1-1-2002

Separating Conjoined Twins: Legal Reverberations of Jodie and Mary's Predicament

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Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol24/iss1/3

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NOTES AND COMMENTS

SEPARATING CONJOINED TWINS: LEGAL REVERBERATIONS OF JODIE AND MARY’S PREDICAMENT

On December 10, 2000, a coroner recorded a special verdict for the death of a baby girl in England. The coroner faced an unusual situation - a death from surgery when it was known beforehand the patient was going to die. The coroner admitted that all surgeries carry a risk of mortality, but in this case the mortality rate from the surgery was known beforehand to be one hundred percent. The special verdict read: “Mary died following surgery separating her from her conjoined twin, which surgery was permitted by an order of the [British] High Court, confirmed by the Court of Appeal.”

I. INTRODUCTION

Conjoined twins, born in the United Kingdom on August 8, 2000, captured the world’s attention with their predicament. The twin girls were born with one functioning heart and a set of lungs that resided in one twin and sustained them both. They were joined at the lower abdomen with two pairs of legs protruding from each side. According to their British doctors, the babies were fated to die if they were not separated before reaching six months of age.

2. Id.
3. Id.
4. Id.
6. Miller, supra note 5.
7. Marjorie Miller, British Judges Ok Surgery to Separate Twins, L.A. TIMES, Sept. 23, 2000, at A1. Their heads were at the opposite ends of their conjoined bodies and their legs emerge at right angles from each side. Siegel-Itzkovich, supra note 5.
Surgically separating conjoined twins is commonplace in modern medicine. The fate of these twins, Jodie and Mary, however, has raised issues never before contemplated. Mary, the weaker twin, would die if surgically separated from Jodie. Jodie had the critical life-sustaining body parts and delivered oxygenated blood to her sister. The parents did not want to separate their daughters, but would be forced to under a British high court ruling valiantly fought for by the twins’ British doctors. This is the first time in recent history that parents of conjoined twins refused to consent to doctor-recommended separation surgery. The issue of separating conjoined twins becomes more complex when it is known which twin will die because of the surgery. This is the first such case to come before any court of law.

This Note will discuss the British court ruling on the legality of ordering separation surgery against parental wishes and how the court reached its decision. Part II provides a brief history of conjoined twins and outlines the medical issues surrounding their births, separation surgery and the plight of other recently born conjoined twins. Part III provides a brief chronology of the British court ruling. Part IV focuses on Jodie and Mary and discusses the facts of their case. Part V discusses the British Court of Appeals decision at length and delves into the medical, family and criminal
law aspects of their decision. Part VI explores the reverberations of this decision and its likely impact on other jurisdictions.

II. A BRIEF HISTORY OF CONJOINED TWINS

Conjoined or Siamese twins, as they are more traditionally known, are twins joined at some part of the body. The term Siamese twins originated from the famous conjoined pair Chang and Eng born in 1811 to Chinese parents living in Siam, now known as Thailand. Despite being conjoined, Chang and Eng led a somewhat normal, long life. Married for more than thirty years to two sisters, they had twenty-two children between them. Chang and Eng lived as farmers who often exhibited themselves for money and a few times considered separation surgery.

One of the earliest sets of conjoined twins was documented in the sixteenth century. Historically, conjoined twins were famous for their exhibitionist value rather than for their life accomplishments. Conjoined twins were revered and reveled for their mystery of doubleness and curiosity of their appearances. Notwithstanding the popular myths about conjoined twins, there are no recognizable prototypes of conjoined twins found in old folk tales or cave hieroglyphics. Our fascination with conjoined twins and even identical twins is that they challenge our perception of individuality and the uniqueness of our bodies and souls.

The likelihood of conjoined twins is between 1 in 50,000 to 1 in 100,000 of all births and 1 in 200 identical twin births. About 40-60% of conjoined twin births are delivered stillborn and 35%

19. Id. at 213.
20. Id.
21. Id. at 214.
22. Id. at 201. The first set of conjoined twins in documented literature was called the "Scottish Brothers." Id. In 1490, they arrived at the court of James IV of Scotland at the age of eighteen. Id. They were famous for their musical talent, singing in tenor and treble and speaking in Latin, French, Italian, Spanish, Dutch, Danish and Irish. Id. Though these brothers are considered the first recorded case of conjoined twins, there were many more mentions of such twins in folklore and mythology such as the Biddenden Maidens who were allegedly born in 1100, but have been largely debunked as a myth. Id. at 201-02.
23. Id. at 199.
24. Id. at 203.
25. Id.
survive only one day.\textsuperscript{27} Altogether, only 5-25% of all conjoined fetuses survive birth and many pairs do not survive more than a year.\textsuperscript{28} Historical records document about 600 sets of surviving conjoined twins over the centuries.\textsuperscript{29} Conjoined twins are always identical, same sex twins.\textsuperscript{30} Of the surviving twins more than 70% are female.\textsuperscript{31} Despite advancements made in medical science, doctors are not certain why conjoined twins develop.\textsuperscript{32} Two prevailing theories include fission and fusion.\textsuperscript{33} Fission theory is "universally accepted" by scientists to explain how non-conjoined twins develop in the womb, but fails to explain how conjoined twins develop.\textsuperscript{34} This theory states that a single fertilized egg is divided into two separate embryos that create non-conjoined twins.\textsuperscript{35} Proponents of the fission theory "suggest some vague, undefined mechanism" where the fertilized egg divides incompletely, producing two attached embryos resulting in conjoined twins.\textsuperscript{36} Consequently, fission theory is subject to criticism because "there is no other known normal or abnormal embryological process that can be distorted to... produce conjoined twins" during the fission process.\textsuperscript{37} The fusion theory is more widely accepted scientifically than the fission theory to explain how conjoined twins develop in the womb.\textsuperscript{38} Fusion theory states that conjoined twins arise from the secondary fusion or union of two originally separate embryos.\textsuperscript{39} "The fusion itself apparently is a catastrophic event, as there is a significant increase in anomalies, not only in the area of the

\begin{tabular}{l}
\textsuperscript{27} Id. \\
\textsuperscript{28} Id. \\
\textsuperscript{29} Siegel-Itzkovich, supra note 5. \\
\textsuperscript{30} Rowena Spencer, \textit{Theoretical and Analytical Embryology of Conjoined Twins: Part I: Embryogenesis}, 13 \textit{CLINICAL ANATOMY} 36, 41 (2000) (Spencer reviewed over 1,800 publications concerning the embryology and pathologic anatomy of conjoined twins.) This article will appear as a chapter in a forthcoming book on conjoined twins by Spencer. \textit{Id. at} 36. \\
\textsuperscript{31} SEGAL, supra note 26, at 297-98. \\
\textsuperscript{33} Spencer, supra note 30, at 36. \\
\textsuperscript{34} Id. \\
\textsuperscript{35} Id. \\
\textsuperscript{36} Id. \\
\textsuperscript{37} Id. \\
\textsuperscript{38} \textit{See} id. \\
\textsuperscript{39} Id. at 43-44.
\end{tabular}
junction, but occasionally in multiple organ systems and so severe as to render one or both fetuses incapable of surviving.” 40 Under the fusion theory, conjoined twins are classified into eight types, based on where the connection occurs. 41

The first attempted separation of conjoined twins was documented in the tenth century. 42 Twin boys, living in Constantinople, were first admired as a curiosity, but then were exiled because they were believed to be a bad omen. 43 When the death of one twin prompted separation, the other twin returned to Constantinople, where he died within three days. 44 Over 600 years later, the first successful separation of conjoined twins was recorded in 1689, when a German doctor severed the twins’ connection at their waist. 45 One of the earliest known episodes of separating conjoined twins to save the life of one over the other occurred nearly two centuries ago. 46 At the age of four, the Orissa sisters, Radica and Doddica, paraded through Europe in 1893. 47 They were surgically separated when they were twelve because Doddica suffered from tuberculosis. 48 Radica died two years later. 49

Conjoined twins born today are likely to be surgically separated. Since 1950, there have been approximately 200 attempted separation surgeries conducted in hospitals around the world. 50 In close to 150 cases, one or both of the conjoined twins have survived. 51 Separation surgery is often delayed until the twins are at least six months old to improve their trauma tolerance. 52 Recent improvements in medical science, however, have permitted earlier attempts at separation surgery. 53 Immediate

40. Id. at 37.
41. Id. at 41.
42. SEGAL, supra note 26, at 306.
43. Id.
44. Id.
45. Id.
46. FIEDLER, supra note 18, at 198.
47. Id.
48. Id.
49. Id.
50. SEGAL, supra note 26, at 306.
51. Id. In 1988, an analysis of separation surgery documented “50% survival in four pairs under four months of age, 90% survival in eight pairs 6-14 months of age, and 100% survival in four pairs over two years of age.” Id. at 306-07.
52. Id. at 307.
53. Id.
separation is often advised when one twin is stillborn, one twin’s health threatens the other twin’s survival or abnormalities threaten the progress of one or both twins.  

Around the same time Jodie and Mary were born, there were many other sets of conjoined twins in the news. Three-month-old conjoined twin girls from Peru were separated in Italy on May 27, 2000, but both babies died within hours. On September 13, 2000, three-month-old conjoined twin girls from Liberia were separated at a U.S. hospital and are expected to recover. On October 9, 2000, a six-month-old girl from Puerto Rico died two days after she was surgically separated from her conjoined twin sister in a New York hospital. Two weeks later, on October 23, 2000, previously conjoined eight-month-old twin girls were released from a U.S. hospital after a team of doctors separated their liver, bowel, bladder and pelvis during a thirty-one hour operation.

III. CHRONOLOGY OF BRITISH COURT RULING

After Jodie and Mary were born, their doctors became convinced that they could carry out the separation surgery to give Jodie a worthwhile life. When the parents refused consent to the surgery, St. Mary’s hospital, where the girls were born, submitted an originating summons entitled “In the exercise of the inherent

54. Id.
55. Conjoined Twin Girls Die After Separation, SAN DIEGO UNION - TRIB., May 28, 2000, at A20. Joined at the chest and sharing the same heart, the doctors told the mother of the conjoined girls, Milagro and Marta, that to have a chance at saving one of the girls they would have to sacrifice the other. Id. Tragically, six hours after Milagro’s death, her sister’s heart stopped. Id.
56. Gillespie, supra note 32, at A11. The twin girls were born June 4, in an African village. Id. They were joined at their lower backs. Id. The girls, Mary Cole, weighing ten pounds, and her sister Decontee, weighing seven pounds, “were doing well” after the surgery. Id. “The nurses want to put them back in the same crib,” said their doctor, “[b]ut for now they are in side-by-side cribs. That’s good for Decontee, because Mary always poked her.” Id.
57. Siamese Twin From Puerto Rico Dies After Separation in New York, ASSOCIATED PRESS NEWSWIRES, Oct. 9, 2000. The twin girls, Janlean and Janlee, shared a liver, kidney and bladder and were joined at the abdomen. Id. They underwent a seventeen-hour separation operation. Id. Janlee initially survived, but subsequently died of complications despite all efforts. Id.
58. Stevan Morgain, Separated Twins Go Home, LONG BEACH PRESS-TELEGRAM, Oct. 24, 2000, at A13. The girls, Charity and Kathleen, were completely joined from the pelvis to the sternum. Id. They each have one leg and doctors are optimistic the girls will overcome the physical challenges. Id.
59. British Court Ruling, 4 All E.R. at 969.
60. Siegel-Itzkovich, supra note 5.
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jurisdiction of the High Court and in the matter of the Children’s Act 1989,” on August 18, 2000, asking for declaratory relief to lawfully carry out the surgery without parental approval. On August 25, 2000, Justice Johnson, of the family division of the British High Court in London, granted the petition.

The lawyers for the parents and the Official Solicitor, who represented Mary’s interests, appealed Justice Johnson’s order to the British Court of Appeals. On September 25, 2000, Lord Justices Ward, Brook and Walker upheld Justice Johnson’s decision. The parents decided not to seek the review of the Court of Appeals’ ruling to the House of Lords. The Official Solicitor also chose not to appeal based on the parents’ decision.

Although legal scholars and commentators who closely followed the case expected the parents to appeal the court’s decision, the parents felt they did the best they could for their girls and were unable to take the case any further. Despite legal permission to go ahead with the separation, the doctors considered abandoning the surgery because the parents were vehemently opposed to it. Nevertheless, on November 7, 2000, the twins were separated in a twenty-hour operation at St. Mary’s hospital in Manchester, England. Mary died as a result of the operation. Jodie was listed in “critical but stable” condition. The few days following the surgery were the most critical to determine whether

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61. British Court Ruling, 4 All E.R. at 987. The Children’s Act of 1989 was designed to ensure that both parents could determine a child’s welfare without resorting to legal proceedings. Ian Johnston, Conjoined Twins, 357 THE LANCET 149 (2001). Under the Act, decisions regarding the child’s welfare are presumed to be best considered within the child’s own family. Id. This Act also prohibits the court from making a ruling unless the court believes that doing so would be better than making no ruling at all. Id.

62. British Court Ruling, 4 All E.R. at 987.


64. Separation of Conjoined Twins, supra note 15.


66. Id.

67. Miller, supra note 7, at A7.

68. Parents of Conjoined Twins Won’t Appeal Surgery Order, supra note 10, at A11.

69. Lois Rogers, Doctors May Not Operate on Twins, SUNDAY TIMES (London), Oct. 1, 2000. “[The doctors] determination to perform the operation is wavering in the face of continued opposition from the babies’ distraught parents.” Id.


71. Id.

72. Id.
or not Jodie would survive. In the months following the surgery, Jodie continued to improve and went home with her parents in June 2001.

IV. JODIE AND MARY

Jodie and Mary's parents were not British subjects, but were from the small Maltese island of Gozo in the Mediterranean Sea. In addition, they were strict Roman Catholics. The parents found out their twins were conjoined during the third month of pregnancy and traveled to the United Kingdom to receive more modern and sophisticated medical care. The parents never imagined they would be forced against their wishes and religious beliefs to have their girls separated; killing Mary to save Jodie. Despite their disappointment, they feared that their small hometown would ostracize them for acceding to murder one of their children or, worse, ridicule their surviving twin for not being normal.

Jodie, for all practical purposes, was considered a healthy baby. Although she will need reconstructive surgery resulting from being separated from her sister, it is likely that Jodie will walk unaided someday and otherwise live a normal life. Mary, on the other hand, was considered to be brain damaged, had a deformed face and could not cry because she did not have her own

73. Id.
75. Parents of Conjoined Twins Won't Appeal Surgery Order, supra note 10. Gozo is part of the Republic of Malta located in the center of the Mediterranean Sea. 1999 THE WORLD ALMANAC AND BOOK OF FACTS 821 (Robert Famighetti ed., 1998). Italy is the nearest neighbor to the North. Id. Gozo is twenty-six square miles, about the size of Manhattan Island in New York, but without the population density. See id. at 429. The population of the Republic of Malta is about 380,000 people and 98% of the population is Roman Catholic. Id. at 821.
76. Id.
77. Miller, supra note 5, at A10.
78. Siegel-Itzkovich, supra note 7. The parents stated in court, “We came to England to give our babies the very best chance for life in the very best place... Now things have gone very badly wrong, and we find ourselves in this very difficult situation...” Id.
79. Miller, supra note 5.
80. Id.
81. Ross, supra note 70. Jodie will need reconstructive surgery to repair organs damaged in the separation surgery. Id. She will also need skin grafts. Id.
82. Miller, supra note 5, at A1.
set of functioning lungs. While Mary relied on Jodie for her life, Jodie’s life was draining away as a result. 

Aside from feared reactions from their hometown, the parents strongly believed that the decision involving the fate of their girls should have been left up to God. They wanted nothing more than to provide good medical care and let nature take its course through God’s will. The parents also felt their hometown would not have the resources to cope with Jodie’s disabilities and that they would have to leave her in Britain.

V. THE DECISIONS

A. Justice Johnson’s Decision

Justice Johnson was under immense pressure to render a decision about Jodie and Mary’s fate. Unlike the three justices sitting on the appeals panel, he did not have the resources or time needed to reach a carefully reasoned and researched decision dealing with the twins’ welfare, the parents wishes and the lawfulness of the separation surgery.

In deciding to allow the surgery, Justice Johnson focused on Mary’s condition. He questioned her ability to live on her own and the advantage of prolonging Mary’s life for a few more months. He wrote that, “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.” He also wondered if Mary would feel any pain if Jodie moved around or tried to crawl. The Justice considered the opinion of one of the doctors who said it would be a “horrendous scenario” for Mary to be “dragged around and not being able to do anything about it.” Finally, Justice Johnson concluded that prolonging Mary’s life

83. British Court Ruling, 4 All E.R. at 988.
84. Dyer, supra note 63.
85. Id.
86. Id.
87. Id.
88. British Court Ruling, 4 All E.R. at 988.
89. Id. at 988-89.
90. Id. at 988.
91. Id.
92. Id.
93. Id.
94. Id.
Justice Johnson next examined the legalities of separation surgery. If the surgery was regarded as a positive act, rather than an act of omission, it could not be lawful under British law. Justice Johnson held that the act was an omission and, thus, lawful because, in essence, it involved withdrawal of Mary’s blood supply. He analogized this to other acts of omission, such as withholding food and hydration. He also theorized that if a person took a clamp and blocked the blood supply from Jodie to Mary, there would be no invasion of Mary’s body and it would, therefore, be lawful.

Justice Johnson’s decision was appealed on the ground that the Justice erred in holding: (1) the surgery was in Mary’s best interest; (2) the surgery was in Jodie’s best interest; (3) the separation surgery was lawful. The Court of Appeals eventually upheld Justice Johnson’s decision, but for different reasons. The Court of Appeals addressed aspects of medical, family and criminal law to reach their decision.

B. Handling the Appeal

The British Court of Appeals opinion is over 100 pages, with each Justice approaching the issues differently. Lord Justice Ward wrote an introduction, stated the facts, discussed medical, family and criminal law, asked if there is a legal duty, and offered his conclusion. Then Lord Justice Brook wrote his introduction, explored the meanings of “kill” and “intent to kill,” discussed the doctrines of double effect and necessity and offered his conclusion. Lastly, Lord Justice Walker wrote about the

95. Id.
96. Id. at 989.
97. Id.
98. Id. Justice Johnson was initially attracted to the analogy that Jodie was a life support machine to Mary and that the operation “was equivalent to switching off a mechanical aid.” Id. Though this seems like a good analogy and would allow the operation to be an omission, Justice Johnson felt that this was not a “proper view of what is proposed in the circumstances of this particular case.” Id.
99. Id.
100. Id.
101. Id. at 962.
102. Id. at 989.
103. See id. at 967.
104. See id. at 967-68.
105. Id.
welfare principle, criminal law issues and offered his conclusions. 106

The first demand that the three justices made was for an independent assessment of the girls' medical prognosis to "allay public concern that we might be rushing to judgment."107 Doctors from London's Great Ormond Street hospital offered their opinion on the twins' life expectancy, the dangers of surgery and the quality of life for the surviving twin.108 Their opinions and the opinions of many other experts weighed heavily in the decision.109

C. The Legal Issues

There are three crucial issues identified in the appeal. First, is it in Jodie's best interests to be separated from Mary?110 Second, is it in Mary's best interests to be separated from Jodie?111 Finally, if deciding in favor of the surgery, can it be legally performed?112 The court balanced the two competing interests of the girls in arriving at a decision.113

Initially, the court addressed whether "this [was] a fused body of two separate persons, each having a life in being?"114 The court affirmed the lower court, deciding that the girls were separate persons.115 Lord Justice Ward stated that it would be contrary to common sense and a denial of the evidence to "say that Mary [was] not [born] alive or that there are not two separate persons."116

Lord Justice Ward also addressed what might have happened if the hospital decided to defer to the wishes of the parents and let nature take its course.117 He wrote that:

[It would] have been a perfectly acceptable response for the

106. Id.
108. See British Court Ruling, 4 All E.R. at 979-982.
109. See id. at 1018-1070.
110. British Court Ruling, 4 All E.R. at 994.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id. at 995.
116. Id. There was ample evidence that the doctors believed that Mary was born alive. Siegel-Itzkovich, supra note 7. Computerized scans and x-rays showed that Mary was kept alive by the oxygen supplied by Jodie, yet she was not considered viable or otherwise able to survive independently. Id.
117. British Court Ruling, 4 All E.R. at 987.
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 the hospital for not bowing to the parents’ choice.¹¹₈

D. The Decision Itself

1. Medical Law or Consent

Lord Justice Ward wrote that the fundamental medical principle is that “every person’s body is inviolate.”¹¹⁹ It is unlawful to operate on a person without their consent.¹²⁰ To do so is considered both the crime of battery and the tort of trespass on the person.¹²¹ Every person of sound mind has an absolute right to veto medical treatments, including surgery.¹²² This principle was recognized in Airedale N.H.S. Trust v. Bland,¹²³ which held “if an adult 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 ....”¹²⁴

A doctor receives legal immunity to perform medical treatments when consent is given.¹²⁵ Furthermore, the court in Bland asked, “how is it that... a doctor can with immunity perform on a consenting patient an act which would be a very

¹¹₈. Id.
¹¹⁹. Id. at 989.
¹²⁰. Id. at 990.
¹²¹. Id.
¹²². Id.
¹²³. Airedale N.H.S. Trust v. Bland, 1 All E.R. 821, 866 (1993). This case concerned a young man who was severely injured in a disaster and remained in a persistent vegetative state. British Court Ruling, 4 All E.R. at 1058. There, the court ruled that it was permissible to withdraw artificial feeding and it was an omission not a positive act. Id. If it were a positive act then it would have been unlawful. Id. Lord Justice Walker describes the controversy raised by the Bland case as “[t]he distinction between death brought about by an omission, on one hand, and death caused by a positive act, on the other hand.” Id.
¹²⁵. Id.
serious crime if done by someone else? The answer must be that bodily invasions in the course of proper medical treatment stand completely outside the criminal law.”  

Consent and the patient’s right to veto medical treatment are part of the fundamental medical principles, but what happens if the person is not a competent adult or is a young child? If no one else can give consent for an adult patient, there is the common law doctrine of necessity, which may justify an action initially considered unlawful. Acting under this doctrine requires actual necessity because the adult cannot give consent. Furthermore, the action taken must mirror what a reasonable person would do under the same circumstances while acting in the best interest of the adult.

For a minor child, each of the parents, if they are married, or the mother, if she is unmarried, has a parental right to give consent for medical treatment on the minor’s behalf. This is a duty owed to the child and the parent(s) must act in the child’s best interest or there may be a culpable omission. Since the parents are empowered at law to give or deny consent, Lord Justice Ward wrote that “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.”

There is, however, an important safeguard to ensure that the child’s best interests are being considered. This safeguard exists in the Children’s Act of 1989, where a party having a recognizable interest in the child’s best interest can bring the parents’ decision before the court. The court has vested power to override the parents’ decision because the common law has never treated parental rights as absolute.

126. Id. at 990-91.
127. Id. at 991.
128. Id.
129. Id.
130. Id.
131. Id.
132. Id. at 992.
133. Id.
134. Id.
135. Id.
2. Family Law

Family law decisions have established the test to apply when seeking to overturn the parents' refusal to give consent for medical treatment. The court has a duty to do what is in the best interest of the child, and can only overrule the parent's wishes when they may not be in the child's best interests.

Jodie's best interest was separation from her sister. For Jodie, the surgery posed little risk of death and would prolong her life from three to six months to a normal lifespan. Lord Justice Ward wrote, "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..." Lord Justice Ward criticized this goal saying, "this is a wholly illusory goal because she will be dead before she can enjoy her independence and she will die because when she is independent she has no capacity for life." He also felt the surgery was an invasion of Mary's body and constituted an assault when done without consent.

Lord Justice Ward looked to the Airedale N.H.S. Trust v. Bland decision for guidance to determine if there was any benefit to Mary being separated from her sister. In Bland, the patient was allowed to die because there was no prospect of medical treatment improving his condition. There is no duty to treat a patient if the treatment is not in the best interests of the patient. The proposed treatment in Bland was futile because there was no benefit to that patient by continuing treatment.

136. Id. at 993.
137. Id.
138. Id. at 996.
139. Id.
140. Id. at 996-97.
141. Id. at 997.
142. Id. at 998.
143. Id.
144. Id. at 1003.
145. Id. at 998.
146. Id.
147. Id.
148. Id.
from saying that the patient’s best interest would be to actively end his life.\textsuperscript{149}

Since Justice Johnson found that Mary’s life would be worth nothing to her and that prolonging her life would be a serious disadvantage, the Court of Appeals saw \textit{Bland} as a relevant influence to Justice Johnson’s decision.\textsuperscript{150} Lord Justice Ward, however, did not agree that Mary’s life was worth nothing to her: “[l]ife is worthwhile in itself whatever the diminution in one’s capacity to enjoy it and however gravely impaired some of one’s vital functions . . . may be.”\textsuperscript{151} The court was not prepared to sanction steps meant to terminate life, but it could accept that it may be proper to withhold or withdraw medical treatment.\textsuperscript{152}

Ironically, separation surgery was not a course of treatment that would prolong Mary’s life.\textsuperscript{153} The issue was not whether Mary should undergo surgery as a treatment, but rather, as Lord Justice Ward wrote, “is it in Mary’s best interests that an operation be performed to separate her from Jodie when the certain consequence. . . is that she will die?\textsuperscript{154} The answer is no.\textsuperscript{155}

3. Jodie Benefits and Mary Does Not; Can This Conflict be Resolved?

The court returned to the Children’s Act of 1989 (“the Act”) for guidance and interpretation in resolving this seemingly impossible conflict.\textsuperscript{156} The Act is vague on what to do when there are two children before the court with competing or conflicting interests, saying only that the court should consider the children’s welfare as paramount.\textsuperscript{157} The English Parliament did not provide for a way to balance these interests, and the court did not think that the Parliament, in using the term “paramount,” meant to regard one child’s interest over another when making a

\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} at 1002.
\textsuperscript{151} \textit{Id.} at 1001.
\textsuperscript{152} \textit{Id.} at 1000.
\textsuperscript{153} \textit{See id.} at 1002.
\textsuperscript{154} \textit{Id.} at 1003-04.
\textsuperscript{155} \textit{Id.} at 1004.
\textsuperscript{156} \textit{Id.} at 1005. The Children’s Act of 1989 was not drafted with this kind of scenario in mind. Johnston, \textit{supra} note 61. The drafters of the act could not have foreseen these kinds of circumstances, but the underlying premise that the child’s welfare be paramount applies in all cases. \textit{Id.}
\textsuperscript{157} \textit{British Court Ruling}, 4 All E.R. at 1005.
Jodie and Mary's interests cannot be reconciled by making one child’s interest paramount to the other. Furthermore, refusing to decide the issues would be the equivalent of a decision (by the court) not to compel the separation surgery. Lord Justice Ward wrote that failure to decide the issue would be a total abdication of the court’s duty. Only the court can strike a balance between Jodie and Mary's interests.

4. Balancing Jodie and Mary's Interest

The parents' wishes should be key in determining the balance between the two competing interests. Parental wishes, however, cannot trump the best interest of the child. The court reviews parental wishes based on the motive behind their wishes rather than merely making an administrative decision.

Here, Lord Justice Ward feared that the wishes of Jodie and Mary's parents were not in the best interests of their girls. They wanted to do nothing, leaving both to die, rather than allow Jodie an opportunity to live as normal a life as possible. They were aghast at the idea of killing Mary, but neglected to see their duty to save Jodie and “fail[ed] fully to face up to the consequence of the failure to separate the twins, namely death for Jodie.”

In rendering its decision, the court had to balance the right to life and the right to treatment. The right to life was equal to both of the twins. There is no balancing of the quality of life

158. Id. at 1006. ‘Paramount’ means ‘above all others in rank, order or jurisdiction; supreme,’” citing the Shorter Oxford Dictionary (3d ed.). Id. at 1005.
159. Id. at 1006.
160. See id.
161. Id.
162. Id.
163. Id.
164. Id.
165. Id. at 1008.
166. Id. at 1009.
167. See id.
168. Id.
169. Id. at 1010.
170. Id. Lord Justice Ward discussed an analysis by Doctor John Keown. Keown states that the Bland confused vitality of life with sanctity of life. Id. Vitality of life means that it is wrong to either shorten life or fail to prolong it when possible. Id. The sanctity of life means that life is created in the image of God and possesses dignity that gives life protection from an unjust attack or a right not to be intentionally killed. Id. Lord Justice Brooke agreed with Keown by saying that the “proposed operation would give these
between the two, i.e., one life is more valuable than the other, because in the "eyes of the law Mary's right to life must be accorded equal status with her sister Jodie's right to life."\(^{171}\) The proposed treatment or surgery would give Jodie a normal chance at life and yet shorten Mary's life, although Mary would have only lived a few more months regardless.\(^ {172}\) Lord Justice Ward put it succinctly when he wrote, "[t]he prospect of a full life for Jodie is counterbalanced by an acceleration of certain death for Mary."\(^ {173}\) Thus, the best way to balance the interest of the girls is to give the chance of life to Jodie because she has a better chance to survive even if it is at Mary's expense.\(^ {174}\)

5. Is the Surgery Lawful Under Criminal Law?

If the surgery cannot lawfully take place because it is an act of murder, a killing of Mary, then the court cannot rule in favor of the surgery.\(^ {175}\) Therefore, the question becomes are the doctors legally immune for performing the surgery, or will they be charged with murder?\(^ {176}\) Lord Justice Ward is concerned with the notion that doctors are not protected by complete immunity.\(^ {177}\) Because of the uniqueness of the case, he urges immunity, irrespective of whether they perform the surgery killing Mary by active intervention, or killing Jodie by omitting to act in her interests.\(^ {178}\)

First, murder is an unlawful killing of a person with intent to kill or cause grievous bodily harm.\(^ {179}\) Whether there is intent to cause the death of Mary or even achieve that result is not the question. There are unintended consequences here.\(^ {180}\) Thus, the doctrine of double effect is applied.\(^ {181}\) The doctrine holds that an act producing a bad effect is allowed if the action is good in itself, i.e., the intention is solely to produce the good effect.\(^ {182}\) This doctrine is applied where doctors administer pain-killing treatment

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children's bodies the integrity which nature denied them." Id. at 1052.

171. Id. at 1026.
172. Id. at 1010.
173. Id.
174. Id. at 1011.
175. Id.
176. Id.
177. Id.
178. Id.
179. Id. at 1012.
180. Id.
181. Id.
182. Id.
that often hastens a patient’s death.\textsuperscript{183}

The doctrine of double effect does not apply in this case because saving one patient’s life, i.e. Jodie, created the bad effect of causing another patient’s death, i.e. Mary.\textsuperscript{184} Further, Mary did not require surgery; it is not a treatment proposed for her well-being, only Jodie’s.\textsuperscript{185} Lord Justice Walker discussed the doctrine of double effect and how it prevents a doctor’s foresight of pending death to be a criminal act.\textsuperscript{186} Here, the doctrine does not apply to the conduct directed at 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.”\textsuperscript{187}

Second, if it was murdering Mary to perform the surgery, it was also murdering Jodie not to perform the surgery.\textsuperscript{188} Lord Justice Ward asked, “why the law will not hold that the doctors and the parents have come under a duty to Jodie.”\textsuperscript{189} The surgery was in Jodie’s best interest and it was the duty of the parents and the doctors to carry out the surgery that would save Jodie’s life.\textsuperscript{190} The duty to save Jodie could not coexist with the duty to keep Mary alive.\textsuperscript{191}

The conflicts between the two duties and balancing the interests between Jodie and Mary require the law to have an “escape through choosing the lesser of the two evils.”\textsuperscript{192} In determining the lesser of two evils, the court considered that Mary was killing Jodie by “draining her life-blood.”\textsuperscript{193} This created a quasi self-defense plea for the doctors to intervene on Jodie’s behalf by “removing the threat of fatal harm presented to her by [Mary].”\textsuperscript{194} Lord Justice Ward stated that the availability of such a

\textsuperscript{183} Id.
\textsuperscript{184} Id. The doctrine works when treatment of a patient produces a potentially bad effect in order to induce a larger good effect within that same patient. Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 1063.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 1013.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 1016.
\textsuperscript{193} Id. at 1017.
\textsuperscript{194} Id. A hypothetical posed on the self-defense issue was: can it be lawful to kill a six-year-old boy who is wielding a gun on a schoolyard killing other children? Id. Lord
plea made it acceptable for the doctors to perform the surgery.195

Lord Justice Brooke discussed at great length the doctrine of necessity, which is considered obscure and seldom featured in English case law.196 The normal view is that necessity is not a defense to murder, but might be acceptable in an emergency or in duress.197 Modern scholars view necessity somewhat differently.198 Lord Justice Brooke, for example, discussed the work of a rabbinical scholar who hypothesized that, "if twin A was 'designated for death' and could not have surgery in any event, but twin B could [have surgery, then] surgery that would kill twin A to help improve the chance of twin B was acceptable."199 Accordingly, it was acceptable to surrender one to save the other.200 Likewise, Mary was already designated for death and no one could extend her life beyond a few more months.201

The doctrine of necessity is a defense that could lawfully allow the separation surgery.202 Although, there is a requirement that there be an emergency, the principle of law is of necessity, not emergency.203 Here, Lord Justice Brooke stated that there would always be ample time to bring a similar issue before the court if similar circumstances should ever arise.204 This would eliminate any concern that "people would be too ready to avail themselves of exceptions to the law" and thus take matters into their own hands at the expense of someone else's life.205 Lord Justice Walker concluded "[t]he 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."206

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Justice Ward asserts that it is lawful to kill this boy in self-defense of others and his murder would be fully justified. Id.

195. Id.
196. Id. at 1032.
197. Id. at 1039.
198. Id. at 1041.
199. Id. at 1041-42 (quoting Offences Against the Person and General Principles, LAW COMMISSION NO. 218, ¶35.6 (1993)).
200. Id.
201. Id. at 1051.
202. Id.
203. Id.
204. Id. at 1051-52.
205. Id. at 1051.
206. Id. at 1070.
VI. LEGAL REVERBERATIONS OF THE BRITISH HIGH COURT DECISION

The impact of this landmark case will likely be felt around the world. The judges took a broad view of the issues and looked to the laws of several countries for guidance.207 This decision will be analyzed in future debates regarding the law and ethics of life and death decisions in medical, family and criminal law.208

In early 2001, a symposium was organized at a law school in Jerusalem to discuss the ruling.209 This event brought together Jewish and Christian experts from Israel and the United States and provoked an intense debate among medical and religious ethicists.210 In addition to the issues reflected in the court decision, these experts also raised issues on how the decision could potentially affect anti-abortion and right-to-life platforms.211 Of course, there was much criticism of how the court reached its decision.212 Many felt that the parents’ wishes should have received more weight.213

The court in this case was careful to explain that these circumstances were unique “[l]est it be thought that this decision could become authority for wider propositions” such as killing a patient who would not survive for more than a few months.214 Lord Justice Ward wrote that this holding only applies when the facts fit this formula:

[I]t must be impossible to preserve the life of X without bringing about the death of Y, that Y by his or her very

208. Id.
209. Siegel-Itzkovich, supra note 7. This event, hosted by Bar-Ilan University law faculty, was called “Sacrificing One Soul for Another: The Ethical, Legal and Halachic Aspects Following England’s High Court Ruling on the Siamese Twins.” Id.
210. Id.
211. Id. “[T]he anti-abortion and right-to-life activists feared the idea that Mary might not be considered to have been born alive and felt questioning of her right to be thought of as a human being could have implications for severely disabled people.” Id.
212. See id.
213. Id.
214. British Court Ruling, 4 All E.R. at 1018. Interestingly enough, a law school professor attending a symposium on this ruling was personally “very concerned at the high court’s failure to state explicitly that its ruling should not be extrapolated to decide future cases.” Siegel-Itzkovich, supra note 7. This professor also felt that when these kinds of facts come up again, the hospital would not bother asking a court for permission, it will just operate. Id.
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.\textsuperscript{215}

Legal scholars and medical ethicists are already identifying fact patterns where this type of holding would be irrelevant. For instance, if both girls were considered viable, separation surgery would have been out of the question under criminal law because it would mean choosing one over the other.\textsuperscript{216} Certainly there will be more debates, commentary and legal analysis about this complex topic.

\textbf{VII. CONCLUSION}

This case certainly caused sleepless nights and agony for the three justices sitting on the Court of Appeals panel.\textsuperscript{217} The upside of this heart-wrenching decision is that now there is precedent should this situation ever arise again.\textsuperscript{218} If Jodie and Mary’s parents had originally consented to the separation surgery, this complex legal issue would not have been decided by a court of law.\textsuperscript{219} This decision provides a much needed clarification on the legality of separation surgery for conjoined twins and provides a blueprint for how future cases should be decided when similar facts come before a court of law.\textsuperscript{220}

As far as happy endings go, Jodie’s short-term recovery from the twenty-two hour separation surgery has surpassed all expectations.\textsuperscript{221} Her father said: “She is a lovely daughter. She has got big brown eyes and smiles a lot. She will hold your hand and is feeding good. She is a normal baby.”\textsuperscript{222} Her mother adds: “We are happy because she is like a normal baby now.”\textsuperscript{223} Together, they have vowed to never forget Mary and plan to tell

\begin{itemize}
\item \textsuperscript{215} British Court Ruling, 4 All E.R. at 1018.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Smith, supra note 207.
\item \textsuperscript{218} Separation of Conjoined Twins, supra note 15.
\item \textsuperscript{219} See British Court Ruling, 4 All E.R. at 961.
\item \textsuperscript{220} Separation of Conjoined Twins, supra note 15.
\item \textsuperscript{221} Nilufer Atik, Siamese Twin Could Be Reaching Out For Her Sister, Say Parents, DAILY MAIL (London), Jan. 4, 2001, at 31.
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id.
\end{itemize}
Jodie about her twin sister some day.\textsuperscript{224} 

Jennifer N. Sawday*