Surgical separation of conjoined twins that results in the death of one of the twins raises complex moral, ethical and legal issues. Of particular concern is the potential for homicide charges against doctors. In two recent cases, one in England and one in Queensland, judges declared the surgery to be lawful but the legal reasoning employed is problematical and may be difficult to apply to future conjoined twins cases, such as infant twins where one is not fully developed, or where it is proposed to separate adult twins. A determination of the threshold issue of whether there are two individual persons capable of being killed may require a reconsideration of existing legal definitions and statutory provisions. Similarly, the excuses and justifications for homicide may need to be clarified or reviewed in the context of separation of conjoined twins.

INTRODUCTION

Surgical separation of conjoined twins was rarely attempted until about six decades ago. However, advances in medical knowledge and expertise since 1950 have resulted in an increase in separation surgery previously not thought possible. While many operations are uncontroversial, cases where the twins share a key organ and separation will result in the death of one twin involve complex moral, ethical and legal issues. Of particular concern is the potential application of the criminal law.

Judges have emphasised that their duty is to apply relevant principles of law, not morals, religious teachings or individual conscience. This article argues that existing legal principles are not able to provide a satisfactory response to the complex criminal law issues that arise when separation of conjoined twins is contemplated, and the death of one is inevitable during surgery. It considers only two of these issues: the threshold question of whether conjoined twins are two individuals capable of being killed, and whether there is an unlawful killing.

This article outlines two cases in which courts declared lawful separation surgery that would involve the death of one twin: the 2000 English case of the Attard twins, Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961, and the 2001 Brisbane case of the Nolan twins, Queensland v Nolan [2002] 1 Qd R 454. Although the judges agreed that the twins in each of the two cases were two separate living individuals, the application of common law and Criminal Code (Qld) definitions to other types of conjoined twins may be problematic. Similarly, the different reasons given by the judges for determining that the death of one of the babies was lawful may be difficult to apply in other cases. The fact that judges arrived at the same outcome but via different routes presents a problem in the application of precedents and creates tensions in the law. Although it is now the better part of a decade since the decisions, it is only a matter of time before ethical, moral and legal issues associated with surgery to separate twins, in which one twin is sacrificed so the other can have a

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3 Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961 at 969 (Ward LJ), at 1069 (Robert Walker LJ).

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chance at life, are once again in the spotlight. Indeed, court involvement was foreshadowed when the Smith twins, who shared a single heart, were born in 2002. However, they died a few weeks after birth.

This article looks at whether existing legal definitions for determining whether conjoined twins are two persons capable of being killed can be applied to other types of conjoined twins. It then considers whether the reasons given by the judges in Re A (Children) and Nolan can be applied to justify the separation of adult conjoined twins, where one is ailing and surgery would be the only way of saving the healthy twin. It concludes that the law as it stands is problematic and that judges called on to make life-and-death decisions regarding separation of conjoined twins where the surgery will kill one would be assisted by legislative clarification of the criminal law implications of this unique dilemma.

THE TWO CASES

In both Re A (Children) and Nolan, courts were asked to declare lawful surgery that would kill one twin in an attempt to save the life of the other. One reason for this was doctors’ concerns about the potential criminal law implications of such surgery. This was also a concern in earlier conjoined twins cases in the United States. In 1977, a surgeon was so concerned he might face charges of premeditated murder that he declined to go ahead with the surgery without court approval. A three-judge panel of the Family Court in Philadelphia heard arguments and, after a few minutes of deliberation, authorised the surgery. There is no written record of the hearing or decision. In a second case within weeks of this case, doctors in Arkansas refused to proceed with surgery until both the Attorney-General and county prosecutor agreed that no criminal prosecution would follow. In a third case 10 years later, a surgeon’s lawyers asked the District Attorney to sign a letter saying surgeons would not be prosecuted. Doctors in the United States now seek approval from the relevant hospital ethics committee and these cases no longer seem to come before courts.

Re A (Children): The Attard twins

The 2001 case of the Attard twins, reported as Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961, was the subject of intense media coverage and debate in philosophical, ethical, medical and legal circles. Gracie and Rosie Attard – identified in the media

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7 Email from Richard Berkman, Dechert LLP, Philadelphia, to Colleen Davis, 21 August 2009.


9 Annas, n 8.

10 Annas, n 8.

11 See eg the possible separation of Natasha and Courtney Smith in 2002. A hospital spokesman said that if an operation were planned to separate the twins, the case would be considered by the High Court before a final decision could be made. See Hall C, “Hope Fades for Siamese Twins”, Telegraph.co.uk (London) (2 May 2002), http://www.telegraph.co.uk/news/uknews/1392908/Hope-fades-for-Siamese-twins.html viewed 2 July 2009. Queensland Supreme Court Justice Williams has pointed out that where there is a fine dividing line between conduct which is lawful and conduct which constitutes a criminal offence, seeking court approval affords a safeguard to the hospital and the medical practitioners performing the operation in question: see Williams GN, “Judicial Views on Medical Procedures”, paper presented at the Greek Conference, Corfu, 2007, http://www.greekconference.com.au/papers/2007/WILLIAMS.pdf viewed 25 June 2009.

and in proceedings before the courts as Jodie and Mary – were born in August 2000. They were ischiopagus (fused at the pelvis and lower portions of the abdomens) conjoined twins who shared only one organ – a bladder. However, they also shared an aorta and inferior vena cava and Mary therefore would not survive separation surgery. She would have died shortly after birth had she not been joined to her sister (at 969). Her heart was abnormal and incapable of pumping blood around her body (at 975, evidence of cardiologist). She survived only because she received oxygenated blood pumped by Jodie’s heart. She also had no functioning lung tissue, and would not have been able to be resuscitated after birth had she been born unjoined (at 975, evidence of neonatologist). There was no evidence that she breathed on her own (at 975, evidence of neonatologist). Mary also had neurological problems but the extent of these was unclear. However, she was not brain dead or in a permanent coma or vegetative state.13

The parents were devout Catholics and did not want the twins separated if this meant the sacrifice of one twin so the other might survive (at 985). Instead, they wanted the twins left untreated – they regarded this as God’s will (at 985). They were also concerned about more pragmatic issues: the lack of medical care on their remote island home, as well as the alternative of leaving the baby in England for ongoing medical care (at 986). The hospital, however, sought a court declaration that it would be lawful and in the children’s best interests to perform separation surgery (at 987). At first instance, Johnson J, exercising the inherent jurisdiction of the High Court, made the declaration (at 988). He equated the operation with the withdrawal of life support (at 1027).14 The parents appealed. A three-judge appellate panel unanimously rejected the appeal.

Two persons capable of being killed?

In England, the common law requires that there be a “reasonable creature in being” before criminal sanction can be imposed for a death (at 1025). Sir Edward Coke, in his Institutes, said murder was the unlawful killing of “any reasonable creature in rerum natura [today rendered anglice as ‘in being’]”.15 The word “reasonable” related to appearance rather than to mental capacity, and excluded “monstrous births” and “strange and deformed births” (at 1025, Brooke LJ). Ward LJ made it clear that notions expressed in earlier times that Siamese twins were “monsters” is totally unacceptable, and is repugnant and offensive in the light of current medical knowledge and social sensibility (at 996).16 “I deprecate any idea of ‘monstrous birth’” (at 996). Brooke LJ accepted a submission that suggested that the “criminal law’s protection should be as wide as possible and a conclusion that a creature in being was not reasonable would be confined only to the most extreme cases, of which this is not an example” (at 1025). Robert Walker LJ said expressions such as “monster” were “redolent of superstitious horror” and no longer had a place in either legal or medical textbooks. “Such disparagingly emotive language should never be used to describe a human being, however disabled and dysmorphic” (at 1054). Having concluded that the conjoined twins were not monsters that fell outside the ambit of the law, the judges then had to determine whether the babies were two separate and living persons.

13 Harris, n 12 at 222.
14 Johnson J held that the surgery would be lawful because it represented the withdrawal of Mary’s blood supply. This conclusion was based on the distinction in Airedale NHS Trust v Bland [1993] AC 789 – a case involving the withdrawal of life support – between positive acts and omissions.
16 See also Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961 at 1026 (Brooke LJ), at 1054 (Robert Walker LJ).
All three judges were satisfied that both Mary and Jodie were independent beings and had been born alive (at 996, 1025, 995). Ward LJ referred to three definitions of “born alive”: two from older cases and one from a more recent case (at 995-996). The first of the old definitions required that a child’s “whole body is brought into the world” and that medical evidence will determine whether or not it is born alive. The second requires that the child “breathe and live through its own lungs alone, without deriving of its living or power of living by or through any connection with its mother.”

The more recent definition, enunciated by Brooke J in a case nine years before Re A (Children), echoed the requirement for independent breathing: a child must be “breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living or power of living by or through its connection with its mother”. Ward LJ declined to examine the law in any detail because he said the evidence before him indicated Mary was alive and there were two separate persons. Robert Walker LJ relied on the definition of still-born child in the Births and Deaths Registration Act 1953 (UK) – “a child … which did not at any time after being completely expelled from its mother breathe or show any signs of life” – to conclude without difficulty that Mary was alive.

Although most of the medical experts consulted concurred that Mary, had she been a single baby and not a conjoined twin, would probably have died at birth had she indeed survived the pregnancy, she was independent of her mother. The issue with conjoined twins is not whether they have been born, in the sense that they are independent of their mothers, but rather that in some cases one twin is completely dependent on the other for survival and, should they be separated, would not survive (at 996). Ward LJ refused to countenance a modified definition of a person capable of being killed to encompass an ability to survive independently, not only of the mother but also of a conjoined twin. His Lordship said Mary’s dependence on her sister for survival could not displace the view that she was alive and separate (at 996).

Is the surgery lawful?

All three judges found the surgery would be lawful even though it would result in the inevitable death of Mary. However, there was marked divergence in their reasoning.

Because Mary’s death was a certain outcome of the surgery, the binding authority of the definition of intention in R v Woollin [1999] 1 AC 82 led Ward LJ to conclude that there would be murderous intent on the part of the doctors should the twins be separated (at 1012). Brooke LJ agreed with Ward LJ that the surgeons would intend in law to kill Mary (at 1029). They therefore then went on to consider whether there was any excuse or justification for Mary’s death.

Both Ward and Brooke LJ held that the doctrine of double effect had no application (at 1030) because the side-effect of the good cure for Jodie was Mary’s death (at 1012). According to this doctrine, an act which produces a bad effect is nevertheless morally permissible if the action is good in itself, the intention is solely to produce the good effect, the good effect is not produced through the bad effect and there is sufficient reason to permit the bad effect (at 1012). However, Robert Walker LJ relied on this doctrine to justify the surgery (at 1063). This doctrine provided a way of getting around the interpretation of intention in Woollin. His Lordship pointed out that the House of Lords in Woollin had said nothing about the situation in which acts for a good purpose cannot be achieved without having inevitable bad consequences (at 1062). The doctrine of double effect could therefore be used to prevent a doctor’s foresight of accelerated death from counting as guilty intention (at 1070).

17 R v Poulton (1832) 5 C & P 329 at 331; 172 ER 997.
18 R v Handley (1874) 13 Cox CC 79 at 81 (Brett J), referred to in Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961 at 995.
19 Rance v Mid-Downs Health Authority [1991] 1 All ER 801 at 817, referred to in Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961 at 996.
20 This definition is relevant only to the Births and Deaths Registration Act 1953 (UK) but Robert Walker LJ indicated the definition corresponds closely to the common law.
21 In R v Woollin [1999] 1 AC 82 at 96 the House of Lords approved the following model direction to the jury: “That where a malintent is 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.”
Ward LJ found that defences of necessity (at 1013) and duress also did not apply (at 1013). However, a quasi self-defence, “modified to meet the quite exceptional circumstances nature has inflicted on the twins”, meant that the surgery would be lawful (at 1017). Ward LJ could see no difference between self-defence and doctors going to Jodie’s defence and removing the threat of fatal harm by Mary (at 1017). The doctors were coming to Jodie’s aid by removing the threat to her survival – her conjoined twin. However, if the surgery did not proceed, Jodie’s death was inevitable within three to six months (at 979) because her heart would fail from the strain of having to supply oxygenated blood to both babies.

Ward LJ recognised the dilemma posed by conflicting duties to both babies, and saw no way to resolve the conflict of duties other than to choose between the lesser of the two evils. The least detrimental choice was allowing the surgery to proceed (at 1011). Ward LJ placed several factors in the scales, including each baby’s right to life. Ward LJ said that, where there is a conflict of duty, doctors should be given the same freedom of choice as the court has given itself (at 1015):

The doctors must be given the same freedom of choice as the court has given itself and the doctors must make that choice along the same lines as the court has done, giving the sanctity of life principle its place in the balancing exercise that has to be undertaken. The respect the law must have for the right to life of each must go in the scales and weigh equally but other factors have to go in the scales as well.

However, Ward LJ provided no further explanation of what “other factors” could or should be considered. These factors would be crucial in cases where both twins are equally healthy and it could be argued that treatment would be equally worthwhile for each twin. What tipped the scales in favour of Jodie for Ward LJ was that she faced the prospect of a relatively normal life, and it would be more worthwhile to undertake treatment for Jodie, while Mary would die anyway (at 1010).

Like Ward LJ, Brooke LJ found it difficult to find a way of determining the surgery to be lawful. His solution was to extend the defence of necessity to the facts before him. This was a major change in the law, as in the past necessity had never been a defence to murder. His Lordship distinguished the case of R v Dudley (1884) 14 QBD 273 on the basis that the victim in that case was not already destined for death as Mary was. Brooke LJ held that three requirements had to be fulfilled for the doctrine of necessity to be applied (at 1052):

(i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary to achieve the purpose; and (iii) the evil inflicted must not be disproportionate to the evil avoided.

His Lordship concluded that the surgery was necessary to avoid inevitable and irreparable harm to Jodie. Possibly anticipating criticism of extending the defence to the case before him, Brooke LJ confined its application to conjoined twins, and rejected the notion that this would place judges on the slippery slope of moral relativism over human life (at 1052). Robert Walker LJ was also prepared to extend the doctrine of necessity to justify the surgery in the case before him (at 1067).

The surgery went ahead, Mary died and Jodie survived. At last report, she was a happy and healthy little girl.

Queensland v Nolan: The Nolan twins

Craniopagus (joined at the head) conjoined twins Alyssa and Bethany Nolan were born on 3 May 2001. Although they had separate brains, they shared cranial draining veins. Bethany had no kidneys or bladder. Waste was removed from her bloodstream by Alyssa’s one kidney. On 25 May Bethany went into heart failure and developed severe pulmonary oedema. Her death appeared imminent. Had she died while still connected to her sister, Alyssa also would have died within hours: Queensland v Nolan [2002] 1 Qd R 454 at 455. The twins’ parents gave permission for the girls to be separated.

22 Ward LJ said necessity arises where A kills B to save his own life. The threat to A’s life is posed by the circumstances, rather than an act of threat by B on A.

23 Harris P., “Amazing Grace, Three Years On”, Mail Online (October 2003), http://www.dailymail.co.uk/health/article-187689/Amazing-Grace-years-on.html# viewed 24 May 2009. Harris reports that Gracie is a normal toddler and that doctors are confident she can continue to grow up without any major treatment.
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aware that surgery would be fatal for Bethany and that there was a 60 to 80% chance that Alyssa would die too (at 456). At 11 pm the State of Queensland applied to the Supreme Court for an order permitting an operation to separate the twins. The court was asked to determine whether the surgery, which would lead to Bethany’s death, would be unlawful. The surgery was scheduled for 6.30 am the next morning.24

Two persons capable of being killed?

Chesterman J had no difficulty in finding there were two lives in existence (at 460). There appears to have been little doubt the twins fell within the definition in s 292 of the Criminal Code (Qld).25

Is the surgery lawful?

In a six-page judgment, considerably briefer than the 110-page decision in Re A (Children), Chesterman J declared that the operation would be lawful as it was an attempt to save Alyssa’s life (at 460). However, His Honour recognised that “[d]istressing as the thought may be in the present circumstances it is the case that a strict application of the Criminal Code might result in those taking part in the operation having committed an offence” (at 456). The Criminal Code provides that it is unlawful to kill any person unless such killing is authorised or justified or excused by law.26 Chesterman J referred to Re A (Children) but said the decision was of limited assistance because two of the Lords Justice relied on the doctrine of necessity, which is a creature of common law and has only a very limited application under the Criminal Code (at 457). This doctrine therefore could not be used to justify the surgery in Queensland.

Chesterman J then turned to the conflict of duties discussed by Ward LJ. This issue does have a counterpart in the Code (at 458). The duty imposed by s 28627 of the Code would extend to the hospital and doctors caring for the babies (at 459):

It may not be stretching things to say that the obligation would, in some circumstances, extend to performing an operation to save Alyssa’s life. That obligation, if discharged by the performance of the operation, will result in the death of Bethany. The operation which is compelled by law is authorisation for the act which has that result. The killing is therefore not unlawful.

Chesterman J also relied on s 28228 to support his conclusion that the operation would not be a criminal offence. The operation was to save Alyssa’s life and the circumstances, including Bethany’s death, made the operation reasonable for the purposes of the section (at 460). The difficulty with Chesterman J’s reasoning is the failure to consider the equal and conflicting duty to Bethany. The surgery was on Bethany and well as on Alyssa and the doctors owed an equal duty to her.

Bethany died during the procedure and Alyssa survived. Alyssa started school in 2007 and was described then as a lively and happy toddler despite having an acquired brain injury, limited peripheral sight, mild cerebral palsy, and limited movement in her neck.29

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24 Williams, n 11.

25 This section provides that “a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not”.

26 Criminal Code (Qld), s 291.

27 Section 286 (Duty of person who has care of child) provides: “(1) It is the duty of every person who has care of a child under 16 years to – (a) provide the necessaries of life for the child; and (b) take the precautions that are reasonable in all the circumstances to avoid danger to the child’s life, health or safety; and (c) take the action that is reasonable in all the circumstances to remove the child from any such danger; and he or she is held to have caused any consequences that result to the life and health of the child because of any omission to perform that duty, whether the child is helpless or not. (2) In this section – person who has care of a child includes a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child.”

28 Section 282 (Surgical operations) provides: “A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient’s benefit, … having regard to the patient’s state at the time and to all circumstances of the case.”

DISCUSSION
In both Re A (Children) and Nolan, the judges found the twins were two persons capable of being killed and that the surgery would not be unlawful. However, the decisions in these cases may not be of assistance to judges called upon to declare lawful separation surgery in future cases where the nature of the conjoining is different or where the factual scenarios differ. Existing legal definitions or statutory provisions that are used to determine whether conjoined twins are born alive, or are two persons capable of being killed, are of limited assistance in conjoined twins cases where one twin is not fully formed. Similarly, the reasons given by the judges in Re A (Children) and Nolan cannot be applied satisfactorily to the separation of adult conjoined twins, where one is ailing and surgery would be the only way of saving the healthy twin.

Incomplete twins and shared organs: Two persons capable of being killed?
In Re A (Children), the judges favoured a broad view of what it means to be born alive, and required simply signs of life. This approach mirrors the Criminal Code (Qld) definition in s 292. In both cases, the judges regarded each of the babies as separate individuals that had been born alive. However, the application of definitions or criteria of life that are relevant to single babies are not always useful in conjoined twins cases and can yield inconsistent and unsatisfactory outcomes where one twin is not fully formed or where the twins share key organs.

Two of the three definitions referred to by Ward LJ require independent breathing as a prerequisite. Using these definitions, it could be argued that twins like Mary are not born alive in a legal sense, because they are incapable of “breathing through (their) own lungs alone”. Had such an argument been accepted in Re A (Children), Mary’s death during the surgery could not have been unlawful because no legal person would be killed. Similarly, other conjoined twins who are unable to breathe on their own and receive oxygenated blood from their twin, would not be regarded as “alive”. Such an approach may avoid the need to find a way to justify the surgery. However, as Ward LJ pointed out (at 995), such a conclusion to the babies before him would be “contrary to common sense and to everyone’s sensibilities”.

In Re A (Children), Mary’s counsel suggested that the law may have to redefine the concept of being born alive, just as the law has had to redefine death in the face of medical advances that can prolong human life. However, Robert Walker LJ suggested there were a number of difficulties in the way of this argument, but there was no need to consider them further as all parties had conceded that Mary was a human being and had been born alive (at 1054). However, in future cases the meaning of “born alive” may have to be reconsidered.

A recent instance in which this was done is the New South Wales case of R v Iby (2005) 63 NSWLR 278. Spigelman CJ said cases such as R v Handley (1874) 13 Cox CC 79 and Rance v Mid-Downs Health Authority [1991] 1 All ER 801 (both of which were discussed by Ward LJ in Re A (Children)), do not require unassisted breathing before a baby can be said to have been born alive. His Honours said what these cases suggest is that evidence of breathing independently of the mother will be evidence that a child was born alive (at 285). In other words, Spigelman CJ took the view that independent breathing is not a mandatory requirement but, if present, will be conclusive evidence that the child is alive. The result of this decision is that “life is deemed to come into existence upon full extrusion from the mother when any indicia of independent life are manifested – heartbeat, respiration or brain function”. However, in both New South Wales and the Australian Capital Territory, legislation expressly provides that a “child shall be held to have been born alive if it has breathed.” Spigelman CJ indicated that the New South Wales section is a “modification of the common law” and

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30 Section 292 (When a child becomes a human being) provides: “A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.”
32 Section 20 of the Crimes Act (NSW) and s 10 of the Crimes Act (ACT) both provide that a “child shall be held to have been born alive if it has breathed.”
applies to a trial for murder of a child (at 286). Therefore, in order for an infant to be capable of being killed in New South Wales and the Australian Capital Territory, it would have to have breathed. Should a case similar to Re A (Children) arise in these two jurisdictions, it could be argued that a twin with primitive or non-functioning lungs would be a life in being. Given the significance of such a determination where the life of one conjoined twin will be sacrificed during surgery to give the other a chance at life, such apparently arbitrary distinctions between jurisdictions is unacceptable.

Other Australian jurisdictions take a broad approach to determining when life comes into being for the purposes of homicide. The common law in Victoria and South Australia, as explained by Barry J in R v Hutty [1953] VLR 338 at 339, requires simply that a person be “fully born in a living state”.

33 The Criminal Codes in Western Australia, Queensland and Tasmania adopt the same standard, requiring that a child has proceeded in “a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not”.

34 The Criminal Code (NT) included an identical provision until late 2008. Section 156 was repealed, and the effect of ss 1B and 1C inserted into the Code at that time is that a child must be born and show signs of life, such as breathing or independent circulation.

Conjoined twins range from two individuals joined by a narrow band of tissue, such as Chang and Eng Bunker, to parasitic twins, where part of another baby is attached to a second clearly identifiable infant, and to fetuses in fetu. A headless conjoined twin that consists only of a torso and limbs would meet the broad approach to determining whether this being is alive. The parasitic twin may have its own blood supply and be alive, even though it cannot breathe. An example is an Indian girl called Lakshmi Tata, who underwent separation surgery in November 2007 when she was two. Her twin was headless, but had a torso and four limbs. Similarly, a conjoined twin that consists of a head but no torso or limbs, such as Manar Maged, would meet the definition of being born alive. This baby was born in March 2004 with a second head attached to her head, but no second body. The head showed signs of life: it could blink, smile, and cry but was not capable of independent life. The head was removed when Manar was two years old but she died a month after the surgery from a brain infection.

35 The concept of “born alive” is therefore not useful in any conjoined cases where a court is considering, prior to separation surgery, whether these twins are persons capable of being killed: both twins have been born, and both show signs of life, even though one twin may not be capable of breathing or have an independent circulation. Even a fetus in fetu would be regarded as born alive, even though the fetus is completely within the twin’s body. Such a conclusion is difficult to reconcile


with the traditional legal view that a fetus immediately prior to birth is not a person capable of being killed, even if the fetus is viable, particularly where the fetus in fetu is only partly formed and therefore not viable when removed from the twin.

It could, however, be argued perhaps that although the twins above meet broad legal definitions of being born alive, in some cases they may not be two individual persons. Where each twin is completely formed, like the Bunker twins, it is not difficult to conclude that there are two individual persons. However, in other cases where one twin is incomplete, it may be difficult to determine whether there are two persons capable of being killed, or whether there is one person and an appendage that can be removed without fear of criminal sanction. There are differences of opinion as to where the line should be drawn. For example, one surgeon commenting on the Attard case said there was only one person and that Mary “was not a human being but a tumour.” A similar argument was raised during the brief 1977 Lakewood case hearing in Philadelphia: lawyers argued that because there was only one heart, there was only one person and removing one of the twins would be akin to removing an appendage. However, a respected bioethicist, writing about this case, suggested an argument that there were not two people might be accepted where a child had one body and two heads, with removal of the second head being similar to removing an extra arm or leg. In another case the same month as the Lakewood case, doctors described the surgery as “amputation of the second twin”. However, as the Hensel twins demonstrate so well, there can be two quite distinct people where conjoined twins have two heads but share a single body. Abigail and Brittany Hensel are connected from the chest down and share two legs and two arms. They celebrated their 18th birthday in March 2008. They have different personalities and do things that most other teenagers do, including playing sport and driving a car.

Medical professionals are also uncertain as to where the line should be drawn between an appendage and a person. Pearn suggests that some doctors regard a fetus with two heads as one human being. The implication is that the removal of one head is a cosmetic operation. However, he says other doctors are not so sure. Pearn’s view is that a twin with an almost separate brain and face who has the ability to communicate independently would be a human being but a conjoined twin without its own head would not. Other writers have suggested alternative approaches to determining which persons can be harmed by killing. For example, Harris suggests a person is characterised by the capacity to value existence and therefore can be harmed by being killed. He argues that persons are individuals with a biographical life and with full moral status. Singer believes the mental quality of self-awareness is what distinguishes human beings from other beings that do not have the right to life. Much of this discussion is in the context of abortion and the killing of fetuses and is centred around the requirement that a baby must be born before it attains the status of a person capable of being killed.

A third issue that may require reconsideration is the requirement, at common law and under the Criminal Code (Qld), of independent life. Independence traditionally has referred to complete separation from the mother’s body. In cases such as the Attard and Nolan twins, it is the fact that one twin is incapable of existing independent from its sibling that is the issue and not whether the babies

41 Annas, n 8, p 236.
45 Pearn, n 44.
47 Harris, n 12 at 234.
have emerged fully from their mother’s body. However, an argument that one twin, who is unable to survive as a single baby independent of the other, is not a person capable of being killed in the eyes of the law is fraught with difficulty. In many cases where twins share a heart or other key organ, so that separation will be fatal for one baby, each baby is nonetheless a living individual and has a personality distinct from its twin. Regarding one baby as not a person because it is incapable of independent survival would fly in the face of evidence that there are two individuals babies who are clearly persons. A further difficulty is that many babies incapable of independent life at birth survive because they are put on life support.

The unique circumstances of conjoined twins, and indeed of each set of conjoined twins, may mean that courts asked in future to sanction separation surgery may find it more difficult than in Re A (Children) and Nolan to determine whether there are two persons capable of being killed. The requirement that, to be a person capable of being killed, a baby must be an individual, separated from its mother’s body and show signs of independent life, may need to be reconsidered in the context of conjoined twins, and a new definition formulated to guide judges and doctors as to which conjoined twins are indeed two individual living persons who fall under the protection of criminal law.

**Separating adult twins: Is there an unlawful killing?**

In both Re A (Children) and Nolan, court sanction was sought before the surgery proceeded because doctors were concerned about the spectre of potential homicide charges. The three judges in Re A (Children) and the single judge in Nolan found that the killing of the weaker twin would be lawful. However, each judge arrived at this decision by a different route. The legal reasoning of the three judges in the Court of Appeal decision in Re A (Children) found that the killing of the weaker twin would be lawful. Similarly, McGrath and Kreleger argue that “instead of stating the law and then applying the particular facts, the judges arrived at their decision as to what the outcome should be and then desperately sought to find legal principles to support this position”. According to McEwan, the judges in Re A (Children) found the criminal law too unbending and inflexible and the decision has left the criminal law “in a state of disarray”. Kirby argues that the legal reasons in this case are unsatisfactory, and Harris describes them as confused and mutually inconsistent.

Queensland v Nolan has also attracted critical academic comment because of the judgment’s selective focus on some provisions in the *Criminal Code* (Qld) and disregard of others. As Devereux points out, Chesterman J’s reliance on ss 286 and 282 is supportable, but at the same time it is difficult to get around s 296. There could be little doubt that doctors will have hastened the death of the baby who dies during surgery.

Despite these concerns, the reasoning in these two cases is likely to be relied on to justify the separation of conjoined infants in the future in situations similar to those in Re A (Children) and

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49 See n 12.
50 Hewson, n 12 at 298.
51 McGrath and Kreleger, n 12 at 327.
52 McEwan, n 12.
54 Harris, n 12 at 223.
56 Section 296 (Acceleration of death) provides: “A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.”
57 Devereux, n 55 at 165.
Nolan. However, applying the reasoning to cases with different facts, eg where the twins are adults, not infants, highlights some of the flaws in the legal justification for the foreseen death of one twin during separation surgery.

When one conjoined twin dies, the death of the second follows within hours. Several adult conjoined twins have rejected separation despite this prospect. The Biddenden Maids, twins joined at the head, are reported have to said, “As we came together, we will also go together.”58 On the other hand, Lori and Reba Schappell, now in their late 40s, want to be separated when one dies.59 However, the issue of separation, before or immediately after death, if one twin is ailing, is one that all adult conjoined twins must address. Separation surgery that was not possible when they were born may be possible now or in the future.

Assume one twin in a hypothetical pair of conjoined infants is dying, and the issue arises whether the twin should be separated before the ailing twin’s death in order to save the life of the other. Assume also that the twins share a key organ so that both cannot survive the surgery. The application of Re A (Children) or Nolan to these facts would justify the surgery as lawful in England and Queensland. However, if the facts are changed, so that the twins are adults and not babies, could the reasoning in these two cases be relied on to relieve a surgeon and/or the other twin from criminal responsibility for the death of one twin?

The first key difference between the hypothetical case and infant twins is that parental consent or refusal is not an issue with competent adult patients. However, consent is still a major problem where the twins are adults but for different reasons. If an ailing adult twin refuses consent to the surgery, Harris suggests operating would be unlawful and unethical.60 People who are competent to consent are entitled to refuse any kind of medical procedure, even where this will lead to their deaths, and the law has upheld this right.61 On the other hand, it would make no difference if the ailing twin did consent, or even demand the surgery. A person cannot consent to being killed, either at common law62 or under the Criminal Code (Qld).63 With adult twins, consent on the part of the ailing twin will not relieve doctors from criminal responsibility, and the surgery cannot proceed without consent. However, it seems incongruous that competent adult twins could not lawfully be operated on, with or without consent, yet the surgery is lawful, or even mandated,64 in cases of infant twins. It is also anomalous that an adult can consent to the surgery where the weaker party does not have the capacity to consent, eg where the twins are babies, but competent adults are unable to do this on their own behalf.65

The judge at first instance in Re A (Children), Johnson J, took the view that the surgery could be likened to removing artificial life support and would therefore be lawful. However, this argument is as unconvincing in the case of adult twins as it is with infants. Quite clearly the surgery would be a positive act and not an omission. In Airedale NHS Trust v Bland [1993] AC 789, Lord Goff held (at 865) that withdrawal of life support was an omission rather than an act, and such an omission would be culpable only if there was a duty to act. However, as Ward LJ pointed out in Re A (Children) (at 985), if Mary was kept alive by life support after the surgery, application of the Bland principles would mean life support could later be withdrawn and there would be no question of unlawful killing. His Lordship went on to say that it would make a mockery of law and medicine to hook Mary up to a heart/lung support machine and then seek permission to discontinue that treatment given the futility of

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60 Harris, n 12 at 227.
61 Harris, n 12 at 227.
63 Section 284 provides: “Consent by a person to the causing of the person’s own death does not affect the criminal responsibility of any person by whom such death is caused.”
64 Queensland v Nolan [2002] 1 Qd R 454 at 459.
65 Harris, n 12 at 228.
of prolonging her life. Bland has already left the law, as Lord Mustill commented, in a “morally and intellectually missshapen” state (at 985). Putting the ailing adult twin onto life support after surgery, and then applying Bland when the life support is withdrawn, as a means to circumvent criminal law issues, is unacceptable and illustrates the difficulties that can arise when the law is extended to accommodate an outcome in a particular set of facts, and is then applied to a different factual scenario.

Ward LJ’s use of quasi self-defence to justify the death of Mary in Re A (Children) is also problematical when applied to adult conjoined twins. The stronger twin would be unable to kill her or his sibling because such an act would result in the death of the weaker sibling. The only chance at survival for the stronger sibling would lie in the hands of surgeons. However, where third-party intervention is required to defend one person from another, the threat is usually from an unlawful and unjust act of aggression. Ward LJ’s description of Mary evokes an image of a parasite who is draining the lifeblood from her sister (at 1010) and is the language of an unjust aggressor. However, Mary did nothing to her sister other than be born attached to her. Similarly, in the case of the adult twins, the ailing twin has done nothing to harm the sibling other than become ill, and it is equally difficult in the case of the hypothetical twins to accept that the ailing twin is attacking his sibling as it is to justify this view with Jodie and Mary.

However, if Ward LJ’s approach is accepted and doctors could be viewed as coming to the aid of the stronger twin by removing the threat to her survival, it may be difficult to argue that the death of the ailing twin is reasonable. As Kirby suggests in the context of infant conjoined twins, such a defence is not reasonable because it involved the “meticulously planned killing of an innocent human being.” It would apply to adults and infant twins alike. Self-defence is usually relied on where a third party intervenes to save one person from another. A further problem with trying to rely on Ward LJ’s quasi self-defence is that the defence could be applied equally to each twin. If the ailing twin refused the surgery but the stronger twin demanded it, each twin is under threat from the other.

Likewise, the doctrine of necessity, relied on by Brooke LJ in Re A (Children) to justify the surgery, could apply to both twins. It is a necessity for the surgery to proceed to save the healthy twin, but it is also a necessity that the surgery not go ahead if the life of the ailing twin is not to be cut short. As Harris points out, this difficulty with applying the doctrine of necessity to conjoined twins is that “in cases like this necessity tells you that you can kill one, but not which one you may kill.” A second reason that it might be difficult to apply necessity to adult conjoined twins is that it may not be possible to comply with Brooke LJ’s requirement that “the evil inflicted must not be disproportionate to the evil avoided” (at 1052). Killing one adult to prolong the other’s life may not be regarded as reasonably necessary or proportionate. Abhorrent as it would be to contemplate a person being anaesthetised against her or his will before being killed, if necessity were able to justify the killing of Mary to save Jodie, why would there be a difference in the case of adult twins?

Robert Walker LJ relied on the doctrine of double effect to justify the surgery, arguing that the benefit to Mary would be bodily integrity. In fact, many adult conjoined twins express a desire not to be separated. Further, his Lordship’s reliance on the doctrine to find that there was no guilty intent is problematical, irrespective of its application to conjoined twins. Whether or not his Lordship’s suggestion that there is a difference between the law’s definition of “intention” and its definition of “guilty intention” (at 1063) is correct is an important question, but beyond the scope of this article.

Even if intention, the mental element for murder, is not proved, doctors could still face manslaughter charges if they surgically separate the adult twins. The dilemma they face is that they owe separate but conflicting duties to each patient. If they fail to operate, there is a potential breach of their duty to the stronger twin. On the other hand, if the surgery proceeds, the doctors breach their duty to the ailing twin. Applying Ward LJ’s balancing-scales approach is unlikely to yield a satisfactory outcome with adult twins. Each life would be given equal weight by the courts, leaving...
the scales evenly balanced. Considering the clinical advantages of the treatment, and with it the quality of their lives, may not alter the balance. This was the determining factor in tipping the scales in Jodie’s favour but will be of no help if both twins are enjoying equally productive and happy lives, despite the illness of one, or, as Ward LJ puts it, “the manner in which they are individually able to exercise their right to live” (at 1010). Ward LJ provided no further guidelines as to how this balancing exercise should be conducted, what other factors should be considered and what weight should be given to them. In the end, it may come down to one twin’s potentially shorter lifespan. It is doubtful whether this would be regarded as a legitimate reason for choosing between conflicting duties.

Chesterman J’s approach to the issue of conflicting duties under s 286 is equally difficult because his Honour considered only the duty to the stronger twin and not the equal duty to the weaker one. However, this section applies only to children under 16 and would not be relevant if the twins were adults. Section 288, on the other hand, imposes a duty on people who carry out surgery or medical treatment to use reasonable care and skill. It could be argued that any surgery that results in the foreseen death of a patient could not meet this standard.

Reasonableness is also the standard in s 282, which Chesterman J also relied on to justify the surgery. However, as with s 286, his Honour did not consider the relevance of this section to the weaker twin. The operation is performed on both twins and not just one. With adult twins, there would be no benefit to the twin to be sacrificed, other than the fulfilment of the ailing adult twin’s wishes should the twin desire the surgery to give her or his sibling the chance of continued life. As with s 286, sacrificial surgery may not meet the requirement for reasonableness, having regard to the patient’s state and the circumstances of the case. The sacrifice of the ailing twin would fall under s 296. This section, not considered by Chesterman J, is clearly relevant to both our hypothetical adult twins, as well as the Nolan babies, because the death of one twin is an inevitable outcome of separation surgery.

In Re A (Children), Brooke LJ suggested (at 1044) that it would be very helpful if Parliament could provide guidance for the courts, parents and medical practitioners as to what is legally permissible and what is not legally permissible in the context of separation surgery on conjoined twins. In Queensland, Chief Justice Paul de Jersey, commenting on Re A (Children) and Nolan in a conference paper, pointed out that where the legislature allows the law to remain silent in an area, judges may be required to extend in order to cover the gap. In an age of “racing medical and scientific development, … [t]he parliament is challenged to provide the courts with an adequate legislative framework.” Until legislatures clarify the criminal law implications of separation surgery that is foreseen to be fatal for one of a pair of conjoined twins, judges and doctors called on to intervene will continue to be in a difficult position. In particular, the interpretation of the intention, the resolution of irreconcilable conflicting duties, and which excuses, defences or justifications might relieve surgeons and parents from criminal responsibility require clarification.

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69 Section 288 (Duty of persons doing dangerous acts) provides: “It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.”

70 Section 282 was amended in July 2009 and now provides: “Surgical operations and medical treatment (1) A person is not criminally responsible for performing or providing, in good faith and with reasonable care and skill, a surgical operation on or medical treatment of – (a) a person or an unborn child for the patient’s benefit; or (b) a person or an unborn child to preserve the mother’s life; if performing the operation or providing the medical treatment is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.” The section in 2001 read: “A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for the patient’s benefit, or upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all circumstances of the case.”

71 Section 296 (Accelerations of death) provides: “A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.”

CONCLUSION

The judgments in *Re A (Children)* and *Nolan* highlight some of the difficulties facing parents, doctors and judges who have to decide whether one conjoined twin should die so that the other might have a chance at life. The law that judges are required to apply can be inappropriate to resolve these complex life-and-death issues and extension of existing legal principles to cover a particular case may be problematic when applied to another case involving conjoined twins with different facts. Legal definitions that apply generally may be inadequate in determining which conjoined twins should be protected by the law. Similarly, a strict application of the law of homicide to separation of conjoined twins can yield perplexing outcomes.

The unsatisfactory state of the law will not always avail judges asked to declare the surgery lawful, and medical personnel will continue to face the uncertainty of possible criminal charges.