http://www.scotcourts.gov.uk/opinions/2013CSIH36.html

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Mackay of Drumadoon
Lady Dorrian
Lord McEwan

[2013] CSIH 36
P876/11

OPINION OF THE COURT

delivered by LADY DORRIAN

in the Petition

of

MARY TERESA DOOGAN and
CONCEPTA WOOD
Petitioners and Reclaimers;

for

Judicial Review of a decision of Greater Glasgow and Clyde Health Board

_____

Act: Petitioners: Moynihan QC, M H Clark, Advocate; Brodies LLP Alt: Respondents: Napier QC, Olson, Advocate; Health Services Central Legal Office

24 April 2013

The issues

[1] This appeal concerns the scope of the right of conscientious objection enjoyed by each of the reclaimers under section 4(1) of the Abortion Act 1967 ("the Act") in respect of their employment at the Southern General Hospital, Glasgow ("the SGH").

The respondents are the NHS Greater Glasgow Health Board, who manage the Southern General Hospital. The dispute between the parties concerns duties of the reclaimers which are

broadly referred to as those of delegation, supervision and support. What that dispute might entail is discussed below. The reclaimers maintain that the performance of any of these duties in connection with a patient admitted to hospital for a termination of pregnancy would give rise to their participation in treatment which is the subject of their conscientious objection. The respondents maintain that the right of conscientious objection which each reclaimer enjoys is limited to a right to refuse to participate only in any "direct involvement in the procedure of terminating pregnancy". At the outset of the hearing, both parties submitted that, despite the fact that there was a degree of factual dispute, the points of law which arose for decision before the Lord Ordinary, and now before us, did not require any evidential hearing. For the reclaimers, the fall-back position was that if the matters of law were not determined in their favour, then they could not be determined without a proof before answer

Legislation

[2] For present purposes, the relevant provisions of the Act are as follows:

> "**1. Medical termination of pregnancy**
> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith -
>
> (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
> (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

.....

(4) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

4. Conscientious objection to participation in treatment

(1) Subject to subsection (2) of this section, no person shall be under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection:

Provided that in any legal proceedings the burden of proof of conscientious objection shall rest on the person claiming to rely on it.

(2) Nothing in subsection (1) of this section shall affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

(3) In any proceedings before a court in Scotland, a statement on oath by any person to the effect that he has a conscientious objection to participating in any treatment authorised by this Act shall be sufficient evidence for the purpose of discharging the burden of proof imposed upon him by subsection (1) of this section.

5.- Supplementary provisions.

....

(2) For the purposes of the law relating to abortion, anything done with intent to procure a woman's miscarriage (or, in the case of a woman carrying more than one foetus, her miscarriage of any foetus) is unlawfully done unless authorised by section 1 of this Act

[3] Section 2 of the Act makes provision for the certification of the medical opinion referred to in section 1, and for notification of terminations to be made to the Chief Medical Officer within the relevant jurisdiction.

Background

[4] The reclaimers are midwives who have worked for many years in the labour ward at the SGH. They are both employed there as Labour Ward Co-ordinators. They are both practising Roman Catholics who, on commencement of their employment in the labour ward, intimated a conscientious objection to participation in termination of pregnancy, according to the Act. As a result they were not expected to, and did not, participate in the treatment of certain patients in the labour ward.

[5] For many years medical terminations of pregnancy have been carried out in the labour ward, if the foetus was more advanced than 18 weeks. Otherwise they took place in the gynaecological ward. From some point in 2007 all such terminations have taken place in the labour ward. In about 2010, with the closure of the Queen Mother's Maternity Hospital in Glasgow, the Foetal Medicine Service, which provided centralised specialist diagnostic facilities, including the diagnosis of foetal abnormality, was transferred to the labour ward at the SGH. Thus the number of terminations of pregnancy carried out in the labour ward increased in 2007 and again in 2010. It is generally accepted that this was the case, although there is a dispute between the parties as to the extent to which the reclaimers were required, prior to 2007, to delegate, supervise or support staff engaged in the treatment or care of patients undergoing termination procedures.

[6] As a result of concerns over the increase in terminations, the reclaimers initiated a formal grievance procedure in September 2009 in which they sought confirmation that, having expressed a conscientious objection to the termination of pregnancy, they would not be required to delegate, supervise and/or support other staff in the participation and provision of care to patients undergoing medical termination of pregnancy, at any stage in the process. The

grievance was not upheld and an appeal to the respondents' Board was refused in decision letters dated 14 June 2011, which each reclaimer received and which stated:

> "It is the view of the Panel that delegating to, supervising and /or supporting staff who are providing care to patients throughout the termination process does not constitute providing direct 1:1 care and having the ability to provide leadership within the department is crucial to the roles and responsibilities of a Band 7 midwife, therefore this part of your grievance is not upheld."

These letters did not in terms address the scope or application of section 4(1) of the Act. The reclaimers sought judicial review of that decision on the basis that it was *ultra vires*, unreasonable, irrational and in contravention of the Act. They sought various orders including declarator that their right of conscientious objection in terms of the Act

> "..includes the entitlement to refuse to delegate, supervise and/or support staff in the participation in and provision of care to patients undergoing termination of pregnancy or feticide throughout the termination process"

[7] It is a matter of agreement that as averred by the respondents in Answer 4.10 the reclaimers are midwifery sisters whose role as "Labour Ward Co-ordinators" includes:

> (1) management of resources within the Labour Ward, including taking telephone calls from the Foetal Medicine Unit to arrange medical terminations of pregnancy;
>
> (2) providing a detailed handover on every patient within the Labour Ward to the new Labour Ward co-ordinator coming on shift;
>
> (3) appropriate allocation of staff to patients who are already in the ward at the start of the shift or who are admitted in the course of the shift;
>
> (4) providing guidance, advice and support (including emotional support) to all midwives;

(5) accompanying the obstetricians on ward rounds;

(6) responding to requests for assistance, including responding to the nurse call system and the emergency pull;

(7) acting as the midwife's first point of contact if the midwife is concerned about how a patient is progressing;

(8) ensuring that the midwives on duty receive break relief, which may mean that the Labour Ward co-ordinator provides the break relief herself;

(9) that if any medical intervention is required, for example instrumental delivery with forceps, , the Labour Ward co-ordinator will often have to be present to support and assist;

(10) communicating with other professionals, e.g., paging anaesthetists;

(11) monitoring the progress of patients to ensure that any deviations from normal are escalated to the appropriate staff level, e.g., an obstetrician;

(12) directly providing care in emergency situations;

(13) ensuring that the family are provided with appropriate support.

[8] During the course of argument before the Lord Ordinary, the respondents accepted that under item 8 they could not require the reclaimers personally to provide break relief which would involve them in having to step in and ensure the achievement of a termination of pregnancy. The reclaimers' obligation would be to find somebody else to do so. So far as medical intervention was required (item 9 on the list) the reclaimers also accepted that the reclaimers could not be required to be present during such intervention. In argument before us it was further accepted that item 4, insofar as it might involve giving advice to midwives about

appropriate treatment, would also be covered by the right of conscientious objection. The same applied to item 7. In fact, counsel for the respondents accepted that the performance of any of these 13 listed duties might involve participation in treatment authorised by the Act and as such be covered by the right of conscientious objection. Whether the performance of the duties did so would require to be addressed on a daily, task by task basis. That would require to be decided by management. There was, however, no expectation on the part of the respondents that the reclaimers would be required to deliver any direct patient care during the termination process itself.

The Lord Ordinary's opinion

[9] In considering the proper interpretation of the phrase "participate in any treatment authorised by this Act" in section 4(1) the Lord Ordinary concluded that the word "treatment" was being used "to denote those activities which directly bring about the termination of the pregnancy." (para [78]). As to "participate", this connoted "taking part in" but did not extend to all those involved in the chain of causation (para [79]). Since the reclaimers were not being required to play any direct part in bringing about the termination of pregnancy, they were not being asked to "participate in any treatment authorised by this Act". Their role was a supervisory and administrative one. The Lord Ordinary made two further observations in support of her conclusion.

[10] First, she noted that prior to the Act, the common law crime in Scotland was that of intentionally procuring abortion, a crime "which was subject to a poorly defined exception where the purpose was preservation of the life or health of the woman." A similar exception

appeared to have been recognised in England, see *R* v *Bourne* 1939 1KB 687. The Lord Ordinary was thus of the view that the Act was concerned only with authorising action which would previously have been criminal. "Since it was not all involvement with terminations of pregnancy that was criminal prior to the authorisation that the Act conferred (see the references to the criminal law above), the context is that Parliament must be taken to have recognised that there would be action taken by persons after its coming into force which required neither its authorisation nor the right of conscientious objection, (which relates only to authorised acts)."

[11] The second observation was that the right under section 4(1) was not unrestricted, since in the Lord Ordinary's opinion it did not extend to terminations authorised under section 1(1)(b) or (c) of the Act, nor to an emergency situation, when what is at stake is the woman's life or the risk of grave injury to her health.

Submissions for Reclaimers

[12] On behalf of the reclaimers it was argued that the Lord Ordinary had erred in concluding that the right of conscientious objection in terms of section 4(1) of the Act did not include entitlement to refuse to delegate, supervise and/or support staff providing care to patients undergoing termination of pregnancy or feticide. Such activities of delegation, supervision and support involved "participation in treatment" authorised by the Act. For example, supervision under items 7 or 11 of the list previously referred to might include requiring to monitor the condition of the patient and the progress of the procedure the patient was undergoing, including whether the medication was having its intended effect; similar considerations might arise under item 4; and under item 13, the appropriate support might include reassurance about

the course of action which had been adopted**.** "Treatment" included the whole medical or surgical process involved in termination, including pre and post-operative care and care pre and post administration of abortifacient drugs. The treatment as a whole was a team effort and supervision was a necessary element of that effort.

[13] It was accepted that section 4(2) overrode any conscientious objection and that the reclaimers would be bound to participate in any treatment which was necessary to save the life of or to prevent grave permanent injury to the physical or mental health of a pregnant woman. The respondents recognised in the present case that each of the reclaimers had a genuine and sincere conscientious objection, and that there were aspects of their job which would otherwise require them to participate in treatment which was the subject of their conscientious objection. It was wrong for the respondents simply to consider the list of duties and concede a few. The reclaimers should be given an exemption from duties which was co-extensive with the bounds of their beliefs. The issue was a subjective one to be determined according to the conscience of each individual. They should not require to carry out duties which were, or were liable to be, in conflict with their conscience. There was no scope in the Act for imposing duties which were in conflict with individual conscience. In these circumstances the question of whether any aspect of their work would in fact do so should be dictated by conscience and not be determined by an administrator. If the reclaimers were required to carry out the tasks in question, they would not be passive bystanders. These tasks would offend against their religious beliefs. They did not accept that they could avoid moral responsibility for a task by asking others to carry it out.

[14] In passing the Act, Parliament had recognised that abortion was a controversial matter. It required to balance the interests of those who wanted the law to be liberalised, to enable treatment to be regulated and carried out safely; with the interests of those who had genuine objections based on conscience. That balance was achieved by liberalising the law but exempting from participation those with a genuine conscientious objection, qualified only by the need to participate if treatment was required to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.

[15] The Lord Ordinary erred in para [75] in stating that the right to conscientious objection did not extend to terminations carried out under section 4(1)(b) or (c). She had also erred in para [76] in concluding that although the Act authorised acts which were previously criminal, since not all acts in relation to the termination of a pregnancy were criminal prior to the Act, the Act had no application to such acts. The Act in section 1 contained an exhaustive statement of the circumstances in which either abortion or feticide were lawful and there was no residual category to which the common law applied. The categories which were envisaged in *R* v *Bourne* 1939 1 KB 687 (in which a doctor carried out an abortion on a 14 year old girl and invited prosecution for clarification of whether there was in law a defence based on actions necessary to prevent grave injury to the mother) were all covered under section 4(1); the Act required that "any" treatment for the termination of pregnancy had to be carried out in a hospital or approved place; and made provision for regulations requiring any medical practitioner terminating a pregnancy to give the requisite notice thereof. Section 5 provided that for the purposes of the law relating to abortion (defined in s 6 as including "any rule of law relating to the procurement

of abortion") "anything done with intent to procure a woman's miscarriage.....is unlawfully done unless authorised by section 1 of this Act".

[16] Support for the view that the Act is exhaustive could be found in the speech of Lord Diplock in *Royal College of Nursing* v *Department of Health and Social Security* 1981 AC 800 ("the RCN case") in which he observed (p826 D-E) that:

> "What the Act sets out to do is to provide an exhaustive statement of the circumstances in which treatment for the termination of a pregnancy may be carried out lawfully."

[17] The remaining submissions for the reclaimers can be summarized in the following propositions:

1. It was wrong to see s 1 and s 4 as co-extensive. S1 rendered treatment lawful in certain circumstances and under certain conditions. S 4 dealt with the consequence of treatment being rendered lawful, and the extent to which the law imposed a duty to participate in such treatment.

2. The criterion which the Act used in dictating the extent of the duty to participate in such treatment was that of conscientious objection, which was subject to a compromise with two components: first: that anyone seeking to assert such an objection bore the onus of proving that they have a genuine objection to performing a specific duty; and second: that the general exemption was overridden by s 4(2) which confirmed a duty to act where necessary to save life or avoid injury. Subject to those two qualifications the Act afforded exemption from duty without further restriction.

3. On a purposive and plain reading of the Act, s 4(1) should be construed as covering the whole medical process resulting in termination and as embracing all of those who

are part of the hospital team with responsibilities in relation to any part of the treatment. One should start with the broad interpretation which the ordinary words of the section implied, then consider whether there was justification within the legislation for restricting that approach.

4. The "whole medical process" was not confined to the administration of the drugs but embraced care given pre- and post- any medical or surgical procedure.

5. The beneficiaries of the exemption were those who were part of the hospital team with responsibilities in relation to the treatment. The Labour Ward Co-ordinators had responsibilities which were central to the overall treatment**.**

[18] The *RCN* case was also referred to for the proposition that "treatment" included the whole medical or surgical process involved in termination. That case concerned the question whether a pregnancy was "terminated by a medical practitioner", when it was carried out by nurses acting on the instructions of such a practitioner. The majority in the House of Lords considered that the phrase "treatment for the termination of pregnancy" meant something broader than the act of termination itself. Rather it contemplated treatment that was in the nature of a team effort, covering the whole process designed to bring about a termination. Reference was made to the speeches of Lord Diplock (p827D-828F); Lord Keith (p834) and Lord Roskill (p837)

[19] Even in a supervisory role, the Labour Ward Co-ordinators were part of the team responsible for the overall treatment and care of the patient and would thus "participate in treatment authorised by the Act". In any event, insofar as any of the items within their job descriptions involved them directly in treatment, they would also do so.

[20] The decision letter of 14 June 2011, in referring to "direct 1:1 care", assumed a definition of participating in treatment which was not in accordance with a plain reading of the Act and echoed the guidance of the Royal College of Midwives, dated 1997, to the effect that:

> "The RCM believes that the interpretation of the conscientious objection clause should only include direct involvement in the procedure of terminating pregnancy. Thus all midwives should be prepared to care for women before, during and after a termination in a maternity unit under obstetric care."

The guidance of the RCM and similar guidance from other professional bodies was relied upon by the respondents. However, such guidance, from however eminent a body, was not relevant. It was for the court to determine the meaning of the legislation.

[21] In *R* v *Salford Area Hospital Authority ex parte Janaway* [1989] 1 AC 537, Lord Keith explained that section 4 created "something of a compromise in relation to conscientious objection". That compromise was reflected in the contrast between sub-sections (1) and (2) of section 4. *Janaway* raised the question whether a secretary who typed a letter referring a patient to a consultant with a view to a possible termination was able to avail herself of the conscientious objection. Lord Keith, agreeing with Nolan J and the dissenting opinion of Balcome LJ in the courts below, considered that the word "participate" should be given its natural meaning. It had not been used to cover the many forms of accessory who might be described as "participating" in a criminal act. In the *RCN* case, when Lord Roskill referred to the need to construe sections 1 and 4 together, it was not in the context of defining the word "participation". His words were not to be taken as incorporating all the technicalities of the criminal law into section 4 (p570-571). LordKeith had agreed with Nolan J and Balcome LJ as to their treatment of the word "participate". In a passage to which the Lord Ordinary was not referred, Balcome LJ, at p553A-D, approved comments of Nolan J regarding "treatment", that:

> "This is not begun or, I imagine, finally decided upon before the patient arrives at the hospital. The treatment is not simply abortion. It includes pre and post-operative care. It covers the case where, for one reason or another, no abortion in fact takes place."

[22] In *Christian Education SA* v *Minister of Education* (2001) 9 BHRC53, a case which concerned the balance to be struck between the application of religious principles and the law of the land, Sachs J observed, para 35:

> "The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not.
> ..... Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law. "

Section 4(1) of the Act is an example of this latter proposition. By giving an exemption to those with a conscientious objection, the state has avoided conflict between the law and religious beliefs. Conscience and belief took precedence over law by the exemption from duty and section 4(1) should be interpreted in such a way as to allow the reclaimers to be true to their beliefs while remaining respectful of the law. The article 9 argument which had been advanced before the Lord Ordinary was not insisted in.

Submissions for the Respondents

[23] Counsel for the respondents submitted that the right of conscientious objection under section 4(1) was a right only to refuse to take part in activities that directly brought about

the termination of a pregnancy, and was not available to the reclaimers in respect of their duties of delegation, supervision and support.

[24] Section 4(1) of the Abortion Act 1967 should be interpreted in accordance with the plain ordinary meaning of the words of the statute, as was done in the *RCN* case.

[25] "Treatment authorised by" the Act should be understood as referring to acts which directly contributed to the bringing about of a termination of pregnancy, or as the Lord Ordinary put, it taking part "in activities which directly bring about the termination of pregnancy". This was reflected in the guidance given for many years by the Royal College of Midwives and the RCN which referred respectively to "direct involvement in the procedure of terminating pregnancy" and "active participation in an abortion". This advice was relevant, because:

> "Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach. That applies particularly in a relatively esoteric area of the law such as the present, in relation to which cases may rarely come before the courts, and the established practice is the only guide for operators and their advisers."

(see *Isle of Anglesey County Council* v *Welsh Ministers* 2009 EWCA Civ 94, para 43.)

[26] Acts which directly contributed to the bringing about of a termination included the prescription by a doctor of the necessary drugs and the administration of those drugs by a midwife. A midwife monitoring the effect of those drugs or attending on a one-to-one basis on a woman undergoing termination, may be said to be participating in "treatment authorised by" the Act. By contrast the provision of general nursing care to a woman undergoing a medical termination, before and after the procedure, was neither the provision of nor participation in "treatment authorised by" the Act. Nor was the provision of general services to such a woman

or the delegation to, supervision and support of those staff who were directly involved in bringing about the termination of pregnancy.

[27] The interpretation argued for by the reclaimers would lead to difficult clinical and legal distinctions in practice. The practical outcome would be almost impossible to manage, could compromise safety and would lead to dual standards of nursing care. Any form of conscientious objection had obvious effects on the running of hospitals in terms of costs, staffing, and the increased burden on staff who did not have such an objection. Accordingly, it would be reasonable to restrict the extent of the right of conscientious objection to the extent argued for. At each step a nurse or midwife would require to state an objection if she considered that her duties would otherwise require her to do something which she considered to be within the scope of her conscientious objection. The assessment of whether an individual job came within the scope of the conscientious objection would thus have to be determined on a task by task basis. The court was not, therefore, being asked to set out a comprehensive list of the circumstances which might come within the scope of section 4(1). Acknowledging that there was bound to be uncertainty in deciding where the line between direct and indirect participation should be drawn, the risks to safety would be less with a continuing obligation on the Labour Ward Co-ordinator to find someone else who would do what the conscientious objector would not.

[28] Counsel for the respondents did not argue that the Act was other than exhaustive, and nor did he argue that there were residual circumstances external to the Act in which abortion would be lawful. If that was what was to be taken from paragraph [76] of the Lord Ordinary's opinion he did not support it. Nevertheless, he advanced the argument that everyone who was

exempted from criminal liability under section 1 was not thereby entitled to the benefit of a conscientious objection under section 4. As we understood his argument, it was that if an act would not have been illegal prior to the Act then there would be no entitlement to claim a conscientious objection to performing it after the Act. If it would not, prior to the Act, have been illegal to deliver general nursing care to someone who had been given an abortion, it would not be open to someone to claim a conscientious objection to providing such care after the passing of the Act. The exemption from criminal responsibility under section 1 is therefore broader than the extent of the conscientious objection available under section 4. One should apply with caution the observations made in the *RCN* case, which were made in the context of the extent of the exemption from criminal liability under section 1.

[29] In the course of argument, reference was also made to *R (Ghaia)* v *Newcastle City Council* [2011] QB 591; *British Pregnancy Advisory Service* v *Secretary of State for Health* [2012] 1 WLR 580; *R (Williamson)* v *Secretary of State* [2005] 2 AC 246; *S* v *L* 2012 SLT 961; *Bayatyan* v *Armenia* [2012] 54 EHRR 15 and *Royal Bank of Scotland* v *Wilson* 2011 SC 66.

Discussion

[30] We start by considering the two more straightforward questions which arise: namely, whether the Act is exhaustive as to the circumstances in which abortion may lawfully be carried out; and whether the right of conscientious objection extends to all the circumstances of sections 1(a) to (d).

[31] Section 5 of the Act provides that anything done with intent to procure a miscarriage "is unlawfully done unless authorised by section 1 of this Act". It is therefore clear that the only

lawful way in which a termination may be carried out is under the procedure authorised by the Act. If paragraph 76 of the Lord Ordinary's opinion is to be read as suggesting that there remains some residual ability at common law to carry out an abortion where the circumstances may be such as existed in *R* v *Bourne*, we disagree.

[32] The right of conscientious objection is qualified only by section 4(2), which has an echo in section 1(1)(b). We agree with the Lord Ordinary, at para 75 of her opinion, that the right of conscientious objection does not apply to a procedure carried out under section 1(1)(b), since the circumstances envisaged by section 1(1)(b) are part of the circumstances envisaged by section 4(2). However, we do not agree that the right does not extend to section 1(1)(c). Apart from the circumstance that it is necessary to prevent grave permanent injury to the physical or mental health of a pregnant woman, covered by section 1(1)(b), the exception in section 4(2) relates to treatment "which is necessary to save the life" of the mother. In our view that denotes something in the nature of an emergency, a situation where, unless the termination is carried out, the mother will die. It is not co-extensive with the circumstances envisaged by section 1(1)(c) which are only that the continuance of the pregnancy would involve risk to the life of the pregnant woman "greater than" if the pregnancy were terminated. That suggests a balancing exercise, and an assessment of whether there would be more risk if the pregnancy went to term than if it were terminated. It is not the same as saying that termination is "necessary" to save the woman's life. We consider that the right of conscientious objection extends to all the circumstances specified in section 1 save section 1(1)(b).

[33] Great respect should be given to the advice provided hitherto by the professional bodies, but prior practice does not necessarily dictate interpretation. Moreover, when the subject of the

advice concerns a matter of law, there is always the possibility that the advice from the professional body is incorrect. The RCM advice, for example, appears to proceed in the belief that in Scotland some special status attaches to the declaration in an affidavit that a midwife has a conscientious objection, rather than that this is simply a method by which the onus of proof may be discharged. It refers to the *Janaway* case and proceeds on the basis that in that case participation was defined as meaning "actually taking part in treatment designed to terminate pregnancy", without recognising the context in which the word "actually" was included. It is not consistent with the approach of Nolan J subsequently approved by Balcome LJ and Lord Keith. It makes no reference at all to the *RCN* case. It also proceeds on the basis that a midwife has a duty to be non-judgmental and that to be selective is unacceptable, but this ignores the fact that the Act allows a degree of selectivity to those with a conscientious objection. The NMC advice, which refers to the right to refuse to have direct involvement in abortion procedures, wrongly suggests that the burden of proof is displaced in Scotland by an affidavit from the midwife in question. When Lord Keith said in *Janaway* that to participate meant "actually taking part in treatment", he was using the word "actually" to distinguish participation in the ordinary sense of the word from the different forms of participation which can arise under the criminal law, and to distinguish those who were involved in treatment in hospital from those who were not so involved, such as a secretary typing a letter. He was not in our view meaning to restrict his definition in the way suggested by the respondents. Looking at these documents in the round, none of them can be said to have addressed the issue of whether the activities under consideration in the present case constitute treatment falling within the scope of section 4(1).

[34] It was suggested on behalf of the respondents that the interpretation contended for by the reclaimers would be more likely to compromise safety and be difficult to manage than the interpretation which they favoured. As counsel recognised, we do not have any factual basis for making any such determination, (on a matter which is any event disputed): however, it does not seem obvious to us that this proposition would be correct. The effect of the interpretation contended for by the respondents would be that whether one of the reclaimers was able to exercise their right to conscientious objection would require to be assessed on a task by task basis. That in itself might not be easy to manage. Moreover, it is debatable whether safety would be compromised more by what the reclaimers propose than by a system which places on those who may already be struggling with their conscience the additional burden of having to assess whether each task comes within the scope of their conscientious objection and of having to re-state that objection, possibly on a daily basis. On the reclaimers' interpretation, the matter would be clear from the outset and management structures and protocols could be devised (as seem to have been possible to some extent previously) to deal with the situation, in respect of procedures which are, for the most part, elective ones. Counsel for the respondents submitted that if "participation" were to be defined according to whether a person was taking part "directly" or "indirectly" there will always be uncertainty as to where the line should be drawn: this seems to us to be inherently undesirable and suggests to us that such an interpretation is not correct. A person with a conscientious objection is not to be under any duty to participate; it would seem to be consistent with that to expect the management of the conscientious objection to be a matter for the employer not the employee.

[35] It is clear that the majority in the House of Lords in the RCN case considered that when section 1 referred to a pregnancy being terminated this was not to be understood as restricting the protection under the Act only to those involved in the actual termination itself, but to all those involved in the process of termination. Part of the rationale for that was the use, in section 4(1) of the phrase "treatment authorised by this Act". See Lord Diplock, p 827H - 828A:

> "I have spoken of the requirements of the Act as to the way in which "treatment for the termination of the pregnancy " is to be carried out rather than using the word " termination " or " terminated " by itself, for the draftsman appears to use the longer and the shorter expressions indiscriminately, as is shown by a comparison between subsections (1) and (3) of section 1, and by the reference in the conscience clause to "treatment authorised by this Act.""

A similar view was expressed by Lord Keith p 834 D-E:

> "Then by section 4 (1) it is provided that no person shall be under any duty "to participate in any treatment authorised by this Act to which he has a conscientious objection." This appears clearly to recognise that what is authorised by section 1 (1) in relation to the termination of pregnancy is a process of treatment leading to that result."

On the same point Lord Roskill (p837G-H) said this:

> "Most important to my mind is section 4 which is the conscientious objection section. This section in two places refers to "participate in treatment" in the context of conscientious objection. If one construes section 4 in conjunction with section 1 (1), as surely one should do in order to determine to what it is that conscientious objection is permitted, it seems to me that section 4 strongly supports the wider construction of section 1(1).

[36] The activity with which the *RCN* case was concerned (the administration of abortifacient drugs) was undoubtedly "treatment", so the comments in that case require to be considered in the context that the court was considering whether that treatment, for the purpose of exemption from criminal responsibility, was "treatment authorised by" the Act. We accept that one should be careful not to apply observations made in that context to circumstances for which they were

not designed. However, in the present case we are not considering the word "participate" in a context other than that of treatment in a hospital. As in the *Janaway* case, we are considering treatment by or under the control of a medical practitioner in hospital. The duties of the reclaimers in this case are far removed from those of a secretary typing a letter of referral, and it has not been argued that their duties involve anything other than treatment in the proper sense. The reclaimers are, in the words used by Lord Keith in *Janaway* "actually taking part in treatment administered in hospital or other approved place in accordance with section 1(3), for the purpose of terminating pregnancy". It would not therefore be inappropriate to apply the dicta in the *RCN* case to the circumstances of the present case. The treatment in question, as Nolan J observed in *Janaway*, is:

> ".. not begun or, I imagine, finally decided upon before the patient arrives at the hospital. The treatment is not simply abortion. It includes pre and post operative care. It covers the case where, for one reason or another, no abortion in fact takes place."

[37] We agree with that approach. It is a common sense approach which avoids, for all levels of nursing staff, the need constantly to make difficult decisions in what might be stressful situations. We also agree with the observations in *Christian Education SA* v *Minister of Education*) that legislation such as this should be interpreted in a way which allows the reclaimers to be true to their beliefs while remaining respectful of the law. In our view it is not only the actual termination which is authorised by the Act for the purposes of section 4(1), but any part of the treatment which was given for that end purpose. Section 4(1) allows an individual to object to participating in "any" treatment under the Act. In our view the right of conscientious objection extends not only to the actual medical or surgical termination but to the whole process of treatment given for that purpose.

[38] The conscientious objection in section 4 is given, not because the acts in question were previously, or may have been, illegal. The right is given because it is recognised that the process of abortion is felt by many people to be morally repugnant. As Lord Diplock observed in the *RCN* case, it is a matter on which many people have strong moral and religious convictions, and the right of conscientious objection is given out of respect for those convictions and not for any other reason. It is in keeping with the reason for the exemption that the wide interpretation which we favour should be given to it. It is consistent with the reasoning which allowed such an objection in the first place that it should extend to any involvement in the process of treatment, the object of which is to terminate a pregnancy. This is also consistent with our conclusion that the only circumstance of sections 1(1)(a) to (d) to which the exemption does not apply is section 1(1)(b), and that the only circumstance when the objection cannot prevail should be when the termination is necessary to save life or prevent grave permanent injury, because in such a situation the real purpose is not to effect a termination but to save life or prevent serious permanent injury.

[30] It follows that the appeal should succeed. The parties were in agreement that on determination of the points of law arising in the case, the matter should be put out by order for further discussion as to which orders were necessary, since it was envisaged that the respondents would be willing to give certain undertakings respecting the decision of the court.