IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2005-485-999

	BETWEEN	RIGHT TO LIFE NEW ZEALAND INC Plaintiff
	AND	THE ABORTION SUPERVISORY COMMITTEE Respondent

Hearing: 17 May 2007

Appearances: P McKenzie QC for Plaintiff
C Gwyn and W Aldred for Respondent

Judgment: 28 May 2007 at 11.00 a.m.

RESERVED JUDGMENT OF RONALD YOUNG J

Introduction

[1] This is an application by the respondent to review an Associate Judge's decision refusing to rule the evidence of seven affidavits, tendered on behalf of the plaintiff, as inadmissible. In addition, the respondent challenges the decision to suppress the name of six of those deponents. The substantive proceedings for judicial review have proceeded at a snails pace since they were filed in 2005. In early October 2005 Wild J struck out some causes of action in the proceedings resulting in a re-pleaded second amended statement of claim.

[2] The plaintiff's current pleadings were described by the Associate Judge as follows:

> [8] The plaintiff's second amended statement of claim filed in this proceeding on 29 July 2005 pleads five grounds of review:

1. Alleged failure by the defendant to properly interpret the Act (Contraception, Sterilisation, and Abortion Act 1977) according to its tenor;

2. Alleged failure by the defendant to perform its statutory duty to review the procedure for the conduct of abortions and determine in any case whether the provisions and procedures set out in the Act are being complied with;

3. Alleged failure by the defendant to enquire into the circumstances in which certifying consultants are authorising the performance of abortions on the mental health ground having regard to the extent to which that ground is used;

4. Alleged failure by the defendant to seek proper information on the mental health ground from certifying consultants;

5. Alleged failure by the defendant to perform its statutory duty or exercise its statutory power to take all reasonable and practical steps to ensure adequate counselling facilities are available (including ensuring that counselling services are independent of the licensed institutions in which they are provided).

[3] The evidence contained in six of the affidavits can be broadly considered together. Each of the deponents has had a termination. The terminations occurred in 1981, two in 1984, 1988, 1996, and 1997.

[4] Each of the six affidavits describe briefly the woman's circumstances before the termination, the process leading up to the termination including counselling (or lack of it) the termination itself and all but one discloses subsequent mental health problems which they identify as having been caused by the termination.

[5] The seventh affidavit is from Dr Julia Aranui-Faed. Dr Aranui-Faed is a consultant psychiatrist and a Fellow of the Royal Australian New Zealand College of Psychiatry. Dr Aranui-Faed's evidence relates to the difficulties she says certifying consultants have in identifying that patients are suffering from a depressive illness, and the requirement in her view that counsellors should, in such circumstances, address post termination risks to the mental health of the women. She describes in her affidavit, how long she takes to make an assessment for a diagnosis of depression. She makes a number of observations about such matters as suicide and pregnancy and informed consent in relation to abortion.

[6] As I understand it, it is common ground that the affidavits in issue from the first six deponents relate to causes of action 2-5 inclusive.

Summary of Associate Judge's decision

The six deponents

[7] The Associate Judge identified the grounds of judicial review, the context of the application to declare the affidavits inadmissible and the contents of the affidavits themselves. He identified both counsel's arguments. He said that he considered the essence of the plaintiff's claim was:

> [27] The substantive proceeding here deals with the claim that the defendant has failed to correctly exercise its duties and functions under the Act. In particular, the plaintiff seeks to show primarily that the defendant has failed to adequately oversee the counselling procedures provided for under the Act. In addition, the plaintiff complains that the defendant has failed to ensure that abortions are only being authorised in the limited circumstances allowed for under the Crimes Act 1961. These claims do not appear to be that the defendant can or should review the discretion exercised by certifying consultants in individual cases, but rather that the defendant is under an obligation to ensure that, in reaching a decision to authorise an abortion, consultants are taking into account proper considerations, and that at all stages the appropriate process is being followed.

[8] He considered the evidence of the six women. He said at [28]:

> [28] . . . Descriptions of the procedures that were followed in their individual cases may be relevant to the plaintiff's contention that the defendant has failed to perform its statutory duty first to review those procedures and secondly, to determine whether the provisions and procedures set out in the Act are being complied with. The accounts of the six women of the circumstances under which their abortions were authorised may be relevant in assessing the allegation that the defendant has failed to properly enquire into the circumstances in which certifying consultants are authorising abortions under the mental health ground. Their evidence of the counselling they received (or did not receive) as I see it is relevant to the plaintiff's claim that the defendant failed to ensure that adequate counselling facilities were available to women considering having an abortion.

[9] He then turned to consider the fact that the most recent experience described by the women was in 1997. As to this he said:

> [30] However, a key point of the plaintiff's claim appears to be that for some time the defendant has been aware of long-standing problems with the way the statutory scheme has been working, and has nevertheless failed to address them. Without wishing to pre-empt this line of argument on the part of the plaintiff, in my view it is possible that the evidence of the deponents here may be relevant to contentions advanced along these lines.

[10] He therefore concluded that the affidavits had "some" relevance to the proceedings. He saw no other basis upon which they could be excluded. In particular, in dealing with the question of whether part of the affidavits of the women were opinion evidence, especially where they related post termination problems with effect said to have arisen from the termination he said:

> [36] . . . The state of mind of the six deponents may be relevant to the way in which counsel address the issue of whether the counselling procedures overseen by the defendant were adequate, and to whether the mental health ground is being properly exercised. This evidence is both relevant and admissible.

[11] He acknowledged that there might be some inadmissible material within the affidavits but said overall he was satisfied they were admissible.

Dr Aranui-Faed

[12] As to Dr Aranui Faed's affidavit the Associate Judge concluded:

(i) Dr Aranui-Faed's comment on Dr A. I. F. Simpson's report (relating to reactive depression and abortion approval) was relevant;

(ii) Dr Aranui-Faed's comments on the nature of depression were also relevant;

(iii) While significant sections of Dr Aranui-Faed's affidavit may ultimately be of limited relevance he considered overall the affidavit was admissible.

[13] As to name suppression the Associate Judge considered that given the highly sensitive nature of the events being described and given the actual identification of the women was not relevant, this was a case for suppression of the names of six deponents in exceptional circumstances.

Approach to review

[14] Counsel are agreed that the proper approach to review of a decision of an Associate Judge under r 61C is set out in paragraph HR61C.02 of McGechan on Procedure. Two relevant points can be made:

(i) This was a reasoned decision by the Associate Judge and so the appropriate approach is an appellate one;

(ii) The applicant has the burden of persuading the Court the decision is wrong.

Jurisdiction as to inadmissible content

[15] It is also common ground that the Court retains an inherent jurisdiction to strike out irrelevant or inadmissible content in affidavit evidence: See *Donovan v Graham* [1991] 4 PRNZ 311.

[16] Rule 510 of the High Court Rules requires that every affidavit is to be confined to such matters as would be admissible if given in evidence at trial by the deponent. Often such matters of admissibility and relevance of evidence are dealt with at trial especially a civil trial. In this case that option was not open. Should some or all of the affidavits be ruled admissible the respondent will wish to make an application the deponents be cross-examined and to fully investigate the circumstances surrounding the deponents' abortions including interviewing and potentially filing affidavits by the deponent's general practitioners, counsellors, certifying consultants and any others who may have relevant evidence to give surrounding the abortion. In addition, should the evidence be declared admissible

the respondent is likely to seek an order that the deponents be ordered to undergo a medical examination relating to their mental health. (s 100 Judicature Act 1908).

Closure of pleadings

[17] The respondent's case is the proceedings have reached an appropriate stage to consider admissibility of evidence because practically the pleadings are effectively closed. The plaintiff expressed concern with the suggestion that the pleadings were closed in this case. They said they may wish to re-plead based on the result of this appeal and/or on the basis of other relevant evidence which may be filed. In my view this is and was an appropriate time to consider the admissibility of evidence. The pleadings are currently settled. That does not mean further amended pleadings are in any sense prohibited but that currently as the plaintiff and respondent accept the pleadings reflect the fact that the issues are identified and settled between the parties. I stress this would not prohibit further amended pleadings.

Counsel's submissions

[18] I consider the parties' arguments in more detail when I turn to a detailed consideration of the issues, however, in summary the respondent, in support of the appeal, submitted:

(i) The Associate Judge failed to keep in mind that this was judicial review proceedings where Courts should encourage a "simple untechnical and prompt procedure": See Cooke P *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348. The Judge's responsibility should therefore be to narrow the issues and ensure only relevant material was before the Court.

(ii) The Associate Judge failed to have proper regard to the relevance of the evidence given the Court's judicial review jurisdiction.

(iii) The Associate Judge did not "describe the basis upon which the challenged evidence was said to be relevant to the committee's performance of its functions".

(iv) The evidence cannot be relevant to the functions of the committee.

[19] The respondent submits that the evidence contained in the six affidavits was:

(i) irrelevant to any issue before the Court;

(ii) contained inadmissible evidence;

(iii) lacked specificity;

(iv) was not evidence of current practice;

(v) was presented for an improper purpose;

[20] The respondent said the consequences of allowing the evidence to be given would be to significantly expand the evidence thereby obscuring rather than illuminating the issues before the trial Judge.

[21] The plaintiff submits that the evidence of the six deponents is all relevant. It supports the decision of the Associate Judge. It says:

(i) The counselling the deponents did or did not have is relevant to the claim that the respondent failed to ensure proper counselling services were available in breach of its statutory obligations;

(ii) The six deponents' evidence as to the circumstances under which their abortions were authorised is relevant in that it supports the plaintiff's allegation that the respondent has failed to "properly enquire into the circumstances under which certified consultants are authorising abortions on mental health grounds".

(iii) The plaintiff says the evidence in the affidavits of appointments made, for counselling and terminations at the same time, supports their claim that the committee has failed to perform its statutory duty to review the procedure for the conduct of abortions.

(iv) The appellant says the evidence of the deponents is not out of date because it deals with the current mental state of those persons and illustrates longstanding problems with the working of the scheme.

(v) The appellant also submits that the respondent's ground of appeal relating to the proper approach of the Associate Judge in judicial review proceedings was never argued before the Associate Judge.

[22] As to (v) above, I accept that the proposition advanced by the respondent was not expressly raised before the Associate Judge. The approach of narrowing issues and ensuring only relevant evidence is given has much to commend it in all litigation. I agree with Miller J (*Te Runanga O Ngati Awa v The Attorney-General* HC WN CIV2006 485 001025 28 March 2007) that such an approach is especially important in judicial review proceedings. I have no doubt that the Associate Judge in any event would have been well aware of that principle when he gave his decision.

Discussion and submissions

General observations

[23] The first difficulty facing the plaintiff with respect to these deponents is the time factor. The proceedings were issued in 2005. They allege certain failures by the respondent and seek orders, the essential thrust of which asks the Court to direct the respondent to either do things or take into account certain matters before deciding what they should do. This pleading therefore requires evidence establishing what the respondent does or does not do and legal argument about what they should do. The evidence of what is or is not being done must therefore be essentially contemporary or establish a pattern of conduct over many years from which

continuing conduct could logically be inferred. I note Wild J's observation in his strike-out judgment ([108]) that the relief claimed is "forward looking" (see *Right to Life New Zealand Inc v Rothwell & Ors* [2006] 1 NZLR 531.

[24] The evidence of the six deponents could not be said to be in either category. It is not contemporary (most recently 1997 and beginning in 1981) nor sufficiently common ([25]) to establish a pattern of conduct from which inferences might logically be drawn. The plaintiff says that the nature of the procedure performed typically prevents women who have recently had an abortion from coming forward and revealing the circumstances. Whether that proposition is accurate or not it hardly alters the inadequacy of the current evidence.

[25] The next general point that can be made about this evidence is that it essentially asks the Court to reach general conclusions from these particular cases. For example the plaintiff says in four of the cases the counselling given was inadequate and in the fifth no counselling was offered. This is intended to show that the respondent has failed to ensure adequate counselling facilities were available as was said to be its statutory mandate (see s 14(1)(e) Contraception, Sterilisation, and Abortion Act 1977). These five failures of counselling occurred during a time when over 80,000 women had abortions (1981-1997). This number is based on a conservative estimate that on average there were 5,000 abortions a year between 1981 and 1997. These five alleged failures would represent, therefore, approximately 0.006 percent of abortions undertaken during that time. Such an analysis might typically go to the weight to be given to the evidence highlighted by the small percentage. However, it is difficult to see how any Court could make the jump from particular counselling experiences of such a small number of women somewhere between (in 2005) 8 and 24 years ago and any failure by the committee to fulfill their obligation under s 14(1)(e) to ensure adequate facilities for counselling are available to women who seek such counselling.

[26] The next general point that can be made is that none of the deponents told the respondent about their concerns before these proceedings were issued. It is difficult, therefore, to see how a Court could make orders based on alleged failure by the respondent to take particular action when such failures as the deponents identify

have never been brought to the attention of the respondent. While the plaintiff says there is other evidence where alleged failures were brought to the committee's attention that submission does not assist in deciding if this evidence should be available to be used to support the plaintiff's case and whether, in this context, it is relevant.

[27] I turn next to consider the potential consequences for this litigation if the evidence is admitted. I accept that the relevance and admissibility of this evidence can be dealt with without considering the consequences of permitting the affidavits to be read. I observe in this case it is unfortunate the parties did not, at the same time as this issue arose, ask the Court to rule on whether the respondent would be entitled to cross-examine these deponents, what further information from the deponents' medical records should be available to the respondent and whether a medical examination of the woman would also be ordered. This would have encouraged a focus on the exact limits of the evidence the plaintiff wanted to bring before the Court with respect to these women.

[28] The Crown have made it clear that if any of the evidence of the six complainants is to be admitted then they would seek:

(i) To cross-examine the women on their affidavits;

(ii) Full access to their medical records;

(iii) An independent medical examination of the women relating to their mental health (past and present).

[29] These issues are not directly before me in this case. I am also conscious that cross-examination of deponents in judicial review is only rarely permitted. However, the respondent must have very strong grounds for orders as to cross-examination, disclosure of information and medical examination. Very serious allegations are made by the deponents against some named but mostly unnamed persons. Some could be allegations of criminal offending. If the evidence is relevant in the way in which the plaintiff claims, then the Crown would no doubt

want to identify those who played a part in the process leading up to each women's abortion including her general practitioner, her counsellor or counsellors and certifying consultants, and potentially other hospital employees whom the deponents have said made relevant comments. Medical and other records would need to be checked and therefore the respondent would require permission to access them. If factual disputes arise, as seems highly likely, affidavits in response would therefore need to be filed. Orders for their cross-examination in turn are likely to be sought by the plaintiff. In addition, the Crown have said they wish to challenge the assertions by some of the deponents that they have suffered specific mental health trauma as a result of the abortion. Again, without deciding this issue, if the evidence as to post abortion mental health is, as the plaintiff claims, important to several causes of action, then it may be very difficult to resist an order for medical examination.

[30] These possibilities illustrate the potential for a substantial loss of focus in this case and considerable expansion. In each case described by the deponents there is likely to be at least four persons whose evidence may be required, the general practitioner, the counsellor, the certifying consultants, and in several cases other hospital employees. Of course if this evidence is properly seen as important to the plaintiff's case then perhaps such an expansion should logically be accepted. If, however, the evidence of the deponents was of modest relevance, the absence of which was not fatal to the plaintiff's case, this would be a relevant factor to take into account in deciding whether the affidavits should be read. Of course all of those possibilities are no more than that, possibilities.

[31] The respondent also claimed that the affidavits lacked specificity. I agree with the respondent that the affidavits do make a number of general observations and some of the affidavits do not identify the doctor, counsellor or hospital worker said to have been involved. It is also correct to say that many of the affidavits contain no specific dates when events are alleged to have occurred. Others report what unidentified professional advisors have apparently told the deponents. And others contain allegations of pressure to have abortions without identifying who may have been responsible for the pressure. However, this lack of specificity alone would not have convinced me to reject the evidence. Should this have been the major objection to admissibility and/or relevance then I would have given the plaintiff the chance to

remedy the "defects" before any final decision on admissibility or relevance was made by me. However, the lack of specificity has not turned out to be pivotal to my decision.

Specific causes of action and relevance of affidavits

Failure to review procedure for conduct of abortions (cause of action 2)

[32] I now turn to the particulars of the affidavits and consider them in relation to the discrete causes of action pleaded.

[33] I note the second ground of review as identified by the Associate Judge ([2]) alleges a failure by the respondent to perform its statutory duty to review the procedure for the conduct of abortions. This obligation presumably arises from s 14(1)(h) of the Act. The second part of this ground of review identified by the Associate Judge is to "determine in any case whether the provisions and procedures set out in the Act are being complied with".

[34] If this is intended to assert the respondent can, in individual cases, decide "whether the provisions and procedures set out in the Act are being complied with" then it cannot be correct. Firstly, neither s 14(1)(h) nor any other statutory provision in the Act authorises such an enquiry. Section 14(1)(h) is concerned with a review of the procedures set out in s 32 and s 33 whereby abortions are justified. In *Wall v Livingston* [1982] 1 NZLR 734 the Court of Appeal made it clear that in this context there is no power either by the Court or the respondent to review individual decisions of certifying consultants.

Failure to ensure adequate counselling services (cause of action 5)

[35] The plaintiff claims the evidence of the six deponents is relevant to the allegations of inadequate provision of counselling services. As to this Associate Judge Gendall said:

> [28] Considering first the affidavits of the six women who have had abortions, in my view it cannot be said that the content of their affidavits is completely irrelevant to the issues in point in the substantive proceeding. Descriptions of the procedures that were followed in their individual cases may be relevant to the plaintiff's contention that the defendant has failed to perform its statutory duty first to review those procedures and secondly, to determine whether the provisions and procedures set out in the Act are being complied with. The accounts of the six women of the circumstances under which their abortions were authorised may be relevant in assessing the allegation that the defendant has failed to properly enquire into the circumstances in which certifying consultants are authorising abortions under the mental health ground. Their evidence of the counselling they received (or did not receive) as I see it is relevant to the plaintiff's claim that the defendant failed to ensure that adequate counselling facilities were available to women considering having an abortion.

[36] Of the six women, four describe having counselling, one of the deponents cannot recall having any counselling and one says that no counselling was offered to her. The plaintiff says the evidence of the six deponents is relevant to its claim that the respondent failed to ensure adequate counselling services were provided.

[37] The statutory obligations of the respondent with respect to counselling is provided for in s 14(1)(e) of the Contraception, Sterilisation, and Abortion Act 1977 as follows:

> **14 Functions and powers of Supervisory Committee**
>
> (1) The Supervisory Committee shall have the following functions:
>
> . . .
>
> (e) To take all reasonable and practicable steps to ensure that sufficient and adequate facilities are available throughout New Zealand for counselling women who may seek advice in relation to abortion:

[38] And in s 31 of the Act:

> **31 Supervisory Committee to appoint or approve counselling services**
>
> (1) For the purposes of this Act, the Supervisory Committee shall from time to time—

> (a) Appoint suitably qualified persons to provide counselling services for persons considering having an abortion; or
>
> (b) Approve any agency for the provision of such counselling services.
>
> (2) In appointing or approving persons or agencies for the provision of counselling services under this section, the Supervisory Committee shall have regard to the following matters:
>
> (a) Every counselling service should be directed by an experienced and professionally trained social worker:
>
> (b) That suitably trained lay counsellors may also be used where there are insufficient professional social workers:
>
> (c) Every counsellor should be thoroughly familiar with all relevant social services and agencies, and able to advise patients, or refer them to appropriate agencies for advice, on alternatives to abortion, such as adoption and solo parenthood.

[39] These statutory provisions the plaintiff says require the respondent to provide counsellors with guidance, possibly through guidelines, as to what information the counsellors should be providing to those seeking abortions. The plaintiff says the respondent has the responsibility to provide counsellors with relevant information to assist them in carrying out their function.

[40] The respondent says that the way in which it ensures that counselling services are of the standard expected is by following the s 31 procedure which requires appointment only of suitably qualified persons with an experienced and professionally trained social worker in charge. These suitably qualified persons can be expected to keep their professional knowledge up to date. The respondent says it is simply not qualified to provide the type of material to professional counsellors as suggested by the plaintiff.

[41] Whatever the obligation of the committee is with respect to counselling services, I cannot see the evidence of the deponents has any relevance or sufficient relevance in the circumstances to be allowed to be given in evidence. I assume for this purpose the plaintiff's interpretation of s 14 is correct.

[42] Mr McKenzie for the plaintiff said the evidence of the deponents experience and post abortion trauma was relevant because:

(i) It illustrated five persons' perceptions about counselling;

(ii) It established a "problem" existed although Mr McKenzie accepted there may be a multitude of causes for the deponents mental health problems;

(iii) It illustrated the need for committee direction in this area.

[43] As the respondent said, this is ad hoc evidence of six women as to what happened to them. It cannot possibly be evidence of widespread systemic failure of counselling services. Their experience constitutes a minuscule example of the numbers who have been counselled. It is historic, between 8 and 24 years ago, and in any event the committee's attention has never been drawn to the alleged failures identified in the affidavits. There could hardly therefore have been a credible assertion of failure to act on behalf of the committee based on this evidence when on the plaintiff's own evidence such alleged failures as the affidavits illustrate were never drawn to the committee's attention.

[44] The related claim of the plaintiff is that these affidavits illustrate if a woman seeking an abortion has an appointment for counselling services and at the same time an appointment is made for the abortion, inappropriate pressure to keep the abortion appointment is created.

[45] The respondent accepts it is, or has been, the habit of some institutions to make the two appointments together in this way. The evidence of the women who described the appointment being made in this way is therefore unnecessary to establish this fact. Also, none of the women who describe this process in their affidavits claim that the fact both appointments were made at one time put them under any inappropriate pressure.

[46] The only deponent who could possibly be seen to comment on this aspect is R.E.S. She describes (para 9) in her affidavit that at the time she was due to have her abortion she expressed some uncertainty to the health practitioner's present. She said: "It was clear, however, that I was expected to go through with the procedure". However, this expectation that she identified arose some time after she had received counselling. This evidence therefore could not possibly relate to the claim that pressure was inherent in making both appointments together. I also note the affidavit does not identify "who" made it "clear" nor how. The evidence of the deponent, therefore, cannot be relevant on this ground.

[47] The third aspect of the plaintiff's claim relating to the provision of inadequate counselling services relates to research undertaken by Dr Fergusson of the Christchurch School of Medicine and Health Services. The scientific report of his work has the title: "Abortion in Young Women and Subsequent Mental Health". This research was first published, as I understand it, in 2006 in the Journal of Child Psychology. The research, the plaintiff says, establishes that those having abortions have elevated rates of subsequent mental health problems. The plaintiff says the research should inform the counselling of those who are considering abortion. In turn, the plaintiff submits the respondent, pursuant to s 14(1)(e), has the obligation to ensure all counsellors are aware of and use this information in their counselling. The committee's alleged failure to require this is part of the basis for the alleged failure of the respondent to comply with its statutory obligation.

[48] The deponent's evidence of their pre abortion counselling and their post abortion descriptions of their mental health problems cannot have any relevance, however, to this claim. On the plaintiff's own evidence, the research was not conducted and the respondent not provided with the results of this research until many years after the most recent deponent had had her abortion. This evidence, therefore, cannot be relevant to the claim that the respondent failed to take into account Dr Fergusson's research. The fact, as the plaintiff claims, that the deponents still suffer mental health problems today does not assist the plaintiff. The complaint is about the inadequacy of counselling at the time of the abortion.

Failure to enquire as to abortions authorised on mental health grounds (cause of action 3)

[49] The second main ground upon which some of the evidence in the deponent's affidavits is said to be admissible relates to the plaintiff's claims of a failure by the committee to enquire into the circumstances on which abortions are authorised under the "mental health" ground.

[50] As to this the Associate Judge said:

> [28] . . . The accounts of the six women of the circumstances under which their abortions were authorised may be relevant in assessing the allegation that the defendant has failed to properly enquire into the circumstances in which certifying consultants are authorising abortions under the mental health ground.

[51] As I have previously observed, the affidavits do not support the plaintiff's claim given their historic nature and the fact that the alleged failures have never been brought to the attention of the respondent. More fundamentally, the anecdotal evidence of six women could hardly be evidence to support an allegation of failure by the respondent to review the procedure or compliance with the statutory regime. At best, this evidence, if accepted, could support a claim that in these cases the certifying consultants may have acted outside the law. This claim cannot form part of the plaintiff's claim (see *Wall v Livingston*). There is no ability to look behind a certifying consultant's grounds for approving an abortion. As I have previously observed, given these events occurred between 8 and 24 years before the filing of these proceedings, that they constitute six abortions out of more than 80,000 during that period and they have never been drawn to the respondent's attention, the evidence of the deponents could not possibly establish or be used to support that which the plaintiff claims.

Further matters

[52] Although said to be essential background material, the affidavits also contain, in places, a highly emotional description of events. I accept that these descriptions reflect the experiences of the women involved. However, this "background"

material is not relevant. It does, however, create an atmosphere in this litigation which compels a "like" response. There also are a number of allegations made in the affidavits of what could be categorised as criminal conduct by others. If the affidavits are to be allowed to be read then understandably those accused will wish to respond. This will inevitably widen this litigation well beyond its current focus.

Improper purpose

[53] I do not consider in detail the respondent's submission that these affidavits were presented for an improper purpose. The respondent submitted that given the irrelevance of the thrust of the affidavits, linking abortion and subsequent depression, this Court could infer the purpose of the affidavits was the creation of media interest in the plaintiff's opposition to abortion in New Zealand. The Associate Judge rejected this claim. In my view there is no clear evidence upon which such an inference could be taken.

Opinion evidence

[54] The respondent also submitted to the Associate Judge that the evidence of the claimed post abortion mental health of the deponents was inadmissible opinion evidence. As to this the Associate Judge said:

> [36] And not all of the material objected to by the defendant on the ground that it is non-expert opinion is in fact opinion – some of it relates to each deponent's recollection of the events she experienced and her reaction to those events. Witnesses may give evidence of their state of mind or emotion when it is relevant to an issue: *Mansell v Clements* (1874) LR 9 CP 139, *R v King* [1897] 1 KB 214. The state of mind of the six deponents may be relevant to the way in which counsel address the issue of whether the counselling procedures overseen by the defendant were adequate, and to whether the mental health ground is being properly exercised. This evidence is both relevant and admissible.

[55] If otherwise admissible, (relevant) a deponent would be able to describe their emotional state before, during and after an abortion. However, whether they should be permitted to give what is in effect a medical diagnosis of their mental health depends upon whether it constitutes inadmissible opinion evidence. The question to

be asked, therefore, is what is the purpose for which the plaintiff wishes to use this evidence. As I understand it the evidence of the deponents in this context, is only of evidential value to the plaintiff if it establishes what the deponents' mental health (including a medical diagnosis) was pre and post abortion. The post abortion mental health of the women is said to be relevant to illustrate the necessity of informing women of the post abortion effects of a termination. The plaintiff says the failure of the respondent to ensure this information is provided to women at counselling is a failure to perform its statutory function.

[56] Some of the deponents claim gambling problems, criminal convictions, use of drugs and alcohol, relationship failures, clinical depression and obsessive compulsive disorder were the result of their abortion. Some of these claims involve a claim the deponent has a medically defined disorder (for example depression). All involve assertions of cause and effect, that the abortion has caused or made considerably worse pre-existing conditions. This evidence, given the use to which the plaintiff wishes to put it, must be inadmissible opinion evidence. Whether a deponent's symptoms constitute for example the medical condition of depression is a matter for medical expertise. Whether any or all of the "problems" identified by the deponents are caused by their abortion also requires an expert opinion. The deponents' evidence where it infringes this opinion evidence principle is inadmissible.

Summary

[57] I am satisfied:

(1) To allow these six affidavits to be read would inevitably expand the focus of the case outside its proper limits.

(2) The evidence of the six deponents is too "historic" to be of relevance in these proceedings.

(3) The evidence of the deponents cannot be used, as the plaintiff invites, to generalise from the particular occasions described.

(4) The complaints of the deponents have never been communicated to the respondent and so no failure to act based on these affidavits can be asserted.

(5) The affidavits lack specificity although this could be cured by orders requiring appropriate specificity.

(6) The women's description of their counselling experiences are not relevant to any cause of action.

(7) The fact some institutions make appointments for counselling and termination at the same time is already established. The deponents do not assert making appointments in this way subjected them to inappropriate pressure.

(8) The deponent's evidence of counselling services is not relevant to Dr Fergusson's research given the timing factor.

(9) The deponent's medical diagnosis of their mental health and their assertions of cause and effect are inadmissible opinion evidence.

(10) The evidence of the deponents as to the circumstances surrounding the abortion including the actions of the certified consultants is not relevant to the plaintiff's cause of actions. The evidence is neither contemporaneous nor illustrative of widespread abuse. It impermissibly challenges individual certifying consultant decisions.

(11) The affidavits contain highly emotive descriptions that make serious allegations of misconduct which if allowed to be read will probably lead to inappropriate expansion of the factual issues.

[58] I am therefore satisfied, for the reasons given that the six affidavits of the female deponents should be excluded in this case. They contain irrelevant and inadmissible material. And if admitted would unreasonably expand the trial issues outside of the pleadings. In this, I have disagreed with the reasons given by the

Associate Judge. Because I have differed from the Associate Judge I have tried to give my reasons in detail for doing so.

[59] I also make this observation. By making this ruling the plaintiff's case will not be fatally wounded. The plaintiff's case for many of these allegations relies upon statements made by the respondent and from research publications.

Evidence of Dr Julia Aranui-Faed

[60] Dr Aranui-Faed's evidence can be broken down into several parts. Paragraphs 7-23 are about depression and pregnancy. Paragraphs 24 and 25 are about evidence that supports the view that abortion increases the risk of subsequent severe depression. Paragraphs 26 and 27 are about the effect of depression on a woman's judgment and thereby ability to give consent to an abortion. Paragraphs 28-31 are about Dr Aranui-Faed's view that certified consultants need to define the particular diagnosis of depression. Paragraph 32 is about evidence previously given by the doctor in Court about these issues, and paragraphs 33-35 relate to Dr Aranui-Faed's view about research undertaken by Dr Fergusson.

[61] As to the evidence of Dr Aranui-Faed, the Associate Judge said:

> [39] In her affidavit Dr Aranui-Faed refers to the report of a Dr A I F Simpson, which has been produced by the defendant in the substantive proceeding. And, she deposes in her affidavit as to her qualifications as a recognised expert in the relevant field. As such, in my view her replies to the report of Dr A.F. Simpson cannot be seen as irrelevant to this proceeding.
>
> [40] Further, her comments in her affidavit on the nature of depression, if accepted, may suggest that the defendant arguably should have taken more proactive steps to ensure that when consultants give a diagnosis of reactive depression, they are required to better indicate the serious risk posed to the health of the woman.
>
> [41] There is a reasonable likelihood, in my view, that there are sections of Dr Aranui-Faed's affidavit that ultimately may prove to be of limited relevance to the issues at hand, or which raise matters which would more appropriately be addressed by counsel as a point of law. However, these questions and the weight to be given to Dr Aranui-Faed's evidence are matters for the trial judge to assess. I conclude that it cannot be said that the material as a whole is so irrelevant as to be inadmissible.

Discussion and submissions

[62] Part of Dr Aranui-Faed's evidence can be relatively simply dealt with. Paragraphs 26 and 27 relate to the effects of depression on judgment and thus the consent of the patient. This does not seem to have any relevance to this case. The plaintiff said this evidence is relevant to the claim that the respondent has failed to do sufficient to provide adequate counselling services. Exactly how this evidence is connected with counselling was not identified by the plaintiff. Presumably the plaintiff's case is that the committee should have ensured that counsellors were advised of Dr Aranui-Faed's view that depressed women may be unable to give informed consent. I assume the responsibility for ensuring informed consent is the certifying consultants and possibly the general practitioner. However, there is no pleading which alleges failure to obtain informed consent is a failure of the respondent's statutory obligations. There is no evidence that the concerns surrounding informed consent as expressed by Dr Aranui-Faed have been passed onto the committee, nor evidence that it has ignored Dr Aranui-Faed's view. Finally, there is no evidence as to the basis upon which Dr Aranui-Faed's view as to informed consent has been reached. For example, she quotes no research by her or others. She does not say whether her opinion on this matter was simply gleaned from her practice and if so the basis of this. In my view this evidence is not relevant to any issue before the Court.

[63] Nor is the relevance of paragraphs 24 and 25 of her affidavit clear. In these paragraphs Dr Aranui-Faed discusses whether abortion is "appropriate treatment for depression". She says that termination creates a risk of increased and more severe depression. She goes on to comment that a woman seeking an abortion who suffers from reactive depression would in her view seldom provide a basis for termination.

[64] The statement of claim does not allege that abortions are being performed as a treatment for depression. Most of the evidence contained in these paragraphs is about what certifying consultants should or should not do when faced with someone seeking an abortion. The plaintiff says this evidence is relevant to the difficulty faced by certifying consultants in deciding whether the alleged depression being suffered by someone seeking an abortion is sufficient to justify their approval of this

procedure. However, this "difficulty" does not appear to be relevant to any cause of action. There is no evidence that any of these assertions by Dr Aranui-Faed have been provided to the committee or if they have that the committee has done nothing about them. Nor is there any information as to the basis for these opinions.

Failure to seek proper information (cause of action 4)

[65] Paragraphs 28-31 of Dr Aranui-Faed's affidavit adds nothing to the plaintiff's claim. Dr Aranui-Faed in these paragraphs asserts the importance of certifying consultants defining the diagnosis and identifying the serious danger it is claimed that the woman faces. Dr Aranui-Faed is perfectly entitled to her opinion as to what certifying consultants should report, but her opinion here is not any part of her expertise. Paragraph 30 is the pivotal paragraph in this section. It contains an expression of Dr Aranui-Faed's view that it is essential to an adequate assessment of whether there is a serious danger to the mental health of the woman or girl for a certifying consultant to define the diagnosis and identify the particular serious danger the woman faces. This is no more than an expression of opinion not a medical opinion for which Dr Aranui-Faed may be qualified to give. It is an expression of what she believes should happen.

[66] The question of what certified consultants are required to report on as to reasons for an individual termination was considered in *Wall v Livingston* [1982] 1 NZLR 734 (CA). At 739 the Court said:

> The statutory silence of the New Zealand legislation in regard to review and the implication to be drawn from that silence is all reinforced by the absence of any direction in the Act or regulations requiring any reason to be given by the certifying consultants for an authorisation other than reference to the statutory exception within s 187A of the Crimes Act. To put the matter in administrative law terms the relevant legislation does not contemplate that the face of the record will include reasons.

[67] This passage emphasises the only statutory obligation on a certified consultant to provide reasons is to identify the relevant grounds in s 187A of the Crimes Act. As to "mental health" grounds, s 187A provides an abortion will not be unlawful if done in the belief that the continuance of the pregnancy would result in serious danger to the mental health of the mother. All, therefore, the certifying

consultant need do in law is to state his or her belief that the continuance of the pregnancy will result in serious danger to the mental health of the mother. Form 3A of the Abortion Regulations 1978 confirms this is the certifying consultant's obligation at least as far as form filling is concerned (see Note 2). The statute, the regulations and the Court of Appeal judgment in *Wall v Livingston* all make it clear what the certifying consultant must report on when he or she authorises an abortion. This does not include the type of information Dr Simpson recommended in his report to the respondent or what Dr Aranui-Faed thinks is "necessary". Dr Aranui-Faed's opinion on this has no relevance to the statutory obligations of the certified consultant. This aspect of her evidence is irrelevant and therefore inadmissible.

[68] Paragraph 32 of Dr Aranui-Faed's affidavit states she gave evidence in March 1993 in the District Court relating to a prosecution. The evidence that she gave was apparently "referred to" by the plaintiffs when they made representations to the Abortion Supervisory Committee in October 2003. I presume, therefore, that this evidence is intended to establish that the supervisory committee did have notice at least that Dr Aranui-Faed gave evidence previously in the District Court. I would be prepared to allow this paragraph to remain as part of the affidavit in the meantime. This evidence is potentially relevant to the question of whether the respondent has previously had notice of Dr Aranui-Faed's concerns. It will have to be redrafted to identify precisely what material from Dr Aranui-Faed was given to the respondent. It is not currently possible to express a view on the relevance of the evidence given by the doctor in Court. Allowing the admission of this expanded evidence still preserves for consideration any later objection to this evidence by the respondent based on relevance.

[69] Paragraphs 33-35 are essentially a statement by Dr Aranui-Faed about Dr Fergusson's research. They also contain Dr Aranui-Faed's view that pre abortion counselling must address post abortion risks to mental health as being confirmed by this research. This view, it is said, is relevant to the "counselling" cause of action. I have already concluded this is not admissible evidence. In one sense these paragraphs contain no evidence in that Dr Aranui-Faed is reporting on what she believes the research of Professor Fergusson concludes. That research could be part of the evidence in this case. If necessary Dr Fergusson, as the obvious person, or

one of the other researchers, may need to complete an affidavit relating to the research. Any "obligations" that research creates, as far as the respondent is concerned could then be the subject of submission.

[70] In paragraph 35, however, the affidavit goes on to say what the doctor thinks is or is not appropriate for pre and post abortion counselling. This evidence relates to the proposition that the committee has failed to adequately respond to Dr Fergusson's research and to direct counsellors as to the need to include what is claimed to be the post abortion effect on their mental health. As I have previously pointed out, this research has only recently been formally brought to the attention of the respondent. It is not alleged that the respondent has considered but refused to act on Dr Fergusson's report. I note that the respondent pleads that they do not consider it is their function to disseminate research or give directions to counsellors as to the content of their counselling. They say they rely upon the counsellor's professional standards to keep up with current research and factor that into the counselling services provided. However, for this purpose I accept the plaintiff's assertion that it is the respondent's obligation to provide direction to counsellors. Given that claim Dr Aranui-Faed's evidence in paras 33-35 is relevant to the plaintiff's claim. With some hesitation I am prepared to allow paras 33-35 to be read.

[71] As to paragraph 7-23 this evidence is based on the proposition that it is for the committee to actively undertake its obligations set out in sections 14(1)(h) and (i). They provide as follows:

> **14 Functions and powers of Supervisory Committee**
>
> (1) The Supervisory Committee shall have the following functions: . . .
>
> (h) To keep under review the procedure, prescribed by sections 32 and 33 of this Act, whereby it is to be determined in any case whether the performance of an abortion would be justified:
>
> (i) To take all reasonable and practicable steps to ensure that the administration of the abortion law is consistent throughout New Zealand, and to ensure the effective operation of this Act and the procedures thereunder.

[72] The plaintiff submits that paragraphs 7-23 are a summary of what Dr Aranui-Faed has previously provided to the committee and that it illustrates that there should be concern that the certifying consultants are authorising abortions that are not according to law. They say this in turn should trigger, pursuant to s 14(1)(h) and (i), a review to ensure consistency of administration and effective operation of the Act.

[73] These paragraphs are, as I understand it, aimed at the proposition that a large number of abortions are being authorised on mental health grounds that do not meet the s 187A criteria. Previously, when a similar issue arose the respondent obtained a specialist psychiatric opinion which considered whether a diagnosis of a particular type of depression could satisfy the mental health grounds in s 187A (Dr Simpson's opinion). The plaintiff says that Dr Aranui-Faed's evidence challenges both the respondent's interpretation of this opinion and whether it can any longer be maintained that the type of depression considered in his report (reactive depression) could be grounds for abortion.

[74] I am prepared to accept this evidence could be relevant. It does not and cannot go behind the grounds for an abortion in an individual case. It raises the question that the respondent previously thought was within their jurisdiction to investigate and of sufficient importance to obtain a report (the 1996 Simpson report). The plaintiff's grounds of review include an assertion that particular mental health grounds commonly used by certifying consultants for authorising abortions that do not comply with s 187A. The plaintiff says the respondent's failure to review whether grounds commonly used to authorise abortions comply with the statutory regime is at the essence of ground (2) of the review (see [2]). The evidence of Dr Aranui-Faed, they say, establishes the need for the review. I am satisfied that her evidence for the reasons identified by the plaintiff is potentially relevant to this claim. It does not in my view, on the face of it, improperly impinge into individual decisions by certifying consultants but does as the respondent previously seems to have accepted concern itself with whether commonly used grounds for abortion comply with the law.

[75] In summary, therefore, as far as Dr Aranui-Faed's evidence is concerned I am satisfied paragraphs 1-23 and paragraphs 32-35 are admissible. The remaining paragraphs are not. To avoid any confusion the proper course is for the existing affidavit to be removed from the Court record and for Dr Aranui-Faed to swear a new affidavit covering only matters in paragraphs 1-23 and 32-35.

Suppression orders

[76] As to the appeal against the suppression order relating to the first six deponents given my conclusion that they should not be read in evidence this appeal need not be considered.

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Ronald Young J