Parliamentary Archives,

HL/PO/JU/18/241

Die Jovis 5° Februarii 1981

Upon Report from the Appellate Committee to whom was referred the Cause Royal College of Nursing of the United Kingdom against Department of Health and Social Security, That the Committee had heard Counsel as well on Monday the 8th as on Tuesday the 9th days of December last upon the Petition and Appeal of the Department of Health and Social Security of Alexander Fleming House, Elephant and Castle, London SW1 6B1 praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 7th day of November 1980 except so far as regards the words " the Plaintiffs' costs of this Appeal and of their costs below before the Honourable Mr. Justice Woolf be taxed by a Taxing Master and paid by the Defendants to the Plaintiffs' Solicitors" and " the Defendants' Application for leave to present a Petition of Appeal to the House of Lords be granted on condition that the said Defendants do not seek to alter the Order for costs by this honourable court or to ask for costs in the House of Lords " might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order so far as aforesaid might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also upon the Case of the Royal College of Nursing of the United Kingdom lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is *Ordered* and *Adjudged,* by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 7th day of November 1980 in part complained of in the said Appeal be, and the same is hereby, **Reversed** and that the Order of Mr. Justice Woolf of the 31st day of July 1980 be, and the same is hereby, **Restored**: And it is further *Ordered,* That there be no Order as to Costs in this House: And it is also further *Ordered,* That the Cause be, and the same is hereby, remitted back

to the Queen's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.

HOUSE OF LORDS

ROYAL COLLEGE OF NURSING OF THE UNITED KINGDOM
(RESPONDENTS)

v.

DEPARTMENT OF HEALTH AND SOCIAL SECURITY
(APPELLANTS)

Lord Wilberforce
Lord Diplock
Lord Edmund-Davies
Lord Keith of Kinkel
Lord Roskill

Lord Wilberforce

MY LORDS,

On 27th October 1967 Parliament passed the Abortion Act 1967. Its long title describes it as an Act "to amend and clarify the law *relating to " termination of pregnancy by registered medical practitioners ".*

Before the Act was passed it was an offence (sc. felony) for *any person* with intent to procure the miscarriage of any woman, whether she be or be not with child, unlawfully to administer to her or cause to be taken by her any poison or other noxious thing or unlawfully to use any instrument or other means whatsoever with the like intent. (Offences Against the Person Act 1861 section 58.) Further, the Infant Life (Preservation) Act 1922 created the offence of child destruction in relation to a child capable of being born alive. These provisions thus affected not only doctors, but nurses, midwives, pharmacists and others: they were in operation in 1967, subject only to the defence judicially given to the doctor in *Rex* v. *Bourne* [1939] 1 K.B. 687.

Section 1 of the Act of 1967 created a new defence, available to any person who might be liable under the existing law. It is available:

(i) " *when a pregnancy is terminated by a registered medical* " *practitioner* " —these are the words of the Act.

(ii) when certain other conditions are satisfied, including the expressed opinion of two registered medical practitioners as to the risks (specified in paragraphs *(a)* and *(b)*) to mother, or child, or existing children, and the requirement that the treatment for the termination of pregnancy must be carried out in a National Health Service Hospital or other approved place.

The present case turns upon the meaning to be given to condition (i).

The issue relates to a non-surgical procedure of medical induction by the use of a drug called prostaglandin. This operates upon the mother's muscles so as to cause contractions (similar to those arising in normal labour) which expel the foetus from the womb. It is used during the second trimester. The question has been raised by the Royal College of Nursing as to the participation of nurses in this treatment, particularly since nurses can be called upon (subject to objections of conscience which are rarely invoked) to carry it out. They have felt, and express grave concern as to the legality of doing so and seek a declaration, that a circular issued by the Department of Health and Social Security, asserting the lawfulness of the nurses' participation, is wrong in law.

There is an agreed statement as to the nature of this treatment and the part in it played by the doctors and the nurses or midwives. Naturally this may vary somewhat from hospital to hospital, but, for the purpose of the present proceedings, the assumption has to be made of maximum nurse participation, i.e. that the nurse does everything which the doctor is not required to do. If that is not illegal, participation of a lesser degree must be permissible.

1. The first step is for a thin catheter to be inserted via the cervix into the womb so as to arrive at, or create, a space between the wall of the womb and the amniotic sac containing the foetus. This is necessarily done

by a doctor. It may, sometimes, of itself bring on an abortion, in which case no problem arises: the pregnancy will have been terminated by the doctor. If it does not, all subsequent steps except number four may be carried out by a nurse or midwife. The significant steps are as follows—I am indebted to Brightman L.J. for their presentation:

2. The catheter (i.e. the end emerging from the vagina) is attached, probably via another tube, to a pump or to a gravity feed apparatus. The function of the pump or apparatus is to propel or feed the prostaglandin through the catheter into the womb. The necessary prostaglandin infusion is provided and put into the apparatus.

*3. The pump is switched on, or the drip valve is turned, thus causing the prostaglandin to enter the womb.

4. The doctor inserts a cannula into a vein.

*5. An oxytocin drip feed is linked up with the cannula. The necessary oxytocin (a drug designed to help the contractions) is supplied for the feed.

6. The patient's vital signs are monitored, so is the rate of drip or flow.

*7. The flow rates of both infusions are, as necessary, adjusted.

*8. Fresh supplies of both infusions are added as necessary.

9. The treatment is discontinued after discharge of the foetus, or expiry of a fixed period (normally 30 hours) after which the operation is considered to have failed.

The only steps in this process which can be considered to have a direct effect leading to abortion (abortifacient steps) are those asterisked. They are all carried out by the nurse, or midwife. As the agreed statement records " the causative factor in inducing ... the termination of pregnancy " is the effect of the administration of prostaglandin and/or oxytocin and " not any mechanical effect from the insertion of the catheter or cannula ".

All the above steps 2-9 are carried out in accordance with the doctor's instructions—which should, as regards important matters, be in writing. The doctor will moreover be on call, but may in fact never be called.

On these facts the question has to be answered: has the pregnancy been terminated by the doctor; or has it been terminated by the nurse; or has it been terminated by doctor and nurse? I am not surprised that the nurses feel anxiety as to this.

In attempting to answer it, I start from the point that in 1967—the date of the Act—the only methods used to produce abortions were surgical methods; of these there were several varieties, well enough known. One of these was by intra-amniotic injection—i.e. the direct injection of glucose or saline solutions into the amniotic sac. It was not ideal or, it appears, widely used. Parliament must have been aware of these methods and cannot have had in mind a process where abortifacient agents were administered by nurses. They did not exist. Parliament's concern must have been to prevent existing methods being carried out by unqualified persons and to insist that they should be carried out by doctors. For these reasons Parliament no doubt used the words, in section 1(1) "termination of " pregnancy by a registered medical practitioner ".

Extra-amniotic administration of prostaglandin was first reported in 1971, and was soon found to have advantages. It involves, or admits, as shown

above, direct and significant participation by nurses in the abortifacient steps. Is it covered by the critical words?

In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to' be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to

3

consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question " What would Parliament have " done in this current case—not being one in contemplation—if the facts had " been before it" attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.

In my opinion this Act should be construed with caution. It is dealing with a controversial subject involving moral and social judgments on which opinions strongly differ. It is, if ever an Act was, one for interpreting in the spirit that only that which Parliament has authorised on a fair reading of the relevant sections should be held to be within it. The new (post-1967) method of medical induction is clearly not just a fresh species or example of something already authorised. The Act is not one for " purposive" or " liberal" or " equitable " construction. This is a case where the courts must hold that anything beyond the legislature's fairly expressed authority should be left for Parliament's fresh consideration.

Having regard particularly to the Act's antecedents and the state of affairs existing in 1967, which involved surgical action requiring to be confined to termination by doctors alone, I am unable to read the words " pregnancy terminated by a registered medical practitioner" as extended or extensible to cover cases where other persons, whether nurses, or midwives, or even lay persons, play a significant part in the process of termination. That a process in which they do so may be reliable, and

an improvement upon existing surgical methods, may well be the case—we do not in fact even know this. It may be desirable that doctors' time should be spared from directly participating in all the stages of the abortifacient process: it may be (though there are very many hospitals and nursing homes in the United Kingdom not all with the same high standards) that nurses, midwives, etc., may be relied upon to carry out the doctor's instructions accurately and well. It may be that doctors, though not present, may always be available on call. All this may, though with some reservation, be granted, but is beside the point. With nurse, etc., participation, to the degree mentioned, a new dimension has been introduced: this should not be sanctioned by judicial decision, but only by Parliament after proper consideration of the implications and necessary safeguards.

The appellants contend that the Act is framed in sufficiently wide terms to authorise what the Department says is lawful.

Their contention, or that which they were willing to accept as their contention during argument was that the words " pregnancy is terminated " by a registered medical practitioner " mean " pregnancy is terminated by " treatment of a registered medical practitioner in accordance with " recognised medical practice". But, with all respect this is not construction: it is rewriting. And, moreover, it does not achieve its objective. I could perhaps agree that a reference to treatment could fairly be held to be implied: no doubt treatment is necessary. But I do not see that this alone carries the matter any further: it must still be treatment by the registered medical practitioner. The additional words, on the other hand, greatly extend the enactment, and it is they which are supposed to introduce nurse participation. But I cannot see that they do this. For a nurse to engage in abortifacient acts cannot, when first undertaken, be in accordance with recognised practice, when it is the legality of the practice

that is in question. Nor can the recognised practice, (if such there is, though the agreed statements do not say so) by which nurses connect up drips to supply glucose or other life-giving or -preserving substances cover connecting up drips, etc. giving substances, designed to destroy life—for that is what they are. The added words may well cover the provision of swabs, bandages, or the handing up of instruments—that would only be common sense: they cannot be used as cover for a dimensional extension of the Act.

The argument for the Department is carried even further than this, for it is said that the words " when a pregnancy is terminated by a registered " medical practitioner" mean " when treatment for the termination of " pregnancy is carried out by a registered medical practitioner". This is said to be necessary in order to cover the supposed cases where the treatment is unsuccessful, or where there is no pregnancy at all. The latter hypothesis I regard as fanciful: the former, if it was Parliament's

contemplation at all in 1967 (for failures under post-1967 methods are not in point) cannot be covered by any reasonable reading of the words. Termination is one thing: attempted and unsuccessful termination wholly another. I cannot be persuaded to embark upon a radical reconstruction of the Act by reference to a fanciful hypothesis or an improbable *casus omissus.*

It is significant, as Lord Denning M.R. has pointed out, that recognised language exists and has been used, when it is desired that something shall be done by doctors with nurse participation. This takes the form " by a " registered medical practitioner or by a person acting in accordance with " the directions of any such practitioner ". This language has been used in four Acts of Parliament (listed by Lord Denning) three of them prior to the Act of 1967, all concerned with the administration of substances, drugs or medicines which may have an impact upon the human body. It has not been used, surely deliberately, in the present Act. We ought to assume that Parliament knew what it was doing when it omitted to use them.

In conclusion. I am of opinion that the development of prostaglandin induction methods invites and indeed merits, the attention of Parliament. It has justly given rise to perplexity in the nursing profession. I doubt whether this will be allayed when it is seen that a majority of the judges who have considered the problem share their views. On this appeal I agree with the judgments in the Court of Appeal that an extension of the Act of 1967 so as to include all persons, including nurses, involved in the administration of prostaglandin is not something which ought to, or can, be effected by judicial decision. I would dismiss the appeal.

Lord Diplock

my lords,

This appeal arises out of a difference of opinion between the Royal College of Nursing of the United Kingdom and the Department of Health and Social Security about the true construction of the Abortion Act 1967; and, in particular, whether it renders lawful the part played by hospital nurses in the treatment for terminating pregnancies by a method known as medical induction. This comparatively modern method which was unknown as a means of bringing about an abortion at the time of the passing of the Act, has come into increasing use for terminating pregnancies in the second trimester (i.e. between the twelfth and twenty-fourth weeks), when it presents less risk to the patient than those methods more exclusively surgical in character that were formerly employed. The treatment takes considerably longer than the purely surgical methods; the average duration is eighteen hours with a maximum of thirty hours and the part played by nurses in the treatment is of greater importance as well as longer than when a purely surgical method is employed.

The Abortion Act 1967 which it falls to this House to construe is described in its long title as "An Act to amend and clarify the law " relating to termination of pregnancy by registered medical practitioners ".

5

The legalisation of abortion, at any rate in circumstances in which the termination of the pregnancy is not essential in order to save the mother's life, is a subject on which strong moral and religious convictions are held; and these convictions straddle the normal party political lines. That, no doubt, is why the Act, which incorporates a " conscience clause " that I shall be quoting later, started its parliamentary life as a private member's bill and, maybe for that reason, it lacks that style and consistency of draftsmanship both internal to the Act itself and in relation to other statutes which one would expect to find in legislation that had its origin in the office of parliamentary counsel.

Whatever may be the technical imperfections of its draftsmanship, however, its purpose in my view becomes clear if one starts by considering what was the state of the law relating to abortion before the passing of the Act, what was the mischief that required amendment, and in what respects was the existing law unclear.

The Abortion Act 1967 applies to England and to Scotland; but your Lordships are not concerned with Scotland in the instant case. In England the " law relating to abortion " which it was the purpose of the Act to amend and clarify, is defined in section 6 of the Act itself as meaning: " sections 58 and 59 of the Offences against the Person Act 1861 ". The relevant section, which it is desirable to set out verbatim, is section 58. (Section 59 deals with supplying abortifacients and instruments for use in unlawful abortions).

" Every Woman, being with Child, who, with Intent to procure
" her own Miscarriage, shall unlawfully administer to herself any
" Poison or other noxious Thing, or shall unlawfully use any Instrument
" or other Means whatsoever with the like Intent, and whosoever, with
" Intent to procure the Miscarriage of any Woman, whether she be or
" be not with Child, shall unlawfully administer to her or cause to
" be taken by her any Poison or other noxious Thing, or shall
" unlawfully use any Instrument or other Means whatsoever with the
" like Intent, shall be guilty of Felony, and being convicted thereof
" shall be liable, at the Discretion of the Court, to be kept in Penal
" Servitude for Life or for any Term not less than Three Years,—or
" to be imprisoned for any Term not exceeding Two Years, with or
" without Hard Labour, and with or without Solitary Confinement."

An offence under the section is committed whether the woman was in fact pregnant, or not, and, if pregnant, whether or not the attempt to terminate it was in fact successful. The section on the face of it draws no

distinction between terminations of pregnancies carried out on the advice of medically-qualified gynaecologists or obstetricians and those " back-street " abortions " that figured so commonly in the calendars of assizes in the days when I was trying crime; but the requirement that in order to constitute the offence the abortifacient must be administered or the instrument used " unlawfully ", indicated that there might be circumstances in which it would be lawful to bring about an abortion.

It had long been generally accepted that abortion was lawful where it was necessary to save the pregnant woman's life; but what circumstances, if any, short of this legitimised termination of a pregnancy does not appear to have attracted judicial notice until, in 1938, the matter was put to a sagaciously selected test by Mr. Aleck Bourne, a well-known obstetrical surgeon at St. Mary's Hospital, London. He there performed an abortion on a fourteen-year-old girl who was seven weeks pregnant as a consequence of being the victim of a particularly brutal rape. He invited prosecution for having done so. The evidence at his trial was that if the girl had been allowed to bear the child she would " be likely to have become a mental " wreck ".

The summing-up by Macnaghten J. in *R. v. Bourne* [1939] 1 K.B. 687, resulted in an acquittal. So the correctness of his statement of the law did not undergo examination by any higher authority. It still remained in 1967 the only judicial pronouncement on the subject. No disrespect is

intended to that eminent judge and former head of my old chambers, if I say that his reputation is founded more upon his sturdy common sense than upon his lucidity of legal exposition. Certainly his summing-up, directed as it was to the highly exceptional facts of the particular case, left plenty of loose ends and ample scope for clarification. For instance, his primary ruling was that the onus lay upon the Crown to satisfy the jury that the defendant did not procure the miscarriage of the woman in good faith for the purpose only of " preserving her life " but this requirement he suggested to the jury they were entitled to regard as satisfied if the probable consequence of the continuance of the pregnancy would be to " make the " woman a physical or mental wreck" —a vivid phrase borrowed from one of the witnesses but unfortunately lacking in precision. The learned judge would appear to have regarded the defence as confined to registered medical practitioners, and there is a passage in his summing-up which suggests that it is available only where the doctor's opinion as to the probable dire consequences of the continuance of the pregnancy was not only held *bona fide* but was also based on reasonable grounds and adequate knowledge—an objective test which it would be for the jury to determine whether, upon the evidence adduced before them, it was satisfied or not.

Such then was the unsatisfactory and uncertain state of the law that the Abortion Act 1967 was intended to amend and clarify. 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. That the statement, which is contained in section 1, is intended to be exhaustive, appears from section 5(2):

" For the purposes of the law relating to abortion, anything done
" with intent to procure the miscarriage of a woman is unlawfully done
" unless authorised by section 1 of this Act ".

This sets aside the interpretation placed by Macnaghten J. in *R.* v. *Bourne* upon the word " unlawfully " in sections 58 and 59 of the Offences against the Person Act 1861.

The " conscience clause " which I have already mentioned is also worth citing before coming to the crucial provisions of section 1. It is section 4(1) and so far as is relevant for the present purposes it reads:

"4.—(1) .... 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 ".

Section 1 itself needs to be set out in extenso:

" 1.—(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 continuance of the pregnancy would involve risk to
" the life of the pregnant woman, or if injury to the physical
" or mental health of the pregnant woman or any existing
" children of her family, greater than if the pregnancy were
" terminated; or

" *(b)* 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.

" (2) In determining whether the continuance of a pregnancy would
" involve such risk of injury to health as is mentioned in paragraph *(a)*
" of subsection (1) of this section, account may be taken of the pregnant
" woman's actual or reasonably foreseeable environment.

" (3) Except as provided by subsection (4) of this section, any
" treatment for the termination of pregnancy must be carried out in
" a hospital vested in the Minister of Health or the Secretary of State

" under the National Health Service Acts, or in a place for the time
" being approved for the purposes of this section by the said Minister
" or the Secretary of State.

" (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."

My Lords, the wording and structure of the section are far from elegant, but the policy of the Act, it seems to me, is clear. There are two aspects to it: the first is to broaden the grounds upon which abortions may be lawfully obtained; the second is to ensure that the abortion is carried out with all proper skill and in hygienic conditions. Subsection (1) which deals with the termination of pregnancies other than in cases of dire emergency consists of a conditional sentence of which a protasis, which is a condition precedent to be satisfied in order to make the abortion lawful at all is stated last: " if two registered medical practitioners are of the opinion ", etc. It is this part of the subsection which defines the circumstances which qualify a woman to have her pregnancy terminated lawfully. They are much broader than the circumstances stated in *R.* v. *Bourne;* and since they depend upon comparative risks of injury to the physical or mental health of the pregnant woman, existing children of the family and to the possibility of abnormalities in the yet unborn child, they are matters of expert medical opinion. The Act leaves them to be decided not by the jury upon expert evidence after the event as in *R.* v. *Bourne* but in advance by two registered medical practitioners whose opinion as to the existence of the required circumstances, if formed in good faith and duly certified under section 2*(a)*, renders treatment for the termination of the pregnancy lawful if it is carried out in accordance with the requirements of the Act.

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 ". Furthermore if " termination " or " terminated " meant only the event of miscarriage and not the whole treatment undertaken with that object in mind, lack of success, which apparently occurs in one to two per cent of cases, would make all who had taken part in the unsuccessful treatment guilty of an offence under section 58 or 59 of the Offences against the Person Act 1861. This cannot have been the intention of Parliament.

The requirement of the Act as to the way in which the treatment is to be carried out, which in my view throws most light upon the second aspect of its policy and the true construction of the phrase in subsection (1) of section 1 which lies at the root of the dispute between the parties to this appeal, is the requirement in subsection (3) that, except in cases of dire emergency, the treatment must be carried out in a National Health Service Hospital (or private clinic specifically approved for that purpose by the Minister). It is in my view evident that in providing that treatment for termination of pregnancies should take place in ordinary hospitals, Parliament contemplated that (conscientious objections apart) like other hospital treatment, it would be undertaken as a team effort in which, acting on the instructions of the doctor in charge of the treatment, junior doctors, nurses, para-medical and other members of the hospital staff would each do those things forming part of the whole treatment, which it would be in accordance with accepted medical practice to entrust to a member of the staff possessed of their respective qualifications and experience.

Subsection (1) although it is expressed to apply only "when a pregnancy " is terminated by a registered medical practitioner" (the subordinate

clause that although introduced by "when" is another protasis and has caused the differences of judicial opinion in the instant case) also appears to contemplate treatment that is in the nature of a team effort and to extend its protection to all those who play a part in it. The exoneration from guilt is not confined to the registered medical practitioner by whom a pregnancy is terminated, it extends to any person who takes part in the treatment for its termination.

What limitation on this exoneration is imposed by the qualifying phrase: "when a pregnancy is terminated by a registered medical practitioner"? In my opinion in the context of the Act, what it requires is that a registered medical practitioner, whom I will refer to as a doctor, should accept responsibility for all stages of the treatment for the termination of the pregnancy. The particular method to be used should be decided by the doctor in charge of the treatment for termination of the pregnancy; he should carry out any physical acts, forming part of the treatment, that in accordance with accepted medical practice are done only by qualified medical practitioners, and should give specific instructions as to the carrying out of such parts of the treatment as in accordance with accepted medical practice are carried out by nurses or other members of the hospital staff without medical qualifications. To each of them, the doctor, or his substitute, should be available to be consulted or called on for assistance from beginning to end of the treatment. In other words, the doctor need not do everything with his own hands; the requirements of the subsection are satisfied when the treatment for termination of a pregnancy is one

prescribed by a registered medical practitioner carried out in accordance with his directions and of which a registered medical practitioner remains in charge throughout.

My noble and learned friend Lord Wilberforce has described the successive steps taken in the treatment for termination of pregnancies in the third trimester by medical induction; and the parts played by registered medical practitioners and nurses respectively in the carrying out of the treatment. This treatment satisfies the interpretation that I have placed upon the requirements of section 1 of the Act. I would accordingly allow the appeal and restore the declaration made by Woolf J.

Lord Edmund-Davies

MY LORDS,

This House is presently concerned with the task of interpreting the Abortion Act 1967, and of applying the interpretation to the termination of pregnancy by a certain type of medical induction. It is well known that the Act was the outcome of a private member's Bill dealing with a highly controversial topic and, as enacted, it is the product of considerable compromise between violently opposed and emotionally charged views. In its preamble it is described as an Act " to amend and clarify the law " relating to termination of pregnancy by registered medical practitioners ", and, far from simply enlarging the existing abortion facilities, in the true spirit of compromise it both relaxed and restricted the existing law.

Before turning to the 1967 Act, reference must be made to the still-extant section 58 of the Offences against the Person Act 1861, which provides as follows :

" Every woman, being with child, who, with intent to procure her
" own miscarriage, shall unlawfully administer to herself any poison or
" other noxious thing, or shall unlawfully use any instrument or other
" means whatsoever with the like intent, and whosoever, with intent
" to procure the miscarriage of any woman, whether she be or be not
" with child, shall unlawfully administer to her or cause to be taken by
" her any poison or other noxious thing, or shall unlawfully use any
" instrument or other means whatsoever with the like intent, shall
" be ... liable ... to [imprisonment] for life."

9

Section 1 of the Abortion Act 1967 is in these terms:

" (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 continuance of the pregnancy would involve risk
" to the life of the pregnant woman, or of injury to the physical
" or mental health of the pregnant woman or any existing
" children of her family, greater than if the pregnancy were
" terminated; or

" *(b)* 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.

" (2) In determining whether the continuance of a pregnancy would
" involve such risk of injury to health as is mentioned in paragraph (a)
" of subsection (1) of this section, account may be taken of the pregnant
" woman's actual or reasonably foreseeable environment.

" (3) Except as provided by subsection (4) of this section, any
" treatment for the termination of pregnancy must be carried out in
" a hospital vested in the Minister of Health or the Secretary of State
" under the National Health Service Acts, or in a place for the time
" being approved for the purposes of this section by the said Minister
" or the Secretary of State.

" (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."

Although no reference to an act done " for the purpose only of preserving "the life of the mother" appears in the 1861 Act, it does appear in the Infant Life (Preservation) Act 1929, section 1. And in *Bourne* [1939] 1 K.B. 687 Macnaghten J. expressed the view that it represented the common law and should be read into the earlier Act by reason of the inclusion of the adverb " unlawfully " in section 58. In that case a surgeon had aborted a girl who had been shockingly raped and, although there was no immediate danger to her life, he claimed that she would have become a physical and mental wreck had her pregnancy been allowed to continue. Directing the jury on a charge of contravening section 58, the learned judge said of " preserving the life of the mother " that the words—

" ought to be construed in a reasonable sense, and, if the doctor is
" of opinion, on reasonable grounds and with adequate knowledge, that
" the probable consequence of the continuance of the pregnancy will
" be to make the woman a physical or mental wreck, the jury are
" quite entitled to take the view that the doctor who, under those
" circumstances and in that honest belief, operates, is operating for the
" purpose of preserving the life of the mother."

Following the acquittal in that case, the courts did not closely scrutinise the evidence of danger to life itself; see, for example, *Newton* v. *Stungo* [19581] Crim. L.R. 469 where, on a section 58 charge of unlawfully using an instrument, Ashworth J. directed the jury that, " Such use of an instrument " is unlawful unless the use is made in good faith for the purpose of " preserving the life *or health* of the woman ", and added, " when I say " ' health ' I mean not only her physical health but also her mental health ".

My Lords, such was the law and practice when the Abortion Act reached the Statute Book in 1967, section 6 thereof providing that the phrase "the " law relating to abortion" used in sections 1(1) and 5(2) thereof means " sections 58 and 59 of the Offences against the Person Act 1861, and any " rule of law relating to the procurement of abortion ". And section 5(2)

10

itself provided that, " For the purposes of the law relating to abortion, " anything done with intent to procure the miscarriage of a woman is " unlawfully done unless authorised by section 1 of this Act".

Details of the termination of pregnancy by administering prostaglandin are the subject of a helpful agreed statement prepared by the parties to this litigation. This has been examined in the speech of my noble and learned friend, Lord Wilberforce, and it is sufficient for me to say that the Royal College of Nursing, while adopting a neutral role, were and remain deeply disturbed as to the legality of the marked degree of participation by nurses in the challenged method of induction and therefore sought clarification and guidance from the court. They must ruefully regard such judicial illumination as has hitherto been vouchsafed them, Woolf J. pronouncing " without any doubt at all" that the prostaglandin procedure is permissible within the terms of section 1 of the 1967 Act, while the Court of Appeal unanimously held that it is not, Lord Denning M.R. declaring emphatically that " the continuous act of administering prostaglandin from the moment it " is started until the unborn child is expelled from the mother's body . . . " must be done by the doctor personally. It is not sufficient that it is done " by a nurse when he is not present."

My Lords, I have already commented that it would be quite wrong to regard the 1967 Act as wholly permissive in character, for it both restricted and amplified the existing abortion law. It amplified " the law relating to " abortion " as declared in *Bourne (ante)* by extending it in section l(l)*(a)* to cases where " the continuance of the pregnancy would involve risk to the ... " physical or mental health of ... any existing children of [the pregnant " woman's] family, greater than if the pregnancy were terminated "; and in section 1(1)*(b)* by including the case of " substantial risk that if the *child* " were born it would suffer from such physical or mental abnormalities as " to be seriously handicapped."

On the other hand, the Act also restricted the *Bourne* law in several ways. The pregnancy must now be terminated " by a registered medical " practitioner ", and this even if, in the words of section 1 (4), "... 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", whereas *Bourne* imposed no such restriction in the cases predicated, and a qualified doctor who was not a registered medical practitioner could have invoked the decision in that case. And, save in those circumstances of urgency, abortive treatment is required under the Act to be carried out in such premises as are designated in section 1 (3) and section 3. Again, in the forefront is the requirement in section 1(1) of the opinion of two doctors that the risks indicated in *(a)* or *(b)* are involved if pregnancy were allowed to go full term. And a further practical (though not legal) restriction was imposed by the requirement under section 2 that the " registered medical practitioner who terminated a pregnancy [must] " give notice of the termination and such other information relating to the " termination as may be ... prescribed ".

My Lords, the opening words of section 1(1) are clear and simple, clear to understand and simple to apply to the only abortive methods professionally accepted in 1967 when the Act was passed. Save in grave emergency, only a qualified doctor or surgeon could then lawfully perform the orthodox surgical acts, and the statute could have had no other person in mind. Then should section 1 be interpreted differently now that abortive methods undreamt of in 1967 have since been discovered and become widely applied? The answer must be that its simple words must not be distorted in order to bring under the statutory umbrella medical procedures to which they cannot properly be applied, however desirable such an extension may be thought to be. The extra-amniotic procedure first reported in 1971 has already been described by my noble and learned friend, Lord Wilberforce, and it is sufficient for my present purpose to quote merely the final paragraph of the " Agreed Statement as to Clinical Background ":

" It will be appreciated that in the medical induction process the " causative factor in inducing the labour and hence the termination of

" pregnancy is the effect of the administration of prostaglandin and/or " oxytocin and not any mechanical effect from the insertion of the " catheter or cannula. In that the nurse does, on the instructions of the " doctor, commence or augment the flow of prostaglandin or oxytocin, " and even sometimes effect the connection between the already " inserted catheter and the prostin pump and the already intravenous " cannula and the oxytocin infusion, her role in the process does " include acts which have, and are intended to have, an abortifacient " effect. Such acts are, however, always carried out in accordance with " the specific instructions of the registered medical practitioner ".

In my judgment, it is quite impossible to regard an abortion resulting from such procedure as one " terminated by a registered medical practitioner ", for the acts indispensable to termination are in many such cases performed not by the doctor but by the nurses over a long period of hours after the doctor last saw the pregnant woman. And, despite the claims of the Solicitor-General that he sought simply to give the statutory words " their " plain and ordinary meaning ", he substantially departed from that approach by submitting that they should be read as meaning " terminated by treatment " for the termination of pregnancy carried out by a registered medical " practitioner in accordance with recognised medical practice ". My Lords, this is redrafting with a vengeance. And even were it permissible, it would still remain to consider what *part* the doctor played in the treatment, in order to ensure that it was not so remote from the termination as to make it impossible to say in any realistic sense that it was *he* who terminated the pregnancy. I am in respectful agreement with Brightman L.J., who said of the extra-amniotic procedure:

"... it would be a misuse of language ... to describe such a
" treatment for termination of a pregnancy as ' carried out by' a
" registered medical practitioner—however detailed and precise the
" written instructions given by the registered medical practitioner to the
" nurse . . . The true analysis is that *the doctor has provided the*
" *nurse with the means to terminate the pregnancy*, not that the doctor
" has terminated the pregnancy ".

It is true that the word " treatment" is to be found in several places in the Act, and that the phrase " treatment of the termination of pregnancy" appears both in section 1(3) and in section 3(1), but both are significantly different from the language of section 1(1). And, had Parliament been minded to legislate on the lines which the appellants submit was its aim, the Master of the Rolls demonstrated by reference to several earlier statutes in the medical field that the Legislature had ready to hand suitable words which would have rendered unnecessary any such expansive interpretation as that favoured in the present instance by the Solicitor-General.

My Lords, at the end of the day the appellants were driven to rely on a submission that, were section 1(1) given its literal meaning, such absurd consequences would follow that a liberal construction is unavoidable if the 1967 Act is to serve a useful purpose. In the foreground was the submission that, were a termination of pregnancy embarked upon when (as it turned out) the woman was not pregnant, the Act would afford no defence to a doctor prosecuted under the 1861 Act. And it was secondly urged that he would be equally defenceless even where he personally treated a pregnant woman throughout if, for some reason, the procedure was interrupted and the pregnancy not terminated. I have respectfully to say that in my judgment it is these objections which are themselves absurd. Lawful termination under the Act predicates the personal services of a doctor operating in section 1 (3) premises and armed with the opinion of two medical

practitioners. But where termination is nevertheless not achieved, the appellants invite this House to contemplate the doctor and his nursing staff being prosecuted under section 58 of the 1861 Act, the charge being, of course, not the unlawful termination of pregnancy (for *ex hypothesi* there was *no* termination) but one of unlawfully administering a noxious thing or unlawfully using an instrument with intent to procure miscarriage. And on *that* charge unlawfulness has still to be established and the prosecution

would assuredly fail. For the circumstances predicated themselves establish the absence of any *mens rea* in instituting the abortive treatment, and its initial lawfulness could not be rendered unlawful either by the discovery that the woman was not in fact pregnant or by non-completion of the abortive treatment. Were it otherwise, the unavoidable conclusion is that doctors and nurses could in such cases be convicted of what in essence would be the extraordinary crime of attempting to do a *lawful* act.

My Lords, it was after drafting the foregoing that I happened upon the following passage in Smith and Hogan's " Criminal Law" (4th edition, p.346) which I now gratefully adopt, for it could not be more apposite:

"... the legalisation of an abortion must include the steps which
" are taken towards it. Are we really to say that these are criminal
" until the operation is complete, when they are retrospectively
" authorised, or alternatively that they are lawful until the operation is
" discontinued or the woman is discovered not to be pregnant when,
" retrospectively, they become unlawful? When the conditions of the
" Act are otherwise satisfied, it is submitted that [doctor] is not
" unlawfully administering, etc., and that this is so whether the
" pregnancy be actually terminated or not ".

I am in this way fortified in my conclusion that the " absurdities " on which the Solicitor-General relies are in reality non-existent and that there is no reason for not giving the specific words of section 1 of the Act their plain and ordinary meaning. Doing just that, the prostaglandin treatment presently adopted requires the nursing staff to participate unlawfully in procedures necessitating their personally performing over a period of several hours a series of acts calculated to bring about a termination of pregnancy. This they cannot lawfully do," and in my judgment the Royal College of Nursing were entitled to a declaration in those terms.

My Lords, I express no view regarding this result, save that I believe it to be inevitable on the facts of the case, and this despite my awareness that several thousand extra-amniotic terminations are now performed annually. If it is sought to render such medical induction lawful, the task must be performed by Parliament. But under the present law it is a registered

medical practitioner who must terminate pregnancy. I would therefore affirm the unanimous view of the Court of Appeal and dismiss this appeal.

Lord Keith of Kinkel

MY LORDS,

This appeal is concerned with the question whether section 1(1) of the Abortion Act 1967 applies, so as to relieve the participants from criminal liability, to the procedures normally followed in operating a modern technique for inducing abortion by medical means.

The technique, which has been evolved and become common practice over the past ten years for the purpose of terminating pregnancy during the third trimester, is considered in medical circles to involve less risk to the patient than does surgical intervention. The details of the procedure have been fully described in the judgments of the courts below. Its main feature is the introduction via a catheter into the interspace between the amniotic sac and the wall of the uterus of an abortifacient drug called prostaglandin. The purpose of this is to induce uterine contractions which in most cases, but not in all, result in the expulsion of the foetus after a period of between 18 and 30 hours. The process is assisted by the introduction into the blood stream, via a cannula inserted in a vein, of another drug called oxytocin. Responsibility for deciding upon and putting the procedure into operation rests with a registered medical practitioner who himself inserts the catheter and the cannula. The attachment of the catheter and the cannula to a supply of prostaglandin and of oxytocin respectively, and the initiation and regulation of the flow of these drugs

13

are carried out by a nurse under the written instructions of the doctor, who is not normally present at those stages. He or a colleague is, however, available on call throughout.

Section 1(1) of the 1967 Act can operate to relieve a person from guilt of an offence under the law relating to abortion only " when a pregnancy " is terminated by a registered medical practitioner". Certain other conditions must also be satisfied, but no question about these arises in the present case. The sole issue is whether the words I have quoted cover the situation where abortion has been brought about as a result of the procedure under consideration.

The argument for the respondents is, in essence, that the words of the subsection do not apply because the pregnancy has not been terminated by any registered medical practitioner, but by the nurse who did the act or

acts which directly resulted in the administration to the pregnant woman of the abortifacient drugs.

In my opinion this argument involves placing an unduly restricted and unintended meaning on the words " when a pregnancy is terminated ". It seems to me that these words, in their context, are not referring to the mere physical occurrence of termination. The side-note to section 1 is " Medical termination of pregnancy ". " Termination of pregnancy " is an expression commonly used, perhaps rather more by medical people than by laymen, to describe in neutral and unemotive terms the bringing about of an abortion. So used, it is capable of covering the whole process designed to lead to that result, and in my view it does so in the present context. Other provisions of the Act make it clear that termination of pregnancy is envisaged as being a process of treatment. Section 1(3) provides that, subject to an exception for cases of emergency, " treatment " for the termination of pregnancy " must be carried out in a National Health Service hospital or a place for the time being approved by the Minister. There are similar references to treatment for the termination of pregnancy in section 3, which governs the application of the Act to visiting forces. 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. Section 5(2) is also of some importance. It provides that " for the purposes of the law relating to " abortion, anything done with intent to procure the miscarriage of a " woman is unlawfully done unless authorised by section 1 of this Act". This indicates a contemplation that a wide range of acts done when a pregnancy is terminated under the given conditions are authorised by section 1, and leads to the inference that, since all that section 1 in terms authorises is the termination of pregnancy by a registered medical practitioner, all such acts must be embraced in the termination.

Given that the termination of pregnancy under contemplation in section 1(1) includes the whole process of treatment involved therein, it remains to consider whether, on the facts of this case, the termination can properly be regarded as being " by a registered medical practitioner ". In my opinion this question is to be answered affirmatively. The doctor has responsibility for the whole process and is in charge of it throughout. It is he who decides that it is to be carried out. He personally performs essential parts of it which are such as to necessitate the application of his particular skill. The nurse's actions are done under his direct written instructions. In the circumstances I find it impossible to hold that the doctor's role is other than that of a principal, and I think he would be very surprised to hear that the nurse was the principal and he himself only an accessory. It is true that it is the nurse's action which leads directly to the introduction of abortifacient drugs into the system of the patient, but that action is done

in a ministerial capacity and on the doctor's orders. Even if it were right to regard the nurse as a principal, it seems to me inevitable that the doctor should also be so regarded. If both the doctor and the nurse were

principals, the provisions of the subsection would be still satisfied, because the pregnancy would have been terminated by the doctor notwithstanding that it had also been terminated by the nurse.

I therefore conclude that termination of pregnancy by means of the procedures under consideration is authorised by the terms of section 1(1). This conclusion is the more satisfactory as it appears to me to be fully in accordance with that part of the policy and purpose of the Act which was directed to securing that socially acceptable abortions should be carried out under the safest conditions attainable. One may also feel some relief that it is unnecessary to reach a decision involving that the very large numbers of medical practitioners and others who have participated in the relevant procedures over several years past should now be revealed as guilty of criminal offences.

My Lords, for these reasons I would allow the appeal, and restore the declarations granted by Woolf J.

Lord Roskill

my lords,

The long title of the Abortion Act, 1967, (" the 1967 Act ") is " An Act " to amend and clarify the law relating to the termination of pregnancy by registered medical practitioners". The respondents accepted before your Lordships' House that the 1967 Act had a social purpose, namely the making of abortions available more freely and without infringement of the criminal law but subject always to the conditions of that Act being satisfied. But Parliament sought to achieve that admitted social purpose not as in the case of some social reforms by expressly creating some positive entitlement on the part of members of the public to that which the statute sought to achieve but by enacting in section 1 (1) that "a person" (not, be it noted, simply " a registered medical practitioner ") should " not be " guilty of an offence under the law relating to abortion " provided that certain other conditions were satisfied. " The law relating to abortion " was defined in section 6 as meaning " sections 58 and 59 of the Offences " against the Person Act 1861, and any rule of law relating to the procure- " ment of abortion . . . ". Thus the scheme of the 1967 Act was to exempt from the sanctions of the criminal law imposed principally by the Offences against the Person Act 1861 ("the 1861 Act") upon those who carried out or attempted to carry out abortions those, but only those, who

carried them out in a manner which satisfied all the requirements of the 1967 Act.

My Lords, the question which now requires determination by your Lordships' House arises because of the development by the medical profession of the termination of pregnancy by the extra-amniotic process, a process not developed nor indeed in use when the 1967 Act became law. The details of the extra-amniotic process and its development will be found in the " Agreed Statement as to Clinical Background " which the parties conveniently made available to the courts below and in the agreed addition to that statement which was further agreed by the parties for the purposes of the instant appeal.

In his judgment in the Court of Appeal Brightman L.J. analysed the successive steps in the case of extra-amniotic medical induction for the termination of pregnancies under nine steps and on the basis of what was called " maximum nurse participation " in that process and further detailed under each of those nine steps those which required action by the doctor and those which required action only by the nurse. I gratefully adopt, without repetition, what the learned Lord Justice there states. It will be observed that of those nine steps the doctor is only positively involved in performing two, the first and the fourth. The remainder are all performed by the nurse. The first step in which the doctor is personally involved is the insertion of the catheter into the womb. The fourth is the insertion

15

of the cannula into the vein but no fluid is then passed by the doctor through the cannula. Thereafter every positive step is taken by the nurse up to and including the ninth step which occurs when the nurse discontinues the treatment either because the foetus has been discharged or because the allotted period has elapsed and the operation has failed. But it must be emphasized that every step taken by the nurse will be in accordance with the instructions of the doctor and those will be written instructions in all important respects. Though the insertion of the catheter into the womb by the doctor can have an abortifacient effect, the intention of the entirety of the process is that the abortion shall be achieved by the administration of the fluids by the nurse.

On those facts, which I have summarized—they will be found more fully detailed in the judgments of the courts below—the crucial issue is whether " a pregnancy is terminated by a registered medical practitioner " assuming, as of course I do for present purposes, that the other prerequisites of section 1 (1) of the 1967 Act are also satisfied. If a narrow meaning is given to the phrase I have just quoted, then it is the nurse and not the doctor who terminates the pregnancy. If that be right the doctor and the nurse are each guilty of a separate offence against the 1861 Act, the nurse because she is carrying out an abortion when she is not a doctor and the

doctor because he is attempting to carry out an abortion when he engages in the first step which is not authorised by the 1967 Act. In addition, he is aiding and abetting the nurse's offence and both, and maybe others as well, are guilty of conspiracy to infringe the 1861 Act. This is the position which the respondents feared might arise and which led them to institute the present proceedings on behalf of the nursing profession in order that the question whether or not their profession are, in these circumstances, entitled to the protection of the 1967 Act might be finally determined. If the construction placed upon the 1967 Act by the majority of the Court of Appeal (Lord Denning M.R. and Sir George Baker) is correct, then the respondents' fears are indeed well-founded.

The appellants, on the other hand, contend for a wider construction of the 1967 Act. It was this wider construction which found favour both with Woolf J. and with Brightman L.J. It was this view of the law for which the appellants had contended, under legal advice, in a letter dated 25th February 1980, the circulation of which led to the institution of the present proceedings. The difference of view between Woolf J. and Brightman L.J. arose only upon the facts since the learned Lord Justice felt that the actual termination of the pregnancy by the nurse could not legitimately be described as " termination by a registered medical practitioner ". The learned Lord Justice summarized his view by saying that " the doctor has provided the nurse with the means to terminate the " pregnancy, not that the doctor has terminated the pregnancy ".

Learned counsel for the respondents did not shrink from the anomalies which would necessarily flow from the acceptance of his submission and the construction adopted by the majority of the Court of Appeal. There was, he said, only a limited qualification engrafted upon an otherwise unchanged criminal law and in 1967 Parliament had legislated by reference to the surgical techniques of abortion as they then were and not for other techniques of abortion as they might subsequently be evolved. Pressed to say whether a new method must not be adopted which involved less risk to the patient, he replied that any such new method would only be lawful if the doctor were present throughout, a view which would seemingly make unrealistic demands upon medical manpower since no one suggested that each of the seven steps taken by the nurse, to which I have already referred, was not well within the capacity of someone possessed of the qualifications and experience which such a nurse would necessarily possess.

My Lords, I have read and re-read the 1967 Act to see if I can discern in its provisions any consistent pattern in the use of the phrase " a " pregnancy is terminated " or " termination of a pregnancy " on the one hand and " treatment for the termination of a pregnancy " on the other hand. One finds the former phrase in section 1(1) and (l)*(a)*, the latter

in section 1(3), the former in section 1(4), the latter in section 2(1)*(b)*, and again in section 3(l)*(a)* and *(c)*. 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). It was suggested that acceptance of the appellants' submission involved re-writing that subsection so as to add words which are not to be found in the language of the subsection. My Lords, with great respect to that submission, I do not agree. If one construes the words " when a pregnancy is terminated " by a registered medical practitioner" in section 1(1) as embracing the case where the " treatment for the termination of a pregnancy is carried out " under the control of a doctor in accordance with ordinary current medical " practice" I think one is reading " termination of pregnancy" and " treatment for termination of pregnancy " as virtually synonymous and as I think Parliament must have intended they should be read. Such a construction avoids a number of anomalies as, for example, where there is no pregnancy or where the extra-amniotic process fails to achieve its objective within the normal limits of time set for its operation. This is, I think, the view which appealed to Woolf J. and to Brightman LJ. and I find myself in respectful agreement with that view. But with respect I am unable to share the learned Lord Justice's view on the facts. I think that the successive steps taken by a nurse in carrying out the extra-amniotic process are fully protected provided that the entirety of the treatment for the termination of the pregnancy and her participation in it is at all times under the control of the doctor even though the doctor is not present throughout the entirety of the treatment.

My Lords, I have reached this conclusion simply as a matter of the construction of the 1967 Act. But as I have already pointed out, Parliament has achieved whatever reforms the 1967 Act did achieve by engrafting qualifications upon the criminal law principally as enacted in the 1861 Act. If the respondents' contentions and the views of the majority of the Court of Appeal are correct and one envisages a doctor and a nurse on trial on indictment for offences or attempted offences against the 1861 Act, the trial judge would be bound at least to tell the jury that if they found the facts as Brightman L.J. described them in his judgment they might find it difficult to see what verdicts other than verdicts of guilty they could properly return even though such a trial judge might properly shrink from telling them that it was positively their duty in those circum-stances to convict. Either direction would, I apprehend, be given with reluctance and acted upon, if at all, with dismay.

My Lords, it was common ground that if the appeal succeeded the proper declaration was that granted to the appellants by Woolf J. Since in my

opinion the appeal should succeed it follows that I would allow the appeal and grant the same declaration as was granted by that learned judge.

313063 Dd 8013619 250 2/81
