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Law, Human Life and Ethical Dilemmas

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Abstract

[extract] I cannot say how the Attard twins case would have been resolved in the Australian courts. I cannot guess how Sir Gerard Brennan and I would have resolved it, had such a problem come before us in the High Court of Australia. This much is clear. The issues of bioethics proliferate. Yet there is never a gap in our law. Theologians may dispute. Philosophers may debate. Popular television may entertain. Hypotheticals may speculate. But in the end, judges, whose jurisdiction and powers are properly invoked, must decide. If, as is usual in such cases, the Constitution and the statute law are silent, the judges must reason by analogy from basic principles. They must offer public reasons. Their conclusions will be open to criticism and to praise. Today in such cases, judges must perform their duties under the public and media spotlight. Whatever they decide will be criticised by some.

Keywords

Sir Gerrard Brennan, judiciary, ethics, Attard twins

ARTICLES

LAW, HUMAN LIFE AND ETHICAL DILEMMAS

*By The Hon Justice Michael Kirby AC, CMG**

Brennan as Colleague

I can remember, as if it were yesterday, my first meeting with F G Brennan. In February 1975, at the age of 35, I had just been appointed the first Chairman of the Australian Law Reform Commission (ALRC). It was felt wise, most especially in the Attorney-General's Department, to balance my obvious youth and enthusiasm with the gravitas of an experienced Queen's Counsel. Mr Brennan called on me for mutual inspection.

We discovered a link through what had been called the National Union of Australian University Students. Like me, and like Gareth Evans (another founding member of the ALRC) he had, in university days, indulged himself in student politics. We were both honorary life members of the national student body. Each of us was to become, in a sense, part of the legal establishment. Yet, I believe, neither of us was ever wholly of its ranks. Perhaps our common ethnicity in Ireland (albeit, in my case, largely in the northern part) encouraged us sometimes to look critically at the Australian law, substantially inherited from England. Neither of us ever lost the edge of prudent radicalism, although it sometimes took us in different directions.

I welcomed Mr Brennan's appointment to the Commission. It followed. It proved a brilliant move. It added weight and depth to the Commission's early reports. This was so in all areas of the law in which we laboured together. But it was especially so in two fields of law to which Gerard Brennan brought particular contributions. They are relevant to these remarks.

* Justice of the High Court of Australia. Member of the International Bioethics Committee of UNESCO. Member of the Ethics Committee of the Human Genome Organisation.

One of them was the criminal law. Criminal cases had formed an important part of his legal practice. They had led to his close involvement in an endeavour to produce a national criminal code that could be adopted for all Australian jurisdictions. He quickly became a sheet anchor for the earliest reports of the Commission on subjects relevant to criminal law.¹

The other subject on which he, like Sir Zelman Cowen later appointed, brought particular insights concerned the first project of the Commission in the field of bioethics. That project led to the highly successful report on *Human Tissue Transplants*.² By the time that undertaking was afoot, Gerard Brennan had been appointed to the federal judiciary. The Commission had to report on new problems concerned with the implantation of human tissue taken from one human being for use in another. In connection with this task, the Commission had to provide a definition of death by reference to the cessation of brain function. This had become necessary because the introduction of mechanical respirators and ventilators had made the diagnosis of death difficult in some cases. They had also presented a potential ethical conflict, in that human beings kept 'alive' by these machines presented ideal sources of 'donor' organs, suffused with blood, suitable for speedy transplantation after 'death' was pronounced.³

Sir Zelman Cowen has often referred to the intense debates which we had over the many controversies presented by our obligation to prepare new laws to govern all aspects of this topic. Justice Brennan's contributions to those debates were always based on a search for concordancy with the traditional approaches of the common law to respect for human life and human dignity and consistency with common moral principles shared by most members of the Australian community. Although he approached the latter from a viewpoint respectful of the secular nature of the Australian Commonwealth and the diversity of opinion of its people, it was inevitable that his viewpoint was influenced by the religious tradition in which he lived. This is the Christian tradition of the Roman Catholic Church, of which he was, and is, a leading lay member. The Church's tradition lays emphasis upon the sacred and inviolable quality of human life. Because its approach is generally common to all people of the Book, and because it profoundly influenced the common law of England in

1 See Australian Law Reform Commission, *Complaints Against Police* (ALRC 1, 1975); *Criminal Investigation* (ALRC 2, 1975); *Alcohol, Drugs and Driving* (ALRC 4, 1976).

2 ALRC 7, 1977.

3 ALRC 7, 1977, Ch 10, paras 114-115.

its origins and development, no disharmony appeared from the introduction of such basic ideas into the work on which the ALRC was engaged. Fortunate were we to have had at our table so informed and articulate a participant in the sensitive tasks of law reform handed to us by the Government.

Soon the tables of our relationship were turned. In 1976 Justice Brennan was appointed the first President of the Administrative Appeals Tribunal. *Ex officio*, he chaired the Administrative Review Council. I sat under his presidency of that body to witness the great skill with which he presided over the introduction into Australian federal law of some of the most important legislative reforms that our country has ever witnessed.⁴ In 1981 he took his seat on the High Court of Australia. In 1995 he was appointed Chief Justice of Australia. In 1996 our paths crossed again when I was appointed to the High Court.

As in the Law Reform Commission, so in the High Court, occasionally we differed, for reasons that we expressed as required.⁵ But in most important cases, we reached the same conclusions, sometimes in common agreement,⁶ sometimes in common dissent.⁷ It is a privilege for me to be invited to participate in this lecture series in Sir Gerard Brennan's honour. His portrait as Chief Justice hangs in the High Court in Canberra. He is presented in the portrait holding a single volume of the *Commonwealth Law Reports*. Close inspection reveals that it is Volume 175. It is in that volume that his leading decision in *Mabo v Queensland [No 2]* appears.⁸ When all else is forgotten of the law in Australia at the dawn of the twenty-first century, *Mabo* will be remembered. Through Gerard Brennan's careful legal analysis shines the light of a personal commitment to fundamental and universal human rights.⁹ Those rights sustain a belief in the essential equality and personal dignity of every human being.

4 Especially *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the commencement of the *Administrative Appeals Tribunal Act 1976* (Cth).

5 See, eg, *Wik Peoples v Queensland* (1996) 187 CLR 1; *Levy v Victoria* (1997) 189 CLR 579; *Green v The Queen* (1998) 191 CLR 334; *I W v City of Perth* (1998) 191 CLR 1.

6 eg *Ha v New South Wales* (1997) 189 CLR 465; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1.

7 eg *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

8 (1992) 175 CLR 1.

9 (1992) 175 CLR 1 at 42.

Twins In The News

I recently attended the sixtieth birthday celebration of my brother, Donald. He was born in 1941, a twin. In 1943 his twin brother died of pneumonia at eighteen months of age. It was war-time. There were no antibiotics or other drugs that now would have saved him. He was the second born, and weaker, of the twins. With their perfect white skin and golden hair they were the joy of my parents lives. The death of one of them was a terrible blow. Upon the birth of another son, Donald cleaved to him as a surrogate twin. Twins are like that. I could never intrude. Like many others before and since, Donald could only take me in small doses.

Our family's tragic experience with twins naturally made us alert to issues involving twins which others might not notice. In recent months, news reports have recorded a number of stories concerning twins.

In January 2001 one such story told of how the natural mother of twin girls, Kimberley and Belinda, offered them for sale on the Internet. It was an offer quickly snapped up by a childless couple, the Allens of California. Then a Welsh couple, the Kilshaws, offered more money. The natural mother handed the six months old babies to them. An adoption broker was the intermediary. Eventually the courts intervened to protect the best interests of the twins.

The Internet sale of the twins was described by the British Prime Minister, Mr Tony Blair, as 'deplorable', an opinion most people would probably share.¹⁰ Years ago, on the report on *Human Tissue Transplants*, Justice Brennan and I agreed to the unanimous recommendation of the ALRC that 'the law should forbid payment of any kind to any person for any dead body or part thereof; or for human tissue removed from any living person or from any dead body'.¹¹ It is not apparent why a different legal principle would be adopted in relation to a living person. Slaves, in earlier times, were bought and sold as chattels. But slavery is incompatible with the common law.¹² It is forbidden by international law.¹³ Paying for human lives (as distinct from affording reimbursement for

10 See 'Internet Twins Need Love, Not Litigation', *Weekend Australian*, 20 January 2001, 16.

11 ALRC 7, p 87 (para 178).

12 *Somerset v Stewart* (1772), Lofft, 1, 1 at 19; 98 ER 499 at 510 per Lord Mansfield.

13 *International Covenant on Civil and Political Rights*, Art 8, *International Convention to Suppress the Slave Trade and Slavery* 1926; *Universal Declaration on Human Rights*, 1948, Art 4.

expenses incurred in adoption and transport) seems incompatible with basic notions of human dignity. Such notions are certainly attracted once a child is born. In law, the child then has an identity separate from its parents which the law will protect.¹⁴

A second case involving twins arose in Australia in October 2000. It concerned two conjoint, or Siamese, twins, Tay-Lah and Monique Armstrong who were joined at the head. In a twelve hour operation conducted by a surgical team of twenty-five professionals at the Royal Children's Hospital in Brisbane, the twins were separated. There were great risks in the operation. In the past sixty years some thirty separation operations have been performed on such twins. In about a third, both survived; in a third, both died. In a third, one survived. Fortunately, in the Armstrong case, both survived. The surgical team was aided by the most modern magnetic resonance imaging scans. The case was rightly reported as a triumph of Australian neurosurgery.¹⁵

Jodie and Mary

The Brisbane case coincided with world-wide attention to another instance of conjoined twins in Britain. Although the names of the twins in the British case were not originally revealed, they were described throughout the litigation by the pseudonyms 'Jodie' and 'Mary'.¹⁶ Later reports in the international media revealed that the parents of these twins were Michaelangelo Attard, 44 and his wife Rina. They live on the Maltese island of Gozo.¹⁷

The Attard twins were joined at the pelvic bones. They shared a single bladder, anus and vagina. On the recommendation of doctors in Malta the parents travelled to Britain so that they could get expert advice on what, if anything, could be done to separate the twins. Although each of the daughters had a separate brain, heart, limbs and most vital organs, it was immediately apparent that there was no possibility of performing the kind of surgical miracle that later proved possible in Brisbane. The dependence of Mary on the efficiency of Jodie's heart placed dangerous strains on the pair which could not continue

14 cf *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 74 ALJR 775 at 785-790 [75]-[81].

15 G Roberts, '12 Hour Operation to Separate Twins a World First', *Sydney Morning Herald*, 27 October 2000, 5.

16 Noted 'Jodie and Mary: Siamese Twins?' (2000) 7 *Healthcare: Policy, Ethics and Law* (India) 157.

17 *The Times* (London) 8 December 2000.

indefinitely. On the other hand, if the twins were surgically separated, the unanimous medical opinion was that Mary would inevitably die but Jodie would enjoy an extremely high chance of survival.¹⁸

Mr and Mrs Attard were devout members of the Roman Catholic Church. It was their view that it was 'God's will for (the mother) to carry twins and it is God's will that those twins have been born alive'.¹⁹ But equally they concluded, having secured the best medical advice, no surgical treatment should be attempted:

We certainly do not want the separation surgery to go ahead as we know and have been told very clearly that it will result in the death of our daughter, Mary. We cannot possibly agree to any surgery being undertaken that will kill one of our daughters. We have faith in God and are quite happy for God's will to decide what happens to our two young daughters.²⁰

Some hospitals would doubtless have allowed the parents' views to prevail. Had the parents remained in Malta, it seems almost certain that this is what would have occurred. However, a summons was quickly filed in the High Court of Justice in England by the hospital in which the twins were being cared for. The summons sought a declaration, in circumstances where the twins could not give valid consent and where the parents withheld their consent, that it was lawful, in effect, to carry out surgical separation. The consideration that made the provision of such relief controversial was the common acceptance that one of the twins, Mary, would certainly die if the application were upheld and the operation performed.²¹

It was this invocation of the jurisdiction and powers of the English courts that presented the primary judge (Mr Justice Johnson) with an urgent problem. He concluded, in what is described as 'effectively an ex tempore judgment',²² that the 'withdrawal of Mary's blood supply' by separation from Jodie would be lawful. He so decided on the basis that the operation was certainly in the best

18 *Re A (Children) (conjoined twins: surgical separation)* [2000] 4 All ER 961 at 980. Estimates of mortality of Jodie in elective surgery ranged from 6% to 1-2%. The risks were appreciably greater if emergency surgery was required. In that event, mortality estimates rose to 60%.

19 *Re A* [2000] 4 All ER 961 at 971.

20 *Re A* [2000] 4 All ER 961 at 986.

21 *Re A* [2000] 4 All ER 961 at 987.

22 *Re A* [2000] 4 All ER 961 at 989.

interests of Jodie; that it was Jodie's only chance of a virtually normal life; and that Mary's state was 'pitiably' and unviable once separation was performed. In such circumstances Mr Justice Johnson concluded that it would be in the best interests of Mary, as well as of Jodie, to carry out the operation. He drew an analogy between the interruption, or withdrawal, of the supply of blood in the case of a mechanical ventilating machine, condoned in certain circumstances by a decision of the House of Lords,²³ and withdrawal of the blood supply from Mary by the surgery separating her from Jodie.²⁴ On this basis, the judge held, the elective operation could proceed. The parents immediately appealed from this decision to the English Court of Appeal.

The Court of Appeal comprised Lords Justices Ward, Brooke and Robert Walker. The appeal hearing took place under the glare of world-wide media attention. The Court heard argument and with commendable speed, on 22 September 2000, delivered its judgment.

The parents and the hospital were represented at the appeal hearing. Separate legal representation was provided in respect of Mary and Jodie. 'Exceptionally'²⁵ the Court 'allowed the [Roman Catholic] Archbishop of Westminster and the Pro-Life Alliance to make written submissions'. It expressed gratitude for the submissions of these interveners. All judges referred to those submissions. In the end, however, for reasons given separately, the Lords Justices dismissed the appeal. The parents' wishes were accorded respect. But they were not given effect. The Court allowed the elective separation of the twins to proceed. Although leave to appeal to the House of Lords was granted, the parties elected to take the litigious fight no further. The surgeons began to prepare for their task.

Before the operation, the father took steps to have Mary confirmed into the Roman Catholic Church. The parents kissed and held her for the last time. One of the surgeons, Mr Adrian Bianchi is himself a devout Roman Catholic. He and the other principal surgeon, Mr Dickson (who described himself as an Evangelical Christian) both prayed with their team before the surgery was undertaken.²⁶ Bianchi and Dickson had worked together for twelve years. They

23 *Airedale NHS Trust v Bland* [1993] AC 789 at 865 per Lord Goff of Chieveley.

24 Judgment of Johnson J as cited in *Re A* [2000] 4 All ER 961 at 1061 per Robert Walker LJ.

25 *Re A* [2000] 4 All ER 961 at 969 per Ward LJ.

26 I Cobain, 'Our heartache, by surgeons who separated twins', *The Times* (London), 8 December 2000, 3.

had shared many difficult moments. They enjoyed the protection of the Court ruling. Yet inescapably, as they knew, Mary, a living baby, would die in their procedure. Mr Dickson described the '... very intense moment. We looked at each other because we knew what we were doing at the time'.²⁷

In consequence of the surgical intervention, Mary quickly died. Jodie survived.

Reports early in January 2001 indicated that Jodie's recovery had amazed the surgeons. They predicted that she would be allowed to return to Malta from Britain by the middle of 2001. Her parents had been able to push her around the hospital in a pram.²⁸ A later report told of the burial of the remains of Mary in Xaghra, Malta. By her real name Rosie, she was honoured by the Bishop of Gozo in the presence of a crowd which packed the church and lined the town's main street.²⁹ The parents had been loyal to their faith and the instruction of their Church. The surgeons had performed the operation considered essential by the hospital if the catastrophic loss of *both* lives was to be avoided. The common law had condoned the operation. In the manner of modern times, a British television network paid around £150,000 to the parents for cooperating in a programme reflecting on their ordeal. This money has been paid into a trust fund for Jodie.³⁰

Many, possibly most, observers who expressed an opinion approved the resolution of the dilemma by the primary judge and by the English Court of Appeal. However a spokeswoman for the Pro-Life Alliance in Britain, which had campaigned against the operation calling for both children to be allowed a natural death, reportedly said 'It may have been lawful, but it doesn't make it right'.³¹

Is it Lawful?

People of the civil law tradition tend to feel intensely uncomfortable without the benefit of positive law to cover the precise controversy they have before them. I discovered this when I served for the United Nations in Cambodia. Non-governmental organisations felt very vulnerable without an enacted

27 Interview 'Tonight with Trevor McDonald' ITV (Britain) 7 December 2000 cited in Cobain, above n 25.

28 *Sydney Morning Herald*, 8 January 2001, 6.

29 'Twins laid to rest', noted *Bangkok Post*, 21 January 2001, p 6.

30 *The Times* (London) 8 December 2001, 1.

31 J Quintavalle quoted *ibid*.

statute permitting and regulating their activities. This revealed a different attitude to law: a deep feeling that without positive law, civil conduct was unstable and dangerous.

In Australia, we have inherited from England a completely different attitude. Unless the law forbids conduct, it may ordinarily take place. For us there is never, ultimately, a gap in the law. If the Constitution is silent on a problem, and there is no valid law made by Parliament or under its authority and if the judges of the past have never declared a rule of the common law to cover the case, there is no legal vacuum. A new law may be 'declared' by the judges, acting within their powers. They will derive the new rule by analogy from past decisions and by the application of logic and reason. Indeed, this is the genius of the common law system.

When the case of the Attard twins came before the courts of England, following the summons issued by the hospital, those courts had no particular statute to which they could resort to provide the norms which they had to apply. True, they had the *Children Act 1989* (UK) and certain other statutory expressions of the duty to uphold the 'best interests of the child'. This is also a principle expressed in international law.³² But the Parliament in the United Kingdom had not enacted a statute laying down the procedures to be followed and rules to be observed in the case of conjoined twins where the parents demanded that separation surgery should not take place, although it was essential to save the life of one of the twins.

Some commentators, not knowing the national origin of the Attard family, had suggested that they were 'Kosovan refugees unjustifiably draining our resources',³³ medical and legal. Refugees are often the target of irrational hatreds. It sometimes seems that we have learned nothing from the plight of the refugees from Nazi Europe. Other critics asserted that lawyers had no special expertise in matters as complex and sensitive as this. Those who were legally

32 The 'paramountcy principle' is discussed in *De L v Director General, NSW Department of Community Services* (1996) 187 CLR 640 and in *CDJ v VAJ* (1999) 197 CLR 172 and *Northern Territory v GPAO* (1999) 196 CLR 553. It is reflected in a number of international instruments including the United Nations *Convention on the Rights of the Child*, Art 9.

33 *Re A* [2000] 4 All ER 961 at 970 per Ward LJ.

literate invoked Justice Scalia's observation in *Cruzan v Director, Missouri Department of Health*:³⁴

The point at which life becomes 'worthless' and the point at which the means necessary to preserve it become 'extraordinary' or 'inappropriate', are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City Telephone Directory.

Because virtually everyone who heard about the Attard twin case formed an opinion as to what should be done, the judges had to face certain criticism whatever they decided. Sometimes, one suspects, criticisms of judicial 'interference' simply represented another way of urging the paramountcy of the wishes of the parents. Lord Justice Ward met such critics with answers which, in his own words 'stress[ed] the obvious':³⁵

This Court is a court of law, not of morals, and our task has been to find, and our duty is then to apply, the relevant principles of law to the situation before us - a situation which is quite unique.³⁶

A feature of the reasons of all three members of the Court of Appeal was the extent to which they each took pains to respond to the concerns of the public, the wishes of the parents, the submissions of interested groups and of the parties. To the public, Lord Justice Ward said this:³⁷

There has been some public concern as to why the court is involved at all. We do not ask for work but have a duty to decide what parties with a proper interest ask us to decide. Here, sincere professionals could not allay a collective medical conscience and see children in their care die when they know one was capable of being saved. They could not proceed in the absence of parental consent. The only arbiter of that sincerely held difference of opinion is the court. Deciding disputed matters of life and death is surely and pre-eminently a matter for a court of law to judge.

Repeatedly, the appellate judges expressed their understanding of, and sympathy for, the predicament of the parents:

34 110 SCt 2841 at 2859 (1990); 497 US 261 at 994 cited by Ward LJ in *Re A* [2000] 4 All ER 961 at 969.

35 *Re A* [2000] 4 All ER 961 at 969.

36 *Re A* [2000] 4 All ER 961 at 969.

37 *Re A* [2000] 4 All ER 961 at 987.

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We wish ... to emphasise to the parents how we sympathise with their predicament, with the agony of their decision - for it has now become ours - and how we admire the fortitude and dignity they have displayed throughout these difficult days.³⁸

Lord Justice Ward confessed that it was not until he actually saw the photographs of the children that the predicament that he faced struck him with its full power.

Each of the judges responded to the submission received from the Roman Catholic Archbishop. Lord Justice Ward noted that the Archbishop had defined human life in terms that it is sacred 'that it is inviolable so that one should never aim to cause an innocent person's death by act or omission.' As to whether, in the circumstances that Mary's dependence on Jodie was imposing a dangerous and ultimately fatal demand on Jodie's organs, it meant that she was not 'innocent' within the *moral* meaning of that word, Lord Justice Ward declared he was 'not qualified to answer that moral question':

I for my part would defer any opinion as to a child's innocence to the Archbishop for that is his territory.³⁹

But Lord Justice Ward insisted that the *legal* classification of the case was the territory of the court. It was the duty of a court, whose jurisdiction and powers has been invoked, to express what the law permitted or required.

For many years, partly in consequence of advances in technology, the invention of mechanical ventilators and the development of surgical techniques previously unknown, courts in England and elsewhere have had to decide cases about the withdrawal of life support⁴⁰ and cases involving positive intervention with major surgery⁴¹ where the subject of the procedure is either a child of tender years or a person who is not mentally competent. In the case of children, the courts have acknowledged that the 'first and paramount consideration' is the welfare of the child.⁴² The judges have insisted that they may not 'hide behind' the wishes of the parents. They must accept the responsibility, where

38 *Re A* [2000] 4 All ER 961 at 987.

39 *Re A* [2000] 4 All ER 961 at 1017.

40 *Airedale NHS Trust v Bland* [1993] AC 789 at 865 per Lord Goff of Chieveley.

41 *In re B (A Minor)* (Wardship: Medical Treatment) [1981] 1 WLR 1424.

42 *Ibid* at 1424 per Dunn LJ.

their jurisdiction and powers are properly invoked, to express their own opinions. Some commentators have tellingly asked how it can ever be in the 'best interest of a child' to terminate that child's life? Yet if that life were bound to be short, full of pain and otherwise intolerable, heroic surgery would not be obligatory. In such a case the parents' refusal would be respected.⁴³ Nature would be allowed to take its course.

It is, perhaps, a symbol of the acute dilemmas that were presented by the predicament of the Attard twins that the English judges were seriously divided in the reasons which they gave for permitting the operation to go ahead. The primary judge faced up to the acute legal problem presented in this respect. This was not whether, in law, the court would have the last say. It was not even whether the law could override the wishes of the parents. It was not whether the law could decline to follow religious opinions, including those of the family concerned. It was not even whether a view would be taken that consent to the operation should be given because it was 'in the best interests of' not only Jodie but also Mary. All of the foregoing questions could clearly be answered in the affirmative. On those answers so far as the law was concerned, there would be no significant contest.

However, the acute question remained. It was whether, notwithstanding such answers, the criminal law intervened to forbid the operation because, to perform it, would involve the commission of a positive act that had the necessary and foreseeable consequence of terminating a human life in being, namely Mary's. If this were the legal classification of the acts, inherent in the proposed surgery, those acts would amount to unlawful homicide. No court had authority to give consent to criminal conduct of that character.

The primary judge resolved this hard question by basing his opinion on the view that what was proposed by the operation 'and what will cause Mary's death will be the interruption or withdrawal of supply of blood which she receives from Jodie'. He stated that: 'Here the analogy [is] with the situation in which the court authorises the withholding of food and hydration. That, the cases make clear, is not a positive act and is lawful'.⁴⁴

None of the appeal judges agreed with Mr Justice Johnson's opinion in this respect. But neither did they agree with each other as to the alternative

43 *Re R (A Minor) (Warship: Consent to Treatment)* [1992] Fam LR 11 per Lord Donaldson of Lynton MR at 22.

44 Johnson J cited in *Re A* [2000] 4 All ER 961 at 1061 per Robert Walker LJ.

explanations for reaching the same conclusion that the termination of Mary's life would not amount to deliberate homicide rendering the surgeons liable to prosecution.

In England, murder is constituted, as at common law, by three elements. The act in question must be unlawful. It must involve the killing of a person. And it must be performed with intent to kill or to cause grievous bodily harm.⁴⁵ Lord Justice Ward considered that the proposed actions of the surgeon would fall outside this definition. They would do so not because they did not comprise the killing of Mary with the requisite intent. Instead, his Lordship considered that the answer was to be found in the first requirement of the definition. The actions would not be an *unlawful* homicide.

In Lord Justice Ward's opinion this was so because the killing of Mary was to be seen as justified, and not unlawful, because it amounted to a form of 'legitimate self-defence [by] the doctors coming to Jodie's defence and removing the threat of fatal harm to her presented by Mary's draining her life-blood'.⁴⁶ In accordance with that opinion 'the availability of such a plea of quasi self defence, modified to meet the quite exceptional circumstances nature has inflicted on the twins, makes intervention of the doctors lawful'.⁴⁷

Lord Justice Brooke took a different view. In his opinion, the case was to be classified as an 'emergency'. It fell within the very narrow 'doctrine of necessity'. This doctrine, he held, provided an exception to what would otherwise have been the unlawfulness of the positive acts taken to kill Mary. According to Lord Justice Brooke, there were three requirements for the application of the doctrine of necessity:

- (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.⁴⁸

To reach this conclusion, Lord Justice Brooke had to overcome a decision of the House of Lords in the well known case of *The Queen v Dudley and Stephens*.⁴⁹

45 *Re A* [2000] 4 All ER 961 at 1012.

46 *Re A* [2000] 4 All ER 961 at 1017.

47 *Ibid.*

48 Sir James Stephen cited *Re A* [2000] 4 All ER 961 at 1052 per Brooke LJ.

49 *R v Dudley and Stephens* (1884) 14 QBD 273.

Every law student learns that case and remembers it for its gruesome details. It involved four survivors of a vessel which sunk in 1884. When rescued, three shipmates acknowledged that a fourth member of the crew, a cabinboy, had been killed and eaten by them on their twentieth day on the open sea without water or food. In a special verdict, an English jury found the facts proved. The case was then argued before a court of five judges to determine whether, and if so how, 'necessity' could be raised in defence of the charge of homicide of the cabin boy. The defence was rejected. The crewmen were convicted. They were sentenced to death. Subsequently their sentence was commuted to six months imprisonment. A hundred years later, the decision was endorsed by the House of Lords.⁵⁰ In consequence, it was generally believed that the doctrine of necessity was unavailing in the case of homicide.

Lord Justice Brooke, however, did not accept that necessity was totally excluded as a defence. He rejected the notion that accepting necessity as a defence to homicide would impose on judges an intolerable burden of deciding the comparative value of human lives or place them on the slippery slope of moral relativism over human life. He said:⁵¹

Mary is, sadly, self-designated for a very early death. Nothing can extend her life beyond a very short span. Because her heart, brain and lungs are for all practical purposes useless, nobody would have even tried to extend her life artificially if she had not, fortuitously, been deriving oxygenated blood from her sister's bloodstream.

It is true that there are those who believe most sincerely - and the Archbishop of Westminster is amongst them - that it would be an immoral act to save Jodie, if by saving Jodie one must end Mary's life before its brief allotted span is complete. ... But there are also those who believe with equal sincerity that it would be immoral not to assist Jodie if there is a good prospect that she might live a happy and fulfilled life if this operation is performed. The Court is not equipped to choose between these competing philosophies. All that the Court can say is that it is not at all obvious that this is the sort of clear-cut case, marking an absolute divorce from law and morality, which was of such great concern to [the judges in *The Queen v Dudley v Stephens*].

For these reasons, Lord Justice Brooke accepted the existence of a defence of necessity. It was no less a defence because of the absence of an immediate

50 *R v Howe* [1987] 1 AC 417 at 429.

51 *Re A* [2000] 4 All ER 961 at 1051 per Brooke LJ.

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emergency. He considered that the three requirements stated above were applicable. In his last words he said:

Finally, the doctrine of the sanctity of life respects the integrity of the human body. The proposed operations would give these children's bodies the integrity which nature denied them.⁵²

Lord Justice Robert Walker, the third member of the Court of Appeal, found yet another path to the same conclusion. He acknowledged that Mary had a right to life both under the common law of England and under the European Convention on Human Rights. He accepted that it would be unlawful to kill Mary intentionally. However, he accepted that Jodie also had a right to life and that this carried with it rights of bodily integrity and autonomy, specifically the right to have her own body whole and intact. He went on:

By a rare and tragic mischance, Mary and Jodie have both been deprived of the bodily integrity and autonomy which is their natural right. There is a strong presumption that an operation to separate them would be in the best interests of each of them. ... In this case the purpose of the operation would be to separate the twins and so give Jodie a reasonably good prospect of a long and reasonably normal life. Mary's death would not be the purpose of the operation, although it would be its inevitable consequence. The operation would give her, even in death, bodily integrity as a human being. She would die, not because she was intentionally killed but because her own body cannot sustain her life. Continued life whether long or short would hold nothing for Mary except possible pain and discomfort, if indeed she can feel anything at all. The proposed operation would therefore be in the best interests of each of the twins. The decision does not require the Court to value one life above another.⁵³

At the end of his reasons, Lord Justice Robert Walker summarised his opinion:⁵⁴

The proposed operation would not be unlawful. It would involve the positive active invasive surgery and Mary's death would be foreseen as an inevitable consequence of an operation which is intended, and is necessary, to save Jodie's life. But Mary's death would not be the purpose or intention of the surgery, and she would die because tragically her body, on its own, is not and never has been viable.

52 *Re A* [2000] 4 All ER 961 at 1052 per Brooke LJ.

53 *Re A* [2000] 4 All ER 961 at 1070 per Robert Walker LJ.

54 *Ibid.*

Is it Right?

The differing opinions of the judges who considered the Attard twins' case reflect the complex of legal and moral dilemmas that had to be resolved. Lord Justice Ward, addressing the truly difficult legal problem of the impermissibility of active homicide, did not feel able to solve that problem by reference to the doctrine of necessity. In this, he conformed to what was generally understood, as a century of legal doctrine: necessity did not apply to homicide. Instead, Lord Justice Ward invoked the well established defence of self defence. It is a defence that is certainly available in the case of homicide. Indeed, he explained his view in a dramatic passage in his reasons 'by giving Jodie a voice'.⁵⁵

Having described the way in which Mary was using Jodie's heart and lungs, and how this would 'cause Jodie's heart to fail and cause death just as surely as a slow drip of poison', Lord Justice Ward asked 'Can it be just that Jodie should be required to tolerate that state of affairs?'⁵⁶ Then, suddenly, Jodie is speaking to us for herself:

If Jodie could speak, she would surely protest 'stop it, Mary, you're killing me'.⁵⁷

Lord Justice Ward drew an analogy between a school child with a gun threatening others of the school inviting the intervention of teachers and the intervention of the medical team springing to Jodie's defence to remove the threat of fatal harm to her life caused by Mary. But is this truly self defence? Properly analysed, this is the defence by others of a third party who is young, too incompetent or too disabled to defend herself.

The common law has, in exceptional cases, extended self defence to cases where force is used by third parties to defend others from harm.⁵⁸ Criminal codes sometimes so provide.⁵⁹ But, until now, at common law, the defence has

55 K Savvell, 'The Case of the Conjoined Twins - A Legal Perspective', unpublished paper for Health Law Seminar series, 2000, Uni of Sydney ('Savvell'), 33.

56 Cited Savvell at 33.

57 Ibid at 38-39.

58 *R v Duffy* [1967] 1 QB 63 at 67; S Bronitt and B McSherry *Principles of Criminal Law* (2001) 295.

59 *Criminal Code* (Q), s 273; *Criminal Code* (WA), s 250.

normally been confined to particular categories of relationship (master and servant, parent and child, husband and wife). It has only arisen in emergency, not carefully planned, circumstances. It has been kept in tight rein. Early comments on the case have found Lord Justice Ward's invocation of self-defence persuasive.⁶⁰ But in the opinion of others, the surgery proposed would not be a response reasonable in the circumstances, in that it necessarily and deliberately undertaking the meticulously planned killing of an innocent human being.⁶¹

Lord Justice Brooke's solution, invoking necessity, presents several difficulties which he himself acknowledged. Since *The Queen v Dudley and Stephens* it has generally been thought that the defence of necessity was not available at common law in answer to a charge of homicide. In Australia, where the defence is available at common law, there has ordinarily been a requirement that the threat or danger should be of such a nature as to exert immense pressure on the person concerned because of its imminence, suddenness or gravity.⁶² In one Australian case, where a driver was observed by police driving his vehicle on a public road far in excess of the speed limit, it was held that the defence of necessity was available when the driver proved that he was only acting in this way to get his gravely ill son to hospital. He proved that there was a real danger and real possibility of the son's death if he had not done so.⁶³ The judge took into account that the speeding was not so gross as to constitute a greater danger. He invoked Lord Denning MR's statement in another case: 'Such a man should not be prosecuted. He should be congratulated.'⁶⁴

In most cases in which it has been invoked both in Australia and in England, the defence of necessity has failed. Its application in the case of the Attard twins sits somewhat uncomfortably with the House of Lords' recent confirmation of the rule of public policy that the defence is unavailable to a charge of murder.⁶⁵

60 cf *Zedevic v Director of Public Prosecutions (Vic)* (1987) 182 CLR 645.

61 cf *Palmer v The Queen* [1971] AC 814; *R v Howe* (1958) 100 CLR 448; and *Zedevic v Director of Public Prosecutions (Vic)* (1987) 182 CLR 645; C Elliot, Comment 'Murder and Necessity following the Siamese Twins Litigation' (2001) 65 *Journal of Criminal Law* 66 at 75.

62 *R v Loughnan* [1981] VR 443.

63 *R v White* (1987) 9 NSWLR 427.

64 *Buckoke v Greater London Council* [1971] Ch 655 at 668.

65 *R v Howe* [1987] 1 AC 417.

Lord Justice Robert Walker's solution was that the 'purpose' or 'intention' of the surgery proposed was to be classified as something other than the killing of Mary. However, this seems somewhat inconsistent with the undoubted facts, proved in the evidence, that the surgery represented a positive and deliberate intervention whose only natural and probable consequence⁶⁶ was the termination of the life of Mary. Moreover, inherent in the operative procedures was the performance of heroic reconstructive surgery designed to create a full and viable human being in the case of Jodie by harvesting (if that is not too offensive a word) parts of the body shared with Mary (namely the shared organs of bladder, vulva and anus) by removing Mary's claim so that Jodie should enjoy a full, separate and viable human existence, in effect at the expense of taking part of Mary's shared organs.

On the subject of differentiated intention, Lord Justice Robert Walker took the Archbishop's submission, received by the Court, to task for being oversimplistic. He declared that the points made were entitled to 'profound respect'. They were reflected to some extent in English law and also in the attitudes expressed by the parents. However, Lord Justice Robert Walker went on:⁶⁷

But they do not explain or even touch on what Roman Catholic moral theology teaches about the doctrine of double effect, despite its importance in the Thomism tradition (there is some evidence that the doctrine was considered by the Roman Catholic Archdiocese of Philadelphia in the [United States] case in 1977...) The term 'casuistry' has come to have bad connotations but the truth is that in law as in ethics it is often necessary to consider the facts of the particular case, including relevant intentions, in order to form a sound judgment. I do not by that imply any criticism of the Archbishop's moderate and thoughtful submissions, which the Court has anxiously considered. But ultimately, the Court has to decide this appeal by reference to legal principle, so far as it can be discerned, and not by reference to religious teaching or individual conscience.

66 *R v Wallin* [1999] 1 AC 82 at 90-93. The House of Lords in that case ruled that, where appropriate, a jury considering a charge of murder 'should be directed that they are not entitled to find the necessary intention, unless they feel sure that the death or serious bodily harm was a virtual certainty [barring some unforeseen intervention] as a result of the defendant's action and that the defendant appreciated that such was the case. Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he *intended* that result, however little he may have *desired* or wished it to happen' (emphasis added).

67 *Re A* [2000] 4 All ER 961 at 1068-1069 per Robert Walker LJ.

It is usually a dangerous thing for a lawyer to engage with theologians on their own ground. Lord Justice Walker chanced his arm. But I, like the angels, fear to tread.

Dr Bernadette Tobin, in an ethical perspective of the Attard twins' case asked whether there was 'a distinctly Catholic view of the case'.⁶⁸ She noted that the BBC seemed to think that there was because, on its website, it described the case as one of 'religion versus medicine'. In Dr Tobin's view, however, there was no distinctive Church position. The Church's viewpoint, as expressed by the Archbishop of Westminster, would, she asserted, have been equally 'at home in secular ethics'.⁶⁹ Secular ethics support the sanctity and special value of human life. It is unique. It is precious to the possessor and to that person's family and loved ones. The horrors of the twentieth century and the terrors of genocide have left a deep and understandable fear of what happens when sanctity is not accorded to human life. If in doubt, go to Auschwitz. Or go to the killing fields of Cambodia. This is why international human rights principles, which were invoked in the form of the European Convention, loomed so large in the debates before the English judges.⁷⁰

The decision and reasons of the English Court of Appeal in this case have their supporters and their critics. The critics understand (as the parents avowedly did) the high motives and pure objectives of the medical team that wanted to save Jodie. They respect the anxious deliberations of the judges who concluded that the surgeons could operate as they wished. I myself have sympathy with the outcome favoured by the English judges. Once it appeared inevitable that the *two* babies would die unless there was urgent and careful surgical intervention, authorising intervention to save *one* life seems, upon a practical view of human ethics, to be morally justifiable. After all, it advances and protects human life (namely Jodie's), the only human life that was viable and could be saved by intervention. To stand by when intervention could save one, simply because it could not save two, seems unduly rigid. Clearly, that was the view that the surgeons took and the judges condoned.

68 B Tobin, 'An Ethical Perspective on the British Conjoined Twins Case', Health Law Seminar Series 2000, University of Sydney, 15 November 2000, unpublished at 9 ('Tobin')

69 Ibid at 10.

70 But see M Bagaric, 'the Jodie and Mary (Siamese Twins) Case: The Problem with Rights' (2001) 8 *Journal of Law and Medicine* 311.

However, I acknowledge the force of the criticisms both of this view of ethics and of the legal reasoning that, in different ways, brought four distinguished, able and sensitive judges of England to their different conclusions. Respectfully, none of the legal reasons leaves me wholly satisfied. Perhaps the judges who wrote them felt the same - as judges do from time to time. The closest to offer a convincing legal principle, in my view, was Lord Justice Brooke. Yet the defence of necessity which he propounded raises as many problems as it solves. And it departs from the long held view that human life is so precious, so sacred if you like, that no 'necessity' can justify its premeditated, deliberate termination, at least without the explicit authority of statute.

The ethical critics are unconcerned with the legal reasoning. But they too are anxious as to where the decision about the Attard twin case leads. Dr Tobin puts her concerns this way:⁷¹

So, the Lords Justices went looking to find considerations that would justify the doctors in killing Mary. But, in so doing, they seemed not to notice that their reasoning threatens the very principle of the sanctity of life which they are meant to uphold as a cornerstone of the law: that is, the idea that human beings are entitled to protection from unjust attack. The pity is that there are ways of finding someone who causes death out of an irresponsible disregard for human life guilty of murder without collapsing the distinction between the intended effects of someone's action and the foreseen but unintended effects. After reading this judgment I shall find it harder to claim that by and large the law reflects common sense, let alone common morality.

Conclusion

I cannot say how the Attard twins case would have been resolved in the Australian courts. I cannot guess how Sir Gerard Brennan and I would have resolved it, had such a problem come before us in the High Court of Australia. This much is clear. The issues of bioethics proliferate. Yet there is never a gap in our law. Theologians may dispute. Philosophers may debate. Popular television may entertain. Hypotheticals may speculate. But in the end, judges, whose jurisdiction and powers are properly invoked, must decide. If, as is usual in such cases, the Constitution and the statute law are silent, the judges must reason by analogy from basic principles. They must offer public reasons. Their conclusions will be open to criticism and to praise. Today in such cases, judges

71 Tobin at 9.

must perform their duties under the public and media spotlight. Whatever they decide will be criticised by some.

In a recent public address to celebrate the centenary of our Constitution, Sir Gerard Brennan reminded us of the origins of the Constitution and of the debt we owe to Britain whose legal traditions we inherited and adapted for ourselves.⁷² He called on Australians to celebrate the diversity of their pluralistic, multicultural society and to champion its tolerance.⁷³ He declared that the virtues of the founders of our Commonwealth lay in their 'vision and courage, compromise and determination'.⁷⁴ These are qualities to which, in his own professional life, Sir Gerard Brennan always aspired. To the listed catalogue I would add an abiding interest in really different ethical puzzles. And a strong inclination to resolve them, drawing upon the wisdom of the centuries, often illuminated by the Church of his tradition.

The puzzle of the conjoint twins is one of many that now engage the law, society and the religions in a world of exploding scientific information and rapid technological advances. Many more dilemmas of this character await ethical and legal resolution.⁷⁵ Sometimes the choices are painful. Sometimes the debates are acrimonious. Often they are extremely urgent. Sometimes, as the case of Mary and Jodie from the island of Gozo shows, the crisis is dramatic and the resolution heart-rending.

Was the operation a success? Was the legal process a success? To answer these legitimate questions demands the most serious moral and legal reflection.

72 Brennan, 'Centenary of the Enactment of the Commonwealth of Australia Constitution Act' (2001) 75 ALJ 31.

73 Ibid, 35.

74 Loc cit.

75 Including the controversial subject of the use of stem cells derived from embryonic tissue for the purpose of taking advantage of their pluripotency in replacing injured or diseased tissue in the treatment of myocardial infarction, Alzheimer's Disease, insulin deficiency etc.