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The Hon. Justice M.D. Kirby, CMG**

Classical literature refers to the appearance of persons with hermaphrodite features. But it is only in recent years that the developments of surgery and advances in techniques of transplantation and treatment of immune rejection has permitted medical intervention to help determine by surgery an ambiguous sexual identification. Such cases normally do not come before the courts. But in increasing numbers, courts, in a number of Commonwealth jurisdictions, have lately been called upon to examine the consequences, including for family law of such "sex change" operations.

Probably the most celebrated case is that involving April Ashley.[1] She was born with male genitals, gonads and a male chromosome pattern. She then underwent a sex change operation in which the scrotum and penis were removed and a vagina constructed. Thereafter she lived exclusively as a woman. She met and married a Mr. Corbett. The relationship broke down. It fell to Ormrod, J to determine whether the marriage had initially been valid. In his judgment, Ormrod, J said:[2]

> "Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends ... upon whether the respondent is or is not a

> woman. ... Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criterion must, in my judgment, be biological, ... In other words, the law should adopt in the first place, the first three of the doctors' criteria, ie chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of the marriage accordingly, and ignore any operative intervention."

Ormrod, J proceeded to conclude that April Ashley was not a woman and so could not marry. He acknowledged that real difficulties could occur in a case where, unlike that case, the three criteria to which he referred were not congruent. He expressed a view, unnecessary for the decision, that "greater weight would probably be given to the genital criteria than to the other two".

The case of added difficulty foreshadowed by Ormrod, J arose in proceedings in the Family Court of Australia in Brisbane in 1979. A wife sought a declaration that her marriage to "D" was null and void on the ground that the husband she had married in 1967 was neither man nor woman but a combination of both. When he was 21, "D" had been diagnosed as a true hermaphrodite. His chromosomal pattern was female. But he possessed both male and female gonads (1 ovary and 1 testis), a short penis, a tiny uterus, a rudimentary vagina and well formed breasts. He had been reared as a male.

Surgical intervention had removed the breasts of "D" and the ovary. It had reconstructed the penis into one of normal size and shape. The medical procedures involved were

sufficiently notable to be documented in a paper published in the Medical Journal of Australia.[3] The medical writers concluded, with understandable pride:

> "[T]here is now nothing in the patient's appearance to distinguish him in any way from a normal adult male. He shows no personality disorder of any kind, and is quite secure in his maleness."[4]

Soon after the completion of the medical procedures, "D" became engaged to his future "wife". They went out together for some five years before getting married. No sexual intercourse took place between them during that time.

Bell, J granted the "wife's" petition. He gave two reasons.[5] The first was that the wife had been mistaken about the identity of the person she had married. In the result, her consent was not a "real consent". She had believed that she was marrying a male person. In fact she was marrying a person who was both male and female. The second reason given was based on the decision in Corbett. "D" was to all intents and purposes a male in two of the three criteria which Ormrod, J had identified. However, his chromosomal character remained female. In these circumstances, being neither man nor woman, he could not enter a valid marriage.

This decision of the Australian Family Court has been criticised by a number of commentators. Dr. Henry Finlay has described the first ground advanced by Bell, J as erroneous.[6] Rebecca Bailey has criticised the second ground offered as evidencing a misunderstanding of the principle in Corbett and resulting in an unacceptable outcome. She points out that the respondent in Corbett would at least have been able to marry in

the future but whereas the respondent "D" could marry no-one. This, she contends adds unacceptably to the psychological and social difficulties already facing transexuals in their attempts to lead a normal life:

> "The medical profession in particular may feel with justification that its efforts in this complex area have been frustrated by the law."[7]

Sir Ronald Wilson, one of the Justices of the High Court of Australia has also offered extra curial comments on the decision:

> "His Honour may have thought he was applying the principle laid down in Corbett but the important distinction lay in the fact that the three criteria based on chromosomal, gonadal and genital tests were not congruent as they were in Corbett. The only help to be gleaned from the earlier case was the tentative suggestion of Ormrod, J that where the criteria were not congruent greater weight might be given to the genital criterion than to the other two. Even then, it seems, his Lordship would have confined himself to the biological considerations at the time of birth."[8]

The principle in Corbett was applied by the English Court of Appeal in R v Tan & Ors.[9] In that case it was held that a person born a male remained biologically a male, even though he iad undergone a sex change operation. Nonetheless, he was held capable of being convicted under s 30 of the Sexual Offences Act 1956 namely of being "a man" who lived on the earnings of prostitution. An application to the House of Lords for leave to appeal was refused.[10] To adapt Bailey's comments, it would seem

that the law is not inclined to keep pace with the changes of sexual identification, now capable of surgical reinforcement.

In the United States attempts have been made to secure legal protection for transexuals under the United States Constitution and under the Civil Rights Act of 1964. But the United States Courts have likewise not proved encouraging.[11] In Australia, a special committee established by the Standing Committee of Attorneys-General has for some time been examining the legal position of transexuals with a view to uniform State legislation. The possible need for Federal legislation in Australia to deal with cases of medical intervention under the marriage and divorce powers may result from reflection upon the unsatisfactory features of the common law as illustrated in Corbett and C v D. Tests which address chromosomal patterns at birth may have been appropriate even in 1971 when Corbett was decided. But as the sophistication of "sex change" operations and transplantation techniques improve and as social attitudes to transexuals change, it may well be more appropriate (and certainly more benign) to have regard to physical and psychological considerations at the time of marriage or after surgical, hormonal and psychological intervention.

As if in proof of this contention, a 1984 case in Toronto, Canada shows what may now be achieved. A 43 member surgical team in Toronto operated to separate two year old Siamese twins. When born, Win and Lin Htut were joined at the pelvis. They were both genetically male and shared male genitalia, liver, intestinal and urinary tracts and some bones. They only had two normal legs between them and a third, deformed leg. During the surgery, the pelvis was divided. Lin

was left with the male genital organs. Skin and muscle from the third leg was used to create an artificial vagina for Win. Her male gonads were removed. The doctors were confident that, with hormone treatment and acceptance of her femininity by others, Win would grow up as a girl. Each child will later receive an artificial leg. Yet if the tests pronounced in Corbett and C v D were applied by the Canadian courts, Win would be condemned by the law to the prospect of a life without [a valid] marriage as an additional burden to the physical disabilities which nature has inflicted but which medical technology and resourceful medical practitioners have struggled to overcome. I suspect that few would quarrel with Sir Ronald Wilson's conclusion:

> "[T]he decision [in Corbett] signals the need for a greater flexibility in the law to enable it to come to grips with current reality freed from bondage to displaced historical circumstances. The decision in the case of C and D was perhaps even worse in its consequences. It effectively relegated D to the "no-man's land" of non-sex, thereby denying him any opportunity of marrying, whether as man or woman. Again, the operation of the criminal law in the case of R v Tan reminds us of the disparate application of that law to the sexes in relation to sexual offences and the problems that occur when a person who in reality has become a woman is nevertheless regarded as a man in the eyes of the law and is committed to prison as such."[12]

Legislation to provide a more modern approach to the predicament of transexuals, including in family law, has been

enacted in Sweden and in several States of the United States of America.[13] It is clear that Commonwealth countries including Australia will have to address this problem with an urgency that reflects changing social attitudes, the advances in medical techniques and the capacity of surgical intervention to achieve success. Attention should be paid to the suggestion, in much recent literature that psycho-social intervention may in many cases be more suitable than surgery in the treatment of transsexuals.[14]

* Paper for the Congress prepared by the author but not delivered because of his absence in Canada in March 1986. For a fuller version of the author's views see M.D. Kirby, "Medical Technology and the new frontiers of Family Law" unpublished paper for the 8th Commonwealth Law Conference, Jamaica, September 1986 mimeo.

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FOOTNOTES

1. Corbett v Corbett [1971] P 83. For further discussion, see also J. Dewar, "Transsexualism and Marriage" (1985) Vol. 15 No. 1 Kingston Law Review 58 and D. Pannick, "Homosexuals, Transsexuals and the Sex Discrimination Act" (1983) Public Law 279.
2. Id, 106.
3. Sir Kenneth Fraser, M. O'Reilly and J. Rintoul "Hermaphroditus versus, with Report of a Case (1966) 1 Medical Journal of Australia 1003.
4. Ibid, 1006.
5. In Re C & D (1979) FLC 90-636 (CCH) (1979) 53 ALJ 659.
6. H. Finlay, "Sexual Identity and the Law of Nullity" (1980) 54 ALJ 115.
7. R. Bailey "Family Law - Decree of Nullity of Marriage or True Hermaphrodite Who Has Undergone Sex Change Surgery" (1979) 53 ALJ 659, 660.

8. R. Wilson, "Life and Law: The Impact of Human Rights on Experimenting with Life" (1985) 17 Aust J Forensic Sciences 61, 79.

9. [1983] QB 1053.

10. [1983] 3 WLR 361, 370.

11. Holloway v Arthur Andersen & Co 566 F 2d 659 (1977).

12. Wilson, 80. See also A. Samuels "Once a Man, Always a Man; Once a Women Always a Woman - Sex Change and the Law" (1984) 24 Med Sci Law 163 and Cf Van Oosterwijck v Belgium (1981) 3 EHRR 557, a case in the European Court of Human Rights concerning a transexual's right to marry.

13. One practical problem faced in Victoria, Canada concerned the jailing of a transsexual convicted of trafficking in cocaine. The convicted person "got off on probation when a judge agreed that to send him to either an all male or all female jail might be cruel and unusual punishment". Canadian Bar Association, National Vol. 13 No. 5 May 1986 p.7.

14. The problem presented by transsexuals was referred to the Australian Family Law Council by the Federal Attorney-General in 1983. The Council's advice was that, where a person had undergone a genuine operation after suitable counselling, that change should be recognised for relevant purposes and the sex of a person ought not to be treated as immutable but should correspond with that person's gender perception. So far as recent literature on non surgical approaches is concerned, see I.B. Pauly, "Outcome of Sexual Reassignment Surgery" in Aust and NZ Journal of Psychiatry, March 1981, 45;

Walinder, Lundstrom and Thuwe, "Prognostic Factors in the Assessment of Male Transsexuals for Sexual Re-Assignment" in British Journal of Psychiatry, January 1978, 16; "Gender Identify Change in Transsexuals", American Medical Association, Archives of General Psychiatry, August 1979, 1001.