



### **Vicarious Liability – what does the recent judgment mean for self-employed status?**

A recent legal judgement has been causing some consternation amongst the dental community. NASDAL (National Association of Specialist Dental Accountants and Lawyers) have been studying the recent *Breakingbury v Croad* case so that they can offer the best advice to dentists.

Damien Charlton, Chair of the NASDAL Lawyers' Group and partner at Ward Hadaway explained, "This is an interesting case that perhaps raises as many questions as it answers. The first point to make is that first and foremost, this is a case about responsibility for defective treatment, and does not address self-employed status as such. The claimant chose to pursue the practice owner rather than the associates that provided the treatment. This could have been because, as reported in some of the dental press, that two of the three associates are no longer registered on the GDC register and are no longer resident in the UK.

"The Judge in the County Court was trying to find who was responsible for poor treatment. In this instance, the court found the practice owner had a non-delegable duty of care to patients. The court also considered the concept of "vicarious liability", which arises when a tortious act (such as negligence) occurs, and a third party is liable for that act because the act was committed by one of its agents. The principle of vicarious liability can make an employer liable for the acts or omissions of his employees, but it is not confined to employment relationships and can arise where there is a relationship that is "akin to employment". In the *Breakingbury* case, the judge found that the practice owner was vicariously liable for the negligence of the associates that work at the practice.

#### **How could this affect you?**

If you are a Principal, it would be advisable to check your indemnity insurance and find out if it provides cover for vicarious liability. You should always ensure that your associates have their own indemnity insurance, and if an associate leaves then try to ensure you have a forwarding address.

#### **"No tax implication"**

Given that the relationship between principal and associate was found to be "akin to employment", the case potentially raises tax issues. However, it is clear from the judgment is that there is no tax implication. Following on the back of the *Uber* judgment, from a tax perspective it is still very clear -

HMRC guidance contained in “Employment Status Manual ESM4030 Particular occupations: dentists” states:

*“It should be noted that there are standard forms of agreement for ‘Associate’ dentists which have been approved by the British Dental Association (BDA) and the Dental Practitioners Association (DPA)(sic). These agreements relate to dentists practicing as Associates in premises run by another dentist.*

*Where these agreements are used and the terms are followed, the income of the Associate dentist is assessable under trading income rules and not as employment income. In these circumstances the dentist is liable for Class 2/4 NICs and not Class 1 NICs.*

*The NHS General Dental Services Contract, which came into force from 1 April 2006, provides for less fluctuation in Associate Dentist’s income. However, providing the Associate Dentist continues to be responsible for paying their share of laboratory fees etc. for work relating to their patients and other terms of the standard agreement are followed, the above guidance will still apply.”*

As long as associates use BDA contracts and actually work in line with them, they should pass the overall self-employment for tax purposes test. However, it continues to be less clear now that an associate could be considered self-employed by HMRC and yet be a “worker” from an employment law perspective.

Alan Suggett, Chair of the NASDAL Technical Committee and Head of the Dental Business Unit at UNW added, “Yet again it seems that the legal and financial landscape is becoming more and more complicated for dental professionals. Now, more than ever, the value of expert advice has never been greater.”

## **ENDS**

Note to editors:

NASDAL, the National Association of Specialist Dental Accountants and Lawyers, was set up in 1998. It is an association of accountants and lawyers who specialise in acting for and looking after the accounting, tax and legal affairs of dentists. It is the pre-eminent centre of excellence for accounting, tax and legal matters concerning dentists. Its members are required to pass strict admission criteria, and it regulates the performance of its members to ensure high standards of technical knowledge and service.

Alan Suggett, who compiles the NASDAL Survey, and Nick Ledingham, the Chairman of NASDAL, are both available for interview. To organise to speak to them or any other members of NASDAL for more information please contact Chris Baker.

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