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The concept of "distress" in the Termination of Pregnancy (Jersey) Law, 1997

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Introduction

On 31st January, 1997, the *Termination of Pregnancy (Jersey) Law, 1997* ("TPL") came into effect. Article 2 (2) (c) provides that abortion is no longer illegal "where the woman's condition causes her distress" and the termination occurs before the twelfth week of pregnancy.

The text of the TPL draws in part generally and in part specifically on analogous provisions on abortion contained in the French *Code de la santé publique* ("CSP"). Whilst modern French laws have been used as the basis of Jersey laws in civil matters (for example, the *Loi (1990) sur la co-propriété des immeubles bâtis)*, this is the first example of modern French social (and penal as it is selective de-criminalisation) legislation being adapted for Jersey.

The purpose of this short article is to focus on the interpretation of the term *détresse* in the French law and its equivalent in the TPL.

French law

Article L-162-1 of the CSP provides:

> *La femme enceinte que son état place dans une situation de détresse peut demander à un médecin l'interruption de sa grossesse. Cette interruption ne peut être pratiquée qu'avant la fin de la dixième semaine de grossesse.*

French law requires that if the doctor consulted refuses to carry out the abortion, he must say so on the woman's first consultation with him (Article L-162-8). In any event, a doctor may not refuse to give her the statutory guide identifying her rights (Article 162-3) and may not refuse a second consultation, even if he will not perform the operation himself.

The interpretation of the word *détresse* was considered in the *Lahache* case [1], where the *Conseil d'État* (the supreme administrative tribunal) considered an appeal by the husband of a woman who had had an abortion. The appeal was based on several grounds, including one alleging that "*l'état de détresse de sa femme n'était nullement établi"*.

In his *conclusions*, the *Commissaire du Gouvernement* (rather like the Advocate General in the ECJ) argued that the texts of Article 162-1 and 162-4 (which refers to "*une femme s'estimant placée dans la situation visée à l'article 162-1"*) construed together meant:

> "*L'état de détresse .. n'est pas une notion à caractère objectif qui serait soumise à l'appréciation d'un tiers ... L'état de détresse n'a pas non plus de rapport avec l'état de nécessité ...*
>
> *L'état de détresse mentionée dans la loi... est donc une notion purement subjective que la femme apprécie souverainement sauf s'il agit d'une femme mineure non mariée. Les consultations organisées par la loi, qu'il s'agisse de celle d'un médecin exigée part l'art. 162-3 ou de celle d'un organisme à vocation sociale, e qui est prévue par l'art. L. 162-4, sont destinées à éclairer la femme sur la portée de son choix mais non à substituer à sa décision celle d'un tiers."*

The *Commissaire* then referred to the *travaux préparatoires* of the law, which amended the CSP. This practice, common in French jurisprudence, enables detailed reference to parliamentary debates as an aid to construing a statute. The *Commissaire* added:

> "*Nous arrivons ainsi à la conclusion qu'un établissement hospitalier n'a pas à vérifier la réalité de la situation de détresse ... la seule obligation qui pèse sur l'établissement hospitalier est ... de ne pas procéder à l'interruption de la grossesse postérieurement à la date limite fixée par l'art. 2 ..."*

The *Conseil d'État* upheld the submissions of the *Commissaire* and thereby confirmed the subjective nature of *détresse.*

Such a position is taken up by commentators on the provision of the law. Françoise Dekeuwer-Défossez [2] opines:

> *"...la notion de "détresse" étant purement subjective et ne pouvant être controlée par personne - ni par le mari, ni par le médecin, ni par le juge - force est de reconnaître que l'avortement est, en fait, totalement libre pendant les dix premières semaine de grossesse."*
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> In *L'Ethique médical et sa formulation juridique* (Sauramps), R. Saury agrees:
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> *"Autrement dit, la femme est seule juge de son état de détresse .. que cette détresse soit matérielle ou morale, elle est ainsi de caractère strictement personnel."*

The TPL

Article 2 (2) (c) provides that abortion is not unlawful where:

"(i) the woman's condition causes her distress and the requirements for consultation in Article 3 have been complied with,

(ii) the termination is carried out before the end of the twelfth week of pregnancy, and

(iii) on the day the termination is carried out, the woman is ordinarily resident in the Island or has been resident in the Island for the period of 90 days immediately preceding that day."

Save for the requirement for consultation being included as a condition within the same Article, the provisions of the CSP and TPL are virtually identical.

Article 3 provides that a woman seeking an abortion under Article 2 (2) (c) must consult a registered medical practitioner, who is obliged to provide her with certain information as to her rights, the counselling services available and the risks involved in terminating the pregnancy. These provisions mirror Article 162-3 of the CSP. The practitioner must give a certificate of compliance regarding the first consultation.

Article 3 (3) envisages a second consultation, with a doctor who is approved to carry out abortions. Article 4 provides that if the doctor at the second consultation will not carry out the abortion:

... he shall - (emphasis added)

"(a) give the woman a certificate of such compliance, in such form as may be prescribed; and

(b) refer the woman to another approved registered medical practitioner who is authorised to carry out terminations."

It is usual for the Royal Court in construing legislation which has been adapted from legislation in another jurisdiction to have regard to any judicial decision of its place of origin. (see for example: *In re Charlton* [3] construing the Evidence (Proceedings in other Jurisdictions) Act, 1975 as extended to the Bailiwick by the Evidence (Proceedings in other Jurisdictions) (Jersey) Order, 1983; and *Macready v. Amy* [4] comparing the absence of provisions relating to appeals under the Dwelling Houses (Rent Control) (Jersey) Law, 1946 and the Furnished Houses (Rent Control) Act, 1946 and considering English judicial decisions in relation to the latter). Such authorities are often highly persuasive, if not necessarily binding. It seems probable that, in litigation on the topic, the Royal Court will regard the decision of the *Conseil d'État* as indicating an approach which it should take in construing the term *distress* in Article 2 (2) (c) of the TPL.

A subjective definition of the term *distress* would, it is submitted, be justified also on a close analysis of the text as:

a. there is no definition of *distress;*
b. Article 2 (2) (c) (i) appears to be subjective: *the woman's condition causes her distress*;

c. the conditions for the legality of the procedure are the presence of distress, consultation (Article 3), satisfaction of the time limit and residence (Article 2 (2) (c) (iii));
d. apart from these conditions, a doctor is not obliged to carry out a termination (Articles 4 (1) and 5) but by virtue of Article 4 (1) (b), if the doctor will not carry out the termination, he *shall* refer the woman to another approved registered medical practitioner.

The only "control", therefore, of abortions on the grounds set out in Article 2 (2) (c) appears to the first doctor's refusal to carry out the operation. As he is required to refer the woman on to another doctor who is approved to carry out terminations, the possibilities of refusal to carry out the termination are limited.

Indeed, Article 4 does not specify the grounds upon which the doctor may refuse to carry out the termination and the only grounds would therefore appear to be those covered by Article 5, where the doctor has a conscientious objection to participation in such treatment.

In the debates on the *projet de loi*, the President of the Health and Social Services Committee made much of the difference between abortion on demand (which implied a right to a termination) and abortion on request (where the doctor retained some discretion). Many argued at the time that the difference was casuistry, a position which seems to be justified in the light of the foregoing comments on the apparent subjective definition of *distress*.

In summary, there are good grounds for suggesting that the French jurisprudence will be followed in construing the TPL. The conclusion can therefore be drawn that the TPL contains liberal provisions relating to abortion in the first trimester, where the doctor's only discretion is to refer the woman to another practitioner if he himself will not carry out the termination.

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Footnotes - (Top)

[1] - October 31st, 1980, D 1981, 38.

[2] - "*Les droits de l'enfant*" - *Que sais-je*, PUF, 1991.

[3] - 1993 JLR 360.

[4] - 1950 JJ 11.