

Dental Negligence Claims

An Introduction



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CHAMBERS

Dentists and Litigation

- The claims experience of the UK dental profession exceeds that of any other country
- One of the most high risk clinical disciplines
- Why?
 - Consumer healthcare
 - The cost of correcting unsatisfactory treatment
 - “Gaming” NHS contracts
 - Culture of dentist knows best v. the law of consent
 - High expectations in the context of cosmetic dentistry
 - Specialist solicitors and “no win no fee”

Legal Obligations

- Negligence (breach of duty and causation)
- Breach of Contract
- (Product liability)

Negligence – The Elements

DUTY, BREACH, CAUSATION, LOSS

1. Is a **duty** of care owed
2. What is the standard of care to be expected?
3. Was that standard **breached**?
4. Did the breach **cause** damage?
5. What is the quantum of **damage**?

Negligence – Breach of Duty

‘The Bolam Test’

- A dentist will not be negligent providing they adopt a practice which is accepted as proper by a reasonable body of dentists
- (i.e.) Treatment recommendations and technique are regulated by the profession

‘The Bolitho Gloss’

- The Courts will intervene if the practice is not logically defensible.

N.B. Many cases come down to questions of fact rather than judgement

Negligence - Causation

- The 'but for' test

'but for' the wrong tooth being extracted, the patient would still have a tooth and would not need an implant'

- The material contribution test

1. patient suffers an infection
2. there is a failure to administer antibiotics/ remove the source
3. the underlying infection in combination with the failure to alleviate it leads to an adverse outcome

Examples: Who is to blame?

- P undergoes a comprehensive course of implant treatment and restorations.
- The restorative dentist formulated a treatment plan. The surgeon placed the implants. The restorative dentist placed the crowns.
- It turns out that the implants have been placed despite an underlying periodontal condition.

Case Study – Breach, Causation and Quantum

- D provides an implant at 4 & 5 with a distal cantilever to replace 6.
- 2 x 4mm wide implants and a 4 mm gap in between.
- Cantilever length 12 mm from centre of distal implant
- The cantilever failed within 6 months and was replaced with an denture supported by implants.
- During a later examination P is noted to be a bruxist

Questions:

- Breach of duty?
- Causation?

Case Study – Breach & Causation

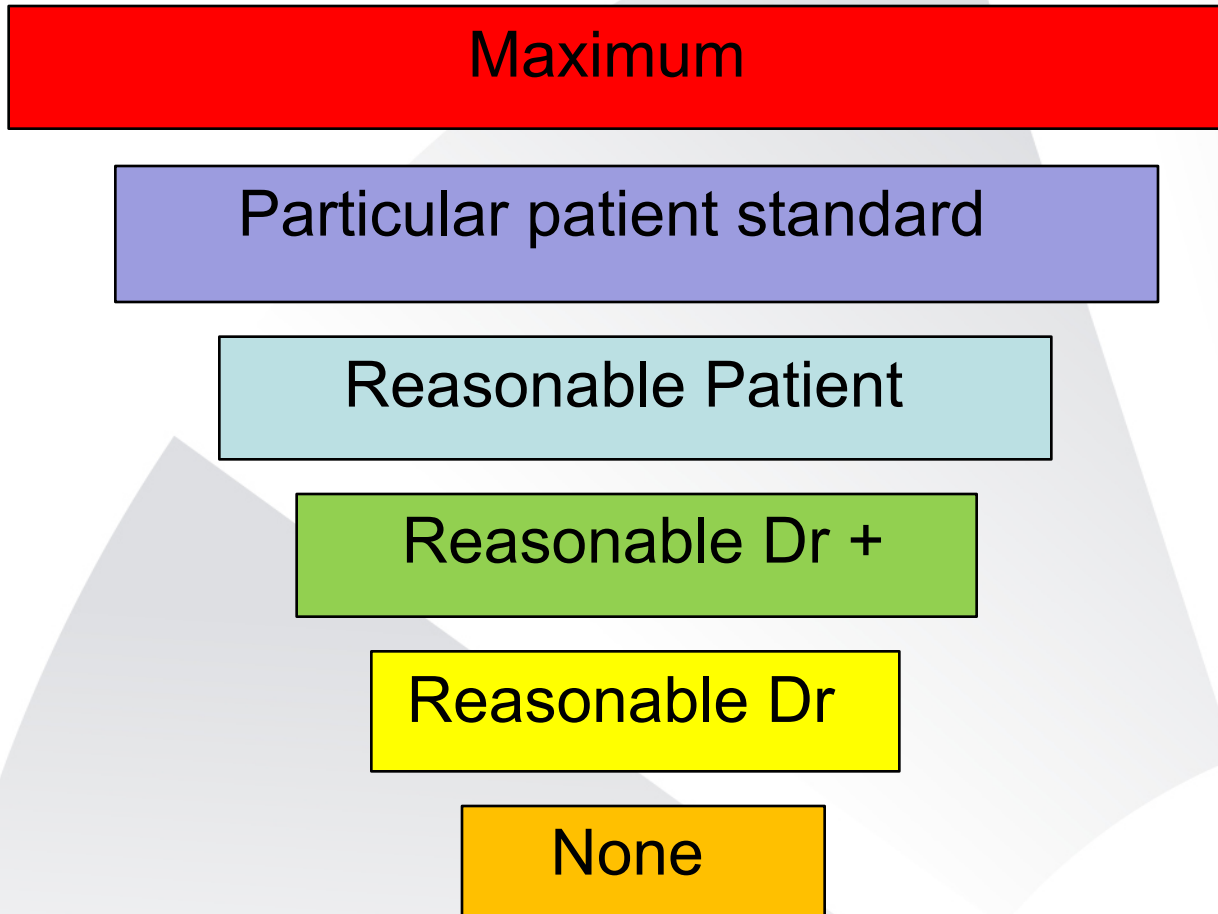
- P has a tooth extracted, in anticipation of an implant being placed
- A retained fragment causes infection
- P complains of pain and is given antibiotics on 2 occasions
- 12 months later an x-ray is taken and the retained fragment and ongoing infection are noted
- At the time of implant placement there is bone loss and a bone graft is required
- P wants compensation for the bone graft

Questions?

Is there a breach of duty?

Is there causation?

Consent – Information Disclosure



Montgomery – The Facts

Shoulder dystocia and difficult birth – 9 to 10%

Brachial plexus injury – 0.2%

Brain injury - < 0.1%

Dr McLellen – *‘if you were to mention shoulder dystocia to every [diabetic patient], if you were to mention to any mother who faces labour that there is a very small risk of the baby dying in labour, then everyone would ask for a caesarean section and it is not in the maternal interests for woman to have cesarean sections.’*

Q: *What information should have been given? Causation?*

The Judgment

‘an adult of sound mind is entitled to know which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken.

The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any **material risks** involved in any recommended treatment and of **any reasonable alternative or variant treatments**.

The test of materiality is whether ... **a reasonable person** in the patient’s position would be likely to attach significance to the risk, or the doctor should be aware that the **particular patient** would be likely to attach significance to it.’

The 'Consent' Exception

Montgomery v Lanarkshire HB

- Consent is regulated by the Courts and not the dental profession
- The patient must be advised of:
 - The material risks of the proposed treatment
 - The intended benefits of treatment
 - Any reasonable variant options (including the option of doing nothing)
- Material risk
 - Generic information
 - Individual information
 - (Heightened obligation where surgery is cosmetic)

Practice points

- **Dialogue** is a two way process
- Inform the patient about the material risks
- **Sheets of information** are not a dialogue
- **Comprehensible information** is required
- **Understand your patient:** Are there any relevant social circumstances or increased risk factors
- **Set aside adequate time**
- **Speak to your patient and answer questions honestly**
- Inform patient about reasonable alternatives
- **Only use the therapeutic exception rarely**
- **Notes:** Document the consent process

Consent – the reasonable variant options

- P attended her dentist in order to have her wisdom tooth extracted.
- CT scanning indicated that the tooth was close to the nerve.
- After very careful review of the CBCT the dentist thought that he would be able to extract the tooth without incident. He considered a coronectomy but in view of the small risk did not think that this would be in her best interests.
- The consent form recorded the risk of nerve damage
- P developed nerve damage

QUESTIONS

Was C adequately consented?

Would you expect discussion of options to be recorded?

Reasonable Variant Options

- Choice of bone grafting sites?
- Choice of NHS/ Private treatment?

Breach of Contract

- **Products** – fit for purpose and of satisfactory quality
- **Services** – provided with reasonable care and skill
- Is bridgework a product or a service?

What does the Claimant get?

- Award for PSLA
- Treatment to put them back in the position they would have been in had the original treatment plan be properly executed
- Refund?
- Out of Pocket Expenses – travel, lost earnings, care



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Judicial College Guidelines– Damage to Teeth

- Significant, chronic, tooth pain (such as from an untreated abscess) extending over a number of years together with significant general deterioration in the overall condition of teeth: **Up to £31,900**
- Loss of or serious damage to several front teeth: **£7320 to £9540**
- Loss of or serious damage to two front teeth: **£3630 to £6380**
- Loss of or serious damage to one front tooth: **£1840 to £3300**

The Litigation Process

- Client contacts solicitor
- Solicitor requests notes
- Instruction of expert
- Letter of Claim
- Letter of Response
- Issue of Court Proceedings
- Particulars of Claim
- Defence
- Exchange of expert reports
- Expert Joint meeting
- Trial

Case Examples

- Failure to treat periodontal disease before commencing implant treatment
- Failure to advise about the increased risk associated with smoking
- Positioning implants too close to adjacent teeth, at an angle or in an unrestorable position
- Failing to appreciate the need for bone grafting
- Not managing cosmetic expectation e.g. by explaining that absent orthodontic treatment the implant would be smaller than the surrounding teeth
- Failure to onwards refer complex cases
- Not using CBCT scan when placing implants in the posterior mandible?