

Evaluate the
contention that the
court of appeals
determination



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

[1]Lord Justice Ward delivered the leading judgement in Re A clearly stating this early in his decision in an attempt to highlight the positivist approach with which the Court of Appeal should decide the case. However, does the statement accurately encompass the reasoning by which the decisions were reached by Ward and his counterparts? To fully understand; one must first attempt to understand the somewhat turbulent relationship between law and morality, analyse the case itself and evaluate each of the respective judgements in an attempt to understand each of the Lord Justice's rationale. One will then conclude by way of overview. The concept of law and morality being intertwined has intrigued scholars since the time of Plato and Aristotle.

Natural law provides a description of the point the two come together. It is a widely misunderstood moral concept, not legal concept, its principal aim, is that, what naturally is, ought to be.[2]Plato's ideals came from his views of human nature, while Aristotle believed these values came by reason.[3]

Natural law became intrinsically linked with theology due to the Christian-Judeo scholars; Saint Augustine and Thomas Aquinas. Saint Augustine simply repackaged Plato's views, removing pagan gods and replacing them with the Christian God. Summa Theologie - Aquinas key work, natural law was a way for ' Gods subjects' to be part of the Lords plan, eternal law.

[4]Natural law began to decline due to two reasons; an increasingly secular society, putting their beliefs in science rather than faith and the rise of legal

positivism.[5] Positivists such as Robert Paul Wolff believe that the law in its very nature requires obedience regardless of ones judgements.[6]Natural law theorists believe what is, and what ought to be in law are two questions that are inseparable. Leading positivist scholars Jeremy Bentham and John Austin, vehemently insist there is a firm difference between the two and both do not apply to each other.

[7] One must highlight the fundamental difference in theories. Natural law deals with society as a whole, while positivism deals purely with the descriptive and analytical issues of law.[8]After the fall of Nazi Germany which relied on positivist and utilitarianism theories in controlling its citizens many people became alienated and disconnected with the ideals of positivism.[9] This led to a reinvigoration of Natural law, sparking many debates.

The most famous of these jurisprudential debates was between Lon Fuller and H. L. A Hart.[10] The debate revolved around the Nazi Grudge Informer cases that had to be dealt with after the fall of Nazi control in Germany.

[11]Hart attempts to establish there is no compulsory link between a legal system and the pursuit for morality and justice.[12] Hart instead issued two questions; the validity of the law and the efficacy of the legal system.

[13] Fuller on the other hand believed that law and morality could not be so easily separated and that the post war courts were compelled to dismiss Nazi laws, believing that calling them laws was a false description.[14] They were merely instruments in a corrupt regime. There is little doubt that the institutions and concepts which govern our law are frequently animated by

moral values.[15] Raymond Wacks rightly points out that moral questions invade the law at every turn.[16] Nothing highlights this issue more than the case of *Re A*. *Re A* represented a dreadful dilemma both legally and morally.

A couple gave birth to conjoined twins. The medical name for their condition was ischiopagus. Josie was the healthier twin considered 'normal' or 'good'. Mary on the other hand was severely abnormal in three key aspects; she had a primitive brain, an under developed heart, and severe pulmonary hypoplasia.[17] Marys relied upon Josie's heart to pump blood around both their bodies.

This put tremendous strain upon Josie and if they were not separated both faced certain death. Doctors at the hospital caring for the twins wished to perform an operation to separate them, this would save Josie's life but would inevitably cause the death of the non-viable twin. The twins parents refused to give their consent to the operation. Being devout Roman Catholics they could not accept letting one child die to save the other.

' We cannot begin to accept or contemplate that one of our children should die to enable the other one to survive. That is not God's will. Everyone has the right to life so why should we kill one of our daughters to enable the other to survive.'^[18]The hospital therefore applied to the court for a declaration that the proposed operation would be lawful and in the best interests of both twins. At first instance in the High Court the operation was deemed lawful by Justice Johnson, under the rationale that Mary's life would be short and hurtful to her and to prolong it would be to her disadvantage. [19] He also deemed the separation to be an omission rather than an act.

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The parents appealed believing that the Judge erred in his ruling, citing three reasons; Mary's interests, Josie's interests and the lawfulness of the operation.[20]The Court of Appeal believed that the High Courts initial decision was correct, but the rationale used by Johnson J to reach his decision was erroneous. Each Lord Justice believed the appeal should be dismissed and the separation of the twins constituted lawful homicide of Mary. It is important to note that Ward, Brooke and Robert Walker L.

J achieved this verdict all on differing grounds.[21]The question raised to the Court of Appeal was not whether it was in Mary's best interests that the hospital should continue to provide her with treatment which would prolong her life, rather it was whether it was in the best interests that an operation be performed to separate her from Josie when it was certain that she would die as a result. Ward L. J. was faced with a difficult dilemma, one which did not fully manifest itself until he had been presented with an image of the twins.

He remarked how the medical documentation had not prepared him for the desperate sadness and shock that had greeted him. Ward echoed Lord Goff in *Airedale NHS Trust v Bland*[22], the apparent precedent for his decision. 'The question is always whether the treatment would be worthwhile, not whether the patients life would be worthwhile'.[23]Ward judged the situation as a choice between two evils. The decision was therefore to find the least detrimental choice.

One can not help to see a parallel between this viewpoint and the utilitarian argument involving the hypothetical trolley case.[24]Ward argued the

operation was in Josie's interests, while stating Mary did have a right to life, but little right to be alive.[25] It was expressed that in any event Mary was killing Josie, draining her life- blood. This idea that Mary was living on ' borrowed time' makes Mary seem culpable in terms of conventional legal morality.

[26] One is struck with the image of Dracula, feeding on a victim, monstrous as well as evil.[27]The point made here is this emotive language seems to be detrimental to the image of Mary, making it seem there is only one child to consider. Mary faced these criticisms since birth, with surgeons referring to her simply as a ' tumour' that should be removed with no qualms.[28] The fundamental question which was later addressed by Robert Walker L. J. was of who should be considered a person.

[29]This view of Mary stealing her sister's life-blood prompted Ward L. J to adopt a ' quasi self-defence' in regards for Josie, obviously modified to fit the unique circumstances of the case. He even stated that if Josie could speak surely she would protest and say to her sister ' stop killing me'. Doctors were under a duty of care to both siblings. They could not operate as Mary was not able to sustain life alone and the operation would lead to her death, but also they were under a duty to care for Josie.

No doubt bolstered by the fact Mary was beyond help, the scales of fairness came down in Josie's favour allowing the operation to be deemed lawful in the eyes of Ward. Lord Justice Brooke took a different standpoint to his colleague. He adopted the legal doctrine of necessity, this presented a rare reliance on this doctrine with regards to the issue murder.[30] He highlighted

the difficulty in using this concept, as who is really has the right to judge a defence of this nature, citing cases such as R v Dudley and Stephens for precedent. He stated the three necessary factors for necessity had been satisfied; the act was needed to avoid inevitable and irreparable evil, no more should be done that was reasonably necessary for the purpose to be achieved, and the evil inflicted was not disproportionate to the evil avoided.

[31]It was this defence of necessity that the Court of Appeal eventually decided was needed to save Josie's life.

It is important to highlight that at common law necessity was not a defence for murder. In order to justify the declaration in Re A the court had to throw away years of legal precedent, itself based in moral arguments that had not even been addressed.[32]Brooke's key logic to his decisions involved two main factors; the doctrine of sanctity of life and the idea that Mary was designated for death from the start. These two factors have been met with much criticism. Along with Ward, Brooke put a great emphasis on the doctrine of sanctity of life. One is likely to mirror the view of Michael Bolander in stating that by looking at the relevant worth of each twin's lives the doctrine is degraded significantly.

[33]Brooke argued that one should have their own bodily integrity with which nature denied them, if this statement is true should that apply to individuals with artificial limbs or pacemakers? Should they be separated from these instruments which make a significant difference to their lives?[34]The idea that Mary was designated for death is an emotive phrase, which yet again puts her in an unfair position. She did not designate herself for death, she was simply born that way.[35]One would agree with John Harris that <https://assignbuster.com/evaluate-the-contention-that-the-court-of-appeals-determination/>

Brooke's argument was half developed, and lacked depth.[36] Lord Justice Walker was the only presiding Judge to believe that the operation was also in Mary's best interests.

He highlighted the welfare principle under the Children Act 1989 Section 1 (1) 'the child's welfare shall be the courts paramount consideration'.[37] He immediately brought to the forefront two important, yet some would say obvious questions. Were there two individuals? Answered yes, and was Mary born alive? This was also answered with a yes but was also highlighted she was incapable of separate existence.[38] Robert Walker L. J.

describes the operation as a positive act of invasive surgery under the Doctrine of Double Effect. It is important to mention that this is not a legal doctrine, merely intended as a guide in morally difficult circumstances. The Doctrine of Double Effect has its origins in Aquinas justification of homicide with regards to self-defence.[39] He continues to argue that it is in the interests of both twins to be separated from each other, to allow Josie to live with dignity and allow Mary to die with dignity.

[40] How can one justify by destroying Mary's life she regains her dignity?

[41] One would mention Philippa Foot and her idea of positive and negative duties. We must accept our negative duties as well as our positive ones.[42]

In this scenario, this is clearly shown as Ward pointed out, a lesser of two evils must be chosen.' Another accuses the court of sacrificing the rights of the parents' religious conscience... upon the altar of medical science and social utilitarianism.

'[43] Was it ever ethically right to take the parents decision away from them?[44]It was not an easy task the Court of Appeal was faced with, many issues had to be dealt with, ranging from family law to criminal law, a task, which while attempted heroically seemed flawed in its analysis.[45] This is apparent from the most cursory readings of the Lord Justices' judgements, which at every turn seems to use moral concepts and language.[46]One would be inclined to agree that the decisions appear to look for the morally 'soft option', giving the answer the public at large would want.[47] It is still a murder and all the judgement seemed to do was make it morally permissible to do so. The lack of precedent available meant there was no settled principle in law the Court of Appeal could act on.

[48] This bending of the law to achieve a utilitarian goal where two lives were at stake has ultimately opened the door to other potential lawful acquittal cases where euthanasia is the reason for killing.[49]It seems reasonably clear, that regardless of the decision of the Court of Appeal it would have split opinion, and this was accepted at the outset by Lord Justice Ward. It can be said that there was a positivist approach taken in attempting to decide this case, but the unique issue that was involved, with no legal precedent, could ultimately not be fitted into the current law at the time, allowing for morality to creep in. Throughout the case the parents of the twins were given the upmost respect for their decision, but were always in the minority with regards to their viewpoint, despite supporting views from the Archbishop of Westminster and Pro-life by their side.