

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN
[SQUARE BRACKETS]

**IN THE DISTRICT COURT
AT KAIKOHE**

**I TE KŌTI-Ā-ROHE
KI KAIKOHE**

**CRI-2019-027-000575
[2023] NZDC 10239**

MINISTRY OF HEALTH
Prosecutor

v

CLAIRE LOUISE WIHONGI MATENE
Defendant

Hearing: 14, 15 and 16 November 2022

Appearances: G Kelly for the Prosecutor
R Park for the Defendant

Judgment: 21 June 2023

RESERVED JUDGMENT OF JUDGE D J ORCHARD

[1] The defendant Claire Wihongi faces six charges under the Health Practitioners Competence Assurance Act 2003 (“the Act”), s 9(4) and the Health Practitioners Competence Assurance (Restricted Activities) Order 2005 (“the Order”). Specifically it is alleged that she did between the dates specified in each charge at Kaikohe perform a restricted activity, namely clinical procedures involved in the insertion and maintenance of fixed and removable orthodontic or oral and maxillofacial prosthetic appliances (dentures) on members of the public when she was not a health practitioner permitted to perform that activity, that is to say a clinical dental technician. The dates specified in the respective charges are:

- 22 May 2016–17 November 2016

- 18 November 2016–18 May 2017
- 19 May 2017–19 November 2017
- 20 November 2017–20 May 2018
- 21 May 2018–21 November 2018
- 22 November 2018–1 April 2019

[2] Ms Wihongi faces a further charge that between 22 May 2016 and 1 April 2019 at Kaikohe she did state or do something calculated to suggest that she practiced as a health practitioner, namely a clinical dental technician, when she was not a health practitioner of that kind. This charge is laid under s 7(2) of the Act and the Order.

[3] Central to these charges is the allegation that between May 2016 (at the latest) and April 2019 when a search warrant was executed at her Tautoro property near Kaikohe, the defendant was operating a one-woman business, dealing directly with members of the public, making and relining dentures when she was not qualified to do so.

[4] While the hearing occupied three days, by the time written submissions were filed in late December the issues had narrowed.

[5] In respect of the charges brought under s 9(4) of the Act Ms Park argued for the defendant that:

- (a) A mould or impression is not a removable oral appliance (or denture) and therefore making a mould is not a restricted activity under the Act and nor is the making of dentures because that activity does not in itself involve clinical procedures. She submitted that where the evidence only went so far as to prove one, other or both of those activities that evidence was insufficient to establish the charge. Ms Park did accept that: “interacting with a client in relation to the insertion or maintenance of completed dentures [was] a restricted activity.” She also accepted

that five of the witnesses who gave evidence of their dealings with Ms Wihongi, described that activity but submitted that the prosecution was unable to prove that the interaction fell within any of the dates alleged in the charges.

- (b) The defendant also sought to rely on the common law defence of necessity preserved by s 20 of the Crimes Act 1961.
- (c) In respect of the charge brought under s 7(2) of the Act, the defendant contended that she has never stated or done anything calculated to suggest that she practiced as a health practitioner, specifically a clinical dental technician. It was submitted that Ms Wihongi had never stated that she was a clinical dental technician and in fact she had told clients that she was not a clinical dental technician. Ms Park conceded that it could be argued that actually performing the activity was doing something “calculated to suggest” that the person practices or is willing to perform activity of that kind but that in *Ministry of Health v Dawson* and *Ministry of Health v Pitt* that was not the approach that was taken.¹ I pause to note that in the first mentioned case the focus of the prosecution was advertisements taken out by the defendant in various publications. The issue of whether actually performing the restricted activity was sufficient to establish the *actus reus* was therefore not considered.

The evidence

[6] Because the issues have narrowed, I shall not summarise the evidence of all the witnesses but focus on the evidence which has assisted me in determining the issues.

[7] John Maxwell Aarts is a qualified and registered dental technician and clinical dental technician with a Postgraduate Diploma in Clinical Dental Technology (Otago)

¹ *Ministry of Health v Dawson* DC Nelson CRI-2008-043-003385, 27 January 2011; and *Ministry of Health v Pitt* [2021] NZHC 2357.

(2005) and a Master of Health Sciences (Otago) (2006). He has been employed on the academic teaching staff at the School of Dentistry, University of Otago on the Bachelor of Dental Technology programme since 2002. He currently serves on the Dental Council (New Zealand) as a committee member. Clearly Mr Aarts is very well qualified in the field of dental technology.

[8] Mr Aarts explained that while an unqualified dental technician is permitted to make dentures, they may not provide them direct to the public. Only a qualified and registered clinical dental technician may interact with patients. This is to ensure the safety of the public and it also provides health practitioners in specific areas with guidelines and defined scopes of practice.

[9] It was clear from Mr Aarts' evidence that clinical dental technology is a skilled occupation. To qualify practitioners must undergo a three-year course of study at Otago University. The first two years focus on dental technology and the last year focuses on clinical procedures. It is common ground that Ms Wihongi has no formal qualifications, although she did have experience making dentures in the laboratory under the supervision of a dentist which an unqualified person is permitted to do.

[10] A registered clinical dental technician must maintain competency and is subject to an audit process to ensure compliance with professional standards.

[11] They should see patients in a setting which is compliant with infection and control standards. Part of their role is to undertake an oral examination when they first see a patient for the purpose of identifying disease or potential disease in the mouth (for example signs of oral cancer) which they would refer to an appropriate health professional and to assure themselves that the patient has no relevant underlying health problems.

[12] They are also trained to carry out first aid if there is a sudden medical emergency. Mr Aarts explained that particular care needs to be taken with partial dentures. If the work is not done correctly it can cause damage to the remaining natural teeth and result in avoidable tooth loss. It can also result in damage to the gums. Because of this a clinical dental technician must ensure that a patient requiring a partial

denture has an oral health certificate from a dentist prior to undertaking fabrication of a partial denture. In his written brief of evidence Mr Aarts referred to photographs taken of partial dentures taken when the defendant's premises were searched on 2 April 2019 and stated that it was clear that the dentures did not follow correct design principles. In his view they would potentially cause a lot of damage if worn. Mr Aarts was also very critical of the poor standard of hygiene apparent in the workplace at the time of the search and the lack of any proper separation between the laboratory (which tends to be inherently dirty because of the materials used) and the area where clinical examinational work is undertaken. There was no real challenge to the essential parts of Mr Aarts' evidence and I accept it as honest, accurate and reliable.

[13] Elizabeth Blake, the Ministry of Health Senior Enforcement Advisor gave evidence of the investigation into Ms Wihongi's activities. I accept her evidence as honest, accurate and reliable. That investigation began with the receipt of a complaint on 13 August 2018 that Ms Wihongi was practicing as a dental technician in the mid-North region. Ms Blake's early enquiries disclosed that Ms Wihongi was not registered with the dental council. Clinical dental technicians must be registered with the dental council. Dental technicians may be registered with the dental council if they wish.

[14] On 28 November 2018 Ms Blake applied for and was granted a production order under s 74 of the Search and Surveillance Act 2012 which ordered the Ministry of Social Development ("MSD") to provide her with all documents or information relating to Ms Wihongi's status as a WINZ provider and also all correspondence from Ms Wihongi in that capacity, as well as other documentary information including Ms Wihongi's address, the location from which she operated, the bank account number provided for payment and WINZ patients/clients and type of service provided, quotes for services and documents or information relating to Ms Wihongi's qualifications.

[15] Ms Blake received the requested information from MSD on 11 December 2018.

[16] The documents showed that on 7 September 2015 Ms Wihongi registered her business described as “Tautoro Denture Repairs” with WINZ by signing the retailer/supplier/payee details form for WINZ. This document was produced as an exhibit. It was recorded that Tautoro Denture Repairs mainly supplies “dentures and repairs”. Its address was recorded as [deleted], Kaikohe and the email address given was [deleted]. This email address and a cellphone number was printed on a card for Tautoro Denture Repairs which was provided to WINZ. That card appears to have been copied onto a number of the quotes for dentures subsequently provided to WINZ which were produced at trial.

[17] In 2019 Ms Blake applied for a second production order in respect of the MSD which resulted in further documents being provided on 4 April 2019, including 24 quotes for work from Ms Wihongi. Her evidence was that the combined documents from the production orders indicated that between 1 June 2016 and 27 April 2019 Ms Wihongi made dentures for 176 WINZ clients and that over that period of time a total of \$168,374.70 was paid into her bank account by New Zealand Income Support Service (“NZISS”).

[18] On 1 April 2019 Ms Blake also applied for a production order requiring ANZ Bank New Zealand Limited (“ANZ”) to produce all transaction records for Ms Wihongi’s account between 7 September 2017 and 28 March 2019 resulting in Ms Blake receiving a number of bank statements on 18 April 2019. Ms Blake was able to reconcile the records of payment by NZISS to Ms Wihongi with Ms Wihongi’s bank statements from ANZ. There was no challenge to the accuracy of Ms Blake’s calculations at the hearing and I accept them as accurate. At the hearing copies of the relevant bank statements from Ms Wihongi’s accounts, appropriately redacted, and copies of the quotes provided to WINZ were produced as exhibits 4 and 5.

[19] On the morning of 2 April 2019 Ms Blake accompanied [Acting Sergeant 1] of the Kaikohe Police when a search warrant was executed at Ms Wihongi’s property. They were also accompanied by Ministry of Health employees, [three names deleted]. [One of the employees] took photographs of the exhibits and also of the cabin where Ms Wihongi worked. Those photographs, or at least some of them, were produced at the trial. It shows a stand-alone cabin. It has running water and electricity. This is

clear from the photographs and the appliances and taps shown in the photographs. The walls and ceiling of the interior are unlined and there does not appear to be any covering on the floor. The whole of the interior is exceedingly dirty and messy. At one end of the cabin there are two cane armchairs which, from the materials beside one of them appear to be used by clients when moulds are taken of their mouths and dentures fitted. There is no physical separation between this area and the work area. Many partially completed dentures appear in the photographs.

[20] On the morning of the search Ms Blake spoke to Ms Wihongi after she had been cautioned by [Acting Sergeant 1]. Ms Blake made notes of the conversation and the following comments are direct quotes from Ms Blake's evidence of what Ms Wihongi said:

Tells everyone who comes to me [knows] I'm not a registered dental technician.

...

I never said I'm registered. I'm an artist who has been making dentures for over 18 years. Word of mouth. I'm allowed to do lab work. I know I am not allowed to do clinical work. I tell people and they say fine, up here people have to pay more so I do it for them. I use disposable trays etcetera and throw it away. I've looked for someone to work with me. I have eight children, so I would have gone and studied. It's only in Otago so that wouldn't work.

...

Just a small time person who people come over [to] and ask for teeth.

...

I understand not being registered as a dental tech; I believe I have never misled anyone. I'm an artist who has worked for 18 years.

[21] The notebook statement was signed and produced in evidence. It will be seen that Ms Wihongi acknowledged that she was making dentures and supplying them directly to the public and that she knew she was not allowed to do clinical work. She also acknowledged the fact that she was aware that the fact that she was doing this work was being disseminated in the community by word of mouth. Her focus seems to be on emphasising that she did not claim to be a qualified so did not mislead anyone.

[22] In November 2019 Ms Blake became aware of an episode on a television programme *The Hui* which Ms Wihongi had made after the search warrant was issued. She watched the programme and a tape of it was produced at the hearing. In the programme Ms Wihongi presented herself as performing a public service by making dentures for people, mainly Māori, many or most of them elderly, who would not otherwise be able to afford dentures. It was notable that significant work had been done on the cabin. It presented an entirely different picture from that which Ms Blake observed when the search warrant was issued. The walls and floor were lined and everything was sparkling white and clean. I am satisfied that Ms Wihongi was presenting to the viewers a very different picture of the conditions in which she had been operating and that the impression she intended to convey was that the state of her workplace at the time of filming was the same as it had been when she was making dentures.

Evidence of former clients of the defendant

[23] Four witnesses who had been clients of the defendant gave evidence and written statements of two others, now deceased, were produced by consent after applications to produce their statement as hearsay evidence were not opposed.

[24] In her statements dated 7 April 2021 and 20 July 2021, [witness A] said that she had previously had dentures made by Middlemore but heard about Ms Wihongi through her daughter. She said that she had got a quote from Claire and then got a voucher from WINZ. She described going to Ms Wihongi's "bach" in 2018. She described the bach as not being very clean with dust everywhere. She said that on her second visit Ms Wihongi took another mould for her upper denture, explaining that she had used the one taken on the first visit for another client. During this process some of the material started to go down her throat, choking her and she "thought [she] was going to die". She ran outside and her moko assisted her by pulling out the two or three inch long piece of material which had lodged in her throat. [Witness A] said that she never went back and never received her teeth even though, after getting a quote from Ms Wihongi they were paid for. She said that they cost her \$1,100. I have seen the quote provided by Ms Wihongi to WINZ in relation to [witness A]. That quote is dated 9 August 2018 and is for a full denture at a cost of \$650 and a partial

lower denture at a cost of \$450. I have also seen record of the payment into Ms Wihongi's bank account which was made on 22 August 2018 for \$1,100. At the time [witness A] made her statement she was 81 years of age and described herself as being in poor health.

[25] [Witness B] also made a statement to Ms Blake on 8 April 2021 which was admitted by consent. She said that her WINZ case manager in Kaikohe referred her to Ms Wihongi who gave her a quote over the phone. [Witness B] said that she had had dentures before she dealt with Ms Wihongi. She too was unimpressed by the premises from which Ms Wihongi was operating. She said that the defendant took impressions for a top denture and had her fingers in [witness B]'s mouth to do so. Ms Wihongi called her about three weeks later to say the teeth were ready and when she returned Ms Wihongi put them in her mouth. [Witness B] described them as being "more plate than teeth". She said that she returned twice more but the dentures never fitted, gave her ulcers and she stopped wearing them. I have located the written quote for [witness B] which is dated 10 May 2018 and is for a full upper denture at \$650 and a relining after healing for \$150, a total of \$800. \$800 was paid into Ms Wihongi's account on 11 May 2018. It is notable that there cannot have been a relining since the dentures were never supplied. [Witness B] said she could not afford replacements.

[26] There was no suggestion in the evidence that Ms Wihongi ever offered either [witness A] or [witness B] a refund or partial refund.

[27] [Witness C] gave evidence that she had accompanied two friends to Ms Wihongi's premises when they were getting dentures made and on enquiry Ms Wihongi told her that WINZ would pay for dentures and that [witness C] could pay them back. [Witness C] applied to WINZ and said that she received her teeth four to five weeks after the initial mould was taken. She said she was never asked about her health by Ms Wihongi in spite of the fact that there were five subsequent fittings at each of which Ms Wihongi placed her hands in her mouth. The teeth were never usable. She said that WINZ paid \$600 and she had to repay them at \$2 or \$4 a fortnight. In fact the records show that Ms Wihongi provided a quote of \$650 to WINZ for a full lower denture on 23 March 2018 and that amount was paid into her bank account on 26 March 2018.

[28] [Witness D] gave evidence that she went to WINZ for an advance for dentures and was given Ms Wihongi's card by someone there after she had got the grant. She recalled the card saying Tautoro Dental Services but I accept that she is likely mistaken and it probably said Tautoro Dental Repairs. Nothing turns on this. She said that she contacted Ms Wihongi the next day and Ms Wihongi came to her to take impressions however when she got the dentures she found that the top denture was too big on the outside and loose on the inside and the bottom denture was too tight. She said that she told Ms Wihongi that the dentures were not fitting. On Ms Wihongi's last visit [witness D] said that she told her that the teeth were not fitting and that she [[witness D]] did not see what else Ms Wihongi could do about it. Ms Wihongi apparently agreed and left and [witness D] never heard from her again. She said she tried to contact Ms Wihongi but she did not answer her phone. [Witness D] subsequently got dentures from elsewhere but said she still had to repay WINZ for the advance. I was unable to find a record of the quote and payment but [witness D]'s evidence was not challenged by the defence and I accept her account as truthful and accurate.

[29] [Witness E] who was a superannuitant gave evidence that she got top and bottom dentures from Ms Wihongi and described them as excellent to begin with and still fine, so her experience was obviously much better than that of the previous witnesses. She gave evidence that she got a grant from WINZ which she had to repay. The records show that Ms Wihongi provided a quote to WINZ on 9 August 2016 for full upper and lower dentures at a cost of \$1,300 and that that sum was paid into Ms Wihongi's bank account on the same day.

[30] [Witness F] heard of Ms Wihongi from her sister, whose dentures Ms Wihongi had made. [Witness F] went to Ms Wihongi in August or September 2018 for a lower partial plate. She said that she got a quote for \$500 from Ms Wihongi which she took to WINZ. The dentures were provided to her but she says that they hurt her gums and adjustments that Ms Wihongi made did not help so that eventually she stopped wearing them. She said that she did get a refund from WINZ. She does not suggest that Ms Wihongi ever offered her a refund. I was unable to find records of [witness F]'s quote or payment but again [witness F]'s evidence that Ms Wihongi made a partial lower denture for her that was paid for by WINZ was not challenged by the defence and I accept her evidence.

[31] The defence called four witnesses who had dentures made by the defendant. [Witness G] gave evidence that Ms Wihongi had made her upper and bottom partial dentures costing \$900 in about 2014. [Witness G] paid for them herself. Ms Wihongi replaced the top denture in 2017 or 2018 at a cost of \$360. Ms Wihongi told her that she was an artist not a technician but that she had made dentures in Auckland. She had heard of Ms Wihongi through friends. She was obviously satisfied with Ms Wihongi's work.

[32] [Witness H] gave evidence that she had lost a tooth when she was young and was very self-conscious about it and that her aunt had paid Ms Wihongi to make a denture for her when she was 15 and she had also made a replacement for that tooth when [witness H] was 30, by which time she was married and living in Australia. She said it would have been too expensive to get a tooth made in Australia and thought that it would have cost about \$2,000. [Witness H] was very happy with Ms Wihongi's work.

[33] [Witness I] gave evidence that he had obtained his first set of dentures from Ms Wihongi more than 10 years ago and his second set about five years ago. He said that he had gone to a dentist in Kerikeri before but described him as being "no good" and said that Claire was "cheaper by a long shot". When asked what he would have done if he had not been able to get Ms Wihongi to make his dentures he replied that he would "cross that bridge when he came to it". The date of the quote supplied to WINZ by Ms Wihongi is illegible but the quote does show that it was for a full upper denture at \$650 and a relining of the lower denture at \$150. Payment of \$800 was made into Ms Wihongi's bank account on 22 August 2018.

[34] [Witness J] gave evidence that he had previously had one tooth made by a dentist in Kaitaia at a cost of \$1,100 and that Ms Wihongi had made him a top and bottom denture for \$900. He said both were partial dentures. He said that he heard about Ms Wihongi through WINZ. The WINZ record shows that Ms Wihongi sent an email to WINZ on 17 July 2018 quoting for partial and upper lower dentures at \$1,000 and that amount was paid into Ms Wihongi's bank account on the same day. [Witness J] was obviously well satisfied with Ms Wihongi's work and mentioned that she had

replaced a tooth in one of the dentures for free. I note that that is the only evidence suggesting that Ms Wihongi had done pro-bono work.

[35] I accept the evidence of all the witnesses called to speak of the work Ms Wihongi did for them as honest and reliable save that some found it difficult to recall the date of their interaction. I note that in many cases their evidence is corroborated by quotes provided by Ms Wihongi and records of payments made to her.

Elements

[36] The elements of the charge of performing a restricted activity contrary to s 9(4) of the Act are as follows:

- (a) That the defendant performed an activity;
- (b) That the activity is declared by Order of Council as a restricted activity;
and
- (c) That the defendant was not a health practitioner permitted to perform the activity when the activity was performed.

[37] All elements must be proved beyond reasonable doubt by the prosecution. I remind myself of this and the fact that the defendant is presumed innocent unless and until she is proved beyond reasonable doubt to be guilty of a charge. In this case the defendant has given and called evidence but that does not shift the burden of proof which remains on the prosecution throughout. I also remind myself that each charge must be considered separately.

[38] This is a strict liability offence and so the only intention which must be proved is the intention to perform the activity.

[39] For the charge of claiming to be a health practitioner the following elements must be proved beyond a reasonable doubt:

- (a) The defendant was not a registered clinical dental technician;

- (b) The defendant did state or did something calculated to suggest that she had practiced or was willing to practice a profession as a clinical dental technician.

[40] I remind myself of the burden and standard of proof as stated in [37] above.

[41] This offence is also a strict liability offence. The only intention the prosecution must prove is the intention to make the statement or do the thing relied upon by the prosecution as calculated to suggest the defendant was willing to practice a profession as a clinical dental technician.

Discussion

[42] Even if Ms Park's submission that a proper interpretation of the restricted activity "clinical procedures involved in the insertion and maintenance of fixed and removable orthodontic or oral and maxillofacial prosthetic appliances (dentures) on members of the public when she was not a health practitioner permitted to perform that activity" should be interpreted narrowly, requiring proof that the defendant actually inserted or fitted a denture to a member of the public, so that proof that she had taken a mould from a client's mouth would not be sufficient because a mould is not a "oral and maxillofacial prosthetic appliance" I would find these charges proved.

[43] I have carefully examined the copies of the quotes given to WINZ by Ms Wihongi and the corresponding payments made into Ms Wihongi's account. I have focussed on the quotes and payments relied upon by the prosecution in their written submissions as supporting each charge.

[44] In the period between 22 May 2016 and 17 November 2016 there were six such transactions and in all but one of those transactions payment was made the same day or within a week of the date of the quote. In the remaining cases payment was eight days after the date of the quote. There is no suggestion in any of the evidence that there were ever long delays between the initial quote, the taking of the mould or impression and the supply and fitting of the dentures. Mostly the witnesses were silent as to that but in one case three weeks was mentioned as being the gap between the mould and the fitting of the denture and in another four to five weeks. Of the

six transactions I have identified in this time period one took place between late May and 1 June, two others in mid-August and a fourth in late June and early July. On the evidence I consider that I am entitled to draw the inference that the dentures would have been supplied within a two- month period from the taking of the moulds and I do draw that inference.

[45] For the period from 18 November 2016 to 18 May 2017 I identified three, possibly four transactions. I shall take the conservative figure of three. Of those, in one case the transaction was complete before the end of January and in the other, by 8 February 2017. Applying the same deductive reasoning I am satisfied beyond a reasonable doubt that at least those two transactions were complete in the specified time period.

[46] In the period between 19 May 2017 and 19 November 2017 I have identified three transactions. The first was completed in May, the second by 1 June and the last by 27 July. By the same deductive process I am satisfied beyond reasonable doubt that the defendant supplied and fitted the dentures involved in those three transactions within the relevant time period.

[47] In the period from 20 November 2017 to 20 May 2018 I have identified eight transactions. Of those the quotation was supplied and the payment made on 7 December 2017 in one case, one of the remaining transactions was in March and the others were in May. I am satisfied beyond reasonable doubt that I can safely infer that the defendant delivered and fitted the denture in the December transaction within the specified time period.

[48] In respect of the period between 21 May 2018 and 21 November 2018 there were 35 transactions that I can identify. Three were completed in June, nine in July and one in May. By the same process of reasoning I am sure that I can conclude that the defendant supplied and fitted dentures to those clients in the relevant time period.

[49] Finally between 22 November 2018 and 1 April 2019 I have identified 23 transactions. Of those transactions two were completed in November, three in

December, eight in January and four in February. Again, I am sure that those dentures must have been supplied and fitted by the defendant within the relevant time period.

[50] Having said that, I do not accept the narrow interpretation for which the defendant contends. In my view the argument ignores a phrase which is key:²

Clinical procedures involved in the insertion and maintenance of fixed and removable orthodontic or oral and maxillofacial prosthetic appliances.

[Emphasis added]

[51] In my view all activity involved in supplying dentures directly to members of the public falls within the ambit of the definition.

[52] In my view the taking of a mould is a necessary first step in the process of making a denture for a member of the public and so falls within the definition of being a clinical procedure involved in the insertion and maintenance of fixed and removable orthodontic or oral and maxillofacial prosthetic appliances even though the mould itself is, as was accepted by Mr Aarts, not itself such an appliance. If that interpretation of the section is correct then of course the case for the prosecution in respect of the charge laid under s 9(4) of the Act is that much stronger.

Defence of necessity

[53] Ms Park argues that Ms Wihongi can rely on the common law defence of necessity. She acknowledges that there is no authority to support the proposition that economic necessity is a sufficient basis for such a defence, particularly when it is not the economic necessity of the alleged offender but of others. She argues that I should extend the parameters of the defence to include economic necessity. She also submits that I should accept Ms Wihongi's evidence that she felt bound by tikanga to help those in need (although not unless they paid her).

[54] While s 20 of the Crimes Act preserves common law defences not specifically dealt with in that act, it is fair to say that the defence has traditionally been regarded

² Health Practitioners Competence Assurance (Restricted Activities Order 2005, cl 2 Schedule Restricted Activities.

as very narrow. In *Southwark London Borough Council v Williams* Lord Edmund Davies LJ said:³

Well, one thing emerges with clarity from the decisions, and that is that the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear necessity can very easily become simply a mask for anarchy.

[55] After looking at earlier cases in which the plea had succeeded his Lordship went on to say:

As far as my reading goes, it appears that all the cases where a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril: for example, the forcible feeding of an obdurate suffragette, as in *Leigh v. Gladstone* (1909) 26 T.L.R. 139...or as in the case tried in 1500 where it was said in argument that a person may escape from a burning gaol notwithstanding a statute making prison-breach a felony, “for he is not to be hanged because he would not stay to be burnt.” Such cases illustrate the very narrow limits with which the plea of necessity may be invoked.

[56] Those notes of caution still ring true. Moreover I am unaware of any authority which supports the proposition that a person can rely on the defence of necessity to operate a commercial enterprise over a period of three years where she provides a service to over 150 people which she is prohibited by law from providing.

[57] Not only is the law against Ms Wihongi so is the evidence. None of the witnesses from whom I heard said that they had no other option but to go to Ms Wihongi to provide them with dentures. Some had already acquired dentures from presumably appropriately qualified sources. At least one other witness has subsequently acquired dentures when those provided by Ms Wihongi failed and all of the witnesses called by the prosecution were financed by WINZ. There was no evidence to suggest that WINZ would not finance the acquisition of dentures from a proper source. They would probably be more expensive but that was no bar. The fact that this is a service that WINZ provides for superannuitants supports that inference.

[58] I find all six charges laid under s 9(4) of the Act proved beyond a reasonable doubt.

³ *Southwark London Borough Council v Williams* [1971] 1 Ch 734.

Section 7(2) of the Act: did the defendant state or do something calculated to suggest that she practised or was willing to practice a profession as a clinical dental technician?

[59] The defendant's argument is that the prosecution has failed to prove that Ms Wihongi ever stated that she was a clinical dental technician, nor did she do anything that was calculated to suggest that she was willing to practice a profession as a health practitioner of that kind ie a clinical dental technician.

[60] I accept that the evidence does not establish that Ms Wihongi ever stated that she was in fact a clinical dental technician. However she did do things that were calculated to suggest that she practiced or was willing to practice a profession of that kind in that she was making and supplying dentures directly to the public when she admittedly knew that she was not entitled to do that. On 7 September 2015 she completed the retailer/supplier/payee details form for WINZ and in that document she said her business mainly supplies "dentures and repairs". On the same date she provided WINZ with a bank slip for her account. Over the ensuing three year period she supplied at least 79 quotes to WINZ for making dentures and partial dentures for WINZ clients. Each quote confirmed that she was prepared to do work of the kind only a registered clinical dental technician was entitled to do, ie make dentures directly for members of the public. Usually, she charged \$1,300 for a full set and \$650 for an upper or lower denture. She was aware that she was known in the community as someone who would make dentures for people and set up premises in order to do that. She accepted that in her evidence. Certainly she said in evidence that she had another line, making jewellery but it is clear that her primary business was making dentures.

[61] I am aware that in *Ministry of Health v Brooks*, Judge Recordon considered the phrase "calculated to suggest" in the context of the act and concluded: "This involves the element of mens rea."⁴ The charge therefore includes the element of intention by Mr Brooks that he be seen "as a registered osteopath".

[62] I respectfully decline to follow that decision. The phrase "calculated to" is defined in *Stroud's Judicial Dictionary of Words and Phrases, 10th Edition* as follows: "The authorities make clear that "calculated to" means "likely"". The standard is an

⁴ *Ministry of Health v Brooks* DC Waitakere CRI-2008-090-010243, 31 March 2010 at [7] and [14].

objective one and is unrelated to the intention of the defendant. In my view all that is required is to be proved is that the defendant intended to do the act relied on. The offence is a strict liability offence and once the act is proved it is for the defendant to establish an absence of fault on the balance of probabilities, which she cannot do. I am satisfied beyond a reasonable doubt that the defendant by the actions described in [52] above did things that were calculated to suggest that she practiced or was willing to practice a profession as a health practitioner of that kind, specifically a clinical dental technician when she was not a practitioner of that kind. She made it clear that she was willing to make dentures directly for members of the public which only a clinical dental technician was permitted to do. I find this charge proved beyond a reasonable doubt.

Judge D Orchard

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 21/06/2023