MARY AND JODIE – THE CASE OF THE CONJOINED TWINS*

The Right Honourable Lord Walker, Lord of Appeal in Ordinary

The case of the conjoined twins, Mary and Jodie, attracted worldwide publicity during September 2000. But memories fade quickly, and I should perhaps begin by reminding you of the basic facts. Then I want to devote most of my time to discussing the very unusual and difficult legal issues which the case raised. I want to concentrate especially on the impact of these issues on the surgeons, doctors and nurses who had the responsibility for caring for the twins. I want to talk primarily about legal principles, not about ethical or religious issues, but it is of course impossible, in a case of this sort, to keep them completely separate.

The twins were born on 8 August 2000. Mary and Jodie are not their real names but those are the names by which they became known to the world, and I will use those names, although most of the injunctions intended to secure the family's privacy have now been lifted. (I will come back to the injunctions later on.)

As is now well known, the twins' parents lived in Gozo, a small island near Malta. It is notable for the strong Roman Catholic faith of its inhabitants and the relatively poor state of its economy. The father had been unemployed, through no fault of his own, for eight years. The mother had had a low-paid job. They had been married for two years and this was her first pregnancy.

When the mother was about four months pregnant an ultrasound scan disclosed that she was carrying conjoined twins. A local doctor who had trained at St Mary's Hospital, Manchester advised that she should be referred there, and that was achieved under a long-standing financial arrangement between Malta and the United Kingdom. She travelled to Manchester in May 2000 and had numerous scans and investigations at Manchester and Sheffield. From these it became apparent that one of the twins was in a poor condition and might not survive birth.

The doctors who were caring for the mother discussed the situation fully with her and her husband. They at once recognised that the parents' religious beliefs not only excluded any consideration of termination of pregnancy, but also required the management of the birth to be as non-interventionist as possible. The consultant obstetrician described this in his written evidence:

> "I have had many discussions with [the parents] about their wishes with regard to their children. I have at all times tried to accommodate their wishes within what I believe to be ethical and acceptable guidelines. As a result of their desire for non-intervention I took the unusual step of allowing the twin

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* An address given by Sir Robert Walker, as he then was, to the Medico-Legal Society of Northern Ireland on 15 January 2002.

> pregnancy to continue until she went into spontaneous labour at 42 weeks. Normally one considers delivery before that time because of a concern as to whether the placenta can adequately nourish both foetuses. Also, as agreed with them, I delivered them by Caesarean section at the last possible moment in labour. This was to meet their desire that the pregnancy was as non-interventionist as possible."

The conjoined twins were in medical terminology ischiopagus tetrapus (that is joined in the region of the pelvis and having four legs). Mary had grave cerebral and cardio-vascular defects. There is a full account of their medical condition at and soon after birth in the reported judgment of Ward LJ,[1] and no doubt detailed accounts have also been published in medical journals. For present purposes the short summary in my judgment may suffice:

> "The basic statistics are that about one in 90 live births produces twins. About one in 250 live births produces monozygotic twins (identical twins from the division of a single fertilised ovum). Very rarely (a suggested figure is once in 100,000 births, although this figure is far from precise and seems to vary in different parts of the world) monozygotic twins fail to separate completely, as normally occurs about a fortnight after conception, resulting in conjoined twins. Rather over half of all conjoined twins are stillborn, and a further third both die within 24 hours. Only about 6% of conjoined twins are classified as ischiopagus (joined at the pelvic level) and only about 2% as ischiopagus tetrapus (joined at the pelvic level and having four legs).
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> Jodie's and Mary's medical condition is therefore very rare indeed. Their condition is even more exceptional in that – quite apart from abnormalities of their bodily organs in the region where they are joined – Mary has very grave defects in her brain, her heart and her lungs. For practical purposes her lungs are non-existent. She is wholly dependent for life on oxygenated blood circulated through Jodie's lungs and Jodie's heart. The consultant paediatric and neonatal surgeon, Mr B, has described her as "totally supported" by Jodie. It is the strain on Jodie of supporting her sister as well as herself which is very likely to lead to the deaths of both twins within a matter of months, if they remain joined, because Jodie is likely to suffer what is called high output heart failure. There is no practical possibility of Mary being put on a heart-lung machine or receiving a heart-lung transplant."

It was apparent to the doctors that there were three available options for treating the twins. The first was to leave them joined, with Mary being kept alive by Jodie's heart and lungs, and by feeding through a tube. This would place an increasing strain on Jodie and would be likely to lead to the deaths of both twins within weeks or months. The second option was elective surgery, which would lead to Mary's certain death and would give Jodie a

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[1] [2001] Fam 147, 158-62.

very good chance of surviving, and a reasonable prospect of a good quality of life. The third option was to delay surgery until an acute emergency (such as Mary's death or incipient heart failure in Jodie.) That course would have involved a much less favourable prognosis for Jodie.

The parents (who were receiving support and advice not only from the hospital but also from a local priest) were strongly opposed to elective surgery. They set out their views in a simple and dignified statement which was in evidence:

> "We know our babies are in a very poor condition, we know the hospital doctors are trying to do their very best for each of them. We have very strong feelings that neither of our children should receive any medical treatment. We certainly do not want separation surgery to go ahead as we know and have been told very clearly that it will result in the death of our daughter, Mary. We cannot possibly agree to any surgery being undertaken that will kill one of our daughters. We have faith in God and are quite happy for God's will to decide what happens to our two young daughters. In addition we cannot see how we can possibly cope either financially or personally with a child where we live, who will have the serious disabilities that Jodie will have if she should survive any operation."

In these circumstances the hospital (or to be precise the Central Manchester Healthcare NHS Trust) decided to refer the matter to the court, and on 18 August it issued an originating summons in the Family Division of the High Court. This asked the court to make a declaration as to which option was lawful and in the twins' best interests.

The originating summons was heard within a week by Johnson J, a very experienced family judge. He gave judgment on 25 August declaring that elective surgery would be lawful and in the interests of both twins. Inevitably the evidence and argument before Johnson J was not as full as in the Court of Appeal. That is particularly true of the argument on the criminal law aspects of the matter. Moreover the Official Solicitor was at that stage acting as *guardian ad litem* to both twins. It was only at the appeal stage that it was appreciated that even as impartial and experienced an official as the Official Solicitor could not properly represent the conflicting interests of Mary and Jodie. Their conflicting interests were of course at the heart of the dilemma.

The Court of Appeal heard argument over five days in the first half of September. The Attorney General was asked to instruct counsel to assist on the issues of criminal law and he did so, while making plain that counsel was acting as a friend of the court and was not putting forward any positive case. The court received further evidence as to the latest position, including some brief oral evidence from the surgeon who would lead the team. The court also received written submissions from two interested parties, the Roman Catholic Archbishop of Westminster and the Pro-Life Alliance. On 22 September the court dismissed the appeal but gave permission to Mary and her parents for an appeal to the House of Lords. Urgent preparations were made for an appeal but the parents decided not to proceed with it. On 3 November the President of the Family Division dismissed an application (by

a director of the Pro-Life Alliance) for the removal of the Official Solicitor as Mary's guardian on the ground of his decision not to appeal, and on the same day the Court of Appeal refused permission for an appeal from the President.

The operation was carried out a few weeks later. Mary died, as the doctors and nurses knew she would, when the separation of a major blood vessel cut off the supply of oxygenated blood which she was receiving from Jodie. Jodie survived the operation and has since made good progress, according to all press reports that I have seen, although she is still likely to need more reconstructive surgery.

In addressing the legal issues I want to begin with a preliminary question which some of you may think abstract or even pointless, but which I regard as important: what sort of function was the court undertaking in adjudicating on the issues which the hospital placed before it? This is more of a lawyer's question than the layman's question or protest, which was often voiced at the time, as to what business the court had to interfere in a question of conscience between the parents and their spiritual and medical advisers. But the answer to the lawyer's question may be of some help in considering the court's right to concern itself with these anxious questions.

The answer to the lawyer's question is that the court was simultaneously exercising two jurisdictions, which are quite distinct but which sometimes (and especially on issues of medical ethics) fall to be exercised together. One is the court's jurisdiction to give directions and guidance as to the care of children, an ancient jurisdiction of non-statutory origin but now largely regulated by statute. The other is the court's inherent jurisdiction, now much enlarged by statute and by rules of court, to grant declaratory relief as to the lawfulness or unlawfulness of some future action.

May I comment on these jurisdictional points in reverse order? The old jurisdiction of the Court of Chancery to make declarations of right has grown enormously in the course of the last four generations.[2] But the court has been cautious about the use which it makes of the jurisdiction. In particular it has always been cautious about attempts to use the civil courts to determine questions of criminal liability (whether actual liability in respect of events which have happened, or prospective liability in respect of events which may happen in the future).

This general reluctance, and the exceptional circumstances in which the court overcomes it, are illustrated by two cases decided in the early 1980's. In *Imperial Tobacco Ltd v Attorney General*[3] the House of Lords held that a tobacco manufacturer, facing prosecution on the ground that a particular sales promotion scheme was an illegal lottery, could not forestall the prosecution by seeking a declaration in the civil court. But in *Royal College of Nursing v Department of Health and Social Security*[4] the House of Lords in civil proceedings decided a question of principle as to whether a particular form of termination of pregnancy (by medical induction using the extra-

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[2] The process began with the Judicature Act 1875 and a change in the Rules of the Supreme Court in 1883.

[3] [1981] AC 718.

[4] [1981] AC 800.

amniotic method) was, if carried out in accordance with a departmental circular, termination "by a registered medical practitioner" within the meaning of section 1 of the Abortion Act 1967. The House of Lords split on the issue of substance – there are powerful speeches by Lord Wilberforce and Lord Diplock which reach opposite conclusions – but the whole House was satisfied that it was right to give guidance on an important general issue about which many nurses had serious concerns.

I can go on from there to the important and controversial decision of the House of Lords in the Tony Bland case, *Airedale NHS Trust* v *Bland*.[5] At this stage I want to quote Lord Goff's observations as to the appropriateness of declaratory relief in cases where doctors are facing life or death decisions. After referring to the *Imperial Tobacco* and *Royal College of Nursing* cases he said:[6]

> "It would, in my opinion, be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as the present, so that a doctor would be compelled either to act contrary to the principles of medical ethics established by his professional body or to risk a prosecution for murder. As Compton J said in *Barber* v *Superior Court of State of California* (1983) 195 Cal. Rptr. 484, 486 "a murder prosecution is a poor way to design an ethical and moral code for doctors who are faced with decisions concerning the use of costly and extraordinary 'life support' equipment". In practice, authoritative guidance in circumstances such as these should in normal circumstances inhibit prosecution or, if (contrary to all expectation) criminal proceedings were launched, justify the Attorney-General in entering a *nolle prosequi*. In the present case, it is to be remembered that an *amicus curiae* has been instructed by the Treasury Solicitor; yet no representations have been made on behalf of the Attorney-General that declaratory relief is here inappropriate. In expressing this opinion, I draw comfort from the fact that declaratory rulings have been employed for the same purpose in other common law jurisdictions, . . . "

Lord Goff then referred to authorities in the United States, New Zealand and South Africa.[7]

One practical difficulty about making a declaration as to lawfulness of a future event may be uncertainty about precisely what action will be taken, and with what motives. That was one difficulty (although by no means the only difficulty) in the way of Mrs Diane Pretty, who suffers from motor neurone disease and wishes to ensure that her husband would not be prosecuted for assisting her to take her own life (a step which she is

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[5] [1993] AC 789.
[6] *Ibid* at 862-3.
[7] *Re Gardner* (1987) 534 A2d 947; *Auckland Area Health Board* v *Attorney-General* (1993) 1 NZLR 235; *Clarke* v *Hurst* (unreported, 30 July 1992).

physically unable to take on her own).[8] In the conjoined twins case there was detailed evidence as to how the separation would be carried out in stages by different teams of surgeons. There was no question of any sort of organ donation from Mary to Jodie. The surgeon's evidence was as follows:

> "Separation of the twins would necessarily involve exploration of the internal abdominal and pelvic organs of both twins and particularly the united bladder. It is expected however that each twin would have all its own body structures and organs. It is not anticipated or expected to take any structure or organ from either twin to donate to the other."

So the court had a clear picture of the surgery that was proposed; and there was no doubt that the surgeons foresaw Mary's death as the inevitable, although unsought, consequence of the operation.

It seems likely that, if the parents had consented to the operation, the hospital would have proceeded without feeling it necessary to seek a court order. That may be illogical (if the surgery was intrinsically unlawful, the parents' consent could hardly make it lawful) but it accords with the general perception of how things should be. Nevertheless the hospital might still have wished to seek an order for the protection of its medical staff, as occurred in a comparable case in Philadelphia in 1977.[9]

That brings me back to the court's jurisdiction in respect of children. Normally consent to surgery on a child is given by the child's parents. The guiding principle, now embodied in section 1 of the Children Act 1989, is that whenever a court determines any question with regard to a child's upbringing (an expression which is widely defined and includes medical or surgical treatment) the child's welfare must be the court's paramount consideration. It necessarily follows that the parent's wishes, if contrary to the child's best interests, cannot be determinative. The court will always give anxious attention to the feelings and views of a conscientious parent, but must in the end form its own view. As Sir Thomas Bingham MR said in 1995 in a case[10] concerned with protecting a disabled child from media publicity:

> "I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect. It should certainly not be disregarded or lightly set aside. But the role of the court is to exercise an independent and objective judgment. If the judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible

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[8] *Queen (on the application of Pretty)* v *DPP* [2001] UKHL 61; [2002] 1 All ER 1. Editor's note: Mrs Pretty has since died. The use of the present tense describes the situation when the address was delivered.

[9] See George J Annas (1987) 17 Hastings Center Report 27: the parents, devout Jews, had consented to the operation after taking advice from a rabbi but the surgeons wished to be protected by an order of the Family Court.

[10] *Re Z (a minor)* [1997] Fam 1, 32-3.

> parent, to give effect to its own judgment. That is what it is there for."

Sometimes the court has to overrule the parents' religious convictions, for instance in treatment involving blood transfusion.[11] Occasionally the court has overruled a refusal by parents to consent to life-saving treatment for a disabled child.[12] In one case,[13] which the present President of the Family Division has described as exceptional, the Court of Appeal (reversing the trial judge) upheld the refusal of devoted parents to consent to their 18 month old child undergoing a second liver transplant operation, after an earlier unsuccessful operation had caused him pain and distress. Without a successful transplant the child was unlikely to live for more than a year. Waite LJ said:[14]

> "All these cases depend on their own facts and render generalisations – tempting though they may be to the legal or social analyst – wholly out of place. It can only be said safely that there is a scale, at one end of which lies the clear case where parental opposition to medical intervention is prompted by scruple or dogma of a kind which is patently irreconcilable with principles of child health and welfare widely accepted by the generality of mankind; and that at the other end lie highly problematic cases where there is genuine scope for a difference of view between parent and judge. In both situations it is the duty of the judge to allow the court's own opinion to prevail in the perceived paramount interests of the child concerned, but in cases at the latter end of the scale, there must be a likelihood (though never of course a certainty) that the greater the scope for genuine debate between one view and another the stronger will be the inclination of the court to be influenced by a reflection that in the last analysis the best interests of every child include an expectation that difficult decisions affecting the length and quality of its life will be taken for it by the parent to whom its care has been entrusted by nature."

What if the court has to consider the welfare of two children whose interests are in conflict? The House of Lords had to consider that issue in 1993[15] in a very different context: one child was a 16 year old mother and the other was her two year old son. The issue was resolved on the narrow ground that the proceedings were concerned only with the welfare of the boy. There is authority that the court may sometimes have to undertake a balancing exercise between two children's interests.[16] But the notion that the court should ever have to evaluate and choose between two innocent human lives

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[11] See *Re R (a minor)(blood transfusion)* [1993] 2 FLR 757.
[12] See *Re B (a minor)(wardship: medical treatment)* [1981] 1 WLR 1421; this was the case of a very young baby with (not very severe) Down's syndrome and a life-threatening intestinal blockage.
[13] See Re T (a minor) (wardship: medical treatment) [1997] 1 WLR 242.
[14] *Ibid*, at 254.
[15] *Birmingham City Council* v *H* [1994] 2 AC 212.
[16] *Re T and E (Proceedings: conflicting interests)* [1995] 1 FLR 581.

is abhorrent. As Lord Mustill said in *Bland*,[17] the fact that a patient who is in pain and distress may wish to end his or her life:

> " . . . is not at all the same as the proposition that because of incapacity or infirmity one life is intrinsically worth less than another. This is the first step on a very dangerous road indeed, and one which I am not willing to take."

That echoes the Archbishop's affirmation that the indispensable foundation of justice is the basic equality of worth of every human being.

Nevertheless, in the conjoined twins case the majority of the court[18] reached the conclusion that a balancing exercise was unavoidable, not by comparing the values of Mary's and Jodie's lives but by comparing the worthwhileness of the treatment in terms of its known or probable outcome for each of the twins. On this point I took a rather different approach,[19] closer to that of Johnson J. It would be inappropriate for me to debate that point, which appears to be the only significant difference between the members of the court on any of the legal issues which arose. In that respect our three lengthy judgments may give a misleading impression: it was a case, like Pascal in his Lettres Provinciales, of not having time to make our reasons shorter.

The law's refusal to value one human life above another reflects its underlying view that human life is invaluable. As Sir Thomas Bingham MR said in the Court of Appeal in *Bland*:[20]

> "A profound respect for the sanctity of human life is embedded in our law and our moral philosophy, as it is in that of most civilised societies in the East and West. That is why murder (next only to treason) has always been treated here as the most grave and heinous of crimes."

Yet Mary's death was foreseen as the inevitable consequence of elective surgery. It was not suggested that she was not a human being who had been born alive. How then could the surgery be lawful?

Johnson J saw the surgical separation of the twins as amounting to the withdrawal from Mary of an extraneous supply of oxygenated blood, and so analogous with the withholding of treatment (artificial feeding and hydration) which the House of Lords had declared lawful in *Bland*. That was the case of the young man who had been severely crushed in the Hillsborough stadium disaster in 1989. Prolonged deprivation of oxygen had caused irreversible damage to the cerebral cortex, but his brain stem was still functioning. His condition was then termed 'persistent vegetative state'. He had no awareness at all, even at the most primitive level, and he was being kept alive only through artificial means and devoted nursing care.

The President of the Family Division made a declaration that the withdrawal of life-sustaining measures would be lawful, and the Court of Appeal (unanimously) and the House of Lords (also unanimously) upheld that

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[17] [1993] AC 789, 894.
[18] See Ward LJ [2001] Fam at 188 and 196–7; Brooke LJ at 205.
[19] *Ibid* at 245–6.
[20] [1993] AC 789, 808.

decision. It must be said, however, that in the House of Lords several of their Lordships expressed disquiet about the process of reasoning which led to that result. The strongest statement of disquiet was that of Lord Mustill:[21]

> "The conclusion that the declarations can be upheld depends crucially on a distinction drawn by the criminal law between acts and omissions, and carries with it inescapably a distinction between, on the one hand what is often called 'mercy killing', where active steps are taken in a medical context to terminate the life of a suffering patient, and a situation such as the present where the proposed conduct has the aim for equally humane reasons of terminating the life of Anthony Bland by withholding from him the basic necessities of life. The acute unease which I feel about adopting this way through the legal and ethical maze is I believe due in an important part to the sensation that however much the terminologies may differ the ethical status of the two courses of action is for all relevant purposes indistinguishable."

Similarly Lord Browne-Wilkinson said[22] he was conscious that he had reached his conclusion on what he called narrow, legalistic grounds, and he called for Parliament to review the law. That was almost nine years ago and no such review has been undertaken. Parliament has legislated in relation to *in vitro* fertilisation and associated matters[23] but not in relation to the withdrawal of life-sustaining treatment, or palliative treatment which may hasten death. In the absence of guidance from Parliament the court has to decide these questions on common law principles since (as Sir Thomas Bingham put it) that is what the court is there for.

When the criminal law issues were considered in the Court of Appeal only counsel for the hospital attempted (without any great conviction) to uphold Johnson J's analogy with *Bland*. The other counsel recognised that the surgical separation was (in relation to each of the twins) an invasive act which had to be justified as such. It could not be justified as a withdrawal of treatment.

Instead the argument revolved round two distinct but converging themes: intention and necessity. I will introduce these separately and then see how they converge. It is a commonplace that although foreseeing a consequence, desiring a consequence and intending a consequence are different things:

> "When a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen."

That is part of the model direction to the jury, on the mental element in the crime of murder, approved by the House of Lords in *R v Woollin*.[24]

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[21] *Ibid* at 887.
[22] *Ibid*, at 878 and 885.
[23] Human Fertilisation and Embryology Act 1990, as amended by the Human Reproductive Cloning Act 2001 (see *R (on the application of Quintavalle)* v *Secretary of State for Health* [2001] 4 All ER 1013).
[24] [1999] 1 AC 82, 96.

The factual context of that case was an act of wanton violence as far removed as anything could be from any exercise of clinical judgment: an angry father threw his three-month-old son on to a hard surface, and he died of a fractured skull. The father was convicted of murder but the House of Lords substituted a conviction for manslaughter because of a serious error in the judge's direction to the jury.

In a clinical context a doctor may foresee that palliative treatment with powerful analgesics may accelerate death, but that does not make the treatment unethical or unlawful. Lord Goff recognised in *Bland*:[25]

> "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; and, on this basis, the treatment will be lawful."

Similarly Lord Donaldson MR had said in a case authorising non-resuscitation (on a future emergency) of a severely brain-damaged child:[26]

> "What doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which *as a side effect* will render death more or less likely."

The emphasis is in the original text. The notion that death should be regarded as a side effect may be surprising (or even shocking) but it does serve to underline that the treatment in question is aimed at some good objective (generally the relief of pain and distress). That is sometimes called the doctrine of double effect.

Mary could probably not feel any pain or other sensation and the separation surgery would not have any palliative effect on her. If she alone is considered it is impossible to see any good objective to be achieved by the surgery, unless the establishment of her bodily integrity, even in the moment of death, can be viewed in that way. The position immediately changes, however, if Mary and Jodie are considered together, as two distinct human beings whose bodies and lives have however been linked together so as to make Mary's life utterly dependent on Jodie, and Jodie's life imminently threatened by Mary's dependency.

So I come to the doctrine of necessity in English law. It has a long and tortuous history which is described, at length and with great clarity, in the judgment of Brooke LJ.[27] Brooke LJ has served as a Chairman of the Law Commission and his survey reflects the deep research and deliberation which the Law Commission have devoted to this topic.[28] What follows is an inadequate summary of parts of his exposition.

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[25] [1993] AC 789, 867.
[26] Re J (a minor) (wardship: medical treatment) [1991] Fam 33, 46.
[27] [2001] Fam 147 at 219-38.
[28] See especially its Reports on Criminal Law in 1989 (Law Com No 177) and 1993 (Law Com No 218).

Necessity has for many centuries been recognised by the common law as a defence to a criminal charge. It does not merely (like diminished responsibility or provocation) reduce the level of criminal liability; if established, it negatives liability, in the same way as a plea of self-defence or duress may negative liability.[29] Necessity is sometimes called duress of circumstances.[30]

The most notorious case in which necessity was relied on, unsuccessfully, as a defence to a charge of murder is *R v Dudley and Stephens*.[31] In 1884, after the wreck of the yacht Mignonette (which Dudley had been engaged to sail to Australia) he, two other men and the cabin boy were adrift in an open boat for 20 days with no water or food, except for two tins of turnips and a small turtle which they caught. In that extremity Dudley and Stephens agreed to kill the cabin boy (who had been drinking sea water and was near to death) and to eat his flesh. The third man refused to join in the enterprise. A few days later the survivors were picked up by a German barge.

There is not time to go further into this gruesome but fascinating story, which is well told in at least two published works.[32] One remarkable aspect of the story is that Dudley, a respectable and indeed religious man, could probably have escaped prosecution had he not insisted on telling the full story (and preserving for burial the remains of the cabin boy's body). It seems that the people of Falmouth (where the survivors were put ashore) were divided in their support for the accused only because there had been a failure to observe 'the custom of the sea', that is the custom of drawing lots; but the majority thought that that was excusable since the cabin boy was near to death, and the others were married men with families to support. Dudley and Stephens were convicted of murder and sentenced to death, but reprieved and released after six months' imprisonment.

In that Victorian *cause celebre* the accused had to rely on the defence of necessity in its starkest form. There was no question of double effect because, as they admitted, they intended to kill the cabin boy, and they had to achieve that purpose before they could assuage their hunger and thirst. But necessity and absence of intention to kill can converge where one and the same act has the effect of almost certainly saving one life and certainly or almost certainly ending another. Writers on moral philosophy are fond of dilemmas involving mountaineers, but Professor Sir John Smith has referred to a real-life incident which is stranger than fiction:[33]

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[29] But duress by threats has never been a defence to a charge of murder: *R* v *Howe* [1987] AC 417; and see *R* v *Gotts* [1992] 2 AC 412, especially the dissenting speech of Lord Lowry.

[30] The most recent review by the Criminal Division of the Court of Appeal seems to be *R* v *Abdul-Hussain* [1999] Crim LR 570, a case of aircraft hijacking. See also *R* v *Bournewood Community and Mental Health Trust* [1999] 1 AC 458, 490 (Lord Goff).

[31] (1884) 14 QBD 273.

[32] AWB Simpson, *Cannibalism and the Common Law* (1984); N Hanson, *The Custom of the Sea* (1999).

[33] *Justification and Excuse in the Criminal Law* (The Hamlyn Lectures, 1989) p 79. The summary is from [2001] Fam at 252.

> "A mountaineer, Simon Yates . . . held his fellow climber, Joe Simpson, after he had slipped and was dangling on a rope over a precipice at 19,000 feet in the Andes. Yates held Simpson for an hour, unable to recover him and becoming increasingly exhausted. Yates then cut the rope. Almost miraculously Simpson landed on a snowy ice bridge 100 feet below, and survived. When they met again Simpson said to Yates 'You did right'."

So far as there is any meaningful analogy to the case of the conjoined twins, that comes somewhere close to it – except of course that there was no miracle in Mary's case. The clinical and ethical judgment of the surgeons and paediatricians (who owed professional duties to both twins) was that it was right to operate in order to save Jodie, even though Mary's death was foreseen (but not of course desired) as an inevitable consequence. Mary died because her defective body, on its own, was incapable of sustaining her life. The court's endorsement of the doctors' judgment reflects Lord Scarman's general observation in the *Gillick* case[34] that:

> "The bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of [criminal liability]."

May I end with one or two footnotes about the hearing in the Court of Appeal? All the members of the court were greatly impressed by the professionalism of the doctors who assisted the court with written or oral evidence. They prepared their reports to meet demanding deadlines and they showed great sensitivity to the parents' feelings, without any loss of intellectual rigour. At one stage there seemed to be some danger of an issue arising as to whether there was room in England for more than one centre of excellence in this very complicated form of surgery, but fortunately the issue subsided and we did not have to adjudicate on it.

The case attracted huge publicity and the court made orders designed to protect the twins, their parents and the hospital from intrusive publicity. With generally good co-operation from the media, a fair degree of protection was achieved. But the fact that the family came from Gozo soon became an open secret and that part of the injunction was lifted: the court does itself no favours by trying to ignore the fact that, for better or worse, information has got into the public domain. I think it was also right, as we did, to allow one photograph of the twins (which had been shown to the court) to be used as the basis of a pastel sketch which was made by an artist and released to the press. That dispelled some mistaken ideas and gave the public some idea of the doctors' problem without the clinical precision of an actual photograph.

The injunctions were also limited so as to enable the parents, at a time and in a manner of their own choosing, to tell the media what they wished to say about their own experiences and feelings. The money which they have raised will, it is to be hoped, go a long way to meet the special expenses of Jodie's upbringing now and in the years to come.

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[34] *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 190.