Commissioner's Comment

Vicariously yours?

Ron Paterson, Health and Disability Commissioner

In a recent case a medical centre was held vicariously liable for breaches of the Code of Health and Disability Services Consumers' Rights (the Code) by a doctor employed as an independent contractor. Further details of my opinion in this case are set out below. A director of the medical centre admitted that he had never heard of vicarious liability and did not realise that the centre could be held responsible in this way. The number of queries and comments I have received in response to that opinion indicates that he is not alone. Given that it is a complex area of law, this response is hardly surprising. The topic of vicarious liability and its implications for providers merits further discussion.

Vicarious liability is a well-recognised legal concept. Basically it involves one person (or entity) being liable for the acts or omissions of another person, even though the former is not personally at fault. The individual at fault remains liable, as well. Most commonly, this issue arises in the context of an employer-employee relationship.

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There is a growing recognition of the importance of good systems in quality health care. The concept of vicarious liability in a health care setting can be viewed as a way of recognising that, where an individual provider breaches the Code, the environment in which he or she works may also be a contributing factor for which an employer should be held to account. This means, in effect, looking beyond the acts of the individual to systemic factors.

Vicarious liability and HDC

Under the Health and Disability Commissioner Act 1994 (the Act) and the Code, there is scope for identifying systemic issues and taking appropriate action. Indeed it is a focus area when assessing complaints and undertaking investigations. The importance of systemic issues in health care (and disability services) is reflected in the fact that the Act specifically incorporates the common law concept of vicarious liability (with some modifications).

Section 72 of the Act sets out how vicarious liability applies to breaches of the Code. Under this section any 'employing authority' (i.e. health care or disability services provider) may be liable for an act or omission of an employee, agent or member – that is, that person's act or omission will be treated as having been done or omitted by the employing authority.

Employing authorities have a defence to such liability if they can prove that they took 'such steps as were reasonably practicable' to prevent the act or omission in question. In this way, the HDC version of vicarious liability is somewhat more charitable than at common law, where liability is strict/absolute and the 'reasonable steps' defence is not available.

When an investigation is commenced into an individual provider, the employing authority will also be notified of the investigation and of the possibility of being held vicariously liable.

Liable for whom?

Liability for employees is a concept with which most employers are familiar. In general, it is also relatively straightforward to identify who is an employee, although changing employment practices are making this task more difficult. There is also the potential of liability for members, which could arise in the context of ownership or partnership in an organisation. However, this category arises least often.

Vicarious liability for agents is the area that generates the most debate. An agency relationship may be expressly entered into. However, there are also situations where an agency relationship will be implied on the basis of the factual scenario. The idea of implying an agency relationship concerns many providers, as it is seen as creating uncertainty as to whom they are responsible for. The outward appearance of the relationship to third parties is important, and courts have addressed the question in terms of *'what is necessary for the reasonable protection of an innocentthirdparty'* .[1]

Without going into detailed legal analysis, the important point is that employing authorities may be vicariously liable for the acts or

omissions of people who are not their employees, but for and over whom they should have some responsibility and control.

The consequences

Where an employing authority is found to be vicariously liable for the acts or omissions of an employee, agent or member, the most likely consequence will be that I recommend that the employing authority review current practices and procedures and put in place suitable safeguards to prevent the acts or omissions in question occurring again. While an employing authority could be referred to the Director of Proceedings for consideration of proceedings before the Human Rights Review Tribunal, to date there have been no Human Rights Review Tribunal cases on vicarious liability under the HDC Act.

Some examples

Legal analysis aside, how has the concept of vicarious liability arisen in actual HDC cases? The case mentioned above (03HDC03134) is one where a very senior GP breached Right 4(1) of the Code by failing to adequately examine and investigate a patient's urinary and abdominal symptoms (the patient was later found to have cancer of the uterus). The GP also breached Right 4(2) owing to poor record-keeping. In this case I considered the medical centre employing the GP as a contractor to be vicariously liable for his breaches of the Code on the basis that there was an agency relationship.

The medical centre admitted that it had not occurred to it that it was necessary to take steps to ensure that its doctors remained competent. The centre expressed the view that the steps usually taken by medical centres to ensure the competence of locums or doctors are limited to informal inquiry with peers and casual overview of their notes, and that it was the job of the regulatory authorities to ensure that doctors are competent. I disagreed with this view and commented that it is far better for problems of individual performance to be detected and addressed by fellow practitioners and managers in the practice setting.

In another case (03HDC10576) a senior emergency doctor breached Right 4(1) of the Code by failing to take an adequate history and order a CT scan for a woman who later died of a subarachnoid haemorrhage. The hospital employing the doctor was found vicariously liable for the breach owing to the absence of appropriate guidelines regarding CT scans in such situations and evidence that there were barriers to obtaining CT scans, particularly after hours.

How to avoid vicarious liability

Medical centres 'employ' medical and nursing staff under a variety of arrangements. Patients attending the centre will assume that staff are employed by the centre, and are competent to provide health services. Although medical centres will not ordinarily be held liable for lapses in care or communication by an individual practitioner, if the lapse was attributable to poor systems or inadequate protocols at the centre, or if there is no evidence that the centre took reasonable steps to ensure that the practitioner was competent (e.g. by credentialling on appointment and conducting ongoing peer review and practice audit), the centre may be held vicariously liable.

Employing authorities will avoid vicarious liability if they can show that they took such steps as were reasonably practicable to prevent the acts or omissions that amount to a breach of the Code. What this generally translates into in practical terms is having good, robust systems in place, providing appropriate training, guidance and support, and ensuring ongoing audit and review.

References

1. Todd S, editor. The law of torts in New Zealand (4th ed); 2005. p 917.

Pay for Performance

'Pay for performance is touted as the magic elixir of health care. Every week a payer outlines a P4P proposal that it says will enhance medical care while paying doctors more. Health plans, employer groups, the federal government - payers universally say that P4P holds the promise of improving quality by encouraging doctors to implement evidence-based medicine. But not all doctors are happy, and physician-participation is crucial to P4P.

Here's what the AMA says: "Some so-called pay-for-performance initiatives are a lose-lose proposition for patients and their doctors," says AMA Secretary John H. Armstrong, MD. "The only benefit is to health plans. Done right, these programs can improve medical care; done wrong, they can harm patients."

The difficulty is in defining performance. Depending on whom you ask, sometimes it is a synonym for quality, at other times for cost.'

Sipkoff M. Is Pay for Performance Part of the Cure or the Problem? Manag Care 2005; 2005 Jul;14(7):48-9, 51, 55-6.