

# THE STOLEN GENERATIONS AND LITIGATION REVISITED

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*[Litigation for the so-called 'Stolen Generations' had been demonstrably unsuccessful until the recent case of Trevorrow v South Australia [No 5] ('Trevorrow'). This article explores in detail the Trevorrow decision and offers some comment on the litigation possibilities that flow from it. The success of the Stolen Generations litigant in Trevorrow is compared and contrasted to past failures in the area. Furthermore, this article considers litigation and non-litigation based responses to past wrongs, and questions whether litigation is capable of leading to an acceptable resolution for members of the Stolen Generations.]*

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I INTRODUCTION

Ten years ago, I wrote an article in the *University of Western Australia Law Review*<sup>1</sup> on possible litigation options for the so-called ‘Stolen Generations’.<sup>2</sup> The purpose of that article was to examine possible legal action that could be brought by the Stolen Generations, highlighting potential legal difficulties confronting Stolen Generations litigants. At that stage there had only been one substantial determination of a ‘Stolen Generations case’.<sup>3</sup> Subsequent cases confirmed the difficulties for those choosing the litigation pathway. However, the recent case of *Trevorrow v South Australia [No 5]* (*‘Trevorrow’*)<sup>4</sup> has shone light into a previously dark litigation tunnel.

Some may argue that the *Trevorrow* decision is a clarion call to the judiciary to reassess its ‘timidity’ towards finding for Stolen Generations litigants. Gray J’s judgment in *Trevorrow* is markedly different in approach and outcome to what came before it. Furthermore, the long-awaited official Commonwealth government apology to the Stolen Generations on 13 February 2008<sup>5</sup> and the subsequent calls for a national compensation scheme<sup>6</sup> following *Trevorrow* has

<sup>1</sup> Antonio Buti, ‘Removal of Indigenous Children from Their Families: The Litigation Path’ (1998) 27 *University of Western Australia Law Review* 203.

<sup>2</sup> Australian historian Peter Read coined this term in relation to his historical study of New South Wales: see Peter Read, Aboriginal Children’s Research Project, New South Wales Government, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (1982). Although the term ‘Stolen Generations’ has attracted criticism, it has gained common usage. By 2001, the term had gained an entry in *The Australian Oxford Dictionary*, being defined as: ‘the Aboriginal people who were removed from their families as children and placed in institutions or fostered by white families’: B Moore (ed), *The Australian Oxford Dictionary* (5<sup>th</sup> ed, 2001) 1087–8.

<sup>3</sup> *Kruger v Commonwealth* (1997) 190 CLR 1 (*‘Kruger’*).

<sup>4</sup> *Trevorrow v South Australia [No 5]* (2007) 98 SASR 136.

<sup>5</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–73 (Kevin Rudd, Prime Minister).

<sup>6</sup> See, eg, David Hollinsworth, ‘More Than Words Needed to Make Apology Count’, *The Sydney Morning Herald* (Sydney), 14 February 2008, 17; Rhianna King, ‘Compensation Demands Grow’, *The West Australian* (Perth), 14 February 2008, 7; Paul Maley, ‘Compensation the Next

generated a renewed optimism among members of the Stolen Generations hoping for either a courtroom victory or another form of historical redress.

The purpose of this article is to explore the *Trevorrow* decision and offer some comment on the litigation possibilities that flow from it. The body of this article is divided into four parts. Part II is a brief overview of the cases decided prior to *Trevorrow*. Part III provides a detailed commentary on the *Trevorrow* case, including an analysis of how the Court's findings on the plaintiff's claims differ from previous Stolen Generations judgments. Part IV examines the possible precedential utility of the *Trevorrow* decision.<sup>7</sup> Finally, Part V of this article considers litigation and non-litigation based responses to past wrongs, and questions whether litigation is capable of leading to an acceptable resolution for members of the Stolen Generations.

## II LITIGATION BEFORE *TREVORROW* — AN OVERVIEW

Stolen Generations litigants, inter alia, have instigated legal actions based in tort, fiduciary and constitutional law. The only substantial case based in constitutional law is *Kruger v Commonwealth* ('*Kruger*').<sup>8</sup> However, as I have discussed this case in my 1998 article, I will make only a brief comment here.

The litigants in *Kruger* were unsuccessful in claiming that the *Aboriginals Ordinance 1918* (Cth) was unconstitutional. None of the Justices found the Ordinance contrary to s 116 of the *Australian Constitution* (freedom of religion),<sup>9</sup> and all Justices considered that there was a sufficient nexus between the Ordinance and s 122 of the *Constitution* (which confers legislative power to make laws for the government of a territory).<sup>10</sup> All the Justices who considered these constitutional issues concluded that the Ordinance, textually at least, was a 'beneficial' law and not genocide,<sup>11</sup> and four Justices held that it did not violate any novel implied constitutional guarantees or prohibitions (if indeed such guarantees or prohibitions existed).<sup>12</sup> *Kruger* also confirmed that, under Australian law, no action in damages arises from breaches of a constitutional right.<sup>13</sup> The *Kruger* judgment reinforces the notion that in any cause of action, it is the

Step: Dodson', *The Australian* (Sydney), 14 February 2008, 3; 'Mansell Talks Up Hope of Compensation', *Mercury* (Hobart), 13 February 2008, 1; Stephanie Peatling and Jessica Irvine, 'Thanks — But Now Let's Talk Compensation', *The Sydney Morning Herald* (Sydney), 14 February 2008, 6.

<sup>7</sup> It is interesting to note that the *Trevorrow* decision came in the year of the 10<sup>th</sup> anniversary of the release of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth of Australia, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ('*Bringing Them Home Report*').

<sup>8</sup> (1997) 190 CLR 1.

<sup>9</sup> *Kruger* (1997) 190 CLR 1, 40 (Brennan CJ), 85–6 (Toohey J), 176 (Gummow J). Dawson J, with whom McHugh J agreed on this point (at 142), held that s 116 does not limit the power conferred by s 122, although his Honour held that even if s 116 did apply, he agreed with Gummow J that the provision was not infringed on the facts: at 60–1 (Dawson J). Gaudron J considered that the question of infringement of s 116 could not be determined: at 134.

<sup>10</sup> *Ibid* 41 (Brennan CJ), 53–8 (Dawson J), 78–9 (Toohey J), 102–7 (Gaudron J), 141 (McHugh J), 176 (Gummow J).

<sup>11</sup> *Ibid* 70 (Dawson J), 88 (Toohey J), 107 (Gaudron J), 144 (McHugh J), 159 (Gummow J).

<sup>12</sup> *Ibid* 44–5 (Brennan CJ), 63–8 (Dawson J), 142 (McHugh J), 153–9 (Gummow J).

<sup>13</sup> *Ibid* 46–7 (Brennan CJ), 93 (Toohey J), 125–6 (Gaudron J), 146–8 (Gummow J).

community standards at the time of the exercise of the legislative power and/or 'welfare care' under challenge that are relevant.<sup>14</sup>

The *Aboriginals Ordinance 1918* (Cth) was again placed under judicial scrutiny in *Cubillo v Commonwealth*.<sup>15</sup> Lorna Cubillo was born in 1938 in the Northern Territory. Her aunt cared for her after Lorna's mother died. Patrol officers forcibly removed her in 1945 and placed her in the Retta Dixon Home in Darwin; she remained there until she was 18 years old.<sup>16</sup> Peter Gunner was born in 1948 on a pastoral station. Patrol officers removed him when he was seven or eight years old. They sent him to St Mary's Church of England Hostel in Alice Springs; he remained there until he was 16 years of age.<sup>17</sup>

Cubillo and Gunner claimed that their removal and detention constituted wrongful imprisonment and deprivation of liberty. They also alleged that the Northern Territory Director of Native Affairs and the Commonwealth, by virtue of the doctrine of vicarious liability, breached their statutory duty, duty of care and fiduciary duty to the plaintiffs. They also claimed damages for breach of 'duty as guardian'. In presenting the claims, counsel for Cubillo and Gunner stated:

These cases concern great injustice done by the Commonwealth of Australia to two of its citizens. By the actions of the Commonwealth, Lorna Cubillo and Peter Gunner were removed as young children from their families and communities. They were taken hundreds of kilometres from the countries of their birth. They were prevented from returning. They were made to live among strangers, in a strange place, in institutions which bore no resemblance to a home. They lost, by the actions of the Commonwealth, the chance to grow among the warmth of their own people, speaking their people's languages and learning about their country. They suffered lasting psychiatric injury. They were treated as orphans when they were not orphans. They lost the culture and traditions of their families. Decades later, the Commonwealth of Australia says in this case that it did them no wrong at all.<sup>18</sup>

Although the Federal Court of Australia rejected the Commonwealth's strike out application,<sup>19</sup> it decided against the plaintiffs on the merits of the case,<sup>20</sup> even though O'Loughlin J found that the removal from family was 'an occasion of intense grief' and had resulted in 'terrible pain' to the children and their families.<sup>21</sup> The Full Court of the Federal Court dismissed an appeal,<sup>22</sup> and the plaintiffs were denied leave to appeal to the High Court of Australia because

<sup>14</sup> Ibid 36–7 (Brennan CJ), 52–3 (Dawson J).

<sup>15</sup> *Cubillo v Commonwealth* (1999) 89 FCR 528 ('*Cubillo* (strike out application)'); *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1 ('*Cubillo* (trial)'); *Cubillo v Commonwealth* (2001) 112 FCR 455 ('*Cubillo* (appeal)').

<sup>16</sup> See *Cubillo* (trial) (2000) 103 FCR 1, 13–14 (O'Loughlin J).

<sup>17</sup> See generally *ibid* 14.

<sup>18</sup> *Ibid* 11–12.

<sup>19</sup> *Cubillo* (strike out application) (1999) 89 FCR 528, 599 (O'Loughlin J).

<sup>20</sup> *Cubillo* (trial) (2000) 103 FCR 1, 483 (O'Loughlin J).

<sup>21</sup> *Ibid* 148. See also at 150.

<sup>22</sup> *Cubillo* (appeal) (2001) 112 FCR 455, 579 (Sackville, Weinberg and Hely JJ).

there was no likelihood of success in overturning the lower courts' decisions.<sup>23</sup> These decisions brought into relief the multiple legal and evidential obstacles involved in pursuing litigation to redress the alleged wrongs of past Aboriginal child separations or removals.<sup>24</sup>

The only other case on Aboriginal child separations policy to reach trial before *Trevorrow* is *Williams v Minister, Aboriginal Land Rights Act 1983*,<sup>25</sup> which named the state government of New South Wales as a defendant.<sup>26</sup> In the early 1940s, Joy Williams, of Aboriginal descent, was placed as a newborn at the Bomaderry Children's Home in NSW. At the age of four and a half years due to her 'fair skinned' appearance she was transferred to Lutanda Children's Home, an institution run by the Plymouth Community for 'white' children of European background. She alleged that the subsequent discovery of her Aboriginality had caused her considerable distress, as she was told that she had 'mud in [her] veins'.<sup>27</sup> After leaving Lutanda at the age of 18, an emotionally disturbed Joy Williams lived precariously as a vagrant, resorting to petty crime and prostitution to support herself. She suffered a range of mental disorders and served a short term in prison. In 1988, the Department of Child and Adolescent Psychiatry diagnosed her with an extremely severe form of mental disorder.<sup>28</sup>

Williams commenced legal action in 1993, seeking an extension of time under the *Limitation Act 1969* (NSW) to file her statement of claim. Although her application failed in the first instance, the NSW Court of Appeal granted the extension, Kirby P holding that her case must be heard in full 'as our system of law provides [justice] to all Australians — Aboriginal and non-Aboriginal — according to law, in open court and on its merits'.<sup>29</sup>

At trial, the Court found that the plaintiff failed to prove her allegations<sup>30</sup> and held that the *Aborigines Protection Act 1909* (NSW) did not transfer guardianship from the mother to the Aboriginal Welfare Board or other body or person.<sup>31</sup> The Court also held that 'policy' reasons, particularly in relation to concerns about 'floodgate' litigation, militated against imposing a duty of care in an

<sup>23</sup> Transcript of Proceedings, *Cubillo v Commonwealth* (High Court of Australia, Gleeson CJ, 3 May 2002).

<sup>24</sup> See, eg, Jennifer Clarke, 'Cubillo v Commonwealth' (2001) 25 *Melbourne University Law Review* 218; Robert van Krieken, 'Is Assimilation Justiciable? Lorna Cubillo & Peter Gunner v Commonwealth' (2001) 23 *Sydney Law Review* 239.

<sup>25</sup> *Williams v Minister for Aboriginal Land Rights Act* (Unreported, Supreme Court of New South Wales, Studdert J, 26 August 1993) ('Williams (time extension application)'); *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 ('Williams (time extension appeal)'); *Williams v Minister, Aboriginal Land Rights Act 1983* (Unreported, Supreme Court of New South Wales, Bruce J, 23 July 1997); *Williams v Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86 ('Williams (trial)'); *Williams v Minister, Aboriginal Land Rights Act 1983* [2000] Aust Torts Reports ¶81-578 ('Williams (appeal)').

<sup>26</sup> There is also the (insignificant) case of *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677, 693-4, where Kirby J held that the pleadings were deficient and did not ground a cause of action. One more case has also added little to the debate: *Johnson v Department of Community Services* [2000] Aust Torts Reports 81-540, 63 495-63 496 (Rolfé J), holding that a negligence case against the Department was not made out.

<sup>27</sup> *Williams* (time extension appeal) (1994) 35 NSWLR 497, 501 (Kirby P).

<sup>28</sup> *Ibid* 501-2.

<sup>29</sup> *Ibid* 515.

<sup>30</sup> *Williams* (trial) (1999) 25 Fam LR 86, 176-9 (Abadee J).

<sup>31</sup> *Ibid* 234-5.

institution–child relationship.<sup>32</sup> The NSW Court of Appeal upheld the lower court decision, remarking that the plaintiff’s case suffered from ‘an insuperable causation problem’.<sup>33</sup> It also raised policy considerations, saying that ‘[t]he potential impact of imposing a duty of care in the present circumstances is, as the trial judge noted, potentially wide’.<sup>34</sup>

A more successful outcome came from the claim of Valerie Linow in the NSW Victims of Crime Compensation Tribunal pursuant to the *Victims Support and Rehabilitation Act 1996* (NSW).<sup>35</sup> This was an alternative to the orthodox litigation pathway, which allowed a member of the Stolen Generations to claim monetary compensation (\$35 000)<sup>36</sup> for harm resulting from ill-treatment while under state care.<sup>37</sup>

The Tribunal Assessor held that on the balance of probabilities ‘the applicant was subjected to a series of indecent and sexual assaults by the alleged offender’<sup>38</sup> and accepted that Linow suffered from psychiatric disorders. However, with poignant but unintended irony, the Tribunal denied her claim because the Assessor believed that she would not have experienced emotional harm had the sexual assaults occurred whilst she was living in a loving family environment: it was her removal and institutionalisation that caused her psychological harm.<sup>39</sup> On appeal, the Victims Compensation Tribunal overturned the decision, holding that compensable injury had to be a direct result, not *the* ‘direct result of the sexual assaults’.<sup>40</sup> Further, an aggravation of an existing condition by an act of violence would qualify as a compensable injury.

The Stolen Generations litigation outlined above highlights the difficulties experienced by Stolen Generations litigants. Major obstacles have arisen in relation to doctrinal arguments, issues of evidence, the historical standard of the time, and policy. That was to change, however, with the case brought by Bruce Allan Trevorrow in the Supreme Court of South Australia.

<sup>32</sup> Ibid 249–50, 260.

<sup>33</sup> *Williams* (appeal) [2000] Aust Torts Reports ¶81-578, 64 175 (Heydon JA).

<sup>34</sup> Ibid 64 176–7.

<sup>35</sup> Notice of Determination, *Claim of Valerie Linow* (Victims of Crime Compensation Tribunal, New South Wales, File Reference 73123, 15 February 2002).

<sup>36</sup> The maximum that could be awarded under the scheme was \$50 000: *Victims Support and Rehabilitation Act 1996* (NSW) ss 19(1)–(2).

<sup>37</sup> Some members of the Stolen Generations (how many is unclear but apparently less than 10) were awarded approximately \$4000 each under the Victorian Criminal Injuries Compensation scheme for sexual assaults while in the care of the State of Victoria: see Amanda Cornwall, *Restoring Identity: Final Report* (2002) 47.

<sup>38</sup> Notice of Determination, *Claim of Valerie Linow* (Victims of Crime Compensation Tribunal, New South Wales, April 2001), cited in Cornwall, above n 37, 47.

<sup>39</sup> Christine Forster, ‘The Stolen Generation and the Victims Compensation Tribunal: The “Writing In” of Aboriginality to “Write Out” a Right to Compensatory Redress for Sexual Assault’ (2002) 25 *University of New South Wales Law Journal* 185, 191.

<sup>40</sup> Appeal Determination, *Claim of Valerie Linow* (Victims Compensation Tribunal, New South Wales, File Reference 73125, 30 September 2002), cited in Chris Cunneen and Julia Grix, ‘The Stolen Generations and Individual Criminal Victimization: Valerie Linow and the New South Wales Victims Compensation Tribunal’ (2003) 14 *Current Issues in Criminal Justice* 306, 307.

III THE *TREVORROW* CASEA *The Litigation and Factual Background*

The Aboriginal plaintiff, Bruce Allan Trevorrow, sued the State of South Australia in the Supreme Court of South Australia for misfeasance in public office, false imprisonment, breach of duty of care and breach of fiduciary and statutory duties. The claim arose out of his removal (at age 13 months) from his Aboriginal family in 1957 and his placement with a foster family in 1958. The plaintiff claimed that the circumstances of his removal from his mother and natural family and his ongoing separation for almost a decade had led to injury, loss and damage. He sought relief by way of declarations and damages. The state denied any liability arising from any of the pleaded causes of action.<sup>41</sup>

Gray J relied on the oral evidence of Bruce's siblings and half-siblings, as well as some documentary evidence, to make findings about family life in Joseph Trevorrow's (Bruce's father)<sup>42</sup> and Thora Karpany's (Bruce's mother) household in the 1950s and 1960s.<sup>43</sup> At the time of Bruce's birth (on 20 November 1956), Joseph and Thora lived with their three children — Hilda, aged nine, George, aged five, and Tom, aged three — in a home in the fringe-dwelling camps outside of Meningie. Joseph also had three children from a previous relationship, Joseph, Rita and Alice, who would occasionally come to stay with Joseph and Thora.<sup>44</sup>

Whilst Joseph and Thora were financially impoverished, Gray J concluded that 'the general picture of a well-nourished family, both physically and mentally, and of a happy family emerged from the evidence.'<sup>45</sup> Joseph was in regular (albeit casual) employment and the children were fed and clothed and were encouraged to attend school.<sup>46</sup> Relatives living nearby would help Thora and Joseph with their children when necessary.<sup>47</sup>

In 1957, Bruce had become ill before Christmas and, on Christmas Day, Joseph enlisted the help of his neighbours to drive his son to the Children's Hospital where he was admitted.<sup>48</sup> Joseph died in January 1966 having never seen the plaintiff again after that Christmas Day.

<sup>41</sup> In *Trevorrow* (2007) 98 SASR 136, Gray J identified a number of limitations of the case, mostly arising from the considerable amount of time that had passed since Bruce was removed from his family over 50 years ago. He noted difficulties in relation to: document management (at 152); witness reliability and availability, including Gray J's assessment of Bruce as a 'poor historian' on account of the effect that his alcoholism and depression had on his memory (at 152–3, 261–4); and the need to consider changing community standards, which meant the Court was to consider 'applicable legislation in the context of its historical setting' (at 153).

<sup>42</sup> Bruce's birth certificate records that his father was a man by the name of Frank Lampard. However, Gray J found substantial circumstantial evidence that this was incorrect and that Joseph Trevorrow was in fact Bruce's biological father: *ibid* 171.

<sup>43</sup> *Ibid* 172.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* 172, 305.

<sup>47</sup> *Ibid* 172.

<sup>48</sup> *Ibid* 305. Gray J found that in the week before Christmas an argument between Joseph and Thora led Thora to temporarily leave the family home to stay with friends. During Thora's absence the three eldest children (Hilda, George and Tom) remained with Joseph at the Trevor-

Although the Court was presented with conflicting evidence about the plaintiff's general wellbeing and family life at the time he was admitted to hospital,<sup>49</sup> after considering all the evidence, Gray J found that Bruce was neither malnourished nor neglected, nor was he 'without parents' when he was admitted to hospital on Christmas Day 1957.<sup>50</sup> Rather, Gray J found that Bruce was only in hospital for the purposes of treatment: he had not been abandoned and it was expected that he would return to the care of his parents when he recovered.<sup>51</sup>

Bruce recovered rapidly whilst in the Children's Hospital and by New Year's Eve the hospital records noted that he was 'going well'.<sup>52</sup> Soon thereafter, he was fostered out to Martha and Frank Davies without the consent of his parents.<sup>53</sup> At the time, Martha was not licensed as a foster parent and no attempt was made to assess properly whether Martha was an appropriate foster mother.<sup>54</sup> Gray J found that this process was authorised and arranged by an officer of the Aborigines Department, acting with the general authority of the Aborigines Protection Board ('APB').<sup>55</sup>

Evidence from welfare officers confirmed that the usual practice was for contact to be maintained between the natural family and the child after removal.<sup>56</sup> An issue at trial was the extent to which Thora had sought the return of the plaintiff.<sup>57</sup> Gray J found that 'the documentation tendered at trial clearly establishes that Thora did seek contact with and the return of the plaintiff and that she did so repeatedly over a period of years.'<sup>58</sup> The Court also found that Thora's requests were consistently ignored or rejected and that there was 'a level of determination on the part of the APB that the plaintiff and Thora were not to have contact'.<sup>59</sup>

In 1963, the proclamation of the *Aboriginal Affairs Act 1962* (SA) transferred guardianship of the plaintiff from the APB to Thora. Gray J found that no steps were taken to personally notify Thora of this change until 1966.<sup>60</sup> The state's submission that newspapers provided adequate public dissemination of the changes to guardianship was rejected.<sup>61</sup>

There was no evidence that any agency of the state monitored the plaintiff's wellbeing with the Davies family until February 1964.<sup>62</sup> Even though there were

row home, and Bruce was cared for in part by Joseph but stayed primarily with Thora's brother and his wife nearby: at 173.

<sup>49</sup> Ibid 173–5.

<sup>50</sup> Ibid 176.

<sup>51</sup> Ibid 336.

<sup>52</sup> Ibid 151.

<sup>53</sup> Ibid 151, 176, 392.

<sup>54</sup> Ibid 176. Martha did become a licensed foster mother over a month after the plaintiff was in her care: at 177.

<sup>55</sup> Ibid 152.

<sup>56</sup> Ibid 180.

<sup>57</sup> Ibid 177–80.

<sup>58</sup> Ibid 178.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid 183.

<sup>61</sup> Ibid 183–4.

<sup>62</sup> Ibid 180.

periods where the plaintiff appeared to live relatively happily with the Davies,<sup>63</sup> he was also experiencing developmental problems, depression and speech difficulties from around the time of his third birthday.<sup>64</sup> In 1964, when Bruce was about eight years old, his behaviour began to deteriorate markedly. He began stealing money from Martha, soiling his underwear, having difficulties at school and was generally described by welfare officers as destructive and irresponsible.<sup>65</sup> It was around this time that the plaintiff was informed that he was not a natural member of the Davies family.<sup>66</sup>

The evidence showed the plaintiff to be psychologically disturbed and, by the age of 10 years, he was being prescribed drug treatment including tranquillisers and antidepressants.<sup>67</sup> The evidence also established that he was emotionally scarred by Martha's recurring threats that if his behaviour did not improve he would be sent to another foster family.<sup>68</sup>

On 20 November 1966 (Bruce's 10<sup>th</sup> birthday), following a further request by Thora, welfare officers arranged Bruce's first meeting with Thora and his natural siblings.<sup>69</sup> Martha reported to a welfare officer that his behaviour following this visit was not good and soon after he developed a limp that apparently had no physical cause.<sup>70</sup> Bruce continued to have contact with Thora, including weekend visits to his natural family in Victor Harbor. Meanwhile, Martha's ability to cope deteriorated as Bruce's poor behaviour continued.<sup>71</sup>

In May 1967, Bruce went to Victor Harbor, apparently to spend the school holidays with his natural family, but ended up staying there permanently because Martha refused to take him back.<sup>72</sup> Neither the plaintiff nor Thora received formal notice of the return.<sup>73</sup> Gray J found that the return generally took place 'in the most unsatisfactory of circumstances.'<sup>74</sup> Thora and Martha were both ill-prepared by the state for this change.<sup>75</sup> In particular, Gray J noted that Bruce was not given the opportunity to say goodbye to his foster family.<sup>76</sup> Nor was he prepared for the "rough and tumble" of indigenous life at Victor Harbor.<sup>77</sup> Whilst his siblings 'had learnt the art of survival in that environment — the plaintiff had not.'<sup>78</sup>

<sup>63</sup> Ibid 180–1.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid 181.

<sup>66</sup> Ibid 182.

<sup>67</sup> Ibid 306.

<sup>68</sup> Ibid 181, 306.

<sup>69</sup> Ibid 184.

<sup>70</sup> Ibid 184–5.

<sup>71</sup> Ibid 185.

<sup>72</sup> Ibid 187.

<sup>73</sup> Ibid 364.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid 188–9, 306.

<sup>76</sup> Ibid 306.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid 306–7.

Approximately 12 months after his return to Thora, Bruce was facing charges of larceny.<sup>79</sup> He was institutionalised as a state child and admitted to Windana Boys Home in July 1968. He was 11 years old.<sup>80</sup> Gray J sums up the plaintiff's return to Thora as 'a disaster'.<sup>81</sup>

Bruce was in and out of various institutions for the remainder of his adolescent years<sup>82</sup> and continued to suffer psychological and behavioural difficulties as well as mental illness.<sup>83</sup> His attempts to return to his Indigenous family life at times during his adolescence were generally unsuccessful.<sup>84</sup> Gray J concluded that by the time he turned 18 in 1974, Bruce was 'ill-equipped to cope with adult life'.<sup>85</sup>

Gray J accepted evidence that the plaintiff had suffered from serious depression throughout his adult life, leading him to abuse alcohol.<sup>86</sup> As a young adult, he came into contact with the criminal justice system on numerous occasions, leading to one brief period of imprisonment.<sup>87</sup> His employment history was 'patchy'.<sup>88</sup> In 1977 and 1979, he suffered two major accidents for which he received compensation.<sup>89</sup>

At the time of the trial, the plaintiff was married and had four children as well as several grandchildren.<sup>90</sup> The Court heard that his marriage was unhappy and violent, and that he had no feelings for either his wife or his children,<sup>91</sup> but that he had developed a bond with his grandchildren.<sup>92</sup>

#### *B Statutory and Policy Framework Relating to Removals in South Australia*

##### *1 The Scheme*

Whilst the proceedings were concerned with the relevant statutory scheme rather than the policy of removing Aboriginal children, Gray J briefly noted that the existence of such a policy and its negative long-term effects are 'now widely recognised in the community'.<sup>93</sup> The Court also accepted evidence of the policy of assimilation operating in South Australia during the early to mid 20<sup>th</sup> century.<sup>94</sup>

The judgment offers a comprehensive overview of the legal background to the plaintiff's removal.<sup>95</sup> The overview includes a brief history of relevant legisla-

<sup>79</sup> Ibid 187–8.

<sup>80</sup> Ibid 189.

<sup>81</sup> Ibid 337.

<sup>82</sup> Ibid 189–201.

<sup>83</sup> Ibid 307.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid 201.

<sup>86</sup> Ibid 307.

<sup>87</sup> Ibid 201, 208.

<sup>88</sup> Ibid 204.

<sup>89</sup> Ibid 204–5.

<sup>90</sup> Ibid 203.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 308.

<sup>93</sup> Ibid 239.

<sup>94</sup> Ibid 236–9.

<sup>95</sup> Ibid 216–50.

tion generally, and a detailed consideration of the statutes and policies in South Australia dealing with Aboriginal welfare issues and the protection of children.<sup>96</sup> Gray J found that the legislative scheme applicable at the time of the plaintiff's removal, placement, and return largely comprised provisions of the *Aborigines Act 1934–1939* (SA) ('*Aborigines Act*'), the *Maintenance Act 1926–1937* (SA) ('*Maintenance Act*') and, to a lesser extent, the *Children's Protection Act 1936* (SA).<sup>97</sup> Importantly, his Honour held that those provisions operated and were intended to be read together.<sup>98</sup>

(a) *Maintenance Act 1926–1937 (SA)*

The *Maintenance Act* was intended to expeditiously protect children who were, or were reasonably suspected of being, neglected or abandoned.<sup>99</sup> The Act applied to all children in the state — both Aboriginal and non-Aboriginal.<sup>100</sup> Part II of the Act established the Children's Welfare and Public Relief Board ('CWPRB'). Section 167 of the Act stipulated that any person acting as a foster mother had to be licensed by the CWPRB for that purpose. Sections 101–2 (in Part IV of the Act) provided that a child could be removed from their parents where the child was found to be destitute or neglected.<sup>101</sup> Section 102 provided that where a court was satisfied that the child was destitute or neglected, it could:

- (a) order such child to be forthwith sent to an institution, to be there detained or otherwise dealt with under this Act until such child attains the age of eighteen years; or
- (b) by an order in writing place such child in the custody and under the control of the board until such child attains the age of eighteen years.

Once a court placed the child under the custody and control of the CWPRB, the child became a 'state child' within the meaning of s 5. The CWPRB could then place the child in care pursuant to ss 102(b) and 128(1). Gray J pointed out that the legislature intended that the welfare of neglected or destitute children be reviewed by the courts and that the scheme allowed a guardian to be heard.<sup>102</sup> Section 106(1) provided:

Whenever any complaint is made charging a child with being a neglected child on the ground that he is under unfit guardianship, the guardian of such child

<sup>96</sup> Gray J discusses the following: *First Proclamation of 1836* (SA); *An Ordinance to Provide for the Protection, Maintenance, and Up-Bringing of Orphans and Other Destitute Children of the Aborigines 1844*, 7 & 8 Vict, c 12; *State Children Act 1895* (SA); *Aborigines Act 1911* (SA); *Aborigines (Half-Caste Children) Bill 1921* (SA); *Aborigines (Training of Children) Act 1923* (SA); *Maintenance Act, Children's Protection Act 1936* (SA); *Aborigines (Consolidation) Act 1934* (SA); *Aborigines Act, Aboriginal Affairs Act 1962* (SA); *Social Welfare Act 1926–1965* (SA); *Community Welfare Act 1972* (SA).

<sup>97</sup> The *Maintenance Act* was replaced by the *Social Welfare Act 1926–1965* (SA), and the *Aborigines Act* was replaced by the *Aboriginal Affairs Act 1962* (SA).

<sup>98</sup> *Trevorrow* (2007) 98 SASR 136, 235.

<sup>99</sup> *Ibid* 228.

<sup>100</sup> Section 5 of the *Maintenance Act* defined a 'child' as 'any boy or girl under the age of eighteen years; and, in the absence of positive evidence as to age, means any boy or girl apparently under the age of eighteen years.'

<sup>101</sup> 'Destitute child' and 'neglected child' were defined in *Maintenance Act* s 5.

<sup>102</sup> *Trevorrow* (2007) 98 SASR 136, 226 (Gray J).

shall be notified in writing by the complainant of the time when and place where such complaint is to be heard.

(b) *Children's Protection Act 1936 (SA)*

The *Children's Protection Act 1936* (SA) provided particular protection for children.<sup>103</sup> Section 5 created offences with respect to the ill-treatment of children. Section 6 dealt with the powers of the court to make orders in cases where there was reasonable cause for suspecting that a child was being ill-treated, neglected, abandoned or exposed in a manner likely to subject a child to unnecessary danger, injury or suffering. In those circumstances, the court could authorise a police constable or an officer of the CWPRB to search for and remove a child to an institution to be detained until the child could be brought before the court.<sup>104</sup>

(c) *Aborigines Act 1934–1939 (SA) and the APB*

The *Aborigines Act* provided further protection for Aboriginal children. It created the APB and made it the legal guardian of Aboriginal children. Section 10 provided:

- (1) The chief protector [APB] shall be the legal guardian of every aboriginal and half-caste child, notwithstanding that any such child has a parent or other relative living, until such child attains the age of twenty-one years, except whilst such child is a State child within the meaning of the *Maintenance Act, 1926*.
- (2) Every protector shall, within his district, be the local guardian of every such child within his district.
- (3) Such local guardian shall have and exercise the powers and duties prescribed.

The duties of the APB were set out in s 7. Of particular relevance to the case was s 7(e), which created the APB's duty to 'provide, when possible for the custody, maintenance and education of the children of aborigines.'<sup>105</sup> In addition to the duties set out in s 7, the *Aborigines Act* apparently envisaged that the APB would work in conjunction with the CWPRB to effect the removal of an Aboriginal child according to law.<sup>106</sup> More specifically, s 38(1) provided:

The [APB] may, with the approval of the [CWPRB] constituted under the *Maintenance Act, 1926*, commit any aboriginal child to any institution within the meaning of the *Maintenance Act, 1926*, under the control of the [CWPRB], to be there detained or otherwise dealt with under the said Act until such child attains the age of eighteen years.

Gray J emphasised that pursuant to s 38 a removed child could only be placed in an institution,<sup>107</sup> and also that s 40(b) stipulated that s 38 only applied to

<sup>103</sup> The *Children's Protection Act 1936* (SA) s 4 defined a 'child' as being apparently under the age of 16 years and included all children whether Aboriginal or not.

<sup>104</sup> *Trevorrow* (2007) 98 SASR 136, 228 (Gray J).

<sup>105</sup> *Ibid* 157.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* 236.

illegitimate children who in the opinion of both the APB and CWPRB were neglected. Under s 39, once control of a child had transferred from the APB to the CWPRB, the child became a state child within the meaning of s 5 of the *Maintenance Act*.<sup>108</sup> The APB also had powers pursuant to s 17(1) of the *Aborigines Act* to place an Aboriginal person within a reserve or Aboriginal institution. However, Gray J stressed that ‘this subsection had no part to play in the removal or placement of the plaintiff.’<sup>109</sup>

*(d) Legislation after the Removal of the Plaintiff*

In 1962, after the plaintiff’s removal from his biological parents, the *Aboriginal Affairs Act 1962* (SA) (*‘Aboriginal Affairs Act’*) replaced the *Aborigines Act*. Pursuant to s 16(1) of the *Aboriginal Affairs Act*, the Aborigines Department was renamed the Department of Aboriginal Affairs and, under s 5, the APB was replaced by the Aboriginal Affairs Board. Gray J emphasised that the most significant feature of the *Aboriginal Affairs Act* was the absence of any provision regarding legal guardianship of Aboriginal children.

In 1965, the *Maintenance Act 1926–1963* (SA) was renamed the *Social Welfare Act 1926–1965* (SA). Under s 8, the CWPRB was abolished and its functions and powers were transferred to, and vested in, the Minister for Social Welfare, who became the legal guardian of all state children pursuant to s 13 of the Act.

2 *The Submissions of the Plaintiff and the State in Relation to the Statutory Scheme*

One of the plaintiff’s central contentions was that his removal and placement did not follow the proper statutory process as it existed at the relevant time. In assessing his claim, Gray J considered two alternative interpretations of the statutory scheme. The first interpretation, submitted on behalf of the plaintiff, was that the only avenue through which Aboriginal children could be removed from their parents was by strict adherence to the relevant legislative provisions expressly authorising that process — namely, ss 17 and 38 of the *Aborigines Act* and s 102 of the *Maintenance Act* — or with the consent of the child’s parents.

The alternative interpretation, submitted on behalf of the state, was that by virtue of the APB’s role and responsibility as the legal guardian of every Aboriginal child pursuant to s 10 of the *Aborigines Act*, the APB was empowered under the statutory scheme to take any steps considered necessary to execute its duties, including those set out in s 7, with respect to Aboriginal children.<sup>110</sup> The state submitted that this included the unrestricted power under ss 7 and 10 of the *Aborigines Act* to remove an Aboriginal child from their parents and place that child in foster care.<sup>111</sup> It thus became necessary for the Court to determine the

<sup>108</sup> A ‘State child’ was defined in s 5 of the *Maintenance Act* as ‘any child who has been committed to an institution, or has been placed in the custody or under the control of the board, pursuant to this Act, or any Act hereby repealed, for a period which has not yet expired.’

<sup>109</sup> *Trevorrow* (2007) 98 SASR 136, 157.

<sup>110</sup> *Ibid* 239.

<sup>111</sup> *Ibid*.

meaning of ‘legal guardian’ within s 10 of the *Aborigines Act* and to consider the extent of the powers of the APB as a legal guardian of Aboriginal children.

### 3 *Guardianship Powers of the APB*

Following the observations made in *Ross v Chambers*<sup>112</sup> and *Kruger*,<sup>113</sup> Gray J found that the word ‘legal’ did not aid in the Court’s interpretation of the scope and meaning of ‘guardianship’.<sup>114</sup> His Honour’s focus was therefore on the word ‘guardianship’ rather than the phrase ‘legal guardianship’.<sup>115</sup> Whilst acknowledging that there is no single established meaning of ‘guardianship’, his Honour considered that the term ‘guardianship’ in the context of the whole of the *Aborigines Act* should be given a narrow interpretation. By ‘narrow guardianship’, Gray J meant the kind of guardianship referred to in *Wedd v Wedd*, where the Supreme Court of South Australia held that ‘guardianship’ denotes duties ‘concerning the child *ab extra*; that is, a warding off; the defence, protection and guarding of the child, or his property, from danger, harm or loss that may enure from without.’<sup>116</sup>

Thus, his Honour rejected the state’s submission that ‘legal guardianship’ should be interpreted as providing the APB with a ‘full bundle of rights’ that would allow it to circumvent the statutory processes for removal.<sup>117</sup> The preference given to a narrow interpretation of guardianship in this instance was in part because the *Aborigines Act* did not disclose a sufficiently clear parliamentary intention to dramatically modify a parent’s common law rights, as required by the decisions of the High Court in *Bropho v Western Australia*<sup>118</sup> and *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*.<sup>119</sup>

Moreover, Gray J found that the legal and historical context of ss 7 and 10 was inconsistent with the APB having unlimited guardian power to remove Aboriginal children.<sup>120</sup> Gray J reflected on the purpose of the *Aborigines Act* and preceding legislation of the same nature,<sup>121</sup> deciding that the purpose of the Act was protection and, as a corollary, that the role of the APB was that of ‘protector’.<sup>122</sup> Gray J found that many provisions in the *Aborigines Act* were designed to protect Aboriginal people by separating them from the general community.<sup>123</sup> Sections 7 and 10 were therefore to be interpreted with a view to achieving that

<sup>112</sup> (Unreported, Supreme Court of Northern Territory, Kriewaldt J, 5 April 1956) 77–8.

<sup>113</sup> (1997) 190 CLR 1, 52, 62 (Dawson J).

<sup>114</sup> *Trevorrow* (2007) 98 SASR 136, 243.

<sup>115</sup> See, eg, *ibid* 242.

<sup>116</sup> [1948] SASR 104, 106–7 (Mayo J).

<sup>117</sup> *Trevorrow* (2007) 98 SASR 136, 239.

<sup>118</sup> (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), cited in *Trevorrow* (2007) 98 SASR 136, 243 (Gray J).

<sup>119</sup> (2002) 213 CLR 543, 562–3 (McHugh J), cited in *Trevorrow* (2007) 98 SASR 136, 243 (Gray J).

<sup>120</sup> *Trevorrow* (2007) 98 SASR 136, 248.

<sup>121</sup> In particular, Gray J considered the second reading speech for the *Aborigines Act 1911* (SA) (the provisions of which were substantially the same as the provisions of the *Aborigines Act*): *ibid* 248.

<sup>122</sup> *Ibid* 249.

<sup>123</sup> *Ibid* 248.

purpose.<sup>124</sup> In particular, ss 17 and 38–40 proscribed the unlimited guardianship powers that the state claimed.<sup>125</sup> It was also unlikely that s 10 of the *Aborigines Act* could have been intended to exclude Part IV of the *Maintenance Act* in relation to the removal of neglected Aboriginal children from their parents.<sup>126</sup>

Gray J concluded that ss 17 and 38 of the *Aborigines Act* and s 102 of the *Maintenance Act* provided the legal procedures for the removal of Aboriginal children from their parents. Accordingly, either the two boards (the APB and the CWPRB) were to agree on procedure or they needed to make an application to a court.

#### 4 *The APB's Appreciation of Its Limited Legal Authority to Remove Aboriginal Children*

In 1949, and again in 1954, the Crown Solicitor advised APB that it lacked the power to remove Aboriginal children from their parents without CWPRB approval, or otherwise than in accordance with prescribed statutory mechanisms.<sup>127</sup> Gray J held that:

the Crown Solicitors' legal advices were correct and that the State, its Cabinet, its Ministers, its relevant boards and departmental officers had a correct appreciation of their limited legal authority at the time, with respect to the removal of Aboriginal children.<sup>128</sup>

The Crown Solicitor's memoranda of advice, along with other documentary evidence indicating the APB's awareness of the limits of its powers, led the Court to hold that when the APB removed the plaintiff from Joseph and Thora in 1958 and placed him in foster care, it did so 'wilfully' and with the knowledge that it was acting unlawfully and beyond power.<sup>129</sup>

#### C *Liability of the State*

A threshold question in *Trevorrow* and other Stolen Generations cases was whether the state could be held responsible for the unlawful actions of its related entities and officials. Applying the 'legislative intention' test laid down by Kitto J in *Inglis v Commonwealth Trading Bank of Australia*,<sup>130</sup> Gray J held that the statutory corporations in charge of the plaintiff (APB and CWPRB) were emanations of the state or, alternatively, instruments or agents of the state.<sup>131</sup> As the creator and funding source of the system that allowed the separation or removal of Aboriginal children from their families, the state also bore responsibility for the actions of departmental officials involved in the removal of the

<sup>124</sup> Ibid 249.

<sup>125</sup> Ibid.

<sup>126</sup> Ibid 246.

<sup>127</sup> Ibid 158–61, 171.

<sup>128</sup> Ibid 249.

<sup>129</sup> Ibid 171.

<sup>130</sup> (1969) 119 CLR 334, 337–8.

<sup>131</sup> *Trevorrow* (2007) 98 SASR 136, 155, 250–61. In determining the intention of the South Australian legislature, Gray J referred at some length to the observations of the High Court in *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51.

plaintiff.<sup>132</sup> Citing *Groves v Commonwealth*<sup>133</sup> and s 5 of the *Crown Proceedings Act 1992* (SA), Gray J held that ‘the State is vicariously liable for the acts and conduct of departmental officers undertaken in the general course of their duties that involved a breach of duty.’<sup>134</sup>

In contrast, in *Cubillo* (trial), O’Loughlin J invoked the so-called ‘independent discretion rule’ to prohibit imputing legal liability on the state or the responsible Minister of the Crown for breaches of guardianship duty by the Chief Protector of Aborigines or the Commissioner of Native Affairs and departmental officers.<sup>135</sup> Under this independent discretion rule, the Minister of the Crown or the Crown itself is not vicariously responsible and therefore not liable for acts of its employees and officers who have an independent discretion in the exercise of their public office or public duties.<sup>136</sup> However, this rule has been criticised as being antiquated<sup>137</sup> and as further enhancing ‘the protected position of governments.’<sup>138</sup> Professor Paul Finn notes that ‘Crown liability should [not] turn on the quite arbitrary fashion in which functions ... are ... allocated by statute.’<sup>139</sup>

More importantly for the purpose of this analysis, the rule has been abrogated in South Australia by s 10(2) of the *Crown Proceedings Act 1972* (SA)<sup>140</sup> and thus could not provide a defence for the state. However, although this is speculative, it is submitted that the tone of Gray J’s judgment suggests the independent discretion rule would not have found favour with his Honour even if it had not been abrogated by statute.

#### D Plaintiff’s Applications for Extension of Time

##### 1 Limitation of Actions Act 1936 (SA)

Bruce Trevorrow instigated proceedings out of time and sought orders extending the time fixed for the bringing of causes of action pursuant to s 48 of the *Limitation of Actions Act 1936* (SA) (*‘Limitation of Actions Act’*). The state opposed such orders on the grounds that it had been prejudiced by the plaintiff’s delay in instituting the proceedings. Pursuant to s 48(3)(b)(i) of the *Limitation of Actions Act*, the discretion to extend time could be enlivened by the discovery of

<sup>132</sup> *Trevorrow* (2007) 98 SASR 136, 260.

<sup>133</sup> (1982) 150 CLR 113, 121 (Stephen, Mason, Aickin and Wilson JJ).

<sup>134</sup> *Trevorrow* (2007) 98 SASR 136, 261.

<sup>135</sup> *Cubillo* (trial) (2000) 103 FCR 1, 336. See also at 345–9. O’Loughlin J’s application of this rule to the case was approved by the Full Court in *Cubillo* (appeal) (2001) 112 FCR 455, 529–31 (Sackville, Weinberg and Hely JJ).

<sup>136</sup> *Tobin v The Queen* (1864) 16 CB NS 310, 347–52; 143 ER 1148, 1162–4 (Erle CJ); *Stanbury v Exeter Corporation* [1905] 2 KB 838, 841–2 (Lord Alverstone CJ), 843 (Wills J), 843–4 (Darling J); *Enever v The King* (1906) 3 CLR 969; *Little v Commonwealth* (1947) 75 CLR 94, 114 (Dixon J); *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626, 637 (Gibbs CJ).

<sup>137</sup> Geoffrey Sawyer, ‘Crown Liability in Tort and the Exercise of Discretions’ (1951) 5 *Res Judicatae* 14, 17, 20.

<sup>138</sup> Paul Finn and Kathryn J Smith, ‘The Citizen, the Government and “Reasonable Expectations”’ (1992) 66 *Australian Law Journal* 139, 145.

<sup>139</sup> Paul Finn, ‘Claims against Government Legislation’ in P D Finn (ed), *Essays on Law and Government* (1996) vol 2, 27, 37. Finn is currently a Judge of the Federal Court of Australia.

<sup>140</sup> The rule has also been abrogated in NSW by s 8 of the *Law Reform (Vicarious Liability) Act 1983* (NSW).

a new material fact (materially relevant to the proceedings not previously known to the plaintiff)<sup>141</sup> within 12 months of instituting proceedings.

Gray J found that the new material facts learned by the plaintiff in July 1997 were details about the APB's failure to follow the proper procedures in removing the plaintiff from Joseph and Thora and his placement with the Davies family.<sup>142</sup> More specifically, the plaintiff discovered that his family circumstances in 1958 were not investigated and his parents' consent to his removal was neither sought nor a court order obtained.<sup>143</sup> Gray J held that the plaintiff's discovery of these new material facts enlivened the discretion to extend time pursuant to s 48(3)(b)(i) of the *Limitation of Actions Act*.

In the alternative, Gray J found that the Court's discretion was enlivened under s 48(3)(b)(ii) by the defendant's conduct in causing the plaintiff's failure to issue proceedings within time. The relevant conduct of the state in this case was its failure to 'disclose to the plaintiff that which only the State could know, namely that it had acted without statutory warrant or, alternatively, with Crown law advice and the belief that it had no statutory warrant.'<sup>144</sup>

His Honour dismissed the state's claim of prejudice and, citing the comments of Deane J in *Hawkins v Clayton* at some length, emphasised Deane J's observation that:

If a wrongful action or breach of duty by one person not only causes unlawful injury to another but, while its effect remains, effectively precludes that other from bringing proceedings to recover the damage to which he is entitled, that other person is doubly injured.<sup>145</sup>

Finding that it would be 'contrary to the interests of justice to bar the plaintiff from bringing his action,'<sup>146</sup> Gray J held that:

The argument that the plaintiff ought to be barred from bringing proceedings against the State due to the prejudice it may face, in circumstances where the conduct of the State was at the least a material, if not a major, contributor to the delay, is not an attractive one.<sup>147</sup>

Furthermore, Gray J found that any prejudice suffered by the state was to some extent alleviated by the comprehensive records kept by officers of the Aborigines Department, the Department of Aboriginal Affairs and the Child Guidance Clinic, as well as the testimony of welfare officers and doctors who had treated the plaintiff.<sup>148</sup> There was enough evidence to paint a detailed picture of the plaintiff's life and the relevant events.<sup>149</sup> Moreover, he considered it unlikely that any oral or documentary evidence could have assisted the state in relation to

<sup>141</sup> *Trevorrow* (2007) 98 SASR 136, 326–7.

<sup>142</sup> *Ibid* 327.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Ibid* 325.

<sup>145</sup> (1988) 164 CLR 539, 590, cited in *Trevorrow* (2007) 98 SASR 136, 330 (Gray J).

<sup>146</sup> *Trevorrow* (2007) 98 SASR 136, 330.

<sup>147</sup> *Ibid* 331.

<sup>148</sup> *Ibid* 332.

<sup>149</sup> *Ibid* 331.

causes of action based on the alleged ultra vires conduct that was the subject of advice of the Crown Solicitor at the time.<sup>150</sup>

As a concluding remark, Gray J added that even though his decision to exercise the discretion within s 48 was principally influenced by the conduct of the state, the discretion would still have been exercised in favour of the plaintiff had it only been enlivened by the discovery of new material facts.<sup>151</sup>

## 2 *Laches*

As the *Limitation of Actions Act* did not impose a limitation period in respect of the plaintiff's equitable claim for breach of fiduciary duty, the state submitted that the equitable defence of laches should bar the claim (if the Court found that the state owed the duty).<sup>152</sup> The issue for the Court was whether the plaintiff's equitable claim was analogous to a legal claim and, if so, whether the equitable claim should be subject to the same statutory time limit as the legal claim. Gray J found that there were similarities between the plaintiff's claim for breach of fiduciary duty through a failure to comply with statutory obligations and his claims in tort.<sup>153</sup> However, his Honour did not 'consider that it would be just in all the circumstances to find that the plaintiff's claim for breach of fiduciary duty should be barred by [either] the application by analogy of a statutory time limit', or by the defence of laches.<sup>154</sup>

### E *Findings on the Plaintiff's Claims*

As can be seen from Part II of this article, Stolen Generations claimants have mounted legal arguments based in constitutional law, negligence, breach of statutory duties, wrongful imprisonment and breach of fiduciary duties. With the constitutional case seemingly laid to rest by the High Court in *Kruger*, the remaining causes of action are those that seek to establish civil liability. According to some commentators, the Stolen Generations cases have challenged the Australian judiciary to expand the doctrines of tort and equity such that they recognise liability for the unique harms which arise out of Australia's past treatment of its Indigenous people.<sup>155</sup> Until *Trevorrow*, the courts had seemingly been reluctant to squeeze the experiences of Stolen Generations claimants into the narrow categories of legal causes of action. By contrast, in *Trevorrow*, Gray J found that the state was liable for misfeasance in public office, wrongful imprisonment, breach of fiduciary duties and negligence.

This section critically examines Gray J's judgment in relation to the various causes of action and in doing so discusses some of the contrasting aspects of the

<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.* 332.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.* 334.

<sup>154</sup> *Ibid.* 335.

<sup>155</sup> Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Discussion Paper No 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004) 4; Simon Young, 'The Long Way Home: Reparation for the Removal of Aboriginal Children' (1998) 20 *University of Queensland Law Journal* 70, 85.

legal arguments made for the Stolen Generations in the *Trevorrow* case vis-a-vis the other Stolen Generations cases.

### 1 *Misfeasance in Public Office*

*Trevorrow* was the first time that misfeasance in public office had been raised as a cause of action by a Stolen Generations litigant. Gray J referred to the recent restatement of principles governing the tort of misfeasance in public office in *Sanders v Snell*,<sup>156</sup> which makes public officials ‘liable for injuries that are caused by acts which, at the time, they knew to be unlawful and involved a foreseeable risk of harm.’<sup>157</sup>

His Honour had already found that, because of widely disseminated advice of the Crown Solicitor, the state, through its Ministers and officers, was well aware that it was condoning unlawful acts in permitting the APB to remove Aboriginal children from their natural families.<sup>158</sup> Furthermore, referring to his earlier finding on foreseeability (in his analysis of the negligence action), his Honour held that the plaintiff was ‘dealt with by the APB and the departmental officers in circumstances that involved a foreseeable risk of harm.’<sup>159</sup> Hence, the plaintiff was entitled ‘to damages for misfeasance in public office by those concerned with his removal and placement and more particularly the State as the body ultimately responsible.’<sup>160</sup>

### 2 *Wrongful Imprisonment*

Counsel for the plaintiff submitted that, by placing the plaintiff in foster care without his parents’ consent and refusing his mother’s request that they return him to the family, the APB had effectively imprisoned the plaintiff by denying him freedom of movement.<sup>161</sup> The Court agreed, Gray J holding that the state, through its agents and emanations, caused the imprisonment.<sup>162</sup> This placed the onus on the state to prove that the plaintiff’s imprisonment was lawful, which it was unable to do.<sup>163</sup> The relief to which the plaintiff was entitled for wrongful imprisonment by the state was a declaration that his removal by the state constituted an unlawful imprisonment.<sup>164</sup> Regardless of proof of actual damage, the plaintiff was also entitled to an award of damages because ‘[f]alse imprisonment, being a trespass to the person, is actionable without proof of damage.’<sup>165</sup>

Wrongful imprisonment had previously been alleged by the plaintiffs in *Williams* (trial) and *Cubillo* (trial). In *Williams* (time extension application), Studdert J held that there was no evidence to support the plaintiff’s claim of

<sup>156</sup> (1998) 196 CLR 329, 344–5 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

<sup>157</sup> *Trevorrow* (2007) 98 SASR 136, 338.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.* 342.

<sup>162</sup> *Ibid.* 343.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

wrongful imprisonment.<sup>166</sup> The plaintiffs unsuccessfully argued in *Cubillo* (trial) that the Commonwealth had ‘a policy of indiscriminate removal irrespective of the personal circumstances of the child’<sup>167</sup> that would in some circumstances amount to wrongful imprisonment. In any case, the removal of Peter Gunner was found by O’Loughlin J to be the result of his mother’s consent, evidenced by a thumb print on a consent form.<sup>168</sup> With regard to Lorna Cubillo, the Commonwealth failed to prove that she had been removed lawfully, but the action for wrongful imprisonment nevertheless failed on the grounds that the Commonwealth was not liable for the actions of the Director of Native Affairs.<sup>169</sup> The outcome for Lorna Cubillo highlights the significance of Gray J’s finding in *Trevorrow* that the state was responsible for the actions of its departmental officials.

### 3 *Fiduciary Duty*

Counsel for the plaintiff submitted that the APB’s legal guardianship of the plaintiff and the conduct of the APB gave rise to a fiduciary relationship between the APB and the plaintiff.<sup>170</sup> Counsel also submitted that there was a fiduciary relationship between the state and the plaintiff because the APB was an emanation of the state.<sup>171</sup> Similar arguments have been made in the other Stolen Generations cases. The removal of Aboriginal children from their families created a classic guardianship relationship between the state and Aboriginal children, whether by statute or in the factual common law context, or both. In other Stolen Generations cases, alleged breaches of guardianship duty<sup>172</sup> have been subsumed under actions based in tort and fiduciary duties. But the arguments under fiduciary law have in the past not proceeded far.

In *Cubillo* (trial), O’Loughlin J accepted that the relationship of statutory guardian and ward can be characterised as a fiduciary relationship,<sup>173</sup> referring to the state-ward guardianship case of *Bennett v Minister for Community Welfare*.<sup>174</sup> However, his Honour was not prepared to hold that, in the case before him, the plaintiffs’ rights had been infringed<sup>175</sup> or that there had been a breach of fiduciary duties, even if there had been a fiduciary relationship between the plaintiffs and the Commonwealth or its officers.<sup>176</sup>

In *Williams* (trial), the trial judge stated that while it was not necessary for him to decide the fiduciary duty issue he would not follow *Cubillo* (strike out

<sup>166</sup> *Williams* (time extension application) (Unreported, Supreme Court of New South Wales, Studdert J, 26 August 1993) 31.

<sup>167</sup> *Cubillo* (trial) (2000) 103 FCR 1, 103 (O’Loughlin J).

<sup>168</sup> *Ibid* 245.

<sup>169</sup> *Ibid* 351.

<sup>170</sup> *Trevorrow* (2007) 98 SASR 136, 343.

<sup>171</sup> *Ibid*.

<sup>172</sup> For example, the duties of maintenance, protection, education, affection and emotional support: see Antonio D Buti, *Separated: Australian Aboriginal Childhood Separations and Guardianship Law* (2004) 23–38.

<sup>173</sup> *Cubillo* (trial) (2000) 103 FCR 1, 406–7.

<sup>174</sup> (1992) 176 CLR 408.

<sup>175</sup> *Cubillo* (trial) (2000) 103 FCR 1, 403.

<sup>176</sup> *Ibid* 408–9.

application)<sup>177</sup> ‘to the extent that it even suggests that a fiduciary relationship might give rise to a fiduciary duty of the kind urged in the instant case’.<sup>178</sup> Abadee J’s refusal to entertain the fiduciary claim was based on three issues: the non-economic character of the interest that the fiduciary principle was being invoked to protect;<sup>179</sup> a refusal to allow equity to encroach into the traditional common law territory of tort (even if the common law offers no remedy);<sup>180</sup> and a suspicion that the fiduciary claim was made only to circumvent a limitation period.<sup>181</sup> When Abadee J’s decision was appealed to the NSW Court of Appeal, the plaintiff did not press the fiduciary claim.

Abadee J’s opposition to the fiduciary claim is consistent with an earlier decision in the Federal Court in *Paramasivam v Flynn* (*Paramasivam* (appeal)).<sup>182</sup> In this case, the non-Aboriginal plaintiff brought an action against his non-parental private guardian for assault and breach of fiduciary duty. He alleged that the guardian had sexually abused him for 10 years commencing when the plaintiff was 11 years old. The plaintiff claimed damages for assaults and breach of fiduciary duty.

The Australian Capital Territory Supreme Court refused to grant an extension of time to bring the claim, Gallop J saying he doubted that the fiduciary argument had any realistic prospect of success.<sup>183</sup> On appeal, the Full Court of the Federal Court of Australia concurred with Gallop J. Even though the Full Court was prepared to find that the respondent’s alleged conduct could ‘be described in terms of abuse of a position of trust or confidence’ and ‘allowing personal interest (in the form of self-gratification) to displace a duty to protect the appellant’s interests’,<sup>184</sup> it was not prepared to find a breach of duty. In fact, the Court said that the fiduciary claim illustrated ‘not only the incompleteness but also the imperfection of all the individual formulae which have at various times been suggested as encapsulating fiduciary relationships for duty.’<sup>185</sup>

*Paramasivam v Flynn* was also significant in O’Loughlin J’s decision in *Cubillo* (trial). In following *Paramasivam v Flynn*, his Honour wrote:

In Anglo-Australian law, the interests which [these] equitable doctrines ... have hitherto protected are economic interests. ... Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, is to be compensated. That is not a field on which there is any obvious need for equity to enter ...<sup>186</sup>

Likewise, in *Williams* (trial), Abadee J stated:

<sup>177</sup> See *Cubillo* (strike out application) (1999) 89 FCR 528, 575–6 (O’Loughlin J).

<sup>178</sup> *Williams* (trial) (1999) 25 Fam LR 86, 235 (Abadee J).

<sup>179</sup> *Ibid* 239.

<sup>180</sup> *Ibid* 240.

<sup>181</sup> *Ibid*.

<sup>182</sup> (1998) 90 FCR 489.

<sup>183</sup> *Paramasivam v Flynn* [1998] ATCSC 10 (Unreported, Gallop J, 21 April 1997) [68].

<sup>184</sup> *Paramasivam* (appeal) (1998) 90 FCR 489, 505 (Miles, Lehane and Weinberg JJ).

<sup>185</sup> *Ibid*.

<sup>186</sup> *Cubillo* (trial) (2000) 103 FCR 1, 403–4, citing *Paramasivam* (appeal) (1998) 90 FCR 489, 504–5 (Miles, Lehane and Weinberg JJ).

Any extension of the law to protect other than economic interests had to be justified in principle with regard to the particular interests protected by equitable doctrines. In my view no such principle exists to warrant extension into a case such as the present.<sup>187</sup>

In Australian fiduciary jurisprudence, the finding of the fiduciary relationship does not impose duties in respect of all aspects of a fiduciary's conduct: the subject matter or interests to be protected by the fiduciary obligations must be identified in order to determine the reach of the fiduciary obligation.<sup>188</sup> Economic interests activate the application of fiduciary law in Australia.<sup>189</sup> Non-economic interests do not. Moreover, Australian fiduciary law imposes only proscriptive duties, not positive duties, as it is concerned with the maintenance of fidelity to the beneficiary, and it is activated when the fiduciary seeks improperly to advance their own or a third party's interest in or as a result of the relationship.<sup>190</sup>

In contrast to *Williams* (trial) and *Cubillo* (trial), Gray J in *Trevorrow* did hold that, through the guardianship of the APB and later through the guardianship of the Minister of Social Welfare and the Minister of Community Welfare, the state was in a fiduciary relationship with the plaintiff and that it breached its fiduciary duties.<sup>191</sup> Gray J had earlier found that the APB was the legal guardian of the plaintiff (pursuant to s 10 of the *Aborigines Act*) until legal guardianship was returned to Thora after the APB was disbanded in 1963.<sup>192</sup> The Court held that the fiduciary relationship remained because Thora was unaware of her new status of legal guardian.<sup>193</sup> Furthermore, his Honour reasoned that, in spite of his return to his mother, there was an 'ongoing relationship' between the state and the plaintiff<sup>194</sup> because of the monitoring roles undertaken by the Department of Aboriginal Affairs, Aboriginal Affairs Board and the Ministers in promoting and supervising the welfare of Aboriginal people.<sup>195</sup>

As noted above, the plaintiff was a state child from 26 July 1968 until he reached 18 years of age on 20 November 1974. During this time, 'the State remained in a fiduciary relationship with the plaintiff through the guardianship of the Minister of Social Welfare and the Minister of Community Welfare.'<sup>196</sup> Its fiduciary duties

were for the APB to take steps to see that the plaintiff was armed with all relevant information concerning the circumstances of his removal, fostering and return to his natural family, and in particular, a disclosure to him of the APB's

<sup>187</sup> (1999) 25 Fam LR 86, 239.

<sup>188</sup> *Breen v Williams* (1996) 186 CLR 71, 82 (Brennan CJ).

<sup>189</sup> *Ibid* 82–3 (Brennan CJ), 112 (Gaudron and McHugh JJ), cf 134–5 (Gummow J); *Paramasivam* (appeal) (1998) 90 FCR 489, 504–5 (Miles, Lehane and Weinberg JJ).

<sup>190</sup> P D Finn, *Fiduciary Obligations* (1977) 15, 16, 47, 51; *Breen v Williams* (1996) 186 CLR 71, 95 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ).

<sup>191</sup> *Trevorrow* (2007) 98 SASR 136, 344.

<sup>192</sup> *Ibid* 324.

<sup>193</sup> *Ibid* 344.

<sup>194</sup> *Ibid*.

<sup>195</sup> *Ibid*.

<sup>196</sup> *Ibid*.

view that it had knowingly acted without legal authority. The APB also had a duty to see that the plaintiff obtained independent legal advice.<sup>197</sup>

The Court held that the state had breached these duties. Moreover, '[t]hese fiduciary duties were not delegable at all or in such a way as to reduce or absolve the State of liability for the acts or defaults of its servants or agents.'<sup>198</sup> However, because Gray J thought that common law damages covered the field, he did not see the need to award equitable compensation for breaches of fiduciary duty. Gray J believed that equitable compensation would overlap with common law entitlements and thus 'adequate and fair compensation can be provided to the plaintiff with respect to his common law claims for the injuries and losses sustained'.<sup>199</sup>

In this respect, Gray J was following orthodoxy under Australian law. For example, the Full Federal Court stated in *Paramasivam* (appeal) that it was unnecessary to seek the assistance of the law of fiduciary duty when dealing with childhood abuses because the law of tort deals with the issues.<sup>200</sup> The Court commented that to expand the reach of fiduciary law into the traditional area of tort law 'would, in our view, involve a leap not easily ... justified in terms of conventional legal reasoning.'<sup>201</sup> Likewise, in the *Cubillo* (appeal), the Full Federal Court said that 'Australian law has set its face firmly against the notion that fiduciary duties can be imposed on relationships in a manner that conflicts with established tortious and contractual principles.'<sup>202</sup> This position, however, fails to appreciate that tort law does not recognise adequately the associated breach of trust. Tort law does not differentiate between the stranger who commits the abuse and the guardian who does so (except perhaps in the imposition of punitive damages).<sup>203</sup> In contrast, fiduciary law has developed to prevent abuses in trust relationships, where the duties of loyalty and fidelity to the person owed that trust are sacrosanct.<sup>204</sup>

#### 4 Negligence

An assessment of whether the state owed common law duties of care to the plaintiff occupied by far the largest part of the *Trevorrow* judgment's discussion of the plaintiff's claims against the state.

##### (a) Imposition of a Duty of Care on a Public Authority

Gray J began his consideration of the duty of care owed to the plaintiff by addressing the relevant case law on the imposition of a duty of care on a public

<sup>197</sup> Ibid 346.

<sup>198</sup> Ibid 346–7.

<sup>199</sup> Ibid 347. Gray J added that he would award equitable compensation if his conclusions on the common law claims were found to be incorrect.

<sup>200</sup> *Paramasivam* (appeal) (1998) 90 FCR 489, 505 (Miles, Lehane and Weinberg JJ).

<sup>201</sup> Ibid.

<sup>202</sup> (2001) 112 FCR 455, 576 (Sackville, Weinberg and Hely JJ).

<sup>203</sup> Nathalie Des Rosiers, 'Childhood Sexual Abuse and the Civil Courts' (1999) 7 *Tort Law Review* 201, 203.

<sup>204</sup> Future Stolen Generations litigants may be wise to consider making more of the guardianship relationship, arguing that it creates a sui generis fiduciary duty that recognises prescriptive duties.

authority.<sup>205</sup> This body of case law had been a factor in O’Loughlin J’s reasoning in *Cubillo* (trial) against imposing a duty of care on either the Commonwealth or the Director of Native Affairs in relation to the plaintiffs’ removal.<sup>206</sup> O’Loughlin J had ultimately favoured the approach taken by the House of Lords in *X (Minors) v Bedfordshire Council*,<sup>207</sup> which concluded that ‘a decision to take a child into care is one that courts are not fitted to assess.’<sup>208</sup> Conversely, Gray J was of the opinion that the broad propositions made in *X (Minors) v Bedfordshire Council* ‘never represented the law in Australia.’<sup>209</sup>

Gray J found that there was ‘nothing in the provisions of the *Aborigines Act 1934–1939* or the *Maintenance Act 1926–1937* or any other relevant statute that exclude[d] the imposition of a duty of care.’<sup>210</sup> His Honour adopted the observation of Redlich J in *SB v New South Wales* that a review of the cases reveals ‘a discernable [sic] trend toward a greater willingness to recognise such a duty in the context of statutory schemes which invest public bodies with responsibilities for the welfare of children.’<sup>211</sup> Furthermore, based on *Sutherland Shire Council v Heyman*,<sup>212</sup> *Pyrenees Shire Council v Day*<sup>213</sup> and *Crimmins v Stevedoring Industry Finance Committee*,<sup>214</sup> Gray J held that ‘a duty of care is not precluded from arising on the sole basis that the statutory body may have discretionary powers.’<sup>215</sup> His Honour continued: ‘whether a duty does arise in a novel area will be determined by the application of the salient features test.’<sup>216</sup> Quoting the summary of the salient features test by Gummow and Hayne JJ in *Graham Barclay Oysters Pty Ltd v Ryan*, Gray J set out his task as follows:

Each of the salient features of a relationship must be considered. The multi-faceted inquiry in the case of a statutory authority calls for an analysis of at least the following: the legislative scheme; the consistency or otherwise of an asserted duty with the scheme; foreseeability; vulnerability; control; proximity; and powers and abilities to take practical steps to obviate or reduce a foreseeable risk.<sup>217</sup>

His Honour then applied the salient features test to the facts of the case.

<sup>205</sup> *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 19 (Gaudron J), 46 (McHugh J); *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 574 (McHugh J), 621 (Kirby J).

<sup>206</sup> (2000) 103 FCR 1, 380–3, 483.

<sup>207</sup> [1995] 2 AC 633.

<sup>208</sup> *Cubillo* (trial) (2000) 103 FCR 1, 385.

<sup>209</sup> *Trevorrow* (2007) 98 SASR 136, 352.

<sup>210</sup> *Ibid* 349.

<sup>211</sup> (2004) 13 VR 527 569, 589 (Redlich J). Gray J stated that he ‘agree[d] with this analysis’: *Trevorrow* (2007) 98 SASR 136, 353.

<sup>212</sup> (1985) 157 CLR 424.

<sup>213</sup> (1998) 192 CLR 330.

<sup>214</sup> (1999) 200 CLR 1.

<sup>215</sup> *Trevorrow* (2007) 98 SASR 136, 357.

<sup>216</sup> *Ibid*.

<sup>217</sup> *Ibid* 358, citing *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 596–8 (Gummow and Hayne JJ).

(b) *Application of the Salient Features Test*

Starting with the legislative scheme, Gray J said that as the object of the scheme was chiefly to protect Aboriginal children and create a close relationship between the state and Aboriginal children, it was difficult ‘to understand why a duty of care would be excluded by the provisions of any statute’.<sup>218</sup> His Honour found that a common law duty of care would ‘complement’ the APB’s and the CWPRB’s performance of their statutory duties.<sup>219</sup> Interestingly, Gray J chose this point in his judgment to note that:

There is no risk of there being indeterminate liability for an indeterminate period from a finding that a duty of care was owed by the State to the plaintiff in the present case. There is no risk of a ‘massive obligation’. There is no risk of a ‘flood of claims’.<sup>220</sup>

No doubt Gray J was here indirectly addressing — and rejecting — the argument that the recognition of a common law duty of care is incompatible with the state’s statutory responsibilities because it would expose the state to indeterminate liability, which the Parliament could not have intended. Gray J’s reasoning in this respect represents a departure from the more cautious approaches of the courts in *Williams* (trial),<sup>221</sup> *Johnson v Department of Community Services*<sup>222</sup> and, to a lesser extent, in *Cubillo* (trial).<sup>223</sup>

As regards foreseeability, his Honour held that it was ‘readily and reasonably foreseeable’ that ‘the removal and long-term separation of an Aboriginal child from that child’s natural parents would give rise to the risk of harm.’<sup>224</sup> His Honour’s finding was largely based on documentary and oral evidence that the ‘importance of the bond and attachment between mother and child was well recognised’ at the time that the plaintiff was removed and placed in foster care.<sup>225</sup> Academic publications, departmental records and university textbooks at the time all recognised the risk of separation. It was foreseeable that ‘the fostering of an Aboriginal child to a non-indigenous family would give rise to a risk of harm’, as would ‘the manner of the return of such a child from fostering to its natural parents’.<sup>226</sup> It is not surprising that his Honour found that the ‘State, through the conduct of the APB and departmental officers, had placed the plaintiff in a vulnerable position,’<sup>227</sup> especially as the state did not attempt to maintain a bond between the plaintiff and his natural family and Indigenous culture.<sup>228</sup>

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Ibid 358–9.

<sup>221</sup> (1999) 25 Fam LR 86, 162 (Abadee J).

<sup>222</sup> [2000] Aust Torts Reports ¶81-540, 63 489 (Rolfe J).

<sup>223</sup> (2000) 103 FCR 1, 385 (O’Loughlin J).

<sup>224</sup> *Trevorrow* (2007) 98 SASR 136, 359.

<sup>225</sup> Ibid. Similar evidence was presented by the plaintiffs in *Cubillo* (trial) (2000) 103 FCR 1, 90, 382 (O’Loughlin J).

<sup>226</sup> *Trevorrow* (2007) 98 SASR 136, 359.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid.

His Honour also found that the state had a degree of control as the plaintiff's legal guardian, and that the APB, by taking physical control of the plaintiff as an infant, had 'complete control over the plaintiff's well-being.'<sup>229</sup> Significantly, the APB obtained this control by acting beyond power.<sup>230</sup> Although proximity 'is no longer the test to be applied in determining whether a duty of care is owed',<sup>231</sup> Gray J found that there was close proximity in this case between the APB and the plaintiff and that this remains a 'relevant consideration.'<sup>232</sup>

The final salient feature requiring the Court's consideration was the powers and abilities of the state. His Honour held that '[t]he APB and the CWPRB had the power and ability to exercise control over the plaintiff and to minimise or reduce the risk of harm.'<sup>233</sup> But, by failing to take even such fundamental steps as checking whether the plaintiff was neglected, or determining the suitability of the child's foster home, the state did not take adequate steps to protect the plaintiff.<sup>234</sup> Gray J, therefore, concluded that the salient features test was satisfied.<sup>235</sup>

His Honour then identified when and how the duties of care owed to the plaintiff by the state, through its various emanations, arose. When the state removed the plaintiff from his family, the APB incurred a duty of care, including a broad duty 'to guard the plaintiff against the foreseeable risks of injury that might arise' following the removal.<sup>236</sup> That duty was ongoing whilst the plaintiff was in foster care.<sup>237</sup> Moreover, for the reasons noted earlier, the duty continued after the plaintiff was returned to his family and throughout his adolescence.<sup>238</sup>

*(c) Breach of Duty of Care*

In deciding whether the state had breached its duties, the Court had to consider the foreseeability and degree of risk, especially the risk associated with rupturing the attachment between mother and child. The Court examined expert medical opinion, the oral evidence of welfare officers and a substantial body of literature, including publications that were available during the period of the plaintiff's removal. Generally, the expert evidence confirmed the risk of harm to a child deprived of maternal care and affection.<sup>239</sup> This led his Honour to the 'common-sense' conclusion that 'welfare officers from the time generally appeared to

<sup>229</sup> *Ibid* 360.

<sup>230</sup> *Ibid*.

<sup>231</sup> *Ibid*.

<sup>232</sup> *Ibid*.

<sup>233</sup> *Ibid*.

<sup>234</sup> *Ibid* 360–1.

<sup>235</sup> *Ibid* 361.

<sup>236</sup> *Ibid*.

<sup>237</sup> *Ibid*.

<sup>238</sup> *Ibid* 362.

<sup>239</sup> *Ibid* 308, 318–19. Gray J relied in large part on a report compiled by a Ms Van Hooff, which reviewed the literature on the attachment between mother and child that was available and had currency in the 1950s and 1960s: at 308–10, 312–15, 318–19. One report — John Bowlby, *Maternal Care and Mental Health* (2<sup>nd</sup> ed, 1951) — formed part of this review and was also tendered in evidence. The report by Bowlby highlighted the importance of the bond between mother and child and the negative effects of separation. It was included in Australian university syllabuses in the 1950s: *Trevorrow* (2007) 98 SASR 136, 310–15, 318–19.

recognise the problems associated with the separation of mother and child.<sup>240</sup> In other words, that harm was foreseeable:

it was reasonably foreseeable that the separation of a 13-month-old Aboriginal child from his natural mother and family and the placement of that child in a non-indigenous family for long-term fostering created real risks to the child's health. The State through its emanations, departments and departmental officers either foresaw these risks or ought to have foreseen these risks.<sup>241</sup>

Clearly, these conclusions influenced his summing up of the state's breaches of its duties:<sup>242</sup>

The State, through the APB, Aborigines Department and the CWPRB and its departmental officers, armed its officers with the practical ability to interfere with a child's life in the most profound way possible. That fact imposed on the State a duty to ensure that the powers were exercised with due care. Due care in the circumstances involved, at a minimum, checking the facts, assessing the child, assessing the foster family and then monitoring the placement.<sup>243</sup>

His Honour's decision in relation to the state's duty of care to the plaintiff was premised on the finding that the state, through the APB, acted unlawfully in the removal of the plaintiff. Nonetheless, his Honour considered that the duty arose whether or not the state acted lawfully:

Whether the State acted with or without statutory warrant, as a matter of fact, the State took control of a vulnerable infant, ruptured the attachment between mother and child and placed the child in a foster arrangement with a non-indigenous family.<sup>244</sup>

Gray J addressed the possibility that, contrary to his earlier finding, the state was correct in its submission that the *Aborigines Act* gave unlimited guardianship powers to the APB to remove Aboriginal children. His Honour identified two constraints on this power. First, it could only be exercised in circumstances where removal was 'in the best interests of the child'.<sup>245</sup> Secondly, the power 'could only be exercised by the APB'.<sup>246</sup> In the circumstances before the Court, there was no inquiry to determine whether the plaintiff was in fact neglected or, relatedly, whether it was in his best interests to be removed. Nor was the removal conducted by the APB because the departmental officers only sought the board's ratification subsequent to the removal. Thus, even if the state's actions were lawful, it owed a duty of care to the plaintiff in relation to the plaintiff's removal, placement and return, which it had breached.<sup>247</sup>

<sup>240</sup> *Trevorrow* (2007) 98 SASR 136, 318–19.

<sup>241</sup> *Ibid* 319.

<sup>242</sup> See *ibid* 363–5.

<sup>243</sup> *Ibid* 365.

<sup>244</sup> *Ibid*.

<sup>245</sup> *Ibid* 366.

<sup>246</sup> *Ibid*.

<sup>247</sup> *Ibid*.

*(d) Causation*

It had previously been very difficult for Stolen Generations claimants to establish a causal connection between their removal and the detriment suffered. Relying on evidence that the importance of the attachment between mother and child was well-known in the 1950s and 1960s, his Honour held that ‘the State knew or ought to have known at relevant times that separating a child from its parents and in particular its mother was likely to cause damage to the child.’<sup>248</sup> Furthermore, expert evidence appeared to refute the evidence of a state witness that the plaintiff’s removal and separation from his natural family ‘had no long-term or lasting effects’ on the plaintiff.<sup>249</sup>

In considering the chain of causation, his Honour emphasised the infant plaintiff’s maternal dependence, and said the ‘real issue’ was ‘whether the Davies family were [sic] equipped to deal with the plaintiff’s needs.’<sup>250</sup> Given Martha’s lack of training as a foster parent and evidence of her inability to cope with the plaintiff, Gray J found that the Davies family was not so equipped. He also rejected the state’s suggestion that the plaintiff’s natural family lived in ‘a toxic home environment.’<sup>251</sup> That suggestion could not be reconciled with the ability of the plaintiff’s siblings to cope in that environment. Rejecting the state’s claim that there were intervening acts leading the plaintiff into crime after he returned to his natural family, Gray J found that the fact that the plaintiff ‘would spend the balance of his adolescence in and out of institutions was a reasonably foreseeable consequence of the conduct of the State in his removal and the breaches of duty.’<sup>252</sup>

Counsel for the plaintiff conceded that the breaches of duty of care to the plaintiff by the state would not have caused all of the plaintiff’s misfortune in his adult life.<sup>253</sup> However, Gray J found that a number of the problems the plaintiff experienced in adulthood could be attributed to the circumstances of his removal. His Honour pointed out that the plaintiff ‘entered adulthood suffering material disadvantages due to the problems stemming from the separation from his mother.’<sup>254</sup> His Honour acknowledged that the plaintiff’s Indigenous siblings had contact with alcohol but, unlike his siblings, the plaintiff ‘was ill-equipped to handle his depression and the inevitable association with alcohol.’<sup>255</sup>

His Honour decided ‘that there were, as a matter of probability, multiple causes of the plaintiff’s injuries and losses.’<sup>256</sup> It was significant, however, that from a commonsense point of view the plaintiff’s removal was a ‘material cause’

<sup>248</sup> Ibid 369.

<sup>249</sup> Ibid 370. The relevant state witness was Professor Tennant. Gray J rejected most of Tennant’s evidence on this point because his experience in child psychiatry was ‘limited’ and his Honour found that Tennant gave evidence under ‘serious misconceptions of fact’.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid 370–1.

<sup>252</sup> Ibid 371.

<sup>253</sup> Ibid 372.

<sup>254</sup> Ibid 373.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid 366–7.

of his lifelong depression and its consequences.<sup>257</sup> Those consequences, broadly defined, included the loss of family and cultural identity, an inability to develop personal relationships, trauma and injury, general illhealth, and alcoholism. Thus, the application of the commonsense test of causation to these facts led the Court to the conclusion that the breaches of duty by the state caused damage and loss to the plaintiff.<sup>258</sup> The precise nature of the plaintiff's injuries, damage and loss became the subject of a more detailed consideration when the Court moved on to discuss the remedies to which the plaintiff was entitled.

### F Remedies

Gray J's analysis of the remedies to which the plaintiff was entitled overlapped to a degree with his Honour's conclusions with respect to causation.

#### 1 Injuries and Loss

Gray J held that the injury and damage that the state's conduct caused to the plaintiff included 'the distress following removal and later short and long term disabilities, manifested through childhood and adult life.'<sup>259</sup> His Honour held further that the circumstances of the plaintiff's return to his natural family in 1967 'exacerbated' the damage the plaintiff had already suffered.<sup>260</sup> Although his Honour was of the opinion that the plaintiff had generally led a 'miserable life',<sup>261</sup> resulting in feelings of isolation and a lack of belonging, alcohol abuse, and a difficult relationship with his wife and children, it was also found that the plaintiff's symptoms had 'fluctuated'.<sup>262</sup>

Both parties accepted that the plaintiff had suffered a major depressive disorder for many years and Gray J added that the plaintiff would continue to suffer depression in the future.<sup>263</sup> The plaintiff's depressive state was a mental illness and was therefore compensable.<sup>264</sup> There were, however, injuries and losses that the plaintiff suffered that were not caused by the conduct of the state, including physical injuries arising from work and motor vehicle accidents, as well as general poor health. Those losses could not be compensated directly, but Gray J held that the plaintiff's depression was likely to have impaired his ability to cope with such stresses and adversities.<sup>265</sup> In addition, the plaintiff's depression made it more difficult for him to resist alcohol abuse.<sup>266</sup>

<sup>257</sup> Ibid 373.

<sup>258</sup> Ibid. Gray J noted that, although he did not need to discuss the more complex approaches to causation in the decisions in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 and *Chappel v Hart* (1998) 195 CLR 232, the tests identified by those authorities would have been satisfied on these facts: at 373-4.

<sup>259</sup> *Trevorrow* (2007) 98 SASR 136, 382.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid 382-3.

<sup>263</sup> Ibid 382.

<sup>264</sup> Ibid 384.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

Gray J was satisfied that the plaintiff had lost earning capacity. He had also lost earnings because of his illnesses, but he was unable to quantify those losses, partly because he was unable to recall accurately his employment history.<sup>267</sup> His Honour therefore decided to make a ‘discretionary allowance’ for these losses.<sup>268</sup>

## 2 *Cultural Identity*

Using the experience of his siblings as a benchmark, the Court held that the plaintiff was entitled to an award of general damages for both his failure to develop a cultural identity and for his inability to rejoin his community or participate in their cultural activities.<sup>269</sup> The Court found that, ‘[i]n all probability’, the plaintiff’s inability to enjoy membership of his Indigenous community resulted from ‘his separation from his natural family and mother, his isolation from that family for a decade, and his subsequent mental illness’ and alcoholism.<sup>270</sup> His failure to identify with his Indigenous people caused the plaintiff ‘considerable distress’,<sup>271</sup> which compounded his depression. It was ‘only a possibility’<sup>272</sup> that the plaintiff would rejoin his Indigenous community post-litigation. Hence, Gray J held that the award of general damages for cultural losses must also recognise ‘the plaintiff’s ongoing distress as to the consequence of the effects of his separation.’<sup>273</sup>

Having regard to the plaintiff’s general poor health, Gray J concluded that 90 per cent of the damages to be awarded were referable to pre-judgment losses.<sup>274</sup>

## 3 *Exemplary Damages*

Of ‘particular relevance’<sup>275</sup> to the facts of the plaintiff’s case was McHugh JA’s observation in *Cotogno v Lamb [No 3]* that ‘the average Australian would expect that the victim of conscious wrongdoing committed in contemptuous disregard for his rights should receive more than a person who has received comparable injuries without such conduct.’<sup>276</sup>

Gray J held that the state’s conduct in relation to the plaintiff was ‘conscious, voluntary and deliberate.’<sup>277</sup> It included: removing the plaintiff without investigating whether he was in fact neglected; removing the plaintiff without following statutory procedures even though it knew that the APB lacked the unrestricted legal power to remove children; failing to inform Thora of her right to have the plaintiff returned to her and actually failing to return the plaintiff to her; and failing to inform the plaintiff until 1997 that his removal had been carried out in the absence of legal authority.<sup>278</sup> Each of these instances demonstrated the state’s

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid* 386–7.

<sup>270</sup> *Ibid* 386.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid* 387.

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid* 387–8.

<sup>276</sup> (1986) 5 NSWLR 559, 587.

<sup>277</sup> *Trevorrow* (2007) 98 SASR 136, 389–90.

<sup>278</sup> *Ibid.*

conscious disregard for the plaintiff's rights, and warranted an award of exemplary damages.<sup>279</sup>

#### 4 *Plaintiff's Entitlement to Damages and Declarations*

Gray J found assessing the plaintiff's damages 'challenging' because of the 'inherent difficulty in equating personal injury with a dollar sum.'<sup>280</sup> His Honour thought it best to adopt a holistic approach to the assessment of damages. The plaintiff was entitled to judgment in the sum of \$525 000.<sup>281</sup> Of that amount, \$450 000 was awarded in damages in respect of his injuries and losses.<sup>282</sup> The remaining \$75 000 constituted an award of exemplary damages with respect to the plaintiff's unlawful removal and detention — that is, 'in respect of misfeasance in public office and false imprisonment.'<sup>283</sup>

The plaintiff was also entitled to declarations 'with respect to the treatment of the plaintiff without lawful authority.'<sup>284</sup> Specific declarations were made 'to assist in relieving the ongoing suffering of the plaintiff and provide a measure of remedy and relief.'<sup>285</sup>

#### IV THE *TREVORROW* CASE AND 'SO WHAT?'

Media reports overwhelmingly describe *Trevorrow* as belonging to that special species of judicial determinations colloquially known as 'landmark' decisions.<sup>286</sup> Gray J's decision has indeed swept aside previous judicial reluctance to find for Stolen Generations litigants. *Trevorrow*'s value as a legal precedent, however, remains open for debate. Professor Frank Brennan has made a tentative comparison between *Mabo v Queensland [No 2]* ('*Mabo*')<sup>287</sup> and *Trevorrow* in relation to land rights and stolen generations compensation. In both areas, there were failures before success.<sup>288</sup> *Mabo* resulted in national legislative action on native title; perhaps *Trevorrow* will ignite a national legislative compensation scheme. It is argued, however, that the basis of that comparison is fundamentally flawed. One of the reasons that *Mabo* provoked such a spirited response from politicians and the legal fraternity alike was that 'the High Court appeared to accept one version of Australian history over another',<sup>289</sup> and in doing so introduced a novel body of legal principles creating native title. The same feat was not accomplished by the Court deciding *Trevorrow*. Gray J did not endorse a particular

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.* 393.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*

<sup>284</sup> *Ibid.*

<sup>285</sup> *Ibid.*

<sup>286</sup> See, eg, Jamie Walker and Pia Akerman, 'Payout a Win for the Stolen', *The Australian* (Sydney), 2 August 2007, 2; Todd Cardy and Gavin Lower, 'One Wrong Righted', *The Daily Telegraph* (Sydney), 4 August 2007, 74; 'Rann Shows Way on Stolen Generation', *The Advertiser* (Adelaide), 6 August 2007, 18.

<sup>287</sup> (1992) 175 CLR 1.

<sup>288</sup> Frank Brennan, 'Let Us Reconsider Today's Treatment of the Stolen Generation', *The Age* (Melbourne), 3 August 2007, 13.

<sup>289</sup> Alexander Reilly, 'How *Mabo* Helps Us Forget' (2006) 6 *Macquarie Law Journal* 25, 37.

version of the history of Aboriginal child removal in Australia, nor did his Honour address and decide innovative legal arguments about the Stolen Generations.

Rather, the Court on this occasion was imputed with the task of assessing the specific South Australian legislative scheme in relation to child removal and determining whether government departments and entities complied with this scheme in their removal of the plaintiff.<sup>290</sup> Causes of action based in wrongful imprisonment, fiduciary duties and negligence had all been raised before in the Stolen Generations context. While Gray J went further than any judge before him in finding in favour of a Stolen Generations litigant, his doctrinal analysis on the various causes of actions was, in the main, orthodox. It is just that his orthodox analysis was so different from the ‘factual–doctrinal’ analysis in the other Stolen Generations cases of *Williams*<sup>291</sup> and *Cubillo*.<sup>292</sup>

Crucial to the plaintiff’s success<sup>293</sup> were Gray J’s findings that the powers to remove Aboriginal children from their parents under statute were limited,<sup>294</sup> and that the entity responsible for his removal, the APB, had received advice from the Crown Solicitor’s office to that effect (which was also disseminated to Cabinet).<sup>295</sup> Gray J’s conclusion that the state acted ultra vires by removing the plaintiff influenced his findings on all the causes of action. Arguably this conclusion is the most significant aspect of the decision, but it is not necessarily one that will have an impact beyond the parameters of Bruce Trevorrow’s individual circumstances.

Also central to the success of each cause of action in *Trevorrow* was a body of expert evidence about the importance of the bond between mother and child and the harmful effects of severing that bond. ‘All causes of action’, said Gray J, ‘had at their *genesis* the plaintiff’s removal from his natural family and the severing of the attachment between mother and child.’<sup>296</sup> His Honour devoted considerable attention in his judgment to the currency of that scientific knowledge in the 1950s and 1960s and ultimately accepted as a matter of ‘common-sense’ that government agencies, including welfare officers, ‘generally appeared to recognise the problems associated with the separation of mother and child’ at the time of the plaintiff’s removal in 1957.<sup>297</sup> It was thus reasonably foreseeable that Bruce Trevorrow would suffer harm following his removal from his natural family.

<sup>290</sup> *Trevorrow* (2007) 98 SASR 136, 239 (Gray J).

<sup>291</sup> *Williams* (time extension application) (Unreported, Supreme Court of New South Wales, Studdert J, 26 August 1993); *Williams* (time extension appeal) (1994) 35 NSWLR 497; *Williams v Minister, Aboriginal Land Rights Act 1983* (Unreported, Supreme Court of New South Wales, Bruce J, 23 July 1997); *Williams* (trial) (1999) 25 Fam LR 86; *Williams* (appeal) [2000] Aust Torts Reports ¶81-578.

<sup>292</sup> *Cubillo* (strike out application) (1999) 89 FCR 528; *Cubillo* (trial) (2000) 103 FCR 1; *Cubillo* (appeal) (2001) 112 FCR 455.

<sup>293</sup> This includes his success in invoking the exercise of the Court’s discretion to extend the statutory limitation period pursuant to the *Limitation of Actions Act 1936* (SA): see *Trevorrow* (2007) 98 SASR 136, 329, 331–2.

<sup>294</sup> *Trevorrow* (2007) 98 SASR 136, 248.

<sup>295</sup> *Ibid* 249.

<sup>296</sup> *Ibid* 373 (emphasis in original).

<sup>297</sup> *Ibid* 318–19.

Trevorrow's counsel, Julian Burnside, reflects that this finding did not depend on the individual circumstances of Trevorrow's case<sup>298</sup> and stresses the implications of the judge's reasoning for other Stolen Generations claimants. According to Burnside, what comes out of *Trevorrow* is 'that, from the 1950s to the present, governments which removed children from their parents knew they were doing something intrinsically harmful to the children ... [u]nless the children were being saved from even greater harm.'<sup>299</sup> Although not groundbreaking, Gray J's findings about the state of scientific knowledge in the mid 20<sup>th</sup> century are potentially significant in the context of future claims being made against the state. Yet in the absence of broader findings about the legality of Australia's history of removing children, '[e]ach case will have to be treated on its individual merits'<sup>300</sup> and, as Part V of this article will argue, it is likely that, even with *Trevorrow* as a precedent, only a handful of claimants will be able to overcome the enduring legal hurdles presented by the court system.

## V JUDICIAL VERSUS NON-JUDICIAL RESPONSES TO THE STOLEN GENERATIONS

### A *Limitations of Litigation for Stolen Generations Claimants*

In 2004, three years prior to the decision in *Trevorrow*, Chris Cunneen and Julia Grix identified seven 'major limitations of the litigation process'<sup>301</sup> for Stolen Generations claimants:

- statutory limitation periods;
- evidentiary difficulties;
- the trauma experienced by members of the Stolen Generations in the adversarial setting;
- the considerable expense of pursuing court action;
- the length of time involved in litigation;
- the problem of establishing specific liability for harms that have been caused; and
- overcoming the judicial view that 'standards of the time' justified the removal in the best interests of the child.

Adding to that list the policy concern that litigation will 'open the floodgates' to an overwhelming volume of Stolen Generations law suits, it is useful to consider the extent to which such difficulties will continue to plague Stolen Generations claimants after *Trevorrow*. In the past, the combined effect of these obstacles has led some commentators to argue that litigation is futile and that the traditional courtroom setting lacks the flexibility to adequately address

<sup>298</sup> Julian Burnside, 'Stolen Generation: Time for a Change' (2007) 32 *Alternative Law Journal* 131, 131.

<sup>299</sup> *Ibid.*

<sup>300</sup> Claire O'Connor, quoted in Colin James, 'Time to Negotiate on Payouts, Say Lawyers', *The Advertiser* (Adelaide), 2 August 2007, 4.

<sup>301</sup> Cunneen and Grix, 'The Limitations of Litigation in Stolen Generations Cases', above n 155, 4.

the damage suffered by members of the Stolen Generations.<sup>302</sup> Whilst Bruce Trevorrow challenged the trend and succeeded in his claim, the following discussion will show that it is unlikely that the hurdles have been altogether removed for future Stolen Generations claimants and, as a corollary, that alternative means of redress warrant further deliberation.

### 1 *Evidentiary Difficulties*

There are obvious difficulties associated with making findings of fact about events that occurred many decades ago. Moreover, the courts have traditionally preferred the imperial cultural tradition of documented history to the oral history tradition of Indigenous history.<sup>303</sup> The onus of proof on Stolen Generations claimants can be very heavy, 'demanding the provision of evidence as to the consent and intentions of individuals in times now far removed, in cases where records are often scant.'<sup>304</sup> Thus litigation presents unique evidentiary hurdles for Indigenous plaintiffs.

In *Cubillo* (trial) and in *Williams* (trial) much of the written record had been lost or destroyed by the time of the trial, leaving the courts with some difficulty in making findings of fact.<sup>305</sup>

However, the quality of the documentary evidence seemed to be relaxed in *Cubillo* (trial) — this time to the disadvantage of the Aboriginal plaintiff. One issue O'Loughlin J had to decide was clear: had Peter Gunner's mother consented to his removal from her? His Honour held that parental consent had been given, relying on a document, written in English and purporting to bear Gunner's mother's (Topsy Kundrilba) thumbprint. The document, entitled 'Form of Consent by a Parent', in part stated:

I, TOPSY KUNDRILBA, being a full-blood Aboriginal (female) within the meaning of the *Aboriginals Ordinance 1918–1953* of the Northern Territory ... do hereby request the DIRECTOR OF NATIVE AFFAIRS to declare my son PETER GUNNER aged seven (7) years, to be an Aboriginal within the meaning and for the purposes of the said *Aboriginals Ordinance*. MY reasons for requesting this action by the Director of Native Affairs are:

1. My son is a Part-European blood, his father being a European.
2. I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.
3. I am unable myself to provide the means by which my son may derive the benefits of a standard European education.
4. By placing my son in the care, custody and control of the Director of Native Affairs, the facilities of a standard education will be made avail-

<sup>302</sup> See, eg, *ibid*.

<sup>303</sup> See, eg, *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. See also Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South' (2003) 31 *University of Western Australia Law Review* 35.

<sup>304</sup> James Cockayne, 'More Than Sorry: Constructing a Legal Architecture for Practical Reconciliation' (2001) 23 *Sydney Law Review* 577, 581.

<sup>305</sup> Clarke, above n 24, 286; *Cubillo* (trial) (2000) 103 FCR 1, 147–8 (O'Loughlin J); *Williams* (time extension appeal) (1994) 35 NSWLR 497, 506–7 (Kirby P); Cunneen and Grix, 'The Limitations of Litigation in Stolen Generations Cases', above n 155, 27.

able to him by admission to St Mary's Church of England Hostel at Alice Springs.<sup>306</sup>

Although Topsy was a tribal Aboriginal woman who was illiterate and spoke little English, O'Loughlin J held that the purported Topsy thumbprint on the document amounted to consent for her son to be removed. This determination appears even stranger given that the Court accepted that it was common for mothers and children at Utopia Station to hide from the sight of the patrol officer when he came to the station.<sup>307</sup>

The plaintiff's evidence was treated in a similar manner in *Williams* (trial). There was evidence of a written record of Dora Williams seeking permission from the Aborigines Welfare Board ('AWB') to visit her daughter. Abadee J stated that it is unclear '[w]hether the mother had forgotten that she had consented to the child going to Lutanda or whether she believed any visit to her wherever she was required the Board's permission'.<sup>308</sup> Cunneen and Grix argue that 'this comment reveals an extraordinary lack of insight into the issues of consent and the power of the AWB over Aboriginal persons'.<sup>309</sup>

By contrast, in *Trevorrow*, Gray J favoured the plaintiff's substantial documentary and expert evidence to that of the state.<sup>310</sup> That is not to say that the plaintiffs in *Cubillo* (trial) and *Williams* (trial) did not have documentary and 'witness' evidence to support their claims.<sup>311</sup> In those cases, the courts simply found the evidence presented by the state to be more persuasive. Of course, the factual situations are different, so one must be careful in comparing the outcomes. Nevertheless, the contrast in approaches to evidence is apparent and no doubt was a significant factor in the ultimate outcome of each case.

## 2 Limitation Periods

Statutory limitation periods apply to claims for damages arising from negligence, wrongful imprisonment, breaches of statutory duties and, by analogy, to claims for equitable compensation for breach of fiduciary duties. The statutory limitation periods have proven to be a considerable obstacle to Stolen Generations litigants. As Cunneen and Grix note,

[a]lthough the courts in *Cubillo* ... and *Williams* ... deferred making a final decision on the question of limitations until after the substantive issues had been considered, both 'ultimately concluded that there would be "overwhelming prejudice" to the defendant if time limits were waived'.<sup>312</sup>

<sup>306</sup> *Cubillo* (trial) (2000) 103 FCR 1, 243–4. The document mentions that Peter Gunner was to be removed so as to receive a 'standard European education'. But Gunner was removed to live in a hostel that was described by the Archdeacon nominally in charge as having facilities no better than 'stinking slum conditions': at 327, cited in John Rush, 'Righting the Wrong: Achieving Reparations for the Stolen Generations' (2002) 27 *Alternative Law Journal* 257, 259.

<sup>307</sup> *Cubillo* (trial) (2000) 103 FCR 1, 241 (O'Loughlin J).

<sup>308</sup> *Williams* (trial) (1999) 25 Fam LR 86, 125.

<sup>309</sup> Cunneen and Grix, 'The Limitations of Litigation in Stolen Generations Cases', above n 155, 24.

<sup>310</sup> See, eg, *Trevorrow* (2007) 98 SASR 136, 315, 317–19.

<sup>311</sup> See, eg, *Cubillo* (trial) (2000) 103 FCR 1, 17–26, 162–3 (O'Loughlin J); *Williams* (trial) (1999) 25 Fam LR 86, 140–3, 213 (Abadee J).

<sup>312</sup> Cunneen and Grix, 'The Limitations of Litigation in Stolen Generations Cases', above n 155, 32, citing Cornwall, above n 37, 46.

On the other hand, backed by a considerable body of evidence, Bruce Trevorrow succeeded in establishing that any prejudice to the state was outweighed by the injustice he would suffer if his action was barred.

Of course, limitation periods need not be an inevitable hurdle to Stolen Generations litigation. It is a conscious decision on the part of the defendant to the action to raise that defence, as it is waived if it is not pleaded. Whereas Australian governments have sought to utilise the defences of the statute of limitations and laches with great vigour,<sup>313</sup> the Canadian government has waived potential limitations and laches defences in litigation over the Aboriginal residential school experience.<sup>314</sup> Arguably, the court system can only begin to address the underlying justice of the situation if governments waive these defences.

### 3 'Standards of the Time' Defence

As in the High Court's decision in *Kruger*<sup>315</sup> and the Federal Court's decision in *Cubillo* (trial),<sup>316</sup> Gray J considered the legislation in question by reference to what the legislature had intended at the relevant time. Gray J warned that '[p]articuliar attention needs to be paid to changing community standards' in cases such as this one.<sup>317</sup> His Honour cited the remarks of Toohey J in *Kruger* that the legislation in question must be assessed by reference to what was seen by the legislature at the time as a rational and relevant means of protecting Aboriginal people against the inroads of European settlement, and that this assessment is a matter of evidence.<sup>318</sup> This 'standards of time' viewpoint arguably reinforces the defences of 'history'<sup>319</sup> and 'justification.'<sup>320</sup>

The courts in *Kruger*, *Cubillo* (trial) and *Williams* (time extension application) accepted that the relevant legislation, by which the removal of the plaintiffs from their families was effected, had a welfare and protective purpose. In *Cubillo* (trial), O'Loughlin J found that the Commonwealth had pursued a policy of assimilation based on what was thought to be in the best interests of the children at that time.<sup>321</sup> Likewise, in *Williams* (time extension application), Studdert J was not satisfied that there was sufficient evidence available to the plaintiff to establish her case because the actions of the AWB were based upon policies of beneficial intent, according to the standards and values of the 1940s.<sup>322</sup>

Gray J in *Trevorrow* also accepted that the primary purpose of the legislation in question was to support and protect Aboriginal children. However, his Honour

<sup>313</sup> See, eg, *Cubillo* (trial) (2000) 103 FCR 1, 445 (O'Loughlin J); *Williams* (trial) (1999) 25 Fam LR 86, 90, 243 (Abadee J); *Trevorrow* (2007) 98 SASR 136, 332 (Gray J).

<sup>314</sup> Julie Cassidy, 'The Stolen Generations — Canada and Australia: The Legacy of Assimilation' (2004) 11 *Deakin Law Review* 131, 176.

<sup>315</sup> *Kruger* (1997) 190 CLR 1, 36–7 (Brennan CJ), 52 (Dawson J).

<sup>316</sup> (2000) 103 FCR 1, 42 (O'Loughlin J).

<sup>317</sup> *Trevorrow* (2007) 98 SASR 136, 153.

<sup>318</sup> *Ibid* 153–4.

<sup>319</sup> Rebecca La Forgia, 'Truth but Still Waiting for Justice' (1997) 22 *Alternative Law Journal* 192, 194.

<sup>320</sup> Barbara Cummings, 'Assimilation, Gender and Land in the Northern Territory after *Kruger*' (1998) 21 *University of New South Wales Law Journal* 217.

<sup>321</sup> (2000) 103 FCR 1, 352.

<sup>322</sup> *Williams* (time extension application) (Unreported, Supreme Court of New South Wales, Studdert J, 26 August 1993).

held that the imposition of a duty of care would not cut across the legislative intent and, further, that it was foreseeable that the removal and long-term separation of the plaintiff from his family would give rise to a risk of harm.<sup>323</sup> As discussed above, His Honour found that there was, at the relevant time, ample literature on, and awareness of, attachment theory and the harm resulting from the rupture of the mother–child bond. It is this finding of fact that could, at least in South Australia, influence future Stolen Generations claims.

#### 4 *Floodgates*

As previously noted, in *Williams* (trial) and *Williams* (appeal) it was held that ‘policy’ reasons, particularly in relation to concerns about ‘floodgate’ litigation, militated against imposing a duty of care in an institution–child relationship.<sup>324</sup> The judiciary appeared sensitive to concerns about public and charitable financial consequences that may flow from a decision attaching liability to the state for wrongs committed against the Stolen Generations.

Gray J had no such hesitancy in finding against the state. He rejected the floodgates argument, saying there was no risk of a ‘flood of claims’.<sup>325</sup> Moreover, he thought it was good policy to find a common law duty against the state instrumentalities, as such a duty would complement the performance of statutory duties by agencies such as the APB and the CWPRB.<sup>326</sup>

#### 5 *Trauma, Cost and Delay*

Trauma to Aboriginal plaintiffs, as well as considerable costs and delays, would appear to be inevitable features of the adversarial process. For example, estimates of the total cost of the *Cubillo* litigation range from \$15 million to \$20 million.<sup>327</sup> John T Rush was ‘confident that if this sort of money had been devoted to a Reparations Tribunal in 1998 ... the process of healing, together with the issue of compensation, would have been enormously advanced.’<sup>328</sup> In early 2008 a prominent Perth law firm, Lavan Legal, announced an agreement with the Aboriginal Legal Service to assist Stolen Generations claimants on a pro bono basis.<sup>329</sup> Whilst this initiative is welcomed and encouraged as a strategy to curtail the expense and time involved in processing Stolen Generations claims, it is likely that the adversarial setting will continue to traumatise future Indigenous plaintiffs.

<sup>323</sup> *Trevorrow* (2007) 98 SASR 136, 358–9.

<sup>324</sup> *Williams* (trial) (1999) 25 Fam LR 86, 249–50; *Williams* (appeal) [2000] Aust Torts Reports ¶81-578, 64 176–7 (Heydon JA).

<sup>325</sup> *Trevorrow* (2007) 98 SASR 136, 358–9.

<sup>326</sup> *Ibid* 358. It should be acknowledged that the APB and the CWPRB no longer exist.

<sup>327</sup> Rush, above n 306, 261.

<sup>328</sup> *Ibid*.

<sup>329</sup> Victoria Laurie, ‘Lavan Launches Stolen Generations Campaign’, *The Australian* (Sydney), 22 February 2008, 8.

### B *An Alternative to Litigation?*

Following the *Cubillo* decisions, Associate Professor Pam O'Connor concluded that '[l]itigation is a poor forum for judging the big picture of history.'<sup>330</sup> Despite Bruce Trevorrow's recent success, this assessment would still resonate with most potential Stolen Generations litigants. It is clear that onerous legal and evidentiary hurdles are likely to continue to obstruct the litigation pathway for them. Recognising the inherent limitations of Australia's judicial system in terms of its capacity to satisfactorily respond to historical wrongs, there have long been calls for an alternative response to the Stolen Generations. Even O'Loughlin J in *Cubillo* (trial) stated his preference for a political and social solution rather than a legal one:

the removal and detention of part Aboriginal children has created racial, social and political problems of great complexity ... it must be left to the political leaders of the day ... to arrive at a social or political solution to these problems.<sup>331</sup>

Over a decade ago, the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, *Bringing Them Home*, recommended that the wider concept of reparations be adopted to deal appropriately with the Stolen Generations.<sup>332</sup> This would not only encompass financial compensation, but also extend to cover acknowledgements and apologies, restitution, rehabilitation and guarantees against future repetition.<sup>333</sup> In a similar vein, Associate Professor Andrea Durbach has argued that '[t]he establishment of a Stolen Generations Reparation Tribunal is essential to acknowledge and begin to heal the loss and damage suffered by the Stolen Generations.'<sup>334</sup> Burnside, who represented Trevorrow, has estimated that a national fund to compensate members of the Stolen Generations would cost significantly less than fighting the claims through litigation.<sup>335</sup>

The establishment of a reparations scheme or a Stolen Generations Tribunal as alternatives to litigation would not be radical initiatives. In Canada, for example, litigation has been successful<sup>336</sup> and there has been a comprehensive reparations settlement. The motivation for this settlement was to bring to a close numerous law suits against the Canadian government and a number of Canadian churches. In 1997, the Canadian government offered an official apology to those who suffered physical or sexual abuse at the residential schools, and provided a

<sup>330</sup> Pam O'Connor, 'History on Trial: *Cubillo* and *Gunner v The Commonwealth of Australia*' (2001) 26 *Alternative Law Journal* 27, 30.

<sup>331</sup> (2000) 103 FCR 1, 41.

<sup>332</sup> See *Bringing Them Home Report*, above n 7, recommendation 3.

<sup>333</sup> *Ibid.*

<sup>334</sup> Andrea Durbach, 'Repairing the Damage: Achieving Reparations for the Stolen Generations' (2002) 27 *Alternative Law Journal* 262, 262.

<sup>335</sup> Mark Dunn, 'Court Option More Costly', *Herald Sun* (Sydney), 16 February 2008, 10.

<sup>336</sup> See, eg, *Blackwater v Plint* (1998) 52 BCLR (3d) 18; *Blackwater v Plint* (2001) 93 BCLR (3d) 228 (British Columbia Supreme Court); *Blackwater v Plint* (2003) 235 DLR (4th) 60 (British Columbia Court of Appeal); *Blackwater v Plint* [2005] 3 SCR 3; *M (FS) v Clarke* [1999] 11 WWR 301 (British Columbia Supreme Court); *A (TWN) v Clarke* (2001) 92 BCLR (3d) 250 (British Columbia Supreme Court). See also Cassidy, above n 314.

'healing fund' of CAD \$350 million.<sup>337</sup> Then, in January 2006, as part of a settlement agreement of over 7000 legal claims against the federal government and a number of churches, the Canadian government agreed to: at least CAD \$1.9 billion for 'common experience' former students of residential schools; additional payments from CAD \$5000 to CAD \$275 000 each for psychological damage caused by serious sexual or physical abuse and more if it has resulted in loss of income; CAD \$125 million towards a healing fund; CAD \$60 million for 'truth and reconciliation to document and preserve the experiences of survivors'; and CAD \$20 million for commemorative projects.<sup>338</sup>

Unlike the response of the Canadian government, in the immediate aftermath of the *Trevorrow* decision the State of South Australia was quick to rule out the possibility of a reparations scheme. Further, contrary to expectations from some sectors, the Commonwealth apology to the Stolen Generations does not appear to have paved the way for a national compensation fund. Whilst Democrats Senator Andrew Bartlett has proposed a statutory compensation system,<sup>339</sup> the Rudd Government remains firmly opposed to any form of compensation.<sup>340</sup> Thus it would appear that, despite initial hopes, *Trevorrow* is yet to be significant in terms of promoting the development of a political and social solution to the Stolen Generations. Whether the Commonwealth and state governments can maintain their hostility towards statutory compensation under the pressure of an ever-increasing volume of litigation against them remains to be seen.

## VI CONCLUSION

The *Trevorrow* decision overturned a history of courtroom failures by Stolen Generations litigants. Although *Trevorrow* arrested this string of failures, its value as a precedent is unclear. Whether other members of the judiciary, particularly in other state and territorial jurisdictions, will reach similar conclusions remains uncertain. Much will depend on the legislative scheme in question. Further, Bruce Trevorrow was almost an 'ideal plaintiff'. The 'authorities' took baby Bruce Trevorrow from his family without their consent and placed him with a foster mother. His siblings remained with their parents. The circumstances

<sup>337</sup> Pamela O'Connor, 'Squaring the Circle: How Canada Is Dealing with the Legacy of Its Indian Residential Schools Experiment' (2000) 6 *Australian Journal of Human Rights* 188; Antonio Buti, 'Canadian Residential Schools — The Demands for Reparations' (2001) 5 *Flinders Journal of Law Reform* 225, 240.

<sup>338</sup> See *Indian Residential Schools Settlement Agreement* (concluded 8 May 2006) sch N, detailed notice <<http://www.residentialschoolsettlement.ca>>. The agreement was not finalised until May 2006 due to the change in the Canadian federal government in early 2006. For a history on the residential schools system, see John S Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (1999).

<sup>339</sup> See Stolen Generations Compensation Bill 2008 (Cth), which was introduced by Senator Bartlett. The Senate Standing Committee on Legal and Constitutional Affairs has recently examined this Bill and has recommended that it not be adopted by Parliament in its current form, advocating instead that a 'National Indigenous Healing Fund' should be created to 'provide health, housing, ageing, funding for funerals, and other family support services for members of the stolen generation': Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Stolen Generation Compensation Bill 2008* (2008) 48.

<sup>340</sup> See, eg, Kim Wheatley, 'No Strategy to Improve Aboriginal Issues after "Sorry" Apology', *The Advertiser* (Adelaide), 13 August 2008, 10.

provided an almost clinical setting in which the effect of family deprivation on Bruce's achievements in life could be measured against those of his siblings. In effect, the siblings became the test control group. They fulfilled their potential; Bruce did not. Moreover, Bruce's foster mother was not registered with the South Australian Child Welfare Department. Legal advice provided to APB at that time was that removing a child from their family without the consent of the parents or the Child Welfare Department was illegal. All these factors contributed to Gray J's decision to compensate Bruce Trevorrow for injuries, losses and false imprisonment.

However, whatever the precedential value of the *Trevorrow* decision for future litigation, it may have greater utility in respect to non-judicial redress or reparations. Success in the courts invariably will place pressure on governments to devise a non-judicial reparations scheme. Canada provides an example of this. At the time of writing, the South Australian government had not established an extra-judicial reparation scheme and had lodged an appeal against the *Trevorrow* decision. Time will tell whether they do follow the lead of the Canadian government, or for that matter the Tasmanian government which has established a reparations scheme even though there has been no Stolen Generations litigation in that state.<sup>341</sup>

## VII EPILOGUE

Bruce Trevorrow died on 20 June 2008, aged 51. He had been admitted to hospital four weeks previously with heart and lung problems and did not recover from a heart attack which happened a few days before his death.<sup>342</sup> In the days immediately following Trevorrow's death, the South Australian government refused to confirm whether it would seek to continue with the appeal but the Attorney-General's Department did confirm that they had sent their condolences to Trevorrow's friends and family.<sup>343</sup>

<sup>341</sup> Under ss 4 and 5 of the *Stolen Generations of Aboriginal Children Act 2006* (Tas), ex gratia individual payments of up to \$5000 per individual and \$20 000 per family have been made available to Stolen Generations members.

<sup>342</sup> Jeremy Roberts, 'Stolen Generations Pioneer Bruce Trevorrow Dies', *The Australian* (online edition), 21 June 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23898064-5006787,00.html>>.

<sup>343</sup> ABC Local, *SA Govt Coy about Future of Trevorrow Compo Appeal* (22 June 2008) <<http://abc.com.au/news/stories/2008/06/22/2281920.htm?site=local>>; Jamie Walker, 'State's Compo Appeal in Limbo', *The Australian* (Sydney), 1 July 2008, 9.