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# Liability of Health Professionals for a Breach of the Abortion Law of New Zealand

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*The abortion law of New Zealand appears to have been interpreted very liberally over recent years by sectors of the medical profession. Indeed the interpretation of the law appears to have been so liberal that it raises questions as to the lawfulness of many of the abortions carried out in New Zealand. The current practice and application of the abortion law is such that it may expose some medical consultants certifying and performing abortions to criminal proceedings and civil claims. [Downloaded from [www.abortionlaw.co.nz](http://www.abortionlaw.co.nz) ]*

## Introduction

This article is intended to bring to the attention of health professionals (and their employers and insurers) the possibility of criminal and civil liability arising as a result of abortions performed in breach of the present abortion law<sup>1</sup> of New Zealand.

There has been comment in New Zealand by the Abortion Supervisory Committee and the Court of Appeal of New Zealand concerning the lawfulness of the application in practice of the abortion law.

The Abortion Supervisory Committee's annual reports to the New Zealand House of Representatives have consistently shown that since 1979 the large majority of abortions have been certified and carried out on the grounds of serious

danger to the mental health of the woman pursuant to s 187A(1)(a) of the *Crimes Act* 1961 (NZ).

It will be submitted that civil and criminal liability for a breach of the abortion law may arise if health professionals knowingly misapply s 187A(1)(a) so as to certify abortions in the absence of proper legal and factual grounds for doing so.

The risk of a legal challenge to health professionals' application in practice of the abortion law should not be ignored. This kind of risk is highlighted by a 1998 media report regarding medical practice and enforcement of the abortion law in Western Australia.<sup>2</sup>

To follow is a discussion of the law in New Zealand, current practice and the potential liability issues.

## What the New Zealand abortion law provides

Abortion is not lawfully available "on demand" in New Zealand.

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<sup>1</sup> The abortion law in this article is defined as ss 10-46 of the *Contraception Sterilisation and Abortion Act* 1977 (NZ) as amended, including by the 1978 and 1990 Amendment Acts and ss 182-187A of the *Crimes Act* 1961 (NZ) as amended, including by the 1977, 1978 and 1985 Amendment Acts.

<sup>2</sup> *Time Magazine*, 1 June 1998, p 27, reportedly involving an incident of health professionals who were charged with criminal offences of procuring an abortion in breach of Western Australia's then restrictive abortion laws. It is understood that the relevant law was amended and the criminal charges did not proceed.

The *Contraception Sterilisation and Abortion Act* 1977 (NZ) provides<sup>3</sup> for the appointment of medical consultants (hereinafter “consultants”) who may only certify the performance of an abortion if, in their professional opinion, the facts of the particular case are within the limits of s 187A(1) or (3) of the *Crimes Act* 1961 (NZ). Certification must be obtained from two consultants before an abortion can lawfully be performed. The operating surgeon performing the abortion may be a person other than one of the consultants.

Section 187A(1) and (3) of the *Crimes Act* sets out the grounds upon which an abortion may lawfully be performed and when it may not. The key concept to bear in mind when reading and applying s 187A(1) and (3) is that of “lawfulness” – what is lawful and what is not. In order lawfully to perform an abortion, a consultant must believe that he or she has factual grounds upon which to certify it as falling within the scope of s 187A(1) or (3) of the *Crimes Act*.

Section 187A(3) states that, in the case of a pregnancy of more than 20 weeks gestation, an abortion is unlawful unless the person performing the abortion believes that the abortion is necessary to save the life of the woman or girl or to prevent serious permanent injury to her physical or mental health.

Section 187A(1) states that it is unlawful to procure an abortion in the case of a pregnancy of not more than 20 weeks gestation unless the person performing the abortion believes:

- “(a) that the continuance of the pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health of the woman or girl; or,
- (aa) that there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped; or,
- (b) that the pregnancy is the result of sexual intercourse between [here the section refers to proscribed family degrees]; or,
- (c) that the pregnancy is the result of sexual intercourse that constitutes an offence against s 131(1) of [the *Crimes Act*]; or,

- (d) that the woman or girl is severely subnormal within the meaning of s 138(2) of [the *Crimes Act*].”

As noted above, the two consultants are required by the *Contraception Sterilisation and Abortion Act* to form separate professional opinions as to whether the facts in each case include grounds for an abortion within the limits of s 187A(1) or (3) of the *Crimes Act*. For example, in relation to s 187A(1)(a) of the *Crimes Act*, the consultants must each reach professional opinions as to whether the continuation of the pregnancy would result in “serious danger (not being danger normally attendant upon childbirth) to the life, or to the physical or mental health of the woman” concerned.

The courts are likely to interpret and proscribe the scope of this phrase in s 187A(1)(a) of the *Crimes Act* so that it is consistent with the purpose and scheme of the rest of the abortion law, including:

- s 187A(2), which states that when forming an opinion for the purposes of s 187A(1)(a) a consultant may take into account the age of the woman and any reasonable grounds for believing that the pregnancy was the result of sexual violation. Section 187A(2) is not intended to set out an exhaustive list of relevant factors, but is indicative of the kinds of factors which a consultant may lawfully take into account when forming his or her opinion; and
- the very existence of the carefully prescribed provisions of s 187A(1)(aa) to (d). A liberal interpretation of s 187A(1)(a) such that allowed abortion “on demand” would not be entertained by the courts, as to do so would render s 187A(1)(aa) to (d) meaningless; and
- the serious nature of the kinds of circumstances referred to in s 187A(1)(aa) to (d) within which abortions may lawfully be performed; and
- the long title of the *Contraception Sterilisation and Abortion Act* which states that that Act sets out the “circumstances and procedures under which abortions may be authorised after having full regard to the rights of the unborn child”; and,
- s 30(5) of the *Contraception Sterilisation and Abortion Act* which states that, when appointing certifying consultants, the Abortion Supervisory Committee shall have regard to the desirability of appointing medical practitioners whose

<sup>3</sup> *Contraception Sterilisation and Abortion Act* 1977 (NZ), ss 30, 32, 33.

assessment of cases will not be coloured by views in relation to abortion that are incompatible with the tenor of the *Contraception Sterilisation and Abortion Act*. This Act states that, for the purpose of s 30(5), the following views shall be considered incompatible with the tenor of the Act:

- “(a) That an abortion should not be performed in any circumstances:
- (b) That the question of whether an abortion should or should not be performed in any case is entirely a matter for the woman and a doctor to decide.”

In summary, it is likely that s 187A(1)(a) of the *Crimes Act* will not be construed by the courts in such a way which allows consultants acting pursuant to the *Contraception Sterilisation and Abortion Act* to interpret the words “serious danger to the life or to the physical or mental health of the woman” as effectively permitting abortion “on demand” or abortion on purely socio-economic grounds or any interpretation close to that.

The New Zealand Court of Appeal in *Wall v Livingston*<sup>4</sup> declined to review or second guess the professional opinions of consultants in this area, save for the exception of bad faith. Bad faith in this context would involve certification of an abortion by a consultant who knew that there was no legal or factual basis for certification within s 187A(1) or (3) of the *Crimes Act*.

The performance of an abortion at the request of a woman in the absence of any real and lawful grounds for the formation of the consultants’ opinions and their consequent decisions to certify an abortion would raise a serious question as to the good faith of the consultants.

The courts would be unlikely to show reluctance to review the professional opinions of consultants if (using the example of s 187A(1)(a)) it was shown that the consultants had certified abortions in bad faith, knowing there was no evidence upon which they could honestly form a professional opinion that there would be serious danger to the life, or to the physical or mental health of the woman if the pregnancy continued.

While the *Contraception Sterilisation and Abortion Act* provides<sup>5</sup> that no certifying consultants are liable for any act done or omitted to be done by

them in good faith in pursuance of the powers conferred on them by the *Contraception Sterilisation and Abortion Act*, bad faith by consultants in the exercise of their statutory duty may expose them to civil liability and criminal prosecution.<sup>6</sup>

### Current practice and application of the abortion law of New Zealand

The annual reports by the Abortion Supervisory Committee reveal an upward trend since 1979 in the number of abortions recorded as being performed on the grounds of serious danger to the mental health of the woman.

Although by the very nature of the factual scenario concerned it is difficult to obtain data as to the manner in which consultants have been interpreting and applying s 187A(1) and (3) of the *Crimes Act*, the Abortion Supervisory Committee in its annual report to Parliament for the year ended 31 March 1988 stated:

“If abortion is abhorrent to the majority of our thinking population, then the emphasis should be on education aimed at achieving a higher proportion of planned pregnancies than perpetuating the present unwieldy system of authorising the termination of potentially normal pregnancies on pseudo-legal grounds.”<sup>7</sup>

This comment appears to indicate that the Abortion Supervisory Committee may have been aware that abortions have been certified by consultants as falling within the provisions of s 187A(1) or (3) of the *Crimes Act* when either scant or no real grounds for that certification existed.

In 1993 the Court of Appeal referred to the above comment by the Abortion Supervisory Committee and to the annual statistics from the latter’s report for the year ended 31 March 1989 in relation to abortions certified as being performed pursuant to s 187A(1)(a) of the *Crimes Act* and stated:

“We have no doubt that the supervisory committee’s statistics about abortions performed on mental health grounds and its critical comments referred to above could give rise to misgivings about the lawfulness of many abortions carried out in New Zealand.”<sup>8</sup>

<sup>6</sup> See below at 5.

<sup>7</sup> Abortion Supervisory Committee report for the year ended 31 March 1988, p 3.

<sup>8</sup> *Bayer v Police* [1994] 2 NZLR 48 at 52 (CA).

<sup>4</sup> [1982] 1 NZLR 734 at 740 (CA).

<sup>5</sup> *Contraception Sterilisation and Abortion Act* 1977 (NZ), s 40.

The number of abortions certified in New Zealand as being performed on the grounds of serious danger to mental health of the woman has increased from 9,805 in 1988<sup>9</sup> to 15,237 in 1999.<sup>10</sup> In respect of both years these figures represented 98 per cent of all certified abortions.

Notwithstanding the restrictive provisions of s 187A(1) and (3) of the *Crimes Act*, New Zealand has one of the highest abortion rates of the 14 Western or developed countries listed in the schedule to the annual report of the Abortion Supervisory Committee of 2000.

In this context the upward trend in the number of abortions certified in New Zealand on the grounds of serious danger to the mental health of the woman raises the possibility of an inference that some certifying consultants may in some instances have been interpreting s 187A(1) and (3) incorrectly and more liberally than was intended by Parliament.

In this regard the Abortion Supervisory Committee in its report for 1996 noted:

“[T]here is a public perception that some consultants may already take into account the socio-economic circumstances of their patients when considering the grounds for abortion under this [s 187A] provision.”<sup>11</sup>

In its report in 1996 the Abortion Supervisory Committee advocated that the *Crimes Act* be amended so that socio-economic grounds could lawfully be taken into account when considering grounds for an abortion.

In 1996 the Justice and Law Reform Committee undertook a parliamentary inquiry into the performance of the Abortion Supervisory Committee and made various recommendations, including that the government review the recommendations of the Committee and draw up legislation to give effect to the same for consideration by the House of Representatives.<sup>12</sup> The issue of whether individual consultants were correctly applying the present abortion law was not resolved at the inquiry.

Questions have been raised in recent years in public debate in New Zealand about the level of abortions and the Abortion Supervisory Committee's effectiveness in ensuring the proper and consistent administration of the present abortion law.<sup>13</sup>

In response to the Abortion Supervisory Committee's report of 1999, the New Zealand Government announced<sup>14</sup> that there was to be a review of the present abortion law. It now reportedly<sup>15</sup> appears that such review may not occur before the next parliamentary general elections scheduled for 2002.

In 2000 Dr Christine Forster of the Abortion Supervisory Committee reportedly<sup>16</sup> stated: “We do essentially have abortion on demand or request, however you like to put it.” In 2000 the Minister of Women's Affairs, Ms Laila Harre, reportedly<sup>17</sup> referred to the current abortion law as “a farce”.

In its report for 2000 the Abortion Supervisory Committee stated:

“The current law does not permit abortion to be carried out for fetal reasons when gestation is beyond 20 weeks. However, major fetal abnormality is the underlying reason for 95 per cent of those abortions, the other 5 per cent being on the grounds that the miscarriage is necessary to save the life of the woman.”<sup>18</sup>

In the light of all of the above, it appears that at present in New Zealand there are abortions being carried out outside the provisions of the current abortion law.

## Case study

A hypothetical situation is now discussed to assist the understanding of what would constitute a contravention of New Zealand's present abortion law and the possible legal consequences. Although in practice the factual scenarios presented to consultants will likely involve varying shades of grey, the following situation is deliberately stated in terms that will highlight the potential liability issues.

<sup>9</sup> For the year January to December 1988 according to the Abortion Supervisory Committee report of 31 March 1989.

<sup>10</sup> For the year January to December 1999 according to the Abortion Supervisory Committee report of 2000.

<sup>11</sup> Report of the Abortion Supervisory Committee for 1996, p 7.

<sup>12</sup> *Inquiry into the Abortion Supervisory Committee, Report of the Justice and Law Reform Committee, First Session, Forty Fourth Parliament 1996* (28 August 1996).

<sup>13</sup> *New Zealand Herald*, 20 Nov 1997, 16 Dec 1997, 17 Dec 1997, 16 Dec 1998, 6 Jan 1999; *Sunday Star Times*, 21 Dec 1997.

<sup>14</sup> *New Zealand Herald*, 22 Dec 1999.

<sup>15</sup> *New Zealand Herald*, 6 Nov 2000.

<sup>16</sup> *Sunday Star Times*, 5 Nov 2000.

<sup>17</sup> *Ibid.*

<sup>18</sup> Report of the Abortion Supervisory Committee for 2000, p 8.

A woman aged 28 years in good physical and mental health is nine weeks pregnant. She has been in a stable marriage for five years and already has two children. The woman tells her general practitioner and the two certifying consultants that she wants an abortion for purely economic reasons. The woman relies upon her general practitioner and the consultants to ensure she is legally entitled to an abortion and she honestly believes that she is so entitled.

After interviewing the woman and ascertaining her physical and mental medical history and present condition, the consultants establish and are aware that there are no grounds upon which they could in good faith believe that the woman's life or mental health would be in serious danger if the pregnancy continued or that any other grounds existed which could otherwise bring the case within the lawful limits of the abortion law. The woman is not informed by the consultants or by anyone else of the unlawful nature of the (proposed) abortion. Nevertheless, the consultants certify that the woman falls within the provisions of s 187A(1)(a) of the *Crimes Act* and one of the consultants then performs the abortion on the grounds of serious danger to the mental health of the woman.

In such circumstances the abortion has been certified and performed unlawfully and the consultants could potentially face criminal prosecution and civil action.

If the woman concerned was later to reassess her decision to have the abortion and became aware that it had been performed on her unlawfully, then the risk of her seeking legal redress becomes a real one.

### **Potential liability of a certifying consultant for certifying and/or performing an unlawful abortion**

The legal and evidential issues involved will, of course, vary according to the facts of each case and so the comments made below only outline in general terms the possible risks of legal liability arising in the case study.

As the consultants in the case study know that the circumstances of the case do not fall within the allowable limits of the abortion law and have acted without good faith, they have certified and performed the abortion unlawfully and are exposed to criminal and civil liability.

### **Criminal liability**

The consultant in the case study who certified and then performed the unlawful abortion is at risk of being charged with offences pursuant to the *Crimes Act*, including:

- procuring an abortion,<sup>19</sup> in respect of which a conviction can result in a maximum term of imprisonment not exceeding 14 years; and
- possibly killing an unborn child,<sup>20</sup> in respect of which a conviction can result in a maximum term of imprisonment not exceeding 14 years.

A culpable homicide charge would be unlikely. The risk of such a charge against a consultant is not great as usually the aborted unborn child will be dead by the time it proceeds from the body of its mother. However, as reportedly happened in an incident in England,<sup>21</sup> an aborted child may sometimes live for a short time after it proceeds from the body of its mother.

A culpable homicide charge<sup>22</sup> could possibly be brought against the consultant if the unborn child completely proceeded in a living state from the body of its mother, whether or not it breathed, whether or not it had independent circulation and whether or not the navel string was severed, if the child died in consequence of injuries received before, during or after birth. However, presumably it would be difficult for the prosecution to prove that the consultant acted with the intention of

<sup>19</sup> Pursuant to s 183 of the *Crimes Act* which charge, it is submitted, on the facts of the case study (re bad faith and unlawful conduct where two certificates were issued), is more likely than a charge for a summary offence under s 37(1)(b) of the *Contraception Sterilisation and Abortion Act 1977* (NZ), which relates to performance of an abortion in the absence of certificates. See also *Contraception Sterilisation and Abortion Act 1977* (NZ), s 38.

<sup>20</sup> Pursuant to s 182 of the *Crimes Act*, though the scope of this section is unclear in relation to an unborn child in the first trimester of pregnancy. See *R v Henderson* [1990] 3 NZLR 174 at 183 (CA); W Brookbanks, "Criminal Law and Procedure" [1990] *NZ Recent Law Review* 300 at 306; *R v Woolnough* [1977] 2 NZLR 508 at 516 (CA).

<sup>21</sup> *New Zealand Herald*, 11 May 1996.

<sup>22</sup> Pursuant to the *Crimes Act*: s 167 re murder and s 171 re manslaughter. Also see ss 158 and 160(2)(a) re definition of culpable homicide; re intent generally see *Adams on Criminal Law* (Brookers), at para CA159.05 and *Attorney-General's Reference (No 3 of 1994)* [1997] 3 WLR 421 (HL); s 159 as to when a child becomes a human being within the meaning of the *Crimes Act* and *R v Henderson* [1990] 3 NZLR 174 at 183 (CA).

causing the death of the child after a live birth or realised that this was a likely consequence.

The non-operating consultant who knowingly certified the unlawful abortion may potentially face criminal prosecution for the same offences as a “party”,<sup>23</sup> if he or she has aided, abetted, incited, counselled or procured the operating consultant to perform the unlawful abortion. Whether the non-operating consultant is likely to be prosecuted as a “party” to criminal offences will depend upon the evidence in each case (not within the scope of the case study).

### Civil liability

The consultants in the case study would be at risk of being sued by the woman for tortious civil claims, which possibly could variously include trespass to the person, breach of statutory duty and negligence in respect of the unlawful conduct, though there would be evidential and also legal hurdles<sup>24</sup> for the woman to overcome before such claims could succeed.

Civil claims by the woman against the consultants for compensatory damages for personal injury are in the main excluded by the current accident compensation regime in New Zealand.<sup>25</sup>

However, the woman in the case study in a civil claim could seek exemplary damages against the consultants in respect of the unlawful abortion, subject to the qualifications noted below.

Although exemplary damages have been awarded in New Zealand in a negligence claim,<sup>26</sup>

the availability of such damages for negligence has yet to be determined by the Court of Appeal.<sup>27</sup>

In 1998 the Court of Appeal in *Daniels v Thompson*<sup>28</sup> (upheld on appeal in the Privy Council in 1999) ruled that a civil claim for exemplary damages would not be allowed against a person who has been prosecuted or is likely to be prosecuted for a criminal offence in respect of the same conduct.

The effect of these Court of Appeal and Privy Council rulings has been reversed by s 396 of the *Accident Insurance Act 1998* (NZ), which section came into force on 1 July 1999. That provision has been held to be of retrospective effect.<sup>29</sup> Pursuant to s 396 of the *Accident Insurance Act 1998* a court may make an award of exemplary damages against a person who has also been prosecuted or is likely to be prosecuted for a criminal offence in respect of the same conduct, though in deciding whether to award exemplary damages a court may take into account whether a penalty has already been imposed for the criminal offence and the nature of the penalty.

In determining whether to award exemplary damages, a court would have regard to all the circumstances of the case including s 396 of the *Accident Insurance Act 1998* and whether or not the consultants had acted in total disregard for the rights of the woman.

The certifying consultants could (subject to the limitations above) be sued by the child (possibly for exemplary damages) if it survived the unlawful abortion though suffered damage as a result.<sup>30</sup> It is, of course, unlikely that the unborn child in the case study would survive the abortion, though there could be a greater risk of this in a more advanced pregnancy.<sup>31</sup>

<sup>23</sup> Pursuant to s 66 of the *Crimes Act*.

<sup>24</sup> For example, in relation to a claim by the woman of trespass to the person, there would be an issue as to whether the woman had consented to the unlawful abortion and whether any such consent was informed consent. Various issues in relation to the claims of breach of statutory duty and negligence there would be issues such as whether a claim for breach of statutory duty was intended by Parliament, the availability of alternative remedies, the ambit/scope of any duty of care, causation and proof of any breach of duty and resultant damage. Each case would depend upon its own facts, discussion of which is not within the scope of this article.

<sup>25</sup> *Accident Insurance Act 1998* (NZ), save that claims for compensatory damages for mental injury can be claimed in certain circumstances where there is no cover for the same under that Act. See *van Soest v Residential Health Management Unit* [2000] 1 NZLR 179 (CA); *L v Robinson* [2000] 3 NZLR 499 (HC) in relation to the not dissimilar accident compensation legislation that preceded the 1998 Act.

<sup>26</sup> *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (HC).

<sup>27</sup> *Ellison v L* [1998] 1 NZLR 417 at 419 (CA).

<sup>28</sup> [1998] 3 NZLR 23 (CA), affirmed in *W v W* [1999] 2 NZLR 1 (PC).

<sup>29</sup> *W v W* (2000) 14 PRNZ 157 (CA).

<sup>30</sup> See *B v Islington Health Authority* [1991] 1 All ER 825 (QBD).

<sup>31</sup> Such risk could arise more critically in the type of scenario reported (*Life Today*, June 1997, p 10) where a doctor in the United States reportedly performed an abortion upon a woman, though it was not known at the time that she was carrying twins. One of the twins was successfully aborted and one remained in the womb unknown to the woman or the doctor. When the woman later discovered she was still pregnant she decided to carry the unborn child full term and gave birth. The child was born with disabilities sustained during the abortion of its twin. If such a scenario occurred in New Zealand and the abortion was ruled by a court to have been performed unlawfully, then the

If the child survived the abortion but died after delivery, then as a matter of law the certifying consultants could not be sued by the child's estate for exemplary damages.<sup>32</sup>

Any professional indemnity insurance policies held by consultants (in respect of negligence) may exclude cover for claims for exemplary damages, unless a special extension of cover has been agreed with the insurer. Such insurance is unlikely to cover conduct by consultants subsequently found by a court to be unlawful.

Accordingly, consultants sued for exemplary damages may find themselves having to fund their own defence and face personal liability for any such judgment awarded.

In summary, the consultants in the case study may be exposed to civil claims which, irrespective of whether or not the same were ultimately successful, would be costly to defend and damaging to professional reputation.

### **Disciplinary action/proceedings before the Complaints Review Tribunal**

The consultants who certified or performed the abortion knowing it to be unlawful could also face disciplinary action before the Medical Practitioners Disciplinary Tribunal<sup>33</sup> or complaint proceedings by the woman or the Director of Proceedings before the Complaints Review Tribunal<sup>34</sup> for breaches of the Code of Health and Disability Services Consumers' Rights.<sup>35</sup>

Pursuant to that Code, the woman has the right to health services that comply with legal standards, which right has been breached in the case study by the consultant who performed the abortion. The Code also provides that the woman has the right to be fully informed, the right to make an informed choice and give informed consent, which rights have also been breached in the case study either by the consultants or other responsible health care personnel involved in the process.

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surviving child could sue the certifying consultants for exemplary damages subject to the qualifications noted herein.

<sup>32</sup> *Law Reform Act 1936* (NZ), s 3(2)(a); *Re Chase* [1989] 1 NZLR 325 (CA).

<sup>33</sup> *Medical Practitioners Act 1995* (NZ), ss 96-110.

<sup>34</sup> *Health and Disability Commissioner Act 1994* (NZ), ss 50-57.

<sup>35</sup> *Health and Disability Commissioner Act 1994* (NZ), ss 50, 51; *Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996* (NZ) (SR 1996/78).

The sanctions able to be imposed by the Medical Practitioners Disciplinary Tribunal include fines (up to NZ\$20,000), costs and orders affecting the consultants' right to practise medicine.<sup>36</sup> The Complaints Review Tribunal can award a wide range of remedies including damages up to NZ\$200,000.<sup>37</sup>

### **Evidential issues**

The relevant evidential issues will vary from case to case and therefore the consultants' possible exposure to liability will also depend upon the facts in each case. For example, three factors which may have significant bearing upon the possible level of liability of the certifying consultants will be:

1. the level of their involvement in interviewing the woman before the abortion as to her physical and mental state. There is no requirement that the consultants personally interview the woman before certifying an abortion unless the woman requests an interview.<sup>38</sup> Involvement by the certifying consultants in the interviewing process will increase their direct knowledge of the woman's circumstances and make it more difficult for them to say that, in reaching their professional opinions pursuant to s 187A(1) or (3) of the *Crimes Act*, they relied upon the results of a third party interviewer. The greater the consultants' involvement in the interviewing of the woman before the abortion, the stronger the likely evidence against them will be. Conversely, reliance by a consultant entirely upon the notes of a third party interviewer would enable a court to see at a glance whether the consultant had acted properly or had acted negligently by not inquiring further; and
2. the nature of the consultants' belief as to the legal limits of the abortion law. If the consultants honestly believed that there were grounds for the performance of a particular abortion within s 187A(1) or (3) of the *Crimes Act*, then the abortion is deemed lawful by s 187A(1) or (3) respectively and they would have a defence to prosecution under the *Crimes Act*, even if they were mistaken in their belief

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<sup>36</sup> *Medical Practitioners Act 1995* (NZ), s 110.

<sup>37</sup> *Health and Disability Commissioner Act 1994* (NZ), ss 54, 57; *Human Rights Act 1993* (NZ), s 89.

<sup>38</sup> *Contraception Sterilisation and Abortion Act 1977* (NZ), s 32(5). See also *Wall v Livingston* [1982] 1 NZLR 734 at 739.

that legal grounds for the abortion existed under s 187A(1) or (3).<sup>39</sup> However, the absence of any reasonable grounds for a consultant's stated belief will tend to undermine his or her assertion as to the honesty of that stated belief; and

3. whether the woman at the time knew that the abortion was being performed upon her unlawfully. Such knowledge by the woman would not provide a legal defence for the consultants to criminal prosecution, though it would reduce the consultants' exposure to civil claims against them by the woman.

Such knowledge by the woman could also expose her to criminal prosecution,<sup>40</sup> though if the woman had knowingly consented to an unlawful abortion she would be unlikely to lay a complaint with prosecuting authorities in the first place.

Even if, at the time, the woman did not know that the abortion was being performed upon her unlawfully, she may still be technically exposed to criminal prosecution,<sup>41</sup> though it is submitted that such a prosecution against her would be unlikely to proceed if it was accepted that she had honestly believed (albeit mistakenly) the abortion had been performed lawfully. The woman's reliance upon the existence of the certificates given by two consultants purporting to act pursuant to a statutory duty in authorising the abortion would buttress the woman's assertion of that honest belief.

Furthermore, a prosecution against a consultant for performing an unlawful abortion would likely rely upon the evidence of the woman who (if the prosecution accepted that, at the time, she had honestly believed that the abortion was performed upon her lawfully) could likely arrange guaranteed immunity from prosecution for herself in exchange for giving evidence against the consultant.

<sup>39</sup> *Wilcox v Police* [1994] 1 NZLR 243 at 253 (HC); see also s 187A(4) of the *Crimes Act*.

<sup>40</sup> It is submitted that the most likely charge, if at all, is for procuring her own miscarriage pursuant to s 44(1)(b) of the *Contraception Sterilisation and Abortion Act 1977* (NZ) (with the maximum penalty a conviction and a \$200 fine), given that pursuant to s 183(2) the woman cannot be charged as a party to an offence against s 183 of the *Crimes Act*. Any charge against the woman as a "party" pursuant to ss 66 and 182 of the *Crimes Act* would be subject to the same qualifications re the consultant as per n 20.

<sup>41</sup> See n 40.

## Potential liability of health authorities

A health authority would be at risk of civil liability if, for example, it knowingly employed consultants who knowingly certified and performed unlawful abortions in the course of their employment.

Such a health authority would also risk being sued in respect of such consultants otherwise seconded or contracted to it, if it exercised or had a right of control over such consultants and knowingly allowed such consultants to act unlawfully at its facilities.<sup>42</sup> Whether the requisite degree of control and knowledge was present sufficient to establish civil liability is a question of fact in every case and is outside the scope of this article.

## Potential liability of the members of the Abortion Supervisory Committee

The Abortion Supervisory Committee has the statutory obligations<sup>43</sup> and functions to keep under review all the provisions of the abortion law and the operation and effect of those provisions in practice. It has the power to receive, consider, grant, revoke and refuse applications for licences or for the renewal of licences under the *Contraception Sterilisation and Abortion Act*. It must obtain, monitor, analyse, collate and disseminate information relating to the performance of abortions. It also has the responsibility to keep under review the procedure prescribed by the *Contraception Sterilisation and Abortion Act*<sup>44</sup> (whereby it is to be determined in any case whether the performance of an abortion would be justified) and 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 and procedures of the *Contraception Sterilisation and Abortion Act*.

<sup>42</sup> As per the principles in *Steel Structures Ltd v Rangitikei County* [1974] 2 NZLR 306 at 310 (CA); *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) re seconded employees; as per principles in *AG v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 at 353, 363, 367 (CA) re independent contractors; and see *Carrington v AG* [1972] NZLR 1106 (SC) re vicarious liability and exemplary damages.

<sup>43</sup> *Contraception Sterilisation and Abortion Act 1977* (NZ), s 14.

<sup>44</sup> *Contraception Sterilisation and Abortion Act 1977* (NZ), ss 32 and 33.

The Court of Appeal in *Wall v Livingston*<sup>45</sup> stated that the Abortion Supervisory Committee has a responsibility for the general oversight of the work of certifying consultants, though with no authority in respect of the individual decisions of consultants.

As was pointed out in the Report of the Justice and Law Reform Committee,<sup>46</sup> the Abortion Supervisory Committee does not have the responsibility of enforcing the criminal law.

The *Contraception Sterilisation and Abortion Act* provides<sup>47</sup> that no member of the Abortion Supervisory Committee shall be personally liable for any act done or omitted to be done by him or her in good faith in pursuance of the powers conferred on it or them by the *Contraception Sterilisation and Abortion Act*.

However, if any members of the Abortion Supervisory Committee had knowingly ignored a practice of abortions being performed unlawfully in specific cases, those members may risk being sued for breach of their statutory duties, though there would be difficult evidential and legal hurdles (including whether such claims were intended by Parliament, the possibility of alternative remedies

and causation) to be overcome before liability against them could be established.

## Summary

Women, consultants, health authorities, Abortion Supervisory Committee members, the New Zealand Medical Association and insurers all have interests in ensuring that the present abortion law of New Zealand is correctly interpreted and complied with by consultants. Failure to ensure the law is complied with may eventually generate otherwise avoidable litigation.

## Postscript

Since the submission of this article for publication, the issue left open by the New Zealand Court of Appeal in *Ellison v L*<sup>48</sup> namely whether exemplary damages can be awarded for negligence, has now been clarified.

The New Zealand Court of Appeal in *Bottrill v A*<sup>49</sup> held by a majority that exemplary damages may be awarded for negligence where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly taking that risk.

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Since the publication of this article in 2001 in the Journal of Law & Medicine there have been various legal changes (including the Privy Council decision in *Bottrill v A* [2003] 2 NZLR 721 and the renaming of the Complaints Review Tribunal as the Human Rights Review Tribunal), though the general liability issues remain.]

<sup>45</sup> [1982] 1 NZLR 734 at 738.

<sup>46</sup> Op cit n 12, p 14.

<sup>47</sup> *Contraception Sterilisation and Abortion Act* 1977 (NZ), s 40.

<sup>48</sup> [1998] 1 NZLR 417. See n 27.

<sup>49</sup> An as yet unreported judgment dated 13 June 2001 CA 75/00; which may yet be appealed.