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# Murder and the separation of conjoined twins

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## Introduction

Difficult legal issues have arisen in recent cases concerning the separation of conjoined (Siamese) twins. If the inevitable result of separating conjoined twins is that one twin will die, does a surgeon performing the operation commit murder? In all Australian states and territories, it is murder to perform an action knowing that it will kill another human being, unless there are circumstances to ground one of a limited number of special defences. A defence called 'necessity' has most commonly been invoked in attempts to excuse causing the death of one conjoined twin in order to benefit the other. That defence, however, is notoriously uncertain in its application. In the event of a murder conviction, some jurisdictions make a sentence of life imprisonment mandatory; other jurisdictions give the judge discretion to impose a sentence up to life imprisonment. What would be an appropriate sentence in the event that a surgeon committed murder by separating conjoined twins?

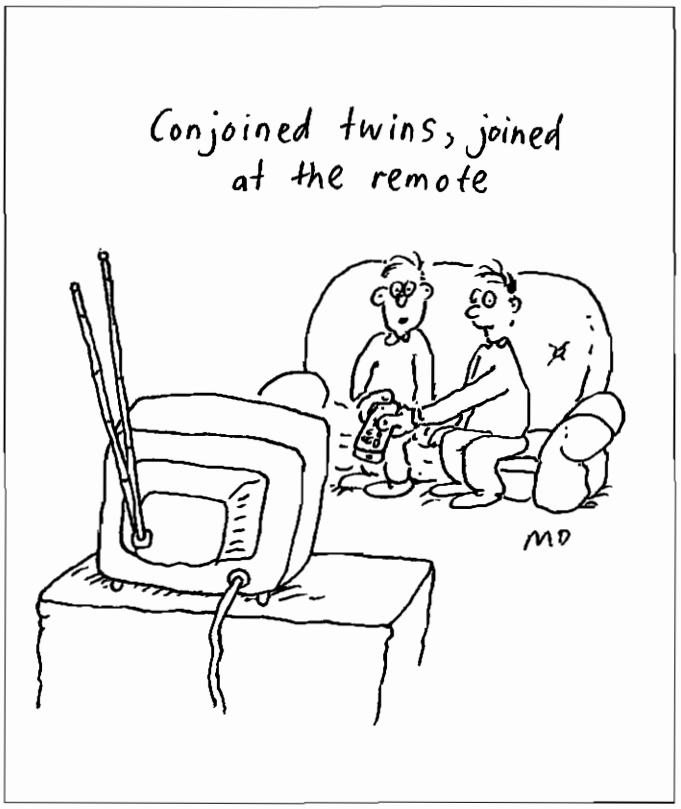
## Moot Problem Facts

These issues formed the problem for this year's regional rounds of the Bond University High Schools Mooting Competition: www.bond.edu.au/law/mootweb/Topic2002.doc. The problem was set in the A.C.T., where the criminal law of New South Wales applies. The defence of necessity exists there as a matter of common law, so that its elements can be determined by the judges. The penalty for murder is discretionary. In the hypothetical case, Susan and Wendy were joined at their heads, sharing some veins and brain tissue. Separation would involve giving the shared material to one of the twins, with the result that the other would die. The conjunction of the brains did not impose an immediate danger to either twin, although they were both weak. There were also risks of various medical complications developing and survival to adulthood was unlikely. Wendy was the weaker twin. She also had a partial bowel obstruction and that did impose an immediate danger. She was likely to die within a few days unless surgery cleared the obstruction and, if she died so too would her sister. In the result, that operation was not performed. Instead, at the request of the parents, the twins were separated. Susan received the shared material and Wendy died. The neurosurgeon was tried for murder. The defence of necessity was raised but the judge withdrew it from the consideration of the jury. The jury then convicted the neurosurgeon and judge sentenced her to the maximum of life imprisonment. The moot problem involved appeals against both the conviction and the sentence.

## *Re A (Children)*

The hypothetical case involved a variation on the facts of the much publicised English case of *Re A (Children),* which was decided in 2000. In that case, the twins were joined at the abdomen. One of them, who had deficient heart and lungs, survived only by receiving oxygenated blood from her sister through a common artery. The medical prognosis was that, without separation, both twins would die within three to six months because of the extra burden on the heart of the stronger one. Separation would, however, cause the immediate death of the weaker twin. Doctors believed separation was the correct course of action. Before action was taken, however, a declaration was obtained that separation would be lawful. Different judges gave their own reasons but the majority effectively ruled that the defence of necessity would remove criminal liability for causing the death of the weaker twin.

The argument for a necessity defence was particularly strong in *Re A (Children)* because it was clear what had to be done, and which twin had to die, if either were to survive beyond a few months. The moot problem was designed to present a case with more balanced arguments for and against allowing the defence, as well as to raise a question about an appropriate sentence in the event of a conviction. The crucial features distinguishing the moot problem from *Re A (Children)* were that: (1) the twins had much better prospects for survival; indeed, if a decision had been taken to correct Wendy's bowel obstruction instead of separating them, they could well have lived for years; (2) in the event of separation, either of the twins could have been given the shared material and therefore the opportunity to live to adulthood. Nevertheless, there were also similar features to the two cases, most importantly: (1) leaving the twins in a conjoined state would have presented serious difficulties for the twins themselves and for the persons responsible for their care; (2) the surgeon performing the separation acted for the sake of other persons and not for reasons of self-interest.





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## Courts Approach to Defence of Necessity

Courts have traditionally been unreceptive to arguments for a defence of necessity and *Re A (Children)* may have been the first time that the defence has been accepted for causing the death of a human being. The defence was unsuccessful in the nineteenth century English case of *R v Dudley and Stephens,* where shipwrecked sailors killed and ate one of their shipmates in order to save themselves from starvation. The defence was also unsuccessful in the recent Canadian 'mercy-killing' case of *R v Latimer,* where a father gassed his twelve year-old daughter. The girl had suffered from birth from a severe form of cerebral palsy. She was quadriplegic; her mental capacity was that of a four year-old baby; she had to be spoon-fed and her nutrition was poor; she suffered five to six seizures daily; it was thought she experienced a great deal of pain. She had undergone numerous surgeries in her life and doctors were planning to perform another major and painful operation when her father killed her. At his trial for murder, the judge ruled that the jury should not consider the defence of necessity. The resulting conviction was appealed unsuccessfully to the Supreme Court of Canada. The father is currently serving a sentence of life imprisonment, which is mandatory on a murder conviction in Canada.

In *Latimer,* it was said that there are three conditions for a defence of necessity: (1) an imminent peril; (2) no reasonable legal alternative to breaking the law: (3) proportionality between the harm avoided and the harm inflicted. It was held that there was no basis in the facts of the case for a jury to suppose that any of these conditions might have been satisfied. The conclusion was therefore that the defence was correctly withdrawn from the jury. It is well established in both Australia and Canada that a judge should not allow a jury to consider a special exculpatory defence unless there is some evidence to support each of its conditions. That does not mean that the defence has to be proved. The burden ultimately lies on the prosecution to disprove entitlement to the defence. Nevertheless, the defence only has to be disproved when there is some evidence supporting each of its elements.

## Primary Issues in Moot - the elements of Necessity

The trial judge in the moot problem adopted the same conditions for a defence of necessity as those articulated in Latimer and reached the same conclusion that the facts of the case did not merit the jury considering the defence. The central issues in the moot problem were (a) whether, as a matter of law, the defence should be subject to those conditions in Australia and (b) whether, on the hypothetical facts, it was correct to withdraw the defence from the jury. If the judge had made a mistake in either of these respects, the conviction would be quashed. The appeal court would then have two options. If the case for a necessity defence was strong, the appeal court could enter an acquittal. The more likely outcome, however, is that the appeal court would order a new trial to allow a jury to consider the defence with proper instructions on its conditions.

The first two of the conditions laid down in Latimer address technical aspects of "necessity'. Whether or not there should be a requirement for an imminent peril (or, as it is sometimes put, an 'emergency') is controversial. Such a requirement was rejected in *Re A (Children),* where it was said: 'The principle is one of necessity, not emergency.' For cases like *Latimer* and the moot problem, a requirement for an emergency would mean that homicide could only occur in order to prevent an imminent prospect of an already dreadful situation getting even worse. One rationale for such a condition might be that an on-going problem may eventually resolve itself without the law having to be broken. That would, however, be cold comfort in seemingly hopeless cases like Latimer and the moot problem. Another rationale might be that, even if there needs to be an exemption from criminal liability, a decision to create it should only be made through the proper channels of legal reform. It is only in an emergency that an individual should feel entitled to break the law without authorisation. There is force to this argument. The view might be taken, however, that it puts too much confidence in the capacity of the legal system to respond to extraordinary circumstances. Criminal law reform can be painfully slow. Demanding an emergency is perhaps one of the weaker reasons for denying a necessity defence in cases like *Latimer* and the moot problem. In this respect, *Re A (Children)* appears to offer a better direction than *Latimer* for the development of Australian law.

In contrast to the requirement of an imminent peril or emergency, the requirement for no reasonable legal alternative appears commonsense. Breaking the law in order to avoid some harm cannot be sanctioned if there was another way out. The way out must, however, be another way of escaping the terrible situation presented in cases like *Latimer* and the moot problem. It cannot be correct to conclude, as the Supreme Court of Canada did in *Latimer,* that 'struggling on' qualifies as a legal alternative. If a necessity defence is to be dismissed because the accused should have just struggled on, that would be because the harm inflicted by the accused was disproportionate to any harm resulting from 'struggling on': that is, the third rather than the second condition for the defence would have failed.

## Proportionality

Proportionality is a moral rather than a technical matter. What has to be decided in cases like *Latimer* and the moot problem is whether it is morally worse to kill someone than to allow that person to live under conditions of suffering and denial of opportunity. Public opinion is divided. One line of division concerns the value of human life. Is all human life of equal value or is the value of human life a variable quantity, with the ending of severe suffering being potentially an acceptable act of compassion? Another line of division concerns the longer term risks of allowing acts of compassion. Can we confine lawful 'mercy-killing' to extreme cases? Or, should we be fearful of a slippery slope where human life will be generally devalued and it will become acceptable to kill the old and the sick or to pressure them to commit suicide?

## Should judges or juries make the decision?

Who should be entitled to answer such questions? In the absence of direction from legislatures, what should be the roles of judges and juries? In principle, juries would seem better qualified. Judges have no special claim to expertise in matters of morality. It may therefore seem wrong that judges withdrew the necessity defence from the consideration of

juries in *Latimer* and the moot problem. In effect, judges were ruling that no reasonable person could entertain any doubt that the action taken was disproportionate to the problem: the question was not even worthy of consideration. Why, however, should juries not be allowed to make up their own minds? A possible reason is that a jury decision requires the concurrence of either all its members or, depending on the jurisdiction, a large majority of the members. Moreover, the prosecution must prove its case beyond reasonable doubt. The result is that, to deny a necessity defence, all or virtually all members of a jury would have to be convinced that the killing was morally wrong. With some public sympathy for the predicament of 'mercy-killers', convictions might be very difficult to obtain. Whether or not this prospect is troubling may depend on one's views about the morality of 'mercy-killing'.

## Conclusion

Convicting 'mercy-killers' of murder may command greater public support in jurisdictions, like the A.C.T. and New South Wales, where the penalty for murder is discretionary. The guiding principle for discretionary sentencing is proportionality: that is, the principle that the severity of the punishment should be in proportion to the gravity of the offence. Under this principle, the most severe punishments are to be reserved for the worse offences. In the moot problem, the trial judge apparently ignored the principle in sentencing the surgeon to the maximum of life imprisonment. An argument in support of the sentence would probably have to insist not only on the equal value of all human life but also on that value overriding all other sentencing considerations, including previous good character and lack of any motivation of self-interest. Such an argument could conceivably be made. It would, however, put even more weight on the sanctity of human life than would be acceptable to some strong opponents of 'mercy-killing'. Of course, even a relatively lenient penalty could have devastating consequences for a surgeon convicted of murder.

## Discussion Points

*Place yourself in the position of the trial judge in the moot problem above. What would your decision have been? Write a brief judgement of 300 words explaining your decision.*

*What are the primary moral (as distinct from legal issues) involved in the separation of conjoint twins? Is the courtroom the best place to resolve this type of issue?*

*What is your view of what the father did in Latimer's Case? If you were on a jury considering that matter would you have been happy to convict the father of murder?*

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