

DO DENTAL TECHNICIANS DISADVANTAGE THEMSELVES IN REGULATORY MATTERS?

Heather Beckett, Specialist in Restorative Dentistry
Barrister
Goldsmith Chambers
Goldsmith Building
Temple
London EC4Y 7BL

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INTRODUCTION

The General Dental Council, (“GDC”), was established pursuant to Section 1 of the Dentists Act 1956¹.

Section 1 of the Dentists Act 1984², sets out the current statutory general duties of the GDC, (referred to as “the Council” in this statute):

(1ZA) The over-arching objective of the Council in exercising their functions under this Act is the protection of the public.

(1ZB) The pursuit by the Council of their over-arching objective involves the pursuit of the following objectives—

(a) to protect, promote and maintain the health, safety and well-being of the public;

(b) to promote and maintain public confidence in the professions regulated under this Act; and

(c) to promote and maintain proper professional standards and conduct for members of those professions.

Accordingly, the GDC currently publishes on its website the following purpose and its approach to achievement of same:

“The primary purpose of the General Dental Council is to protect patient safety and maintain public confidence in dental services. To achieve this, we register qualified dental professionals, set standards for the dental team, investigate complaints about dental professionals’ fitness to practice and work to ensure the quality of dental education”³.

In 2005, by way of the Dentists Act 1984 (Amendment) Order 2005/2011, additions to Section 36 of the Dentists Act 1984 defined a general group other than “dentists”, called “Professions Complementary to Dentistry” and established the requirement for The Dental Care Professionals Register together with the general qualifications which an individual is

¹ Dentists Act 1956 c.29 S1 (1) : “With a view to making the dental profession a self-governing profession, there shall be established, in accordance with the provisions of this Act, a body to be called the General Dental Council whose general concern it shall be to promote high standards of professional education and professional conduct among dentists and who shall in particular perform the functions assigned to them by this Act”

² Dentists Act 1984 c. 24

³ GDC website. About Us. <https://www.gdc-uk.org/about-us> Downloaded on 29 December 2019.

required to possess for registration thereon, and associated matters with which the GDC is necessarily concerned.

The categories of Dental Care Professionals, all of whom are required to be registered with the GDC, now include: dental nurse, dental technician, dental therapist, dental hygienist, orthodontic therapist and clinical dental technician⁴. The GDC publishes guidance upon the “Scope of Practice” of each registrant group⁵, based upon the skills and abilities each group should possess, in line with the GDC’s “core” functions of protection of patients and maintenance of public confidence in dental services. In addition, the GDC publishes a set of “Standards for the Dental Team”⁶ and it is a mandatory requirement for all registrants to practice and generally behave in accordance with these Standards.

The Scope of Practice and broad description of the work of a dental technician as per the GDC Scope of Practice document is given in Box 1.

As at December 2019, there were 5762 individuals registered as “Dental Technician” by the GDC (344 of these were also registered as Clinical Dental Technicians)⁷. For comparative purposes as to numbers of registrants, 42426 individuals were registered as dentists and 58652 as dental nurses (the two largest registrant categories).

It is evident that whilst Dental Technicians, (as distinct from Clinical Dental Technicians) may have legitimate direct contact with patients within their recognised scope of practice, such contact is likely to be significantly less than the contact which other registrant categories have with patients. A major part of the work of Dental Technicians is laboratory-based. Nevertheless, unless a dental technician is registered with the GDC, they cannot work in their own role without breaking the law. Inability to work for other than a very limited period, is very likely to have a negative financial impact upon a dental technician and may potentially result in them leaving the profession altogether. As it is, there were fewer registered dental technicians in December 2019 than in December 2018 (5762/5921).

The purpose of this paper is to identify and discuss themes emerging from published recent Fitness to Practise hearing outcomes specifically involving registered Dental Technicians.

⁴ GDC website. How to Join the Register. <https://www.gdc-uk.org/registration/join-the-register/how-to-join-the-register> Downloaded on 29 December 2019.

⁵ GDC website. Scope of Practice. https://www.gdc-uk.org/docs/default-source/scope-of-practice/scope-of-practice.pdf?sfvrsn=8f417ca8_4 Downloaded on 29 December 2019.

⁶ GDC website. Standards for the Dental Team. https://www.gdc-uk.org/docs/default-source/standards-for-the-dental-team/standards-printer-friendly-colour.pdf?sfvrsn=98cffb88_2

⁷ GDC website. Registration report December 2019. https://www.gdc-uk.org/docs/default-source/registration-reports/registration-report---december-2019.pdf?sfvrsn=39e9b72e_2 Downloaded on 29 December 2019

Box 1 – Scope of Practice of registered Dental Technicians

Dental technicians

Dental technicians are registered dental professionals who make dental devices to a prescription from a dentist or clinical dental technician. They also repair dentures direct to members of the public.

As a dental technician, you can undertake the following if you are trained, competent and indemnified:

- review cases coming into the laboratory to decide how they should be progressed
- work with the dentist or clinical dental technician on treatment planning and outline design
- give appropriate patient advice
- design, plan and make a range of custom-made dental devices according to a prescription
- modify dental devices including dentures, orthodontic appliances, crowns and bridges according to a prescription
- carry out shade taking
- carry out infection prevention and control procedures to prevent physical, chemical and microbiological contamination in the laboratory
- keep full and accurate laboratory records
- verify and take responsibility for the quality and safety of devices leaving a laboratory
- make appropriate referrals to other healthcare professionals

Dental technicians can see patients direct to repair dentures.

Additional skills which dental technicians could develop include:

- Working with a dentist in the clinic, assisting with treatment by helping to fit attachments at chairside.
- Working with a dentist or a clinical dental technician in the clinic, assisting with treatment by:
 - taking impressions
 - recording facebows
 - carrying out intra-oral and extra-oral tracing
- carrying out implant frame assessments
- recording occlusal registrations
- tracing cephalographs
- carrying out intra-oral scanning for CAD/CAM
- taking intra and extra-oral photographs.

Dental technicians **do not** work independently in the clinic to:

- perform clinical procedures related to providing removable dental appliances
- carry out independent clinical examinations
- identify abnormal oral mucosa and related underlying structures
- fit removable appliances

Dental technicians **do not** provide treatment for or give advice to patients in the ways that are described under the sections for dental hygienists, dental therapists, orthodontic therapists or dentists.

MATERIALS AND METHODS

Registered Dental Technicians involved in regulatory fitness to practice hearings before a Professional Conduct Committee brought by the GDC during 2019 were identified using the “Filter Results” option on the “Past Hearings” section of the “Outcomes and Appeals List” page of the GDC website⁸. Within the “filter results” option:

- the “Profession” field was selected as “Dental Technician”;
- the “Type of hearing” field was selected as “Professional Conduct Committee”.

The published determinations for all hearings identified by the filtering process having an “Event date” given as being between 01 January 2019 and 31 December 2019 inclusive were reviewed by clicking on the name of each identified registrant and thereafter on the link to the determination for the hearing.

Where a hearing which had taken place during 2019 was identified as a “Review” determination, all published information within the specific fitness to practice proceedings was reviewed, including any earlier determinations in the particular proceedings, as well as the latest determination reached during 2019.

In particular, the following features identifiable from the published determinations were specifically noted:

- Whether the registrant attended the hearing(s);
- Whether the registrant was represented by counsel at the hearing(s);
- The nature of the charges faced by registrants;
- The outcome(s) in terms of sanction;
- Whether the use of any “in-guise” or “under-guise” investigation was referred to within the review of evidence recorded as having been provided to the Committee.

RESULTS

Sixteen (16) Registered Dental Technicians were identified from the filtered database on the GDC website as having had their fitness to practice considered by a Professional Conduct Committee between 01 January 2019 and 31 December 2019.

Two (2) of these registrants were identified as also being registered as a Clinical Dental Technician. The allegations of misconduct specifically in respect of one of these included, (but were not restricted to) allegations regarding sub-standard clinical work and administrative practices. The other registrant self-referred to the GDC, as well as being referred by a former employer. The allegations in this case related to working beyond the scope of practice of a Clinical Dental Technician and inadequate record-keeping.

Attendance and representation at hearings

Eight (8) of the identified 2019 hearings were “resumed hearings”, intended to review Orders made at previous hearings. Of these:

⁸ GDC website. Outcomes and Appeals List. <https://olr.gdc-uk.org/hearings> Downloaded on 30 December 2019

- One registrant had attended the original hearing, when they were represented by counsel. However, they did not attend and were unrepresented at a 12 month review hearing in 2019.
- Two registrants had attended the original hearing in person, although they were unrepresented. However, they did not attend and were unrepresented at a 12 month review hearing in 2019.
- One registrant attended their original hearing by telephone, but then disengaged from proceedings, failing to attend a review hearing and failing to comply with a condition that a written reflection in relation to the misconduct found be provided.
- One registrant had attended their original hearing in person in 2016 and provided some limited evidence of remediation the following year. However, they then failed to attend the review hearing itself and thereafter disengaged with the process, failing to attend two further review hearings in 2018 and 2019.
- One registrant did not attend either their original or a 2019 review hearing.
- Two registrants had failed to attend their original hearings and also failed to attend a first review one year after their original hearings, but both thereafter appeared to engage with proceedings. At second review hearings in 2018, two years after the initial hearings, one attended by telephone and the other in person. In 2019, three years after the original hearings, both attended in person before the Committee.

Of the eight (8) identified registrants where their fitness to practise was first considered by a Professional Conduct Committee at a hearing during 2019:

- Three were not present and were not represented.
- One attended by telephone, and self-represented.
- One attended by Skype, and self-represented.
- One was present in person and self-represented
- Two were present and represented by counsel.

Charges

Charges against Dental Technicians involved two main primary areas;

1. Working or offering to work outside the registrant's scope of practice. These featured in ten (10) of the cases.
2. Criminal convictions or cautions/failing to notify the GDC of same. These featured in four (4) of the cases.

In all but two of these fourteen cases, it was charged in addition that the "primary" areas of alleged misconduct meant that the registrant's actions were:

- i. Misleading; and
- ii. Dishonest.

In a number of cases it was additionally charged that the actions also evidenced a lack of integrity and in one case that a patient's informed consent was not gained as a result of the treatment provided being outside the registrant's scope of practice.

A number of charges featured in more than one case:

- i. Failure to have in place adequate insurance or indemnity cover;
- ii. Failure to cooperate with the GDC investigation (this was commonly a failure to provide details of insurance or indemnity cover);
- iii. False declarations to the GDC regarding indemnity insurance;
- iv. Poor or inadequate record-keeping.

One registrant was also charged with failure to wear gloves while treating a patient (that treatment itself being outside the registrant's scope of practice), and failure to respond professionally to a patient's complaint

One registrant was charged with misleadingly and dishonestly representing to GDC counsel that he was enrolled on a CDT program at the time he had treated a patient outside the scope of practice of a Dental Technician and allowing GDC counsel to so submit at an Interim Orders Committee hearing.

One was charged with allowing misleading publication of advertisements and/or misleading information to appear on a website.

Two determinations mentioned registrants' health, but understandably there were no further details, given the personal and private nature of the health of an individual.

Sanctions

The sanctions listed at Table 1 are those imposed at all relevant hearings involving the identified registered dental technicians. (Figures also include sanctions imposed at any relevant hearings prior to any 2019 review hearing in relation to the relevant proceedings):

Table 1

SANCTION	NUMBER OF TIMES IMPOSED	COMMENT
Reprimand	2	Imposed at first hearing
Conditions (with a review),	1	Imposed at first hearing
Conditions revoked, Suspension imposed at review hearing	1	When registrant failed to continue meaningfully to engage
Suspension (with a review)	11	Imposed at first hearing
Suspension extended (with a review)	8	Where registrant failed to attend a review hearing following an earlier suspension
Suspension lifted, Conditions of practice formulated	2	At review hearing
Conditions extended at review hearing	2	Following imposition of conditions at earlier hearing
Indefinite suspension	1	Imposed after repeated failure to engage over an extended period
Erasure	2	Imposed at first hearing

Use of “in guise” (“under guise”) investigations

A particular feature of the evidence in four cases was the use by the GDC of investigators “in-guise” (or “under-guise”), in other words posing as members of the public. The registrants in these cases were charged with having offered to provide services outside their scope of practice during enquiries by the investigators in relation to “fictitious” potential patients, usually described as “relatives” during the enquiries.

DISCUSSION

This small study clearly has limitations. The GDC “Outcomes and Appeals” hearings list published online does not give information about matters concluded before reaching the stage of a full hearing. In addition, details of hearings which result in a finding of no case to answer, or at which any facts found proved do not amount to misconduct, or a finding is made of “no current impairment” do not typically remain on the website for long (although they are initially published after the relevant hearing) and so are not reliably retrievable using the “filter” facility methodology used.

Nevertheless a number of general themes appear to emerge, several of which may be particularly specific to registered Dental Technicians:

1. A significant number of Dental Technicians registrants failed to attend one or more of the hearings held in relation to them;

The ability to demonstrate insight and remediation in regulatory proceedings is inevitably severely hampered by not engaging. Several of the cases reviewed, in fact, suggested that a Committee, in effect “left open” the possibility of future engagement and development of insight by a registrant, by applying the sanction of suspension with a review. Suggestions as to the type of evidence which might assist a future Committee reviewing the issue of ongoing impairment in the future were also provided.

2. Working beyond or offering to work beyond a dental technician’s scope of practice was a frequent charge, accompanied almost always by a charge of dishonesty:

Since 2017, the test for dishonesty has been based on Supreme Court judgment in the case of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67. In essence, this test is as shown in Box 2.

Box 2: The “Ivey” test for dishonesty

When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

Applying the test for dishonesty to, for example, the situation where a registrant has worked outside their scope of practice, if the registrant knows their scope of practice,

this almost inevitably leads to a finding that the registrant must have also known working outside that scope. Given that registrants are required to be familiar with their scope of practice under Standards for the Dental Team, it is only very unusually that a registrant can argue that they did not have the requisite knowledge or belief (the subjective test). The subsequent application of the second, objective limb of the /vey test, (the standards of ordinary decent people) then almost automatically produces a finding of dishonesty. If a person knew that they should not have been working outside their scope of practice yet still did so, they would be dishonest in so doing.

The determinations reviewed do, in fact, include two instances where dishonesty was not found proved, notwithstanding this analysis. These two cases are, however, distinctly fact specific. The first was where an offer to provide services outside scope of practice (to ‘under-guise’ investigators) was found to be misleading and to lack integrity but not to be dishonest. It is not fully clear from the determination why this conclusion was reached, although there was no finding that the registrant had actually provided services outside the scope of practice as distinct from offering to do so. The second was where a registrant failed to report a criminal conviction. The failure to report on the very specific facts of the case was found to be misleading, but not lacking in integrity or dishonest because of the registrant’s poor understanding of English and what was found to be his genuinely held belief that there was no need to inform.

3. The most frequent sanction for the Dental Technician registrants was suspension:

In the circumstances, this is not particularly surprising:

- i. Firstly, other groups of registrants, particularly dentists, commonly face allegations of misconduct relating to clinical practice where protection of the public is the chief concern. In such cases, formulation of conditions of practice may be sufficient both to protect the public and also to address the requirement to maintain public confidence in the profession and its regulator. Given the scope of practice of dental technicians, it is relatively unusual to be able to formulate conditions of practice additional to abiding by the requirement to work within the scope of practice which is required in any event. Something more is often required in order to protect the public unless the Committee can be satisfied of full insight and very low risk of repetition of misconduct.
- ii. Secondly, when there is a finding of dishonesty, public interest and maintenance of public confidence in the profession and regulator is a very major consideration. In considering sanction, the Committee will consider what is required to address the dishonest conduct and the potentially damaging effect the specific dishonest conduct (and any aggravating and mitigating factors) will have had on the reputation of the profession and the public’s confidence in dental care professionals. It will consider the “Indicative Sanctions Guidance”⁹. In this Guidance, suspension:

“is appropriate for more serious cases and may be appropriate when all or some of the following factors are present (this list is not exhaustive):

- ...
- *The registrant has not shown insight and/or poses a significant risk of repeating the behaviour;*

⁹ GDC. Guidance for the Practice Committees including Indicative Sanctions Guidance . Last revised 03 May 2019. https://www.gdc-uk.org/docs/default-source/hearing-and-decisions/guidance-for-the-practice-committees---indicative-sanctions-guidance.pdf?sfvrsn=9a17c9ae_2 Downloaded on 31 December 2019

- ...
- *Public confidence in the profession would be insufficiently protected by a lesser sanction;*
- *There is no evidence of harmful deep-seated personality or professional attitudinal problems (which might make erasure the appropriate order)*".

Erasure is a possible (and indeed likely) sanction when there is “*serious dishonesty, particularly where persistent or covered up*” and where conduct is fundamentally incompatible with a registrant remaining on the Register in all the circumstances of that case.

4. Dental Technicians are only infrequently represented by counsel:

It has relatively recently been reported¹⁰ that a Freedom of Information request by Dental Protection to the GDC illustrated an apparent significant discrepancy between the level of sanctions applied to dentists who are legally represented and those who are not. The general suggestion seems to be that substantially more dental professionals whose fitness to practise is found not to be impaired are legally represented than not. In addition, it seems that many more dentists erased from the register (and therefore unable to continue to practice for a minimum of five years and even then only if they achieve restoration) following a hearing are unrepresented.

The issue is not restricted to dentists and dental care professionals. A similar Freedom of Information request by Medical Protection to the General Medical Council confirmed a similar effect of professional legal representation at Medical Practitioners Tribunal Service hearings and Interim Order Tribunals¹¹. Whilst hearings involving registered Dental Technicians do not make up a very great proportion of reported hearings, based on the cases reviewed in this small study, it appears that suspension of the registration of a Dental Technician is an extremely likely outcome, particularly if the registrant does not attend at a hearing or review hearing. It seems possible that effective representation at a hearing might limit the length of any suspension imposed, and also that effective presentation in relation to evidence of insight, remorse and remediation could have a positive effect. In one of the few cases reviewed in the current study where the registrant was represented by counsel, although the GDC submitted that a suspension was an appropriate sanction, the sanction imposed by the Committee following submissions from the registrant’s counsel and its own consideration of the facts was a reprimand (although it is fair to say that dishonesty was not charged or proven in this particular case).

5. Use of “under-guise” investigators:

The undertaking of “under-guise” investigations by the GDC has recently come under the spotlight following a case where unusually a stay of proceedings (effectively bringing the proceedings to an end) was granted on the grounds of abuse of

¹⁰ GDUK website. <https://www.gdpuk.com/news/latest-news/3193-dentists-without-legal-representation-face-much-tougher-sanctions-at-gdc-hearings> Downloaded on 31 December 2019

¹¹ Medical Protection website. <https://www.medicalprotection.org/uk/articles/doctors-without-legal-representation-face-tougher-sanctions-from-mpts-hearings> Downloaded on 31 December 2019

process¹². In that particular case the registrant had the benefit of tenacious legal representation. One criticism of the GDC's approach was that whereas the initial complaint received by the GDC related to the possibility of a Clinical Dental Technician working without registration, when an under-guise investigation was commissioned, the letter of instruction substantially reformulated the complaint without any objective justification or evidence to suggest that rather than working without registration, the issue was that of working out of scope of practice. The subsequent under-guise investigation utilised a specific fictitious scenario which, it was found:

“went beyond providing [the registrant] with an unexceptional opportunity and amounted to inciting him to indicate that he may be prepared to act outside his scope of practice”.

In other words, the tactics employed by the investigators in this specific investigation amounted to entrapment. Following the analysis in the case of *R v Loosely*¹³ the key issue here appears to be whether the undercover investigation presents to the person under investigation a scenario which could be expected to arise in the “normal” course of events, or whether it presents an exceptional situation which would be most unlikely to occur normally and thereby incites the investigated person to act in an “exceptional” manner. The former is not entrapment, but legitimate undercover investigation. The latter may be, depending upon the individual facts of the case, an abuse of process.

There is no suggestion within the published determinations of the four Dental Technician cases identified in the current study that the registrants were presented with anything other than scenarios which might arise in the normal course of events and thereafter offered to work outside their scope of practice. The descriptions of the attributes of the fictitious potential patients appear to have been consistent with information that would not put a Dental Technician registrant under “exceptional” pressure to cause them to offer or even consider offering to carry out services outwith their scope of practice. Based on the limited information available in the published determinations, it appears that the “fictitious” patients were generally described as older relatives of the investigators, such as “father” or “mother” who had lost their denture or simply needed a new denture.

However, it is perhaps notable that one registrant in oral evidence explained that the conversation with the investigators had felt to him more like an “interrogation” than a normal patient query, to the extent that he felt as though he was being pressurised or “dragged” into saying the “*wrong thing*”. He had even suspected at the time that the visitors might be from the GDC. The line between what is a scenario which presents an unexceptional opportunity and one which goes significantly beyond this so as to make it exceptional, is likely to be very fact-specific.

It certainly appears possible that the GDC will continue to employ “under-guise” investigators in order to gather evidence when a complaint is received regarding a registrant working outside their scope of practice.

¹² The Dark Arts of the GDC: covert investigations and entrapment in healthcare regulation. BLMLaw website 04 November 2019. <https://www.blmlaw.com/news/the-dark-arts-of-the-general-dental-council>
Downloaded on 31 December 2019

¹³ *R v Loosely* [2001] UKHL 53

CONCLUSIONS

Based on this small study, whilst recognising the methodological limitations, it appears that some registered Dental Technicians are prepared to offer to work and/or actually work outside their scope of practice. The GDC, in line with its statutory duties, takes a robust approach, upon occasions commissioning under-guise investigations. Where these present no more than unexceptional scenarios to registrants, they are likely to be justifiable.

Because of the nature of the test for dishonesty derived from the case of *Ivey*, it is more likely than not that where a registrant offers to work or actually works outside the scope of practice or fails to inform the GDC of a criminal conviction, their actions will be also found dishonest.

A finding of dishonesty will almost inevitably result in a finding of current impairment on public interest grounds. A sanction of suspension of registration at the very least will then result.

It is significant that several Dental Technicians have failed to engage in the regulatory process in a consistent and meaningful way, by failing to appear at hearings. Suspension of registration or extension of suspension is likely to result from such a course of action.

Dental Technicians facing a regulatory hearing do not always have professional legal advice and representation but may well benefit from doing so.