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A COURT OF LAW OR A COURT OF CONSCIENCE: A CRITIQUE OF THE DECISION IN RE A (CHILDREN)

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Abstract

This article critiques the legal reasoning adopted by the Court of Appeal in *Re A (Children)* – the controversial case which addressed the separation of conjoined twins Rose and Grace Attard (or ‘Mary and Jodie’). Separation would ensure survival for Jodie and death for Mary; as such, the Court of Appeal was required to consider whether separation constituted murder or whether it was justifiable as a protective measure for Jodie. In this article, the author examines the separate lines of reasoning adopted by each of the three judges in *Re A*, explores the precedents used to justify separation, discusses the distinction between ‘morality’ and ‘ethics’, and the impact the decision in *Re A* has had on subsequent ‘conjoined twins’ cases.

Keywords: sanctity of life, *Re A* conjoined twins, defence of necessity, child’s best interests

Introduction

In August 2000, twins Rose and Grace Attard (under the pseudonyms Mary and Jodie) were born conjoined and severely disadvantaged at Manchester Hospital. Whilst Jodie was responsive and relatively healthy,² Mary had a primitive brain, a deficient heart and very little lung tissue.³ Fortunately for Mary, an artery existed between the twins which enabled Jodie’s heart to pump oxygenated blood around the bodies of both girls, sustaining Mary’s life, but tragically this put an intolerable strain on Jodie, and the doctors forecast that Jodie’s heart would be unable to serve them both for much more than a further three to six months.⁴ They recommended separation, to give Jodie a chance for a long and normal life; however they also

¹ Laura is currently taking some time out of her studies to travel in South east Asia

² *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam. 147, p.159-161.

³ *Ibid.*, p.161-162.

⁴ *Ibid.*, p.163.

foresaw that separation would mean immediate and inevitable death for Mary who could not survive with her own organs.⁵

The hospital made an application to the courts for a declaration that separation would be lawful, in light of the unusual facts and the twins' parents' refusal of consent due to their beliefs as Roman Catholics.⁶ Johnson J granted the declaration that separation would be lawful, on the grounds that separation was in the best interests of both Jodie and Mary, and that cutting off the blood supply would be analogous to removing artificial nutrition and ventilation under the *Bland*⁷ principle. The parents of the twins then appealed to the Court of Appeal, on the following grounds: (1) That separation could not be in Mary's best interests; (2) That separation would not be in Jodie's best interests; (3) Even if the operation was in the best interests of the twins, separation would constitute an unlawful act, and could not be likened to a withdrawal of treatment but is instead a positive act. This article is a critique of the Court of Appeal decision in this case, focusing on three main areas of discussion in the judgments - the principle of the sanctity of life, the application of the defence of necessity, and the application of private defence.

2 Sanctity of Life

The court was primarily tasked with assessing whether the separation was in the best interests of each of the twins. With regards to Jodie, it did not take the court much effort to conclude that her welfare would be best served by being able to grow past infancy and lead a normal and healthy life. However, some critics have suggested that this conclusion was reached too easily, questioning whether the separation was in fact in Jodie's best interests. Gillon, for example, acknowledges that, as a result of the separation, Jodie would be 'severely disabled, would need a series of further painful and distressing operations, and when she grew up would always know that her life had been saved as a result of a decision taken on her behalf that would kill her sister.'⁸ The issue of the separation was even less clear with regards to Mary's best interests. At first instance, Johnson J, taking into account the length and quality of life Mary would experience, ruled that Mary's life, if allowed to live it, would 'be very seriously to her disadvantage.'⁹ He noted that 'however pitiable [Mary's] state

⁵ *Ibid.*, p.169.

⁶ *Ibid.*, p.172-173.

⁷ *Airedale NHS Trust v Bland* [1993] 1 All ER 821 (HL).

⁸ Gillon, R., 'Jodie and Mary, Conjoined Twins: A Case of Judicial Moral Hubris?' (2004) 72 (3) *Medico-Legal Journal* 3, p.6.

⁹ Quoted in *Re A (Children)* p.175.

now, it will never improve during the few months she would have to live if not separated',¹⁰ and held that this was sufficient reason to deny her right to life in favour of her sister's, stating, 'I conclude that the few months of Mary's life if not separated from her twin would not simply be worth nothing to her, they would be hurtful.'¹¹

This article suggests that such reasoning is greatly flawed. Harris writes that 'where the individual with short life expectancy has a life to lead and wants to lead it for whatever time is left... it would seem inconceivable that they would be killed against their will by a decision of the courts.'¹² Furthermore, in *F v West Berkshire Health Authority* the court considered the definition of treatment in the best interests of the patient, coming to the conclusion that 'the operation or other treatment will be in their best interests if, but *only if*, it is carried out in order either to save their lives, or to ensure improvement or prevent deterioration in their physical or mental health' [Emphasis added].¹⁵ None of these potential goals were present in Mary's case; as such, the ruling of Johnson J that death would be in Mary's best interests seems at odds with existing authority. Furthermore, in light of this express precedent, it can be argued that the court has a *duty* to conclude that the separation is *not* in the best interests of Mary, and that no other conclusion may be reached without rejecting *F* outright.

In *Re Superintendent of Family & Child Service and Dawson*, McKenzie J stated:

I do not think that it lies within the prerogative of any parent or of this court to look down upon a disadvantaged person and judge the quality of that person's life to be so low as not to be deserving of continuance... It is not appropriate for an external decision maker to apply his standards of what constitutes a liveable life and exercise the right to impose death if that standard is not met in his estimation.¹⁷

To make such a decision would be to create as many problems as it would solve; in what circumstances would life not be worth living, and who would be the judge of the 'worth' of a person like Mary's life? The Court of Appeal rejected the conclusion of Johnson J, stating instead that every person's life will be worth something to them,

¹⁰ *Ibid.*, p.174.

¹¹ p.175.

¹² Harris, J., 'Human Beings, Persons and Conjoined Twins: An Ethical Analysis of the Judgment in *Re A*' (2001) 9 *Medical Law Review* 221, p.221.

¹⁵ *F v West Berkshire Health Authority* [1990] 2 AC 1.at p.55

¹⁷ *Re Superintendent of Family & Child Service and Dawson* (1983) 145 D.L.R. (3d) 610 at 620.

however hopeless.¹⁸ Ward LJ asked, 'is it in Mary's best interest that an operation be performed to separate her from Jodie when the certain consequence of that operation is that she will die?' He concluded, simply, that 'no, that is not in her best interests.'²⁰

The court therefore found itself in a situation where the interests of the twins were opposed, and the question became can, and should, their interests be balanced against each other to find a solution? This issue caused the court considerable difficulty, since the only differences between the twins related to their length and quality of life, a detail which will not usually allow the court to justify the ending of a life. Ward LJ quoted a commentary by Keown which noted that making distinctions between the twins would require the court to engage in reasoning which 'denies the ineliminable value of each patient, and engages in discriminatory judgments... about whose lives are "worthwhile" and whose are not.'²¹

Indeed, as Gillon writes, to balance the interests of the twins is to 'balance one child's inevitable hopeless interest with another child's potentially hopeful interests.'²² However, Harris writes that this 'is precisely what you cannot do if you believe that each life has an ineliminable value and dignity.'²³ To compare the value to the twins of living is to compare the value of their lives, as much as the court insisted otherwise. Harris argues that:

Welfare, contra Ward LJ, cannot (unlike justice) be a value of comparable importance for otherwise we would all be vulnerable when welfare sums indicate that our welfare is less than that of another whose survival our death could purchase.²⁴

The court clearly appreciated the dilemma that it faced; however, having held that the doctors owed a duty to both Mary and Jodie – to act in their opposed best interests – it acknowledged that a balance must be struck. Ward LJ conceded, 'I do not see how the court can reconcile the impossibility of properly fulfilling each duty by simply declining to decide the very matter before it.'²⁵

¹⁸ *Re A (Children)* p.188.

²⁰ *Ibid.* p.190

²¹ Keown, J., 'Restoring Moral and Intellectual Shape to the Law after Bland' (1997) 113 (Jul) *Law Quarterly Review* 482, p.487.

²² Gillon, *op. cit.*, p.5.

²³ Harris, *op. cit.*, p.228.

²⁴ *Ibid.*, p.226.

²⁵ *Re A (Children)* p.192.

The court therefore balanced the interests of the two babies, putting the relevant issues into ‘the scales’;²⁶ however, only practical considerations were included in the ‘weighing up’, such as their basic right to life, the advantages and disadvantages of the separation and ‘the manner in which they are able to exercise their right to life’²⁷ – and not legal or public policy matters. For example, ethical objections or the principle of sanctity of life were not included in the exercise, which they plausibly could have been. Indeed, Gillon writes that ‘it would be possible on moral grounds to argue that best interests and a consequent operation were morally overridden by the evil of killing one to save another.’²⁸ Furthermore, when the right to life was put in ‘the scales’, they were given equal weight for each twin; however, Gillon also argues that ‘where the duty [to preserve life] would involve killing another innocent person then there are strong arguments for concluding that there cannot be either a moral or a legal right to life.’²⁹

Interestingly, Harris suggests that the material difference between Mary and Jodie is their capability for becoming what Harris calls ‘Persons.’ Of course, ‘the law does not distinguish between human beings on the basis of their right to life’,³⁰ although Harris suggests that, perhaps subconsciously, the court acknowledged that only one twin will ever have the opportunity to live a ‘biographical life’³¹ as a true ‘Person’ – a life that is capable of including things which make the right to life valuable. He submits that this idea of ‘Personhood’ separates fetuses in the womb and those in a permanent vegetative state from the rest of society, in that they lack ‘the capacity to value existence.’³² Indeed, Ward LJ implied a similar thought process when he stated that an important factor in the decision was ‘the manner in which [the twins] are individually able to exercise their right to life.’³³

Finally, the court turned to what was perhaps the most difficult issue in the case, and the one which would ultimately decide the outcome: could the separation be carried out lawfully, or would it constitute the murder of Mary? The court drew on authority from *Re J*,³⁴ where counsel had argued that the court was:

²⁶ *Ibid.*, p.196.

²⁷ *Ibid.*, p.197.

²⁸ Gillon, *op. cit.*, p.8.

²⁹ *Ibid.*, p.12.

³⁰ Harris, *op. cit.*, p.223.

³¹ *Ibid.*, p.231.

³² *Ibid.*, p.232.

³³ *Re A (Children)* p.197.

³⁴ *Re J (A Minor)* [1991] Fam. 33.

Never justified in withholding consent to treatment which could enable a child to survive a life-threatening condition, whatever the pain or other side effects inherent in the treatment and whatever the quality of the life which it would experience thereafter.³⁵

This submission was firmly rejected by the Court of Appeal in that case. It has been proposed, both by Keown³⁶ and by Ward LJ³⁷ that counsel in *Re J* were mistaking the sanctity of life doctrine with the doctrine of vitalism, a very similar principle with a starkly different practical application, and Ward LJ made very clear that it was the former which would apply to the twins. Vitalism, Keown writes, holds that human life is sacred, and 'is to be preserved at all costs.'³⁸ However, he continues that it 'is as ethically untenable as its attempt to maintain life indefinitely is physically impossible.'³⁹ Indeed, the court in *Re A* found this 'too extreme a position to hold.'⁴⁰

Sanctity of life, on the other hand, states that 'one ought never intentionally to kill an innocent human being,'⁴¹ and so provides not a duty on society to *prolong* life, but a prohibition on the *intentional shortening* of it. That being said, the doctrine still espouses certain high standards of conduct and values of its own, and it is by no means simple to see how the separation in *Re A* could be justified, even provided that 'sanctity of life' is more flexible than the doctrine of vitalism. It is an accepted principle in law, indeed a foundation of the right to life, that courts will 'never sanction steps to terminate life',⁴² and it does not take a great leap of faith to construe the operation in *Re A* as a step intended to terminate the life of Mary prematurely. Indeed, at first instance Johnson J noted that 'if the operation is properly to be regarded as a positive act', which the Court of Appeal later agreed it would be,⁴³ 'then it cannot be lawful and cannot be made lawful'.⁴⁴ In the Court of Appeal, Ward LJ agreed that 'to operate to separate the twins may be to murder Mary.'⁴⁵

³⁵ *Ibid.*, p.42.

³⁶ Keown, *op. cit.*

³⁷ *Re A (Children)* p.186.

³⁸ Keown, *op. cit.*, p.482.

³⁹ *Ibid.*

⁴⁰ *Re A (Children)* p.186.

⁴¹ Keown, *op. cit.*, p.483.

⁴² *Re J (A Minor)*, *op. cit.*, p.53.

⁴³ *Re A (Children)* per Ward LJ at p.180 and per Brooke LJ at p.215.

⁴⁴ Quoted in *Re A (Children)* p.175.

⁴⁵ *Ibid.*, p.180.

However, in *Re A* the court did take that step, and held that 'Mary may have a right to life, but she has little right to be alive,'⁴⁶ a statement which is clearly at odds with the authority. To come to the conclusion that Jodie's life is worth Mary's premature death is to come to the conclusion that Mary's life does not hold the 'ineliminable value and dignity'⁴⁷ that everyone else's does. But the authority is clear that length and quality of life does not justify a person in ending life because they believe their life has no value.⁴⁸ However, it was argued by the Court of Appeal in *Re A* that no judgments on the worth of Mary's life had been made,⁴⁹ and instead the court had looked only at whether the treatment was worthwhile, under the authority in *Airedale NHS Trust v Bland*:

If the question is asked, as in my opinion it should be, whether it is in [Bland's] best interests that treatment which has the effect of artificially prolonging his life should be continued, that question can sensibly be answered to the effect that his best interests no longer require that it should be.⁵⁰

Indeed, in his analysis of this case, Keown reiterates that:

In order to decide whether a proposed treatment would be worthwhile, one must first ascertain the patient's present condition and consider whether and to what extent it would be improved by the proposed treatment... At no point in the sanctity assessment is one purporting to pass judgment on the worthwhileness of the patient's life.⁵¹

Harris, however, questions how the issue of 'whether or not the treatment is worthwhile [can] be addressed independently of the question of whether the life it restores is worthwhile?'⁵² He suggests that:

The treatment is worthwhile if it contributes to the continuance of a worthwhile life, a life the continuance of which is a benefit to the individual whose life it is, not otherwise.⁵³

This analysis has certain holes; notwithstanding the argument that worthwhile treatment requires the life it prolongs to be worthwhile, it is not so clear cut the other way round. A life, (such as that of the Down's Syndrome baby in *Re B*)⁵⁴ may be regarded as not worth living by the members of society who are lucky enough to live healthy lives, but this will be irrelevant to the worth of the treatment; when the

⁴⁶ *Ibid.*, p.197.

⁴⁷ *Ibid.*, p.188.

⁴⁸ *R v Inglis* [2010] EWCA Crim 2637.

⁴⁹ *Re A (Children)* p.197.

⁵⁰ *Airedale NHS Trust v Bland*, *op. cit.*, p.868.

⁵¹ Keown, *op. cit.*, p.486-487.

⁵² Harris, *op. cit.*, p.223.

⁵³ *Ibid.*, p.223.

⁵⁴ *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421.

treatment will improve the state of the individual from one disadvantaged state to another, less disadvantaged state, the treatment will be worthwhile – quite apart from the issue that the life still may be seen by some as not worth living.

However, there is one clear distinction between the aforementioned cases and *Re A*, which the Court in *Re A* seemingly overlooked; in *Re B* and similar cases, the treatment in question was one which it was hoped would improve the patients' quality or length of life, and in *Bland* the treatment, namely the ventilation and artificial nutrition, maintained Tony Bland's state, the *termination* of which would cause death. In contrast, in *Re A* the *treatment itself* – the operation to separate the twins – would be the active cause of the end of Mary's life, and in such a unique situation it is submitted the 'worthwhileness' of that treatment cannot be a discrete question separate from the 'worthwhileness' of Mary's life. The treatments in the former cases had benefits of their own, benefits of improving a life which may already be difficult, but were benefits all the same; it is on the strength of these benefits that 'worthwhileness' was measured in these cases. However, in *Re A* the only benefits that the Court mentioned for Mary were that her cruel and disadvantaged life would no longer have to be lived; this can only be seen as a benefit after, and in the light of, an assessment of the 'worthwhileness' of Mary's life.

3 Necessity

Before *Re A*, it was an established legal principle that a so called defence of 'necessity' could not justify the killing of another person. In *R v Dudley and Stephens*,⁵⁵ two shipwrecked sailors killed and ate one of their number – a young sailor named Parker – in order to stay alive until they could be rescued; they were found guilty of murder, despite their protestations that they acted out of the necessity of the situation. However, in *Re A*, Brooke LJ identified two important features of *Dudley* which distinguished it from *Re A*, therefore allowing necessity to be used:

The first objection was evident in the court [in *Dudley*]'s questions: who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured?⁵⁶

Such a decision is arbitrary, and the court therefore felt that whilst it may have been necessary to kill *one* of the sailors, it was not necessary to kill Parker instead of any of the others. Brooke LJ continued, '[t]he second objection was that to permit such a

⁵⁵ *R v Dudley and Stephens* (1884-1885) LR 14 QBD 273.

⁵⁶ *Re A (Children)* p.239.

defence would mark an absolute divorce of law from morality.⁵⁷ It would have meant declaring lawful the killing of the innocent for personal gain, a notion which would offend the sanctity of life principle. However, he added that ‘in my judgment, neither of these objections are dispositive of the present case.’⁵⁸ The Court of Appeal were not bound by *Dudley*, which was heard in the High Court, but chose not to disapprove of the decision, instead distinguishing it. However, it is submitted that despite the attempts of Brooke LJ, *Re A* still conflicts with established law on this issue of necessity.

First, in *Dudley*, Coleridge CJ asked ‘by what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?’⁵⁹ This ‘question of human choice’,⁶⁰ if allowed to have been made, would permit ‘him who is to profit by it to determine the necessity which will justify him in deliberately taking another’s life to save his own.’⁶¹ The arbitrary nature of the decision of who to sacrifice is what most offended the court in *Dudley*; indeed, they asked ‘was it more necessary to kill [Parker] than one of the grown men? The answer must be ‘no’.⁶² In contrast, in *Re A* there was no question of sacrificing Jodie to save Mary, as Mary’s death, with or without the separation, was inevitable. The court quoted the teachings of rabbinical scholars in a similar 1977 case in Philadelphia,⁶³ stating that Mary was ‘designated for death.’⁶⁴

However, in *Dudley* the decision of who to kill was based on the honest belief that Parker – who had been drinking sea water and was, as a result, deathly ill – was going to die imminently, and would provide better sustenance if he was killed before he wasted away. *Dudley* is therefore express authority on the issue that, not only is necessity not applicable to a murder charge when the decision of who to sacrifice is taken at random, but also that decisions based on likelihood of survival are just as arbitrary as any other standard of measurement. It is therefore not acceptable for Brooke LJ to state that *Re A* does not involve the same capricious valuations that *Dudley* did.

⁵⁷ *Ibid.*, p.239.

⁵⁸ *Ibid.*

⁵⁹ *R v Dudley and Stephens*, *op. cit.*, p.287.

⁶⁰ *Re A (Children)* p.229.

⁶¹ *R v Dudley and Stephens*, *op. cit.*, p.287.

⁶² *Ibid.*, p.287-288.

⁶³ Unreported, described by George Annas (1987) 17 *Hastings Center Report* 27.

⁶⁴ *Re A (Children)* p.229.

Furthermore, Harris writes that to allow the sacrifice of one twin because she is 'designated for death' is to 'say that value of life is correlated with life expectancy',⁶⁵ a conclusion which the court went to great lengths to reject. Ward LJ noted that 'it is impermissible to deny that every life has an equal inherent value';⁶⁶ yet the court's method of selecting a twin for sacrifice because she was already unable to live as long as the other clearly retained an element of arbitrariness. Ward LJ quoted Keown, who wrote that such questions engage:

In discriminatory judgements, posited on fundamentally arbitrary criteria...about whose lives are 'worthwhile' and whose are not. The arbitrariness is highlighted when it is asked which disabilities, and to which degree, are supposed to make life not worth living?⁶⁷

Likewise, how long must a person have left to live before what would otherwise be murder can become lawfully 'necessary'? As mentioned above, the second objection to the defence of necessity in *Dudley* was that to allow the defence would be to effect 'a divorce of law from morality.'⁶⁸ However, in distinguishing *Dudley*, *Re A* Brooke LJ argued that:

There are... those who believe with... sincerity that it would be immoral not to assist Jodie if there is a good prospect that she might live a happy and fulfilled life if this operation is performed... It is not at all obvious that this is the sort of clear-cut case, marking an absolute divorce from law and morality, which was of such concern to Lord Coleridge CJ.⁶⁹

It appears, therefore, that under *Re A* an act will be covered by the defence of necessity so long as it is not completely and thoroughly immoral, rather than requiring it to be positively moral. Questionable morality and controversial cases, therefore, would be covered under Brooke LJ's necessity as they are not 'clear-cut' or 'absolute'.⁷¹

Further, it is submitted that Brooke LJ's use of the 'moral divorce' distinction is simply another way of stating that the separation is the 'lesser of two evils,' an approach expressly denied by the court in *Dudley* and every court since when necessity is in issue. It is submitted that the question to be asked is not 'would allowing the defence be immoral' but instead which outcome is less 'evil' and does this lesser 'evil'

⁶⁵ Harris, *op. cit.*, p.229.

⁶⁶ *Re A (Children)* p.187-188.

⁶⁷ Keown, *op. cit.*, p.487.

⁶⁸ *R v Dudley and Stephens*, *op. cit.*, p.287.

⁶⁹ *Re A (Children)* p.239.

⁷¹ *Ibid.*

outcome have a grey area of morality which would circumvent the *Dudley* objection, which requires total, unmitigated immorality? The problem with this approach is that any assessment of such situations is subjective, and the defence identifies no criteria for assessing which 'evil' is 'the lesser'. Some may feel that intentionally ending the life of a small baby before its natural end constitutes an absolute evil, regardless of the other benefits; equally, some may feel that sacrificing the life of an ill and dying young man with no dependants to ensure the survival of three men with families was morally permissible when measured against the alternative.

Additionally, in *Dudley* itself Coleridge CJ stated that 'law and morality are not the same, and many things may be immoral which are not necessarily illegal',⁷² thus there is a stark difference between 'morals' and 'ethics', with only the latter accepted as a material consideration in medical law cases (whilst only the former is discussed by Brooke LJ in relation to this 'morality distinction.')

Mason and Laurie define ethics as 'a system of principles or values which assist in decision making... and allows us to justify a particular course of action by reference to wider, socially acceptable principles or values.'⁷³ In contrast, morality is a subjective and open assessment of what is right and wrong, which changes according to each person, or indeed, each judge. Whilst morality is mentioned time and time again during the opinion of Brooke LJ, ethics is barely even alluded to, despite the obvious ethical undertones in the case.⁷⁴ It is submitted that an ethical approach would have been capable of ensuring greater consistency in the law, whereas the moral approach would have left Coleridge CJ in *Dudley* open to find that killing for survival is immoral, whilst allowing Brooke LJ in *Re A* free to find that separation is the lesser of two evils, according to their own moral compasses.

Many academics have attempted to navigate the ethics of necessity in *Re A*, in the absence of express usage by the court. Gardner acknowledges the difficulty with the 'lesser of two evils' approach, instead choosing to explore necessity through other avenues.⁷⁵ He writes that when necessity is viewed from a consequentialist or utilitarian perspective, the court must aim to value the worth of an action in terms of its utility to society, and this is perhaps the most applicable of all available ethical

⁷² *R v Dudley and Stephens*, *op. cit.*, p.287.

⁷³ Mason, J., and Laurie G., *Mason and McCall Smith's Law and Medical Ethics* (8th ed.) (2011), p.2-3.

⁷⁴ 'Morality' is referred to 18 times within the judgment of Brooke LJ, whilst 'ethics' is mentioned only 6 times, 4 of which are when reciting the titles of journals or the names of committees.

⁷⁵ Gardner, S., 'Direct Action and the Defence of Necessity,' (2005) *Criminal Law Review* 371.

frameworks, as Brooke LJ acknowledged that ‘the doctrine of necessity [is] an expression of the philosophy of utilitarianism.’⁷⁶ This theory is similar to the moral ‘lesser of two evils’ approach, as it requires one to consider ‘which involved the greater harm, killing Mary in order to save Jodie, or allowing both to die?’ However, the two approaches are by no means identical, as a utilitarian perspective disregards moral and legal considerations, instead assessing worth against usefulness to society (or, in this more concentrated and unique case, the individuals involved). As such, to justify the separation, a utilitarian view would require that it be ‘right that it should be done; or at least not wrong that it should be done’.⁷⁸

However, it is arguable that this is no more helpful than Brooke LJ’s morality approach, since it is a question which Gardner describes as ‘simply unanswerable.’⁷⁹ The consequences of separation may be no more or less desirable than the consequence of failure to separate, depending on personal opinion, and this ethical view does not assist in defining which outcome is consequentially preferable when it is not obvious, as was the case in *Re A*. The available case law, however, suggests that necessity views excessive loss of life as preferable to an offence to the sanctity of life principle, with authority such as *Dudley and Stephens* and *R v Howe*⁸⁰ failing to provide the defence. If a consequentialist or utilitarian perspective is applicable, therefore, it is difficult to see how *Re A* is ethically sound.

Robert Walker LJ also sought to justify separation by necessity, although he approached the issue slightly differently, choosing to utilise the doctrine of double effect. Double effect is a very specialised and uncommon legal principle which, because of its delicate and unusual nature, has not received much attention from the courts. Robert Walker LJ, however, explained that it may ‘be seen as a sort of bridge between the issue of intention and the issue of necessity.’⁸¹

The doctrine governs cases involving situations ‘in which an individual acts for a good purpose which cannot be achieved without also having bad consequences’.⁸² Robert Walker LJ stated that there are two classes of double effect cases: those involving doctors relieving the pain of patients while abbreviating their lives, and

⁷⁶ *Re A (Children)* p.226.

⁷⁸ McLeod, I., *Legal Theory (1st ed.)* (1999), p.135.

⁷⁹ Gardner, *op. cit.*, p.376.

⁸⁰ *R v Howe* [1987] AC 417.

⁸¹ *Re A (Children)*, p.250.

⁸² *Ibid.*, p.251.

those involving emergencies during hazardous activities.⁸⁴ The former is the more widely recognised of the two classes, and was acknowledged in the opinion of Goff LJ in *Bland*:

It is... the established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part of the care of the living patient, in his best interests.⁸⁵

Robert Walker LJ took this one step further and stated that the treatment was lawful not only because it was in the best interests of the patient, but because '[t]he doctrine of double effect prevents the doctor's foresight of accelerated death from counting as a guilty intention';⁸⁶ in effect, by acting in order to prevent the patient's suffering the doctor will not have the required intention for murder.

However, on the few occasions that this class of double effect has come to court, one thing has been clear – the good effect and the bad consequence must be directed at the same person, which, in *Re A*, was not the case. Whilst the intention was to save the life of Jodie, the foreseen consequence of this was to end Mary's life prematurely, and therefore fell outside the scope of the doctrine. If such a 'net good' versus 'net bad' approach was held to be encompassed within the principle, other unlawful practices, such as killing to harvest healthy organs for example, would become defensible. Indeed, Robert Walker LJ acknowledged this and stated that 'this type of double effect cannot be relevant to conduct directed towards Mary', recognising instead that the separation would need to be capable of being 'something which ought to be achieved in the best interests of Mary as well as Jodie.'

Robert Walker LJ then went on to explain his second class of double effect, which applies when a person is faced with a life or death dilemma, usually during some hazardous or remote activity. He gave a number of real life examples, including a mountaineer who cut a rope between himself and his dangling climbing partner after they both fell in the Andes,⁸⁹ and the captain of an Australian warship who closed off access to a burning engine room, killing all who were inside but saving the ship and the rest of its crew.

⁸⁴ *Ibid.*, p.252-254.

⁸⁵ *Airedale NHS Trust v Bland*, *op. cit.*, p.867.

⁸⁶ *Re A (Children)* p.251.

⁸⁹ *Ibid.*, p.252.

If a person, faced with such a dilemma, acts with the intention of saving his own life, or the lives of others, it may be said that leaves no room for a guilty intention to harm or even kill the third person.⁹¹

The doctors' foresight of Mary's inevitable death, therefore, would not have constituted intention under the *Woollin*⁹² principle, as they intended simply to save Jodie.

There are certain benefits of this approach to necessity which outweigh the one utilised by Brooke LJ. First, the doctrine of double effect does not require reference to or distinction from *Dudley and Stephens*, and so allows an established authority to continue to operate without qualifications which may become confusing or exploitable. Second, it classes the separation as conduct which was never murder in any form, rather than first considering it an unlawful act which needs to be excused, as Brooke LJ's defence of necessity does.

However, none of the examples that Robert Walker LJ cited for his second class of double effect have ever come to court; it is therefore questionable whether he could be certain that this second class was applicable or indeed even legally existed. At the time of writing, no 'emergency necessity' cases have ever been justified by lack of intention, and pre-*Re A* the academic literature exclusively described the traditional, doctor-patient class of double effect when defining the principle. It is accepted that in such cases as described by Robert Walker LJ the perpetrator would not, and should not, be culpable. However, justice is served in these situations by the Crown Prosecution Service, or other relevant authority, exercising its discretion when considering prosecution, rather than the law bending to allow exceptions, as indeed it refused to do in *Dudley*. Moreover, even if the examples provided by Robert Walker LJ had come to court and established such a defence, , how could he be so sure that it was double effect that would provide it? Perhaps the captain of the Australian ship would have been able to rely on the principle of necessity that Brooke LJ espoused, or the mountaineer could cite Ward LJ's private defence (see below). Robert Walker LJ, it seems, created his second class of double effect from nothing, citing a number of non-judicial examples – that may or may not have been applicable – as if they were conclusive enough to prove its existence.

⁹¹ *Ibid.*

⁹² *R v Woollin* [1999] 1 AC 82.

4 Private Defence

Ward LJ, however, was of the opinion that the most appropriate defence was not necessity but private defence, and took the view that 'Mary is killing Jodie.'⁹³ However, Herring⁹⁴ writes that there are five basic requirements for a circumstance when private defence may lawfully be used, not all of which were present in *Re A*. First, the victim must pose a threat; second, that threat must be unjustified; third, the use of force must be necessary; fourth, the degree of force must be reasonable; and fifth, the defendant must be acting in defence of himself or another.⁹⁵

In relation to the first element, Uniacke suggests that 'the concept of threat is itself normative',⁹⁶ in that a person can only be a threat to another when measured against some standard which defines what is threatening and what is not. This is an interesting theory, and though it has never been expressly defined by the judiciary, it is clear from existing authority that there is no rigid benchmark by which to classify 'a threat.' For example, a sufferer of Asperger Syndrome may find a person standing close to them to be threatening, but others in society may not. However, a defendant, with or without Asperger Syndrome, who had used private defence in the face of a perceived threat would be tried subjectively, on the facts as they honestly believed them to be. The question would thus remain 'what constitutes a threat to that individual', and not 'what would constitute a threat in the opinion of society at large.' Uniacke writes that 'someone or something that is a threat to B will or might, if unchecked, make B worse off in some way', and therefore submits that the standard that 'threat' is measured against is the so-called 'threatened person's' prior state – their life without the threat. In *Re A*, however, 'there was no interference by or involving Mary that undermined Jodie's prior position; the twins came into existence conjoined and thereby endangered.'⁹⁸ Mary was not removing Jodie from a state that she usually enjoyed, but rather Mary and Jodie were simply existing in a state that they had always existed in. This was not discussed by any of the judges in *Re A*, let alone taken into consideration when applying private defence to the case.

Further, Uniacke draws a distinction in law, between conduct which causes another person to be put at a disadvantage somehow, and conduct which causes another

⁹³ *Re A (Children)* p.203.

⁹⁴ Herring, J., *Criminal Law: Texts, Cases and Materials* (4th ed.) (2010)

⁹⁵ *Ibid.*, p.640-641.

⁹⁶ Uniacke, S., 'Was Mary's Death Murder' (2001) 9 *Medical Law Review* 208, p.212.

⁹⁸ *Ibid.*, p.213.

person to be more disadvantaged than they *ought to be*. For example, she writes that if one person, B, has collapsed, and another, A, decides to do nothing to resuscitate her, B is in a worse off state than she could (or perhaps should) be as a result of A's failure to act; however, A is still not required to act and B (or others on behalf of B) would not be justified in using private defence to force A to act. Uniacke writes that this is because 'B is not made worse off than she is at present by A's negative action. Rather, when A decides to do nothing to help B in circumstances where aid is morally or legally required, B is worse off than she ought to be.'⁹⁹ Similarly, in *Re A*, Jodie was worse off than perhaps she may have been had the twins separated properly in the womb, but that should not make defensive action justified in her defence. Instead, the measure applied should take into consideration the fact that Jodie and Mary were born, and had always existed, as a conjoined and dependent pair, and Mary's attachment to Jodie did not put Jodie in any worse position than she had ever enjoyed before, or would normally enjoy, as in most cases of private defence.

Second, Ward LJ acknowledged that Mary, though harming Jodie, was not an aggressor in the situation between the twins, and was not doing anything unlawful.¹⁰⁰ However, he noted that her conduct 'does not have to be unlawful'¹⁰¹ for private defence to apply to actions opposed to it, and gave an example of a six-year-old shooting others in a school playground, who would not be culpable, due to his age, but would still warrant legitimate defensive action.

He stated that he could:

See no difference in essence between that resort to legitimate self-defence and the doctors coming to Jodie's defence and removing the threat of fatal harm to her presented by Mary's draining her lifeblood.¹⁰³

It is respectfully submitted, however, that there is a material difference between this example and the twins' case, which was not discussed and which would render private defence inappropriate to be used in this context.

In the example given by the court, the child may not be a criminal in law, but it was accepted by Ward LJ that he 'is not morally innocent',¹⁰⁴ as he is doing something which, if done by someone who was legally culpable, *would* be unlawful. It is

⁹⁹ *Ibid.*

¹⁰⁰ *Re A (Children)*, *op. cit.*, p.203.

¹⁰¹ *Ibid.*

¹⁰³ *Ibid.*, p.204.

¹⁰⁴ *Ibid.*

submitted that an attacker must be either doing something which is unlawful or doing something which would be unlawful if perpetrated by a person who is capable of committing the act unlawfully.¹⁰⁵ Uniacke agrees and writes that ‘the distinction between a culpable and non-culpable unjust threat does not tell us the conditions under which A constitutes a threat to B.’¹⁰⁶ Note however, in *Re A*, it was common ground amongst the judges that Mary, though a threat, was not engaging in criminal or unlawful activity. Mary was not committing any crime, and not just because she was too young to be blamed for her actions – as in Ward LJ’s example – but because the act in itself, being born conjoined, was not an act which was blameworthy, *unlike* Ward LJ’s example. It therefore seems inappropriate to apply private defence.

Third, the force must be necessary and with regards to the specific requirements for the law on private defence, the threat must be pressing and imminent.¹⁰⁷ The twins, however, had three to six months with the most pessimistic diagnosis,¹⁰⁸ and perhaps much more, until the threat of death would realise itself. Additionally, it was noted by the surgeons that it may have been possible to perform an emergency procedure on the twins in the event that Mary died before Jodie, or Jodie’s heart began to fail – an option which did not involve the acceleration of Mary’s death. It therefore seemed ‘unnecessary’ to sacrifice the remainder of Mary’s life, and the fact that Jodie would have had a better chance of survival of an elective procedure was irrelevant; private defence does not allow a victim to choose their preferred method of defence, but rather requires that they use the least aggressive option available.

The fourth requirement states that the degree of force used must be reasonable, and *Re A* is an unusual situation with regards to the degrees to which the doctors had to go to to remove the threat posed by Mary. In most cases of legitimate self-defence, the defendant will have acted merely to remove the threat and, in instances of fatal force, death will have been merely an unfortunate consequence of that attempt. In *Re A*, however, the threat was caused by the very fact that Mary lived, and the defensive action was aimed at removing her life support, rather than stopping her conduct. The concept may be best explained by way of an example: if one person, A, felt threatened by another, B, A or others on his behalf would be justified in removing the threat posed by B, but would not be justified in killing B so that he was no longer able

¹⁰⁵ See *DPP v Bayer* [2003] EWHC 2567.

¹⁰⁶ Uniacke, *op. cit.*, p.213.

¹⁰⁷ *Attorney General for Northern Ireland’s Reference (No. 1 of 1975)* [1977] AC 105.

¹⁰⁸ *Re A (Children)* p.166.

to pose a threat. Likewise, a court could not order that B be killed to protect A. This is not an issue that is discussed in the academic literature on *Re A*, nor is there any case law available. However, it is clear that the only way that Jodie could be protected from the threat posed by Mary was by killing her so that she was no longer able to put a strain on Jodie's heart.

Fifth, the act must be in defence of the 'victim', and of all five requirements, this is the only one which does pose an obstacle. Coincidentally (or perhaps not), this is also the only element of the doctrine which the Court of Appeal in *Re A* drew upon when applying private defence to the case. Robert Walker LJ stated that the court and the doctors had 'a duty to protect and save Jodie's life,'¹⁰⁹ and Ward LJ agreed, stating that:

The reality here – harsh as it is to state it, an unnatural as it is that it should be happening – is that Mary is killing Jodie... as surely as a slow drip of poison. How can it be just that Jodie should be required to tolerate that state of affairs?¹¹⁰

Likewise, Gillon writes that Mary was 'a dangerous threat to the life of [Jodie]'¹¹¹ and thus private defence was the most appropriate defence to apply.¹¹²

Conclusion

This article submits that the decision in *Re A* was not legally justifiable, in light of the conflicting legal principles, as they 'fail to utterly justify, either legally or morally, the overruling of the parents' wishes.'¹¹³ The objections to the court's reasoning discussed in this article are two-fold. First, the decision offends the sanctity of life principle, declaring the active termination of human life *ex ante* by civilians lawful for the first time in English legal history. Second, none of the defences used by the court were sufficient to excuse or justify offence to the principle, as they were either misapplied by the court, inappropriate in the circumstances, or, in the case of Robert Walker LJ's double effect, fictitious. Furthermore, the Court of Appeal's reasoning has been described as 'confused and mutually inconsistent'¹¹⁴ and their failure to agree on a single, applicable rule of law which would allow the separation to lawfully

¹⁰⁹ *Ibid.*, p.255.

¹¹⁰ *Ibid.*, p.203.

¹¹¹ Gillon, *op. cit.*, p.13.

¹¹² It should be noted that Gillon is a philosopher and not a legal academic and would therefore have been viewing the justification without the benefit of knowing the other requirements.

¹¹³ Harris, *op. cit.*, p.222.

¹¹⁴ *Ibid.*

take place damages the credibility of the decision. Each judgement becomes counter-productive when viewed in the context of one single decision by the court; whilst each judge outlined the reasoning of their own defence, they simultaneously imply that the other defences are not applicable.

Unfortunately, this has led to a 'mix-and-match' law, where judges and academics are able to choose which judgement would be most applicable, and use that to their advantage. In May 2001, twins Alyssa and Bethany Nolan were born in Australia, conjoined at the head.¹¹⁵ At a few days old Bethany's blood pressure began to rise, and doctors were unable to treat her without bringing Alyssa's blood pressure down too, which would have been fatal for a healthy baby. Clearly, Ward LJ's private defence would have been inappropriate in the circumstances, as neither was directly causing the other's death. Instead, there was merely a bar to treatment provided by one's attachment to the other. Likewise, which to treat and which to sacrifice would be a wholly human choice, as both were viable but not at the same time, making Brooke LJ's necessity inapplicable. Robert Walker LJ's double effect *would*, however, have allowed the operation to be carried out lawfully in that situation.

In the event, Bethany's situation worsened and she went into cardiac arrest, with doctors predicting that she had only 24 hours to live; her death also meant death for Alyssa, whilst separation would result in instant death for Bethany.¹¹⁶ In this situation, Brooke LJ's necessity was, in theory, applicable, as Bethany had been 'designated for death', and no one was required to choose who to sacrifice and who to save between the twins – as in *Re A*. However, when the case came to court,¹¹⁷ Chesterman J applied the reasoning of Robert Walker LJ, and held that Bethany's death would not be the intention of the doctors, stating that 'the operation is one to save the life of Alyssa. The circumstances, including the loss of Bethany, would, in my opinion, make the operation reasonable.'¹¹⁸

Likewise, a year later, twins Natasha and Courtney Smith were born conjoined at the chest in London, sharing a heart which was not strong enough to support them

¹¹⁵ Webb, A., 'A private nightmare made public,' *The Independent*, 1 April 2002. See also: www.bethany-nolan.memory-of.com

¹¹⁶ Grubb, A., 'Conjoined Twins: *Re A* Down Under' (2002) 10 *Medical Law Review* 100.

¹¹⁷ *Queensland v Nolan* [2001] QSC 174.

¹¹⁸ *Ibid.*, para. 25.

both.¹¹⁹ They passed away before their case was heard before a court, but it had been planned by hospital and their parents during the pregnancy that Natasha would be given the heart and Courtney would be surgically separated from her sister, an operation which would mean Courtney's immediate death. In this situation, not only would Brooke LJ's necessity not apply, it would serve as an express authority, in favour of Courtney, that the operation could *not* take place, as that arbitrary element of human choice that so offended Brooke LJ in *Re A* and Coleridge CJ in *Dudley* would be present. However, under Robert Walker LJ's double effect necessity the separation *would* be entirely lawful, as the doctors could be said to be intending only the good effect of saving one of the two twins rather than letting both die.

In light of such confusion and misapplication, it is submitted that the court may well have first answered the case according to their own personal views and then searched for relevant law to support their decision. Such confusion and inconsistency generates weak authority for future cases, such as those mentioned above, and leads to a lack of established, relevant law which can be called upon in conjoined twin cases, quite apart from '[blurring] the application of particular norms that are important to each of the defences in question.'¹²⁰ Robert Walker LJ asserted that the decision in *Re A* 'should not be regarded as a further step down a slippery slope because the case of conjoined twins provides a unique problem';¹²¹ worryingly, it seems that conclusion was incorrect on at least one count. It is therefore hoped by many that *Re A* does not follow *Bland* down that slippery slope, or constitute another 'morally and intellectually dubious distinction... [in] a context where the ethical foundations of the law are already open to question.'¹²³

¹¹⁹ Huxtable, R., 'Separation of Conjoined Twins: Where Next for English Law?' (2002) *Criminal Law Review* 459.

¹²⁰ Uniacke, *op. cit.*, p.209.

¹²¹ *Re A (Children)*, p.255.

¹²³ *Airedale NHS Trust v Bland*, *op. cit.*, p.898.