

### 10.11 Conscientious objection

Of course abortion is a highly controversial issue. Inevitably there will be medical practitioners who have moral objections to the procedure.<sup>211</sup> The Abortion Act, section 4 makes it clear that if someone has a conscientious objection to abortion they are not under a legal duty to participate in any treatment authorized by the Act. This is subject to some limitations. First, it should be noticed that section 4 does not affect the duty of a doctor to perform an abortion if that is necessary to save the life or prevent permanent injury to the physical or mental health of a pregnant woman. So if a patient's life is in danger or she is at risk of serious injury, the doctor's conscience does not provide a defence to any legal action which may result from her or him not acting. Of course, in many cases, a doctor with a conscientious objection in such a case will be able to find a colleague to carry out any necessary surgery. Second, the Act does not remove the duty on a doctor to advise. Therefore if a patient visits a GP wanting to discuss an abortion, but the GP has contentious objections to abortions, she or he should still refer the patient to another practitioner.<sup>212</sup> Third, section 4 does not affect the duties owed to those who have had an abortion. For example, if due to a negligently performed abortion a woman required a blood transfusion, a doctor could not refuse to participate in the blood transfusion because of her or his objections to abortion.

The leading case on section 4 is the following:

#### KEY CASE *Janaway v Salford AHA* [1989] AC 537 (HL)

The applicant was employed as a secretary at a Health Centre. She was a Roman Catholic and refused to type a letter referring a patient to a consultant for a possible abortion. She was disciplined for failing to carry out the instructions and in due course her employment was terminated. She applied for judicial review and sought to quash the decision to dismiss her and a declaration that she was entitled to refuse to participate in typing work if it was connected to an abortion. She argued that but for the Abortion Act she could have been, in typing the letter, liable as an accessory to the offence of procuring a miscarriage. The Act would have provided her with a defence to such a charge and therefore she was acting in a way authorized by the Act. But, if so, she was entitled to rely on section 4. Their Lordships dismissed the application, holding that the use of the words 'in any treatment under the Act' indicated that section 4 only applies to 'actually taking part in the treatment'. Had Parliament intended the section to apply to people such as the applicant, Lord Keith suggested, the word treatment would not have been used and instead section 4 would have referred to 'anything authorized by the Act'.

The protection of conscience has been further protected by a resolution of the Council of Europe's Parliamentary Assembly.<sup>213</sup> It states in the first paragraph:

[n]o person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an

<sup>211</sup> The BMA (2004) says that it is neutral on the ethical debate surrounding abortion. Although see BMA (2007d), which argues that in the first trimester the consent of the woman alone should be sufficient in law to justify abortion.

<sup>212</sup> *Barr v Matthews* (1999) 52 BMLR 217, although it is unclear whether this is a legal duty.

<sup>213</sup> Resolution 1763 (2010), discussed Campbell (2011).

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Some commentators regard care professionals.<sup>214</sup> They regard as immoral must protect the conscience of treatment which the law could not mark a point that was morally required in accordance with conscience not act. In response it is said that science is a greater invasion of acting in what one thinks is right. Those who refuse to participate in 'treatment' who do not have a conscientious objection. That could be seen as a matter of belief, but not if doing so is required. Gerrard, writing in support of the Act on grounds of conscience, notes a range of ethical views.<sup>215</sup>

### 10.12 Actions to prevent

If a person wishes to oppose an abortion being performed? It appears that

(i) In *Paton v Trustees of British Birth Control* Baker held that the father's claim under the 1967 Act did not even if the father took place. He did not, in fact, seek an abortion not to take place. The father sought to argue that even if the father, he could intervene to prevent the abortion because the foetus was said to be a person.

(ii) In *C v S*<sup>219</sup> a man's claim that the abortifacient RU-486 should be left to the courts. The court also rejected the claim that the foetus could not be considered a person.

<sup>214</sup> Foster (2009: Chap 3).

<sup>216</sup> BMA (2008). See also GM [1979] QB 276. <sup>219</sup>

<sup>220</sup> In a Canadian decision *Leclerc* that a pro-life pressure group sought to prevent abortions.

abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason.

Some commentators regard these provisions as necessary to protect the rights of health care professionals.<sup>214</sup> Their autonomy not to be involved in procedures which they regard as immoral must be protected. However, Wicclair<sup>215</sup> has argued that we do not protect the conscience of professionals who feel morally obliged to offer a service or treatment which the law or ethics does not permit. For example, a health care professional could not mark a patient with a religious symbol even if the professional thought that was morally required. Wicclair argues that as we do not protect the right to act in accordance with conscience when a professional acts, so too when a professional does not act. In response it might be said that being forced to act contrary to one's conscience is a greater invasion of one's freedom of conscience than being prevented from acting in what one thinks is a good way. The BMA supports the right of the doctor to refuse to participate in 'morally sensitive procedures', but adds 'as long as colleagues who do not have a conscientious objection are available to carry out the procedure'.<sup>216</sup> That could be seen as taking the view that a doctor has a right to respect for their belief, but not if doing so would mean a patient would not have access to an abortion. Gerrard, writing in support of allowing doctors to refuse to be involved in abortions on grounds of conscience, argues that it is beneficial to society to have doctors with a range of ethical views.<sup>217</sup>

### 10.12 Actions to prevent abortion

If a person wishes to oppose an abortion are they able to seek an injunction to prevent it being performed? It appears not. The leading decisions are as follows:

(i) In *Paton v Trustees of the British Pregnancy Advisory Service*<sup>218</sup> a husband sought an injunction to prevent his wife from having an abortion without his consent. Sir George Baker held that the father had no right to such an injunction. Indeed he noted that the 1967 Act did not even require a father to be consulted or notified before an abortion took place. He did not, however, rule out the possibility that a court might order an abortion not to take place where a doctor was clearly acting in bad faith. Mr Paton also sought to argue that even if he did not have standing to prevent the abortion as the father, he could intervene to prevent it on behalf of the foetus. This argument failed because the foetus was said not to have any legal standing in the eyes of the law.

(ii) In *C v S*<sup>219</sup> a man sought to prevent his partner having an abortion. The approach in *Paton* was followed, with Sir John Donaldson MR stating that even where it was claimed that the abortion would be illegal (ie the doctor was acting in bad faith) the matter should be left to the Director of Public Prosecutions or the Attorney-General.<sup>220</sup> The court also rejected the man's attempt to claim to represent the foetus on the ground that the foetus could not be a party to the proceedings. He failed in the English courts

<sup>214</sup> Foster (2009: Chap 3). <sup>215</sup> Wicclair (2009).

<sup>216</sup> BMA (2008). See also GMC (2008b) which takes a similar line.

<sup>217</sup> Gerrard (2009).

<sup>218</sup> [1979] QB 276. <sup>219</sup> [1988] QB 135.

<sup>220</sup> In a Canadian decision *League for Life in Manitoba Ltd v Morgentaler* [1985] 4 WWR 633 it was held that a pro-life pressure group did not have standing to bring an application to prevent a doctor performing abortions.

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