

CRIMINAL LAW IMPLICATIONS FOR DOCTORS WHO PERFORM SACRIFICIAL SEPARATION SURGERY ON CONJOINED TWINS IN ENGLAND AND AUSTRALIA

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There are two reported cases in which courts have been asked to declare lawful surgery to separate conjoined twins where it is known that one twin will die during the procedure. Although judges granted the declaration sought, the two written decisions one from the common law jurisdiction of England and Wales, the other from a code jurisdiction in Queensland, Australia are problematic. This paper argues that neither of these cases provides a principled or certain basis for exculpating doctors in a future conjoined twin case, particularly if this case does not involve infant conjoined twins, one of whom is dying or is severely disabled.

I: INTRODUCTION

As medical expertise rises to meet the challenges involved in separating conjoined twins, it creates in turn ever more complex ethical and legal quandaries. Cases where both conjoined twins will die if they are not separated, but doctors know that they can save only one twin, are particularly difficult.

A review of academic literature and newspaper articles reveals there have been more than 30 sacrificial separations around the world in recent decades. Brief reports that say one conjoined twin died during surgery suggest there may be more, and many cases are not reported. However, despite the fact that the foreseen death of one twin raises the possibility of homicide, prior judicial sanction has been sought in only three cases: the unreported 1977 *Lakewood case* in the United States,¹ *Re A (Children) (conjoined twins: surgical separation)*² in England and *Queensland v Nolan*³ in Queensland, Australia. In each of these cases, judges declared that surgery would be lawful. These decisions were ground-breaking in that judges sanctioned a positive act by a doctor that resulted in a death. Conjoined twins appear to be the exception to the established rule that a doctor who ends the life of a patient by a positive act – even if this is done at the request of the patient whose life has become intolerable, may be guilty of murder.⁴

This paper will argue that neither *Re A (Children)* nor *Nolan* provides a clear or certain legal basis for exculpating doctors who perform sacrificial separation surgery, for a number of reasons. First, there is uncertainty about key aspects of the general law, such as the interpretation

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¹ This appears to be the first case in which court approval was sought before sacrificial separation surgery was performed. Twins born in Lakewood, New Jersey, shared a liver and one fused six-chambered heart. 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 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. After a few minutes of deliberation, the Family Court authorised the surgery. There is no written record of the hearing or decision and it will not be discussed any further in this paper.

² [2000] 4 All ER 961 (*Re A (Children)*).

³ [2002] 1 Qd R 454 (*Nolan*).

⁴ *Airedale NHS Trust v Bland* [1993] 1 All ER 821; *Nicklinson v DPP* [2012] EWHC 2381 (Admin) (16 August 2012).

of intention and nature and scope of the defence of necessity. Second, there is a lack of internal consistency between the judgments. *Re A (Children)* involved three extensive judgments by senior Court of Appeal judges, and although all of the judges found that the surgery would be lawful, each arrived at this decision by a different route. Third, none of the judges in *Re A (Children)* examined the elements of the defences⁵ they relied on in the context of the facts at hand. The judgment in *Nolan* is more principled, but the reasoning does not clearly distinguish between liability for the death of the twin that could survive if separated and liability for the death of the sacrificed twin.

The paper begins with a brief outline of the two reported cases. It then analyses the law of homicide – offences and defences – as applied in the two written decisions. It will point out areas where uncertainty in the general law of homicide has ramifications in a conjoined-twin context and then examine the reasoning in the various judgments. The paper deals only with the potential criminal liability of doctors with respect to the sacrificed twin. It also assumes that the twin to be sacrificed is a person capable of being killed.⁶ It concludes that it is difficult to discern any clear legal principle that could be applied to exculpate doctors in future sacrificial separation surgery cases, particularly where the conjoined twins are not infants, one of whom is moribund.

II: THE TWO CASES

A: *Re A (Children)*, England 2000

Conjoined twins, identified as Jodie and Mary, were joined end to end at the hip, and shared an aorta and inferior vena cava. Mary had a poorly developed brain, her heart was abnormal and she had no functioning lung tissue. She survived only because she received oxygenated blood pumped by her twin's heart.⁷ However, the strain of supporting both bodies meant that Jodie's heart would fail and both twins would die.⁸

The Catholic parents did not want the twins separated if one twin had to be sacrificed to give the other a chance at survival. The hospital, however, sought a court declaration that it would be lawful and in the children's best interests to perform separation surgery.⁹

At first instance, Johnson J held that the surgery would be lawful because it represented the withdrawal of Mary's blood supply.¹⁰ The Court of Appeal rejected Johnson J's reasoning,¹¹ but granted the declaration on other grounds. Ward and Brooke LJ both found that the doctors would have murderous intent.¹² However Ward LJ held that self-defence, in the form of defence

⁵ This paper uses the term 'defence' in its general sense to refer to defences, justifications and excuses.

⁶ In some cases, the twin selected to be sacrificed is not complete. The law of homicide will be relevant only if the incomplete twin is a person capable of being killed. See Colleen Davis, 'Conjoined Twins as Persons that can be Victims of Homicide' (2011) 19(3) *Medical Law Review* 430.

⁷ *Re A (Children)* [2000] 4 All ER 961, 975.

⁸ Ibid 1052.

⁹ Ibid 985, 987.

¹⁰ Ibid 989.

¹¹ Ibid 1003, 1027.

¹² Ibid 1012, 1029.

of others, would excuse the doctors,¹³ whereas Brooke LJ relied on necessity to find the surgery lawful.¹⁴ Robert Walker LJ, on the other hand, found that the doctors did not have the requisite intention for murder, and applied the doctrine of double effect and duress of circumstances (which he regarded as a species of necessity) to protect doctors from criminal liability.¹⁵

B: Queensland v Nolan

Alyssa and Bethany Nolan were born in Brisbane, Queensland, in 2001, joined at the head and sharing cranial draining veins. At three weeks, Bethany's health declined and her death appeared imminent. The twins' parents gave permission for the girls to be separated, knowing that Bethany could not survive. The state hospital applied to the Supreme Court for an order that the surgery would be lawful.¹⁶ Chesterman J granted the declaration, relying on two provisions in the *Criminal Code 1899* (Qld) to exculpate the surgeons. The first – s 286 – imposes a duty on people who have care of children under 16 years to take reasonable precautions to avoid danger to the child's life, health or safety. The second – s 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.

The paper turns now to an analysis of the law of homicide, as applied in these two cases. It begins with the offence of murder, and the key mental element of intention. This is followed by an analysis of each of the defences relied on by the judges.

III: MURDER

Intention to kill or to do grievous bodily harm is the key element for murder in both England and Queensland.¹⁷ However, while Queensland and most other Australian jurisdictions¹⁸ interpret intention to encompass only direct or purpose intention, in England intention also extends to indirect or oblique intent. Direct intention has been defined by judges as deciding to bring about a state of affairs,¹⁹ to mean or have in mind, the directing of the mind, having the purpose or design.²⁰ Oblique or indirect intention arises where a person does not act in order to cause the prescribed result but is aware when he acts that there is practical certainty that the result will ensue.²¹

Prior to *R v Woollin*,²² there was uncertainty in England whether oblique intention was a type of intention or merely of evidentiary value.²³ *R v Woollin* was handed down two years before *Re A*

¹³ Ibid 1017.

¹⁴ Ibid 1052.

¹⁵ Ibid 1067.

¹⁶ *Nolan* [2002] 1 Qd R 454, 456.

¹⁷ *Re A (Children)* [2000] 4 All ER 961, 1012; *Criminal Code 1899* (Qld) s 302.

¹⁸ The exceptions are the Northern Territory, the Australian Capital Territory, the Commonwealth and Tasmania.

¹⁹ *Hyam v DPP* [1975] AC 55, 74 (Hailsham LJ).

²⁰ *R v Willmot (No 2)* [1985] 2 Qd R 413, 418 (Connolly J).

²¹ Itzhak Kugler, 'The Definition of Oblique Intention' (2004) 68 *Journal of Criminal Law* 79.

²² [1998] 3 All ER 102.

(*Children*) and was welcomed by the three Lords Justices in *Re A (Children)* as providing some much-needed certainty in the law regarding oblique intention.²⁴ In *R v Woollin*, Lord Steyn said jurors should be told that they are not entitled to find the necessary intention unless they are sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of a defendant's actions, and that the defendant knew this.²⁵ In *Re A (Children)* Ward LJ said:

I have to ask myself whether I am satisfied that the doctors recognise that death or serious harm will be virtually certain (barring some unforeseen intervention) to result from carrying out this operation. If so, the doctors intend to kill or to do that serious harm even though they may not have any desire to achieve that result.... Unpalatable though it may be - to stigmatise the doctors with 'murderous intent', that is what in law they will have, if they perform the operation and Mary dies as a result.²⁶

Brooke LJ took a similar approach.²⁷ However Robert Walker LJ said the facts and judgments in *R v Woollin* 'say nothing at all about the situation in which an individual acts for a good purpose which cannot be achieved without also having bad consequences (which may be merely possible, or very probable, or virtually certain)'.²⁸ According to Robert Walker LJ, there would be no murderous intent on the part of the doctors because of the doctrine of double effect,²⁹ which is discussed under defences below.

It remains unclear after *Re A (Children)* whether *R v Woollin* should be interpreted as holding that foresight of a virtually certain outcome is a form of intention, or whether it is merely evidence of intention.³⁰ Lord Steyn said that 'a result foreseen as virtually certain *is* an intended result' (italics added).³¹ Further, Blackhurst suggests that Lord Steyn's use of the words 'to find' indicates that intention and foresight are equivalent.³² Lord Justice Munby also takes this view.³³

However, it could be argued that Lord Steyn's use of the word 'entitled' in the context of 'to find', as well as his comment that *R v Nedrick*³⁴ does not prevent a jury from considering all the evidence, could be interpreted as endorsement of the evidentiary alternative.³⁵ Writers such as Williams and Dingwall draw on the decision in *R v Matthews and Alleyne*³⁶ to support their

²³ Cases in which this was discussed include *Hyam v DPP* [1975] AC 55; *DPP v Smith* [1961] AC 290, *R v Nedrick* [1986] 1 WLR 1025.

²⁴ *Re A (Children)* [2000] 4 All ER 961, 1012, 1029, 1062.

²⁵ [1998] 3 All ER 102, 113.

²⁶ *Re A (Children)* [2000] 4 All ER 961, 1012.

²⁷ *Ibid* 1029.

²⁸ *Ibid* 1062.

²⁹ *Ibid* 1063.

³⁰ Arfan Khan, 'Intention in Criminal Law: Time to Change?' (2002) 23(3) *Statute Law Review* 235.

³¹ *R v Woollin* [1998] 3 All ER 102, 110.

³² Andrea Blackhurst, 'Directing Juries on Criminal Intention' (1999) 10 *Kings College Law J* 119, 121.

³³ Lord Justice Munby, 'Medicine and the Law of Homicide: A Case for Reform?' (Lent Lecture delivered at Kings College, London, 2 February 2012) 5.

³⁴ *R v Nedrick* [1986] 1 WLR 1025.

³⁵ Janet Loveless, *Complete Criminal Law* (Oxford University Press, 2008) 110.

³⁶ [2003] 2 Cr App R 461.

argument that *R v Woollin* did not sufficiently clarify the law about the status of oblique intention.³⁷ In *R v Matthews and Alleyne*, Rix LJ said *R v Woollin* did not lay down a substantive rule of law,³⁸ although if death is foreseen as a virtual certainty, there would be very little to choose between a rule of evidence and one of substantive law.³⁹ Wells and Quick also suggest that the practical relevance of such a distinction is questionable.⁴⁰ While this may be true in many murder cases, the distinction could be of vital importance in a future case involving sacrificial separation of conjoined twins. If a future case were to take the view that foresight of a certain outcome is of evidentiary value only, and not a species of intent, manslaughter would be the appropriate offence.

In Queensland, intention is interpreted narrowly to mean only purpose or direct intention.⁴¹ In *Nolan* Chesterman J thought it possible that a strict application of the Criminal Code might result in those taking part in the operation having committed an offence of unlawful killing.⁴² However, His Honour did not consider murder as a possibility, probably because there was no intention to kill Bethany in the sense that this was the doctors' purpose or design.

The common law jurisdictions of New South Wales, Victoria and South Australia, as well as Western Australia, which has a criminal code similar to Queensland's, also interpret intention narrowly.⁴³ However, the Northern Territory, Australian Capital Territory and Commonwealth codes contain identical definitions of intention that encompass both direct and oblique intention, and, interestingly in light of the unclear position in England, not merely as part of the evidence, but as a form of intention.⁴⁴ In Tasmania, also a code jurisdiction, the mental element for murder includes an intention to cause bodily harm that 'the offender knew to be likely to cause death in the circumstances although he had no wish to cause death'.⁴⁵ Doctors know that the death of one twin will occur in the ordinary course of events and the mental element for murder is likely to be met in Tasmania and both territories.⁴⁶

In England and Australia, manslaughter is an alternative verdict to murder, and even if there was no intention, doctors would have to rely on a defence to avoid criminal responsibility for the death of the sacrificed twin. The next section of this paper discusses each of the defences relied on by the judges in *Re A (Children)* and *Nolan*.

³⁷ Glenys Williams and Gavin Dingwall, 'Inferring Intention' (2004) 55(1) *Irish Legal Quarterly* 69, 72.

³⁸ [2003] 2 Cr App R 461 [43].

³⁹ Ibid [45].

⁴⁰ Celia Wells and Oliver Quick, *Lacey, Wells and Quick, Reconstructing Criminal Law: Text and Materials* (Cambridge University Press, 4th ed, 2010) 756-7.

⁴¹ *R v Willmot (No 2)* [1985] 2 Qd R 413, 418.

⁴² *Nolan* [2002] 1 Qd R 454, 456.

⁴³ *He Kaw The v The Queen* (1985) 157 CLR 523, 569 (Brennan J).

⁴⁴ Section 5.2 *Criminal Code 1995* (Cth), s 18(2) *Criminal Code 2002* (ACT) and s 43A1(2) *Criminal Code 1983* (NT). The sections read '[a] person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events'.

⁴⁵ Section 157(1)(b) *Criminal Code 1924* (Tas); Ian Leader-Elliott, 'Recklessness and Moral Desiccation in the Australian Law of Murder' in Jeremy Horder (ed), *Homicide Law in Comparative Perspective* (Hart Publishing, 2007) 143, 149 suggests that this provision encompasses recklessness. However, although the section clearly requires foresight, there is no suggestion that risk-taking is required. See the discussion about recklessness that follows.

⁴⁶ Murder only arises under the Commonwealth Criminal Code in the context of United Nations officials, war crimes and involving Australians outside Australia. It is unlikely that would apply to conjoined twins, unless the separation surgery takes place overseas.

IV: DEFENCES

A: Self defence

In *Re A (Children)*, Ward LJ held that a ‘plea of quasi self-defence, modified to meet the quite exceptional circumstances nature has inflicted on the twins, makes intervention by the doctors lawful’.⁴⁷ He said the doctors were acting in defence of Jodie, who was being killed by Mary who was ‘draining her life blood’. Ward LJ said ‘the harsh reality’ was that Mary was killing her sister. His Lordship said the threat posed by Mary did not have to be unlawful.⁴⁸

There are a number of difficulties with Ward LJ’s reliance on defence of others. If the reference to a ‘modified’ defence means that His Lordship was expanding or changing the existing doctrine, it is unfortunate that he provides no guidance as to how the traditional defence was modified and what the elements of such a ‘modified’ defence are. This guidance is essential if defence of others is to be applied in future conjoined twin cases. If, on the other hand, Ward LJ simply applied the accepted doctrine of defence of others, there are a number of difficulties that His Lordship neither acknowledged nor addressed.

At common law, it is lawful to use reasonable and proportionate force in defence of others.⁴⁹ The defence also extends to a person who acts to defend a third party.⁵⁰ It is unclear whether an unjust threat is required, and if so, what this entails. Some writers take the view that the use of defensive force cannot be justified against a threatener who is innocent of any wrongdoing, such as conjoined twins,⁵¹ whereas others suggest that the fact that a threatener may be morally innocent is immaterial.⁵² The defence requires that the threat be imminent, but there may be problems with imminence in cases where doctors opine that the twins could live for several months. The requirements for reasonableness and proportionality are particularly difficult because of the diverse possible views in the context of sacrificial separation. As the Irish Law Reform Commission recently pointed out that ‘problems arise because of the balancing process involved. In essence, the proportionality rule is equal to the ‘choice of evils’ test ... what one person deems proportionate may not be proportionate to another.’⁵³

A perception of whether or not performing the surgery is regarded as objectively reasonable and proportionate may depend in part on individual philosophical, moral and religious attitudes to the right to life. The Archbishop of Westminster, in a submission to the Court of Appeal in *Re*

⁴⁷ *Re A (Children)* [2000] 4 All ER 961, 1017.

⁴⁸ Ibid 1016-7.

⁴⁹ William Wilson, *Criminal Law* (Pearson, 4th ed, 2011) 265.

⁵⁰ *Beckford v The Queen* (1988) 1 AC 130, 145.

⁵¹ Tom Stacy, ‘Acts, Omissions, and the Necessity of Killing Innocents’ (2002) 29 *American Journal of Criminal Law* 481; Helen Watt, ‘Conjoined Twins: Separation as Mutilation’ (2001) 9(3) *Medical Law Review* 237.

⁵² Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide*, (Cambridge University Press, 1994) 27; Anne Lodge, *Criminal Responsibility for Intrusions on the Rights of Innocent Persons: The Limits of Self-Defence, Necessity and Duress* (PhD Thesis, University of Durham, 2009), 119 <http://etheses.dur.ac.uk/2102/1/2102_110.PDF?UkUDh:CyT>.

⁵³ Law Reform Commission (Ireland), *Defences in Criminal Law*, Report No 95 (2009), 67 <http://www.lawreform.ie/_fileupload/Reports/rDefencesinCriminalLaw.pdf>.

A (Children), argued the surgery was morally impermissible,⁵⁴ but the medical professionals in this case clearly took a different view.⁵⁵

In *Nolan*, defence of others was not mentioned by Chesterman J. Although s 273 *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.⁵⁶ Chesterman J was correct to not raise this defence.

Other Australian jurisdictions also provide for force to be used in defence of others but the relevant sections in the Australian Capital Territory, Northern Territory, West Australian, Victorian and Commonwealth legislation stipulate that the defence does not apply where an accused responds to conduct known to the accused to be lawful.⁵⁷ Defence of others would be unavailable to doctors who perform sacrificial separation surgery because the fatal threat posed by one conjoined twin to the other twin does not amount to a criminal offence.

There is no requirement in New South Wales, South Australia or Tasmania that the person killed in self-defence must have acted unlawfully.⁵⁸ Therefore, these are the only jurisdictions in which doctors might be able to rely on defence of others in response to a homicide charge over the death of the sacrificed twin. Each of these three jurisdictions has enacted a legislative form of the common law test for self-defence outlined in *Zecevic v Director of Public Prosecutions (Vic)*.⁵⁹ In this case, the High Court held that the question to be asked is whether the accused believed, on reasonable grounds, that it was necessary in self-defence to do what he did.⁶⁰ The law is therefore no different to that in England, apart from the absence of a requirement for proportionality, and the same problems arise in the determination of reasonableness. The only Australian state to specifically require proportionality as a separate element of self-defence is South Australia.⁶¹

As in English law, imminence is an issue in Australian jurisdictions, apart from Western Australia.⁶² Fairall and Yeo suggest that the common law in Australia is flexible enough to allow the use of pre-emptive force in self-defence.⁶³ English and Australian judges have modified the law to allow a battered wife to rely on provocation even though there was a lapse of time

⁵⁴ Cormac Murphy O'Connor, 'The Conjoint Twins 1: Submission to the Court of Appeal by the Archbishop of Westminster' [2000] (November) *Catholic Medical Quarterly*, [3(c)] <http://www.cmq.org.uk/CMQ/2000/conjoined_twins1.htm>.

⁵⁵ *Re A (Children)* [2000] 4 All ER 961, 987.

⁵⁶ Conjoinder would not meet the definition of assault in s 245 - there is no striking, touching or moving, or application of force.

⁵⁷ Section 10.4 *Criminal Code 1995* (Cth); s 42 *Criminal Code 2002* (ACT); s 43BD *Criminal Code 1983* (NT); ss9AC, 9AE *Crimes Act 1958* (Vic); s 248(5) *Criminal Code 1913* (WA).

⁵⁸ *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 663 (Wilson, Brennan, Dawson and Toohey JJ). Section 422 *Crimes Act 1900* (NSW) expressly states that self-defence is not excluded simply because the conduct an accused responds to is lawful.

⁵⁹ (1987) 162 CLR 645. The relevant sections are s 46 *Criminal Code 1924* (Tas), which provides that a person is justified in using force in defence of another person if the force is reasonable, in the circumstances as he believes them to be; s 15 *Criminal Law Consolidation Act 1935* (SA) also requires a defendant to believe the defensive conduct is necessary and reasonable, provided the conduct was reasonably proportionate to the perceived threat; and s 418 *Crimes Act 1900* (NSW) also refers to the subjective/objective standard of reasonableness, but in addition expressly requires that the person who uses defensive conduct must believe it is necessary.

⁶⁰ *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 654 (Mason CJ), 661 (Wilson, Brennan, Dawson and Toohey JJ).

⁶¹ Section 15 *Criminal Law Consolidation Act 1935* (SA); *Zecevic v DPP (Vic)* (1987) 162 CLR 645, 662 (Wilson, Brennan, Dawson and Toohey JJ) made it clear that proportionality is not a separate discrete requirement for self-defence, but instead is of evidentiary value only.

⁶² Section 248 *Criminal Code 1913* (WA) expressly refers to harmful acts that are not imminent.

⁶³ Paul A Fairall and Stanley Yeo, *Criminal Defences in Australia* (LexisNexis, 4th ed, 2005) 180.

between the provocative conduct and the killing.⁶⁴ It is possible therefore that in Australia as well as in England, the imminence requirement could be relaxed in conjoined twin cases where defence of others is at issue.

B: Necessity, duress of circumstances and emergency

1: England

In *Re A (Children)*, Brooke LJ held that the rarely used defence of necessity would be a defence to murder in the case at hand because, on a choice of two evils, avoiding the greater harm was justified.⁶⁵ In *R v Dudley and Stevens*⁶⁶ it was held that necessity is not available as a defence to a murder charge. However Brooke LJ argued that neither of the two policy objections underlying this decision applied to the case at hand. First, there was no need to choose the victim in *Re A (Children)*: Mary was designated for death.⁶⁷ Second, the case at hand was not one in which there was the clear-cut divorce of law from morality that so concerned Lord Coleridge in *R v Dudley and Stephens*.⁶⁸ However, Brooke LJ did not provide any explanation for this opinion.

In the last nine paragraphs of his lengthy judgment, Brooke LJ outlined what is, and is not required, for the defence:

1. The act is needed to avoid inevitable and irreparable evil;
2. No more should be done than is reasonably necessary for the purpose to be achieved; and
3. The evil inflicted must not be disproportionate to the evil avoided.⁶⁹

Unfortunately, Brooke LJ did not discuss the elements outlined but concluded simply that because family law principles pointed irresistibly to the conclusion that Jodie's interests must be preferred to those of Mary, all three elements were satisfied.⁷⁰ A closer examination suggests this might not be the case.

Identifying the relevant evils can be arbitrary, because the term 'evil' lacks precision. On one view, it could be argued that Jodie's death was capable of being viewed as an evil, and the surgery was the only way to prevent her demise.⁷¹ On the other hand, it could also be argued that the death of an infant is not an evil, but a common feature of human existence. As Hewson suggests, the death of conjoined twins from natural causes is 'very sad, but hardly evil'.⁷² Indeed, the death of deformed or terminally ill infants in intensive care units is sometimes regarded as desirable, and treatment is withdrawn for this reason. If the evil inflicted is the killing of one twin, with the

⁶⁴ Queensland Law Reform Commission, *A Review of the Defence of Provocation*, Discussion Paper WP No 63 (2008) 114.

⁶⁵ *Re A (Children)* [2000] 4 All ER 961, 1048.

⁶⁶ (1884) 14 QBD 273.

⁶⁷ *Re A (Children)* [2000] 4 All ER 961, 1051.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* 1052.

⁷⁰ *Ibid.*

⁷¹ Sabine Michalowski, 'Sanctity of Life - Are Some Lives More Sacred Than Others?' (2002) 22(3) *Legal Studies* 377, 392.

⁷² Barbara Hewson, 'Killing Off Mary - Was the Court of Appeal Right?' (2001) 9(3) *Medical Law Review* 281, 298.

evil avoided being the death of the other twin, the question of proportionality is determined by balancing the saving of one life against the ending of another. However, it is difficult to see how killing one to save another can be regarded as proportionate if both lives have equal value. Alternatively, it could be argued that the evil avoided is allowing both babies to die a natural death⁷³ and the evil inflicted is the death of one.

Clearly there is more to proportionality in conjoined-twin cases than just numbers. Other factors need to be considered, but which ones? For Michalowski, the factors that tip the scales against proportionality are the intentionality of the killing and the innocence of the victim.⁷⁴

Some writers take a much broader view of the factors to be considered in determining proportionality. Clarkson argues that because an assessment of proportionality is context dependent, society's moral and political judgments about the types of threat that can be averted and all other relevant circumstances should be considered.⁷⁵ Rogers suggests that in the case of Jodie and Mary '(o)ne might have thought that the effect of the decision upon the girls' parents should have been weighed in the process of balancing evils'.⁷⁶ The prospect of the surgery and of caring for a disabled child in place with limited medical resources caused the parents considerable distress.⁷⁷

On the other hand, McGrath and Kreleger say that it is not appropriate to consider factors like social problems in the context of the defence of necessity because this would broaden the scope of the defence and invite misuse.⁷⁸

In summary, a focus solely on the number of lives saved versus the number of lives lost is not a satisfactory way to determine the questions of reasonableness or proportionality in sacrificial separation cases. However, just what other factors ought to be considered in this context is unclear. Even if a prosecutor could not disprove the three elements outlined by Brooke LJ in *Re A (Children)*, so that lesser-evils necessity is a viable defence for doctors who perform sacrificial separation surgery, doctors would still need to overcome English courts' resistance to allowing the defence to murder or to euthanasia,⁷⁹ and Parliament's reticence to clarify the position in this respect.⁸⁰

Although Robert-Walker LJ indicated that he would be prepared to extend the defence of necessity to cover the case at hand, it was not the same version of necessity that Brooke LJ relied on. Instead, His Lordship appeared to be discussing the defence of duress of circumstances rather than necessity per se.

In duress of circumstances, the court has to look at all the circumstances in deciding if the accused acted reasonably and proportionately to avoid the threat of death or serious injury.⁸¹ Robert Walker LJ said the test of proportionality was met first because there was a matter of life

⁷³ Charles I Lugosi, 'Playing God: Mary Must Die So Jodie May Live Longer' (2001) 17 *Issues in Law and Medicine* 123, 161.

⁷⁴ Michalowski, above n 71, 388.

⁷⁵ C M V Clarkson, 'Necessary Action: A New Defence' (2004) *Criminal Law Review* 81, 89.

⁷⁶ Jonathan Rogers, 'Necessity, Private Defence and the Killing of Mary' [2001] *Criminal Law Review* 515, 522.

⁷⁷ *Re A (Children)* [2000] 4 All ER 961, 985-6.

⁷⁸ Gemma McGrath and Noella Kreleger, 'The Killing of Mary: Have We Crossed the Rubicon?' (2001) 8(3) *Journal of Law and Medicine* 322, 327.

⁷⁹ See, eg *Nicklinson v Ministry of Justice* [2012] EWHC 2381 (16 August 2012).

⁸⁰ *Re A (Children)* [2000] 4 All ER 961, 1043-4.

⁸¹ *R v Harris* [1995] 1 Cr App 170.

and death and Mary was bound to die soon anyway.⁸² It could be argued that other cases of necessity or duress before *Re A (Children)* also involved matters of life and death, but courts and Parliament have steadfastly refused to allow duress to be used as a defence to a charge of murder.⁸³ The second reason given by Robert Walker LJ is that the surgery would give both twins the bodily integrity they are entitled to.⁸⁴ Whether restoration (or creation in the case of conjoined twins) of bodily integrity is proportionate to a killing is questionable, particularly given that for one twin this would come at the cost of her life.

It is unclear, therefore, whether duress of circumstances would be available in a future conjoined twin case to excuse doctors who perform sacrificial separation surgery. Although Robert Walker LJ's judgment in *Re A (Children)* suggests that it could, a closer scrutiny shows there may be difficulties for a doctor seeking to rely on the defence. Quite apart from its application to a murder charge, the same difficulty arises here as with defence of others in that assessments of reasonableness and proportionately will depend on the assessor's personal moral and religious views.

2: Australia – necessity and emergency

Duress has not been extended in Australia to include duress of circumstances.⁸⁵ Instead, necessity or emergency are the relevant defences for a person who commits an offence to escape a threat posed by circumstances.

The Australian version of the defence is subject to the same reservations in English law about its availability to a murder charge.⁸⁶ The elements of the common law defence of necessity are outlined in *R v Loughnan*,⁸⁷ and appear to be an amalgam of Brooke LJ's lesser-evils test and duress of circumstances in English law. The three elements are:

1. The criminal act must have been done only in order to avoid inflicting an irreparable evil on the accused or someone he or she was bound to protect;
2. The accused must honestly believe on reasonable grounds that there is an imminent peril; and
3. The acts done to avoid the imminent peril must not be out of proportion to the peril avoided, ie would a reasonable person in the position of the accused have considered he or she had an alternative to doing what he or she did to avoid the peril.⁸⁸

The same issues arise with respect to the elements of imminence, irreparable evil, reasonableness and proportionality as under necessity and defence of others in English law.

⁸² *Re A (Children)* [2000] 4 All ER 961, 1067.

⁸³ *R v Shayler* [2001] 1 WLR 2206, 2230 [70]; Law Commission (UK), *Murder, Manslaughter and Infanticide*, Law Com No 304 L (2006) 145.

⁸⁴ *Re A (Children)* [2000] 4 All ER 961, 1067.

⁸⁵ Simon Bronitt, 'Australia' in Kevin Jon Heller and Markus D Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press, 2011) 73.

⁸⁶ Fairall and Yeo, above n 63, 109.

⁸⁷ [1981] VR 443.

⁸⁸ Ibid 448 (Young CJ and King J).

Several Australian jurisdictions have a statutory excuse of emergency⁸⁹ that has potential for application to conjoined twin separations. Although there are minor differences from one jurisdiction to another,⁹⁰ the key elements are the existence of a sudden and/or extraordinary emergency, a subjective belief on the part of the accused that his/her response is the only way to deal with the situation, and that the response is objectively reasonable from the perspective of the hypothetical ordinary or reasonable person.

In conjoined twin cases such as *Re A (Children)*, where there is time for deliberation and completion of medical tests, the requirement for a sudden emergency may be difficult to meet. It may be easier to argue that such cases are an extraordinary emergency. Conjoined twin cases are, by their very nature and rarity, unusual, and the situation where one sibling unwittingly poses a threat to the other's life by virtue of their permanent attachment is unique. It could therefore be argued that such cases meet the requirement for an 'extraordinary emergency'. On the other hand, it is equally plausible to argue that there is nothing extraordinary about the plight of two terminally ill babies. It is the fact that the twins are conjoined that makes their situation extraordinary.

As far as the subjective belief is concerned, many doctors take the view in conjoined-twin cases that it is 'preferable to intervene to save one life, if possible, rather than to permit the inevitable loss of both'.⁹¹ As surgery is the only possible way to achieve this goal, a prosecutor may have difficulty negating this element.

The main stumbling block with emergency is the requirement for objective reasonableness. Further, if doctors can rely on emergency in conjoined twin cases, there would appear to be no reason why the excuse could not be extended to other situations such as the use of anencephalic infants as organ donors for healthy infants, as proposed by American Medical Association's Council on Ethical and Judicial Affairs in 1995.⁹² Similarly, a case where one non-conjoined infant twin is dying, and the other needs an organ transplant to survive and the terminally ill twin is a perfect match, could be regarded as an extraordinary emergency, and it is possible that some doctors might regard killing the donor and harvesting the organ as reasonable.

Given that emergency is available to all offences, including murder, it is somewhat surprising that Chesterman J in *Nolan* did not explore the possible application of the excuse to

⁸⁹ See, eg, ss 25, 282 *Criminal Code 1899* (Qld); s 33 *Criminal Code 1983* (NT); ss 25, 259 *Criminal Code 1913* (WA); s 41 *Criminal Code 2002* (ACT); s 9AI *Crimes Act 1958* (Vic); s 10.3 *Criminal Code 1995* (Cth).

⁹⁰ In Queensland, s 25 *Criminal Code 1899* (Qld) relieves a person from criminal responsibility for an act or omission done under circumstances of 'sudden or extraordinary emergency' that an 'ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise'. The comparable section in the Northern Territory - s 33 *Criminal Code 1983* (NT) - requires both a sudden *and* extraordinary emergency whereas its Queensland counterpart requires one or the other. The Northern Territory section requires 'an ordinary person similarly circumstanced would have acted in the same or a similar way' whereas the Queensland provision refers to 'an ordinary person possessing ordinary power of self-control'. In *R v Russell* (1989) 9 MVR 15, 18 the Queensland Court of Criminal Appeal imported the concept of reasonableness into the test for s 25, saying that what the section referred to was 'an ordinary reasonable man' whose actions 'must not exceed what is reasonably necessary'. The comparable provision in Western Australia (s 25 *Criminal Code 1923* (WA)) makes no reference to powers of self-control, and requires instead a focus on whether an accused reasonably believes that circumstances of sudden or extraordinary emergency exist and that committing the offence is the only reasonable way to deal with the emergency. The belief must be objectively reasonable, as must the response to the emergency. The relevant sections in the criminal codes of the Australian Capital Territory, and the Commonwealth, as well as in Victoria are almost identical to the Western Australian provision. See s 41 *Criminal Code 2002* (ACT); s 10.3 *Criminal Code 1995* (Cth); s 9AI(3) *Crimes Act 1958* (Vic).

⁹¹ James O'Neill et al, 'Surgical Experience with Thirteen Conjoined Twins' (1988) 208(2) *Annals of Surgery* 299, 308; *Re A (Children)* [2000] 4 All ER 961, 987 (Ward LJ).

⁹² American Medical Association Council on Ethical and Judicial Affairs, 'The Use of Anencephalic Neonates as Organ Donors' (1995) 273(20) *Journal of the American Medical Association* 1614.

conjoined twin separations. Instead, His Honour turned to s 282 as the basis for his finding that the surgery would not be a criminal offence.⁹³ This section has been referred to as a defence of medical necessity.⁹⁴

The fundamental difficulty with Chesterman J's reliance on s 282 is that His Honour applied the section only to the survivor twin, Alyssa, and not to the sacrificed twin, Bethany. Although the doctors were potentially liable for a breach of duty to Alyssa if they did not perform the surgery, the spectre of criminal liability was far stronger with respect to Bethany whose death would be caused by a positive act. Chesterman J's reliance on s 282 was correct in terms of justifying the separation surgery as far as Alyssa was concerned because the surgery was performed 'in good faith and with reasonable skill' and for Alyssa's benefit. Chesterman J also thought the operation was reasonable having regard to all the circumstances of the case. However, the use of this section to exculpate doctors for Bethany's death is difficult to explain. Clearly, the surgery would be performed on Bethany as well. It is difficult to see how surgery can be for a twin's benefit if it causes his or her death.

3: Summary – necessity, duress of circumstances and emergency

Although the Australian common law defence of necessity is slightly different to its English counterpart, it suffers from the same lack of certainty as to precisely what it involves, and raises the same difficulties for a doctor seeking to rely on the defence when reasonableness or proportionality of the surgery requires an objective appraisal. In this context, the taking of a life, particularly an innocent one, may lead to a conclusion that the sacrifice of one conjoined twin is not reasonable. Similarly, provisions like s 282 of the *Criminal Code 1899* (Qld) require an assessment of reasonableness. A key issue, therefore, in the application of any of these defences, is a consideration of whether and when it is reasonable to sacrifice one person, by means of a deliberate and premeditated act, to save another. The wide range of views as what is reasonable under the circumstances do not leave doctors or their lawyers with any certainty about the law that applies to sacrificial separation surgery.

C: Doctrine of double effect

All three Lords Justice in *Re A (Children)* referred to double effect,⁹⁵ but only Robert Walker LJ thought it had any application to the facts at hand.⁹⁶ Ward and Brooke LJ did not think the doctrine could apply when the side effect was another patient's death, and the surgery would have no benefit for this patient.⁹⁷ One interpretation of these comments is that double effect only

⁹³ *Nolan* [2002] 1 Qd R 454, 457.

⁹⁴ Blake, Meredith, 'Doctors Liability for Homicide Under the WA Criminal Code: Defining the Role of Defences' (2011) 35 *University of Western Australia Law Review* 287, 311.

⁹⁵ *Re A (Children)* [2000] 4 All ER 961, 1012. Ward LJ explained that double effect applies where an act which produces a bad effect is nevertheless morally permissible if four criteria are met: the action is good in itself, the intention is solely to produce the good effect, the good effect is not produced through the bad effect, and there is sufficient reason to permit the bad effect'.

⁹⁶ *Ibid* 1062.

⁹⁷ *Ibid* 1012, 1030.

applies where the good and bad effects apply to the same person⁹⁸ and has no application where one person must die in order for another to benefit.⁹⁹ If the doctrine does apply to two separate individuals, concerns that it could be used to justify sacrifice – in the form of active killing – in other cases may be well founded.

Robert Walker LJ said double effect ‘prevents the doctor's foresight of accelerated death from counting as intention’.¹⁰⁰ One problem with this approach, as Simester and Smith point out, is that the reasoning is ‘based on a proposition that there is a difference between the law's definition of “intention” and “guilty intention”’. No such difference exists¹⁰¹ in English law.

Whereas Ward and Brooke LJ regarded Mary's death as the incidental bad effect that outweighed the good effect (the saving of Jodie), Robert Walker LJ said restoring Mary's separate bodily integrity, even at the moment of death, could be ‘seen as a good end in itself and as something which ought to be achieved in the best interests of Mary as well as Jodie’.¹⁰² It seems incongruous to rely on sanctity of life to justify a killing under the pretext that this would restore bodily integrity. The remarks of Ward LJ make more sense:

... the operation would, if successful, give Mary the bodily integrity and dignity which is the natural order for all of us. But this is a wholly illusory goal because she will be dead before she can enjoy her independence and she will die because, when she is independent, she has no capacity for life.¹⁰³

Although Ward LJ outlined the criteria for the doctrine of double effect,¹⁰⁴ neither he nor the other Lords Justice in *Re A (Children)* explored the application of these criteria to conjoined twin cases. An examination of the four criteria shows that there are potential problems with each in this context or, at the very least, the possibility of conflicting interpretations. As with the other defences already discussed, views as to whether there is proportionality between harm and benefit will depend on the vagaries of individual opinion about sanctity of life and the killing of an innocent to save another.

The common law doctrine of double effect has no place in Queensland law.¹⁰⁵ It is therefore not surprising therefore that Chesterman J in *Nolan* did not refer to double effect.

V: DISCUSSION

An analysis of sacrificial separation cases shows that they do not provide a principled or certain legal basis for exculpating doctors, for a number of reasons. In England, lack of clarity and certainty about key aspects of the law, in particular the nature and scope of oblique intention and of the defences of necessity and duress of circumstances, compound the difficulties facing judges

⁹⁸ Michalowski, above n 71, 385; Charles Foster et al, 'The Double Effect Effect' (2011) 20 *Cambridge Quarterly of Healthcare Ethics* 56, 68.

⁹⁹ David Wenkel, 'Separation of Conjoined Twins and the Principle of Double Effect' (2006) 12 *Christian Bioethics* 291, 297.

¹⁰⁰ *Re A (Children)* [2000] 4 All ER 961, 1063.

¹⁰¹ A P Simester and G R Sullivan, *Medical Necessity and Murder* (14 October, 2002) Hart Publishing <http://www.hartpub.co.uk/updates/crimlaw/crimlaw_med.htm>.

¹⁰² *Re A (Children)* [2000] 4 All ER 961, 1063.

¹⁰³ *Ibid* 998.

¹⁰⁴ *Ibid* 1012.

¹⁰⁵ Section 282A *Criminal Code 1899* (Qld) is based on the doctrine of double effect but is not a replication of the doctrine.

called upon to determine whether sacrificial separation surgery is lawful. Although each of the judges in *Re A (Children)* and *Nolan* held that it was lawful, the difficulties they faced in justifying this conclusion can be seen in the fact that each arrived at this decision by a different route. A closer examination of each judgment shows that the legal reasoning underpinning the application of each defence is either absent or not convincing.

What is interesting is that there are elements in common to the different defences relied on by the judges: the requirements for reasonableness and/or proportionality. Views about what is reasonable or proportionate in the context of sacrificial separation surgery may be diverse. However, it is difficult to reconcile a view that it is reasonable and proportionate to sacrifice one conjoined twin to save the other, but unreasonable to prohibit the sacrifice of a non-conjoined twin in case where, like conjoined twins, both will die but one could be saved if the other is sacrificed.¹⁰⁶

Ward LJ was acutely aware that his judgment might open the floodgates to widespread medical euthanasia and therefore made it clear that it is authority for special circumstances only:

- it must be impossible to preserve the life of X without bringing about the death of Y;
- that Y by his or her very continued existence will inevitably bring about the death of X within a short period of time; and
- that X is capable of living an independent life but Y is incapable under any circumstances (including all forms of medical intervention) of viable independent existence.¹⁰⁷

However, His Lordship's attempt to limit the precedent authority of his decision to conjoined-twin cases where both will die if they are not separated but one will not survive separation surgery (and there is no medical way, such as a heart transplant, to remedy this) may be unhelpful in a future conjoined twin case.

First, Ward LJ's summary does not provide any guidance as to which twin should be designated 'X' and which 'Y'. In a future case, where the conjoined twins are equally healthy, how would the sacrificed twin be chosen? In one case, doctors chose the twin to survive on the basis that the shared heart was positioned more inside her chest.¹⁰⁸ In another case, the choice was also based on the position of the heart, but before the surgery took place, the twin whose heart was in the normal anatomical position aspirated on a feed and suffered severe brain damage. The doctors then decided to save the other twin.¹⁰⁹ It may be difficult to argue that the requirements for reasonableness and proportionality are met in cases where a person is selected to die based on factors such as relative positions of organs or disability.

Likewise, Ward LJ's second criterion is of no help in these cases, because it could be argued, equally plausibly, that each twin will bring about the death of the other. Further, what would

¹⁰⁶ Sally Sheldon and Stephen Wilkinson, 'Conjoined Twins: The Legality and Ethics of Sacrifice' (1997) 5(2) *Medical Law Review* 149, 169.

¹⁰⁷ *Re A (Children)* [2000] 4 All ER 961, 1018. Neither Brooke LJ nor Robert Walker LJ confined their judgments to conjoined twin cases.

¹⁰⁸ Shellie K Park, 'Severing the Bond of Life: When Conflicts of Interest Fail to Recognize the Value of Two Lives' (2002) 25(1) *University of Hawaii Law Review* 157.

¹⁰⁹ M A El-Gohary, 'Siamese Twins in the United Arab Emirates' (1998) 13 *Pediatric Surgery International* 154.

qualify as a 'short period of time'? Predictions about the lifespan of conjoined twins are not always accurate. The Bailey twins, for example, defied medical expectations by living to beyond their third birthday. Doctors predicted that the twins, who shared a heart, would die within 15 minutes of their birth.¹¹⁰

Ward LJ's third criterion is useful where conjoined twins are like Jodie and Mary, one healthy but the other severely disabled and unable to survive if separated from her twin. However, as with the first and second criteria, this third requirement is of no assistance in cases like the Bailey or Smith conjoined twins.¹¹¹ Legal academics and doctors have suggested that sacrificial separation in such a case might not be lawful.¹¹²

Should a future case where sacrificial separation is mooted involve adult twins,¹¹³ it is also unlikely that judges would sanction the surgery. With adults, an argument that the death of one twin is reasonable and proportionate under the circumstances may well face an insurmountable obstacle in judicial and parliamentary refusal to sanction a positive medical act of killing. It also seems incongruous that an adult person cannot consent to his own death, but that judges can sanction this where the conjoined twins are infants, even though the sacrificed twin's death occurs by means of a positive act.

VI: CONCLUSION

Just as the decision in *Airedale NHS Trust v Bland*¹¹⁴ left 'some British doctors in an odd and uncomfortable position' even though the decision ended a decade in which doctors had made difficult decisions about withdrawal of life-prolonging treatment 'in a vacuum, without legal or professional guidance',¹¹⁵ neither the common law in England nor the common law and criminal codes in Australia are equipped to deal with the legal dilemmas posed by sacrificial separation surgery. The English Court of Appeal's decision in *Re A (Children)* and the Queensland Supreme Court decision in *Nolan* do not provide a principled legal basis for exculpating doctors who perform sacrificial separation surgery.

¹¹⁰ *Conjoined Twins Growing Too Big for Their Shared Heart* (10 March 2010) *Foxnews.com* <<http://www.foxnews.com/health/2010/03/10/conjoined-twins-growing-big-shared-heart/>>.

¹¹¹ Natasha and Courtney Smith, born in 2002, shared a heart but each twin appeared to be normal, and capable of independent life should she be allocated the shared heart on separation. However, the parents agreed to separation surgery in which one twin would be sacrificed, and the surgery was discussed and planned before the twins were born. Doctors decided to save Natasha because the heart was further inside her body. After Natasha and Courtney were born, further tests showed that the shared heart was abnormal, and the complex maze of blood vessels would make it almost impossible to repair the heart and would also prevent separation. Plans for sacrificial separation surgery were abandoned and the twins died. The opportunity for English judges to clarify the law never came to pass.

¹¹² Richard Huxtable, 'Separation of Conjoined Twins: Where Next for English Law' [2002] *Criminal Law Review* 459, 469; Andy Drought, 'Legal Threat to Siamese Twin's Sacrifice', *The Herald* (online), 6 May 2002 <<http://www.theherald.co.uk/news/archive/5-2-19102-23-39-11.html>>.

¹¹³ *Aarushi Dhasmana v Union of India*, Writ Petition (Civil) No 232 of 2012 (10 April 2013) [16]-[17] Radhakrishnan and, Misra JJ indicated that he may be willing to authorise sacrificial separation surgery of teenage conjoined twins who are almost equally healthy, physically and mentally, against their will if there was medical evidence that both would die if not separated but only one could survive the procedure. The judges do not explore the criminal law issues.

¹¹⁴ [1993] 1 All ER 821.

¹¹⁵ S Luttrell, 'Withdrawing or Withholding Life Prolonging Treatment' (1999) 318(7200) *British Medical Journal* 1709.

This extends to future cases involving infant twins with a similar set of facts to the cases explored; cases involving infant twins that are equal, or almost equal, in cognitive or physical ability; or indeed where the conjoined twins are adults. Medical professionals in England and Australia remain justifiably uneasy about the criminal law implications of surgery that will result in the foreseen death of one twin.