has no powers to adjudicate on whether a claim should have been covered.

## Occurrence-based or claims-made

A patient complaint about their treatment is usually made after an interval. Fewer than 25% of all claims made against dentists happen within 12 months of treatment and a further 25% between one and two years<sup>1</sup>. You must have adequate indemnity protection to cover all future claims. Not all indemnity policies are the same, so you need to understand the provisions of your policy and the limitations.

All policies have a start date (when the policy was first taken out) and an end date. The end date can be when you stop working, retire, change indemnity provider, take an extended break, stop paying the fees or when you die.

### Occurrence-based indemnity

Occurrence-based cover provides perpetual indemnity for treatments provided during the period (normally 12 months). If an incident took place during your period of cover (even on your last day), you will be covered; it does not matter when the claim is submitted. A single subscription for each year that you practice, provides protection for you and your patients in perpetuity.

Occurrence-based providers usually offer different categories of membership depending on the type of dentistry you provide. You must ensure that, at the time of the incident, your membership was in the appropriate category.

These providers demonstrate a long-term commitment, so policies can be more expensive, but they do give ongoing peace of mind.

### Claims-made indemnity

A typical claims-made policy provides a specified level of cover, for specified circumstances, and for a specified period (usually the duration of the policy). These policies are designed to cover only a proportion of the claims that might arise, so can be priced lower than occurrence-based policies.

Claims-made policies are favoured by many commercial insurance companies because they are more predictable and can generate reliable profits, especially in the early years. Not renewing a policy brings the insurer's liability to an abrupt end. Bearing in mind the likely interval between the provision of treatment and a claim for negligence, you need to ensure adequate cover long after you have stopped working.

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<sup>1</sup> Implementing Compulsory Indemnity: exploring the practical issues. Consultation response to Standards Committee of GDC, Dental Protection, 2005

### **Run-off cover (extended reporting period)**

You or the insurer can choose to terminate an indemnity policy at any time, but you must provide for future claims relating to treatment provided when the policy was active. The GDC insists that you have adequate indemnity to cover past as well as current periods of practice. Run-off cover provides an extended reporting period (ERP) indemnifying you against claims relating to previous years.

Insurers are not obliged to offer this when you stop the policy and they have discretion over whether to provide it (something to bear in mind when leaving a claims-made policy). Where an insurer offers run-off cover, it will usually charge between 100% and 150% of the previous year's premium. However, you will need run-off cover to ensure that you are covered for claims relating to previous treatments (in the same way as provided by occurrence-based indemnity). The longer you work under a claims-made policy, the longer the period that needs to be covered by separate run-off cover; the premium consequently becomes more expensive with each passing year.

This is not always made clear nor fully understood by those taking out a claims-made policy.

### **Mature claims-made indemnity**

If you have no indemnity for treatment provided before your current policy, you could use mature claims-made indemnity to cover you for claims made during the term of the current policy but that relate to treatment provided before the policy was taken out (the incident date). The earliest incident date covered (the retroactive date) is usually defined in the policy. The cost will vary depending on how long the retroactive period needs to be.

### **Automatic run-off cover**

Some insurance policies include automatic run-off cover in specified circumstances (and at no additional cost) if the policy was still in force at the time. For example:

- Death of the policyholder
- Permanent disability of the policyholder
- Permanent retirement from dentistry.

As there is no consistency between policies, you must check your policy for the circumstances that might lead to automatic run-off cover.

Consider other situations where you decide not to renew a policy and will need run-off cover (which may or may not be included) – such as:

- Parental leave
- Postgraduate study or any kind of career break
- Leaving the UK to practise elsewhere (temporarily or permanently)
- Long-term sickness or an accident
- A move to a different indemnity provider whilst still working.

If run-off cover is included, it may be limited to a specified period – for example: one year for maternity absence, or 3, 5, 10 or 12 years for retirement. If you receive a claim outside the specified period, it will not be covered. Given that significant-sized claims are often some of the last to arrive, and claims relating to the treatment of minors (including orthodontics) do not have to be brought until the child has reached 21 years, there is a real risk of inadequate or incomplete run-off cover.

When any kind of run-off cover is included 'free', the cost of any claims will be met by other dentists who are still in working.

### **Limitations of claims-made indemnity**

You will need to meet (from your own resources) any claims that falls outside the scope or terms of a policy. Failing to comply with the GDC's requirement to have adequate indemnity to cover past periods of practice, could have serious consequences, not least because you would have made untruthful and misleading declarations to the GDC at each annual renewal of your registration. Conversely, occurrence-based indemnity provides perpetual indemnity, removing the need for run-off cover.

There is no system for ensuring dentists purchase run-off cover when their claims-made indemnity comes to end because they have retired, died or ceased practice through illness, disability, maternity breaks, study leave, or other career breaks etc.

### **Long-term certainty**











If the market does not deliver anticipated profits, commercial insurance companies providing claims-made indemnity can withdraw its provision. It has no obligation to offer run-off cover, leaving you without indemnity for claims from previous years. The UK dental market has experienced this.

## The difference between occurrence-based and claims-made policies

A patient complaint about their treatment is usually made after an interval. Fewer than 25% of all claims made against dentists happen within 12 months of treatment and a further 25% between one and two years.

You must have adequate indemnity protection to cover all future claims. Not all indemnity policies are the same, so you need to understand the provisions of your policy and the limitations.

### Indemnity policy types:

Occurrence-based policy			
Policy in force		Policy no longer in force	
<p> Clinical incident occurs</p>	<p> Claim is made by patient</p> <p> Dentist covered by the policy</p>	POLICY PREMIUMS STOP	<p> Claim is made by patient</p> <p> Dentist covered by the policy</p>
<p>An occurrence-based policy provides perpetual indemnity for treatments provided during that policy period. If an incident took place during the policy period (even on the last day), the Policyholder will be covered; it does not matter when the claim is made against you.</p> <p>A single subscription for each year that the dentist practices, provides protection for them and their patients in perpetuity.</p>			
Claims-made policy			
Policy in force		Policy no longer in force	
<p> Clinical incident occurs</p>	<p> Claim is made by patient</p> <p> Dentist covered by the policy</p>	POLICY PREMIUMS STOP	<p> Claim is made by patient</p> <p> Dentist not covered by the policy. Unless the claim is made within an agreed extended reporting period (run-off).</p>
<p>A typical claims-made policy provides a specified level of cover, for specified circumstances, and for a specified period (usually the duration of the policy - the details vary). Beyond that your cover ends.</p> <p>These policies are designed to cover only a proportion of the claims that might arise from any given year, so can be priced lower than occurrence-based policies.</p> <p>Claims-made policies are favoured by many commercial insurance companies because they are less of a risk, more predictable and can generate reliable profits, especially in the early years.</p> <p>Not renewing a policy brings the insurer's liability to an abrupt end. Bearing in mind the likely interval between the provision of treatment and a claim for negligence, the dentist will need to ensure adequate cover long after they have stopped working.</p>			

## Advice and support

Indemnity covers the main financial risks (legal costs and patient compensation), but you will also need advice and support to help you through the process. You want to be sure that your provider understands the challenges that you face, the care that you provide and your working environment. Most providers aim to be dentist-focussed but you must check the level of advice and support that you will receive if you receive a complaint or claim from a current or past patient.

### Advice

Receiving a complaint or a solicitor's letter can be worrying and you should seek advice on how best to deal with it. Many dentists find it helpful to discuss the matter with a colleague, especially when the matter relates to clinical treatment and, ideally, a colleague with experience of dento-legal matters.

Not all providers use dental advisers. This may not matter (depending on the circumstances of the case) but most dentists who have been through the process, value having access to an experienced dental colleague who also understands the dento-legal processes and how to navigate them. Some cases also benefit from the formal opinion of at least one independent expert.

### Service

Make sure that you can access the help you need at the time you need it.

- When and how is the best time to make contact?
- Who will be available to help you and what understanding of dentistry will they have?
- How responsive is your provider and how easy is the process?

Indemnity providers vary in size. Larger providers will probably have more advisers but will share access with many other members; smaller providers may be less accessible, and the level of service may suffer as a consequence.

## Financial security and oversight

Mutual indemnifiers are private membership organisations, so are not regulated by the Financial Conduct Authority or the Prudential Regulatory Authority. Insurance companies, banks, and pension funds, for example, are regulated.

### Occurrence based indemnity – best-guess at future claims

Organisations offering occurrence-based indemnity take on long-term potential risks by allowing their members to request indemnity and assistance for many years into the future, for claims arising from treatment provided during their membership.

These organisations can only guess at the number of future potential claims and requests for help, when they might happen and how costly they will be; current net assets (total assets less known liabilities, including current cases) should be sufficient to cover these unknown claims. Of course, expert actuaries can provide complex forecasts and calculations, but nothing is certain. These organisations tend to value their own existing claims and estimate the potential total value of all future claims; they decide if they need to externally validate these estimates.

### Confidence levels

When setting reserves, confidence level is another important difference between a regulated insurance company and a mutual discretionary organisation (MDO).

Annual accounts of MDOs calculate reserves somewhere between 0% (zero confidence of the reserve being sufficient) and 100% (absolute certainty). The midway position (or 'best estimate') is described as a 50% confidence level.

Whether or not they have sufficient funds to meet every future claim is immaterial; MDOs can, in theory, refuse any future claims from the moment they run out of money, and would be entirely within their rights to do so.

In contrast, the reserves held by regulated insurers must have robust prudential (safety) margins of solvency with a confidence level of 99.5%. Having sufficient reserves is essential for a regulated insurer.

## Ratings

Alongside onerous regulation, the financial security of insurance companies is independently rated by various specialist organisations (for example, Moody's, Fitch, and Standard and Poor's). The rating gives a general indication of the relative financial strength of a provider – for example, AAA, AA, A, B, C, and so on, with differentiators like A1, A2. Each level has a distinctive meaning and significance.

There is no equivalent comparative rating for the MDOs, so comparison of relative strength is difficult. But, being mutually-owned membership organisations, they can make a 'call' on members for additional subscription – a safety net that insurance companies do not have. This means that an MDO could require its members to pay a second subscription during the same membership year. The second subscription cannot exceed the value of the first. A member who fails to pay this second subscription would lose the benefits of membership, including indemnity. This is a powerful option available to MDOs that need additional capital at short notice.

## Limits

An insurance policy usually specifies financial limits for each claim and, possibly, the aggregate of all claims arising from a single year. The financial limit is important; it may be so high as to be almost irrelevant or sufficiently low to be uncomfortably close to levels of expenditure of past dental cases.

MDOs tend not to place financial limits on the cover provided and are often described as unlimited. In reality, cover is limited by the financial resources available at the time and whether the MDO exercises its discretion to limit expenditure after it has agreed to assist with the case. Such a decision must always remain at the absolute discretion of the MDO's Board.

The presence or absence of a financial limit is of less significance to both discretionary and contractual (insurance) cover than the level of any cap and when and how any restriction might be applied.

## Profit vs non-profit making

For some this is an important philosophical consideration; others are more pragmatic and accept that solicitors and barristers who represent and defend dentists will make a profit from the work they do.

A commercial insurance company aims to make a profit to ensure its shareholders receive a return (dividend) on their investments. Premiums, therefore, usually include:

- A profit margin for the insurance company itself
- A fee or commission to the insurance broker who arranges the insurance (if applicable)
- Insurance premium tax that is paid to the government to offset the cost of regulation.

Insurance companies will also take out re-insurance policies to protect against catastrophic losses. Reinsurers take on these risks in return for a premium that they hope will be sufficient to cover their costs and provide a profit.

MDOs are not-for-profit (or non-profit-seeking) organisations, so do not plan for profits when setting subscription rates. This does not mean that they do not include a profit element for other reasons – for example, generating contingency should their claims experience be worse than expected, or generally building up reserves, or cross-subsidising different groups of members by charging one group less and another group more. Although not required to, they are likely to insure themselves (and protect members' funds) against catastrophic losses, in the same way as insurers re-insure themselves.

Without the need to generate a profit and the fact that insurance premium tax is not payable (because they are not regulated), MDO subscriptions should be significantly lower than those charged by a commercial company. However, no two indemnity products will be the same in every respect, and subscription costs are determined by more than the need to generate a profit and the insurance premium tax; something to be aware of when comparing prices.



## Other considerations

### Reputation

Technology creates many new risks, including online patient feedback portals and social media. Some law firms acting for patients, regularly post details of their 'successes' on their websites and in the local media where the dentist practises. This can create additional problems (and costs) even when you are indemnified against the actual claim costs.

Your indemnity provider may be willing to help you protect your reputation in these situations – for example, by preparing press releases or appointing a media spokesperson to act on your behalf.

### Employer-provided indemnity (NHS and Crown indemnity)

Employer-provided indemnity against negligence claims protects the employer (for example, the NHS Trust) that holds the cover, not the individual dentist. Under present arrangements, all forms of Crown indemnity are discretionary. It will only cover claims relating to work carried out under the terms of your employment, not private work nor GDC cases. Ask for confirmation of what is covered or excluded.

NHS or Crown indemnity does not preclude the need for personal indemnity to ensure that your interests are properly protected and that you have access to support and assistance if you leave the employment in question.

### Vicarious liability

Employing or engaging any other healthcare professionals can make you vicariously liable for their acts and omissions. This is particularly relevant if you have dentists working in your practice for short periods or who leave the UK.

As an employer, you are likely to be vicariously liable for the negligent acts and omissions of your employed dentists, hygienists, dental nurses etc. Check whether your indemnity covers vicarious liability and if there are conditions attached.

As a practice owner you may be vicariously liable for a self-employed dentist, but this depends on the circumstances and individual working arrangements. Some courts have ruled that the practice owner has vicarious liability, whereas others have taken the opposite view. You must do all that you can to protect yourself against these types of risks and to ensure you have adequate and appropriate indemnity.

Steps that you can take to help protect you against such risks include:

- Check that all GDC registrations are up to date
- Include an appropriate clause in your contract with the associate that requires them to hold appropriate professional indemnity and to produce evidence on request
- To demonstrate that indemnity provision is appropriate and adequate to cover past as well as current periods of practice
- If the indemnity is a 'claims-made' policy, to ensure that the dentist understands the need to have adequate 'run-off' cover if they stop practicing or change indemnity provider.