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Two Children of the Stolen Generation Come to Court:

Gunner and Cubillo v The Commonwealth

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The Federal Court has recently considered claims brought by two members of a group that has become known as "The Stolen Generation." In *Gunner and Cubillo v the Commonwealth*,[1] the applicants accused the Commonwealth of wrongly taking them away from their families as children and placing them in institutions in the Northern Territory in the 1940s and 1950s.

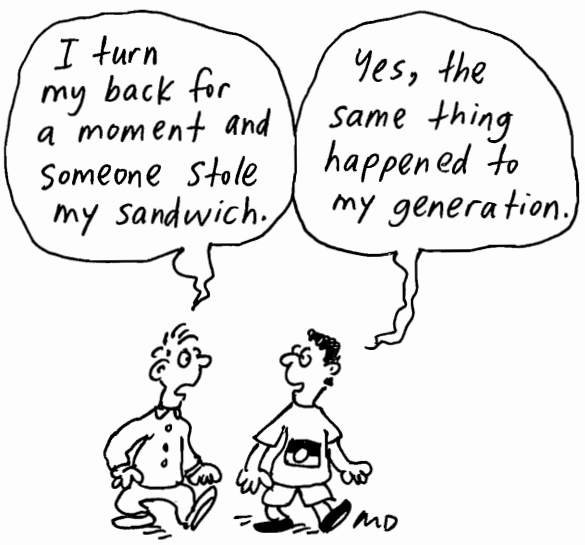
The claims made by Mrs Lorna Cubillo and Mr Peter Gunner were separate, but they were heard together by Justice O'Loughlin. The trial took place over fourteen months. The judge heard witnesses called by the applicants and by the Commonwealth, and his Honour reviewed a large number of documents in an attempt to piece together what happened to the applicants not long after World War II, when they were children.

The Court ultimately found the Commonwealth was not liable for what happened to the applicants. O'Loughlin J found that the applicants were removed from their families and placed in institutions where they were desperately unhappy. The living conditions in those institutions were very hard, and Mr Gunner (and perhaps Mrs Cubillo) were the victims of sexual misconduct by staff. But his Honour concluded that there was insufficient evidence to conclude that the Director of Native Affairs was acting improperly when his officers removed Lorna Cubillo from her family. He also found that Peter Gunner was removed at the request of his mother who apparently wanted him to have the benefits of a western education. The Commonwealth had not done anything unlawful for which it could be held legally responsible.

The trial judge went on to find that the Commonwealth was not responsible for the actions of the Director of Native Affairs (or his successor, the Director of Welfare) if those public servants had acted unlawfully. His Honour also concluded that the Commonwealth was not liable for what happened to the children in the homes.

The decision may yet be appealed, but it is important for a number of reasons:

- It is the first occasion on which the claims made by persons who count themselves as part of The Stolen Generation have been tested in court.
- The case provides an insight into the policies and practices of those who were responsible for the welfare of Aboriginal and part-Aboriginal children in the Northern Territory in the middle of last century.
- The judgment illustrates the way in which courts go about the fact-finding process, and shows the difficulties of establishing what happened years ago when documents have disappeared, memories have faded and witnesses have died.
- The case also provides a valuable lesson on the role of the courts: their job is to provide a legal remedy in response to a legal wrong. Judges are not necessarily equipped to provide answers to the larger social and political questions that lie behind legal disputes. The law has its limits.



[1]The references that follow refer to paragraph numbers in the version of the judgment found on austlii. The judgment, including a helpful summary, can be found at www.austlii.edu.au/au/cases/cth/federal_ct/2000/1084.html

The Stolen Generation

The expression "Stolen Generation" is taken from the report of an inquiry conducted by the Human Rights and Equal Opportunity Commission delivered in 1997. The inquiry was chaired by Sir Ronald Wilson, a former judge of the High Court. The report of the inquiry was titled *Bringing Them Home*. It concluded that between one in three and one in ten indigenous children were forcibly removed from their families between 1910 and 1970. The inquiry found that many of these individuals were discouraged from maintaining contact with their families, and they were taught to reject their Aboriginal heritage. The institutions in which they were housed were often harsh and the education provided did little more than prepare the children for menial labour. Many witnesses told the inquiry that they were subjected to excessive discipline and some were sexually abused. The inquiry concluded that the welfare officials failed in their duty to protect the children from these conditions.[2]

The inquiry found that children who were forcibly removed from their families do not enjoy a better standard of living and are more likely to be arrested - even though the removals were originally justified on the basis that they were in the best interests of the child in the long term. The inquiry also found that those raised in institutions did not learn good parenting skills, which has created social problems for the children of the next generation.

The inquiry concluded that forcible removal was:

- an act of genocide, contrary to the convention on Genocide that Australia ratified in 1949;
- a gross violation of human rights in that it was racially discriminatory – a violation of Australia's international treaty obligations as a member of the United Nations; and
- a denial of the legal rights of individuals to remain with their families in the absence of a court finding that it was in the child's best interests to be removed.

In *Gunner* and *Cubillo*, the trial judge emphasised that he was not commenting upon or questioning the findings made in *Bringing Them Home*. O'Loughlin J pointed out that the report was not in evidence before him; he was concerned only with the question of whether the evidence showed that the two applicants in this case had been dealt with unlawfully.[3]

The facts

(i) Lorna Cubillo

Lorna Cubillo's birth certificate said that she was born on 8 August 1938. Her mother was an Aboriginal woman and her father was of European descent. She was brought up in her early years by her maternal aunt and her grandmother and other relatives. on Banka Banka station, and subsequently at camps near ration depots. (The government distributed rations of tea, flour and other basic items to the Aboriginal people from depots that were maintained throughout the bush.) Lorna was living with members of her extended family on the Phillip Creek settlement in 1947.

The Phillip Creek settlement was occasionally visited by patrol officers working for the Native Affairs branch of the Northern Territory administration, and by other officials. The applicant (ie Mrs Cubillo's lawyers) led evidence showing that the residents often panicked when they saw a vehicle driven by an official approach the camp: Mrs Cubillo recalled that her grandmother had on one occasion taken her to a creek-bed and rubbed ashes into her relatively fair skin so that it would not be apparent that she was part-Aboriginal. The trial judge accepted this was a common practice amongst relatives of part-Aboriginal children who feared the children would be taken away by authorities.[4]

On or about 22 July 1947, the settlement was visited by the superintendent of the Retta Dixon home. The Retta Dixon home for Aboriginal and part-Aboriginal children was run by Christian missionaries. The superintendent, Miss Amelia Shankelton, had come to explain to the mothers of part-Aboriginal children living on the settlement why they should permit their children to be taken to the home where they could be educated in western ways. A patrol officer arrived the following day in a truck. He had instructions to take Miss Shankelton and 16 of the children from Phillip Creek to the Retta Dixon home near Darwin.[5]

The party left the settlement on 23 July 1947. The witnesses at the trial - including some of the children and the patrol officer - told of the great distress of the departing children and their families. Mrs Cubillo said that people were crying. Some of those who were left behind hit themselves with sticks.[6]

The traumatic events of that day left a lasting impression on Mrs Cubillo. As O'Loughlin J explained:[7]

"I have no difficulty in accepting this portion of Mrs Cubillo's evidence. She was a young child - no more than eight years of age. Mrs Cubillo received great comfort from her extended family and the community at the Settlement. She was accepted in the community and felt part of it. No matter the circumstances of her leaving, whether it was or was not with the informed consent of those who cared for her, it would have been a sad and traumatic event: one that would leave a lasting impression on a young mind. Mrs Cubillo said that she has suffered in silence and continues to suffer. I believe her."

The trial judge doubted whether the mothers of all the children had consented to the removal of the children from the settlement by Miss Shankelton and the patrol officer.[8]

Mrs Cubillo and the other children from Phillip Creek arrived at the Retta Dixon home in Darwin on 26 July 1947. She remained there until her 18th birthday in 1956.

The Retta Dixon home was operated by missionaries from the Aborigines Inland Mission under the direction of Miss Shankelton. The institution housed part-Aboriginal children of school age like Mrs Cubillo, single part-Aboriginal mothers and their children, and single part-Aboriginal girls working in Darwin.[9] The government provided financial assistance and stores to the home.[10]

The living conditions of inmates at the time were certainly difficult: the home was a collection of corrugated-iron huts obtained from the army. The toilet and catering facilities were primitive[11] and the huts themselves were often overcrowded. But O'Loughlin J noted that the conditions

[2] For a useful summary of the conclusions of the report, see Bringing them Home - Community Guide, published at www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen_summary/

[3] para 68
[4] para 400
[5] para 441-442
[6] para 423
[7] para 445
[8] para 457
[9] para 523
[10] para 525
[11] para 518ff

were not unusual in the Northern Territory in the years following the war.[12]

There was evidence that officers within the Native Affairs branch were unhappy with aspects of the operation of the home. They were particularly concerned about reports of excessive corporal punishment[13] and the cloistered nature of the up-bringing at the home.[14] They were also critical of the quality of staff recruited by the mission. On one occasion, the Director of Native Affairs exercised his statutory power to exclude a staff member from the reserve (and therefore from the home, which caused him to leave his employment) after reports that he had beaten inmates.[15]

Mrs Cubillo claimed that she was starved of affection throughout her time at the Retta Dixon home, and complained that she was assaulted by staff.[16] O'Loughlin J accepted that she was desperately unhappy while an inmate.[17] He also accepted that she was the victim of a inappropriate advances from a male staff member,[18] and had been beaten on another occasion by the same staff member with a belt.[19] But His Honour noted that some other inmates of the home who were called as witnesses had different experiences that were more positive.[20] His Honour found that Mrs Cubillo's sense of bitterness and anger had coloured her memories of the home over the years.[21]

Mrs Cubillo left school at the end of year eight and worked in a variety of domestic jobs while still living at the home. She finally left Retta Dixon in October 1956 and became a live-in housekeeper. She was married shortly after, and had six children to her husband who was a violent drunk. She worked as cleaner throughout this period to support her family. She obtained permanent employment with the welfare branch of the Northern Territory administration where she worked until she was injured at work in 1988.[22] Mrs Cubillo never returned to live a traditional lifestyle,[23] although she occasionally visited members of her family.

(ii) Peter Gunner

Peter Gunner was born in 1948. His mother, Topsy, was an Aboriginal woman and his father was European. Peter was raised by his mother and her family on Utopia station. Although there was some evidence that young Peter was something of a misfit in his community, the trial judge concluded that the settlement at Utopia station was:[24]

"..a happy, healthy Aboriginal community and environment - a community into which [Peter] had been accepted and of which he was a part."

The settlement was visited by officials from the Native Affairs branch on a regular basis. The patrol officers' functions included:

- inspecting living and working conditions for Aboriginals;
- assisting station owners and managers in placing Aboriginals in employment;
- counting the numbers of Aboriginals in the area and keeping records of their details; and
- transporting Aboriginals into town for hospital treatment.

As at Phillip Creek, the evidence showed that mothers and children would flee when a patrol officer appeared. His Honour explained:[25]

"[T]he presence of a white patrol officer was synonymous with children being taken from their families; and, clearly, such takings had occurred with sufficient frequency that the urge to flee was uppermost in the mind of the people."

While patrol officers continued to be regarded with fear and suspicion during this period, changes to government policy in the early 1950s appeared to have led to fewer forced removals.[26] Some officials called as witnesses claimed that children were not removed without the consent of their parents during this period unless there was evidence that the child was at risk.[27] In any event, the patrol officer who visited Utopia set about explaining to Peter's mother the benefits of a western education for her son.

Peter's mother placed her thumb-print on a consent form that was prepared by the Native Affairs branch. The form stated that she wished her son to be transported to St Mary's home in Alice Springs so that he could receive an education. The patrol officer promised Peter's mother that her son would be permitted to return to Utopia station on holidays. The officer took Peter and another child from Utopia and he was admitted to St Mary's home in Alice Springs on 24 May 1956.[28]

St Mary's was operated by the Australian Board of Missions, an Anglican Church organisation. It provided hostel accommodation for part Aboriginal children. In some cases, the parents contributed towards the cost of maintaining their children; in other cases, the children were paid for by the Native Affairs branch. Some of the children may have been taken from their families without consent, but his Honour was unable to be sure.[29]

The Commonwealth provided up to 90% of St Mary's annual operating budget. The church met the cost of wages and controlled the appointment of staff. The facilities were very primitive - even more so than at Retta Dixon. Over time, officers from the Native Affairs branch (which was subsequently renamed the Welfare branch) were critical of conditions at St Mary's. They were deeply concerned about standards of hygiene, the adequacy of facilities and the quality of staff employed in the home.[30] There was also evidence that children from the home would forage in the local rubbish dump looking for food.[31] His Honour found that conditions in the home "were unsatisfactory on today's standards and they were unsatisfactory on the standards of the day."[32]

Mr Gunner was subject to harsh discipline while at St Mary's, although the trial judge suspected Mr Gunner's memories became more negative over time.[33] His Honour also found that one of the male staff members had engaged in sexual misconduct towards boys in his care.[34] O'Loughlin J noted that the man was charged with sexually assaulting a boy residing at the hostel in 1964, but the charges had been quickly dismissed by the magistrate.[35] During the course of

[12] para 542
[13] para 700ff
[14] para 535ff, 551ff
[15] para 336
[16] para 11
[17] para 1250
[18] para para 677
[19] para 678ff; 705
[20] para 594ff
[21] para 593
[22] para 717ff
[23] para 657
[24] para 769. The evidence about Peter's life on Utopia is not consistent. There was some evidence from the station owner's wife suggesting that Peter was a sickly child and that he was an outcast, as was his mother: para 801. There was even some evidence that Peter's mother had attempted to kill him at one point although his Honour found "the evidence on this subject...too confusing to make any finding at all:" para 801.
[25] para 775
[26] para 200, 248
[27] para 300ff
[28] para 838, 934
[29] para 746
[30] para 857, 1020ff
[31] para 1073
[32] para 1066
[33] para 926
[34] para 992; 905ff
[35] para 946-948

his evidence in this case, the man admitted to conduct which counsel for the applicant submitted constituted "perverted behaviour".[36] The trial judge agreed with that description,[37] saying: "The actions to which [the adult in question] admitted would disgust anyone who had the slightest sense of propriety."[38] The man denied that there was anything improper about his conduct.[39]

Mr Gunner also claimed that he was discouraged from speaking his Aboriginal language while an inmate of the home.[40] The warden of the home did not agree that the children were punished for speaking in their native tongue, but he conceded they were encouraged to speak English.[41] The home also insisted that children adopt western customs and manners - the use of knives and forks, for example.[42]

Peter absconded from the home on at least two occasions.[43] He was returned each time. He never traveled to visit his home at Utopia during holidays as had been promised; it was unclear why the promise made to his mother at the time of their separation was not honoured.[44]

Peter left St Mary's in 1963. He obtained work as a stockman and later as a liaison officer in the Legal Aid Office. He left the Legal Aid office in 1991 and returned to live with his wife (whom he had married in 1971) on Utopia station. He claimed he was excluded from some aspects of tribal life upon his return because of his separation - he said he had not been initiated and was therefore unable to participate in some tribal activities. He also said he was unable to speak the local dialect.[45] The trial judge doubted whether Mr Gunner was in fact excluded from any aspect of the life of tribe: his Honour concluded that Mr Gunner was eligible to undergo initiation that would lead to further acceptance, if that was his wish.[46]

The claims made by Mrs Cubillo and Mr Gunner

Each of the applicants made a range of allegations against the Commonwealth. The claims related to the circumstances of their removal from their homes (Mrs Cubillo and Mr Gunner both said they were unlawfully removed) and to the conditions under which they were forced to live in the hostels. Specifically, the applicants claimed that the Commonwealth had, through its public servants and staff of the homes:[47]

- wrongly imprisoned the applicants and deprived them of their liberty (the conduct was alleged to be wrongful in the sense that the Commonwealth's servants or agents were said to have acted without authorisation under any statute or law);
- breached a fiduciary duty (a duty to act in the best interests of another) owed to the applicants;
- breached a statutory duty to provide for the custody, maintenance and education of the children,[48] and exercise a general supervision and care over all matters affecting the welfare of Aboriginals and protect them against immorality, injustice, imposition and fraud;[49]
- breached a duty to take reasonable care of the applicants.

The applicants initially sought declarations (statements from the court that the law had been contravened), damages to compensate them for the wrongs they suffered, and exemplary and punitive damages (an extra award of damages designed to punish and deter the other party).

His Honour summarised the thrust of the applicants' case as follows:[50]

"On the first day and the last day of the trial the applicants were pursuing the same goal. They set themselves the task of proving that a sovereign State acted with a 'conscious and contumelious disregard for the welfare and the rights' of two small part Aboriginal children by forcibly separating them from their families against the wishes of their families. Their alternative plea was that the Commonwealth acted with a 'wanton cruel and reckless indifference' to their welfare and their rights."

The legislation under which the applicants were removed and detained

The *Aboriginals Ordinance 1918 (NT)* was in force at the time that Mrs Cubillo and Mr Gunner were separated from their families. The Ordinance provided for the appointment of a Director of Native of Affairs, who reported to the to the Administrator (the head of government administration in the Territory), who reported to a minister in Canberra.

The primary duties of the Director were set out in s5(1) of the Ordinance. The duties included:

- Providing for the custody, maintenance, and education of the children of aboriginals;
- Managing and regulating the use of all reserves for aboriginals; and
- Exercising a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud."

The Director was given the power under s6

"... to undertake the care, custody, or control of any aboriginal or half caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half caste for him to do so..."

The expression "Aboriginal" was defined broadly in s3 to include part-Aboriginals.

In addition to the power of removal under s6, the Director also had the power under s16 to cause an Aboriginal person to be confined to a reserve or Aboriginal institution.

Under s13, the Administrator could declare a mission or other non-government establishment to be "an Aboriginal institution for the maintenance, custody and care of aboriginal and half-caste children...". Both the Retta Dixon home and St Mary's were declared to be "Aboriginal institutions" within the meaning of this provision.

The Aboriginals Ordinance was replaced in May 1957 by the *Welfare Ordinance 1953 (NT)*. Mrs Cubillo had left Retta Dixon at that point, but Peter Gunner was still residing at St

[36] para 992
[37] ibid; see also
[38] para 994
[39] para 989, 907-908
[40] para 862
[41] para 866
[42] para 867
[43] para 885
[44] para 887
[45] para 921ff
[46] para 924
[47] para 1077ff
[48] Aboriginals Ordinance 1918 (NT), s5(1)(d); see also Welfare Ordinance 1953 (NT), s8(a)
[49] Aboriginals Ordinance 1918 (NT), s5(1)(f); see also Welfare Ordinance 1953 (NT), s8
[50] para 17

Mary's. The Welfare Ordinance provided for the Director of Welfare (the equivalent of the Director of Native of Affairs under the old Aboriginals Ordinance) to declare a child to be a ward of the Director under s14.

Peter Gunner was declared to be a ward under s14 on 13 May 1957 when the new legislation commenced.

Section 8 set out duties of the Director in relation to wards. Section 8(a)(i) required the director to take steps:

" to promote their social, economic and political advancement for the purpose of assisting them and their descendants to take their place as members of the community of the Commonwealth".

The section also required the Director to arrange for the education and training of wards, and to promote their physical well-being, and exercise a general supervision and care over matters affecting their welfare."

Elsewhere in s8, the Director was made responsible for supervising and regulating the management of institutions.

Was the Commonwealth liable for any unlawful conduct?

O'Loughlin J commenced his analysis of the law with a discussion of whether the Commonwealth was liable for any wrongs that may have been done to the applicants by officers of the Native Affairs and Welfare branches (who were Commonwealth public servants) or by the staff of either home. Remember that the proceedings had been brought against the Commonwealth of Australia, rather than against individual persons.

The legislative and administrative arrangements in the Northern Territory were such that the Administrator and his senior officers were regarded as officers of the Commonwealth. The patrol officers and welfare officers involved in removals were also employees of the Commonwealth.[51]

As a general principle, a person will be held liable for the wrongful acts of:

(i) his or her employees, and

(ii) other persons acting on his or her behalf.

The process of attributing liability to the employer is known as vicarious liability. Was the Commonwealth vicariously liable for the acts of its servants or other persons acting on its behalf in this case?

O'Loughlin J held that the Commonwealth was not liable for any wrongful conduct that might have occurred.[52] His Honour relied upon the "independent discretion" rule. The rule provides that where a statute invests a particular person with the power to make a decision and that person is not subject to any direction - from a minister, for example - then any mistakes he or she makes in exercising the discretion cannot be attributed to his or her employer.[53] The effect of the rule was explained by Dixon J in *Field v Nott*[54] in this way:

"When a public officer, although a servant of the Crown, is executing an independent duty which the law casts upon him, the Crown is not liable for the wrongful acts he may commit in the course of his execution. As the law charges him with a discretion and responsibility which rests upon him in virtue of his office or of some designation under the law, he alone is liable for any breach of duty. The Crown is not acting through him and is not vicariously responsible for his tort."

In both the *Aboriginals Ordinance* and the *Welfare Ordinance*, decision-making power in relation to the relevant matters was vested personally the Director. The Director could not be instructed how to exercise his power by either the Minister or the Administrator. It followed that if the Director acted improperly in relation to the removal of Mrs Cubillo and Mr Gunner, or if he failed to carry out his duty to adequately supervise and regulate the affairs of the two homes, the breach was his alone and could not be attributed to the Commonwealth.[55]

Were the applicants able to prove they had been wronged?

Having decided that the Commonwealth was not liable for any wrong-doing, O'Loughlin J proceeded to consider whether Mrs Cubillo or Mr Gunner were able to establish that they were the victims of actionable wrong-doing. The wrongs alleged can be addressed under two headings:

- were the applicants wrongfully removed from their families? and
- were the applicants wronged by their subsequent detention and treatment in the homes?

(i) Were the removals of Lorna Cubillo and Peter Gunner lawful (ie authorised by law)?

O'Loughlin J was not satisfied that Peter Gunner had been removed from Utopia station without his mother's consent. His Honour pointed to the form of consent bearing his mother's signature[56] and the evidence suggesting that the parents of many Aboriginal and part-Aboriginal children wanted their children to have a western education.[57] The Director had not exercised his powers of removal under s6 of the Aboriginal Ordinance, so there was nothing to criticise. While the evidence raised questions about whether or not Peter's mother had given informed consent or was pressured into agreeing to Peter's removal, his Honour was unable to conclude that she was under duress.[58]

His Honour added that if the Director had exercised his powers of removal under s6 in relation to Peter, there was no evidence that he had not given the individual consideration to Peter's welfare required by that section.[59] Indeed, there was some evidence that pointed to careful consideration being given to young Peter's individual circumstances.[60]

The position in relation to Mrs Cubillo is more complex. His Honour was satisfied that the removal occurred without the consent of young Lorna's family - although there was some question as to whether she was in the custody of an adult at the settlement who was legally capable of giving consent to her removal.[61] In any case, the Director presumably exercised his powers under s6 of the Aboriginals Ordinance. The High Court found in Kruger v The Commonwealth that the removal provisions of the Ordinance were valid.[62] To succeed, the applicant had to establish:[63]

[51] para 1086

[52] para 1122ff, 1130, 1132

[53] See, for example, the decisions of the High court in *Enever v R* (1906) 43 CLR 969 and *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626

[54] (1939) 62 CLR 660 at 675

[55] para 1123, 1132, 1141, 1230ff

[56] para 838

[57] See, for example, para 1008

[58] para 782

[59] para 1133

[60] para 781, 1246

[61] para 511

[62] (1997) 190 CLR 1

[63] para 505

"the Director either did not form any opinion or that the opinion that he did form was either so unreasonable that no reasonable person could have formed it or, at least, that it could not be said that he believed that her removal was necessary or desirable in her interests."

Counsel for Mrs Cubillo submitted during the course of the trial that the Director's discretion under s6 had miscarried - in other words, the decision was invalid because the Director had gone about making his decision in the wrong way. The Director was required under the legislation to make his decision having regard to the interests of the child; counsel for the applicant argued that the Director ignored the interests of Lorna Cubillo and simply pursued a racist policy of removing all part-Aboriginal children from their families.[64]

O'Loughlin J was not satisfied that the Director was motivated by an inflexible general policy of removal of the kind alleged by Mrs Cubillo. His Honour accepted that welfare officers assumed it was in the interests of part-Aboriginal children to be exposed to western education and influences. While there was little evidence in relation to Mrs Cubillo in particular, his Honour was satisfied that the Director was not ignoring his duty to consider the individual circumstances of the children in question.[65] His Honour pointed out that the inflexible pursuit of a general policy of removal was not feasible in any case: the Territory did not have the facilities to take all of the "eligible" children into care.[66]

The trial judge supported his conclusions by referring to the general proposition that a person given a statutory power which incorporated a discretion was deemed to have exercised the power properly in the absence of evidence to the contrary.[67]

His Honour was also satisfied there was no evidence that the Director's discretion had been exercised unreasonably.[68]

While his Honour was not prepared to find that the Director's discretion had miscarried, there remained the question of whether the removal constituted wrongful imprisonment. If a person can establish he or she has been deprived of their liberty, the person who imprisons that individual must establish that he or she had lawful reasons for doing so. The gap in the evidence about the Director's intentions in removing young Lorna created a problem for the Director: in the absence of an explanation as to what had gone on, the presumption of deprivation of liberty might arise.[69]

While an action for wrongful imprisonment might be available against the Director and others involved in Mrs Cubillo's removal, his Honour repeated his findings that the Commonwealth was not responsible for what had occurred.[70]

(ii) The legality of confining the applicants to the homes

O'Loughlin J found that Mr Gunner was lawfully committed to the custody of St Mary's home, although it was unclear whether the Director had formally exercised his power to keep young Peter at the home under s17 of the new legislation when it came into effect in 1957. This gap in the Director's authority might be enough to support a claim of wrongful imprisonment against the Director - but the Commonwealth was not vicariously liable for that deprivation of liberty.

Lorna Cubillo might also succeed in a claim for wrongful imprisonment against the Director and the Aborigines Inland Mission as a result of her placement in the Retta Dixon home. The gaps in the evidence meant that there would be no justification forthcoming for the detention. But once again, the Commonwealth was not liable.

Other claims for breach of duty

In addition to the claims for wrongful imprisonment, the applicants alleged that there had been breaches of various duties owed to them. Those breaches, it was claimed, caused the applicants to suffer trauma and shock.[71]

O'Loughlin J found that the Commonwealth did not have a duty of care to the applicants since it had no power: the ordinances vested power and responsibility for the welfare of the children in the Director, not the Commonwealth. [72] Nor could the Commonwealth be criticised for breaching statutory or fiduciary duties, since it owed none in the circumstances. But was the Director liable?

(i) Breach of statutory duty

The applicants claimed that the Director had failed in his duties as guardian of the children.[73] The applicants did not specify what those duties were; O'Loughlin J declined to find a breach in those circumstances.[74] His Honour went on to add that if the applicants were alleging that the Director's failure as guardian arose out of a decision to remove the applicants from their families, the claim must fail. His Honour held that the exercise of a statutory power by the Director could not be challenged unless it were exercised for a malicious purpose, or a purpose that was foreign to the legislation. That was not the case here; the legislation contemplated an exercise of powers of removal and detention for precisely the purposes for which they were used in these cases.[75]

O'Loughlin J added that the policy behind the legislation might be objectionable, but that was not a matter for the courts. The Director was safe provided that he was acting within his statutory authority.[76]

(ii) Breach of a duty of care

O'Loughlin J was satisfied that the Director assumed responsibility for the safety and well-being of children when they came into his care.[77] But did that give rise to an actionable duty of care in tort?

His Honour concluded that the Director did not owe a duty of care when making a decision to remove children. The nature of the welfare officer's job militated against such a finding: the Director had to be free to act quickly, and quick action inevitably led to mistakes. The threat of litigation for breaching a duty could make the Director reluctant

[52] para 1122ff, 1130, 1132

[53] See, for example, the decisions of the High court in *Enever v R* (1906) 43 CLR 969 and *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626

[54] (1939) 62 CLR 660 at 675

[64] para 1159

[65] para 1160, 1173, 1245

[66] para 300

[67] para 1157; see *Point of Ayr Collieries Ltd v Lloyd George* [1943] 2 All ER 546. See also *Attorney-General (NT) v Minister for Aboriginal Affairs* (1986) 67 ALR 282

[68] para 1174

[70] para 1162, 1167

[69] para 1162ff

[71] para 1244

[72] para 1197-1198

[73] para 1178

[74] para 1186, 1192

[75] para 1190-1191

[76] para 1187

[77] para 1223

the Commonwealth would suffer irreparable prejudice if an extension were granted.[93] In any case, his Honour noted that the Commonwealth on his analysis had a good answer to the claims being made against it. This was not a case where the Commonwealth was seeking to exploit the limitation period in order to avoid a claim that was otherwise certain to succeed.[94]

In those circumstances, his Honour declined to grant the extension of time sought by the applicants.

Conclusion

The concluding remarks of O'Loughlin J offer the best summary of his findings in this case:

"The evidence showed that there were people in the 1940s and 1950s who cared for the Aboriginal people...However, their concern did not extend to the recognition of the Aboriginal culture and lifestyle; it was devoted to western style welfare or religious issues and issues of concern for the physical or spiritual well-being of the people. That form of paternalism is not accepted today but it was accepted in the 1940s and the 1950s by many people and in particular by those who administered the Native Affairs Branch and the Welfare Branch in the Northern Territory in the period that covered the institutionalisation of both Mrs Cubillo and Mr Gunner.

"I have great sympathy for Mrs Cubillo, for Mr Gunner and for others who, like them, suffered so severely as a result of the actions of many men and women who thought of themselves as well-meaning and well intentioned but who today would be characterised by many as badly misguided politicians and bureaucrats. Those people thought that they were acting in the best interests of the child. Subsequent events have shown that they were wrong. However, it is possible that they were acting pursuant to statutory powers or, perhaps in these two claims, it would be more accurate to say that the applicants have not proved that they acted beyond their powers."

Discussion questions

1. Do you agree that the Commonwealth should escape liability "on a technicality" (because of the "independent discretion" rule) if in fact the Director or other officers engaged in unlawful conduct?

2. O'Loughlin J held that the courts cannot compensate people hurt by valid laws that are based on bad policy. Do you agree with that view of the court's role? What else could or should be done for people who are hurt by "bad" laws?

3. The trial judge pointed out that we must be careful to judge what occurred in the distant past according to the standards and attitudes of the time. Do you agree? If things were done in the 1950s that may have been acceptable then but which are plainly unacceptable according to today's standards, should we compensate people who were victims of that conduct?

4. The removals in this case occurred around 50 years ago. What difficulties arise in determining what happened in the distant past? Does there come a point where we should forget the mistakes of the past? (The same question might be asked about attempts to prosecute Nazi war criminals who are still alive.)

Schools Conflict Resolution and Mediation Competition

The aim and philosophy of SCRAM is to recognise the opportunities for change and progress that can result from conflict and to maximise the ability of students Australia-wide to manage conflict in a way that leads to a positive outcome.

It also aims to acknowledge the increasing use of mediation by courts and the community and to equip students with the skills necessary to participate in a mediation process.

Objectives

The SCRAM objective for students is to create an awareness of their responsibilities when dealing with others, to further personal development, to encourage self esteem and to learn to manage conflict in a productive way.

For the school, SCRAM, will reduce conflict in the school environment, modify aggressive behaviour, reduce tension in the classroom environment and maximise the opportunities for learning for all students.

Within the community, SCRAM will reduce aggressive behaviour resulting from poor conflict management skills, promote open communication to resolve contentious issues, maximise the benefits of co-operative problem-solving and halt the trend towards litigation.

Contact: The Scram Co-ordinator
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The Law Society of New South Wales Inter-School Mock Trial Competition

What is a Mock Trial?

Mock Trials are simulated court cases in which the participating student teams contest a fictional legal matter in a mock local court sitting.

With the introduction of Legal Studies as part of the formal curriculum participation in mock trials has become an approved method of assessment for students studying the Legal Studies Syllabus.

- Introduction to law and the court process
- Shows lawyers in a positive and approachable light

Skills are developed, including:
- Confidence
- Experience enhanced
- Challenges broached as a result of involvement in the competition

Students use:
- Lateral thinking, imagination, improvisation, their own experience, research and analuytical skills

Students develop:
- Strong communication skills, confidence in addressing an audience, taking responsibility within a team and maturity in their behaviour

For further information write to:

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The Law Society of NSW is developing links with Bond University School of Law. The Law School is currently providing all editorial material and discussion questions for publication in Legal Eagle; providing two scholarships to study law at Bond University to the outstanding advocates in the Law Society's popular Mock Trial competition for secondary school students; and also participating in the annual Legal Studies Teachers Conference.