NOTE: ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PATIENT MADE IN HIGH COURT REMAINS IN FORCE: [2020] NZHC 373.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA141/2020
CA252/2020
[2021] NZCA 347

BETWEEN	CHRISTOPHER RYAN Appellant
AND	THE HEALTH AND DISABILITY COMMISSIONER Respondent

Hearing:	27 and 28 October 2020
Court:	French, Miller and Clifford JJ
Counsel:	A H Waalkens QC and K M Wills for Appellant V E Casey QC and J I King for Respondent M F McClelland QC for New Zealand Medical Association as Intervener
Judgment:	28 July 2021 at 3 pm

JUDGMENT OF THE COURT

A The appeal against the decision of the High Court upholding the finding of vicarious liability (CA141/2020) is dismissed.

B The appeal against the decision of the High Court declining the application for permanent name suppression (CA252/2020) is dismissed.

C Costs are to lie where they fall.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] In what circumstances can one doctor be held vicariously liable under s 72 of the Health and Disability Commissioner Act 1994 (the Act) for the conduct of another doctor working at the same medical centre?

[2] That is the main issue raised in the first of these two appeals (CA141/2020) from the High Court. The second appeal (CA252/2020) relates to the appellant's application for permanent name suppression.

Background

[3] Drs Ryan and Sparks are both general practitioners.

[4] In an affidavit filed in these proceedings, Dr Ryan details the way the two doctors practise in the following terms. He says they operate their medical practices out of the Moore Street Medical Centre (the Medical Centre) situated in Ashburton. A limited liability company called Ashburton Medical Centre Ltd owns the premises that the Medical Centre operates from. The Medical Centre pays rent to the company. Both Dr Ryan and Dr Sparks are directors of the company and each indirectly holds 50% of the shareholding.

[5] The Medical Centre employs nursing and administrative staff as well as locum doctors. It also purchases and owns the plant, equipment and practice management systems used at the premises. All patient files are kept in a centralised system with patient information shared across the clinic. There is a bank account in the name of the Medical Centre and Drs Ryan and Sparks pay an agreed sum into that account every week.

[6] The Medical Centre is not itself an incorporated entity and Drs Ryan and Sparks do not have a written partnership agreement.

[7] Patients are registered with either Dr Sparks or Dr Ryan. They are not registered with the Medical Centre. As well as maintaining separate patient registers, the two doctors maintain separate bank accounts. When patients consult their usual doctor and pay a consultation fee, those fees are paid into the account of that doctor. Patients will only see the other doctor if their usual doctor is unavailable. In that event the other doctor will invoice the usual doctor for the consultation fee.

[8] In contrast, when a patient sees a nurse or a locum doctor, the fee for the visit is paid into the Medical Centre account.

[9] As well as separate bank accounts Drs Ryan and Sparks have different, individual IRD and individual GST numbers. At the end of the financial year, each files their own tax return through different accountants. Each regards themselves as separately operating and managing their own individual practices out of the Medical Centre premises.

[10] The Medical Centre has developed various protocols and policies. These include a statement of the Code of Health and Disability Services Consumers' Rights[1] (the Code) which, the policy document says, will "guide the design and delivery of all services provided at this practice". Other policies include a complaints policy, a policy on incident reporting, significant event management, and protocols for dealing with patient requests for prescriptions.

[11] In his affidavit, Dr Ryan further deposes that all staff including himself and Dr Sparks are expected to act in accordance with these policies. However, although a breach of the policies may attract disciplinary action, that is so only in the case of employees, not Dr Ryan or Dr Sparks. Complaints against a staff member will be dealt with by the two doctors and the practice manager. In contrast, complaints against either of the two doctors themselves are dealt with solely by the practice manager.

[12] Dr Ryan also says that because of their individual practices, he cannot either directly or indirectly discipline or control Dr Sparks's day to day practice and vice

---

1 Set out in the schedule to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

versa. He acknowledges that from time to time, he and Dr Sparks may discuss interesting cases or seek an opinion from the other but he considers that to be no different to contacting another peer who works outside of the Medical Centre for advice. Dr Ryan and Dr Sparks do not sit in on each other's consultations nor do they review each other's files. The only thing Dr Ryan says they can do is to ensure that appropriate practice policies are put in place.

[13] In 2016 a patient made a complaint about Dr Sparks to the Health and Disability Commissioner (the Commissioner). The patient's usual doctor was Dr Ryan but he was away at the time and she was seen by Dr Sparks. Dr Sparks prescribed the patient medication from a class of antibiotics to which she had a documented allergy even though there were more suitable alternatives available. He was aware of the allergy but thought that because the antibiotic he prescribed had a different molecule to the one used before, it would be safe. When the patient took her prescription to a pharmacy, the dispensing chemist raised concerns with a nurse at the Medical Centre. However, Dr Sparks continued to advise use of the medication. He did not discuss the risks with the patient nor did he provide safety netting advice. Shortly after taking the medication, the patient suffered an allergic reaction and was hospitalised.

[14] The Commissioner upheld the complaint. He found that Dr Sparks breached three rights under the Code. First, in breach of right 4(1), Dr Sparks failed to provide services to the patient with reasonable care and skill. Secondly, he breached right 6(1)(b) by failing to give the patient information it was reasonable for her to expect to receive. And thirdly, he breached the patient's right to make an informed choice and to give informed consent (right 7(1)).[2]

[15] As part of his investigation into the complaint, the Commissioner also considered the culpability of the Medical Centre. He was satisfied that the Medical Centre had policies consistent with expected standards and therefore had not itself directly breached the Code.[3] However, that was not the end of the matter.

---

2 Deputy Health and Disability Commissioner *A Report by the Deputy Health and Disability Commissioner* (Case 16HDC01889, 26 June 2018) [Commissioner's report] at [67] and [72].

3 At [73].

The Commissioner also found that "Dr … Ryan and Dr … Sparks (trading as Moore Street Medical Centre)" were nevertheless vicariously liable for Dr Sparks's wrongdoing as a result of the provisions of s 72 of the Act.[4]

[16] Section 72 imposes vicarious liability on health care providers for the acts or omissions of their employees, agents and members in certain specified circumstances. In the view of the Commissioner, s 72 applied because when Dr Sparks consulted with the patient and prescribed the wrong medication he did so as the Medical Centre's agent and was acting within the authority it had granted.

[17] The Commissioner recommended that Dr Sparks provide a written apology to the patient for his breaches of the Code and undertake further education and training on informed consent. Noting that Dr Sparks was already undergoing a Medical Council of New Zealand education programme focusing on aspects of his prescribing practices under s 38 of the Health Practitioners Competence Assurance Act 2003, the Commissioner further recommended that the Medical Council provide him (the Commissioner) with an update at the conclusion of that programme.[5]

[18] The Commissioner did not make any recommendations regarding the Medical Centre and Dr Ryan.

[19] However, the finding of vicarious liability was of itself of sufficient concern to Dr Ryan that he issued judicial review proceedings challenging its lawfulness. As stated in his affidavit:

> the prospect that I am held responsible and accountable for the actions of another, where I was not involved in the consultation, had no influence over what occurred, and no ability to influence such an occurrence in the future, does not sit well with me to say the least.

[20] The grounds for judicial review were first that the Commissioner had misapplied s 72 and secondly that the decision to impose vicarious liability was unreasonable, there being no basis for the conclusion that the Medical Centre had authorised the actions of Dr Sparks.

---

4 At [75].
5 At [76]–[77].

[21] In the High Court, Grice J rejected both contentions.[6] The Judge upheld the Commissioner's finding of vicarious liability under s 72(3) on the basis that Dr Sparks was the agent of the Medical Centre.[7] She also found that liability could equally have been imposed under s 72(4) on the basis that Dr Sparks was a member of the Medical Centre.[8]

[22] In a separate judgment, Grice J dismissed an application for orders permanently suppressing identifying particulars of Dr Ryan, Dr Sparks and the Medical Centre.[9]

[23] Dissatisfied with those outcomes, Dr Ryan now appeals both High Court decisions.

[24] We were told that the Commissioner has invoked s 72 before but only in a very limited number of cases. This is the first time the High Court and this Court have ever had occasion to consider the provision. As happened in the High Court,[10] this Court made an order joining the New Zealand Medical Association as an intervener in the appeal. The way in which Dr Sparks and Dr Ryan operate their practices with regard to the Medical Centre is said to be a common arrangement in New Zealand and the case is therefore of general importance.

The appeal against the finding of vicarious liability (CA141/2020)

Arguments on appeal

[25] Section 72 of the Act provides as follows:

Vicarious liability

72 Liability of employer and principal

(1) In this section, the term **employing authority** means a health care provider or a disability services provider.

---

6 *Ryan v The Health and Disability Commissioner* [2020] NZHC 373 [Judicial review judgment]. We note that the neutral citation for this judgment appears to read in error "[2019]".

7 At [68].

8 At [65].

9 *Ryan v The Health and Disability Commissioner* [2019] NZHC 360 [Name suppression judgment]. Again, the neutral citation for this judgment appears to read in error "[2019]".

10 *Ryan v The Health and Disability Commissioner* [2019] NZHC 1921.

> (2) Subject to subsection (5), anything done or omitted by a person as the employee of an employing authority shall, for the purposes of this Act, be treated as done or omitted by that employing authority as well as by the first-mentioned person, whether or not it was done or omitted with that employing authority's knowledge or approval.
>
> (3) Anything done or omitted by a person as the agent of an employing authority shall, for the purposes of this Act, be treated as done or omitted by that employing authority as well as by the first-mentioned person, unless it is done or omitted without that employing authority's express or implied authority, precedent or subsequent.
>
> (4) Anything done or omitted by a person as a member of an employing authority shall, for the purposes of this Act, be treated as done or omitted by that employing authority as well as by the first-mentioned person, unless it is done or omitted without that employing authority's express or implied authority, precedent or subsequent.
>
> (5) In any proceedings under this Act against any employing authority in respect of anything alleged to have been done or omitted by an employee of that employing authority, it shall be a defence for that employing authority to prove that he or she or it took such steps as were reasonably practicable to prevent the employee from doing or omitting to do that thing, or from doing or omitting to do as an employee of the employing authority things of that description.

[26] It is common ground that the Medical Centre, being a health care provider, could be an "employing authority" for the purposes of s 72.

[27] It is also common ground that Dr Sparks was not an employee of the Medical Centre and therefore s 72(2) does not apply.

[28] What is strongly disputed is the Commissioner's finding under s 72(3) that Dr Sparks was an agent of the Medical Centre when he provided the care at issue. Dr Ryan's counsel Mr Waalkens QC acknowledged that vis-à-vis the other staff at the Medical Centre, Drs Ryan and Sparks must be conducting a partnership but contended that otherwise the (then in force) Partnership Act 1908 did not apply and that what he described as an "apparent combined practice" does not establish agency. He submitted that although through a "range of factors" an impression might exist that Dr Sparks is associated with the Medical Centre, his GP practice — and care provided within it — is totally separate. The Medical Centre did not stand to benefit from the consultations between Dr Sparks and his patients, and the individual nature of the treatment provided by Dr Sparks within his GP practice did not allow any involvement by others. Correctly analysed, the Medical Centre was simply a means for sharing the cost of

essential overheads. It was wrong to treat it as a vehicle through which Drs Sparks and Ryan provided GP services.

[29] Mr Waalkens acknowledged the existence of policies which affected the management of the practice but contended that such policies did not interfere with the independent function and decision making of a GP within a single consultation. When it came to seeing and treating their own patients, the two doctors were in business on their own account and solely responsible for their own clinical actions and decisions. Mr Waalkens likened their situation to a set of barristers' chambers.

[30] Mr Waalkens further argued that even if Dr Sparks were an agent, his breaches of the Code were not authorised either expressly or impliedly by the Medical Centre and therefore the proviso to s 72(3) applied. Mr Waalkens also contended the Medical Centre could invoke the defence available under s 72(5) so that the Medical Centre would not be vicariously liable if — as the evidence showed was the case — it took reasonably practicable steps to prevent Dr Sparks from breaching the Code. That was essential in the interests of fairness, because unlike an employer, the Medical Centre and/or Dr Ryan did not have close oversight or control of Dr Sparks's clinical practice.

[31] In support of these central contentions, Mr Waalkens relied on affidavit evidence provided by the Chair of the New Zealand Medical Association Dr Baddock and by a senior GP, Dr Mangan. Both doctors express surprise at the Commissioner's finding of vicarious liability which they say is inconsistent with how doctors view their relationships within a medical centre and with each other. Both also have significant concerns about its implications.

[32] Dr Baddock states that the ruling will have serious adverse consequences on the future of general practice from the perspective not only of the GPs but their patients and the community. She says it is wrong to consider doctors the agents of the practice in which they work. They are independent clinicians responsible for their own clinical decisions and their own clinical competence and conduct. She notes too that they are held to account as individuals by the Commissioner, the Medical Council and the Health Practitioners Disciplinary Tribunal.

[33] In Dr Baddock's view, to hold one doctor responsible for the clinical decisions of another is unjustifiable and ultimately unworkable given the independent nature of a doctor's relationship with the patient and the individual nature of the judgments and the many decisions he or she has to make in one day. Realistically, it is impossible for a GP to supervise the work of another and influence the clinical decisions the other makes. It follows that holding a doctor responsible for the mistakes of another will not in any way protect the public. It is also unfair because it will cause reputational damage to a doctor in Dr Ryan's position despite the fact he or she has done nothing wrong.

[34] In similar vein, Dr Mangan says that to have otherwise than the individual doctor taking responsibility for their own decisions will fundamentally change the way GPs operate. The time required to supervise each other will destroy the efficient functioning of general practice. There is, in his view, nothing to be gained and no enhancement of public safety by including medical centres in disciplinary action when they have no ability to influence the care provided and therefore no ability to prevent breaches of the Code.

Analysis

Legislative framework

[35] As emphasised by Ms Casey QC for the Commissioner, the Act has a very strong consumer protection focus. Its purpose is expressed in s 6 as being:

> … to promote and protect the rights of health consumers and disability services consumers, and, to that end, to facilitate the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights.

[36] The Act, as Ms Casey also points out, requires any person exercising or performing a power or function under it to take into account the New Zealand health strategy.[11] The strategy endorses the need to promote a culture of quality and safety improvement across health services so that those services minimise patient harm and achieve best possible health outcomes.[12]

---

11 Health and Disability Commissioner Act 1994, s 7(a).

12 Minister of Health *New Zealand Health Strategy: Future direction* (Ministry of Health, April 2016) at 27.

[37] The Act creates the office of the Commissioner[13] and in a list of the Commissioner's functions, stipulates that a first priority is the drafting of the Code in accordance with s 19.[14] Other functions relevantly include the promotion of consumer rights as well as receiving and investigating complaints.[15] By virtue of s 24, the Commissioner is also required to designate one of their employees as the Director of Health and Disability Services Consumer Advocacy.

[38] Part 4 of the Act sets out the process for making a complaint that a health care provider has breached the Code. Part 4 also details the Commissioner's powers of investigation.

[39] Section 42(1) provides that after deciding to investigate a complaint about the conduct of a health care provider, the Commissioner must give notice of the fact of the investigation to the appropriate authority.[16] In this case, that was the Medical Council.[17] On receipt of the Commissioner's notice, the Medical Council is prevented from taking any disciplinary action of its own under the Health Practitioners Competence Assurance Act pending disposition of the complaint.[18]

[40] If, as happened in this case, the Commissioner finds that the Code has been breached, they may make recommendations.[19] Their other powers following an investigation include the power to forward their findings to any authority or professional body, make a complaint themselves to any authority or refer the health care provider(s) in question to the Director of Proceedings.[20] The latter may then determine whether to bring civil proceedings under the Act or disciplinary proceedings under the Health Practitioners Competence Assurance Act.[21]

[41] Civil proceedings for breach of the Code are brought in the Human Rights Review Tribunal[22] and may result in the healthcare provider being ordered to pay

---

13 Health and Disability Commissioner Act, s 8.
14 Section 14(1)(a).
15 Section 14(1)(c), (da) and (e).
16 See also Health Practitioners Competence Assurance Act 2003, s 66.
17 Section 114(1) and sch 2.
18 Section 70; and Health and Disability Commissioner Act, s 42(2).
19 Health and Disability Commissioner Act, s 45(2)(b).
20 Section 45(2)(b), (d) and (f).
21 Section 49(1).
22 Section 50.

monetary compensation to the aggrieved party.[23] Significantly it is not a defence that the breach was unintentional or without negligence on the part of the defendant although that may be relevant to the Human Rights Review Tribunal's assessment of the appropriate remedy, if any.[24]

[42] It follows that having been found vicariously liable for breaching the Code, a doctor in Dr Ryan's position (that is to say, a doctor not personally at fault) is potentially at risk of being sued and made liable to pay compensation. Technically, any judgment would not be against Dr Ryan as an individual but against the two doctors trading as the Medical Centre. As to whether someone in Dr Ryan's position could ever face disciplinary proceedings, the Act (and the Health Practitioners Competence Assurance Act) is silent on that. However, we consider that would be most unlikely and indeed unreasonable in the absence of any fault.

[43] Before turning to consider s 72 itself and its application to the facts of this case, it is important to provide a brief explanation of the concept of vicarious liability at common law. In doing so, we draw heavily on the very helpful exposition in the leading text *Todd on Torts*.[25]

Vicarious liability at common law

[44] Vicarious liability is a form of strict liability. It arises where one person A is held to be liable for civil wrongs committed by a second person B, even though A themselves is without fault. Where vicarious liability applies, it does not mean that both A and B have committed a civil wrong. Under vicarious liability, liability is imputed to A.

[45] If however the facts are that A actually authorised or ratified the wrong, that does not call for the application of vicarious liability. That is an instance of primary liability and A is personally liable.[26]

---

23 Sections 54(1)(c) and 57.
24 Section 54(4).
25 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019).
26 At 1249.

[46] At common law, vicarious liability can arise where the relationship between A and B is one of employer and employee (or analogous to employment) or in limited circumstances one of principal and agent. It can also arise, as we shall see, under the Partnership Act 1908 and Partnership Law Act 2019.

[47] The common law requires there to be a connection between the wrongful act and the relationship. In the case of the employment relationship, the orthodox test for determining that connection is whether the wrong occurred in the course of the employment. This has been superseded in a limited category of cases by a "close connection" test: was the conduct closely connected with the employment?[27]

[48] Unlike the employment relationship, in the case of the principal-agent relationship, there is no general rule that a principal is vicariously liable for the wrong of an agent committed in the course of an agency.[28] Instead, a distinction is drawn between two categories of agents for the purposes of vicarious liability. The first such category is a person engaged for the purpose of bringing their principal into contractual or legal relations with third parties (contractual agent) and the second comprises agents in the wider sense of a person authorised to act on behalf of another person. It is only the conduct of the first type of agent, the contractual agent, to which vicarious liability may attach.[29] The test is whether the principal has actually or ostensibly authorised the commission of the contractual agent's wrong. Where there is actual authority (which may be express or implied), the liability of the principal is personal not vicarious.[30]

The interpretation of s 72

[49] For ease of reference, we again set out the full text of the section:

---

27 At 1215. See more generally 1232–1244.

28 At 1247; and *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [111].

29 *Todd on Torts*, above n 25, at 1250. The only exceptions are where (a) a person drives a vehicle for another; and (b) where a person fosters a child pursuant to an arrangement made with the government department responsible for social welfare.

30 At 1249.

Vicarious liability

72 Liability of employer and principal

(1) In this section, the term **employing authority** means a health care provider or a disability services provider.

(2) Subject to subsection (5), anything done or omitted by a person as the employee of an employing authority shall, for the purposes of this Act, be treated as done or omitted by that employing authority as well as by the first-mentioned person, whether or not it was done or omitted with that employing authority's knowledge or approval.

(3) Anything done or omitted by a person as the agent of an employing authority shall, for the purposes of this Act, be treated as done or omitted by that employing authority as well as by the first-mentioned person, unless it is done or omitted without that employing authority's express or implied authority, precedent or subsequent.

(4) Anything done or omitted by a person as a member of an employing authority shall, for the purposes of this Act, be treated as done or omitted by that employing authority as well as by the first-mentioned person, unless it is done or omitted without that employing authority's express or implied authority, precedent or subsequent.

(5) In any proceedings under this Act against any employing authority in respect of anything alleged to have been done or omitted by an employee of that employing authority, it shall be a defence for that employing authority to prove that he or she or it took such steps as were reasonably practicable to prevent the employee from doing or omitting to do that thing, or from doing or omitting to do as an employee of the employing authority things of that description.

[50] Section 72 appears in pt 5 of the Act headed "[m]iscellaneous provisions".

[51] The section creates three categories of actors for whom the employing authority may be held vicariously liable, namely its employees, its agents and its members. Liability is dependent on the wrongdoer acting in the capacity of one of those three categories at the relevant time as denoted by the use of the word "as" in front of each category — "as the employee", "as the agent" and "as a member". Another way of looking at it is to regard the "as" as doing the same work as the common law requirement of a connection between the wrongful conduct and the relationship.

[52] None of those terms "employee", "agent" or "member" is defined.

[53] In the case of vicarious liability for employees, liability is imputed by s 72(2) to the employer regardless of whether or not the wrongdoing was done with the employer's knowledge or approval. That is broadly similar to the position at common law. However, what is different from the common law is the existence of a defence in s 72(5) of taking all reasonably practicable steps to prevent the act or omission.

[54] Contrary to the submission made by Mr Waalkens, there is no doubt in our view that the s 72(5) defence only applies to the employee category and not the other two categories.

[55] Mr Waalkens drew support for his submission from a comment made by the High Court in *Totalisator Agency Board v Gruschow*.[31] However, the comment was only obiter and in our view is plainly wrong. The wording of s 72 does not permit of such an interpretation. Only s 72(2) — the employee subsection — is expressed to be subject to s 72(5) and the wording of s 72(5) itself refers throughout to employees and only employees. Unlike the test of liability for members and agents, the test of liability for employees' actions is not dependent on questions of authority. The test of liability being different, it makes sense for there to be a special defence in respect of that category and not the other two.

[56] As regards acts done by the wrongdoer as agent of the employing authority, the employing authority is only to be vicariously liable under s 72(3) if the wrongdoing has been done with the express or implied authority of the employing authority. That is the effect of the proviso to s 72(3) "unless … without that employing authority's express or implied authority, precedent or subsequent".

[57] As mentioned, at common law, express or implied actual authority would render the principal personally liable for the conduct of the agent. It would not be a case of vicarious liability at all. Which raises the question what then is meant by "implied authority" in s 72(3).

---

[31] *Totalisator Agency Board v Gruschow* [1998] NZAR 529 (HC) at 537. The comment was made in relation to similar wording contained in s 68(3) of the Human Rights Act 1993: see [59] below.

[58] The meaning of "implied authority" as it appeared in another vicarious liability provision dealing with agents has already been considered by this Court in the decision of *Proceedings Commissioner v Hatem*.[32] *Hatem* involved an agency relationship arising from partnership. It was held that for the purposes of s 33 of the now-repealed Human Rights Commission Act 1977 the required implied authority would exist if the agent's wrongful act was done in the ordinary course of the principal's business.[33]

[59] Although the *Hatem* decision concerned the interpretation of a provision in different legislation, the wording under consideration was almost identical to the wording contained in s 72(2), (3) and (5) relating to employees and agents. Further, as this Court in *Hatem* noted, the same wording was carried over from the Human Rights Commission Act to a vicarious liability provision in the statute which replaced it, namely s 68 of the Human Rights Act 1993.[34]

[60] At issue in *Hatem* was the liability of a two-partner firm for the actions of one of the partners who committed the statutory tort of sexual harassment. He did so while interviewing prospective staff and while supervising current employees. In holding that the firm was liable, the Court articulated the following key points:

(a) The Human Rights Commission Act was not a code and therefore it was necessary to turn to general law to determine the meaning of terms used in s 33 such as "employer" which were not defined.[35]

(b) If the issue of the firm's liability was approached under s 13 of the Partnership Act 1908 — liability of the firm for wrongs — the test of liability was whether the sexual harassment was performed by the wrongdoing partner while acting in the course of the business of the firm.[36]

---

32 *Proceedings Commissioner v Hatem* [1999] 1 NZLR 305 (CA).
33 At 309.
34 At 307.
35 At 308.
36 At 309.

(c) If the issue of the firm's liability was approached under s 33(2) of the Human Rights Commission Act, the starting point was the provision of the Partnership Act which states that every partner is an agent of the firm and his or her partners for the purpose of the business of the partnership.[37]

(d) The general principles of agency as between partners are that each partner has implied authority from the firm to do everything which is in the ordinary course of the firm's business.[38]

(e) Thus whether the issue was approached via s 13 of the Partnership Act or via s 33(2) of the Human Rights Commission Act, the crucial question was whether the wrongdoer was acting in the ordinary course of the firm's business.[39]

(f) The question of whether the wrongdoer is acting in the ordinary course of the firm's business is a question of fact and will usually involve matters of degree. Relevant factors will be the nature of the wrongful activity, what temporal connection it had to the firm's business and whether that business provided the opportunity for the commission of the wrong. None of those factors are determinative and other factors may be relevant.[40]

(g) In the ultimate judgment, issues of policy may arise. If for example sexual harassment is not the responsibility of the firm as a whole, then it is likely to be less vigorously policed. To hold the firm liable therefore better serves the purpose of the legislation which is to deter sexual harassment and to provide a remedy for victims. Policy issues cannot lead to a result which is otherwise untenable but in a case

---

37 At 309.
38 At 309–310.
39 At 310.
40 At 311.

involving matters of degree it is legitimate to keep the purpose of the legislation in mind.[41]

(h) The same approach should apply when interpreting s 68 of the Human Rights Act.[42]

(i) Helpful analogies may be derived from vicarious liability in general tort law.[43]

[61] Like the High Court, we see no reason to depart from the *Hatem* approach when considering the wording of s 72(3) and (4) and in particular the meaning of "agent" and "implied authority".[44] We also endorse what was said in *Hatem* about the relevance of policy considerations and the purpose of the legislation.

[62] That said, there are also differences between the wording of s 72 and the equivalent provisions in the Human Rights legislation.

[63] The first is that s 72 has the heading "[v]icarious liability" which the two Human Rights provisions do not. They only have the section name "liability of employer and principals" — as does s 72 — and the words "vicarious liability" do not appear anywhere in the text. What significance (if any) should attach to the use of the heading "vicarious liability" in s 72 is debatable. Why did Parliament borrow the common law term? It cannot signify a legislative intention to replicate the law of vicarious liability in general tort law because as already mentioned, the scope of the liability under both s 72 and the Human Rights provisions differs in some respects from the common law.

[64] Further, the legislative history of s 72 shows the new heading "[v]icarious liability" only appeared after the third and last version of the Bill had been reported from the Committee of the Whole House. We are driven to the conclusion that it was intended to do nothing more than convey that the type of liability of principals and

---

41 At 311.
42 At 307 and 313–314.
43 At 312.
44 Judicial review judgment, above n 6, at [52].

employers being addressed in the section is a form of strict liability for the actions or omissions of someone else.

[65] The second difference between s 72 and the equivalent provisions in Human Rights legislation is however of more significance and that is the existence of the third category of actor in s 72, namely the "member" category. Like the "agent" category, liability is premised on the member acting with the express or implied authority of the employing authority.

[66] The member category is unique to s 72 and is important because unlike "employee" and "agent", "member" is not a legal term. Further as a matter of ordinary English meaning, it clearly is wider.

[67] Referring again to the legislative history, from the very beginning the clause that was to become s 72 always contained a member category. In its original version, the category was expressly limited to members of area health boards, Children's Health Camps Boards or a camp committee under the Children's Health Camps Act 1972.[45] Those limitations were removed in the second version of the Bill as reported from the Social Services Committee.[46] Unfortunately, there is no explanation as to why that happened. It cannot be because all of those entities were later abolished. That only came later. At the time the Act came into force, the Children's Health Camps Boards and camp committees were still in existence and remained within the definition of health care providers.[47] Nor is there any discussion anywhere in the legislative history about the intended scope of this third category. All that can safely be drawn from the amendment to the Bill is an intention that the term "member" should be a broad, general term and not restricted to specific health care providers.

[68] It can also be safely and reasonably assumed that Parliament intended the "member" category to include wrongdoers who did not fit within either the agent

---

45 Health Commissioner Bill 1990 (44-1), cl 62(3).

46 Health and Disability Commissioner Bill 1990 (44-1), cl 62(3).

47 They were dissolved in 1999 by s 3 of the Children's Health Camps Board Dissolution Act 1999. Area health boards were however dissolved in 1993, prior to the enactment of the Health and Disability Commissioner Act.

or employee category. That is to say, the category cannot be co-extensive with either of the other two categories. It must be wider in order to have work to do.

[69] In the High Court in this case, Grice J took the view that "member" should be interpreted in "the common-sense way as meaning someone belonging in some sense to the Medical Centre and delivering medical services".[48] For the reasons already mentioned, we acknowledge that "member" is a wider category than the other two categories. It was designed to respond to the possible myriad of structures and arrangements that may be involved in the delivery of health care. On the other hand, we are concerned that the Judge's formulation is so imprecise and broad as to be too expansive.

[70] We consider it more helpful to approach the interpretation of the word "member" on the basis that while a "member" need not be an employee or a partner, it must be a person whose status in relation to the employing authority is such that it justifies the presumption that what they do or omit to do is done with the authority of the employing authority. That is to say, it must be a status that is closely allied to those other concepts. In the absence of agency or employment, "member" is likely to involve someone who is in some other way closely associated with or identified with the employing authority.

The application of s 72 to the facts of this case

[71] As already mentioned, it is common ground that Dr Sparks was not an employee of the Medical Centre. Therefore, the Medical Centre can only be vicariously liable if when he consulted with the complainant and wrote the prescription, he was acting as its agent or as its member with its express or implied authority.

[72] For reasons we now explain, we consider the agency route to liability is problematic and that the member category is a much better fit for the facts of this case.

---

48 Judicial review judgment, above n 6, at [65].

[73] Following *Hatem*, in the absence of a statutory definition of "agent", it is necessary to turn to general law to determine whether on the facts of this case there was an agency relationship.

[74] In the High Court, the Judge took the view that an agency relationship existed for the purposes of s 72 on either the basis of a partnership between Drs Ryan and Sparks or on the basis of the conduct of Dr Sparks and the Medical Centre.[49] In making the latter finding, the Judge did not refer to the legal meaning of agent nor the law of agency. The Judge also appears to have assumed that vicarious liability automatically followed regardless of what type of agent Dr Sparks was. Yet, as already noted, that is not the orthodox position at general law.

[75] In our view, of the two approaches to agency taken by the Judge, partnership offers the more coherent path. But it too has its difficulties.

[76] The Medical Centre is plainly not a legal entity as such. It is not a company nor is it an incorporated association and therefore has no separate legal personality. However, correctly analysed it is in our view undoubtedly a partnership between Drs Ryan and Sparks. It is trite law that a partnership can exist despite the absence of a written partnership agreement.[50]

[77] It follows by virtue of s 8 of the Partnership Act (now s 17 of the Partnership Law Act), that each doctor was the agent of the other and was also an agent of the firm the Medical Centre.

[78] However, that is not the end of the matter. Before deciding whether the partner's conduct falls within the ordinary course of the firm's business, it is obviously necessary first to decide what the business of the partnership is. On the facts of *Hatem*, there was no difficulty in deciding that. The two partners ran a garage and supervising the partnership's employees who worked in the garage was plainly a task undertaken as part of the business of the firm.[51] However, the fact situation before us is not nearly as straightforward.

---

49 At [55]–[56].
50 *Clark v Libra Developments Ltd* [2007] 2 NZLR 709 (CA) at [155].
51 *Proceedings Commissioner v Hatem*, above n 32, at 313.

[79] As a matter of law, nothing prevents people being in partnership for one purpose and not another. Thus the fact that the Medical Centre is the firm name of a partnership — that is to say a collection of two people carrying on business together with a view to profit[52] — does not of itself as a matter of law preclude the possibility of Dr Sparks conducting another business on his own account from the same premises.

[80] Indeed there is on the evidence a strong argument for saying that when consulting with their respective patients, Drs Sparks and Ryan are not each other's partner but separate business entities. This is supported by the evidence about the sharing of profits from patient consultations compared with sharing of profits from the Medical Centre. Each doctor is paid separately for consultations. They do not share losses. If one of the doctors were to see fewer patients so as to make a loss, there is no suggestion the other or the firm would share in that loss as opposed to the position that pertains to the profits and losses of the Medical Centre.

[81] If that is the correct legal analysis, then in our view, and again following *Hatem*, the case is not on the borderline and policy considerations such as the strong consumer focus of the Act will not of themselves convert Dr Sparks into acting as an agent of the Medical Centre at the relevant time when he was not one at general law.

[82] None of these difficulties were alluded to by the Commissioner at the time he made his finding of vicarious liability relying on s 72(3).[53] Nor were they considered by the High Court.

[83] It is not however necessary for us to express a concluded view on that point because while the interpretation of s 72(3) is constrained by general law, the same is not true of the member category in s 72(4). And in our view, the Commissioner's decision can be justified under that category.

[84] While a partner in a firm is sometimes referred to as a member of the firm, the word "member" under s 72 is, as previously discussed, wider than "agent."

---

52 At 308.

53 Commissioner's report, above n 2, at [74].

Applying the meaning we attribute to "member" to the facts of this case, it is clear that Dr Sparks can fairly be described as a member of the Medical Centre. He along with Dr Ryan was undoubtedly the person most closely identified or associated with it and was to all intents and purposes in charge. Further, we have no doubt that is how he would have been regarded by the patients and general public.

[85] Importantly, there is also nothing in s 72 which would preclude the possibility of a member acting in a dual capacity when treating patients. That is to say, at the time Dr Sparks saw the complainant, there is nothing to preclude the analysis that he was acting both in business on his own account and also as a member of the Medical Centre. The two are not mutually exclusive. Again, in our view, that would accord with the way patients and the general public would perceive it. Likewise, there can also be no question that in seeing the patient he was acting within the scope of his authority as a member of the Medical Centre.

[86] At one point of his submissions, Mr Waalkens appeared to suggest that "without … express or implied authority" meant that if the employing authority did not authorise the wrongful act — that is, the breach of the Code — then s 72(4) and for that matter s 72(3) did not apply. However, such an interpretation is not only contrary to *Hatem* but it would render those provisions utterly pointless. If the Medical Centre had itself authorised the mis-prescription, then it would be directly liable. There would be no need for vicarious liability.

[87] We are of course very mindful of the concerns expressed by Drs Baddock and Mangan. We also acknowledge that a key policy reason for the imposition of vicarious liability on a principal is their ability to control or direct the wrongdoer.

[88] However, we consider that the concerns in the affidavits understate the level of control exercised by the Medical Centre in this case over the way in which Dr Sparks conducted his practice. That is graphically illustrated by the fact that in response to the complaint, the Medical Centre conducted an internal review and itself implemented changes to reduce the risk of a similar mistake being made again. Appointment times which had been ten minutes were increased to 15 minutes and the computer system was changed to ensure that alerts triggered the appropriate

warning for prescribing doctors. It also instituted a new policy that all calls regarding prescription warnings and queries would be discussed with the prescribing doctor directly, rather than have them mediated by a nurse as it will be recalled had happened in this case. Dr Ryan also completed a medic alert application form for the particular patient so that other clinicians would see it.

[89] As Ms Casey put it, all these changes demonstrate the reality that the combined culture and practices of the Medical Centre bear very much on the safety of the patients that both Drs Ryan and Sparks treat. That was something the Medical Centre itself recognised in its statement that the Code would "guide the design and delivery of *all* services provided at this practice".

[90] In all the circumstances including the sharing of patient information and the policies detailed at [10] above, the Medical Centre is far removed from the analogy of a set of barristers' chambers relied on by Mr Waalkens. Unlike barristers delivering legal services, the evidence shows very clearly that Dr Sparks did not have complete autonomy in the way he delivered medical services to the patients and that the imposition of vicarious liability on the Medical Centre does, to use the words of *Hatem*, better serve the protective purpose of the Act than just holding Dr Sparks liable.[54]

[91] It follows from all of the above that the decision imposing vicarious liability was within the scope of s 72 and was not unreasonable.

[92] The appeal against the finding of vicarious liability is accordingly dismissed.

Appeal against decision declining name suppression (CA252/2020)

[93] As mentioned, Grice J declined Dr Ryan's application for permanent name suppression of his name and/or identifying particulars as well as those of Dr Sparks and the Medical Centre.[55]

---

54 *Proceedings Commissioner v Hatem*, above n 32, at 311.
55 Name Suppression judgment, above n 9.

[94] On appeal, Mr Waalkens submitted the Judge had given insufficient weight to the statutory and regulatory context within which this type of judicial review proceeding occurs. The Commissioner's investigations are generally conducted in private and their findings when published usually — but not always — have the names and identities redacted as indeed happened in this case. That being so and having regard to the fact that this proceeding is about statutory interpretation, not individual conduct, Mr Waalkens contended that no useful purpose would be served in now publishing the names. On the contrary, the only consequence of publishing the names would very likely be unfair reputational harm to Dr Ryan and the Medical Centre.

[95] While we are sympathetic to Dr Ryan's position, we are not persuaded there is any legal basis for us to make the suppression orders requested. The fact that the Commissioner's usual but not invariable practice is to redact the names does not mean that names should be suppressed in this proceeding. Nor is it a ground for distinguishing the leading authority of *Erceg v Erceg* as Mr Waalkens sought to do.[56] This proceeding is not a continuation of the investigation. It is a civil proceeding under the Judicial Review Procedure Act 2016 and the ordinary principles of open justice apply.

[96] In *Erceg*, the Supreme Court emphasised that courts should not make non-publication or confidentiality orders simply because the publicity associated with a proceeding would be embarrassing or unwelcome. To justify an exception from the fundamental rule of open justice, the party seeking suppression must show specific adverse consequences. The standard is a high one.[57]

[97] In this case, there is no compelling evidence of specific adverse consequences. Rather the evidence is of general and largely speculative harm to reputation. The concerns must also be tempered against the fact that it will be very apparent to readers of this judgment that Dr Ryan was not in any way personally at fault and nor was the Medical Centre. They have only been deemed liable because of the structure of the Act and the way the two doctors have chosen to practise. The judgment will

---

56 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.
57 At [13].

also show Dr Ryan and the Medical Centre in a favourable light because of the responsible approach they took when responding to the complaint.

[98] The appeal against the High Court decision declining to grant name suppression is also dismissed.

Costs

[99] Ms Casey sought costs in the event the appeals were dismissed. However, this was in the nature of a test case and therefore in the interests of justice we consider that costs should lie where they fall. We acknowledge that was not the view taken in the High Court where Grice J awarded costs against Dr Ryan in both appeals. Costs are of course at the discretion of the Judge and we are not bound by the approach taken in the High Court.

Outcome

[100] The appeal against the decision of the High Court upholding the finding of vicarious liability (CA141/2020) is dismissed.

[101] The appeal against the decision of the High Court declining the application for permanent name suppression (CA252/2020) is dismissed.

[102] Costs are to lie where they fall.

Solicitors:
Wotton + Kearney, Wellington for Appellant
Office of the Health and Disability Commissioner, Wellington for Respondent