Necessity and murder

Re A (Children) [2001] 1 Fam 147 (HL), [2001] 2 WLR 480, [2000] 4 All ER 961, [2001] 57 BMLR 1.

Jodie and Mary were conjoined twins. On appeal, the Court of Appeal was asked to determine whether it would be lawful for surgeons to operate on the pair to separate them. The implications of separation were that M would certainly die within minutes and that J would most probably live. On the other hand, if the twins were not separated ultimately both would die within a matter of months.

M's own heart and lungs were inadequate to sustain M's life. While joined to J, M survived only by relying on J's heart to pump the blood oxygenated by J through both twins' bodies. Sustaining both lives was imposing an excessive strain on J's heart. It was common ground that J's heart would fail within approximately 3-6 months. M's death would inevitably follow J's.

On these facts, the Court of Appeal held that it would be lawful (though not required) for surgeons to carry out the operation. To the extent that any general proposition can be extracted from the decision, its gist seems to be that a defence of necessity can extend to lethal acts undertaken in order to negate a threat to life even where that threat is an innocent one. Hence, on the best view of the law after *Re A*, the story told of the petrified passenger during the sinking of the *Herald of Free Enterprise*, who had to be pushed off a ladder (and who apparently then drowned) in order that others may survive, may now disclose an appropriate case for the necessity defence. [See S&S § 21.2(vi).]

The case establishes few if any general propositions of law. Even though the ruling of the Court was unanimous, each of the three judgments adopts different—and inconsistent—reasoning. There is, at least, welcome agreement that Johnson J erred at first instance in holding that the surgical intervention would be lawful because it would be an omission (a withdrawal of the blood supply to M) rather than a positive act of killing. [For criticism of similar reasoning in *Airedale NHS Trust* v. *Bland* [1993] AC 789, see S&S § 4.1(i)(e).] The Court of Appeal rightly held that their decision had to be made on the basis that the surgery, while undertaken in order to save J, would constitute a positive act of killing M.

On what basis, then, could the killing of M to save J be justified and lawful? The difficulty here is posed by the rule in *Dudley and Stephens* (1884) 14 QBD 273 that necessity is not available as a defence to murder. [See S&S § 21.3(ii)(e).] Prima facie, the surgery would be murder of M, since both the actus reus and mens rea elements of murder would be present (more on which below). Thus the challenge for the Court of Appeal was to circumnavigate, without undermining, the rule in *Dudley and Stephens*. Each judge sought to achieve this by a different route.

Bringing the case within self-defence: Ward LJ's judgment

Ward LJ evaded the bar to pleading necessity in two ways. His primary line of reasoning involved characterising the case as one of (third party) self-defence, a criminal law defence that definitely *is* available to murder. In his Lordship's analysis, the key point of the case is that, albeit through no fault of her own, M was killing J. What is distinctive about the justifying defence of self-defence is that D acts to avoid a threat from P, not by transferring the harm in some way to another person (as classically occurs in duress), but by negating that threat *directly* at source. In *Re A*, J's life was being threatened. Therefore, J (or someone acting on her behalf) would be justified when acting in order to negate that threat, even though a consequence of so doing was that the person *who was the source of that threat* would die.

It is, of course, odd to think of this as a case of self-defence, since M can hardly be described as an unlawful aggressor. But as Ward LJ rightly observes, there is no requirement in self-defence that the attack be a criminal offence:

> "The six year old boy indiscriminately shooting all and sundry in the school playground is not acting unlawfully for he is too young for his acts to be so classified.... [H]owever, ... *in law* killing that six-year old in self-defence or others would be fully justified and the killing would not be unlawful. I see no difference in essence between that resort to legitimate self-defence and the doctors coming to Jodie's defence and

> removing the threat of fatal harm to her presented by Mary's draining her life blood." (At 1017.)

In something of a belt and braces approach, Ward LJ also noted that if one weighs up the respective best interests of J and M, the scales were tipped heavily in J's favour because she was the only child with any prospect of life extending beyond the following few months. However, this point matters, if at all, only when the case is viewed as one of necessity. It is irrelevant to self-defence: if P attacks D when D has only one hour to live and P is healthy, D is still entitled, if necessary, to kill P in self-defence. His Lordship seems to think the point important because it resolves the dilemma created by the conflict in the doctors' legal duties to act in the best interests of each of J and M:

> "What are the doctors to do if the law imposes upon them a duty which they cannot perform without being in breach of Mary's right to life if at the same time the respecting of her right puts them in breach of the equally serious duty of respecting Jodie's right to life?... In those circumstances it seems to me that the law must allow an escape through choosing the lesser of two evils." (At 1016.)

Here Ward LJ helps himself to a second line of argument, that the surgeons may also have a defence of necessity. This possibility is developed more fully by Brooke LJ, whose judgment is endorsed by Ward LJ as a "masterly analysis" (at 1013).

Bringing the case within necessity: Brooke LJ's judgment

In Brooke LJ's view, the case falls entirely within the defence of necessity, since it satisfies the following three criteria, espoused originally by Stephen:

(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. (At 1052)

These criteria reflect a characterisation of necessity as a lesser-evils defence: "The claim is that [D's] conduct was not harmful because on a choice of two evils the choice of avoiding the greater harm was justified. (At 1048.) It should immediately be remarked that this is not a comprehensive characterisation. As was argued in *Simester and Sullivan* [§ 21.3(ii)], there is no unitary rationale of the necessity defence. It is capable of covering a range of justificatory reasons. Moreover, while the lesser evils rationale does seem to apply here, the criteria set out above by Brooke LJ are insufficient by themselves to distinguish *Re A* (which involved killing one to save one) from *Dudley and Stephens* (which involved killing one to save three). More needs to be said.

To this need, Brooke LJ responds that "Mary is, sadly, self-designated for a very early death." (At 1051; see at 1041-2.) Hence, unlike the case of *Dudley and Stephens*, there was no question of human choice in selecting the candidate for death. Moreover, the balance of evils is tilted by the fact that "the principles of modern family law point irresistibly to the conclusion that the interests of Jodie must be preferred to the conflicting interests of Mary" (at 1052), since Jodie had a good prospect of living a happy, fulfilled life and Mary had no prospect of life at all. His Lordship explicitly eschews reliance on the proposition that M was an "unjust aggressor": "None of the formulations of the doctrine of necessity which I have noted in this judgment make any such requirement: in this respect [necessity] is different from the doctrine of private defence." (At 1051.) Hence his Lordship's analysis of the case differs sharply from that of Ward LJ. (Incidentally, it is an arduous task to reconcile this difference with Ward and Brooke LJJ's assertions at 1011 and 1018 that they agree with each others' judgments.)

The account given by Brooke LJ is attractive but incomplete. As was stated in the last-but-one paragraph, necessity cloaks a variety of different rationales, and the requirements of the ordinary lesser-evils defence, as identified by his Lordship, need to be augmented before they can deal with the sort of situation in *Re A*. Let us suppose, as was said to be true in *Dudley and Stephens*, that the cabin boy was about to die in any event: that he was, in the language used by his Lordship, "self-designated for death". Surely, nonetheless, the defendants would not be entitled to kill him? Likewise, doctors are not free to accelerate the death of a terminally ill patient, V, merely in order to be able to transplant one of V's organs into P, an otherwise healthy patient.

If one chooses to call *Re A* a case of necessity rather than self-defence, there are two important features that must be relied upon to distinguish it from *Dudley and Stephens*. First, despite Brooke LJ's refusal to rely on this fact, it matters that M was the source of the threat to J's life. This was not true of either *Dudley and Stephens* or the transplant example given in the last paragraph; but it was true of the unfortunate young man on the *Herald of Free Enterprise*. Secondly, even though M's death was foreseen as a virtual certainty (and therefore intended, by virtue of the definition of intention in *Woollin* [1999] 1 AC 82; see S&S § 5.1(iv)), *Re A* was arguably not a core case of direct intention. Recall that the criminal law acknowledges two varieties of intention [S&S § 5.1]. D intends the actus reus if:

(I) D directly *intended* the actus reus in the ordinary, paradigm sense of "intention"—i.e. if he acts with the aim, object, or purpose of bringing the actus reus about; or
(II) D recognised that the actus reus was a *virtually certain* consequence of his actions.

In *Dudley and Stephens*, the cabin boy's death was intended in the core or direct sense: the defendants aimed to kill him, in order then to eat him. In *Re A*, M's death was no part of the doctors' aim or purpose, but was at least a virtually certain consequence of what they set out to achieve. (We return to this issue below.) It is only by supplementing Brooke LJ's analysis with these distinctions that the rule in *Dudley and Stephens* can safely be evaded.

Lack of a criminal intent? Robert Walker LJ's judgment

A distinction between these two varieties of intention is at the heart of the Thomist double effect doctrine, which however ordinarily requires that the beneficial purpose of the treatment (e.g. to alleviate pain) be directed at the same person who suffers the unwanted side-effect (e.g. an acceleration of death). Although, formally, the double effect doctrine is inapplicable to *Re A*, in which two patients are involved rather than one, the underlying distinction upon which that doctrine rests is essential, it is submitted, to support Brooke LJ's analysis of the case as one of necessity. Moreover, the same distinction is explicitly relied upon by Robert Walker LJ (see at 1063). His Lordship combines this distinction with a finding that surgery would be in the best interests of M as well as J (cf. 1063E); hence the operation "would not be unlawful. It would involve the positive act of invasive surgery and M's death would be foreseen as an inevitable consequence of an operation which was intended, and was necessary, to save J's life. But M's death would not be the purpose or intention of the surgery, and she would die because tragically her body, on its own, was not and never had been viable." (At 1070.) Thus Robert Walker LJ's analysis relies on a variant of the double effect doctrine.

Both Ward and Brooke LJJ reject the conclusion that the operation was in M's best interests, and that conclusion will not be discussed here. What is of greater concern is the assertion by his Lordship that "the doctrine of double effect prevents the doctor's foresight of accelerated death from counting as a guilty intention." (At 1063.) This sort of reasoning appeared in *Gillick* v. *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 190,

where Lord Scarman once said that "the bona fide exercise by a doctor of his clinical judgement must be a complete negation of the guilty mind." [See S&S § 10.3(i)(c).] It has been criticised trenchantly and rightly by Ashworth ("Criminal Liability in a Medical Context: The Treatment of Good Intentions" in Simester and Smith (eds), *Harm and Culpability* (1996) 173). Robert Walker LJ's (and Lord Scarman's) reasoning depends on a proposition that there is a difference between the law's definition of "intention" and its definition of "guilty intention". No such difference exists. Either D fulfilled the definition of intention set out in *Woollin* or he did not. *Re A, Gillick*, and any other criminal case, should be approached by asking whether D's conduct constitutes the actus reus and mens rea of an offence; then by asking separately whether any defence is available. If D acts in a situation of necessity, that conclusion is a matter of defences and does not mean that D in some way lacked a "guilty" intent.

What sort of intent to kill?

One final difficulty. It is clear that, as a matter of mens rea, the doctors intended to kill M. The case falls well within the definition of intention in murder, as laid down in *Woollin* [1999] 1 AC 82. At the same time, it is arguable that the judges in *Re A* wrongly took it for granted that this is a case of foresight of virtual certainty. M's death seems too close, too intimately bound-up, with the intended operation to separate her from J, for that death plausibly to be characterised merely as a *side-effect*, even a virtually certain side-effect. [Compare the case of the spelaeologists, discussed in S&S § 5.1(iv).]

Since the law acknowledges only two categories of intention, this suggests that M's death is better treated as something directly intended by the surgeons who operate. However, that conclusion does not seem right either. M's death was neither sought for its own sake, nor sought as a means to an end. Her death supplied no part of the reasons why the doctors were operating; it was not an aim, object, or purpose of the operation; the doctors would not have regarded themselves as having "failed" in any sense if, by a miracle, M had survived. [See, on these characteristics of direct intent, S&S § 5.1(i).]

This suggests that, apart from core cases of direct intention (i.e. means and ends), and cases of virtual certainty (i.e. virtually certain side-effects), there is a further subcategory of intention which applies to *inseparable accompanying effects*. M's death was an inseparable accompanying effect of the intended operation to separate her from J. [For further discussion of this category, see Simester, "Moral Certainty and the Boundaries of Intention" (1996) 16 OJLS 445.]

Why might all this matter? It does not affect the issue of mens rea, because inseparable accompanying effects lie well inside the boundaries set down in *Woollin*. But it may matter to the availability of a *defence* like necessity. If death is merely a foreseen certain side-effect, there is room for distinguishing the case from *Dudley and Stephens*. Similarly, the double effect doctrine in Thomist theology depends for its application on the difference between a doctor who directly seeks to kill, as a means to end pain, and a doctor who seeks to end pain knowing that death will be accelerated as a side-effect. But if death is an inseparable accompanying effect, and not merely a side-effect, it is unclear whether this distinction, upon which the necessity defence in *Re A* rests, can be drawn so easily. Unfortunately, their Lordships failed even to notice this difficulty.

Conclusions

Future criminal cases will find little material with which to generalise in *Re A*. Robert Walker LJ's judgment can largely be disregarded, and the analyses of Ward and Brooke LJJ tread

different paths. Indeed, their Lordships' mutual declarations of agreement are undermined by the reasoning in their judgments. No *ratio decidendae* emerges with clarity from the decision. Nonetheless, authoritative dicta may be drawn upon to support arguments about the scope of self-defence (in Ward LJ's judgment) and especially necessity (in Brooke LJ's judgment). And one may be confident in future that a defence to murder will be available to D in situations where a blameless victim is, by her conduct, posing an unjustified threat to the lives of others, at least provided the victim's death is not directly sought and is only a virtually certain side-effect of the life-preserving actions taken by D.