Decisions at the end of life are particularly difficult and a huge number of factors can go towards justifying or unjustifying a particular course of action. In this chapter I want to focus in on what is becoming a legally accepted practice and ask whether a distinction which seems to underlie the legal principle can in fact be supported on good philosophical grounds. The distinction relates to allowing incompetent patients to die and the difference between such omissions and directly killing similar patients. The discussion also has implications for the related issue of respecting the right of competent patients to refuse treatment/have treatment withdrawn and how respect for this right compares with cases where competent patients request assistance in dying.

Making decisions on the patient’s best interests

Consider the following real case: An infant, let’s call her X, suffering from Down’s syndrome has a further complication. She has a potentially fatal bowel obstruction, which however can be treated with a fairly straightforward surgical operation. Her parents decided to decline the surgery on the grounds that given her disabilities the kindest thing to do would be to allow her to die. The child’s doctors were uneasy with this decision and took the matter to court. The first court’s decision was to respect the refusal of treatment, but the Court of Appeal reversed this decision. The Court of Appeal argued that it is a mistake to place so much emphasis on the wishes of the parents as this is fundamentally a decision about what is in the child’s best interests. The Court saw itself as having to decide ‘whether the life of this child is demonstrably going to be so awful that in effect the child must be
condemned to die or whether the life of this child is still so imponderable that it would be wrong for her to be condemned to die’, and decided that in this case treatment should go ahead to ensure the child lives.

Of course, one could argue here that the Court made the wrong judgement when considering the awfulness of this child’s life, but in a sense this is beside the point. The important conclusion of this case is that it gives guidance on the kind of reasoning one should follow in such cases. In such situations there is a balancing exercise to be carried out: one has to decide whether this patient’s life is so terrible it is better for him/her to be allowed to die, or whether the quality of this life is unknown and one should err on the side of caution. Although in the case of infant X the balance came out in favour of treatment, the alternative possibility was left open by the Court when it stated: ‘There may be cases … of severe proved damage where the future is so certain and where the life of the child is so bound to be full of pain and suffering that the court might be driven to a different conclusion’.

Given that this is the kind of approach one should be taking in deciding these cases, it was then only a matter of time before a case would come to the attention of the Courts which merited a different conclusion on the question of the patient’s quality of life. In the case of Baby J, a brain-damaged child who was not, however, dying, the Court of Appeal decided that if she were to go into respiratory failure, treatment should be withheld. The Court clarified the following considerations which must be taken into account in deciding such cases:

1. One must start with a presumption in favour of treatment.
2. One must consider the prognosis in terms of pain, suffering and in general quality of life.
3. Decisions should be co-operative between doctors and parents, and made in the best interests of the child.

I would like to argue that in some cases consideration 2, along with judgements about what is in the child’s best interest as outlined in 3, defeat consideration 1, at which time it then becomes inconsistent to also hold consideration 4. That is, I am going to argue that, under specific circumstances, allowing a patient to die by withholding treatment is, at least, morally equivalent to killing that patient. It may even