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The Bill of Rights and Abortion Law

Research paper for Family Law
LL.M. (LAWS 513)

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PART I : INTRODUCTION

0.1 Format of the paper

This paper attempts firstly to examine the current state of New Zealand abortion law and then to determine what, if any, effect the proposed Bill of Rights would have upon it. The approach taken is to look at the law through the eyes of the three central characters affected by the abortion decision: The pregnant woman; the father of the unborn child; and the unborn child himself.

The paper begins with a description and criticism of case-law doctrines on legal personhood and the supposed live-birth requirement for legal personhood. Next, Article 14 of the proposed Bill of, is subjected to syntactical scrutiny to determine whether it applies to the unborn child. That necessitates the analysis of recent case-law on abortion appearing Chapter 3.

The concept of "viability" as it appears in American and New Zealand abortion legislation is the subject of Chapter 4, which includes also a discussion on the possible impact of developing ectogenetic technology on the abortion laws of those two countries.

The existing New Zealand abortion scheme is next compared with the requirements of Article 14 in Chapter 5. These requirements are divided into two components ; the procedural and the substantive law aspects. Chapter 5 takes each of these aspects and analyzes their adequacy in light of Article 14 from the

separate viewpoints of the pregnant woman, the father of the unborn child, and the unborn child itself. Included also in that Chapter is an exposition of the doctrine developing in tort law.

Article 21 of the Draft Bill of Rights is the focus of the last chapters of this paper. Again, the separate viewpoints of the pregnant woman, the father of the unborn child, and the unborn child itself are adopted in examining the likely effects of this provision on the current New Zealand abortion law.

The main themes of the paper are drawn together in the conclusion.

0.2 Commonly Used Terms

It is useful at this stage to introduce some of the terms commonly used in connection with pre-natal life. This can best be done by a simple description of the processes of ovulation, fertilization and implantation.

The **ovary** is the female gonad, the organ which produces the female sex cells or ova and hormones, including female hormones (estrogens).

An **ovum** is the female reproductive cell or "egg" which is produced in the ovaries.

The **ovaries** of the woman contain follicles in which ova are held.

Approximately once a month an ovum is released in a process called **ovulation.** On its release from the follicle, the ovum travels down the **Fallopian Tube** which links the ovary to the uterus.

For **fertilization** to occur the ovum must unite with the **male sperm** within 48 hours of release. When the ovum is released, it is surrounded by a shiny skin called the **zona pellucida.** To fertilise the ovum it is necessary for the sperm to penetrate this skin and this it does within the Fallopian Tube.

The product of this **conception** is now called a **zygote.** It travels down the Fallopian Tube within which it is held for three to five days by a valve at the junction of the tube and the entrance to the uterus. It is held for this long to allow the necessary cell divisions to occur, and for the zona pellucida to be shed. Without this shedding of the zona pellucida, the zygote is unable to **implant** itself in the lining of the uterus.

The fertilised ovum, on entering the uterus, may implant itself in the uterine wall. There are substantial losses of zygotes which are flushed from the uterus before implantation. Probably between 15 and 30 percent of all zygotes do not survive implantation, and even after implantation, a further 20 to 25 percent will not survive, or will be stillborn or spontaneously aborted.

The zygote which does implant in the lining of the uterus, passes

through a number of phases in the implantation process. At first it is called a **blastula** which penetrates the mucous membrane lining the uterus and attaches itself to the uterine wall by a network of roots. The implantation of the blastula in the uterine wall takes place about five to seven days after fertilisation of the ovum, and itself takes about four days. Implantation is complete by the eleventh day following upon fertilisation.

From two weeks after conception until approximately eight weeks development the **unborn child** is medically termed an **embryo.** From the eighth week of development until birth, the medical term applied is **fetus.**

The term **unborn child** is used by some people to cover the whole of the pregnancy, though often only from the time of implantation to birth, and not from conception to birth. The term unborn child is used in this paper to describe the full stage of human development from fertilisation until birth. It includes also those ovum artificially fertilized in-vitro.

However as most abortion operations are performed upon fetuses, and some upon embryos, the discussion in the paper is relevant mainly at that stage of human development.

It is not intended to discuss the difficulties surrounding the related area of fetal experimentation.

0.3 Concepts of Human Life

Another important theme underlying the whole abortion problem is the question of when human life begins. From a biological point of view there is no argument as to when life begins. That point is conception. The real problem which has arisen is as to the value of that life, especially at its earliest stages.

The New Zealand Royal Commission on Contraception Sterilisation and Abortion 1977, found it useful to classify the wide range of views put to it according to three broad classifications. It is useful to adopt these here and simply to use the Commission's description of the three schools of thought.(i)

1. The Genetic School

The main views of the Genetic School are:

1. At the moment of conception all the characteristics of the human being are determined genetically. From that point on, there is a new human being, a separate individual, a man in miniature. From the moment of conception the child is an independent person, for the time being included inside the body of the mother.

2. The life is never part of the mother but it is a distinct individual human life. the unborn child, like any other person, can be ill and require treatment before birth, just as it does after birth.

3. The unborn child asserts a command over the pregnancy.

the conceptus initiates the process by which the corpus luteum maintains the uterine lining by suppressing menstruation. It initiates the development of the amniotic sac and the placenta for its survival; and it is from the pituitary gland of the fetus that the processes of labour are initiated.

4. The conceptus has the ability to satisfy the two qualities of an individual: unity and uniqueness. Exceptions to unity and uniqueness, for example, twinning and chromosomal disorders, occur extremely precociously and do not alter the humanity of the being. Abnormalities and diseases such as the hydatidiform mole kill a conceptus, but do not alter its humanity. It is then still a human being, but a diseased one.

5. The fact that a fetus under 20 weeks has never been capable of extra-uterine life, and that it is unlikely to survive if born before 24 weeks, does not make it any less an independent being. Viability depends on the appropriate environment, not on the subject in that environment. After the child reaches full term and is born, it lives in the environment which is most suited to its survival but until birth it lives in the environment which is most suitable to its survival at that stage.

6. Terms such as zygote, embryo, and fetus, do no more than indicate the stages of development within the uterus, and should not be confused with the fact of the existence of

human life. Life is already present from conception. Between conception and death, life does not develop; it is already there. What does change and mature is a morphological structure, in which, as growth continues, behavious traits, personality, ethical awareness and an appreciaton of social responsibilities develop.

2. The Developmental School :

Within this school are those who hold that, while conception establishes the genetic basis for an individual human being, some degree of development is required before one can legitimately speak of the life of an individual human being as being an issue in the abortion decision. The Developmental School does not accept that the establishment of the genetic basis of itself will constitute an "individual human being". Some degree of development of the embryo is required before full human status is assigned to it. Those who are persuaded to this line of thinking believe that life is a continual process with growing stages of significance deserving different degrees of moral concern. On this view the fetus late in development is recognised as a living human individual both in form and function. But this status is not given to the single cell stage, early in biological development. In short, the view is taken that the human individual develops biologically in a continuous fashion and the possibility is advanced that the rights of a human person might develop in the same way.

On the basis that this view is accepted, a moral policy is put forward which proceeds upon the footing that the developing embryo is not yet a human being, and that, under some circumstances, the welfare of the actually existing person might supersede the welfare of the developing embryo. The main views of those who subscribe to this philosophy are:

1. While conception establishes a genetic basis, some degree of development is required before full human status can be assigned.

2. Presence of the full genetic code from the time of conception proves nothing because after fertilisation two or more human existences (twins) can develop with the same genetic code.

3. Although the fetus is a potential human being, it should not be regarded as acquiring human status until later stages in development.

Three stages in particular are suggested. These are:

(1) Brain development. The fetus does not have the characteristically human cerebral substratum for thought until the twenty-eighth to thirty-second week of pregnancy. It is suggested that this stage of development is one at which the fetus can be regarded as achieving full human status.

(2) Viability. Until the fetus is capable of

continuous, independent, extra-uterine existence, it is said that it is parasitic upon the mother. Therefore, up to that stage the fate of such a fetus should be vested in the mother alone.

(3) Quickening. Quickening is the stage at which the movements of the fetus can be felt within the mother. It is suggested as a stage when the fetus can be recognised as an individual human being.

4. Sacredness of life is a value judgment capable of varying interpretations.

5. The enormous wastage associated with human reproduction, including spontaneous abortion, is seen as evidence that life is not regarded by nature as being sacred.

6. There is a difference between a neurologically undifferentiated organism and a socially and mentally integrated organism with complex rights and needs.

7. People feel and react differently to different stages of fetal development.

3. The Social Consequences School

This school of thought has gained strength from the writings of Dr Glanville Williams, and Dr Garret Hardin. According to the former, in the "Legislation of Medical Abortion", the decision to call the conceptus a human being is to be made

on the basis of the social consequences of the decision. For his part, Dr Williams would accept viability, which he thinks to be socially acceptable, as the dividing line, and the beginning of brain waves as a possible compromise solution. Garret Hardin, in "Abortion - Or Compulsory Pregnancy?" says: "Whether the fetus is or is not a human being is a matter of definition, not fact; and we can define it in any way we wish. In terms of the human problem involved, it would be unwise to define the fetus as human (hence tactically unwise ever to refer to the fetus as an 'unborn child'). the main views of this school are:

1. Biological facts do not directly dictate the definition of "human".

2. The decision to call the conceptus a human being is to be made on the basis of the social consequences of the decision.

3. People do not feel the same emotional response to the zygote and the embryo as they do to the unborn child in the later stages of pregnancy.

4. Society has never regarded the fetus as a human being, and no nation requires that a dead fetus be treated in the same way as a dead person.

(i) The Report of the Royal Commission of Inquiry into Contraception Sterilisation and Abortion in New Zealand. (Government Print, New Zealand, 1977) pp 184 - 189

PART II :

Chapter 1 : Personhood and Birth

The White Paper on the proposed Bill of Rights suggests that Article 14 has no applicability to an unborn child. The comment within the paper is brief: "The possible application of the article to abortion depends upon whether the courts would consider it as giving rights to a foetus. In Canada, the Saskatchewan Court of Queens Bench has held that the corresponding provision of the Canadian Charter does not; Borowski v. Attorney General of Canada"[1]

That "corresponding provision" is S.7. which states:

"7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

In Borowski it was alleged that the unborn child is a person and therefore falls within the definition of "everyone" as this term was utilised in S.7. Matheson J. noted firstly the various judicial decisions relating to the law of negligence, and the law of property and child welfare where it was concluded that the unborn child does have certain rights,[2] such as the right not to be injured negligently; the right to participate in a gift of property to a class of children, even where the children living at the time of the testator's death were specified;[3] and the right to protection from abuse.[4] The court found:

"Decisions of this nature are of little assist-

> ance, however, in attempting to answer the question whether a foetus is, from the time of conception or shortly thereafter, a legal person for all purposes, because all such decisions involved foetuses subsequently born alive, or which it was anticipated, unless left unprotected, would be born alive." (5)

This "distinction" is open to criticism. Irrespective of whether the unborn child in these cases was or was not later born alive, the fact remains that the courts acknowledged their legal personhood as existing even when they were still in utero. Actually, the fact of subsequent live birth was sometimes not a material consideration at all in these cases, in some it was not even referred to.

In the case of a planned termination of the child's life, it is difficult to see what relevance that planned termination has to the question of legal personality. It is the act in which the parties (including the child) are involved which has changed, not anything about the parties themselves.

Certainly, different acts carry with them different rights, freedoms and obligations for the parties concerned. An individual is involved in countless changing relationships and actions in the course of a lifetime and his legal "status" changes as the circumstances dictate, but this is not to say that his fundamental status of personhood ever does. A condemned criminal does not cease to be a person, but rather he is a person subject to a death sentence.

His change in "status" does not extend to his legal **personality.** Only in the case of the unborn child does this happen when it is proposed that its life be taken, if the Borowski decision is correct.

The Borowski decision is in my view interesting, odd and undesirable. Interesting, because the Saskatchewan Court recognised the need for parliamentary guidance on the shaping of abortion law;

> "Although rapid advances in medical science may make it soundly desirable that some legal status be extended to foetuses, irrespective of ultimate viability, it is the prerogative of Parliament, and not the courts, to enact whatever legislation may be considered appropriate to extend to the unborn any or all legal rights possessed by living persons." (6)

The Court is here recognising the need to abandon the arbitrary distinction of personhood based upon birth.

The decision is odd, since it has no discernible logical or moral cohesion and discriminates against only a selected group in society. Its greatest oddity lies in its inherent inconsistency. It is equally (if not more) arguable that the principle to be drawn from the cases Matheson J. cites, is that the child's legal personhood does (or at least should) exist in the abortion transaction.

After all, if it is admitted in more **peripheral** or **ancillary** transactions (such as those involving property rights),

might not we expect it to subsist firstly in more **basic** and essential transactions? Should we not be working from the **core** outwards, not attaching legal personhood to the fringe areas and denying it at the core?

The decision is **undesirable** because of its uncertainty and vagueness; it does not contribute to the development of a consistent and principled body of law. From the point of view of the unborn child it is undesirable as it fails to recognise.its most basic interests, while recognising those ancillary interests that are so dependent, after all, upon the most basic essential interest of life itself.

Even if one leaves aside the question of whether Matheson J.'s conclusion is correct (that the negligence and property cases are of little assistance regarding the child's legal personhood in the area of abortion) as a descriptive statement of the way the law has developed; as a prescriptive statement arguing for the attaching or stripping away of legal personhood altogether, it has no weight.

Chapter 2 : The Syntactic Approach

One possible approach to Article 14 is to compare the use of the words **"No one"** in that Article with the other commonly

used expression found in the Bill, "**Everyone**". Articles 6 to 12 (inclusive), 15, 16, 17 (1), 18, 19 and 20 all begin with the impersonal pronoun "**Everyone**". These articles concern such matters as the right to freedom of thought, conscience and religion (Article 6); freedom of expression (Article 7); manifestation of religion and belief (Article 8); freedom of peaceful assembly (Article 9); freedom of association (Article 10); freedom of movement (Article 11) and freedom from discrimination. Also liberty of the person (Article 15); rights on arrest (Article 16) and the minimum standards of criminal justice (Article 17) employ that expression. Clearly, these are not matters which concern the unborn child because it simply has no **capacity** for them. These rights and freedoms are of the kind applicable and exercisable by (normally) adult human beings; for **practical** purposes they have no relevance to those with no capacity for them, such as children, including the unborn child, even though they may apply to them at some time in the future.

Article 14 however clearly holds some relevance for the unborn child. The right to life must be one of the basic human rights upon which all others build and depend. After all, it is futile to talk of the right to freedom of association (Article 15) if your very life itself is not respected as something to which you have a right. So Article 14 concerns a matter of real essence for the unborn child.

It might be argued therefore that the words **"No one"** have a wider meaning than the **"Everyone"** of those other articles, and includes the unborn child to whom it is clearly relevant. Such an argument however is unlikely to find the courts' favour. Indeed a similar suggestion was considered in Borowski. At page 126 of the judgment, Matheson J. referred to the publication "The Canadian Charter of Rights and Freedoms; Commentary" (1982), Tarnopolsky and Beaudoin. In Chapter 9 of that publication, Patrice Grant proferred the following comment:

> "As the Charter uses the term "everyone" (*chacun*) to designate the person entitled to the right and not the expression "all persons" (*toute personne*), perhaps the intention of the legislators was to move away from the traditional concept of "human person" and to turn towards the notion of potential person so that the "viable foetus" would be protected by S.7."

Matheson J. found little support for this notion however, commenting:

> "Any such intention, as suggested, was clearly not manifested when the Solicitor-General stated that it was truly a matter of indifference to the Federal Government whether the expression "everyone" or "every person" was utilized.
>
> Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, January 22, 1981, issue No. 43, pp 47-8"

No such explanatory comment has been made about the language in the New Zealand Bill however, so the argument may not be dismissed so easily.

However in the Canadian case there perhaps exists a greater distinction between **"All persons"** (and everything that traditionally implies) and **"Everyone"**, than exists between the two impersonal pronouns of the New Zealand Bill. In other words, the argument outlined above for the New Zealand case, might run better if the Articles mentioned used the words **"Every person"**. Indeed, some of the articles in the Bill do use this expression - Article 21 providing the "Right to Justice" and Article 18 concerning the "Rights of persons charged". Perhaps **"No one"** in Article 14 should be contrasted with the **"Everyone"** or **"Every person"** of the other Articles? We might consider that **"No one"** means something different from these phrases and that it is coloured by the nature of the right being considered.

Difficulties arise however with Article 19(2) and (3) which also employ the words **"No one"**. These read:

> "17 (2) No one shall be liable to conviction of any offence on account of any act or omission which did not constitute an offence by such person under the law of New Zealand at the time it occurred.
>
> 17 (3) No one who has been finally acquitted, convicted of, or pardoned for, an offence shall be tried or punished for it again."

Clearly **"No one"** here does not apply for practical purposes to children, including the unborn child. But there is nothing in the nature of the subject-matter itself which indicates that it means anything other than the phrases

"Everyone" or **"Every person"** as they appear in the other articles mentioned. The same people are encapsulated by the three differing phrases. So any purely syntactical argument is doomed; the context simply does not allow such technical niceties. The argument in the end, then, is that those articles which by their nature may apply to any group **necessarily** do; the "implication" of the differing text is exposed as a nullity.

The argument so presented is not such a bad one, except that the history of all law relating to pre-natal life indicates that something more is required before the right can be read as being constitutionally guaranteed.

Chapter 3 : Recent History

3.1 Paton. v. British Pregnancy Advisory Service

Abortion laws in Commonwealth jurisdictions generally do not expressly deal with the issue of the status of the unborn child. Of all the recent Commonwealth cases, only the Nova Scotia case In Re Simms and H [7] has found in favour of the unborn child in this matter. In the 1978 case of Paton v. Trustees of the British Pregnancy Advisory Service [8], Sir George Baker P. made this general comment about the Commonwealth law:

> "The foetus cannot, in English law, in my view, have a **right of its own** at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country...and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia and, I have no doubt, in others."(9)

The Paton decision was *ex tempore* however, swiftly decided with little time for a considered examination of the authorities. the judgment was not a considered one, and should be seen as holding little weight as authority.

The facts of the Paton case were as follows:

Mr Paton applied for an injunction to prevent his wife from undergoing an abortion without his consent. His wife had obtained, pursuant to the Abortion Act, 1967, the necessary certificate from registered medical practitioners stating that the were of the opinion that the continuance of the pregnancy would involve risk of injury to the physical or mental health of the wife.

The Act gave no right to a father to be consulted in respect of the abortion. The Court concluded therefore that the husband had no legal right enforceable at law or in equity to veto the abortion.

The court's conclusion did not, of course, entail an examination of rights guaranteed by a constitutionally entrenched charter or Bill of Rights.

Having failed at the Queens Bench, Paton pursued his mission before the European Commission of Human Rights: [10] Paton v. United Kingdom.

The European Convention on Human Rights provides in Article 2(1) that:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction..."

Considering what application this held for the unborn, the Commissioners noted that no other use of the word "Everyone" in the Convention indicated a possible pre-natal application, and concluded that Article 2 does not include the unborn.

Turning to the question of whether the word "life" included unborn life, the Commissioners held that an unborn child does not have an **absolute** right to life, since to recognise such a right would place higher value upon unborn life than upon the life of the pregnant woman, so limiting her own right to life which is clearly protected by Article 2(1).

Such an absolute recognition of unborn life would be contrary, it was observed, to the object and purpose of the convention. But to hold that it does not have an absolute right to life is not to hold that it has no right to life at all; in fact, it infers the contrary.

Further, the Commissioners confined themselves strictly to the facts of the case, which involved the initial stage of pregnancy, the woman being only eight weeks pregnant, and medical grounds of danger to the woman's life. This accordingly leaves open contrary arguments regarding fetuses of more advanced gestational age, and abortion indicated on other than medical grounds. It is doubtful however that even a viable fetus would found a more successful claim than was presented in Paton, as they would be excluded from the meaning of "Everyone" in Article 2(1).

3.2 Morgentaler v. The Queen

In Morgentaler v. The Queen,[11] it was alleged by the accused and by the Canadian Civil Liberties Association and the Foundation for Women in Crisis, who were granted standing at the Supreme Court of Canada level, that the amendments to S.251 of the Canadian Criminal Code, violated women's right to privacy, the security of the person, the right to appear before therapeutic abortion committees and to a fair hearing, and constituted a denial of equality before the law and a denial of due process of law, all as provided for by the Canadian Bill of Rights. So this case was bought from an opposite stand-point, by those who were desirous of avoiding the prescribed procedures for authorising abortions - i.e. avoiding the intervention of therapeutic abortion committees.

The Supreme Court rejected all of these assertions, commenting especially on the need to avoid the temptation of considering the wisdom of the legislation.[12] This decision holds no great weight as authority on the status of the unborn child under New Zealand's Bill however, as its focus was a Criminal Code rather than a Bill of Rights. Furthermore the issue the Court decided upon was the various rights of the mother, and not the status of the child.

3.3 Dehler v. Ottawa Civic Hospital

The next case of major significance was the Canadian case Dehler v. Ottawa Civic Hospital.[13]

This case concerned Mr Dehler, an Ottawa lawyer, who "as representative of those unborn persons or that class of unborn persons whose lives may be terminated in the defendant hospital", claimed injunctive and declaratory relief, the effect of which would be to prohibit further therapeutic abortions from being performed in these hospitals. Mr Dehler attempted to establish that legally protected persons originate at conception or shortly thereafter.

The legislation under attack was subsections (4), (5), (6) and (7) of S.251 of the Criminal Code - the same Act in contention in Morgentaler, and Robins J. found nothing in the facts as alleged which would impel a different conclusion.[14]

The second question facing the court was whether Mr Dehler had the status or standing to maintain an action on behalf of these unborn persons. Robins J. approached the question by asking:

> "whether the members of the class the plaintiff represents, the unborn children whose lives may be terminated by abortion, could themselves have the required status or standing to prosecute the action and by considering, as is implicit in the question, the rights of the unborn children to the relief sought in this case. If the unborn cannot individually maintain the action, they cannot maintain it collectively, nor can it be maintained as a class action on their behalf...it should be noted, the plaintiff claims entirely in a representative capacity asserting no personal rights enforceable in law or equity upon which to found this action".(15)

His "short answer" to the first question (of capacity in law to prosecute an action) was an emphatic NO. He acknowledged that the unborn child had been attributed various rights by law but reiterated the constant theme of the abortion law cases, that the unborn child is excluded from the legal concept of "persons". He found support in this from Pollock in his "First Book of Jurisprudence" (at p. 110).

> "Persons are the subjects of rights and duties: and as the subject of a right, the person is the object of the correlative duty. **A person is such, not because he is** human, but because rights and duties are ascribed to

> him. The person is the legal subject or substance of which the rights and duties are attributes. An individual human being, considered as having such attributes is what lawyers call a natural person."

This quote presents a purely positivistic perception of the law, which is not the only perception. In fact rights and duties are less commonly ascribed than **recognised** by law as already subsisting in persons.

Robins J. continued:

> "A foetus, whatever its stage of development, is recognized as a person in the full sense only after birth. In the law of torts or property, in cases involving inheritance or pre-natal injury, a foetus would have no rights if stillborn. Only upon live birth can rights acquired during gestation be asserted. **In none of the decisions to which I have referred or of which I am aware, has the foetus been regarded as a person before its birth.** In short, the law has set birth as the line of demarcation at which personhood is realized, at which full and independent legal rights attach, and until a child *en ventre sa mere* sees the light of day it does not have the rights of those already born." (16)

This part of his judgment is difficult and his interpretation of the tort and property cases he refers to is open to criticism.

Robins J. correctly asserts that "only upon live birth can rights acquired during gestation be asserted." but the most important point to be taken from these cases is that the rights were acquired by, or recognised as existing in, the child while it was still *en ventre sa mere*. The unborn child is, in Pollock's terms, "the subject of rights and duties" and is therefore a "person". Even if one accepts Pollock's positivistic perception

of law and legal personality as being correct therefore, the conclusion it leads to (in light of the tort and property cases) is that the unborn child is a "person".

It is true also that in the tort and property cases the unborn child would have no action to maintain if stillborn. But this says nothing about the "personhood" of the unborn child; it certainly does not justify the conclusion that the unborn child has **no** legal personhood. An analogy may be found in common law. At common law no person can maintain a tort action if the injury complained of kills him; dead people cannot bring claims. But this is purely a practical measure designed to reduce litigation. It in no way removes their personhood before death; on the contrary it affirms it. The courts have merely imposed a restriction upon litigants; they must be alive to bring the action.

Likewise in the cases referred to by Robins J. the rights recognised as existing in an unborn person have been held to be justiciable only upon live birth. But as is explained above this is a purely practical rule designed to prevent court action by people who lack actual capacity to litigate. It does not imply that they have no or even less personhood at the time of the injury than at the time of the court action: rather it affirms their personhood while they are still unbonrn. Under this approach therefore, the practical measure restricting litigation which is the hub of Robins J.'s approach becomes simply uninteresting.

It is arguable that Robins J. may have been incorrect therefore in concluding that "In none of the decisions to which I have referred or of which I am aware, has the foetus been regarded as a person before its birth." It is respectfully submitted that this view confuses the practical rules of enforcement of a person's rights with the concept of personhood itself.

This confusion permeates many of the decisions dismissed in this chapter and is a central issue in abortion law interpretation. Sometimes the judges explain the tort actions maintained upon live birth as involving a "legal fiction" recognising rights in the unborn retroactively. For example, Matheson J. in Borowski talked of:

> "the creation of a legal fiction...not unknown to the law ...that a potential human being be deemed a legal person contingent upon the potential human being achieving the status of an actual human being." (17)

There are difficulties with this view. It is not at all clear in what sense the terms "potential human beings" and "actual human beings" are being used here. Historically there has been great debate in the biological and medical sciences as to when human life begins. The current state of the debate is unclear but it is established beyond doubt that the qualification "potential" is inaccurate in describing **foetal** life (i.e. an unborn child enters its foetal stage six weeks after conception). As most abortions are performed after the eighth week it is clearly medically incorrect to refer to a would-be-applicant as a "potential human

being".

Even if used in a metaphysical sense, the birth distinction is outmoded and inapproriate. It appears that the terms are in the end used in a purely legal sense. The "fiction" then is not in the "deeming" of a "potential human being" to be an "actual human being" but in the legal definition of "personhood" as arising upon live birth, which effectively deems actual human beings to be "potential".

Mr Dehler's principal contention was that the legal issues were so dependent upon or intertwined with the unresolved questions of fact for their proper determination that the action should proceed to trial so that the necessary facts could be established. The essential fact he sought to prove was that the unborn are human beings from the moment of conception. From it he argued that the unborn, as human beings from conception, have a right to life and to full protection of the law and that Parliament could not constitutionally confer on a doctor the 'right' to kill an unborn person, or upon the mother the 'right' to an abortion.

Robins J. would have none of this however. Noting that "the question of when human life beings is one which has perplexed the sages down the corridors of time", he felt that "even if the theological, philosophical, medical and jurisprudential issues involved in it could be answered in a court-room, the answer would be beside the point, in so far as this lawsuit is concerned. Accepting as fact the conclusion the plaintiff seeks to

establish by testimony at trial, that is, that a fetus is a human being from conception, the legal result obtained remains the same. The fetus is not recognised in law as a person in the full legal sense."[18]

The plaintiff therefore had no status to maintain the action, since a representative cannot have greater power to act that the party claimed to be represented, and unborn persons have no power to have proceedings brought on their behalf.

Robins J. found it significant that the plaintiff Dehler could cite no cases supporting his argument.

The plaintiff's case was dismissed without any evidence ever being adduced, and the decision of Robins J. was affirmed by the Ontario Court of Appeal without reasons[19] and an application for leave to appeal to the Supreme Court of Canada was refused.[20]

3.4 Wall v. Livingston and Roborgh

The New Zealand case of Wall v. Livingston and Roborgh,[21] was influenced in part by Paton and Dehler in holding that in New Zealand no direct claim of standing could be spelt out of the mere existence of a fetus.

In this case a teenage girl was referred by her own doctor to a

public hospital for medical investigation of a suspected complication arising from a known heart complaint. The symptoms were found to be due to early pregnancy. She was then referred to two certifying consultants in terms of S. 32 of the Contraception, Sterilisation and Abortion Act 1977, who issued a certificate authorising the abortion.

During the period the girl was under examination in the hospital, she was seen by the plaintiff Dr. Wall, who in fact diagnosed her symptoms as morning sickness. Based upon the knowledge he had gained of the girl during her period in the hospital and a discussion he had with a cardiological specialist, he formed the opinion that there were no grounds within the provisions of the Act upon which an abortion could be justified.

Dr. Wall accordingly sought an injunction or declaration to the effect that the certificates authorising performance of the abortion were invalid. The judgment of the Court of Appeal was delivered by Woodhouse P. who had this general comment to make about the New Zealand scheme:

> "it is important not to lose sight of what must have been **a deliberate Parliamentary decision:** the avoidance of any attempt to spell out what were to be regarded as the legal rights in an unborn child: with the **consequential absence** of any statutory means by which rights (whatever their nature) could be enforced." (22)

He made two broad points. Firstly that the New Zealand scheme clearly indicated that Parliament intended no general right of judicial review of decisions made under it, any such jurisdiction would extend probably only to bad faith claims. Secondly on the

question of **locus standi** that

> "no individual who is not one of the statutory participants could ever be regarded as having a sufficient interest to institute proceedings for judicial review." (23)

The "statutory participants" probably include only the woman seeking the abortion plus the two or three certifying consultants who make the authorisation decision. The "status" of the unborn child in New Zealand abortion law is therefore unclear.

The long title to the Contraception Sterilisation and Abortion Act describes itself as, amongst other things:

> "An Act...to provide for the circumstances and procedures under which abortions may be authorised after having full regard to the rights of the unborn child."

But as Woodhouse P. pointed out (see above), these rights have not been spelt out and no one may be heard to argue for them anyway.[24]

3.5 In Re Simms and H:

In Re Simms and H[25] is the only recent case to step out of line with these other authorities, but it involved interpretation of the Children's Services Act 1976 rather than of underlying common law principles. The case arose in the Family Court when a husband, upset at his estranged wife's successful application for therapeutic abortion, applied for an injunction from the provincial Supreme Court to restrain the abortion.

The Supreme Court hearing was scheduled for a short time ahead, when the judge in the Family Court would have been unavailable after the day of hearing he was conducting. The Family Court hearing concerned not the father whose proceedings were pending in the Supreme Court, but one Dorothy Simms who was locally active in opposing abortion. She made an application under S.56 of the Children's Services Act 1976 (N.S.) to be appointed guardian ad litem of the unborn child for the purpose of representing the unborn child in the proceedings to be brought by the father.

The Family Court Judge, Bartlett J., bearing in mind the need for a speedy decision,[26] read the provincial Act to apply to an unborn child, and granted the application permitting Mrs Simms to appear as guardian ad litem in the Supreme Court proceedings schedule for hearing four days later. In fact, the hospital yielded to the threat of litigation and cancelled the therapeutic abortion, so the High Court proceedings were not pursued.

The case has raised significant questions, however, not only upon the proper reading of the Children's Services Act 1976, but also upon whether a Family Court can give status to participate in High Court proceedings. Being at the lowest level of the hierarchy of Courts, the case holds little weight as precedent.

3.6 The Lahache case

In a recent French case[27] the father of the unborn child unsuccessfully attempted to claim damages from the hospital which performed an abortion at his wife's request. Mme Lahache requested an abortion which was performed at the Hospital Centre of Dinan before the end of the tenth week of pregnancy. The statutory scheme operating was the Code of Public Health which allows[28] any pregnant woman, who considers that her condition (pregnancy) has put her in a situation of stress and who has carried out the necessary consultations,[29] to obtain a termination of her pregnancy before the end of the tenth week. Included in that scheme is the direction that "each time it is possible, the couple should take part in consultation and in the decision to be taken"[30]. In fact, Mr Lahache was not invited to take part in the consultation, and it was upon this ground that he sued the hospital for 150,000F.

Having failed at the lower hearing (the administrative Tribunal of Rennes) he appealed to the Council of State. The Council noted that the provision in question was purely optional in character and that neither the fact of the failure to consult Mr Lahache, nor his willingness to come to his estranged wife's assistance in the event of her having the child constituted a legal obstacle to the decision to abort.

3.7 The Danforth and Wade Cases

The United States Supreme Court had occasion to consider the constitutional validity of a Missouri abortion statute in Planned Parenthood of Central Missouri et al v. Danforth.[31][32]

The provisions of the statute attacked which are of potential interest to the New Zealand situation were:

(1) S. 3(3) a spousal consent provision, required the prior written consent of the spouse of a woman seeking an abortion during the first 12 weeks of pregnancy, unless the abortion were certified by a physician to be necessary for preservation of the mother's life.

(2) S. 3(4) a parental consent provision, required, with respect to the first 12 weeks of pregnancy where the pregnant woman is unmarried and under 18 years of age, the written consent of a parent or person in loco parentis unless the abortion were certified by a physician as necessary for preservation of the mother's life.

Reference was made in the court's decision regarding both the provisions to the watershed case of Roe v. Wade[33] which forms the basis of American abortion law. The judgment of the Supreme Court in Wade was delivered by Blackmun J. (similarly for the Danforth case) who, after giving an historical overview of American state abortion law turned to a consideration of the right to privacy. Acknowledging that the Constitution does not explicitly mention any such right, he affirmed its existence by implication,

citing several decisions in which the Court has found in varying contexts at least the roots of that right under assorted provisions of the constitution.

The Court concluded that the:

> "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[34]

It emphatically rejected, however, the proferred argument "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses".[35]

Instead, this right "must be considered against important state interests in regulation"[36]. Indeed the Court noted that the "pregnant woman cannot be isolated in her privacy" for she "carries an embryo and, later, a fetus"[37]. It was therefore "reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly"[38].

The Court then established the three trimester division which has become the measuring stick for American state abortion law. "For the stage prior to approximately the end of the first trimester,

the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician", without state interference.[39]

The state acquires a legitimate interest in protecting "potential life" approximately at the end of the second trimester, when the fetus has become "viable". At this stage the state "may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother".[40] During the second, or middle trimester, the state may, if it chooses, reasonably regulate the abortion procedure in the interest of promoting the health of the mother, but it may not constitutionally prohibit abortions altogether.[41]

Danforth relied heavily upon this case in coming to the following conclusions on the constitutionality of the provisions in the Missouri Act.

(1) The spouse's consent.

Section 3(3) required the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy unless "the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother". The Court noted with interest that the condition did not relate, as most statutory conditions in that area do, to the preservation of the lie or health of the mother.[42]

The provision was defended on the ground that it was enacted in the light of marriage as an institution. Reference was made to an abortion's possible effect on the woman's childbearing potential. It was established that marriage always has entailed some legislatively imposed limitations[43] and argued that it was legitimate for the legislature to exercise its inherent policy-making power to determine that "a change in the family structure set in motion by mutual consent should be terminated only by mutual consent."[44]

The two physicians attacking the legislation[45] contended that section 3(3) was obviously designed to afford the husband the right unilaterally to prevent or veto an abortion, whether or not he was the father of the child.

In Roe v. Wade and Doe v. Bolton[46] (both decided in the same year) the Supreme Court specifically reserved decision on the question whether a requirement for consent by the father of the unborn child, by the spouse, or by the parents, or by a parent, of an unmarried minor, may be constitutionally imposed.[47]

In Danforth the Court specifically confronted with the question and it responded

> "We now hold that the state may not constitutionally require the consent of the spouse, as is specified under s. 3(3) of the Missouri Act, as a condition for abortion during the first 12 weeks of pregnancy".(48)

This was a clear and necessary conclusion following from the inability of the state to regulate or proscribe abortion during

the first trimester,

> "we cannot hold that the state has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the state itself lacks that right."(49)

This conclusion was arrived at despite a specific recognition of the "deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying."[50] The court also referred to the "profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious"[51] that an abortion may produce.

The court noted the ideal of a **mutual** decision to "terminate" but found it

> "difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason or no reason at all".(52)

The striking down of the provision would open the way for a **unilateral** decision by the woman, but this could be justified by

> "The obvious fact (is) that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favour".(53)

The court concluded that s. 3(3) was unconstitutional as inconsistent with the standards enunciated in Roe v. Wade.

2. The Parental Consent provision

This provision, requiring the written consent of one parent or

person in loco parentis where the woman is unmarried and under the age of 18 years and the pregnancy is advanced less than 12 weeks, was also found unconstitutional. Just as with the requirement of consent from the spouse, this provision purported to give a third party "an absolute, and possible arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."[54] As such it violated the strictures of Roe v. Wade.

Chapter 4 : The Viability Concept

New Zealand, has not explicitly adopted the "viability" and three-trimester approach of the American system. An argument might still be raised however, in support of an unborn child's claim under Article 14 of the draft Bill of Rights, that the attaining of the age (or stage) of viability promotes the unborn to the class of beings encapsulated by the phrase "no-one" in article 14.

Such a claim might draw upon the traces of the viability notion present in New Zealand scheme which give greater recognition of the right to life of a viable foetus.[55]

The adoption of such an approach would create many new difficulties for the New Zealand Courts however, if it simply

adopted the Roe formula.

4.1 The Roe definition

The Roe decision is one of the most controversial pieces of constitutional jurisprudence ever to be handed down by the American Supreme Court. This results not only from its constitutional analysis, but also from its strong reliance on medical definitions and theories which, at the time of the decision, did not themselves have a majority of support within the medical field.[56]

There are two problems which flow from the definitions of viability which underpinned the Roe decision. Firstly, the definition utilized by the Court is one about which physicians disagree. Secondly, even if there was adequate medical and scientific justification for the court's definition in 1973, the rate of change of fetal technology is so great as to render that definition outdated (and it may be anticipated that the advances in neonatology, ectogenesis, and fetal technology will in the long run only serve to defeat the intention of the court in Roe by providing "viability" at or near conception).

It was noted above (p.25) that viability was the point at which the court found the state's interest in "potential life" became sufficiently compelling to justify regulation of abortion. The Court defined viability as that point when the fetus is "poten-

tially able to live outside of the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks".[57] Furthermore, the Court found that it is at this time when the fetus "presumably has the capability of meaningful life outside the mother's womb".[58]

It is this seemingly arbitrary definition of viability which is the focus of the controversy surrounding Roe. On the one hand the Court conceded that it was in no position to determine when human life begins.[59] On the other hand, however, they found themselves capable of determining when "meaningful life" begins.

One might well ask how the one question is possible of determination yet not the other; the two questions being of the same generic type, the incapacity must pervade both issues. Furthermore, the declaration of viability being at twenty-four to twenty-eight weeks is no more a matter of consensus amongst medical practitioners than is the definition of "viability" as the point at which the fetus is potentially able to live outside the womb "albeit with artificial aid".[60]

The determination in Roe is based upon certain theories of fetal development which even if correct at the time, may not be flexible enough to accommodate the growth and development of fetal sciences which have occurred since then. The developing problem is that these advances have the inevitable effect of pushing the date of viability continually back to earlier points in ges-

tation.

The end result of this tendency is obvious. For America, states will be quite within the constitutional boundaries established by Roe[61] and its progeny in proscribing abortions at continually earlier points in gestation, as the point at which their interest becomes "compelling" moves back with advances in fetal technology and neonatology. For New Zealand the consequences of the Bill of Rights discussed in this paper would occur at an earlier gestational stage if she were to adopt the American approach.

In the Danforth case the court emphasised the role of the medical practitioners in determining viability and downplayed the time scale set in Roe.[62] This creates further difficulties making the viability concept an arguably inappropriate one. The practitioner is faced with a difficult task in determining viability when the fetus is in utero; there are simply no accurate indications of viability.

Weighing is impossible while the fetus remains in utero; estimating fetal age is imprecise, depending as it does upon a patient's memory, and truthfulness and being subject to irregularities in menstruation. Amniocentesis usually yields no results until about the twenty-first week of pregnancy, whereas most abortions are performed before the twentieth week. Ultrasonography is normally not accurate until the third trimester.

One American's report concluded that:

> considering the biological variations in each pregnancy and the imprecision of measuring fetal maturity, the physician faces an insurmountable task in attempting to place viability before performing an abortion.

Given the complications the various artificial aids to maintaining fetal life add, the task may become well nigh impossible for the practitioner.

4.2 Viability in the New Zealand Scheme

The concept of viability is present in New Zealand abortion law also, but the drafting of her scheme saves her the difficulties outlined above which confront the Americans.

In America these difficulties arise from the explicit use and definition of the word "viability" in her case laws. In the New Zealand statutory scheme the word viability is not explicitly used so her laws are not threatened by the new technology in the same way as is America's abortion law. New Zealand avoids the difficulty of defining viability.

The concept is present in the New Zealand scheme however. It appears explicitly in S. 182A of the Crimes Act, 1961 which defines miscarriage:

> "s.182A Miscarriage defined:
>
> (a) the destruction or death of an embryo or fetus after implantation; or
> (b) the premature expulsion or removal of an embryo or fetus after implantation, otherwise than for the purpose of inducing the birth of a fetus **believed to be viable** or removing a

fetus that has died." (emphasis added)

The viability concept appears **implicitly** in s.187A of the Crimes Act which sets out grounds upon which abortions may lawfully be performed. These grounds are **exceptions** to the crime of inducing a miscarriage.

S.187A (3) of the Crimes Act provides that an abortion of a pregnancy of more than twenty weeks gestation is unlawful unless the person performing the abortion 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.

These grounds are much narrower than the exemptions outlined in s.187A (1) and (2) which apply to pregnancies of not more than twenty weeks gestation. These are:

> s. 187A (1) (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) of this Act; or

(d) That the woman or girl is severly subnormal within the meaning of section 138 (2) of this Act.

(2) The following matters, while not in themselves grounds for any act specified in section 183 or section 186 of this Act, may be taken into account in determining for the purposes of subsection (1) (a) of this section, 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 rape.

The New Zealand scheme is therefore similar to the American law under Roe v. Wade. Until "viability" (thought by the American Supreme Court to occur around twenty-four weeks) state regulation of abortion was limited (see above p.25). After "viability" the state could regulate or even proscribe abortion except where it is necessary for the preservation of the life or health of the mother. These are very nearly the same grounds as appear in s.187A (3) of the New Zealand Crimes Act which comes into play after twenty weeks gestation. So some viability-type notion is present in the New Zealand set of exemptions.

But by avoiding the use of the word "viability" and the definition of that stage in the way Roe v. Wade did, New Zealand has largely avoided the legal difficulties presented by the new technologies discussed above.

The New Zealand legislation does recognise the viable foetus as having a greater right to life under s.187A (3) of the Crimes Act therefore and one might argue that this should also be recognized constitutionally under Article 14. "Viability" would be arbitrarily set out twenty weeks as per s. 187A(3) of the Crimes Act avoiding some of the difficulties facing the American Courts.

Debate about the arbitrariness of the twenty week limit would result, but presumably that has occurred already when it was introduced by s.187A (3) of the Crimes Act.

4.3 "Termination" vs. "Feticide"

Even leaving this whole problem aside the new fetal technology still presents New Zealand legislators with a major difficulty which challenges the Americans also. That is, it presents them with the problem of whether abortion implies a right to destroy a fetus or merely to terminate a pregnancy.

Historically, termination of pregnancy has necessarily involved feticide. The development of ectogenesis however is destroying the necessary fusion of the two aspects of what we loosely term "abortion".

This is an exciting development as it may potentially serve to reconcile the competing interests at stake in the abortion trans-

action, but first the law must differentiate the two aspects. Certainly the New Zealand statutes and the Commonwealth and American cases operate and were decided within that narrower framework where the one aspect necessarily implies the other.

Literally meaning 'outside beginning' ectogenesis refers to various techniques enabling a fetus to experience part of its prenatal development outside the mother's womb.[64] There are two types of ectogenesis. "Preimplantational ectogenesis" which as its name suggests, refers to the extra-uterine maintenance of the fetus prior to its implantation in the uterus.

"Post implantational ectogenesis" concerns extra-uterine maintenance of the fetus from that time on, either in an artificial womb or for the period of time the fetus spends outside its original womb while being transferred to the womb of a surrogate mother.

It is to the development of an artificial placenta, an artificial uterus, and the perfection of methods of fetal transference that the largest effort in post implantational ectogenesis is currently directed.[65] We are becoming more familiar with the results of implantational ectogenesis with the successes in the area of in-vitro fertilization and the possibilities which surrogacy are opening up.

As yet, there has been no complete in-vitro artificial gestation,

though the necessary technology is currently available. "With the progress of ectogenetic technology, a total *in vitro* system of gestation is inevitable in the near future."[66]

This could conceivably reconcile the competing interests of the state and the pregnant woman. The woman's interest is primarily in terminating her pregnancy, the state's interest is in protecting unborn life, which it does through the provisions of the Crimes Act proscribing abortion except on certain grounds. Using ectogenetic techniques, both interests may be accommodated; the woman can choose to terminate her pregnancy, and the state may exercise its interest in protecting fetal life by use of an in vitro gestational device, or by use of a surrogate mother.

In America, the states could arguably proscribe abortion (which currently implies feticide) altogether as ectogenesis can be considered an "artificial aid" within the *Roe* definition of viability. New Zealand is fortunately spared this constitutional dilemma as she avoids a direct reference to "viability" in her abortion equations. With the pushing back of the viability date occurring through ectogenesis, New Zealand legislators may eventually be faced with the question of exactly what the right to abortion entails.

In fact to resolve that it entailed only the right to termination of pregnancy and not feticide would require readily available options in the form of artificial gestation apparatus or surrogate mothers for most of the six thousand odd women who are

currently having abortions in New Zealand every year.[67]

It would also raise nice questions as to who was responsible for the child and who should pay the costs of his or her life. Would responsibility revert to the woman once the conditions which precipitated the termination of the pregnancy no longer existed? Would the father have to bear responsibility? Could he if he so desired? Would the child become a ward of the state?

It can be seen what a minefield this whole area quickly becomes; we are already experiencing many of these difficulties with the advent of in vitro fertilization, surrogacy, third party donations of semen etc.

Buckley, in his article, "Current Technology Affecting Supreme Court Jurisprudence"[68] foresees another difficulty too, if the scenario outlined above were to realize.

> "A sort of moral or ethical dilemma would be created for the woman which would negatively affect her freedom of choice. Certainly, fewer women will choose to abort if they know that the fetus will survive and then either be given for adoption or left to the state."[69]

Chapter 5 : Article 14 and the New Zealand Scheme

Assuming that article 14 does apply to the unborn child (an assumption which as indicated above is far from being a sure one), what would be its effect? Article 14 reads:

> "No one shall be deprived of life except on such grounds, and, where applicable, in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice"

There are two requirements therefore for the lawful taking of life under this Article:

(a) It must be in accordance with procedures established by law and consistent with the principles of fundamental justice.

(b) The grounds on which life is taken must likewise be established by law and consistent with the principles of fundamental justice.

Let us examine what that means for New Zealand abortion law.

5.1 The Procedural Requirements

Firstly as to the current procedure. The procedure for obtaining a lawful abortion is set out in the Contraception, Sterilisation and Abortion Act 1977. This Act, and the two Acts which establish the grounds on which an abortion is lawful (i.e. The Crimes Amendment Acts of 1977 and 1978) were passed as the result of the findings of the Royal Commission of Enquiry on Contraception, Sterilisation and Abortion which tabled its report to the House of Representatives in March 1977.

The question arises as to whether these procedures are "consistent with principles of fundamental justice". The procedure is outlined in s.32 of the Act, which provides that when a woman

approaches her own doctor[70] wishing to have an abortion, the doctor shall consider the case and if it is considered that it may be covered by one of the exemptions contained in s.187A of the Crimes Act, the doctor shall refer the case to an operating surgeon.[71]

If the operating surgeon is satisfied that the case does in fact meet the criteria of one of the exemptive clauses, that surgeon shall refer the case to two certifying consultants with a request that they determine in accordance with s.33 of the Contraception Sterilisation and Abortion Act whether or not to authorise the performance of an abortion.[72] Differing provisions apply where the woman's own doctor is also either the operating surgeon or a certifying consultant or where the operating surgeon is also a certifying consultant.

In making their decisions, the certifying consultants have, under s.32(7) of the Act, the power to consult any person to assist them in their consideration of the case. This is, however, contingent upon the patient's consent. Under s.32(6) of the Act, the woman's own doctor and the proposed operating surgeon are entitled (with the patient's consent) to make such representations as they think fit to each certifying consultant.

Where two certifying consultants arrive at opposite conclusions in determining a case, then under s.33(3) and (4) of the Act the opinion of a third certifying consultant is conclusive.

How does this square with "principles of fundamental justice"? What are these "principles of fundamental justice" referred to in article 14? The Analysis appended to the Draft Bill discusses this phrase, comparing it with the equivalent phrase in the Canadian Charter. The comment reads:

> "The Canadian Charter reads: "Everyone has the right...not to be deprived (of life) except in accordance with the principles of fundamental justice." There is uncertainty whether the phrase "fundamental justice" there refers merely to procedures or extends to substance - in other words whether it is simply a synonym for natural justice. The quite different wording of the New Zealand Article makes it clear that matters of substance as well as procedure are germane..." (emphasis added)

From this comment, and the wording of Article 14 itself may be inferred that the **procedural** requirement is one of "**natural justice**". The question then becomes, what does **natural justice** require, and does the procedure outlined in the Contraception Sterilisation and Abortion Act satisfy these requirements?

It is generally said that natural justice involves not just the right to a fair hearing - to proper notice, the chance to call evidence, and to confront the adverse witnesses and evidence - but also the right to an unprejudiced decider; the decider must not be biased.

5.1.1 - an unbiased decider

Let us consider the right to an unbiased decider. What does the right to an unbiased decider mean in the context of abortion law?

Consider the nature of the interests involved. The woman's interests are in her psychological, emotional and physical health; her right to some degree of autonomy over her body and right to privacy (or non-interference by the state). The unborn child's interest is in his or her right to life; physical and emotional well-being and support upon life birth.[73]

Once the grounds of lawful abortion have been established, we would expect an unbiased decider to be one who would be fully aware of these various interests, and who would apply the law as set out in the Crimes Act without fear or favour, and whose judgment would not be tainted by a view which represented either extreme of the abortion debate itself.

In New Zealand, it is the Abortion Supervisory Committee[74] who are charged with the function of setting up and maintaining a list of "deciders" or certifying consultants.[75] Under s.30(5) of the Contraception Sterilisation and Abortion Act, the Committee is to appoint persons as certifying consultants "whose assessment of cases coming before them will not be coloured by views in relation to abortion generally that are incompatible with the tenors of [the] Act."

More precisely, certifying consultants should not hold either of these views:

(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 her doctor to decide.

S. 30(6) provides that every appointment to the list of certifying consultants shall be for the term of one year, with the power of reappointment vesting in the Supervisory Committee.

Under s.30(7) of the Act, the Committee may at any time, at its own discretion, revoke the appointment of any certifying consultant. This power would presumably be exercised in practice where the number of abortions authorised by a particular certifying consultant deviated markedly from the norm (taking into account the number of referrals that certifying consultant had received). This is because the Supervisory Committee is totally without power to investigate or review individual cases; statistical inference would be the only satisfactory basis upon which the Committee could establish that a consultant was making decisions consistent with one of the two extreme views outlawed by s.30(5). (supra)

On the face of it then, the New Zealand structure does satisfy this element of the natural justice requirement. We have a politically independent public authority (the Supervisory Committee) who appoint and monitor the decisions of the deciders (the certifying consultants) who must profess to hold and act in accordance with, an attitude on abortion generally which falls at neither extreme of the abortion debate.

In Wall v. Livingston and Roborgh[76] the Court of Appeal indicated that judicial review would be available where a claim of bad faith was entered against a certifying consultant. That claim would need, in terms of the Wall decision, to be pursued by the Attorney-General.

Perhaps some argument may be made here that this added burden (the need to satisfy the Attorney-General grounds so convincing as to warrant his intervention) may be contrary to the rules of fundamental justice.

However, the content of natural justice always falls to the determined in the light of the whole context of the power being exercised.[77] Given the highly political and emotive nature of the abortion debate, and the indications which the Court of Appeal found in the New Zealand legislation as to the proper rule of the court in the abortion process in the Wall case (see below p. 75), it may be argued that the additional safeguard against politically motivated claims which this extra requirement provides, does no violence to natural justice.

On the other hand, the courts always have power to strike out proceedings at an early stage and if the claim was found wanting in this way, could be disposed of in the normal exercise of judicial discretion.

It is less clear that the current procedure in New Zealand would satisfy the first aspect of the natural justice requirement: the right to a fair hearing. What needs be established firstly, however, is whether this "fair hearing" aspect of the natural justice requirement applies to the abortion situation at all, and if so to whom it applies, and what exactly it means for those parties (given that if it should be found to apply to the unborn child, he or she is in no position to argue for him or her self anyway).

5.1.2 - a fair hearing, the pregnant woman's point of view

Firstly, from the point of view of the pregnant woman. Probably the procedures do give her a "fair hearing". The fair hearing requirement (expressed traditionally in the maxim audi alterem partem) is generally held to require that the party whose interests are the subject of deliberation be given notice of the care to be met, and a fair opportunity to answer the opposition case and to present her own.

Clearly the woman is given notice of the case to be met. The case to be met is established in the Crimes Act, 1961 and the Contraception Sterilisation and Abortion Act 1977. She is not entitled to an abortion unless she satisfies two certifying consultants that her circumstances come within one of the exempting provisions set out in the Crimes Act. As the question is

so much one of straight out medical judgment, there is not much more that can be done. There is no "opposition case" for the woman to answer - there is only an assessment to be made.

The first step in the process is a referral by the woman's own doctor to the certifying consultant: the referral will happen only if the doctor considers the case **may** be covered by one of the exemptions contained in s.187A of the Crimes Act. Then (under s.32(6) of the Contraception Sterilisation and Abortion Act) with the woman's consent, the woman's own doctor, plus the proposed operating surgeon may make such representations as they think fit to each certifying consultant.

Now these representations could of course be **prejudicial** to her claim, though one would normally expect the woman to grant consent to the representations only if that person had indicated that he would support her case. The present procedure makes no specific allowance for the woman to know of the substance of any prejudicial comments: it is conceivable therefore that a situation may arise where she is unaware of the prejudicial evidence.

Under Daganayasi v. Minister of Immigration [78], this would be a breach of natural justice. In that case Mrs Daganayasi unsuccessfully applied for a permanent residence permit in New Zealand, but was refused. She later was convicted of remaining in New Zealand after her temporary entry permit had expired. An automatic consequence of conviction was a Court order that she be

deported.

She appealed to the Minister against deportation under s.20A of the Immigration Act 1964, as amended in 1977. Section 20A gave the Minister a discretion to order that an offender not be deported if he was satisfied that his or her case presented exceptional circumstances of a humanitarian nature which would render deportation unduly harsh or unjust. Her main ground of appeal under s.20A was that one of her New Zealand-born children had a rare metabolic disease and must remain in New Zealand to receive proper treatment.

A doctor appointed by the Immigration Division as a medical referee was prejudicial to Mrs Daganayasi's case and conveyed the impression that the doctor in charge of the clinic treating the boy had been fully consulted and was in general agreement with the substance of the report. The Minister declined on the basis of this report to order that the mother not be deported.

On appeal to the Court of Appeal it was held by Richmond P, Cooke and Richardson JJ unanimously, that the Minister's decision was invalid on the ground of procedural unfairness because the report and memoranda of the medical referee, or at least the substance of any prejudicial content, should have been disclosed to Mrs. Daganayasi or her advisers before a decision was made, to allow her a reasonable opportunity of answering them.

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So too in the abortion situation then, any evidence prejudicial to her claim, entered for the decider's consideration by either the woman's own doctor, or the operating surgeon should be made available to the pregnant woman.

The same can be said for evidence tendered by any other person who is consulted by the certifying consultants under s.32(7) of the Act (which gives the certifying consultants the power to consult any other person, subject to the woman's consent, to assist them in their consideration of the case). In fact, however, the consent requirement is again likely to prevent any prejudicial material being presented to the consultants anyway.

Actually these requirements would apply whether or not the woman has any claim under Article 14.[80] The doctrinal development of natural justice which has been so extensive over the last twenty years since Ridge v. Baldwin have not relied upon any explicit constitutional indications, but the concept has been seen as an already existing backdrop to statutory interpretation, seen in this sense as part of the unwritten constitution itself.

In fact it is extremely doubtful that Article 14 does guarantee anything to the pregnant woman seeking an abortion anything. The reference in Article 14 to grounds and procedures "consistent with the principles of fundamental justice" is intended to be, of course, a safeguard for the person who is being "deprived of life". In the abortion transaction this appears to include the unborn child.

5.1.3 - a quality of life ethic?

The qualification "appears" is used in the last paragraph because it may be argued that the concept of "life" in Article 14 includes a **quality of life** ethic or component. If it did, this would open up the procedures and grounds of the abortion transaction to attack, not just by the unborn child but also by the woman, and possibly the father of the child also.

The claim would be an extremely weak one however and with respect at least to the procedural requirements under Article 14 would be a redundant claim in light of Article 21 (discussed below) which guarantees the right to natural justice anyway.

That would still leave open a claim by these parties under Article 14 that the **grounds** of deprivation of their quality of life (established by s.187A of the Crimes Act) were contrary to the principles of fundamental justice.

Even assuming Article 14 had some application to the abortion transaction, it is submitted that the last thing the New Zealand courts would want to do is become involved in an exercise examining the wisdom of our abortion law. This is an activity which the Courts in Commonwealth countries have consistently refused to engage in.

The very nature of the relationship and conflicting interests involved would make it extremely difficult for a court to hold

that concepts of fundamental justice required judicial interference on such a matter. The interests involved do not make this a logically or theoretically impossible scenario; there is nothing about the political process which guarantees that a difficult and sensitive area such as this will always be legislated on in a way consistent with concepts of fundamental justice, but it would be a bold and brave court indeed, considering necessarily a very extreme legislative scheme, which substituted some other set of values for those of the legislature.

It is unlikely that any claim relating to the grounds of lawful abortion would be entertained by New Zealand courts therefore.

5.1.4 - a fair hearing : the unborn child's point of view

Let us examine the legislative procedures then, from the point of view of the unborn child. What is immediately apparent is that nowhere in the whole process is any voice heard in defence of the unborn child's interests.

The "opposition" (the pregnant woman) puts her case, explaining how it is in her interests that the pregnancy should be terminated; the decider makes a medical judgment and determines whether the circumstances establish that the legal criteria are satisfied. Nowhere are the interests of the other main party (the unborn child) even directly referred to.

Indeed as Woodhouse J. pointed out in Wall (see above p.19) Parliament has deliberately avoided any attempt to spell out what are to be regarded as the legal rights in an unborn child. The only reference is in the long title to the Contraception Sterilisation and Abortion Act which described itself as "An Act...to provide for the circumstances and procedures under which abortions may be authorised after having **full regard to the rights of the unborn child.**"

It may be immediately seen however, that the "full regard to the rights of the unborn child" and indeed the **actual** rights which the system is having regard to, boil down to nothing more than a **supposed presence** in the mind of the certifying consultant confronted with the immediate impact of a distraught pregnant woman.[81] Is this sufficient to satisfy natural justice requirements?

Natural justice means different things in different situations. Thus, for example, an individual hearing would not normally be given to a person who was part of a whole class of people being affected by a determination made by some public authority (the commentary on Article 21 of the Draft Bill gives the example of a change in local body rates).

In Ridge v. Baldwin[82] Lord Reid discussed[83] the application of principles of natural justice to duties imposed on Ministers and distinguished between an exercise of power on a large scale and

one relating solely to the treatment of an individual; the latter being subject to court control far more readily.

In that case it was held that the Chief Constable of Brighton, who held statutory office and by regulation could only be removed on grounds of neglect of duty or inability was entitled to notification of the charges laid against him and to the opportunity to be heard in his own defence.

Lord Reid indicated that natural justice applied to those who hold statutory office from which they can be dismissed only for cause; those whose property has been taken away in certain circumstances;[84] and those whose reputations are being affected by decisions taken by professional or social bodies of which they are members.

The range of factors to be taken into account in determining when a hearing need be given include:[85]

1. The interests or range of interests involved; if the interest involved reputation, property rights or statutory office, a fair hearing is indicated.

2. The type of judgment to be made by the decision-makers; are they considering whether personal fault exists (fair hearing indicated) or the best method of ensuring efficient government (no hearing indicated)?

3. The sanction imposed by the decision.

4. What other safeguards are written into the legislation?

Applying these criteria to the abortion decision we see:

1. The **interest involved** for the unborn child is his

or her right to life; far more fundamental than mere property rights or reputation.

2. The **type of judgment to be made** is one where the individual circumstances are all important. The effect upon the unborn child is **direct** : as one of the two central parties whose interests are being balanced, the effect is not in any sense incidental. The element of personal fault indicated Ridge v. Baldwin is not present, but is not a necessary factor. (86)

3. The **sanction imposed** by the decision is a death penalty for the unborn child.

These factors indicate the right to representation of the unborn child; the opportunity to answer the pregnant woman's case.

However there are difficulties with this argument; difficulties in determining how this requirement might operate in practice. Does natural justice require a person to rebut the woman's case, a kind of a devil's advocate present at the consultation?

Who would s/he be? A statutorily appointed doctor indicating the reasons why in his opinion the grounds set out in the Crimes Act are not present in the particular case? Would it have to be a doctor? What would be his or her brief? What limits to his or her power? Would s/he be able to call witnesses? Could s/he tender documentary evidence in the form of affidavits, say of the father of the unborn child? Could s/he interview other related parties (e.g. the pregnant woman's spouse, the father of the unborn child, the girl's parents if a minor etc) in order to gather evidence? Should this representative personally appear before the certifying consultants at all, or should all evidence

s/he tenders be documentary? Who should appoint him or her?

As one considers all the questions that such an appointment raises, it becomes patently obvious that a position such as this could and should never be created. It would be impractical to the point of near (if not actual) impossibility, expensive, and would do great violence to the structure of our abortion system. In fact the 1977 Royal Commission specifically rejected the concept. And there are alternatives.

One such alternative would be to allow those individuals who have a legitimate interest in the outcome of the decision (e.g. the father, the spouse, the woman's parents if she were an unmarried minor) to make such submissions as they desired to the certifying consultants **as of right.** At the moment these people **may** (under s.37A of the Contraception Sterilisation and Abortion Act) be consulted if the certifying consultant so chooses and if the patient consents. Under the scheme outlined above, they would not require the patient's consent, nor would such representations be at the indulgence of the certifying consultant.

If there was any relevant evidence that could be adduced in favour of the unborn child, it would be by this small group of people - the child's father, the spouse of the pregnant woman and the parents of an unmarried minor. It is the attitude of these people close to the woman in question which will be largely relevant in determining whether she falls within the exemptive provisions of the Crimes Act.

It will be their response to the pregnancy which will determine in part the degree of risk which the pregnancy poses to her mental health. Approximately 75 per cent of all abortions have been justified on the grounds of serious danger to the woman's mental health in New Zealand in the last four years.[87] If there is evidence from these people that the woman will receive a high input of emotional, psychological and economic support from these people throughout the pregnancy and for as long afterwards as she decides to keep the baby, natural justice requires that it be made available to the person deciding the future of the unborn child; it is evidence of central relevance to the decision-making. Oral or documentary evidence from these interested parties would do no violence to the current scheme.

If these people had nothing to say in support of the unborn child, then that is a relevant factor too, for the same reason that supportive evidence is relevant; it would go to establishing the degree of danger to the woman's mental health.

The last factor mentioned in Ridge v. Baldwin a determining whether a hearing need be given was the procedural safeguards written into the legislation. It is arguable that the safeguards of the current system are adequate to satisfy natural justice.

It might be said that the certifying consultant, in keeping the interests of the unborn child at the "forefront of [his] con-

sideration"[88] when listening to the patient's evidence, is fulfilling the role of the representative for the fetus. There is some merit in this argument - indeed it is a part of the answer to the suggestion considered above (at page 53) that some other person should be appointed as the unborn child's advocate. But the claim is meritorious only if that person really has evidence in favour of the unborn child to hold in his mind. Without this opportunity for input by those interested parties mentioned above, the process looks less like being a fair one; it does not sound much like a fair hearing, or natural justice, to say that the "decider" is also the "representative" of the unborn child, and may not, except with the permission of the pregnant woman, hear evidence in favour of the child whose interest he is appointed to safeguard.

In Wall v. Livingston and Roborgh there are very strong indications from the Court that the system should not be interfered with. However, what is being mooted here is not an interference of the kind the Court rejected in Wall. In that case the Court found the legislative context and the statutory procedure to be inimical to the co-existence of judicial review. The existing procedure for obtaining a lawful abortion would not be inimical to the introduction of the changes proposed above however. Indeed they may be seen as enhancing the procedure, by giving the decider additional relevant material on which to base his decision.

5.2 The Grounds for Lawful Abortion

Having considered what **procedural** requirements the principles of fundamental justice require, let us now turn to that other aspect of Article 14, the **grounds** on which the taking of life may be justified. Article 14 directs that not only must the **procedure** established for the deprivation of life, but also the **grounds** themselves must be consistent with the principles of fundamental justice. In the context of the abortion transaction this may be reason enough on its own for the courts to hold that Article 14 did not apply to the unborn child.

In Wall the Court refused even to allow judicial review to test the legality of the decision on the law as it stands at present; this indicates the unlikeliness of the court considering the legality of the **grounds** set down by our legislature in the light of such nebulous notions as "principles of fundamental justice".

The task which would confront the courts is an extremely difficult one. It would need to decide firstly, what principles of fundamental justice applied to the act of abortion. Secondly, they would need to establish what these principles required in terms of the grounds for lawful abortion. Thirdly the courts would have to examine the exemptive provisions in s.187A of the Crimes Act in light of their answers to these first two questions and determine if there is any breach of those requirements.

That second question is difficult, and would involve the Court in the same sort of exercise already entered into by Parliament in

framing the law in the first place.

So because of both the difficulty of the question, and the danger of the Court being seen as usurping the role of Parliament in answering it, the Court may be unlikely to find unconstitutional anything but the most extreme legislation. Legislation proscribing abortion altogether or allowing it on demand spring to mind as possibly breaching the principles of fundamental justice.

There may be a further complication with Article 3 - the "Justified limitations" clause, reading:

> "The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

This could possibly be used by the Court as an answer to any suggestion that Article 14 imposed restrictions upon the grounds established in the Crimes Act.

Article 3 is a limitation provision on each of the separate freedoms established by the Bill of Rights. It recognises that none of the rights stated in and guaranteed by the Bill are absolute.

The first point to note about it is that it comes into play only when one of the guaranteed freedoms has been presumptively abridged. So if it were presumptively established that the provisions of s.187A of the Crimes Act abridged rights accorded

to the unborn under Article 14, those provisions might still be justified under Article 3; they would not necessarily be doomed.

The second point about Article 3 is that there must be "limits prescribed by law". In Re Ontario Film and Video Appreciation Society [89] the Ontario Court of Appeal held that film censorship legislation which did not supply standards to control the censor failed because of the vagueness and breadth of the discretion of the Board, its powers were not "prescribed by law".

The New Zealand abortion legislation is not likely to fall foul of this requirement. The procedures and grounds for lawful abortion are clearly set out in the New Zealand Acts, and the task of the medical practitioners involved is not to exercise a discretion but to form a medical opinion on whether those grounds exist in the circumstances.

The third important feature of Article 3 is that it puts the burden of persuading a court that the provision justifies a law or other government action which is presumptively in breach of a right in the Bill on the Government or other party relying on the law or action.

In the context of the present discussion, Government would need to persuade the court that the limits in the Crimes Act on the right to life guaranteed under Article 14 are reasonable and can be justified in a free and democratic society.

It is difficult to imagine that any law which breached a "principle of fundamental justice" (Article 14) could ever be "demonstrably justified in a free and democratic society". (per Article 3). It is difficult to discern what, if any, difference, there is between the two phrases. The relationship between Articles 3 and 14 is unclear therefore.

5.3 The "Wrongful Life" Concept

Another possible approach under Article 14 is a claim that it provides the fetus not only with the positive **right to** life, but also the converse right to protection **from** life. Such a claim would be analagous to the recent Canadian decision holding that freedom of religion incorporates also freedom from religion. In R v. Big M Drug Mart Ltd[90] the Supreme Court of Canada determined that the (Federal) Lord's Day Act which generally prohibits work or commercial activity on a Sunday infringed s.2a of the Canadian Charter of Rights and Freedoms which reads:

> s.2 "Everyone has the following fundamental freedoms -
> (a) freedom of conscience and religion"

The six judges on the Supreme Court were unanimous in their conclusion that the Act infringes s.2(a) of the Charter and thus is of no effect.

Five of them held that the **purpose** of the Act was "the compulsion of sabbatical observance" in direct conflict with the Charter which "prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others."

The other judge agreed with the result but thought it was the effect rather than the purpose of the Act which was offensive.

In tort theory the wrongful life concept is emerging as an action brought by a live-born child alleging that due to the negligence of the defendant, he was born.

The situation involves severely handicapped children bringing suits against a hospital, doctor or genetic counsellor, who negligently leads parents to believe their child will be born healthy, resulting in their decision not to abort. When the child is subsequently born severely handicapped, that child's own life is claimed as the injury resulting from the defendant's lack of due care in advising his parents. It is the birth itself with these defects, rather than the defects per se which is claimed to be the result of the defendant's negligence. This action should not be confused with the "wrongful birth" action which is brought by the parents of the child themselves.

The doctrine has been recognised by the California Court of Appeal in Curlender v. Bio-Science Laboratories[91] in which the plaintiff was born with Tay-Sachs disease. Genetic testing to

determine whether either of the parents was a carrier of the disease was negligently performed and revealed a negative result. The plaintiff claimed that her mother would have chosen to abort the pregnancy had the test correctly shown her parents to be carriers of the disease.

Earlier American cases[92] had rejected claims of this type on the following basis:

1. It was logically impossible to measure the damages because this would require a comparison of the child's condition with that of present non-existence.[93]
2. That since birth with defects was better than non-existence, the child had suffered no harm.[94]
3. To allow the cause of action would be to approve abortion.[95]
4. That because society placed a high value on life, to declare any life to be a harm, regardless of the degree of deformity would be to circumvent that belief.[96]
5. That it was impossible to draw the line of recovery at which the deformities were not serious enough to warrant recovery of damages.[97]
6. That it was impossible to know the true desires of the defective child.[98]

The Court in Curlender rejected this reasoning and allowed the wrongful life action in cases where the genetic test is capable of disclosing a high probability that a severely impaired child

would result and that due to the defendant's negligence, a severely handicapped child does result. The bases of the court's decision were:

1. **Public policy** which dictated the need for a wrongful life action on four grounds:

   (a) Abortion is legal and it is the duty of the medical profession to provide parents-to-be with accurate information on which they can decide whether to abort.

   (b) The need to ease the national health care burdens.

   (c) The need to protect the public from the medical profession's negligence.

   (d) The need to provide a remedy in keeping with the fundamental jurisprudential notion that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer.

2. Defective birth is itself an injury; the court rejected the argument that no injury had been suffered since existence with defects was better than non-existence.

> "The reality... is that such a plaintiff both exists and suffers due to the negligence of others...We need not be concerned with the fact that had the defendant not been negligent the plaintiff might not have come into existence at all."(99)

3. The Court rejected the argument that it was impossible to measure the child's damages because this would involve a comparison between his present condition and non-existence.

It set out the measure of damages as follows -

"We construe the "wrongful life" cause of action...as the right of such child to recover damages for the pain and suffering to be endured during the limited life span available to such child and any special pecuniary loss resulting from the impaired condition."(100)

The court went further, declaring that a child has a cause of action against his parents if they decide to proceed with the full term of the pregnancy in the knowledge that the fetus is defective. It stated as obiter:

"If a case arose where...parents made a conscious choice to proceed with a pregnancy with full knowledge that a seriously impaired infant would be born...we see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they wrought upon their offspring."(101)

This obiter drew an immediate legislative response in the form of S.43(6) of the Californian Civil Code which reads:

"No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived, if conceived, should not have been born alive."

The English Courts have emphatically held that the common law does not recognise the "wrongful life" claim. In McKay v. Essex[102] the plaintiff child was born disabled as a result of rubella which had infected her mother in the early months of her pregnancy. She alleged that the Essex Health Authority's laboratory was negligent in testing the mother's blood samples with the result that she was misled as to the advisability of an abortion, and that the doctor was negligent in failing to advise the mother to abort.

The Court of Appeal considered and rejected Curlender as failing to provide any answer to the two central objections to this cause

of action. The court considered these to be:

1. That the only duty the defendants owed to the unborn child was a duty not to injure her. To say that the defendants were negligent in allowing her to be born deformed amounted to imposing a duty upon them to terminate her life.

   The court held:

   "There is no doubt that this child could legally have been deprived of life by the mother undergoing an abortion with the doctor's advice and help. So the law recognises a difference between the life of a foetus and the life of those who have been born.

   But because a doctor can lawfully by statute do to a foetus what he cannot lawfully do to a person who has been born, it does not follow that he is under a legal obligation to a foetus to do it and terminate its life, **or that the foetus has a legal right to die...**

   To impose such a duty towards the child would...make a further inroad on the sanctity of human life which would be contrary to public policy. 'It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving..."(103)

2. The damages would be not only difficult, but impossible to assess. The defendants would be liable for compensating the child for the difference between its condition as a result of their allowing it to be born alive and injured and its condition if its embryonic life had been ended before its life in the world had begun. A judge could not possibly value that.

3. The Congenital Disabilities (Civil Liability) Act 1976 deprives the child of a right to this action and imports the assumption that, but for the occurrence

giving rise to a disabled birth, the child would have been born normal and health (not that it would not have been born at all).

Several difficulties arise in determining the effect of these two lines of authority in the New Zealand context.

Firstly, the problem of which line New Zealand courts would follow arises. Presumably they would follow the English case; New Zealand Courts regard English decisions as persuasive authority. American cases are far less persuasive authority. Furthermore, McKay was decided after Curlender and professed to be based upon reasons which Curlender could not displace.

The greater difficulty is the question of how the tort position would be translated into constitutional law. Even assuming the doctrine did exist in its most extreme form in New Zealand, what would that tell us about the fundamental human rights and freedoms in the Bill of Rights?

How would such a "right" translate in legislative terms? Would it demand the striking down as unconstitutional of abortion law which did not provide for "fetal deformity" as an indication for lawful abortion? Such an indication already exists in the New Zealand legislation[104] but to suggest that the tort doctrine would require its inclusion in any constitutionally valid statute

is difficult.

Serious questions arise both as to the **nature** of this supposed "right" and the **identity** of the party in whom it rests.

If indeed it is a right, there should normally be a choice involved as to its exercise. Clearly the unborn child is incapable of either making or communicating such a choice. Perhaps therefore, someone should be appointed to make it for the unborn child? But according to what criteria? The New Zealand legislation provides for abortion in cases where "there is a substantial risk that the child, if born, would be so physically or mentally abnormal as to be seriously handicapped."[105]

But for whom does this create a right? What is the nature of that right? It may be seen that this subsection creates no right exercisable by the unborn child. As the choice involved in this "right" may be exercised (only) by the mother, without reference to any criteria other than her own desires, it may be considered to create no right for the child at all. Rather, it appears to have created a **right in the mother** not to give birth to "defective" life.

Indeed it is this latter right which the Curlender decision appears to create. None of the factors mentioned in that case answer the McKay objections which stem from an appraisal of the child's viewpoint, but they do square very nicely with a mother-oriented approach recognizing her right to not have to raise a

"defective" child.

It is submitted that the right of a child to protection from life is as impossible to draft as it is to conceptualize and should not be read as being implicit in the language of Article 14.

Chapter 6 : Article 21

It would appear from the discussion in the last chapter that Article 14 has no effect on abortion law in New Zealand. This is for a variety of reasons including difficulties in overcoming Canadian and New Zealand case-law, syntactic barriers in the provision itself and the difficulty of establishing what Article 14 would require in terms of change to the existing structure anyway.

One other article in the Bill may have a potential effect however, insofar as it effects those people directly affected by the abortion decisions; Article 21.

Article 21 provides the constitutional "Right to Justice" and contains two provisions relevant to this discussion:

1. Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

2. Every person whose rights, obligations or

> interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply to the High Court, in accordance with law, for judicial review of that determination.

Let us examine these provisions from the viewpoint of the three figures most involved in the abortion transaction : the pregnant woman; the father of the unborn child; and the unborn child.

6.1 : Article 21 (1)

6.1.1. The position of the pregnant woman

The pregnant woman is clearly a "person" for the purposes of this provision. The certifying consultants, being appointed by a statutory body and acting according to a statutory procedure, are clearly a "public authority". In authorising the abortion, they have "the power to make a determination in respect of [her] rights, obligations or interests" which are "protected or recognised by law" (the Contraception Sterilisation and Abortion Act and the Crimes Act).

The pregnant woman clearly falls within the parameters of this provision then, and so is entitled to "**natural justice**" in the decision-making procedure. What this may require from the woman's viewpoint in the abortion context is considered in full above (pages 45 - 50) in the discussion on Article 14, so there is no benefit in reiterating that here. Suffice it to conclude that this constitutional guarantee would probably require no change to the present system to accommodate rights vested in the woman.

6.1.2. The position of the father of the unborn child

It is unclear whether the father is encapsulated by Article 21 (1). The provision applies only if the certifying consultants are making a determination **in respect of** the father's rights, obligations, or interests protected or recognised by law.

The meaning of the phrase "in respect of" is unclear. A narrow interpretation of that expression might require that the certifying consultants be making a specific determination of the father's rights for his inclusion. Arguably, they are not. He is not the focus of their attention. They are concerned with the mother who is before them and whose rights, obligations and interests are protected or recognised by the Contraception Sterilisation and Abortion Act and the Crimes Act. They are concerned also with the unborn child whose rights are "in the forefront of [their] clinical consideration".[106] But it is not clear that either of the Acts with which they are concerned (the Contraception Sterilisation and Abortion Act or the Crimes Act) directly "protect or recognise" any rights of the father. Certainly they do not do so explicitly.

So it may be argued that this provision should be read very narrowly, excluding the father whose rights are not the specific subject of the consultants' investigation or decision.

However, even if the provision were interpreted narrowly, the father may still be included. For his interests (in the effect

on his relationship with the mother, in the future of his child etc) are recognised **implicitly** in the proscription on abortion except in the circumstances set out in those two Acts. Even on this narrow view of the meaning of Article 21 (1) therefore, the father may be entitled to natural justice.

Furthermore the father has clear obligations, rights and interests under other Acts (such as the Guardianship Act 1968 and the Family Proceedings Act 1980) which are contingent upon the certifying consultants' decision. For example the duty to maintain the child under s. of the Family Proceedings Act clearly depends upon the determination of the consultants.

Similarly, his guardianship rights arising under s.6 of the Guardianship Act are affected by the abortion decision. So in this broader sense, the consultants are making "a determination in respect of [the father's] rights, obligations or interests protected or recognised by law"

A wider interpretation of this provision may well entitle the father to natural justice therefore.

This would have an important effect on the New Zealand decision-making process. At present the New Zealand scheme provides the father of the child with no right of access to the decision-makers; he is not **entitled** as of right to make any representations to the consultants. Provision is made in s.32(7)

of the Contraception Sterilisation and Abortion Act for consultation of any person by the certifying consultants, but that is contingent upon both the patients and their own consent. From the point of view of the father, it is only by way of **privilege** that he may make representatives. It may be anticipated that he is unlikely to be granted this privilege if he intends to oppose the abortion; the patient is unlikely to grant consent to the consultation.

If the father were entitled to natural justice however, he might successfully claim the **right** to consultation.

Let us examine Article 3 to determine whether it could be called in aid to limit this right. Article 3 provides inter alia that the "justified limitations" must be **prescribed by law.**

The comment on this phrase within the Draft Bill indicates that:

> "The law would not have to be an Act of Parliament; it could be subordinate legislation or common law" (107)

As the New Zealand law stands at the moment there is no case law preventing the father making representations to the consultants. Such a claim has never been the subject of litigation. However there may be limit on his right to natural justice present in the Contraception Sterilisation and Abortion Act which outlines the necessary procedure for a lawful abortion. S. 32(7) of the Act provides that aconsultant may:

> "with the consent of the patient, consult with any other person...as he thinks fit"

The necessary implication of this provision is that the father may make no representations **except** with the patient's consent and at the consultant's discretion (*inclusio unius est exclusio altarius*.)

It may be assumed that the expression "prescribed by law" in Article 3 includes all necessary implications of that express law.

There are limits "prescribed by law" upon the father's right to natural justice under Article 21(1) therefore.

The next requirement of Article 3 is that the limit be "reasonable" and "demonstrably justified in a free and democratic society". There are several factors which might tend to establish that the consent requirement in s.32(7) is neither "reasonable" nor "demonstrably justified in a free and democratic society":

1. The father, as the person equally responsible for the pregnancy, has a strong personal interest in the decision.

2. The consent requirement may be anticipated to operate in practice as a complete limitation upon a father who had evidence prejudicial to the woman's case.

3. The right to consultation would not necessarily breach any of the woman's rights. It would not act as a **veto** on her abortion decision.

4. A consultation may provide the consultant with information which would aid him in making his decision.

All these factors tend, it is submitted, to establish that the

limitations within s. 32(7) is neither reasonable, nor demonstrably justifiable in a free and democratic society. It should be noted that in any action questioning the constitutional validity of s. 32(7), the onus would be upon the Government to establish that the limit was reasonable and demonstrably justified.

6.1.3. The position of the unborn child

The position of the unborn child is likely to remain unchanged under this provision as he will have difficulty establishing locus standi. It appears from the case law (discussed above) that a new legislative indication is required before the Courts will recognise the personhood of the unborn child. As the Bill of Rights gives no such indication, it may be assumed that the unborn child is not included in the phrase "Every person". It is discussed above (pages 50 - 56) what the natural justice requirement may mean in relation to the unborn, should it be established that it applies to them.

6.2 Article 21 (2)

6.2.1. The position of the pregnant woman

The pregnant woman would clearly have standing under Article 21 (2), and in light of that provision might well question the

jurisdictional limits which the Court imposed upon itself in Wall v. Livingston and Roborgh.[108]

In that case Dr Wall applied for judicial review of a decision made by certifying consultants to authorise an abortion for a teenage girl. The Court of Appeal upheld the High Court decision of Speight J. and refused to grant review. Woodhouse P. delivered the judgment of the Court and found two issues arising : the question of availability and likely limits of jurisdiction, and the matter of locus standi.

What is important in the context of the present discussion is that he expressly declined to give a definitive ruling in the jurisdiction issue, holding "We do not think it necessary or desirable to express a final view upon at least the first of those matters - the jurisdictional point."[109] This is important for us as it leaves the way open for the court to alter its position if that is what Article 21 is proven to demand.

Woodhouse P. did make some general comments about the role of judicial review in the abortion's decision-making process. His first point was that nowhere in the Contraception Sterilisation and Abortion Act except in the long title is there a mention of the phrase "the unborn child". Nor, he pointed out, is there any mention elsewhere of its rights.

He noted that the rights of the unborn are protected by sur-

rounding lawful termination of a pregnancy with the "precautionary process" of prior authorisation of two certifying consultants. He emphasised s.30(2) of the Act, which stipulates that there shall be "the minimum number of certifying consultants required to ensure, so far as possible, that **every woman** seeking an abortion has her **case considered expeditiously**" (emphasis added by Woodhouse P.). Of importance also, was:

> "What must have been a **deliberate Parliamentary decision:** the avoidance of any attempt to spell out what were to be regarded as the legal rights in an unborn child; with the **consequential absence** of any statutory means by which rights (whatever their nature) could be enforced." (emphasis added) (110)

All these factors went to demonstrate that the legislative and administrative context indicated that **no** judicial review of decisions would normally be available. Other factors within the Contraception Sterilisation and Abortion Act also led to this conclusion. Firstly, the "deliberate absence of any review process inside the Act itself" which Woodhouse P found to be based upon three considerations, namely:

(i) The special attention given in the Act to the preservation of anonymity of the woman patient.

(ii) The whole process which is designed to place "fairly and squarely upon the medical professions as represented...by the certifying consultants a responsibility to make decisions which will depend so very much upon a medical assessment pure and simple."

(iii) The "adverse medical implications" which could arise from the passage of time if such a review were undertaken.

The second factor was 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 one of the statutory exceptions within s.187A of the Crimes Act. This is presumably significant because of the practical problems which would arise if a review were undertaken when the reasons for the decision were not known.

Woodhouse P. also made some comments on the related question of locus standi. He affirmed firstly the ruling of Speight J in the High Court that no direct claim of standing could be spelt out of the mere existence of the fetus. He based this finding upon the Contraception Sterilisation and Abortion Act itself and also upon the authority of Paton v. British Pregnancy Advisory Service Trustees [111] and Dehler v. Ottawa Civic Hospital [112]

He discounted Dr Wall's independent claim to standing, noting that

> "It would be inconsistent with the whole scheme and purpose of the Act if it were possible to introduce into such a matter anybody other than the woman herself and those very few persons who have been given the **statutory responsibilities for screening her request for an abortion**" (113) (emphasis added)

It was only the "statutory participants" then who would ever have standing.

All these factors, plus the fact that any review would be considering a medical judgment made by professional men acting under a statutory duty where it would be difficult to isolate that straight-out medical judgment from strictly legal questions,

indicated a restriction of jurisdiction to claims of bad faith instituted by the Attorney-General.

It might be argued however that Article 21 (2) provides the right to review on wider issues than those restricted grounds established in Wall, such as:

1. Whether the persons who determined the matter were properly invested with authority under the Act;

2. Whether those persons did address themselves to the matters committed to them, by taking **all** and **only** relevant factors into account. (This might necessitate the keeping of records).

3. Whether they have erred in law, for example, by **not** basing the decision upon one of the exemptive clauses under s.187A(1)(3) of the Crimes Act, or alternatively, by basing the decision **solely** upon the factors mentioned under s.187A(2) (i.e. age of the woman or evidence of rape) which are **not in themselves** grounds for abortion.

4. Whether on the basis of the material before them, **no** reasonable certifying consultant could have reached the decision which they reached.

These are the types of question the Court might normally ask itself in reviewing administrative decisions and Article 21 (2) might arguably overturn Wall to the extent that it refused review on these grounds.

Two difficulties stand in the way of establishing the right to this wider jurisdiction however. Firstly the phrase "in accordance with law" appearing in Article 21 (2). This phrase recognises (according to the commentary to this provision) that the law may regulate review proceedings.

> "The phrase is intended, however, to permit only the **regulation** of the right and not to authorise its **denial.** Accordingly any attempt completely to deprive the High Court

of its review, powers would violate the guarantee."(114)

The Wall decision then, in merely **limiting** the grounds of review and not **depriving** the Court of its review powers altogether would not necessarily breach this provision.

The second difficulty which arises is that Article 3 may be invoked to override any implications as to wider review powers in Article 2 (2) and justify the Wall limitations. The question would arise, whether such limitations are "reasonable" and "demonstrably justifiable in a free and democratic society".

From the woman's point of view it is likely that this question will remain purely academic and so the question is considered below from the point of view of the father.

6.2.2. The position of the father

The first question for the father is whether he prima facie falls within the wording of Article 21 (2). The provision applies to:

> "Every person whose rights, obligations or interests protected by law have been **affected by** a determination of any tribunal or other public authority."

The words "affected by" appear to have a wider meaning than the "in respect of" found in Article 21 (1). It may be seen that the rights, obligations and interests of the father under the Guardianship, Family Proceedings and other Acts which regulate the paternal relationship are clearly "affected by" the consultants' decision (see discussion above, p.71). Prima facie therefore the father is entitled to judicial review of that decision.

This raises serious questions about the Wall decision. The first is whether Wall is good law insofar as it completely precludes a review action by the father of the unborn child. It was noted above (p.75) that apart from the pregnant woman herself, "only those very few persons who have been given the statutory responsibilities for screening her request for an abortion" would be permitted standing.

This clearly does not include the father of the unborn. the next question is whether Article 3 may justify the Wall limitation. To do so, the exclusion of the father from the (small) group of people entitled to review under Wall needs to be a reasonable limit, which is "demonstrably justifiable in a free and democratic society".

It is submitted that that language does not accurately describe the total exclusion of the father from review proceedings. The reasons for this are those same reasons set out above (p.73) in the discussion of the father's right to natural justice under Article 21 (1).

It is noted that the commentary in the Draft Bill of Rights indicates that "The Courts may be expected to apply the ordinary rules as to standing to seek judicial review".[115] It is submitted that it should not be understood from this that Wall is unchallengeable even in the light of the qualifying language in

Article 3. To so hold would be to render Article 3 nugatory. It must still be established that the Wall limitation (which excludes the father from review altogether) is "reasonable" and "demonstrably justifiable in a free and democratic society".

Like the pregnant woman, the father of the unborn child would be concerned about the limits on the grounds of review which the Court imposed upon itself in Wall. The difference is that he is likely to seek review in different circumstances from the woman, i.e. when the request for an abortion has been granted. The discussion at pages 78 - 79 on this question is relevant here also.

6.2.3. The position of the unborn child

The unborn child would be faced with the same problems with standing under this provision as under Articles 14 and 21 (1). It is clear from case law that the unborn child will never be granted standing in the abortion transaction (see discussion above pages 1- 4 and 8 - 22). The correctness of the Courts' reasoning in those cases is also discussed above.

III. CONCLUSION

It may be anticipated that if the proposed Bill of Rights for New Zealand has any effect upon the New Zealand abortion scheme, it will be through the provisions of Article 21.

The central "beneficiary" would be the father of the unborn child who may play a greater role in the decision-making process. This role might take the form of a right to consultation with the certifying consultants making the abortion decision. This may be seen as an appropriate modification of the current procedure which totally excludes the father from the decision-making process, except with the pregnant woman and the certifying consultants' consent.

The possibility of a right to judicial review of the consultants' decision is interesting, particularly in light of the *Wall* decision which effectively precluded it. In practice however it may not be as frightening a possibility as it may at first appear to some. It may be expected to be exercised only seldom as it would probably apply only to the pregnant woman and the father of the unborn child.

The position of the pregnant woman under the Bill of Rights is unlikely to change, as even under the terms of the *Wall* decision she has the right to judicial review. The scope of that review may be widened by Article 21 (2) however. The present procedure already adequately protects her right to natural justice.

The position of the unborn child is likewise likely to remain unchanged. The distinctions arising in recent case-law between the property and tort cases on the one hand, and the abortion situation on the other, is likely to remain as regards the legal recognition of personhood. Criticism is levied in the paper against the supposed differences between these situations. The comment of the Saskatchewan Court of Queens Bench in Borowski that

> "...rapid advances in medical sciences may make it soundly desirable that some legal status be extended to foetuses, irrespective of ultimate viability..."

is, it is submitted, an accurate and well-chosen comment. The procedural changes mooted in this paper which would provide something akin to natural justice for the unborn child in the decision-making procedure stem from this same concern.

Lastly it is considered that the difficulties raised by the ectogenetic techniques in determining the actual "rights" involved in the abortion act (i.e. of termination or feticide) are likely to remain more apparent than real in New Zealand.

The resources (in terms of high-technology equipment such as artificial wombs and so on) required to provide a real choice, are unlikely to ever be available in great enough numbers to create a real ethical difficulty (surrogacy notwithstanding). Even if the resources were available, the question of responsibility for the preserved life and the cost involved would

likely sway the decision in favour of feticide and not the mere termination of pregnancy.

FOOTNOTES

1. (1983) 4 D.L.R. (4d) 112

2. Montreal Tramways v. Leveille, (1933) 4 D.L.R. 337, (1933) S.C.R. 456 41 C.R.C. 291.

3. Re Sloan Estate, (1937) 3 W.W.R. 455.

4. Re. Superintendent of Family & Child Service and MacDonald (1982), 135 D.L.R. (3d) 330 (1982) 4 W.W.R. 272, sub. nom. Superintendent of Family & Child Service v. M(B) and O(D).

5. Borowski n (1) p.122

6. Ibid, 36

7. (1979) 106 D.L.R. (3d) 435

8. [1978] 2 A11 E.R. 987

9. Ibid, 989

10. (1980), 3 E.H.R.R. 408

11. (1975) 53 D.L.R. (3d) 161

12. Ibid,

13. (1979) 101 D.L.R. (3d) 686

14. Ibid, 694

15. Id

16. Ibid, 675

17. Borowski n 1 at 127

18. Dehler n 13 at 699

19. (1980) 117 D.L.R. (3d) 512

20. [1981] I.S.C.R. viii

21. [1982] 1 N.Z.L.R. 734

22. Ibid, 737

23. Ibid, 740

24. except the woman seeking the abortion or the certifying consultants involved, who have no interest in so arguing.

25. (1979) 106 D.L.R. (3d) 435

26. Ibid, 436 "It becomes apparent that **time is of the essence** not only for someone to speak for the unborn child but the effect of advancing stages of pregnancy for the medical discipline.

27.

28. articles L. 162-1 to L. 162-11 included under article 4 of the law No. 75-17 of 17th January 1975.

29. prescribed by Articles L.162-3 and L.162-5

30. Article L. 162-4

31. H.C.S. House Bill No. 1211 Missouri State, June 14, 1974

32. 428 US 52, 49L Ed 2d 788, 96 S Ct 2831

33. 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973)

34. 410 US, at 153, 35 L Ed 147, 93 S Ct 705

35. Id

36. Ibid, 154, 35 L Ed 2d 147, 93 S Ct 705

37. Ibid, 159

38. Id

39. Ibid, 164

40. Ibid, 165

41. Ibid, 164

42. 49 L Ed 2d 788, 804

43. reference was made to adultery and bigamy as criminal offences; consent requirements for adoption, artificial insemination, voluntary sterilization : and to the long-established requirement of spousal consent for the effective disposition of an interest in real property, 49 L Ed 2d at p. 804. 428 US at p. 68

44. Brief for Appellee Danforth 38.

45. David Hall, M.D., licensed physician, who supervised abortions at the Planned Parenthood facility and Michael Freiman, M.D. who performed abortions at two St Louis hospitals and a clinic were joined as plaintiffs along with the Planned Parenthood Centre. They clearly had standing to challenge the constitutional validity of the statute as "If the physician is the one against whom [the Act] directly

operates in the event he procures an abortion that does not meet the statutory exceptions and conditions." Doe v. Bolton, 410 US179 at 188, 35 L Ed 2d 201, 93 S Ct 739, quoted in Danforth at 428 US 62, L Ed 2d 800, 801

46. 410 US 179 (1973)

47. 410 US at 165. 35 L Ed 2d 147, 93 S Ct 705

48. 428 US at p. 69. 49 L Ed 2d at p. 804

49. 428 US at p. 70. 49 L Ed 2d at p. 805

50. Ibid

51. Ibid

52. Id US p.70 L Ed p. 806

53. Ibid : cf. Roe v. Wade 410 US at 153

54. 428 US 74 49 L Ed 2d 808

55. infra, pp. 31 - 34

56. see Buckley: "Current Technology Affecting Supreme Court Abortion Jurisprudence" 27 NY L. Sch. L. Rev. 1221 - 60 1982

57. 410 US at 163

58. Id

59. Id at 159

60. see Colautti v. Franklin 439 US 379, 396 n.15 for an example of the disagreement amongst physicians with respect to determining when liability occurs.

61. Doe v. Bolton 410 US 179 (1973)
Planned Parenthood v. Danforth 428 US 52 (1976)
Colautti v. Franklin 439 US 379 (1979)

62. Danforth p. 64 "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is and must be, a matter of judgment of the responsible attending physician."

63. Special Project : Survey of Abortion Law, 1980 Art 2 ST. L. J. 67, at 130 47 TEMP L.Q. 715, at 735 (1974)

64. See Artificial Gestation : New meaning for the Right to Terminate Pregnancy, 21 AR12 L Rev 755 (1979) at

65. Ibid, 757

66. "Current Technology Affecting Supreme Court Abortion Jurisprudence" M. B. Buckley 27 NY L. Sch. L. Rev. 1221-60 1982

67. The number of abortions in New Zealand in the years 1976 - 1983 were:

1976: 4682
1977: 5842
1978: 1980
1980: 5945
1981: 6831
1982: 6823
1983: 6267

Source: Abortion Supervisory Committee Reports to the House of Representatives.

68. Note 66

69. Id at 1245

70. "The Woman's Own Doctor" is defined in s.32(1) of the Act as the "registered medical practitioner...who is consulted by or in respect of a female who wishes to have an abortion."

71. "Operating surgeon" is defined in s.32 of the Act as a registered medical practitioner who may be willing to perform an abortion in the event of it being authorised in accordance with the Act.

72. This section governs the procedure to be followed where a decision is reached anprovides for the issuing of "a certificate in the prescribed form authorising the performance of an abortion." The form is prescribed by the Abortion Regulations 1978 (S.R. 1978/50)

73. It is obvious that the word "right" is used here in the loosest sense. The outline of the interests involved is intended to be neither definitive nor exhaustive. It is arguable that the exact determination of the interests involved in the abortion transaction, and the conclusion to be drawn from any one interest in terms of drafting abortion law, is the greatest difficulty facing legislators, who find the issues so bound up in the rhetoric of the opposing camps as to be difficult of exact and neutral expression.

74. Established by s.10 of the Contraception Sterilisation and Abortion Act 1977

75. s. 30 Contraception Sterilisation and Abortion Act 1977

76. [1982] 1 N.Z.L.R. 734

77. Ridge v. Baldwin [1963] A.C. 40

78. Daganayasi v. Minister of Immigration [1980] 2NZLR 130 p.132 line 21, p. 144 line 50, p. 149 line 39

79. Ibid

80. This question is considered infra p. 43 - 47

81. At the High Court level of the Wall case, Speight J. noted that the rights of the unborn child were afforded protection implicitly by being "in the forefront of clinical consideration. "There is a presumption in its favour" he surmised. Unreported Hamilton, A1/82, 19 January 1982 p. 3

82. [1964] AC 40 : [1963] 2 A11 ER 66

83. Ibid pp 71 - 76 : 75 - 79

84. Such as in Cooper v. Wardsworth Board of Works (1863) 14 C.B.N.S. 180. In that case, where an owner had failed to give proper notice to the Board they had under an Act of 1855 authority to demolish any building he had erected and recover the cost from him. An action was brought against the board because they had used that power without giving the owner an opportunity of being heard.
The court found unanimously in favour of the owner. Erle C.J. held (at p.189) that the power was subject to a qualification that no man is to be deprived of his property without his having an opportunity of being heard.

85. see K. J. Keith "Ridge v. Baldwin - Twenty Years On." 1983 V.U.W.L.R. 237

86. In Daganayasi v. Minister of Interior [1980] NZLR 130 natural justice applied where the applicant had a legitimate expectations of a favourable decision gravity her a **privilege.** No question of personal fault arose.

87. 1980 : 72% 1981 : 75% 1982 : 91% 1983 : 95%
source : Abortion Supervisory Committee Annual Reports to the House of Representatives.

88. Speight J. High Court decision Hamilton A1/82 19 January 1982, p. 3

89. (1983) 41 Ont. Reps (2d) 583, 592

90. Discussed in the Capital Letter Vol 8, No. 17 (336)

91. 165 Cal. Rptr. (2d Dist. 1980)

92. Gleitman v. Cosgrove 49 NJ 22 227A 2d 689
Stewart v. Long Island College Hospital 296 NYS 2d H (1968)
Park v. Chessim 386 NE 2d 807 (1978)
Becker v. Scharwz 46 NY 2d 401 (1978)

93. Gleitman v. Cosgrove n. 92

94. Stewart v. Long Island College Hospital n.92

95. Ibid

96. Park v. Chessim n.92

97. Ibid

98. Becker v. Scharwz n.92

99. Curlender n. 91 at 488

100. Id p. 489

101. Id p. 488

102. [1982] 2 A11 ER 771 (C.A.)

103. Ibid, 781

104. Crimes Act S. 187A(5)

105. Ibid

106. n. 81

107. Draft Bill, p.

108. [1982] 1 NZLR 734

109. Ibid, 736

110 Ibid, 737

111. [1979] Q.B. 276

112. [1980] 117 D.L.R. (3d) 312

113. n. 108, 740

114. "A Bill of Rights for New Zealand A White Paper" Government Print 1985 p.111

115. Ibid