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Published
2014

Journal Title
Journal of Law and Medicine

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The spectre of court-sanctioned sacrificial separation of teenage conjoined twins against their will

Colleen Davis

In a recent decision of the Indian Supreme Court, judges foreshadowed authorising separation of teenage conjoined twins where both would die if not separated but where the operation could save only one. The absence of medical information advising separation precluded such a decision in the case at hand. However, the case raises a number of difficult legal and ethical questions that judges would have to consider before authorising sacrificial separation of these or other non-infant conjoined twins.

INTRODUCTION

The recent decision of the Indian Supreme Court in Dhasmana v Union of India (2013) 9 SCC 475 (Dhasmana) is likely to reignite the debate about the moral, ethical and legal issues associated with sacrificial separation of conjoined twins. Dhasmana is the first conjoined twin court case that does not involve infant conjoined twins. In three previous cases – the Lakewood case in 1977, Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961 (Re A (Children)) and Queensland v Nolan [2002] 1 Qd R 454 (Nolan) – courts were asked to declare lawful surgery in which one infant twin was sacrificed to give the other the chance at a longer life. The conjoined twins in Dhasmana – Farah and Saba Shakeel – were at least 16 years old when the Indian Supreme Court handed down its decision in April 2013. The judges indicated they would authorise the sacrificial separation of these teenage conjoined twins, against the parents’ wishes, if this would save the life of one twin and where both would die if they were not separated. However, in the absence of medical reports, which the judges sought but which could not be provided because the twins’ parents refused to consent to medical examinations of the girls, the judges said they were unable to give a positive direction for separation surgery to proceed. The wishes of the conjoined twins, Farah and Saba Shakeel, were not considered by the court, but media reports suggest they are opposed to separation.

This article argues that the foreshadowing of sacrificial separation by the judges in Dhasmana raises a number of legal issues and challenges that would need to be addressed if separation surgery is advised on medical grounds. The first relates to the question of who should decide whether separation surgery should be performed: the parents, judges or the conjoined twins themselves? Where this surgery involves the sacrifice of one twin to save another, the question of who should decide, and the effect of consent to the procedure, is even more difficult. A second problem squarely raised by Dhasmana is the choice of which conjoined twin should die and which should live. A key point of distinction between this case and the earlier cases is that the conjoined twins are equal, cognitively and...
physically, whereas in previous cases one twin was moribund and/or severely disabled. A third problem raised by Dhasmana is whether the right to life in the Constitution of India can be relied on to authorise, or even compel, a killing that would otherwise be homicide or involuntary euthanasia in law. In earlier cases, the right to life of each twin operated as a potential impediment to sacrificial separation surgery. A fourth problem – whether sacrificial separation of twins like the Shakeel sisters would be lawful, and on what basis the foreseen death of one twin would be authorised, justified or excused – was not discussed by the judges in Dhasmana. The lawfulness or otherwise of proposed surgery was, however, a key issue in the Lakewood case, Re A (Children) and Nolan.

This article outlines the background and the decision in Dhasmana and provides a brief summary of the earlier cases before discussing these areas of concern. The article concludes that court-sanctioned sacrificial separation of teenage conjoined twins such as the Shakeel sisters is fraught with ethical and legal difficulties, and that any future decision by judges to sanction such a procedure would require a careful and considered examination of the law and the points of distinction between the facts of this case and earlier conjoined twin cases.

THE BACKGROUND

In June 2011, Indian newspapers carried a story about the plea by the father of twins joined at the head that doctors be allowed to carry out a mercy killing of his conjoined twin daughters. Farah and Saba Shakeel, 15, were reported as “suffering terrible headaches, joint pain and slurred speech as they grow older.” Their father’s meagre wage had to support a family of eight and he could not afford the ongoing medical treatment that the twins required or the cost of medical investigations to find the cause of the girls’ increasing pain.

Five years earlier, their parents had rejected an offer by the Crown Prince of Abu Dhabi to pay for separation surgery because there was a one-in-five chance that one or both girls would die during the six operations needed to separate them. After separation, Saba would receive a kidney transplant only if Farah had kidneys.

A law student, Aarushi Dhasmana, became aware of the conjoined twins’ suffering in 2012 and filed a PIL (public interest litigation) in which she sought “the setting up of a ‘high-level’ committee

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8 Mary in Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961 had no functioning lung tissue and a primitive brain. Bethany in Queensland v Nolan [2002] 1 Qd R 454 was dying. The sacrificed twin in the Lakewood case had a circulatory defect and would not have survived even if given the shared heart.

9 In Re A (Children) (Conjoined Twins: Surgical Separation) [2000] 4 All ER 961 at [1004], Ward LJ said separation surgery would bring Mary’s life to an end and would deny her inherent right to life: “Looking at her position in isolation and ignoring, therefore, the benefit to Jodie, the court should not sanction the operation on her.” In Queensland v Nolan [2002] 1 Qd R 454 at 457, Chesterman J agreed with Ward LJ’s view that the right to life of each conjoined twin is equal.

10 Thornhill, n 1.


9 Dhasmana v Union of India (2013) 9 SCC 475 at [4], (Radhakrishan and Dipak Misra JJ). The surgery would have been performed by Dr Benjamin Carson, head of paediatric neurosurgery at Johns Hopkins Children’s Centre in Baltimore and whose experience in separating craniopagus conjoined twins dated back to 1987, and a team of Indian doctors. The twins share a sagittal sinus vein, and Dr Carson therefore planned to graft a vein segment from the thigh of one twin to become a sagittal sinus vein for the second twin. The circumference of the fused portion of the skull would be divided and kept apart using a bone graft. The brains would be eased away from each other and would be separated two months later. See Gupta RL, “Glimpses of Progress in Surgery” in Gupta RL (ed), Recent Advances in Surgery – 10 (Jaypee Brothers Publishers, 2006) p 16.


of medical experts for the purpose of examining the possibility of separating the twins”. She said the twins’ hapless parents had made “fervent appeals” for the “mercy killing of their daughters if all options to separate them failed”.

The petition was heard on 16 July 2012 by Radhakrishan and Dipak Misra JJ. The court ordered that a team of medical experts examine what medical assistance could be provided to the twins, and that the State of Bihar/Union of India bear the entire cost of “medical expenses to save the lives of the conjoined twins”. On 30 July, the Supreme Court ordered that the twins and their parents be flown to the All India Institute of Medical Sciences in New Delhi for medical investigations, at the expense of the state. However, the twins’ parents refused this, saying they only wanted financial assistance to look after the girls. The court then ordered the medical team to travel to Patna to examine the twins. On 31 October, the medical team reported back to the court that the conjoined twins’ parents and brother had refused to allow investigations such as a CT scan, MRI and MRI angiography, to be performed. The report said the parents were “not willing to take any risk including the risk involved in investigations”. Instead, the “brother and the parents handed over a written submission requesting financial help.”

THE JUDGMENT

Radhakrishan and Dipak Misra JJ handed down their decision in Dhasmana on 10 April 2013. They indicated that, in the absence of the medical report they had sought that would indicate that both, or at least one of the twins, could be saved by separation surgery, they were unable to give a “positive direction” about separation (at [19]). Instead they ordered that doctors should examine the twins and report back to the court every six months about the twins’ treatment and condition, that the State of Bihar pay for all medical treatment of the girls as well as an amount of Rs 5,000 for the girls’ care (at [19]). The court also directed the State of Bihar “to move this Court for further directions, so that better and more scientific and sophisticated treatment could be extended to Saba and Farah” (at [19]).

In the course of their judgment, Radhakrishan and Dipak Misra JJ made it clear (at [12]) that: If there is an authentic medical report before us that the life of one could be saved, due [to] surgical operation, otherwise both would die, we would have applied the “least detrimental test” and saved the life of one, even if parents are not agreeable to that course. Every life has an equal inherent value which is recognised by Article 21 of the Constitution and the Court is duty bound to save that life.

Although Art 21 of the Constitution of India guarantees a right to life, Radhakrishan and Dipak Misra JJ said that where both conjoined twins would die if not separated, but one could survive separation surgery, “is there not a duty on the Court to save at least one” (at [11]). They said that, given the conflict of interests between Saba and Farah, the court would have to “adopt a balancing exercise to find out the least detrimental alternative” (at [12]).

The judges recognised that, as a general rule, a medical test or surgery performed on a person without his or her consent is unlawful (at [10]). However, because the Shakeel sisters were minors, judges could override the view of parents in their determination of the “welfare of the children”.

PIL, any member of the public can bring an application for an appropriate direction, order or writ, but only against the state and not private parties. PIL is not adversarial but rather is cooperative or collaborative. See Sood AM, “Gender Justice Through Public Interest Litigation: Case Studies from India” (2008) 41(3) Vanderbilt Journal of Transnational Law 833 at 839-841; Deva S, “Public Interest Litigation in India: A Critical Review” (2009) 28(1) Criminal Justice Quarterly 19.


15 Dhasmana v Union of India (Writ Petition (Civil) No 232 of 2012, Order, 30 July 2012).

16 Dhasmana v Union of India (2013) 9 SCC 475 at [5].

17 Dhasmana v Union of India (Writ Petition (Civil) No 232 of 2012, Order, 21 August 2012) at [5].

18 Dhasmana v Union of India (2013) 9 SCC 475 at [6].

19 Dhasmana v Union of India (2013) 9 SCC 475 at [6].
Farah and Saba had been made wards of court, and therefore the court, exercising its wardship jurisdiction, had to make the decision (at [15]). Radhakrishan and Dipak Misra JJ referred to comments by Lord Dunn and Lord Templeman in *Re B (A Minor) (Wardship: Medical Treatment)* (1990) 3 All ER 927 to the effect that the court cannot hide behind the decision of the parents or of the doctors (at [15]). They said that the court had “a responsibility to find out whether it is possible to save both and if not, at least one, for which investigations are necessary” (at [16]).

**EARLIER CASES**

**Lakewood case**

The 1977 *Lakewood* case appears to be the first case in which court approval was sought before sacrificial separation surgery. The twins shared a liver and one fused six-chambered heart. The parents agreed to separation surgery, knowing that one twin could not survive the procedure.20 The surgeon was concerned he might face charges of premeditated murder and refused to go ahead with the surgery without court approval. A three-judge panel of the Family Court in Philadelphia heard arguments from lawyers that the greater good would be served by saving one child instead of losing both, and that there would be no crime if a court ruled that the good outweighs the bad.21 The lawyers used an analogy of a mountain climber who falls but is saved because he is roped to another climber. However, the second climber’s hold is not secure enough to prevent both from plunging to their deaths and he would therefore be justified in cutting the rope to save himself. The Family Court agreed with the logic in this argument and, after a few minutes of deliberation, authorised the surgery.22 There is no written record of the hearing or decision.23 The weaker twin died during the surgery, and the survivor died 47 days later after contracting hepatitis B from a blood transfusion.24

**Re A (Children)**

The second case in which court sanction was sought is *Re A (Children)*. Conjoined twins, identified as Jodie and Mary, were joined end-to-end at the hip, and shared an aorta and inferior vena cava. Mary’s heart was abnormal and she had no functioning lung tissue.25 Mary would therefore not survive separation surgery. She lived only because she received oxygenated blood pumped by Jodie’s heart, and she would not have been able to be resuscitated after birth had she been a singleton.26 Mary also had very poorly developed “primitive” brain.27

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. Instead, they wanted the twins left untreated – they accepted that this was God’s will.28 The hospital, however, sought a court declaration that it would be lawful and in the children’s best interests to perform separation surgery.

At first instance, Johnson J, exercising the inherent jurisdiction of the High Court, made the declaration. Although the surgery could not be described as an omission, his Honour held that the surgery would be lawful because it represented the withdrawal of Mary’s blood supply. The parents...
The spectre of court-sanctioned sacrificial separation of teenage conjoined twins against their will appealed. A three-judge appellate panel unanimously rejected the appeal, but for different reasons. Ward and Brooke LJJ both found that the doctors would have murderous intent. However, Ward LJ held that self-defence, in the form of defence of others, would excuse the doctors, whereas Brooke LJ relied on necessity to find the surgery lawful. Robert Walker LJ, on the other hand, found that the doctors did not have the requisite intention for murder because Mary’s death was not the purpose of the surgery. His Lordship suggested that _R v Woollin_ [1999] 1 AC 82, a pivotal decision on the meaning of intention, did not apply to the case at hand because _R v Woollin_ does not address cases where a person acts for a good purpose that cannot be achieved without having virtually certain bad consequences. Robert Walker LJ was also prepared to extend duress of circumstances (which he regarded as a species of necessity) to protect doctors from criminal liability.

**Nolan**

Alyssa and Bethany Nolan were born in Brisbane on 3 May 2001, joined at the head. Although they had separate brains, they shared cranial draining veins and Bethany had no kidneys or bladder. On 25 May, Bethany’s health declined and her death appeared imminent. The twins’ parents gave permission for the girls to be separated, knowing that surgery would be fatal for Bethany. The State of Queensland applied to the Supreme Court for an order that the surgery would be lawful. Chesterman J granted the declaration, relying on the duty imposed by s 286 of the _Criminal Code_ 1899 (Qld) on people who have care of children under 16 years, in conjunction with the excuse in s 282, to find the surgery would be lawful. Section 282 relieves doctors from criminal responsibility if they perform, in good faith and with reasonable care, surgery for the benefit of the patient provided it is reasonable under all of the circumstances.

**DISCUSSION**

**Separation surgery: Who should decide?**

In two of the earlier conjoined twin court cases (the _Lakewood_ case and _Nolan_), the parents and doctors agreed that sacrificial separation surgery should go ahead, knowing that one twin could not survive the procedure but hoping that the other would be given the chance at a longer life. In _Re A (Children)_ on the other hand, as in _Dhasmana_, the parents of the conjoined twins were opposed to the surgery. There was considerable debate and discussion about whether the decision to separate Mary and Jodie should rest with parents, or whether courts could and should overrule the parent’s decision. _Dhasmana_ raises for the first time the additional possibility that conjoined twins...
themselves, as opposed to their parents and/or a court, should have this right. There are two possibilities in this case: separation (where both twins could survive the procedure) and sacrificial separation (where only one twin could survive).

**Non-sacrificial separation**

In *Re A (Children)*, all three Lords Justices made the point that the views of the parents were an important consideration but that at common law the rights of parents to make health decisions for their children is neither sovereign nor beyond review and control. Overriding control is vested in the court. In *Dhasmana*, the judges reiterated this principle and, like Ward LJ in *Re A (Children)*, they also cited *Gillick v West Norfolk and Wisbech Area Authority* [1985] 3 All ER 402 as authority for the court’s ability to override the parents’ wishes (at [13]). However, the judges in *Dhasmana* did not refer to a second relevant principle from *Gillick* – that children might be competent to consent to medical procedures. This test has become known as Gillick competence. In India, a patient is competent to give consent to medical procedures on the attainment of the age of majority – 18 years. It is unclear whether a Gillick-type test of competence is applied in India such that minors who are sufficiently mature and able to understand the nature and implications of the proposed treatment are able to consent to it. According to Nandimath, the common law application of consent is not fully developed in India. Further, as Malhotra points out, India is a collectivist society in which parental authority is near absolute, and children do not usually exercise any consent or opinion. Rao makes the point that families play a pivotal role in decision-making processes about health care. This may explain why the judges in *Dhasmana* refer to the wishes of the conjoined twins’ parents and brother, but make no mention of the wishes of the conjoined twins themselves. It may be that, in India as in Australia and England, there are some procedures for which only a court can give consent. Nonetheless, as there was no evidence before the court and nothing in the media reports to suggest

41 *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 at 985 (Ward LJ), 1018 (Brooke LJ), 1056, 1069-1070 (Robert Walker LJ).

42 *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 at 992 (Ward LJ), referring to *Gillick v West Norfolk and Wisbech Area Authority* [1986] 1 AC 112 at 184 (Lord Scarman).

43 *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 at 992 (Ward LJ).

44 A child under 16 years has the legal capacity to consent to medical treatment if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment. See *Gillick v West Norfolk and Wisbech Area Authority* [1986] 1 AC 112 at 166, 169 (Lord Fraser), 188-189 (Lord Scarman), 195 (Lord Bridge). It was argued in this case that girls under 16 lacked capacity to consent to medical treatment, but the House of Lords held that these factors were more important than age.

45 Loveless J, *Criminal Law, Text, Cases, and Materials* (3rd ed, Oxford University Press, Oxford, 2012) p 563 explains that the test of competence in children is not a question of age, but of “maturity, understanding and intelligence”. Gillick competence applies in Australia, apart from in South Australia and New South Wales, where the Gillick test is encapsulated in legislation (see *Consent to Medical Treatment and Palliative Care Act 1995* (SA), s 16; *Minors (Property and Contracts) Act 1970* (NSW), s 6). In the United Kingdom, a person over 18 years is presumed to be competent. “Child” is defined in s 105(1) of the *Children Act 1989* (UK) as a person under 18 years. In England, Wales and Northern Ireland, teenagers between 16 and 18 can consent to treatment. See *Family Law Reform Act 1969* (UK), s 8(1); Larcher V, “Consent, Competence, and Confidentiality” (2005) 330(7487) *British Medical Journal* 353 at 354.


47 Nandimath, n 46.


50 See White B, McDonald F and Willmott L, *Health Law in Australia* (Lawbook Co, 2010) pp 140-146 for a discussion of these procedures.
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that the Shakeel sisters’ condition requires separation as a medical emergency to save at least one life, there was no reason for judges to step in and suggest they might mandate the procedure against the wishes of both the twins and their family. Once the twins turn 18, they can make their own decisions about medical treatment, including possible separation. They may decide to follow the Bijani sisters and decide that being conjoined is so intolerable that they are prepared to take the risks inherent in separation surgery.\textsuperscript{51} On the other hand, they may take the view, as have many other adult conjoined twins, that they prefer to remain conjoined even if this will lead to the death of both in the short term.\textsuperscript{52} Once they turn 18, they will be legally able to make their own decision about separation, one way or the other.

The judges in \textit{Dhasmana} indicated that they were not able to give a direction about separation without “an expert medical opinion indicating that either of them can be saved due to surgical operation or at least one” (at [19]). However, having made it clear that judges can override parental wishes where children are wards of the court, it is perhaps surprising that the judges did not decide to compel the medical investigations needed to determine if the girls could be separated. It is unclear why they opted instead to order the state to seek further directions with respect to “more scientific and sophisticated treatment” for the girls (at [19]). Given that the thrust of the Writ Petition appears to be separation surgery, that this is what the judges had in mind, and that the conjoined twins had been made wards of the court, it could be argued that compelling the necessary medical tests might have been the preferred option and the one that was in the best interests of the conjoined twins. Instead, the judges made the quantum leap from not mandating medical investigations to foreshadowing mandated sacrificial separation.

It is somewhat surprising that the judges in \textit{Dhasmana} considered the possibility of sacrificial separation surgery at all. There is nothing in the facts to suggest that the twins’ lives were under threat because they are conjoined, as was the situation in other cases like \textit{Re A (Children)} and the \textit{Lakewood} case, or that one twin is dying, as was the case in \textit{Nolan}. Media reports suggest the Shakeel sisters are in constant pain\textsuperscript{53} but there is no indication that their conjoined state poses a threat to their lives.\textsuperscript{54} Furthermore, Dr Carson’s outline in 2005 of the staged separation over a period of nine months clearly contemplates the survival of both girls, although as the judges in \textit{Dhasmana} noted (at [4]), there was a one-in-five chance that either of the girls might die during each of the staged procedures.

\textbf{Sacrificial separation}

If future medical investigations reveal that the girls’ conjoined state does in fact pose a threat to the life of one or both of them, such that both would die if they are not separated but that only one could survive separation surgery, the question of consent becomes more complex and other issues need to be considered. If the twins are minors and the decision rests with a court, judges would have to consider the lawfulness of the proposed operation. As Chesterman J in \textit{Nolan} points out (at [10]), it “would not

\textsuperscript{51}Ladan and Laleh Bijani, 29-year-old craniopagus twins, wanted to be separated despite the fact that surgeons at six centres in three countries refused to do the operation because it carried such a high risk. The women both died during the surgery. See Lustig A, “Separated After Birth” (2003) 130(16) \textit{Commonweal} 8; Wilkinson S, “Separating Conjoined Twins: The Case of Ladan and Laleh Bijani” (Cardiff Centre for Ethics, Law and Society, 2003), \url{http://www.cceh.cardiff.ac.uk/archives/issues/2003/wilkinson.pdf} viewed 20 July 2013.

\textsuperscript{52}For example, Ronnie and Donnie Galyon, who turned 60 in 2012, do not want to be separated. According to Ronnie: “Our belief is this – let God separate us. Let the good Lord separate us. God made us, let God separate us, not using surgical knives.” See Cox E, “World’s Oldest Conjoined Twins”, \textit{The Sun} (7 March 2009), \url{http://www.thesun.co.uk/sol/homepage/features/article2302127.ece} viewed 25 May 2009. Some adult conjoined twins have declined separation to give one the chance of living. The Chulkhurst sisters, Mary and Eliza, declined separation surgery after one died, saying “as we came together, we will go together”. See Dreger AD, \textit{One of Us, Conjoined Twins and the Future of Normal} (Harvard University Press, 2004) p 46. Mary and Margaret Gibb refused separation in 1967, even when one was dying of cancer. See Barilan YM, “Head-Counting vs Heart-Counting, An Examination of the Recent Case of the Conjoined Twins from Malta” (2002) 45(4) \textit{Perspectives in Biology and Medicine} 593 at 601. Lori and Reba Schappell, born in 1961, say they never want to be separated. See Quigley C, \textit{Conjoined Twins, An Historical, Biological and Ethical Issues Encyclopedia} (McFarland and Co, 2003) p 148.

\textsuperscript{53}Thornhill, n 1.

\textsuperscript{54}In the earlier cases, separation surgery became an issue when it became apparent that both twins would die if they were not separated but that one twin could survive the procedure.
be in a child’s best interests that it be subjected to an unlawful, especially a criminal, act”. Ward LJ in *Re A (Children)* also makes it clear (at 994) that a “court cannot approve of a course of action which may be unlawful”. (The lawfulness of sacrificial separation will be discussed briefly below.)

If the twins are adults, their consent may be irrelevant. In India, as in England and Australia, the fact that a person has consented to being killed does not alleviate the person who causes the death, including doctors, from criminal responsibility for homicide (although in India consent reduces a murder charge to manslaughter). Therefore, even if one of the sisters consented to being killed so that her sibling could survive, the death of the sacrificed twin would still raise the possibility that doctors who perform the surgery could be convicted of manslaughter. If the twins were opposed to sacrificial separation surgery, doctors could face murder charges. The judges in *Dhasmana* do not discuss the criminal law implications for doctors, and they do not refer to *Nolan*, which comes from Queensland, a jurisdiction that, like India, has a Criminal Code, or to the English decision in *Re A (Children)*, where the common law of murder and available defences were discussed at length. In *Re A (Children)*, Ward LJ held that self-defence, in the form of defence of others, would excuse the doctors (at 1017) whereas Brooke LJ relied on necessity to find the surgery lawful (at 1052). Robert Walker LJ was also prepared to extend duress of circumstances (which he regarded as a species of necessity) to protect doctors from criminal liability (at 1067). In *Nolan*, the defence of others was not mentioned by Chesterman J. Although the Criminal Code 1899 (Qld) specifically provides for force to be used in defence of others – the main stumbling block in applying this defence to conjoined twins is the preliminary requirement for an assault. Section 97 of the *Indian Penal Code 1860* likewise permits self-defence to be used only in response to an offence to the person.

The English doctrine of necessity is incorporated into s 81 of the *Indian Penal Code* but the elements of the defence are not the same. Further, the requirement in s 81 that there not be any intention to cause criminal harm may mean that this section has no application to sacrificial separation surgery. As in England, intention is interpreted in India to encompass the inevitable consequence of an act. Therefore, if the conjoined twins themselves were to consent to surgery that would sacrifice one to save the other, the possible criminal liability for homicide on the part of the doctors is a live issue. There is also a possibility that the surviving twin could be charged as an accessory.

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55 *Airedale NHS Trust v Bland* [1993] 1 All ER 821 at 892-893 (Lord Mustill); *R v Wacker* [2003] QB 1203. The position is the same in Australia: *Criminal Code 1899* (Qld), s 284; *Criminal Code 1924* (Tas), s 53; *Criminal Code 1983* (NT), s 26; *Boughey v The Queen* (1986) 161 CLR 10.

56 *Under Indian Penal Code 1860*, s 300 a homicide is not murder if the person whose death is caused is above the age of 18 and consents to the risk of death.

57 Provided no defence or excuse is available under the *Indian Penal Code 1860*.

58 *In Queensland v Nolan* [2002] 1 Qd R 454, Chesterman J relied on the duty imposed by *Criminal Code 1899* (Qld), s 286 on people who have care of children under 16 years, in conjunction with the excuse in s 282. This section relieves doctors from criminal responsibility if they perform, in good faith and with reasonable care, surgery for the benefit of the patient provided it is reasonable under all of the circumstances.

59 *Criminal Code 1899* (Qld), s 273.

60 Section 81 provides that: “Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be once without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property. Explanation: It is a question of fact in such case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.” In an early commentary on this section, Mayne indicates the section gives effect to the principle that where there is a sudden and extreme emergency and one or other of two evils is inevitable, it is lawful to direct events so that the smaller only will happen. See Mayne JD, *Criminal Law of India* (4th ed, Higginbothams, 1914) p 157, discussed in Tan Cheng Han, “The General Exception of Necessity Under the Singapore Penal Code” (1990) 32 *Malaya Law Review* 271 at 272. Brooke LJ’s formulation of necessity at common law in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 at 1052 requires: “(i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil inflicted must not be disproportionate to the evil avoided.”

61 In *Paryag v State of Allahabad* (1967) 37 AWR 572 at 573-574, Mahesh Chandra J held that “if a man knows that a certain consequence will follow from his act it must be presumed in law that he intended that consequence to take place although he may have had some quite different ulterior motive for performing the act”. Han, n 60 at 274-279 puts forward alternative interpretations of intention in the context of s 81.
Choosing which twin will die and which will be saved

The judges in Dhasmana said that where both twins would die if the surgery was not performed, they “would have applied the ‘least detrimental test’ and saved the life of one” (at [12]). There is no explanation what this test involves, but the judges say they would need to “adopt a balancing exercise” to find the least detrimental alternative (at [12]). Although the judges do not refer to Re A (Children), the use of terms such as “least detrimental alternative” and “balancing exercise” are reminiscent of Ward LJ’s approach in Re A (Children) to resolving the conflict of duty owed to each conjoined twin.62 This would be a key issue in a case such as the Shakeel sisters. Ward LJ said the scales remained equally balanced after each twin’s right to life was considered, but the scales tipped in favour of Jodie in the case at hand when the worthwhileness of the treatment and the quality of life of each twin were added to the scales (at 1010). Mary, the twin to be sacrificed, had “grossly impaired cardiac performance and no useful lung function” (at 976) and a “very poorly developed ‘primitive’ brain” (at 975). Ward LJ concluded (at 1011) that:

The best interests of the twins is to give the chance of life to the child whose actual bodily condition is capable of accepting the chance to her advantage even if that has to be at the cost of the sacrifice of the life which is so unnaturally supported. I am wholly satisfied that the least detrimental choice, balancing the interests of Mary against Jodie and Jodie against Mary, is to permit the operation to be performed.

Ward LJ’s balancing act approach may be unhelpful to judges in a case such as the Shakeel sisters who appear to be equally healthy, physically and cognitively, apart from the fact that Saba has no kidneys. In the case of the Smith conjoined twins, born in 2002 in England sharing a heart, each infant appeared to be normal and capable of independent life should she be allocated the shared heart.63 Doctors, bioethicists and lawyers suggested that a court might declare that sacrificial separation in such a case would be unlawful,64 and said that there was nothing in law that would allow a court to hand down a decision that one viable human being should die to allow another one to live.65 However, after the conjoined twins were born, further tests showed that the girls could not be separated66 and they died.67 The opportunity for English judges to clarify the law never came to pass and it is doubtful whether an English court could order a healthy, viable conjoined twin to be sacrificed to save the other. The position in India may well be the same.

The right to life

A further possible impediment to sacrificial separation of twins like Farah and Saba is the right to life. In Dhasmana, Radhakrishan and Dipak Misra JJ held that the Art 21 of the Constitution of India68 would mean the court is “duty bound” to save the life of one twin, against parental wishes (at [12]). This suggestion that the right to life would mandate the sacrifice of one twin is at odds with the broad interpretation given to the Article by Indian judges. In a series of cases, the right to life has been

62 Ward LJ uses the phrase “least detrimental alternative” at 1004, 1006, “least detrimental choice” at 1011, and “balancing exercise” at 1005, 1010, 1011 and 1016.
68 Article 21: “Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.”
extended to include a right to health, a right to good food and a right to a pollution-free environment. Article 21 requires that no-one shall be deprived of his or her life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful. According to Sinha et al, Art 21 guarantees the protection of life “and by no stretch of the imagination can extinction of life be read into it”. It could be argued, therefore, that Art 21 might forbid sacrificial separation surgery and that it would not compel the active killing of one person to save the life of another.

This is the approach to the right to life followed by English courts. In Re A (Children), Ward LJ said the following principles set out by Taylor J in Re J (A Minor) [1990] 3 All ER 930 at 943 are well accepted:

[T]he court’s high respect for the sanctity of human life imposes a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances. The problem is to define those circumstances … it cannot be too strongly emphasised that the court never sanctions steps to terminate life. That would be unlawful. There is no question of approving, even in a case of the most horrendous disability, a course aimed at terminating life or accelerating death.

This paragraph alludes to the crucial distinction in law between omissions and positive acts. In a medical context, an omission to provide treatment, that is where treatment is withdrawn or withheld, can be lawful, but the positive act of killing, even if done with good motives, is not. There is no mention in Dhasmana of Airedale NHS Trust v Bland [1993] 1 All ER 821 or of the act-omission distinction in medical killings. However, in saying that they would sanction sacrificial separation surgery of the Shakeel sisters if this was the only way for one to live, the judges would in effect permit a positive act of killing. The apparent readiness of the judges to sacrifice one twin is surprising in a country where judges have been reticent to declare lawful the withdrawal of life support from patients in a persistent vegetative state. It was only in 2011 that an Indian court took this step for the first time and declared it would be lawful to turn off the life support of a patient who had been in a vegetative state for nearly 40 years. It is also unlikely that courts would have acceded to a reported plea from Saba and Farah’s father in 2011, that doctors be allowed to carry out a mercy killing to end the girls’ suffering if no funding for their treatment was forthcoming.

CONCLUSION

Comments by the judges in Dhasmana that they would be prepared to authorise sacrificial separation surgery of teenage conjoined twins if both were going to die but one could be saved are worrying because of the absence of any considered discussion of the law in this context. There is no medical evidence to suggest that the lives of the girls are under threat because they are conjoined, and there

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72 Airedale NHS Trust v Bland [1993] 1 All ER 821 at 862 (Lord Keith), 867 (Lord Goff), 877 (Lord Lowry), 880 (Lord Browne-Wilkinson), 890 (Lord Mustill). This is also the position in India: see Rao, n 49 at 652.


74 Thornhill, n 1.

would appear therefore to be no medical imperative to consider sacrificial separation. However, if future medical investigations showed that this was in fact the case, there are a number of reasons why judges might prefer a cautious approach, and a careful consideration of the legal position in light of the facts of the case and the points of distinction between this case and the earlier conjoined twin cases. Most notably, Saba and Farah appear to be equally healthy, unlike the conjoined twins in *Re A (Children)* or *Nolan*, and each of them could lead a long and productive life if chosen to be the survivor of separation surgery. There would appear to be no acceptable legal basis for judges to decide which twin to save and which to sacrifice in such a case. Both conjoined twins have a right to life and this right to life is protected by Art 21 of the *Constitution of India*. In two earlier cases, the equal right to life of each conjoined twin was an impediment to sacrificial separation surgery, but the decision in each case to authorise the procedure was facilitated by the fact that the twin to be sacrificed was moribund. Further, judges would need to address the fact that sacrificial separation surgery involves a positive act on the part of the doctors, and until now, a death that is caused by a positive act on the part of a doctor has been regarded as unlawful. The question of consent also needs to be considered more carefully given the twins’ age. If the conjoined twins and their parents are opposed to separation, there would need to be compelling reasons for a court to override them. Even if the twins and their parents did consent to surgery that could save only one twin, the criminal law obstacles may be insurmountable.

*Dhasmana* raises ethical and legal problems and issues even more complex than those facing judges in *Re A (Children)* and *Nolan*. A more detailed and considered analysis of these issues might lead judges to conclude that sacrificial separation surgery is not possible. In the end, all that judges might be able to do in this case – or indeed a future case where sacrificial separation is the only way to save the life of at least one teenage or adult conjoined twin – is to ensure the twins receive appropriate medical care. This is exactly what the court in *Dhasmana* has done.