ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PATIENT.

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-65
[2020] NZHC 373

UNDER THE	Judicial Review Procedure Act 2016
IN THE MATTER OF	An application pursuant to the Judicial Review Procedure Act 2016
BETWEEN	CHRISTOPHER RYAN Applicant
AND	THE HEALTH AND DISABILITY COMMISSIONER Respondent

Hearing: 29 October 2019 and 11 December 2019

Appearances: S O'Sullivan and S Ryland for Applicant
V Casey QC for Respondent
M McClelland QC and A McClelland for Interested Party

Judgment: 3 March 2020

JUDGMENT OF GRICE J
(Judicial review)

Introduction

[1] Dr Sparks and Dr Ryan are general practitioners. They practise from and own as business partners a provincial medical centre (the Medical Centre). This application concerns a finding by the Health and Disability Commissioner (HDC) that the Medical

Centre is vicariously liable for breaches by Dr Sparks of the Health and Disability Services Consumer Rights (the Code).[1] The issues raised are not disciplinary.

Background

[2] In late November 2016 Dr Sparks saw a patient of Dr Ryan's while Dr Ryan was on holiday. The consultation took place at the Moore Street Medical Centre. Dr Sparks prescribed the patient an antibiotic to treat a recurring infection. The patient's medical notes included information about an earlier allergic reaction to an antibiotic from the same class as that prescribed. When the patient went to fill the prescription at the pharmacy, the pharmacist was alerted by their system to the patient's allergy. The pharmacist queried the prescription with a practice nurse at the Medical Centre. When the nurse checked with Dr Sparks about the prescription, he approved it. The prescription was filled and the patient later took their first dose.

[3] The patient suffered an anaphylactic reaction to the prescribed antibiotic and was treated in hospital. A complaint was made to the Health and Disability Commissioner (the Commissioner) in relation to Dr Sparks' services.

[4] The Commissioner commenced an investigation into the complaint.[2]

[5] The Commissioner wrote to the Medical Centre on 8 December 2016 requesting a response to the complaint. The Medical Centre provided a response dated 12 January 2017 that was signed by the Practice Manager and Dr Sparks. This letter set out Dr Ryan's involvement in completing the Incident Report Form and the medical alert form.

[6] On 2 August 2017 the Commissioner inquired about the name and contact address of the legal entity that owned the Medical Centre. The Practice Manager replied that "it is operated on a partnership/cost share basis by the two Doctors who

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1 Code of Health and Disability Services Consumer Rights Regulations 1996 (the Code).

2 The Deputy Commissioner was the author of the report and the investigator. However, the Deputy Commissioner acts under delegated authority from the Commissioner under s 69(3) of the Health and Disability Commissioner Act 1994 (the Act). Therefore, I use the term "Commissioner" throughout.

operate their own medical practices from the centre". These were Dr Sparks and Dr Ryan.

[7] On 3 August 2017 the Commissioner couriered two letters, one to Dr Sparks and the other to the partners of the Medical Centre, advising that the Commissioner had completed its preliminary assessment and had decided to commence a formal investigation. The letters sought information from each party, including responses to the expert advice received by the Commissioner.[3]

[8] That letter directed to the partners of the Medical Centre drew attention to the possibility of vicarious liability. Dr Ryan did not recall knowing about the issue of vicarious liability until May 2018. However, the evidence suggests it was brought to his attention in the letter which was resent to the Medical Centre on 29 August 2017. Nothing turns on this.

[9] Dr Sparks responded to the letter on 28 August 2017. The Medical Centre provided its response to the letter on 4 September 2017 which was signed by both Dr Ryan and Dr Sparks. The letter set out details of the Medical Centre's practices and procedures, as well as the changes it had made to its operations in response to the issues raised by the Commissioner's expert. It also provided a high-level description of the relationship between the two doctors and the Medical Centre. The Medical Centre sent the Commissioner copies of its Best Practice Statement, its Incident Reporting Policy and Procedure, its Significant Event Management Policy and its Protocol for dealing with patient requests for prescriptions.

[10] On 10 May 2018 the Commissioner sent its provisional decision to Dr Sparks and to the partners of the Medical Centre. It contained a finding that Dr Sparks had breached various rights under the Code. The provisional decision also indicated that the Commissioner did not consider the Medical Centre had directly breached expected standards but that it was liable for the breaches by Dr Sparks as its agent as an employing authority under s 72(3) of the Health and Disability Commissioner Act 1994 (the Act).

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[3] A further copy was emailed from the Commissioner to the Medical Centre on 29 August 2017.

[11] Dr Ryan provided comments on the provisional decision on 24 May 2018. He challenged its characterisation of the relationship between Dr Spark and himself in relation to the Medical Centre as a partnership. He further said the Medical Centre did not have a legal structure and therefore could not be an 'employing authority' under s 73(3) of the Act. In any event he said Dr Sparks' breaches of the Code were not made with the express or implied authority of the Medical Centre.

[12] The Commissioner then sought further information about who employed the staff[4] who worked at the Medical Centre and what its relationship was with the company (Ashburton Medical Centre Ltd) which owned the premises. The response from Dr Ryan's lawyer, who had also been responding on behalf of the Medical Centre, was that the staff were employed by the Medical Centre. The company owning the premises was jointly owned by Drs Spark and Ryan – they each owned 50 per cent of the shareholding under various names and entities. The company was the landlord but had nothing to do with the day to day operation of the practice.

[13] Moore Street Medical Centre owned all the plant and equipment at the clinic. It ran a shared practice management system to which both Dr Sparks and Dr Ryan had access. The Medical Centre had a trading account into which Dr Sparks and Dr Ryan paid a fixed weekly amount to cover the Medical Centre's expenses. That included rent, wages and salaries as well as other administrative expenses.

[14] Dr Ryan and Dr Sparks had separate patient registers. However, if one of them was unavailable to see his own patient the other would see the patient. Dr Ryan and Dr Sparks each had separate bank accounts to receive the payment of fees from their respective patients. The Medical Centre hired other doctors from time to time as employees or would retain them on contract during periods of high demand. The fee for a visit to the employed and contracted doctors or other staff in the centre was paid into the Medical Centre's account.

[15] The Commissioner issued his final report on 26 June 2018. The report concluded that Dr Sparks had failed to provide services to the patient with reasonable

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4 The evidence indicates that Moore Street Medical Centre then employed four nurses, four administrative staff, one practice manager and one doctor.

care and skill. He had therefore breached Right 4(1) of the Code. In addition the Commissioner found that the patient had not been provided with the information that a reasonable consumer in the circumstances would expect to receive. Dr Sparks had therefore also breached Right 6(1)(b) of the Code. Without this information the Commissioner found the patient was not in a position to make an informed choice and give their informed consent to taking the medication. This was a breach of Right 7(1) of the Code by Dr Sparks. Those findings are not challenged.

[16] The Commissioner in the report noted that the Medical Centre was operated by Drs Ryan and Sparks. It found Dr Sparks was authorised to act as a general practitioner on behalf of the Medical Centre when he was providing care to the patient and he was, therefore, an agent of the Medical Centre. The Commissioner concluded that in consulting with the patient and prescribing the drug, Dr Sparks was acting within the authority granted by the Medical Centre. Accordingly, the Medical Centre was vicariously liable for Dr Sparks' breaches of rights 4(1), 6(1)(b), and (7)(1) of the Code pursuant to s 72(3) of the Act.

[17] Dr Ryan was not found personally liable for the breaches by Dr Sparks. The finding however affected him because he was a partner in the Medical Centre and provided medical services from the Medical Centre.

[18] Specific recommendations were made in respect of Dr Sparks personally. In addition, the report was to be provided to the Medical Council of New Zealand and the Royal New Zealand College of General Practitioners with identifying particulars of the parties removed except for Dr Sparks. A copy of the report with the details identifying the parties removed was also to be provided to the Health Quality & Safety Commission, and placed on the HDC website for educational purposes. I note that the Commissioner has since agreed to defer publication of the report on the website pending prompt resolution of this proceeding.

[19] No issue is taken with the factual background insofar as it relates to Dr Sparks' actions or omissions nor with the findings in relation to Dr Sparks personally. These proceedings relate only to the findings against the Medical Centre based on vicarious liability under s 72(3) of the Act.

The grounds for review

[20] The grounds of judicial review raised by Dr Ryan are that the Commissioner made an error of law in his decision that the Medical Centre was vicariously liable for Dr Sparks' breaches of the Code and that the decision was unreasonable.

[21] First, Dr Ryan says the Commissioner misapplied s 72(3) of the Act which deals with vicarious liability. He says that:

(a) The Medical Centre is an employing authority for the purposes of s 72(1).

(b) Section 72(3) provides that the actions or omissions of an agent of an employing authority are to be treated as those of the employing authority unless that act or omission was done "without the employing authority's express or implied authority, precedent or subsequent".

(c) The Commissioner applied a narrow interpretation to that section by restricting the act or omission for which authority from the employing authority was required to the mere act of consulting and prescribing.

(d) The Commissioner erred in law by finding Dr Sparks was an agent of the Medical Centre and Dr Ryan when he prescribed the patient with the antibiotic.

(e) The Commissioner erred in law by failing to correctly apply the exception to s 72(3) of the Act to the acts or omissions that gave rise to the beach in this case.

[22] Secondly, Dr Ryan says that the Commissioner's decision was not reasonable as there was no basis for the conclusion that the Medical Centre gave authority in any form for the acts giving rise to the breach.

[23] The Commissioner's report did not make a finding that Dr Sparks was an agent of Dr Ryan as opposed to agent of the Medical Centre. This point was not pursued in

argument. Therefore, I confine my decision to the issue of vicarious liability as it relates to the finding against the Medical Centre.

[24] There is no separate claim that insufficient reasons were provided in the decision nor of breach of natural justice by the Commissioner.

[25] It is common ground that the Commissioner's decisions in the report of 26 June 2018 are decisions that exercise a power of a public nature and have a public dimension. The decisions were made pursuant to a statutory power of decision in terms of the Judicial Review Procedure Act 2016.[5]

Judicial review

[26] The Court has a supervisory function to ensure public power is exercised according to the law.[6] An error of law must be material meaning "one which may well have altered the ultimate decision".[7] This might arise "where a decision-maker has applied a gloss to a statutory test or asked him or herself the wrong question".[8] A decision maker's failure to consider relevant matters or consider irrelevant matters is an error of law. An argument about the weight the decision maker places on a relevant matter is not an error of law.[9] Judicial review is not a substitute for an appeal against the substance of the decision itself.[10]

[27] In this case it is necessary to consider whether the Commissioner has applied the correct legal tests and has taken into account only relevant matters in applying those tests.

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5 Sections 3 and 5; and *A Lawyer v New Zealand Law Society* [2019] NZHC 1961 at [89].

6 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 388.

7 *Astrazeneca Ltd v Pharmaceutical Management Agency* HC Wellington CIV-2011-485-2314, 22 December 2011 at [73] citing *Bulk Gas Users Groups v Attorney General* [1983] NZLR 129 (CA) at 136 per Cooke J.

8 *G v Legal Complaints Review Officer* [2019] NZHC 601, [2019] NZAR 844 at [6] citing Matthew Smith *New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at 709 and Philip Joseph *Constitutional and Administrative law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 985.

9 *Berryman v Solicitor-General* [2008] 2 NZLR 772 (HC) at [84].

10 *Aorangi School Board of Trustees v Ministry of Education* [2010] NZAR 132 (HC) at [8].

[28] A high bar has been set to establish unreasonableness in the public law sense. This has been reiterated recently by Thomas J in *G v Legal Complaints Review Officer*:[11]

> [8] Unreasonableness is one of the most problematic grounds of Judicial review.[12] As discussed above, judicial review is concerned with the legality, as opposed to the merits, of administrative decisions. As this Court will not substitute its decision for that of the specialist decision-maker, the reasonableness of a decision has historically been approached from the high standard of *Wednesbury* unreasonableness.[13] Unreasonableness was explained in *Wednesbury* as a decision "that no reasonable body could have come to".[14] …

[29] I now turn to consider the legislation.

Interpretation

[30] The interpretation of s 72 involves a consideration of the text and the purpose which are the key drivers of statutory interpretation. The approach was summarised by the Supreme Court in *Commerce Commission v Fonterra*:[15]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[31] The Supreme Court in *Hickman v Turner and Waverley Ltd* noted a broad and untechnical approach to statutory interpretation should be taken where the policy of the legislation indicates that such an approach is appropriate.[16] In that case the Supreme Court was considering the obligations imposed under the Securities Act 1978 on those taking investments from the public. The developers sought to use the wording

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11 *G v Legal Complaints Review Officer*, above n 8.

12 Joseph *Constitutional and Administrative law in New Zealand*, above n 8, at 997 citing *Shaw v Attorney-General (No 2)* [2003] NZAR 216 (HC) at 239.

13 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 (CA).

14 At 239.

15 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] (footnotes omitted).

16 *Hickman v Turner and Waverley Ltd* [2012] NZSC 72, [2013] 1 NZLR 741.

of the formal documents to argue that they were insulated from the legal consequences of the actions and representations of agents who had dealt directly with the investors. The Court declined to take a narrow and technical approach to interpretation of the statutory provisions. The majority said:[17]

> [98] Which of these two views provides the more appropriate basis for deciding the case, in the end, comes down to an assessment which is controlled by the policy of the Securities Act, rather than the detail of the formal documents by which the developers sought to insulate themselves from the legal consequences of the actions and representations of the Blue Chip agents.
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> …
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> [100] … it is difficult to see how it would be reconcilable with policy for the impact of s 37 to be avoided by the simple device of using separate companies for different components of a single integrated financial product. …

The legislation

[32] Section 72(3) of the Act provides:

> **72 Liability of employer and principal**
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> (1) In this section, the term **employing authority** *means a health care provider or a disability services provider*.
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> (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 …
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> …
>
> (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

[17] Per Elias CJ, McGrath, William Young and Anderson JJ.

> 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.
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> [Emphasis added]

[33] Both counsel took the view that, for the purposes of this argument, there was no significant difference between "agent" or "member" as used in s 72(3) or (4) respectively. In either case Dr Ryan says the Medical Centre could not be vicariously liable for the actions of Dr Sparks.

[34] Dr Ryan now concedes that the Medical Centre is a health care provider and an employing authority for the purposes of s 72(1).[18]

[35] Dr Ryan says the Commissioner erred in law when he found that Dr Sparks was an agent of the Medical Centre when providing the relevant health care to the patient. He points out that the acts or omissions leading to Dr Sparks' breaches of the Code were failing to explore the patient's previous reaction to the antibiotic, prescribing a drug from the same class as the drug that had previously triggered a reaction despite the availability of other more suitable alternatives, and failing to do anything once alerted by the pharmacist.

[36] Dr Ryan argues that the Commissioner made no adverse findings against the policies of the Medical Centre therefore the only person who could have prevented the breaches was Dr Sparks. Further, Dr Sparks and Dr Ryan operated practices independent of each other. Their relationship was solely a business relationship to operate the premises and pay overheads. They had separate patient registers, separate accounts to which they banked their patients' fees and neither doctor took on an obligation to supervise the other.

[37] Dr Ryan said that patients rely on the care provided by their own doctor. Dr Ryan contrasted that position with a business partnership where commercial and economic considerations underpin the imposition of apparent or ostensible authority.

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[18] The initial stance taken by Dr Ryan was that the Medical Centre was not an entity capable of being an employing authority.

He said that the Commissioner had confused common law principles of apparent/ostensible authority applicable in the tortious civil context with the special legislative provisions that apply here. He said that the general concept of ostensible authority does not apply here given the wording of the statute and its purpose.

[38] In summary, Dr Ryan says the provision of health care by Dr Sparks to the patient was not "done as an agent" of either the Medical Centre or Dr Ryan. He says there was no actual agency relationship nor any basis to impose apparent or ostensible authority.

[39] In response the Commissioner says that Dr Sparks provided his clinical services as part of the medical and related services delivered through the Medical Centre. In common with any employed or contracted doctor in the Medical Centre, Dr Sparks delivered medical services through the Medical Centre as the "employing authority" for the purposes of s 72.[19]

[40] The net income for employees and contractors performing services delivered through the Medical Centre was distributed to Dr Sparks and Dr Ryan as partners through the Medical Centre partnership accounts.

Vicarious liability

[41] The Commissioner says that the Medical Centre is vicariously liable under s 72(3) because Dr Sparks was authorised by the Medical Centre to act as a general practitioner when providing care to the patient and that the act of prescribing the antibiotic and related services by Dr Sparks were within that authority. Ms Casey QC says it follows that Dr Sparks was an agent delivering medical services which were within his actual or implied authority. The Medical Centre's services could only be delivered by individual medical professionals working at the Centre including Dr Sparks and Dr Ryan.

[42] Mr O'Sullivan, for Dr Ryan, argues that the wording of s 72(3) provides for a two-step test to establish vicarious liability in this case. First, it must be established

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[19] Vicarious liability in relation to the actions or omissions of employees are dealt with under s 72(2) and (5).

that Dr Sparks was the agent of the Medical Centre. Secondly, it must be established that he was acting within the actual or implied authority of the Medical Centre. He says the second limb of the test requires separate consideration from that of the first limb concerning agency.

[43] The Commissioner responds by saying that the statutory imposition of vicarious liability for agents and members of an employing authority under the Act represents a policy choice taken by Parliament to impose vicarious liability in that situation. Parliament has determined that health service providers will be vicariously liable for their employees, agents and members.

[44] Ms Casey for the Commissioner submitted the policy choice was consistent with the intention to broaden liability (and responsibility) for the better protection of the rights and entitlements of health consumers. Ms Casey noted that the purpose of the Act was one of consumer protection: to promote and protect the rights of health consumers.

[45] An equivalent provision to s 72 first appeared in the now repealed Race Relations Act 1971.[20] In its present form s 72 was introduced in s 33 of the now repealed Human Rights Commission Act 1977. This was then carried through to s 68 of the Human Rights Act 1993 and s 126 of the Privacy Act 1993.[21] The provision is consistent with the public interest objectives of that legislation to protect consumer rights.

[46] Ms Casey says common law vicarious liability has some indirect relevance to the interpretation of the section because s 72 is the only section contained under that part of the Act headed "Vicarious Liability". Vicarious liability is a form of strict, no-fault liability at common law which originally imposed liability on masters for the acts of their servants. The doctrine encompasses other relationships including but not limited to employer/employee relationships.

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20 Section 8.

21 Equivalent provisions are also found in various other pieces of legislation.

[47] The House of Lords in *Majrowski v Guy's and St Thomas' NHS Trust*[22] noted that in times past the concept of "control" had been an important factor in establishing vicarious liability but it was no longer central to finding vicarious liability in even the employee/employer relationship.[23]

Analysis

[48] Section 33 of the 1993 Act was considered by the Court of Appeal in *Proceedings Commissioner v Hatem.*[24] The Court there found that a partner accused of sexual harassment of staff was acting within the ordinary course of business of the partnership and was deemed to have the implied authority of the other partners of the firm under the section equivalent to s 72(3) of the present Act.

[49] Central to the inquiry in that case was whether the partner was acting within the general scope of authority of the firm given the particular act was wrongful. The Court had no hesitation in concluding that the vicarious liability cases were sufficiently analogous to be helpful.[25] It concluded that although the sexual harassment itself could not be regarded as part of the ordinary course of a firm's business, when the partner/perpetrator acted as he did, he was acting while in the ordinary course of the firm's business. If the partner dealt with staff badly he was nevertheless doing something within the ordinary course of the business of the firm. The Court concluded that the partner, in carrying out the wrongful behaviour, was acting within the general scope of the authority of the firm's business.[26]

[50] The Court concluded that the true question was whether the wrongful act was done by a partner when "acting" in the ordinary course of that business.[27] Tipping J noted in that decision that the question would be one of fact and usually involved matters of degree. Relevant factors included the nature of the wrongful act, its temporal connection with the firm's business and whether that business provided some opportunity for the wrong to occur. He also considered that issues of policy were

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22 *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 at [7]–[9] per Lord Nicholls;
23 *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 at [21].
24 *Proceedings Commissioner v Hatem* [1999] 1 NZLR 305 (CA) ("*Hatem"*).
25 At 312–313.
26 *Hatem,* above n 26, at 313.
27 At 311.

relevant. For instance, in that case the purpose of preventing sexual harassment would be better achieved by holding the firm responsible rather than just the individual partner.[28]

[51] Dr Ryan sought to distinguish *Hatem* on the basis that the non-offending partner in that case had earlier subjected another woman to conduct in the nature of sexual harassment to the extent that she left the employment and did not return. However, that reasoning had already been rejected in *Hatem* by the High Court and the Court of Appeal did not revisit that finding.[29]

[52] The approach to interpretation adopted by the Court of Appeal in *Hatem* has application in the present case. For the Medical Centre to be vicariously liable it must be established that the wrongful act was done by a doctor when "acting" in the ordinary course of the medical centre's business. In that case fact that the act was wrongful does not take it outside the scope of "ordinary course".

[53] In this case the breaches occurred in the course of a consultation and follow up discussions directly related to the medical services delivered to the patient. This indicates that the breaches were within the scope of the "ordinary course" of business of the Medical Centre as contemplated in *Hatem.*

Analysis

[54] For the purposes of this case whether Dr Sparks was acting as an agent of the Medical Centre at the relevant time is a question of fact. It is to be determined objectively rather than based on the documentation which did or did not exist between Dr Sparks and Dr Ryan regulating their relationship inter se.

[55] Dr Sparks and Dr Ryan were partners in the Medical Centre business.[30] The Medical Centre delivered medical services. In my view Dr Sparks delivered his GP/medical services as an agent of the Medical Centre. It was not necessary that Dr Sparks and the Medical Centre formally recognised or acknowledged their

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28 At 311.
29 At 331.
30 Partnership Act 1908, s 8. Provides that every partner is deemed to be an agent of the firm.

relationship as one of agency. The agency relationship was manifest in Dr Sparks' actions in his delivery of medical services through the Medical Centre and by it in its conduct as a medical services provider.

[56] Even if Dr Sparks had not been a partner in the Medical Centre (which he was), his conduct and that of the Medical Centre based on the way that it operated and the systems it adopted for dealing with patients support a finding of agency. The factors that support that conclusion include:

(a) The partners presented themselves as operating as a combined medical practice through the Medical Centre. This is the impression conveyed by the name, logo, letter head and contact information of the Medical Centre. That material indicated the staff in the centre including employed doctors and the two doctor partners were delivering services through the Medical Centre.

(b) Although a consumer seeking medical services would usually be registered with an individual GP in the Medical Centre they were directed to and seen by any other doctor if their own was not available. This might be the other GP partner or a contract or employed doctor

(c) Individual patients' records were shared. Regardless of who the patient was registered with, the other doctors and the staff including Dr Sparks and Dr Ryan had access to the patient records. If the doctor/partners had been running independent practices their access to the other's patients records would have been a breach of the Health Information Privacy Code 1994. One of the benefits of practicing as a single entity health services agency, rather than independent practice, is the seamless access to patients' notes. In this particular case Dr Sparks had access to a patient's notes held on the Medical Centre's information management system. This was despite the fact the patient was registered with Dr Ryan.

(d) The Medical Centre's reporting and investigation policy and procedures covered all incidents which occurred at the Medical Centre with a view to preventing recurrence. Such incidents included "events that reflect an unsatisfactory situation in terms of the quality of clinical practice …". Examples of such incidents included medication errors and adverse allergic reactions to medications. It stated that the Medical Centre believed that "a systems approach, rather than an individual approach will be taken in investigating incidents". This supports a finding that the Medical Centre was the service provider through which among others Dr Sparks provided medical services.

[57] In addition the systems and procedures of the Medical Centre were designed to apply to all medical service providers working in the Centre. It did not differentiate between types of medical service providers. For instance, the Medical Centre policy and procedure documentation included a policy on the "Code of Health and Disability Consumer Rights" which contained a best practice statement. This recorded that the Code would guide the design and delivery of all services provided. The policy provided assurances by the Medical Centre that all patients would be provided with appropriate and sufficient information to enable them to make an informed decision about their care and that the members of the practice team would receive appropriate training to help them educate and support patients in making choices relating to their health care. Furthermore the practice would ensure that patients were kept informed about their treatment.

[58] Systems changes applied to all relevant service providers at the Medical Centre. For instance the change made by the Medical Centre following the incident in this case required that all pharmacist alerts about a patient's adverse reaction be dealt with by the prescribing GP dealing directly to the pharmacist rather than as occurred here through a nurse relaying the pharmacist's alert to Dr Sparks and a nurse relaying the doctor's response to the pharmacist.

[59] Dr Sparks and Dr Ryan may have had other supervision arrangements from a professional point of view as well as a business arrangement between them so each took their own fees from their respective patients, however, they provided their

medical services as agents of the medical centre.[31] The focus of inquiry is on how they delivered their GP services in fact and not their personal professional or business arrangements nor how they viewed the relationship between themselves.

[60] As will be apparent I am of the view that the Commissioner made no error of law in finding that the facts supported a finding of vicarious liability on the part of the Medical Centre for Dr Sparks' actions or omissions in breach of the Code. The breaches were not wrongful acts outside the scope of the ordinary course of business of the Medical Centre. The situation is similar to that in *Hatem* where the Court of Appeal concluded that wrongful acts committed in the ordinary course of business did not necessarily take the agent's action outside the scope of the ordinary course of business. The wrongful acts in *Hatem* were actions of sexual harassment which were if anything less connected to the scope of services or business than is the case here.

[61] The business of the Medical Centre was to deliver medical services including GP services. It then follows that Dr Sparks in delivering services in the course of the business of the Medical Centre was authorised and did so as an agent of the employing authority. Dr Sparks was acting as an agent in the ordinary course of delivering the Medical Centre's medical services by consulting and prescribing for a patient. In the course of this he made errors which put him in breach of various provisions of the Code. The errors were made in the course of the delivery of the services. The breaches of the Code were well within the scope of the "ordinary course" of the Medical Centre's business.

[62] The finding of vicarious liability is supported by the purpose of the legislation insofar as it relates to the protection rights of health and disability services consumers.[32] A connected systems approach rather than individual responsibility is also indicated generally by the New Zealand Health Strategy Future Direction which must be considered by every person exercising a function under the Act.[33] This includes the Commissioner.

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31 The Medical Centre was a partnership in terms of the Partnership Act 1908. No written partnership agreement was necessary.

32 Section 6 of the Act.

33 Section 7 of the Act set out in 2016, New Zealand Health Strategy Future Direction. Wellington. Ministry of Health, p 14. A narrow interpretation of agency is contrary to those considerations.

[63] In the final report of 26 June 2018 the Commissioner said:

> 73. As a health care provider, Moore Street Medical Centre is responsible for providing services in accordance with the Code and, accordingly, it may be held directly liable for the services it provides. Dr Maplesden advised that me Moore Street Medical Centre had policies consistent with expected standards. Accordingly, I do not find that Moore Street Medical Centre breached the Code directly.
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> 74. In addition to any direct liability for a breach of the Code, under section 72(3) of the Health and Disability Commissioner Act 1994, an employing authority is vicariously liable for any acts or omissions of its agents unless the acts or omissions were done without that employing authority's express or implied authority.
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> 75. Moore Street Medical Centre is operated by Dr Christopher Ryan and Dr Peter Sparks. While not an employee, I consider Dr Sparks was authorised to act as a GP on behalf of Moore Street Medical Centre when he was providing care to [the patient] and was therefore an agent of Moore Street Medical Centre. I also consider that Dr Sparks, in consulting with [the patient] and prescribing [them an antibiotic], was acting within the authority granted by the medical centre. As such I find Dr Christopher Ryan and Dr Peter Sparks (trading as Moore Street Medical Centre) vicariously liable for Dr Sparks' breaches of Rights 4(1), 6(1)(b) and 7(1) of the Code.

Ground one: error of law

[64] I am satisfied that on the facts available to the Commissioner in this case the conclusion that Dr Sparks was an agent of the employing authority (the Medical Centre) and acted within the Medical Centre's express or implied authority was an available conclusion. That conclusion meant that the requirements of s 72(3) as to vicarious liability of the Medical Centre were established.

[65] I am supported in this conclusion by the provisions of s 72(4). This refers to a "member" of an employing authority being vicarious liable for the actions or omissions of a member. Counsel were unable to shed light on whether there was a special meaning for "member" in that context. I am of the view that it should be interpreted in the common-sense way as meaning someone belonging in some sense to the Medical Centre and delivering medical services. There is no doubt that Dr Sparks could equally have been found to be a member as an agent of the Medical Centre on the facts. Therefore, the Centre could also have been vicariously liable under s 72(4).

[66] I do not need to further consider whether in other cases it would be necessary to undertake the two stage inquiry suggested by Dr Ryan. There may be cases where an agency is established but where the employing authority had given no express or implied authority in relation to a particular act or omission involved. That is not the case here. It has been established that Dr Sparks was acting as an agent within the general scope of services delivered by the Medical Centre and there is nothing to suggest otherwise. He was therefore acting within the express or implied authority of the Medical Centre.

[67] The reasons set out in the Commissioner's report may be brief, but they did not need to be elaborate. The report clearly sets out the supporting facts and reasons for the decision. It notes Dr Sparks was the GP who saw the patient at the Medical Centre, that he reviewed the patient's health notes which included Dr Ryan's treatment notes and liaised with the Medical Centre's practice nurse. He undertook the consultation with the patient performing a GP/medical service delivered through the Medical Centre. Dr Sparks made errors in the course of the consultation resulting in breaches of the Code. The report concluded that Dr Sparks was therefore an agent and the Medical Centre was the employing authority in terms of s 72(3) of the Act. The reasons as recorded above at [62] are all that is necessary in the circumstances.

[68] I am of view that the Commissioner made no error of law in finding that the Medical Centre, an employing authority under the Act was vicariously liable under s 72(3) of the Act for the acts or omission of its agent, Dr Sparks in breaching the Code.

Ground two: reasonableness

[69] I do not consider that the Commissioner's decision was unreasonable. Unreasonableness is a high standard to meet. It has not been met in this case as is obvious from my comments above.

Conclusion

[70] The application for judicial review is dismissed.

The intervenor's position

[71] Mr McClelland QC filed evidence from Dr Braddock on behalf of the New Zealand Medical Association as an intervenor. This evidence was directed at the general issue of whether GP practices (whatever form their legal structure took) should be vicariously liable for the breaches of the Code by their GP owners. Dr Braddock emphasised that GPs are independent decision makers in their own clinical practices regardless of the structure through which they deliver services. She noted that GPs are individually accountable to their professional bodies and subject to individual disciplinary processes.

[72] I also note this is not a case about discipline but about a breach of a code promulgated for the purpose of consumer protection. It is about vicarious responsibility for breaches of the Code by a Medical Centre which is the employing authority through which Dr Sparks delivered his GP services. It is consistent with the policy of the Act that the Medical Centre be vicariously liable. The purpose of protecting health consumers is better achieved by holding the Medical Centre vicariously liable in appropriate circumstances rather than just the individual GP.

[73] As I have indicated above my conclusions are based on the facts of this particular case.

Costs

[74] There appears to be no reason why costs should not be awarded in the usual manner based on a 2B categorisation in favour of the respondent. However, if counsel are unable to agree on the issue of costs any application together with supporting submissions should be made by memorandum filed within seven days of the date of this decision. A response to that memorandum should be made within a further five days and any reply should be filed within a further three days.

Name suppression

[75] Applications have been made for permanent name suppression in relation to the practitioners and the Medical Centre. Interim orders were in place pending the

determination of the application for permanent orders. I have delivered a separate judgment on that application.

[76] There remains in place a permanent order suppressing the name and any identifying particulars of the patient involved.

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Grice J

Solicitors:
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Office of the Health and Disability Commissioner, Wellington for Respondent