IN THE SUPREME COURT OF NEW ZEALAND

SC 73/2011
[2012] NZSC 68

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

Hearing: 13 March 2012

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: P D McKenzie QC, I C Bassett and R Wong for Appellant
C R Gwyn and W L Aldred for Respondent

Judgment: 9 August 2012

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

Para No

ELIAS CJ, BLANCHARD AND TIPPING JJ

(Given by Blanchard J)

Introduction

[1] The appellant, Right to Life New Zealand Inc, takes the position that the

Abortion Supervisory Committee, established under the Contraception, Sterilisation, and Abortion Act 1977, is not fulfilling its statutory functions and that, in consequence, abortions are being approved in circumstances in which they should not be permitted. It has made an application for judicial review, naming the Committee as respondent, in which it asserts that the Committee has misinterpreted its statutory powers, in particular in the Committee's expressed belief in its annual reports to Parliament that the Act gives it "no control or authority or oversight in respect of the individual decisions of [certifying] consultants".[1]

[2] In the High Court Miller J held that the Committee was misinterpreting its functions and powers by reasoning that it was precluded from reviewing or scrutinising such decisions of certifying consultants.[2] He found that it was able to do so using its powers in s 36 of the Act to require consultants "to keep records and report on cases they have considered, for the purpose of performing its statutory functions":[3]

> Those functions include keeping under review all the provisions of the abortion law, as defined, and their operation and effect in practice, reporting to Parliament on the operation of the abortion law, keeping the procedure for authorising abortions under review, ensuring the administration of the abortion law is consistent throughout New Zealand, and appointing and removing consultants. The Committee may form its own opinion about the lawfulness of consultants' decisions to the extent necessary to perform these functions.

The Judge expressed the opinion that there was "reason to doubt the lawfulness of many abortions authorised by certifying consultants", noting that the Committee itself had stated (in a report to Parliament) that the law was being used more liberally than Parliament intended.[4] He also commented:[5]

> The approval rate seems remarkably high, bearing in mind that under s 187A [of the Crimes Act 1961] the consultants must form the good faith opinion that continuance of the pregnancy would result in serious danger to the mother's health.

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1 *Wall v Livingston* [1982] 1 NZLR 734 (CA) at 738–739.
2 *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC) at [5].
3 At [5].
4 At [5].
5 At [56].

But later in his reasons he made it clear that he had reached no final conclusion on whether certifying consultants were complying with the abortion law:[6]

> It is for the Committee to assess these matters. I accept that the Committee is on notice that certifying consultants collectively are apparently employing the mental health ground in much more liberal fashion than the legislature intended, and it also seems that there may be inconsistencies in their application of the law.

[3] The Judge refused, however, to grant mandatory relief and in a later decision declined to grant any declaration.[7]

[4] The Court of Appeal, by majority, allowed the Committee's appeal.[8] It held that the Committee did not have the power found by the High Court in individual cases and that it was not open to the Committee to form its own opinion about the lawfulness, including the clinical correctness, of particular decisions of certifying consultants.[9] The majority said that, given its conclusions on the nature and scope of the Committee's functions and powers, the factual findings or observations of the type made by the Judge were inappropriate and that no such findings should have been made.[10] It concluded that the findings as to lawfulness of the decision-making of the certifying consultants or judicial comment about New Zealand having abortion "on request" ought not to have been made in the circumstances of the case, and were of no lawful effect.[11] From that decision Right to Life appeals to this Court.

The Royal Commission and the legislation

[5] The 1977 Act largely implemented recommendations of a Royal Commission[12] which had reported in March of that year. The Commission had discussed the considerations to which it thought any legal policy on abortion law should have regard and had set out the basis of a suggested legal code "which aims

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6 At [135].

7 *Right to Life New Zealand Inc v Abortion Supervisory Committee (No 2)* HC Wellington CIV-2005-485-999, 3 August 2009.

8 *The Abortion Supervisory Committee v Right to Life New Zealand Inc* [2011] NZCA 246, [2012] 1 NZLR 176.

9 At [100].

10 At [134].

11 At [137].

12 Report of the Royal Commission of Inquiry *Contraception, Sterilisation, and Abortion in New Zealand* [1977] II AJHR E26.

to remove the doubts and uncertainties which at present exist in the law":[13]

> We recommend the setting up of a committee which is to have general oversight of the administration of the abortion law in this country. It has been our aim to ensure some uniformity of approach which has hitherto been lacking. The committee would help to attain this object. It would prescribe standards and give general supervision to the working of the abortion law. There is a need for adequate counselling services to be provided before any decision on abortion is made. The setting up of such services would also be the responsibility of the committee. Our recommendation is that the decision should be made by panels established by the statutory committee but, as an alternative, we recommend that the decision should be made by two doctors.

It expanded upon the "two doctors" suggestion:[14]

> That, as an alternative to the system of decision-making by panels, the decision be made by two doctors under the general framework and supervision of the statutory committee, and that such decision then be made only after the pregnant woman has been counselled at the counselling service established by the statutory committee or at one approved by it.

[6] Parliament chose to implement this alternative recommendation. The Commission recognised that there were criticisms which could be made of it. There was the risk that the two doctors would give effect to their own personal views in deciding whether the criteria for approving an abortion had been met, and that a decision in one locality might differ from that made in similar circumstances in another. But it considered that the risk was reduced by requiring a decision of two doctors and was "further reduced by the supervision and oversight which the statutory committee would give to the working of the abortion laws in New Zealand".[15]

[7] The long title of the 1977 Act is:

> An Act to specify the circumstances in which contraceptives and information relating to contraception may be supplied and given to young persons, to define the circumstances under which sterilisations may be undertaken, and to provide for the circumstances and procedures under which abortions may be authorised after having full regard to the rights of the unborn child

The Act defines in section 2 the "[a]bortion law" as every provision of ss 10–46 of

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13 At 25.
14 At 297.
15 At 294.

the Act and of ss 182–187A of the Crimes Act 1961.

[8] Section 10 of the Act constituted the Abortion Supervisory Committee, consisting of three members, of whom two must be medical practitioners. The powers and functions of the Committee are as follows:

> **14 Functions and powers of Supervisory Committee**
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> (1) The Supervisory Committee shall have the following functions:
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> (a) To keep under review all the provisions of the abortion law, and the operation and effect of those provisions in practice:
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> (b) To receive, consider, grant, and refuse applications for licences or for the renewal of licences under this Act, and to revoke any such licence:
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> (c) To prescribe standards in respect of facilities to be provided in licensed institutions for the performance of abortions:
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> (d) To take all reasonable and practicable steps to ensure—
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> (i) That licensed institutions maintain adequate facilities for the performance of abortions; and
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> (ii) That all staff employed in licensed institutions in connection with the performance of abortions are competent:
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> (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:
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> (f) To recommend maximum fees that may be charged by any person in respect of the performance of an abortion in any licensed institution or class of licensed institutions, and maximum fees that may be charged by any licensed institution or class of licensed institutions for the performance of any services or the provision of any facilities in relation to any abortion:
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> (g) To obtain, monitor, analyse, collate, and disseminate information relating to the performance of abortions in New Zealand:
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> (h) To keep under review the procedure, prescribed by sections 32 and 33, 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:

(j) From time to time to report to and advise the Minister of Health and any district health board established by or under the New Zealand Public Health and Disability Act 2000 on the establishment of clinics and centres, and the provision of related facilities and services, in respect of contraception and sterilisation:

(k) To report annually to Parliament on the operation of the abortion law.

(2) The Supervisory Committee shall have all such reasonable powers, rights, and authorities as may be necessary to enable it to carry out its functions.

[9] The Committee can appoint advisory and technical committees to advise it[16] and may co-opt specialist advice.[17] It issues licences to institutions (usually a hospital) which authorise the holder to permit the performance of abortions in the institution to which the licence relates.[18] A licence is granted only if the Committee is satisfied of certain matters specified in the legislation[19] and for a renewable term of one year.[20] The Committee has power to cancel a licence if the holder no longer meets the statutory requirements or has failed to take all such reasonable and practicable steps to ensure that the provisions of the abortion law have been complied with in the institution.[21]

[10] Section 29 provides that no abortion shall be performed "unless and until it is authorised by 2 certifying consultants". These are the two doctors envisaged by the Royal Commission. Section 30 requires the Committee to set up and maintain a list of certifying consultants. It has to determine the minimum number of consultants required to ensure, so far as possible, that every woman seeking an abortion has her case considered expeditiously. It must consult the New Zealand Medical Association, and may consult with any other professional or other body, before determining whom to appoint. It must ensure that at least one-half of the total number of certifying consultants are practising obstetricians or gynaecologists and

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16 Section 15.
17 Section 16.
18 Section 19.
19 Section 21.
20 Sections 23 and 24.
21 Section 25.

that there is a sufficient number of appointees practising in each area of New Zealand to ensure that every woman seeking an abortion can have her case considered without involving her in considerable travelling or other inconvenience.

[11] Subsections (5), (6) and (7) of s 30 provide:

> (5) In addition, in making such appointments, the Supervisory Committee shall have regard to the desirability of appointing medical practitioners whose assessment of cases coming before them will not be coloured by views in relation to abortion generally that are incompatible with the tenor of this Act. Without otherwise limiting the discretion of the Supervisory Committee in this regard, the following views shall be considered incompatible in that sense for the purposes of this subsection:
>
> > (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.
>
> (6) Every appointment to the list of certifying consultants shall be for a term of one year, but the Supervisory Committee may reappoint any practitioner on the expiry of his term.
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> (7) The Supervisory Committee may at any time, at its discretion, revoke the appointment of any certifying consultant.

[12] Under s 31 the Committee is obliged to appoint suitably qualified persons to provide counselling services for persons considering having an abortion or to approve an agency for the provision of such services.

[13] Section 32 of the Act sets out the procedure to be followed where a woman seeks an abortion and s 33 prescribes how the certifying consultants must carry out their task. Because those sections cross-refer to the Crimes Act sections which form part of the abortion law as defined, it is necessary to interrupt this description of the 1977 Act to refer to the Crimes Act sections.

[14] Section 182 of the Crimes Act makes punishable by a term of imprisonment not exceeding 14 years the causing of the death of "any child that has not become a human being in such a manner that [the offender] would have been guilty of murder if the child had become a human being". Section 183(1) likewise punishes anyone

who, with an intent to procure the miscarriage of any woman or girl:

(a) unlawfully administers to or causes to be taken by her any poison or any drug or any noxious thing; or

(b) unlawfully uses on her any instrument; or

(c) unlawfully uses on her any means other than any means referred to in paragraph (a) or paragraph (b).

What is or is not "unlawful" under s 183 and s 186 [Supplying means of procuring abortion] is detailed in s 187A which, along with s 183 and a definition of "miscarriage" in s 182A, was inserted into the Crimes Act when the 1977 Act was passed:

187A Meaning of unlawfully

(1) For the purposes of sections 183 and 186, any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of not more than 20 weeks' gestation, the person doing the act 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—

(i) a parent and child; or

(ii) a brother and sister, whether of the whole blood or of the half blood; or

(iii) a grandparent and grandchild; or

(c) that the pregnancy is the result of sexual intercourse that constitutes an offence against section 131(1); or

(d) that the woman or girl is severely subnormal within the meaning of section 138(2).

(2) The following matters, while not in themselves grounds for any act specified in section 183 or section 186, may be taken into account in determining for the purposes of subsection (1)(a), whether the continuance of the pregnancy would result in serious danger to her life or to her physical or mental health:

(a) the age of the woman or girl concerned is near the beginning or the end of the usual child-bearing years:

(b) the fact (where such is the case) that there are reasonable grounds for believing that the pregnancy is the result of sexual violation.

(3) For the purposes of sections 183 and 186, any act specified in either of those sections is done unlawfully unless, in the case of a pregnancy of more than 20 weeks' gestation, the person doing the act believes that the miscarriage is necessary to save the life of the woman or girl or to prevent serious permanent injury to her physical or mental health.

(4) Where a medical practitioner, in pursuance of a certificate issued by 2 certifying consultants under section 33 of the Contraception, Sterilisation, and Abortion Act 1977, does any act specified in section 183 or section 186 of this Act, the doing of that act shall not be unlawful for the purposes of the section applicable unless it is proved that, at the time when he did that act, he did not believe it to be lawful in terms of subsection (1) or subsection (3), as the case may require.

[15] It will be observed that one of the grounds for a lawful abortion – the one on which the concern expressed by the appellant is centred – is where, in the case of a pregnancy of not more than 20 weeks' duration, the person doing the act believes that the continuance of the pregnancy would result in serious danger to the mental health of the woman or girl. It is also to be noted that, under subs (4), an abortion performed by a medical practitioner in pursuance of a certificate issued by two certifying consultants under s 33 of the 1977 Act is not unlawful unless the medical practitioner does not believe it to be lawful under whichever of subss (1) or (3) of s 187A is applicable.

[16] That returns us to the procedures laid down in the 1977 Act. A medical practitioner (called the "the woman's own doctor") consulted by a female who wishes to have an abortion must, if requested by her or on her behalf, arrange for the case to be considered and dealt with under ss 32 and 33. If the woman's own doctor considers that the case may be one to which s 187A(1) or (3) applies, the doctor must, if not proposing to perform the abortion, refer the case to another medical practitioner (the operating surgeon) who may be willing to perform it (if authorised by the Act) or, if proposing to perform the abortion, the doctor must refer the case to

two certifying consultants for a determination under s 33.[22] One of the certifying consultants must be a practising obstetrician or gynaecologist. The section similarly provides for certification where the woman's own doctor refers the case to an operating surgeon, who may act as one of the certifying consultants if appointed as such.

[17] As soon as practicable after a case is referred to a certifying consultant, he or she must consider it and, if requested so to do by the patient, interview the patient. The woman's own doctor and the proposed operating surgeon are entitled (with the patient's consent) to make such representations and to adduce such medical or other reports concerning the case as thought fit to each certifying consultant. The certifying consultants may, with the consent of the patient, consult with any other person (whether or not a medical practitioner) as thought fit in order to assist in the consideration of the case but may not disclose the patient's identity without her consent.[23]

[18] Section 33(1) provides that if the certifying consultants are of the opinion that the case is one to which any of paras (a)–(d) of subs (1) or subs (3) of s 187A apply, they shall forthwith issue a certificate in the prescribed form authorising the performance of an abortion.[24] If they are of the contrary opinion, they must refuse to authorise the performance of an abortion.[25] If the certifying consultants are not of the same opinion they must refer the case to another medical practitioner on the list of certifying consultants maintained under s 30(1). If that other medical practitioner is of the opinion that the case is one to which any of the provisions of s 187(A)(1) or (3) applies, the certifying consultant who is of the same opinion issues a certificate authorising the performance of an abortion. Where a certificate is issued, it is sent to the holder of the licence in respect of the licensed institution in which the abortion is to be performed. If the operating surgeon is not one of the certifying consultants, he must endorse on the certificate a statement that he is willing to perform an abortion

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22 If the woman's own doctor is a certifying consultant the case is referred only to one other certifying consultant.

23 Section 32(7).

24 The form of the certificate is prescribed by the Abortion Regulations 1978. Form 3A requires the consultants to state the ground(s) on which in their opinion an abortion is justified, that is, by reference to s 187A, but does not provide for the giving of any reasons for that opinion.

25 Section 33(2).

on the patient. But failure to do so does not invalidate the certificate. Where any certifying consultant has not reached a decision within 14 days after the matter is referred to him or her, the consultant must advise the Committee in writing of the matter, and of the reasons for the delay.

[19] Section 35 requires certifying consultants who have made a decision in any case, whether for or against an abortion, to advise the woman seeking an abortion of her right to seek counselling from any appropriate person or agency.

[20] Section 36 is the provision primarily relied upon for the appellant's contention that the Committee does have power to investigate and form an opinion on the lawfulness of decisions made by a certifying consultant. It reads:

> **36 Certifying consultants to keep records and submit reports**
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> (1) Every certifying consultant shall keep such records and submit to the Supervisory Committee such reports relating to cases considered by him and the performance of his functions in relation to such cases as the Supervisory Committee may from time to time require.
>
> (2) No such report shall give the name or address of any patient.

[21] Section 40 provides that the members of the Committee and certifying consultants are not personally liable for any act done or omitted to be done in good faith in pursuance of powers conferred by the Act.

[22] Finally, s 45, which is expressed to be without limitation to anything in s 36, requires every medical practitioner who performs an abortion (that is, the operating surgeon) to make a record thereof and of the reasons therefor[26] and, within one month of performing the abortion, to forward a copy of the record to the Committee. But no such record is to give the name or address of the patient.

Reports under s 36

[23] There is no prescribed form of report under s 36. In practice, the Committee

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[26] This appears to be a reference to the grounds stated in the prescribed form of certificate given by the certifying consultants. The operating surgeon is not privy to the reasons of the consultants for reaching their opinion unless he is one of the consultants himself.

has required consultants to submit reports on every abortion which is authorised or which they decline to authorise. No name or identifying particulars of the woman are required but the consultant who gives the first certificate is required by the Committee to state the grounds for the authorisation by reference to s 187A of the Crimes Act and to supply the following "socio-economic" information:

(a) the patient's date of birth;

(b) the country in which she was born; and, if that was not New Zealand:

(c) the year of her arrival in New Zealand; and

(d) whether she has New Zealand residency.

The consultant is also asked to report on "pregnancy history":

(e) the estimated duration of the pregnancy;

(f) the woman's number of previous live births;

(g) the number of months since her last live birth;

(h) the number of her previous induced abortions either in New Zealand or overseas;

(i) whether she used contraception prior to conception; and

(j) whether conception was prescribed before her discharge and the method, if it was.[27]

The decisions below

[24] In the courts below, the case for the appellant was conducted on a much broader front. It unsuccessfully sought to establish that the Act recognises an express right to life on the part of an unborn child and that the common law "born alive" rule had been modified by the Act to provide protection to a foetus in relation to abortion. It also asserted that an unborn child had a right guaranteed by s 8 of the New Zealand Bill of Rights Act 1990, not to be deprived of life. All of these arguments were rejected both by the High Court and, unanimously, by the Court of Appeal. This Court declined leave to appeal on these wider grounds, saying that it

[27] It seems from the last question that the report is made after any abortion has been performed.

was plain that the legislation was based on the premise of the "born alive" rule, in the face of which the proposed grounds of appeal were untenable.[28]

[25] Among the pleaded grounds of review to which Miller J made reference were the Committee's failure to inquire 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 it has been used, and its alleged failure to seek proper information on mental health grounds from certifying consultants. The Judge noted the pleading that 98.2% of abortions are performed under this ground. He said that the Committee has frequently suggested in its reports that consultants are not complying with s 187A or are applying it more liberally than Parliament intended and that the Committee has said that it can do nothing about that.[29] He referred to a comment made by the Court of Appeal in *Bayer v Police*[30] that statistics and critical comments made in the Committee's 1988 report "could give rise to misgivings about the lawfulness of many abortions carried out in New Zealand". They tended to confirm the view expressed by a Chair of the Committee in a newspaper article in 2000 that New Zealand essentially has abortion on demand. The Judge commented on the statistics, saying that the approval rate was "remarkably high" bearing in mind that under s 187A the consultants had to form a good faith opinion that continuance of the pregnancy would result in serious danger to the mother's heath. As counsel for the Committee had acknowledged, the statistics put the Committee on inquiry. It had responded by providing consultants with opinions from the clinical director of the Auckland Regional Forensics Psychiatry Service containing advice about the making of diagnoses for the purposes of the mental health ground. The Committee maintained that it could go no further. Miller J remarked that Parliament appeared untroubled by the state of the abortion law. The Committee's occasional calls for reform had gone unheeded.[31]

[26] He considered the arguments on the Committee's functions, powers and duties with which this Court is concerned.[32] He said that s 14(1)(a) of the Act

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28 *Right to Life New Zealand Inc v The Abortion Supervisory Committee* [2011] NZSC 97.
29 At [50].
30 *Bayer v Police* [1994] 2 NZLR 48 (CA) at 52.
31 At [55]–[58].
32 At [106]–[136].

contemplated that the Committee would keep under review certifying consultants' compliance with s 187A of the Crimes Act.[33] He was of the view that s 14(1)(i) was concerned, at least in its first limb, with the work of certifying consultants and that its functions extended to identifying any apparent inconsistencies and establishing whether they are attributable to divergence in standards. If so, he said it was for the Committee to take all reasonable and practicable steps to ensure that the law was applied consistently.[34] These functions that the Judge identified led him to the conclusion that the Committee might demand reports about consultants' decisions under s 36, "including where necessary decisions in particular cases".[35] That review process might alter consultants' approach in future cases because they could be expected to respond to informed criticism and to recognise a risk that serious non-compliance will result in disciplinary action.[36] The Judge considered that such after-the-fact review of individual decisions was consistent with *Wall v Livingston*,[37] in which an application for judicial review intended to stop a particular abortion from being carried out was unsuccessful. It would not invariably involve second-guessing medical judgments. The Committee had previously reported that the law was not being administered as Parliament had intended, without having made a comprehensive investigation of the work of all consultants:[38]

> And because the [Contraception, Sterilisation, and Abortion] Act treats decisions to authorise or refuse abortions as medical in nature, there must be room for the exercise of judgment about both diagnosis and degree of risk. A review might be confined to ensuring that decisions were properly documented, that they rested on recognised diagnoses and that they were not plainly unreasonable.

[27] As to the possibility of criminal liability, Miller J said that it was not a case of the civil law being employed to prevent a crime. The Committee had statutory functions to perform. The legislature evidently did not think those functions incompatible with criminal proceedings against those who procure or perform abortions unlawfully.[39]

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33 At [113].
34 At [116].
35 At [119].
36 At [121].
37 *Wall v Livingston*, above n 1. See [36]–[37] below.
38 At [125].
39 At [130].

[28] The Court of Appeal majority, Chambers and Stevens JJ, was satisfied that none of the functions or powers of the Committee in ss 14(1)(a), (i) or (k) or s 36 empowered it to review or scrutinise the decisions of certifying consultants in relation to either the authorisation or refusal of an abortion in individual cases. It was not open to the Committee to form its own opinion about the lawfulness, including the clinical correctness, of the decisions of the certifying consultants in particular cases. The Act characterised the decision of certifying consultants as a medical assessment pure and simple.[40] The legislation immunised the Committee from involvement in decisions made by health professionals on medical and clinical grounds in particular cases. Certifying consultants were not required to give reasons for their decisions, beyond identifying the applicable statutory exception in s 187A. The Committee could not require certifying consultants to specify in the authorising certificates the specific diagnosis and its severity.[41] A power of after-the-fact review would cause real practical difficulties. The nature and scope of the records to be kept and maintained pertaining to individual cases were likely to be established in the first instance by the professional obligations of the medical practitioner concerned. They would fall to be administered and enforced by the Health and Disability Commissioner and various other medical authorities. The disclosure of records kept had the potential to impact on the privacy of both the patient and the relevant medical practitioner or provider. The disclosure of the records kept pursuant to s 36 might only tell part of the story. It might be critical for other relevant information to be obtained from the patient or other persons who have had been supporting her. The disclosure of such information might well give rise to disciplinary issues that were properly the province of the Health and Disability Commissioner or other medical authorities.[42] The Committee's statutory functions were silent on issues of establishing professional and ethical obligations, investigating alleged breaches of such obligations, enforcing standards and the administrative and procedure framework to deal with these matters.[43] The majority contrasted this absence of statutory provisions with the more detailed machinery provided for the licensing of institutions under the Act.

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40 At [101].
41 At [101].
42 At [103].
43 At [104].

[29] The majority saw the power of review in s 14(1)(a) as operating at a general level as envisaged by the Royal Commission. The Committee must not intervene in individual decisions, absent bad faith. The power of the Committee to revoke the appointment of a certifying consultant did not require a different approach. That power was available to the Committee to be exercised where, in a clear case, bad faith was demonstrated or where for some other reason an early or urgent revocation was required before the expiry of any annual appointment period.[44] The majority reviewed the way in which the Committee had discharged its functions saying that there was no doubt that it had taken seriously its obligation to report to Parliament and had repeatedly given its honest opinion as to the state of the law.[45]

[30] Chambers and Stevens JJ also considered a submission for Right to Life that the Committee had failed to collect, act on or audit information in order to discharge its statutory functions properly. They referred to the form of report which the Committee requires in each case under s 36 and to the fact that it had on three occasions received detailed reports from the Health and Disability Commissioner about complaints made concerning medical professionals involved in the abortion process, and the fact that it has on four occasions referred abortions involving breach of the Crimes Act to the police. But the majority took the issue about the Committee's failure to audit information no further because, the Judges said, it had not been pleaded and so the Committee had not been put on notice of the need to give evidence about such audits. The majority did, however, express the following view:[46]

> By way of general guidance to the Committee only, we consider that the combined effect of ss 14(1)(a), (h) and (i), together with s 36, could be used by the Committee to gather information where it considers that appropriate, to analyse it and to carry out appropriate audits. It may not, of course, review the clinical or medical judgment of medical practitioners in individual cases.

[31] Arnold J dissented in relation to the issues which are before this Court. He considered that in the context of keeping the work of consulting physicians under review, the Committee might be required to consider whether consulting physicians

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44 At [108].
45 At [120].
46 At [129].

were performing their proper statutory role and to form a view about that in order to report to Parliament. A conclusion that some of the certifying consultants were not performing their proper role might suggest that some abortions had been performed unlawfully. But the possibility of a generalised view of that type being formed did not mean that the Committee must reach specific conclusions about the legality of specific abortions in the sense precluded by *Wall v Livingston*, nor did it mean that the Committee could have no significant role in reviewing the work of consulting physicians or reporting to Parliament about it.[47]

[32] Arnold J found it difficult to see how the Committee could meet its review obligation under s 14(1)(a) without having regard to the way that certifying consultants in fact performed their functions under the Act. The function under para (i) also suggested that the Committee must have regard to the way in which certifying consultants performed their statutory role. This was necessary to enable the Committee both to make a consistency assessment and to reach a view about the effective operation of the Act and its procedures. The obligations under para (k) of reporting annually to Parliament reflected the important and continuing role that Parliament saw for itself under the Act. It seemed unlikely to the Judge that Parliament would have limited the scope of the reporting obligation by excluding from it the Committee's views on the question whether certifying consultants were performing their roles consistently with the Act.[48]

[33] Arnold J referred to the Committee's statutory role under s 30(1) in establishing and maintaining a list of certifying consultants. He noted particularly subs (5) in which he said Parliament had made a careful attempt to achieve an appropriate balance between authorising abortion "on demand" and prohibiting abortion, or limiting its availability to very extreme situations. That balance was reflected in s 187A of the Crimes Act. The use of a standard of "desirability" in s 30(5) (the language of objective rather than requirement) did not mean that the Committee had no obligation to turn its mind to the views of medical practitioners about abortion when considering their appointment. The power of revocation was available to deal with performance issues and was unqualified. In the Judge's view,

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47 At [155].
48 At [163].

one situation where the Committee could properly revoke an appointment was where it became apparent that a certifying consultant was allowing his or her decisions about abortions to be influenced by an extreme view, whether liberal or conservative.[49]

[34] Referring to s 36, Arnold J said that the prohibition on the giving of a patient's name and address showed that Parliament contemplated that reports under the section could properly contain details of individual cases. Parliament had decided that abortion was not a matter to be left simply to the affected woman and her doctor. It had chosen to interfere with the privacy interests of women seeking abortions and with their professional relationships with their medical advisers. Simply because a particular reporting requirement might engage a privacy or professional interest did not of itself indicate to the Judge that it was beyond the scope of the Act.[50] He did not agree that there was a procedural lacuna in the Act which indicated that it was not intended that the Committee have the power to review the work of certifying consultants. It was entitled to review their work in an effort to assess whether or not they were approaching their task in a neutral fashion.[51] In his view, as part of the reporting obligation, the Committee might require certifying consultants to report to it on the basis for their decisions, including the underlying diagnoses. But it could not interview the women involved.[52] In undertaking such review processes, the Committee was not attempting to determine the legality of particular abortions or whether particular consultants had committed criminal or disciplinary offences. Rather, it was attempting to assess whether consultants were making decisions consistently with the tenor of the Act, that is, neutrally, and whether their decision-making was broadly consistent across the country. In this sense, the Committee's perspective was a systemic one. The Committee might well be able to conduct some form of audit to assess the position, provided that issues of patient name and address were satisfactorily addressed.[53]

[35] In accordance with the views of the majority, the Court of Appeal allowed the

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49 At [172].
50 At [178].
51 At [179].
52 At [181].
53 At [182].

appeal by the Committee and dismissed a cross-appeal by Right to Life.

Wall v Livingston

[36] Not very long after the Act came into force a paediatrician, Dr Wall, had attempted to prevent the carrying out of an abortion that two certifying consultants had certified could proceed. The High Court dismissed his application for judicial review.[54] He appealed to the Court of Appeal notwithstanding that in the meantime the abortion had proceeded. In a judgment delivered by Woodhouse P, the Court of Appeal confirmed the High Court's decision that Dr Wall had no standing to bring the proceeding.[55] It also made some general remarks about the operations of the Committee:[56]

> The supervisory committee has a responsibility for the general oversight of the work of certifying consultants throughout New Zealand and the way in which the purposes of the Act are working out in practice. But what is important and of significance in this case is that the supervisory committee is given no control or authority or oversight in respect of the individual decisions of consultants. That deliberate absence of any review process inside the Act itself is probably founded upon three considerations. First, special attention has been given in the Act to the preservation of anonymity of the woman patient. Secondly, the whole process of authorisation appears designed to place fairly and squarely upon the medical profession as represented in any particular case by the certifying consultants a responsibility to make decisions which will depend so very much upon a medical assessment pure and simple. And thirdly, there are the adverse medical implications which could arise from the passage of time should such a determination be easily open to review. Thus it can be said that the Act itself has put aside the dangers and anxieties and frustrations together with moral as well as medical argumentation that might develop by permitting the substitution of one set of medical opinions for others as the result of some generally available process of review or appeal.
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> ...
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> 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. Indeed that kind of decision and the process leading up to it is probably unique. It certainly is remote from the

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54 *Wall v Livingston* HC New Plymouth A1/82, 19 January 1982.
55 *Wall v Livingston*, above n 1.
56 At 738–739.

> normal work of any administrative tribunal. The consultants are obliged to interview the woman concerned only if she so requests. There is nothing in the statute to indicate the nature or the form of the interview if it does take place. There is provision for the reception of certain representations in support of the request. A certifying consultant may make inquiries on his own account for the purpose of assisting him in his consideration of the case, provided anonymity is preserved. But in essence what is aimed at by the Act is the substitution of the medical opinion of the two independent consultant doctors for that of the woman's own doctor so that there will be a completely detached medical judgment as to whether or not one or other of the exceptions in s 187A of the Crimes Act is applicable.

Later the Court said that no individual, who was not one of the statutory participants, could ever be regarded as having a sufficient interest to institute proceedings for judicial review. The Court referred to the limited scope of any judicial review that might be available:[57]

> The subject of the review would be the exercise of medical judgment by professional men in discharge of a professional responsibility under a statutory authority. To put the matter in another way, the legislation provides for the formulation of a medical judgment by medical practitioners as to whether the performance of an abortion is authorised by s 187A of the Crimes Act which with two exceptions is entirely concerned with medical considerations. And most significantly, as we have earlier mentioned, the exercise of that medical judgment in individual cases is not subject to review by the supervisory committee, the specialist body established under the Act to exercise oversight of the legislation. Against that statutory background we do not think it can possibly have been Parliament's intention that upon such a delicate matter as this the Courts could freely take under review the conclusions reached by the professional men so exclusively entrusted with the statutory responsibilities.

[37] These remarks were, however, made in the context of a proceeding designed to question the medical judgment of certifying consultants in the case of a particular woman – something which the appellant is not seeking to do and which it accepts cannot be done. It has not been suggested that Right to Life does not have standing to bring the present proceeding, which raises no direct or even indirect challenge to any particular abortion authorisation. Nonetheless, the observations made in *Wall v Livingston*, which have long been regarded, rightly in our view, as settling the issues which were addressed, do provide guidance in the present case. The entire

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[57] At 741.

discussion in that case is inconsistent with the view that the statements of principle were intended to be confined to pre-termination circumstances.[58]

Discussion

[38] With that in mind, we turn to the provisions of the Act which are said to give the Committee the power contended for by the appellant. Those upon which the appellant principally relied are s 14(1)(a), (i) and (k) and s 36, read in the light of s 30(5), (6) and (7).[59]

[39] It is noticeable immediately that the three paragraphs of s 14(1) are cast in very general terms, which is consistent with the view expressed in *Wall v Livingston* that the Committee's responsibility is for general oversight only. Para (a) requires it to keep under review the provisions of the abortion law, that is, ss 10–46 of the Act and the Crimes Act provisions on abortion. But it must also keep under review the operation *and effect* of those provisions in practice. So it must inform itself about how the Act is operating in practice in the general run of cases. Is practice consistent with those provisions? Under para (i) it must do what is reasonable and practical to ensure the consistent administration of the abortion law throughout New Zealand. If it finds that the Act is operating unevenly, as it might be if, for example, there were a marked divergence in the numbers of abortions relative to population levels in particular places, *and* that appeared to result from differing practices in those places, the Committee's function would be to try to eliminate or reduce the divergence. The additional words in s 14(1)(i) ("and to ensure the effective operation of this Act and the procedures thereunder") seem to us merely to underline what the Committee should in any event endeavour to do in this regard. Under para (k) the Committee must report annually to Parliament on how, in its view, the abortion law is operating in practice. That would include passing on to Parliament any conclusions which the

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[58] In addition to the three passages cited above, see 736 at line 45 to 737 at line 12, 740 at lines 21 to 35, and 740 at line 43 to 741 at line 4.

[59] The appellant had argued below that s 14(1)(h) was of assistance to its case but Miller J held that it is concerned with the process under ss 32 and 33, not the substantive criteria relative to the decision-making of the consultants. The Court of Appeal majority accepted this. Argument to the contrary was pressed only faintly by the appellant in this Court. The appellant also sought to rely on s 45, but it is about the obligations of the operating surgeon and sheds no light on the issues in the case.

Committee has reached as a result of inquiries made in pursuance of its other functions.

[40] We endorse the position taken in *Wall v Livingston* that the Committee cannot, even after the event, make any inquiry or investigation into the decision-making in an individual case where that would tend to question a decision actually made in a particular case. To put the matter in more concrete terms, and by way of illustration, the Committee could, in our view, ask a consultant how he was approaching decision-making in general – over the whole of his workload under the Act. But it could not question him about how he came to a diagnosis or conclusion in a particular case – even one selected at random and anonymised in the consultant's response. To do this would be to engage in a process of attempting to review the clinical judgment of the consultant in an individual case – something which, as *Wall v Livingston* recognised, is not contemplated by the Act. Individual decisions are a matter of medical judgment and expertise in the particular case and not to be questioned, whether before or after the decision has been acted on. Moreover, as counsel for the Committee submitted, it would usually not be possible to reach a properly informed judgment on an individual decision without full access to the medical records (that not being within the power of the Committee as explained in the next para) and also full access to the patient whose identity and confidentiality the Act sets out to protect. Such an investigation would ordinarily require the Committee to look into the propriety of a consultant's assessment in a particular case. That is not a function of the Committee under the Act, nor does it have conferred on it the full range of powers which it would need to be able to exercise for the purpose, such as the ability to call participants before it to question them.

[41] The appellant placed much emphasis on the Committee's power to require anonymised reports from consultants under s 36. That section is, however, entirely consistent with, indeed supports, what has just been said. It distinguishes between, on the one hand, the *keeping* of records (that is, medical records relating to individual cases) by a consultant and, on the other, the *submitting* of "reports relating to cases considered by him and the performance of his functions in relation to such cases". In context the reference to "cases" is a reference to cases considered by him

as a group (his caseload). It is distinct from his records, and it is not directed to individual cases. Significantly, the Committee has no power to call for submission of case records, even in an anonymised form. If it were intended to permit the Committee to seek a report about the diagnosis made or the conclusion reached in a particular case, one would expect to find that expressly spelled out, along with appropriate safeguards for the position of the consultant whose clinical judgment was under investigation.

[42] What the Committee is at liberty to seek from consultants is information about how they have generally approached their caseload. It could also seek background information of statistical significance such as anonymised information of a socio-demographic kind not germane to the diagnosis of, or decision, in any case. We have earlier described the Committee's practice of calling for such socio-demographic information in a standard report under s 36 concerning each decision by a certifying consultant. That seems unexceptionable. We are not able to be as certain about its practice of also seeking a report in an individual case about the pregnancy history of the woman concerned and her use of contraception and, as we heard no argument about the relevance of that information to the making of a diagnosis or decision, we are not prepared to express any opinion on this. To the extent, if any, that this information is treated as relevant to the diagnosis or decision made in any individual case, it would appear to be beyond the power of the Committee under s 36 and would not be authorised by any of the general functions under s 14.

[43] In support of its argument that the Committee does have power to inquire into what occurred in individual cases, the appellant placed a good deal of emphasis upon the role of the Committee under s 30, which requires it to maintain a list of certifying consultants appointed and reappointed on an annual basis and upon the Committee's power, at its discretion, at any time to revoke an appointment. The appellant drew attention in this connection to the requirement in subs (5) that the Committee must have regard to the desirability of appointing as consultants medical practitioners whose assessment of cases coming before them will not be coloured by views relating to abortion generally that are incompatible with the tenor of the Act. Subsection (5) expressly rules out as incompatible the extreme views on both sides

of the abortion debate: that it should not be performed in any circumstances and that it is entirely a matter for the woman and her doctor. The appellant's case was that the Committee must be able to utilise s 36 in order to find out whether someone already appointed to the list is exhibiting, by the way he or she goes about the process of deciding on authorisations, a tendency to make assessments coloured by views which are incompatible with the Act.

[44] If that were so, however, one would expect to find either in s 30 or in s 36 itself some express power or indication that such an inquiry could be made in respect of a particular case or cases or, at the very least, a requirement for some kind of formal application for appointment and renewal of appointment, supported by a prescribed form setting out questions to be answered by the consultant. But nothing of that kind is provided for in the Act. That is consistent with the recommendation of the Royal Commission and the interpretation of the Committee's role by the Court in *Wall v Livingston* that the Committee's function is one of general oversight only. It is not empowered to act as a quasi-inquisitorial or disciplinary body called upon to make the detailed investigations required of such a body. That task is properly left to the Health and Disability Commissioner and the procedures under the Health Practitioners Competence Assurance Act 2003, where there are the necessary powers and safeguards.

[45] As we have said, the Committee can make generalised inquiries, including the seeking of information from consultants about how they are undertaking, across their caseload, under the Act the making of diagnoses of the mental health of women presenting for abortion authorisations. The Committee could, for example, ask about the use of particular diagnostic criteria or techniques by a consultant across the run of his or her caseload. If such generalised inquiries were to reveal matters, which led the Committee to believe that a consultant held views on abortion, which are incompatible with the tenor of the Act, it could be expected to consider whether to renew his or her appointment and, in an extreme case, it might well think it appropriate to exercise its discretion to make an immediate revocation of an existing appointment. It could also communicate its concerns about whether a consultant may have been authorising abortions inconsistently with the abortion law to the Health and Disability Commissioner and the medical disciplinary authorities. It

should obviously consider exercising those powers of revocation and referral whenever it has reason to believe that a consultant may not have acted in good faith.

[46] We would go further. The Committee not only has the power to make generalised enquiries of the kind we have described but, in fulfilment of its functions of keeping under review the operation of the provisions of the abortion law (under s 14(1)(a)) and of ensuring consistency of the administration of that law throughout New Zealand (under s 14(1)(i)), it ought to make such inquiries from time to time – but not on the basis of individual cases. Although, like the Court of Appeal majority, we are not in a position to express a concluded view, it does seem from the material before the Court that the Committee has not been making inquiries of this nature because it has believed that it lacked the power to do so. If that is the position, then the Committee has not fully appreciated the breadth of its functions and powers in this respect.

[47] Generalised inquiries of the kind we have described will also be of value to the Committee in making its annual reports to Parliament on the operation of the abortion law. It must, however, be acknowledged that in relation to this function the Committee has in the past been prepared to voice criticisms of that operation. It suffices to say by way of summary that in its 2003 report, for the 2002–2003 year, the Committee recorded that since 1988 it had in its reports advised Parliament that the abortion law needed to be reviewed. An inquiry into the Committee itself was in fact conducted by a parliamentary committee in 1996. It recommended, inter alia, that the Government review the Act.

[48] The position espoused by Right to Life in support of its appeal has been put to the Court on the basis that the Committee could and should have made investigation of consultants' practices in individual cases. It will be clear from what we have already said that we reject that view. Right to Life's appeal on its principal ground must therefore fail.

[49] We can deal quite briefly with the argument we heard about whether Miller J should have expressed his concerns about the way in which the Committee was performing its functions. What he said did not amount to conclusions on the issues

before him but, rather, was in the nature of comments on what he saw in the materials which he had to consider. Such comments are not uncommon. Judges should of course take care over what they say in their reasons for judgment but on occasion it will be appropriate for them to be forthright. If the matter goes to appeal against an order made by the Judge it will equally be open to the appellate court to express its own views if they differ.

[50] Unless, however, what is said is an integral part of a decision which the Judge has been called upon to make, it will generally not be something to which a right of appeal applies. This Court remarked in *Arbuthnot*[60] that an appeal must be against the result to which a decision maker has come, namely the order or declaration made or other relief given, not simply against the conclusions reached by the decision maker which led to that result. But it can be accepted that there may be exceptional circumstances.

[51] In this case, the Committee was permitted to bring an appeal directed in part to Miller J's observations and the majority of the Court of Appeal concluded that the Judge had erred and should not have made what it called "findings" as to the lawfulness of the decision-making of certifying consultants or comment about New Zealand having abortion "on request". The Court of Appeal majority said that these observations were of no lawful effect.

[52] The majority was of course correct in the last of these remarks. What Miller J said was merely a commentary and not part of his decision. He made no declaration as sought by Right to Life. The Judge did go too far when he appeared to question the lawfulness of abortions authorised by certifying consultants. Once the necessary certificate has been given by two consultants the ensuing abortion is not unlawful under s 187A unless the operating surgeon did not at the time believe it to be lawful in terms of that section.

[53] So far as Miller J gave his further opinions about the conduct of the Committee or the operations of the Act based on the material before him, it was open

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[60] *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [25].

to him to do so. To a large extent he was repeating or paraphrasing remarks already made by the Committee itself in its reports to Parliament. It was also open to the Court of Appeal, if it disagreed, to express a different opinion, which the majority has done. Arnold J, however, tended to agree with Miller J. In this highly sensitive field no good purpose would be served by this Court weighing in with its own opinion. Our job on this appeal is to determine whether the Committee has misinterpreted its functions and powers. The Court has done that, and it should now be left to the Committee, and ultimately perhaps to Parliament, to consider, in light of what emerges from the proper exercise of those functions and powers in accordance with the statements of the law by this Court, whether the Act is operating as it ought.

Result

[54] The appeal must be dismissed. But, recognising that each side has had some success, all costs in this Court should lie where they fall.

McGRATH AND WILLIAM YOUNG JJ

(Given by McGrath J)

Introduction

[55] We disagree with the conclusions reached by the other Judges of the Court on the scope of the statutory functions and powers of the Abortion Supervisory Committee. They conclude that the Supervisory Committee's responsibilities are in the nature of general oversight only and that it cannot, in the course of exercising its functions, inquire into decision-making of certifying consultants in individual cases. Rather, the Supervisory Committee is confined to reviewing their caseloads and decision-making generally under the Contraception, Sterilisation, and Abortion Act 1977 ("the Act").

[56] In our view, an analysis of the text of the relevant provisions of the Act, read

in their context, indicates that the true scope of the Supervisory Committee's functions and powers is wider than the majority judgment recognises. In particular, wherever it is reasonably necessary for the exercise of its functions, the Supervisory Committee is empowered to seek information retrospectively from certifying consultants about the diagnoses in individual cases that led to their decisions on authorisation.

[57] In passing, we record our view that it was open to Miller J, in the High Court, to make observations on the manner in which the Supervisory Committee was performing its functions based on the material before him.[61]

The statute

[58] We start with the provisions of the Act that are relevant to the issue we are addressing. The Act created a new statutory body, which it called the Abortion Supervisory Committee, with three members, two of whom are to be medical practitioners.[62] Section 14, so far as relevant, confers on the Supervisory Committee the following functions:

> **14 Functions and powers of Supervisory Committee—**
>
> (1) The Supervisory Committee shall have the following functions:
>
> (a) To keep under review all the provisions of the abortion law, and the operation and effect of those provisions in practice:
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> ...
>
> (g) To obtain, monitor, analyse, collate, and disseminate information relating to the performance of abortions in New Zealand:
>
> (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:

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61 *Right to Life New Zealand Inc v Abortion Supervisory Committee* [2008] 2 NZLR 825 (HC).

62 Section 10(1) and (2).

...

(k) To report annually to Parliament on the operation of the abortion law.

(2) The Supervisory Committee shall have all such reasonable powers, rights, and authorities as may be necessary to enable it to carry out its functions.

[59] Of contextual relevance to the scope of the Supervisory Committee's functions and powers are ss 30(1), (5), (6) and (7), 32, 33 and 36.

30 Supervisory Committee to set up and maintain list of certifying consultants—

(1) The Supervisory Committee shall set up and maintain a list of ... medical practitioners (in this Act termed certifying consultants) who may be called upon to consider cases referred to them by any ... medical practitioner and determine, in accordance with section 33 of this Act, whether to authorise an abortion.

...

(5) In addition, in making such appointments, the Supervisory Committee shall have regard to the desirability of appointing medical practitioners whose assessment of cases coming before them will not be coloured by views in relation to abortion generally that are incompatible with the tenor of this Act. Without otherwise limiting the discretion of the Supervisory Committee in this regard, the following views shall be considered incompatible in that sense for the purposes of this subsection:

(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.

(6) Every appointment to the list of certifying consultants shall be for a term of one year, but the Supervisory Committee may reappoint any practitioner on the expiry of his term.

(7) The Supervisory Committee may at any time, at its discretion, revoke the appointment of any certifying consultant.

[60] Sections 32 and 33 of the Act set out its procedure for authorisation of abortions by two certifying consultants. Every doctor consulted by a woman wishing to have an abortion, if requested to do so, will refer the matter to two certifying consultants to consider the case and decide if an abortion is justified under

the Act.[63] If the consultants decide that, although it would involve acts proscribed by ss 183 and 186 of the Crimes Act 1961, the case is covered by one of the exceptions in s 187A so that an unlawful act would not be involved, they must authorise the abortion. Otherwise they must refuse to authorise it. Where an abortion is so authorised, its performance by a medical practitioner is not unlawful unless the practitioner performing it is, effectively, acting in bad faith.[64]

[61] Section 36 contains a specific provision for the Supervisory Committee to obtain information. It provides:

> **36 Certifying consultants to keep records and submit reports—**
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> (1) Every certifying consultant shall keep such records and submit to the Supervisory Committee such reports relating to cases considered by him and the performance of his functions in relation to such cases as the Supervisory Committee may from time to time require.
>
> (2) No such report shall give the name or address of any patient.

[62] Section 14(1) sets out the functions of the Supervisory Committee. The functions in s 14(1)(a) and (h) require that it keep specified matters "under review", meaning that they are to receive the Supervisory Committee's continuing scrutiny. Section 14(1)(a) requires this review, first, in respect of all the provisions of the "abortion law". "Abortion law" is defined to mean ss 10 to 46 of the Act and ss 182 to 187A of the Crimes Act 1961.[65] The former group of provisions are a code dealing with authorisation and performance of abortions. The latter, under the sub-heading "Abortion" in the Crimes Act, proscribe the acts terminating pregnancy which are criminal offences. A central provision is s 187A, which states circumstances of exception to such unlawfulness. In the case of a pregnancy of not more than 20 weeks' gestation, a prescribed act is not done unlawfully if the person doing it believes (inter alia):

> (a) that the continuance of a pregnancy would result in serious danger (not being danger normally attendant upon childbirth) to the life, or the physical or mental health of the woman or girl ...

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63 If the woman's own doctor proposes to perform the abortion, the case must be referred to either one other certifying consultant if he or she is also a certifying consultant, or referred onto two other certifying consultants if he or she is not: see s 32(2).

64 Under the Crimes Act 1961, s 187A(4).

65 Section 2.

[63] Section 14(1)(a) of the Act also requires the Supervisory Committee to keep under review the operation and effect of the abortion law provisions "in practice".

[64] Section 14(1)(h) makes it a function of the Supervisory Committee to keep under review the statutory procedure for determining in each case if an abortion is justified. This is a specific review function within the area already covered by s 14(1)(a). This element of repetition in the drafting emphasises the importance of the specific function of the Supervisory Committee within the scheme of the Act.

[65] Section 14(1)(i) states a function in terms which require positive action as opposed to continuing scrutiny. The committee is to take "all reasonable and practicable steps" to ensure that two policy ends are achieved. The first is that the abortion law is administered consistently throughout New Zealand, and the second is that the Act and its procedures operate effectively. Furthermore, the Supervisory Committee is to take steps "to ensure the effective operation of [the] Act and [its] procedures". This reference to the Act's procedures must include those for determining whether performance of an abortion is justified, which are the focus of the previous function, set out in s 14(1)(h).

[66] The functions under s 14(1) are supported by the Supervisory Committee's powers under s 14(2). These are expressed in broad terms: "all such reasonable powers, rights, and authorities as may be necessary to enable it to carry out its functions". This is to be read with the Supervisory Committee's specific power to require records be kept and reports made to it by certifying consultants under s 36.

[67] Under s 30, the Supervisory Committee must set up and maintain a list of medical practitioners who may be called upon as certifying consultants to decide whether to authorise abortions. Half of those on the list are to be practising obstetricians or gynaecologists.[66] As well, there are to be sufficient appointees in each area for a woman to have her case considered without considerable travelling or other inconvenience.[67] The Supervisory Committee appoints consultants for twelve month terms, and may reappoint and revoke appointments. The basis on which

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66 Section 30(4)(a).
67 Section 30(4)(b).

women seeking abortions are referred to consultants and by which they determine if abortions are justified has already been set out.

[68] A policy of the Act and a mandatory consideration in relation to such decisions is that it is desirable that medical practitioners whose views are incompatible with the tenor of the Act are not to be, or remain, appointed.[68] This indicates that the Supervisory Committee should make itself aware whether persons who might be, or have been, appointed have such views.

[69] Section 36 enables the Supervisory Committee to obtain information for the purpose of exercising its functions by requiring that records are kept and reports submitted to it by certifying consultants concerning cases they have considered and functions they have performed under the Act.

The Royal Commission's Report

[70] The principal contextual guide, outside of the Act, to the meaning of the Act's provisions concerning abortion is the discussion and recommendations for change in this branch of the law in the Report of the Royal Commission on Contraception, Sterilisation, and Abortion in New Zealand which was submitted in 1977.[69] At that time, the statutory law of abortion was exclusively contained in the provisions of the Crimes Act. Abortions could lawfully take place only if they were not unlawful under that Act. The Royal Commission recommended the introduction of a statutory code with a regime providing for authorisation of abortions which were not unlawful under the Crimes Act.

[71] Following consideration of the Royal Commission's report, the government introduced a Bill to the House of Representatives which, according to its explanatory note, was designed to give effect to those recommendations of the Royal Commission "that can be implemented only by legislation".[70] Ms Gwyn, senior counsel for the Supervisory Committee, accepted that the Royal Commission report

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68 Section 30(5).

69 Royal Commission of Inquiry "Contraception, Sterilisation, and Abortion in New Zealand" [1977] AJHR E26.

70 Contraception, Sterilisation, and Abortion Bill 1977 (57–1).

was part of the context existing at the time of the enactment, but urged caution in using it to assist in the interpretation of the Act, because of departures from the Royal Commission's proposals in the enacted legislation. There have also been amendments since 1977. We accept the need for care in seeking clarification of meaning of the statutory text from the Royal Commission's report. The Act does, however, give substantial effect to the scheme that was proposed by the Royal Commission, and its report provides helpful context as to the meaning of many of the Act's provisions.

[72] Under its terms of reference, the Royal Commission had inquired into the state of the law of abortion, its interpretation, application and working.[71] It concluded that the law lacked certainty as to when abortions were lawful and that widely different interpretations were being given to it in different districts and hospitals throughout New Zealand. The Royal Commission recommended that legislation be enacted which clarified when abortions were lawful and also proposed procedures for authorisation of abortions which were lawful in individual cases. A key purpose of the Royal Commission was to ensure that there was no variance in the application and practice of the abortion law throughout New Zealand.[72]

[73] At that time, no department, or other committee, had governmental responsibility for administration of abortion laws. As to that role, the Royal Commission proposed:[73]

> ... the setting up of a committee which is to have general oversight of the administration of the abortion law in this country. It has been our aim to ensure some uniformity in approach which has hitherto been lacking. The committee would help attain this object. It would prescribe standards and give general supervision to the working of the abortion law.

An important purpose of the oversight role of the statutory committee was "to ensure the uniform, impartial, and efficient working of the abortion laws".[74]

[74] Two systems for the authorisation of abortions were discussed by the

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71 At 11.
72 At 25 and 285.
73 At 25.
74 At 35.

Royal Commission. Its first proposal was that panels should be established to give approval of abortions, under the jurisdiction and oversight of the new statutory body.[75] Individual cases would be referred to the panel to decide whether the abortion sought was within the law. If it was, the panel would authorise the abortion, otherwise it would not. That model appeared in the Bill which was introduced to the House of Representatives. The system proposed as an alternative was that the decision on whether an abortion should be authorised, should be the responsibility of two doctors to whom the case of the women seeking the abortion would be referred.[76] This system had been adopted in the United Kingdom.[77] The Bill was amended during its passage through the House of Representatives to replace the proposed panel system for authorisation with this alternative procedure.[78]

[75] The two doctors model had not, however, been the Royal Commission's preference. In suggesting it as an alternative to the panel system, the Royal Commission observed that there were risks:[79]

> The alternative which seems best able to ensure a measure of objectivity in the operation of the abortion law is a system under which, within the general framework and supervision of the statutory committee, the decision is made by two doctors after the pregnant woman has been counselled at the counselling service set up by the statutory committee or at one approved by it.
>
> There are criticisms which can be made of the placing of the abortion decision in the hands of two doctors. There is the risk that they will give effect to their own personal views in deciding whether the criteria have been met, and that a decision made by two doctors in one locality may differ from that made in similar circumstances in another. The chances of variations of this kind occurring will, however, be much less than if the matter is left to the decision of one doctor. The risk will be further reduced by the supervision and oversight which the statutory committee would give to the working of the abortion laws in New Zealand.

[76] The Royal Commission said that the decision-makers should act "under the

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75 At 290.
76 At 25, 36 and 293–294.
77 See 294.
78 Supplementary Order Paper 1977 (42) Contraception, Sterilisation, and Abortion Bill 1977 (57–1).
79 At 293–294.

general framework and supervision of the statutory committee",[80] which was also to have the duty to review the process of decision-making. Its view was that neither the Department of Health, nor any other department of government, should be given responsibility by the Act for oversight of administration of the abortion laws.[81] It proposed that the statutory body itself would report to Parliament on the working of the abortion code.[82] The Royal Commission set out in some detail the functions it considered the statutory body should be given.[83] These are closely reflected in the functions given to the Abortion Supervisory Committee established by the 1977 Act.

Wall v Livingston

[77] The majority judgment of this Court holds that the scope of the Supervisory Committee's functions give it a responsibility confined to general oversight of the operation and effect of the Act's provisions in practice, which does not extend to the examination of particular cases.[84] In doing so the majority rely principally on the Court of Appeal's judgment in *Wall v Livingston*.[85] The Supervisory Committee also sees that judgment as holding that its role is confined. It reported in 2001 to the House of Representatives that:

> [W]hile the Committee has a responsibility for the general administration of the law and the oversight of the work of certifying consultants, the Act gives the Committee no control, authority or oversight in respect of consultants' individual decisions authorising abortions. The Court observed that the whole process of authorisation appeared designed to place fairly and squarely upon certifying consultants the responsibility to make decisions based on medical assessment. Under the present law the Committee is unable to investigate individual medical assessments, nor revoke the registration of any certifying consultant without applying the rules of natural justice.

[78] *Wall v Livingston* concerned an application for judicial review of the decisions of two consultants who authorised the abortion of a teenage girl. The applicant sought an order from the High Court preventing the termination of the girl's pregnancy from taking place. The application was refused and the abortion

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80 At 36.
81 At 286.
82 At 287.
83 At 34–35.
84 At [39]–[40].
85 *Wall v Livingston* [1982] 1 NZLR 734 (CA).

duly performed. The applicant subsequently appealed to the Court of Appeal. In its judgment, after discussing the Act's provisions for the Supervisory Committee to make and revoke appointments of medical practitioners as certifying consultants, the Court of Appeal made some observations concerning the Supervisory Committee's functions.[86] These have been read as supporting the proposition that the Supervisory Committee's responsibility is for general oversight only, and that it cannot make any inquiry or investigation into decisions in an individual case that would tend to question them or the clinical judgment underlying them.

[79] We conclude that the judgment in *Wall v Livingston* does not support such a narrow reading of the Supervisory Committee's functions. The judgment was concerned with an attempt to review the lawfulness of an authorisation by consultants prior to the abortion being performed. The applicant had sought an order from the High Court that would prevent it taking place. Significantly, before making the observations relied on, the Court of Appeal prefaced its discussion of the statutory scheme by saying:[87]

> For the purposes of the present case it is not necessary to analyse the Act in a comprehensive way but some explanation is needed of the authorising machinery which it sets up.

[80] *Wall v Livingston* accordingly did not analyse comprehensively the role of the Supervisory Committee under the Act. The case only required consideration of the Supervisory Committee's role during the period following an authorisation before the authorised termination took place. It was in that context that the Court made its observation that:[88]

> ... what is important and of significance *in this case* is that the supervisory committee is given no control or authority or oversight in respect of the individual decisions of consultants.

In relation to the period prior to an authorised termination taking place, the Court of Appeal's judgment was plainly correct, but it is important to keep in mind that, throughout its judgment, the Court was not addressing the Supervisory Committee's role outside of that period after the authorised termination had taken place. Indeed,

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86 At 738–739 and 741 cited by the majority judgment at [36].
87 At 738.
88 At 738–739 (emphasis added).

elsewhere in its judgment the Court of Appeal appears to recognise that, in relation to its role in appointment of consultants under s 30(5), some investigation of particular decision-making may be required. The Court said:[89]

> It is not surprising therefore to find that in necessary circumstances a consultant may be removed by the committee.

The scope of the Supervisory Committee's powers

[81] The Supervisory Committee's functions are expressed generally and specifically. The general aspect, expressed in s 14(1)(a), requires the Supervisory Committee to maintain continuing scrutiny of the "abortion law" and how it is applied. The more specific function in s 14(1)(h) requires such scrutiny of the procedure by which decisions are made by the certifying consultants in cases referred to them for determination. The Act's emphasis on the importance of scrutiny of this critical aspect of the statutory scheme[90] reflects the concern of the Royal Commission over the risk of intrusion of personal views into decisions of two doctors in the same locality and of regional variances in decision-making.

[82] The function in s 14(1)(i) is closely related to that in s 14(1)(h). The Supervisory Committee is charged with taking positive steps to ensure consistent administration of the scheme throughout New Zealand and the effective operation of the Act and *its procedures*. That must include the Act's procedures for determining if abortions are justified (which are the focus of the function in s 14(1)(h)). Clearly Parliament envisaged that the Supervisory Committee should take positive steps to this end.

[83] The "reasonable and practical steps" that may be taken are not spelt out in detail. The Supervisory Committee is, however, given all reasonable powers necessary to carry out its functions under s 14(2). It is sufficient for present purposes to say that such "steps" and "powers" must include the Supervisory Committee's duty to set up and maintain the list of the certifying consultants who will operate the procedure for authorisation, and the provision under s 36 for it to require consultants

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89 At 738.

90 See [64] above.

to keep records and submit reports relating to their cases to the Supervisory Committee.

[84] The former duty is discharged by appointing qualified persons as consultants for terms of 12 months and reappointing or revoking their appointments at any time as appropriate. The discretion must be exercised in accordance with the requirements and policy of the Act as a whole. As to that, the Court of Appeal in *Wall v Livingston* pertinently observed that s 30 emphasises:[91]

> ... the rigid attitudes that must be avoided and by implication the difficulties that would be likely to arise in the administration of the Act if they are not ...

As well, s 30 may be used to change the number of consultants in a particular area so as to ensure expeditious consideration of cases or to meet any changes in circumstances.

[85] Section 36 complements s 14(2) of the Act, as it enables the Supervisory Committee to require certifying consultants to keep records and submit reports relating to cases which they have considered "as the Supervisory Committee may require". That s 36 provides for the keeping of records and the submission of reports does not, to our mind, signal that the Supervisory Committee is unable to inquire into diagnoses in particular cases, as the majority of this Court concludes. Rather, the stipulation in the section that reports not contain the woman's name and address indicates that Parliament envisaged reports could and would include details of particular cases, whilst still protecting patients' privacy.[92]

[86] Parliament could, of course, have specified the content of the records and reports, or provided for it to be determined by statutory regulations. Instead it left what was required to the decision of the Supervisory Committee, recognising that it was an expert body which would need specific types of information to fulfil its functions, and should have the power to stipulate its requirements. The only limitation on such a broad power to impose requirements is that the information

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91 At 738.

92 As Arnold J recognised in his judgment in the Court of Appeal: *The Abortion Supervisory Committee v Right to Life New Zealand* [2011] NZCA 246, [2012] 1 NZLR 176 at [177].

required is sought for the purposes of the Act.[93] In the present case, as indicated, that means for the purposes of taking reasonable and practical steps to ensure the Act's procedures for appointment of consultants to operate in accordance with the statutory policy.

[87] It is necessary at this point to consider the submission in this Court of Ms Gwyn that an investigation into individual decisions made by consultants under s 36 could give rise to disciplinary issues that are more properly the province of the Health and Disability Commissioner and other authorities better equipped under their legislation to address them.

[88] This submission is in accord with the views expressed by Chambers and Stevens JJ in the Court of Appeal.[94] They held that a power to review individual cases would be inconsistent with the statutory provision that consultants were not required to give reasons for their decisions.

[89] The Court of Appeal compared the powers of the Supervisory Committee under the Act with the more developed powers and functions of the Health and Disability Commissioner and medical authorities under their empowering legislation, which Parliament clearly intended would continue to be exercised. As well, any alleged breaches of the law would continue to be dealt with by the police, with those subject to investigation having the benefit of criminal justice and criminal procedure protections. The majority saw a tension between the exercise of these disciplinary and law enforcement powers, and any investigation by the Supervisory Committee of individual decisions of consultants.

[90] Similarly, the majority judgment in the present appeal decides that, under s 36, the Supervisory Committee is able to require that it be provided with information which informs it about the operation and effectiveness of the abortion law in practice across each consultant's caseload, but if it goes beyond that it would be at risk of exercising its powers in a manner that is contrary to its statutory authority.

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93 *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA) at [45].
94 At [103].

[91] For reasons we can state briefly, we are satisfied that the provisions of the 1977 Act in relation to the Supervisory Committee's powers need not be read down.

[92] Established principles of statutory interpretation require that where it is reasonably possible to construe two legislative provisions which are arguably inconsistent so as to give effect to both, that should be done in preference to reading down one of them. As Richardson J said:[95]

> The starting point, of course, is that there be an inconsistency. If it is reasonably possible to construe the provisions so as to give effect to both, that must be done. It is only if one is so inconsistent with, or repugnant to the other, that the two are incapable of standing together, that it is necessary to determine which is to prevail.

[93] The Supervisory Committee's functions are confined to supervision and oversight of the abortion law. The aspect of those functions that may on occasion overlap with those of other regulators, and the police, concerns the appointment, reappointment and revocation of appointment of certifying consultants. The Supervisory Committee needs in particular to become informed as to whether those who have already been appointed are undertaking their responsibilities in a manner that is compatible with the Act, and that regional differences signalling possible departures from that standard are not emerging. But the potential for overlap with other agencies is not extensive and, in any event, already exists in other contexts with bodies exercising roles in relation to standards of professional conduct on the one hand, and the police in investigating possible breaches of the criminal law on the other. In that context, the overlap in functions has been managed in a way that has allowed each statutory body or office holder to perform its role.[96] There is no reason to believe the position of the Supervisory Committee will be different.

[94] The Act is, of course, just as much an expression of legislative policy as other regulatory legislation in the health sector. In some respects its provisions are skeletal but that is not a basis for reading down its scope. The absence of express provisions for natural justice in relation to those who are subject to the Supervisory Committee's jurisdiction, including its record keeping and reporting requirements, presents no problem. To the extent that they are inadequate to protect individual

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95 *Stewart v Grey County Council* [1978] 2 NZLR 577 (CA) at 583.

96 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [132].

rights to natural justice, they can be supplemented by the courts to the full extent that is consistent with the legislative policy.[97]

[95] The Court of Appeal also perceived an internal conflict within the Act if s 36 were read as empowering the Supervisory Committee to inquire into reasons for an abortion in particular cases. We see no such conflict. The Act does not require that reasons be given by the certifying consultants for authorising an abortion, other than by reference to the statutory criteria under s 187A of the Crimes Act, and no disclosure of the name or address of any patient may be made in reports to the Supervisory Committee. But maintaining the privacy of the women who have sought abortions is not inconsistent with the Supervisory Committee subsequently seeking information about the circumstances of decisions in a particular case or cases, including reasons for the diagnosis of the consultants that led to their decision. Such a step may be required to fulfil its statutory role of general oversight. This does not mean that every decision needs to be scrutinised; indeed, such a course would be neither expected nor be feasible in terms of resources and expertise.[98] Where the Supervisory Committee believes it is reasonably necessary for it to seek information from consultants about the specifics of a woman's case after a termination has taken place or a decision to refuse an abortion has been made, however, the Act, in our view, empowers the Supervisory Committee to do that.

[96] In the end, if the Supervisory Committee is not permitted to seek such information, its ability to exercise its functions will be severely curtailed, and the Parliamentary purposes of consistent administration of the abortion law in accordance with the statutory criteria for lawful abortions will not be fulfilled.

Conclusion

[97] In summary, we conclude that investigation into individual cases, when reasonably necessary in the view of the Supervisory Committee, is contemplated and permitted under the Act, in addition to generalised inquiries into the operation of the

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97 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141; *Wyeth (NZ) Ltd v Ancare New Zealand Ltd* [2010] NZSC 46, [2010] 3 NZLR 569 at [40].

98 As Arnold J pointed out in the Court of Appeal judgment at [182].

abortion law. Such scrutiny is envisaged by ss 14(1)(h) and (i), 14(2) and 36, and may be required on occasion to ensure that the law is being applied consistently, effectively and in accordance with the policy of the legislation. In this respect, after-the-fact review is in a different category from pre-operation review, examined in *Wall v Livingston*. The Supervisory Committee is statutorily entrusted with the supervision of the provisions of abortion law, particularly decision-making under ss 32 and 33, and its role in this respect should not be read down.

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