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BOND UNIVERSITY

THIRD GERARD BRENNAN LECTURE

GOLD COAST, QUEENSLAND

SATURDAY 3 MARCH 2001

LAW, HUMAN LIFE AND ETHICAL DILEMMAS

The Hon Justice Michael Kirby AC CMG

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BRENNAN AS COLLEAGUE

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

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

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

I welcomed Mr Brennan's appointment to the Commission. It proved a brilliant move. It added weight and insight to the Commission's early reports. This was so in all areas of the law in which we laboured. But it was especially so in two fields of law to which Gerard Brennan brought special contributions. One of these was the criminal law. Criminal cases had formed an important part of his legal practice. They had led to his close involvement in an endeavour to produce a national criminal code that could be adopted for all Australian jurisdictions. He became the sheet anchor for the earliest reports of the Commission on subjects relevant to criminal law¹.

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

The other subject on which he, like Sir Zelman Cowen later appointed, brought particular insights was the first project of the Commission in the field of bioethics. This project led to the highly successful report on *Human Tissue Transplants*². By the time that undertaking was being considered, Gerard Brennan had been appointed to the federal judiciary. The Commission had to report on a new problem concerned with the implantation of human tissue taken from one human being and used in another. In connection with this task, the Commission had to offer a definition of death by reference to the cessation of brain function. This had become essential because the introduction of mechanical respirators and ventilators had made the diagnosis of death difficult in some cases. They had also presented a potential ethical conflict, in that human beings kept "alive" by these machines presented ideal sources of "donor" organs, suffused with blood, suitable for transplantation after "death" was pronounced³.

Sir Zelman Cowen has often referred to the intense debates which we had over the many controversies presented by the obligation to prepare new laws to govern all aspects of human tissue transplantation. Justice Brennan's contributions to those debates

² ALRC 7, 1977.

³ ALRC 7, 1977, Ch 10, paras 114-115.

were always based on a search for concordancy with the traditional approaches of the common law to respect for human life and human dignity and concordancy with common moral principles shared by most members of the Australian community. Although he was careful to approach the common moral principles from a viewpoint respectful of the secular nature of the Australian Commonwealth and the diversity of opinion of its people, it was inevitable that his approach was influenced by the religious tradition in which he lived. This is the tradition of the Roman Catholic Church, of which he was, and is a leading lay member. It is a tradition that lays emphasis upon the sacred and inviolable quality of human life. Because the Church's approach is generally common to all people of the Book, and because it profoundly influenced the common law of England in its origins and development, no disharmony appeared from the introduction of such basic ideas into the work on which the Commission was engaged. Fortunate were we to have had at our table so informed and articulate a participant in the sensitive tasks of law reform handed to us by the Government.

Soon the tables of our relationship were turned. In 1976 Justice Brennan was appointed the first President of the Administrative Appeals Tribunal. *Ex officio* he chaired the Administrative Review Council. I sat under his presidency of that body to witness the great skill with which he presided over the

introduction into Australian federal law of some of the most important legislative reforms that our country has ever witnessed⁴. In 1981 he took his seat on the High Court of Australia. In 1995 he was appointed Chief Justice of Australia. The following year our paths crossed again when I was appointed to the High Court⁵.

As in the Law Reform Commission, so in the High Court. Occasionally we differed for reasons that we expressed as required. But in most important cases, we reached the same conclusion⁶, sometimes in common dissent⁷. It is a privilege for me to be invited to participate in this lecture series in Sir Gerard Brennan's honour. His portrait as Chief Justice hangs in the High Court in Canberra. He is presented in the portrait holding a single volume of the *Commonwealth Law Reports*. Close inspection reveals that it is Volume 175 of the series. It is in that volume that his leading opinion in *Mabo v Queensland [No 2]* appears⁸. When all else is

⁴ Especially *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁵ eg *Wik Peoples v Queensland* (1996) 187 CLR 1 and *Green v The Queen* (1998) 191 CLR 334.

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

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

⁸ (1992) 175 CLR 1.

forgotten of the law in Australia at the turn of the twenty-first century, *Mabo* will be remembered. Through the careful legal analysis shines the light of a personal commitment to fundamental and universal human rights⁹ and a belief in the essential equality and personal dignity of every human being.

TWINS IN THE NEWS

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

Our family's sad experience with twins naturally made us alert to issues involving twins which might leave others untouched. In recent months, news reports have recorded a number of stories

⁹ (1992) 175 CLR 1 at 42.

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

The Internet sale of the twins was described by the British Prime Minister, Mr Tony Blair, as "deplorable", an opinion most people would probably share¹⁰. Years ago, on the report on *Human Tissue Transplants*, Justice Brennan and I agreed to the unanimous recommendation of the Commission that "the law should forbid payment of any kind to any person for any dead body or part thereof; or for human tissue removed from any living person or from any dead body"¹¹. It is not apparent why a different legal principle would be adopted in relation to a living person. Slaves, in earlier times, were bought and sold as chattels. But slavery is incompatible with the common law¹². It is forbidden by international law¹³.

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

¹¹ ALRC 7, p 87 (para 178).

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

Paying for human lives (as distinct from affording reimbursement for expenses incurred in adoption and transport) seems incompatible with basic notions of human dignity. Such notions are certainly attracted once a child is born. The child then has an identity separate from its parents which the law will protect¹⁴.

A second case involving twins arose in Australia in October 2000. It concerned two conjoint or Siamese twins, Tay-Lah and Monique Armstrong who were joined at the head. In a twelve hour operation conducted by a surgical team of twenty-five professionals at the Royal Children's Hospital in Brisbane, the twins were separated. There were great risks in the operation. In the past sixty years some thirty separation operations have been performed on such twins. In about a third, both survived; in a third, both died. In a third, one survived. Fortunately, in the present case, both survived, the surgical team being aided by the most modern magnetic resonance imaging scans. The case was rightly reported as a triumph of Australian neurosurgery¹⁵.

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

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

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

The Brisbane case followed world-wide attention to another instance of conjoined twins in Britain. Although the names of the twins in the British case were not originally revealed, they were described throughout the litigation by the pseudonyms "Jodie" and "Mary"¹⁶. Later reports in the international media revealed that the parents of these twins were Michaelangelo Attard, 44 and his wife Rina. They live on the Maltese island of Gozo¹⁷.

The Attard twins were joined at the pelvic bones. They shared a bladder, anus and vagina. Following their birth, the parents brought their twin daughters to Britain on the recommendation of doctors in Malta so that they could get expert advice on what could be done, if anything, to separate them. Although each of the daughters had a separate brain, heart, limbs and most vital organs, it was immediately apparent that there was no possibility of performing the surgical miracle that proved possible in Brisbane. The dependence of Mary on the efficiency of Jodie's heart placed dangerous strains on the pair which could not continue indefinitely. On the other hand, if the twins were surgically separated, the best medical opinion was that Mary would inevitably die but Jodie would enjoy an extremely high chance of survival¹⁸.

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

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

¹⁸ *Re A (Children) (Conjoined twins: Surgical separation)* [2000] 4 All ER 961. Available

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

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

Some hospitals would doubtless have allowed the parents views to prevail. Had the parents remained in Malta, it seems likely that this is what would have occurred. However, in days after the Attard twins were born, a summons was filed in the High Court of Justice in England by the hospital in which the twins were being maintained. The summons sought a declaration, in the circumstances where the twins could not give valid consent and

ATTP://www.courtservice.gov.uk/info/newsitems/siamese.htm, unreported decision, Court of Appeal, p 15 (para 9). Estimates of mortality of Jodie in elective surgery ranged from 6% to 1-2%. The risks were appreciably greater if emergency surgery was required. In that event, mortality estimates rose to 60%.

¹⁹ Court of Appeal judgment p 17 (para 11).

²⁰ Court of Appeal judgment p 19 (par 12).

where the parents withheld their consent, that it was lawful, in effect, to carry out specified operative procedures including an elective separation procedure upon both of them. The consideration that made the provision of such relief controversial was the common acceptance that one of the twins, Mary, would certainly die²¹.

It was this invocation of the jurisdiction and powers of the courts that presented the primary judge (Mr Justice Johnson) with an urgent decision. He concluded in what is described as "effectively an ex tempore judgment"²² that the "withdrawal of Mary's blood supply" by separation from Jodie would be lawful. He so held on the basis that the operation was certainly in the best interests of Jodie; that it was Jodie's only chance of a virtually normal life; and that Mary's state was "pitiable" and unviable once separation was performed. In such circumstances Mr Justice Johnson concluded that it would be in the best interests of Mary, as well, to carry out the operation. He drew an analogy between the interruption or withdrawal of the supply of blood in the case of a mechanical ventilating machine, condoned in certain circumstances by a decision of the House of Lords²³, and withdrawal of the blood

²¹ Court of Appeal judgment p 20 (para 14).

²² Court of Appeal judgment p 22 (para 15).

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

supply from Mary by the surgery separating her from Jodie²⁴. On this basis, he held, the elective operation was required. It could lawfully be carried out. The parents appealed from this decision to the English Court of Appeal.

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

The parents and the hospital were represented at the appeal hearing. Separate representation was provided in respect each of Mary and Jodie. "Exceptionally"²⁵ the Court "allowed the [Roman Catholic] Archbishop of Westminster and the Pro-Life Alliance to make written submissions". It expressed gratitude for the submissions of these interveners. All judges referred to them. In the end, however, for reasons separately given, the Lords Justices dismissed the appeal. The parents' wishes were given respect; but not effect. The Court allowed the elective separation of the twins to proceed. So indeed it did.

²⁴ Judgment of Johnson J as cited by Robert Walker LJ, Court of Appeal judgment p 76-77 (para 30).

²⁵ Court of Appeal judgment p 6 (para 1) per Ward LJ.

Before the operation, the father took steps to have Mary confirmed into the Roman Catholic Church. The parents kissed and held her for the last time. One of the surgeons, Mr Adrian Bianchi is himself a devout Roman Catholic. He and the other principal surgeon, Mr Dickson (who described himself as an Evangelical Christian) both prayed with their team before the surgery²⁶. Bianchi and Dickson had worked together for twelve years. They had shared difficult moments. They enjoyed the protection of the Court ruling. But inescapably, as they knew, Mary would die in the procedure. Mr Dickson described the "... very intense moment. We looked at each other because we knew what we were doing at the time"²⁷.

As expected, as a consequence of the surgical intervention, Mary quickly died. Jodie survived.

Reports early in January 2001 indicated that Jodie's recovery had amazed the surgeons. They predicted that she would be allowed to return to Malta by the middle of 2001. Her parents had been able to push her around the hospital in a pram²⁸. A later report told of the burial in Xaghra, Malta of the remains of Mary. By her

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

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

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

real name Rosie, she was honoured by the Bishop of Gozo in the presence of a crowd which packed the church and lined the town's main street to comfort her parents²⁹. The parents had been loyal to the faith and instruction of their Church. The surgeon had performed the operation considered essential by the hospital if the catastrophic loss of *both* lives was to be avoided. The common law had condoned the operation. In the manner of modern times a British television network paid around £150,000 to the parents for cooperating in a programme reflecting on their ordeal. This money has been paid into a trust fund for Jodie³⁰.

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

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

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

³¹ J Quintavalle quoted *ibid*.

IT IS LAWFUL

Lawyers of the civil law tradition feel intensely uncomfortable without the benefit of positive law that covers the precise controversy they have before them. I discovered this when I served for the United Nations in Cambodia. Non-governmental organisations felt very vulnerable without an enacted statute permitting and regulating their activities. This revealed a different attitude to law: a deep feeling that without affirmative law conduct was unstable and dangerous.

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

When the case of the Attard twins came before the courts of England, following the summons issued by the hospital, those courts had no particular statute to which they could resort to provide the

norms which they had to apply. True, they had the *Children Act* 1989 (UK) and certain other statutory expressions of the duty to uphold the "best interests of the child", a principle also expressed in international law³². But the Parliament in the United Kingdom had not enacted a statute setting out procedures to be followed and rules to be observed in the case of conjoined twins where the parents demanded that separation surgery should not take place, although it was essential to save the life of one of the twins.

Some commentators, not knowing the national origin of the Attard family, had suggested that they were "Kosovan refugees unjustifiably draining our resources"³³, medical and legal. Refugees are often the target of irrational hatred. It sometimes appears that we have learned nothing from the plight of the refugees from Nazi Europe. Critics also asserted that lawyers had no special expertise in matters as complex and sensitive as this. Those who were legally literate invoked Justice Scalia's observation in *Cruzan v Director, Missouri Department of Health*³⁴:

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

³³ Court of Appeal judgment, p 7 (para 2) per Ward LJ.

³⁴ 110 SCt 2841 at 2859 (1990) cited by Ward LJ in Court of Appeal judgment p 6 (intro).

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

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

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

A feature of the reasons of all three members of the Court of Appeal was the extent to which they took pains to respond to the concerns of the public, the wishes of the parents, the submissions of

³⁵ Court of Appeal judgment p 6 (intro).

³⁶ Court of Appeal judgment p 7 (para 1).

interested groups and of the parties. To the public, Lord Justice Ward said this³⁷:

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

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

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

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

³⁷ Court of Appeal judgment p 20 (para 14).

³⁸ Court of Appeal judgment p 20 (para 14).

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

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

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

For many years, partly in consequence of advances in technology, the invention of mechanical ventilators and the development of surgical techniques previously unknown, courts in England and elsewhere have had to decide cases about the

³⁹ Court of Appeal judgment p 43 (para 7.7).

withdrawal of life support⁴⁰ or involving positive intervention with major surgery⁴¹ where the subject of the procedure is either a child of tender years or a person otherwise mentally incompetent. In the case of children, the courts have acknowledged that the "first and paramount consideration" is the welfare of the child⁴². The judges have insisted that they cannot hide behind the wishes of the parents. They must accept responsibility, where their jurisdiction is properly invoked, to express their own opinions. Some commentators have tellingly asked how it can ever be in the "best interest of a child" to terminate that child's life? Yet if that life were to be short, full of pain and intolerable, heroic surgery would not be obligatory. In such a case the parents' refusal would be respected⁴³.

It is, perhaps, a symbol of the acute dilemmas that were presented by the predicament of the Attard twins that the English judges were divided in the reasons which they gave for permitting the operation to go ahead although they knew that, inevitably, it meant the death of Mary. The primary judge faced up to the acute legal problem presented in this respect. This was not whether, in

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

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

⁴² *Ibid* at 1424 per Dunn LJ.

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

law, the court would have the last say. It was not even whether the law could override the wishes of the parents. It was not whether the law could decline to follow religious opinions, including those of the family concerned. It was not even whether a view would be taken that consent to the operation should be given because it was "in the best interests of" not only Jodie but also Mary. All of these foregoing questions could clearly be answered in the affirmative. To those answers so far as the law was concerned, there would be no significant contest. However, the acute question remained. It was whether, notwithstanding such answers, the criminal law intervened to forbid the operation because, to perform it, would involve the performance of a positive act that had the necessary and foreseeable consequence of terminating a human life in being, namely Mary's. If this were the legal classification of the acts, inherent in the operation, those acts would amount to unlawful homicide. No court had authority to give consent to criminal conduct of that character.

The primary judge resolved this hard question by basing his opinion on the view that what was proposed by the operation "and what will cause Mary's death will be the interruption or withdrawal of supply of blood which she receives from Jodie". He stated that: "Here the analogy [was] with the situation in which the court

authorises the withholding of food and hydration. That, the cases make clear, is not a positive act and is lawful"⁴⁴.

None of the appeal judges agreed with Mr Justice Johnson's explanation of how the law of homicide could be circumvented in this case. But neither did they agree with each other as to the alternative explanations for reaching the final opinion that the termination of Mary's life would not amount to deliberate homicide rendering the surgeons liable to prosecution for homicide.

In England, murder is constituted, as at common law, by three elements. The act in question must be unlawful. It must involve the killing of a person. And it must be performed with intent to kill or to cause grievous bodily harm⁴⁵. Lord Justice Ward considered that the proposed actions of the surgeon would fall outside this definition. It would do so not because they did not comprise the killing of Mary with the requisite intent. Instead, his Lordship considered that the answer was to be found in the first requirement. The actions would not be an *unlawful* homicide.

In Lord Justice Ward's opinion this was because the killing of Mary was to be seen as justified and not unlawful because it

⁴⁴ Johnson J cited in Court of Appeal judgment 76 (para 30), per Robert Walker LJ.

⁴⁵ Court of Appeal judgment p 39 (Pt IV para 3).

amounted to a form of "legitimate self-defence [by] the doctors coming to Jodie's defence and removing the threat of fatal harm to her presented by Mary's draining her life blood"⁴⁶. In accordance with that opinion "the availability of such a plea of quasi self defence modified to meet the quite exceptional circumstances nature has inflicted on the twins, makes intervention of the doctors lawful"⁴⁷.

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

- "(i) The Act is needed to avoid inevitable and irreparable evil;
- (ii) No more should be done than is reasonably necessary for the purpose to be achieved; and
- (iii) The evil inflicted must not be disproportionate to the evil avoided"⁴⁸.

⁴⁶ Court of Appeal judgment p 43 (Pt IV para 7.7).

⁴⁷ *Ibid.*

⁴⁸ Sir James Stephen cited Court of Appeal judgment p 70 (para 27) per Brooke LJ.

To reach this conclusion, Lord Justice Brooke had to overcome the decision of the House of Lords in the well known case of *The Queen v Dudley and Stephens*⁴⁹. Every law student learns that case. It involved three survivors of a vessel which sunk in 1884. When rescued, the three shipmates acknowledged that a fourth member of the crew, a cabinboy, had been killed and eaten on their twentieth day on the open sea without water or food. In a special verdict, an English jury found the facts proved. The case was then argued before a court of five judges to determine whether, and if so how, a defence of necessity could be raised in defence of the charge of homicide of the cabin boy. The defence was rejected. The crewmen were convicted. They were sentenced to death. Subsequently their sentence was commuted to six months imprisonment. A hundred years later, the decision was endorsed by the House of Lords⁵⁰. It was generally believed that the doctrine of necessity was unavailing in the case of homicide.

Lord Justice Brooke, however, did not accept that necessity was totally excluded as a defence. He rejected the notion that accepting necessity as a defence to homicide would impose on judges an intolerable burden of deciding the comparative value of human lives. He said⁵¹:

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

⁵⁰ *R v Howe* [1987] 1 AC 417 at 429.

⁵¹ Court of Appeal judgment p 69 (para 26 per Brooke LJ).

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

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

For these reasons, Lord Justice Brooke accepted the existence of a defence of necessity. It was no less a defence because of the absence of an immediate emergency. He considered that the three requirements stated above were applicable. In his last words he said:

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

⁵² Court of Appeal judgment p 70 (para 26 per Brooke LJ).

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

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

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

⁵³ Court of Appeal judgment p 83 (para 34) per Robert Walker LJ.

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

IS IT RIGHT?

The differing opinions of the judges who considered the Attard twins case reflect the complex of legal and moral dilemmas that had to be resolved. Lord Justice Ward, addressing the truly difficult legal problem of the impermissibility of knowing and active homicide, did not feel able to solve that problem by reference to the doctrine of necessity. In this he conformed to what was understood, and apparently confirmed as a century of legal doctrine: necessity did not apply to homicide. Instead, Lord Justice Ward invoked the well established defence of self defence. It is a defence that certainly applies in the case of homicide. Indeed, he explained his view in a dramatic passage in his reasons "by giving Jodie a voice"⁵⁴.

Having described the way in which Mary was using Jodie's heart and lungs and how this would "cause Jodie's heart to fail and

⁵⁴ K Savvell, "The Case of the Conjoined Twins - A Legal Perspective", unpublished paper for Health Law Seminar series, 2000, Uni of Sydney ("Savvell"), p 33.

cause death just as surely as a slow drip of poison", Lord Justice Ward asks "Can it be just that Jodie should be required to tolerate that state of affairs"⁵⁵? Then, suddenly, Jodie is speaking to us for herself:

"If Jodie could speak, she would surely protest "stop it, Mary, you're killing me"⁵⁶".

Lord Justice Ward draws an analogy between a school child with a gun threatening others of the school and the intervention of the medical team springing to Jodie's defence to remove the threat of fatal harm to her life. But is this truly self defence? Properly analysed, this is the defence by others of a third party who is young, too incompetent or too disabled to defend herself. The common law has, in exceptional cases, extended self defence to cases where force is used to defend others from harm⁵⁷. Criminal codes sometimes so provide⁵⁸. But until now at common law the defence has commonly been confined to particular categories of relationship (master and servant, parent and child, husband and wife). It has arisen in emergency, not planned, circumstances. It has been kept

⁵⁵ Cited Savvelli, p 33.

⁵⁶ *Ibid*, pp 38-39.

⁵⁷ *R v Duffy* [1967] 1 QB 63 at 67; S Bronitt and B McSherry *Principles of Criminal Law* (2001) 295.

⁵⁸ *Criminal Code* (Q), s 273; *Criminal Code* (WA), s 250.

in tight rein. Early comments on the case have found the invocation of self-defence persuasive⁵⁹. Nor in the opinion of some, would the surgery proposed be a response reasonable in the circumstances, in that it necessarily involved the killing of an innocent life⁶⁰.

Lord Justice Brooke's solution invoking necessity presents several difficulties which he himself acknowledged. Until now, since *Dudley and Stephens* it has been thought that the defence of necessity was not available at common law in answer to a charge of murder. In Australia, where it is available at common law, there has ordinarily been the requirement that the threat or danger should be of such a nature as to exert immense pressure on the person concerned because of its imminence, suddenness or gravity⁶¹. In one Australian case where a driver was observed by police driving his vehicle on a public road, far in excess of the speed limit, it was held that the defence of necessity was available when the driver proved that he was only concerned to get his gravely ill son to hospital. He proved that there was a real danger and real possibility of the son's death if he had not done so⁶². The judge took into

⁵⁹ cf *Palmer v The Queen* (1971) AC 814; *R v Howe* (1958) 100 CLR 448; and *Zedevic v Director of Public Prosecutions (Vic)* (19987) 182 CLR 645.

⁶⁰ cf *Palmer v The Queen* (1971) AC 814; *R v Howe* (1958) 100 CLR 448; and *Zedevic v Director of Public Prosecutions (Vic)* (1987) 182 CLR 645.

⁶¹ *R v Loughnan* [1981] VR 443.

⁶² *R v White* (1987) 9 NSWLR 427 (BC).

account that the speeding was not so gross as to constitute a greater danger. He invoked Lord Denning MR's statement in another case: "Such a man should not be prosecuted. He should be congratulated"⁶³. Nevertheless, in most cases in which it has been invoked, the defence of necessity has failed. Its application in the case of the Attard twins sits somewhat uncomfortably with the House of Lords, recent confirmation of the rule of public policy that the defence is unavailable to a charge of murder⁶⁴.

Lord Justice Robert Walker's solution that the "purpose" or "intention" of the surgery was to be classified as something other than the killing of Mary seems inconsistent with the undoubted facts, proved in the evidence, that the surgery represented a deliberate intervention whose only natural and probable consequence⁶⁵ was the termination of the life of Mary. Moreover, inherent in the operative procedures was the performance of heroic

⁶³ *Buckoke v Greater London Council* [1971] Ch 655 at 668.

⁶⁴ *R v Howe* [1987] 1 AC 417.

⁶⁵ *R v Wallin* [1999] 1 AC 82 at 90-93. The House of Lords ruled where appropriate a jury considering a charge of murder "should be directed that they are not entitled to find the necessary intention, unless they feel sure that the death or serious bodily harm was a virtual certainty [barring some unforeseen intervention] as a result of the defendant's action and that the defendant appreciated that such was the case. Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired to wished it to happen".

surgery which would only construct a full and viable human being in the case of Jodie by harvesting (if that is not too offensive a word) parts of the body of Mary (namely the shared organs of bladder, vulva and anus) so that Jodie should enjoy a full, separate and viable human existence.

On the subject of differentiated intention, Lord Justice Robert Walker took the Archbishop's submission, received by the Court, to task as being over-simplistic. He declared that the points made were entitled to "profound respect". They were also reflected in the English law and in the attitudes expressed by the parents. However, Lord Justice Walker went on⁶⁶:

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

⁶⁶ Court of Appeal judgment p 82 (para 33) per Robert Walker LJ.

It is a dangerous thing for lawyers to engage with theologians on their own territory. Lord Justice Walker has chanced his arm; but I, like the angels fear to tread.

Dr Bernadette Tobin, in an ethical perspective of the Attard twins' case asked whether there was "a distinctly Catholic view of the case"⁶⁷. She noted that the BBC seemed to think there was because on its website it described the case as one of "religion versus medicine". In Dr Tobin's view, there was no distinctive Church position. Its viewpoint, as expressed by the Archbishop of Westminster, would have been equally "at home in secular ethics"⁶⁸. Secular ethics support the sanctity and special value of human life. It is unique. It is precious to the possessor and to that person's family and loved ones. The horrors of the twentieth century and the terrors of genocide have left an abiding and understandable fear of what happens when sanctity is not accorded to human existence. If in doubt, go to Auschwitz. Or go to the horror camps of Cambodia. This is why international human rights principles, which were invoked in the form of the European Convention, loomed so large in the debates before the English judges.

⁶⁷ B Tobin, "An Ethical Perspective on the British Conjoined Twins Case", Health Law Seminar Series 2000, University of Sydney, 15 November 2000, unpublished p 9 ("Tobin")

⁶⁸ *Ibid*, 10.

The decision and reasons of the English Court of Appeal in this case have their supporters and their critics. The critics understand (as the parents avowedly did) the high motives of the medical team that wanted to save Jodie. They respect the anxious deliberations of the judges who concluded that the surgeons could operate as they did. I myself have sympathy with the outcome favoured by the Court of Appeal. Once it appeared inevitable that the *two* babies would die without surgical intervention, authorising intervention to save *one* life seems, upon one view of human ethics, to be as morally justifiable for the advancement and protection of human life (namely Jodie's) the only human life that was viable and could be saved by intervention.

But I acknowledge the force of the criticisms both of this view of ethics and of the legal reasoning that in four different ways brought four distinguished, able and sensitive judges of England to their conclusions. None of the reasons leave me wholly satisfied. The closest to do so is that of Lord Justice Brooke. Yet the defence of necessity raises as many problems as it ultimately solves. And it departs from the long held view that human life is so precious, sacred if you like, that no "necessity" can justify its termination without explicit authority of statute.

The ethical critics are unconcerned with the legal reasoning. But they are anxious as to where it leads. Dr Tobin puts her concerns this way⁶⁹:

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

CONCLUSIONS

I cannot say how the Attard twins case would be resolved in Australian courts. I cannot guess how Sir Gerard Brennan and I would have resolve it, were such a problem to come before us in the High Court of Australia. The issues of bioethics proliferate. But there is never a gap in our law. Theologians can dispute. Philosophers can debate. Popular television can entertain. Hypotheticals can speculate. But in the end, judges, whose

⁶⁹ Tobin, 9.

jurisdiction and power are properly invoked, must decide. If, as is usual in such cases, the Constitution and the statute law are silent, they must reason by analogy from simple principles. They must offer public reasons. Their conclusions are open to criticism and to praise. Today in such cases, they must perform their duties under the public and media spotlight. Whatever they decide will be criticised by some.

In a recent public address to celebrate the centenary of our Constitution, Sir Gerard Brennan reminded us of the origins of the Constitution and of the debt we owe to Britain whose legal traditions we inherited and adapted for ourselves⁷⁰. He called on Australians to celebrate the diversity of their pluralistic, multicultural society and to champion its tolerance⁷¹. He declared that the virtues of the Founders of our Commonwealth lay in their "vision and courage, compromise and determination"⁷². These are qualities to which, in his own professional life, Sir Gerard Brennan always aspired. To the listed catalogue I would add a deep interest in ethical puzzles. And strong inclination to resolve them drawing upon the wisdom of the centuries, often expressed in the Church of his tradition.

⁷⁰ Brennan, "Centenary of the Enactment of the Commonwealth of Australia Constitution Act" (2001) 75 ALJ 31.

⁷¹ *Ibid*, 35.

⁷² *Loc cit*.

The puzzle of the conjoint twins is one of many that engages the law, society and the churches in a world of exploding scientific information and rapid technological advance. Many more dilemmas of this character await resolution⁷³. Sometimes the choices are painful. Sometimes the debates acrimonious. Often they are urgent. Sometimes, as the case of Mary and Jodie from the island of Gozo, the crisis is dramatic and the resolution heart-rending.

⁷³ Including the controversial subject of the use of stem cells derived from embryonic tissue for the purpose of taking advantage of their pluripotency in replacing injured or diseased tissue in the treatment of myocardial infarction, Alzheimer's Disease, insulin deficiency etc.