Draft Feminist Judgment for Foy v An t-Ard Chláraitheoir

Lydia Foy, Plaintiff v. **An t-Ard Chláraitheoir,** Defendants; **Jennifer and Claire Foy,** Notice Parties [2007] IEHC 470, [2006 No. 33 S.P.]; [2009] IESC 1

High Court 19th October, 2007

Supreme Court 19th November, 2009

Ní Mhuirthile J. 19th November, 2009

Introduction

[1] Labour wards all over the world reverberate to joyous exclamations of 'it's a boy!' or 'it's a girl!' A seemingly simple statement: one that lies at the very heart of this case. At its core, this case revolves around the question of how legal gender is constructed. How does one become a man or a woman for the purposes of coming *sui juris*? Is the exclamation in the birthing chamber and the consequent recording of sex on the birth certificate a definitive determination on a point of law, or is it merely, as Mr Justice McKechnie noted in the 2002 High Court judgment on this matter, "a "snap shot" of matters on a particular day and does not purport to be otherwise"? If the latter, how then is legal gender determined? This is the question which the appellant asks this Court to resolve.

[2] The appellant was born on Monday 23rd June, 1947 in Athlone, Co. Westmeath. As required by law, the appellant's mother registered the birth of her baby, naming her child "Donal Mark" and noting her baby's sex as male. The case arises as the appellant asserts that as he grew he developed a female gender identity. The appellant contends that she has a congenital disability, known as gender identity disorder. This results from a lack of congruence between the physical sex of her body and her internal sense of self as a gendered person. Consequently, in adulthood, and as the married father of two children, the appellant began living as a woman. She applied to the Registrar General to have the sex marker on the register of births amended to note "female" and the names changed to read "Lydia Annice". Throughout this judgment, I will refer to the appellant using female pronouns, apart from where it makes no sense, such as in the historical context

[3] The application to amend the register was refused and the case came before the High Court by way of judicial review proceedings. The appellant sought an order requiring the desired amendment to the birth register or, in the alternative, a finding that the absence of an ability to achieve legal recognition in her gender of preference infringed the appellant's constitutional rights to privacy, dignity, equality and the right to marry a man. In advancing these arguments, the appellant also relied upon the European Convention on Human Rights.

[4] Each of these claims was strongly contested by both the respondents: the Registrar General, Ireland and the Attorney General and the notice parties: Dr. Foy's children.

[5] The High Court ruled that the register of births records the information available at the time of registration and operates primarily as a document of historical record. It is, as noted in the quotation from McKechnie J. at paragraph 1 above, not intended to serve any other purpose. McKechnie J. also ruled that the appropriate legal test for gender

determination was that laid down in *Corbett v. Corbett* [1970] 2 All E.R. 33: namely that the congruence of the chromosomes, gonads and genitals at birth is determinative of the legal gender of an individual.

[6] Dr. Foy appealed that judgment. However, between the time of the filing of the notice of appeal and the initial hearing in the Supreme Court on 8th November, 2005, the legal landscape had altered in three significant aspects. First, two days after the High Court judgment in these proceedings, the European Court of Human Rights in *Goodwin v. United Kingdom* [2002] 35 E.H.R.R. 18 and *I v. United Kingdom* [2003] 40 E.H.R.R. 53, reversing two decades of jurisprudence, found that the continued failure of the UK state to recognise the preferred gender identity of the applicants amounted to a breach of their rights under Articles 8 and 12 of the Convention. Secondly, the Convention itself became part of the domestic legal framework by virtue of the European Convention on Human Rights Act, 2003. Finally, the system of civil registration was repealed in its entirety and replaced by a new system under the Civil Registration Act, 2004, which included provisions in sections 63, 64 and 65 to amend errors in the recording of a birth

[7] As these matters had not, and could not have, formed part of the legal reasoning in the High Court judgment of 2002, they were remitted back to the High Court for consideration at first instance. Unusually, and by agreement between the parties, the remitted action was again heard by my esteemed colleague McKechnie J. He ruled that as the *Goodwin* judgment was prospective only it could not have impacted upon his earlier decision. Regarding the Convention argument, he found that this too was dependant on a conclusion that the 2003 Act had retrospective effect which, based on the decision in *Dublin City Council v. Fennell* [2005] I.E.S.C. 33, he ruled it did not. As the new system of civil registration had not existed at the time, the introduction of the Civil Registration Act, 2004 was also of no significance in terms of that judgment.

[8] Accordingly, Dr. Foy's arguments on these remitted points were unsuccessful. The sole question which remains for this Court to consider is whether the High Court, in adopting the *Corbett* test erred in law.

Background to the Case

[9] For a detailed account of the facts, background to the case and the medical evidence presented in submissions, I refer to the compassionate, comprehensive and considered judgments of McKechnie J. in the High Court. Nevertheless, there are some aspects of the facts that I wish here to note.

[10] Dr. Foy was one of a large family of seven children and has five brothers and one sister. According to the evidence presented, Dr. Foy was at all times raised and treated as a boy by his family. In discussing his childhood, Dr. Foy notes that he was very different from his brothers and conscious of the clothes he wore, of his sense of femininity, and of his interest in and attraction to the clothes of his younger sister. He described a secret world: one of recurring dreams where he desired to act, look like and be feminine. According to Dr. Foy these feelings have always been part of his sense of self. Dr. Foy noted the occasion of his First Holy Communion as an instance which caused acute distress as he was part of the boys' group and was required to dress accordingly. Dr. Foy found this period of his life very stressful and has very little recall of this time. His Communion caused a crisis: a conflict between his subject identity and the identity objectively assigned to him, and resolved his internal identity as a girl. He recalls using harmless household items to fulfil this need to express his identity, for example wearing a towel as if it were a skirt. Such incidents he now considers as moments of true expression of himself. Throughout the remainder of his co-

educational primary schooling he reported envying the freedom of the girls in the class to openly express their identities. He was frequently on his own and had little, if any interest, in boyish activities.

[11] Once he began secondary school as a boarder in Clongowes Wood College in the early 1960s he was considered by some classmates to be gay and others treated him in a manner he described as “gentlemanly”. He had no close friends and described that time in his life as walking on a tightrope as his feelings regarding his gender identity continued. Again he reports experiencing an “in world” and an “out world” and reports cross dressing during holiday time in the early morning or late evening when it was safe to do so.

[12] It was in his mid-teens that Dr. Foy began consciously and deliberately to question his identity. He explored certain books which became available to him for information, yet this heightened his confusion. For example, in Hadfield on *Childhood and Adolescence* the word “transsexual” was defined by reference to the section on “sexual deviancy”, which created in him a huge guilt complex. Thus Dr. Foy was left in a constant state of questioning his identity; whether he would ever recover from his unidentified condition; whether he was the oldest person in the world to experience this conflict; and so on.

[13] At University College Dublin where he studied Pre-Med and subsequently Dentistry, Dr. Foy had increased access to books to facilitate his research into his condition but he could not uncover much concrete information, apart from a book written by journalist Jan Morris which discussed the availability of gender reassignment surgeries in Casablanca. None of the material available provided the appellant with the information he sought: a thorough explanation of exactly what a transsexual person is. He was a member of the College’s Musical Society but no other details from his undergraduate career were presented.

[14] Dr. Foy began to practise as a dentist in 1972. There was little information about his life during this time in the evidence from the High Court. No elaboration was given regarding dissonance between his inner life and his outward life. Nor was there any information about the persistence of his cross-dressing practices or otherwise. It was confirmed that he had a non-sexual relationship with a woman prior to meeting Mrs. Foy and had proposed marriage to that woman.

[15] While he worked as a dentist in Mullingar in the early 1970s, Dr. Foy maintained an active membership of a local musical society. It was there that he met Ann Naughton, the future Mrs. Foy, in 1975. A courtship ensued and the couple became engaged at Christmas 1976 and were married on 28th September, 1977. The birth of their daughters followed quickly: Jennifer on 16th August, 1978 and Claire on 18th September, 1980. In 1982/3 Dr. Foy was hospitalised due to a physical condition affecting his leg and was generally unwell. Towards the end of 1983 in November or December he first went to work in Saudi Arabia for a two year period, returning home at quarterly intervals for a few weeks. When he renewed his contract the entire family joined him for seven or eight months after which they all returned to Ireland.

[16] Sometime in 1982, Dr. Foy became increasingly concerned by the conflict between his inner sense of femininity and his outer male persona such that he became severely depressed and consulted a psychiatrist. The stress caused by attempting to conform to his social role as a man, a husband and a father while attempting to reconcile his internal sense of himself as woman caused deep and profound unhappiness which manifested in a number of stress-related physical complaints. He told Mrs. Foy that he was a transvestite and enjoyed wearing female clothing. She responded that neither she nor the children would have anything to do with such activity, were not to see him so dressed and ordered that he never mention this to her again.

[17] In 1989, Dr. Foy was referred by a colleague to see another psychiatrist Dr. Wilson. He in turn referred her to Dr. Frank O'Donoghue who was the most experienced doctor at the time in this area of medicine in the country. Following a series of meetings, Dr. Foy was diagnosed as a transsexual and underwent gender assignment surgery in 1992. These interventions were medically successful and she now lives her life as a woman. I refer to my colleague McKechnie J.'s detailed accounts of the medical treatment undergone by Dr. Foy in his 2002 judgment from the High Court. I do not repeat them here as they are irrelevant to the core question before this court.

[18] In terms of Dr. Foy's private and family life it is noteworthy that in the summer of 1989 Dr. Foy told Mrs. Foy that he was taking female hormones. Understandably, Mrs. Foy was shocked at this disclosure. Naturally she wished to discuss this matter, but despite many attempts to do so, Dr. Foy did not engage with her on this topic. Following on from the initial consultation with Dr. O'Donoghue, both Dr. and Mrs. Foy attended joint and separate consultations. In was in the private consultation with Dr. O'Donoghue that Mrs. Foy was informed of the condition of transsexualism, of Dr. Foy's likely diagnosis and various treatment options up to and including surgery. Mrs. Foy was in utter shock and total disbelief. From the perspective of their family life, matters disintegrated from that point on with Dr. Foy vacating the family home in April 1990. Proceedings were set in train and were settled in the Circuit Court on 13th December 1991. Dr. Foy consented to the order for judicial separation with Mrs. Foy being granted sole custody of their children. Access arrangements were agreed, subject to certain terms and conditions. In October 1993, a barring order was obtained against Dr. Foy which was confirmed by the Circuit Court on 20th May, 1994. The order of 1994 also prohibited Dr. Foy any access to the children and directed that she transfer her interest in the family home into the sole name of Mrs. Foy. An appeal to the High Court was dismissed in October 1994. Dr. Foy continues to feel aggrieved at these orders. The facts of the case illustrate that there are no winners here. The inherent societal pressure that Dr. Foy felt in attempting to conform to acceptable notions of gender identity, gender expression and family has resulted in a situation where the entire Foy family has been bruised. The adversarial nature of the law as it attempts to resolve familial disputes can only have aggravated an already delicate situation.

Legal Gender Determination

[19] The test for determination of legal gender as set out in *Corbett* contains both biological and temporal aspects. It is resolved based on the congruence of the chromosomes, gonads and genitals at birth. The test was developed by Ormrod J. in the High Court of England and Wales in 1970 in the context of nullity proceedings. The plaintiff in the case (the husband) argued that the marriage of the parties was invalid as the respondent had been born, and registered at birth as male. Consequently, under *Hyde v. Hyde* [1866] L.R. 1 P. & D. 130, it could not be considered a valid marriage as the parties were of the same gender.

[20] In reaching this decision, Ormrod J. heard extensive evidence from the medical experts and noted the difference in opinion as to the aetiology or causation of transsexuality between the experts:-

> "[Some experts] regard it at present as a psychological disorder arising after birth, probably as a result of some, as yet unspecified, experiences. The alternative view is that there may be an organic basis for the condition."

[21] Studies on the latter proposition had been conducted only on immature rats and other animals by that time. Consequently, Ormrod J. was of the opinion that any application of that work to the human being was purely speculative. Thus he found that this second theory had "nothing to contribute to the solution of the present case." He went on to note that the medical experts agreed on four criteria for assessing the sex of an individual: chromosomal, gonadal, genital and psychological. Some of the experts, he noted, would add a fifth criterion: the hormonal factor. Such criteria, he remarked, had been evolved by doctors to systemise medical knowledge and to assist unfortunate patients who suffer either physically or psychologically from sexual abnormalities. However, he stated that "[t]hese [psychological and hormonal] criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination." Consequently he determined that, given the current state of scientific knowledge, at that time, the relevant criteria were the first three criteria as outlined above. The test, as developed by Ormrod J., is entrenched in scientific understandings from the 1970s and cannot and does not account for scientific, or indeed social, developments in the intervening years. I find myself pondering the potential stymieing effect of a legal test shackled to a specific moment in the evolution of scientific knowledge.

[22] In the High Court hearings on the instant case, Dr. Foy, in advancing an argument that scientific knowledge had developed in the 30 years since *Corbett* was decided, adduced medical evidence from Professor Gooren that male and female brains differ and that the size and shape of the hypothalamus in a male-to-female transsexual is the same as that to be found in "normal" females and smaller than that found in "normal" males. Thus Professor Gooren concluded that there is a neuro-scientific basis to transsexuality, and therefore it should be considered as a form of intersex condition. This argument did not find favour with the Court. McKechnie J. found that there were limitations with the studies Professor Gooren conducted and consequently there were difficulties with the conclusion he arrived at and the extrapolation made from that conclusion. He found that the scientific community was still debating the basis for transgender identity. McKechnie J. concluded that it was "insufficient to establish the existence of brain differentiation as a marker of sex and, accordingly, I do not believe that this court in such circumstances could give to it the legal recognition which is sought." Consequently, it was found that the *Corbett* test represents the law in Ireland on this matter.

[23] In ascertaining whether this was a correct interpretation of the law, it seems to me that we must consider how the information for noting sex in the Register of Births is ascertained.

How Gender is Determined for the Purposes of Recording Births in the Register of Births in Practice

[24] The Registration of Births and Deaths (Ireland) Act, 1863, as amended, established the scheme which governed the registration of births at the time when the birth of Dr. Foy was recorded. Under s.1 of the Births and Deaths Registration Act (Ireland), 1880, certain individuals, known as qualified informants, are required to inform the Registrar General, or his officials, of the birth of a child within 42 days of said event. Such qualified informants include the father and mother of the child, the occupier of the house where the child was born, each person present at the birth and any person having charge of the child. In providing this information, the qualified informant must complete the required details as set out in Form A including the sex of the child. Neither the legislation, nor Form A, provides precise instruction as to how the sex of the child is to be determined other than that it must be recorded as male or female (although this specificity regarding gender was deleted by

Schedule 1 to the Registration of Births Act, 1996 and was not reinstated in the first schedule to the Civil Registration Act, 2004.) In the absence of such guidance, some means of determining the sex of a child must be identified. Consequently, a practice has developed to use biological criteria, or more accurately the appearance of the genitalia, as determinative.

[25] As outlined in the 2002 judgment, Dr. Foy was the only person who gave evidence regarding the first 30 years of his life. It was noted in the judgment that his mother registered his birth and recorded his sex as male based on the appearance of his external genitalia. No evidence was presented regarding the nature of the chromosomal or gonadal aspects of his body at that time. As is clear, from the discussion above, for the *Corbett* test to apply the congruence of these three criteria at the moment of birth must be ascertained. From the evidence it does not appear, nor does it usually happen, that the congruence of all the relevant criteria was assessed at the moment of birth or prior to the registration of the birth.

[26] In his *Corbett* judgment, Ormrod J. recognised that a person might have incongruent criteria where a biological intersex condition exists. On that basis he found that in cases of incongruence, the genital criterion should be determinative. In this way he confirms the presumption that genital appearance can establish legal gender.

[27] The presumption that genital appearance can be determinative of gender was challenged before the High Court of England and Wales in the case of *W v. W* [2001] 1 F.L.R. 324. The applicant in that case sought a decree of nullity on the basis that the respondent (wife) was not female at the date of the marriage. Mrs. W was an intersex individual. Evidence was presented that Mrs. W had been born with indeterminative genitalia and, as her father had a preference for a son, her birth was registered as that of a boy. In applying the *Corbett* test to the facts before him Charles J. found that Mrs. W had XY chromosomes, her gonadal sex was likely male, and that prior to her gender reassignment surgery her genitals were ambiguous. In considering whether the flap of skin was a micro-penis or an enlarged clitoris he found that it would "fall on the male side of the line". On a strict application of the test Mrs. W ought to be classified as a male and her marriage annulled. However, further medical evidence attested that Mrs. W experienced spontaneous breast growth and Dr. Conway, the consultant endocrinologist providing expert testimony, diagnosed her as having Partial Androgen Insensitivity Syndrome (PAIS). Additionally she self-identified as a woman and had been socially accepted as a woman by others. Charles J. then moved to consider the expanded *Corbett* test for application in cases lacking the necessary congruence. He found that preferring the genital criterion as determinative would preserve a finding that Mrs. W was male. Consequently, Charles J. concluded that to apply the *Corbett* test to the case before him would be "an incorrect application". He accepted the diagnosis of PAIS and the opinion that had she been born today she would have been assigned the female gender at birth by the medical profession. Thus he found Mrs. W to be a woman for the purposes of marriage. The decision of Charles J. in *W* suggests that despite its widespread acceptance the *Corbett* test, and its extension in the case of ambiguity, does not always enable the determination of legal gender.

[28] For most people, the note on the register of births as regards the recording of their sex is based on a *prima facie* presumption that the outward appearance of their genitals will conform to the subsequent development of their gender identities. As was held by McKechnie J., the function of the register of births is not to establish the present legal identity of an individual but rather to record matters as they were on a particular day. Of course, in focusing so tightly on the purpose for which the register was created, my colleague neatly avoids confronting the reality that its practical utility goes beyond that limited function. The birth certificate, although not designed to be such, has in the absence of any other method become the mechanism by which legal identity is ascertained. It is necessary to produce a birth certificate in order to access other documents which serve secondarily as certificates of

identification such a driving licences and passports. Nonetheless, the vast majority of the population do not contest the sex of record by asserting an alternative gender for the purposes of legal recognition. Consequently, the law proceeds in its interactions with an individual on the basis of the presumption that, where it becomes legally significant the sex recorded on the birth certificate represents the gender of legal recognition. As is evident from *W.* this is a rebuttable presumption. Thus, consideration must be paid to the question of what can rebut this presumption. In other words, what is the test to be applied to the determination of the gender of an individual for legal purposes?

Legal Tests for Determination of Legal Gender

The Biological Temporal Test

[29] The *Corbett* test represents one possibility for the determination of gender for legal purposes. This test consists of two aspects, the biological congruence aspect and the temporal aspect of the moment of birth as determinative. As discussed, in practice the information required to satisfy this test is rarely obtained prior to an entry being made on the register. Despite the prioritisation of the moment of birth as a core element of this test, the *prima facie* presumption as to sex based on the appearance of the genitalia at birth is only upheld or displaced at the later date when the *Corbett* test is applied retrospectively. The *W.* case highlights the limits of the test – it cannot properly account for situations where the required congruence is not present.

The Harmonisation Test

[30] A different test was proposed two years prior to *Corbett* in *Re. Anonymous* [1968] 293 N.Y.S. 2d. 834 when the question of whether to legally recognise the preferred gender identity of a post-operative transsexual woman arose before the New York City Civil Court. The Court stated that "any difficulty presented herein is not so much in the nature of the problem itself, but in trying to apply, perhaps inadequately, static rules of law to situations ... which perhaps merit new rules and/or progressive legislation." The Court held that where there is disharmony between the psychological gender and the anatomical sex as a person ages the anatomical sex is determinative. Where that dissonance has been harmonised, either with or without medical intervention, the social gender of the individual should reflect the harmonised status and be recognised by the law. Additionally, Pecora J. stated that there was a serious question of whether to deny the petitioner relief (namely the alteration of her birth certificate to reflect her newly acquired gender) would amount to a violation of her human rights. Thus the Court recognised the harmonisation of the petitioner's psychological gender identity and post-surgical anatomical sex as determinative of her legal gender.

[31] *Re. Anonymous* was cited with approval by the Superior Court of New Jersey, Appellate Division in *M.T. v. J.T.* [1976] 140 N.J. Super. 77 which also took this second, harmonisation, approach to the determination of legal sex. The plaintiff was a male-to-female transsexual who was seeking an order of maintenance from her ex-husband. The respondent asserted that M.T. had been born a male, therefore the marriage was void and he was not liable for maintenance payments. The Court examined *Corbett* as the only case which had previously considered the legal status of transsexuals as regards marriage. The Court considered that the decision in *Corbett* had been incorrectly reached. The *Corbett* court, it was found, viewed sex and gender as disparate phenomena and its conclusion was rooted in the premise that a 'true sex' must be ascertained by biological criteria. The *M.T.* Court found

that if the anatomical sex of a transsexual is made to conform to the psychological gender then legal recognition of gender must be governed by the congruence of these standards.

Right Based Test

[32] A final approach to the question of how legal gender ought to be determined was developed by the European Court of Human Rights. From the first time the question as to how legal gender ought to be determined arose before that Court in *Van Oosterwijck v. Belguim* [1980] 3 E.H.R.R. 557, the Court acknowledged the existence of a right to legal recognition of one's preferred identity is a general principle of law. In that particular case it was not vindicated due to the failure to exhaust domestic remedies. In his partly concurring judgment, the Belgian Judge Gansof Van Der Meersch stated that:-

> "A man or woman who is unable to obtain recognition of his or her sexual identity, an aspect of status which is inseparable from his or her person will be unable to play his or her full role in society. As has been said, the right to such recognition is a general principle of law."

[33] Support for the vindication of a right to recognition of preferred gender continued to be manifest throughout the dissenting judgments of the Strasbourg Court on this matter. It should be noted that in these cases the majority consistently found that there was no violation of the article 8 right to respect for one's private and family life due to the lack of consensus on the issue and the consequent margin of appreciation afforded to each state. In *Cossey v. United Kingdom* [1990] 13 E.H.R.R. 622 Martens J., dissenting, cited approvingly the approach adopted by the New Jersey Superior Court in *M.T. v. J.T.* He criticised the majority decision in cases such as *Rees v. United Kingdom* [1986] 9 E.H.R.R. 56 for focusing on biological and medical technicalities to the detriment of the essential principles at stake:-

> "The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality. A transsexual does use those very fundamental rights. He is prepared to shape himself and his fate."

[34] Martens J. stated that recognition of preferred gender was a request which the law should refuse only if it had "truly compelling reasons", and in the absence of such reasons, a refusal "can only be qualified as cruel" and is inconsistent with the principles of privacy and human dignity.

[35] In *Sheffield & Horsham v. United Kingdom* [1999] 27 E.H.R.R. 163 the Strasbourg Court found that due to the margin of appreciation on the issue there was no positive obligation on the UK to legally recognise the acquired genders of the applicants. The Court re-iterated its caution from *Rees* that this area of the law would have to be kept under review. In his concurring opinion Freeland J. warned that "continued inaction on the part of the respondent State, taken together with further developments elsewhere, could well tilt the balance in the other direction." In their joint dissenting opinion Judges Bernhardt, Thór Vilhjálmsson, Spielmann, Palm, Wildhaber, Makarczyk and Voicu noted the recent scientific developments in the area and found that these were of secondary importance: "[r]espect for privacy rights should not, as the legislative and societal trends referred to above demonstrate, depend on exact science." I find myself in agreement with these judges that while science can

be a useful tool to explain and understand the facts of a case we cannot permit it to become a tourniquet which strangles legal developments, and access to fundamental human rights in particular.

[36] In his judgment Van Dijk J., found that the core of this case involved the issue of the fundamental right to self-determination. He stated that this right is not expressly enunciated in the E.C.H.R., but:-

> "is at the basis of several of the rights laid down therein, especially the right to liberty under Article 5 and the right to respect for private life under Article 8. Moreover, it is a vital element of the "inherent dignity" which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world."

[37] As was noted above, it was shortly after the 2002 judgment was handed down in this case that the Strasbourg Court found in *Goodwin* that the growing consensus and "unmistakable trend" among Contracting States towards legal recognition of the acquired gender of transsexuals had the effect that the UK could no longer claim that the matter fell within its margin of appreciation. The Court found unanimously that the failure of the UK to recognise the applicant's acquired gender breached her rights under Article 8:-

> "[T]he very essence of the Convention is respect for human dignity and human freedom. Under Article 8 … the notion of personal autonomy is an important principle underlying the interpretation of its guarantees … In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy … In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable."

Rebutting the Presumption that the Sex Recorded on the Register of Births Represents the Gender of Legal Recognition

[38] Having identified the possible approaches to the question of how the *prima facie* presumption based on genital appearance at birth might be rebutted, I now turn to consider which of them represents the legal test in this country.

[39] The *Corbett* congruence test has the initial advantage of being widely accepted across the common law world as authoritative on this issue. However, as seen from *W.* it is not without its limits, such as its failure to encompass the non-congruent intersex body. Furthermore, as it purports to be effective from the moment of birth, it cannot account for the lived experience of those whose selves, whether physical or psychological, do not develop in the expected manner.

[40] Although *Corbett* was decided on the basis on the congruence test, Ormrod J. did go on to consider the question of whether there had been a valid consummation of the putative marriage. In examining the consummation of the marriage, he considered the decision of Lord Wilmer in *S. v. S. (otherwise W.) (No. 2)* [1963] 3 All E.R. 55 where a decree of nullity was declined on the basis that a woman who suffered a vaginal defect, which could be remedied by surgical intervention, was found to be capable of consummating her marriage. Lord Wilmer held that it was irrelevant whether the vagina was artificially enlarged or indeed wholly artificial, the salient point was that:-

> "In either case full penetration can be achieved, and there is thus complete union between the two bodies. … In such circumstances I do not see why intercourse by means of such a vagina should not be regarded as amounting to "vera copula"…"

[41] Ormrod J. in *Corbett* found this statement to be obiter and therefore not binding. It is, the Court found, its essential heterosexual nature that distinguishes the marital relationship from all others. Therefore any intercourse between the parties in the *Corbett* case is unnatural:-

> "When such a cavity has been constructed in a male, the difference between sexual intercourse using it, and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres."

From this statement it is evident that the Court was concerned about homosexuality and that to rule that the Corbett marriage was valid might permit the legitimacy of homosexual marriage.

[42] The *M.T.* harmonisation test has its attractions. This approach appears to give priority to an individual's preferred gender identity and to publicly, and legally, validate that sense of self. Yet, on closer examination the decision is not as simple as it initially seems. I note the emphasis in the judgment on the fact that M.T. was a post-operative trans woman. Given the great attention the Court placed on ascertaining that M.T. could no longer function sexually as a man and that her acquired vagina could function as a site of heterosexual intercourse I cannot help but wonder if recognition would have been denied her had this not been clarified.

[43] The decisions in both the *Corbett* and *M.T.* cases can be compared as both were concerned with the sexual performance of the parties. Mrs Corbett's body was found to be incapable of marital consummation as a woman. Similarly in *M.T.* the applicant only fully achieves harmonisation when her body can function effectively as a site of heterosexual intercourse to the satisfaction of her partner. Conceiving of gender in this manner is to reduce the lived experience of individuals to their functionality of their genitalia. Considered from this perspective, neither approach respects the privacy nor the dignity of the person. Both approaches are preoccupied with intercourse and whether it can be classified as heterosexual or homosexual. I am reminded of the statement by Griffin J. in *McGee v. A.G.* [1974] I.R. 284 that invasion of the "sacred precincts of the marital bedroom" is repulsive to the notions of privacy surrounding the marital relationship. It seems to me that a fixed focus on the functionality of a person's genitals is equally repugnant to respecting that person's inherent human dignity.

[44] The approach of the Strasbourg Court is based on the inherent dignity of individuals. Under the Preamble to the 1937 Constitution the promotion of the dignity and freedom of the individual is assured. The courts have consistently stated that the dignity of an individual is a value to be pursued: *Re. Article 26 Offences Against the State (Amendment Bill)* [1940] I.T. 470 and *Re. Philip Clarke* [1950] I.R. 235. As my esteemed college, Justice Denham (as she then was) stated in *Re. A Ward of Court* [1996] 2 I.R. 79:-

> "An unspecified right under the Constitution to all persons as human persons is dignity – to be treated with dignity."

[45] McKechnie J. in his 2002 judgment noted that:-

> "The evidence in this case, irrespective of legal outcome, shows, without dispute or debate, that [gender identity disorder] is an established and recognised condition, that present or hoped for societal status is entirely foreign to its existence, that such condition is not influenced by sex orientation or driven by sexual pleasure and that those inflicted suffer greatly, usually for long periods, in relative isolation and frequently without understanding. Any person, reasonable in view and tolerance, would be horrified at the mockery, derision, and downright abuse which such individuals have to endure."

[46] Section 2(1) of the European Convention on Human Rights Act, 2003 states that:-

> "In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

[47] In light of this obligation, I find that in ascertaining the test for legal gender recognition I must do so in manner which best respects the dignity of the appellant. Consequently, I find that the rights based approach, grounded in a respect for the self-determination and dignity of the person is the correct one.

Application of the Test to the Facts

[48] On that basis, I accept Dr. Foy's assertion that the presumption that the sex recorded on the register of births represents her self-identified gender is rebutted. It is clear from an analysis of the facts that Dr. Foy struggled throughout her childhood, adolescence and marriage attempting to live as a man. The tension between her inner and outer life manifested in physical ill-health and stress induced hospitalisations on a number of occasions. Her struggles did not end with her physical transition as her family life disintegrated completely, her marriage ended and she lost all access to her children as a result of the court orders following her judicial separation from Mrs. Foy. I find that Dr. Foy has, as suggested by Martens J. in *Cossey*, shaped herself in the way that she deems best fits her personality. To refuse legal recognition of her preferred identity as female would not be consistent with the obligation on this court to respect her inherent human dignity. Consequently, I find that Dr. Foy should be legally recognised as a woman.

[49] I also find that this rebuttal of the presumption of legal gender can be prospective only. To find otherwise would be to potentially imperil actions done while the presumed sex was the gender of legal recognition. Any claim to retrospectivity would introduce such levels of uncertainty into the law that no person could engage in even the simplest of legal actions without actively asserting their gender of legal recognition.

Impact on the Notice Parties

[50] Thus, I turn to consider the situation of the notice parties and what impact such a finding has on their situation. The notice parties, being the daughters of Dr. and Mrs. Foy, are concerned that any decision of this Court might negatively impact upon their status and,

notwithstanding the judicial separation of their parents, strip them of the special Constitutional protections they currently enjoy as members of a family based on marriage.

[51] Mrs. Foy has not sought to annul the marriage. Rather, Dr. Foy consented to a judicial separation on the 13th December, 1991 and divorce proceedings are now underway. Nonetheless, I find that a review of the law on nullity can assist in the clarification as to the legal status of the notice parties.

[52] According to the law on nullity, the defining moment when assessing the validity or otherwise of the marriage is the moment at which the marriage occurs: *Napier v. Napier* [1915] Probate 184. No subsequent event can render a valid marriage invalid; see *A.B. v. N.C.* [2006 I.E.H.C. 127. Therefore, a marriage validly contracted by two parties who presented as, and were legally recognised as, being of opposite genders at the moment of marriage does not transform into a same sex marriage upon the legal recognition of the preferred gender of one spouse. Neither is the status of the notice parties in any way disturbed by recognition of the preferred gender of Dr. Foy.

Reliefs

[53] In terms of the reliefs sought by the plaintiff, I find that the High Court applied the incorrect test for the determination of legal gender, and overrule that aspect of the decision. What impact does this have on the question of whether the Registrar General acted *ultra vires* in refusing to amend the record of Dr. Foy's birth on the Register of Births?

[54] I accept and agree with the finding of McKechnie J., that the record on the Register of Births is merely a historical document recording particular facts on a particular day – it is a "snapshot" of a moment in time. This register is not an identity document nor is it the official *curriculum vitae* of events of legal import for a person. Significant events subsequent to the birth of a person, for example marriage or death are not recorded on the Register by way of annotation. S.27 of the Births and Deaths Registration Act (Ireland), 1880 permits alteration of the register by reason of "clerical errors" or "errors of substance" by way of marginal annotation. No error was made in the recording of the sex of the appellant as male as that represented the best information available at the time the record was completed. Neither is it a "mistake" within the meaning of the Civil Registration Act, 2004 and thus the power to rectify mistakes contained in sections 63 and 64 of the 2004 Act are also not applicable.

[55] Thus I find myself with very limited options by which to affect a meaningful resolution for the appellant resulting from my findings. In the absence of some mechanism whereby an official record can be made of a successful rebuttal of the presumption of gender flowing from the record in the Register of Births I find that the most useful mechanism available to me is the possibility of issuing a Declaration of Incompatibility under s.5 of the European Convention on Human Rights Act, 2003. While such a Declaration would not disturb the validity of any existing law it is, nonetheless, a valuable tool. It will oblige the Taoiseach to lay the order identifying the incompatibility before both Houses of the Oireachtas within 21 sitting days. It will also enable the appellant to make an application under s.5(4) of the 2003 Act to the Government, through the Attorney General, for an *ex gratia* payment. Such a Declaration may also have implications for the exercise of court discretion regarding the costs of the proceedings.

[56] I close by reiterating the call made by my colleague Mr Justice McKechnie in his 2002 judgment when he urged the Oireachtas to review the matter of the legal recognition of gender urgently. Now, some seven years later, this matter is even more vital.