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

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 98/2021
[2023] NZSC 42

BETWEEN	CHRISTOPHER RYAN Appellant
AND	HEALTH AND DISABILITY COMMISSIONER Respondent

Hearing:	24 March 2022
Further Submissions:	26 August 2022
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	A H Waalkens KC and K M Wills for Appellant V E Casey KC and J M Manning for Respondent M F McClelland KC and A F McClelland for New Zealand Medical Association as Intervener
Judgment:	28 April 2023

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved.

REASONS

WINKELMANN CJ, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by O'Regan J)

Table of Contents

Introduction

[1] Section 72 of the Health and Disability Commissioner Act 1994 (HDC Act) provides that, in certain circumstances, a health care provider may be liable for acts or omissions of an employee, agent or member of the health care provider.[1] The present appeal raises for consideration whether that provision applies to impose liability on a medical centre where two doctors conduct general practices from the medical centre and one of those doctors is found by the Health and Disability Commissioner (the

[1] It also applies in respect of a disability services provider: Health and Disability Commissioner Act 1994 [HDC Act], s 72(1).

Commissioner) to have breached the Code of Health and Disability Services Consumers' Rights (the Code).[2]

[2] The Commissioner,[3] the High Court[4] and the Court of Appeal found that the health care provider in this case, the Moore Street Medical Centre (the Medical Centre), was liable under s 72 of the HDC Act.[5] However, their reasoning to that conclusion was not the same. The Commissioner and the High Court considered that Dr Sparks was acting as an agent of the Medical Centre, while the Court of Appeal preferred the view that he was acting as a member of the Medical Centre.

[3] The appellant, Dr Ryan, appeals to this Court with leave against the Court of Appeal decision.[6] While the Commissioner agrees with the Court of Appeal that Dr Ryan was a member of the Medical Centre, he has filed a notice to support the Court of Appeal judgment on the basis that Dr Sparks was an agent. The New Zealand Medical Association (NZMA) was given leave to intervene (as it had in both the High Court and Court of Appeal) and we received both written and oral submissions from its counsel, Mr McClelland KC.

Background

[4] The doctor against whom the finding of breach was made, Dr Sparks, practised at the Medical Centre. Dr Ryan also practised at the Medical Centre. Dr Ryan had practised there since 1989, at which time Dr Sparks was already operating his practice there.

---

2 The Code of Health and Disability Services Consumers' Rights (the Code) is set out in the schedule to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.

3 *A Report by the Deputy Health and Disability Commissioner* (Health and Disability Commissioner, Case 16HDC01889, 26 June 2018) [Commissioner's Report]. The Deputy Commissioner was acting under delegation from the Commissioner and, for simplicity, we use the term "the Commissioner" to refer to both the Commissioner and the Deputy Commissioner.

4 *Ryan v The Health and Disability Commissioner* [2020] NZHC 373 (Grice J) [HC judgment].

5 *Ryan v The Health and Disability Commissioner* [2021] NZCA 347 (French, Miller and Clifford JJ) [CA judgment].

6 *Ryan v Health and Disability Commissioner* [2021] NZSC 143 (Glazebrook, O'Regan and Ellen France JJ). The approved question was whether the Court of Appeal was correct to uphold the finding of liability under s 72 of the HDC Act.

The complaint

[5] The complaint against Dr Sparks was made in 2016. The complainant was actually a patient of Dr Ryan but, as Dr Ryan was on leave, she was seen by Dr Sparks. Dr Sparks prescribed her medication from a class of antibiotics to which she had a documented allergy, mistakenly thinking that the particular antibiotic would be safe. When the complainant took the prescription to a pharmacy, the pharmacist telephoned a nurse at the Medical Centre to raise concerns. Despite this, Dr Sparks continued to advise the use of the prescribed medication, without discussing the risks with the complainant or providing advice as to a safety net in the event of an allergic reaction. The complainant took the medication, suffered an allergic reaction, and was admitted to hospital. For brevity, we will refer to this event as the "prescription error".

[6] The complainant made a complaint to the Commissioner against Dr Sparks. She did not make a complaint against Dr Ryan or the Medical Centre.

Commissioner's Report

[7] The Commissioner's Report found that Dr Sparks had breached three rights under the Code.[7] There is no dispute about the Commissioner's upholding of the complaint against Dr Sparks and Dr Sparks is not a party to the present litigation.

[8] Although the complaint was against Dr Sparks only, the Commissioner also considered the potential liability of the Medical Centre (that is, Dr Ryan and Dr Sparks, trading as the Medical Centre). The Commissioner found that the Medical Centre did not directly breach the Code, because it had policies that were consistent with the expected standards.[8] However, he made a finding that the

---

7 Right 4(1) (failing to provide services with reasonable care and skill), Right 6(1)(b) (failing to give the patient information it was reasonable for her to expect to receive, including an explanation of options available) and Right 7(1) (breach of the patient's right to make an informed choice and to give informed consent): Commissioner's Report, above n 3, at [67] and [72].

8 At [73]. Counsel for the Commissioner, Ms Casey KC, said counsel for the appellant, Mr Waalkens KC, was wrong to say the Commissioner found the Moore Street Medical Centre's (Medical Centre) policies and procedures were consistent with expected standards, because the Commissioner referred only to policies. Be that as it may, the Commissioner made an unequivocal finding that the Medical Centre had not itself breached the Code. Both Ms Casey (in her submissions) and the Commissioner (in an affidavit filed in the High Court) pointed to indicators of fault on the part of the Medical Centre. We do not think those allegations are reconcilable with the Commissioner's "no breach" finding and they are, in any event, irrelevant to the issue as to

Medical Centre was liable for Dr Sparks' breaches under s 72 of the HDC Act.

[9] The Commissioner's finding in relation to the Medical Centre was expressed in the Commissioner's Report as follows:

> 73. As a healthcare provider, [the] 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. [The medical expert who advised the Commissioner] advised me that [the] Medical Centre had policies consistent with expected standards. Accordingly, I do not find that [the] Medical Centre breached the Code directly.
>
> 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.
>
> 75. [The] Medical Centre is operated by Dr Christopher Ryan and Dr Peter Sparks. While not an employee, I consider that Dr Sparks was authorised to act as a GP on behalf of [the] Medical Centre when he was providing care to [the complainant], and was therefore an agent of [the] Medical Centre. I also consider that Dr Sparks, in consulting with [the complainant] and prescribing her ciprofloxacin, was acting within the authority granted by the medical centre. As such, I find Dr Christopher Ryan and Dr Peter Sparks (trading as [the] Medical Centre) vicariously liable for Dr [Sparks'] breaches of Rights 4(1), 6(1)(b), and 7(1) of the Code.

[10] The Commissioner recommended that Dr Sparks provide a written apology to the complainant for his breaches of the Code and undertake further education and training on informed consent.[9] He did not, however, make any recommendations regarding the Medical Centre or Dr Ryan.

Mode of practice

[11] Each of Dr Ryan and Dr Sparks operate a medical practice from premises in Ashburton. The premises are owned by Ashburton Medical Centre Ltd, of which Dr Ryan and Dr Sparks are the only directors. Each effectively owns 50 per cent of the shares. The Medical Centre pays rent to Ashburton Medical Centre Ltd.

---

whether the Medical Centre is liable under s 72 on the basis that the acts and omissions of Dr Sparks are attributed to it.

9 At [76].

[12] The Medical Centre does not have a corporate form. There is no partnership agreement or other written agreement dealing with the relationship between Dr Ryan and Dr Sparks in respect of the Medical Centre. Both Dr Ryan and Dr Sparks pay an agreed sum into a bank account in the name of the Medical Centre every week to meet expenses. The amount is calculated to meet the Medical Centre's commitments, according to an annual budget prepared prior to the commencement of each financial year. The Medical Centre employs a practice manager, a doctor, several nurses and administrative staff. From time to time, it also engages locum doctors, either as employees or contractors. It owns the plant, equipment and practice management systems used at the premises. All patient files are kept in a centralised system, with patient information being accessible by Dr Ryan, Dr Sparks and others.

[13] Dr Ryan and Dr Sparks maintain separate patient registers and separate bank accounts. Patients are registered with either Dr Ryan or Dr Sparks, not with the Medical Centre. When a patient consults the doctor with whom they are registered, the fee is paid into the account of that doctor. If their usual doctor is unavailable, the patient may see the other doctor, but if that occurs the patient's consultation fee is paid into the usual doctor's account and the other doctor invoices the usual doctor for the fee. If a patient sees a nurse or a locum doctor employed by the Medical Centre, the fee for the visit is paid into the account of the Medical Centre.

[14] Dr Ryan and Dr Sparks have different IRD numbers and GST numbers. They file their own tax returns through different accountants. They regard themselves as operating separately from each other, with each managing his individual practice out of the Medical Centre premises.

[15] The Medical Centre has developed various protocols and policies, including a statement on the Code, a complaints policy, a policy on incident reporting, a significant event management policy and a policy for dealing with patient requests for prescriptions. All those working at the Medical Centre, including Dr Ryan and Dr Sparks, are expected to act in accordance with those policies. In the event of a breach by an employee of the Medical Centre, there may be disciplinary action. However that does not apply in the case of Dr Ryan or Dr Sparks. Complaints against those employed by the Medical Centre will be dealt with by Dr Ryan, Dr Sparks, and

the practice manager. Complaints against either of Dr Ryan or Dr Sparks are dealt with solely by the practice manager, who may then discuss the complaint with the doctor involved.

[16] In the present case, the Medical Centre conducted an internal review after the prescription error occurred and implemented changes aimed at reducing the risk of a similar error being made in the future. Among those changes was an increase in appointment times for the doctors from 10 minutes to 15 minutes. In addition, the Medical Centre's computer system was updated to generate a more detailed alert about the allergy of the complainant and Dr Sparks said he would now speak directly with the pharmacist, rather than through a nurse. These changes occurred before the Commissioner's Report was issued.

[17] Dr Ryan said in his evidence that he and Dr Sparks operate individual practices, which means that neither can directly or indirectly discipline or control the day-to-day practice of the other. While he and Dr Sparks may discuss interesting cases or seek an opinion from each other, Dr Ryan said this is no different from contacting a peer who works in another medical centre for a second opinion. Dr Ryan and Dr Sparks do not sit in on each other's consultations or review each other's files.

Judicial review application

[18] The Commissioner made no finding against Dr Ryan personally. Nevertheless, Dr Ryan said that the prospect of being held responsible for the actions of another, where he was not involved in the consultation, had no influence over what occurred and no ability to influence any occurrence in the future, did "not sit well with [him] to say the least". He said if the finding of liability against the Medical Centre is upheld, this will damage his professional reputation and his practice. He therefore commenced judicial review proceedings, arguing that the Commissioner had misapplied s 72 and that the decision to find the Medical Centre liable was not made fairly, reasonably or in accordance with law.[10]

---

[10] Ms Casey pointed out that, as there was no finding by the Commissioner against Dr Ryan personally, he was not the correct plaintiff. Rather, Dr Ryan and Dr Sparks trading as the Medical Centre ought to have been the plaintiff. However, she did not make any formal objection.

Statutory provisions

HDC Act

[19] The purpose of the HDC Act is set out in s 6 as follows:

> … 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.

[20] Section 7(a) of the HDC Act requires those exercising powers or functions under the Act to take into account the New Zealand health strategy,[11] which, among other things, endorses the need to promote a culture of quality and safety improvement across health services to minimise harm and achieve best possible health outcomes.[12]

[21] The HDC Act establishes the office of the Commissioner, whose functions include promotion of consumer rights and investigation of complaints.[13] If the Commissioner finds that the Code has been breached, they may make recommendations, 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 appointed under s 15 of the HDC Act.[14] The Director of Proceedings may then determine whether to bring civil proceedings under the Act in the Human Rights Review Tribunal or disciplinary proceedings under the Health Practitioners Competence Assurance Act 2003.[15]

[22] We accept Ms Casey's submission that the HDC Act is protective, rights-based legislation aimed at promoting and protecting the rights of health consumers and increasing the safety of health and disability services.

[23] As noted earlier, the Commissioner made recommendations in this case in relation to Dr Sparks but did not make any recommendation or take any action in

---

11 Section 7 has since been amended to require those exercising powers or functions under the HDC Act to take into account the Government Policy Statement on Health, and any health strategy issued under the Pae Ora (Healthy Futures) Act 2022, so far as those strategies are applicable to the circumstances of the particular case.

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

13 HDC Act, ss 8 and 14(c), (da) and (e).

14 Sections 45(2)(a), (b), (d) and (f).

15 Sections 49(1) and 50.

relation to Dr Ryan or the Medical Centre. The Commissioner did not refer Dr Sparks or the Medical Centre to the Director of Proceedings.

Section 72

[24] Section 72 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.
>
> (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.

[25] The following features should be noted:

(a) Although the heading above the section says "Vicarious liability", those words are not mentioned in the section itself. Rather, the section says the act or omission of the employee, agent or member is treated as done

by the employing authority as well as the first-mentioned person. We address this in more detail below.[16]

(b) The section heading refers to liability of employers and principals, but not to entities that are liable for the acts or omissions of their members.[17]

(c) "[H]ealth care provider" is defined in s 3 of the HDC Act to include "any … person who provides, or holds himself or herself or itself out as providing, health services to the public or to any section of the public, whether or not any charge is made for those services".[18] The High Court Judge recorded that Dr Ryan conceded that the Medical Centre was a health care provider for the purposes of s 72(1).[19] So there is no dispute that the Medical Centre is an employing authority for the purposes of s 72.

(d) Section 72(2) imposes liability on an employing authority for acts or omissions of employees, whether or not it was done or omitted with the employing authority's knowledge or approval. But this is balanced by s 72(5), which provides a defence for the employing authority if it proves that it took reasonably practicable steps to prevent the employee from doing or omitting to do the act or omission in question (we will call this the "reasonable steps defence"). Section 72(5) applies only to employees, so does not modify the liability of an employing authority where the act or omission is by an agent or a member of an employing authority.[20] That means it is inapplicable in this case.

(e) Both s 72(3) and (4) contain a proviso in relation to the acts of agents and members, which are not attributed to an employing authority if "done or omitted without that employing authority's express or implied

---

16 Below at [44]–[47].
17 Compare the Privacy Act 2020, s 211.
18 HDC Act, s 3(k).
19 HC judgment, above n 4, at [34].
20 CA judgment, above n 5, at [54]. The appellant did not challenge that finding in this Court.

authority, precedent or subsequent" (we will call this the "without authority proviso").

(f) The terms "employee", "agent" and "member" are not defined in s 72 or elsewhere in the HDC Act.

Similar statutory provisions

[26] There are a number of similar legislative provisions in both New Zealand and overseas legislation. A provision similar to s 72 first appeared in New Zealand legislation in s 8 of the Race Relations Act 1971,[21] and there have been many examples since that time.[22]

[27] Section 33 of the Human Rights Commission Act 1977 is the first example of a provision containing both the without authority proviso and a reasonable steps defence. However, s 33 dealt only with employees and agents, not members. The reasonable steps defence applied only to employees.

[28] There is some indication in the legislative history of s 33 of the Human Rights Commission Act that, when it was decided to include a reasonable steps defence in relation to employees, this was considered as more difficult to establish than it was to come within the without authority proviso. In s 8 of the Race Relations Act and the initial draft of what became s 33 of the Human Rights Commission Act, the without authority proviso applied to both employees and agents. The Select Committee was told by the Department of Justice that some organisations described the without

---

21 While there were provisions in earlier legislation imposing liability on employers, principals or similar for the actions of employees or agents, s 8 of the Race Relations Act 1971 was the first example of such a provision to include the without authority proviso. For earlier legislation see, for example, the Indecent Publications Act 1910, s 7; Radiation Protection Regulations 1951, reg 35; Indecent Publications Act 1963, s 23; Radiation Protection Act 1965, s 27; and Animal Remedies Act 1967, s 59.

22 Human Rights Commission Act 1977, s 33; Human Rights Act 1993, s 68; Films, Videos, and Publications Classification Act 1993, s 138; Privacy Act 1993, s 126; Financial Transactions Reporting Act 1996, s 53; Hazardous Substances and New Organisms Act 1996, s 115; Agricultural Compounds and Veterinary Medicines Act 1997, s 58; Animal Welfare Act 1999, s 164; and Privacy Act 2020, s 211. All these provisions include a without authority proviso, and none refers to "vicarious liability". Some of the Acts preceding those listed include "vicarious liability" in their provision titles: see, for example, the Indecent Publications Act 1963, s 23; Animal Remedies Act, s 59; and Video Recordings Act 1987, s 55. However, there is no explanation in the legislative history as to why there was no such reference included in subsequent Acts.

authority proviso as "too big a loophole".[23] The Department also noted that imposing liability for the acts of employees even if not authorised, but with a reasonable steps defence, was stricter (i.e. more likely to hold employers liable) than the without authority proviso.[24] This may explain why Parliament introduced a reasonable steps defence in s 72(5) for employing authorities in relation to the acts of employees but not in relation to the acts of agents or members.[25] The availability of this defence in relation to acts of employees but not agents (or members) has also been said to be an anomaly.[26]

[29] There are similar provisions in legislation and regulations in the United Kingdom[27] and legislation in both Commonwealth and State jurisdictions in Australia.[28] In some cases, the wording of these provisions differs slightly from s 72. In almost all cases, these provisions address the situation of employees and agents, but not members.

---

23 *Human Rights Commission Bill: Report of the Department of Justice – Part B* (23 May 1977) at 8.

24 At 8. This would support the argument made by the appellant, which we address later, to the effect that the without authority proviso means that a principal is not liable for the actions of an agent unless the principal authorised the unlawful act undertaken by the agent. The same argument would apply to a member.

25 The same is true in relation to the provisions noted above at n 22.

26 The England and Wales Court of Appeal noted the same feature in s 109 of the Equality Act 2010 (UK). The Court observed that it found it "rather surprising" that the reasonable steps defence in s 109(4) of that Act was available to employers but not to principals: *Unite the Union v Nailard* [2018] EWCA Civ 1203, [2019] ICR 28 at [16] and [111]. Permission to appeal was refused in *Unite the Union v Nailard* [2019] ICR 512 (SC). It is notable that equivalent provisions in some Australian statutes provide for a reasonable steps defence and a version of a without authority proviso for both employers and principals: see, for example, s 53 of the Anti-Discrimination Act 1977 (NSW). In the present case, if the prescription error had been made by an employee of the Medical Centre, it seems likely from the findings of fact made by the Commissioner that the reasonable steps defence would have been available to the Medical Centre.

27 United Kingdom Acts include the Disability Discrimination Act 1995, s 58; the Equality Act 2010, s 109; the Sex Discrimination Act 1975, s 41 (repealed); and the Race Relations Act 1976, s 32 (repealed). United Kingdom Regulations include the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, reg 11; the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, reg 12; the Employment Equality (Religion or Belief) Regulations 2003, reg 22; the Employment Equality (Sexual Orientation) Regulations 2003, reg 22; the Employment Equality (Age) Regulations 2006, reg 25; and the Equality Act (Sexual Orientation) Regulations 2007, reg 30.

28 The Australian Acts include the Race Discrimination Act 1975 (Cth), ss 18A and 18E; Sex Discrimination Act 1984 (Cth), s 106; Anti-Discrimination Act 1977 (NSW), s 53; Equal Opportunity Act 1984 (SA), s 91; Equal Opportunity Act 1984 (WA), s 161; Discrimination Act 1991 (ACT), s 121A; Anti-Discrimination Act 1991 (Qld), s 133; Anti-Discrimination Act 1992 (NT), s 105; Anti-Discrimination Act 1998 (Tas), s 104; and Equal Opportunity Act 2010 (Vic), ss 109 and 110.

[30] We will revert to the interpretation of s 72 after summarising the decisions of the High Court and Court of Appeal.

High Court

[31] The High Court Judge considered that the Commissioner's conclusion that Dr Sparks was an agent of the Medical Centre and acted within its express or implied authority was "an available conclusion".[29]

[32] The Judge began her analysis by stating that Dr Sparks and Dr Ryan were partners in the Medical Centre business and, under s 8 of the Partnership Act 1908, a partner is deemed to be an agent of the firm.[30] She drew support for the finding that Dr Sparks was acting as an agent of the Medical Centre partnership from the analysis of s 33 of the (now repealed) Human Rights Commission Act 1977 and a decision applying that section, *Proceedings Commissioner v Hatem*.[31] We will discuss this decision in greater detail later.

[33] Having concluded that Dr Sparks and Dr Ryan were partners in the Medical Centre business the High Court Judge continued:[32]

> 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 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.

[34] The High Court Judge added that, even if Dr Sparks had not been a partner in the Medical Centre, she still considered he was an agent for the Medical Centre given the two doctors presented themselves as operating a combined practice; patients of one doctor would see the other doctor or an employed doctor if their own doctor was unavailable; individual patient records were shared; the Medical Centre's reporting

---

29 HC judgment, above n 4, at [64].

30 At [55]. The Partnership Act 1908 applied at the relevant time. It has now been replaced by the Partnership Law Act 2019. All references to the Partnership Act in this judgment are to the Partnership Act 1908, although the relevant provisions in the Partnership Law Act 2019 do not contain any significant differences.

31 *Proceedings Commissioner v Hatem* [1999] 1 NZLR 305 (CA).

32 HC judgment, above n 4, at [55].

and investigation policy and procedures covered all incidents which occurred at the Medical Centre, including those involving Dr Ryan and Dr Sparks; and the Medical Centre's systems and procedures were designed to apply to all medical service providers working there.[33]

[35] The Judge indicated that she considered the breaches by Dr Sparks were not wrongful acts outside the scope of the ordinary course of business of the Medical Centre. Rather, in consulting and prescribing medication, Dr Sparks was acting as an agent in the ordinary course of delivering the Medical Centre's medical services. She saw this as similar to the situation in *Hatem*.[34] She concluded that the Commissioner had made no error of law in his finding against the Medical Centre, and that the finding was not unreasonable.[35] She added that she considered Dr Sparks could equally have been found to be a member of the Medical Centre on the facts, which would have meant the Medical Centre was liable for Dr Sparks' action under s 72(4).[36]

[36] The Judge noted that there may be cases where an agency is established but the particular act or omission has not been expressly or impliedly authorised by the employing agency. However, as this was not the case on the facts before her, she declined to consider it further.[37]

Court of Appeal

[37] The Court of Appeal considered that the agency route to liability (that is, liability under s 72(3)) was problematic: it considered that the member category (s 72(4)) was "a much better fit".[38]

[38] In relation to agency, the Court of Appeal considered that the Medical Centre was "undoubtedly a partnership".[39] But it considered that there was a strong argument

---

33 At [56]–[58].
34 At [60]–[61].
35 At [64]–[69].
36 At [65].
37 At [66].
38 CA judgment, above n 5, at [72].
39 At [76].

that, when consulting with their respective patients, Dr Sparks and Dr Ryan were not each other's partner, but rather separate business entities.[40]

[39] The Court did not, however, express a concluded view on whether there was liability under s 72(3), because it considered it was clear there was liability under s 72(4).[41] It considered that "member" was wider than "agent" and that it was clear that Dr Sparks could fairly be described as a member of the Medical Centre.[42] It considered that there was nothing to preclude the analysis that Dr Sparks was acting both in business on his own account and also as a member of the Medical Centre when consulting with patients; the two were not mutually exclusive.[43]

[40] The Court of Appeal also rejected an argument advanced on behalf of Dr Ryan in relation to the without authority proviso. Dr Ryan argued that for a wrongful act to be within the "express or implied authority" of the employing authority it was necessary for the employing authority to authorise the wrongful act itself (the breach of the Code). The Court said such an interpretation would be to render s 72(4) pointless. If the Medical Centre had itself authorised the breach, it would have been directly liable and there would have been no need for vicarious liability.[44]

[41] The Court of Appeal also considered that concerns raised about the lack of control exercised by one doctor over another were overstated. The fact that the Medical Centre altered its practices and procedures after the prescription error occurred demonstrated that the combined culture and practices of the Medical Centre bear very much on the safety of the patients treated by both Dr Ryan and Dr Sparks.[45]

[42] It considered the finding that the Medical Centre was liable was within the scope of s 72 and not unreasonable.[46]

---

40 At [80].
41 At [83].
42 At [84]. See also at [70].
43 At [85].
44 At [86].
45 At [89].
46 At [91].

Issues

[43] The issues for resolution are:

(a) Does s 72 impose vicarious liability as in the law of torts?

(b) Is the Medical Centre a partnership? If not, what is its legal form?

(c) Was Dr Sparks acting as an agent of the Medical Centre when the breach of the Code occurred?

(d) Was Dr Sparks acting as a member of the Medical Centre when the breach of the Code occurred?

(e) Was it necessary for the Medical Centre to authorise the breach of the Code by Dr Sparks or was it sufficient that Dr Sparks was acting within his authority as an agent or member of the Medical Centre?

Vicarious liability

[44] As noted earlier, there is a heading "Vicarious liability" above s 72 in the HDC Act,[47] but there is no reference to vicarious liability in the section itself.[48] The section heading is "Liability of employer and principal" and the operative words in subss (2), (3) and (4) are "anything done or omitted by [the employee, the agent or the member] shall … be treated as done or omitted by [the] employing authority as well as by the [employee, agent or member]". On its face, this wording attributes to the employing authority the acts or omissions of the employee, agent or member, thus making the employing authority liable alongside the employee, agent or member. Conceptually, that is different from vicarious liability as understood in the law of torts, where acts of employees are not attributed to the employer but rather the employer is held liable for the wrongs of the employee.[49] Or, to put it another way, the liability

---

47 The heading only appeared after the third reading version of the Bill. There is no explanation in the legislative history as to why this was added. As noted above at n 22, similar provisions in other Acts do not have the "vicarious liability" heading.

48 However, a heading can still be relevant to the ascertainment of the meaning of the provision: Legislation Act 2019, s 10(3) and (4).

49 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at 1215–1216.

imposed by s 72 is a bespoke, statutorily defined version of vicarious liability, reflecting the fact that the context is a statutory regime for professional standards and the protection of consumer rights, which differs from the private law context in which the concept of vicarious liability was developed.

[45] In the Australian case, *Christian Youth Camp Ltd v Cobaw Community Health Services Ltd*, the Victorian Court of Appeal addressed ss 102 and 103 of the Equal Opportunity Act 1995 (Vic).[50] Both sections refer to "vicarious liability" in the section headings and s 103 refers to an employer or principal not being "vicariously liable" under s 102 if the employer or principal took reasonable precautions (the equivalent to s 72(5) of the HDC Act). Maxwell P held that s 102 imposed vicarious liability as understood in common law and therefore did not also impose direct liability on an employer or principal.[51] However, the majority on this point, Neave and Redlich JJA, considered that the liability imposed on employers and principals under s 102 was broader than vicarious liability at common law. It included direct liability for a wrongful act of an employee or agent and attributed those acts to the employer or principal.[52]

[46] Two other Australian decisions, *South Pacific Resort Hotels Pty Ltd v Trainor*[53] and *Oak Hotels & Resorts Ltd v Knauer* also support the proposition that sections akin to s 72 should not be construed as providing for vicarious liability as understood at common law.[54]

[47] We consider that s 72 should be read as it is written, attributing to an employing authority the acts or omissions of the relevant employee, agent or member, while still holding the employee, agent or member responsible for their acts or omissions. The reference to "vicarious liability" in the heading above the section should be interpreted in a non-technical sense of liability imposed on one person for the act or omission of another. However, as we will come to later, developments in the law relating to the

---

50 *Christian Youth Camp Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75, (2014) 50 VR 256.

51 At [126]–[128].

52 At [394] and [396] per Neave JA and [457] and [469] per Redlich JA.

53 *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130, (2005) 144 FCR 402 at [42] per Black CJ and Tamberlin J and [64]–[68] per Kiefel J.

54 *Oak Hotels & Resorts Ltd v Knauer* [2018] QCA 359, [2019] 3 Qd R 232 at [17].

scope of vicarious liability of a principal for the acts or omissions of an agent at common law may still provide some assistance in assessing the scope of an employing authority's liability under s 72.[55]

Is the Medical Centre a partnership?

[48] The intervener adduced in the High Court an affidavit sworn by Dr Kathryn Baddock, an experienced general practitioner and the Chair of the NZMA. She gave expert evidence about medical practice in New Zealand. Her evidence in relation to typical general practices in New Zealand was:

> General practices in New Zealand are generally of three types - associateships, partnerships and companies. Traditionally associateships were the most common where a group of doctors co-located in a single building and shared the fixed costs of the building eg electricity, administration, cleaning services etc. Each doctor however worked as a sole trader working for themselves but sharing overheads. The doctors operated their own practices, responsible clinically only to themselves, their patients and the Medical Council.

[49] Dr Ryan adduced in the High Court an affidavit sworn by Dr Alan Mangan, also an experienced general practitioner, in which he said:[56]

> A medical centre such as [the Medical Centre] is, in my experience, a means by which the necessary administrative and other support services can be shared and provided for a GP practice. This allows [GPs] to share the costs of essential overheads such as premises, IT services and staff.

[50] In August 2017, when the Commissioner inquired about the name 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 operate [their] own medical practices from the centre".

[51] If the Medical Centre were only a cost centre, which appears to correspond with the concept of an "associateship" in Dr Baddock's evidence, it would not be a partnership as defined in s 4 of the Partnership Act. That is because s 4(1) defines partnership as "the relation which subsists between persons carrying on a business in common *with a view to profit*" (emphasis added), and a cost centre is not carried on

---

55 See below at [81].

56 He did, however, refer to the parties to an agreement dealing with the structure and governance of the practice as "partners".

with a view to profit. However, the evidence about the Medical Centre does not establish that it was confined to being a cost centre. The High Court Judge found it was a partnership.[57] The Court of Appeal also found that the Medical Centre was "undoubtedly a partnership".[58]

[52] In this Court, the appellant's counsel, Mr Waalkens KC, said in his written submissions that the Court of Appeal had appropriately found there was a relationship of agency and partnership in respect of some of the administrative components in operating the Medical Centre. This indicated that he was not, therefore, disputing that the Medical Centre was a partnership, but rather arguing that the two doctors' practices were outside the ambit of that partnership.

[53] However, at the hearing, Mr Waalkens said there was no evidence on whether the account that Dr Ryan and Dr Sparks contributed to, and which received fees from services delivered by nurses and locums, ever operated at a profit. He described the structure as designed for the meeting of costs, likening it to the operation of barristers within barristers' chambers. But he later accepted that in relation to activities such as locums and nurses undertaking medical services and generating fees, the Medical Centre business was operating as a partnership and confirmed that it accounts for tax in this respect as a partnership.

[54] There is nothing before us to indicate that the findings of the Courts below, that the Medical Centre was a partnership between Dr Ryan and Dr Sparks, were wrong. In those circumstances, we proceed on the basis that it was indeed a partnership. However, there was an issue as to the scope of that partnership, to which we will return later.[59]

Was Dr Sparks acting as an agent of the Medical Centre?

[55] The Commissioner's finding that the Medical Centre was liable under s 72(3) of the HDC Act was based on his conclusion that Dr Sparks was acting as an agent of

---

57 HC judgment, above n 4, at [55] and [59], n 31. The High Court Judge noted at [40] that the net income from the Medical Centre was distributed to Dr Sparks and Dr Ryan as partners.

58 CA judgment, above n 5, at [76].

59 See below at [67]–[70].

the Medical Centre when he made the prescription error. The Commissioner did not articulate how the agency arose.

[56] As mentioned earlier, there is no definition of "agent" in the HDC Act. That gives rise to an issue as to whether the section refers to an agent as defined in the common law of agency or in a non-technical sense as a person who acts on behalf of another person or firm.

[57] There are authorities in favour of both of these approaches. In England and Wales, for example, the Employment Appeal Tribunal found in *Yearwood v Commissioner of Police of the Metropolis* that "agent" as used in s 41(2) of the Sex Discrimination Act 1975 (UK) and s 32(2) of the Race Relations Act 1976 (UK), should be interpreted as having its technical legal meaning (a person acting on behalf of another person as to affect the other person's relations with third parties),[60] rather than its everyday ordinary meaning (a person who acts on behalf of another person with that person's authority).[61]

[58] The England and Wales Court of Appeal also examined s 32(2) of the Race Relations Act (UK) in *Ministry of Defence v Kemeh* and indicated support for a technical legal interpretation of "agent".[62] However, the Court considered that there may not be any significant difference between the technical and ordinary constructions of "agent" as discussed in *Yearwood*. The term "agent" cannot be easily defined and there is not one, settled definition. It is possible for someone to be considered an agent at common law even if they cannot affect the legal relations of the principal and third parties.[63]

[59] There is also Australian authority supporting a technical interpretation of "agent" when the term is included in statutory provisions.[64]

---

60 *Yearwood v Commissioner of Police of the Metropolis* [2004] ICR 1660 (EAT) at [35] citing FMB Reynolds and Michele Graziadei *Bowstead and Reynolds on Agency* (17th ed, Sweet & Maxwell, London, 2001) at [1–001].

61 *Yearwood*, above n 60, at [39].

62 *Ministry of Defence v Kemeh* [2014] EWCA Civ 91, [2014] ICR 625 at [33].

63 At [38]–[39] per Elias LJ citing Reynolds and Graziadei, above n 60, at [1–04]. See also at [70] per Lewison LJ; and *Unite the Union*, above n 26, at [23].

64 See, for example, *A v B1 (No 2)* [2012] WASC 383, (2012) 271 FLR 122 at [286]; and *Lo v Russell* [2016] VSCA 323 at [46].

[60] In New Zealand, the interpretation of "agent" in the slightly different context of s 45(2) of the Fair Trading Act 1986 was in issue in *Commerce Commission v Vero Insurance New Zealand Ltd*.[65] In that case, Asher J determined that the concept of agency in the context of consumer protection legislation was not restricted to the contract law concept of an agent as a person who has authority or capacity to create legal relations between a principal and a third party. Rather, in the context he was addressing, it should be interpreted broadly as a person who acts with the actual or apparent authority of the principal.[66]

[61] We consider that it would make little sense to construe "agent" in s 72 of the HDC Act in its technical sense of a person having authority or capacity to create legal relations between a principal and a third party. We also see the context we are addressing as requiring a non-technical construction: in this legislative context, a person is acting as an agent of an employing authority if he or she carries out, on behalf of the employing authority, the work that satisfies an obligation of the employing authority to provide the relevant service.[67]

[62] Where the employing authority is a partnership and the person said to be its agent is a partner, there is an alternative or additional way in which it can be established that that person is acting as an agent. Section 8 of the Partnership Act provides that a partner is an agent of the partnership and the other partners for the purpose of the business of the partnership. A partner who is an agent under s 8 of the Partnership Act is also an agent under s 72 of the HDC Act.[68] That is so whether "agent" in the HDC Act is interpreted in a technical or non-technical way. Section 8 goes on to provide that the acts of every partner in carrying on the usual business of the firm bind the firm and the other partners, unless the partner has no authority to act

---

65 *Commerce Commission v Vero Insurance New Zealand Ltd* (2006) 11 TCLR 779 (HC).

66 At [56]–[58] and [61].

67 We should not be taken as endorsing any particular definition of "agent" for the purpose of the common law of agency. We note too Ms Casey's argument that the meaning of "agent" has wider significance beyond s 72 of the HDC Act because of the equivalent provisions in human rights legislation which do not contain the broader "member" category as a fallback position: see, for example, the Human Rights Act, s 68. Adopting the narrow definition of "agent" in relation to these provisions would be inappropriate when a more expansive interpretation of "agent" is available on both a textual and purposive interpretation.

68 See *Hatem*, above n 31, at 314.

for the firm in the particular matter and the third party either knows that the partner has no authority or does not know or believe the partner is, in fact, a partner.

[63] In *Hatem*, the Court of Appeal summarised the position as follows: "[i]f the agency arises from partnership, each partner has implied authority from the firm to do everything which is in the ordinary course of the firm's business".[69]

[64] Whether a partner was acting with the implied authority of the partnership when the breach of the Code occurred (the position summarised in *Hatem*) gives rise to essentially the same question as posed under s 72(3) of the HDC Act: was the partner acting as an agent of the employing authority when he or she breached the Code? The answer would be "yes" if the partner was carrying on the business of the partnership when he or she breached the Code, for the reasons given by the Court of Appeal in the decision under appeal, citing *Hatem*.[70]

[65] However, as is apparent from the interpretation of the term "agent" that we have adopted above, we do not think it would be consistent with the consumer protection objective of the HDC Act to restrict the scope of the implied authority of an employing authority that is a partnership to that applying to a partner coming within s 8 of the Partnership Act. We agree with the submission of Ms Casey that it would be inappropriate to determine the level of responsibility of the Medical Centre for acts or omissions of doctors practising within the Medical Centre on the basis of the particular financial arrangements between the doctors. As she pointed out, patients would likely have assumed that health professionals at the Medical Centre would be working together for their care and would not think to inquire whether the level of co-operation they could expect would depend on the financial arrangements between the doctors.

[66] In the present case, we see the outcome of the application of s 8 of the Partnership Act and the application of the non-technical definition of "agent" to the facts of the case as leading to the same outcome. Applying the non-technical definition of "agent" outlined above, Dr Sparks will have been acting as an agent of the

---

69 *Hatem*, above n 31, at 310.
70 CA judgment, above n 5, at [60]–[61].

Medical Centre if, when undertaking the consultation with the complainant that led to the prescription error, he was satisfying an obligation of the Medical Centre to provide medical services to the complainant. Applying the Partnership Act analysis, Dr Sparks will have been acting as an agent of the Medical Centre partnership if, when undertaking that consultation, he was carrying on the usual business of the partnership.

Was Dr Sparks satisfying the obligation of the Medical Centre to provide medical services to the complainant when he made the prescription error?

[67] A combination of factors supports the proposition that the Medical Centre partnership business encompassed the provision of medical services by Dr Ryan and Dr Sparks, as well as by locums, nurses and other employed or contracted health practitioners. The Medical Centre business was presented to the public as a single, integrated medical services provider. Dr Ryan and Dr Sparks operated their practices in tandem with each other's and with the other health practitioners operating out of the Medical Centre premises.[71] The Medical Centre rented premises, employed staff, and purchased or rented equipment for the purpose of the medical services operated from the premises. The medical services provided by Dr Ryan and Dr Sparks were offered to the public under the Medical Centre's name. Letters from Dr Sparks to the complainant used the Medical Centre's name as the header and contained the names of both Dr Sparks and Dr Ryan in the footer. There was a shared booking system and shared patient records. The Medical Centre had practice-wide policies that applied to both doctors, as well as the other health practitioners operating from the Medical Centre premises. The doctors did not have complete autonomous control over their clinical practices, as is evidenced by the centre-wide policy in place at the time of the prescription error that all doctors' consultations at the Medical Centre, including those of Dr Sparks and Dr Ryan, would be for a duration of 10 minutes. Patients were able to see any doctor at the Medical Centre if their registered doctor was not available.

[68] It is true that when Dr Sparks treated a patient who was registered with him, the fee was paid into Dr Sparks' account (and that the same practice applied to Dr Ryan). And if a patient of Dr Ryan was seen by Dr Sparks, the consultation fee was paid into Dr Ryan's account and Dr Sparks invoiced Dr Ryan for the fee (and vice

---

[71] See above at [11]–[17].

versa). But we do not see that as determinative of the position under s 72(3). It can be seen as an agreed method of sharing the revenue and, ultimately, the profit of the Medical Centre business.

[69] In these circumstances, we consider Dr Sparks, when undertaking the consultation with the complainant that led to the prescription error, was satisfying an obligation of the Medical Centre to provide medical services to the complainant. Applying the non-technical definition of "agent", he was therefore acting as an agent of the Medical Centre for the purpose of s 72(3) of the HDC Act when he made the prescription error.

Was Dr Sparks carrying out the usual business of the Medical Centre partnership when he made the prescription error?

[70] For the same reasons, it can also be said that Dr Sparks, as a partner in the Medical Centre partnership, was carrying out the usual business of the partnership when he made the prescription error. On this analysis also, therefore, he was acting as an agent of the Medical Centre partnership for the purposes of s 72(3) when he made the prescription error.

Facts-specific analysis

[71] We emphasise that we reach this conclusion on the facts of the present case. The same conclusion may not be available in other cases in which doctors conduct independent practices from the same premises in circumstances where their practices are conducted separately from each other. A careful consideration of the facts of each case is required.

Was Dr Sparks acting as a member of the Medical Centre?

[72] As we have concluded that Dr Sparks was acting as an agent when he made the prescription error, it is unnecessary for us to determine whether Dr Sparks was acting as a member of the Medical Centre under s 72(4) of the HDC Act. We make only a few general observations regarding the meaning of "member".

[73] The Court of Appeal found that the "member" category was a better fit for the present situation. It traced the legislative history of s 72, noting that there was little indication as to the intended scope of the "member" subsection. The Court considered that "member" is a broad, general term, intended to include wrongdoers who did not fit within the "agent" or "employee" category.[72] It said the "member" category cannot be co-extensive with "employee" and "agent". It must be wider to have any use.[73] The Court said that "member" should be interpreted as "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".[74] The Court considered that, in the absence of agency or employment, "member" was likely to involve "someone who is in some other way closely associated with or identified with the employing authority".[75]

[74] We agree that the legislative history is largely unhelpful in explaining the types of people that Parliament intended the "member" term to encompass. Similar provisions to s 72 in New Zealand legislation and in legislation overseas do not provide much guidance either. Most of these provisions refer only to employees and agents. The inclusion of "member" appears to have first occurred in s 126(3) of the Privacy Act 1993, where the reference was to a member of an "agency" as defined. The Privacy Act 1993 was passed a year before the HDC Act. As far as we are aware, there have been no cases applying s 126(3).

[75] Since we have found Dr Sparks was an agent of the Medical Centre, a determination as to whether he was a member of the Medical Centre would have no bearing on the outcome of the appeal. In those circumstances, we leave the definition of "member" for a case in which, on the facts, the wrongdoer is not an agent and the determination of the scope of the concept of member will affect the outcome.[76]

---

72 CA judgment, above n 5, at [67]–[68].
73 At [68].
74 At [70].
75 At [70].
76 It also curious that ss 39(3) and 54(4) of the HDC Act refer to an "officer or employee or member" of a health care provider but not an agent. It is unclear why Parliament chose to exclude "agent" here.

Was Dr Sparks' prescription error done without the Medical Centre's express or implied authority, precedent or subsequent?

[76] As mentioned earlier, s 72 differentiates between employees on the one hand and agents and members on the other. In relation to the liability of employing authorities for the acts of employees, s 72(2) provides that such liability arises whether or not the employee's act or omission was with the employing authority's knowledge or approval. However, s 72(5) contains a defence for the employing authority if it proves that it took reasonable steps to prevent the employee from doing or omitting the act or omission in question.

[77] In contrast to this, the regime in relation to agents and members is that the employing authority is liable for the member's or agent's act or omission, unless the act or omission occurred without the employing authority's express or implied authority, precedent or subsequent.

[78] Much of the analysis of the without authority proviso in the judgment of the Court of Appeal and the argument before us relied on *Hatem*.[77] That case involved an agency relationship arising from a partnership. One of the partners was found to have breached s 15 of the Human Rights Commission Act 1977 by sexually harassing two former employees of the partnership. The issue before the Court was whether the partnership was liable under s 33 of the Human Rights Commission Act.[78]

[79] As mentioned earlier, the Court of Appeal in *Hatem* considered that, where an agency arises from a partnership, each of the partners has implied authority to do everything which is in the ordinary course of the firm's business.[79] Thus, the Court concluded that the crucial question in determining whether liability for a partner's actions arose under s 33 was whether the perpetrator was acting in the ordinary course of the firm's business.[80]

---

77 *Hatem*, above n 31, discussed in CA judgment, above n 5, at [58]–[61].

78 The Court noted that s 33 of the Human Rights Commission Act 1977 was now replaced by the exact equivalent in s 68 of the Human Rights Act 1993: *Hatem*, above n 31, at 307.

79 See above at [63].

80 *Hatem*, above n 31, at 310.

[80] In the present case, the Court of Appeal considered that the approach in *Hatem* to the without authority proviso should be applied to s 72 of the HDC Act. In our view, *Hatem* addresses the meaning of the without authority proviso only in relation to the actions of a partner. This is because it focused on the relationship between s 8 of the Partnership Act (which determines when a partner is an agent of the firm and what actions of the partner will bind the firm) and the without authority proviso in s 33 of the Human Rights Commission Act.

[81] Nevertheless, there are only two available interpretations of the text of the without authority proviso.[81] The first is that an employing authority will be liable when it authorises the particular breach of the Code. The second is that it will be liable for any acts done by the agent or the member in the scope of their express or implied authority. If this broader interpretation were adopted, an agent would be liable if they breached the Code in the course of performing the functions they were authorised to do. It is essentially equivalent to the "ordinary course of the firm's business" test as espoused in *Hatem* but, instead of applying only to partners and firms, it would apply to agents and principals more broadly. It is also consistent with the common law position as set out in this Court's decision in *Nathan v Dollars & Sense Ltd* that a principal is liable for the conduct of an agent if that conduct fell within the scope of the task to be performed by the agent.[82] Conduct will be within scope if there is a sufficiently close connection between the task to be performed by the agent and the unlawful act of the agent.[83]

[82] We conclude that the second interpretation is the correct one. Our reasons for that conclusion, and our responses to arguments of counsel in relation to it, follow.

[83] The argument that in order for an entity to be liable under provisions similar to s 72(3) or (4) it must have authorised the very act that breached the Code has been advanced and rejected elsewhere.

---

81 We set out below at [95]–[100] why we reject a third interpretation advanced by the appellant.
82 *Nathan v Dollars & Sense Ltd* [2008] NZSC 20, [2008] 2 NZLR 557 at [39].
83 At [40].

[84] In *Ministry of Defence v Kemeh*, the England and Wales Court of Appeal was dealing with a question of the liability of the Ministry of Defence for acts of racial discrimination by an alleged agent of the Ministry under s 32 of the Race Relations Act (UK).[84] Under that section, a principal is liable for anything done by a person as an agent for the principal with the authority of the principal. In dealing with an argument similar to that made by Mr Waalkens in this case, Elias LJ said:[85]

> [11] Read literally, subsection (2) might suggest that the principal must authorise the act of discrimination itself before liability arises. But I agree with [an earlier case] that this would virtually render the provision a dead letter. In my judgment, Parliament must have intended that the principal will be liable wherever the agent discriminates in the course of carrying out the functions he is authorised to do. …
>
> [12] If that analysis is right and the principal can be liable even though he has not authorised the act of discrimination itself, it follows that the act itself may be—and no doubt usually will be—without the principal's knowledge or approval. …

[85] The same approach to this issue was taken by the England and Wales Court of Appeal in *Unite the Union v Nailard*.[86]

[86] In support of his submission that the more limited interpretation should be adopted, Mr Waalkens emphasised that the HDC Act deals with the professional standards of health practitioners, in contrast with the human rights context in cases like *Hatem*, where it was obviously important that the firm take responsibility for the human rights breach by one of its partners. He argued that, in a professional standards context, s 72(3) and (4) should be interpreted on the basis that the Medical Centre could not be liable under s 72 unless it authorised the erroneous prescription by Dr Sparks. He said that if the Medical Centre ratified the prescription error after the event, by saying that it was not a matter of concern and the Medical Centre was not going to do anything about it, that would be authorisation for the purposes of s 72(3) and (4).

---

84 *Ministry of Defence v Kemeh*, above n 62. The perpetrator was an employee of a contractor to the Army and was found not to be an agent of the Ministry.

85 Lewison and Kitchin LJJ concurring at [61] and [73].

86 *Unite the Union*, above n 26, at [16]–[19].

[87] We accept that the context of the HDC Act is different from that of the human rights statutes containing similar provisions to s 72, in that the HDC Act is dealing with professional standards, whereas the other human rights statutes are dealing with acts or omissions that are discriminatory or offend other human rights norms. However, breaches of the Code involve breaches of the rights of health consumers under the HDC Act, so the distinction is not as significant as Mr Waalkens suggested. In both cases, the focus of the statutes is on rights protection.

[88] In any event, Parliament has chosen to use the same wording in s 72 of the HDC Act as it has in those other statutes. As Mr Waalkens accepted, those equivalent provisions in human rights statutes should be interpreted broadly on policy grounds. We do not see any proper basis to adopt a different approach to the same wording in s 72. As we see it, the scope of liability under s 72 of the HDC Act is intended to be as broad as under the other rights-protective statutes in which equivalent provisions appear.

[89] Mr Waalkens argued that if any act by an agent done in the course of carrying out their authorised functions was thereby classified as being impliedly authorised by the employing authority the without authority proviso would be essentially redundant. He said this would lead to a substantial increase in the exposure of health care providers to liability for the acts or omissions of agents or members, whether or not they authorised the act or omission or whether they could have done anything to prevent it. He argued that the reasonable steps defence, which applies in relation to employees, provides greater protection for an employing authority in relation to employees than the without authority proviso provides to an employing authority in relation to agents and members. He said it would be incongruous if Parliament intended that employing authorities of agents and members were more likely to be found liable under s 72 than employing authorities of employees in the very same situation.

[90] It is not necessary for us to determine whether the reasonable steps defence does provide greater protection for an employing authority in relation to employees than the without authority proviso provides to an employing authority in relation to agents and members. That is because, even if it did, we are of the view that this would

not outweigh the countervailing factors that indicate Ms Casey's interpretation of the proviso is the correct one.

[91] Ms Casey argued that to require the employing authority to have authorised the very breach of the Code that is in issue would make s 72 ineffective in holding employing authorities responsible for the acts of agents and members. We agree. On the other hand, we also accept Mr Waalkens' point that interpreting the without authority proviso to require only that the agent or member be acting in the course of carrying out the functions they are authorised to do makes the without authority proviso of very limited scope. Neither interpretation is particularly attractive, but we consider that the interpretation advocated by Ms Casey is the interpretation that better reflects the purpose of the section and the consumer protection objectives of the HDC Act.[87]

[92] Ms Casey also argued that if the without authority proviso required the employing authority to have authorised the agent's or member's breach of the Code, it would be largely pointless, because such authorisation would render the employing authority directly liable for the breach under Part 4 of the HDC Act. She said that if s 72 was interpreted as Mr Waalkens submitted it should be, it would merely duplicate the employing authority's liability under Part 4.

[93] Mr Waalkens accepted that the Medical Centre is a "health care provider" for the purposes of the HDC Act, as defined by s 3, and can therefore be subject to complaints itself under Part 4. Nevertheless, he argued that Part 4 covers situations where the employing authority has directly acted to breach the Code, such as instituting a reckless or inappropriate policy. In contrast, he argued that s 72 covers situations where the employing authority has authorised, ratified or failed to act in response to a breach of the Code by an agent or member, or has acted in a way that contributed to the circumstances where the agent or member breached the Code. In our view, there is no substantive difference between an employing authority directly acting to breach the Code or authorising the breach of an agent or employee; in both

---

87 This approach is also consistent with that taken in a different context in the New Zealand case *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 (CA) at [44] per Gault P and Tipping J and [80] per McGrath J, dealing with attributed liability under s 90 of the Commerce Act 1986.

cases, the employing authority's own act or omission would be an independent breach of the Code and covered by the provisions of Part 4.

[94] We note too the arguments of the Mr McClelland for the NZMA in support of Mr Waalkens' interpretation of the without authority proviso. He submitted that a broader interpretation would conflict with general practitioners' views of their organisational structure and liability, would fail to recognise the inability of doctors to effectively monitor other doctors' practices and would disincentivise practitioners from operating in a collective, to the detriment of health care consumers. In our view, where the balance should be struck between consumer protection and the burden on service providers is a matter for Parliament. The emphasis on consumer protection in the purpose of the Act suggests to us that Parliament intended the Act to be read broadly, in favour of health care consumers, in instances of ambiguity.[88] To the extent that the liability imposed in s 72 may have ramifications for health care practice in New Zealand, that is a matter for Parliament to consider and address.

[95] Mr Waalkens posited an alternative construction of the without authority proviso, based on the New South Wales case, *Shellharbour Golf Club Ltd v Wheeler*.[89] That case concerned s 53(1) of the Anti-Discrimination Act 1977 (NSW), which provided:

> An act done by a person as the agent or employee of the person's principal or employer which if done by the principal or employer would be a contravention of this Act is taken to have been done by the principal or employer also unless the principal or employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.

[96] Another section in the Act, s 109, put the onus on defendants to prove exceptions to liability under the Act.[90]

[97] In *Shellharbour*, the president of a golf club was found to have sexually harassed an employee of the golf club. The Equal Opportunity Tribunal found the club was liable for his actions under s 53. On appeal to the Supreme Court of

---

88 HDC Act, s 6.
89 *Shellharbour Golf Club Ltd v Wheeler* [1999] NSWSC 224, (1999) 46 NSWLR 253.
90 What was s 109 at the time of the case is now s 104 of the Anti-Discrimination Act 1977 (NSW).

New South Wales, the Court found the club would be liable under s 53 if the president was an agent of the club (he was) and was performing his duties at the time he had conducted himself (he was) *unless the club proved the act or omission complained of was unauthorised by the club*.[91] The Court interpreted "authorised" as embracing "sanction, approve, countenance, and permit".[92] The Court upheld the Tribunal's finding that it was not satisfied that the club had established that it did not authorise the conduct.[93]

[98] The *Shellharbour* approach was adopted by the New South Wales Court of Appeal in *NSW Breeding & Racing Stables Pty Ltd v V*.[94]

[99] Mr Waalkens argued that applying the above italicised step from *Shellharbour* in the present case would lead to the conclusion that the Medical Centre had not authorised (nor, presumably, sanctioned, approved, countenanced or permitted) the erroneous prescription by Dr Sparks, given that its policies in relation to prescribing were found by the Commissioner to be adequate.

[100] We see the same problems arising from the *Shellharbour* approach as from the approach requiring authorisation of the unlawful act itself. And we note the HDC Act does not have a reverse onus provision like that in the legislation in issue in *Shellharbour*.

Result

[101] In the present case, we find that Dr Sparks was acting as an agent of the Medical Centre when he made the prescription error. In doing so, he was undertaking an act that was clearly within the functions he was required to perform (prescribing a drug to a patient) and he was therefore acting with the authority of the Medical Centre. Accordingly, the Medical Centre is, by virtue of s 72(3) of the HDC Act, to be treated as having done what Dr Sparks did, i.e. to have breached the Code. We reiterate,

---

91 *Shellharbour Golf Club Ltd v Wheeler*, above n 89, at [33], [39]–[41] and [70].
92 At [58]. The Court added that permission could be inferred from inactivity and indifference where the principal is aware that some particular behaviour may occur.
93 At [71].
94 *NSW Breeding & Racing Stables Pty Ltd v V* [2005] NSWCA 114.

however, that there is no suggestion that Dr Ryan himself actually breached the Code, nor does s 72 deem him to have done so.

[102] The appeal is dismissed.

Costs

[103] The Court of Appeal ruled that costs should lie where they fall. We are unclear as to whether the Commissioner seeks costs in this Court. We therefore reserve costs. If the Commissioner does seek costs, submissions may be filed and served as follows.

[104] Submissions for the appellant are to be filed and served by 19 May 2023. Submissions for the respondent are to be filed and served by 2 June 2023 and any submission for the appellant in reply by 9 June 2023.

WILLIAM YOUNG J

Where I agree with the reasons of the majority

[105] I agree that:

(a) The Moore Street Medical Centre (Medical Centre) was a partnership;

(b) Its business extended to the provision of services by Dr Sparks to the complainant; and

(c) For these reasons, Dr Sparks was acting as its agent when he prescribed ciprofloxacin to the complainant.

In these respects, I agree with the corresponding conclusions of the majority and the reasons they have given.

[106] If the partnership approach were not correct and the correct analysis was that the two doctors were running independent practices, I would be of the view that Dr Ryan was prima facie liable in relation to the actions of Dr Sparks; this on the basis that when Dr Sparks saw the complainant, the patient's fee was paid into Dr Ryan's

account and Dr Sparks billed Dr Ryan separately for the consultation. This might be thought to imply that the relevant contractual relationship was between the complainant and Dr Ryan, with Dr Sparks having seen the complainant on behalf of Dr Ryan.

The operation of the proviso to s 72(3)

[107] I differ from the majority as to the application of the proviso in s 72(3) of the Health and Disability Commissioner Act 1994 (HDC Act).

[108] Section 72 provides:[95]

> **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.

[109] In issue is the meaning to be attributed to the proviso in s 72(3) that I have italicised. On the interpretation advanced on behalf of Dr Ryan, the effect of the

---

95 Emphasis added.

proviso is that the Medical Centre is not liable unless Dr Sparks had its authority to prescribe ciprofloxacin for the complainant despite her known allergy. On the interpretation adopted by the majority, the Medical Centre is liable if Dr Sparks' consultation with the complainant was in the ordinary course of its business.

[110] If the effect of the proviso is to exclude liability unless the agent has the authority of the employing agency to do the wrongful act alleged, the practical scope of liability under s 72(3) will be extremely narrow. This is a weighty factor against the interpretation offered on behalf of Dr Ryan, particularly as its effect would, in some circumstances, limit the relief that could practically be obtained by a complainant. It is, however, to my way of thinking, outweighed by three considerations that go the other way:

(a) On the majority's approach the words I have italicised in s 72(3) may as well not be there;

(b) I see that approach as inconsistent with the understanding of Parliament as to what s 72 would achieve; and

(c) That approach will produce anomalous outcomes.

The second and third of these factors are interconnected.

[111] An act will never be "done or omitted by a person as the agent of an employing authority" unless it was with the actual or implied authority of that employing agency. So, a conclusion that 72(3) is engaged will necessarily exclude the operation of the proviso as interpreted by the majority. As well, given that the section only bites where the person was acting as an agent of the employing authority, there will, on the majority's interpretation, never be a need to rely on subsequent approval. On this approach the section means exactly the same as it would if the proviso were not there. I would be very slow to adopt an interpretation that puts a line through statutory language. Such an interpretation is obviously not consistent with the statutory text. The only way to allow the italicised words to have any effect is to adopt the interpretation advanced on behalf of Dr Ryan. And, as will become apparent, this

approach is consistent with what I take to be the Parliamentary purpose to impose liability in relation to the actions of employees more strictly than in the case of those of agents.

[112] Section 72 of the HDC Act was largely based on s 33 of the Human Rights Commission Act 1977. The legislative history of that provision is discussed at [26]–[30] of the reasons of the majority. There are two aspects that are significant:

(a) The Select Committee dealing with the Human Rights Commission Bill that became the Human Rights Commission Act 1977 was advised that the equivalent without authority proviso was in the nature of a "loophole".[96] On the majority's approach, far from being a loophole, the proviso has no scope for practical operation.

(b) The Select Committee was also advised that the provisions of the Human Rights Commission Bill corresponding generally to s 72(2), (3), and (5) of the HDC Act (which included the reasonable steps defence in relation to the acts of employees) imposed liability more strictly in respect of the actions of employees than in the case of agents. But on the interpretation adopted by the majority, the hierarchy of strictness under s 72 of the HDC Act goes the other way.

[113] If the complainant had been seen by a locum doctor employed by the Medical Centre, I think it clear that the Medical Centre could have relied on s 72(5) and such reliance would probably have been successful given the finding of the Commissioner that the Medical Centre had policies in place that were consistent with reasonable standards. That the Medical Centre's exposure to liability is greater in respect of the actions of an agent than the actions of an employee is, at least at a general level, odd. I say at a general level because I would expect a partnership to be liable for the actions of a partner carried out in the course of the partnership's business, a point to which I will revert shortly. But as s 72 does not make particular provision for partnerships but rather just provides for them in the general language of s 72(3), and

---

[96] *Human Rights Commission Bill: Report of the Department of Justice – Part B* (23 May 1977) at 8.

perhaps subs (4), the distinction between limited liability in relation to employees and stricter liability in relation to other agents is anomalous.

[114] For these reasons, I would allow Dr Ryan's appeal.

General comments

[115] I consider that s 72 warrants reconsideration by Parliament.

[116] The structure of s 72 does not coincide closely with recognised legal notions of business structure involving sole traders, partnerships and corporations and, for this reason, is not particularly well-tailored to the way people conduct business.

[117] Section 13 of the Partnership Act 1908 (which was in force at the time relevant to this appeal) provided:

> **13 Liability of the firm for wrongs**
>
> Where by the wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his or her co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

And under s 15, every partner was liable for everything for which the firm was liable. The corresponding provisions in the Partnership Act 2019 are ss 23 and 25.

[118] It is perhaps possible that the Medical Centre may have been directly liable in relation to the complaint by reason of s 13 of the 1908 Act. This, however, was not argued and, for this reason, I have put this possibility to one side.

[119] More to the present point (which is focused on the language of s 72), s 13 of the 1908 Act provided a straight-forward model for adoption in statutory schemes such as that in the HDC Act. The liability of a partnership for the wrongful acts or omissions of a partner is straight-forward and does not raise the sort of issues that may arise in other contexts of principal and agent. For this reason, such liability should have been dealt with discretely.

[120] The expression "member of an employing authority" obviously encompasses members of a partnership providing health care or disability services. It is, however, far from clear that s 72(4) is ever otherwise engaged.[97] If the only way someone could be a "member of an employing agency" is by being a partner in a partnership (which is my provisional view), the section should have said so. And in any event, if this is what was intended, it is odd that the liability of the employing authority/partnership for the actions of partners is expressed in s 72(4) using exactly the same language as is used in s 72(3) for other types of principals and agents.

[121] I have no difficulty with the result arrived at by the majority as a matter of principle. This is because it is intuitively right and also consistent with partnership law for a partnership to be responsible for wrongs committed by a partner in the ordinary course of the firm's business (which is how I see Dr Sparks' prescribing error in relation to the Medical Centre). My dissent is because I cannot see my way clear to reach that conclusion on the basis of the statutory language used in s 72 and the arguments that were advanced.

Solicitors:
Wotton + Kearney, Wellington for Appellant
J I King, Office of the Health and Disability Commissioner, Wellington for Respondent
Bartlett Law, Wellington for New Zealand Medical Association as Intervener

---

[97] It can have no application in the case of a sole trader and I have difficulty envisaging its application where the relevant services are provided by a body corporate.