

# "On the Sharpest Horns of Dilemma": Re A (Conjoined Twins)

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Medical Law Review, 9 (3) pp 201 – 207

2001

Post Refereed Version – Not Published Version

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**Abstract:** n/a

**Keywords:** n/a

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## Introduction

This issue of the *Medical Law Review* contains six papers which were originally presented at a workshop held at Keele University in February 2001.<sup>1</sup> The event brought together lawyers and philosophers to discuss *Re A (children) (conjoined twins)*, a case which had gripped the popular imagination and dominated the news media for the previous months.<sup>2</sup>

The facts of *Re A* are so well-known that they need only the briefest rehearsal here. Conjoined twin baby girls, known as Jodie and Mary for the purposes of the court case, were born at St Mary's Hospital, Manchester, in August 2000. Their Maltese parents, the Attards, had travelled to Manchester from their home in Gozo to receive specialist medical treatment for their babies, after learning that Mrs Attard was carrying conjoined twins. Mary and Jodie were ischiopagus

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<sup>1</sup> *Re A (Children): a Workshop*, Keele University, 14 February 2001, sponsored by the Departments of Law and Philosophy, Keele University, and the UK Forum on Health Care Law and Ethics. We would like to thank all of the speakers for their stimulating and thought-provoking presentations on that occasion and the audience for their many insightful comments. We are also indebted to Professor Andrew Grubb for his invitation to reproduce the papers here.

<sup>2</sup> *Re A (Children) (conjoined twins)* [2000] 4 All E.R. 961.

conjoined twins. The lower ends of their spines and spinal cords were fused, and they shared a bladder and a common aorta. The heart and lungs located within the smaller and weaker twin (Mary) did not function and her supply of blood was pumped by the heart of her larger sibling (Jodie). Mary had a number of other medical problems including a poorly developed 'primitive' brain and abnormal neurological responses.

It was agreed that if the twins were not separated then there were only two possible outcomes. Either Jodie's heart and lungs would be gradually damaged by the strain of providing a blood supply for two bodies, her heart would fail and the twins would die (within a time-span estimated to be between six months and two years) or, alternatively, Mary might die in which case it would be necessary to perform an emergency separation procedure to save Jodie. Emergency separation would have a far smaller chance of success for Jodie (estimated at 60% risk of mortality) than would an earlier, elective separation (estimated at 6% risk of mortality). However, if the twins were separated, this would inevitably involve the severing and clamping of the artery which allowed Jodie's heart to pump blood around Mary's body, swiftly and inexorably resulting in the Mary's death. It was accepted that, should she survive, Jodie would probably be left with a level of disability consistent with living a comparatively normal life. The parents, the hospital, and (eventually) the courts were therefore faced with a dreadful dilemma: separate the twins in an attempt to save Jodie's life but in so doing end Mary's life, or refrain from separation leaving both twins to die within a relatively short period of time.

The Attards, who were devout Roman Catholics, opposed separation surgery, stating: “we cannot begin to accept or contemplate that one of our children should die to enable the other one 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”.<sup>3</sup> St Mary’s Hospital disagreed and Central Manchester Health Area NHS Trust initiated proceedings in the High Court, seeking a declaration that separation would be lawful. This was duly granted.<sup>4</sup> In a lengthy judgement, the Court of Appeal dismissed appeals brought by the parents and by the Official Solicitor acting on behalf of Mary. The separation was performed in November 2000. Mary died in the operating room. Jodie and her parents returned to Gozo in June 2001, at which time one of the consultant surgeons at St Mary’s commented on her condition:

“She has come on really well, better than expected. Everything works and everything is where it should be, as it is in a normal baby. There are no plans for further surgery and we are confident she will have an excellent quality of life.”<sup>5</sup>

The judgements of the courts are complex and whilst all four of the judges involved in deciding the case found in favour of allowing separation, the reasoning

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<sup>3</sup> *Re A* at 985.

<sup>4</sup> *Central Manchester Healthcare Trust v Mr and Mrs A and A Child* (unreported). It was only this disagreement between parents and hospital which led to the courts becoming involved. In other similar cases where there was agreement surgery has gone ahead with no prior judicial discussion: see S. Sheldon and S. Wilkinson ‘Conjoined Twins: the Ethics and Legality of Sacrifice (1997) 5(2) Med. L. Rev. 149 and S. Holm and C. Erin ‘Deciding on Life – an Ethical Analysis of the Manchester Conjoined Twins Case’ (forthcoming 2001) 6 *Jahrbuch für Wissenschaft und Ethik*. Andrew Bainham is particularly critical of the Court of Appeal’s acceptance that, had the doctors treating Mary and Jodie been in agreement with the parents, they would have been acting perfectly lawfully if they decided against separation: A Bainham, ‘Resolving the Unresolvable: the Case of Conjoined Twins’ (2001) 60(1) C.L.J. 49, see also Freeman, this collection.

<sup>5</sup> T. Reid, ‘Separated Twin Goes Home to Row over £1m Media Deal’, *Times*, 18 June 2001.

by which they reached this conclusion varied significantly. Johnson J in the High Court held that separation surgery was in Mary's best interests. Her life would be short and hurtful to her and to prolong it would be 'very seriously to her disadvantage'. Further, he held that the separation of Mary and Jodie would be not an act, but an omission – the interruption or withdrawal of the supply of blood which Mary received from Jodie. As such, the surgery could go ahead by analogy with those cases where the courts have authorised the withholding of food and hydration.<sup>6</sup> The parents appealed on the grounds that Johnson J erred in holding that the operation was (i) in Mary's best interests; (ii) in Jodie's best interests; and (iii) lawful.

The Court of Appeal was unanimous both in upholding the declaration that separation surgery was lawful and in rejecting Johnson J's reasoning in support of such a conclusion.<sup>7</sup> The Court's own reasoning was complex, containing lengthy discussions of both family and criminal law principles. The family law questions, addressed primarily in the judgement of Ward LJ, involved the Court in assessing whether separation was in the twins' best interests. Having decided that separation was in Jodie's best interests but against Mary's, the Court was faced with the question of how to balance the competing interests of the two children. With some difficulty, it was decided that the balance lay in favour of giving Jodie a chance of life. That resolved, the Court was then faced with a second and still more difficult question: would the operation be in accordance with the principles of criminal law? Whilst all three judges agreed that the operation would be lawful, the

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<sup>6</sup> Ward LJ described Johnson J's characterisation of separation surgery as an omission, as 'utterly fanciful' if 'valiant and wholly understandable', at 1003.

<sup>7</sup> Although, unlike Ward and Brooke LJJ, Walker LJ concurred that separation was in Mary's 'best interests'.

bases for this view range from a rare reliance on the doctrine of necessity (Brooke LJ) to an invocation of a ‘quasi self-defence’ argument (Ward LJ).

Given the plethora of issues raised by this case, it is scarcely surprising that it has already provoked a large amount of academic commentary.<sup>8</sup> *Inter alia*, the case requires us to examine such fundamental questions as: when does a human being become a person and worthy of respect as such, and what role can the characteristic of physical separation play in establishing such status? When, if ever, should considerations of ‘quality of life’ be allowed to outweigh those of ‘sanctity of life’? What is the legal and moral importance of the distinction between acts and omissions and how do we determine what constitutes a positive act? Who should decide what is in the best interests of a child (parents, doctors, courts or others) and what factors should be taken into account in making this decision? What credence should be assigned to the doctrine of double effect in this context? And what is the relevance of the *European Convention on Human Rights*, newly and selectively incorporated by the Human Rights Act 1998? Even choosing a starting point from which to begin to pick a way through this morass of issues would prove a daunting task for any court and, whilst many disagreed with the final decision which the Court of Appeal eventually reached, few would have envied

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<sup>8</sup> See, for example: Holm and Erin, *op. cit.* n. 3, Bainham, *op. cit.* n. 3, J. Appel, ‘English High Court Orders Separation of Conjoined Twins’ (Fall 2000) 28 *Journal of Law, Medicine & Ethics* 312; L. Burrows, ‘A Dilemma of Biblical Proportions’ (Winter 2001) 27 *Human Life Review* 31; R. Gillon, ‘Imposed Separation of Conjoined Twins – Moral Hubris by the English Courts?’ (2001) 27 *J.M.E.* 3; L. Knowles, ‘Hubris in the Court’ (January-February 2001) 31 *Hastings Center Report* 50; A. London, ‘The Maltese Conjoined Twins’ (January-February 2001) 31 *Hastings Center Report* 48; A. London, ‘A Separate Peace’ (January-February 2001) 31 *Hastings Center Report* 49; A. McCall Smith, ‘The Separating of Conjoined Twins’ (2000) 321 *B.M.J.* 782; J. Pearn, ‘Bioethical Issues in Caring for Conjoined Twins and their Parents’ (2001) 357 *Lancet* 1968; P. Ratiu and P. Singer, ‘The Ethics and Economics of Heroic Surgery’ (March-April 2001) 31 *Hastings Center Report* 47; J. Radcliffe-Richards, ‘The Wrong Moral Autopilot’ *The New Statesman* 20 November 2000, 27, R. Huxtable ‘The Court of Appeal and Conjoined Twins; Condemning the Unworthy Life?’ (2000) 162 *Bulletin of Medical Ethics* 13, V. Munro ‘Square Pegs and Round Holes: the Dilemma of Conjoined Twins and Individual Rights’ (forthcoming 2001) 10(4) *Social & Legal Studies*.

them the task of having to reach it.<sup>9</sup> This has not however led commentators to moderate the tone of their criticisms of the Court. One writer elevates Ward LJ to ‘the ranks of the dangerously wrong and famous’, accusing him of contributing to the ‘rapid dehumanisation of those who don’t measure up to contemporary standards of beauty, health and usefulness’.<sup>10</sup> Another accuses the Court of sacrificing ‘the rights of the parents’ religious conscience ... upon the altar of medical science and social utilitarianism’.<sup>11</sup>

Yet to suggest that there was any easy solution to the facts of *Re A*, or to indulge in a knee jerk reaction to the decision reached by the courts having heard it, is surely mistaken. The complexity of the issues raised by the case requires careful and nuanced consideration, as is evidenced by the papers contained in the present collection.<sup>12</sup> A fundamental point which is clear both from reading the Court of Appeal’s judgement in *Re A* itself, and the commentaries on it which follow, is the futility of any approach which attempts to make sense of this decision (and, indeed, health care law in general) without a thorough understanding of its ethical underpinnings. The courts, of course, were called upon to resolve legal, not moral, issues – a fact of which Ward LJ reminded us, remarking, “this is a court of law, not of morals”.<sup>13</sup> Nonetheless, the *de facto* impossibility of separating the legal from the ethical is clear from even the most cursory reading of the judgements which make extensive use of moral concepts and language.

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<sup>9</sup> Several of the Court of Appeal judges reported sleepless nights: D. Kennedy, ‘Siamese Twin Dilemma Robs Judges of Sleep’, *Times*, 7 September 2000. The Court of Appeal in turn expresses sympathy for the High Court judge ‘sitting alone, having to take such a decision as this in such difficult circumstances’, per Ward LJ at 988.

<sup>10</sup> Editorial, *Christianity Today*, 13 November 2000, 44 at 44.

<sup>11</sup> D. Sulmasy, ‘Heart and Soul: the Case of the Conjoined Twins’ (December 2000) 2 *America* 12 at 13.

<sup>12</sup> See also our early attempt to unravel some of these issues, in a paper which predated the birth of Mary and Jodie: S. Sheldon and S. Wilkinson, *op. cit.* n. 4.

<sup>13</sup> At 969.

For this and other reasons, it seems to us that health care law can only benefit from sustained scrutiny by moral philosophers. We are therefore particularly pleased that health care ethicists are as well represented in this collection of essays as are lawyers. John Harris, Suzanne Uniacke and Helen Watt all interrogate some of the central concepts which the courts used in reaching their decision, and reach provocative and worrying conclusions regarding the inadequacy of the way in which the courts have developed these concepts.

Uniacke provides us with meticulous philosophical analyses of three of the arguments discussed by the Court of Appeal (quasi self-defence, necessity, and the doctrine of double effect). In so doing, she finds a number of serious problems with the use made by the Court of these ideas. Harris also offers a critique of the Court's reasoning, and one which is more wide-ranging and more scathing than that of Uniacke. He describes the Court's reasons as so 'confused' and 'inconsistent' that they 'fail utterly to justify, either legally or morally, the overruling of the parents' wishes'. Hence, claims Harris, although the separation was not intrinsically wrong, it should not have been forced on unwilling parents. This raises a fundamental point of disagreement between the papers included here: should the courts be involved in making this kind of decision and what weight should they attribute to parental wishes? Whilst the argument for allowing parental wishes to prevail in cases which are ethically finely balanced also receives strong support

from Barbara Hewson, it comes under sustained attack in Michael Freeman's paper.<sup>14</sup>

Harris' conclusion is based chiefly on his view that (like other neonates) neither Mary nor Jodie were persons, since they did not have 'biographical lives' or the capacity to value their own existence. In stark contrast to Harris (who thinks that only some humans are persons, and that only some persons are humans), Watt believes that the ethical category *person* should be identified with the biological category *human being*. This leads her to the view that both Mary and Jodie are persons. She then proceeds to comment on the way in which the doctrine of double effect was deployed in *Re A*, claiming that although the surgeons may not have intended Mary's death, they did nonetheless intentionally, and wrongfully, assault and mutilate her.

Neither of the contrasting views of 'personhood' adopted by Harris and by Watt was open to the courts which were restricted by the well established principle of English law that a legal person is created at the moment when she is born alive.<sup>15</sup> As such, it is not surprising that whilst the lawyers included in this collection are equally concerned with the courts' reasoning in *Re A*, their points of attack are rather different. In her paper, Jenny McEwan advances an important practical concern: the state of the law of murder following *Re A*. Whilst the Court of Appeal attempts to limit the precedent authority of *Re A* by describing its *ratio*

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<sup>14</sup> See also M.D.A. Freeman, 'Can We Leave the Best Interests of Very Sick Children to their Parents?' in M.D.A. Freeman and A. Lewis (eds) *Law and Medicine* (OUP 2000) which focuses specifically on *Re T (a minor) (wardship: medical treatment)* [1997] 1 All E.R. 906.

<sup>15</sup> See for example *Rance v Mid-Downs HA* [1991] 1 All ER 801 at 817. A child is born alive if, per Brooke J: '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.'



*decidendi* in the most restrictive of terms,<sup>16</sup> McEwan is extremely sceptical as to whether its authority can be so contained. Is necessity now to be recognised as a defence to murder? And if so, how will juries approach the issue of what is meant by this term? Notwithstanding that such a possibility is explicitly denied by the Court, could necessity nonetheless function as a defence in a case of mercy killing where death is necessary to end the patient's suffering? Has the Court of Appeal opened the door to lawful acquittal following euthanasia?

Only two of the six papers included here are persuaded that the Court of Appeal may have reached the right decision in *Re A*. Yet even these argue that it was for the wrong reasons. Like Johnson J in the High Court and Walker LJ, in the minority on this point, Michael Freeman is convinced that separation can be justified as in Mary's best interests. Yet for Freeman, this is due to a right not recognised by the courts in *Re A*: Mary's right to death with dignity. Likewise, Barbara Hewson concedes that the Court of Appeal may have reached the right verdict, however she argues that the better basis on which to have done so would have been Mary's implied consent to the procedure. That this course did not commend itself to the Court, Hewson takes as evidence of the way in which the judges characterised the relationship between the twins as one of antagonism. A more neutral and holistic approach, contends Hewson, would have concluded that the twins were 'an item', their conjoined state in itself a form of bodily integrity.<sup>17</sup>

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<sup>16</sup> Ward LJ states at 1018, 'Lest it be thought that this decision could become authority for wider propositions, such as that 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 viable independent existence.'

<sup>17</sup> On this point, see also Munro *op. cit.* n. 8.

The Court of Appeal recognised that any conclusion which it could reach would inevitably offend as many as it would please. Their decision has been both attacked as a dangerous breach of the sanctity of life and unjustifiable erosion of parental authority, and heralded as a triumph of common sense over religious fundamentalism and creditable act of judicial support for the well intentioned acts of doctors trying to salvage a life from a no-win situation. The future is unlikely to bring any greater moral consensus on the rights and wrongs of *Re A* and what it means in terms of legal precedent will surely be equally vehemently contested. Charting the full extent of the legal impact of *Re A* will be a task for years to come and, no doubt, will fill many further pages of this journal. We are delighted to introduce the current collection as a thoughtful and stimulating contribution to the ongoing debate.

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