

MURDER BY DESIGN: THE 'FEEL-GOOD FACTOR' AND THE CRIMINAL LAW

The much-publicised recent decision of the Court of Appeal in the case of the ischiopagus conjoined twins, Mary and Jodie, should be viewed with considerable alarm by criminal lawyers. We find the mood of the Court reminiscent of that in Airedale NHS Trust v. Bland¹. There, too, the criminal law appeared to present an inconvenient obstacle to the result desired by all the courts involved. In the case of the twins, Re A (children) (conjoined twins: surgical separation)², the courts have again, and again outside the context of a criminal trial, found the criminal law to be too unbending and inflexible for their purposes. The driving force behind both decisions appears to be to be seen to find a justification for the morally 'soft option', giving the impression that judges now want to leave their courts bathed in the glow of having been seen to do what feels good to the public at large. Criminal law may be left in total disarray in consequence, but the Court of Appeal appears remarkably unconcerned on that score. In Re A, Ward L.J. observed, "The search for settled legal principle has been especially arduous and conducted under real pressure of time"³. On one view, in fact, the settled principle was clear; the proposed operation would legally be murder. The only arduous aspect of this case from the Court's point of view was that it was difficult to escape this apparently unwelcome conclusion. Nevertheless, it set itself the task of finding a way out, apparently so that all concerned (except the parents) could feel a comfortable sense of having saved a life⁴. The Court would not countenance an interpretation of the law which involved sitting back and watching the life of both twins

¹ [1993] 1 All E.R. 821. Anthony Bland was 21, but for three years had been in a persistent vegetative state following catastrophic injury at the disaster at the Hillsborough Football Stadium in 1989. The family and medical team sought a declaration that it would be lawful not to replace the nasogastric tubes through which he was fed, nor to provide antibiotic treatment. The Courts at all levels held that this would be lawful in this case.

² [2000] 4 All E.R. 961.

³ Ibid., at 969

⁴ This reaction was predicted in S. Sheldon and S. Wilkinson, 'Conjoined Twins: the Legality and Ethics of Sacrifice' (1997) 5 Med. L. Rev. 149

ebb away. In Bland, the feel-good factor had more to do with sparing the family and medical team from having to sit back and watch the ageing process in and gradual deterioration of the body of a young man, once fit and vigorous.

The twins Jodie and Mary were joined at the lower abdomen. They had a common artery and shared a bladder. Their spines were fused at the base. Mary had very weak cardiac performance and no useful lung function. Jodie's heart was pumping blood around the bodies of both babies, and would ultimately collapse under the strain. The medical evidence was that if the twins were not separated, Jodie would die, although not immediately. The proposed operation to separate the twins would inevitably lead to Mary's death, because her connection with the common artery would be severed, and her own heart could not supply her with sufficient oxygen. She could be kept alive on a heart and lung machine, but such machines are normally used for short-term purposes, for example, during a surgical operation that would enable the patient to function independently afterwards. St Mary's Hospital, Manchester asked the court for a declaration as to the legality of an operation to separate.

The Court of Appeal recognised that at first sight the proposed surgical operation to separate the twins appeared to involve the murder of Mary unless some specific defence could be invoked⁵. The majority of their Lordships decided that they could rely on the defence of necessity to avoid this difficulty, and so gave a declaration that the operation would be lawful. The killing of Mary would be justified by necessity - the need to save Jodie's life. Yet, at common law, necessity is not a defence to murder⁶. In order to justify the declaration in Re A, the Court had to throw away years of legal precedent, itself based on moral arguments which were not addressed.⁷ This enabled the Court of

⁵ This operation has now taken place. Mary died, as had been anticipated

⁶ Dudley and Stephens (1884-5) 14 Q.B.D. 273

⁷ See paper by Suzanne...?

Appeal to impose its will on the children's parents, who live outside its jurisdiction and will have to bear the consequences in terms of caring for the surviving twin. Their belief that the operation was morally wrong was supported by advice from their Church. Thus the Court's decision overrode both the moral views of the children's parents and established criminal law doctrine.

The cost is high – hard cases are known to make bad law. The alterations made in Re A to the doctrine of necessity not only create enormous uncertainty; they will inevitably draw criminal courts into many cases involving difficult moral issues. The defence of necessity works in this way. If the law does not recognize the defence in a murder case (which previously it most certainly did not), the judge will not allow the jury to consider it. It is not legally available as a defence. But where it is a legal defence, the jury has to decide whether the killing was genuinely necessary. They must consider the nature of the emergency and whether means other than killing were available to deal with it.⁸ How would a jury respond to that defence being raised where the killing was an act of mercy? Is it now the case that a trial judge would have to allow the jury to return a verdict of not guilty where they are persuaded that death was 'necessary' as euthanasia? The Court of Appeal has opened the door to lawful acquittal where euthanasia is the reason for a killing, and it could be only a matter of time before such cases are before the courts.

All this is the inevitable consequence of distorting the law in order to achieve a utilitarian goal where two lives are at stake. To achieve the 'feel-good' result in a very unusual case, we are at risk of having to condone euthanasia by private citizens who raise the defence of necessity. However, my main argument here is that there is more wrong with Re A than the blatant distortion of the general defences that exist in

⁸Martin [1989] 1 All E.R. 652; Conway [1989] 3 All E.R. 1025

criminal law. For, in addition to that, the Court of Appeal attempt to disguise the fact that at every point of their argument they are engaged in a comparison of the respective rights to life of two human beings. The judges, while apparently giving every consideration to Mary's right to life, and while acknowledging the flaws in the reasoning employed in Bland, adopt an interpretation of the decision which renders her interests to the periphery of the inquiry and which must raise questions as to how much value the common law attaches to the sanctity of life. It is proposed to in this paper to examine the analysis of murder offered in Re A. This, I suggest, will show that Bland charted the wrong course and that the title of Finnis' note, 'Crossing the Rubicon'⁹ was well chosen.

LIFE IN BEING

In neither Bland nor Re A would the courts take the route of deciding that the person about whom the declaration was sought did not amount to a life in being capable of protection by the criminal law. Only in Re A was the matter specifically addressed,¹⁰ apparently because of the view of some doctors that Mary could be regarded as equivalent to a deformity on Jodie's body. Many of us in fact would be revolted by the implication that we can classify who is and who is not a human being on the basis of some medical judgment about the number of functioning organs or the capacity to feel sensation. Brooke L.J. made the court's view clear: "In this context"¹¹ it is wholly illegitimate to introduce considerations that relate to the quality, or the potential quality of, each sister's life"¹² What is unclear is why context is the main factor here. We find later in the judgment a marked willingness to weigh the value of two lives against each

⁹ J. Finnis, 'Bland: Crossing the Rubicon?' (1993) 109 L.Q.R. 329

¹⁰ ibid., Brooke L.J. at 1026, Ward L.J. at 996

¹¹ Author's emphasis

¹² Re A., supra, at 1026

other, and consequential erosion in our courts of the principle of the sanctity of life. Finnis has shown how unconvincing is the claim made in Bland that the courts will not involve themselves in eugenics.¹³

ANALOGY WITH BLAND

To prove murder by the doctors, a prosecutor would have to show that they performed an act, or omitted to act where they have a duty to act, in a fashion which caused the death of Mary, and that they had the intention to kill or cause her really serious harm. The approach of Johnson J. at first instance in Re A was to develop an analogy with Bland to show that the proposed surgery would not be criminal. Does an analogy stand up?

1. Could it be said that by removing the 'life-support system' provided by Jodie, the hospital would not be performing a positive act but omitting to act?

It has frequently been stated that there is a vital distinction between acts and omissions; a positive act that kills cannot be justified even when in the best interests of the patient. However much a patient's continued existence is not in her best interests, a doctor apparently is not allowed to perform a positive act, which kills her. In Bland it was recognised that there is no moral difference between such an act and an omission with the same effect, and that the law's refusal to countenance the former is a matter of policy. Nevertheless, the House of Lords relied on the distinction to justify its decision. The lack of any logical or ethical rationale for the positive act/omission dichotomy was

¹³ J. Finnis, op. cit.

noted by Lord Goff. He observed, possibly with more prescience than he realised, that the House might be embarking on the slippery slope towards euthanasia¹⁴.

In Bland the proposed course of action was difficult to categorise as either an omission to act or a positive act. Would the cause of death be the removal of the old feeding-tube, the failure to insert a new one, or the failure to supply nutrition through the tube? The general view was that it would be absurd if culpability rested on such categorisation. The fact that there was to be a positive act, the removal of tube, should not define the procedure as homicide.¹⁵ The House of Lords held that effectively, it would amount to a cessation of treatment. Lord Browne-Wilkinson explained that failure to do what you have previously done is not, in any ordinary sense, a positive act. Hence, should a hospital discontinue treatment by way of life-support machine, the effect would be the same as if the treatment had never been initiated.¹⁶ The hospital would have omitted to act, not committed a positive act, even though someone must have switched the machine off. Yet it would clearly be murder if a layperson were to walk into a hospital ward and deliberately switch off a patient's life-support machine. Why would the interloper's behaviour be seen as a positive act of murder, whereas the hospital's would not? According to Lord Goff, the distinction is that the interloper stops the doctor from prolonging the patient's life¹⁷. This suggests that the totality of the hospital action is to cease to treat; seen as one continuing behaviour¹⁸, consisting of a number of acts and omissions, the overall conduct of the hospital is the cessation of treatment, an omission to act. Whereas where the hospital is engaged in a course of treating and prolonging the

¹⁴Bland, *supra*, at 867

¹⁵*ibid.*, 881

¹⁶*ibid.*, *per* Lord Goff at 867. But see A.J. Ashworth, Principles of Criminal Law (Oxford University Press 1999) p??

¹⁷Re A, *supra*, at 867

¹⁸ See H. Beynon, 'Doctors as Murderers' [1982] Crim. L.R. 19

life of a patient, the interloper who switches off life-support is performing only one act, a positive act that kills.¹⁹

A problem for the House of Lords in Bland was that even an omission to act can be murder, where there is a duty to care for someone. This duty to care for a person may arise through contract, parental responsibility, or through having undertaken and begun a process of caring.²⁰ This duty includes the provision of basic nourishment for the helpless. Since Anthony Bland was being fed through a tube by a hospital which wished to discontinue that process, there was a clear murder issue to be resolved. In response, the House of Lords argued that the feeding of the patient through a nasogastric tube was more than the basic care the hospital is obliged to provide. It amounted to medical treatment. Although there is transatlantic authority for this²¹, it is not clear why all the House followed the American Supreme Court in allowing medical opinion to define for legal purposes what constitutes medical treatment, (as opposed to the basic care to which all patients in hospitals are entitled)²². After all, the consequence of this interpretation was literally a matter of life and death for Anthony Bland. Gunn and Smith have shown that it is impossible to claim, in the case of a helpless patient, that not to feed is not to allow nature to take its course.²³ Kennedy and Grubb²⁴ recognise the danger of this approach and the difficulty of separating such feeding from the spoon-feeding of patients who cannot feed themselves. But their solution, that we should recognise that the doctor's obligation is to act in the best interests of the patient²⁵, and that this should determine what manner of care the hospital is entitled to withhold,

¹⁹A.J. Ashworth, op. cit., at ??

²⁰Gibbins and Procter (1918) 17 Cr. App. R. 134; Stone and Dobinson [1978] 2 All E.R. 341

²¹Re Claire Conway (1985) 486 A. 2d. 1209; Cruzan v. Director, Missouri Department of Health (1990) 110 S. Ct. 2841

²²See J. Finnis, op. cit.: J. Keown, 'Restoring Moral and Intellectual Shape to the Law after Bland' (1997) 113 L.Q.R. 481

²³M.J. Gunn and J.C. Smith, 'Arthur's Case and the Right to Life of a Down's Syndrome Child' [1985] Crim. L.R. 705

²⁴I. Kennedy and A. Grubb, Medical Law: Text with Materials (Butterworths 1994) 1230

²⁵ibid., 1230

places a lot of faith in the accuracy of judgment and the objectivity of the medical profession. If such faith were widespread, the law might feel more comfortable about euthanasia as a general practice.

Whatever one may feel about the wisdom of relying on the classification of nasogastric feeding as medical treatment, the problems in Re A were very different; could it be argued with at least equal validity that the supply of oxygen to Mary's body from a heart and pair of lungs which were not her own amounted to medical treatment? And although the distinction between acts and omissions is logically unsound and morally irrelevant, it performs a vital function for as long as the courts insist that they cannot condone euthanasia. The elastic nature of omission in law gave the court ample opportunity in Re A to justify the operation to separate the twins and seems no more irrational than to overrule Dudley and Stephens with no attention to its ratio decidendi. However, it was held in Re A that the proposed surgery would be a positive act, in that it would represent an invasion of Mary's bodily integrity²⁶.

There is a second and significant aspect to this discussion. It emerged in Re A that Mary's life could be saved if she were placed on a heart and lung machine after separation from Jodie. The hospital said that this would not be normal practice.

It is not something that we would have planned as part of the procedure because this is the sort of situation that one would set up if one was looking towards a survivor. It is a holding situation... Unless there was a heart and lungs available for transplant instantly there would not really be all that much point, and then one has to take into context the rest of the problems which the child has, which

²⁶ Re A, per Ward L.J. at 993

really do not suggest that there is any point taking on a heart/lung transplant for this child²⁷.

If she were to be placed on such a machine, said the Court of Appeal, the hospital could subsequently remove it from her on the principles set out in Bland. “If her life were being supported, not by Jodie, but by mechanical means, it would be right to withdraw that artificial life-support system and allow Mary to die”²⁸. Hence there was apparently little point in using the machine in the first place.

Here we can see that although the Court of Appeal claimed that it did not rely on the positive act/omission distinction, insofar as it underpins the decision in Bland, the Court is forced in this argument to fall back on it. Their Lordships effectively leap-frog the direct effect of the operation, which is immediate death, into a Bland analogy in which the hospital would merely be ceasing to treat. In doing so, they transform a positive act that kills Mary into an omission to act. The same problem informs their use of the necessity defence as the justification for the surgery; there would be no necessity in killing Mary if her life could be saved afterwards. However, the Court decided that it could not, because in the final analysis, the means of saving her could be denied her on Bland principles.

2. The withdrawal of life support from Mary would be in her best interests

In Bland, the House of Lords appeared to feel justified in discounting the principle of the sanctity of life against their Lordships’ interpretation of the patient’s best interests.²⁹

All courts appeared willing to engage in language which demonstrates a judicial notion

²⁷Evidence of paediatric neurosurgeon quoted by Ward L.J., ibid., at 985

²⁸ibid., Robert Walker L.J. at 1057

²⁹Following Re J [1990] 3 All E.R. 930. See I. Kennedy and A. Grubb, op. cit., 1251-1259

of a metaphysical separation of mind and body, as in Sir Stephen Brown at first instance “His spirit has left him and all that remains is the shell of his body”³⁰. This separation does not represent the common law approach to life and death,³¹ and sits oddly with the unwillingness discussed above to countenance any suggestion of that Mary was not ‘a life in being’. However, it allows the courts to engage in a balancing act between the sanctity of life and a patient’s best interests. This raises the question of what is meant by the sanctity of life. Hoffman L.J. in the Court of Appeal in Bland followed Professor Dworkin’s argument that the right to life is an aspect of an individual’s right to autonomy. There are some ways of dying, and possibly some ways of being kept alive, which no one would select, given a free choice. Hence the right to life must involve some choice on the manner of one’s dying, as well as of living³². This might be thought a precarious line of argument for courts to follow, since it justifies euthanasia, but some judges seem attracted by it. “Human dignity and personal privacy belong to every person whether living or dying. Yet, the sheer invasiveness and the manipulation of the human body which [the treatment] entails; the pitiful and humiliating helplessness of the patient’s state, and the degradation and dissolution of all bodily functions invoke these values.”³³ It was suggested in Bland that there was something undignified about the fact that the hospital was keeping treating its young patient alive. It is not clear why this view was taken, and certainly not why it was apparently thought that the manner of his treatment robbed him of dignity.

In Bland the hospital could not point to any risk or futility in the treatment he was receiving. Here the reasoning of the court centred not on whether the treatment was

³⁰Bland, *supra*, at 832

³¹ Finnis argues that neither has it a philosophical basis. J Finnis, *op. cit.*,

³² “Making someone die in a way that others approve, but he believes a horrifying contradiction of his life, is a devastating, odious form of tyranny”. R. Dworkin, Life’s Dominion: an Argument about Abortions and Euthanasia (Harper Collins 1993) at 217

³³ Auckland Area Health Board v. A-G. [1993] 1 N.Z.L.R. 235 *per* Thomas J. at 245

worthwhile but on the value of his life. John Keown points out that there was no reason to decide that feeding Anthony Bland or providing him with antibiotic treatment for infection was not worthwhile, unless it was assumed that his life was not worthwhile³⁴. In the Court of Appeal, Butler-Sloss L.J. announced that the sanctity of life was now to be balanced in an equation against the quality of life³⁵. Sir Thomas Bingham M.R. said, “I cannot conceive what benefit his continued existence could be thought to give him”³⁶, and Hoffman L.J. declared, “the stark reality is that Anthony Bland is not living a life at all”³⁷. In an Irish case involving a patient with some cognitive function, the Irish Supreme Court held that if she were aware of her condition, it would be a terrible torment to her.³⁸ How are such assessments justified? Keown³⁹ points out that this approach was rejected in the criminal law over a hundred years ago in Dudley and Stephens⁴⁰ in relation to necessity and Howe⁴¹ in relation to duress as a defence. The law may not ratify the decision of an individual that another should live or die, even where another life could be saved, and even if the other’s life is likely to be short or uncomfortable. That would be to ask the courts to a judgment as to which human life should be preferred over another.⁴²

In Re A the Court of Appeal recognized the strength of the criticisms of the ‘quality of life’ argument, and agreed that it could not be said that it was in Mary’s best interests to be killed. She was quite comfortable⁴³. Why then, would it be pointless to keep her on a heart and lung machine? Why was it assumed that removal of the machine would

³⁴ Op. cit.

³⁵ Bland, supra, at 849

³⁶ ibid., at 839

³⁷ ibid. at 855

³⁸ In the Matter of a Ward of Court [1995] I.L.R.M. 410

³⁹ Op. cit.

⁴⁰ Supra

⁴¹ [1987] A.C. 134

⁴² Op. cit. at 488

⁴³ ibid., per Ward L.J. at 989

inevitably be justifiable by analogy with Bland? Would she be less comfortable than she was with Jodie's body performing the same function?

3. Could it be said that that the operation would not cause death?

Unfortunately the criminal cases on causation are far from clear on the subject of hospitals who fail to treat disease or injury (either correctly or at all). In general, however, negligent treatment will not break the chain of causation where an individual inflicted the original injury. That person will therefore be held to have caused the death and be culpable. This is the case even where the doctor has a duty to treat the injury.⁴⁴ Yet in Bland, judges were divided as to whether it could be said that once nasogastric feeding were discontinued, the cause of death would be Anthony Bland's original injuries rather than the hospital failure to treat him. Sir Stephen Brown considered that if the feeding tubes were removed, the true cause of Anthony Bland's death would be "the massive injuries which he sustained...in the Hillsborough disaster."⁴⁵ There was some agreement with this in the Court of Appeal; "The withdrawal of nasogastric feeding would amount to an omission to act which would allow causes already present in the body to operate and the introduction of an external agency of death. Without the tube he would have died from his medical condition"⁴⁶. But the logic of this argument would remove any need for a judicial declaration authorising the discontinuance of treatment in cases of this kind. Any hospital could make the decision entirely on its own responsibility, claiming that the consequent death was caused by the disease or injury. In such a context there would be no need to consider the issue of the patient's best interests at all.

⁴⁴ Smith [1959] 2 All E.R. 193; Cheshire [1991] 3 All E.R. 670

⁴⁵ [1993] 1 All E.R. 821, 833

⁴⁶ Bland, supra, Butler-Sloss L.J. at 849; cf. Sir Thomas Bingham M.R., at 841

Hoffman L.J. rightly rejected this approach. Starving a child to death is not allowing nature to take its course⁴⁷. There is a positive duty of humanity, to provide basic nourishment, where there is a duty of care and someone is helpless. In the same way, if someone is ill and that duty exists, the carer cannot simply withhold it and say the illness caused the death. As far as withholding medical treatment is concerned, as Kennedy and Grubb point out⁴⁸ there are some patients who will in fact die of the disease or injury, but others who will not. Patients in a persistent vegetative state fall into the latter category.⁴⁹ However, if Mary and Josie were to be separated, so that Mary would die, the surgery itself would surely cause her death⁵⁰, not the fact that she was born physically attached to her sister⁵¹.

The majority of the Court of Appeal recognised that a causation solution would raise more questions than it answered. It was irrelevant to their decision in that the judges rejected a life-support analogy as far as the joining of the twins and the operation to separate were concerned. They did not consider how the argument would have worked if Mary were to be placed on life-support after the operation. Conceivably, it could be said that if the machine were withdrawn from Mary at some later stage, she would die not as a consequence of that, but because of the weakness of her organs. In Auckland Area Health Board v Attorney-General⁵² Thomas J observed in the New Zealand High Court that, if it were argued where life-support is removed from patients in extremis the cause of death would not be the procedure but the disease itself, then the same could be said of a patient with polio being removed from a heart and lung machine who actually

⁴⁷ibid. at 855; cf. Lord Mustill at 892-3

⁴⁸op. cit. 1217

⁴⁹Bland, supra

⁵⁰“ just as a lethal injection accelerates the death of a patient at the terminal stage” per Ward L.J., Re A, supra. at 1012

⁵¹According to Brooke L.J., the operation would involve a number of invasions of Mary’s bodily integrity. The surgeons would have to identify whose organs belonged to whom; hence the procedure bore no resemblance to the discontinuance of artificial feeding. It would amount to a positive act which would kill Mary. Re A, supra, at 1027

⁵²Supra

wants to live. In Mary's case the cause of death would be the removal of the machine, and, as in Re J⁵³ and Bland, it would have to be justified as being in her best interests. The Court of Appeal had already concluded that separation from Jodie was not in her best interests. So why would removal of a heart and lung machine be different?

Despite the many problems which accompany a causation solution in cases of this nature, Robert Walker L.J. appeared to adopt it

Mary would die because she was non-viable, and was designated for death.....

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INTENTION

In Re A the Court of Appeal appeared to believe that the surgeons who would operate on Jodie and Mary would have the mens rea⁵⁴ of murder, specifically, the intention to kill. Now, in Bland it is quite clear that the intention to kill would be present when treatment was discontinued, albeit with laudable motive, to alleviate suffering. For the whole object of the proposed cessation of feeding was to cause Anthony Bland's death.⁵⁵ However, in Re A, Mary's death was not desired, although the doctors knew her death was virtually certain⁵⁶. The Court of Appeal considered that therefore the test in Woollin⁵⁷, currently the leading case on the mens rea for murder, would be satisfied.

But the Woollin test is less than clear-cut. Evidence that a defendant foresaw death or really serious bodily harm is evidence from which a jury may, not must, infer intention.

⁵³ Supra

⁵⁴ The state of mind which a prosecutor must prove in relation to a particular offence

⁵⁵ Although Lord Bingham M.R. suggested that the doctors would not have the required mens rea, but he gave no explanation of this: Bland, supra, at 841

⁵⁶ The Archbishop of Westminster had explained that the doctrine of double effect did not assist: the good end (to save Jodie) did not justify the means (killing Mary). See also S. Sheldon and S. Wilkinson, op.cit.

⁵⁷ [1998] 4 All E.R. 103

There is before the jury, then, a “get-out” clause whereby they may decide that although a defendant foresaw death as virtually certain, he or she did not intend it. The House of Lords gave no guidance as to when a jury might legitimately do this. William Wilson suggests that the presence of ‘good motive’ might be a justification for an acquittal on the grounds that there was no intention. In his example, a motorist driving with reasonable care along a narrow mountain cliff turns a bend and discovers a bunch of hikers stretched out across the road. Lacking time to brake, his options are to carry on, plunging into the group at the likely cost of causing death, or to drive off the cliff “in heroic self sacrifice”.⁵⁸ (If the preference for self is thought to weaken the goodness of the good motive, Wilson’s scenario could be strengthened by placing the driver’s children with him in the car). Surely, the argument goes, the jury is entitled in this instance to conclude that the driver’s foresight of death does not mean he intended to kill?

Does this mean that the surgeons proposing to operate on Jodie and Mary lacked intention? Curiously, Brooke LJ. said any jury directed on Woollin lines would convict⁵⁹. That seems to miss the point that the case establishes only the basis on which a jury is entitled to infer intention. It does not define intention. The problem presented by Woollin is in fact a different one. It stems from the fact that Re A concerned a hypothetical rather than an actual trial for murder. If Mary’s surgeons were tried for murder, the jury would make a decision on the facts as to whether intent was present at the time of the operation. They would be likely to conclude that the surgeons foresaw Mary’s death as being a virtually certain consequence of their actions. Whether or not their wish to save Jodie would lead the jury to conclude that they did not intend to kill Mary is a matter of guesswork. The Court of Appeal was not entitled to anticipate how

⁵⁸ W. Wilson, ‘Doctrinal Rationality after Woollin’ (1999) 62 M.L.R. 448

⁵⁹ Re A, *supra*, at 1029

the jury would resolve the issue. Even if there were no doubt but that the jury would acquit of murder (because of lack of intention), a difficulty remains. Intention is not required to sustain a verdict of manslaughter, and so the surgeons of St Mary's would be at risk of a manslaughter conviction were they to rely for their defence on denial of mens rea alone. And, of course, had Mary been transferred to heart and lung machine on a temporary basis, removal from it would have been accompanied by a clear intention, since there would be no higher purpose than to let her die.

CONCLUSION

The appeal judges in this case stress that they wish to take Mary's rights seriously. In defence of those rights they claim to eschew an analogy with Bland. Yet the Court accepted, apparently without question, the medical view that there was no purpose to be served by keeping her alive after the operation. It was taken as read that any artificial means of sustaining her could legally be withdrawn at any or at some time subsequently. This assumption is fundamental to the court's espousal of the necessity defence in this case. For if there were means of saving Mary, her death would not be the necessary price to pay for saving Jodie. However, the assumption that she was doomed is based on an undeveloped comparison with Bland. Although the Court of Appeal was aware the flaws in that judgment, it became embroiled in precisely the same contradictions and moral fudging. However, that enables the Court of Appeal to achieve a utilitarian goal (saving one life rather than lose two lives) while talking in terms of the right to life and the sanctity of life. It also allows the judges to impose their views upon parents from outside the jurisdiction, although those views are highly questionable in terms of law, logic and morality. Some of us may read this case and find that we do not feel particularly good, after all.