



Activity 1: Considering the criminal law issues

1. Introduction

It is obvious that the question of whether or not this operation can be lawfully performed is crucial to the outcome of the appeal. ...

2. 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.

3. Intention

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 [mental element] required to establish murder, “the law of murder was in a state of disarray”: per Lord Steyn in [Reg. v Woollin \[1999\] 1 A.C. 82](#), 91 A. ... I have to ask myself whether I am satisfied that the doctors recognise that death or serious harm will be virtually certain (barring some unforeseen intervention) to result from carrying out this operation. If so, the doctors intend to kill or to do that serious harm even though they may not have any desire to achieve that result. 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... to stigmatise the doctors with “murderous intent”, that is what in law they will have if they perform the operation and Mary dies as a result.

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 effect and there is sufficient reason to permit the bad effect.... I can readily see how the doctrine works when doctors are treating one patient administering pain-killing drugs for the sole good 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.

4. Causation

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 of 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.

5. 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....

6. Unlawfully

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 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. ...

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 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 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 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.

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. ... 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 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 boy indiscriminately 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 life-blood. 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....

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. As I said at the beginning of this judgment, this is a very unique case.

Lord Justice Brooke:

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. ...

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 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 example, duress is available as a defence to a charge of aircraft hi-jacking but not to a charge of murder or attempted murder. ...

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....

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...

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"... 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.

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.

Lord Justice Robert Walker:

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 on to 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 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."...



However the stark facts of *Woollin* and the speeches in the House of Lords in that case say nothing at all about the situation in which an individual acts for a good purpose which cannot be achieved without also having bad consequences (which may be merely possible, or very probable, or virtually certain). 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... are both directed at the same individual. That can be 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....In these cases the doctrine of double effect prevents the doctor's foresight 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 arises 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 *Woollin* principles) be taken to have intended the death which he foresaw as virtually certain, he has a defence of necessity. ...

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". ...

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 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. ...



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 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...

In the absence of Parliamentary intervention the law as to the defence of necessity is going to have to develop on a case by case basis .. 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 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 a 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 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.

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 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 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. ...

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 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.



(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.

(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.

(iii) Mary has a right to life, under the common law of England (based as it is on Judeo-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.

(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. 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 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 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.