IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2005-485-999

IN THE MATTER OF	Part 1 of the Judicature Act 1972 and Rule 623 of the High Court Rules
BETWEEN	RIGHT TO LIFE NEW ZEALAND INC Plaintiff
AND	THE ABORTION SUPERVISORY COMMITTEE Defendant

Hearing: 24 September 2007

Counsel: W Aldred for Applicant/Defendant
P McKenzie QC and I Bassett for Respondent/ Plaintiff

Judgment: 3 October 2007

JUDGMENT OF SIMON FRANCE J

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[1] The plaintiff has initiated judicial review proceedings challenging the manner in which the Abortion Supervisory Committee is performing its functions under the Contraception, Sterilisation and Abortion Act 1972. The proceedings have been the subject of full analysis in the context of a strike out application (Wild J, 11 October 2005) and a defendant's challenge to admissibility of 7 affidavits filed by the plaintiff (Ronald Young J, 28 May 2007). As a result of Wild J's decision, a second Amended Statement of Claim was filed on 28 October 2005 and that remains the operative document.

[2] This application relates to two further affidavits filed by the plaintiff which the defendant alleges are inadmissible and should be struck out. I do not consider it necessary or helpful to again traverse in any detail the respective position of the parties. The essence of the plaintiff's case is that the Supervisory Committee has

functions and responsibilities under the Act which it is not performing. The defendant contends for a much narrower interpretation, which it says is consistent with the interpretation taken by the Court of Appeal in the leading decision of *Wall* v *Livingston* [1982] 1 NZLR 734. In his strike-out decision Wild J indicated that many of the plaintiff's propositions would be difficult to sustain but were not so untenable as to be regarded as hopeless and meriting a strike-out.

[3] The affidavits presently in dispute are from two paediatricians who describe the present medical capacities in relation to foetal surgery and foetal diagnosis. Neither deponent offers an opinion on the issues in the case; rather, the affidavits are more by way of information on a specialist area from persons qualified to know.

Purpose of the evidence

[4] The plaintiff contends that the common law "born alive" rule concerning the legal status of a child/foetus underpins both the interpretation that has to date been taken of the Contraception, Sterilisation and Abortion Act 1977 (CSA), and the possible inapplicability of s8 of the New Zealand Bill of Rights Act 1990 (the right to life) to the interpretation of CSA. It wishes to contend that the "born alive" rule is an historical concept that has no validity in today's world. One of the arguments it would wish to make in support is the current state of foetal diagnosis and surgery, whereby it is now possible to partially remove the foetus from the uterus so as to operate and then return the foetus back. The argument is that 'birth' is not a sensible criteria.

Objection

[5] The applicant submits the case is about how the Committee performs its functions under the Act. The status of foetal surgery cannot impact on that. Nor has it been alleged how, even if s8 NZBORA were applicable, this would alter the meaning of CSA and the Committee's functions. It is submitted that if the evidence is allowed the respondent will need to obtain its own evidence as to its accuracy, and consider whether to respond. Ms Aldred submitted the Court had a duty to restrict

the ambit of judicial review to its appropriate scope, and this was a situation where such steps should be taken. Ms Aldred confirmed that the respondent's position is that s8 NZBORA is inapplicable (the arguments why are set out fully in Wild J's judgment, paras [21]-[35]). However, the respondent does not rely on the common law "born alive" rule, and submits that the viability of the foetus at any particular stage is not an aspect of the case.

[6] Finally, it was submitted in oral submissions that the evidence is being put in for collateral purposes associated with the plaintiff's position on abortion.

Decision

[7] Mr Bassett argued the matters for the plaintiff and my conclusions largely reflect his submissions.

[8] Dealing first with the suggestion of collateral purpose, this argument was advanced and rejected in both the prior hearings (Wild J at [111]- [113]; Ronald Young J at para[53]. There is no basis for the submission and I reject it.

[9] In the ruling given by Ronald Young J, His Honour ruled out 6 affidavits and significant portions of a 7th. However the context was very different from here. Those affidavits were from women who had had terminations many years ago. They contained information on the processes that had been followed in relation to those women, who as Young J noted, constituted .006 of the abortions performed over the relevant years. The affidavits were excluded because they would inevitably take the case outside its proper scope, the evidence was too historic to be relevant to a consideration of how the Committee was currently performing its functions, it was not anyway capable of being a basis for generalised conclusions and the evidence would require response and challenge, leading to an unreasonable expansion of the proceedings.

[10] None of these concerns arise here. The affidavits are totally neutral in their tone and merely provide information about the current state of medical science. There is no basis at this stage to consider the evidence will in any way expand the

proceedings, or require expansive response. The affidavits do not comment on any particular abortions and so lack the underlying issues that were raised by those under consideration in the previous challenge before Ronald Young J. Nor are the affidavits emotive as was the case with the earlier excluded affidavits.

[11] Of course none of this is to make relevant that which is irrelevant; but it does in my view mean the Court should give a reasonable measure of latitude to the party tendering the affidavits. Essentially at worst they are irrelevant but they carry no other implications or consequences and so if a tenable basis for their admissibility is shown, I consider the plaintiff should be allowed to present its case as it wishes.

[12] The plaintiff sees the "born alive" rule as a potential impediment to its case and wants to be in a position to contest that rule if either the respondent or the Court see it as relevant. An element of its challenge to the relevance of the rule is the current state of medical capacity in relation to the foetus. The recent text Medical Law in New Zealand (Ed Skegg and Paterson) notes that generally New Zealand adheres to the born alive rule, although there have been inroads. It suggests that there is scope for future challenges to its continuing relevance.

[13] The defendant's objection is essentially based on its propositions about the Act and the role of the Committee. If those propositions are correct then no doubt this evidence will be irrelevant. Ultimately it may also be the situation that the respondent is right that the born alive rule is not essential to the plaintiff's case, especially since the respondent says it is no part of its argument. However, at an interlocutory stage, given the limited nature of the evidence in issue, I am not satisfied about that so as to rule the evidence inadmissible.

[14] Section 7 of the Evidence Act 2006 makes evidence admissible if relevant (which I provisionally hold it is in the sense of not being satisfied at this stage of the proceeding it is irrelevant) and not otherwise prohibited by an enactment. The opinion rule in s23 of the Evidence Act 2006 arguably provides such a limit, but was not relied on by the defendant. Whilst the deponents are undoubtedly experts, their evidence would not normally be seen as "opinion" in its nature, being essentially descriptive of the current capacities of medical science. However, if the deponents'

description of the current state of medical science turned out to be a matter of dispute, it would then be likely the evidence would be seen more as opinion evidence and subject to the substantial helpfulness test. Since a challenge on this basis was not advanced, I do not need to finally determine it. The reality, though, is that if the state of medical science as to foetal surgery is relevant, it could hardly be suggested the court would not be helped by expert evidence on the topic.

[15] I decline to hold at this stage that the affidavits are irrelevant and therefore inadmissible. This ruling is limited to relevance and does not address the issue of, for example, hearsay.

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Simon France J

Solicitors:
P Doody, Christchurch for the Plaintiff
Crown Law Office, Wellington for the Defendant