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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 98/2021
[2022] NZSC Trans 8

BETWEEN **CHRISTOPHER RYAN**
Appellant

AND **HEALTH AND DISABILITY COMMISSIONER**
Respondent

NEW ZEALAND MEDICAL ASSOCIATION
Intervener

Hearing:	24 March 2022
Coram:	Winkelmann CJ (via AVL) William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	A H Waalkens QC and K Wills for the Appellant (via AVL) V E Casey QC and J Manning for the Respondent (via AVL)

M F McClelland QC and A F McClelland for the Intervener (via AVL)

CIVIL APPEAL

WINKELMANN CJ:
Mr Waalkens.

MR WAALKENS QC:
Yes, good morning, members of the Court. I'm appearing for the appellant together with (inaudible 10:05:30) in my office.

WINKELMANN CJ:
Sorry, you froze for a moment. Together with who in your office Mr Waalkens?

MR WAALKENS QC:
Ms Wills.

WINKELMANN CJ:
Ms Wills. Tēnā korua.

MS CASEY QC:
E ngā Kaiwhakawā, tēnā koutou. Ms Casey appearing with Ms Manning for the Health and Disability Commissioner.

WINKELMANN CJ:
Tēnā korua.

MR McCLELLAND QC:
May it please your Honours. Mr McClelland for NZMA and I appear with Mr McClelland.

WINKELMANN CJ:

Tēnā korua Mr McClelland and Mr McClelland. So that's the appearances complete. It's so hard to see on the screen, but I expect it is. So Mr Waalkens?

MR WAALKENS QC:

Yes, thank you.

WINKELMANN CJ:

We thought just to give an indication, we would be assisted if you could start out by giving us a pretty good step of how these entities operated, the Ashburton Medical Centre Limited, the Moore Street Medical Centre, Dr Ryan and Dr Sparks. Justice Grice outlined in paragraphs 12 to 14, so your starting point could be –

MR WAALKENS QC:

Sorry your Honour. Your Honour (inaudible 10:07:14). I'm sorry your Honour, that's breaking up, I couldn't hear that. I heard the beginning, that you want a breakdown of the, or an overture of the factual material, yes, and (inaudible 10:07:28)

THE COURT ADDRESSES MR WAALKENS – AUDIO/AVL ISSUES

COURT ADJOURNS: 10.08 AM

COURT RESUMES: 10.15 AM

WINKELMANN CJ:

Mr Waalkens, I see you there.

MR WAALKENS QC:

There's something across the middle of the screen, your Honour.

WINKELMANN CJ:

The top part will be where the documents that you refer us to are displayed.

MR WAALKENS QC:

Yes.

WINKELMANN CJ:

I know, it is a little bit off-putting.

MR WAALKENS QC:

That's all right. Your Honour asked a question about the facts, the Medical Centre and the company. I didn't hear the rest of your question, you alluded to something to do with Justice France, I just couldn't pick that up.

WINKELMANN CJ:

Justice Grice, her judgment I think at paragraphs 11 to 14, it sets out some facts. So as a starting point I wanted to know if you took any issue with those paragraphs.

MR WAALKENS QC:

No, I don't. The Court of Appeal have summarised those also in its judgment and those…

WINKELMANN CJ:

This is really not a very good connection is it.

THE COURT ADDRESSES MR WAALKENS – AUDIO/AVL ISSUES (10:17:33)

WINKELMANN CJ:

So the question was, can you please just take us through the business operational relationships between these different entities?

MR WAALKENS QC:

Yes, all right. So if we go to Dr Ryan's affidavit, and that is at page 201.0004, from paragraph 18 sets out the – from 18, yes. I don't know about others, but my visual copy of what's on the screen from the text is very blurred but I'll presume you can see it all right.

WINKELMANN CJ:

We can.

MR WAALKENS QC:

Well, as he says, he describes the Moore Street Medical Centre as the premises, the name of the premises from which they operate. It's owned by, he goes on to say –

WINKELMANN CJ:

So what paragraph are you at, Mr Waalkens, because it hasn't moved to that paragraph.

MR WAALKENS QC:

Number 18, Moore Street Medical Centre is the name, it "employs four nurses" and so forth, paragraph 19, it "owns all the plant and equipment at the clinic", at 21 it "has its own bank account" and various expenses are described there, how they're paid. There's a reference to the preparation of the budget each year and then, over the page, the individual practices are referred to. If we go back to paragraph 13 of that affidavit it describes the Ashburton Medical Centre Limited, the company that owns the premises from which the Medical Centre operates, and rental is paid to the company, they're both directors, and actually as the Court of Appeal and Justice Grice referred to in their (inaudible 10:21:09)

WINKELMANN CJ:

So is it the case that the Medical Centre, the Moore Street Medical Centre, charges Dr Ryan and Dr Sparks a fee?

MR WAALKENS QC:

No, yes – just one moment. The Court of Appeal judgment refer to the sum, your Honour, but they pay a fee into the Moore Street Medical Centre account that addresses matters like rental, that's set out in paragraph 21 of Dr Ryan's affidavit. He pays "a fixed weekly amount", as does Dr Sparks, to cover all the expenses, including rent, wages and whatever else.

WINKELMANN CJ:

And does this ever run at a profit?

MR WAALKENS QC:

No, no, there's no evidence on that, your Honour, but the structure as describe by Dr Ryan appears to be that it's a meeting of costs, a bit like barristers and lawyers operate, or barrister sole, so they pay the costs and cover the costs. The income that's generated from the Moore Street Medical Centre in part is, and the Court of Appeal judgment refers to this as clearly a partnership, and that is for example the activities of locums and nurses who may undertake medical services for which a fee is generated. That gets paid into the Moore Street Medical Centre account.

WINKELMANN CJ:

And so it does, it accounts for tax as a partnership, does it?

MR WAALKENS QC:

Yes, in that respect it does, yes.

WILLIAM YOUNG J:

Mr Waalkens, can I ask you a question about paras 27 and 28 of Dr Ryan's affidavit?

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

So when Dr Sparks saw the patient in question in this case a fee was charged…

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

And that went into Dr Sparks' account, I take it? That's 28.

MR WAALKENS QC:

No. In this case that fee was paid to Dr Ryan and Dr Sparks separately billed Dr Ryan for the consultation fee, and that is also described somewhere in the Court of Appeal judgment.

WILLIAM YOUNG J:

So was Dr Sparks then acting as the agent for Dr Ryan when he saw Dr Ryan's patient? Did the service –

MR WAALKENS QC:

No…

WILLIAM YOUNG J:

Sorry, just let me carry on. Did this, provided a service for which Dr Ryan was paid and then independently rendered an invoice for seeing Dr Ryan's patient?

MR WAALKENS QC:

That is correct.

WILLIAM YOUNG J:

But it does look a bit like he was acting as Dr Ryan's agent.

MR WAALKENS QC:

Well, I would say that, as the Court of Appeal paragraph 80 has noted, the evidence conveys a strong argue for saying that when consulting their respective patients they're not each other's partner but separate business entities.

WILLIAM YOUNG J:

Well, I mean, I agree, but did they engage with – and I had initially assumed that Dr Sparks, the consultation fee for seeing the patient, would have gone into Dr Sparks' account.

MR WAALKENS QC:

No, no, it doesn't. It's referred to in paragraph 27 of Dr Ryan's affidavit, he describes –

WILLIAM YOUNG J:

Yes, those are the two paras, 27 and 28.

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

Can you see those on your screen, Mr Waalkens?

MR WAALKENS QC:

I've got the hard copy but I can see the screen but, as I said before, it's quite blurred, the text is quite blurred, but I can read it.

WINKELMANN CJ:

Mr Waalkens, do you feel disadvantaged by how you're conducting this hearing at the moment?

MR WAALKENS QC:

A little bit, your Honour. I've got another screen in my office where evidently it will be clearer. I don't quite know why this is happening. I've had many AVL hearings in the last COVID period and I've not had this at all.

GLAZEBROOK J:

You've got the hard copy though, so you're seeing the same thing we are.

MR WAALKENS QC:

Yes.

WILLIAM YOUNG J:

But he obviously missed something I said which was –

GLAZEBROOK J:
No, I'm not suggesting in relation to that, just in relation to the documents I think.

THE COURT ADDRESSES MR WAALKENS – AUDIO/AVL ISSUES (10:26:50)

COURT ADJOURNS: 10.27 AM

COURT RESUMES: 10.44 AM

WINKELMANN CJ:
Maybe Mr Waalkens…

MR WAALKENS QC:
Yes, I apologise again about that. I don't quite know what it is but I'm now working from my junior's laptop, which is a much smaller screen, but I hope I can be heard and possibly now also seen.

WINKELMANN CJ:
You are being heard and seen much better now Mr Waalkens.

MR WAALKENS QC:
Thank you very much. So just picking up where we were at a moment ago about the payment of the fees for the actual consultation, the point I'd make is that when Dr Sparks undertakes, as he did in this instance, the consultation, he's not undertaking the consultation for and on behalf of Dr Ryan at all. As the Court of Appeal had noted at paragraph 80 there is strong evidence about having separate practices. So all that can be said is that this is a fee arrangement as to how they would allocate the fee for a consultation. Of itself that doesn't create an agency argument at all, in my respectful submission.

WINKELMANN CJ:
Can I ask you if they had a locum coming in, would that be the same arrangement?

MR WAALKENS QC:

No, that's a different arrangement your Honour. The arrangement for that is that the locum gets paid a payment of compensation for his or her work, and the fee is generated by the locum, as with practice nurses, as income that goes into the account of the Moore Street Medical Centre. So as the Court of Appeal, I say rightly, recognised these two people can be in partnership at different, for one purpose, but not for another, so vis-à-vis their own practices where they undertake consultations, I agree with the Court of Appeal the reference to the strong evidence that they're in separate businesses, separate entities. There are components of the medical service work including locums and nurses where they would be regarded as in partnership. So just following through on that. If, for example, a locum had breached the Code, as Dr Sparks is found to have breached the Code on this occasion, that's the Code of Patient Rights under the HDC Code, the Moore Street Medical Centre would be responsible through the fact that the locum is acting as agent for the Moore Street Medical Centre. But, as I say, not so for separate practices of Ryan and Sparks as individuals.

Your Honours will see in Dr Ryan's affidavit from paragraph 40, he there sets out how he has no reason to query Dr Sparks' competence and how he undertakes his work. He does not sit in on the consultation and nor is there any consultation with him about his patients, and the only oversight, at 42, they have is through the employed doctors, the locums, and there is evidence from the other two doctors who gave evidence, I won't take you to them unless you need to see it, as to the nature of the consultation being a very subjective series of assessments made by the individuals. So this case is all about Dr Sparks and Dr Sparks breaching the Code and that's made clear in the Court of Appeal's judgment at paragraph 14, they set out there, in summary, the breaches on the part of Dr Sparks, and we say that it would be, it draws a long bow to connect those breaches, certainly through an agency argument, to Dr Ryan, or the Moore Street Medical Centre.

GLAZEBROOK J:

Can I just check, when a patient makes an appointment, they ring the Medical Centre?

MR WAALKENS QC:

There is no degree of evidence, or detail of evidence around how the appointments are made your Honour. Inevitably –

GLAZEBROOK J:

In terms of the computer system does the Moore Street Medical Centre – I can't remember, if we go back perhaps to the paragraph, where they're discussing that in Dr Ryan's affidavit.

MR WAALKENS QC:

Yes.

GLAZEBROOK J:

I'm just trying to get an idea of what the Medical Centre actually does.

MR WAALKENS QC:

Yes. I stand to be corrected, but I don't believe there was any evidence on this aspect of matters, your Honour, as to the making of appointments.

WILLIAM YOUNG J:

Well, you probably either ring up the Medical Centre or book online on the Medical Centre's website, I imagine.

MR WAALKENS QC:

There could be no reason for appointments not to be made in a myriad of different ways and certainly that would be right, those are two options.

GLAZEBROOK J:

And can I just check if there are other receptionists employed by the Medical Centre?

MR WAALKENS QC:

Yes, they are, they are employed by the Medical Centre.

GLAZEBROOK J:

So the appointments would be made through those receptionists, is that right?

MR WAALKENS QC:

Yes.

GLAZEBROOK J:

Thank you.

MR WAALKENS QC:

I had been proposing today, of course subject entirely to how your Honours would wish me to address you, to say something very briefly about the facts and the fact we've already spent more time on those than I was proposing to, but I do recognise it's important to cover the facts. I was going to speak for a few minutes on the facts, then address the proviso, the actual subsections (3) and (4) of section 72, then say something briefly about *Proceedings Commissioner v Ali Hatem* [1999] 1 NZLR 304, the *Hatem* case on which the Court of Appeal placed reliance, and then I would like to deal with two points in particular that are raised by the Commissioner, the first being the point that if our argument, that is the appellant's argument, was correct, then matters would be for the Centre dealt with under Part 4 of the HDC Act, dealing as it does with direct liability, and I want to just take your Honours through actually what Part 4 is about, and I can summarise that now.

It in part, it deals with direct liability and there are employing authorities who can be found directly liable who would be investigated under Part 4, but there's good reason for why the legislature has enacted section 72, as it has, to provide for the circumstances where there is a liability being found, in this case on the part of the employing authority for the conduct of another, and I want to just say something about Part 4.

I'd also like to say something about my learned friend's point to do with the accessing of centralised notes, that is the Commissioner makes the point that it's "particularly significant", are the words used, that in this Medical Centre Dr Ryan and Dr Sparks can both access any records in the Medical Centre, whether they are those of that particular doctor or not, and the answer to all of that is actually what is set out in the Health Information Privacy Code at rule 11, and I arranged yesterday and I don't know whether it's come to you, a copy of both parts of Part 4 of the HDC Act and also the Health Information Privacy Code to come to you.

WINKELMANN CJ:
We did get those.

MR WAALKENS QC:
We don't need to come to those at the moment but I see you've got those, thank you. Then lastly I was going to address you on the point of whether there is an agency and/or whether there is a member situation here under either subsections (3) or (4). So that is what I propose to address your Honours on. Much of what I propose to say I won't be reading from my submissions because I'm assuming that you've had the chance to read through those. I've set out in my written submissions what I do propose to say about those points. So unless there's any other matters you'd like at this moment for me to address, can I just say something additional please about the facts?

I had six broad points to make. Firstly, to emphasise the point in paragraph 14 of the Court of Appeal's judgment that that is, that sets out in summary where Dr Sparks was found to have breached the Code of patient rights during the consultation that he solely undertook with this particular patient and, as you know, no challenge to any of that at all. I say that that's instructive in that that is clearly what the legislature is referring to when in subsections (3) and (4) the commencing words are: "Anything done or remitted by a person as," be it as agent or member, so those words:

“Anything done or omitted by a person,” in this case Dr Sparks, is surely a reference to what is set out in paragraph 14. The Court of Appeal didn’t accept that. They said that if it was the, the breach that was being referred to, then it would render the concept of vicarious liability wrong and nugatory and I'll come to this in a moment. It’s a key part of the argument, the key part of the case.

WINKELMANN CJ:
Can you just repeat your proposition, what subsection were you at of section 72?

MR WAALKENS QC:
Section 72, subsections (3) and (4).

WINKELMANN CJ:
Yes, and you say what about them?

MR WAALKENS QC:
The commencing words “Anything done or omitted by a person,” is very plainly, I suggest, a reference to anything done or omitted by Dr Sparks in the various capacity, be it an agent or as a member. That reference “anything done or omitted” has to be, I say, a reference to Dr Sparks’ conduct in paragraph 14 in the Court of Appeal judgment recognising where the, or what the breaches were.

I'll take you to the point in a moment when I look at the meaning of the proviso in the section, that the Court of Appeal said that of that suggestion it would render it utterly pointless, the latter provisions in that section, and I don’t agree with that and I'll come to that in a moment. But that’s the first point I wanted to highlight, the breach of the Code by Dr Sparks.

I’ve already addressed the second broad point, and that is when consulting patients, both Dr Sparks and Dr Ryan are very much undertaking a separate business entity assessment. They’re acting, they’re doing their own

assessment and they're not agents or members, we'll come to that in a moment.

I thirdly want to emphasis something the Court of Appeal touched on and they've rightly summarised this in paragraph 24 of the judgment, the last sentence reflecting other affidavit evidence, and I won't take your Honours to it, but it was a Dr Baddock and a Dr Mangan. The Court of Appeal recite in paragraph 24 what they were told, which is: "The way in which Dr Sparks and Dr Ryan operate their practices with regard to the Medical Centre is said to be a common arrangement in New Zealand." That is indeed so. This is a very common arrangement.

The next point is that the practice, Dr Ryan, the Centre, had no control nor ability to supervise Dr Sparks.

The fifth point on the facts, just as a general outline, and this really picks up on a point that my learned friend Mr McClelland for the intervener has emphasised, and that is that the consequences of an outcome such as the Court of Appeal have settled on, has very huge or large ramifications or implications for general medical practice here in New Zealand, and if anything will disincentivise doctors to undertake and work in practice, encourage them to go into sole practice, and it's an arrangement that my learned friends submissions for the intervener have rightly said is unpracticable and unworkable. I'm not going to take you through that detail, but I certainly do agree that that is the case.

The last point is that the outcome on the part of the Court of Appeal does actually not further, a consumer protection in any way at all, and again that's Dr Baddock's evidence, and my learned friend Mr McClelland for the intervener has referred to that evidence. So that's what I wanted to say by way of a general background on the facts.

I'd now like to turn to the key issue and that is the interpretation of the two subsections (3) and (4) and in particular the proviso. The first point I make

about it, and this will be a reference to the Court of Appeal judgment, is, as the Court of Appeal had noted, the terminology, the text adopted in section 72(3) and (4) are not provisions of vicarious liability at all, and if I can take you to the Court's analysis from paragraph 43, please, you'll see at the end of 43 in the last sentence the Court in interpreting the section has found great assistance from the author *Todd on Torts* – and I agree, that's not in the bundle of authorities – but the cited references, in fact you'll see footnote 26 at the bottom of the page refers to *Todd* at page 1249, and it is a very helpful exposition of vicarious liability and where it fits in the law. The Court of Appeal, having directed itself in that, then went on to note at 44 of course it's trite, it's "a form of strict liability", they set out in the next sentence one person is found liable for the civil wrongs by the second even though "themselves is without fault", and then 45, which is important: "If however the facts are that A actually authorised," so that "A" is of course a reference to the Medical Centre, "or ratified the wrong," and that's, in our section we've got the words "precedent or subsequent" at the end of both subsections (3) and (4) and they're there for a good reason, so it may be authorised both prior to the conduct or even ratified subsequently, as noted in paragraph 45 that's "an instance of primary liability" and A, in this case the Centre, is "personally liable".

The Court of Appeal repeat the very same point across the page on paragraph 48, and I'll just take you to the last sentence there where they rightly say: "Where there is actual authority (whether express or implied), the liability of the principal is personal, not vicarious." And my learned friend took issue – and that's what I've said in my written submissions you will have seen – my learned friend took issue with the lack of explanation on the part of the appellant of what is referred to as "personal". Is it, she said, or questioned, a reference to individual liability, and the answer is no, it's exactly as the Court of Appeal had said, citing as they do *Todd*, it's simply direct liability of a personal nature, in this case on the part of the Medical Centre, where it may have expressly or by implication authorised the act or the thing done or remitted.

WINKELMANN CJ:

Mr Waalkens, is that – so do you accept as correct the statement on law by the Court of Appeal at paragraphs 44 and 48 as to the inter-relationship between the liability of principals for the actions of their agents and the law of vicarious liability?

MR WAALKENS QC:

Yes, I do, in terms of the common law, yes, I do, indeed, and I agree with what the Court of Appeal is emphasising in all of these sections, the last one is paragraph 57, in fact it picks up from 56, at the end of 56, they at 56 direct themselves: "As regards acts done by the wrongdoer as agent," "is only to be vicariously liable under s 72(3) if the wrongdoing has been done with the express or implied authority of the employing authority. That is the effect of the proviso, 'unless…without that employing authority's express or implied authority, precedent or subsequent'." And then 57: "As mentioned at common law, express or implied actual authority would render the principal personally liable for the conduct… It would not be a case of vicarious liability at all." And then they go on to raise the question, well: "What is then meant by 'implied authority'?"

So, just pausing here, I say that and commend to you that the proviso words in both subsections (3) and (4), "unless it's done or remitted without that employing authority's express or implied authority", is indeed saying that the employing authority will be directly or personally liable, it's not vicarious liability as such at all, vicarious liability being liability absent of any fault.

WINKELMANN CJ:

So how do you account for the "Vicarious liability" heading at the top of the heading?

MR WAALKENS QC:

Well, just as the Court of Appeal do – if I can just have a moment, it's in my written submissions. Just give me a moment, I do apologise…

WINKELMANN CJ:

Well, we can come back to that if you want and Ms Wills could find it while you…

MR WAALKENS QC:

I do come to it in a moment, your Honour, I've got in my notes.

WINKELMANN CJ:

Well, carry on, don't…

MR WAALKENS QC:

So what my learned friend says in response to this, that is that the language of the two subsections is referring to direct and personal liability, not vicarious liability at all, is that if that were so then she says it would render redundant the whole provision in section 72 because she says this conduct would be picked up and covered by Part 4 of the HDC legislation. Now that's what I've provided your Honours with yesterday, and if I could ask for that Part 4 to be brought up on the screen, it's sections 31 and 40 in particular.

So section 31 – this is the commencement of Part 4 of the HDC Act – makes it clear that: "Any person may complain orally or in writing to an advocate or to the Commissioner," the HDC, "alleging that any action of a health care provider…is or appears to be in breach of the Code." So the words are plainly looking at the action of a health care provider.

The short point I make here is that in this case involving Dr Sparks it's not the action of the Centre, the Medical Centre, that's in focus, it's actually Dr Sparks' conduct, it's his actions that are being looked at, and the short point I make about Part 4 is that – and if we in fact go over to the next section that I provided you, section 40: "The Commissioner may decide to investigate any action of a health care provide," and it's accepted, as your Honour will note, that both Dr Sparks and the Centre are both under the Act, health care –

GLAZEBROOK J:

Is “health care provider” defined?

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

I just couldn't find it.

WILLIAM YOUNG J:

Section 2 – section 3, I think.

MR WAALKENS QC:

Yes, in section 3 of the HDC Act.

WINKELMANN CJ:

We’ve got very spotty parts of the HDC Act to assist us.

MR WAALKENS QC:

You’ll find section 3 in the Intervener’s bundle of authorities, yes, there it is there. So there’s the definition of “health care provider” and it’s accepted, certainly under (k): “Any other person who provides, or holds himself or herself out as providing, health services to the public.” So the Medical Centre, there is, I can confirm, as counsel then acting in the High Court conceded, the Medical Centre is a health care provider.

WILLIAM YOUNG J:

It is under (k) anyway, because it is the public face of the practices the two doctors conduct.

MR WAALKENS QC:

Well it, yes, it meets the definition under (k) any other person holds – absolutely.

GLAZEBROOK J:

And it would be, you'd accept it was holding itself out as providing the services of Dr Ryan and Dr Sparks? That was my, that was when I was asking about the appointment process because that seems to be if they're in a group practice they are holding themselves out to be actually providing the services of the doctor, even though behind the scenes they may not be.

MR WAALKENS QC:

Yes, that is in broad terms there. The point I'm making about Part 4 of the Act is that the language used, and it refers to the action of a health care provider, and without section 72, and HDC investigation, or if the HDC was to open an investigation, say in a case like this one, involving Dr Sparks, about Dr Sparks' conduct, and in the same time decided it wanted to have a look at what responsibility the Centre may have, it may be met with an argument, well under Part 4 of the Act you can only look at the action of a health care provider, and so the legislature has enacted section 72 to cover the situation where in this case Dr Sparks acted with authority, be that express or implied, of the Medical Centre, then the Medical Centre can be held responsible.

WINKELMANN CJ:

So I can imagine that Ms Casey's point is that on your analysis if these provisions are creating personal liability then the actions of the health care provider would be the actions of the Medical Centre for those purposes?

MR WAALKENS QC:

Well the – in fact under Part 4 of the Act, your Honour, there will be circumstances, and we've seen examples already in the authorities that we have before us, where an employing authority can be held directly in breach under Part 4. The facts and circumstances are not this case but the bundle of authorities that we've provided at tab number 7 has the judgment of Justice Muir in *The Partners of Waikanae Health Centre v The Health and Disability Commissioner* [2021] NZHC 1488 case, and I can just give you a reference to the extract in that. It's at paragraph 80. In this case, and I should, this is a case about a doctor whose name was Dr Ben-Dom, who was

a member of or a part of the Waikanae Health Centre, and he had a long history or a pattern, as it says in paragraph 80, of unacceptable behaviour, of inappropriate examination and touching of female patients in the process of examining them. It was made clear that on that case there actually was no sexual undercurrent as such in it, but all the same the allegation was one of a, as paragraph 80 has noted, a pattern of what was said to be highly unacceptable behaviour, and the argument in that case, which the HDC found and formed an opinion on was that the Waikanae Health Centre, in the knowledge of this pattern of behaviour, had stood back and allowed it to carry on.

So their conduct in that regard was brought under the spotlight under Part 4 as being directly liable, or directly responsible for their own conduct, in this case, failing to respond to the criteria in paragraph 80. It's very different from this case. My learned friend has made reference to the fact that Dr Sparks is said to have had a history of prior problems, but what's significant is that there is no suggestion, and nor could there be, that the Medical Centre stood by and did nothing, or permitted that to happen. If that had been an argument it would have been looked at under, just like under the *Waikanae Health Centre* case, under Part 4.

WINKELMANN CJ:
That was not the finding of fault. There was no finding of fault.

MR WAALKENS QC:
In the *Waikanae* case?

WINKELMANN CJ:
No, in this case. There was no finding of fault of the health centre on that basis.

MR WAALKENS QC:
No, there's no finding of fault on the health centre on that basis your Honour. Unlike *Waikanae*. Another example of a sort of Part 4 type direct liability –

WINKELMANN CJ:

Can I just ask you, because at the moment I'm finding this hard to follow, because you seem to be arguing for Ms Casey's point, because Ms Casey's point is that on her analysis Part 4 would cover ground already because the Medical Centre would be directly implicated, so that's exactly as the – ah, so you're not, I may have just worked out what you are arguing, so carry on Mr Waalkens.

MR WAALKENS QC:

Just to repeat it, under Part 4 there has to be a focus, I say, on the way the text is used in Part 4. There's a focus on the action of a health care provider, and from the get-go the action of the health care provider that's been the subject of both the complaint and the investigation, had been Dr Sparks' conduct. What section 72 enables is for the legislature to recognise that in circumstances where the conduct of Dr Sparks may have been done with the express or implied authority, then there's liability, or there can be a liability finding. So the section 72 isn't rendered nugatory at all, on my argument. Another good example of how the HDC would investigate in employing authority like, in this case the Centre, but on the facts of this case not so, is where, for example, the Medical Centre had a reckless policy, or some inappropriate policy like, for example, direction that it would not bother following up lab results from people who had biopsies and other tests, with a result that a patient ends up being, having a cancer not picked up –

ELLEN FRANCE J:

Mr Waalkens, sorry, I might be misunderstanding, but are you saying that you couldn't bring, couldn't make a complaint under Part 4 in relation to that, so the reckless policy example?

MR WAALKENS QC:

No, that is what Part 4 is looking to. So a –

ELLEN FRANCE J:

Yes, well then I'm not sure I understand what your response to Ms Casey's argument is.

MR WAALKENS QC:

There would be conduct on the part of the employing authority, having a reckless policy, which results in the example of a lab test not being followed up because it's policy is we're not going to do that –

GLAZEBROOK J:

But if the people are complaining they're going to say, I had whatever they're going to say in terms of what happened to them, and they'll probably say the Moore Street Medical Centre did this, usually won't they? If they've made an appointment and that's who they think of as their medical centre. I mean they may do a particular doctor but that could be a locum or anybody, couldn't it?

MR WAALKENS QC:

Yes, that could be so. But, as the Court of Appeal have noted at paragraph 13 in this case, the complaint was about Dr Sparks.

GLAZEBROOK J:

All I'm saying is that will not necessarily be the case. The patient will say: "Something happened to me and it was X's fault." Now it may be that they say it was Dr Ryan's fault because that's their doctor, and if that's not the case then the complaint will be transferred to whoever it is, presumably.

MR WAALKENS QC:

Yes. All the same, the structure of Part 4 is to focus on an investigation into the actions of the health care provider who is –

WINKELMANN CJ:

So, Mr Waalkens, it might help us if you explain how, if you gave us a different factual situation under which you could be liable under section 72 where you're not already caught under Part 4 as the health agency.

MR WAALKENS QC:

Where there may have been by implication authorisation given by the employing authority of the action or conduct of the individual doctor, as section 72 expressly picks up in the proviso.

GLAZEBROOK J:

Well, why wouldn't that come under Part 4?

WINKELMANN CJ:

Yes, and I'm really asking you to give us a fact situation, Mr Waalkens, like, how do you give express or implied authority in a way which doesn't bring you under Part 4?

MR WAALKENS QC:

Well, section 72 is a, the answer is that section 72 is just a legislative catch-all to prevent an argument from an employing authority: "This is not about my action, my conduct."

WINKELMANN CJ:

Well, can you tell us, on your analysis, how do you give express or implied authority? Are you saying you have to authorise a wrongful act or just authorise the kind of acts that were done wrongfully?

MR WAALKENS QC:

It's both of them. You could do, because of the precedent or subsequent reference at the end of both subsections you could either, as an employing authority be, having been found they've given authority, because you have expressly authorised particular action on the part of an individual doctor, or you may subsequently have done something that shows that you are ratifying the conduct, not taking action, standing by…

GLAZEBROOK J:

But wouldn't that come under Part 4 though?

MR WAALKENS QC:

Some of these things may come under Part 4, but in order to avoid an entity like Moore Street Medical Centre saying to an HDC willingness to conduct an investigation they're not party to: "Well, this isn't about us," section 72 would enable that to happen.

ELLEN FRANCE J:

But if we took the present fact scenario but there was no alert system, so nothing on the patient's file indicating that they had any allergic reaction to the drug, how do you say that that complaint could be dealt with? Under both Part 4 and 72 or…

MR WAALKENS QC:

In different circumstances it may be both. But perhaps the better example where the use of section 72 comes in is that there may be circumstances of conduct that warrant an argument of breach to have happened under that section, section 72, that doesn't meet the threshold of finding a breach of the Code under Part 4.

WINKELMANN CJ:

I must say at the moment I'm not convinced by your argument, Mr Waalkens, because it seems to me every situation you put up does sound like it would come within. If it's direct, if it's authority as, liability as a principal, it sounds to me like it's coming within Part 4. So that is something you might need to have another go at maybe?

MR WAALKENS QC:

Well, yes, all I can say is what I've already said, that this case is a good example of it. There's an investigation into the complaint of, of the conduct of Dr Sparks…

WINKELMANN CJ:

Yes, but what I've asked you to do is articulate a fact situation which would be caught by section 72 but is not caught, would not be within Part 4.

GLAZEBROOK J:

Is the argument section 72 is an investigation section or belts and braces, is that how I understand your argument? Because obviously at the beginning of this investigation it would not be known whether it was totally the fault of Dr Sparks or the medical centre or Dr Ryan, would it?

MR WAALKENS QC:

No, that's true…

GLAZEBROOK J:

It's only after, at the end of the investigation that it could be sheeted home solely, you say, to Dr Sparks.

MR WAALKENS QC:

Yes, it would only be at the end of the investigation that that would be made clear. But as I've been saying, and I can hear I'm not making progress on this, the section 72 is to give the Act some teeth in order for the HDC to respond to ever the suggestion by an employing authority: "Well, this is not conduct about us, we can't be involved in this," and –

GLAZEBROOK J:

Except that it doesn't read like just an investigation section, the way I put it to you.

MR WAALKENS QC:

No, it's not just an investigation section, no.

WINKELMANN CJ:

It might be that this is, if over the break someone could email to the Court a full copy of the Act so we can look at the index, et cetera, to see what…

MR WAALKENS QC:

Yes, all right, I'll arrange for that to happen.

GLAZEBROOK J:

Because, I mean the point I was making really is that if section 72 doesn't bite then the health authority could still, sorry, health provider, could still say, health care provider, could still say: "Well, it's nothing to do with me, either under 72 or Part 4." So unless 72 does something other than Part 4, it doesn't help in your investigation scenario?

MR WAALKENS QC:

Well…

GLAZEBROOK J:

And you might just say: "Well, they thought that it was doing something and it isn't doing anything more than Part 4, or shouldn't be read as doing anything more than Part 4."

MR WAALKENS QC:

Well, as I say, I am here repeating myself. Part 4, I suggest, is very much focused on the actions of the health provider and section 72 is a saving provision, if you like, to…

GLAZEBROOK J:

Do you just say to pick up anything that for some reason doesn't come within Part 4 but was something that was authorised directly?

WINKELMANN CJ:

On its own terms though it's purporting to extend, to clarify the extent of all those provisions in Part 4, isn't it? Because it's saying whose actions it's deemed to be.

MR WAALKENS QC:

Yes, that's what section 72 is doing, it's personalising it to the employing authority.

WINKELMANN CJ:

So in those circumstances they're liable not just for their own neglect, which they might on the face of it come under the section being – it's the Part 4 on, but they're also liable for any wrongful action by their employee, say, or agent, in terms of section 72, but…

MR WAALKENS QC:

Yes, and in this case the HDC conclusion, and the Court will find that in volume 3 at page, it starts at page 301.0122.

WINKELMANN CJ:

So you're really just saying that section 72 qualifies, clarifies that the law of principal and agent, et cetera, and I assume somewhere in there vicarious liability, where it's appropriate, applies in this, where Part 4 applies, it applies to this Act?

MR WAALKENS QC:

Yes. If I can just take you to the – this shows this shows how the HDC applied it in this case. If we go to the very last paragraph on that page, paragraph 73, and this is under the heading "Opinion: Moore Street Medical Centre – breach": "As a health care provider, Moore Street Medical Centre is responsible for providing services in accordance with the Code and it may be held directly liable for the services it provides," so that's the reference to Part 4. Maplesden, that's the HDC's medical advisor, advises that the Centre "had policies that were consistent with expected standards". "Accordingly I do not find that Moore Street Medical Centre breached the Code directly," and it goes on in paragraph 75, it's operated by Ryan and Sparks, "not an employee", "I consider he is authorised to act", and then at the last sentence on that paragraph 75: "As such, I find Ryan and Sparks (trading as Moore Street Medical Centre) vicariously liable for Dr Sparks' breaches."

WILLIAM YOUNG J:

He's assuming Moore Street Medical is providing the care to patient and, I mean, can't help but think that that is actually the guts of the issue.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

From the point of view of the patient it's probably right. From the internal point of view of Dr Ryan and Dr Sparks it's not right – well, it may be right actually – well, no, it's not right.

MR WAALKENS QC:

No. No, that's certainly so, it's not right to…

WINKELMANN CJ:

It could that Dr Ryan is the one who should be caught by it because of the agency relationship.

WILLIAM YOUNG J:

Well, I would find the argument that he was the agent of Dr Ryan a rather easier one than that he's the agent of the Moore Street Medical Centre, but just based on the legal relationship. So I agree that it's Moore Street Medical Centre that's holding itself out as a health care provider.

GLAZEBROOK J:

And so is the health care provider in terms of (k).

WILLIAM YOUNG J:

Yes, but whether…

GLAZEBROOK J:

Or the other – the doctors will be as well of course.

WILLIAM YOUNG J:

So there are three health care providers: there's the Medical Centre, Dr Sparks and Dr Ryan, and who was Dr Sparks acting for when he does this? It could be any one of the three. Well, that's the range of options.

GLAZEBROOK J:
Yes.

WINKELMANN CJ:
Well, shall we take the morning adjournment?

MR WAALKENS QC:
Yes, thank you, that's good.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.49 AM

WINKELMANN CJ:
Thank you. Mr Waalkens, I see you there.

MR WAALKENS QC:
Yes, thank you. I've given some thought to the answer to the discussion around, well, where would be a circumstance of section 72 liability but not under Part 4 on the part of an employing authority, and an example would be something where there had been an administrative error within the medical practice, that is on the part of a medical centre, be that in their computer system, or in their policies, where a doctor has breached the Code in the way he or she has dispensed the medical services to the patient, and that doctor is found liable under, or in breach of the Code under Part 4. But the conduct of the Medical Centre of itself is not sufficient to warrant an adverse finding of a breach of the Code in its own, on its own part, that is under Part 4. Section 72 enables the HDC to make an imputed breach finding that the Centre is responsible for the omissions and the conduct of the doctor.

So the simple point is that it's not at all the case that a breach under section 72, or an adverse finding against an employing authority under section 72, would always be the subject of a direct breach on its part under Part 4. Obviously fact-dependent and specifics and so forth, but there is an example.

WINKELMANN CJ:

I mean isn't section 72 read as really a little bit of a codification, or an attempt at codification, in the particular context of where, of a health provision, a codification of principles that tend to make others liable for the conduct of an individual. So employment, agency and the only peculiar one there is, which is very context specific, is membership of an employing authority, and that's, this is, section 72 is a clarification that those principles are applying to make people liable under the general scheme.

MR WAALKENS QC:

That's right, but what I'm emphasising is it's not, it won't always be the case that an employing authority who maybe a subject of an adverse finding because of section 72, this, the liability finding under 72 would also have been, in any event, liable under Part 4, which is the point that my learned friend makes for the HDC. There maybe and will be circumstances where the conduct of the employer of its own is not enough to warrant adverse breach findings under Part 4 against the employing authority, but the deeming provision under section 72, and your Honour has rightly described broadly what it's trying to do, with –

WINKELMANN CJ:

Isn't' it saying you'll be liable under the other parts of the Act as if you'd done the Act, isn't that what section 72 is saying, so it's actually to be read as part of the other parts of the Act, because –

MR WAALKENS QC:

Yes, well that's right, but of its own under the – I'm sorry to interrupt your Honour, but under Part 4 had it not been for section 72 the employing authority would not have been found liable at all. So section 72 is deeming the employing authority liable for the conduct of this other person. So my learned friend's point was that interpretation would render completely pointless the section 72 because an employing authority would be, in any event, liable under Part 4 for its own action and conduct and breach of the Code.

WINKELMANN CJ:

And on that interpretation you might explain the heading "Vicarious liability" is relating to section 72 –

MR WAALKENS QC:

Yes. Well can I take you to, I was hunting for that before, it's in the Court of Appeal's judgment at paragraph 63. Here the Court of Appeal is referring to the Tribunal heading "vicarious liability" and it's true to say, as the Court notes, that heading is not mentioned in the human rights, or it doesn't appear in the Human Rights provisions, and in the third sentence: "What significance (if any) should attach to the use of the heading… is debatable. Why did Parliament borrow the common law term? It cannot signify a legislative intention to replicate the law of vicarious liability in general tort law because as already mentioned, the scope of the liability under both s 72 and the Human Rights provisions differs in some respects…" and that's a reference to the sections I took you to earlier of why the Court of Appeal was noting the proviso makes it clear it's referring to direct and personal liability, not vicarious liability.

Then they go on in paragraph 64: "Further, the legislative history of s 72 shows the new heading '[v]icarious liability' only appeared after the third and last version… We are driven to the conclusion that it was intended to do nothing more than convey… type of liability." It's not vicarious liability as such, and it can't be because the proviso words were that "authority's expressed or implied authority, precedent or subsequent" is indeed direct and personal, not vicarious strict liability.

The next point I wanted to make was the Court of Appeal in paragraph 68 – I beg your pardon, 86, I'm sorry, in paragraph 86 dealt with my submission too at the hearing that the proviso words "without express or implied authority" meant that if the employing authority did not authorise the wrongful act, then subsections (4) and (3) didn't apply. They say two things about it. They firstly refer to Hatem, and I'll come to that in a moment, but they then assert that it would render those provisions, that is the proviso provisions utterly pointless.

If the Centre had, itself, authorised the prescription, this prescription, then it would be directly liable. There'd be no need for vicarious liability and I agree. It would be direct, they are directly liable because it's not a vicarious liability terminology at all, give the recognition that something done without the authority of the employing authority wouldn't be captured by it.

I go on to say that in fact, and this is in my paragraph 36 and 37 of my submissions, with construing the commencing words, anything done or omitted, as the Court of Appeal do, to be something in the ordinary course of business, that is what would render the two provisions utterly pointless, and I say that because of what follows in my –

GLAZEBROOK J:
I'm sorry, I don't think I quite got that point.

MR WAALKENS QC:
In my written submissions, your Honour, at paragraph 36 and following I make the point that its interpretation where it relied on the interpretation that acts or omissions in the, it's a reference to anything done in the ordinary course of business, I say that renders utterly pointless the proviso, and I discuss that and I explain that in paragraph 37 and following. To say that an act or omission that occurs in the ordinary course of the business of an employing authority, and we're talking about here in the health arena, well impliedly mean that the proviso can never be accessed to avoid liability because the only focus of the Health and Disability Act is on the provision of health and disability services, and that would mean that any provision of health and disability services, however it might have arisen, if it's to be treated as impliedly authorised –

GLAZEBROOK J:
So are you saying – before you said I think when the Chief Justice asked was that it could be authorised to do the act, or it could be authorised to do the wrongful act. Is your submission that you have to be authorised to do the wrongful act being contrary to what you said before?

MR WAALKENS QC:

Yes, yes. It's referring to an implicit authorisation of the wrongful act, and that's the, that comes back to, as I said earlier, the breaches on the part of Dr Sparks.

GLAZEBROOK J:

Well it would be relatively rare, wouldn't it, to have somebody say you're authorised to give your patient a drug to which they're allergic.

MR WAALKENS QC:

Well they might by implication have done just that by knowing the doctor had a bad record, standing by not doing anything –

GLAZEBROOK J:

But you say they would then be liable under Part 4.

MR WAALKENS QC:

The HDC could look at Part 4, but if Part 4 didn't cut the mustard, then the breach by the doctor could be said to have been also liability of the employing authority under section 72, even though the employing authority may not have itself breached the Code directly.

WINKELMANN CJ:

What you've just said is inconsistent with the general law in relation to vicarious liability for employees, and in relation to general law of agency and principals, isn't it?

MR WAALKENS QC:

Well, this is –

WILLIAM YOUNG J:

Just pause there. I think the law as to agency has been a bit compressed in the discussions to date. There isn't a general principle of vicarious liability of principals for agents. In some respects agents – principals are treated as

liable for agents pretty much as if they were employees, for instance, real estate agents who make misrepresentations when selling property. They're anomalous cases where a person who permits someone else to drive their car is liable for the tortious actions of the driver, said to be vicariously. But in other cases of principal and agent the principal is often said to be liable only if the principal has authorised the wrongful act, not just the authorised course of conduct in which the act occurred, and part of the problem is the law of principal and agent ranges so broad and wide that it's very difficult to get explicit, get a set of simple principles.

WINKELMANN CJ:
Well, but there is a general law in relation to the liability of principals for the actions of their agents, and normally your liable just in a general what of agency? Your liable for the acts of your agents if it's within…

WILLIAM YOUNG J:
I'm not sure there is.

WINKELMANN CJ:
Within the category of conduct that you are authorising to do, even if they do it in a way which causes harm to someone else, so it's when they step outside that range of….

WILLIAM YOUNG J:
Well that's the case of employer/employees, and it's the case for some, for instance if I employ, retain a real estate agent to sell my house, and in the course of trying to sell my house the real estate agent has a car accident, I'm not liable for the real estate's negligence, even though he or she was acting in the course of the agency. So it's actually – part of the problem is that the section seems to have conflated the employee vicarious liability with agency employee liability.

WINKELMANN CJ:

I mean from my reading it doesn't, except it separates note 2 and 3, but in any case what I'm saying to you, Mr Waalkens, is have you looked at this law, because you're saying this is an agency/principal relationship, and then you're saying – so that's what you're saying that's what it's talking about at (3), and therefore, I think it is (3)?

MR WAALKENS QC:

Yes, three, subsection (3).

WINKELMANN CJ:

Yes, and therefore you're saying, so you're attempting to apply the law of principal an agents, agency to the situation. What I'm saying to you is have you found support for your proposition as to this very narrow scope of liability for a principal in the law of principal and agents?

MR WAALKENS QC:

Well as Justice Young just identified, the text Todd has an excellent discussion on this from under the paragraph 22.7, it's not before the Court, but it makes the point in that paragraph, nor is there any general rule suggesting that a principal is vicarious liable for a tort whenever it's committed by a person acting on the principal's behalf –

WINKELMANN CJ:

That's my point. You're saying it's not vicarious liability, you're saying it's agency, so you wouldn't go to tort on vicarious liability, you might, for instance, go to (inaudible 12:06:05) on agency, so you can't, you're mixing your arguments up. You're saying it's not vicarious liability, we're just talking about principal and agent here. Isn't that your argument?

MR WAALKENS QC:

Yes, that is right, yes. It's not vicarious liability at all. The heading is a misnomer.

WINKELMANN CJ:

Well, I mean on my reading of the heading it relates to section 72(2), which is the employee relationship perhaps, but what I'm asking is if we are in the area of principal and agents, and not vicarious liability, as you say, do you have any authority for your proposition that the liability for the principal is so narrow as you would say, because it's an unusual formulation for principal.

WILLIAM YOUNG J:

It's set out in the Court of Appeal judgment in broad terms at para 48. I don't know, I don't actually entirely agree with that summary, but that does set out, refer to the law.

MR WAALKENS QC:

That is right –

GLAZEBROOK J:

But if it's an agent, you say, I authorise you to deliver these goods to this person, and you either, and you deliver faulty goods to the person…

WILLIAM YOUNG J:

Well then the principal is liable for not having delivered the right goods.

GLAZEBROOK J:

Well, exactly.

WILLIAM YOUNG J:

So that's why there's a lot of debate about whether liability in this area in any event is direct or vicarious. In some respects if plainly is vicarious, for instance, the driver/owner cases.

WINKELMANN CJ:

Yes, and that's a mis-statement of the law at paragraph 48, if it's taken to be a complete statement of the law in relation to agents, principals are liable for the actions of their agents. You can't just say it has to be authority of the wrong,

that's not the law of agency as I've ever understood it. The principal has to authorise the actual wrongful, you know, say yes I authorised you to go and commit a wrongful act. So if they don't authorise, for instance, an assault on the patient, to be liable for the assault on the patient, if we're in a world where you could be liable for the assault on a patient. Well we are I suppose, yes.

MR WAALKENS QC:

I commend, just on this, I would commend to you the brief discussion in Todd at paragraph 22.7, which the Court of Appeal referred in part to it in their footnote 30 at page 1249, of the Todd text, but there's a very useful discussion on this. It does set out clearly what the limits of, the liability of the principal is to a tort or the conduct of an agent, it's certainly not broad.

GLAZEBROOK J:

Well just to be clear, you say that the Medical Centre must have, by implication or expressly, authorised Dr Sparks to give a drug to which the patient was allergic.

MR WAALKENS QC:

Correct.

GLAZEBROOK J:

And that could be impliedly by not doing something about it?

MR WAALKENS QC:

Correct. And it could be even subsequent to the events making it clear that Dr Sparks in the meeting after the event that actually it's not a big deal and we're not going to do anything about it. We stand by what you did and understand why you did it.

WILLIAM YOUNG J:

That's ratification by implied authority subsequent.

MR WAALKENS QC:

Yes, that's right, that's ratification, picking up the last word of the subsection, subsequent.

WINKELMANN CJ:

So just to recap your argument then, Mr Waalkens, your argument is that Dr Sparks was not an agent of the Medical Centre…

MR WAALKENS QC:

No, that's right.

WINKELMANN CJ:

And even if he was he wasn't authorised.

MR WAALKENS QC:

And even if he was – yes, that's right.

WINKELMANN CJ:

And you say at section 72(4), about section 72(4), you say that just doesn't apply to this circumstance?

MR WAALKENS QC:

Yes. So I say that for the reasons that the Court of Appeal rejected the agency argument on the basis that – and that's paragraph 80 in the file – at 80 they say there's "strong argument" they're in "separate entities".

WINKELMANN CJ:

So can you help us all with the history of section 72(4), contextualising it?

MR WAALKENS QC:

I can do no better than how the Court of Appeal have set it out in the judgment. We've all been back and looked at Hansard and other sections and the earlier iterations of it.

WINKELMANN CJ:

And you say it's intended to apply in circumstances such as…

MR WAALKENS QC:

Section 72, do you mean?

WINKELMANN CJ:

Section 72(4).

MR WAALKENS QC:

Yes, 72(4).

WINKELMANN CJ:

Which is the member thing.

MR WAALKENS QC:

Oh, the member one. Yes, the Court of Appeal do refer to the history of it and they refer to various health authorities and the like. But an example might be a cluster, a group of medical providers who are in something short of a separate entity, as like in a club, a sporting club or something, you could get a group of medical providers, physiotherapists, doctors, all working in the same building under the same umbrella or the broad entity, where it might be said that one is a member of the entity. It's not this case. I say that this case, the answer's that the Court of Appeal's rightful rejection of any serious argument that there is an agency situation must also apply under the heading of "member". I accept the Court of Appeal's argument that "member" has to be something bigger and broader than an agent, but because these two people were operating separately, as they were when the consultation took place, the same reasoning for "member" must apply to "agency".

Now the only other thing I wanted to say, your Honour, it's in my written submissions as the Court of Appeal's reliance on *Hatem,* and the Court in that regard used *Hatem* to introduce this concept of ordinary course of business to cast the, commencing with "anything done or omitted by a person" to be, as

was seen in *Hatem,* to be something in the ordinary course of business, and your Honours will have read in my submissions the big distinctions with *Hatem* are severalfold. One is it was a partnership under the Partnership Act.

WILLIAM YOUNG J:
Well, this probably was too, and if not a partnership it was a joint venture that was substantially the same as a partnership.

MR WAALKENS QC:
That's a better way of putting it, your Honour, yes. There were very compelling policy reasons why the Court construed the comparable sections under the Human Rights Act as broadly as they did, and that's at page 311 of *Hatem*, and the difficulty is how to hold an entity or a person responsible for sexual harassment. It was seen by the Court, and rightly so, as being within the purpose of the Human Rights Act to interpret that very broadly, and we don't have that concern for doctors in the health arena because they are each in their own right held responsible though the Medical Council, through the Health Practitioners Competence Assurance Act, and other factors that don't apply to a body like in the *Hatem* case in that joint venture partnership-type arrangement. And in *Hatem* the only reference to vicarious liability is right at the every end of the discussion at page 312 line 39, and you'll see there on the screen: "As the firm is said to be liable for the (statutory) tort," they say there there's a "direct analogy with vicarious liability in the general law of tort" and, as the Court of Appeal said in this case, this section really isn't one of vicarious liability at all.

And the last matter I wanted to address your Honours on is the point my learned friend made –

WINKELMANN CJ:
Are you saying the whole section's not vicarious liability? You don't need to go that far, do you?

MR WAALKENS QC:

I don't need to go that far, but it's –

WINKELMANN CJ:

No. From my reading of it, section 72(2) is vicarious liability and that's how it's…

MR WAALKENS QC:

I'm sorry, I did make that point in my written submissions, the employee, employer/employee is absolutely, subsection (2) is precisely vicarious liability, but the two sections relating to agency and members are not. That is as I've said in my written submissions.

WINKELMANN CJ:

Yes.

MR WAALKENS QC:

And the last thing I wanted to address your Honours on is the centralised patient note point that's made by my learned friend in her submissions, and you'll find that really at paragraph 88 of the main discussion of it, although it's also discussed in her paragraph 7, and my learned friend there said: "The centralised patient management system with patient information shared across the clinic is particularly significant. If the two doctors did operate truly independent practices then this would raise serious issues under the Health Information Privacy Code. Their practice clearly involves full access to each other's patient records. That would be in breach of the Privacy Code," as I said, "unless together they constituted a single entity," and that is not the case. The Health Information Privacy Code, which is now on the screen, you'll see under Rule 11 subrule (1): "A health agency that holds health information must not disclose the information unless the agency believes on reasonable grounds…" So this is the sharing between the two doctors, as my learned friend is asserting, and you'll see under subpart (b), (1)(b): "that the disclosure is authorised by the individual concerned," and if we can just run a little ahead for the moment across the page, Rule 11 subrule (2), it is there

said compliance with that subrule, that is where it's authorised, "is not necessary if the agency believes on reasonable grounds that it is either not desirable or not practicable to obtain authorisation from the individual concerned". If we just go back to subrule (1), there are two grounds that would permit what has happened here under the health medical, accessing of medical records regime, part (b): "that the disclosure is authorised by the individual" or (c): "that the disclosure of the information is one of the purposes in connection with which the information was obtained".

So one of the purposes of obtaining information that gets recorded onto the patient's records is to enable other doctors, other health care providers, to understand how the patient's health is being managed. So there's nothing inappropriate at all within medicine of doctors having access to another provider's records, and that is why when –

GLAZEBROOK J:
Are you suggesting that they could actually provide these just generally on an absolutely free basis to every doctor in New Zealand?

MR WAALKENS QC:
No, not at all. But just as if you go and have a specialist examination, like an X-ray or some investigation on a shoulder injury, the clinician, the expert, the radiologist or whatever or the orthopaedic surgeon, is able to access your previous records when you've had previous assessment made –

GLAZEBROOK J:
But only from that particular provider, they can't access other…

MR WAALKENS QC:
No, not at all.

GLAZEBROOK J:
But they can't access the GP's records. I know everybody thinks that would be –

WINKELMANN CJ:

I mean, there is a high level. Well, perhaps Mr Waalkens you could just outline that for us, because my understanding is that there is a high level of information sharing that goes on in the medical, in the health sector.

MR WAALKENS QC:

Absolutely. Doctors can go online and access all manner of information about patients and many –

WILLIAM YOUNG J:

But just pausing here, in this instance the access is only between the Medical Centre partnership, if you like it, and a person, a doctor, who was treating a patient who's come in to see a doctor at that Medical Centre.

MR WAALKENS QC:

On this case that is the sharing of the records.

WILLIAM YOUNG J:

Yes.

MR WAALKENS QC:

But the mere fact that these records are being shared when one of the purposes of obtain the records is to enable subsequent assessments to have access to records it's, "precisely authorised" doesn't by any, it just simply doesn't follow that that means that they are deemed to be a partnership or whatever else.

WILLIAM YOUNG J:

It gives a slight support for the view that the service is being provided by the Medical Centre rather than the individual doctors, but it's hardly controlling of that. The patient in this case would have expected Dr Sparks to have access to Dr Ryan's notes.

MR WAALKENS QC:

Correct. And that's actually –

GLAZEBROOK J:

Yes, I wasn't suggesting there was anything wrong with it, I was just suggesting that in giving authorisation in respect of the particular medical centre I don't think the patient could be said to be giving authorisation for any old person, apart from someone in that medical, to look at the record. I'm not sure that it makes any difference but…

WILLIAM YOUNG J:

Perhaps just going back, just by way of illustration, how did the pharmacist know that the patient had an allergy?

MR WAALKENS QC:

Well, that's right, because they go onto the records, they have access to the records. And so my learned friend actually touches on this very issue about how widely accessible records reasonably are in the community with the practice of medicine, and that's paragraph 94 of my learned friend's submissions.

GLAZEBROOK J:

But I'm assuming, just like every record that's accessible, it would be wrong to look at records that you don't have a reason to look at? I mean a medical reason to look at.

MR WAALKENS QC:

Yes, that would be a breach of privacy, to be accessing records that have got nothing, so going into psychiatric records or something for a presentation, absolutely nothing to do with a psychiatric issue, would not be permitted. But if Dr Sparks' patient who he was seeing on this day, was consulting him for psychiatric related issue, Dr Sparks would be quite entitled to access whatever other health provider psychiatric material may be available, and if you go to 94, it's up on the screen now, my friend has said: "As part of the

combined service the patient reasonably expects that all the GPs and other health professionals in the centre will have full access to his or her records…and will be co-operating to ensure that the combined care is provided to the required standard." It goes in fact even a lot further than that, you can access records from outside of the centre too.

So unless there are any other matters, those are the submissions.

WINKELMANN CJ:
Thank you, Mr Waalkens. Ms Casey.

MS CASEY QC:
Thank you, your Honour. I think all the parties were anticipating that Mr McClelland might follow and then I'd just have a single response.

WINKELMANN CJ:
Right, okay, thank you. Mr McClelland, are you there?

MR McCLELLAND QC:
I'm sorry…

WINKELMANN CJ:
Yes, you are, you're back.

MR McCLELLAND QC:
What I was saying first was I thought I was following Ms Casey, but that's not a problem. But it seems to me that Mr Waalkens has covered all the points really that I would have intended to make in my submissions and that had been addressed in the Intervener's evidence from Dr Baddock. Your Honours may have particular issue that you'd like me to address.

This is of considerable concern to the NZMA because the members very much feel, and it's not just GPs, it's specialists and all sorts of different health practitioners, they believe that when they consult they are doing it very much

independently and separately from anyone else, and their concern about this decision is that there's simply, there are so many decisions that go on within a consultation there's simply no way that an employing authority can monitor those decisions or, indeed, influence those decisions, and so their view, their position, very much is: "We are regulated in so many different ways, there are so many different ways that our practice is monitored through the Medical Council, through HDC, through ACC, through the Privacy Commissioner and various other forms, the feeling is that being held vicariously liable in situations like this really just doesn't achieve any extra level of protection for the health consumers, their concern is they simply have no control, they would have no control for example where a patient goes in to see a doctor with a skin condition and the doctor says: "No, that's okay, we'll just leave it," and then that develops into a cancerous lesion. There's nothing that anyone outside of that consultation can do, there's no way that a policy can be introduced that would address such an issue, it's entirely up to the doctor's training and expertise and if he or she gets it wrong then they obviously answer to the HDC or the Medical Council or the Health Practitioners Disciplinary Tribunal.

WINKELMANN CJ:

Do you say that's reflected in the scheme of that legislation? Because section 72(2), which makes you liable for your employees' actions, whether it's done or, I imagine, with that employer's, authority's, knowledge or approval, but the employer can escape that liability by showing that they had done everything reasonably practical to prevent that happening, that's a different scheme than applies for the agency or the membership liability.

MR McCLELLAND QC:

Yes, and I think Mr Waalkens makes that point in his submission, your Honour, is that the employer/employee relationship where the employer probably has more control than perhaps an agent or a member, the employer has that out under subsection (5) where that isn't the case for agents or members.

WILLIAM YOUNG J:

Well, you'd expect liability for the actions of an employee to be more stringent, ie, more exacting on employers than liability on a principal for the actions of an agent, I guess.

MR McCLELLAND QC:

Yes, your Honour, and the other issue is now, I think we described it as "super practices" we have practices where it's not only GPs, it's podiatrists and physiotherapists and pharmacists and all different range of health practitioners, and then you have other instances where, particularly in rural areas, you have visiting specialist like a cardiologist or whatever. They have access, all of those people, irrespective of what particular discipline that they practice, they will have access to the notes, the notes of the collective for the patient, and provided they access those notes to provide appropriate treatment then there's nothing wrong with doing that. But it seems that if you are the employing authority, and you're perhaps a doctor, you could be held liable theoretically for the actions or shortcomings of the pharmacist or the physiotherapist or podiatrist or whatever.

WINKELMANN CJ:

So what do you say about Mr Waalkens' point regarding the meaning of the employing authority's express or implied authority "precedent or subsequent"?

MR McCLELLAND QC:

Well, thinking about that, your Honour, one account of that may well be that, you may recall when we were being vaccinated we had to wait after the shot for 15 minutes, and many GPs were concerned: "Well, where are we going to put all these people because our waiting room doesn't have enough room?" So if, for example, a medical centre said: "Well, we're not going to say you have to wait for 15 minutes, we're going to say you only have to wait for five minutes," and as a result of that someone became seriously ill, then that is where the employing authority would be found to be liable under section 72, because –

GLAZEBROOK J:

Why not under Part 4?

MR McCLELLAND QC:

Well, that may well be the case as well, your Honour.

WINKELMANN CJ:

So you agree with Mr Waalkens that it has to be, you'd have to authorise a wrongful act?

MR McCLELLAND QC:

Yes. And I agree that you're not going to get a medical centre saying: "We authorise you not to," or, "We authorise you to prescribe a drug that's contra-indicated," and that obviously won't happen. But in the vaccine instance that is a possibility. But at the end of the day the public is protected because the doctor personally will be investigated and in all probability will be found liable either for a breach or end up before the Tribunal. So just holding this practice vicariously liable really, in our submission, achieves nothing, and –

WINKELMANN CJ:

What about if you're using, for instance, an agent to attend and you know that that agent has multiple investigations underway and that the situation you're placing them in is risky? So, say it was Dr Ryan here, on Mr Waalkens' analysis he's acting, it's section 72(3), he's allowing Dr Sparks to see his patient. Say that was an agency wouldn't – actually, don't use Dr Sparks – say he was allowing someone who was a problematic practitioner who was known to be risky and he was putting them into a risky situation, would he still be able to escape liability unless it could be shown that he's actually authorised a wrongful act?

MR McCLELLAND QC:

That's a bit like the *Waikanae Health Centre* issue, where Dr Ben-Dom was doing unnecessary breast examinations, and in that case the Waikanae

Health was found to be liable, directly liable. But that was overturned by Justice Muir, and part of the difficulty that Justice Muir had in that case, and this is a difficulty that NZMA has, is there's no reasoning as to why the Health Centre was found liable. The purpose of these opinions by the Commissioner is to set standards and is to educate. But when you read the two or three paragraphs relevant to the vicarious liability under (inaudible 12:35:24) there is no education, and there's no standards, and as Justice Muir said there is no explanation as to what they should have done.

WINKELMANN CJ:
I suppose the answer to my own question might be that the fact that those actions they take in putting them into a risky situation without supervision might, in fact, be the wrongful acts themselves.

MR McCLELLAND QC:
Yes.

WINKELMANN CJ:
So you don't need section 72, it's their own acts, so they're ones that are, tried to be in breach.

MR McCLELLAND QC:
And that's what the *Waikanae* case was all about, yes.

WINKELMANN CJ:
Does anyone else have questions of Mr McClelland? No? Thank you Mr McClelland.

MR McCLELLAND QC:
Thank you your Honour. Ms Casey.

MS CASEY QC:
Thank you your Honour, members of the Court. I'm conscious of the time and I thought it might be helpful just to start addressing some of the matters that

my learned friend took you to just immediately before Mr McClelland's submissions. So –

WINKELMANN CJ:

If we do have to run over after lunch a little, because of how disruptive the morning is, we'll do that, so you're not compressed for time.

MS CASEY QC:

Thank you very much your Honour. I just wanted to start perhaps then addressing the core substance I think of my learned friend Mr McClelland's submission, which is it's not in the public interest, and it's not good for doctors for vicarious liability to be imposed on GP practices. Your Honours, that decision has already been made by Parliament and what we're looking at here is the interpretation of what are the limits and extent of that liability, and while public policy –

WILLIAM YOUNG J:

Well, just pause there. I agree with that to this extent, but the decision has been made to the extent to which the Medical Centre is providing the service and the individual doctor is acting as the employee or agent for the medical service. So that's clear.

MS CASEY QC:

Yes.

WILLIAM YOUNG J:

But the issue is whether and in what circumstances one should construe sole practitioner doctors, who are providing services they say to their own patients, but under the aegis of an expense sharing arrangement, and a public facing arrangement, the agents of a medical centre which they don't regard as actually providing the services in question.

MS CASEY QC:

Your Honour, that is one of three questions I think before the Court. The first is that is the question that is supported by the Commission's notice to support the decision on other grounds. We take the position that the Court of Appeal was too narrow in its approach to agency. But we also very firmly agree with the Court of Appeal, and it's been a common ground all the way through this case, is that in terms of the outcome for the Moore Street Medical Centre, it's actually not a significant matter because the subsection (4) of "member", the Court of Appeal held would apply even if agency didn't, and –

WILLIAM YOUNG J:

Sorry, just pause there. It only applies if it was the Medical Centre, if the doctor, Dr Sparks was acting as a member of the Medical Centre partnership when providing these services.

MS CASEY QC:

Yes.

WILLIAM YOUNG J:

If Dr Sparks was acting simply as a sole practitioner, seeing a patient who happened to be Dr Ryan's patient, then the membership argument falls away on exactly the same basis as the agency argument, doesn't it? You're assuming the Medical Centre –

MS CASEY QC:

Well it falls away equally –

WILLIAM YOUNG J:

Yes, you're suggesting the Medical Centre is providing the medical services that were an issue in this case, and that's obviously in dispute.

MS CASEY QC:

Yes your Honour, and that's why we say that's the second issue in the case and –

WILLIAM YOUNG J:

Yes, but I don't see them as alternatives.

MS CASEY QC:

– in a way more substantive.

WILLIAM YOUNG J:

I don't see them actually as alternatives. I mean it seems to me that if you miss out on the agency then you would miss out for the same reason on the member because, simply on the basis that this wasn't a consultation where the Medical Centre was directly involved.

WINKELMANN CJ:

And to flip it around another way, it is a significant matter to say that they're a member because that means that Part 4 applies directly to them, so it does seem to me a significant matter so bootstrapping itself up –

MS CASEY QC:

Thank you for those indications, and just while I'm finishing the outline, of course the separate issue is whether the authorisation contemplated in the proviso of (2) or (3).

WINKELMANN CJ:

Right, the scope –

MS CASEY QC:

I'm sorry your Honour, I'm pausing because I'm not sure if I – I saw your Honour speaking but I wasn't hearing, so I'm not sure if I've got a lag in transmission or not.

WINKELMANN CJ:

Can you hear me Ms Casey?

MS CASEY QC:

Yes I can Ma'am. You look to be speaking later so I'll account for that and listen rather than look. Your Honours, the other question, of course, before this Court is express or implied authority and the question of whether that requires authorisation of the wrongful act or of the conduct in general. But if it's useful for your Honours I will start with the membership issue first, and the agency issue. Your Honour Justice Young we wouldn't –

GLAZEBROOK J:

I'm sorry, Ms Casey, I apologise, but I think in the exchange I've now lost what you said the issues were in relation to agency and membership. So perhaps before you start, could you just outline the issues again. I'm sorry, but…

MS CASEY QC:

So in terms of subsection (3), agency, the Court of Appeal held that they thought it was a problematic route for the Commissioner to go down. They didn't make a firm finding that there wasn't an agency, but as my learned friend has pointed out they said there are strong arguments that there's no agency in terms of an individual consultation. The Health and Disability Commissioner has filed a notice in support on other grounds, and the essence of that argument is that the Court of Appeal in paragraph 40, contrary to what my learned friend Mr Waalkens has been outlining to you, didn't say that the practice was different or distinct. What they relied on was the fact that this was an area where the two doctors didn't share profits and what the Commissioner has said in its notice to support from other grounds is that it supports a broader version, or a broader view of what agency is, in the context of the Health and Disability Commissioner Act, given the purposes and objectives of that Act, and your Honours we refer you to the decision of this Court in the *Hickman v Turn and Wave Ltd* [2012] NZSC 72, [2013] 1 NZLR 741 where the Court in the context of the consumer protection provisions of the Securities Act 1978 took a broad view as to the scope of agency. So essentially the Commissioner's position is that that would be the appropriate broad approach to agency to take in the present case, and to treat both doctors as agents of the Medical Centre, and your Honours –

WILLIAM YOUNG J:

Why is that in the interests of the consumer? Why is it in the interests of the consumer there, that the Medical Centre has a finding against it?

MS CASEY QC:

A vicarious liability finding?

WILLIAM YOUNG J:

Yes.

MS CASEY QC:

So as the Commissioner, yes. Very basically your Honour, if you go back to the purpose of the Health and Disability Commissioner Act and its origins, this Act and the regime of the Commissioner was designed to address the very issue that my learned friend Mr McClelland was talking about, and Mr Waalkens. They were telling you that doctors are subject to discipline and, their individual decisions are subject to a disciplinary process. Now your Honours will be familiar and recall the origins of the Cartwright Inquiry and the unfortunate experiment where what was realised as a result of that process was that the protections of an individual disciplinary process were not sufficient to ensure patient safety or that patients' rights were respected, and that's the origin of the Act, and it sits alongside, of course, the ACC regime, which –

WILLIAM YOUNG J:

Sorry, just pause there. I don't think there's any dispute that the Act is a consumer focus, but why is that consumer focus improved by holding the Medical Centre liable when it didn't do anything wrong?

MS CASEY QC:

That's the point I was just about to, the next step of the origins of the Act your Honour, was that what's missing under an individual disciplinary process, which other professions are subject to because they don't have the ACC bar, is a systemic and organisational accountability, and Mr Hill, the former

Commissioner's evidence in response to NZMA discusses this in quite a lot od detail. It's also the focus of the health strategy, which is brought into the Health and Disability Commissioner Act, is that safety and rights are not adequately protected just by focusing on the individual conduct. We need to look at systems, and we need to look at operational aspects, and this is routine –

GLAZEBROOK J:
But here the systems were found to be fine, so – well at least there were no findings against them in relation to those systems, so I think the issue is why actually, even if it's allowed as a matter of law, as a matter of practice, why on earth was this finding made?

MS CASEY QC:
Thank you your Honour. The systems weren't fine, as is apparent from the system improvements that were put in place immediately after this, which was the two doctors together agreed that the process of the Medical Centre –

GLAZEBROOK J:
But there were no criticism of the systems in the report, was there?

MS CASEY QC:
There was no criticism of the written policies, they were agreed to be fine. There's no finding of direct breach by the practice, that's correct, and that's, to come back to your Honour Justice Young and your Honour Justice Glazebrook's question, vicarious liability is an additional tool when you are trying to drive operational systemic change at an organisational level, this is what the Court of Appeal in *Hatem* said, is that even though the partnership in *Hatem* had no fault in the sexual harassment that took place, change is more likely to occur, and we promote it more strongly, with vicarious liability, and that is the policy decision of vicarious liability.

WINKELMANN CJ:

Ms Casey, your argument is postulated in part on – it's based in part on the notion that there's a gap unless you extend liability under section 72 to the Medical Centre, but if the – everyone accepts the Medical Centre was a health care provider, if the Medical Centre's processes were defective they could have been found directly liable under the provisions of Part 4. So say there had been a finding that there were these gaps that you say that there were in their systems, they could have been found directly liable, so I'm not seeing where the gap is. It doesn't seem to me that those provisions are really aiming at that situation, they're more aiming at a situation that's say, where someone is putting people out into the world as health providers and in some way that they should be held responsible for them, so their actions that are wrongful, as Mr Waalkens said, so there is already direct responsibility on anyone who is a health provider.

MS CASEY QC:

Yes your Honour, and the point about whether there was wrongful conduct from the Medical Centre, as my learned friend took you to is the *Waikanae* case, the issue there was they knew, they stood back, they did – did they do enough to prevent it, and that was a direct liability. So section 72 and the concept of deemed liability, whether we call it vicarious or not, but section 72 is clearly a deemed strict liability provision. It's not filling a gap in Part 4. Part 4 is fine. Part R picks up every direct breach and every act and omission by both practitioners and organisations, and that's the core. Section 72 just adds another layer in terms of policy –

WINKELMANN CJ:

Just pause, I'll tell you thinking about section 72. I'm with you that section 72(2) looks like strict liability, because it says with, you know, it doesn't matter that you don't know or approve, but then it's subject to the out in (5), but (3) and (4) don't look like strict liability to me because they are requiring that the Act be done with the express or implied authority of the principal or entity which is, or the employing authority under (4). So that's not the language of strict liability. Your fault is the authority that you've provided.

MS CASEY QC:

Your Honour, I would submit that there's a different interpretation available to (3) and (4) and the point is to break the (2) in half as my learned friend has done. He talks about the proviso. So, your Honour, just looking at – and I see it's up on the screen – as a simple statutory interpretation, the concept in (2), (3) and (4) are the same. They are, for the purpose of the Act, the conduct of one is deemed to be the conduct of the other. So the conduct of the agent, member or employee is deemed to be the conduct of the health services provider. So that is –

WINKELMANN CJ:

Do you accept though that the basis of liability under section 72(2) is that you're liable whether or not you knew or approved of the conduct, whereas the basis for liability under section 72(3) and (4) is only you are only liable if you expressly implied or authorised the conduct which is a different basis of liability?

MS CASEY QC:

I do and – well, it's not a different basis; it's a different scope, your Honour, if I may put it this way. So (2), (3) and (4) are classic strict liability, vicarious liability, deemed liability might be the neutral term. All three are deemed liability provisions. But the proviso in (2) is much broader the proviso in (3) and (4). So the proviso in (2) covers every conduct by an employee, whether or not it's within the scope of the business of the health provider, and that, in our respectful submission, is the reason why you've got a limited defence in (5) because (2) is expressed in far wider terms than vicarious liability would be in common law. So it would pick up the sort of examples where an employee is not just acting in the course of the business of the provider but is also on a frolic of their own. So, for example, if you had a nurse practitioner who –

WILLIAM YOUNG J:

Just pause there. That's not necessarily so. It imposes liability for an act done or omitted by a person as the employee.

MS CASEY QC:

Yes.

WILLIAM YOUNG J:

So the liability is confined to actions or inactions that occur in the context of the employee performing that employee's obligation as employee. Now that's pretty much the same as vicarious liability for – that an employer has for the acts of an employee, and the sort of – and notwithstanding just corresponds in a very broad way with the general law.

MS CASEY QC:

Your Honour, that may be the way of looking it. The Court in *Hatem* and the Court of Appeal in this case looked at (3) and (4), and the High Court in this case as well, and said that the usual scope of vicarious liability, being omitted without express or implied authority, precedent or subsequent, effectively relates to ordinary course of business, or in the UK Supreme Court cases that are evolving now, close connection to the business of the entity. So my respectful submission is that (3) and (4) are, to paraphrase your Honour, Justice Winkelmann's, phrase, an attempt to codify what was understood of a common law vicarious liability at that time, and key –

WILLIAM YOUNG J:

You see, I'm not sure it does –

WINKELMANN CJ:

Were you paraphrasing – can I just say that's not what I said. I said that section 72 was an attempt to codify different ways that there can be deemed liability, as you say, and I said (2) was vicarious liability, (3) was agency and (4) was some special thing to do with the health sector which I'm not sure we've got to the bottom of.

MS CASEY QC:

Sorry, your Honour, if I misunderstood or misphrased. But my respectful submission is that 72 as a whole is intending to convey the concept of

"vicarious liability" and it's helpful to break it down. So employees are covered and they are covered on a wider basis than (3) and (4). So the only different between (3) and (4) is the scope of the conduct for which the employee's actions will be deemed to be the actions of the principal. So (2) is clearly wider than (3) and (4). So then the question is how narrow is the proviso in (3) and (4)? What does it mean to implicitly or explicitly authorise the conduct, and respectfully that question is the question of, is it required that the employing authority authorises the conduct, or authorises the wrongful act.

WINKELMANN CJ:

Can I just find the language "proviso" here is a little bit tricky. I'm minded to see the only proviso as being subsection (5) and I don't know why we're talking about provisos. Do we mean qualifying words –

MS CASEY QC:

Your Honour, sorry I was –

WINKELMANN CJ:

I know it's Mr Waalkens' submission –

MS CASEY QC:

I was using my learned friend's.

WINKELMANN CJ:

Yes, I find it confusing and I'm not quite sure what is meant by this. Is it the expression used to capture the basis for liability, you know, whether it's strict liability in (2) or on the basis of implied authority at (3) and (4), is that what you're trying to capture, the basis of liability?

MS CASEY QC:

No your Honour. What I'm trying to capture is the submission that (2), (3) and (4) are vicarious liability provisions, but the second part of each section, each subsection describes the conduct which agency A is deemed to be responsible. It's a limitation or an expansion. What conduct is the employing

authority responsible for, because (2), (3) and (4) deemed certain conduct to be that of the employing authority, and they deem it without fault. If you look at the first part the words that are the same all the way through are deeming. So the second part of each subsection is what conduct is it that's deemed, is attributed to the employing authority. For (3) –

WILLIAM YOUNG J:
Sorry, Ms Casey, when you say (2), (3) and (4) deem it without fault, but that presupposes what you're trying to establish with the unless without –

MS CASEY QC:
Your Honour you're right, yes, and that's to me the crunch question for this Court is not whether we call this "deeming liability" or "vicarious liability" but is respectfully to recognise that (2), (3) and (4) start as a deeming provision, and then the issue for the Court is under (3) and (4), what is the scope of the conduct that is, belongs to the employing authority and my respectful submission, your Honour, is that the contest now, and my learned friend Mr Waalkens is helpfully very clear on this, is does implied authority import the concept of conduct that is generally authorised by the employing authority, so within the ordinary scope of business, or closely connected with the business, or however we would phrase that in common law vicarious liability, or is it limited to conduct, the actual wrong conduct.

So is (3) limited, is the scope of deemed liability ordinary course of business, close connection with business, or is it that the health provider must have authorised the wrongful conduct itself, and it seems to be the key issue, and the Commissioner's very firm position is that the Court of Appeal and the High Court were correct, that the Court of Appeal in *Hatem* were correct, that this Court in the *Nathan v Dollars and Sense Ltd* [2008] NZSC 20; [2008] 2 NZLR 557 case were correct that the concept of deemed liability here relates to the conduct, not the mode of its performance. So – and the UK Supreme Court cases here are in the same concept. Whether it's an employee, an agent or a member, the concept is that liability will accrue if the

conduct is authorised, and this conduct clearly was, going back of course to assuming whether they were in a member situation at all.

WILLIAM YOUNG J:

Ms Casey, it's not anything like as clear cut as that in relation to principal and agent. I agree it is pretty much as simple as that with employers/employees. There are all manner of agents I might employ to do something, and if they do it negligently I'm not liable. I mean the example of, if I ask someone to go and look at a property for me, and they have an accident on the way, there's no way I'm liable for that, and yet your submission just sort of, whereas if that person were my employee, I would be liable. So they are different and –

GLAZEBROOK J:

I think what Ms Casey is saying here, it's whether you're authorised to give drugs, and therefore when you're giving drugs if you do that wrongfully –

WILLIAM YOUNG J:

Oh no, I understand that. If these words "unless it was done without the employing authority's express or implied authority present and or subsequent" were in (2), I would entirely agree that the concept was to the course of conduct, was the person acting – the course of conduct of the person concerned within the authority of the employer. But it's not within (2), it's within (3) and (4) and I would expect (3) and (4) liability to be more narrow than liability under (2). So probably to my way of thinking that suggests that it is not, it doesn't, it isn't just the course of conduct knowledge and approval, it's the – or authority, it's the breach authority. Which is sometimes said to be the case in relation to principal's liability for the acts of an agent.

MS CASEY QC:

Well if I may answer that in probably three steps, except for it is 1 o'clock. Should I just give my answer to that or would it…

WINKELMANN CJ:

Perhaps answer it after, but the difference Justice Young – what I'm about to say, and Justice Young and I might also frame the issues for you, because I take a different view to him. I think that the law of agency is, as you say, in relation to the reliability of principals, the actions of their agents as it's captured in *Dollars and Sense* and elsewhere, but it seems to be when you look at the scheme of this legislation Justice Young must be right about how it's applying in this case and that might be that the framers thought of it as capturing quite (inaudible 13:01:47) agency relationships so that they were only going to make people liable for those kind of, those agency relationships we often loosely call agents but aren't really agents as the law would say, are they going to make you liable for your agent's actions if you actually authorised the wrongful act, and that seems to be supported by the statutory scheme that Justice Young has just outlined to you, and also by the fact that if in fact they are doing something wrongful, that public policy would want us to stop them doing, they should be directly liable under Part 4. So that's the – so you've got the law of agency and the statutory scheme in your way at the moment, Ms Casey, is what I'm saying to you.

MS CASEY QC:

Thank you for that indication your Honour.

WINKELMANN CJ:

Just a bit of encouragement for you before lunch. So we'll come back at 2 o'clock.

COURT ADJOURNS: 1.02 PM

COURT RESUMES: 2.04 PM

WINKELMANN CJ:

Right, Ms Casey?

MS CASEY QC:

Thank you your Honours. What I propose to do is address issues in this order, if that suits the Court. First of all to address the broader point of the statutory scheme, or the regime, what is vicarious liability's role here and why do we say that's what Parliament intended. Second, to address the issue of the limitations of vicarious liability between principals and agents in common law. Third, to turn to the factual question of whether Dr Sparks was delivering services as a member or agent of the Medical Centre. That should pretty much canvas the Commission's whole case in any event.

So starting with the question of what is vicarious liability, or deemed liability for agents and members, what's it role here. Why does the Commission say that implied authority is not the authorisation of the role, but the course of business equivalent. The first point I'd like to make, I've got five points to make here. The first is that it's acknowledged and it's obvious that the Health and Disability Commissioner Act is a consumer rights and consumer protection regime, but it's necessary to step back and consider what implications that has. We are not talking about a disciplinary process for an individual doctor. So when we talk about vicarious liability or what liability should a doctor have, we're not focused on what is fair and reasonable for an individual doctor, that's the disciplinary process part. What we're focused on is, is this a useful tool for the protection and promotion of consumer rights, and for every submission that I make that follows, that core is Parliament here and the regime here is focusing on, is this a useful thing for protecting and promoting consumer rights. The fact that –

WINKELMANN CJ:

I think that might be a slight mis-phrasing because when we talk about consumer rights we're talking about normally their rights to the Code rights but really aren't you talking about promoting very good standards of care, consent et cetera? Promoting good standards I suppose is what –

MS CASEY QC:

Yes, your Honour, the Chief Justice, those are the core of the rights. Right 4.5 is about safe and co-operate and collaborative standards. Safe practice is the core of consumer rights, and that goes right back to the Cartwright Inquiry. So these aren't, you know, purchaser rights, or rights of disclosure, these are fundamental rights for safe practice, which is going back to why the Act brings in the strategy, and that's at its core. So that's the first point.

The second point is in response to the discussion earlier, and an inference being drawn that the obligations for the conduct of an employee are probably supposed to be more expansive and wider than the obligations for the conduct of an agent or a member. Respectfully, I don't think that is an obvious inference to draw from the regime, and there are, in fact, equally strong arguments that go the other way. So if the concept of a member and an agent is to pick up a health practitioner providing services to a consumer who's not an employee, then we are in all likelihood, as we are here, in the majority cases looking at partners, directors, owners. Those who have the most control over the systems and the organisational culture and structure of the practice. So respectfully –

WILLIAM YOUNG J:

Sorry, just pause there. That's treating section 72 as if it's solely directed to medical practices, but it's also directed to the controlling authority of a hospital, children's health camps, treatment centres, ambulance centres –

MS CASEY QC:

Yes, yes.

WILLIAM YOUNG J:

So it doesn't really quite make so much sense then to treat – I mean if you're right on member then okay you might say member is in a stricter position, but you can't really ride on agent can you?

MS CASEY QC:

I could equally, your Honour, I could equally be right on agent, because agent you could cover from a one-off small relationship to the sort of relationship that is at issue in this case, where a partner is definitely an agent. So in terms of –

WILLIAM YOUNG J:

But if you're right a partner –

WINKELMANN CJ:

Another thought is that, you know, one of the reasons that the law makes, comes down so –

WILLIAM YOUNG J:

Sorry, carry on Chief Justice.

REGISTRAR ADDRESS THE COURT – AUDIO/AVL ISSUES (14:09:38)

WINKELMANN CJ:

I hope I'm back.

WILLIAM YOUNG J:

You are back and you were rudely interrupted initially by me and then by the VMR technology.

WINKELMANN CJ:

I'm hoping I have re-arrived?

WILLIAM YOUNG J:

You have re-arrived, yes.

WINKELMANN CJ:

I was just asking, because partnership, one of the principles that underlies your responsibility for your partner's conduct is that you are both trying to

make a profit. So it's the notion that, you know, with the gains comes the responsibilities. But this is far broader than that in this context.

MS CASEY QC:

It is, your Honour. There are other gains for partnership, for example, collegiality, for example, being able to provide a seamless model for your customers which can be of value. It's not just profit-sharing, and I think that's clear. The only point I'm trying to make here is that it's not necessarily a fair assumption that this regime intended that the scope of vicarious liability for the acts of an employee would be broader than the vicarious liability for the acts of a member or agent who would include, as well as obviously other people, but would include partners, co-owners, directors, and in the context of what the regime is trying to achieve it's not reasonable to infer that they were supposed to have a lesser responsibility for each other, given that they are the ones that have the most say over an organisational culture, for example. So it was just to respond to that one particular point that there is an inference that vicarious liability for employees should be more expensive. I don't think you can say either way and there are arguments to support the opposite.

REGISTRAR ADDRESSES THE COURT – AUDIO/AVL ISSUES (14:11:56)

WINKELMANN CJ:

I'll have a go again. I was just going to say, Ms Casey, it's probably better if you don't say "vicarious liability" because one of the issues is whether it's intended to be vicarious liability in those other sections. At the moment we're just talking at a conceptual level, aren't we, about whether the liability should be –

MS CASEY QC:

Your Honour, I'm happy to use "deemed" and I'll come back to the section itself because in my submission the heading "vicarious liability" really did mean to cover all of it, but, whether it's called that or not, "deemed liability" will be sufficient for this point because the third point that I wanted to make was that what is very clear from the intention of the regime is that section 72

should have full coverage. It covers employees, it covers agents and it covers this very broad amorphous term of "member" and it seems clear that the intention was that regardless of the internal structure, profit sharing, contractual arrangements, that are not visible to the outside, so to the consumer, it is the health service, every element of the health service provider's operations will be caught by this "deemed liability" provision as long as it's within its operations.

The member provision – I don't think this is referred to in the Court of Appeal decision but it is in my written submissions – the addition of "member" as opposed to just "employee" or "agent" was first introduced in the 1993 Privacy Act. We have, as Mr Waalkens said, all done a deep dive and no one can find any discussion anywhere what they were thinking but we agree with the Court of Appeal that the inference which works both for the Health and Disability Commissioner Act and the Privacy Act was the nature of the agencies covered by the Acts is immensely broad, so in the Privacy Act "agency" is defined as any person, group of persons, corporate, incorporate, and the definition of a "health services provider" is equally expansive, other than what it's doing. So it seems clear that the introduction of "member" was to make sure that deemed liability under section 72 couldn't be avoided on the basis of the contractual or organisational details which wouldn't be obvious to the consumer in this Act, or to the person whose privacy was breached in the Privacy Act. So that support –

GLAZEBROOK J:
So where do you – sorry Ms Casey, where do you infer that from the addition of member or was it something else?

MS CASEY QC:
That's from the addition of member.

GLAZEBROOK J:
Thank you.

GLAZEBROOK J:

Because it matched in Privacy Act with the expanse of agency, and that's also, your Honour, that's also fully aligned with this Court's analysis in the *Hickman v Turn and Wave* case where it made that very same point, that strict liability or deemed liability shouldn't depend on contractual arrangements in the consumer protection area, and also, your Honour, in my written submissions I refer to the Supreme Court of the United Kingdom in the *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660 case, who made exactly the same point. So that's a very strong rationale through in the context of vicarious or deemed liability, that it should be not defeated by detailed structural matters.

So that's the broader regime part and now more specifically turning to the, what we can see from the regime in section 72. I've already spoken about how the deeming regime, the deeming provision is the same, (2), (3), (4) and I also do rely very heavily on the vicarious liability heading. This is the only section under that heading and it was inserted to have meaning. With respect it's not a drafting error by PCO to bring that in, and I think my learned friend said through the reading stage, it was a deliberate decision, and that needs to be given weight. But also one, it is, point out in the heading 72 liability of employer and principal, and read under that heading of vicarious liability that indicates a similarity, that there is a similar concept coming through.

The key substantive point though now is it is not necessary for (3) and (4) to exist if all they are picking up is an authorisation of a wrongful act, and we do take you back to the very same provision that part of the Court of Appeal judgment that my learned friend Mr Waalkens took you to, which is paragraph 44 of the Court of Appeal judgment here, and my learned friend I think suggested that this was the Court of Appeal saying that section 72 isn't about vicarious liability at all. Well that's, with respect, a clear mischaracterisation of the Court of Appeal's decision, because the Court of Appeal decided that 72(4), both 72(3) and (4) were vicarious liability, but decided that member was the better application in the present case. But what the Court here is saying very clearly in 44 and 45, which is respectfully completely orthodox and

uncontentious, that if there is an actual authorisation of a wrongful act it's direct liability, there's no need to deem the conduct of A to be the conduct of B, because B has made their own wrongful conduct, and any authorisation be it implicit –

WILLIAM YOUNG J:
Just pause there slightly. At one level that's true, but in fact the wrongful conduct of the employing agent would be slightly different. It might, the wrongful conduct might well be not having a proper system in place to ensure that complaints are picked up and registered.

MS CASEY QC:
Yes.

WILLIAM YOUNG J:
It doesn't necessarily mean that the employing authority is liable for the misconduct on the day of the actual service provider. So, yes, so you could have vicarious – well. You could have, but there would be, it's, the best, I mean it seems to me the strong point you have is that unless section 72(3) and (4) mean what you say they mean, there's not much point to them, but there might be some point because the fault of the employing authority would be different from the fault that under this section might be imputed to them.

COUNSEL ADDRESSES THE COURT – AUDIO/AVL ISSUES (14:20:00)

WINKELMANN CJ:
Go ahead.

MS CASEY QC:
I'm sorry, your Honour, Justice Young, I got to the hopeful point that this was my better point.

WILLIAM YOUNG J:

Okay, well, can I just perhaps – the strong point you've got is that unless these subsections mean broadly what you say there's not much point in them. But there may be some point. Let's just tweak the facts a little. Say it was the case that the Medical Centre didn't have a system at all for recording alerts. Then that would perhaps lead to a situation where they themselves are in breach of the Act as a medical centre and it could be a situation where they might in some way or other be treated as authorising the way in which the doctor behaved in this case. Now they would be different wrongs. One would be a systemic wrong, the other would be an error-on-the-day wrong. But it's not a complete overlap in this situation.

GLAZEBROOK J:

But how by not having an alert do you authorise somebody to give somebody a drug to which they're allergic?

WILLIAM YOUNG J:

Well, if you know they're in the habit of doing so.

GLAZEBROOK J:

Well, but then you probably are directly liable for the actual act, aren't you?

WILLIAM YOUNG J:

Well, it may be courting a risk or something. You're courting the risk that something's going to happen. But I'm just saying that it's one thing to say that – sorry – it's just that there's a range of bases upon which the employing agency might be seen to be in the wrong, one for it's own actions, the other for the particular actions of the doctor on the day. So –

WINKELMANN CJ:

Just before you answer, Ms Casey, can I add a third which is simply, and this is what Mr Waalkens' case is, that it can also be liable under section 72 simply for authorising the action. So it's the act of authorisation which is not in itself a breach of the Code but authorising the action even subsequently.

MS CASEY QC:

Thank you. If I may broadly address those together, everything you've described would be a direct breach of the Code.

WILLIAM YOUNG J:

Yes, but of different breaches.

MS CASEY QC:

If a –

WILLIAM YOUNG J:

They would be different breaches.

MS CASEY QC:

Different breaches. They would be but, your Honour, that comes back to the fact that Dr Sparks' breach, the personal breach is a personal act by Dr Sparks. He wrote the prescription and so he personally failed to deliver safe care. The organisation would also be in breach of that same provision of the Code but through different conduct. By authorising Dr Sparks to provide unsafe care it would be –

WILLIAM YOUNG J:

Just pause there. That again assumes your case.

WINKELMANN CJ:

It does, yes.

WINKELMANN CJ:

It assumes that Dr Spark is providing services on behalf of the Medical Centre. But the Medical Centre – assume that's not true, the Medical Centre could be liable independently because it is undoubtedly a health service provider. Amongst the services it provides are administrative services to the doctors. If it's at fault there then that's its own responsibility.

MS CASEY QC:

Thank you, Sir. I think, if I may, the two halves of my learned friend's cases are becoming entwined here. If the practice is not delivering services to the consumer, then we're not in section 72 or Part 4 or under the Health and Disability Consumer Act. If the practice is not delivering services, it's not in breach of the Code, direct or indirect.

WILLIAM YOUNG J:

Well, I agree that's a very important –

MS CASEY QC:

So yes, it is begging the question if – I'm sorry, Sir?

WILLIAM YOUNG J:

That's a very important question. I mean it's certainly a very live one, in my mind, whether it was delivering services.

GLAZEBROOK J:

At the moment we're assuming they are agents because this is just an argument would have to happen with an agent and I think Ms Casey is coming to whether they're an agent or not.

WILLIAM YOUNG J:

Okay, sure. We're focusing on the unless but I agree, sorry.

MS CASEY QC:

Yes, thank you Justice Glazebrook, that's exactly right. We come back to the question of on the facts of this case was Moore Street Medical Centre providing services to the patient at all and that is, as you say. But that's a separate issue. We're now in, at the moment we're in the, assuming membership or agency, what does express or implied authority mean.

WILLIAM YOUNG J:

Yes.

MS CASEY QC:

So the point that I'm making is that all the examples you have given, assuming that the employing authority is the health service provider engaged in care would be direct breaches. There is no need, there would be no work for (3) and (4) to do because anything in the nature of authorising, or having a system that by omission or action permits a practitioner to do, to breach the Code, would itself be subject to scrutiny under Part 4.

WINKELMANN CJ:

Doesn't that assume, that assumes that the law that is captured in section 72 applies, so if you look at section 72(2) they wouldn't be liable for direct breach on the basis of the vicarious liability of an employer unless it was clear that the principles of vicarious liability applied in the statutory context. The section 72(2) makes that clear. Under Part 4 – be liable as a principle unless the law of principal and agency makes that clear, and section 72(3) makes that clear, and so on, and section 72(4) does that extending thing, you say, to make sure that there's no arguments about legal structures. So the point is you're assuming that section 72 doesn't fulfil this clarificatory kind of role.

MS CASEY QC:

Correct your Honour I am, because if you go back to section 40 and Part 4 of the Act, Moore Street Medical Centre, or a health service provider, is a health service provider, and is providing services to a consumer. Now it's not an – sorry your Honour?

WINKELMANN CJ:

Carry on.

MS CASEY QC:

It's not an actual person, the Medical Centre, a GP practice, a DHB is never an actual person, so they only ever act through people, through practitioners –

WINKELMANN CJ:

But the –

MS CASEY QC:

– and the whole concept of –

WINKELMANN CJ:

Without section 72 there could be an argument, for instance, that Waikato DHB is not liable for the actions of its doctors because it's the employer, it's not the doctor. To take an example.

MS CASEY QC:

That's what my learned friend said, well it's, we need this so that that argument might not be raised. Your Honour, this Act is now somewhere close to 30 years old. It's an argument that's never been raised. It would be fully answered by the definition of the health, what a health services provider is. So it is, can be, and usually will be, a non-natural body, and it is absolutely routine practice for the Commissioner to start investigating a doctor or a nurse's conduct, and then broaden out to look at the systemic issues of the health service provider for whom that person was delivering services to the consumer on. So it's just built into the whole regime. DHBs would be held directly liable for breaches of the Code, whether or not section 72 existed or not, and that's the point, is that section 72 has no lifting power in terms of the scope of the jurisdiction of the Commissioner in terms of investigations or in terms of direct breach, which is part of the reason why it sits outside Part 4. If it was such a critical point to link between an individual and an organisation, it wouldn't be in the miscellaneous provisions tacked on at the end and –

WINKELMANN CJ:

It does look to be the section for vicarious liability for employer, I mean, for employee, so –

MS CASEY QC:

Yes, and obviously the Commissioner's position is it's a vicarious liability for all three groups but these are not about direct breaches and that's why we say it's appropriate to interpret it as "vicarious liability", ie, no-fault breaches. This is the provision outside direct fault and, your Honour, if you go to the Code and you look at the Code you'll see the range –

WINKELMANN CJ:

Ms Casey, the thing though, you're arguing against yourself there because you're saying it already applied to no-fault breaches because it already applied to the employer.

GLAZEBROOK J:

No, I think the point was that Part 4 does direct breaches and if the employer has done anything then Part 4 applies and otherwise it's section 72.

WINKELMANN CJ:

That doesn't answer my argument.

GLAZEBROOK J:

But at the moment we do seem to be mixing up the different arguments that Ms Casey wishes to make which is at the moment she's only looking at whether you need direct authorisation, and she's coming on to who's an agent and who's not as I understand her argument.

WILLIAM YOUNG J:

Or who's delivering the service effectively.

ELLEN FRANCE J:

Well, it would be helpful if we could just hear this part of the argument before we're moving on.

GLAZEBROOK J:

I think we were up to about point 3 that Ms Casey wished to make but I've sort of lost it slightly.

MS CASEY QC:

I may have lost count myself. I think we are at the – the heading of this point was that (3) and (4) would be redundant because if the employing authority, the health service provider, had directly authorised one of its agents, members or employers to commit a breach of the Code, that would be direct liability. The Court of Appeal at 44, 45, confirms that and the position is for the Commission that that's absolutely correct. So the argument that (3) and (4) require authorisation of the wrongful act respectfully would leave them as the Court of Appeal in this case said, with utterly redundant. Your Honours, this is the same reasoning –

GLAZEBROOK J:

Can I just check, I think you extended that to if they had systemic issues that effectively facilitated the breach that they would still be liable for that particular breach in relation to that particular patient. That was the submission, wasn't it, if I understood you correctly?

MS CASEY QC:

Yes, your Honour, thank you, that is correct, and the *Waikanae Health* authority case that my learned friend referred to is an exact example of that very proposition. So the patient in that case had been subject to inappropriate examinations and the Commissioner formed an opinion that there was a direct breach because of the level of egregious omission by the practice was such that it constituted itself a breach of the Code on the obligation to provide safe care. So two different – there's the practitioner and the provider – two slightly different breaches, as your Honour, Justice Young, pointed out. Same patient, same on the day, effect on the customer and the consumer, and it is that, of course, that is the focus. So yes, systemic omissions and organisational failures are direct breaches under the Code.

That leads me to the slightly nuanced argument that my friend, Mr Waalkens, put forward is that – and if we could go back to section 72 – that, well, section 72 is a threshold. You still have to be wrongful but you might not have the wrongful threshold to get direct liability on the organisation. With respect, your Honours, that's not something that is a concept that exists as far as I can tell in any part of direct or indirect liability. If the threshold for direct liability, ie, the act is not sufficiently culpable to amount to a breach of the Code, isn't met, then there's no direct breach of the Code. But there isn't a half way house of, well, it was a bit naughty and therefore section 72 picks you up. One, that's not what section 72 says. (3) and (4) talk about authorising, and if authorising means authorising a wrongful act, it means direct wrong act by the employing authority. There's no concept of half way house here. If it's vicarious liability or deemed liability, it's strict liability and that's the point. So this idea of a half way house of bad conduct that doesn't make the grade for a direct breach, with respect, I don't think can stand.

GLAZEBROOK J:

Ms Casey, can I just check, because one issue might be that if there was actually sexual assault but unlike for an employee just by authorising somebody to provide medicine or just ordinary consultations that arguably that could come outside the direct or indirect authorisation, unlike for an employee where you're liable for any act in the ordinary course of business. Do you accept those sort of distinctions that used to be under the law of vicarious liability, but have been extended.

MS CASEY QC:

And indeed the, in my submissions your Honour I do refer to the cases how far outside your scope of employment is that sort of conduct, the sexual assault. Clearly mis-prescribing is within the ordinary course of business when theoretical but it is that hard issue on the edge of vicarious liability whether a petrol station attendant who leaves his post and drags a customer out of the car and beats them senseless, is that then within the course of business. The UK Supreme Court said he was but it's a contentious issue.

So, yes, there is a boundary, of course there's a boundary as to what's within scope of implied authority –

GLAZEBROOK J:
It maybe that it's different for an agent or a member under these sections than it would be for an employee and that's what's meant by the difference between (2), (3) and (4). Is that part of the submission? I'm just trying to get your submission which…

MS CASEY QC:
Yes your Honour, that's exactly my submission. My reading, and we don't have, there's unfortunately no legislative history to point to this either way, is that (2) was supposed to be wider, and that's why it's got a limited defence, in terms of the scope of the authority. So (2) would pick up an employee who commits a deliberate tort, for example, whereas (3) and (4) might not.

WINKELMANN CJ:
So (3) and (4) don't pick up – so you accept that there is a difference between being liable, just being liable under (2) and (3) and (4), what's the difference between their liability, if you take out the subsection (5) proviso in your case what's the difference between the scope of liability? Just putting the proviso to one side.

MS CASEY QC:
Yes, well, the difference between (2), (3) and (4) is the second part of the section. My submission would be that (3) and (4) implied authority is orthodox vicarious liability, you have to be acting within the course of business. (2) is clearly wider because it says doesn't matter whether you were approved to do the conduct that turned out to be the wrong or not, the employer is still liable, and the most obvious example in the present context might be, for example, a practitioner under an employment contract with a limited scope of practice who exceeds their scope of practice. So they've deliberately breached their employment contract and they would be caught there. These are the

WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12 cases in this UK Supreme Court that are playing with that very boundary –

WILLIAM YOUNG J:
But Ms Casey –

MS CASEY QC:
– when is a deliberate tort –

WILLIAM YOUNG J:
Isn't the carrying on doing actions in the ordinary course of the relationship, isn't that picked up by anything done as the employee, as the agent, as the manager. Isn't that the ordinary course requirement and I mean if it's a sort of a logical set of sections the second – the last part of each section would be dealing with something different. You're starting with the view –

MS CASEY QC:
Your Honour –

WILLIAM YOUNG J:
There's no liability unless it's done as part of the relationship between the person and the employer principal, or you say manager of the organisation.

MS CASEY QC:
Your Honour I see the logic of your point, and if this was a highly precise set of draftings that may take weight, but in the context of vicarious liability, of strict liability provisions, we know legislative drafting can be a bit belts and braces, and we would say it's a belts and braces, it's the express or implied authority precedent or subsequent is a common term and it's in the Partnership Act, it's a common term used in common law vicarious liability case law, so rather than just as, with respect, this is just trying to pick up that concept, I don't think it can be read that this must do something else and that something else must be to say: "Well, you had to authorise the wrongful act,"

and I'd like to take you to the *Hatem* case now which discusses that exact point.

So if I could take you to the *Hatem* case which is in the appellant's bundle of authorities at tab 5 and I'd like to go to page 309. Now your Honours will be familiar that this case approached the issue both under the Partnership Act and under the Human Rights Act as it was then because there was a specific provision in the Human Rights Act relating to sexual harassment. If we could just scroll down to about line 15. So the Court at this point is now turning to discuss section 33(2) of the Human Rights Act and you'll see 33(2) is in exactly the same, or very close to the same terms, as 72(3) and (4) of our Act.

If I could just scroll down a line, I'm not sure if your Honours are seeing the very next line where the Court confirms that section 68(2) of the 1993 Act is in identical terms, and, your Honour, just because we don't have 33(2) in front of you, if I could take you to section 68 of the Human Rights Act 1993 which is in the respondent's bundle of authorities at tab 4, and, your Honours, you'll see this is very much where our –

WINKELMANN CJ:
Just pause a moment. Is it – okay, you've got it up on the screen. Carry on. It's just that there's a delay in its arriving on my screen. Carry on.

MS CASEY QC:
So section 68 is – we're looking at the same as our provision but without the members. So we've got the employers with that broad whether it's not done, done with or without the other person's knowledge or approval. Then we've got the agency and then in (3) we've got the proviso for employment. So this is one of the origin sections for our section.

Now if I could take you back to *Hatem* and this time I want to go to page 311, and it's about half way down, about line 23. The Court is setting out the decision of the High Court which took exactly the approach my learned friend, Mr Waalkens, is advocating here, that the authorisation under 33 in the

Human Rights Act had to be authorising the sexual harassment, and the Court here, what we're looking at, talks about the arguments either way and Ms Duffy contending that "if the High Court's reasoning was correct, section 13 would be deprived of any significant effect. It can be fairly said that the High Court's conclusion would mean that, unless a partnership was in the business of committing wrongs, a most unlikely proposition, the wrong in question would seldom, if ever, be visited on the firm…" and just scrolling down at the end of that paragraph: "The question is not whether the wrongful act (here the sexual harassment) was part of the ordinary course of the firm's business. The true question is whether the wrongful act was done by a partner when 'acting in' the ordinary course of that business." Now the Court here is referring back to section 13 of the Partnership Act which has both, ordinary course of business and implied authority, but the critical point is that they regard the analysis as the same under the Human Rights Act, so as the same provision that we're looking at.

Then they say the question will be one of fact and usually involve matters of degree, and that policy issues may arise, and here's key. So it says: "For example, in the present case, sexual harassment of an employee by one partner, if it is not the responsibility of the firm as a whole, is likely to be less vigorously policed. One purpose of the legislation is obviously to deter sexual harassment and to provide a remedy for its victims. That purpose will be better achieved by holding the firm as a whole liable, rather than just the individual partner."

So back to your Honour, Justice William's, question of what is it about the statutory regime that makes this good policy, here's the clearest possible example where the firm did not approve the sexual harassment of one of its employees, but the purpose of this deemed and strict liability in the sense of a no-fault liability, is to better promote the outcome for the protective purpose of the Act, and with respect that it is exactly at in the present case, as it was under the Privacy Act and various other rights protective provisions in legislation across the book now, that use these exact same phrases. We've got money laundering, we've got HSNO, we've got animal welfare,

these are all in my submissions on page 13 in the footnote. This is now the standard format for protective legislation where the focus is on how do we drive improvements, and it's that really critical distinction between driving improvements in an organisation for the future, and holding an organisation liable for direct fault in the past, and it is, with respect, very clearly demonstrated in the present case because Dr Ryan in this case, as is canvassed in submissions and in Mr Hill's evidence, had at this point in time already been subject to 12 complaints about his prescribing.

ELLEN FRANCE J:
Dr Sparks.

MS CASEY QC:
Dr Sparks sorry, not Dr Ryan. Dr Ryan's evidence before the Court in the High Court was that this was none of his business. He said it was not relevant to his practice whether Dr Sparks was practicing safely or not, and I've got the references there to Dr Ryan's two affidavits where he says that. Now Dr Ryan's view that this was not his business, even though he's sharing his patients with Dr Sparks, is not culpable conduct under the Code. It's not enough, and it's not the point almost. The point is that we want to drive, or the Commissioner wants to drive, and Parliament wanted to drive the continuous improvement of systems and organisational cultures and frameworks which would say, I'm sorry, that's not good enough. Yes, you're not breaching the Code, you didn't do anything wrong, you had your right policies in place, but we expect you to be more proactive, particularly when you sharing patients as a medical centre does. This is not rights-focused, this is not consumer-focuses. So vicarious liability –

WINKELMANN CJ:
Ms Casey, isn't that narrative assuming that they found that Dr Ryan has done anything, could've done anything more, because they didn't actually make any finding in relation to a deficiency, did they?

MS CASEY QC:

No they didn't, I'll answer that in two parts your Honour. They didn't find direct liability for the Medical Centre, and that's the point, is that the Medical Centre, as Mr Waalkens said, that would probably have never reached the threshold. Just knowing about the fact that he's got past problems. But whether or not they knew, the point of –

REGISTRAR ADDRESSES THE COURT – AUDIO/AVL ISSUES (14:48:10)

WINKELMANN CJ:

I'm sorry.

MS CASEY QC:

Your Honour, the point I was masking was what we, what Parliament wanted in this consumer protection regime, as in other protective regimes, was to drive improvements in culture so that that sort of attitude would change, because that –

WINKELMANN CJ:

What sort of attitude, because there was no attitude found.

MS CASEY QC:

Your Honour, the Commissioner was investigating direct breaches. We're talking about what is the regime purpose of vicarious liability. It is to drive improvements not punish fault. That's a no-fault regime, and it's only raison d'etre is to drive those sort of improvements for systems that could be better. They're not in breach, systems that are not in breach of the Code but could be better because that's a better outcome for patient safety, and that's exactly what the Court of Appeal said in *Hatem*. That's the point and a policy of a provision like this. So that's its role int eh regime, and that's why it's different from direct liability, because it's to drive cultural and systems change. It's the same reason why the Court – well, it's part of the policies why the courts look at vicarious liability under common law as well. But in

Parliament's terms this is a tool and it's a tool used to protect and promote the interests of consumers.

WILLIAM YOUNG J:

But there can be liability – there could have been liability imposed on the Medical Centre, couldn't there?

MS CASEY QC:

Not – no, your Honour, the –

WILLIAM YOUNG J:

Can't there be proceedings under the Act?

MS CASEY QC:

Under the Code, for breach of Code?

WILLIAM YOUNG J:

Yes. Can't there be proceedings under the Health and Disability Commissioner Act against the Medical Centre for the breach of the Code that's been attributed to it?

MS CASEY QC:

Yes, sorry, is there a proceedings consequence of this opinion?

WILLIAM YOUNG J:

Well, there could be, couldn't there?

MS CASEY QC:

Is that your Honour's question?

WILLIAM YOUNG J:

Yes.

MS CASEY QC:

Yes, absolutely.

GLAZEBROOK J:

So is the argument really that in order to have a finding of a breach of a code you have to have fallen below the minimum standards of the Code but section 72 is to drive you above minimum standards which will improve patient safety?

MS CASEY QC:

Yes, your Honour. Thank you, that –

GLAZEBROOK J:

Because you may well be absolutely okay in terms of having done the minimum and yourself not breaching the Code but having this provision means, as happened in this case in fact, that they went above and beyond the bare minimum. Is that…

MS CASEY QC:

Your Honour, that's perfect. That's exactly what I was reaching to say, and, as you've touched on, they then did. They extended their appointment times from 10 minutes to 15. They introduced a cultural change so that when a pharmacist called, the doctor, prescribing doctor or a colleague, had to speak directly to the pharmacist and they introduced changes to their record-keeping so that their alerts were more prominent and Dr Sparks himself said, look, if those things had, well, particularly one of those things, the speaking to the pharmacist, had been part of the culture, he doesn't think he would have made this error. The Court of Appeal refer to that as this is, when you think about the level of control an organisation or culture has, this is how it actually really plays in principle.

Your Honour, Justice Young, going back to your point, doesn't it mean a finding or an opinion under 72 exposes the practice to a potential damages claim? Yes, it does, and that is how the incentive works, and it works in the same way that a law firm is liable to its customers for an individual breach of a lawyer, say fraud, but goes above and beyond minimum standards to protect itself from just such liability, and that harks back to the ACC bar and the point

of the Health and Disability regime, it's trying to create that same level of incentive that's the exposure to civil liability outside the medical profession, or the health profession, gives to other organisations. So, yes, it's expected to do that.

O'REGAN J:
Didn't they in this case make –

WINKELMANN CJ:
Can I just say – go ahead Justice O'Regan.

O'REGAN J:
Didn't they in this case make the improvements before the finding of liability?

MS CASEY QC:
Yes, yes your Honour, and that's, a responsible practice should have done that.

O'REGAN J:
But so it wasn't, you didn't need a finding under section 72 to get the improvements, the finding against – the complaint against Dr Sparks and the realisation that he had made a mistake was sufficient, wasn't it?

MS CASEY QC:
It was sufficient for Moore Street Medical Centre to have changed its practice, yes, but for Moore Street Medical Centre to maintain that change in practice, and for every other practice to sit up and take notice, which is the point, as my learned friend Mr Waalkens says, is the point of the Health and Disability regime, the finding was important. It's often the case, and again it's – sorry?

WINKELMANN CJ:
I was just going to say, to pick you up on that point about every other practice sitting up and taking notice, this is the submission made by Mr McClelland

which is that any professional, and from my understanding particularly doctors, are very fearful of findings that they've breached the appropriate standards for their profession. There is the risk that this will have the chilling effect that they predicted, which is that people, will cause people to change the structure of the practice in way which is not desirable because a finding of breach has been imposed where there's no finding that they've done anything wrong, and they, and doctors are likely to say, well, what are we to do.

MS CASEY QC:

Your Honour if I may I'll answer that in a couple of bits, but just going back to Justice O'Regan's point, what I wish to tie up on, to tie with that one is that's why I made the submission at the beginning that it's the consumer focus that's important here, it's not a disciplinary focus on the practice. So the fact that the practice has already changed doesn't mean it's wrong for the finding to be made, if we're focusing on consumers.

Your Honour turning to the NZMA's position that this could have catastrophic effects in terms of, if you read Dr Baddock's evidence she talks about every doctor is going to have to have another doctor sitting with them, they're not going to be able to trust each other's judgements, they're going to restructure themselves so they're all sole practitioners. First of all, your Honour, the Court of Appeal rightly dismissed that as overstated. Secondly, your Honour, this is not an unusual situation for professionals who practice subject to individual judgements, and with respect to the NZMA, a couple of aspects of this are seriously overstated. Lawyers, engineers, accountants, architects, any number of professionals work one-on-one with their client and make judgement calls, give advice, provide services. Doctors are no different. Lawyers, engineers, accountants, et cetera, all have individual vocational responsibilities to their disciplinary bodies, and will be subject to personal discipline, just like doctors. The difference is when those, assuming agency firm relationships, they have been exposed to this sort of liability, except for much more extreme because it usually comes with a financial kick, in their practice for decades, and lawyers don't in a law firm think that each partner has to have another partner in the room while they make a judgement call,

they develop systems and processes, and that's what vicarious liability is for. So doctors may not be used to this concept but every other professional in business is. So there are ways and means. Secondly, whether it would drive –

O'REGAN J:
Mr Waalkens said the real analogy was not with a law firm but with a set of barristers chambers, and in those circumstances an error by one barrister wouldn't lead to liability by the whole chambers, would it?

MS CASEY QC:
That's correct, and we're getting now into, you know, is this a law firm or a barristers chambers, but the Court of Appeal said it's not a barristers chambers, and in the medical profession that's exactly right, because that was the next point that I wanted to make. My learned friend Mr McClelland talked about the issue of super practices and suddenly a physiotherapist is going to be responsible for a judgement call of a doctor looking at someone's mole. Two really big points, and important points here. One is we're talking about breach of the Code, we're not talking about anybody being made liable for the judgement calls of a health professional. Breach of the Code is –

WILLIAM YOUNG J:
Well aren't you? Sorry, can't a bad judgement call, just construed broadly, result in a Code breach?

MS CASEY QC:
Not in a reasonable interpretation of the Code your Honour. The Code is not about judgement calls, it's about basic patient safety.

WILLIAM YOUNG J:
Sorry, if the Health and Disability Commissioner thinks that it was not a reasonable judgement, a judgement that was reasonably open to the clinician, then there is likely to be a finding against the clinician.

MS CASEY QC:

A judgement that was not reasonably open to a practitioner is a different thing from a difference in view on a right call to make.

WILLIAM YOUNG J:

Well, isn't it just a rather emphatic difference of view?

WINKELMANN CJ:

In any case, I think Justice Young's question is, on this model it could have this practice medical centre being liable for very serious breaches.

MS CASEY QC:

Yes it could your Honour, and that's the point. By going back to the super centre that my learned friend Mr McClelland was talking about, it's going to be a question of fact in each case. Whether there's a single health service provider and –

WILLIAM YOUNG J:

But there isn't –

MS CASEY QC:

– what it's comprised of.

WILLIAM YOUNG J:

You're not saying there's a single health service provider here, are you, aren't there at least three? The Medical Centre and the two doctors.

MS CASEY QC:

Actually your Honour, we would say one.

WILLIAM YOUNG J:

But so do you say –

MS CASEY QC:

No, we would say one, but it's –

WILLIAM YOUNG J:
So you say the doctors are not individually health care providers?

MS CASEY QC:
Sorry, can I keep putting the who they are and how this practice actually works to later because we're getting, I think we're talking high level, is there going to be a chilling effect, what's going to happen with super structures. There will be a question of fact whether there is a provider, so who is the employing authority will be a question of fact. So, for example, with after-hours there's the doctors and the nurses, that's one. The pharmacy next door, probably not. But that's a question of fact that gets resolved. It's not a reason to read this section down so that it's meaningless, and then there will be the question, as you say your Honour, whether they're an agent or a member, and how – these are all questions of fact which come later. They're not reasons to read down what is, in my respectful submission, supposed to be a no-fault provision, and require it to have fault.

It is understood that the medical profession has concerns as to what this would mean. But the other, the third reason why this is not a good policy argument, with respect, is that we start then to put consumer, the level of protection of consumer rights becomes dependent on the contractual arrangements between doctors, and what we know from section 72 and the whole scheme of the Act is that it should not depend on that. Doctors should not be able to contract out of their obligations under the Code, and nor should health –

WILLIAM YOUNG J:
But they're not contracting out –

MS CASEY QC:
– and nor should health –

WILLIAM YOUNG J:

They're not, the doctors are practice, produce, have a business entity, a business model, and it's a very standard business model, although no doubt there are tweaks that vary from practice to practice. Isn't the issue simply where here's the business model, it's not abusive or anything, does this legislation cover it.

MS CASEY QC:

Yes, and we would say –

WILLIAM YOUNG J:

So I don't think it's helpful to say that they're contracting out.

MS CASEY QC:

Well, your Honour, it shouldn't, the scope of their responsibility shouldn't depend on the details of their contract, is probably the more important point.

WILLIAM YOUNG J:

Might it not depend on the details of their business relationships, because the section distinguishes between employees and agents, and isn't that going to be dependent on the business structure?

MS CASEY QC:

Yes your Honour, and, sorry, I was talking general rather than the more specific distinction that – and again, you know, the issue of direct and indirect breach is something that would be reflected in actual liability for damages as well. So yes, there are variations but they shouldn't entirely depend on that. I think that's harking back to the provision, the general principles around no-fault liability that I referred to in *Hickman* and *Cox* as well.

So that was responding to that basic question of why would it be good policy for this regime to have vicarious liability in the terms that the Commission says section 72 encompasses, and with respect it's because it's an important tool for consumer protection, and as the common law cases on vicarious liability

recognise, it's not ordinarily the way that liability works because it is imposing liability on someone who has done nothing wrong, and that is intrinsically and intuitively very unfair, which is why the policy reasons for doing it are so important. But with respect in the way that the Commission reads the intention of section 72, Parliament made that decision affirmatively in relation to this regime, as it's done for other regimes using the exact same framing, and respectfully to my friend Mr Waalkens, his proposed interpretation of express or implied liability as relating to wrongdoing only would completely defeat that purpose because the impact of 72 would be removed for anything other than a direct employment relationship and, with respect, given the objectives of the Act, it's not clear why Parliament would have made that distinction and let alone phrased it in the way that they have.

So that was the discussion of the regime. Before we turn to the member agency and the facts of this case, one of my tasks for after lunch was to talk about the common law constraints on the vicarious liability between principals and agents. Obviously the Commission, and this is addressed in written submissions on our support of other grounds, takes a view that under this Act it is appropriate to look at agency very broadly to give effect to the purpose of the Act in the same way as this Court did in *Hickman v Turn and Wave*.

But to get back to the more fundamental point of the common law only imposes vicarious liability for certain kinds of agents and certain kinds of conduct. My submission here is that those limitations in the common law actually aren't relevant to section 72 because section 72 is setting its own code of when will a principal be liable for the acts of its agent. Now what that is, is obviously a matter for the Court, as a matter of statutory interpretation, but it is clearly intended to be different from, and my respectful submission, broader than the common law category of principal/agent liability if only, your Honour Justice Young, because of the subject matter. Common law doesn't hold a principal liable for its agent's acts in breach of the Code of patient's rights, the same way sexual harassment is short of a tort, same way breach of privacy, so that's my first response. The second response, as your Honours will see in my written submissions –

WINKELMANN CJ:

Sorry Ms Casey, are you accepting the normal rules in relation to principal and agent would result in a narrower scope of the liability than vicarious liability?

MS CASEY QC:

That was exactly what I was just about to come to your Honour. I agree with –

WINKELMANN CJ:

I thought you – sorry.

MS CASEY QC:

My first point is no matter how narrow they are they're not relevant to section 72 because 72(3) is supposed to be different from the common law rules. The common law rules also in the context of vicarious liability respectfully I would also take the position that the Court of Appeal's description I think in paragraph 48 is too narrow. That there is, as the UK Supreme Court refers in a number of cases, this concept is on the move. In New Zealand we have the minority judgment of Justice Tipping in *S v Attorney-General* [2003] 3 NZLR 450, which was the foster parents case, and the majority in that case were prepared to extend the concept of agent/principal vicarious liability to cover foster carers who were abusing children in care. Justice Tipping preferred a principled based approach. He said that concept of, you know, the category of agency is no longer apt and the concept of vicarious liability for wrongs like this, and that approach is also playing out in the United Kingdom Supreme Court in, for example, and these cases are all in my submissions, in *The Catholic Child Welfare Society v Various Claimants and The Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 case, in the *WM Morrison Supermarkets plc v Various Claimants* [2020] UKSC 12 case, in the *Cox* case, and last year in the England Wales Court of Appeal *Blackball Football Club Ltd v DNS* [2021] EWCA Civ 1352 case, regarding soccer development teams touring to New Zealand. So the category approach of when will a principal be

vicariously liable for the acts of an agent, and the concept of agency itself seems to be undergoing a reasonably broad approach though.

WINKELMANN CJ:

Aren't those cases you just cited to us really about vicarious liability within the employment relationship? Both the –

MS CASEY QC:

Not all of them.

WINKELMANN CJ:

I thought the *Blackball* one and *The Catholic Child Welfare Society* were about employment relationship, vicarious liability –

MS CASEY QC:

No they weren't. That was the key thing. The *Christian Brothers* case, the employment relationship was between the brothers and the school, and the case was whether the brotherhood itself would be liable on a similar, how vicariously liable the school was under the employment relationship, and the Court then found a sufficient relationship akin to agency for vicarious liability across the brotherhood, and the *Blackball* case was definitely not a relationship of employment, so the question was agency and so far the Court of Appeal has said the relationship wasn't close enough and vicarious liability wont' arise. So none of that is particularly relevant here because we're in a different statutory ground, but that was just to fully answer the question of whether, how wide is the principal agency point, it's on the move, in the common law anyway, but my respectful submission is that we don't need –

WINKELMANN CJ:

But your point is –

MS CASEY QC:

Sorry, your Honour, were you about to speak?

WINKELMANN CJ:
No, carry on.

MS CASEY QC:
So then the next point, my third topic to cover this afternoon is the question of moving away from the correct interpretation of section 72 to the factual question of is Dr Sparks a member or an agent? Who is providing – is the Moore Street Medical Centre the service provider to this consumer?

Your Honours, before I turn to address it in detail on the facts, I do need to emphasise a point that's in my written submissions. The interpretation of section 72 and whether the Commissioner got that right is absolutely within the scope of judicial review because that would be a clear error of statutory interpretation.

The question of was Dr Sparks and Dr Ryan trading as Moore Street Medical Centre the provider of services to this patient and membership agency is an assessment on the evidence that was made by the Commissioner. Now that is, of course, subject to judicial review but we are now in the context and the phrasing of *Edwards v Bairstow* or *Wednesbury*, so it's obviously –

WILLIAM YOUNG J:
Is that right? I mean it's a pretty superficial assess. It just says the Medical – I can't remember the wording. You can possibly take us back to it. But it's just a conclusory statement that Dr Sparks was acting on behalf of the Medical Centre when he consulted with the patient.

MS CASEY QC:
Yes.

WILLIAM YOUNG J:
Now we know what the facts are. The question whether he was acting on behalf of the Medical Centre in these circumstances is substantially one of law, isn't it?

MS CASEY QC:

Your Honour, I've made the submission that my assessment is, and the Court of Appeal's approach, is that it's going to be a question of fact whether there is an agency relationship or a membership.

WILLIAM YOUNG J:

But we know all the facts. There's no dispute about the facts. So in a situation where there –

MS CASEY QC:

Well, it's, in my respectful submission is – sorry, your Honour.

GLAZEBROOK J:

Perhaps move on. Make that submission and then move on to why they are agents.

MS CASEY QC:

I will, your Honour. So the Commission's submission is the question for this Court was was it open to the Commissioner to reach that view and that is the question of law absolutely.

WILLIAM YOUNG J:

You should also deal with whether that view was right.

GLAZEBROOK J:

That's what I've just asked her to move on to.

WILLIAM YOUNG J:

Yes, but actually what – yes.

MS CASEY QC:

Yes. I've made that submission and it's in my written submissions as well.

So, your Honour, if I may, I think it's probably, your Honours, easiest to start with my learned friend's focus on the Court of Appeal decision at

paragraph 80, and my learned friend, Mr Waalkens', submissions was that this applies equally to whether there was a membership issue.

So this is the Court of Appeal discussing agency and their view that it's a problematic pathway for the Commission to take where as members is fine. So the Court of Appeal here at 80 says there's a strong argument for saying that when consulting with their respective patients they are not each other's partner but separate business entities. This is supported with evidence from the sharing of profits from patient consultations compared with other profits from the Medical Centre. Each is paid separately. They do not share losses.

Then at 81 they say if that is the correct legal analysis, they are not going to be agents in this context.

Your Honours, what I want to focus on here is that the Court was looking at profit-sharing only and, for example, did not consider patient-sharing which in the context of what does agency and service provision mean in the Health and Disability Commissioner Act is the far more important distinction. They may not share profits on a single consultation but they are sharing patients and therefore, your Honours, apart from every other factor outlined in my written submissions, that should be sufficient to constitute them as agents for each other and for the practice and the care they provide for the patient.

WINKELMANN CJ:
Isn't the problem with that submission that they weren't actually sharing patients, that when they did another patient they would invoice the doctor for that so it was more arm's length? They were keeping their patients, they were…

MS CASEY QC:
They're keeping their money, they're keeping separate, your Honour, and that individual invoicing – sorry.

WINKELMANN CJ:

But that was still – were still saying an – seeing another person's patient and so weren't sharing patients. It was a sort of more arm's length thing than that.

MS CASEY QC:

Well, your Honour, Dr Ryan describes the patients as registering with the Medical Centre in his evidence and they clearly do. They have to be signed up with an individual GP under DHB capitation funding. So that's just part of – that's how funding works which is why one doctor will invoice the other because Dr Ryan received the capitation funding for that visit and received this and it's obviously set up that he receives the fee, and so they balance out the money. These are all indicia. None of them are going to be the slam dunk which is where the Court gets to if I can step through now to paragraph 90 when the Court's now turned to members, and the Court steps through a lot of – actually, your Honours, maybe I'll start at 84 – I'm sorry to the person controlling the screen – because this is an analysis that the Commission will fully back up.

So at 84 the Court is noting that "member" must be wider than "agent", and they talk, over the page at – they consider it clear that Dr Sparks can fairly be described as a member of the Medical Centre. He and Dr Ryan were undoubtedly the people mostly closely identified and associated with it and to all intents and purpose in charge.

At 85 the Court makes an important observation that there is nothing stopping precluding the doctors from being agents for some purposes, partners for some purposes and members for other purposes, and they say that there's nothing stopping Dr Sparks being both in business on his own account and also a member of the Medical Centre, it's not mutually exclusive, and confirm that in their view he was acting within the scope of his authority as a member.

Then at 80 they make the same point about Mr Waalkens' argument on what is authorisation, just being to authorise the wrong.

At 87 the Court addresses Dr Baddock's concern and here in 88 the Court addresses that and referring to it being "graphically illustrated" that the culture can have influenced the practice of the individual doctors. It's not doctors separately alone, and 89 refers to the points that we've already covered.

Then at 90 the key here is: "In all the circumstances, including the sharing of patient information and the policies detailed … above," which I'll come to soon, "the Medical Centre is far removed from the analogy of a set of barristers' chambers relied on by Mr Waalkens. Unlike barristers delivering legal services, the evidence shows very clearly that Dr Sparks did not have complete autonomy in the way he delivered medical services to the patients and that the imposition of … liability" better serves the purpose.

Your Honour, I'd now like to take you through some of that evidence and first of all just starting with the basics. Moore Street Medical Centre, it's common ground and conceded from the High Court onwards that Moore Street Medical Centre is a health services provider and, as I've noted, it's stating the obvious to say it only delivers its services through its members, agents and employees, through natural persons.

WILLIAM YOUNG J:
Well, I'm not sure that's right, you see.

MS CASEY QC:
It's –

WILLIAM YOUNG J:
Just pause there. I accept it's a health services provider for two reasons: firstly, because it does actually provide health services via locum and nurse consultations; secondly, under the last subsection in (3) it is holding itself out to the public as a health service provider. But you're sort of assuming that all services provided within its premises are services which it provides.

MS CASEY QC:

If I may, yes, your Honour. I'm not assuming. I'm about to give submissions more specifically on what are the scope of the services provided and what's the doctor's role in it. But at that point I'm just making the obvious thing; it can't do anything without people. Whether it's the locum or the GPs, it can't do anything without people.

My next submission, your Honour, is perhaps getting closer to the point that you're interested in, is I think it's also completely uncontentious that the core business of the Medical Centre is the GP practices. It doesn't exist and would not exist without these two doctors providing GP services. You can't – a medical centre, just as a matter of reality, doesn't exist with just nurses and receptionists. So the doctors are at the core of the Medical Centre.

It's also uncontentious and accepted, and again the references are in my submissions, that both Dr Ryan and Dr Sparks trade as Moore Street Medical Centre. That's how they present themselves. So "trading as", your Honour, in the most basic terms, means they deliver their services as Moore Street Medical Centre. The fact that they are individually accredited and – it's just like lawyers. Russell McVeagh is Russell McVeagh. The fact that lawyers are subject to this individual disciplinary tre – response, vocational training, et cetera. These doctors, like those lawyers, trade as the Centre, and that's not contentious. That's not disputed.

Now I've already said that they share patients between themselves and their locums and their nurses. Your Honour, we do place some reliance on the issue of the records, and I do need to address my learned friend's response on that. The submissions you heard from my learned friend, Mr Waalkens, seemed to get to the extent that provided they were doing it for a proper practice, any medical practitioner or professional or organisation in the country could access Moore Street medical records and those of the patient. It had to be for the right purpose, they had to be relevant, but there was no barrier. There was no need for permission. Your Honour, that's actually, one, the

evidential foundation for that is not there and, two, the evidential foundation for that is we do have the opposite.

In response to a direct question whether the pharmacist was able to and did access into the GP records, the answer is no, she didn't, and that would have been a breach of the Privacy Code if the practice had let her.

Your Honours will be familiar with if you go and see a specialist they can't access your GP records. There's a letter of referral and it's done with your consent, and with your consent the report back to the GP practice is done with your consent. Your GP doesn't access your specialist records.

Health sharing information, there's different Codes relating to DHBs which complicate the matter as well but in terms of the pharmacist which is –

WINKELMANN CJ:
Isn't there, however, as a matter of practice with doctors, that really when you're there presenting with a similar problem to the one you presented with on previous occasions and they are wanting to get your history, effectively you're treated as consenting, they then go ahead and collect your information, often as you sit in the chair, ask providers –

MS CASEY QC:
Yes, your Honour, that's the point. Because Moore Street Medical Centre is the health care provider, they're not sharing information outside the provider. Because the Centre, and this is why the records are a good indicia, they're not a controlling factor, I agree, but the reason why your doctor, and then you go and see the next doctor in the practice and then you go and see the nurse, all access your same records, is because your records are held by the Centre and any professional in that Centre can access them. There's no permission required because you are one of the patients of the Centre. So just –

WINKELMANN CJ:

I think what I was saying to you was just asking you to comment on Mr Waalkens' point which I think he was making that also there's another way of looking at that which is it's implied consent. You know, you go to a medical centre and you know there are different doctors there. Your doctor is not available so you ask to see another doctor and when you ask to see a doctor you're impliedly saying: "Well, I want you to look at my notes on this," because it's in a medical centre, and the question is where that sits on –

MS CASEY QC:

Your Honour, it's not an implied consent. It's a direct consent. Your records belong to the Medical Centre. They belong to that health care provider. That's why they fit within the Privacy Code. It would be – a classic example is my learned friend's response to the question: "Well, did the pharmacist access that," because, you know, she's treating the same person. "Could she access the Centre's records," and the answer is – if I could take you to the final opinion at, the reference is 301.0116, and it's paragraph 30 that I'd like to take you to. So this is the pharmacist, she's processing the prescription. While the prescription was being processed the pharmacist's own records presented an alert, an intolerance note, so that's just correcting my learned friend Mr Waalkens' answer to your question, and no, it would be a breach of the Privacy Code for one practitioner who was not part of this health service provider, providing services to access records like this. So it is a very important indicia that this is a combined practice of two GPs –

WILLIAM YOUNG J:

Sorry, just going back. Is this, does that mean, are you saying that the pharmacist's intolerance note, as it were, self-generated.

MS CASEY QC:

Yes, it's in her records because she's dealt with this –

WILLIAM YOUNG J:

Bu it's come from – she's dealt with it herself, it hasn't come from what she's been told by the practice, or has access to –

MS CASEY QC:

No your Honour, this is her system, because this is one of her regular consumers, and her notes, and how good her systems are, is obviously something that the Disability Commissioner looked at as well. So to respond saying yes it is, it's a significant indicia if a group of practitioners share records, that's an indicia that they are part of a single health provider entity. The other strong indicia here is particularly in relation – well, I would like to take you to some of the other evidence now.

If I could take you to page 301.0007 and, your Honours, respectfully this not something you would ever see from a barristers chambers. So we have, this is a letter, very early on in the investigation, and if I could just ask you to scroll down to the footer of the document. So this is letterhead under "Moore Street Medical Centre", these are the two doctors presenting themselves on the letterhead as belonging to Moore Street Medical Centre, and then if I can scroll back up please to the first substantive paragraph where it says, because this is signed by the practice manager and Dr Sparks, who the complaint was directed to, and the practice manager says he spoke with Dr Ryan, the patient's normal GP, done a form, and as per our policy, and the doctors have discussed the incident, the nurses have discussed the incident, and this is where they immediately talk about the medical alert having been added now. So the doctors together are improving their systems.

You'll see then, if I may jump forward to page 301.0033, so this is a policy that a health service provider has to have. They have to have a complaints policy, and they usually format it as a – they have to publish the Code as well. This is in the name of Moore Street Medical Centre your Honours. If Dr Ryan and Dr Sparks were separate practitioners, as you might see, for example, in specialists at Wakefield Hospital and Mercy Hospital who have their own systems, and their own receptionist, they have their own policies. Dr Sparks

and Dr Ryan don't. They only have joint policies and they're all in the name of Moore Street Medical Centre. You will see Best Practice Statement: "The Code … will guide the design and delivery of all services provided at this practice." That clearly encompasses the services of these doctors.

Your Honour, if we can then step over to 301.0035, and this is the incident and reporting procedure, and this relates to ensure the safety of patients and staff at Moore Street Medical Centre. "Patients" include, in my respectful submission, the patients of these two doctors. They will be subject to this – these patients will be subject to this. It talks about "outlines the process for reporting and investigating …" and over the page refers to incident reports being provided and an investigation conducted by the practice management, and there's reference through these documents to the partners as well.

Then over the page on 37, just half way down under "Process", introduction there. So this is the Medical Centre committing to "continual improvement of all processes and services that support the care of our patients/clients and a safe working environment for staff" and then what the Centre believes. Again, respectfully, your Honours, this has to cover the patients of Dr Ryan and Dr Sparks. They are working together through the Medical Centre as a single provider delivering services through them, and again –

I haven't got many more, your Honours, but if I could take you to – the policies continue for the next few pages and then over at 301.0041, and this is a Significant Event Management Policy and again under the name of Moore Street Medical Centre and just down the bottom you'll – sorry – you'll see reference to continuous improvement of safety, minimising occurrence of adverse events in general practice, et cetera. These are what the Commissioner wants to incentivise. Then down the bottom of this page you'll see it's got a reference document to the RNZ, Royal New Zealand College of General Practitioners, and Mr Hill's evidence refers to, and as does Dr Ryan, policies such as this are necessary part of the cornerstone accreditation for practitioners belonging to the Royal College, and again these don't exist for

Dr Ryan and Dr Sparks. They only exist in the joint practice of the Medical Centre.

Then finally, your Honours, I want to take you to 301.0080. No, I'm sorry, I've just… Sorry, your Honours, I've lost a reference. I was going to take you for completeness to the letter where they sent out their, the reforms that they've done, but I probably don't need to go there. But it is very –

WINKELMANN CJ:
Ms Casey, can I just take you back to the Court of Appeal's judgment and just get you to clarify what you say really bites on this or what they're talking about, because they say: "Unlike barristers delivering legal services, the evidence shows very clearly that Dr Sparks did not have complete autonomy in the way he delivered medical services …" What do you think they're really talking about there?

MS CASEY QC:
Partly they are talking about the policies I've just taken you to. Partly they're talking about the cultural improvements that the doctors between them agreed would be important, such as, for example, that they would speak to a pharmacist directly if contacted. Partly they're talking about the doctors –

WINKELMANN CJ:
Just must be talking about the policies, you think?

MS CASEY QC:
No, not just the policies, your Honour. It's the culture and the decisions that the two doctors make about the detail of how they are going to run their combined practice. They didn't – they're not free – Dr Sparks wasn't free to go: "Well, you want 15 minutes. I'll go 10 minutes." The doctors agreed that they would both go 15 minutes, and the doctors agreed between them that they would talk to the pharmacist directly. These were safety measures that between them they've agreed as how the Medical Centre will provide the

services. So they are constraints that they put on each other voluntarily by agreement. Same with the policy –

WINKELMANN CJ:
But the point is that the extent to which they weren't really just independent agents operating, which is actually exemplified by the actions that they took in response to these events.

MS CASEY QC:
Your Honour, I apologise, I haven't got the reference for the letter that both doctors jointly signed as to the improvements that the practice were making, which were just discussed. The reference, it is clearly, it's referred to in some detail in my written submissions so your Honours will be able to have the reference there. Sorry your Honour. I think it's at 27. So if you scroll back to 301.0027. Yes, your Honour, this response and the terms of it exemplify that not just the patients but the doctors themselves regarded themselves as operating together obviously, like lawyers and any doctor employed or not delivering one-on-one service to their patient.

So again we have the letterhead. In the first paragraph there's a reference to "our practice manager" and then at 2. So paragraph 2, scrolling down: "Moore Street Medical Centre has already addressed the issues raised." Not Dr Sparks, not Dr Ryan, but the Centre. So this is them describing their medical practice in terms of the Centre. They're not describing themselves as individual practitioners, and I don't, letters are like this are not binding concessions, they're just evidence of the reality, and this is where they set out the reviews they've undertaken, "our policy and procedures were reviewed and were updated." In the middle they say: "Due to the volume of patients… the doctors had been running on 10 minute appointments." Then at the end of that paragraph they talk about the increase of appointment times. Then over the page they talk about their combined computer alert system. Then they talk about at six, information – sorry. At six they do say: "Dr Sparks is one of two permanent doctors operating their own practices from within the building."

So that goes against my point, but I don't think that it's an overwhelming contraindication to all these other aspects. Then at seven they refer to the policies and procedures which I've just taken you to and eight: "Changes relevant to aspects of our services." And obviously signed by both the documents.

The final reference that I want to take your Honours to is jumping right forward to 0080, and just down the page, this is where I've referred before without taking you to the evidence, Dr Sparks in the last paragraph on this letter, confirms that his view that if he had spoken directly with the pharmacist, which is another cultural change that the practice has made, he's fairly sure that the event wouldn't have happened, and that I think, your Honour, is what the Court of Appeal is talking about, these cultural and organisational issues do have a real impact both for patient safety and in terms of control of how the doctors conduct their individual practices in terms of their one-on-one contact with their clients and their patients.

So for those reasons the Commission supports the conclusion of the Court of Appeal at paragraph 106 that it was a reasonable conclusion for the Commission to reach, that the services were being delivered by the Medical Centre and that Dr Sparks was a member of the Medical Centre.

The final aspect, your Honours, is was he also an agent, and I've addressed that in my written submissions and the point is raised only – it's acknowledged that it will make no difference to the outcome if your Honours accept that Dr Sparks was a member, we don't need to get into the agency, and we agree that it's an easier road through the members but we do want to place on record that the Commission's view is that the broader scope of agency that I've just already touched on a few times is more appropriate in the context of the HDC.

Your Honour, Justice Young, I'd like to just come back to a point you made right at the beginning of my friend's, Mr Waalkens', submissions, that given

that Dr Sparks was paid by Dr Ryan to see his patient that might constitute a direct agency relationship between those two anyway, and you'll see in my written submissions that we do put that as the alternative, that even if they're not generally each other's agents they should be classed for that when they're sharing patients.

But I would like to address that tiny point in just a bit more detail as that –

GLAZEBROOK J:
Ms Casey, have you finished on the general agency argument?

MS CASEY QC:
Yes, your Honour.

GLAZEBROOK J:
Then can I ask a question on that? Effectively what you're saying is that both doctors are agents of the Medical Centre itself and therefore, as I understand, agents of each other, or I'm not quite sure how that works. It's just that assume that it was Dr Sparks' own patient that he misprescribed for, would the Medical Centre – you say the Medical Centre would still be liable in respect of him prescribing wrongly for his own patient?

MS CASEY QC:
Yes, and that's because the core – the core submission on agency is that both doctors are agents of the Medical Centre in the delivery of their services to their patients because of the nature of the practice and how it is presented to the consumer. We put up as –

GLAZEBROOK J:
So you say it's a consumer focus because the consumer thinks they're going to the Medical Centre as the – and that's their health provider and they go there because not only do they know Dr Ryan or Dr Sparks is their doctor but they also know that there's cover in case their doctor isn't available? Is that…

MS CASEY QC:

Yes, and they expect, they reasonably expect –

GLAZEBROOK J:

And all the other ancillary services?

MS CASEY QC:

And all the other – and they reasonably expect that the doctors will be looking after them together. It's that a patient from Medical Centre thinks they're getting shared care and that, I suppose, is the starkest issue with Dr Ryan's evidence, that it wasn't his business that he had a colleague who was not prescribing safely, because from the patient's point of view the Medical Centre is providing shared care. So that's why we say they are agents from that perspective.

WINKELMANN CJ:

They don't care what the profit sharing is?

MS CASEY QC:

They don't care and they're never going to know. Well, presumably they're not going to know. So yes, that's exactly that. So that's the primary submission on agency, and I was just following up with the secondary one, in any event, if your Honours were not happy with that breadth of agency. In particular circumstances where they really are sharing an actual patient then there must be an agency relationship there. But we don't need to take that very far because that's just as a fallback position. But we do say that that agency relationship would go back to the Medical Centre. It could also go back to Dr Ryan but when you step back and look at the implications for that for the Act it gets very convoluted, if you had a practice of six doctors and they were agents for each other when they were seeing different patients, and Mr Hill, the former Commissioner, talks about how a growing number of GP practices have patients who don't identify with a particular doctor. That sort of long-term family doctor is a thing of past and a growing number, nearly up to half now, don't identify with a particular doctor at all. They just go in with that

shared care. So it would be a pure accident as to who they had registered with for capitation funding. So that's part of that sort of reality check.

WINKELMANN CJ:

This legislation has been in place for quite a while and the doctors have been conducting their practices in this way for quite a while. Is this really the first time it's come to a head as an issue?

MS CASEY QC:

It's the first time it's been challenged, your Honour. It's a provision that's been used previously, not a great deal. There was an earlier approach by the Commissioner, an earlier Commissioner, which the Court of Appeal referred to a decision that the proviso in (5) had to apply across all of them. It took a while for views to crystallise as to its application, but it has been applied before this case and a number of cases. This is just the first challenge that has come through.

WILLIAM YOUNG J:

I've just been looking at Google, that great law legal research tool, to see if there are medical negligence cases from other jurisdictions where practices of this sort have been held liable for the negligence of one of the members. I've got a sort of notation on an American case, but there doesn't seem to be very much on it, which is, it may just be a function of the way the insurance industry works.

WINKELMANN CJ:

Or your Google skills.

WILLIAM YOUNG J:

Well it could be, I mean I've Googled "medical practice vicarious liability for negligence" so that would perhaps give us a bit of a handle. The one, the American case did make the sort of points that you're making, that the two doctors were holding themselves out, effectively, as an entity, and that's the way that had been seen by the people they dealt with, and therefore they had

the implied authority of each other to deal with patients on behalf of both of them.

MS CASEY QC:

And I think in the New Zealand context if we pretend that the ACC bar wasn't there, then I think we would get case law developing very much along the lines for the legal profession and the engineers with earthquake certification and all that sort of stuff. One imagines that the tort law would have developed along those lines, but…

ELLEN FRANCE J:

Could I just ask, Ms Casey, the finding is of vicarious liability for all of Dr Sparks' breaches, so no differentiation –

MS CASEY QC:

Yes.

ELLEN FRANCE J:

– between, say, the right to have services provided with reasonable care and the one dealing with the explanation of options available, et cetera. Just thinking about that, in terms of Dr Baddock's evidence, I suppose you would say, well something like appointment times, length of appointments, addresses all three breaches, but that wouldn't always be the case, would it? In other words do you get two situations where you are sort of somehow expecting one doctor to not, interfere is not the right word, but somehow have some say over consultation practice?

MS CASEY QC:

As, and I think a lot of the policies do, so if it comes back to what does the Medical Centre control, one of the things it does control is, does it have the right policies but also, for example, is the, a good practice would be for there to be checks that policies are being complied with. So, and some of those policies would get into that detailed level of control over practice. In a way taking the call from the pharmacist is almost one of those.

So, for example, one of the policies is about prescription when you haven't seen your doctor, and that's a clinical decision for a doctor to make, but the Centre itself has set rules about how and when they can do that. So yes, it could. The broader issue as well, your Honour, is that 72, because it's a deeming provision in a funny way the limitation on what's deemed is within the scope of the section itself.

WINKELMANN CJ:

Ms Casey, can I take you back to section 72, because on your analysis I'm not sure I see what the gap, the difference between the liability that's imposed by (2), (3) and (4), what the difference is between that scope, if you leave the proviso in (5) to one side.

MS CASEY QC:

Your Honour, I'm not going to take a very firm position on this. There clearly was an intended difference because the words are different. I've hazarded a guess as to what that might be. There's no legislative history to guide us on this, and it's, I've got to say it's not the easiest thing to unpick.

WINKELMANN CJ:

Well, you see, to me it seems, when I look at this just with a common law hat on, it seems to me obvious what they're attempting to achieve and I don't think that it's bad for you or your argument that they're simply – it's reflecting the employment relationship, vicarious liability, it's reflecting agency at (3), principal agent, and it's reflecting, making sure that that principal agency's situation extends to this membership of an employing authority, so that the critical issue – and if that's right then the critical issue comes down to that argument that Mr Waalkens raised which is whether you needed – whether there's some special, some reason in this circumstance to take a different approach to the general law on agency in relation to the extent of a principal's liability for the actions of their agents.

MS CASEY QC:

Your Honour, my best punt on the difference between (2) and (3) and (4) on the other side is I suspect the scope of whether or not it was done or omitted without knowledge or approval was intended to reach for a wider scope of vicarious liability for actions, actions that might not have others been within scope of ordinary course of business. That's how I read it, but I can't say that I've got any authority for that at all. It's just reading the words and trying to make sense of it.

WINKELMANN CJ:

Okay.

MS CASEY QC:

So your Honours, unless there's any questions, those are the submissions of the Commission.

WINKELMANN CJ:

Thank you, Ms Casey. Mr Waalkens, did you have reply?

MR WAALKENS QC:

I just had a few points to make and they're really points arising from the latter part of my learned friend's submissions, if I may. The first, and they're all very brief points, the first is I don't accept at all that there was a sharing of patients between these two doctors any more so than if the patient had been unable to see Dr Ryan and had gone up the road to see another doctor, that that wouldn't also constitute a sharing of patients. All it boils down, they have had the financial arrangements between that they have in terms of compensating for the consultation that Dr Sparks separately undertook when he consulted with the patient. That's my first point.

GLAZEBROOK J:

What do you say to the patient thinking that they're a patient of Moore Street?

MR WAALKENS QC:

Well, your Honour, it's not the way the patient made the complaint. The complaint was a complaint about Dr Sparks. It's not about –

GLAZEBROOK J:

At Moore Street, I think it says, but…

WILLIAM YOUNG J:

At the Medical Centre.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

I think the bigger point you have to answer on that point, Mr Waalkens, is the fact that this was presented to the world as these doctors practising out of Moore Street Medical Centre and people came to Moore Street Medical Centre to book appointments and the doctors seem, on Ms Casey's accounted facts to us, to have used Moore Street Medical Centre as kind of like how they – as a centre for how they organise themselves.

MR WAALKENS QC:

Well, that is the point I was going to come to in terms of these policies that are referred to. All medical centres have to have, or all health providers have to have policies. It's the way of the world now, and the Moore Street Medical Centre, as we've already heard, does employ other and provide other health services through locums, through nurses and through whatever else. So the difference that's been made to the policies or the practice procedures, in my respectful submission, doesn't speak at all to what the nature of the relationship is between the two doctors and the Moore Street Medical Centre.

WINKELMANN CJ:

But the point you have to meet, Mr Waalkens, is not really what their business relationship is; it's how they present themselves to the world, and their patients.

MR WAALKENS QC:

Well, as I say – yes, yes. I've addressed that.

WINKELMANN CJ:

Right.

GLAZEBROOK J:

Well they certainly present themselves to the world as Moore Street, and when the patient went in she decided not to wait for her doctor but to see the other doctor, didn't she?

MR WAALKENS QC:

Well she did see the other document. We don't know the circumstances and how that ended up…

GLAZEBROOK J:

I think that's what she says. Her mother said that she should go straight away rather than wait for the next day.

MR WAALKENS QC:

Right, yes.

GLAZEBROOK J:

And that's one of the advantages of having a multi-doctor practice, that if you do have something that has to be done immediately, you can go to another if the doctor is in the practice, and all of your notes and everything are available and you don't have to wait for five hours in an emergency medical centre.

MR WAALKENS QC:

Yes. Just on the accessing of the notes, I don't accept at all that the, that the providing of patient notes, a patient set of notes outside of the Medical Centre would constitute a breach of privacy at all, assuming that the access notes were on the same topic, not something completely unrelated, and I addressed you on that earlier today.

The other point, and I think this is the last point your Honours, is the reliance both by the HDC and also the Court of Appeal, the Court of Appeal in paragraph 88 of the changes that have been made in the knowledge of the fact of this complaint. In my submission it doesn't actually take you any further in terms of identifying the nature of the relationship between these two doctors in the Medical Centre, and indeed to use the fact of – I should say, firstly the changes were made, as Justice O'Regan in his discussion with my learned friend had observed, were made not just prior to the HDC's completed opinion, but many, many months before. It was in January 2007 that the first letter of changes was written, and the last one was in September '17, and I can take you to the passages if you needed them in the evidence, but I don't think that's going to be instructive.

That the HDC's opinion was not reached initially provisionally until May of the following year, and then finally the final opinion was in June '18, it was many, may months later, and it's, if anything, I suggest, a responsible reaction by a practice, or by any entity, to address any concerns to be seen to be proactive, and if anything it's in fact a disincentive to the consumer focus, or protection focus of the Act if a responsible body like doctors making changes in the knowledge of a complaint are then to have those factors used against them in this way. So –

GLAZEBROOK J:

I can understand that submission in the sense of whether this should have been a decision made in this particular case, but I think Ms Casey was speaking more generally to say that it was to encourage people to make those changes that this practice actually very responsibly made off its own bat, and

quite quickly. But just to – and I think she was saying that was the policy reason why it was useful to have this because it then meant that practices would make changes. Now I can totally understand the submission that it was rather odd, given that it happened, and given that no fault had been fault, that they were found vicariously liable, but that is should the – that's more a was it reasonable to apply this, rather than could legally that happen.

MR WAALKENS QC:

Yes, I hear the point. The fact that, in fact absent any vicarious liability type provision like in section 72, it is exactly how medical practitioners would respond anyway. They would address any concerns in a proactive manner. The HDC's opinion –

GLAZEBROOK J:

I'm not sure about that necessarily, I mean at a practice level. Because Dr Ryan said, well I don't have anything to do with Dr Sparks, didn't he, but there was an incentive at a practice level to do the thing responsibly.

MR WAALKENS QC:

Yes, and it's noteworthy that the HDC at no time made any reference to the fact even of any of these changes, least of all a suggestion that these are things that ought to have been in place beforehand and –

GLAZEBROOK J:

No, no, absolutely, these were, and I think Ms Casey agreed, these were above minimum requirements under the Code, that they met minimum requirements under the Code.

MR WAALKENS QC:

Yes.

GLAZEBROOK J:

And perhaps "minimum" is a slightly pejorative term. They met the Code requirements, and these were over and above the Code requirements.

MR WAALKENS QC:

Yes, that is a fair way of putting it, that is so. That's what the HDC determined. So those are my submissions, unless there's any other matters that I can address you on?

WINKELMANN CJ:

Thank you Mr Waalkens. Thank you counsel. Thank you Mr McClelland for appearing for the Intervener. We will take some time to consider our decision and we will now retire.

COURT ADJOURNS: 4.01 PM