A diagnosis of partial androgen insensitivity, its cause and effect, (b) the respondent's ambiguous external genitalia, and (c) the respondent's development which led to her making a *final* choice to live as a woman well before she starting taking oestrogen and before she had surgery, in my judgment the respondent was a female for the purposes of her marriage to the applicant. Accordingly I refuse and dismiss the applicant's application B for a decree of nullity in respect of his marriage to the respondent.

Order accordingly.

Solicitors: Buss Murton, Tenterden; Bonneton de Sarlat, Cranleigh.

J C B

C

D

Court of Appeal

In re A (Children) (Conjoined Twins: Surgical Separation)

2000 Sep 4, 5, 6, 13, 14; 22 — Ward, Brooke and Robert Walker LJJ

E *Children — Court's inherent jurisdiction — Medical treatment — Conjoined twins — Weaker twin surviving only through stronger twin's blood supply — Separation required to prevent death of both but certain to cause death of weaker twin — Parents refusing consent — Whether operation to separate lawful — Whether in best interests of each twin — Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), art 2(1)*

F J and M were conjoined twin girls who were born to devout Roman Catholic parents. They were joined at the pelvis and each had her own brain, heart and lungs and other vital organs and her own arms and legs. The medical evidence was that J, the stronger twin, sustained the life of M, the weaker twin, by circulating oxygenated blood through a common artery, and that M's heart and lungs were too deficient to oxygenate and pump blood through her own body. If they were not separated J's heart would eventually fail and they would both die within a few months of their G birth. However, if they were separated the doctors were convinced that J would have a life which was worthwhile although M would die within minutes. The parents refused to consent to the operation on religious grounds. It was accepted that M, although having a severely impaired brain, heart and lungs, was alive and that the twins were two separate persons. On the hospital's application for a declaration that it could lawfully carry out separation surgery, the judge, having found that separation would enable J to lead a relatively normal life and that the few months of H M's life if not separated from J were worth nothing to her and were seriously to her disadvantage, held that, although regard had to be accorded to the parents' wishes, the proposed operation was not a positive act, which would be unlawful, but rather, by analogy with the situation where a court authorised the withholding of food and hydration, represented the withdrawal of M's blood supply, and therefore could be lawfully performed.

On the parents' application for leave to appeal— A

Held, granting the application but dismissing the appeal, (1) that, notwithstanding the conflict of duties the doctors owed to each twin in respect of her right to life and the impossibility of undertaking any relevant surgery on one without affecting the other, the proposed operation was an act of necessity to avoid inevitable and irreparable evil; that its purpose was to preserve the life of J and not to cause the death of M, and it was inappropriate in the unique circumstances to characterise foresight of M's accelerated death as amounting to criminal intent; that the B protection of a person's right to life in article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] did not import any prohibition, additional to that under English common law, to the proposed operation, and "intentionally" in its ordinary and natural meaning applied only to cases where the purpose of the prohibited action was to cause death; that (per Ward LJ) in essence there was no difference between resort to legitimate self-defence and the doctors coming to J's defence and removing the threat of fatal harm to her presented by M's C draining her lifeblood; and that, accordingly, the operation could be lawfully carried out (post, pp 203A–C, 204A–C, G–H, 238D–F, 239G–240E, 251G–H, 254A–B, 255E–G, 256H–257A, 259C).

R v Dudley and Stephens (1884) 14 QBD 273, dicta of Wilson J in *Perka v The Queen* (1984) 13 DLR (4th) 1, 36 and *Airedale NHS Trust v Bland* [1993] AC 789, HL(E) considered.

(2) That the proposed operation was a positive act of invasive surgery and not a D withdrawal of treatment or an omission, and, although clearly in J's best interests, (per Ward and Brooke LJJ) could not be in the best interests of M since it could not ensure any other improvement to her condition, would bring her life to an end before its natural span and deny her inherent right to life; that, given the conflict of duty the court faced in considering the best interests of each twin, its task was to strike a balance between each and do what was best for each by considering the worthwhileness of the proposed treatment, having regard to the actual condition of E each twin and the advantages and disadvantages which flowed from the performance or non-performance of that treatment, and not to balance the quality of life of each in the sense of considering the worth of one life compared with the other, since that would offend the principle of the sanctity of life and was unlawful; that the prospect of a normal expectation of relatively normal life for J was counterbalanced by an acceleration of certain death for M so that, in the unique circumstances of the case, the court was obliged to consider the manner in which each twin was individually able to exercise her right to life; that the balance was heavily in favour of J since the F best interests of the twins was to give the chance of life to the twin whose actual bodily condition was capable of accepting the chance to her advantage, even if that had to be at the cost of the sacrifice of the life which was so unnaturally supported; and that, therefore, the least detrimental choice, balancing the interests of M against J and J against M, was to permit the operation to be performed; that (per Robert Walker LJ) there was a strong presumption that the proposed operation, consent to which did not require the court to value one life above another, would be G in the best interests of each twin since its purpose would be to give J a reasonably good prospect of a long and reasonably normal life, and, although M's death would be its inevitable consequence, she would obtain bodily integrity and human dignity which was her right, her death was not the purpose of the operation, she would die because her own body could not sustain her life, and her continued life, whether short or long, conferred no benefit on her except possible pain and discomfort and was to her disadvantage (post, pp 182F–G, 184C–D, 189G–H, 190B–D, 192F–G, 196F–197G, H 205C–E, 214A–B, 215A–B, 246A–B, 250D–E, 258C–D, F–259D).

Decision of Johnson J affirmed.

[1] Convention for the Protection of Human Rights and Fundamental Freedoms, art 2(1): see post, p 256A–B.

A The following cases are referred to in the judgments:

A (Male Sterilisation), In re [2000] 1 FLR 549, CA

Abbott v The Queen [1977] AC 755; [1976] 3 WLR 462; [1976] 3 All ER 140, PC

Airedale NHS Trust v Bland [1993] AC 789; [1993] 2 WLR 316; [1993] 1 All ER 821, Sir Stephen Brown P, CA and HL(E)

Attorney General's Reference (No 3 of 1994) [1998] AC 245; [1997] 3 WLR 421; B [1997] 3 All ER 936, HL(E)

Auckland Area Health Board v Attorney General [1993] 1 NZLR 235

B (A Minor) (Wardship: Medical Treatment), In re [1981] 1 WLR 1421; [1990] 3 All ER 927, CA

B (A Minor) (Wardship: Sterilisation), In re [1988] AC 199; [1987] 2 WLR 1213; [1987] 2 All ER 206, HL(E)

C *Birmingham City Council v H (A Minor)* [1993] 1 FLR 883, CA; [1994] 2 AC 212; [1994] 2 WLR 31; [1994] 1 All ER 12, HL(E)

C (A Minor) (Wardship: Medical Treatment), In re [1990] Fam 26; [1989] 3 WLR 240; [1989] 2 All ER 782, CA

Cruzan v Director, Missouri Department of Health (1990) 110 S Ct 2841

D v United Kingdom (1997) 24 EHRR 423

Director of Public Prosecutions v Smith [1961] AC 290; [1960] 3 WLR 546; [1960] D 3 All ER 161, HL(E)

Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653; [1975] 2 WLR 641; [1975] 1 All ER 913, HL(NI)

F (Mental Patient: Sterilisation), In re [1990] 2 AC 1; [1989] 2 WLR 1025; [1989] 2 All ER 545, CA and HL(E)

Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112; [1985] 3 WLR 830; [1985] 3 All ER 402, HL(E)

E *Hunter v Canary Wharf Ltd* [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)

Ireland v United Kingdom (1978) 2 EHRR 25

J (A Minor) (Wardship: Medical Treatment), In re [1991] Fam 33; [1991] 2 WLR 140; [1990] 3 All ER 930, CA

J v C [1970] AC 668; [1969] 2 WLR 540; [1969] 1 All ER 788, HL(E)

F *K D (A Minor) (Ward: Termination of Access), In re* [1988] AC 806; [1988] 2 WLR 398; [1988] 1 All ER 577, HL(E)

Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349; [1998] 3 WLR 1095; [1998] 4 All ER 513, HL(E)

MB (Medical Treatment), In re [1997] 2 FLR 426, CA

McCann v United Kingdom (1995) 21 EHRR 97

Morgentaler v The Queen [1976] 1 SCR 616

G *Nancy B v Hôtel-Dieu de Québec* (1992) 86 DLR (4th) 385

Oakey v Jackson [1914] 1 KB 216, DC

O'Hara, In re [1900] 2 IR 232

Osman v United Kingdom (1998) 29 EHRR 245

Palmer v The Queen [1971] AC 814; [1971] 2 WLR 831; [1971] 1 All ER 1077, PC

H *Paton v United Kingdom* (1980) 3 EHRR 408

Perka v The Queen (1984) 13 DLR (4th) 1

Peters v Netherlands (1994) 77-A D & R 75

R (A Minor) (Wardship: Consent to Treatment), In re [1992] Fam 11; [1991] 3 WLR 592; [1991] 4 All ER 177, CA

R v Abdul-Hussain [1999] Crim LR 570, CA

R v Bourne [1939] 1 KB 687; [1938] 3 All ER 615
R v Bournewood Community and Mental Health NHS Trust, Ex p L [1999] 1 AC 458; [1998] 3 WLR 107; [1998] 3 All ER 289, HL(E)
R v Conway [1989] QB 290; [1988] 3 WLR 1238; [1988] 3 All ER 1025, CA
R v Cox (1992) 12 BMLR 38
R v Dudley and Stephens (1884) 14 QBD 273
R v Gibbins and Proctor (1918) 13 Cr App R 134, CCA
R v Gotts [1992] 2 AC 412; [1992] 2 WLR 284; [1992] 1 All ER 832, HL(E)
R v Gyngall [1893] 2 QB 232, CA
R v Handley (1874) 13 Cox CC 79
R v Howe [1987] AC 417; [1987] 2 WLR 568; [1987] 1 All ER 771, HL(E)
R v Hudson [1971] 2 QB 202; [1971] 2 WLR 1047; [1971] 2 All ER 244, CA
R v Hyam [1975] AC 55; [1974] 2 WLR 607; [1974] 2 All ER 41, HL(E)
R v Instan [1893] 1 QB 450
R v Kingston [1995] 2 AC 355; [1994] 3 WLR 519; [1994] 3 All ER 353, HL(E)
R v Kitson (1955) 39 Cr App R 66, CCA
R v Martin (Colin) [1989] 1 All ER 652, CA
R v Pommell [1995] 2 Cr App R 607, CA
R v Poulton (1832) 5 C & P 329
R v Sheppard [1981] AC 394; [1980] 3 WLR 960; [1980] 3 All ER 889, HL(E)
R v Stratton (1779) 21 St Tr 1045
R v Walker (1979) 48 CCC (2d) 126
R v Willer (1986) 83 Cr App R 225, CA
R v Woollin [1999] 1 AC 82; [1998] 3 WLR 382; [1998] 4 All ER 103, HL(E)
Rance v Mid-Downs Health Authority [1991] 1 QB 587; [1991] 2 WLR 159; [1991] 1 All ER 801
S v McC (orse S) and M (D S intervener); W v W [1972] AC 24; [1970] 3 WLR 366; [1970] 3 All ER 107, HL(E)
St George's Healthcare NHS Trust v S [1999] Fam 26; [1998] 3 WLR 936; [1998] 2 All ER 673, CA
Schloendorff v Society of New York Hospital (1914) 105 NE 92
Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871; [1985] 2 WLR 480; [1985] 1 All ER 643, HL(E)
Southwark London Borough Council v Williams [1971] Ch 734; [1971] 2 WLR 467; [1971] 2 All ER 175, CA
T (A Minor) (Wardship: Medical Treatment), In re [1997] 1 WLR 242; [1997] 1 All ER 906, CA
T (Adult: Refusal of Treatment), In re [1993] Fam 95; [1992] 3 WLR 782; [1992] 4 All ER 649, CA
T and E (Proceedings: Conflicting Interests), In re [1995] 1 FLR 581
United States v Holmes (1842) 26 F Cas 360
Z (A Minor) (Identification: Restrictions on Publication), In re [1997] Fam 1; [1996] 2 WLR 88; [1995] 4 All ER 961, CA

The following additional cases were cited in argument:

Buckoke v Greater London Council [1971] Ch 655; [1971] 2 WLR 760; [1971] 2 All ER 254, CA
C (A Baby), In re [1996] 2 FLR 43
R v Steane [1947] KB 997; [1947] 1 All ER 813, CCA
Secretary, Department of Health and Community Services v JWB and SMB (1992) 175 CLR 218
Sinnasamy Selvanayagam v The King [1951] AC 83, PC
Soobramoney v Minister of Health (KwaZulu-Natal) (1997) 4 BHRC 308
W (A Minor) (Medical Treatment: Court's Jurisdiction), In re [1993] Fam 64; [1992] 3 WLR 758; [1992] 4 All ER 627, CA
Winnipeg Child and Family Services (Northwest Area) v G (1997) 152 DLR (4th) 193

A The following additional cases, although not cited, were referred to in the skeleton arguments:

Attorney General's Reference (No 6 of 1980) [1981] QB 715; [1981] 3 WLR 125; [1981] 2 All ER 1057, CA
C (A Child) (HIV Testing), In re [2000] Fam 48; [2000] 2 WLR 270
C (Medical Treatment), In re [1998] 1 FLR 384
C v S [1988] QB 135; [1987] 2 WLR 1108; [1987] 1 All ER 1230, Heilbron J and
B CA
Collins v Wilcock [1984] 1 WLR 1172; [1984] 3 All ER 374, DC
Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22; [1998] 2 WLR 350; [1998] 1 All ER 481, HL(E)
F (in utero), In re [1988] Fam 122; [1988] 2 WLR 1288; [1988] 2 All ER 193, Hollings J and CA
C *F v S (Wardship: Jurisdiction)* [1991] 2 FLR 349; [1993] 2 FLR 686, CA
Gillow v United Kingdom (1986) 11 EHRR 335
H v Norway (1992) 73 D & R 155
Herczegfalvy v Austria (1992) 15 EHRR 437
J (A Minor) (Abduction: Custody Rights), In re [1990] 2 AC 562; [1990] 3 WLR 492; [1990] 2 All ER 961, HL(E)
Johnstone v Beattie (1843) 10 Cl & Fin 42, HL(Sc)
D *Kelly v Kelly* 1997 SC 285
LCB v United Kingdom (1998) 27 EHRR 212
M (Abduction: Habitual Residence), In re [1996] 1 FLR 887, CA
Myers v Director of Public Prosecutions [1965] AC 1001; [1964] 3 WLR 145; [1964] 2 All ER 881, HL(E)
O (A Minor) (Medical Treatment), In re [1993] 2 FLR 149
P (G E) (An Infant), In re [1965] Ch 568; [1965] 2 WLR 1; [1964] 3 All ER 977, CA
E *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276; [1978] 3 WLR 687; [1978] 2 All ER 987
R (A Minor) (Blood Transfusion), In re [1993] 2 FLR 757
R (Adult: Medical Treatment), In re [1996] 2 FLR 99
R v Adams (unreported) 8 April 1957, Devlin J
R v Arthur (1981) 12 BMLR 1
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)
F [2000] 1 AC 147; [1999] 2 WLR 827; [1999] 2 All ER 97, HL(E)
R v Brain (1834) 6 C & P 349
R v Brown (Anthony) [1994] 1 AC 212; [1993] 2 WLR 556; [1993] 2 All ER 75, HL(E)
R v Chief Constable of the North Wales Police, Ex p AB [1999] QB 396; [1998] 3 WLR 57; [1998] 3 All ER 310, CA
R v Crutchley (1837) 7 C & P 815
G *R v Dadson* (1850) 4 Cox CC 358, CCA
R v Donovan [1934] 2 KB 498, CCA
R v Duffy [1967] 1 QB 63; [1966] 2 WLR 229; [1966] 1 All ER 62, CCA
R v Enoch (1833) 5 C & P 539
R v Ministry of Agriculture, Fisheries and Food, Ex p SP Anastasiou (Pissouri) [1994] COD 329
R v Pritchard (1901) 17 TLR 310
H *R v Reeves* (1839) 9 C & P 25
R v Sellis (1837) 7 C & P 850
R v Senior [1899] 1 QB 283
R v Tait [1990] 1 QB 290; [1989] 3 WLR 891; [1989] 3 All ER 682, CA
R v Trilloe (1842) 2 Mood 260
R v West (1848) 2 Cox CC 500

R v Wright (1841) 9 C & P 754 A
S (A Minor) (Custody: Habitual Residence), In re [1998] AC 750; [1997] 3 WLR 597; [1997] 4 All ER 251, HL(E)
Svensson and Gustavsson v Ministre du Logement et de l'Urbanisme (Case C-484/93) [1995] ECR I-3955, ECJ
Tarasoff v Regents of University of California (1976) 83 ALR (3d) 1166
Wellesley v Duke of Beaufort (1827) 2 Russ 1
Wilson v Pringle [1987] QB 237; [1986] 3 WLR 1; [1986] 2 All ER 440, CA B
X v United Kingdom (1980) 19 D & R 244

APPLICATION for leave to appeal from Johnson J

By a summons issued on 18 August 2000 St Mary's Hospital, Manchester, where conjoined twins, J and M were being treated, applied for a declaration that in circumstances where conjoined twins could not give valid consent and where the parents withheld their consent it C should be lawful and in the children's best interests to (a) carry out such operative procedures not amounting to separation upon the twins, (b) perform an emergency separation procedure on them and/or (c) perform an elective separation procedure upon them. Johnson J on 25 August granted a declaration that separation surgery could be lawfully carried out. The parents of J and M applied to the Court of D Appeal for leave to appeal that there should be no medical treatment including separation surgery to either twin without the parents' consent and that the judge's decision was wrong on the grounds that (1) separation of the twins would not be in M's best interests and his decision that it would be was against the weight of the evidence, in particular he erred in finding that without separation prolonging M's life would be seriously to her disadvantage; (2) separation would not be in E J's best interests and his decision that it would be was against the weight of the evidence, in particular he erred in finding that for J separation meant the expectation of a normal life and he gave insufficient weight to the medical and other problems that J would face if she survived separation; and (3) even if separation would be in the best interests of one or both twins it would be illegal, and the judge's F characterisation of the operation as the withdrawal of M's blood supply and permissible as a withdrawal of treatment was wrong since the operation required could only be characterised as a positive act that would terminate M's life.

The facts are stated in the judgment of Ward LJ.

Simon Taylor for the parents. G

Judith Parker QC, *Tim Owen QC* and *Deborah Eaton* for J.

Adrian Whitfield QC and *Huw Lloyd* for Central Manchester Healthcare NHS Trust.

David Harris QC and *Andrew Hockton* for M.

Nicola Davies QC, *David Perry* and *Gareth Patterson* as amicus curiae.

David Anderson QC for Pro-Life Alliance and Archbishop Cormac H Murphy O'Connor, Archbishop of Westminster, made written submissions.

The submissions of counsel are sufficiently set out in the judgments.

Cur adv vult

A 22 September. The following judgments were handed down.

WARD LJ

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I

INTRODUCTION TO THE CASE OF THE SIAMESE TWINS H

In the past decade an increasing number of cases have come before the courts where the decision whether or not to permit or to refuse medical treatment can be a matter of life and death for the patient. I have been involved in a number of them. They are always anxious decisions to make

A but they are invariably eventually made with the conviction that there is only one right answer and that the court has given it.

In this case the right answer is not at all as easy to find. I freely confess to having found it exceptionally difficult to decide—difficult because of the scale of the tragedy for the parents and the twins, difficult for the seemingly irreconcilable conflicts of moral and ethical values and difficult because the search for settled legal principle has been especially arduous and conducted B under real pressure of time.

The problems we have faced have gripped the public interest and the case has received intense coverage in the media. Everyone seems to have a view of the proper outcome. I am very well aware of the inevitability that our answer will be applauded by some but that as many will be offended by it. Many will vociferously assert their own moral, ethical or religious values. C Some will agree with Scalia J who said in the Supreme Court of the United States of America in *Cruzan v Director, Missouri Department of Health* (1990) 110 S Ct 2841, 2859:

> "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 D this court any better than they are known to nine people picked at random from the Kansas City telephone directory . . ."

It is, however, important to stress the obvious. 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.

E It truly is a unique case. In a nutshell the problem is this. Jodie and Mary are conjoined twins. They each have their own brain, heart and lungs and other vital organs and they each have arms and legs. They are joined at the lower abdomen. Whilst not underplaying the surgical complexities, they can be successfully separated. But the operation will kill the weaker twin, Mary. That is because her lungs and heart are too deficient to oxygenate and pump blood through her body. Had she been born a singleton, she would not have F been viable and resuscitation would have been abandoned. She would have died shortly after her birth. She is alive only because a common artery enables her sister, who is stronger, to circulate life sustaining oxygenated blood for both of them. Separation would require the clamping and then the severing of that common artery. Within minutes of doing so Mary will die. Yet if the operation does not take place, both will die within three to six G months, or perhaps a little longer, because Jodie's heart will eventually fail. The parents cannot bring themselves to consent to the operation. The twins are equal in their eyes and they cannot agree to kill one even to save the other. As devout Roman Catholics they sincerely believe that it is God's will that their children are afflicted as they are and they must be left in God's hands. The doctors are convinced they can carry out the operation so as to give Jodie a life which will be worthwhile. So the hospital sought a declaration that the H operation may be lawfully carried out. Johnson J granted it on 25 August 2000. The parents applied to us for permission to appeal against his order. We have given that permission and this is my judgment on their appeal.

Exceptionally we allowed the Archbishop of Westminster and the Pro-Life Alliance to make written submissions to us. We are grateful for them.

We are also very grateful for the very considerable research undertaken by the Bar and by the solicitors and for the powerful submissions counsel have advanced which have swayed me one way and another and left me at the conclusion of the argument in need of time, unfortunately not enough time, to read, to reflect, to decide and then to write. A

II B

THE FACTS IN MORE DETAIL

1 *A cautionary word—the injunction*

Enough is known about this case for everyone to understand what a hideous nightmare it must be for these parents. If anyone is entitled to peace and privacy it is this mother and father and their babies. To protect them, Johnson J made an order preventing the publication of anything calculated to lead to the identification of the parties or even their addresses—and that includes for the avoidance of doubt the country in which they live. The identities of the medical witnesses are likewise protected to keep them free from intrusion as they go about their private and professional lives. In order, however, to put into the legitimate public domain all that the public needs to know, I shall set out the facts as fully as possible, indeed more fully than I would ordinarily do for law reporting purposes. C D

2 *The parents*

The father is 44 years old; his wife is 10 years younger. They have been married for two years and have no other children. Life is hard for them. There is simply no work for the husband. He has been unwillingly unemployed for eight years. The mother was more fortunate but her work terminated during her pregnancy. They have, somehow, managed to accumulate very modest savings and were in process of building a home for their expected family. E

When about four months pregnant, an ultrasound scan revealed that the mother was carrying twins and that they were conjoined. A doctor at the hospital had trained at St Mary's Hospital, Manchester, and knew of its expertise and excellence. He advised that they should seek treatment there. F

Through long-established links between their government and ours their country is allowed to send a number of patients to be treated here on our National Health Service. We explain this because we read of what may be a concern to some that the parents are Kosovan refugees unjustifiably draining our resources. They are not, nor anything of the kind. That said, we remind the curious that the injunction covers any publication of any matter "calculated to lead to the identification" of the parents' address. The assessment panel in their homeland not surprisingly judged that theirs was a case which local resources could not manage and in that way their government paid for the mother to travel to Manchester in mid-May for treatment during her pregnancy. The father has managed somehow to join her there. Further scans were taken and a magnetic resonance scan was undertaken at Sheffield. To quote from the parents' statement: G H

> "As a result of these scans it became clearer during the latter stages of the pregnancy that the difficulties with the twins were more than had originally been suspected and for a number of weeks towards the latter end of the pregnancy the clear indication was given to us by the treating

A doctors that sadly the smaller of the two twins would probably not survive. Indeed it was not thought that the smaller of the twins would survive birth. This was something we had to consider carefully and for a long time during the pregnancy we have always been aware that both of our babies were in great danger. In [our homeland], the termination of any pregnancy is illegal. When we came to England . . . there was talk . . . of [the mother] being able to undergo a termination because of the
B difficulties with the unborn children. This was not something [we] could give any serious consideration to because we are Roman Catholics and our beliefs are very important to us and we believe very strongly that everyone has a right to life. It was God's will for [the mother] to carry twins and it is God's will that those twins have been born alive and are continuing to make progress and indeed have made progress in the first
C seven days of their lives."

The consultant obstetrician said:

"I have had many discussions with [the parents] about their wishes with regard to their children. I have at all times tried to accommodate their wishes within what I believe to be ethical and acceptable guidelines.
D As a result of their desire for non-intervention I took the unusual step of allowing the twin pregnancy to continue until she went into spontaneous labour at 42 weeks. Normally one considers delivery before that time because of a concern as to whether the placenta can adequately nourish both foetuses. Also, as agreed with them, I delivered them by Caesarean section at the last possible moment in labour. This was to meet their desire that the pregnancy was as non-interventionist as possible."

E

3 *The birth*

The twins were born on 8 August 2000. Their combined birth weight was 6 kg. They were immediately taken to a resuscitation venue. The notes on Jodie record: "Baby crying and active . . . making respiratory effort . . . Easily intubated . . . Baby making spontaneous breathing effort . . . Kept
F intubated in view of condition of other twin."

As expected it was very different for Mary. Her notes read:

"Making spontaneous respiratory effort on arrival from theatre. Face mask oxygen given . . . Intubated . . . Very stiff to ventilate. No audible air entry. Position rechecked and tube replaced to confirm tracheal placement. Still unable to ventilate. No chest movement or breath sounds."

G An hour later it was noted: "No assistance to breathing being given. No active intervention at the moment. Outlook for twin 2 still bleak despite surprisingly stable condition at the moment." In his evidence the consultant neonatologist said:

"The foetal scans—in other words, those done before the delivery took place—suggested that there was a large quantity of fluid within the chest
H where the lungs should be, and that there was a large heart, and probably lung tissue. The real test came when the baby was born and we expected—she had sufficient lung tissue to support herself breathing—that she would with our initial help be able to do so. My consultant anaesthetist colleague, who was intubating and resuscitating Mary, found

that although he could pass the end of the clear tube into her main airway he was not able to make her chest move and he was not able to detect any gasway at all, nor when he put a monitor into the ventilator to track for excretion of carbon dioxide did he detect that any carbon dioxide, which should be being exhaled, was coming out. So we never had any evidence that she has breathed for herself at all."

4 *The conjoined twins*

They are ischiopagus (i e joined at the ischium) tetrapus (i e having four lower limbs) conjoined twins. The ischium is the lower bone which forms the lower and hinder part of the pelvis—the part which bears the weight of the body in sitting. The lower ends of the spines are fused and the spinal cords joined. There is a continuation of the coverings of the spinal cord between one twin and another. The bodies are fused from the umbilicus to the sacrum. Each perineum is rotated through 90° and points laterally.

The reports and medical literature did not prepare me fully for the almost numbing surprise at first seeing the twins in the photographs which were produced to us, though not to Johnson J. After the initial shock one is filled with desperate sadness and sympathy for these helpless babies and their devastated parents. These photographs are taken from the side and show the twins lying end to end on their backs. Jodie's head seems normal but Mary's is obviously enlarged, for she has a swelling at the back of the head and neck, she is facially dysmorphic and blue because she is centrally cyanosed. Between these two heads is a single torso about 40 cm long with a shared umbilicus in the middle. Two legs, Mary's right and Jodie's left, protrude at an acute angle to the spine at the centre of the torso, lying flat on the cot but bending to form a diamond shape. The external genitalia appear on the side of the body. The consultant's report reads:

> "The nature of the conjoin produces a grossly abnormal laterally placed vulval configuration on each side and a markedly splayed perineum. The vulva for each twin is composed of two halves, each coming from the other twin. There is a single orifice in each vulva, which drains urine and meconium, and each twin has an imperforate anus. Each twin has two hemi-vaginae and two hemi-uteri. Such ano-urogenital disposition is consistent with a cloacal abnormality. The gonads and fallopian tubes could not be assessed."

Internally each twin has her own brain, heart, lungs, liver and kidneys and the only shared organ is a large bladder which lies predominately in Jodie's abdomen but which empties spontaneously and freely through two separate urethras.

For our purposes the absolutely crucial anatomical fact is:

> "Jodie's aorta feeds into Mary's aorta and the arterial circulation runs from Jodie to Mary. The venous return passes from Mary to Jodie through a united inferior vena cava and other venous channels in the united soft tissues."

5 *The twins' present condition*

The information concerning the twins' condition was originally given in a number of statements by the treating doctors, and by the evidence they gave

A Johnson J. It is worthy of noting, and we commend Johnson J for his typically sensible approach, that the evidence of the doctors was taken by a video link facility outside the confines of the Royal Courts of Justice. Sooner, rather than later, fully efficient facilities ought to be established here. Since there was a degree of urgency about the hearing, no second opinion was available. This left us with a slight sense of unease that there may have been a rush to judgment and so we encouraged, and all parties agreed to, the B Great Ormond Street Hospital for Children reporting to us and we are grateful for the speed with which they did so. During the course of the hearing, we have had updating reports on the twins' progress.

6 *Jodie's present condition*

The consultant gave this description of Jodie nine days into her life:

C

> "She has an anatomically normal brain, heart, lungs and liver. Her bowel is also normal and appears to be totally separate from that of twin Mary. There is an abnormal vertebra in the lower thoracic area of the spine. She has two kidneys and a full spinal cord. She has two normal lower limbs, which move normally but are widely spaced because of the pelvic diastasis. The hip joints are both normal but the sacroiliac joints D are dislocated and externally rotated causing the lower limbs to lie at right angles to the spine."

Neurologically the position is:

> "She has various neonatal responses which appear to be normal including a Moro response, plantar grasp and palmar grasp responses, a withdrawal response and an asymmetrical tonic neck response. There is E normal routing response and a glabellar tap. In the cranial nerves, the optic fundi are normal and she has normal external ocular movement. Facial movements are normal and she is capable of sucking and swallowing. In the limbs, appearance, tone, movements and muscle development seem satisfactory. The tendon reflexes are present and equal and the plantar responses are equivocal. Touch, pain and temperature are F well perceived. In the trunk there appears to be normal development of the chest wall and the diaphragmatic movements are satisfactory. No obvious abnormality was seen in the cervical, dorsal and lumbar spine. The bladder is shared with her co-twin Mary. The pictures of the ultrasound brain scan showed no obvious abnormality. My finding suggests that Jodie may have normal brain development."

G So far as her intelligence is concerned:

> "The feeling from the team is that Jodie's behaviour and anatomical studies, ultrasound scans and suchlike suggest that she has a normal brain, which is expected to function normally and of normal intelligence in so far as one can tell that at this point in time."

We are told that at three weeks of age she showed "normal reactions and H normal development as expected for a child of her age and gestation". Of particular concern is the capacity of her heart to sustain life for herself and her sister. At three weeks:

> "Jodie's heart remains stable and appears to be coping well with the circumstances . . . these results"—of blood gas analysis—"are below

normal indicating a degree of oxygen deprivation for both twins. Despite this presently Jodie does not show any clinical signs of concern." A

There are some complications in that there is only one external opening which communicates with the urinary bladder and vagina and there is no opening of the anus. The neonatologist who gave evidence to Johnson J on 22 August 2000 said:

B

"I last saw her yesterday evening and she was, as I described just now, very sparkling really, wriggling, very alert, sucking on a dummy and using her upper limbs in an appropriate manner, very much a with-it sort of baby."

After that hearing Jodie suffered a severe blood infection with staphylococcus aureus and needed urgent intravenous resuscitation with plasma and antibiotics for which treatment the parents gave consent. It was effective and she soon returned to normal. The antibiotics have been discontinued and she is not receiving and indeed she does not require any medical support, though she has retained the intravenous catheter which was surgically placed at the time of her collapse. A report from the hospital dated 31 August states: C

D

"Her heart remains stable and shows no signs of strain from supporting, virtually completely, her sister Mary as well as herself. She feeds normally by mouth and appears to be a bright little girl achieving the expected developmental milestones. Her blood gas analysis has been consistently below normal for blood oxygen, probably as a result of admixture with the severely deoxygenated blood of her sister Mary. This has not as yet presented any detectable clinical problem." E

The Great Ormond Street paediatric surgeon told us:

"Jodie appeared alert, responsive and was seen to feed well. She is quite thin but is undistressed. Cardiac and pulmonary function appeared normal. There was nothing abnormal to feel in her abdomen either. During the time I observed them, the twins appeared entirely contented. There was nothing to suggest pain or distress in either twin." F

Their cardiologist reported:

"Jodie was comfortable breathing air, alert and hungry. She was observed to feed from a bottle without distress. She is on demand oral feeds . . . Oxygen saturation was 100% . . . Arterial pulses were palpable in all limbs. There was good peripheral perfusion. Leg blood pressure was recorded as 80/50 mm Hg. The precordial impulse was not overactive. Heart sounds were normal. I could not hear a heart murmur." G

It is interesting that Great Ormond Street made the following comment:

H

"At the present time, the twins' calorie intake is insufficient to allow growth. It is a feature of Siamese twins, even when both are neurologically normal, that one is more active and feeds less than the other. Conversely, the active, feeding, twin is thinner than the fatter one. A similar situation is developing here where Mary does very little and her twin does all the work. Although Jodie is feeding on demand, she is not at

A present receiving enough calories to grow normally and this is not a favourable situation for her in the long term. Presumably her feeding can be supplemented when this is deemed necessary."

On 13 September Mr Whitfield, counsel for St Mary's Hospital, reported:

"The cardiac assessment this morning shows that Jodie's heart remains B steady and there is no sign of failure. The surgeons are therefore not in any great hurry, as from the cardiac point of view things remain steady. However, the surgeon, from his usual observations, has noticed that Jodie is not growing as he would expect, and he has noticed this since last week, as has the nurse. Mary is growing normally. From the physical point of view, Jodie is not growing—although she is eating well—and the surgeon thinks that it may be that Mary is drawing nutrition from Jodie, and C growing at her expense. This could have implications for the timing of the operation but there is no immediate rush. The surgeon is thinking of monitoring over the next week or so, and unless he continues to observe failure to grow in Jodie, he would still put the point of separation at three plus months. If, however, there was a continued failure to thrive, the operation would be advanced by about four weeks."

D

7 *Mary's present position*

Mary is severely abnormal in three key respects. First, she has a very poorly developed "primitive" brain. The brain scan showed various abnormalities including reduced cortical development, ventricular enlargement, partial agenesis of the corpus callosum and a Dandy-Walker E type malfunction of the hindbrain. A neuronal migration defect may have occurred. These are the result of a major malformation which was probably present early in foetal life. Similar brain malformations are not compatible with normal development in post-natal life. The neurologist gave evidence and these passages are pertinent:

"*Q* How would you describe the degree of abnormality of Mary's F brain? *A* Very severe indeed . . . It is possible that this child is progressively developing hydrocephalus which might be to its detriment. Corpus callosum in later childhood is associated with seizure disorders/epileptic fits. It is also associated with developmental delay and learning difficulties."

The second problem is with her heart. Hers is very enlarged, almost filling G the chest with a complex cardiac abnormality and abnormalities of the great vessels. In his evidence the cardiologist said:

"[Her heart] is very dilated and very poorly functioning. In terms of actually pumping blood out round the body it is doing very little work of its own accord. In terms of structure, the actual way the heart is formed is probably normal and, as I say, the problem is much more the functioning H aspects, it is just not squeezing well at all . . .

"*Q* So far as Mary's heart is concerned, is there any further deterioration that can occur in her heart that will cause any problems? *A* I think, as has already been said, if Jodie wasn't covering Mary's circulation she wouldn't be alive now if they were separate twins. There

is no flow at all into her heart. I don't think things could get any worse than they are at present." A

Thirdly, there is a virtual absence of functional lung tissue (severe pulmonary hypoplasia). The neonatologist said of her:

"It has become apparent that she has no functioning lung tissue and does not shift air at all in and out of the chest, and has very poor heart function . . . together with the fact that she has several very significant brain spectral problems . . . the combination of the abnormal lung tissue development, which is virtually non-existent, and the very abnormal cardiac function which, for a single twin, would have meant that we would not have been able to resuscitate her from the word go, had she been just a single baby, plus a combination of the inter-cranial abnormalities makes me feel that her outlook is really extremely poor." B C

Great Ormond Street confirmed that Mary "is not capable of separate survival because of grossly impaired cardiac performance and no useful lung function, with no prospect of recovery". That is the sad fact for Mary. She would not have lived but for her connection to Jodie. She lives on borrowed time, all of which is borrowed from Jodie. It is a debt she can never repay. D

8 *The available options and the doctors' views*

There are three ways of treating this appalling situation. (a) Permanent union: at the moment the twins survive virtually unaided, though Mary has to be fed by tube. The summary of the hospital view is:

"[Permanent union] condemns a potentially normal Jodie to carry her very abnormal sister, Mary, throughout the life of both. In view of the anatomical disposition Jodie will be unable to walk or even sit up appropriately. She is liable to progressive high output heart failure, which may lead to her earlier death within weeks or months." E

This was examined in the evidence led before the judge. The cardiologist said: F

"At the moment the function of Jodie's heart is very good. We are happy with its functioning now. The difficulty we envisage for her is that at the moment she is pumping blood round both babies' circulations, and the analogy I give staff in the unit, so that it is easy to understand, is that it is like asking anybody's heart to pump up to a 10 foot person. So if we suddenly grew about four feet overnight we are asking our heart to suddenly adapt and manage to deal with that for the foreseeable future. So the difficulty these hearts get into is that in time it places such an extra strain on the heart that they begin to show signs of failure. G

"*Q* And what would the effect of that failure be? *A* At the time the heart failed to pump blood round both babies both Jodie and Mary would have less blood going to the vital organs and the kidneys would potentially fail . . . the brain would be again further starved of blood and oxygen and that would lead to the death of both infants. H

"*Q* Are you able to express an opinion upon when, if at all, it is likely that Jodie will suffer this condition of high cardiac output failure? *A* In terms of conjoined twins it is very difficult to be precise . . . but I think

A three to six months is a reasonable guide of the kind of time we could be looking at."

In cross-examination he was asked:

> "Are there circumstances in which Mary could die but Jodie's heart continues to function? *A* I think at the moment . . . because Jodie is essentially pumping for the vital organs of both twins as they breathe, I think that is unlikely . . . I think that while Jodie is performing OK, Mary will survive. I think if she was to deteriorate to the point where Mary was to die because of Jodie's heart being compromised I think probably both twins would die simultaneously."

B

Great Ormond Street were not quite as pessimistic. The paediatric surgeon says: "Although my impression is they can live together for many months, or perhaps even a few years, it does not seem likely that they can survive in this fashion long term." The cardiologist said:

C

> "Jodie's heart provides subtotal perfusion of Mary's tissues. Cardiac work in Jodie will be substantially increased as a result, and consequently she is at risk of heart failure. This can be defined as the inability of her heart to pump sufficient blood for the needs of the body, which in this case also includes Mary's body. The estimated life expectancy of three to six months . . . was reasonable, in my opinion. Any estimate of anticipated survival in this case will have wide confidence limits, and may need revision according to observed progress. Since the suggested 80–90% chance of death by age six months was made, more than two weeks has elapsed without evidence of haemodynamic deterioration. Jodie's heart continues to provide adequate tissue perfusion to both her own body and that of Mary without the need for pharmacological support. I do not know how long the twins will survive without surgical intervention. However, with the benefit of the longer follow up to date, I would estimate the chance of survival to beyond six months to be greater than the 10–20% likelihood previously suggested . . . Life expectancy with non-surgical supportive care is difficult to estimate. However, progress to date suggests that the chance of survival of both twins to beyond the age of six months is probably greater than the previously suggested 10–20%. I cannot provide an accurate estimate for an 'upper limit' for life expectancy but this estimate would gradually increase with time if the present satisfactory progress from the point of view of Jodie's cardiac performance is maintained."

D

E

F

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(b) Elective separation: the summary of the hospital's view on this is that:

> "[It] will lead to Mary's death, but will give Jodie the opportunity of a separate good quality life. There are concerns regarding the possibility of acute heart failure for Jodie at the time of separation. Jodie may have bladder and anorectal control problems and is likely to require additional operative intervention over time. She may have musculoskeletal anomalies, which may also require surgical correction. It is expected, however, that separation will give Jodie the option of a long-term good quality life. She should be able to walk unaided and relatively normally. Separation should allow Jodie to participate in normal life activities as appropriate to her age and development."

H

I will need to explore the prognosis for Jodie in more detail. A
(c) Semi-urgent/urgent separation:

> "[This] may need to be considered in the event of an acute catastrophe such as Mary's death, the development of progressive heart failure for Jodie, or the development of a life threatening condition . . . The prognosis for Jodie would be markedly reduced and mortality highly likely, particularly following the death of Mary. For Jodie the prospects B of urgent separation are less good (60% mortality) when compared with those of a planned elective separation (6% mortality). Clearly, for Mary, separation will always mean death. If it is possible it would be preferable to plan for an elective separation than to avoid 'urgent' procedures."

No one in the case advances this option. The probability seems to be that Jodie would die first and Mary's death would follow immediately. So long C as Mary is alive the real problems in the case remain whether it is elective surgery or surgery undertaken in response to the intervening event. The hospital and all concerned with the treatment and care of the twins are in favour of elective separation. The leader of the team gave this evidence:

> "I think every one of us involved in the team considering these issues, as indeed with many other issues we face in daily life, has to form their D own judgment and form their own approach as to what in conscience, for instance, they are able to accept. We have taken the attitude that we would consult very widely with all members of the team giving opportunity to everyone to discuss and to bring up points for discussion. No one has been forced into anything. I took the occasion after your comments yesterday to ask the members of the nursing staff on the neonatal unit, where the twins are presently being looked after, whether E they or anyone they knew had any feelings or views which precluded them from being part of the team, or whether they had any conscientious objections and I was told that no one could think of any individual who wished to opt out on a conscience basis knowing the full implications of what was proposed. So it has been discussed. People have had their views very definitely, but the feeling from everyone is that everyone is on F board."

9 *The nature of the proposed operation to separate the twins*

The surgeon gave the judge this explanation of the operation:

> "The operation will be in separate parts. The first bit will be to explore the anatomy to confirm that which we have been seeing on various G investigations, so in other words can we confirm which bits are definitely whose and suchlike. We need also to determine—much of this can only be done at the time of surgery—from which parts each bit of each organ is being supplied so that we know which bit to give to whom. So that will be the first part of the operation. We would then be looking to proceeding with the separation of the bladders, giving whichever bit to each patient H and also looking at the anatomy of the anal rectum. Once it is established which bits are going to whom, the actual separation then starts by separating the bones, the pelvic bones, one from another anteriorly and then proceeding fashioning skin and suchlike as you go along towards the spine, where the two spinal bones are joined together at their tip. That

A will need to be separated, the bones would need to be separated, within that we expect to find the common channel between the linings of the spinal cord which will need to be separated and similarly the terminal ends of the spinal cord. Once we reach that stage, we should be left with possibly some muscle union at the pelvic floors, that will need to be divided so that each has its own two halves. Finally and eventually we have a major blood vessel, which is the continuation of Jodie's aorta, B which is bringing blood across to Mary, and similarly the vena cava, which is returning blood from Mary to Jodie. Those would need separating, dividing. It is at that point that we would expect that Mary would then die. The rest of the operation for Jodie would then be essentially a reconstructive operation, attempting to bring the pelvic bones together. One needs to break them and divide them at the back in C order to allow rotation and apposition in front and then forming the buttocks and forming the anus and the vagina and urethra and essentially closing the abdominal wall anteriorly. It is a major procedure and it will take many hours and it will involve various teams of surgeons: ourselves, the orthopaedic surgeons and one of the neurosurgeons in particular, as well as an anaesthetist for each baby and his team."

D Further important points about the operation need to be noted. First, as the surgeon reported to us in answer to a question, "Would the separation operation impinge on the bodily integrity of Mary?" the response was:

"Separation of the twins would necessarily involve exploration of the internal abdominal and pelvic organs of both twins and particularly the united bladder. It is expected however that each twin would have all its E own body structures and organs. It is not anticipated or expected to take any structure or organ from either twin to donate to the other."

Secondly, there was a suggestion in the oral evidence to the judge that as a matter of prudence, given the utterly hopeless outcome for Mary, it would be better to favour Jodie "in relation to the skin element to ensure that we could close the surgical wound with Jodie". In evidence to us the surgeon F explained that, although that was the prudent course, it was not a necessary course and, if required not to do so, that precaution would not be taken, so that, putting it crudely, no part of Mary would be given to Jodie. It is important to recognise that this is not a case involving any organ transplant nor indeed the donation of any bodily parts from one child to the other.

Thirdly, as to where the clamping of the aorta would occur, he explained in a report to us: "Interruption of the blood supply from Jodie supporting G Mary would occur at the level of the united sacrococcygeal vertebrae. The site could be biased towards Jodie." A report from the spinal surgeon was also placed before us and he is of the opinion that:

"As far as one can see her spinal deformity is a single hemi-vertebra at the thoracolumbar level, together with the contiguous sacra. Her hemi-vertebra is unlikely to require treatment, but will require follow-up by a H spinal surgeon. It is unlikely to cause anything other than a minor deformity and should not be the source of any functional deficit. With respect to her contiguous sacra, given that she has normal bladder function it is likely that the nerve supply to the lower limbs will be sufficient to enable her to walk reasonably normally. She will of course

require surgery to stabilise her pelvis. Overall, the outlook from the point of view of her musculoskeletal problems is good." A

10 *The prognosis for Jodie*

If the twins remain united, then, as already set out, Jodie's heart may fail in three to six months or perhaps a little longer. But it will eventually fail. That is common ground in this case. Her prospect of a happy life is measurably and significantly shortened. As to the manner of her death the surgeon told us: B

"[Jodie] has, so far as we can make out, a perfectly normal brain and therefore we could expect that in the event of heart failure, with increasing breathlessness, increasing difficulty with oxygenation, with swelling of the liver, swelling of the legs, that she would become uncomfortable and would eventually find it an unpleasant experience to say the least." C

Those effects could be palliated with drugs and the use of a ventilator. A similar breathlessness would occur if she suffered hypoxia, a drop in the oxygen concentration in the blood, usually as a result of infection. Such an infection might be septicaemia, some forms of which are not always successfully treated by antibiotics. Very young babies often suffer necrotising enterocolitis but the risk is decreasing as time goes by. If they suffered respiratory infection, she may again need to be placed on a ventilator. If she were to survive without the onset of illness, she would, ordinarily, attempt to roll over so that she is lying on her abdomen, ultimately to get into a crawling position. This would happen between five to eight months of age. She would instinctively want to try these movements but it will not be possible due to the attachment of Mary who, by reason of her brain anomalies, would not be developmentally at the stage where she would be wishing to undertake the same manoeuvre. For Jodie there will be the frustration of not being able to move: D E

"Her attachment to Mary means that she is not going to be able to walk or to stand, she is going to need to lie or to be carried wherever, and that will therefore limit her ability to develop as a normal child whereas if she survives this operation and walks, as she is expected to, she can have a relatively normal or as close to normal free existence." F

If the operation to separate is carried out, there is a 5–6% chance the children might die. Great Ormond Street were more confident. They reported: "Surgery would probably be a low risk procedure for Jodie. The operation itself and the possibility of later complications would probably carry an overall risk of death of perhaps 1–2%." G

As to her life expectancy St Mary's surgeon said:

"From what we know at this time of Mary, there is nothing which suggests that the life expectancy should be any shorter than normal . . . Jodie's problems are functional, if you like, rather than life-threatening. Against those risks must be balanced the opinion that there is a 64% chance of death if an emergency operation had to be undertaken and the 80–90% prospect of death within three to six months, or perhaps a little longer, if no surgery is undertaken at all." H

A Evidence was given that the literature suggested "that the separation is usually well accepted without any serious or other psychological effects on the survivor . . . it is unlikely that she will have any major psychological consequences from that separation".

So far as her mobility is concerned, the surgeon said:

> "All the indicators and also the experience from the literature suggest B that she should be able to stand and she should be able to walk on her own without support, so, yes, we would expect her to have reasonably normal mobility. I hesitate to say normal because obviously there are serious concerns here. That will be the expectation: that she will be able to get around sensibly, as close to normal as possible on her own and unsupported."

C He was asked for the worst possible scenario and said: "In the worst scenario, yes, it is possible that she will never walk, she may need a wheelchair, she may need an appliance in the form of a crutch or a brace or something like that but it is not what is expected." He explained:

> "In the first instance she is going to need her pelvis sorting out at the D time of first operation in order to allow closure and suchlike. Any further operative procedures will depend on whether the pelvis and the spine were stable, whether there was any progression of any adverse circumstance, so she may need no operations at all. If as she was growing it became obvious that the spine was beginning to bend, for instance, as a scoliosis, then the spinal surgeon may consider it relevant to institute therapy for that, be it conservative with plaster and/or surgery . . . The E most common situations which arise when they do arise relate to the pelvis respreading so that the limbs go into a lateral position, so we have a sort of wobbling gait, rather than feet facing forwards they face laterally. So a further operation at some stage to readjust the configuration of the pelvis and to bring the feet into a more normal alignment for walking would be one area. Another would be the question of a bend in the spine, F as I have mentioned, scoliosis, developing and progressing and that would be a scenario where surgery would be relevant to correct the bend and join the bones, tying the bones together such that the bend is stabilised. But it may be that she would never come to any surgery. The literature says that in looking towards the long-term future one should have regard to potential musculoskeletal concerns and we have taken that on board G along with every other system."

He was a little more cautious about the anorectal situation, saying:

> "It is not normally formed, it is an imperforate anus and therefore we are going to have to reconstruct in a manner of an imperforate anus and if you add to that the split of the floor, which is where the muscles are, then it does make it rather more difficult. So there are good points and there H are bad points. The nerves going to the muscles seem to be normal but the muscles themselves are split and the whole area is not normally formed. Therefore when you come to reconstruct all that there are very many factors at which one has to look in terms of continence so I am a little bit cautious at saying to you that it is going to be all right. I hope it will be."

He explained the difficulty. The prospect is that the anus will learn to open and close normally. If that has not been achieved by about school age, it may need wash-outs and enemas and suchlike and the possibility of a colostomy. The family would need some form of medical nursing support initially to help them in learning how to care for the attachment of the colostomy bag and there may be practical difficulties in finding a ready availability of those bags in their homeland. As the surgeon observed: "A colostomy would perhaps be regarded as a much greater handicap than it would be in this country for instance." The surgeon is hopeful, though he cannot be certain, that they would be able to preserve what seems like a relatively normal bladder function. Again the worst case scenario would be that Jodie would have to have a urinary diversion with a bag. The surgeon commented in evidence:

> "Of themselves, they reduce your quality of life but they do not destroy your life. There are several children and people who live with such diversions. It may be it is not an entirely normal life. I think perhaps the most relevant ones would be serious musculoskeletal problems, which would directly interfere with her life and in the longer term she may require further attention to her vagina which may to a certain extent affect how she functions sexually, but it certainly is reconstructable . . . Jodie at the moment has normal vaginal structures and uterus, they are unfused, they are in two parts instead of one, they are in the form of two tubes as they develop embryologically instead of one tube, so she needs some attention to that vagina in order to make it one channel . . . [She] has two half uteri and two half wombs both of which normally grow sufficiently to make a full pregnancy without concern, so the uteri do not need surgery. We do not know as yet what is the status with her gonads, with her ovaries. The normal expectation is that she should have two normal ones . . . So one would expect that as long as she is able to perform normally sexually there is no reason why she should not conceive in the course of time and have her own children."

The long-term prognosis following surgery offered by Great Ormond Street is much more optimistic and I bear in mind the greater experience they bring to bear. Their surgeon says:

> "Jodie . . . will require further surgery. It seems likely to me that her large bowel is normal and, therefore, I would expect her to have normal bowel control. However, given that the attachments of the muscle in the pelvis will be absent or at least tenuous on one side, one could not be absolutely certain that bowel control will be normal. I would, however, be hopeful in regard to this aspect. At present, it seems that the twins void normally. One would hope, therefore, that this would continue after surgery. Further operations will be required to provide a functioning vagina. This is a procedure which is commonly performed and the results are variable. None the less, the great majority of children achieve a functioning vagina after reconstruction. From the available literature, it seems that gait is normal, or near normal. Jodie does have a hemi vertebra at the lower end of her thoracic spine. It is possible that she would need scoliosis surgery should a curvature of the spine develop. At

A present the need for surgery cannot be predicted and one would need to await further spinal growth."

The consultant surgeon said:

> "As far as one can see her spinal deformity is a single hemivertebra at the thorocolumbar level, together with the contiguous sacra. Her B hemivertebra is unlikely to require treatment, but will require follow-up by a spinal surgeon. It is unlikely to cause anything other than a minor deformity and should not be the source of any functional deficit."

11 The prognosis for Mary

If the operation to separate the twins is carried out, Mary will be C anaesthetised against all pain and death will be mercifully quick. The surgeon was frank in acknowledging there was really no benefit for Mary in the operation. This was put to him:

> "Q The phrase you used, which is a harsh one, but the reality none the less has to be faced, is that effectively during this operation you would be, to use your own words, killing off Mary. *A* Yes and that is a very serious D worry for all of us involved in such an act and we would only look to taking it on if we felt that there was really and truly in the best interest, taking the whole situation as it is, of Jodie and if Mary's long-term survival was so poor that it was not really a sensible proposition, also leaving them united together detracts markedly and severely from the quality of life for both really.
>
> "Q Just focusing on Mary for a moment, there cannot really be any E doubt, can there, that, as his Lordship said, it is in Mary's best interests to maintain the status quo? *A* Can I question 'best interests'? It is only in Mary's best interests in so far as it is her only means of survival to continue to use Jodie as her oxygen supply and her circulatory pump . . .
>
> "Q Is there any therapeutic benefit for Mary in the operation being performed? *A* If you look at it in terms of Mary dying, no, there is not a F therapeutic benefit. If you look at it in terms of what Mary's life would be like attached forever to her sister, then it is not a benefit for her to remain attached to her sister: she will be much happier if she is separate."

The neonatologist expressed himself slightly differently. In his report he said: "It is sadly therefore in Mary's best interests that the ultimate aim should be planned separation of these twins accepting the fact that this G would terminate the life of Mary." Asked about that he said in evidence:

> "I think my perception of the quality of her life is that it would be so poor that I do not feel that it is a life that she will enjoy. I think her limitations would be so severe that inter-reactions with and development and progress would be so severely interrupted, prevented really, that in my view it is acceptable to acknowledge that Mary should be allowed to H die . . .
>
> "Q . . . I do not think you have quite answered my question. Is it really your view that the best option for Mary is to terminate her life? *A* I think I come back to the fact that the quality of any life that she will have will be so poor that, yes, I feel that it is appropriate to terminate her life."

If the twins are to remain fused, the evidence is that Mary will have a 75% or more chance of developing hydrocephalus which would be "extremely difficult" to treat because usually the end of the shunt system would either go into the abdominal cavity which is abnormal in her case or into the heart which is also not possible in her case. The effect of untreated hydrocephalus will be to increase brain damage. She is at risk of suffering epilepsy. Lack of sufficient oxygen will progressively cause cellular damage and brain damage. In the view of the neonatologist, her condition is not terminal but severe.

There is great uncertainty as to the extent to which she suffers pain. The paediatric surgeon in the evidence he gave us said:

> "What we see at present is a child whose responses are extremely primitive. They are more like mass movements to a stimulus, be it what is regarded as a pleasurable stimulus or a painful stimulus. They are withdrawal type and grimacing and suchlike. So we are not really able to differentiate at this time, and even at four weeks of age now, whether this twin actually appreciates pleasure or pain. Certainly there is a response to stroking and there is a response to pinprick, but they are the same."

The neonatologist explained: "she just screws her face up in what appears a painful sort of way, and that is the only facial expression I see her make, and that is not an 'irritant stimulation', it's really gentle, it's patting her or stroking her head." Sadly the same reaction is produced to a pinprick. He explained to the judge: "That might be a reflex response to sensation." The judge commented:

> "But this baby cannot cry because this baby has no lungs. So how would you know, in the situation that I am putting to you, whether Mary is suffering pain or not? *A* It is extremely difficult, sir, I do not have a straightforward answer for you . . . My Lord, the responses that Mary shows are certain stereotype responses that we can observe as doctors, but it is how you interpret those responses which matters. If that response occurs to being tugged or pulled, her being pricked to obtain a blood sample, the interpretation that one might place on that stereotype response is possibly pain. On the other hand, if you get a similar response to gentle stroking it might not imply pain."

The paediatric neurosurgeon, observing that her brain is not functioning normally and that she would not achieve the development one would expect in the next three to six months in a child with a normal brain, then said, in answer to the question whether she had any ability to feel pain or suffering:

> "I was impressed by the observation of being dragged around, which was going to be if not painful certainly very uncomfortable, and I would further subscribe to that by saying that having your skin dragged over any sort of surface is likely to be very uncomfortable, if not constantly painful, and I agree—I think that is a horrendous scenario, to think of being dragged round and being able to do nothing about it. I think with the increasing activity of Jodie, Mary's situation becomes worse."

Miss Parker on Jodie's behalf asked the surgeon a "very theoretical question" whether Mary could be kept alive if she were attached to a heart lung machine immediately after the common aorta was severed. He agreed that it was possible but he went on to say:

A "It is not something that we would have planned as part of the procedure because this is the sort of situation that one would set up if one was looking towards a survivor. It is a holding situation, pending whatever is your final operation that is going to lead to a separate viable entity. Here for the weaker of the twins, unless there was a heart and lungs available for transplant instantly there would not really be all that much point, and then one has to take into context the rest of the problems B which the child has . . . which really do not suggest that there is any point in taking on a heart/lung transplant for this child."

Great Ormond Street agreed. In their opinion:

"This would not be appropriate as the only accepted indication for this very intensive form of treatment is in the context of potentially C recoverable abnormality, or possibly as a short-term bridge to transplantation. Heart and lung transplantation in Mary is not an option. Heart and lung transplantation has not been performed in early infancy to my knowledge; even if it was considered to be technically feasible, donor organs of appropriate size are not available."

Miss Parker wisely and properly did not pursue this line. It would make a D mockery of law and medicine to escape some of the difficulties in this case by hooking this child into a heart/lung support machine and then seeking permission to discontinue that treatment given the futility of prolonging her life. *Airedale NHS Trust v Bland* [1993] AC 789 has already left the law, as Lord Mustill commented, at p 887, in a "morally and intellectually misshapen" state. It would be quite wrong, as the doctors recognise, to E contemplate this an acceptable outcome to the case. But it remains a poignant irony in the case. At one end of life, the pregnancy could have been lawfully terminated, Mary would have died but no offence would have been committed because she is not viable. Now at the other end, were it ethically permissible to do so, life could have been preserved artificially and then ended on *Bland* principles.

F 12 *The medical literature*

A considerable body of medical literature has been placed before us, as well as a number of helpful articles referring to the legal and ethical problems in dealing with conjoined twins. It has been fully discussed in the judgment of Brooke LJ, a copy of which I have read in draft, and, rather than repeat any of it in this judgment, I gratefully adopt his exposition.

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13 *The parents' views*

It is a laudable feature of this case that, despite holding such different views about the twins' future, the parents and the hospital have throughout maintained a relationship of mutual respect. The highly commendable attitude of the parents is shown in this passage in their statement:

H "We have been spoken to on many occasions by all the treating doctors at St Mary's Hospital and we were fully aware of the difficulties . . . We have been treated with the utmost care and respect at St Mary's Hospital and we have no difficulties or problems with any of the medical staff that are treating [us]."

As parents of the children, their views are a very important part of this case. It is right, therefore, that I set them out as fully as possible: A

> "We have of course had to give serious consideration to the various options as given to us by our daughters' treating doctors. We cannot begin to accept or contemplate that one of our children should die to enable the other to survive. That is not God's will. Everyone has the right to life so why should we kill one of our daughters to enable the other to survive. That is not what we want and that is what we have told the doctors treating Jodie and Mary. In addition we are also told that if Jodie survives and that is not known at all, then she is going to be left with a serious disability. The life we have . . . is remote . . . with very few, if any facilities would make it extremely difficult not only for us to cope with a disabled child but for that disabled child to have any sort of life at all . . . there is a small hospital where you can receive emergency treatment but certainly they do not have the staff or facilities to cope with someone with serious ongoing difficulties. Any treatment would have to be undertaken [some distance away] where there is a hospital and a further hospital is being built which should be completed in about three years' time. However, if specific treatment is required it may be necessary for us to go further afield and indeed come back to St Mary's Hospital in Manchester for further treatment. That is how we came to St Mary's Hospital in the first place to ensure that our babies had the best possible treatment. These are things we have to think about all the time. We know our babies are in a very poor condition, we know the hospital doctors are trying to do their very best for each of them. We have very strong feelings that neither of our children should receive any medical treatment. We certainly do not want 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. In addition we cannot see how we can possibly cope either financially or personally with a child where we live, who will have the serious disabilities that Jodie will have if she should survive any operation. We know there is no guarantee of survival but she is the stronger of the two twins and if she should survive any surgery then we have to be realistic and look at what we as parents can offer to our daughter and what care and facilities are available to her in our homeland. They are virtually nil. If Jodie were to survive she would definitely need specialist medical treatment and we know that cannot be provided. Jodie would have to travel, on many occasions, possibly to England to receive treatment. It concerns us that we would not have any money for this treatment and we do not know if this is something [our] government would pay for. This has meant that we have also had to give very careful consideration to leaving Jodie in England, should she survive, to be looked after by other people. We do not know if other people would be willing to look after such a seriously disabled child, but we do know that this is something that if we had any other choice we would not even give it consideration. It would be an extremely difficult, if not impossible, decision for us to reach, but again we have to be strong and realistic about matters and understand that certainly Jodie

B C D E F G H

A would receive far better care and importantly the required medical treatment should she continue to reside in England as opposed to her being taken home. We do not know whether it is possible or feasible for Jodie to remain in England. We do not know if it is possible or feasible for her to be fostered by another family so that we can have an involvement in her upkeeping or whether she would have to be adopted and we could B have no contact with her at all. That would break our hearts. We do not want to leave our daughters behind, we want to take them home with us but we know in our heart of hearts that if Jodie survives and is seriously disabled she will have very little prospects on our island because of its remoteness and lack of facilities and she will fare better if she remains in this country . . . So we came to England to give our babies the very best chance in life in the very best place and now things have gone badly C wrong and we find ourselves in this very difficult situation. We did not want to be in this situation, we did not ask to be in it but it is God's will. We have to deal with it and we have to take into account what is in the very best interests of our two very young daughters. We do not understand why we as parents are not able to make decisions about our children although we respect what the doctors say to us and *understand* D *that we have to be governed by the law of England*. We do know that everyone has the best interests of our daughters at heart and this is a very difficult situation not only for us as their parents but also for all of the medical and nursing staff involved in Mary's and Jodie's treatment."

I have added the emphasis to make it clear that the parents accept the jurisdiction of the English courts to decide the awesome question laid before E us.

I said when this appeal opened that we wished at the very beginning to emphasise to the parents, strangers in our midst, how we sympathise with their predicament, with the agony of their decision—for now it has become ours—and how we admire the fortitude and dignity they have displayed throughout these difficult days. Whether or not we agree with their view F does not diminish the respect in which we hold them.

14 *The nature of these proceedings*

I am satisfied there has been the closest consultation between the medical team, the parents, their friends, their priest and their advisers. Just as the parents hold firm views worthy of respect, so every instinct of the medical G team has been to save life where it can be saved. Despite such a professional judgment it would, nevertheless, have been a perfectly acceptable response for the hospital to bow to the weight of the parental wish however fundamentally the medical team disagreed with it. Other medical teams may well have accepted the parents' decision. Had St Mary's done so, there could not have been the slightest criticism of them for letting nature take its course in accordance with the parents' wishes. Nor should there be any criticism of H the hospital for not bowing to the parents' choice. The hospital have care of the children and whilst I would not go so far as to endorse a faint suggestion made in the course of the hearing that, in fulfilment of that duty of care, the hospital were under a further *duty* to refer this impasse to the court, there can be no doubt whatever that the hospital are entitled in their discretion to

seek the court's ruling. In this case I entertain no doubt whatever that they were justified in doing so. A

Thus they issued an originating summons on 18 August entitled "In the exercise of the inherent jurisdiction of the High Court and in the matter of the Children Act 1989." The relief which was sought was:

> "A declaration that in the circumstances where [the children] cannot give valid consent and where [the parents] withhold their consent, it shall be lawful and in [the children's] best interests to (a) carry out such operative procedures not amounting to separation upon [Jodie and/or Mary], (b) perform an emergency separation procedure upon [Jodie and/or Mary] and/or (c) perform an elective separation procedure upon [Jodie and Mary]." B

There has been some public concern as to why the court is involved at all. We do not ask for work but we 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. That is what courts are here for. C D

15 The judgment of Johnson J

His judgment was given, as so frequently happens in this kind of case, under even greater pressure of time than we have felt. He did not have the benefit of the searching arguments we demanded and received of counsel. The case as it was presented to him and the case in the shape into which we knocked it are as different as chalk and cheese. I would like to record my sympathy for the judge, sitting alone, having to take such a decision as this in such difficult circumstances. He found that Jodie would be able to lead "a relatively normal life": E

> "All in all, the evidence, which has not been, and in my judgment could not be, the subject of serious dispute is that in medical terms Jodie's life would be virtually as long as and would have the quality of that of any ordinary child . . . For Jodie separation means the expectation of a normal life; for Mary it means death." F

He directed himself that the children's welfare was paramount. He attached "great weight to the wishes of the parents". He asked: "If in a situation such as this, parents' rights are to be regarded as anything less than of the most vital importance, then what rights, I ask, are there in a free society." He said: G

> "If, which I do not, I were to balance the interests of Jodie against those of Mary then Jodie's chance of a virtually normal life would be lost in order to prolong the life of Mary for those few months . . . Mary's state is pitiable . . . However pitiable her state now, it will never improve during the few months she would have to live if not separated. During the course of the hearing I raised with counsel and with one of the paediatricians the question of pain. Mary cannot cry. She has not the lungs to cry with. H

A There is no way that could be remotely described as reliable by which those tending Mary can know even now whether she is hurting or in pain. When lightly touched or stroked her face contorts. When pinched there is some reflex. But she cannot cry. So I asked what would happen as the weeks went by and Jodie moved, tried to crawl, to turn over in her sleep, to sit up. Would she not, I asked, be pulling Mary with her? Linked B together as they are, not simply by bone but by tissue, flesh and muscle, would not Mary hurt and be in pain? In pain but not able to cry. One very experienced doctor said she thought that was a horrendous scenario, as she put it, being dragged around and not being able to do anything about it. Accordingly, weighing up those considerations I conclude that the few months of Mary's life if not separated from her twin would not simply be worth nothing to her, they would be hurtful . . . to prolong C Mary's life for these few months would in my judgment be very seriously to her disadvantage."

He dealt with the parents' wishes, quoting at length from their statement:

"as one way of my emphasising to the parents that I have truly taken into account their feelings as loving parents. I recognise, as do they, that D what is proposed has not only an inevitability for Mary but also creates at best the chance for Jodie of a life that will have social and emotional problems over and above those problems which can be medically cured. But as I have sought to emphasise throughout this judgment, my focus has been upon Mary and what is best for her. And about that I am in no doubt."

E He dealt with the lawfulness of the proposed act observing and holding that:

"If the operation is properly to be regarded as a positive act then it cannot be lawful and cannot be made lawful. I have found this to be the most difficult element in my decision . . . I was at first attracted by the F thought prompted by one of the doctors, that Jodie was to be regarded as a life support machine and that the operation proposed was equivalent to switching off a mechanical aid. Viewed in that way previous authority would categorise the proposed operation as one of omission rather than as a positive act. However, on reflection I am not persuaded that that is a proper view of what is proposed in the circumstances of this particular case. I have preferred to base my decision upon the view that what is G proposed and what will cause Mary's death will be the interruption or withdrawal of the supply of blood which she receives from Jodie. 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. Jodie's blood supply circulates from and returns to her heart by her own circulation system, independent of the H supply and return from Mary. So it was suggested that one could theoretically envisage a clamp being placed within Jodie's body to block the circulation to Mary, so that there would be the immediate consequence for Mary without any invasion of her own body. I emphasise that this was simply part of the argument to see how the operation should be categorised in order to judge its lawfulness. It was simply one of a

number of arguments, analogies and illustrations that were canvassed in final submissions which I have not found it possible to record more extensively in what is effectively an extempore judgment. None the less I have concluded that the operation which is proposed will be lawful because it represents the withdrawal of Mary's blood supply. It is of course plain that the consequence for Mary is one that most certainly does not represent the primary objective of the operation."

So he made the declaration asked.

16 The grounds of appeal

The parents have appealed on the grounds that the judge erred in holding (i) that the operation was in Mary's best interest, (ii) that it was in Jodie's best interest and (iii) that in any event it would be legal. The appeal has accordingly ranged quite widely over many aspects of the interaction between the relevant principles of medical law, family law, criminal law and fundamental human rights. I propose to address them in that order.

III

MEDICAL LAW

1 The fundamental principle

The fundamental principle, now long established, is that every person's body is inviolate: see, per Lord Goff of Chieveley in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 72E. The importance of this principle was emphasised by Lord Reid in *S v McC (orse S) and M (D S Intervener); W v W* [1972] AC 24, 43 where he said:

> "There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will . . . The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'état but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions."

It follows that, per Lord Goff in *In re F*, at p 71: "It is well established that, as a general rule, the performance of a medical operation upon a person without his or her consent is unlawful, as constituting both the crime of battery and the tort of trespass to the person."

2 The principle of autonomy and the consequence of an adult patient's refusal to consent to treatment

In *In re F*, at p 73, Lord Goff endorsed the libertarian principle of self-determination which, to adopt the words of Cardozo J, in *Schloendorff v Society of New York Hospital* (1914) 105 NE 92, 93, recognised that: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . ." The patient's right of veto is absolute:

A "This right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are rational, irrational, unknown or even non-existent": per Lord Donaldson of Lymington MR in *In re T (Adult: Refusal of Treatment)* [1993] Fam 95, 102, following *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*
B [1985] AC 871, 904–905.

The principle was also recognised in *Airedale NHS Trust v Bland* [1993] AC 789, and it might be useful to cite two passages:

"it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult
C patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so . . . To this extent, the principle of the sanctity of human life must yield to the principle of self-determination . . . and, for present purposes perhaps more important, the doctor's duty to act in the best interests of his patient
D must likewise be qualified": per Lord Goff, at p 864.

"Any invasion of the body of one person by another is potentially both a crime and a tort . . . How is it that, consistently with the proposition just stated, a doctor can with immunity perform on a consenting patient an act which would be a very serious crime if done by someone else? The answer must be that bodily invasions in the course of proper medical
E treatment stand completely outside the criminal law. The reason why the consent of the patient is so important is not that it furnishes a defence in itself, but because it is usually essential to the propriety of medical treatment. *Thus, if the consent is absent, and is not dispensed with in special circumstances by operation of law, the acts of the doctor lose their immunity* . . . If the patient is capable of making a decision on whether to
F permit treatment and decides not to permit it his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right to proceed in the face of objection, even if it is plain to all, including the patient, that adverse consequences and even death will or may ensue": per Lord Mustill, at p 891. (Emphasis added).

G 3 *Treatment of the incompetent adult*

Where no one is capable of giving consent for an adult patient who does not have the capacity to give consent himself for whatever reason, Lord Goff in *In re F* [1990] 2 AC 1, 74 seized upon the fact that "there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful". The basic requirements, applicable to such a case of
H necessity, are that to fall within the principle:

"not only (1) must there be a necessity to act when it is not practicable to communicate with the assisted person, but also (2) the action taken must be such as a reasonable person would in all the circumstances take, acting in the best interests of the assisted person": p 75.

4 *The power to give proxy consent for a young child to undergo treatment* A

The parents if they are married have this power; if they are not, it is the mother's. In *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 184 Lord Scarman said:

> "It is abundantly plain that the law recognises that there is a right *and a duty* of parents to determine whether or not to seek medical advice in respect of their child, and, having received advice, to give or withhold consent to medical treatment." (Emphasis added.) B

I have added the emphasis to show the close link between parental right and duty. Failure to perform the duty may be a culpable omission. Lord Scarman went on to note that the parental right derives from parental duty and that is recognised in the common law. He referred, at pp 184–185, to *Blackstone's Commentaries*, 17th ed (1830), vol 1, chs 16 and 17 where Blackstone: C

> "analyses the duty of the parents as the 'maintenance . . . protection, and . . . education' of the child: p 446. He declares that the power of parents over their children is derived from their duty and exists 'to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it' ": p 452. D

The current law is contained in the Children Act 1989. Each of the parents, or the mother if she is unmarried, has parental responsibility over the child. That is defined, perhaps rather unsatisfactorily, in section 3 of the Act in these terms: "(1) In this Act 'parental responsibility' means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property." E

So in the current law the right and the duty to give consent to medical treatment is an incident of parental responsibility vested in the parent.

5 *The effect of the parents' refusal*

Since the parents are empowered at law, it seems to me that their decision must be respected and in my judgment the hospital would be no more entitled to disregard their refusal than they are to disregard an adult patient's refusal. To operate in the teeth of the parents' refusal would, therefore, be an unlawful assault upon the child. I derive this from *In re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, 22 where Lord Donaldson of Lymington MR said: F G

> "It is trite law that in general a doctor is not entitled to treat a patient without the consent of someone who is authorised to give that consent. If he does so, he will be liable in damages for trespass to the person and may be guilty of a criminal assault."

There is, however, this important safeguard to ensure that a child receives proper treatment. Because the parental rights and powers exist for the performance of their duties and responsibilities to the child and must be exercised in the best interests of the child, "the common law has never treated such rights as sovereign or beyond review and control": per Lord Scarman in *Gillick's* case [1986] AC 112, 184. H

A Overriding control is vested in the court. This proposition is well established and has not been the subject of any challenge in this appeal. Because of the comment in the media questioning why the court should be involved, I add this short explanation. Long, long ago the sovereign's prerogative to protect infants passed to the Lord Chancellor and through him to the judges and it forms a part of the inherent jurisdiction of the High B Court. The Children Act 1989 now contains a statutory scheme for the resolution of disputes affecting the upbringing of children. If a person having a recognisable interest brings such a dispute to the court, the court must decide it.

There are abundant examples of this happening. One such case is *In re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421. There C a child who was born suffering from Down's Syndrome and an intestinal blockage required an operation to relieve the obstruction if she was to live more than a few days. If the operation were performed, the child might die within a few months but it was probable that her life expectancy would be 20 to 30 years. Her parents, having decided that it would be kinder to allow her to die rather than live as a physically and mentally disabled person, refused to consent to the operation. The local authority D made the child a ward of court and, when a surgeon decided that the wishes of the parents should be respected, they sought an order authorising the operation to be performed by other named surgeons. Templeman LJ said, at pp 1423–1424:

> "On behalf of the parents Mr Gray has submitted very movingly . . . E that this is a case where nature has made its own arrangements to terminate a life which would not be fruitful and nature should not be interfered with. He has also submitted that in this kind of decision the views of responsible and caring parents, as these are, should be respected, and that their decision that it is better for the child to be allowed to die should be respected. Fortunately or unfortunately, in this particular case F the decision no longer lies with the parents or with the doctors, but lies with the court. It is a decision which of course must be made in the light of the evidence and views expressed by the parents and the doctors, but at the end of the day it devolves on this court in this particular instance to decide . . ."

Dunn LJ said, at p 1424:

G

> "I have great sympathy for the parents in the agonising decision to which they came. As they put it themselves, 'God or nature has given the child a way out.' But the child now being a ward of court, although due weight must be given to the decision of the parents which everybody accepts was an entirely responsible one, doing what they considered was H the best, the fact of the matter is that this court now has to make the decision. It cannot hide behind the decision of the parents or the decision of the doctors; and in making the decision this court's first and paramount consideration is the welfare of this unhappy little baby."

So it is that at this point we move into the realm of family law.

IV A

FAMILY LAW

1 The test for overriding the parents' refusal

This is trite law. In *In re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199, 202 Lord Hailsham of St Marylebone LC said:

> "There is no doubt that, in the exercise of its wardship jurisdiction the B first and paramount consideration is the well being, welfare, or interests (each expression occasionally used, but each, for this purpose, synonymous) of the human being concerned . . ."

In so far as these proceedings are brought under the inherent jurisdiction of the court, that is the test that governs. In any event the position is regulated by section 1(1) of the Children Act 1989 under which these C proceedings are also brought. That provides: "When a court determines any question with respect to—(a) the upbringing of a child . . . the child's welfare *shall* be the court's paramount consideration." (Emphasis added.)

The peremptory terms of this section should be noted. It places the court under a duty to do what is dictated by the child's welfare.

D

2 The meaning of welfare

In *J v C* [1970] AC 668, 710–711 Lord MacDermott addressed the question of construction as to the scope and meaning of the words in the Guardianship of Infants Act 1925, "shall regard the welfare of the infant as the first and paramount consideration", and said:

> "I think they connote a process whereby, when all the relevant facts, E relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood."

In *In re MB (Medical Treatment)* [1997] 2 FLR 426, 439 Butler-Sloss LJ said: "Best interests are not limited to best medical interests." In F *In re A (Male Sterilisation)* [2000] 1 FLR 549, 555 Dame Elizabeth Butler-Sloss P said: "In my judgment best interests encompasses medical, emotional and all other welfare issues."

3 The interface with the criminal law

It should not need stating that the court cannot approve of a course of G action which may be unlawful. The stark fact has to be faced in this case that to operate to separate the twins *may* be to murder Mary. It seems to me, however, that the question of what is in the best interests of the child is a discrete question from whether what is proposed to be done is unlawful. A patient in terminal decline, racked with pain which treatment may not be able fully to alleviate, may beg to die and it may be said—at least by some— H that it is in his best interests that he should be allowed to do so, but that would not justify unlawfully killing him. In my judgment, although the nature of what is proposed to be done has a bearing on how one ascertains where the patient's best interests lie, the ascertainment of those interests is the first but a separate stage of the court's task. If the operation is in the best

A interests of a child patient, then the court can, as stage 1 of the task which it has to undertake, override the parents' refusal and approve the operation but conditionally, always subject to and dependent upon the outcome of the second stage of the court's inquiry, which is whether or not the carrying out of that operation would be lawful.

B 4 *The main issues in this appeal*

On the basis of the foregoing analysis, the crucial questions which arise in this appeal are: (1) is it in Jodie's best interests that she be separated from Mary? (2) Is it in Mary's best interests that she be separated from Jodie? (3) If those interests are in conflict is the court to balance the interests of one against the other and allow one to prevail against the other and how is that to be done? (4) If the prevailing interest is in favour of the operation being C performed, can it be lawfully performed?

5 *But first, a preliminary issue: is this a fused body of two separate persons, each having a life in being?*

All parties took for granted in the court below that Mary is a live person and a separate person from Jodie. In the literature which was placed before D us, some commentators had questioned whether this was the right approach to adopt. Consequently we invited counsel to address the question. Before dealing with the law, I should set out the facts, including further material placed before us by the hospital on this particular point.

There is no unanimity of view in answer to the hypothetical question: if Mary had not been joined to Jodie, would she have been born alive? The E neonatologist said: "Had Mary been born with very tiny lungs she could well have been born alive but would then have been unresuscitatable." The consultant radiologist said: "There would have been a significant risk of her dying of heart failure during the pregnancy . . . Mary may well have deteriorated further and died in pregnancy, though I am unable to quantify the risk of this." The obstetrician felt that: "With the degree of abnormalities of the circulatory system I feel that probably Mary would have been born F dead." The cardiologist expressed the firmest view: "If Mary and Jodie had been separate and Mary's cardio-respiratory system in utero was as weak as it is now, I think it is 100% likely she would have died at birth had she survived the pregnancy." Nevertheless he was equally emphatic about her present position: "I first reviewed Mary at 72 hours of age (not at birth) and at that stage, although her heart was very large and weak, it was pumping, G but contributing probably less than 10% of the circulatory requirements of Mary." The neonatologist was also clear: "When Mary was born the clinicians' judgment was that she did have functions indicative of life. Her heart was beating regularly, she did make some spontaneous respiratory efforts and there were movements of all her limbs." There was total unanimity about their individuality. The neonatologist said: "The twins are considered to be separate individuals. There are two heads, two brains and H at different times of the day and night they exhibit different states of wakefulness/alertness and clearly their feeding abilities and patterns are very different." The cardiologist said: "Although the twins share some common tissue, they each have separate hearts, brains, etc, and thus medically I feel are separate individuals." In the face of that evidence it would be contrary to

common sense and to everyone's sensibilities to say that Mary is not alive or that there are not two separate persons. It is, therefore, unnecessary to examine the law in any depth at all. A

In one of the early cases, *R v Poulton* (1832) 5 C & P 329, 330, Littledale J in his summing up to the jury in a murder trial stated: "With respect to the birth, the being born must mean that the whole body is brought into the world . . . Whether the child was born alive or not depends mainly upon the evidence of the medical men." B

In *R v Handley* (1874) 13 Cox CC 79, 81 Brett J told the jury they would have to consider whether the child was born alive: "i e, whether it existed as a live child, breathing and living by reason of breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother."

Brooke J in *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 621 adopted a similar definition, saying that a child is born alive "if, after birth, it exists as a live child, that is to say, breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother". I think I can guarantee that, when Brooke J said that, he did not relate his observations to Siamese twins. Here Mary has been born in the sense that she has an existence quite independent from her mother. The fact that Mary is dependent upon Jodie, or the fact that twins may be interdependent if they share heart and lungs, should not lead the law to fly in the face of the clinical judgment that each child is alive and that each child is separate both for the purposes of the civil law and the criminal law. C D

I would not wish to leave this topic without saying firmly that the notions expressed in earlier times that Siamese twins were "monsters" is totally unacceptable, indeed repugnant and offensive to the dignity of these children in the light of current medical knowledge and social sensibility. I deprecate any idea of "monstrous birth". E

6 Jodie's welfare: where do her best interests lie?

Mr Taylor, on the parents' behalf, faces an uphill struggle to persuade this court that Johnson J was wrong to find that the operation would be in Jodie's best interests and, to be fair to him, he recognised the difficulty. There was abundant evidence before the judge to justify his conclusion, which could not be attacked on appeal unless it was plainly wrong, that is to say unless it fell outside the generous ambit within which reasonable disagreement is possible. Far from being plainly wrong, Johnson J was, in my judgment, plainly right to conclude that the operation would be in Jodie's best interest. F G

The salient facts are these. The operation itself carries a negligible risk of death or brain damage. On the contrary the operation is overwhelmingly likely to have the consequence that Jodie's life will be extended from the period of three to six months or a little more to one where she may enjoy a normal expectancy of life. Prolonging her life is an obvious benefit to her. In general terms, she will live a normal or fairly normal life. Her present intellectual functioning is good and there is no reason to think that she will not have the mental capacity fully to enjoy her life. There is every chance that she will walk reasonably normally though future operations cannot be ruled out. She will have her own bladder and should be capable of controlling it. There is no certainty about bowel control though it is H

A interesting to note that the opinion of Great Ormond Street is hopeful in this respect. At worst she will have to wear a colostomy bag. She is expected to be capable of satisfactory sexual functioning. The judge's findings are amply confirmed by (1) the report from the Great Ormond Street Hospital which must carry great weight with the court because it is independent and because they are world-recognised experts and (2) the spinal surgeon's report, both of which are set out in the discussion on Jodie's prognosis.

B I will deal separately with the problems that will or may arise in the parents or others giving care to Jodie but in the context of the argument which has dominated this case, namely the sanctity of life and the worthwhileness of life, it seems to me impossible to say that this operation does not offer infinitely greater benefit to Jodie than is offered to her by letting her die if the operation is not performed.

C

7 *A more difficult question—Mary's welfare: where do her best interests lie?*

7.1 *The difficulties in the judge's approach*

The steps in the analysis of Mary's best interests as carried out by Johnson J are: (i) her "pitiable" state will never improve; (ii) there is no reliable way to test whether she is hurting or in pain; but (iii) linked as they D are, Jodie's wish to move "pulling Mary with her" would hurt Mary: this was a "horrendous scenario"; (iv) accordingly "the remaining few months of her life if not separated would not simply be worth nothing—they would be hurtful"; (v) "to prolong Mary's life for those few months would be very seriously to her disadvantage".

The careful criticisms of counsel have revealed some flaws in these E propositions and lead me to the preliminary conclusions that: (i) I agree with the judge's assessment: one pities Mary because her position is utterly dire for she exists pathetically on borrowed time. (ii) Although there may be no reliable way of telling whether she can differentiate between pleasure and pain, the Great Ormond Street observations would suggest that she tends ordinarily to be quite comfortable. (iii) The evidence seized on by the judge (given, one has observed, in answer to his promptings) may sit a little F uneasily with his main finding of the uncertainty of the extent to which her primitive brain can register pain. The horror of the scenario is more likely, therefore, to impinge upon Jodie who, being sentient, may find it more difficult to cope with this hindrance to her instincts and development. (iv) The conclusion that the ensuing months of Mary's life are worth nothing brings the dichotomy between quality of life and sanctity of life into critical G focus. (v) Whether the operation to separate the twins is properly to be viewed in terms of a prolongation of her life, as opposed to its termination, is again a critical element of the analysis.

7.2 *The welfare assessment*

The question of Mary's best interests is one of the key and one of the difficult issues in the case and it calls for thorough exposition. That Mary's H welfare is paramount is a trite observation for family lawyers. Welfare dictates the outcome of the question relating to her upbringing which is before the court. It means no more and no less than that the court must decide what is best for her, taking all her interests and needs into account, weighing and then bringing into balance the advantages against

disadvantages, the risks of harm against the hopes of benefit which flow A from the course of action under consideration.

The first step must be to characterise that course of action. Here it is proposed to operate to separate Mary from Jodie. So the first question is: what are the gains and losses from that intervention? I would judge the answer by application of the test expressed by Lord Brandon of Oakbrook in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 55: "The operation or other treatment will be in their best interests if, but only if, it is carried out in B order either to save their lives, or to ensure improvement or prevent deterioration in their physical or mental health."

The only gain I can see is that 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, C she has no capacity for life. The operation is not capable of ensuring any other improvement to her condition or prevent any deterioration in her present state of health. In terms of her best health interests, there are none. To be fair to the hospital, they do not pretend that there are. If one looks to the operation as a means of meeting any other needs, social, emotional, psychological or whatever, one again searches in vain. One cannot blind oneself to the fact that death for Mary is the certain consequence of the D carrying out of this operation.

7.3 *Introducing Bland*

If the search is to find how, if at all, there can be any benefit from an operation which it is known will terminate her life, then one must look to *Airedale NHS Trust v Bland* [1993] AC 789 for guidance because there, as E here, it was known that the proposed course of action would terminate life. Tony Bland's awful predicament is well known. He was a young supporter of Liverpool Football Club who was caught in the Hillsborough crush which reduced him to a persistent vegetative state. The hospital applied for a declaration that it might lawfully discontinue all life-sustaining treatment and medical support measures designed to keep him alive in that state, F including the termination of ventilation, nutrition and hydration by artificial means. That declaration was granted. As I pointed out in argument, the speeches in the House of Lords have been the subject of much academic scrutiny: see for example Kennedy and Grubb, "Withdrawal of Artificial Hydration and Nutrition: Incompetent Adult" (1993) 1 Med L Rev 359; *Kennedy & Grubb, Medical Law: Text with Materials*, 2nd ed (1994), ch 16, p 1179 et seq; J M Finnis, "*Bland*, Crossing the Rubicon?" (1993) G 109 LQR 329 and J Keown, "Restoring Moral and Intellectual Shape to the Law after *Bland*" (1997) 113 LQR 481. Looking at the matter very broadly, the drift of their Lordships' thinking was along these lines. (i) There was some recognition that the intention was to cause death. (ii) Actively to bring a patient's life to an end is "to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia— H actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law": per Lord Goff, at p 865. (iii) Withdrawal of treatment was, however, properly to be characterised as an omission. (iv) An omission to act would none the less be culpable if there was a duty to act. (v) There was no duty to treat if treatment was not in the best interests of the

A patient. (vi) Since there was no prospect of the treatment improving his condition the treatment was futile and there was no interest for Tony Bland in continuing the process of artificially feeding him upon which the prolongation of his life depended.

We see shades of *Bland's* case in the way Johnson J framed his vital fourth and fifth proposition, and the way in which he wrestled with the problems of acts and omissions. I must, therefore, examine his propositions (iv) and (v) in B the light of the speeches in the House of Lords and the academic commentary thereon.

7.4 *Would Mary's life if not separated from her twin "be worth nothing to her"?*

The judge must have reached that conclusion by forming an assessment of C the quality of her life. How did the quality of life argument enter the jurisprudence? As far as I can trace, it seems to have been introduced by *In re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421 in 1981, the case of the Down's Syndrome baby with the intestinal blockage. It should be noted that that case came before the High Court judge in the morning and was decided by the Court of Appeal in the afternoon. The test D adopted by Templeman LJ, at p 1424, was: "whether the life of this child is demonstrably going to be so awful that in effect the child must be condemned to die". Dunn LJ observed, at pp 1424–1425:

> "There is no evidence at all as to the quality of life which the child may expect. As Mr Turcan on behalf of the Official Solicitor said, the child should be put into the same position as any other Mongol child and must E be given the chance to live an existence. I accept that way of putting it."

That was practically all I had to go on when deciding baby C's future: *In re C (A Minor) (Wardship: Medical Treatment)* [1990] Fam 26. That cruelly disadvantaged baby was dying. Although I (not for the first time nor for the last) failed to express myself with "felicity", the Court of Appeal did not appear to disapprove of the twin strands of my approach: first, that no F treatment would alter the hopelessness of the child's position and, secondly, that in so far as I was able to assess the quality of life "which as a test in itself raises as many questions as it can answer". I judged the quality of her life to be demonstrably awful and intolerable following *In re B* [1981] 1 WLR 1421.

In re J (A Minor) (Wardship: Medical Treatment) [1991] Fam 33, which followed shortly thereafter, was another damaged young baby case, though G here she was not terminally ill. The court rejected the Official Solicitor's first submission, which was:

> "His first, or absolutist, submission is that a court is *never* justified in withholding consent to treatment which could enable a child to survive a life-threatening condition, whatever the pain or other side effects inherent in the treatment and whatever the quality of the life which it would H experience thereafter": see p 42 (emphasis added).

Having rejected it, the court was left only with the quality of life argument and whether life would be intolerable to the child as judged from the perspective of the child. (Since a "substituted judgment" approach has been rejected by *Bland's* case, I doubt whether that view is still good law. That,

however, is not the main point.) John Keown in his penetrating analysis of *Bland's* case seems to me correctly to identify that counsel in *In re J* [1991] Fam 33 was confusing the doctrine of vitalism on the one hand and the true principle of sanctity of life on the other. Vitalism holds that human life is an absolute moral value and that it is wrong either to shorten it or to fail to lengthen it. This is too extreme a position to hold. A

The sanctity of life doctrine holds that human life is created in the image of God and is therefore possessed of an intrinsic dignity which entitles it to protection from unjust attack. The "right to life" is essentially a right not to be intentionally killed, according to John Keown. Taylor LJ began his judgment in *In re J* by setting out three preliminary principles not in dispute. The first was that welfare is the court's paramount consideration. He said, at p 53: B

> "Secondly, the court's high respect for the sanctity of human life imposes a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances. The problem is to define those circumstances. Thirdly, and as a corollary to the second principle, it cannot be too strongly emphasised that the court never sanctions steps to terminate life. That would be unlawful. There is no question of approving, even in a case of the most horrendous disability, a course aimed at terminating life or accelerating death. The court is concerned only with the circumstances in which steps should not be taken to prolong life." C D

The Archbishop puts as his first "overarching moral consideration": "Human life is sacred, that is inviolable, so that one should never aim to cause an innocent person's death by act or omission . . ." The House of Lords Report of the Select Committee on Medical Ethics (1994) (HL Paper 21-I), para 237 similarly provides: E

> "That prohibition"—of intentional killing—"is the cornerstone of law and of social relationships. It protects each one of us impartially, embodying the belief that all are equal. We do not wish that protection to be diminished . . ." F

A joint statement by the Anglican and Roman Catholic Archbishops in the aftermath of the House of Lords judgment in *Bland's* case [1993] AC 789 included the following passage to which the Archbishop of Westminster has helpfully drawn our attention:

> "Those who become vulnerable through illness or disease deserve special care and protection. Adherence to this principle provides a fundamental test as to what constitutes a civilised society . . . Because human life is a gift from God to be preserved and cherished, the deliberate taking of life is prohibited except in self-defence or the legitimate defence of others . . . a pattern of care should never be adopted with the intention, purpose or aim of terminating life or bringing about the death of a patient . . ." G H

What the sanctity of life doctrine compels me to accept is that each life has inherent value in itself and the right to life, being universal, is equal for all of us. The sanctity of life doctrine does, however, acknowledge that it may be proper to withhold or withdraw treatment. The Archbishop points out that

A in Roman Catholic moral theology one is justified in declining "extraordinary" treatment where the prospective benefits of treatment do not clearly warrant the burdensome consequences it is likely to impose, such as physical pain, psychological stress, social dislocation and financial expenditure. John Keown argues, to my mind very persuasively, 113 LQR 481, 485 that:

B "the question is always whether the *treatment* would be worthwhile, not whether the patient's *life* would be worthwhile. Were one to engage in judgments of the latter sort, and to conclude that certain lives were not worth living, one would forfeit any principled basis for objecting to intentional killing."

In my judgment, that is essentially what the court was doing in *In re J*
C [1991] Fam 33 and what I was trying to do in *In re C* [1990] Fam 26. Lord Goff makes the point in *Bland's* case [1993] AC 789, 868:

"But if the question is asked, as in my opinion it should be, whether it is in his best interests that treatment which has the effect of artificially prolonging his life should be continued, that question can sensibly be answered to the effect that his best interests no longer require that it
D should be. Even so, a distinction may be drawn between (1) cases in which, having regard to all the circumstances (including, for example, the intrusive nature of the treatment, the hazards involved in it, and the very poor quality of the life which may be prolonged for the patient if the treatment is successful), it may be judged not to be in the best interests of the patient to initiate or continue life-prolonging treatment, and (2) cases
E such as the present in which, so far as the living patient is concerned, the treatment is of no benefit to him because he is totally unconscious and there is no prospect of any improvement in his condition. In both classes of case, the decision whether or not to withhold treatment must be made in the best interests of the patient. In the first class, however, the decision has to be made by weighing the relevant considerations. For example, in *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, the
F approach to be adopted in that case was stated by Taylor LJ as follows, at p 55: 'I consider the correct approach is for the court to judge the quality of life the child would have to endure if given the treatment and decide whether in all the circumstances such a life would be so afflicted as to be intolerable to that child.' "

In Keown's analysis, at p 487:

G "From the standpoint of the sanctity doctrine, a central objection to the quality of life philosophy is that it denies the ineliminable value of each patient and engages in discriminatory judgments, posited on fundamentally arbitrary criteria such as physical or mental disability, about whose lives are 'worthwhile' and whose are not. The arbitrariness is highlighted when it is asked *which* disabilities, and to which *degree*, are
H supposed to make life not worth living?"

7.5 Conclusions as to the worth of Mary's life

Given the international conventions protecting "the right to life", to which I will return later, I conclude that it is impermissible to deny that every

life has an equal inherent value. Life is worthwhile in itself whatever the diminution in one's capacity to enjoy it and however gravely impaired some of one's vital functions of speech, deliberation and choice may be. I agree with the Archbishop that: "The indispensable foundation of justice is the basic equality in worth of every human being." This accords with the observation of Lord Mustill in *Bland's* case [1993] AC 789, 894:

> "whilst the fact that a patient is in great pain may give him or her a powerful motive for wanting to end [his or her life], to which in certain circumstances it is proper to accede, [that] is not at all the same as the proposition that because of incapacity or infirmity one life is intrinsically worth less than another. This is the first step on a very dangerous road indeed, and one which I am not willing to take."

Neither am I. In my judgment, Johnson J was wrong to find that Mary's life would be worth nothing to her. I am satisfied that Mary's life, desperate as it is, still has its own ineliminable value and dignity.

7.6 Johnson J's fifth proposition: "To prolong Mary's life . . . would be very seriously to her disadvantage"

My difficulty with that proposition lies in the characterisation that the treatment under consideration is a course of action which will prolong Mary's life. This again derives from *Bland's* case [1993] AC 789. It is best seen in Lord Goff's speech. He points out, at p 865, that the law draws a crucial distinction between cases in which a doctor decides not to provide life-prolonging treatment and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end. The latter course crosses the Rubicon. At the heart of the distinction is the difference between acts and omissions. He says, at p 866:

> "The distinction appears, therefore, to be useful in the present context in that it can be invoked to explain how discontinuance of life support can be differentiated from ending a patient's life by a lethal injection. But in the end the reason for that difference is that, whereas the law considers that discontinuance of life support may be consistent with the doctor's duty to care for his patient, it does not, for reasons of policy, consider that it forms any part of his duty to give his patient a lethal injection to put him out of his agony."

The decision to discontinue treatment which prolongs life is governed by the patient's best interests: p 867C. The question at the heart of the case is on what principle the doctor can justifiably discontinue the process: p 867H. He continues, at p 868:

> "It is crucial for the understanding of this question that the question itself should be correctly formulated. The question is not whether the doctor should take a course which will kill his patient, or even take a course which has the effect of accelerating his death. The question is whether the doctor should or should not continue to provide his patient with medical treatment or care which, if continued, will prolong his patient's life. The question is sometimes put in striking or emotional terms, which can be misleading. For example, in the case of a life support system, it is sometimes asked: should a doctor be entitled to switch it off,

A or to pull the plug? And then it is asked: can it be in the best interests of the patient that a doctor should be able to switch the life support system off, when this will inevitably result in the patient's death? Such an approach has rightly been criticised as misleading, for example by Professor Ian Kennedy in his paper ["Switching off Life Support Machines: The Legal Implications"] in *Treat Me Right, Essays in Medical*
B *Law and Ethics* and by Thomas J in *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235, 247. This is because the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care."

C He concludes, at p 869:

"But for my part I cannot see that medical treatment is appropriate or requisite simply to prolong a patient's life, when such treatment has no therapeutic purpose of any kind, as where it is futile because the patient is unconscious and there is no prospect of any improvement in his condition . . . But in the end, in a case such as the present, it is the futility
D of the treatment which justifies its termination."

Finally, at p 873, he says:

"To me, the crucial point in which I found myself differing from Mr Munby was that I was unable to accept his treating the discontinuance of artificial feeding in the present case as equivalent to
E cutting a mountaineer's rope or severing the air pipe of a deep sea diver. Once it is recognised, as I believe it must be, that the true question is not whether the doctor should take a course in which he will actively kill his patient, but rather whether he should continue to provide his patient with medical treatment or care which, if continued, will prolong his life, then, as I see it, the essential basis of Mr Munby's submissions disappears."

F

7.7 *Act or omission in this case?*

I set out earlier, I realise with embarrassment a lot earlier, how this operation would be performed. The first step is to take the scalpel and cut the skin. If it is theoretically possible to cut precisely down the mid-line separating two individual bodies, that is not surgically feasible. Then the
G doctors have to ascertain which of the organs belong to each child. That is impossible to do without invading Mary's body in the course of that exploration. There follow further acts of separation culminating in the clamping and then severing of the artery. Whether or not the final step is taken within Jodie's body so that Jodie's aorta and not Mary's aorta is assaulted, it seems to me to be utterly fanciful to classify this invasive treatment as an omission in contradistinction to an act. Johnson J's valiant
H and wholly understandable attempt to do so cannot be supported and although Mr Whitfield did his best, he recognised his difficulty. The operation has, therefore, to be seen as an act of invasion of Mary's bodily integrity and, unless consent or approval is given for it, it constitutes an unlawful assault upon her.

7.8 Is the course of action one which can be characterised as not continuing to provide the patient with treatment which will prolong the patient's life?

A

The answer to that has to be "No". Mary is not receiving treatment, or any substantial treatment, at the present time. Such care as she receives in hospital will of course prolong her life but there is no question of withdrawing that care or that treatment. What is under consideration is the active invasion of her body. That will not prolong her life. It will terminate it. With respect to the judge he asked the wrong question. The question is not: is it in Mary's best interests that the hospital should continue to provide her with treatment which will prolong her life? This case is not about providing that kind of treatment. What is proposed should be done and what the court is being asked to sanction demands that the question be framed in this way: is it in Mary's best interests that an operation be performed to separate her from Jodie when the certain consequence of that operation is that she will die? There is only one answer to that question. It is: "No, that is not in her best interests." In my judgment the judge's approach is fatally flawed and his assessment of Mary's best interests falls with it.

B

C

7.9 Conclusion as to Mary's best interests

D

The question is whether this proposed operation is in Mary's best interests. It cannot be. It will bring her life to an end before it has run its natural span. It denies her inherent right to life. There is no countervailing advantage for her at all. It is contrary to her best interests. Looking at her position in isolation and ignoring, therefore, the benefit to Jodie, the court should not sanction the operation on her.

E

8 On the sharpest horns of dilemma: what does the court do now?

I have found this a very difficult question to answer. Subject to having regard to the parents' wish, which I will consider shortly, the operation will be in Jodie's interests but not in Mary's. Can that conflict be resolved and if so how? In the course of argument I speculated that Mary's interests may not be overborne and that consequently approval for the operation cannot be given. Miss Parker on Jodie's behalf submits very strongly that it can. She submits that judges in the family courts are frequently presented with a clash of interests between children whose upbringing they have to regulate and that when that arises the judges balance the interests of one against the other and choose the least detrimental alternative. So they do, but is it right that they do so and can one's right to life be traded against another's?

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There is no clear authority on the point. In *Birmingham City Council v H (A Minor)* [1994] 2 AC 212 the House of Lords was invited to express its opinion of this question but was able to avoid doing so. In that case the local authority applied for a care order in respect of a young baby. The mother was only 15 and was a "child" herself. Application was made pursuant to section 34(4) of the Children Act 1989 for an order authorising the local authority to refuse contact between the baby and the mother. No conflict arose because the question to be determined by the court related to the baby's upbringing and it was the baby's welfare that was to be the court's paramount consideration, even where the mother herself was a child in care. Section 34(3) enabled the court to "make such order as it considers

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A appropriate with respect to the contact which is to be allowed between the child and that person". Lord Slynn of Hadley said, at p 222:

"For this purpose, 'the child' is the child in care in respect of whom an order is sought by one of the four categories of person. That child is the subject matter of the application. The question to be determined relates to that child's upbringing and it is that child's welfare which must be the B court's paramount consideration. The fact that the parent is also a child does not mean that both parent's and child's welfare is paramount and that each has to be balanced against the other."

The case was decided on that narrow basis. The Court of Appeal [1993] 1 FLR 883 had proceeded differently. The Court of Appeal considered that the upbringing of both mother and daughter was involved and that C section 1(1) of the Act governed the position. Balcombe LJ said, at pp 890–892:

"So the question of contact between R"—the baby—"and M"—the mother—"relates to the upbringing of each of them and in each case the Act requires that their welfare shall be the court's paramount consideration. But this is an impossibility. 'Paramount' means 'above all D others in rank, order or jurisdiction; supreme'—see the *Shorter Oxford Dictionary* (3rd ed). On one and the same issue, contact between them, M's welfare cannot rank above R's welfare, and his above hers. This potential difficulty, which may also occur when the cases of two or more siblings come before the court, was foreseen by the Law Commission in their studies leading up to the 1989 Act—see Working Paper No 96, para 6.16 and Report No 172, paras 3.13 and 3.14 and section 1(2) of the E draft Bill appended to the report. However, for whatever reason, the draftsman of the 1989 Act did not adopt the Law Commission's recommendations on this point, and we have to resolve the dilemma ourselves. Where the court is faced with what appears to be an impossibility, it must try and give the statutory provision such meaning as it can sensibly bear, having regard to any other provisions of the Act F which may throw light on the intention of the legislature . . . In my judgment, therefore, we are thrown back upon the words of section 1(1) of the 1989 Act. I can think of no reason why Parliament should have intended, when a question with respect to the upbringing of two children is before the court, that the court should regard one child's interest as paramount to that of the other. Accordingly, in my judgment, while the welfare of M and R, taken together, is to be considered as paramount to G the interests of any adults concerned in their lives, as between themselves the court must approach the question of their welfare without giving one priority over the other. You start with an evenly balanced pair of scales. Of course, when you start to put into the scales the matters relevant to each child—and in particular those listed in section 1(3)—the result may come down in favour of the one rather than the other, but that is a H balancing exercise which the court is well used to conducting in cases concerning children."

Kennedy and Evans LJJ agreed but Evans LJ added, at p 896:

"The question in issue in this case is whether contact should be allowed between M, the child's mother, and R, her son, who is now aged

> 15 months. This question concerns the upbringing of R and it is therefore subject to section 1(1) of the Act, which provides that the child's welfare shall be the court's paramount consideration. The problem arises because M herself is a child, 16 years, and is herself in care of the same local authority as R. If the same question is also one 'with respect to her upbringing', then section 1(1) makes her welfare the court's paramount consideration, and on the judge's findings, her welfare and R's are in conflict . . . The Act does not provide expressly for the case where the parent is herself a child, nor for the situation where the question of welfare may arise between two children in other circumstances, for example, between siblings. The Law Commission drew attention to the latter problem . . . but the Act is silent. We therefore have to attempt to apply the general provisions of the Act in the exceptional, though unhappily not unique, circumstances of this case. It seems that there is no reported authority, whether before or after 1989, where this or any similar question has risen between a child and a parent who is herself a child . . . The starting-point must be the correct interpretation of sections 1 and 34 of the Act."

He concluded, at p 899:

> "But the welfare of the two individuals cannot both be 'paramount' in the ordinary and natural meaning of that word. If that is the requirement of section 1(1) in the circumstances, then the Act presents the court with an impossible task. For this reason, I agree with Balcombe LJ that the requirement must be regarded as qualified, in the cases where the welfare of more than one child is involved, by the need to have regard to potential detriment for one in the light of potential benefit for the other. Only in this way, as it seems to me, can the subsection be applied and the manifest objects of the Act achieved."

The House of Lords expressed no view as to the correctness or otherwise of that approach. It seems to me, therefore, that it must stand as at least persuasive, if not binding, authority. Moreover the question arises directly in this case and because it is the right to life of each child that is in issue, the conflict between the children could not be more acute. If the duty of the court is to make a decision which puts Jodie's interests paramount and that decision would be contrary to the paramount interests of Mary, then, for my part, I do not see how the court can reconcile the impossibility of properly fulfilling each duty by simply declining to decide the very matter before it. That would be a total abdication of the duty which is imposed upon us. Given the conflict of duty, I can see no other way of dealing with it than by choosing the lesser of the two evils and so finding the least detrimental alternative. A balance has to be struck somehow and I cannot flinch from undertaking that evaluation, horrendously difficult though it is. Before doing so, I must decide what weight to give to the parents' wishes.

9 Giving due weight to the parents' wishes

9.1 The parents and the courts

As I have shown, the parents in their statement accept that they are governed by the law of England: there is no challenge to the court's jurisdiction. Furthermore Mr Taylor on their behalf does not challenge the

A judge's approach, only his conclusion. Since the parents have the right in the exercise of their parental responsibility to make the decision, it should not be a surprise that their wishes should command very great respect. Parental right is, however, subordinate to welfare. That was the view of the House of Lords in *In re K D (A Minor) (Ward: Termination of Access)* [1988] AC 806, 824–825 where Lord Oliver of Aylmerton said:

B "My Lords I do not, for my part, discern any conflict between the propositions laid down by your Lordships' House in *J v C* [1970] AC 668 and the pronouncements of the European Court of Human Rights in relation to the natural parent's right of access to her child. Such conflict as exists, is, I think, semantic only and lies only in differing ways of giving expression to the single common concept that the natural bond and relationship between parent and child gives rise to universally recognised C norms which ought not to be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it. The word 'right' is used in a variety of different senses, both popular and jurisprudential . . . Parenthood, in most civilised societies, is generally conceived of as conferring upon parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, D with all that that entails. That is a privilege which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or by the authorities upon whom the legislature has imposed the duty of supervising the welfare of children and young persons. When the jurisdiction of the court is invoked for the protection of the child the parental privileges do not terminate. E They do, however, become immediately subservient to the paramount consideration which the court has always in mind, that is to say, the welfare of the child. That is the basis of the decision of your Lordships' House in *J v C* and I see nothing in *R v United Kingdom* (Case 6/1986/104/152), The Times, 9 July 1987 which contradicts or casts any doubt upon that decision or which calls now for any reappraisal F of it by your Lordships. In particular, the description of those familial rights and privileges enjoyed by parents in relation to their children as 'fundamental' or 'basic' does nothing, in my judgment, to clarify either the nature or the extent of the concept which it is sought to describe."

In *J v C* [1970] AC 668, 715 Lord MacDermott set out the rule which has served the test of time:

G "While there is now no rule of law that the rights and wishes of unimpeachable parents must prevail over other considerations, such rights and wishes, recognised as they are by nature and society, can be capable of ministering to the total welfare of the child in a special way, and must therefore preponderate in many cases. The parental rights, however, remain qualified and not absolute for the purposes of the H investigation, the broad nature of which is still as described in the fourth of the principles enunciated by FitzGibbon LJ in *In re O'Hara* [1900] 2 IR 232, 240."

That fourth principle, which itself was derived from *R v Gyngall* [1893] 2 QB 232, is stated thus [1900] 2 IR 232, 240:

"4. In exercising the jurisdiction to control or to ignore the parental right the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

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Finally, it is perhaps useful to repeat the passage in the judgment of Sir Thomas Bingham MR in *In re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1, 32–33, in accordance with which Johnson J approached this part of the case. Sir Thomas Bingham MR said:

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"I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect. It should certainly not be disregarded or lightly set aside. But the role of the court is to exercise an independent and objective judgment. If that judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible parent, to give effect to its own judgment. That is what it is there for. Its judgment may of course be wrong. So may that of the parent. But once the jurisdiction of the court is invoked its clear duty is to reach and give the best judgment it can."

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That is the law. That is what governs my decision. That is what I am desperately trying to do. I do not discern any very significant difference between the law, as set out above, and the Archbishop's fifth overarching moral consideration which he expresses in these terms: "Respect for the natural authority of parents requires that the courts override the rights of parents only when there is clear evidence that they are acting contrary to what is strictly owing to their children."

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9.2 The role of the court: reviewer or decision-maker?

Is the court reviewing the parental decision as it reviews an administrative decision or does the court look at the matter afresh, in the round, with due weight given to the parental wish? If there was doubt about that, it has been resolved in favour of the latter approach by the decision of this court in *In re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 WLR 242. That was an agonising decision for the court to take. The baby, a year old, had a life threatening liver defect. An operation when he was $3\frac{1}{2}$ weeks old was unsuccessful. The unanimous medical opinion was that without a liver transplant he would not live beyond the age of $2\frac{1}{2}$ years. His parents refused to consent to that operation. Their wish eventually prevailed. On this particular point Butler-Sloss LJ said, at p 250:

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"the first argument of Mr Francis that the court should not interfere with the reasonable decision of a parent is not one that we are able to entertain even if we wished to do so. His suggestion that the decision of this mother came within that band of reasonable decisions within which a court would not interfere would import into this jurisdiction the test applied in adoption to the refusal of a parent to consent to adoption. It is wholly inapposite to the welfare test and is incompatible with the decision in *In re Z* [1997] Fam 1."

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A Waite LJ said, at p 254:

> "An appraisal of parental reasonableness may be appropriate in other areas of family law (in adoption, for example, where it is enjoined by statute) but when it comes to an assessment of the demands of the child patient's welfare, the starting point—and the finishing point too—must always be the judge's own independent assessment of the balance of B advantage or disadvantage of the particular medical step under consideration. In striking that balance, the court will of course take into account as a relevant, often highly relevant, factor the attitude taken by a natural parent, and that may require examination of his or her motives. But the result of such an inquiry must never be allowed to prove determinative. It is a mistake to view the issue as one in which the clinical advice of doctors is placed in one scale and the reasonableness of the C parent's view in the other . . . It can only be said safely that there is a scale, at one end of which lies the clear case where parental opposition to medical intervention is prompted by scruple or dogma of a kind which is patently irreconcilable with principles of child health and welfare widely accepted by the generality of mankind; and that at the other end lie highly problematic cases where there is genuine scope for a difference of view D between parent and judge. In both situations it is the duty of the judge to allow the court's own opinion to prevail in the perceived paramount interests of the child concerned, but in cases at the latter end of the scale, there must be a likelihood (though never of course a certainty) that the greater the scope for genuine debate between one view and another the stronger will be the inclination of the court to be influenced by a reflection that in the last analysis the best interests of every child include an E expectation that difficult decisions affecting the length and quality of its life will be taken for it by the parent to whom its care has been entrusted by nature."

Roch LJ expressed a similar view.

9.3 The weight to be given to these parents' wishes

F I would wish to say emphatically that this is not a case where opposition is "prompted by scruple or dogma". The views of the parents will strike a chord of agreement with many who reflect upon their dilemma. I cannot emphasise enough how much I sympathise with them in the cruelty of the agonising choice they had to make. I know because I agonise over the dilemma too. I fear, however, that the parents' wish does not convince me G that it is in the children's best interest.

(i) From Jodie's point of view they have taken the worst possible scenario that she would be wheelchair bound, destined for a life of difficulty. They fail to recognise her capacity sufficiently to enjoy the benefits of life that would be available to her were she free and independent.

(ii) She may indeed need special care and attention and that may be very H difficult fully to provide in their home country. This is a real and practical problem for the family, the burden of which in ordinary family life should not be underestimated. It may seem unduly harsh on these desperate parents to point out that it is the *child's* best interests which are paramount, not the *parents'*. Coping with a disabled child sadly inevitably casts a great burden on parents who have to struggle through those difficulties. There is, I sense,

a lack of consistency in their approach to their daughters' welfare. In Mary's case they are overwhelmed by the legitimate, as I have found it to be, need to respect and protect her right to life. They surely cannot so minimise Jodie's rights on the basis that the burden of possible disadvantage for her and the burdens of caring for such a child for them can morally be said to outweigh her claim to the human dignity of independence which only cruel fate has denied her.

(iii) They are fully entitled to recoil at the idea, as they see it, of killing Mary. That is wholly understandable. This lies at the core of their objection. Yet they came to this country for treatment. They were aware of the possibility that Mary might be stillborn and they seemed reconciled to an operation which would separate Jodie from her. They seemed to have been prepared, and presented their case to Johnson J on the basis that they would agree to the operation if Mary predeceased Jodie. The physical problems for Jodie would be the same, perhaps even worse in such an event. The parents appear to have been willing to cope in that event, and the burdens for parents and child cannot have changed. Mary is lost to them anyway.

(iv) In their natural repugnance at the idea of killing Mary they fail to recognise their conflicting duty to save Jodie and they seem to exculpate themselves from, or at least fail fully to face up to, the consequence of the failure to separate the twins, namely death for Jodie. In my judgment, parents who are placed on the horns of such a terrible dilemma simply have to choose the lesser of their inevitable loss. If a family at the gates of a concentration camp were told they might free one of their children but if no choice were made both would die, compassionate parents with equal love for their twins would elect to save the stronger and see the weak one destined for death pass through the gates.

This is a terribly cruel decision to force upon the parents. It is a choice no loving parent would ever want to make. It gives me no satisfaction to have disagreed with their views of what is right for their family and to have expressed myself in terms they will feel are harshly and unfairly critical of them. I am sorry about that. It may be no great comfort to them to know that in fact my heart bleeds for them. But if, as the law says I must, it is I who must now make the decision, then whatever the parents' grief, I must strike a balance between the twins and do what is best for them.

10 *How is the balance to be struck?*

The analytical problem is to determine what may, and what may not, be placed in each scale and what weight is then to be given to each of the factors in the scales.

(i) The universality of the right to life demands that *the right* to life be treated as equal. The intrinsic value of their human life is equal. So the right of each goes into the scales and the scales remain in balance.

(ii) The question which the court has to answer is whether or not the proposed treatment, the operation to separate, is in the best interests of the twins. That enables me to consider and place in the scales of each twin the worthwhileness of the treatment. That is a quite different exercise from the proscribed (because it offends the sanctity of life principle) consideration of the worth of one life compared with the other. When considering the worthwhileness of the treatment, it is legitimate to have regard to the actual condition of each twin and hence the actual balance sheet of advantage and

A disadvantage which flows from the performance or the non-performance of the proposed treatment. Here it is legitimate, as John Keown demonstrates, and as the cases show, to bear in mind the actual quality of life each child enjoys and may be able to enjoy. In summary, the operation will give Jodie the prospects of a normal expectation of relatively normal life. The operation will shorten Mary's life but she remains doomed for death. Mary B has a full claim to the dignity of independence which is her human entitlement. In the words of the rabbinical scholars involved in the 1977 case in Philadelphia (see George J Annas (1987) 17 Hastings Center Report 27), Mary is "designated for death" because her capacity to live her life is fatally compromised. The prospect of a full life for Jodie is counterbalanced by an acceleration of certain death for Mary. That balance is heavily in Jodie's favour.

C (iii) I repeat that the balancing exercise I have just conducted is *not* a balancing of the quality of life in the sense that I value the potential of one human life above another. I have already indicated that the value of each life in the eyes of God and in the eyes of law is equal. Remember Lord Mustill's observation in *Bland's* case [1993] AC 789.

(iv) In this unique case it is, in my judgment, impossible not to put in the D scales of each child the manner in which they are individually able to exercise their right to life. Mary may have a right to life, but she has little right to be alive. She is alive because and only because, to put it bluntly, but none the less accurately, she sucks the lifeblood of Jodie and she sucks the lifeblood out of Jodie. She will survive only so long as Jodie survives. Jodie will not survive long because constitutionally she will not be able to cope. Mary's parasitic living will be the cause of Jodie's ceasing to live. If Jodie E could speak, she would surely protest, "Stop it, Mary, you're killing me." Mary would have no answer to that. Into my scales of fairness and justice between the children goes the fact that nobody but the doctors can help Jodie. Mary is beyond help.

Hence I am in no doubt at all that the scales come down heavily in Jodie's favour. The best interests of the twins is to give the chance of life to the child F whose actual bodily condition is capable of accepting the chance to her advantage even if that has to be at the cost of the sacrifice of the life which is so unnaturally supported. I am wholly satisfied that the least detrimental choice, balancing the interests of Mary against Jodie and Jodie against Mary, is to permit the operation to be performed.

11 Conclusion on the family law aspect of this case

G I would grant permission for the operation to take place provided, however, what is proposed to be done can be lawfully done. That requires a consideration of the criminal law, to which I now turn.

V

THE CRIMINAL LAW

H *1 Introduction*

It is obvious that the question whether or not this operation can be lawfully performed is crucial to the outcome of the appeal. What I confess I had not fully appreciated was how rooted in obscurity the answer to those difficulties was. Brooke LJ was fully aware of all the intricacies and he set

counsel a rigorous reading list to meet our concerns. I am, therefore, grateful to him for leading the way. In his judgment, which I have read in draft, he so fully sets out the relevant material that I am happy to adopt it and I will not add to this lengthy judgment by needless repetition. In the light of his full exposition of the law, I can state the gist of my reasons for agreeing with him quite shortly.

2 *Is there some immunity for doctors?*

Archbold, Criminal Pleading, Evidence & Practice, 2000 ed, p 1630, para 19–38, states:

> "Bona fide medical or surgical treatment is not 'unlawful' and therefore death resulting therefrom does not amount to murder, even though death or serious injury is foreseen as a probable consequence. Nor does it amount to manslaughter, unless the person giving the treatment has been guilty of 'gross negligence' . . ."

No authority is given for this sweeping statement. It is true that in *Gillick's* case [1986] AC 112, 190 Lord Scarman said:

> "The bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse."

Lord Mustill speaks of it in *Bland's* case [1993] AC 789. Yet hanging over *Bland's* case is the spectre of murder. To have crossed the Rubicon would have been to murder. I therefore approach the question of lawfulness of the proposed separation on the basis that, whatever immunity doctors do enjoy, they have no complete immunity. I have to be satisfied that in this case they will not be guilty of unlawfully killing Mary by active intervention—and perhaps of unlawfully killing Jodie by omitting to act in her interests if there is a duty upon them to do so.

3 *Murder*

Stripping away the inessential elements, for present purposes I have to examine whether there would be (1) an unlawful (2) killing of a person (3) with intent to kill or cause grievous bodily harm. Each of those elements calls for consideration.

4 *Intention*

4.1 *The proper test*

It is sufficient for present purposes simply to note that, despite several earlier attempts by the House of Lords to clarify the mens rea required to establish murder, "The law of murder was in a state of disarray": per Lord Steyn in *R v Woollin* [1999] 1 AC 82, 91A. *Woollin* is binding upon us and, despite Mr Owen's submission that article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) will require us to recast the definition, I do not propose to do so. Law which has long needed to be settled should be left to settle. The test I have to set myself is that established by that case. I have to ask myself whether I am satisfied that the doctors recognise that death or serious harm

A 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. It is common ground that they appreciate that death to Mary would result from the severance of the common aorta. Unpalatable though it may be—and Mr Whitfield contends it is—to stigmatise the doctors with "murderous intent", that is what in law they will have if they perform the B operation and Mary dies as a result.

4.2 *The doctrine of double effect*

This teaches us that an act which produces a bad effect is nevertheless morally permissible if the action is good in itself, the intention is solely to produce the good effect, the good effect is not produced through the bad C effect and there is sufficient reason to permit the bad effect. It may be difficult to reconcile with *R v Woollin*. Nevertheless it seems to enjoy some approval from Lord Donaldson of Lymington MR: see *In re J* [1991] Fam 33, 46C and Lord Goff in *Bland's* case [1993] AC 789, 867C–D. I can readily see how the doctrine works when doctors are treating one patient administering pain-killing drugs for the sole good D purpose of relieving pain, yet appreciating the bad side effect that it will hasten the patient's death. I simply fail to see how it can apply here where the side effect to the good cure for Jodie is another patient's, Mary's, death, and when the treatment cannot have been undertaken to effect any benefit for Mary.

5 *Causation*

E I appreciate, of course, that in one sense Mary will die because she is simply incapable of living. She is not a viable child. But as she is alive at the time the operation is undertaken, the operation serves to hasten her inevitable death just as the lethal injection accelerates the death of a patient at a terminal stage. So I do not see how, in law, the severance of the artery will not be treated as a cause of her death.

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6 *Killing*

I have already explained why the operation will be an active invasion of Mary's body and by that act the doctors will kill her. I seem to be the lone voice raising the unpalatable possibility that the doctors and even—though given the horror of their predicament it is anathema to contemplate it—the G parents might kill Jodie if they fail to save her life by carrying out the operation to separate her from Mary. Although I recoil at the very notion that these good people could ever be guilty of murder, I am bound to ask why the law will not hold that the doctors and the parents have come under a duty to Jodie. If the operation is in her interests the parents must consent for their duty is to act consistent with her best interests: see Lord Scarman in the *Gillick* case [1986] AC 112 in the passages I have already set out. I know H there is a huge chasm in turpitude between these stricken parents and the wretched parents in *R v Gibbins and Proctor* (1918) 13 Cr App R 134 who starved their child to death. Nevertheless I am bound to wonder whether there is strictly any difference in the application of the principle. They know they can save her. They appreciate she will die if not separated from her

twin. Is there any defence to a charge of cruelty under section 1 of the Children and Young Persons Act 1933 in the light of the clarification of the law given by *R v Sheppard* [1981] AC 394 which in turn throws doubt on the correctness of *Oakey v Jackson* [1914] 1 KB 216? Would it not be manslaughter if Jodie died through that neglect? I ask these insensitive questions not to heap blame on the parents. No prosecutor would dream of prosecuting. The sole purpose of the inquiry is to establish whether either or both parents and doctors have come under a legal duty to Jodie, as I conclude they each have, to procure and to carry out the operation which will save her life. If so then performance of their duty to Jodie is irreconcilable with the performance of their duty to Mary. Certainly it seems to me that if this court were to give permission for the operation to take place, then a legal duty would be imposed on the doctors to treat their patient in her best interests, i e to operate upon her. Failure to do so is a breach of their duty. To omit to act when under a duty to do so may be a culpable omission. Death to Jodie is virtually certain to follow, barring some unforeseen intervention. Why is this not killing Jodie?

7 *Unlawfully*

7.1 *The search for settled principle*

The search for settled principle is difficult where the law is as uncertain in this area as Brooke LJ's masterly analysis has shown it to be. Doing the best I can, I have come to these conclusions.

7.2 *Necessity*

Necessity in the *R v Dudley and Stephens* (1884) 14 QBD 273 sense arises where A kills B to save his own life. The threat to A's life is posed by the circumstances, rather than an act or threat by B on A in conventional self-defence terms.

7.3 *Duress*

Similar considerations apply to duress. There is, of course, a difference between them but as Lord Hailsham of St Marylebone LC said in *R v Howe* [1987] AC 417, 429:

> "This, however, is, in my view a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats. I cannot see that there is any way in which a person of ordinary fortitude can be excused from the one type of pressure on his will rather than the other."

7.4 *The policy of the law*

The policy of the law is to prevent A being judge in his own cause of the value of his life over B's life or his loved one C's life, and then being executioner as well. The policy of the law was expressed in similar terms in *Hale's Pleas of the Crown* (1736), vol 1, p 51 and *Blackstone's Commentaries* (1857 ed), vol 4, p 28. Blackstone wrote that a man under duress "ought rather to die himself than escape by the murder of an innocent". The sanctity of life and the inherent equality of all life prevails.

A Several passages in *R v Howe* [1987] AC 417 show this. Lord Hailsham LC said, at pp 430, 433:

> "This brings me back to the question of principle. I begin by affirming that, while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure, and, in the present case, the overriding objects of B the criminal law must be to protect innocent lives and to set a standard of conduct which ordinary men and women are expected to observe if they are to avoid criminal responsibility . . . Other considerations necessarily arise where the choice is between the threat of death or a fortiori of serious injury and deliberately taking an innocent life. In such a case a reasonable man might reflect that one innocent human life is at least as C valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils. Instead he is embracing the cognate but morally disreputable principle that the end justifies the means . . . It may well be thought that the loss of a clear right to a defence justifying or excusing the deliberate taking of an innocent life in order to emphasise to all the sanctity of a human life is not an excessive price to pay in the light of these mechanisms."

D Lord Mackay of Clashfern was equally emphatic, at p 456:

> "It seems to me plain that the reason that it was for so long stated by writers of authority that the defence of duress was not available in a charge of murder was because of the supreme importance that the law afforded to the protection of human life and that it seemed repugnant that E the law should recognise in any individual in any circumstances, however extreme, the right to choose that one innocent person should be killed rather than another. In my opinion, that is the question which we still must face. Is it right that the law should confer this right in any circumstances, however extreme?"

The question posed by Lord Mackay is the crucial question to resolve in F this case. To arrive at the right answer, it is in my view necessary to state two important features of this case.

7.5 A legal duty?

The first important feature is that the doctors cannot be denied a right of choice if they are under a duty to choose. They are under a duty to Mary not G to operate because it will kill Mary, but they are under a duty to Jodie to operate because not to do so will kill her. It is important to stress that it makes no difference whether the killing is by act or by omission. That is a distinction without a difference: see Lord Lowry in *Bland's* case [1993] AC 789, 877. There are similar opinions in the other speeches. Lord Browne-Wilkinson said, at p 885:

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> "Finally, the conclusion I have reached will appear to some to be almost irrational. How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already

struck them? I find it difficult to find a moral answer to that question. But it is undoubtedly the law . . ." A

Lord Mustill said, at p 887:

"The acute unease which I feel about adopting this way"—drawing a crucial distinction between acts and omissions—"through the legal and ethical maze is I believe due in an important part to the sensation that however much the terminologies may differ the ethical status of the two courses of action is for all relevant purposes indistinguishable." B

The Archbishop would agree. He tells us that: "To aim at ending an innocent person's life is just as wrong when one does it by omission as when one does it by a positive act."

C

7.6 The effect of a conflict of duty

What then is the position where there is a conflict of duty? In *East's Pleas of the Crown* (1803), vol 1, ch 5, p 221, para 7 East explained that "justification is founded upon some positive duty; excuse is due to human infirmity". Much later, Wilson J, speaking only for herself, gave a similar explanation in *Perka v The Queen* (1984) 13 DLR (4th) 1, 36:

D

"the ethical considerations of the 'charitable and the good' must be kept analytically distinct from duties imposed by law. Accordingly, where necessity is invoked as a justification for violation of the law, the justification must, in my view, be restricted to situations where the accused's act constitutes the discharge of a duty recognised by law. The justification is not, however, established simply by showing a conflict of legal duties. The rule of proportionality is central to the evaluation of a justification premised on two conflicting duties since the defence rests on the rightfulness of the accused's choice of one over the other." E

So far I agree. But she goes on to say:

"As the facts before the court in the present case do not involve a conflict of legal duties it is unnecessary to discuss in detail how a court should go about assessing the relative extent of two evils. Suffice it to say that any such assessment must respect the notion of right upon which justification is based. The assessment cannot entail a mere utilitarian calculation of, for example, lives saved and deaths avoided in the aggregate but must somehow attempt to come to grips with the nature of the rights and duties being assessed. This would seem to be consistent with Lord Coleridge CJ's conclusion"—in *R v Dudley and Stephens* (1884) 14 QBD 273—"that necessity can provide no justification for the taking of a life, such an act representing the most extreme form of rights violation. As discussed above, if any defence for such a homicidal act is to succeed, it would have to be framed as an excuse grounded on self-preservation. It could not possibly be declared by the court to be rightful." F G

She is adhering to the sanctity of life principle. What are the doctors to do if the law imposes upon them a duty which they cannot perform without being in breach of Mary's right to life if at the same time the respecting of her right puts them in breach of the equally serious duty of respecting Jodie's right to life? A resort to a sanctity of life argument does not enable both rights to H

A receive the equal protection the doctrine is supposed to provide each of them equally. In those circumstances it seems to me that the law must allow an escape through choosing the lesser of the two evils. The law cannot say, "Heads I win, tails you lose." Faced as they are with an apparently irreconcilable conflict, the doctors should be in no different position from that in which the court itself was placed in the performance of its duty to give paramount consideration to the welfare of each child. The doctors must be B given the same freedom of choice as the court has given itself and the doctors must make that choice along the same lines as the court has done, giving the sanctity of life principle its place in the balancing exercise that has to be undertaken. The respect the law must have for the right to life of each must go in the scales and weigh equally but other factors have to go in the scales as well. For the same reasons that led to my concluding that consent should be C given to operate, so the conclusion has to be that the carrying out of the operation will be justified as the lesser evil and no unlawful act would be committed.

I should emphasise that the doctors do not cease to owe Mary a duty of care: they must continue to furnish such treatment and nursing care as may be appropriate to ensure that she suffers the least pain and distress and retains the greatest dignity until her life comes to an end.

D

7.7 *Offending the sanctity of life principle*

The second reason why the right of choice should be given to the doctors is that the proposed operation would not in any event offend the sanctity of life principle. That principle may be expressed in different ways but they all amount to the same thing. Some might say that it demands that each life is E to be protected from *unjust attack*. Some might say as the joint statement by the Anglican and Roman Catholic bishops did in the aftermath of the *Bland* judgment [1993] AC 789 that because human life is a gift from God to be preserved and cherished, the deliberate taking of human life is prohibited *except in self-defence or the legitimate defence of others*. The Archbishop defines it in terms that human life is sacred, that is inviolable, so that one F should never aim to cause an *innocent* person's death by act or omission. I have added the emphases. The reality here—harsh as it is to state it, and unnatural as it is that it should be happening—is that Mary is killing Jodie. That is the effect of the incontrovertible medical evidence and it is common ground in the case. Mary uses Jodie's heart and lungs to receive and use Jodie's oxygenated blood. This will cause Jodie's heart to fail and cause Jodie's death as surely as a slow drip of poison. How can it be just that Jodie G should be required to tolerate that state of affairs? One does not need to label Mary with the American terminology which would paint her to be "an unjust aggressor", which I feel is wholly inappropriate language for the sad and helpless position in which Mary finds herself. I have no difficulty in agreeing that this unique happening cannot be said to be unlawful. But it does not have to be unlawful. The six-year-old boy indiscriminately H shooting all and sundry in the school playground is not acting unlawfully for he is too young for his acts to be so classified. But is he "innocent" within the moral meaning of that word as used by the Archbishop? I am not qualified to answer that moral question because, despite an assertion—or was it an aspersion?—by a member of the Bar in a letter to "The Times" that we, the judges, are proclaiming some moral superiority in this case, I for my part

would defer any opinion as to a child's innocence to the Archbishop for that is his territory. If I had to hazard a guess, I would venture the tentative view that the child is not morally innocent. What I am, however, competent to say is that *in law* killing that six-year-old boy in self-defence of others would be fully justified and the killing would not be unlawful. I can see no difference in essence between that resort to legitimate self-defence and the doctors coming to Jodie's defence and removing the threat of fatal harm to her presented by Mary's draining her lifeblood. 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 by the doctors lawful.

8 Conclusion

For these reasons, very shortly expressed, I conclude that the operation which I would permit can be lawfully carried out.

VI

ENTER THE HUMAN RIGHTS ACT 1998

The 1998 Act will be in force in ten days' time. It is idle to pretend it should not apply. If the doctors are to operate they are in any event likely to operate after 2 October. It will then be unlawful for the hospital as a public authority, as it will be unlawful for the court, to act in a way which is incompatible with a Convention right. Article 2(1) provides in the first sentence that everyone's right to life shall be protected by law. As applied to the state, this essentially requires there to be adequate laws against murder and so forth. If so construed there are adequate laws binding on the hospital to afford protection to patients. On that basis the hospital's resort to the court is an adequate and equal safeguard for Mary and Jodie. If, on the other hand, the right to life is more literally construed, the protection has to be offered equally to both children and where there is a conflict there is the same impossibility of performance which has dominated the whole of this judgment. I cannot believe that the court in Strasbourg would reach any other conclusion for solving that dilemma than we have done. Mr Anderson in his powerful written submissions argues that the negative obligation to refrain from the intentional deprivation of life in effect trumps the positive obligation to take steps to protect the enjoyment of the right to life. In my judgment, Mr Owen was right to point out that that is not the view the European Commission of Human Rights took when deciding the abortion case, *Paton v United Kingdom* (1980) 3 EHRR 408, where, at p 416, para 23, the Commission construed article 2 to be subject to an implied limitation which would justify the balancing act we have undertaken.

For reasons more fully expressed by Brooke and Robert Walker LJJ, with which I agree, I find nothing in the forthcoming Human Rights Act 1998 which calls for a different answer to the problem to the one I have already given.

VII

CONCLUSION

In my judgment, the appeal must be dismissed. Lest it be thought that this decision could become authority for wider propositions, such as that a

A doctor, once he has determined that a patient cannot survive, can kill the patient, it is important to restate the unique circumstances for which this case is authority. They are that 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 B viable independent existence. As I said at the beginning of this judgment, this is a very unique case.

BROOKE LJ

Introduction

C If this appeal had been concerned only with difficult issues of family law, I would have been content if the judgment of Ward LJ, with which I agree, had been issued as a single judgment of the court. Although my heart goes out to the parents of Jodie and Mary in the cruel dilemma in which they find themselves, Parliament has directed us to consider the interests of the children to be paramount. The devout wishes of the children's parents must D form an important factor in the balancing equation, but I am completely satisfied, for the reasons given by Ward LJ, that if what is now proposed is a lawful operation, the best interests of Jodie compel us to authorise that operation. It would give her a very good prospect of living a happy, fulfilled life, and provided that the operation is lawful we should not allow Jodie's interests to be overridden by Mary's interests where those interests are in conflict. I also entirely agree, for the reasons he gives, with Ward LJ's E analysis of the situation from Mary's standpoint, and with the criticisms he makes of the judge's conclusions in this respect.

We have been told by an independent paediatric surgeon from the Great Ormond Street Hospital that surgery would probably be a low risk procedure for Jodie. He would expect her to have normal bowel control, although he cannot be absolutely certain about this. She voids normally, and F he hopes that this will continue. She will need further operations to provide a functioning vagina, but in his experience the great majority of children achieve a functioning vagina after reconstruction. It seems that her gait will be normal, or near normal, although he cannot exclude the possibility of surgery should a curvature of the spine develop. Some of the media comment about this case has focused on the extreme possibilities of untoward outcomes in relation to all these matters, in contrast to what we G have been told is the likely outcome, not only by the Manchester team but also by the independent expert from Great Ormond Street, for whose assistance we are very grateful.

There is one aspect of the facts which I would mention in addition to the very full summary provided by Ward LJ. He has mentioned the pressures on Jodie's heart if the present situation continues for any significant length of H time. The consultant paediatrician from Manchester mentioned two other threats which Mary posed to Jodie. The first was that persistent hypoxia in Mary might lead to the release of cytokines which would be capable of crossing over to Jodie's circulation. Such cytokines are known to be damaging to the brain and might lead to white matter damage, which in turn might lead to the development of irreversible cerebral palsy. Persistent

hypoxia in Mary might also lead to the generation of thromboplastins which would enter Jodie's circulation and cause an abnormality in coagulation, causing a prolongation in clotting time and a tendency to bleed. In evidence, this witness added that chronic hypoxia over many days and weeks would promote cell destruction in Mary, and there was a possibility that it would have a similar effect on Jodie. The dangers posed to Jodie by Mary's continued attachment to her cannot simply be limited to the serious dangers posed to Jodie's heart.

Although I am in full agreement with Ward LJ on the family law issues in this appeal, I have been constrained to prepare a judgment of my own because of the exceptionally difficult issues of criminal law which this appeal has raised. In this judgment I am happy to adopt the description of the facts of this case which Ward LJ has set out. In order to understand more fully the issues we have to decide, I have also found it valuable to consider in some detail the effect of the medical and other literature which has been put before the court.

The medical literature

The birth of conjoined twins is a comparatively rare event. In 1975 one expert suggested that they constituted 1 in 50,000 live births. There has been a more recent estimate of 1 in 100,000. In 1986 another expert estimated that on the continent of Africa 1 in 14,000 births were of conjoined twins. 40 to 60% of these twins were stillborn, and a further 35% survived for only one day after birth.

Conjoined twins are always the product of a single fertilised egg, and they always have the same chromosomal composition and sex. It is believed that they result from an incomplete division of the inner cell mass about 15 to 16 days after the egg is fertilised, and about seven days after what is called monozygotic twinning is said to occur. The exact reason for the complex fusion which may result from such late cleavage is still unknown, and it takes a wide range of different forms. The incomplete division of the embryo appears to be associated with a process which inhibits the complete differentiation of the various organ systems. Conjoined twins with fused organs therefore usually enjoy incomplete development. This may be manifested, for instance, in conjoined hearts or livers, or conjoined gastro-intestinal and genito-urinary tracts.

There are a few centres of medical and surgical excellence in different parts of the world which specialise in the care and, on very rare occasions, the separation of conjoined twins. The Great Ormond Street Children's Hospital in London has now established itself as one such centre. The Children's Hospital of Philadelphia is another, and we have been greatly assisted by being afforded the opportunity to read two papers written by Professor James O'Neill, formerly of the Department of Surgery at that hospital. The first, entitled "Surgical Experience with 13 Conjoined Twins", was a paper he presented to a specialist gathering in San Francisco in 1988 (208 Ann Surg 299). The other is his chapter on conjoined twins in *Pediatric Surgery*, 5th ed (1998), vol 2, ch 127, p 1925, which was published much more recently. We also obtained much assistance from an article entitled "Twenty-Three-Year Follow-up of Separated Ischiopagus Tetrapus Conjoined Twins" (1989) 210 Ann Surg 673 by Dr R M Hoyle and Dr C G Thomas of the School of Medicine in the University of North

A Carolina. This article summarises the outcome of the 33 reported attempts at surgical separation of the type of conjoined twins with which we are concerned in this case. While the authors were engaged in preparing this summary, they conducted a survey of more than 600 publications in the medical literature concerned with the topic of conjoined twins.

Doctors give the name "ischiopagus conjoined twins" to twins of this B type. The Greek derivation of the first part of this word means "pelvis" and the second part of the word means "fixed". In 1988 Professor O'Neill believed that ischiopagus twins constituted about 6% of the total number of conjoined twins. They are joined, as their name suggests, at the pelvis, and they often possess shared genito-urinary structures, recta and livers. They may possess a ruptured omphalocele—a hernia of abdominal organs through the umbilicus (navel)—and they usually have either three or four C lower extremities. They can therefore be categorised as ischiopagus tetrapus (four legs), like the twins in this case, or ischiopagus tripus (three legs). Bipus (two legs) twins also feature in the literature. There may be substantial differences in the way in which the bones and organs of the bodies of ischiopagus conjoined twins develop in the womb.

Ward LJ has described the anatomical structures of these two children, D and I need not repeat what he has said. One feature of these structures is that this is not one of those cases in which there would have to be any organ transplantation from Mary to Jodie as a part of any surgical separation. Apart from the organs they share (which would have to be divided) and their divided organs (which would have to be united) they each have a complete set of separate organs, although in Mary's case some of them, and in E particular her heart, lungs and brain, are severely underdeveloped.

Because they may develop differently, there can be no single solution to the legal issues that arise from any proposal to separate twins joined at the pelvis, let alone all conjoined twins. About 75% of all conjoined twins are joined at the thorax or the navel. These very often have conjoined hearts, and surgical separation is regarded as likely to be hopeless in the vast majority of such cases. The next main category (pygopagus: 18%) are joined F at the rear, at sacrum level, and a tiny minority (craniopagus: 1·5%) are joined at the head. There are also heteropagus children born with parasitic attachments that are attached as duplicates to any part of their bodies, or even within their bodies. We are not of course concerned in this case with any of these other types of conjointure, which form 94% of the total.

The general scene has been well described by Sally Sheldon and Stephen G Wilkinson, of the law and philosophy departments of Keele University, in their recent article "Conjoined Twins: the Legality and Ethics of Sacrifice" (1997) 5 Med L Rev 149, 150:

> "At one end of the spectrum is the case of two fully grown, fully equipped bodies with a minor connection which is easy to remove, leaving two complete individuals who could survive into old age. At the H other end is one complete body with a small number of extra parts which could be removed to leave just one complete individual. Between these two extremes are a range of gradations including two fairly complete bodies which are so heavily fused that they cannot be separated; two bodies which can be separated but at a substantial risk; and two which

can be separated with the inevitable consequence that one of them will die . . ." A

We are concerned with the last of these three situations. The authors of the article are correct to add, and we cannot stress this point too strongly, that each situation will raise its own unique problems.

Although the Roman writer Pliny referred to a pair of conjoined twins nearly 2,000 years ago, and although the Maids of Biddendon, who were B born in England in 1100 and survived into adult life, joined laterally from hips to shoulders, gained a reputation which has lasted to the present day, conjoined twins were not mentioned in a significant medical treatise until 1678, and the earliest recorded successful surgical separation was performed in 1689. It is a measure of the extreme rarity of the operation (at any rate until very recent times) that Professor O'Neill has said that only about 100 C successful separations (featuring the survival of one or both twins) were reported in medical literature between 1689 and 1988. In the latest edition of his textbook on paediatric surgery he raised that figure to 150, and in 1997 another review, conducted by N V Freeman and others, "Separation of Ischiopagus Tetrapus Conjoined Twins in the Sultanate of Oman" (1997) 12 Pediatr Surg Int 256, updated Dr Hoyle's figures and concluded that there were now 210 reports of surgical separation operations for conjoined twins D reported in world medical literature.

Conjoined twins obtained international notoriety, and a name now universally used, in the 19th century when Eng and Chang Bunker, born in Siam in 1811, toured the world with P T Barnum's circus, living fertile and successful lives until their deaths, within three hours of each other, at the age of 63. Notwithstanding the obvious happiness of these two men, conjoined E twins were described as "double-headed monsters" in medical literature well into the 20th century. Very few of them, if born alive, survived for more than a few days, and a tiny handful grew up into adulthood. Separation was hardly ever attempted before about 1955.

As I have said, we are concerned in this case only with the surgical separation of twins joined at the pelvis. Hoyle and Thomas reported 33 such operations in the medical literature up till 1989 and listed them conveniently F in a table. The later operations in this series, from about 1979 onwards, on the whole display more or less consistently successful outcomes, although the survivors were inevitably still very young when their article was written. On the other hand, of the 26 children involved in the 13 operations undertaken between 1955 and 1974 only 15 survived, and one of these died when only two years old. G

More significantly for the purposes of the present case, in two of these early cases one of the twins is said to have been sacrificed. In one of these cases the sacrificed twin suffered from anencephaly, i e it lacked all or most of the cerebral hemispheres, but was capable of using its lungs. In the other case, the first in the series, the sacrificed twin was said to have been deformed and moribund. In that case the surviving twin was lost to follow-up at the H age of 10, but at that time she was said to be doing quite well except for her short stature and abnormal gait due to the absence of a symphysis pubis.

We have also been shown a 1998 article, "Urological problems in conjoined twins", written by a senior registrar, D T Wilcox, at Great Ormond Street Hospital in conjunction with others at that hospital (1998)

Br J Uro 905. Between 1985 and 1995 seven sets of conjoined twins were surgically separated at Great Ormond Street. Urological problems were encountered in three of these sets of twins, all of whom were joined at the pelvis. They were also all joined at the navel, and two of them were joined at the breast bone as well. Their separation operations took place at the ages of eight months, ten months and three years respectively. One of these children died three days after her operation, probably secondary to cardiac insufficiency, and another died a year after separation from aspiration of a foreign body.

The pre-operative and post-operative conditions of all these children were different, and because they were either bipus or tripus twins, all the survivors now possess an artificial limb. One of them, at eight years old, was said to have urinary control, with normal renal function. Of the second set, one twin was having problems with his renal function and bladder at the time of his death. The other was having very considerable problems with renal function, had no urinary control, and at the age of four was awaiting stone removal and further genital reconstruction. Pre-operatively those twins had possessed medial kidneys fused on the midline and displayed very complex problems in the genital region. Both twins in the pair who both survived (until the age of 10 at least) were experiencing continuing difficulties of a urological nature. One of them was still incontinent of urine despite an injection into the neck of his bladder, while the other was fitted with suprapubic catheterisation to control his bladder emptying functions. Other centres were said to have reported greater success in achieving urinary continence in such children following their separation.

Another article by Hukih-shing Hsu and others, "Experience with Uro-Genital Reconstruction of Ischiopagus Conjoined Twins", discussed the comparable experience of the Philadelphia Children's Hospital between 1957 and 1993. Their 20 surgical separations included six pairs of twins joined at the pelvis. Ten of them survived—one of the two deaths resulted from a cause unconnected with the surgery—but many of them experienced continuing urinary problems, or were awaiting further surgical intervention. The authors concluded that with careful observation and judicious intervention it was possible to maintain normal kidney function, provide bladder continence, and make normal sexual activity and fertility achievable goals, so that the individuals concerned might have satisfying well-adjusted lives.

Although more than 200 surgical separations have now been carried out, neither counsel nor the members of the court were able to discover any reported judgment of any court in any jurisdiction that has addressed the issues that are at the centre of the present appeal. It appears that in the United States of America proposals to separate conjoined twins may now be referred to hospitals' ethics committees, and not to a court, no doubt because of features of United States law that are different from English law.

We were shown, however, one article by George J Annas, "Siamese Twins: Killing One to Save the Other" (1987) 17 Hastings Center Report 27 that contained a vivid description of a case in Philadelphia in 1977 in which a three-judge panel of a local Family Court retired for only three minutes before deciding that a surgical separation might go ahead. This was a case similar to ours, where the survival of both twins following separation was out of the question. It therefore raised the same ethical, and legal,

question: could one twin be sacrificed so that the other might have a chance to live? In that case the parents, who were deeply religious Jews, would not consent to the separation without rabbinical support. Many of the nurses at the hospital were Catholic, and they would not allow themselves to become involved in the proposed operation unless a priest assured them that it was morally acceptable to proceed. In the event, both the rabbinical scholars and the archdiocesan authorities gave favourable answers, for reasons to which I will refer later in this judgment. The court authorised the surgery, although sadly the surviving twin died three months later.

It is possible to draw two fairly clear conclusions from the medical literature before the court: although surgical separation of conjoined twins is still a very rare event, it is now being performed more frequently, and there is a substantial volume of writing available to assist medical and surgical teams, like the teams at Manchester, who are undertaking the operation for the first time. The separation of twins joined at the pelvis is complicated by the incidence of shared (or divided) organs in the genito-urinary and gastro-intestinal regions. Such separations, however, are now being undertaken more frequently, with reasonably good results although there is always a need for careful post-operative monitoring and for further surgical intervention, if and when it is required.

The law of murder and the sanctity of human life

I turn from this general introduction to the issues of criminal law that have been raised by this appeal. As is apparent from the judgment of Ward LJ, issues of life and death are presented in the starkest terms. The operation to save Jodie would kill Mary. If the operation is not performed, both will probably live for a few more months and they will both then die. The question is: would such an operation be lawful? To answer this question we must go first to the law of murder and the defences that are available to a charge of murder. An important part of this examination must be devoted to the defences that may be available to surgeons performing life-saving operations in accordance with good surgical practice. And because this operation, if permitted, is likely to take place after 2 October 2000, when the Human Rights Act 1998 comes into force, we must also consider the effect of relevant provisions of the European Convention on Human Rights.

First, then, the law of murder. Murder is a common law offence. The classic definition of murder is contained in *Coke's Institutes* (Co Inst Pt III (1797 ed), ch 7, p 47). It is in these terms:

> "Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with malice aforethought, either expressed by the party, or implied by law . . ."

I omit the requirement, recently repealed by statute, that the death had to occur within a year and a day after the causative act or omission. The editors of *Archbold, Criminal Pleading, Evidence & Practice*, 2000 ed, p 1622, para 19–1, have suitably modified this definition so that it conforms with the present state of the law:

> "Subject to three exceptions, the crime of murder is committed where a person of sound mind and discretion unlawfully kills any reasonable

A creature in being and under the Queen's peace with intent to kill or cause grievous bodily harm . . ."

None of the three exceptions are relevant in this case. They relate to the defences of provocation, diminished responsibility and action in pursuance of a suicide pact. These serve, if available, to reduce to manslaughter what would otherwise be an offence of murder.

B The words or phrases in the *Archbold* definition which need to be explored in the present case are the words "unlawfully", "kills", "any reasonable creature" and "with intent to kill". It is first, however, necessary to say a little about the value protected by the law of murder, namely the sanctity of human life. The right to life is one of the most important values protected by our law. The penalty for murder is a mandatory sentence of life C imprisonment. Before 1957 the mandatory penalty for murder was death. When I consider, in due course, the circumstances in which the law is willing to recognise that an act which would otherwise constitute a crime was not unlawful, it will be evident that our common law judges, right up to the present day, have shown very great reluctance to extend those defences when an innocent life has been taken deliberately. As the law now stands, for D example, duress is available as a defence to a charge of aircraft hijacking but not to a charge of murder or attempted murder. In recent years Parliament has greatly increased the penalties for certain driving offences that result in death. In exercising their sentencing discretion in cases of involuntary manslaughter, where death arises by accident from a quite trivial act of unlawful violence, the judges have always laid stress on the fact that a life has been needlessly lost. Successive governments, and Parliaments, have set E their face against euthanasia. I cannot better what Sir Thomas Bingham MR said about the sanctity of human life in his judgment in *Airedale NHS Trust v Bland* [1993] AC 789, 808, in the passage quoted by Robert Walker LJ in his judgment.

We received a written submission from the Archbishop of Westminster which began along these lines:

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"The arguments presented in this submission stem from the belief that God has given to humankind the gift of life, and as such it is to be revered and cherished. Christian belief about the special nature and value of human life lie at the root of the western humanist tradition which continues to influence the values held by many in our society and historically underpins our legal system."

G

The first of the five "overarching moral considerations" which governed the Archbishop's submission was in these terms: "Human life is sacred, that is inviolable, so that one should never aim to cause an innocent person's death by act or omission." As the Archbishop observed, the same sentiment is expressed, in secular terms, in article 2 of the European Convention on H Human Rights:

"(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

The Archbishop told us that he was articulating principles of morality which the Catholic Church held in common with countless others who value the Judaeo-Christian tradition. There can, of course, be no doubt that our common law judges were steeped in the Judaeo-Christian tradition and in the moral principles identified by the Archbishop when they were developing our criminal law over the centuries up to the time when Parliament took over the task. There can also be no doubt that it was these principles, shared as they were by the other founder members of the Council of Europe 50 years ago, which underlay the formulation of article 2 of the European Convention on Human Rights. Although parts of our criminal law, as enacted by Parliament, reflect a shift away from some of the tenets of Judaeo-Christian philosophy (in particular, for example, a shift away from the Catholic Church's teaching on abortion) in favour of the views of the majority of the elected representatives of an increasingly secular, and increasingly multi-cultural, modern state, there is no evidence that this process is at work in that part of our law concerned with the protection of human life between the moment of birth and the moment of death.

The emphasis that English law places on the importance of the protection of human life is also reflected in the case law of the European Court of Human Rights in Strasbourg. In *McCann v United Kingdom* (1995) 21 EHRR 97, 160, para 147, the case concerned with the shooting of suspected IRA terrorists in Gibraltar, the court said:

> "It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, article 2 ranks as one of the most fundamental provisions in the Convention . . . Together with article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe."

It is against this background that I turn to the four words or phrases whose meaning has to be explored in this case: "unlawfully", "kills", "any reasonable creature", "with intent to kill". I will consider first the words "any reasonable creature".

Is Mary a reasonable creature?

For the reasons given by Ward and Robert Walker LJJ, with which I agree, I am satisfied that Mary's life is a human life that falls to be protected by the law of murder. Although she has for all practical purposes a useless brain, a useless heart and useless lungs, she is alive, and it would, in my judgment, be an act of murder if someone deliberately acted so as to extinguish that life unless a justification or excuse could be shown which English law is willing to recognise.

In recent editions of *Archbold*, including the 2000 edition, the editors have suggested that the word "reasonable" in Sir Edward Coke's definition (which they wrongly ascribe to Sir Matthew Hale, at p 1622, para 19–1) related to the appearance rather than the mental capacity of the victim and was apt to exclude "monstrous births". Spurred on by this suggestion, and because the present case broke so much novel ground, we explored with counsel some of the thinking of 17th century English philosophers in an effort to ascertain what Coke may have meant when he used the expression "any reasonable creature" as part of his definition. We had in mind their

A absorbing interest in the nature of "strange and deformed births" and "monstrous births" (see *Thomas Hobbes, The Elements of Law: Natural and Politic* (1650), Pt II, ch 10, § 8 and *John Locke, An Essay Concerning Human Understanding* (1689), vol 3, ch 3, § 17, ch 6, §§ 15 and 26, and ch 11, § 20).

In *Attorney General's Reference (No 3 of 1994)* [1998] AC 245, 254F
B Lord Mustill referred to another statement in *Coke's Institutes*, not mentioned in that passage in *Archbold*, where after referring to prenatal injuries which lead to the delivery of a dead child, Coke writes (Co Inst, Pt III, ch 7, p 50): "if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive". In these circumstances I have no hesitation in accepting the submission by Miss Davies, whose assistance, as
C the friend of the court, was of the greatest value, which was in these terms:

> "In *The Sanctity of Life and the Criminal Law* (1958), pp 31–32 Professor Glanville Williams stated: 'There is, indeed, some kind of legal argument that a "monster" is not protected even under the existing law. This argument depends upon the very old legal writers, because the matter has not been considered in any modern work or in any court
> D judgment.' After discussing the meaning of the word 'monster' (which might originally have connoted animal paternity) he states, at pp 33–34: 'Locked ("Siamese") twins present a special case, though they are treated in *medical* works as a species of monster. Here the recent medical practice is to attempt a severance, notwithstanding the risks involved. Either the twins are successfully unlocked, or they die.' (Emphasis
> E added.) It is implicit in this analysis that the author is of the view that 'Siamese' twins are capable of being murdered and the amicus curiae supports this view. Advances in medical treatment of deformed neonates suggest that the criminal law's protection should be as wide as possible and a conclusion that a creature in being was not reasonable would be confined only to the most extreme cases, of which this is not an example. Whatever might have been thought of as 'monstrous' by Bracton, Coke,
> F Blackstone, Locke and Hobbes, different considerations would clearly apply today. This proposition might be tested in this way: suppose an intruder broke into the hospital and stabbed twin M causing her death. Clearly it could not be said that his actions would be outside the ambit of the law of homicide."

Modern English statute law has mitigated the prospective burden that
G might otherwise fall on the parents of severely handicapped children and their families if they are willing to avail themselves of its protection at any time up to the time the child (or children) is born. Section 1(1)(d) of the Abortion Act 1967, as substituted by section 37(1) of the Human Fertilisation and Embryology Act 1990, provides:

> H "Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith . . . (d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped."

Once a seriously handicapped child is born alive, the position changes, and it is as much entitled to the protection of the criminal law as any other human being. The governing principle is sometimes described as the universality of rights. In the Canadian case of *Perka v The Queen* 13 DLR (4th) 1, 31 Wilson J said that the principle of the universality of rights demands that all individuals whose actions are subjected to legal evaluation must be considered equal in standing. It follows that, unless there is some special exception to which we can have recourse, in the eyes of the law Mary's right to life must be accorded equal status with her sister Jodie's right to life. In this context it is wholly illegitimate to introduce considerations that relate to the quality, or the potential quality, of each sister's life.

The meaning of the word "kills"

I turn now to the word "kills" in the definition of murder. In the Tony Bland case, *Airedale NHS Trust v Bland* [1993] AC 789, the House of Lords was much exercised with the question whether the cessation of medical treatment and care to a patient who had been in a persistent vegetative state for three years constituted an intentional killing of that patient for the purposes of the law of murder. Lord Goff of Chieveley identified what he described as a crucial distinction in these terms, at p 865:

> "I must however stress, at this point, that the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be: see *R v Cox* (1992) 12 BMLR 38. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia—actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law."

In *Bland's* case the House of Lords was satisfied that the cessation of life-prolonging treatment or care could not be categorised as a positive act for the purposes of the law of murder, and since on the facts of that case the doctors owed no duty to the patient to prolong his life (since that course, the House of Lords held, would not be in their patient's best interests) they could not be found guilty of a culpable omission to act either. It was this distinction between acts and omissions which the judge had in mind when he held that it would be lawful to perform the proposed operation. He explained his thinking in the long passage which Ward LJ has recited (ante, p 187C–F) fully in his judgment. He believed, in short, that the proposed operation was not unlawful because it did not represent a positive act but merely the withdrawal of Mary's blood supply.

A On the hearing of the appeal only Mr Whitfield sought to persuade us to uphold the judge's approach. I am satisfied that the judge's approach was wrong. The proposed operation would involve a number of invasions of Mary's body, in the process of identifying which organ belonged to which child, before the positive step was taken of clamping the aorta and bringing about Mary's death. These acts would bear no resemblance to the discontinuance of artificial feeding sanctioned by the House of Lords in B *Bland's* case. They would be positive acts, and they would directly cause Mary's death.

The intention to kill

Next, the words "intent to kill". There is a technical difficulty about one aspect of the meaning of "intention" in this context. It seems to me that the C best way to describe it is to start with an extract from the Law Commission's Report on Criminal Law: Legislating the Criminal Code: Offences against the Person and General Principles (Law Com No 218) (1993), pp 8–10:

> "7.1 Clause 1(a) of the Criminal Law Bill [at p 90 of the report] provides for the purposes of the offences in Part I of the Bill that: 'a person acts . . . "intentionally" with respect to a result when—(i) it is his purpose D to cause it; or (ii) although it is not his purpose to cause that result, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result.' . . . 7.4 In all but the most unusual case, courts and juries will only be concerned with the basic rule in clause 1(a)(i) of the Criminal Law Bill: that a person acts intentionally with respect to a result when it is his purpose to cause that E result. 7.5 The concept of purpose is ideally suited to express the idea of intention in the criminal law, because that law is concerned with results that the defendant causes by his own actions. Those results are intentional, or intentionally caused, on his part, when he has sought to bring them about, by making it the purpose of his acts that they should occur . . . 7.6 . . . in almost all cases when they are dealing with a case of intention, courts will not need to look further than paragraph (i) of F clause 1(a). Paragraph (ii) is however aimed at one particular type of case that, it is generally agreed, needs to be treated as a case of 'intention' in law, but which is not covered by paragraph (i) because the actor does not act in order to cause, or with the purpose of causing, the result in question . . . 7.7 The point was formulated by Lord Hailsham of St Marylebone in *R v Hyam* [1975] AC 55, 74. A person must be treated G as intending 'the means as well as the end and the inseparable consequences of the end as well as the means'. If he acts in order to achieve a particular purpose, knowing that that cannot be done without causing another result, he must be held to intend to cause that other result. The other result may be a *precondition*; as where D, in order to injure P, throws a brick through a window behind which he knows P to be standing; or it may be a *necessary* concomitant of the first result: as H where . . . D blows up an aeroplane in flight in order to recover on the insurance covering the cargo, knowing that the crew will inevitably be killed. D intends to break the window and he intends the crew to be killed. 7.8 There is, of course, no absolute certainty in human affairs. D's purpose *might* be achieved without causing the further result; P *might*

fling up the window while the brick is in flight; the crew *might* make a miraculous escape by parachute. These, however, are only remote possibilities, as D (if he contemplates them at all) must know. The further result will occur, and D knows that it will occur, 'in the ordinary course of events'. This expression was used in clause 18 of the [Law Commission's 1989 draft Criminal Code Bill] to express the near-inevitability, as appreciated by the actor, of the further result."

In its report, at pp 8–9, para 7.2, the Law Commission touched on some of the problems that existed in 1993 in this corner of the law. These problems were vividly described by Lord Steyn in his speech in the recent case of *R v Woollin* [1999] 1 AC 82, 90–93, with which the other members of the House of Lords agreed. Apart from mentioning, at p 91A, the "state of disarray" into which the House of Lords had plunged the law of murder in *R v Hyam* [1975] AC 55, it is not necessary to go into any further detail about these problems. Suffice it to say that Lord Steyn restated the law along the lines suggested by the Law Commission six years earlier. The effect of his speech, at p 96, is that in this rare type of case a judge should direct the jury in accordance with the following principles:

"Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions 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."

Now that the House of Lords has set out the law authoritatively in these terms, an English court would inevitably find that the surgeons intended to kill Mary, however little they desired that end, because her death would be the virtually certain consequence of their acts, and they would realise that for all practical purposes her death would invariably follow the clamping of the common aorta.

The doctrine of double effect

We received interesting submissions from Mr Owen and Mr Whitfield in which they suggested that the doctrine of double effect would relieve the surgeons of criminal responsibility in these circumstances. This doctrine permits a doctor, in the best interests of his or her patient, to administer painkilling drugs in appropriate quantities for the purpose of relieving that patient's pain, even though the doctor knows that an incidental effect of the administration of these drugs will be to hasten the moment of death. In his speech in *Airedale NHS Trust v Bland* [1993] AC 789, 867 Lord Goff, while describing the doctor's duty to act in the best interests of his patient, said:

"It is this principle too which, in my opinion, underlies the established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part of the

A care of the living patient, in his best interests; and, on this basis, the treatment will be lawful. Moreover, where the doctor's treatment of his patient is lawful, the patient's death will be regarded in law as exclusively caused by the injury or disease to which his condition is attributable."

In *In re J* [1991] Fam 33, 46 Lord Donaldson of Lymington MR identified the relevant principles in these terms:

B

"What doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which *as a side effect* will render death more or less likely. This is not a matter of semantics. It is fundamental. At the other end of the age spectrum, the use of drugs to reduce pain will often be fully justified, notwithstanding that this will hasten the moment of death. C What can never be justified is the use of drugs or surgical procedures with the primary purpose of doing so."

Mr Whitfield relied on these dicta in support of his argument that what matters in this context is the surgeon's "primary purpose", a phrase used by Ognall J in summing up to the jury in *R v Cox* (1992) 12 BMLR 38, and that the fact that Mary's accelerated death would be a secondary effect of the D surgeon's actions would not justify his conviction for murder. He also referred us to the passage, at pp 179–180, in an essay by Professor Ashworth, "Criminal Liability in a Medical Context: the Treatment of Good Intentions", which is published in *Harm and Culpability* (1996), edited by A P Simester and A T H Smith. Mr Whitfield summarised Professor Ashworth's argument as follows: (i) the true meaning of intention is E purpose; (ii) one may purpose ends or means; (iii) one does not purpose a side effect; (iv) therefore a consequence, even if prohibited, is not intended if it is a side effect.

Mr Owen, for his part, referred us to a passage in *Kennedy & Grubb, Medical Law: Text with Materials*, 2nd ed, p 1207 in which the authors criticise the doctrine of double effect in so far as it is advanced as negating the necessary elements of intention or causation for the crime of murder, F saying:

"the more appropriate analysis is as follows: the doctor by his act *intends* (on any proper understanding of the term) the death of his patient and by his act *causes* (on any proper understanding of the term) the death of his patient, but the intention is not culpable and the cause is not blameworthy because the law permits the doctor to do the act in G question."

It is not necessary for the purpose of this case to decide authoritatively whether this is the correct analysis, answering as it does the anxieties about the manipulation of the law of causation expressed by Lord Mustill in *Airedale NHS Trust v Bland* [1993] AC 789, 895–896. There are certainly some powerful dicta in support of a proposition that if a surgeon administers H proper surgical treatment in the best interests of his or her patient and with the consent (except in an emergency) of the patient or his or her surrogate, there can be no question of a finding that the surgeon has a guilty mind in the eyes of the criminal law: see in particular *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, per Lord Fraser of

Tullybelton, at pp 174–175, and Lord Scarman, at p 190F–G. The reason why it is not necessary to decide these matters now is that the doctrine of double effect can have no possible application in this case, as the judge rightly observed, because by no stretch of the imagination could it be said that the surgeons would be acting in good faith in Mary's best interests when they prepared an operation which would benefit Jodie but kill Mary.

In this context it is relevant to quote the second and third overarching moral considerations identified by the Archbishop of Westminster in his written submission:

> "(b) A person's bodily integrity should not be invaded when the consequences of doing so are of no benefit to that person; this is most particularly the case if the consequences are foreseeably lethal. (c) Though the duty to preserve life is a serious duty, no such duty exists when the only available means of preserving life involves a grave injustice. In this case, if what is envisaged is the killing of, or a deliberate lethal assault on, one of the twins, Mary, in order to save the other, Jodie, there is a grave injustice involved. The good end would not justify the means. It would set a very dangerous precedent to enshrine in English case law that it was ever lawful to kill, or to commit a deliberate lethal assault on, an innocent person that good may come of it, even to preserve the life of another."

It is of interest to note in this context that when the Catholic nurses at the Children's Hospital in Philadelphia consulted their archdiocesan authorities in a similar case in 1977 (with the sole distinguishing factor that the parents of the "sacrificed" child were willing to consent to the operation once they had received favourable rabbinical advice) the comfort they received was based on the double effect doctrine. It was argued that the tying of the carotid artery was done not to terminate the life of the sacrificed twin but to preserve the life of the other twin by protecting it from the poisons that would built up in the sacrificed twin's blood after its death: see George J Annas, "Siamese Twins: Killing One to Save the Other" (1987) 17 Hastings Center Report 27, 28 and David C Thomasma and others "The Ethics of Caring for Conjoined Twins" by (1996) 26 Hastings Center Report 4, 9. I do not consider that this method of applying the doctrine of double effect would have any prospect of acceptance in an English court.

It follows from this analysis that the proposed operation would involve the murder of Mary unless some way can be found of determining that what was being proposed would not be unlawful. This, the fourth and final part of the investigation, is far the most difficult. It is worth noting at the outset that Miss Davies supported the contentions of Mr Whitfield and Mr Owen to the effect that what was proposed would not be unlawful. They were opposed by Mr Taylor, for the parents, and Mr Harris, instructed by the Official Solicitor on behalf of Mary. At the close of his final submissions on behalf of Mary, however, Mr Harris, acting on the Official Solicitor's express instructions, took us back to the final page of his original written argument to this court, which had ended in these terms:

> "It is difficult to accommodate the proposed treatment which, notwithstanding the above comments, it is recognised the court may well consider to be desirable, within the framework of established legal

A principle. It might be argued that the basic principles of medical law cannot be applied to these facts. Existing case law is based upon the presumption of bodily integrity. John Locke's assertion that 'every Man has a Property in his own Person. This no Body has any Right to but himself' (*Two Treatises of Government*, 1690) which underpins much of the moral dialogue in this area is difficult to apply in the case of conjoined twins. Both twins' physical autonomy was compromised at birth with the B result that they now have fundamentally inconsistent interests and needs. In these circumstances, the court may wish to explore the possibility of a development of the law to enable a doctor lawfully to undertake surgery to preserve the life and achieve the independence of one twin even though that may result in the death of the other provided that: (i) the actions of the doctor viewed objectively constitute a proportionate and necessary C response to the competing interests viewed as a whole; and (ii) such actions are approved in advance by the court. How any development of the law in this area might be reconciled with M's best interests and right to life is a question which it is easier to ask than answer."

This explicit encouragement by the Official Solicitor that we should explore the possibility of developing the law so as to enable such surgery to D be undertaken lawfully was not at all unwelcome. We pointed out repeatedly to Mr Taylor and Mr Harris during the course of argument that, if their contentions were correct, no separation surgery which would inevitably involve the sacrifice of one conjoined twin could ever lawfully take place, however ardently their parents wished one of their children to survive, and however severely compromised the condition of the other twin. It would also follow, if their arguments based on the effect of article 2 of the E European Convention on Human Rights, bolstered on this occasion by the written arguments of Mr Anderson on behalf of the Pro-Life Alliance, are well founded, that no separation surgery involving the sacrifice of a conjoined twin could take place in any of the member states of the Council of Europe. Mr Taylor and Mr Harris accepted, realistically, that this was indeed the effect of their submissions.

F

The doctrine of necessity

We received some interesting and powerful submissions about the doctrine of necessity, and the ways in which it might be called in aid to justify the operation proposed by the doctors. Although for many years cases involving pleas of necessity were notable for their absence from our G case law, the doctrine has recently been given a new lease of life by Lord Goff of Chieveley, first in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 and more recently, in a speech with which the other members of the House of Lords agreed, in *R v Bournewood Community and Mental Health NHS Trust, Ex p L* [1999] 1 AC 458.

This doctrine is so obscure, and it has featured so seldom in our case law in the criminal courts, that I must describe it in considerable detail, H and identify the problems it throws up, before I go on to decide whether it is permissible to apply it to the facts of the present case. In *In re F* [1990] 2 AC 1, 74 Lord Goff said in the context of the law of tort:

"That there exists in the common law a principle of necessity which may justify action which would otherwise be unlawful is not in doubt.

> But historically the principle has been seen to be restricted to two groups of cases, which have been called cases of public necessity and cases of private necessity. The former occurred when a man interfered with another man's property in the public interest—for example (in the days before we could dial 999 for the fire brigade) the destruction of another man's house to prevent the spread of a catastrophic fire, as indeed occurred in the Great Fire of London in 1666. The latter cases occurred when a man interfered with another's property to save his own person or property from imminent danger—for example, when he entered upon his neighbour's land without his consent, in order to prevent the spread of fire onto his own land."

Lord Goff then went on to consider a third group of cases, also founded upon the principle of necessity, which were concerned with actions taken by someone as a matter of necessity to assist another person without his consent. We are not, however, concerned in the present case with this application of the doctrine, because the law confers on the parents of an infant child the authority to consent on her behalf, and because there is also the residual right of consent vested in the court.

In the *Bournewood* case [1999] 1 AC 458 Lord Goff had recourse to this doctrine again when holding that doctors were entitled to rely on it as the basis for their authority to care for compliant incapacitated patients of adult years and treat them without their consent. At the end of his speech in that case he mentioned some old cases which authorised, in so far as this was shown to be necessary, the detention of those who were a danger, or potential danger, to themselves or others. He added, at p 490:

> "I must confess that I was unaware of these authorities though, now that they have been drawn to my attention, I am not surprised that they should exist. The concept of necessity has its role to play in all branches of our law of obligations—in contract (see the cases on agency of necessity), in tort (see *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1), and in restitution (see the sections on necessity in the standard books on the subject) and in our criminal law. It is therefore a concept of great importance. It is perhaps surprising, however, that the significant role it has to play in the law of torts has come to be recognised at so late a stage in the development of our law."

Public and private necessity in the criminal law

In the present case we are concerned with what is said by some of those who appeared before us to be a case of private necessity in the eyes of the criminal law. Bracton, writing in the 13th century *On the Laws and Customs of England* (trans Samuel E Thorne), vol 2 (1968), pp 340–341, identified this type of necessity, in the context of the law of homicide, in these terms:

> "Of necessity, and here we must distinguish whether the necessity was avoidable or not; if avoidable and he could escape without slaying, he will then be guilty of homicide; if unavoidable, since he kills without premeditated hatred but with sorrow of heart, in order to save himself and his family, since he could not otherwise escape [danger], he is not liable to the penalty for murder."

A Five hundred years later the same concept of necessity, which still forms part of our law today, was expressed as follows by Sir Matthew Hale in his *Pleas of the Crown* (1800 ed), vol 1, p 51:

> "but if he cannot otherwise save his own life, the law permits him in his own defence to kill the assailant; for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, B and necessity, hath made him his own protector cum debito moderamine inculpatae tutelae, as shall be farther showed, when we come to the chapter of homicide se defendendo."

Later in the same volume Hale identifies two kinds of necessity which justify homicide: necessity which is of a private nature, and the necessity which relates to the public justice and safety, with which we are not here C concerned. He added, at p 478:

> "The former is that necessity, which obligeth a man to his own defence and safeguard, and this takes in these inquiries, 1. What may be done for the safeguard of a man's life . . . As touching the first of these—viz, homicide in defence of a man's own life, which is usually styled se defendendo . . . Homicide se defendendo is the killing of another person D in the necessary defence of himself against him that assaults him."

Blackstone, Commentaries on the Laws of England (1857 ed), vol 4 had recourse to the law of nature as the source of a person's authority to use proportionate force in self-defence, saying, at p 30: "in such a case"—viz a violent assault—"he is permitted to kill the assailant; for there the law of nature and self-defence, its primary canon, have made him his own E protector."

During the 17th century there were suggestions that the right of self-preservation extended beyond the right to use appropriate force in self-defence. Thus in his *Elements of the Common Laws of England* (1630), pp 29–30 Lord Bacon wrote:

> "Necessity is of three sorts, necessity of conservation of life, necessity F of obedience, and necessity of the act of God or of a stranger. First of conservation of life, if a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither se G defendendo nor by misadventure, but justifiable."

Similar sentiments appear in Thomas Hobbes's *Leviathan* (1651), Pt II, ch 27 (Pelican ed (1968), p 157):

> "If a man, by the terror of present death, be compelled to do a fact against the law, he is totally excused, because no law can oblige a man to abandon his own preservation. And supposing such a law were H obligatory; yet a man would reason thus, if I do it not, I die presently; if I do it, I die afterwards; therefore by doing it, there is time of life gained; nature therefore compels him to the fact. When a man is destitute of food, or other thing necessary for his life, and cannot preserve himself any other way, but by some fact against the law; as if in a great famine he take

the food by force, or stealth, which he cannot obtain for money nor charity; or in defence of his life, snatch away another man's sword, he is totally excused, for the reason next before alleged." A

Both these extensions of the doctrine of necessity have been authoritatively disapproved as propositions of English law. For the disapproval of the idea that in order to save himself a man is entitled to deprive another of the place of safety he has already secured for himself, see B *R v Dudley and Stephens* (1884) 14 QBD 273, 285–286, per Lord Coleridge CJ ("if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day": p 286) and *R v Howe* [1987] AC 417, 431E, per Lord Hailsham of St Marylebone LC to similar effect. For the equally strong disapproval of the idea that if a starving beggar takes the C law into his own hands and steals food he is not guilty of theft, see *Southwark London Borough Council v Williams* [1971] Ch 734, 743, 745–746, per Lord Denning MR and Edmund Davies LJ. See also on these topics *Hale's Pleas of the Crown* vol 1, pp 51, 54 and *Blackstone's Commentaries*, vol 4, pp 30, 31–32.

Nineteenth century attempts at codifying the doctrine of necessity D

Nineteenth century governments appointed commissions from time to time with the laudable purpose of consolidating or codifying our criminal law. Inevitably, these commissions addressed issues related to the existence and scope of the doctrine of necessity. It is not at all surprising that they found them difficult to handle. For example in 1839 the Commissioners on Criminal Law wrote: see the Fourth Report of Her Majesty's Commissioners E on Criminal Law (1839), Parliamentary Papers vol XIX, p xxi:

"II There are necessarily some occasions, which, upon general principles of criminal jurisprudence, and independently of the motive or state of mind of the party who causes the death control the generality of the abstract rules founded on mere intention, and which tend to justify or excuse, or to extenuate the act of homicide. Of the former class, that F is, of those which serve to justify or excuse the act, the most prominent are those founded on a principle of necessity where the act is essential to the defence of a man's person or property. The rule as to the latter class, i e, where the occasion serves to extenuate criminality, is also founded on a mixed principle of necessity and policy."

In 1846, in the Second Report of Her Majesty's Commissioners for G Revising and Consolidating the Criminal Law (1846), Parliamentary Papers vol XXIV, the Commissioners dealt with self-defence as a potential justification for homicide in article 16 of their draft Code, but they decided on policy grounds not to provide a more general defence of necessity. In a footnote to article 19 they wrote, at p 36:

"The treatises generally contain a provision justificatory of the H homicide of an unoffending party committed in order to save the life of the accused, or rather because the accused reasonably thought that the homicide was indispensable for preserving his own life. We propose to omit any justificatory rule for these occasions. Independently of the question which has been much discussed by ancient and modern jurists of

A the right in foro conscientiae of a person depriving another of life under such circumstances, we conceive that there would be less inconvenience in leaving persons to the mercy of the Crown who have thus acted under circumstances of sudden and extreme peril, than in holding out protection to the general disposition of all persons to overrate the danger to which they are exposed, and to place too low an estimate on the life of another B when placed in the balance against prospect of additional safety to themselves. The Indian Law Commissioners . . . express themselves on this subject in the following terms: 'There are, as we have said, cases in which it would be useless cruelty to punish acts done under the fear of death, or even of evils less than death. But it appears to us impossible to precisely define these cases; we have, therefore, left them to the Government, which, in the exercise of its clemency, will doubtless be C guided in a great measure by the advice of the court.' "

When the Criminal Code Bill commissioners took up the challenge in 1879, in the Report of the Royal Commission to consider the Law Relating to Indictable Offences (1879), Parliamentary Papers vol XX, they were equally baffled by definitional difficulties, although they were readier to leave open the possibility of establishing a lawful justification based on D necessity. They said, at pp 43–44:

"ingenious men may suggest cases which, though possible, have not come under practical discussion in courts of justice . . . We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should E in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."

Sir James Stephen was one of these commissioners, and his initial views on this elusive topic are to be seen in his *History of the Criminal Law of England* (1883), vol 2, pp 108–110. He began his discussion of the subject, F at p 108:

"Compulsion by necessity is one of the curiosities of law, and so far as I am aware is a subject on which the law of England is so vague that, if cases raising the question should ever occur the judges would practically be able to lay down any rule which they considered expedient. The old instance of the two drowning men on a plank large enough to support one G only, and that of shipwrecked persons in a boat unable to carry them all, are the standing illustrations of this principle. It is enough to say that should such a case arise, it is impossible to suppose that the survivors would be subjected to legal punishment."

After referring to the dilemmas created by cases where a boat will sink unless it is relieved of one or more of its passengers, he found some comfort H in the judgment of Lord Mansfield CJ in *R v Stratton* (1779) 21 St Tr 1045, 1224, from which he derived the proposition that it was just possible to imagine cases in which the expediency of breaking the law was so overwhelming that people might be justified in breaking it. He went on to say, at pp 109–110:

> "but these cases cannot be defined beforehand, and must be adjudicated upon by a jury afterwards, the jury not being themselves under the pressure of the motives which influenced the alleged offenders. I see no good in trying to make the law more definite than this, and there would I think be danger in attempting to do so. There is no fear that people will be too ready to obey the ordinary law. There is great fear that they would be too ready to avail themselves of exceptions which they might suppose to apply to their circumstances."

He ended by saying that these considerations applied also to the case of a choice of evils. One of the two examples he gave in this context was of a ship so situated that the only possible way of avoiding a collision with another ship (which would probably sink one or both of them) involved running down a small boat.

R v Dudley and Stephens

This was the legal background against which *R v Dudley and Stephens* 14 QBD 273 was set. In AW B Simpson's *Cannibalism and the Common Law* (1984) the author described how the three survivors of the yacht *Mignonette* were landed from a German sailing barge at Falmouth in September 1884, a year after *Stephen's History of the Criminal Law of England* was published. On the day they landed all three of them described the circumstances in which the fourth member of the crew, the ship's boy, had been killed and eaten on their twentieth day of survival on the open sea without water or food, apart from two tins of turnips. As part of the historical background of the case Mr Simpson describes in chapter 5 of his book, gruesomely entitled "The Customs of the Sea", a large number of similar instances in the 19th century of shipwrecks leading to cannibalism, some of which were described by Samuel Plimsoll in 1875 in a parliamentary debate.

The law report shows how a jury at the Devon and Cornwall Assizes had found the facts of the case in a special verdict. The case was then ordered to be argued in London before a court of five judges. In giving the judgment of the court Lord Coleridge CJ considered earlier writings, including the judgment of a circuit court in Pennsylvania in *United States v Holmes* (1842) 26 F Cas 360, about necessity being a possible justification for homicide before he concluded that the facts stated in the jury's verdict provided no legal justification for the homicide in the present case. His reasoning can be seen in two passages towards the end of his judgment, at pp 286–288:

> "Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called 'necessity'. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it . . . It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the

A comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be 'No'—'So spake the Fiend, and with necessity, The tyrant's plea, excused his devilish deeds.' It B is not suggested that in this particular case the deeds were 'devilish', but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that C prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it."

Sir James Stephen was not a member of the court, although he authorised Lord Coleridge CJ to say that the language he had used about necessity in his *History of the Criminal Law of England* was not meant to cover a case like this. Three years later, in his *Digest of the Criminal Law*, 4th ed (1887), D Stephen attempted a description of the doctrine of necessity in these terms, at pp 24–25:

"An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom E he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided . . . The extent of this principle is unascertained. It does not extend to the case of shipwrecked sailors who kill a boy, one of their number, in order to eat his body."

F It is not necessary for present purposes to refer to the detail of the long footnote in which he commented, not always favourably, on the judgment of the court in *R v Dudley and Stephens*. That case has sometimes been taken as authority for the proposition that necessity can never under any circumstances provide a legal justification for murder. While it is true that a passage in the speech of Lord Hailsham of St Marylebone LC in *R v Howe* G [1987] AC 417, 429C–D might be interpreted to this effect, in my judgment neither that passage nor a similar passage in Lord Mackay of Clashfern's speech, at p 453C–D, displays any evidence that they had in mind a situation in which a court was invited to sanction a defence (or justification) of necessity on facts comparable to those with which we are confronted in the present case. I accept Miss Davies's submission that *R v Dudley and Stephens*, endorsed though it was by the House of Lords in *R v Howe*, is not H conclusive of the matter.

Necessity: the recent studies by the Law Commission

We have also been shown how the Law Commission tackled this troublesome doctrine in the criminal law between 1974 and 1993. In 1974 a

very experienced working party was brave enough to recommend codified proposals for a general defence of necessity: see the Codification of the Criminal Law: General Principles: Defences of General Application (Law Commission Working Paper No 55), pp 38–39. Three years later the Commission itself retreated so far from this proposition that it recommended that there should be no general defence of necessity in any new Code, and that if any such general defence existed at common law it should be abolished: Law Commission Report on Criminal Law: Report of Defences of General Application (1977) (Law Com No 83), p 54. It felt that it would be much better if Parliament continued to create special defences of necessity, when appropriate. Because euthanasia was so controversial, and because the Criminal Law Revision Committee was engaged in work on offences against the person, the Commission thought it better to leave to that committee any questions relating to the provision of a defence in that area of the law.

This retreat, influenced by the responses it had received on consultation, particularly from practitioners (see pp 24–25), evoked a storm of protest from academic commentators (see, for instance, Glanville Williams, "Necessity" [1978] Crim LR 128 and P H J Huxley, "Proposals and Counter Proposals on the Defence of Necessity" [1978] Crim LR 141, and the powerful criticism, to the effect that the proposals represented "the apotheosis of absurdity", by Sir Rupert Cross in "Murder under Duress" (1978) 28 UTLJ 369, 377, cited by Professor Glanville Williams in his *Textbook of Criminal Law*, 2nd ed (1983), p 602.

Professor Glanville Williams returned to the topic of necessity in chapter 26 of that book. He observed, at p 602, that the main difficulty felt by the Law Commission appeared to have been in respect of certain "human rights", whereas the doctrine of necessity was an expression of the philosophy of utilitarianism. He referred, however, to a suggestion by an American writer, Paul Robinson, to the effect that the recognition of important values did not entirely exclude a defence of necessity. In the determination of cases where those values did not appear, their existence could not affect the outcome, and, even where they did appear, they could be given special weight in estimating the balance of interests. In his powerful section 26.3, pp 603 et seq, "Necessity as a reason for killing", Professor Glanville Williams addressed the issues with which we are confronted in this case. He began his treatment of the subject by saying that many people believed in the sanctity of life, and consequently believed that killing was absolutely wrong. It was for this reason, he said, that the defence of necessity, if allowed at all, was given very narrow scope in this area. He distinguished private defence from necessity (although the two overlapped) on the grounds that, unlike necessity, private defence involved no balancing of values, while on the other hand private defence operated only against aggressors (who, with rare exceptions, were wrongdoers) whereas the persons against whom action was taken by necessity might not be aggressors or wrongdoers. In this context he mentioned *R v Bourne* [1939] 1 KB 687 (where Macnaghten J had suggested in his summing up that there might be a duty in certain circumstances to abort an unborn child to save the life of the mother) as an example of the defence of necessity, even though it was a case not of homicide but of foeticide. Professor Glanville Williams came to the heart of the matter, at p 604:

A "*Might this defence apply where a parent has killed his grossly malformed infant?* Doubtless not. It may of course be argued that the value of such an infant's life, even to himself, is minimal or negative, and that if parents are obliged to rear him they may be disabled from having another and normal child. But it is not a case for applying the doctrine of necessity as usually understood. The child when born, unlike the foetus, B is regarded as having absolute rights. Besides, there is no emergency . . . The usual view is that necessity is no defence to a charge of murder. This, if accepted, is a non-utilitarian doctrine; but in the case of a serious emergency is it wholly acceptable? If you are roped to a climber who has fallen, and neither of you can rectify the situation, it may not be very glorious on your part to cut the rope, but is it wrong? Is it not socially desirable that one life, at least, should be saved? . . . Again, if you are C flying an aircraft and the engine dies on you, it would not be wrong, but would be praiseworthy, to choose to come down in a street (where you can see you will kill or injure a few pedestrians), rather than in a crowded sports stadium. *But in the case of cutting the rope you are only freeing yourself from someone who is, however involuntarily, dragging you to your death. And in the case of the aircraft you do not want to kill anyone;* D *you simply minimise the slaughter that you are bound to do one way or the other. The question is whether you could deliberately kill someone for calculating reasons.* We do regard the right to life as almost a supreme value, and it is very unlikely that anyone would be held to be justified in killing for any purpose except the saving of other life, or perhaps the saving of great pain or distress. Our revulsion against a deliberate killing is so strong that we are loth to consider utilitarian reasons for it. But a E compelling case of justification of this kind is the action of a ship's captain in a wreck. He can determine who are to enter the first lifeboat; he can forbid overcrowding; and it makes no difference that those who are not allowed to enter the lifeboat will inevitably perish with the ship. The captain, in choosing who are to live, is not guilty of killing those who remain. He would not be guilty even though he kept some of the F passengers back from the boat at revolver point, and he would not be guilty even though he had to fire the revolver."

Between 1985 and 1993 the Law Commission returned to the topic of necessity on three separate occasions. In 1985 it published a report prepared by three professors of criminal law, who included Professor John Smith, Report on Criminal Law: Codification of the Criminal Law (Law Com G No 143). Their recommendation was in these terms, at p 120, para 13.26:

"Necessity is not a topic to which we can apply our normal procedure of restatement, for which the present law does not provide suitable material. We cannot ourselves conduct a law reform exercise and propose a general defence of necessity of our own devising. And, as indicated above, we cannot support the Law Commission's totally H negative proposals. In these circumstances our main proposal is that necessity should remain a matter of common law. That is, to the extent that the defence is now recognised, it should be unaffected by the Criminal Code Act; and (probably more important, because the present status of the defence is so limited and uncertain) the courts should retain the power that they now have to develop or clarify the defence. Necessity,

that is to say, would fall within the general saving for common law defences declared by clause 49. Our only specific necessity provision is clause 46, which admits a defence in circumstances so closely analogous to those of the duress defence that it might indeed be 'the apotheosis of absurdity' to admit the one and to deny the other. The kind of situation catered for by clause 46 has, indeed, sometimes been called 'duress of circumstances'."

In 1989 the Law Commission itself accepted this recommendation without taking the matter any further: see its Report on Criminal Law: A Criminal Code for England and Wales (Law Com No 177), vol 1, Report and Draft Criminal Code Bill, clauses 4(4) and 45(c), pp 44, 62 and the Commentary on Draft Criminal Code Bill in vol 2, p 234, para 12.41(ii). Following further consultation the Law Commission maintained this approach in its Report on Criminal Law: Legislating the Criminal Code: Offences against the Person and General Principles (1993) (Law Com No 218). After discussing the defence of duress by threats, the Commission said, at pp 63–64, para 35.5:

"By contrast with the defences of duress just discussed, there appear to be some cases, more properly called cases of 'necessity', where the actor does not rely on any allegation that circumstances placed an irresistible pressure on him. Rather, he claims that his conduct, although falling within the definition of an offence, was not harmful because it was, in the circumstances, justified. Such claims, unlike those recognised by the duress defences, do seem to require a comparison between the harm that otherwise unlawful conduct has caused and the harm that that conduct has avoided; because if the latter harm was not regarded as the greater the law could not even consider accepting that the conduct was justified. Nor, fairly clearly, does the defence depend on any claim that the actor's will was 'overborne': on the contrary, the decision to do what, but for the exceptional circumstances, would be a criminal act may be the result of careful judgment, as in the case of the kind of professional decision referred to in the next paragraph."

The Commission went on to mention Lord Goff's speech in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, where he had relied on the doctrine of agency of necessity as providing a legal justification for the sterilisation of a mentally incapable adult without her consent. It added, at p 64, para 35.6:

"A perhaps more straightforward example is that given by Lord Goff in his judgment in the same case: 'a man who seizes another and forcibly drags him from the path of an oncoming vehicle, thereby saving him from injury or even death, commits no wrong': [1990] 2 AC 1, 74. In such cases there is no question of the defence depending on the actor's resistance being overcome, in the sense discussed in paragraph 29.11 above; rather, the courts decide that in all the circumstances the actor's, freely adopted, conduct was justified."

It will be seen that the Law Commission envisaged that in exceptional circumstances a comparison might have to be made, perhaps as a matter of careful professional judgment and not in the throes of a life or death

A emergency, between the harm that otherwise unlawful conduct has caused (or would cause, if performed) and the harm that that conduct has avoided (or would avoid).

Necessity: modern academic writers

Those who prepared that report would have been familiar with a modern B update of the "two men on a plank" dilemma, which dates back to Cicero, *de Officiis*, and the "two mountaineers on a rope" dilemma which was mentioned by Professor John Smith in his 1989 Hamlyn Lectures, published under the title "Justification and Excuse in the Criminal Law". At the coroner's inquest conducted in October 1987 into the Zeebrugge disaster, an army corporal gave evidence that he and dozens of other people were near the foot of a rope ladder. They were all in the water and in danger of C drowning. Their route to safety, however, was blocked for at least ten minutes by a young man who was petrified by cold or fear (or both) and was unable to move up or down. Eventually the corporal gave instructions that the man should be pushed off the ladder, and he was never seen again. The corporal and many others were then able to climb up the ladder to safety.

In his third lecture, "Necessity and Duress", Professor Smith evinced the D belief, at pp 77–78, that if such a case ever did come to court it would not be too difficult for a judge to distinguish *R v Dudley and Stephens* 14 QBD 273. He gave two reasons for this belief. The first was that there was no question of choosing who had to die, the problem which Lord Coleridge CJ had found unanswerable in *R v Dudley and Stephens*, at p 287, because the unfortunate young man on the ladder had chosen himself by his immobility there. The second was that, unlike the ship's boy on the *Mignonette*, the young man, E although in no way at fault, was preventing others from going where they had a right, and a most urgent need, to go, and was thereby unwittingly imperiling their lives.

I would add that the same considerations would apply if a pilotless aircraft, out of control and running out of fuel, was heading for a densely populated town. Those inside the aircraft were in any event "destined to F die". There would be no question of human choice in selecting the candidates for death, and if their inevitable deaths were accelerated by the plane being brought down on waste ground the lives of countless other innocent people in the town they were approaching would be saved. It was an argument along these lines that led the rabbinical scholars involved in the 1977 case of conjoined twins to advise the worried parents that the sacrifice of one of their children in order to save the other could be morally justified. G George J Annas (1987) 17 Hastings Center Report 27 described how they

> "reportedly relied primarily on two analogies . . . In the first, two men jump from a burning airplane. The parachute of the second man does not open, and as he falls past the first man, he grabs his legs. If the parachute cannot support them both, is the first man morally justified in kicking the second man away to save himself? Yes, said the rabbis, since the man H whose parachute didn't open was 'designated for death'. The second analogy involves a caravan surrounded by bandits. The bandits demand a particular member of the caravan be turned over for execution; the rest will go free. Assuming that the named individual has been 'designated for death', the rabbis concluded it was acceptable to surrender him to save

everyone else. Accordingly, they concluded that if twin A was 'designated for death', and could not survive in any event, but twin B could, surgery that would kill twin A to help improve the chance of twin B was acceptable." A

There is, however, no indication in the submission we received from the Archbishop of Westminster that such a solution was acceptable as part of the philosophy he espoused. The judge's dilemma in a case where he or she is B confronted by a choice between conflicting philosophies was thoughtfully discussed by Simon Gardner in "Necessity's Newest Inventions" (1991) 11 OJLS 125–135. He explored the possibility of rights-based justifications based on a principle that otherwise unlawful actions might be justified where the infraction was calculated to vindicate a right superior to the interest protected by the rule, but he was perplexed by the idea that judges in a C democracy could make their own decisions as to what was right and what was wrong in the face of established law prohibiting the conduct in question. The whole article requires careful study, but its author concluded that in jurisdictions where rights were guaranteed the judicial vindication of a guaranteed right would be seen as protecting democracy rather than contravening it. This consideration does not, however, assist us in a case where there are conflicting rights of apparently equal status and conflicting D philosophies as to the priority, if any, to be given to either.

Before I leave the treatment afforded to the topic of necessity by modern academic writers of great distinction (there is a valuable contemporary summary of the issues in *Smith & Hogan, Criminal Law*, 9th ed (1999), pp 245–252), I must mention the section entitled "Justifications, Necessity and the Choice of Evils" in *Ashworth, Principles of Criminal Law*, 3rd ed E (1999), p152. After referring to the facts of the Zeebrugge incident he said, at pp 153–154:

"No English court has had to consider this situation, and it is clear that only the strongest prohibition on the taking of an innocent life would prevent a finding of justification here: in an urgent situation involving a decision between n lives and $n + 1$ lives, is there not a strong social interest F in preserving the greater number of lives? Any residual principle of this kind must be carefully circumscribed; it involves the sanctity of life, and therefore the highest value with which the criminal law is concerned. Although there is a provision in the Model Penal Code allowing for a defence of 'lesser evil', it fails to restrict the application of the defence to cases of imminent threat, opening up the danger of citizens trying to justify all manner of conduct by reference to overall good effects. The G moral issues are acute: 'not just anything is permissible on the ground that it would yield a net saving of lives'. Closely connected with this is the moral problem of 'choosing one's victim', a problem which arises when, for example, a lifeboat is in danger of sinking, necessitating the throwing overboard of some passengers, or when two people have to kill and eat another if any of the three is to survive. To countenance a legal H justification in such cases would be to regard the victim's rights as morally and politically less worthy than the rights of those protected by the action taken, which represents a clear violation of the principle of individual autonomy. Yet it is surely necessary to make some sacrifice, since the autonomy of everyone simply cannot be protected. A dire choice has to

A be made, and it must be made on a principle of welfare or community that requires the minimisation of overall harm. A fair procedure for resolving the problem—perhaps the drawing of lots—must be found. But here, as with self-defence and the 'uplifted knife' cases, one should not obscure the clearer cases where there is no need to choose a victim: in the case of the young man on the rope ladder, blocking the escape of several others, there was no doubt about the person who must be subjected to force, probably B with fatal consequences."

Necessity: the work of Parliament

I turn now from 20th century academic writing and the work of the Law Commission and its specialist working parties to consider the way in which Parliament and the courts have addressed these issues. So far as I am aware, C Parliament has never even debated these issues in a general sense, in spite of the recommendations of the Law Commission and the increasingly insistent pleas for parliamentary assistance which have been made by senior judges in the context of the rapidly developing new defence of "duress of circumstances". Parliament has, however, to an increasing extent included "necessity" defences or justifications in modern offence-creating statutes, D and where such provisions are present the parliamentary intention is clear. In 1974 the Law Commission's Working Party identified such provisions in the Infant Life (Preservation) Act 1929, section 1(1), the Education Act 1944, section 39(2)(a), the Fire Services Act 1947, section 30(1), the Road Traffic Regulation Act 1967, section 79, the Abortion Act 1967, section 1(1) and the Road Traffic Act 1972, section 36(3). The Criminal Damage Act 1971, section 5(2)(b) provides another example from that period, and this E statutory process has continued up to the present day, although, as is common with piecemeal law reform, the defences are not always framed along the same lines.

The Abortion Act 1967 provides a particularly good example of this process at work, expanding and clarifying the law for the benefit of the courts and for everyone else who, for whatever reason, needs to have F recourse to the law in this controversial area. Before its enactment Macnaghten J in *R v Bourne* [1939] 1 KB 687 derived a "necessity" defence out of the word "unlawfully" in section 58 of the Offences against the Person Act 1861 (24 & 25 Vict c 100): "Any person who unlawfully uses an instrument with intent to procure a miscarriage shall be guilty of felony." Macnaghten J said, at p 691, that he thought that the word "unlawfully" imported the meaning expressed by the proviso in section 1(1) of the Infant G Life (Preservation) Act 1929: "Provided that no person shall be guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother." He went on to direct the jury, at p 693:

"In such a case where the doctor anticipates, basing his opinion upon the experience of the profession, that the child cannot be delivered H without the death of the mother, it is obvious that the sooner the operation is performed the better. The law does not require the doctor to wait until the unfortunate woman is in peril of immediate death. In such a case he is not only entitled, but it is his duty to perform the operation with a view to saving her life."

That, as I have observed earlier, was the common law defence of necessity at work when a judge was interpreting what he believed Parliament must have meant when it used the word "unlawfully" in a codifying statute. Parliament's current intentions in this field are now clearly set out in section 1(1) of the Abortion Act 1967, as substituted. It would of course be very helpful, once Parliament has had the opportunity of considering the implications of the judgments in the present case, if it would provide similar assistance to the courts and to all other interested parties, and in particular parents and medical practitioners, as to what is legally permissible and what is not legally permissible in the context of separation surgery on conjoined twins. Parliament would of course now have to take account of the relevant provisions of the European Convention on Human Rights when formulating any new legislation.

Necessity: the courts and the defence of duress of circumstances

In addition to the major work that has been undertaken by Parliament in creating statutory excuses or justifications for what would otherwise be unlawful, the courts have also been busy in this field, at all events in those cases where a defendant maintains that he/she was irresistibly constrained by threats or external circumstances to do what he/she did.

So far as duress by threats is concerned, it was common ground between counsel that the solution to the present case is not to be found in the case law on that topic which Lord Hailsham of St Marylebone LC has described as "that species of the genus of necessity which is caused by wrongful threats": *R v Howe* [1987] AC 417, 429C. After no fewer than three split 3:2 decisions the House of Lords and the Privy Council have now both ruled that "duress by threats" is not available as a defence to murder (*R v Howe*) or attempted murder (*R v Gotts* [1992] 2 AC 412); see also, in this series *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653 and *Abbott v The Queen* [1977] AC 755.

The work of academic writers and of the Law Commission has, however, led to one significant development in the common law. This lies in the newly identified defence of "duress of circumstances". The modern development of this defence began in the field of driving offences. In *R v Kitson* (1955) 39 Cr App R 66 the defendant, who had had a lot to drink, went to sleep in the passenger seat of a car driven by his brother-in-law. When later charged with driving the car under the influence of drink, he said in his defence that, when he woke up, he found that the driving seat was empty and the car was moving down a hill with the handbrake off. He managed to steer the car into a grass verge at the bottom of the hill. He was convicted of driving a car under the influence of drink, and when the Court of Criminal Appeal dismissed his appeal on the basis that the ingredients of the offence were made out, and he had undoubtedly been driving the car within the meaning of the Act, nobody suggested that he was entitled to rely on a defence of necessity or duress of circumstances.

Thirty years later this potential line of defence first saw the light of day in *R v Willer* (1986) 83 Cr App R 225. The defendant had been convicted of reckless driving, for which he was given an absolute discharge, although his licence was endorsed with ten penalty points, because he had been seen driving his car quite slowly on the pavement in front of a shopping precinct. He wished to defend the case on the basis that this had seemed to him to be

A the only way in which he could escape from a gang of 20 to 30 youths who had already banged on his car and threatened to kill him, and were now bent on doing him further violence. The assistant recorder, however, ruled that a defence of necessity was not available to him on those facts. On his appeal Watkins LJ said that the court doubted whether the defence of necessity was in point, but the court held, at p 227, that the jury ought to have been left to B decide whether "the appellant was wholly driven by force of circumstances into doing what he did and did not drive the car otherwise than under that form of compulsion, i e under duress".

A similar issue arose in *R v Conway* [1989] QB 290, another case of reckless driving. The defendant said that the reason why he had driven recklessly was that he was in fear for his life and that of his passenger. Woolf LJ said, at pp 296–297, that the court found itself bound by the C decision in *R v Willer* to rule that a defence of duress was available. He added that it was convenient to refer to this type of duress as "duress of circumstances" (being the expression adopted by the Law Commission's Criminal Code Working Party four years earlier: see Law Com No 143, para 13.26). He said that the defence would be available where the defendant was constrained by circumstances to drive as he did in order to D avoid death or serious bodily harm to himself or some other person. He added that whether "duress of circumstances" was called "duress" or "necessity" did not matter. What was important was that, whatever it was called, it was subject to the same limitations as the "do this or else" species of duress.

In *R v Martin (Colin)* [1989] 1 All ER 652 Simon Brown J gave the judgment of the Court of Appeal, which included Lord Lane CJ, in a case E where the defendant had wished to advance a defence to the effect that the only reason why he had driven while disqualified was that he had felt constrained to drive his stepson to work because his stepson had overslept. His case was that his wife (who had suicidal tendencies) had been threatening suicide unless he drove the boy to work, since she was so worried that her son might lose his job. Simon Brown J, relying on the earlier F decisions in *R v Willer* 83 Cr App R 225 and *R v Conway* [1989] 2 QB 290, said that a defence was available to the defendant (however sceptically one might regard its prospects of success) and that he ought to have been allowed to place it before a jury. He added, at pp 653–654:

> "The principles may be summarised thus: first, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly G this defence arises as duress, that is pressure on the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances.' Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury. Third, assuming the defence to be open H to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result;

second, if so, would a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was Yes, then the jury would acquit; the defence of necessity would have been established."

In the course of the last 11 years, the scope of this defence has been broadened. In *R v Pommell* [1995] 2 Cr App R 607, the Court of Appeal ruled that it was available to a defendant convicted of possessing a loaded sub-machine gun who had wished to advance a defence to the effect that on the previous evening he had taken it "off a geezer who was going to do some people some damage with it". Kennedy LJ, giving the judgment of the court, said, at pp 613–614:

"The strength of the argument that a person ought to be permitted to breach the letter of the criminal law in order to prevent a greater evil befalling himself or others has long been recognised (see, for example, *Stephen's Digest of Criminal Law*), but it has, in English law, not given rise to a recognised general defence of necessity, and in relation to the charge of murder, the defence has been specifically held not to exist (see *R v Dudley and Stephens* 14 QBD 273). Even in relation to other offences, there are powerful arguments against recognising the general defence. As Dickson J said in the Supreme Court of Canada in *Perka v The Queen* (1984) 13 DLR (4th) 1, 14: '"no system of positive law can recognise any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value". The Criminal Code has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions.' However, that does not really deal with the situation where someone commendably infringes a regulation in order to prevent another person from committing what everyone would accept as being a greater evil with a gun. In that situation it cannot be satisfactory to leave it to the prosecuting authority not to prosecute, or to individual courts to grant an absolute discharge. The authority may, as in the present case, prosecute because it is not satisfied that the defendant is telling the truth, and then, even if he is vindicated and given an absolute discharge, he is left with a criminal conviction which, for some purposes, would be recognised as such."

This reasoning is strikingly different from the reasoning in the context of a murder charge which led Lord Simon of Glaisdale, then in a minority, in *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 687 and Lord Hailsham of St Marylebone LC in *R v Howe* [1987] AC 417, 433 to hold that administrative as distinct from purely judicial remedies (the discretion not to prosecute, the royal prerogative, the role of the Parole Board, etc) were strong enough techniques to mitigate "the hardships which might otherwise occur in the most agonising cases" (see

A Lord Hailsham of St Marylebone LC in *R v Howe*, at p 433) if duress was not available as a defence to murder.

In *R v Abdul-Hussain* [1999] Crim LR 570, the Court of Appeal held that the defence of duress, whether by threats or from circumstances, was generally available in relation to all substantive crimes, except murder, attempted murder and some forms of treason. Rose LJ, speaking with the authority of the Vice-President of the Criminal Division of the Court of B Appeal, said that this was now the fourth occasion in five years on which the court wished to emphasise the urgent need for legislation to define duress with precision. In that case all the defendants except one (whose appeal was dismissed) had wished to put forward a defence to the effect that the reason why they had hijacked a Sudanese Airbus on a flight from Khartoum to Amman and had forced it to fly to Stanstead Airport in England was that C they were terrified that the Sudanese authorities might deport them to Iraq, where they faced the prospects of imprisonment in conditions of extreme hardship, torture and summary execution. Rose LJ said that the judgment of Simon Brown J in *R v Martin (Colin)* [1989] 1 All ER 652 afforded the clearest and most authoritative guide to the relevant principles in relation to both forms of duress. He also gave further guidance on the law as it now stands. In particular, he said that the imminent peril of death or serious D injury to the defendant, or those for whom the defendant has responsibility, was an essential feature of both forms of duress, and that this peril must operate in the mind of the defendant at the time when he commits the otherwise criminal act (so as to overbear his will). The execution of the threat need not, however, be immediately in prospect. He added [1999] Crim LR 570:

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> "the period of time which elapsed between the inception of the peril and the defendant's act was a relevant but not determinative factor; [and] that all the circumstances of the peril, including the number, identity and status of those creating it, and the opportunities (if any) to avoid it were relevant . . . when assessing whether the defendant's mind was affected so as to overbear his will . . ."

F In his judgment Rose LJ described how in the course of that hijacking an air hostess was seized and threatened with a plastic knife, an imitation grenade was produced (accompanied by a threat to blow up the plane), a knife was held for a very long time to the captain's back, passengers believed to be security officials were tied up and one of the defendants pretended to instruct the others to blow up the plane if there was any movement on board. The G defendants had declined to release the women and children at Larnaca, in Cyprus, where the plane stopped to refuel. The atmosphere on board was said to have been very tense.

I mention these facts to show that the Court of Appeal is now willing to entertain the possibility of a defence of duress even in a case as extreme as this if it is arguable that "the will of the accused has been overborne by threats of death or serious personal injury so that the commission of the H alleged defence was no longer [his] voluntary act": see *R v Hudson* [1971] 2 QB 202, 206E, per Lord Parker CJ. The defence is available on the basis that, if it is established, the relevant actors have in effect been compelled to act as they did by the pressure of the threats or other circumstances of imminent peril to which they were subject, and it was the impact of that

pressure on their freedom to choose their course of action that suffices to excuse them from criminal liability. A

I have described how in modern times Parliament has sometimes provided "necessity" defences in statutes and how the courts in developing the defence of duress of circumstances have sometimes equated it with the defence of necessity. They do not, however, cover exactly the same ground. In cases of pure necessity the actor's mind is not irresistibly overborne by external pressures. The claim is that his or her conduct was not harmful because on a choice of two evils the choice of avoiding the greater harm was justified. B

Necessity: a Canadian perspective

In his judgment in *R v Pommell* [1995] 2 Cr App R 607 Kennedy LJ cited an extract from the judgment of Dickson J, with which three other members of the Canadian Supreme Court agreed, in *Perka v The Queen* 13 DLR (4th) 1. In that case a ship bound on a voyage between Colombia and Alaska was driven by mechanical breakdowns and deteriorating weather to seek refuge on the west coast of Vancouver Island. Canadian police officers boarded the ship and seized over 33 tons of cannabis marijuana, which would not have come within the jurisdiction of the Canadian courts but for the emergencies which forced the ship to seek shelter in Canadian waters. C D

It was not in issue in that case that necessity was a common law defence, since it was expressly preserved by section 7(3) of the Canadian Criminal Code. What was in issue was whether it was available to the defendants on the facts. Dickson J held, at p 14, that, although the residual defence of necessity could not be conceptualised as a justification for wrongdoing, it might properly be identified as an excuse where someone does a wrongful act under pressure which, in the words of Aristotle's *Nichomachean Ethics*, "overstrains human nature and which no one could withstand". He was therefore concerned with that type of necessity which in modern English law would be characterised as "duress of circumstances". E

In her judgment Wilson J cavilled at Dickson J's conclusion that the appropriate jurisdictional basis on which to premise the defence of necessity was exclusively that of excuse. She was firmly of the view that a door should be left open, in an appropriate case, for justification to be adopted as the jurisdictional basis of the defence. She said that an act might be said to be justified where an essential element of the offence was absent, whereas an act might be excused if all the elements of the offence were present but the jury was requested to exercise compassion for the accused's predicament in its evaluation of his claim that "I could not help myself". In making this distinction Wilson J drew on the recent writings of Professor G R Fletcher, "The Individualisation of Excusing Conditions" (1974) 47 SCLR 1264, 1269. She referred to some American cases as illustrations of situations where someone's criminally wrongful act was treated as "normatively involuntary", and therefore blameless, in the particular circumstances in which he or she was situated. F G

She could see no reason why a court should not regard an act as justified on the grounds of necessity if it could say that the act was not only a necessary one but that it was also rightful rather than wrongful. She did not think that the fact that one act was done out of a sense of immediacy or urgency and another after some contemplation could serve to distinguish its quality in terms or right or wrong. Instead, she considered that any H

A justification of a wrongful act must be premised on the need to fulfil a legal duty which was in conflict with the duty which the accused was charged with having breached. She gave two Canadian cases as examples. In *R v Walker* (1979) 48 CCC (2d) 126 it was held to be legitimate to break the law where it had been necessary to rescue someone to whom one owed a positive duty of rescue (because failure to act in such a situation might itself constitute a B culpable act or omission: see *R v Instan* [1893] 1 QB 450). In *Morgentaler v The Queen* [1976] 1 SCR 616 Laskin CJC, taking forward the thinking of Macnaghten J in *R v Bourne* [1939] 1 KB 687, perceived a doctor's defence to an abortion charge as his legal duty to treat the mother rather than his alleged ethical duty to perform an unauthorised abortion. Wilson J said, at p 36:

C "where necessity is invoked as a justification for violation of the law, the justification must, in my view, be restricted to situations where the accused's act constitutes the discharge of a duty recognised by law. The justification is not, however, established simply by showing a conflict of legal duties. The rule of proportionality is central to the evaluation of a justification premised on two conflicting duties since the defence rests on the rightfulness of the accused's choice of one over the other."

D She made it reasonably clear, however, that she could not conceive of any circumstances in which this application of the doctrine of necessity could be extended to provide justification of an act of homicide. Her recourse to the principle of the universality of rights showed that she envisaged that everyone was of equal standing in relation to their right to life. For this reason she went on to say, at p 36:

E "The assessment cannot entail a mere utilitarian calculation of, for example, lives saved and deaths avoided in the aggregate but must somehow attempt to come to grips with the nature of the rights and duties being assessed. This would seem to be consistent with Lord Coleridge CJ's conclusion that necessity can provide no justification for the taking of a life, such an act representing the most extreme form of rights F violation. As discussed above, if any defence for such a homicidal act is to succeed, it would have to be framed as an excuse grounded on self-preservation. It could not possibly be declared by the court to be rightful."

I found this a valuable way of forcing us to think more clearly about the reasons why it is ever permissible to admit a defence drawn from what G Lord Hailsham of St Marylebone LC would describe as the genus of necessity as a means of establishing that a defendant is not in law guilty of a crime even though the requirements of mens rea (a guilty mind) and actus reus (a guilty act) appear to be satisfied. In the last resort, however, it does not provide the solutions we are seeking in the present case for three reasons. The first reason is that English criminal law does not make any clear-cut H distinction between a justification and an excuse. As Professor John Smith said in his first Hamlyn Lecture in 1989, "Justification or Excuse: Does it Matter?", p 12:

"Whether the act is one which society wants to be done, or merely tolerates, is a question which is not easy to answer if society has not

expressed its wishes in the form of legislation or judicial decision. Not unnaturally there is disagreement between the theorists. So far as the successful defendant is concerned, it matters not in the least whether the court, or anyone else, says that he is justified or merely excused; he is simply found not guilty in either event."

Secondly, as he points out, at p 18, the distinction between those who save others out of a legal duty and those who do the same act for reasons which cannot be so characterised is not always very easy to sustain. Thirdly, Wilson J made it clear that she did not regard the analysis as available when someone's right to life was in question.

The European Convention on Human Rights

I have already observed how in 1983 Professor Glanville Williams discussed the way in which the increasing emphasis on the importance of human rights might be difficult to reconcile with the doctrine of necessity, being as it is an expression of the philosophy of utilitarianism. The fundamental importance of the right to protection of life is so ingrained in the English common law that I do not consider that any different solution to the dilemma we face can be found in the language of the European Convention for the Protection of Human Rights and Fundamental Freedoms, on which we received helpful oral submissions from Mr Owen and Mr Taylor in addition to Mr Anderson's written submissions.

I can take the Convention points quite shortly because I have read in draft the judgment of Robert Walker LJ on these matters, with which I agree. I do not consider that the *R v Woollin* [1999] 1 AC 82 extension of the meaning of the word "intention" is appropriate when determining whether a doctor who performed a separation operation on conjoined twins in circumstances like these was intentionally killing the twin whose life was to be sacrificed. The doctor's purpose in performing the operation was to save life, even if the extinction of another life was a virtual certainty. Like Robert Walker LJ I do not consider that the adoption of an autonomous meaning of the word "intentionally" in article 2(1) of the Convention need have any effect on the interpretation of the concept of "intention" in our national law, which has at long last been settled by the House of Lords in *R v Woollin*.

I should add that I was unattracted by Mr Owen's fall-back argument, to the effect that article 2 contained an implied implication that the right it proclaims may be violated if it is in conflict with another person's article 2 right. He based his argument on some words used by the European Commission on Human Rights in its decision in *Paton v United Kingdom* (1980) 3 EHRR 408, 416, para 23. The doctrine of inherent (or implied) limitation still appears to be in its infancy as a matter of Convention law (see *van Dijk and van Hoof, Theory and Practice of the European Convention on Human Rights*, 3rd ed (1998), pp 763–765), and on the present state of Convention law I would be reluctant to hold, unless and until compelled to do so, that a right as fundamental as the right identified in article 2 can be subject to an implied limitation which destroys its value.

Mr Anderson also relied, much less convincingly, on articles 3 and 8 of the Convention. The medical evidence, which was not available to him, was to the effect that it is most unlikely that Mary can suffer pain, and I do not consider that her treatment during the course of the proposed operation, in

A which she will be under a general anaesthetic, could properly be described as inhuman or degrading within the meaning of article 3. The facts of *Ireland v United Kingdom* (1978) 2 EHRR 25, 59, 79–80, paras 96, 167 and *D v United Kingdom* (1997) 24 EHRR 423, 437–438, paras 51–53 are a very long way away from the present case. So far as article 8 is concerned, once it is established on the welfare principle that Jodie's interests are to be preferred, then the reference to the protection of the rights and freedoms of B others in article 8(2) provides a justification for what would otherwise be a wrongful interference with Mary's article 8(1) rights (which include a right not to be subjected to compulsory medical interference: see *Peters v Netherlands* (1994) 77-A D & R 75, 79).

After this long analysis of the doctrine of necessity in our criminal law, I turn finally to the question whether it is, uniquely, available in the present C case to provide a lawful justification for what would otherwise be an offence of murder.

Conclusion

I have considered very carefully the policy reasons for the decision in *R v Dudley and Stephens* 14 QBD 273 supported as it was by the House of Lords D in *R v Howe* [1987] AC 417. These are, in short, that there were two insuperable objections to the proposition that necessity might be available as a defence for the *Mignonette* sailors. The first objection was evident in the court's questions: who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? The second objection was that to permit such a defence would mark an absolute divorce of law from morality. In my judgment, neither of these objections are E dispositive of the present case. Mary is, sadly, self-designated for a very early death. Nobody 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 F Archbishop of Westminster is among 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. For those who share this philosophy, the law, recently approved by Parliament, which permits abortion at any time up to the time of birth if the conditions set out in section 1(1)(d) of the Abortion Act 1967, as substituted, are satisfied, is equally repugnant. But there are also those who believe with equal sincerity that it would be immoral not to G 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 a 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 concern to Lord Coleridge CJ and his fellow judges.

H There are sound reasons for holding that the existence of an emergency in the normal sense of the word is not an essential prerequisite for the application of the doctrine of necessity. The principle is one of necessity, not emergency: see Lord Goff in *In re F* [1990] 2 AC 1, 75D, the Law Commission in its recent report ((1993) (Law Com No 218), pp 63–64, paras 35.5–35.6) and Wilson J in *Perka v The Queen* 13 DLR (4th) 1, 33.

There are also sound reasons for holding that the threat which constitutes the harm to be avoided does not have to be equated with "unjust aggression", as Professor Glanville Williams has made clear in section 26.3 of his *Textbook of Criminal Law*, 2nd ed. None of the formulations of the doctrine of necessity which I have noted in this judgment make any such requirement: in this respect it is different from the doctrine of private defence.

If a sacrificial separation operation on conjoined twins were to be permitted in circumstances like these, there need be no room for the concern felt by Sir James Stephen that people would be too ready to avail themselves of exceptions to the law which they might suppose to apply to their cases, at the risk of other people's lives. Such an operation is, and is always likely to be, an exceptionally rare event, and because the medical literature shows that it is an operation to be avoided at all costs in the neonatal stage, there will be in practically every case the opportunity for the doctors to place the relevant facts before a court for approval (or otherwise) before the operation is attempted.

According to Sir James Stephen there are three necessary 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; (iii) the evil inflicted must not be disproportionate to the evil avoided. Given that the principles of modern family law point irresistibly to the conclusion that the interests of Jodie must be preferred to the conflicting interests of Mary, I consider that all three of these requirements are satisfied in this case.

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

For these reasons I, too, would dismiss this appeal.

ROBERT WALKER LJ

Conjoined twins

The tragic situation of Jodie and Mary is very rare in medical terms, and it appears to be unprecedented anywhere in the world in terms of full consideration of the legal position by a court. The basic statistics are that about one in 90 live births produces twins. About one in 250 live births produces monozygotic twins (identical twins from the division of a single fertilised ovum). Very rarely (a suggested figure is once in 100,000 births, although this figure is far from precise and seems to vary in different parts of the world) monozygotic twins fail to separate completely, as normally occurs about a fortnight after conception, resulting in conjoined twins. Rather over half of all conjoined twins are stillborn, and a further third both die within 24 hours. Only about 6% of conjoined twins are classified as ischiopagus (joined at the pelvic level) and only about 2% as ischiopagus tetrapus (joined at the pelvic level and having four legs).

Jodie's and Mary's medical condition is therefore very rare indeed. Their condition is even more exceptional in that—quite apart from abnormalities of their bodily organs in the region where they are joined—Mary has very grave defects in her brain, her heart and her lungs. For practical purposes her lungs are non-existent. She is wholly dependent for life on oxygenated

A blood circulated through Jodie's lungs and Jodie's heart. The consultant paediatric and neonatal surgeon, Mr B, has described her as "totally supported" by Jodie. It is the strain on Jodie of supporting her sister as well as herself which is very likely to lead to the deaths of both twins within a matter of months, if they remain joined, because Jodie is likely to suffer what is called high output heart failure. There is no practical possibility of Mary B being put on a heart-lung machine or receiving a heart-lung transplant. In an article by Hoyle and Thomas (1989) reviewing 33 separations of ischiopagus tetrapus twins reported throughout the world between 1955 and 1986, only two seem to have been cases in which, for reasons other than a shared vital organ, one identified twin had no prospect of surviving the surgery (one was already dying when the surgery was undertaken, and the other was anencephalic).

C The legal position has been considered in some published articles, including an article by Sally Sheldon and Stephen Wilkinson, "Conjoined Twins: the Legality and Ethics of Sacrifice" (1997) 5 Med L Rev 149 which contains a helpful discussion. But the only decision of a court referred to in any of the medical and legal literature is the decision in 1977 of a three-judge panel of the Family Court in Philadelphia which authorised an operation to D separate thoracopagus twins with a conjoined heart (see George J Annas (1987) 17 Hastings Center Report 27). The article also mentions a similar operation in Philadelphia in 1987 in which the hospital obtained prior clearance from the district attorney and approval from its own ethics committee, but did not go to court. It appears that in the 1977 case the parents, who were deeply religious Jews, had consented to the operation after taking rabbinical advice; and the hospital nurses, most of whom were E Roman Catholics, had also been reassured by a priest. The application to the Family Court was made by the surgeon for his own protection. It does not appear whether the Family Court gave a reasoned judgment (the court is said to have deliberated for only a few minutes, so probably it did not).

In these circumstances this court has to start with some very basic questions. Are these conjoined twins two persons or one in the eyes of the F law? If they are two persons, was Mary born alive? (If she was not born alive, there can be no possible question of criminal liability for her unlawful killing.)

Mr Whitfield, appearing with Mr Lloyd for the healthcare trust, conceded that Jodie and Mary must be regarded as two separate persons, and he was clearly right to do so. They have two brains and two nearly complete bodies, G despite the grave defects in Mary's brain and her heart and lungs. There are cases of incomplete (or heteropagus) twinning in which a child is born with abnormalities which can be regarded as no more than a parasitic attachment. But it has not been and could not be suggested that this case comes anywhere near that category.

The evidence also indicates that Mary, although incapable of separate existence, was born alive. A "still-born child" is defined by section 41 of the H Births and Deaths Registration Act 1953, as amended by section 1(1) of the Still-Birth (Definition) Act 1992, as: "a child which has issued forth from its mother after the twenty-fourth week of pregnancy and which did not at any time after being completely expelled from its mother breathe or show any other signs of life."

The medical notes from the hospital show that Mary was struggling to breathe, although sadly in vain, when she and Jodie were brought from the operating theatre into the recovery ward. Mr B (who would lead the operating team) was clear in his oral evidence to this court that Mary was not stillborn, but that she could not be resuscitated and was not viable. Since her umbilical cord was cut she has been dependent for life on her sister. The fact that she is alive as a distinct personality, but is not viable as a separate human being, is the awful paradox at the centre of this case.

The definition in the 1953 Act applies only for the purposes of that statute, but it appears to correspond closely (except in the precision of the minimum 24-week term, which is not relevant here) to the position at common law: see generally the full historical review by Brooke J in *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 617–623. Mr Harris, appearing with Mr Hockton, instructed by the Official Solicitor, for Mary, drew the court's attention to some passages in the speeches in *Airedale NHS Trust v Bland* [1993] AC 789, most notably in the speech of Lord Browne-Wilkinson, at pp 878–879, pointing out that, as medical science has developed new techniques and equipment for the prolongation of human life, the law has had to redefine death (in terms of brainstem death rather than cessation of unaided cardiovascular functioning). Mr Harris submitted that, just as the law has had to redefine death, so it may have to redefine the concept of being born alive. There are a number of difficulties in the way of that argument but they need not be considered further since Mr Whitfield, and all other counsel who might have been concerned to argue the contrary, have rightly conceded that Mary is a human being and was born alive.

It hardly needs to be said that there is no longer any place in legal textbooks, any more than there is in medical textbooks, for expressions (such as "monster") which are redolent of superstitious horror. Such disparagingly emotive language should never be used to describe a human being, however disabled and dysmorphic. But, having studied the medical evidence and the photographs, the court must recognise that if the twins remain as they are, solidly joined at their trunks, with their genitals and legs at right angles to their bodies, and if the specialists from Great Ormond Street Hospital prove right in their prediction that a longer lifespan is possible, there would be grave physical and (for Jodie) psychological problems to be faced. The appellant parents' counsel, Mr Taylor, himself used emotive language to describe that prospect when he drew attention to the new medical evidence.

The welfare principle

The twins are not wards of court, nor have they been taken into care under the Children Act 1989. The healthcare trust's application to the court was made under the inherent jurisdiction of the court. But the proceedings are proceedings with respect to the twins' upbringing, which is defined in section 105 of the Children Act 1989 so as to include care. Therefore the court is bound by the overriding welfare principle in section 1(1) of that Act: "the child's welfare shall be the court's paramount consideration."

In this case the court has to consider the welfare (or best interests—the expressions are synonymous) of each of the twins. The court has on several occasions had to consider a situation in which the interests of two minors appeared to be in conflict. In *Birmingham City Council v H (A Minor)*

A [1994] 2 AC 212 the House of Lords had to consider a conflict between the interests of a mother (aged 14 when her child was born) and her son (who was aged 2 when the appeal was heard). The issue was resolved on the narrow ground that the only question to be determined by the court was in respect of the baby's upbringing. But, in cases where questions as to the upbringing of two siblings are before the court, it appears that the court B must normally undertake a balancing exercise to achieve the situation of least detriment, as the Court of Appeal had held in the case of the child mother and her baby: see *Birmingham City Council v H (A Minor) (No 2)* [1993] 1 FLR 883; also *In re T and E (Proceedings: Conflicting Interests)* [1995] 1 FLR 581, 584–587.

However, the decisions in which those conflicts of interests arose were decisions as to matters such as residence and contact which, however C anxious and difficult, are routinely made by family judges. They were not decisions on a matter of life or death. The notion that the court should ever undertake the evaluation of the lives of two innocent human beings, with a view to deciding which should live and which should die, could not be reconciled with the law's respect for the sanctity (or inviolability) of human life, either before or after the incorporation of the European Convention on D Human Rights. In his enumeration of the salient principles in *Airedale NHS Trust v Bland* [1993] AC 789, 808 Sir Thomas Bingham MR put this first:

> "A profound respect for the sanctity of human life is embedded in our law and our moral philosophy, as it is in that of most civilised societies in the East and the West. That is why murder (next only to treason) has E always been treated here as the most grave and heinous of crimes."

This court has been shown many similar statements, both in law reports and in academic work, but it is unnecessary to multiply citations.

The court was referred to a number of reported decisions in which judges of the Family Division, or this court, have authorised the withdrawal of treatment (or the withholding of treatment on a future emergency) in the F case of severely disabled children. It is not necessary to refer to all the cases which were cited. All are concerned primarily with the question of the best interests of a single child, and the weight to be given to the wishes of devoted parents. None goes far into the issue of lawfulness, since it did not arise.

In *In re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421 this court (reversing the trial judge) authorised surgery, against the parents' wishes, for an intestinal blockage of a Down's syndrome baby who was only G a few days old. The baby was not very severely disabled. In *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 this court (upholding the trial judge) authorised non-resuscitation (on a future emergency) of a six-month-old child who had been born very prematurely and had suffered very severe brain damage. Lord Donaldson of Lymington MR said, at p 46:

> H "What doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which *as a side effect* will render death more or less likely. This is not a matter of semantics. It is fundamental. At the other end of the age spectrum, the use of drugs to reduce pain will often be fully justified, notwithstanding that this will hasten the moment of death.

What can never be justified is the use of drugs or surgical procedures with the primary purpose of doing so." A

In the same case Taylor LJ set out three principles which were not in dispute. The first related to the welfare principle and the weight to be given to parents' wishes. Taylor LJ went on, at p 53:

"Secondly, the court's high respect for the sanctity of human life imposes a strong presumption in favour of taking all steps capable of preserving it, save in exceptional circumstances. The problem is to define those circumstances. Thirdly, and as a corollary to the second principle, it cannot be too strongly emphasised that the court never sanctions steps to terminate life. That would be unlawful. There is no question of approving, even in a case of the most horrendous disability, a course aimed at terminating life or accelerating death. The court is concerned only with the circumstances in which steps should not be taken to prolong life." B C

In *In re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 WLR 242 this court (reversing the trial judge) upheld the objections of devoted parents to an 18-month-old child undergoing an operation for a liver transplant after previous surgery had been unsuccessful and had caused the child pain and distress. Butler-Sloss LJ, who was a member of the court, has since described the case as exceptional and as lying near one end of the spectrum of cases. One of its special features was that if the child were to have a successful liver transplant it would require total commitment by the caring parent to the proposed treatment. *In re T* confirms, following *In re Z (Identification: Restrictions on Publication)* [1997] Fam 1, that where parents withhold consent to a particular course of action the court's function is not limited to reviewing the parents' decision and reversing it only if it is unreasonable (as with an appellate court asked to reverse a lower court's exercise of discretion). The court exercises its own judgment. In *In re Z* Sir Thomas Bingham MR put it as follows, at pp 32–33: D E

"I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect. It should certainly not be disregarded or lightly set aside. But the role of the court is to exercise an independent and objective judgment. If that judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible parent, to give effect to its own judgment. That is what it is there for. Its judgment may of course be wrong. So may that of the parent. But once the jurisdiction of the court is invoked its clear duty is to reach and express the best judgment it can." F G

There are to my mind particularly strong reasons for having regard to the parents' views in this case, even if they have been, as the judge put it, "overwhelmed by the circumstances that confront them". They have sincerely held religious views, formed after discussion with a priest near the hospital, and now backed by the Archbishop of Westminster. Their views might be described as controversial but, unlike the objections to blood transfusion held by Jehovah's Witnesses, they are not obviously contrary to any view generally accepted by our society. Still less are their views contrary H

A to those generally accepted in the remote community from which they have come to this country. Healthcare services (and, it may be, social security) are less readily available in that community and the parents are naturally concerned about what the future would hold. No one suggested that it was selfish or unreasonable that they should have concerns about their ability, either financially or personally, to care for Jodie at home, if there is a B separation operation which Jodie alone survives (they assume that there is no possibility of their taking both twins home without separation). That is so, I think, even if they have taken what is on the medical evidence a rather pessimistic view of the likely outcome for Jodie after elective surgery.

I would add, to avoid any possible misunderstanding, that the doctors and officers of the healthcare trust have themselves shown every consideration to the parents. This court has had the benefit of hearing oral C evidence from Mr B, and has read transcripts of all the oral evidence given to the judge. It is impressive both for its sensitivity to the feelings and wishes of the twins' parents, and for its intellectual honesty. The medical specialists have faced up to the consequences for Mary of elective separation, but remain of the view that that separation is the best course.

The judge, who did not have the benefit of the very full and carefully-D prepared arguments which this court has heard, and for which we are greatly indebted to all counsel and solicitors in the case, dealt with the matter by considering first the best interests of Jodie, then the best interests of Mary and then, as a separate matter, the issue of lawfulness. Those issues are (in all too real a sense) not easily separated, and Mary's best interests cannot be fully considered except in the context of the decision of the House of Lords in *Airedale NHS Trust v Bland* [1993] AC 789, and the (perhaps even more E difficult) questions of possible unlawfulness and criminal liability which arise on the facts of this case.

So far as it was appropriate to consider Jodie's best interests on their own the judge had ample material on which to conclude, as he did, that elective separation of the twins would be in the best interests of Jodie, despite the risk, which is put at about 6%, of her not surviving the operation, and despite F the risks of her quality of life being affected by incontinence, difficulty in walking and the need for protracted reconstructive surgery. Those are risks—not probabilities, still less near certainties—and they were fully addressed in the medical evidence. The judge mentioned them at the beginning of his judgment. Nevertheless he rightly said that for Jodie separation means the expectation of a normal life.

G The judge came to the conclusion that separation would also be in Mary's best interests, even though it would result in her immediate death. As I have said, this raises very difficult issues. At present I deal primarily with the judge's findings of fact about Mary's condition. It is uncertain how far she can feel pain, but the evidence did not positively establish that she cannot feel pain. It did establish that she cannot cry, as she has no effective lungs. The judge was obviously very concerned about that, and about the prospect H of Mary being caused pain and discomfort as Jodie becomes more mobile. He referred to the oral evidence of the paediatric neurosurgeon: "I think that is a horrendous scenario, to think of being dragged around and being able to do nothing about it. I think with the increasing activity of Jodie, Mary's situation becomes worse."

Mr Taylor and Mr Harris have respectfully but firmly criticised the judge for fastening on this evidence, to the exclusion of other evidence that Mary probably cannot feel pain. There may be some force in that criticism, although this court would be slow to differ from the findings of this very experienced family judge who had seen and heard all the witnesses. But, even if it were assumed that Mary is no more capable of feeling pain or discomfort than she is of any pleasant sensation or emotion, it is hard to see any benefit to her from continued life. In *Bland's* case [1993] AC 789, 868 Lord Goff drew a distinction between cases in which the patient has (or may come to have) some awareness of his or her quality of life and cases of total unconsciousness. Whichever category Mary should be put in I do not differ from the judge's conclusion that to prolong Mary's life for a few months would confer no benefit on her but would be to her disadvantage. If Mary had been born separated from Jodie but with the defective brain and heart and lungs which she has, and if her life were being supported, not by Jodie but by mechanical means, it would be right to withdraw that artificial life support system and allow Mary to die.

Airedale NHS Trust v Bland

The facts of *Airedale NHS Trust v Bland* [1993] AC 789 are well known. A young man, aged 17 at the time of his injury but of full age at the time of the application to the court, was so severely injured in the Hillsborough disaster that he was in a persistent vegetative state. His cerebral cortex had been destroyed and he had no awareness of his condition and no sensation of pain. But his brainstem was alive and, although he could not swallow and required feeding through a nasal tube, he could breathe spontaneously. (His condition was therefore the converse of a patient with Guillain-Barré syndrome as in the Canadian case of *Nancy B v Hôtel-Dieu de Québec* (1992) 86 DLR (4th) 385; she had all her mental faculties but could not breathe and depended for continued life on a ventilator. The patient in the New Zealand case of *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235 was in a more advanced state of that syndrome, in which the brain is alive but incapable of controlling the body because the conductivity of the nervous system has been destroyed.)

In *Bland's* case the House of Lords, upholding this court and the President of the Family Division, authorised the withdrawal of treatment, that is, artificial nutrition and hydration, but made clear that positive action to bring about the patient's death would be unlawful. Lord Goff said [1993] AC 789, 865:

> "the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his

A suffering, however great that suffering may be: see *R v Cox* (1992) 12 BMLR 38. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia—actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law."

The practical result was that the patient died slowly from lack of nutrition B and hydration, a process which caused him no pain, but which seems likely to have caused distress to the nurses who were caring for him. Switching off a ventilator is also regarded as a withdrawal of treatment (that is, as an omission rather than a positive act) even though it results, and is expected to result, in immediate death. Many of the judges who considered *Bland's* case were understandably anxious about the intellectual robustness of the C distinction between death brought about by an omission, on the one hand, and death caused by a positive act, on the other hand. That appears very clearly in the speech of Lord Mustill. He said, at p 887:

"The conclusion that the declarations can be upheld depends crucially on a distinction drawn by the criminal law between acts and omissions, and carries with it inescapably a distinction between, on the one hand D what is often called 'mercy killing', where active steps are taken in a medical context to terminate the life of a suffering patient, and a situation such as the present where the proposed conduct has the aim for equally humane reasons of terminating the life of Anthony Bland by withholding from him the basic necessities of life. The acute unease which I feel about adopting this way through the legal and ethical maze E is I believe due in an important part to the sensation that however much the terminologies may differ the ethical status of the two courses of action is for all relevant purposes indistinguishable. By dismissing this appeal I fear that your Lordships' House may only emphasise the distortions of a legal structure which is already both morally and intellectually misshapen."

F He set out, at pp 897–898, an argument which he regarded as "logically defensible and consistent with the existing law", but added at p 898:

". . . I must recognise at once that this chain of reasoning makes an unpromising start by transferring the morally and intellectually dubious distinction between acts and omissions into a context where the ethical foundations of the law are already open to question. The opportunity for G anomaly and excessively fine distinctions, often depending more on the way in which the problem happens to be stated than on any real distinguishing features, has been exposed by many commentators, including in England the authors above-mentioned, together with *Smith & Hogan on Criminal Law*, 6th ed (1988), p 51, H Beynon at [1982] Crim LR 17 and M J Gunn and J C Smith at [1985] Crim LR 705. All this H being granted we are still forced to take the law as we find it and try to make it work."

(The academic writers to whom Lord Mustill had already referred were Professor Skegg, Professor Glanville Williams and Professor Kennedy. This court has been referred to much of this material and has also considered

more recent work, including some valuable articles by Professor Ashworth, Professor Finnis and Dr Keown.) A

Lord Browne-Wilkinson was equally candid. He described his conclusion as reached on narrow, legalistic grounds. He said at the end of his speech, at p 885:

> "the conclusion I have reached will appear to some to be almost irrational. How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question. But it is undoubtedly the law and nothing I have said casts doubt on the proposition that the doing of a positive act with the intention of ending life is and remains murder." B C

To the same effect Lord Lowry referred, at p 877, to a possible "distinction without a difference". Several of their Lordships referred to the need for these questions of life and death to be determined by the democratic processes of Parliament, rather than by the court.

The switching off or disconnection of a ventilator has also been regarded by the New Zealand court as a withdrawal of treatment: see the judgment of Thomas J in *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235, to which Lord Goff paid tribute in *Bland's* case [1993] AC 789, 867. The Canadian case of *Nancy B v Hôtel-Dieu de Québec* 86 DLR (4th) 385 was different in that the court's function was to recognise the rights of self-determination of a mentally competent but physically disabled patient. The decision of the House of Lords in *Bland's* case has (unsurprisingly, in view of its very controversial subject matter) attracted criticism. So far as legal academic literature is concerned this court has been referred in particular to two well argued articles in the Law Quarterly Review, (1993) 109 LQR 329 (Professor Finnis) and (1997) 113 LQR 481 (Dr Keown). But as Parliament has not since 1993 intervened to make any change in the law the decision in *Bland's* case is binding on this court, and it is important to identify the principle of the decision as precisely as possible. D E F

The following points seem to be stated or approved in all five of their Lordships' speeches and led to the result that the appeal in *Bland's* case should be dismissed. (1) The artificial feeding of the patient through a nasogastric tube constituted (at any rate in conjunction with other nursing care) medical treatment. (2) The discontinuance of artificial feeding should be regarded as an omission, since although the removal of the tube was a positive act the substance of the matter was the discontinuance of a treatment; and an omission to give treatment could not be unlawful or contrary to the patient's best interests unless there was a duty to treat him. (3) There was no duty on the doctors to administer to the patient treatment which was futile and contrary to his best interests. (4) None of this authorises or legalises a positive act intended to cause the patient's death, since, as Lord Goff put it, at p 866, the law "does not, for reasons of policy, consider that it forms any part of [a doctor's] duty to give his patient a lethal injection to put him out of his agony". It is that reasoning which led Lord Goff to say, at p 868: "the question is not whether it is in the best interests of G H

A the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care."

The judge's decision and the issues in the appeal

The judge considered whether elective separation would be in the best B interests of Jodie and whether it would be in the best interests of Mary. In each case he concluded that it would be. He then considered the question of lawfulness, which he regarded as the most difficult element in his decision. If the operation is carried out Mary's death would be the inevitable result of positive action by the surgeons, who would at some stage place a clamp within Jodie's body and cut off the supply to Mary's body of oxygenated blood from Jodie's heart and lungs. She would die immediately. The judge C said that he had not been presented with any argument based on the doctrine of double effect. He referred to the difficulty in this area of distinguishing between an act and an omission, and to the "Rubicon" which might be crossed. This was an indirect reference to a passage (already cited) in the speech of Lord Goff in *Bland's* case [1993] AC 789, 865. Having referred to these difficulties the judge said:

D "I was at first attracted by the thought prompted by one of the doctors, that Jodie was to be regarded as a life support machine and that the operation proposed was equivalent to switching off a mechanical aid. Viewed in that way previous authority would categorise the proposed operation as one of omission rather than as a positive act. However on reflection I am not persuaded that that is a proper view of what is E proposed in the circumstances of this particular case. I have preferred to base my decision upon the view that what is proposed and what will cause Mary's death will be the interruption or withdrawal of the supply of blood which she receives from Jodie. 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."

F There are some serious difficulties about this way of looking at the case, as Mr Taylor and Mr Harris have pointed out. It is impossible, they submitted, to describe the proposed surgery as being a withdrawal of treatment. It is active surgical intervention which will be invasive of the bodies of both Jodie and Mary, and will result in the latter's death. Nevertheless Mr Harris recognised that the principle of bodily integrity, which is fundamental to the court's approach to these problems, is difficult G to apply in the case of conjoined twins. Where twins are born alive but conjoined their physical integrity and autonomy has already been gravely prejudiced by the rare accident of incomplete separation at an early stage of gestation. But Mr Harris urged this court to take a principled approach, and not to decide this case in a way which might distort the development of the law. In this context he and other counsel drew attention to some cautionary H observations in recent cases in the House of Lords: *R v Kingston* [1995] 2 AC 355, 375, 377; *Hunter v Canary Wharf Ltd* [1997] AC 655, 707 and *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 378–379.

The case put forward by Mr Taylor and Mr Harris is straightforward, and is supported by two important decisions of the House of Lords. A surgical operation to separate the twins would be a deliberate, positive act. It would

be invasive of Mary's body and it would cause her death. Necessity, counsel said, is not a defence to murder: *R v Howe* [1987] AC 417. Nor is it a defence to say that the defendant did not wish to cause death, if it is for all practical purposes inevitable that that will be the result of his actions: *R v Woollin* [1999] 1 AC 82. Nothing in the cases on medical treatment, including *Bland*, is in any way inconsistent with those principles.

Against that apparently simple and compelling case various lines of argument have been put forward by those counsel who argued for elective separation (that is Mr Whitfield and Mr Owen, who appeared for Jodie to argue the issues of criminal law; they received some degree of support from Miss Davies, Mr Perry and Mr Patterson, who were appointed by the Attorney General to assist the court, but made clear that they were not arguing for any particular outcome). These arguments overlap to some extent, as became apparent as soon as counsel's written submissions were delivered. It is convenient to note at the outset certain lines of argument which were not pursued, at any rate with any enthusiasm, in this court. No one argued that Mary could not be a victim of unlawful killing. No one other than Mr Whitfield argued that the operation could be equated with a withdrawal of treatment such as was regarded (in *Bland's* case [1993] AC 789) as an omission. That seems to have been the ground on which the judge based his decision as to lawfulness. Mr Whitfield sought to uphold this ground of decision, while candidly recognising the difficulties in his way. He pointed out that in the proposed operation no bodily organ or skin of Mary's would be transferred to Jodie; their shared bladder would be divided into two. Nevertheless it would be invasive of Mary's body. On the clear and undisputed evidence as to what the proposed operation would involve, it cannot be described as a withdrawal of treatment, or as an omission rather than a positive act.

The main submissions in favour of upholding the judge's order were based on intention and necessity, including the species of necessity sometimes referred to as private defence; and some counsel, although not Miss Davies, also relied on the doctrine of double effect, which no one had relied on below, but which can be seen as a sort of bridge between the issue of intention and the issue of necessity. The arguments run into each other. What follows is a summary treatment of difficult issues which are more fully and profoundly considered in the judgment of Brooke LJ.

Criminal law issues

There are various ways in which English criminal law gives effect to the general intuitive feeling that a defendant should not be convicted of a serious crime unless he did the prohibited act intentionally and in circumstances in which he should be held responsible for the consequences. Many of these are concerned with cases, which can all be loosely called cases of necessity, where the defendant's freedom of choice has in one way or another been constrained by circumstances. But, if a defendant's action is of its nature certain, or virtually certain, to produce a harmful result, he cannot normally be heard to say that he did not intend that result. In *R v Woollin* [1999] 1 AC 82 an angry father threw his three-month-old son onto a hard surface. The child suffered a fractured skull and died. The father was convicted of murder but because of a misdirection the House of Lords allowed his appeal, substituting a verdict of guilty of manslaughter. That was the context in

A which their Lordships approved, as part of a model direction to the jury, the passage at p 96:

> "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."

B

The decision of the House of Lords in *R v Woollin* has, it is to be hoped, finally resolved a debate as to the mental element requisite for murder ("malice aforethought" is the traditional but archaic phrase) which has been continuing intermittently since *Director of Public Prosecutions v Smith* [1961] AC 290, with legislative intervention in the form of section 8 of the Criminal Justice Act 1967. Mr Owen submitted that *R v Woollin* C may have to be reconsidered in the light of the Human Rights Act 1998 and article 2 of the European Convention on Human Rights. I would not accept that submission, if it were relevant, for reasons set out later in this judgment.

However, the stark facts of *R v Woollin* [1999] 1 AC 82 and the speeches in the House of Lords in that case say nothing at all about the situation in D 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). This is the doctrine (or dilemma) of double effect which has been debated by moral philosophers, as well as lawyers, for millennia rather than centuries. In one class of case the good purpose and the foreseen but undesired consequence, what Bentham called "oblique intention", are both directed at the same individual. That can be E illustrated by a doctor's duty to his patient. The doctor may in the course of proper treatment have to cause pain to the patient in order to heal him. Conversely he may, in order to palliate severe pain, administer large doses of analgesics even though he knows that the likely consequence will be to shorten the patient's life. That was recognised by Lord Donaldson of Lymington MR in the passage of his judgment in *In re J* [1991] Fam 33, F 46 which I have already cited (note its references to primary purpose and side effects; similar language was used by Ognall J in his summing up to the jury in *R v Cox* 12 BMLR 38, the case of the doctor who administered potassium chloride to a dying patient). Similarly Lord Goff referred in *Bland's* case [1993] AC 789, 867 to:

> "the established rule that a doctor may, when caring for a patient who G is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful."

In these cases the doctrine of double effect prevents the doctor's foresight H of accelerated death from counting as a guilty intention. This type of double effect cannot be relevant to conduct directed towards Mary unless the mere fact of restoring her separate bodily integrity, even at the moment of death, can 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.

There is another class of case in which a person may be faced with the dilemma of whether to save himself or others at the cost of harm or even death to a third person. The dilemma generally rises as the result of an emergency, and the examples, real or imagined, are typically concerned with disasters at sea, or emergencies during mountaineering or other hazardous activities. If a person, faced with such a dilemma, acts with the intention of saving his own life, or the lives of others, it may be said that that leaves no room for a guilty intention to harm or even kill the third person. Equally it may be said that although he must, on *R v Woollin* [1999] 1 AC 82 principles, be taken to have intended the death which he foresaw as virtually certain, he has a defence of necessity. That is the way the submission was put by Miss Davies.

Of the many real and imagined examples put before the court it is worth mentioning two incidents which really did happen, although neither was the subject of a court decision. One is the awful dilemma which faced the commander of an Australian warship, in peacetime, when a very serious fire occurred in the engine room. He ordered the engine room to be sealed off and flooded with inert gas, in order to save the ship and the rest of the crew, although the order meant certain death for anyone who was still alive in the engine room. The other is the equally awful dilemma of a mountaineer, Simon Yates, who held his fellow climber, Joe Simpson, after he had slipped and was dangling on a rope over a precipice at 19,000 feet in the Andes. Yates held Simpson for an hour, unable to recover him and becoming increasingly exhausted. Yates then cut the rope. Almost miraculously Simpson landed on a snowy ice bridge 100 feet below, and survived. When they met again Simpson said to Yates, "You did right." This incident is mentioned in Professor Smith's 1989 Hamlyn Lectures, "Justification and Excuse in the Criminal Law", p 79.

The House of Lords has made clear that a doctrine of necessity does form part of the common law: see *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, especially in the speech of Lord Goff, at pp 74–78, and *R v Bournewood Community and Mental Health Trust, Ex p L* [1999] 1 AC 458. In the latter case Lord Goff said, at p 490:

> "The concept of necessity has its role to play in all branches of our law of obligations—in contract (see the cases on agency of necessity), in tort (see *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1), and in restitution (see the sections on necessity in the standard books on the subject) and in our criminal law. It is therefore a concept of great importance. It is perhaps surprising, however, that the significant role it has to play in the law of torts has come to be recognised at so late a stage in the development of our law."

In *R v Howe* [1987] AC 417 the House of Lords held that duress by threats is no defence to a charge of murder (and in *R v Gotts* [1992] 2 AC 412 that has, by a bare majority, been extended to attempted murder; the dissenting speech of Lord Lowry merits careful study). In *R v Howe* [1987] AC 417, 429 Lord Hailsham of St Marylebone LC referred to what he called the famous and important case of *R v Dudley and Stephens* 14 QBD 273 in which two shipwrecked mariners, adrift in a boat, killed the ailing cabin boy and survived by eating his flesh. They were convicted of murder but the death sentence was commuted. Lord Hailsham of St Marylebone LC said

A that that case was generally regarded as an authority on the "supposed defence of necessity" but he went on, at p 429:

> "There is, of course, an obvious distinction between duress and necessity as potential defences; duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused. This, however, is, in my view a
B distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats."

Similarly the defence of private defence (action in defence of one's own life, person or property, or in defence of the life, person or property of another) can be seen as a species of a more general defence based on
C necessity. The law lays great stress on action in self-defence being no more than is necessary: see *Palmer v The Queen* [1971] AC 814, especially at pp 828–829. But it is clear that deliberate killing in self-defence can sometimes be justified.

Duress of circumstances can therefore be seen as a third or residual category of necessity, along with self-defence and duress by threats. I do not think it matters whether these defences are regarded as justifications or
D excuses. Whatever label is used, the moral merits of the defence will vary with the circumstances. The important issue is whether duress of circumstances can ever be a defence to a charge of murder. There is authority that it can be a defence to the very serious crime of aircraft hijacking contrary to section 1 of the Aviation Security Act 1982, for which the maximum punishment is life imprisonment: see *R v Abdul-Hussain*
E [1999] Crim LR 570. The judgment of the court in that case, delivered by Rose LJ, examined the development of the defence. Rose LJ stated the principles which he derived from the authorities, the first three principles being as follows, from the transcript of the judgment:

> "(1) Unless and until Parliament provides otherwise, the defence of duress, whether by threats or from circumstances, is generally available in
F relation to all substantive crimes, except murder, attempted murder and some forms of treason: *R v Pommell* [1995] 2 Cr App R 607, 615. Accordingly, if raised by appropriate evidence, it is available in relation to hijacking aircraft; although, in such cases, the terror induced in innocent passengers will generally raise issues of proportionality for determination, initially as a matter of law by the judge and, in appropriate cases, by the jury. (2) The courts have developed the defence
G on a case by case basis, notably during the last 30 years. Its scope remains imprecise: *R v Howe* [1987] AC 417, 453–454; *R v Hurst* [1995] 1 Cr App R 82, 93. (3) Imminent peril of death or serious injury to the defendant, or those to whom he has responsibility, is an essential element of both types of duress: see *Southwark London Borough Council v Williams* [1971] Ch 734, 746A, per Edmund Davies LJ; *R v Loughnan*
H [1981] VR 443, by the majority, at p 448 and the dissentient, at p 460; and *R v Cole* [1994] Crim LR 582)."

The hijacking case concerned Shiite muslims from southern Iraq. Many members of their families had been tortured and killed and they faced similar threats. Duress of circumstances was therefore a much more suitable

description of their plight than the dilemma facing the doctors in this case. The doctors are not faced with any threat to themselves, but they are faced with the anxious dilemma of trying to perform the professional duties which they owe to their two infant patients. The special features of this case are that the doctors do have duties to their two patients, that it is impossible for them to undertake any relevant surgery affecting one twin without also affecting the other and that the evidence indicates that both twins will die in a matter of months if nothing is done. Whether or not that is aptly described as duress of circumstances, it is a situation in which surgical intervention is a necessity if either life is to be saved.

I do not find any clear principle in *R v Howe* [1987] AC 417, *R v Gotts* [1992] 2 AC 412 or *R v Abdul-Hussain* [1999] Crim LR 570 which applies to the clinical dilemma which faces the doctors in this case. Like the other members of the court I have derived assistance from the minority judgment of Wilson J given in the Supreme Court of Canada in *Perka v The Queen* 13 DLR (4th) 1. The facts of that case were totally different (a ship used by drug smugglers had been driven ashore by a storm) but the judgment of Wilson J discusses the underlying principles and the importance of a conflict between legal, as opposed to moral, duties. Wilson J said, at pp 34–35:

> "Accordingly, not only can the system of positive law not tolerate an individual opting to act in accordance with the dictates of his conscience in the event of a conflict with legal duties, but it cannot permit acts in violation of legal obligations to be justified on the grounds that social utility is thereby increased. In both situations the conflicting 'duty' to which the defence arguments point is one which the court cannot take into account as it invokes considerations external to a judicial analysis of the rightness or wrongness of the impugned act. As Lord Coleridge CJ succinctly put it in *R v Dudley and Stephens* 14 QBD 273, 287: 'Who is to be the judge of this sort of necessity?' On the other hand, in some circumstances defence counsel may be able to point to a conflicting duty which courts can and do recognise. For example, one may break the law in circumstances where it is necessary to rescue someone to whom one owes a positive duty of rescue (see *R v Walker* (1979) 48 CCC (2d) 126), since failure to act in such a situation may itself constitute a culpable act or omission: see *R v Instan* [1893] 1 QB 450. Similarly, if one subscribes to the viewpoint articulated by Laskin CJC in *Morgentaler v The Queen* [1976] 1 SCR 616 and perceives a doctor's defence to an abortion charge as his legal obligation to treat the mother rather than his alleged ethical duty to perform an unauthorised abortion, then the defence may be invoked without violating the prohibition enunciated by Dickson J in *Morgentaler v The Queen* against choosing a non-legal duty over a legal one."

She said, at p 36:

> "The justification is not, however, established simply by showing a conflict of legal duties. The rule of proportionality is central to the evaluation of a justification premised on two conflicting duties since the defence rests on the rightfulness of the accused's choice of one over the other. As the facts before the court in the present case do not involve a

A conflict of legal duties it is unnecessary to discuss in detail how a court should go about assessing the relative extent of two evils. Suffice it to say that any such assessment must respect the notion of right upon which justification is based. The assessment cannot entail a mere utilitarian calculation of, for example, lives saved and deaths avoided in the aggregate but must somehow attempt to come to grips with the nature of B the rights and duties being assessed. This would seem to be consistent with Lord Coleridge CJ's conclusion that necessity can provide no justification for the taking of a life, such an act representing the most extreme form of rights violation. As discussed above, if any defence for such a homicidal act is to succeed, it would have to be framed as an excuse grounded on self-preservation."

C Wilson J's reference to a conflict of duties in relation to abortion must be treated with caution because of the well established rule that English law (like Canadian law, but here differing markedly from the teaching of the Roman Catholic church) does not regard even a viable full-term foetus as a human being until fully delivered: see the account in *Rance v Mid-Downs Health Authority* [1991] 1 QB 587, 617–623 to which I have already referred, and also *St George's Healthcare NHS Trust v S* [1999] Fam 26, 45–D 50. There is in law no real analogy between Mary's dependence on Jodie's body for her continued life, and the dependence of an unborn foetus on its mother.

In truth there is no helpful analogy or parallel to the situation which the court has to consider in this case. It is unprecedented and paradoxical in that in law each twin has the right to life, but Mary's dependence on Jodie is E severely detrimental to Jodie, and is expected to lead to the death of both twins within a few months. Each twin's right to life includes the right to physical integrity, that is the right to a whole body over which the individual will, on reaching an age of understanding, have autonomy and the right to self-determination: see the citations from *Bland's* case [1993] AC 789 collected in the *St George's Healthcare* case [1999] Fam 26, 43–45.

In the absence of parliamentary intervention the law as to the defence of F necessity is going to have to develop on a case by case basis, as Rose LJ said in *R v Abdul-Hussain* [1999] Crim LR 570. I would extend it, if it needs to be extended, to cover this case. It is a case of doctors owing conflicting legal, and not merely social or moral, duties. It is a case where the test of proportionality is met, since it is a matter of life and death, and on the evidence Mary is bound to die soon in any event. It is not a case of G evaluating the relative worth of two human lives, but of undertaking surgery without which neither life will have the bodily integrity, or wholeness, which is its due. It should not be regarded as a further step down a slippery slope because the case of conjoined twins presents an unique problem. There is on the facts of this case some element of protecting Jodie against the unnatural invasion of her body through the physical burden imposed by her conjoined twin. That element must not be H overstated. It would be absurd to suggest that Mary, a pitiful and innocent baby, is an unjust aggressor. Such language would be even less acceptable than dismissing Mary's death as a "side effect". Nevertheless, the doctors' duty to protect and save Jodie's life if they can is of fundamental importance to the resolution of this appeal.

The European Convention on Human Rights A

Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides for the right to life. It provides:

> "(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. (2) Deprivation of life shall not be regarded as inflicted B in contravention of this article where it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

The right has, naturally enough, been described as one of the most C fundamental provisions of the Convention: *McCann v United Kingdom* 21 EHRR 97, 160, para 147. Article 2 was in the forefront of the written submissions of Mr Anderson on behalf of the Pro-Life Alliance. Mr Anderson also made submissions based on articles 3 and 8 of the Convention and on article 2 of the Fourth Protocol to the Convention. The last-mentioned submissions would be relevant only if there were a dispute, D which at present there is not, about the twins being moved to another country. Mr Anderson's submissions on article 2 of the Convention were on the same lines as those of Mr Taylor and Mr Harris, but were more fully developed. Mr Anderson submitted that the word "intentionally" in article 2(1) should be given its natural and ordinary meaning, and that the Strasbourg jurisprudence has no hint of the doctrine of double effect. It does not admit of necessity. The positive obligation in the first sentence of E article 2(1), which is the only provision on which Jodie could rely, is a very much weaker obligation: see *Osman v United Kingdom* (1998) 29 EHRR 245, 305–306, para 116.

Mr Owen did not seek to rely on any part of article 2(2). He rightly accepted that Mary's dependence on Jodie's cardiovascular system, however life-threatening to Jodie, could not be described as unlawful violence. But F Mr Owen and Mr Whitfield both relied strongly on the word "intentionally" (in French "intentionnellement") in article 2(1). Mr Owen seized on Mr Anderson's submission that the word should be given its natural and ordinary meaning. That meaning, he said, was limited to the purpose of an action. The *R v Woollin* [1999] 1 AC 82 principle, extending intention to foreseen but undesired consequences, did not apply. That was why the draftsmen of article 2 did not think it was necessary to include further G qualifications relating to double effect. Mr Owen went so far as to submit that the *R v Woollin* principle will have to be modified as a result of the coming into force of the Human Rights Act 1998. I do not follow that submission. The Convention does not in any way restrict a contracting state as to how the most serious form of homicide is defined in its domestic law.

Mr Anderson's submissions were clearly and skilfully developed but I do H not accept them. The Convention is to be construed as an autonomous text, without regard to any special rules of English law, and the word "intentionally" in article 2(1) must be given its natural and ordinary meaning. In my judgment the word, construed in that way, applies only to cases where the purpose of the prohibited action is to cause death. It does

A not import any prohibition of the proposed operation other than those which are to be found in the common law of England. The coming into force of the Human Rights Act 1998 on 2 October 2000 does not therefore alter my view of the case. The incorporation of the Convention into domestic law is a very important event but in this case its effect is to confirm, and not to alter, pre-existing law.

B *The Archbishop's submissions*

This court has also accepted written submissions made by the Roman Catholic Archbishop of Westminster, the Most Reverend Cormac Murphy-O'Connor. Those submissions make five salient points based on Roman Catholic faith and morality. These are, first, that human life is sacred and inviolable. Secondly, a person's bodily integrity should not be invaded when C that can confer no benefit. Thirdly, the duty to preserve one person's life cannot without grave injustice be effected by a lethal assault on another. Fourthly, there is no duty on doctors to resort to extraordinary means in order to preserve life. Fifthly, the rights of parents should be overridden only where they are clearly "contrary to what is strictly owing to their children". The rest of the submissions are very largely submissions as to English law D and cover points already considered in this judgment.

The five salient points made by the Archbishop are entitled to profound respect. In general they underpin some important foundations of English law, although the fifth point does not form part of English law, and they have no doubt been reflected in the advice which the twins' parents have received from their local priest. But they do not explain or even touch on what Roman Catholic moral theology teaches about the doctrine of double effect, E despite its importance in the Thomist tradition (there is some evidence that the doctrine was considered by the Roman Catholic Archdiocese of Philadelphia in the case in 1977 which I have already mentioned: see Thomasma and others, "The Ethics of Caring for Conjoined Twins" (1996) 26 Hastings Center Report 4, 9). The term "casuistry" has come to have bad connotations but the truth is that in law as in ethics it is often necessary to F 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.

G *Conclusions*

In this case highly skilled and conscientious doctors believe that the best course, in the interests of both twins, is to undertake elective surgery in order to separate them and save Jodie. The surgery would not be intended to harm Mary but it would have the effect of ending her life, since her body cannot H survive on its own, and there is no question of her life being prolonged by artificial means or by a heart-lung transplant. The doctors' opinion cannot be determinative of the legality of what is proposed—that responsibility has fallen on the court—but it is entitled to serious respect. In *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 190 Lord

Scarman, with whom Lord Fraser of Tullybelton and Lord Bridge of Harwich agreed, said, in relation to the supply of contraceptives to a girl under 16: "The bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of the criminal offence of aiding and abetting the commission of unlawful sexual intercourse." A

Here the court is concerned with the possibility of the commission of a much more serious criminal offence, that is murder. But in the wholly exceptional case of these conjoined twins I consider that the same principles apply. In *Airedale NHS Trust v Bland* [1993] AC 789 Sir Thomas Bingham MR, whose judgment was approved in the House of Lords by Lord Goff and a majority of their Lordships, was prepared to put the matter very broadly, at p 815: "For present purposes I do not think it greatly matters whether one simply says that that is not an unlawful act, or that the doctor lacks criminal intent, or that he breaches no duty or that his act did not cause death." B C

In this case the doctors would perform a positive act of invasive surgery, but they would do so for the well-intentioned purposes which I have mentioned. The surgery would plainly be in Jodie's best interests, and in my judgment it would be in the best interests of Mary also, since for the twins to remain alive and conjoined in the way they are would be to deprive them of the bodily integrity and human dignity which is the right of each of them. As Thomas J said in *Auckland Area Health Board v Attorney General* [1993] 1 NZLR 235, 245: "Human dignity and personal privacy belong to every person, whether living or dying." D

Much of this judgment has necessarily been rather technical, and I am conscious that some of it may seem rather remote from the deeply troubling dilemma which Jodie's and Mary's condition presents. Every member of the court has been deeply troubled by this case, but we have to decide it in accordance with the principles of existing law as we perceive them to apply to this unprecedented situation. I will summarise my conclusions as to the applicable principles as simply as I can. E

(i) The feelings of the twins' parents are entitled to great respect, especially so far as they are based on religious convictions. But as the matter has been referred to the court the court cannot escape the responsibility of deciding the matter to the best of its judgment as to the twins' best interests. F

(ii) The judge erred in law in equating the proposed surgical operation with the discontinuance of medical treatment (as by disconnecting a heart-lung machine). Therefore the Court of Appeal must form its own view. G

(iii) Mary has a right to life, under the common law of England (based as it is on Judaeo-Christian foundations) and under the European Convention on Human Rights. It would be unlawful to kill Mary intentionally, that is to undertake an operation with the primary purpose of killing her.

(iv) But Jodie also has a right to life.

(v) Every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy—the right to have one's own body whole and intact and (on reaching an age of understanding) to take decisions about one's own body. H

(vi) By a rare and tragic mischance, Mary and Jodie have both been deprived of the bodily integrity and autonomy which is their natural right.

A There is a strong presumption that an operation to separate them would be in the best interests of each of them.

(vii) 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 B because she was intentionally killed, but because her own body cannot sustain her life.

(viii) Continued life, whether long or short, would hold nothing for Mary except possible pain and discomfort, if indeed she can feel anything at all.

(ix) 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 C above another.

(x) The proposed operation would not be unlawful. It would involve the positive act of 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.

D I would therefore dismiss this appeal.

Appeal dismissed.
Leave to appeal to parents and to Official Solicitor.

E 3 November. The court (Ward and Robert Walker LJJ) dismissed an appeal by Mr Bruno Quintavalle, a director of the Pro-Life Alliance, from the decision of Dame Elizabeth Butler-Sloss P dismissing his application for the removal of the Official Solicitor on the ground that he had improperly refused or neglected to present an appeal to the House of Lords and for the applicant's appointment in his place.

F *Solicitors: Pannone & Partners, Manchester; Bindman & Partners; Hempsons, Manchester; Official Solicitor; Treasury Solicitor; Brown Cooper.*

RVR

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